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

DECLARATION OF DAVID T. MCDONALD IN SUPPORT OF WASHINGTON STATE DEMOCRATIC PARTY'S RESPONSE TO STATE OF WASHINGTON AND WASHINGTON STATE GRANGE'S MOTIONS TO STRIKE DEMOCRATIC PARTY'S FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

I, David T. McDonald, hereby declare as follows:

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1. I am counsel for the Washington State Democratic Central Committee in this matter.

2. On October 12, 2009 I sent the email attached as Exhibit 1 to counsel for all other parties in the case. None of the parties objected to any aspect of the proposed filing attached to the email prior to my filing of the Democratic Party's First Amended and Supplemental Complaint on January 21, 2010.

3. Attached as Exhibit 2 is a copy of the proposed First Amended and Supplemental Complaint that was submitted to the Court in connection with the Democratic Party's Motion to Amend and Supplement Complaint. Exhibit 2 is redlined to show the differences between the proposed Amended and Supplemental Complaint and the originally filed Complaint.

4. Attached as Exhibit 3 is a copy of the First Amended and Supplemental Complaint that was filed by the Democratic Party on January 21, 2010. Exhibit 3 is redlined to show the differences between Exhibit 2 and Exhibit 3 (i.e. all redlines in Exhibit 2 have been accepted and then the edits to Exhibit 2 tracked to show redlines on Exhibit 3).

I declare under penalty of perjury that the foregoing is true and correct:

EXECUTED this 19th day of February, 2010 at Seattle, Washington.

David T. McDonald

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 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
David T. McDonald, WSBA #5260
Alex Wagner, WSBA # 36856
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Tel: (206) 623-7580
Fax: (206) 623-7022
david.mcdonald@klgates.com

Attorneys for Plaintiffs in Intervention, Washington State Democratic Party and Dwight Pelz, Chair

EXHIBIT 1

McDonald, David

From: McDonald, David
Sent: Monday, October 12, 2009 12:25 PM
To: white@lfa-law.com; orrin@orringgrover.com; ahearne@foster.com; jeffe@atg.wa.gov; 'jamesp@atg.wa.gov'
Subject: WSRP v Logan: Draft Amended Complaint

Attachments: Draft First Amended Complaint (redlined to MTA version) reflecting court orde (10-12)r.doc

All, please find attached copy of the Amended Complaint I plan to file on behalf of the Democratic Party in light of the Court's order on the motions to amend and dismiss. If you believe it is not within the scope of the Court's order, please let me know and we can discuss your concern before I file it in the hopes we may avoid unnecessary motion practice. The attached document is redlined to the proposed Complaint attached to our Motion to Amend rather than to the original Complaint (though to the extent the Motion copy reflected proposed changes to the Complaint incorporates that reflection if we believe it appropriate under the Court's order). I will not take any silence by you as an indication of agreement with the substance of the material.

Draft First
mended Complaint .

David T. McDonald
K&L Gates
925 Fourth Ave, Suite 2900
Seattle, WA 98104

EXHIBIT 2

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

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF REGARDING INITIATIVE 872 AND PRIMARY ELECTIONS

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

NATURE OF ACTION

1. The First and Fourteenth Amendments to the United States Constitution guarantee the right of individuals to associate in a political party, the right of that party to select its nominees for partisan political office, and the right of the individuals and their party to limit participation in the process of selecting nominees to those voters the party identifies as sharing its interests and persuasions. As the Ninth Circuit noted in striking down Washington's blanket primary, " ... the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees. The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapés. Party adherents are entitled to associate to choose their party's nominees for public office." *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004) ("*Reed*").

2. One of the fundamental purposes of the First Amendment is to provide for and promote competition between ideas in American civilization. This purpose is advanced by requiring that the selection of a political party's candidates and nominees be done by adherents of the party rather than by those opposed to or indifferent to the party.

3. The State of Washington (the "State") has enacted Initiative 872, attempting to prevent the Washington State Democratic Party (the "Party") and its adherents from selecting their nominees, and to force the Party to be associated publicly with candidates who have not been nominated by the Party, who will alter the political message and agenda the Party seeks to advance, and who will confuse the voting public with respect to what the Party and its adherents stand for. The State seeks to appropriate the use of the Democratic Party's name in primaries and general elections in order to protect the political interests of the incumbent and the well-known at the expense of the committed and the innovative. Acting under color of law, State and local officials force the Party and its adherents to include supporters of other

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

parties and political interests in determining which, or whether any, candidate will carry the Democratic Party name in the general election.

4. Initiative 872, as set forth in both Section 2 ("In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective....") and Section 18, was expressly intended to defeat the constitutional right of the Party and its adherents to nominate candidates, recognized by the U.S. Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402, 147 L. Ed. 2d 502 (2000) and *Reed*. The Initiative, as implemented by State officials, eliminates mechanisms previously enacted by the State to protect the First Amendment rights of the Party and its adherents and provides no effective substitute mechanism for the Party to exercise its right to limit participation in the nomination process and thereby protect its adherents' right of association from forced dilution.

5. This is an action to protect the First Amendment rights of the Party and its adherents to advocate and promote their vision for the future without subtle or overt censorship or interference by the State through the County Auditors acting under color of the laws of the State of Washington. Initiative 872 is unconstitutional.

JURISDICTION AND VENUE

6. Plaintiffs' rights of political association and political expression are guaranteed against abridgement by the State and those acting under color of its laws by the First and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983. This case presents a federal question involving federally-protected rights, including freedom of association and protection against state intervention into the association rights of the Party and its adherents, set out in *Reed*. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1343(a)(3), 2201 and 2202.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
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7. Defendants reside in the Western District of the State of Washington (the "Western District") and the conduct and threatened conduct that gives rise to Plaintiffs' claims substantially occurred and threatens to occur within the Western District. Venue for this action lies within the Western District pursuant to 28 U.S.C. §§ 1391(a) and 1391(b).

PARTIES

~~**Plaintiffs**~~

8. The Party is a "major political party" as defined in RCW 29A.04.086 and is organized for the purposes of promoting the political beliefs of its adherents, selecting and supporting candidates who support the political beliefs of the Party's adherents and electing public officials who will conduct government affairs in a manner consistent with the Party's philosophy. The Party has all the powers inherent in a political organization and is empowered to perform all functions inherent in a political party.

9. Intervenor-Plaintiff ~~Paul Berendt~~ Dwight Pelz is a resident of the Western District. He is the elected Chairman of the Washington State Democratic Central Committee, the governing body of the Party pursuant to its Charter, and is the political and administrative head of the Party pursuant to its Charter and Bylaws and RCW 29A.80.020, *et seq.*

10. The Defendants are Sam Reed, in his capacity as Secretary of State of the State of Washington; Robert McKenna, in his capacity as Attorney General of the State of Washington; and the State of Washington. ~~Dean Logan, King County Records & Elections Division Manager and Bob Terwilliger, Snohomish County Auditor, Vicky Dalton, Spokane County Auditor, Greg Kimsey, Clark County Auditor, Christina Swanson, Cowlitz County Auditor, Vern Spatz, Grays Harbor County Auditor, Pat Gardner, Pacific County Auditor and Diane L. Tischer, Wahkiakum County Auditor (the "County Auditors") are~~ Secretary Reed is the chief ~~election~~ officer in the State, having the overall responsibility to conduct primary elections within each respective county, ~~of primary elections and are responsible, consistent~~

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
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~~with the rules established by the Secretary, to~~ including providing and tabulating ballots for such elections. Secretary Reed and Attorney General McKenna intervened as defendants. The State was substituted as a defendant for the original defendants (the County Auditors) by an agreed order of the Court on July 13, 2005. ~~The County Auditors, except Vicky Dalton, reside in the Western District of Washington.~~

WASHINGTON'S PARTISAN PRIMARY

11. The Defendants will administer partisan primaries this September. Pursuant to the laws of the State, including the Montana primary system adopted by the Legislature and RCW 29A.04.311, 29A.20.121, and 29A.52.116, the Party is required to advance its candidates for Congressional, State and County offices by means of partisan political primaries administered by the Secretary of State ("the Secretary") and the County Auditors. RCW 29A.52.116 states: "Major political party candidates for all partisan elected offices, except for president and vice-president ... must be nominated at primaries held under this chapter." The mandatory notice of the primary must contain "the proper party designation" of each candidate in the primary. RCW 29A.52.311. RCW 29A.52.112, adopted by I-872, requires that "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 …." The same statute also provides that the "top two" vote-getters in the primary required by I-872 will advance to the general election. The Secretary has asserted that only the two candidates who receive the most votes on primary day will advance to the primary even if both candidates are associated with the same political party. Former defendants Logan and Terwilliger have each asserted, "At this time, I am not aware of any language associated with the Initiative that contemplates

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

a partisan nomination process separate from the primary."

12. Neither the laws of the State nor the rules adopted or proposed by the Secretary provide any mechanism for the Party to effectively exercise its right of association in connection with the partisan primary in which it is forced by State law to participate. Any individual may appropriate the Party's name, regardless of whether the Party desires affiliation with that person.

13. The State, through its filing and campaign advertising statutes, also compels the Party to associate with any person who files a declaration of candidacy expressing a "preference" for the Party, regardless whether the Party desires association with the person. In addition, the State through its Voter's Pamphlet propagates to all voters claims of Party endorsement or nomination by candidates without regard to whether the Party has in fact endorsed or nominated the candidates.

14. In addition to requiring the Party to accept as one of its candidates any individual without regard to the individual's political philosophy or participation in Party affairs RCW 29A.04.127 forces the Party to permit any voter to participate in selection of the Party's standard-bearer without regard to the voter's partisan affiliation or beliefs. The State thus forces the Party and its adherents to associate with those who do not share their beliefs or are openly antagonistic to them. Initiative 872 was intended to establish *a de facto* blanket primary in response to a declaration that the blanket primary is unconstitutional and to facilitate cross-over and ticket-splitting voting, thus depriving the Party of its right to prevent supporters of other political parties and interests from participating in its candidate selection and nomination processes. It was intended to force the Party to modify its message or have a modified message forced upon it by the simple expedient of eliminating the Party's selected

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

spokesperson in favor of a spokesperson selected by non-adherents of the Party. The sponsors' official statement in support of the Initiative states, "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." This attempt at forced message modification was rejected as a legitimate state interest by both the Supreme Court in *Jones* and the Ninth Circuit in *Reed.*

15. The other interests asserted as the basis for adopting I-872, codified as RCW 29A.04.206, were also rejected in *Reed* as legitimate grounds for invading the right of political association.

16. The Party and its adherents are irreparably injured by the forced adulteration of the Party's nomination process, by the State's active encouragement of cross-over and ticket-splitting, and by the resulting dilution and potential suppression of its message. The presence and participation of non-party voters in the partisan primary inevitably alters candidates' messages and actions and thereby dilutes the Party's message and influence. Dilution of the Party's vote in any partisan primary carries with it the risk that the Party will be denied a place on the general election ballot to the extent that only the "top two" vote-getters will appear on the general election ballot. For example, if seven candidates carrying the Party name each receive 10% of the vote at a partisan primary, and two candidates of other parties each receive 15%, the Secretary maintains there would be no Party candidate on the general election ballot, despite the receipt by candidates with the Party's identification or 70% of the total vote.

17. Defendants-Intervenors Washington State Grange filed Initiative 872 in January 2004 seeking to convert the State's then blanket primary election system into a Top Two primary system. During the 2004 legislative session the Grange lobbied aggressively for the Washington legislature to adopt a primary election system that was substantially similar to

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Initiative 872. In the end, however, Washington repealed the blanket primary statutes, including statutes referred to by Initiative 872, and adopted the "Montana" primary system to replace the blanket primary.

18. Thereafter the Grange initiated a signature gathering campaign to place Initiative 872 on the November 2004 ballot. This campaign's promotional materials represented to voters that the Initiative would "restore the kind of choice that voters enjoyed for seventy years under the blanket primary." The promotional materials also represented that "minor parties would continue to select candidates the same way they do under the blanket primary. Their candidates would appear on the ballot for each office (as they do now)." Voters were told that ballots would look the same after passage as before passage of Initiative 872. On April 19, 2004, counsel for the Democratic Party advised the Grange that petitions for Initiative 872 being circulated for signature contained material inaccuracies in that the Initiative was seeking to replace the blanket primary but the laws had changed. Despite this warning, the Grange continued to pursue Initiative 872 as filed in January 2004.

19. As presented to the voters, Initiative 872 did not properly disclose the statutes that would be amended if the Initiative passed.

SUPPLEMENTAL ALLEGATIONS REFLECTING MATERIAL EVENTS SINCE THE FILING OF THE ORIGINAL COMPLAINT

20. After the passage of I-872, defendant Secretary of State requested the Legislature adopt legislation implementing I-872. At the Secretary's request HB 1750 and SB5745 were introduced in the 2005 session of the legislation. The Secretary's proposed implementation would have amended RCW 29A.36.121(3) to eliminate provisions of the

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

statute relating to nomination by minor parties but proposed to re-enact the first sentence of the section to read: "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 or general election ballot." The Secretary also proposed emergency regulations, WSR 05-11-101, which provided that on the ballot form to be used "the party preference or independent status of each candidate shall be listed next to the candidate." WSR 05-11-101 at WAC 434-230-170

21. As a direct result of this litigation challenging the proposed implementation and this Court's decision that the I-872 is unconstitutional, defendants repealed their proposed implementation of I-872 in 2005, including the form of ballot that defendants proposed to use. Thereafter, defendants argued to appellate courts that the form of ballot was not known and that it might not be the form upon which the District Court's determination that I-872 is unconstitutional had been based.

22. In 2006, by more than two-thirds vote, the Washington Legislature reviewed and amended various election statutes. Among other things, the Legislature changed Washington's primary election date to August. In 2007 the Washington adopted a requirement that all partisan primary ballots contain a statement that a voter may only vote for candidates of one party. To the date of this pleading, the Legislature has not amended RCW 29A.36.121(3) and its first sentence continues to read: "The political party or independent candidacy of the each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot."

23. In May 2008, two weeks prior to the commencement of filing of candidacies for the 2008 election the Secretary adopted emergency regulations implementing I-872, although this Court had not been requested to modify or vacate its injunction barring the Secretary from implementing I-872. In his 2008 emergency implementation the Secretary ignored RCW 29A.36.121(3)'s requirement that partisan primary ballots list the political party

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

or independent status of each candidate next to the name of the candidate. The Secretary also ignored the requirements of RCW 29A.24.030 (as amended by I-872) that for partisan offices declarations of candidacy must include a place for the candidate to indicate his or her major or minor party preference or independent status. Instead, the Secretary implemented forms that had no place to indicate independent status, only a box with which to decline to state a preference. Similarly the Secretary's emergency regulations did not indicate the independent status of candidates but instead indicated that the candidate had declined to state a preference.

24. As part of their implementation of Initiative 872, defendants have ignored, on the basis that they are impliedly repealed, numerous valid statutes of the State of Washington. The repeal of these statutes, or portions thereof, by implication if Initiative 872 were to pass was not disclosed to the voters in connection with Initiative 872.

25. Washington's Public Disclosure Commission also adopted regulations implementing I-872. In particular, the PDC adopted WAC 390-05-274 declaring that the terms "party affiliation," "political party," "party" and "political party affiliation" when used in RCW 42.17, WAC 390 or on forms adopted by the PDC meant a candidate's self-identified party preference. In addition, the PDC adopted a new brochure in July 2008 providing information to campaign advertising sponsors advising sponsors with respect to compliance with RCW 42.17.510's requirement that political advertising and communications must clearly identify a candidate's party or independent designation, as indicated by his or her statement of preference on the declaration of candidacy. The PDC brochure indicated that "Official symbols or logos adopted by the state committee of the party may be used in lieu of other identification." The PDC brochure also advised advertisers that the traditional abbreviations for political parties, such as "D., Dem., Demo," could be used to indicate the candidate's party.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

26. Election coverage both before and after the primary made no distinction between candidates carrying the Democratic Party name who were authorized to use the party name and candidates who did so without authorization. The practical effect of I-872 was to confuse voters about which candidates carrying the Democratic Party name actually supported the party and its objectives and candidates who had appropriated the party name for their own political advancement.

27. As implemented by defendants, I-872 unconstitutionally interferes with the internal affairs of the Democratic Party by allowing non-Democrats to participate in the election of the Party's precinct committee officers and, based on their implementation of I-872, defendants have even declared non-members of the Democratic Party to be elected to party positions. Pursuant to RCW 29A.80.030 the county central committee of a political party consists of its precinct committee officers. Pursuant to Article II, Section 15 of the Washington State Constitution, vacancies in the legislature or in any partisan county elective office must be filled by a candidate who has been nominated for the vacancy by the pertinent county central committee of the same political party as the legislator or local elected official who caused the vacancy. RCW 29A.80.041 requires that in order to file for the office of precinct committee officer for a political party a candidate must be a member of that party. In addition, RCW 29A.80.051 requires that in order to be elected a precinct committee officer of a party, a candidate must receive at least ten percent of the number of votes cast for the candidate of the precinct committee officer candidate's party who received the highest number of votes in the precinct.

28. Prior to the 2008 implementation of I-872 by the defendants, a candidate for the office of Democratic precinct committee officer was required to state as part of his or her declaration of candidacy that he or she was legally qualified to hold the office if elected and that he or she was a candidate of the Democratic Party. Under the defendants' 2008

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

implementation of I-872, a candidate is no longer required to affirm that he or she is legally qualified to take office if elected nor is the candidate required to request that his or her name be printed as a candidate of the Democratic Party.

29. Prior to the 2008 implementation of I-872 by the defendants, a voter could only vote in a Democratic precinct committee officer election if the voter had taken a separate Democratic Party ballot, had responded affirmatively that he or she wanted to affiliate with the Democratic Party or had voted only for candidates of the Democratic Party in partisan races on the ballot. As part of their implementation of I-872, defendants directed that all voters, without regard to whether such voters were adherents of the Democratic Party, would be offered the opportunity to vote in Democratic precinct committee officer elections. Defendants further directed that votes in the Democratic precinct committee officer elections would be counted without regard to how the voter voted in other partisan races on the ballot. Defendants finally directed that the requirement that in order to be elected a candidate must receive at least ten percent of the votes received by the highest vote getter of that candidate's party in the precinct would be ignored.

30. It is unconstitutional to allow non-party members to vote for a party's precinct committee officers. *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003). Defendant's implementation of I-872 is unconstitutional.

31. Subsequent to defendants' implementation of I-872, state officials, voters and the press treated a candidate's statement in his or her declaration of candidacy that he or she prefers the Democratic Party as indicating that he or she is associated with the Democratic Party. The absence of any opportunity for the Party to object to association with a candidate, the association of the candidate with the Party on ballots and in voter's pamphlets, the requirement that all advertising referring to a candidate treat the candidate's party preference statement as indicating the candidate's party affiliation, the encouragement by State to

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

candidates and advertisers to use the Party's symbols and logos, and the characterization by state officials of candidates as "Democratic candidates" based on party preference statements under I-872, all create a forced association between the Democratic Party and candidates stating a preference for the Democratic Party.

DENIAL OF EQUAL PROTECTION OF LAWS

32. In contrast to its invasion of the associational rights of the Party, by denying a right to nominate candidates, the State expressly authorizes minor parties to nominate candidates through a convention process. RCW 29A.20.121, re-adopted by the legislature in 2006, after this Court's issuance of an injunction against I-872 on other grounds, provides, "Any nomination of a candidate for partisan public office by other than a major political party may be made only in a convention ...." (internal punctuation omitted).

33. The State also affords minor political parties a mechanism to protect themselves from individuals or groups who attempt to hijack the party name or force an association with the minor political party. RCW 29A20.171(1) recognizes that there can be only one nominee of a minor political party. RCW 29A.20.171(2) provides for "a judicial determination of the right to the name of a minor political party ...." The Defendants intend to administer the State's partisan primary in a manner that denies the Party the right to nominate its candidates and the right to its name. In doing so, the State improperly protects the First Amendment right of association to minor political parties and their adherents, but denies the same protection to Plaintiffs.

DEMOCRATIC PARTY OF WASHINGTON V. REED

34. In *Reed*, the Ninth Circuit held that Washington cannot force a political party and its adherents to adulterate their nomination process. The *Reed* decision overturned Washington's blanket primary system, which—like I-872—prevented the Party from

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

controlling its own nomination process. The court, rejecting a litany of "compelling interests" advanced by the State to justify the invasion of First Amendment rights, stated that "[t]he remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their interests is to vote for someone else, not to control whom the party's adherents select to carry their message." *Reed*, 343 F.3d at 1206-07.

35. In *Jones*, the Supreme Court noted that forced political association violates the principles set forth in earlier cases, by forcing "political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." 530 U.S. at 577. The Supreme Court also noted that "a corollary of the right to associate is the right not to associate. 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' In no area is the political association's right to exclude more important than in the process of selecting its nominee." 530 U.S. at 574-575 (citations omitted). The Ninth Circuit decision followed the U.S. Supreme Court decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *Reed*, 343 F.3d at 1201.

36. There is no constitutionally significant difference between Washington's previous blanket primary system held unconstitutional by the Ninth Circuit and the "People's Choice" primary system. Indeed, the voter's pamphlet statement prepared by I-872's proponents stated that "I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary."

DEPRIVATION OF CIVIL RIGHTS BY STATE OFFICIALS UNDER COLOR OF LAW

37. The Washington State Democratic Central Committee has adopted rules

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

governing the nomination of its candidates, requiring Democratic candidates and nominees to be selected pursuant to rules adopted by the Party, and prohibiting candidates not qualified under Party rule to represent themselves as candidates or the Party. The Party has provided those rules to the Defendants.

38. The conduct of any partisan primary by State officials without implementation of an effective mechanism for the Party to exercise its right to limit participation in connection with that primary to adherents of the Party is action by those State officials under law and color of law that deprives Plaintiffs of their civil rights.

39. The conduct of any partisan primary by State officials in which the state promotes, permits or encourages claims by candidates in or on widely distributed State election materials, including ballots and voter's pamphlets, to be associated with, members of, endorsed by or nominated by the Democratic Party without regard to whether such candidates are in fact associated with, members of, endorsed by or nominated by the Democratic Party modulates and alters, and thus interferes with, the political message of the Democratic Party. The conduct of any partisan primary by State officials in which the Democratic Party is required to repeat in its own materials unwanted claims of association by candidates unconstitutionally compels political speech from the Party. Requiring that the officers of the Democratic Party be selected in a process that permits voters who are not affiliated with the Democratic Party to determine the outcome unconstitutionally interferes with the internal affairs of the Democratic Party. These actions by Defendants, acting under color of law, deprive plaintiffs of their civil rights.

40. If the State is ~~County Auditors are~~ permitted to conduct a "qualifying" partisan primary with multiple "Democratic" candidates listed and not chosen by the Party, plaintiffs will be denied their First Amendment rights and will be irreparably injured. Moreover, if the State conducts partisan primaries pursuant to procedures which are known to be

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

unconstitutional, then there is a substantial risk that the results of those primaries will be invalid.

FIRST CAUSE OF ACTION: CONDUCTING AN INVALID PRIMARY

41. Plaintiffs reallege and incorporate by reference Paragraphs 1-40.

42. An actual controversy exists between Plaintiffs and Defendants with regard to the exercise of Plaintiffs' federally protected rights. Plaintiffs are entitled to declaratory judgment establishing the unconstitutionality of the State's primary system as applied to them.

43. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the County Auditors to permit non-affiliates of the Party to participate in the Party's nominee selection process.

44. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the Secretary and County Auditors to facilitate cross-over voting and ticket-splitting by placing Democratic primary races on the same ballot as primary races for other political parties or affiliations over the objection of the Party and without requiring mechanisms to prevent voting in violation of the Party's associational rights.

45. Initiative 872 lacks a severability clause. Therefore, if any portion of I-872 is unconstitutional, the entire enactment is void.

46. The primary system implemented by the Defendants is invalid under Washington law, because it was superseded by statutes readopting the Montana primary system in 2006 and 2007. In 2007, the Legislature adopted SB 5408, requiring separate party ballots, or a consolidated ballot with a party "check-off" system for voters to affiliate with a party before nominating candidates. In 2008, a bill was introduced in the Washington legislature to adopt a "top two" system, including amendments to repeal minor party convention, nomination and name control statutes, but was not adopted.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

47. Pursuant to 42 U.S.C. § 1983, *et seq.*, Plaintiffs are entitled to a declaratory judgment regarding their rights under the First Amendment and to their reasonable attorneys' fees and costs in this case.

SECOND CAUSE OF ACTION: FORCED ASSOCIATION

48. Plaintiffs reallege and incorporate by reference Paragraphs 1-47.

49. RCW 29A.24.030, RCW 29A.24.031 and RCW 29A.36.010 are unconstitutional under the First Amendment to the extent that they permit the State to compel the Party during a primary to publicly affiliate with candidates other than those who are qualified under Party rules to represent themselves as candidates of the Party.

50. The State's primary system, including RCW 29A.36.170, is unconstitutional under the First Amendment to the extent that it places upon the general election ballot as a candidate of the Party for any office the name of an individual who has been selected though a voting system that deprives the Party of the ability to limit participation in nominee selection to those the Party has determined should be included.

51. Initiative 872 is unconstitutional because, both in isolation and in conjunction with other laws governing elections and election campaigns, it will confuse voters as to whether candidates publically affiliated with the Democratic Party are, in fact, affiliated with the Democratic Party or represent its views, and will further confuse voters regarding whether messages advanced by candidates bearing the Democratic Party name on ballots, in the voter's pamphlet, and in political advertising are those of the Democratic Party. Initiative 872 constitutes a misappropriation by the Defendants and potentially by unauthorized candidates of the Party's name, which is associated in the mind of the public with the Party and its positions on important issues of the day.

52. Initiative 872, as implemented by Defendants, is unconstitutional because it permits voters who are not adherents of the Democratic Party to elect directly officers of the

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

Party and indirectly to select higher officials of the Party and its nominees to fill vacancies in partisan office.

THIRD CAUSE OF ACTION: DENIAL OF EQUAL PROTECTION UNDER LAW

53. Plaintiffs reallege and incorporate by reference Paragraphs 1-52.

54. The State, through RCW 29A.20.171 and other provisions of state law, provides protection for minor political parties from forced association with candidates who may not share the goals or objectives of the minor political party and its adherents. Through the convention process and the statutory procedures to resolve competing claims to the use of a minor political party's name, those parties and their adherents may prevent misrepresentations of affiliation on primary ballots prepared by the Defendants. The State discriminates among political parties by providing a mechanism for minor political parties to protect themselves from forced affiliation with candidates, but denying the same right to the Party and its adherents under RCW 29A.24.030 and RCW 29A.24.031 by permitting any person to represent himself or herself as a candidate of the Party.

55. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983, *et seq.*

FOURTH CAUSE OF ACTION:
VIOLATION OF THE WASHINGTON STATE CONSTITUTION

56. Plaintiffs reallege and incorporate by reference Paragraphs 1 – 55.

57. I-872 identified the portions of Washington's primary and general election laws both that it amended and repealed, as well as any new provisions it added to the statutory scheme.

58. I-872 did not include in its text the provisions of existing state law (or prior state law) regarding the August Montana primary, minor party convention rights, ballot format, precinct committee officer elections, campaign finance regulation, protections for

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

unauthorized use of minor party political names by candidates or other statutes that would be repealed or amended by I-872. Nor did I-872 include such statutory provisions in its list of sections of the law to be repealed.

59. As approved by the voters in November 2004, Initiative 872's text violates of Article II, Section 37 of the Washington State Constitution and is void.

60. Both the text of Initiative 872 and the sponsor's materials presented to the voters in the course of its signature gathering campaign (as well as the general election campaign for the Initiative) mislead and confused voters regarding the effect of the Initiative, violating Article II, Section 37 of the State Constitution.

FIFTH ~~FOURTH~~ CAUSE OF ACTION: INJUNCTIVE RELIEF

61. Plaintiffs reallege and incorporate by reference Paragraphs 1-60.

62. There exists an imminent and ongoing threat by State officials to deprive Plaintiffs of their civil rights by selectively enforcing laws and permitting the State to blur ~~requiring Plaintiffs to select~~ the candidates and nominees of the Party through a primary process in which Plaintiffs are not permitted to exercise their First Amendment rights of association and exclusion.

63. Plaintiffs will suffer irreparable injury if the Party's candidates and nominees are selected in a process in which the Party is deprived of its right to define participation.

64. Plaintiffs are entitled to preliminary and permanent injunctive relief restraining State officials from:

a) conducting any partisan primary without affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the Party's exercise of its right to select the candidates who participate in that primary associated with the Party's name;

c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the Party for that primary;

d) placing on a primary or general election ballot or in any officially distributed election materials the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party.

65. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983, *et seq.*

PRAYER FOR RELIEF

Plaintiffs respectfully request the Court enter judgment:

1. Declaring RCW 29A.04.127 unconstitutional;

2. Declaring RCW 29A.24.030 and RCW 29A24.031 unconstitutional under the Constitution of the United States to the extent they authorize placing on a primary ballot the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party;

3. Declaring RCW 29A.36.010 unconstitutional;

4. Declaring RCW 29A.36.170 unconstitutional;

5. Declaring RCW 29A.52.112 unconstitutional;

6. Declaring Initiative 872 unconstitutional;

7. Declaring that the primary system in effect immediately before the passage of I-872 remains in effect;

8. Declaring Initiative 872 unconstitutional for violating Article II, section 37 of

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

the Washington State Constitution and declaring the primary system in effect immediately prior to passage of the Initiative remains in effect;

9. Permanently restraining Defendants ~~the County Auditors~~ and all those acting in active concert and participation with them from:

a) conducting any partisan primary without affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;

b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the Party's exercise of its right to select the candidates who participate in that primary associated with the Party's name;

c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the Party for that primary;

d) placing on a primary or general election ballot or in other officially distributed election material the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party.

10. Awarding Plaintiffs their reasonable attorneys' fees and costs; and

11. Granting such further relief as the Court deems appropriate.

DATED this 1st ~~8th~~ day of December, 2008 ~~June 2005~~.

s/David T. McDonald
David T. McDonald, WSBA #5260
Alex Wagner, WSBA # 36856
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Tel: (206) 623-7580
Fax: (206) 623-7022
david.mcdonald@klgates.com

Attorneys for Plaintiffs in Intervention,

Washington State Democratic Party and
Dwight Pelz ~~Paul R. Berendt~~, Chair

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2008, 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 the following:

James Kendrick Pharris

Richard Dale Shepard

John James White, Jr.

Thomas Ahearne

s/David T. McDonald
David T. McDonald, WSBA #5260
Alex Wagner, WSBA # 36856
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Tel: (206) 623-7580
Fax: (206) 623-7022
david.mcdonald@klgates.com

Attorneys for Plaintiffs in Intervention, Washington State Democratic Party and Dwight Pelz, Chair

EXHIBIT 3

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

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF REGARDING INITIATIVE 872 AND PRIMARY ELECTIONS

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

NATURE OF ACTION

1. The First and Fourteenth Amendments to the United States Constitution guarantee the right of individuals to associate in a political party, the right of that party to select its nominees for partisan political office, and the right of the individuals and their party to limit participation in the process of selecting nominees to those voters the party identifies as sharing its interests and persuasions. As the Ninth Circuit noted in striking down Washington's blanket primary, " ... the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees. The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapés. Party adherents are entitled to associate to choose their party's nominees for public office." *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004) ("*Reed*").

2. One of the fundamental purposes of the First Amendment is to provide for and promote competition between ideas in American civilization. This purpose is advanced by requiring that the selection of a political party's candidates and nominees be done by adherents of the party rather than by those opposed to or indifferent to the party.

3. The State of Washington (the "State") has enacted Initiative 872, attempting to prevent the Washington State Democratic Party (the "Party") and its adherents from selecting their nominees, and to force the Party to be associated publicly with candidates who have not been nominated by the Party, who will alter the political message and agenda the Party seeks to advance, and who will confuse the voting public with respect to what the Party and its adherents stand for. The State seeks to appropriate the use of the Democratic Party's name in primaries and general elections in order to protect the political interests of the incumbent and the well-known at the expense of the committed and the innovative. Acting under color of law, State and local officials force the Party and its adherents to include supporters of other

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

parties and political interests in determining which, or whether any, candidate will carry the Democratic Party name in the general election.

4. Initiative 872, as set forth in both Section 2 ("In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective....") and Section 18, was expressly intended to defeat the constitutional right of the Party and its adherents to nominate candidates, recognized by the U.S. Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402, 147 L. Ed. 2d 502 (2000) and *Reed*. The Initiative, as implemented by State officials, eliminates mechanisms previously enacted by the State to protect the First Amendment rights of the Party and its adherents and provides no effective substitute mechanism for the Party to exercise its right to limit participation in the nomination process and thereby protect its adherents' right of association from forced dilution.

5. This is an action to protect the First Amendment rights of the Party and its adherents to advocate and promote their vision for the future without subtle or overt censorship or interference by the State through the County Auditors acting under color of the laws of the State of Washington. Initiative 872 is unconstitutional.

JURISDICTION AND VENUE

6. Plaintiffs' rights of political association and political expression are guaranteed against abridgement by the State and those acting under color of its laws by the First and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1983. This case presents a federal question involving federally-protected rights, including freedom of association and protection against state intervention into the association rights of the Party and its adherents, set out in *Reed*. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1343(a)(3), 2201 and 2202.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

7. Defendants reside in the Western District of the State of Washington (the "Western District") and the conduct and threatened conduct that gives rise to Plaintiffs' claims substantially occurred and threatens to occur within the Western District. Venue for this action lies within the Western District pursuant to 28 U.S.C. §§ 1391(a) and 1391(b).

PARTIES

8. The Party is a "major political party" as defined in RCW 29A.04.086 and is organized for the purposes of promoting the political beliefs of its adherents, selecting and supporting candidates who support the political beliefs of the Party's adherents and electing public officials who will conduct government affairs in a manner consistent with the Party's philosophy. The Party has all the powers inherent in a political organization and is empowered to perform all functions inherent in a political party.

9. Intervenor-Plaintiff Dwight Pelz is a resident of the Western District. He is the elected Chairman of the Washington State Democratic Central Committee, the governing body of the Party pursuant to its Charter, and is the political and administrative head of the Party pursuant to its Charter and Bylaws and RCW 29A.80.020, *et seq.*

10. The Defendants are Sam Reed, in his capacity as Secretary of State of the State of Washington; Robert McKenna, in his capacity as Attorney General of the State of Washington; and the State of Washington. Secretary Reed is the chief officer in the State, having the overall responsibility to conduct primary elections within each respective county, including providing and tabulating ballots for such elections. Secretary Reed and Attorney General McKenna intervened as defendants. The State was substituted as a defendant for the original defendants (the County Auditors) by an agreed order of the Court on July 13, 2005.

WASHINGTON'S PARTISAN PRIMARY

11. The Defendants will administer partisan primaries this September. Pursuant to the laws of the State, including the Montana primary system adopted by the Legislature and

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

RCW 29A.04.311, 29A.20.121, and 29A.52.116, the Party is required to advance its candidates for Congressional, State and County offices by means of partisan political primaries administered by the Secretary of State ("the Secretary") and the County Auditors. RCW 29A.52.116 states: "Major political party candidates for all partisan elected offices, except for president and vice-president ... must be nominated at primaries held under this chapter." The mandatory notice of the primary must contain "the proper party designation" of each candidate in the primary. RCW 29A.52.311. RCW 29A.52.112, adopted by I-872, requires that "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 …." The same statute also provides that the "top two" vote-getters in the primary required by I-872 will advance to the general election. The Secretary has asserted that only the two candidates who receive the most votes on primary day will advance to the primary even if both candidates are associated with the same political party. Former defendants Logan and Terwilliger have each asserted, "At this time, I am not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary."

12. Neither the laws of the State nor the rules adopted or proposed by the Secretary provide any mechanism for the Party to effectively exercise its right of association in connection with the partisan primary in which it is forced by State law to participate. Any individual may appropriate the Party's name, regardless of whether the Party desires affiliation with that person.

13. The State, through its filing and campaign advertising statutes, also compels

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

the Party to associate with any person who files a declaration of candidacy expressing a "preference" for the Party, regardless whether the Party desires association with the person. In addition, the State through its Voter's Pamphlet propagates to all voters claims of Party endorsement or nomination by candidates without regard to whether the Party has in fact endorsed or nominated the candidates.

14. In addition to requiring the Party to accept as one of its candidates any individual without regard to the individual's political philosophy or participation in Party affairs RCW 29A.04.127 forces the Party to permit any voter to participate in selection of the Party's standard-bearer without regard to the voter's partisan affiliation or beliefs. The State thus forces the Party and its adherents to associate with those who do not share their beliefs or are openly antagonistic to them. Initiative 872 was intended to establish *a de facto* blanket primary in response to a declaration that the blanket primary is unconstitutional and to facilitate cross-over and ticket-splitting voting, thus depriving the Party of its right to prevent supporters of other political parties and interests from participating in its candidate selection and nomination processes. It was intended to force the Party to modify its message or have a modified message forced upon it by the simple expedient of eliminating the Party's selected spokesperson in favor of a spokesperson selected by non-adherents of the Party. The sponsors' official statement in support of the Initiative states, "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." This attempt at forced message modification was rejected as a legitimate state interest by both the Supreme Court in *Jones* and the Ninth Circuit in *Reed.*

15. The other interests asserted as the basis for adopting I-872, codified as RCW 29A.04.206, were also rejected in *Reed* as legitimate grounds for invading the right of political association.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

16. The Party and its adherents are irreparably injured by the forced adulteration of the Party's nomination process, by the State's active encouragement of cross-over and ticket-splitting, and by the resulting dilution and potential suppression of its message. The presence and participation of non-party voters in the partisan primary inevitably alters candidates' messages and actions and thereby dilutes the Party's message and influence. Dilution of the Party's vote in any partisan primary carries with it the risk that the Party will be denied a place on the general election ballot to the extent that only the "top two" vote-getters will appear on the general election ballot. For example, if seven candidates carrying the Party name each receive 10% of the vote at a partisan primary, and two candidates of other parties each receive 15%, the Secretary maintains there would be no Party candidate on the general election ballot, despite the receipt by candidates with the Party's identification or 70% of the total vote.

17. Defendants-Intervenors Washington State Grange filed Initiative 872 in January 2004 seeking to convert the State's then blanket primary election system into a Top Two primary system. During the 2004 legislative session the Grange lobbied aggressively for the Washington legislature to adopt a primary election system that was substantially similar to Initiative 872. In the end, however, Washington repealed the blanket primary statutes, including statutes referred to by Initiative 872, and adopted the "Montana" primary system to replace the blanket primary.

18. Thereafter the Grange initiated a signature gathering campaign to place Initiative 872 on the November 2004 ballot. This campaign's promotional materials represented to voters that the Initiative would "restore the kind of choice that voters enjoyed for seventy years under the blanket primary." The promotional materials also represented

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

that "minor parties would continue to select candidates the same way they do under the blanket primary. Their candidates would appear on the ballot for each office (as they do now)." Voters were told that ballots would look the same after passage as before passage of Initiative 872. On April 19, 2004, counsel for the Democratic Party advised the Grange that petitions for Initiative 872 being circulated for signature contained material inaccuracies in that the Initiative was seeking to replace the blanket primary but the laws had changed. Despite this warning, the Grange continued to pursue Initiative 872 as filed in January 2004.

19. As presented to the voters, Initiative 872 did not properly disclose the statutes that would be amended if the Initiative passed.

SUPPLEMENTAL ALLEGATIONS REFLECTING MATERIAL EVENTS SINCE THE FILING OF THE ORIGINAL COMPLAINT

20. After the passage of I-872, defendant Secretary of State requested the Legislature adopt legislation implementing I-872. At the Secretary's request HB 1750 and SB5745 were introduced in the 2005 session of the legislation. The Secretary's proposed implementation would have amended RCW 29A.36.121(3) to eliminate provisions of the statute relating to nomination by minor parties but proposed to re-enact the first sentence of the section to read: "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 or general election ballot." The Secretary also proposed emergency regulations, WSR 05-11-101, which provided that on the ballot form to be used "the party preference or independent status of each candidate shall be listed next to the candidate." WSR 05-11-101 at WAC 434-230-170

21. As a direct result of this litigation challenging the proposed implementation and this Court's decision that the I-872 is unconstitutional, defendants repealed their proposed

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

implementation of I-872 in 2005, including the form of ballot that defendants proposed to use. Thereafter, defendants argued to appellate courts that the form of ballot was not known and that it might not be the form upon which the District Court's determination that I-872 is unconstitutional had been based.

22. In 2006, by more than two-thirds vote, the Washington Legislature reviewed and amended various election statutes. Among other things, the Legislature changed Washington's primary election date to August. In 2007 the Washington adopted a requirement that all partisan primary ballots contain a statement that a voter may only vote for candidates of one party. To the date of this pleading, the Legislature has not amended RCW 29A.36.121(3) and its first sentence continues to read: "The political party or independent candidacy of the each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot."

23. In May 2008, two weeks prior to the commencement of filing of candidacies for the 2008 election the Secretary adopted emergency regulations implementing I-872, although this Court had not been requested to modify or vacate its injunction barring the Secretary from implementing I-872. In his 2008 emergency implementation the Secretary ignored RCW 29A.36.121(3)'s requirement that partisan primary ballots list the political party or independent status of each candidate next to the name of the candidate. The Secretary also ignored the requirements of RCW 29A.24.030 (as amended by I-872) that for partisan offices declarations of candidacy must include a place for the candidate to indicate his or her major or minor party preference or independent status. Instead, the Secretary implemented forms that had no place to indicate independent status, only a box with which to decline to state a preference. Similarly the Secretary's emergency regulations did not indicate the independent status of candidates but instead indicated that the candidate had declined to state a preference.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

24. As part of their implementation of Initiative 872, defendants have ignored, on the basis that they are impliedly repealed, numerous valid statutes of the State of Washington. The repeal of these statutes, or portions thereof, by implication if Initiative 872 were to pass was not disclosed to the voters in connection with Initiative 872.

25. Washington's Public Disclosure Commission also adopted regulations implementing I-872. In particular, the PDC adopted WAC 390-05-274 declaring that the terms "party affiliation," "political party," "party" and "political party affiliation" when used in RCW 42.17, WAC 390 or on forms adopted by the PDC meant a candidate's self-identified party preference. In addition, the PDC adopted a new brochure in July 2008 providing information to campaign advertising sponsors advising sponsors with respect to compliance with RCW 42.17.510's requirement that political advertising and communications must clearly identify a candidate's party or independent designation, as indicated by his or her statement of preference on the declaration of candidacy. The PDC brochure indicated that "Official symbols or logos adopted by the state committee of the party may be used in lieu of other identification." The PDC brochure also advised advertisers that the traditional abbreviations for political parties, such as "D., Dem., Demo," could be used to indicate the candidate's party.

26. Election coverage both before and after the primary made no distinction between candidates carrying the Democratic Party name who were authorized to use the party name and candidates who did so without authorization. The practical effect of I-872 was to confuse voters about which candidates carrying the Democratic Party name actually supported the party and its objectives and candidates who had appropriated the party name for their own political advancement.

27. As implemented by defendants, I-872 unconstitutionally interferes with the internal affairs of the Democratic Party by allowing non-Democrats to participate in the

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

election of the Party's precinct committee officers and, based on their implementation of I-872, defendants have even declared non-members of the Democratic Party to be elected to party positions. Pursuant to RCW 29A.80.030 the county central committee of a political party consists of its precinct committee officers. Pursuant to Article II, Section 15 of the Washington State Constitution, vacancies in the legislature or in any partisan county elective office must be filled by a candidate who has been nominated for the vacancy by the pertinent county central committee of the same political party as the legislator or local elected official who caused the vacancy. RCW 29A.80.041 requires that in order to file for the office of precinct committee officer for a political party a candidate must be a member of that party. In addition, RCW 29A.80.051 requires that in order to be elected a precinct committee officer of a party, a candidate must receive at least ten percent of the number of votes cast for the candidate of the precinct committee officer candidate's party who received the highest number of votes in the precinct.

28. Prior to the 2008 implementation of I-872 by the defendants, a candidate for the office of Democratic precinct committee officer was required to state as part of his or her declaration of candidacy that he or she was legally qualified to hold the office if elected and that he or she was a candidate of the Democratic Party. Under the defendants' 2008 implementation of I-872, a candidate is no longer required to affirm that he or she is legally qualified to take office if elected nor is the candidate required to request that his or her name be printed as a candidate of the Democratic Party.

29. Prior to the 2008 implementation of I-872 by the defendants, a voter could only vote in a Democratic precinct committee officer election if the voter had taken a separate Democratic Party ballot, had responded affirmatively that he or she wanted to affiliate with the Democratic Party or had voted only for candidates of the Democratic Party in partisan races on the ballot. As part of their implementation of I-872, defendants directed that all

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

voters, without regard to whether such voters were adherents of the Democratic Party, would be offered the opportunity to vote in Democratic precinct committee officer elections. Defendants further directed that votes in the Democratic precinct committee officer elections would be counted without regard to how the voter voted in other partisan races on the ballot. Defendants finally directed that the requirement that in order to be elected a candidate must receive at least ten percent of the votes received by the highest vote getter of that candidate's party in the precinct would be ignored.

30. It is unconstitutional to allow non-party members to vote for a party's precinct committee officers. *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003). Defendant's implementation of I-872 is unconstitutional.

31. Subsequent to defendants' implementation of I-872, state officials, voters and the press treated a candidate's statement in his or her declaration of candidacy that he or she prefers the Democratic Party as indicating that he or she is associated with the Democratic Party. The absence of any opportunity for the Party to object to association with a candidate, the association of the candidate with the Party on ballots and in voter's pamphlets, the requirement that all advertising referring to a candidate treat the candidate's party preference statement as indicating the candidate's party affiliation, the encouragement by State to candidates and advertisers to use the Party's symbols and logos, and the characterization by state officials of candidates as "Democratic candidates" based on party preference statements under I-872, all create a forced association between the Democratic Party and candidates stating a preference for the Democratic Party. As a result of the implementation of I-872 by the defendants, voters are confused about which candidates on the ballot are truly representative of and associated with the Democratic Party and which have merely appropriated the party name for personal electoral advantage – to the detriment of the party, its candidates, programs and message.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

DENIAL OF EQUAL PROTECTION OF LAWS

32. In contrast to its invasion of the associational rights of the Party, by denying a right to nominate candidates, the State expressly authorizes minor parties to nominate candidates through a convention process. RCW 29A.20.121, re-adopted by the legislature in 2006, after this Court's issuance of an injunction against I-872 on other grounds, provides, "Any nomination of a candidate for partisan public office by other than a major political party may be made only in a convention ...." (internal punctuation omitted).

33. The State also affords minor political parties a mechanism to protect themselves from individuals or groups who attempt to hijack the party name or force an association with the minor political party. RCW 29A20.171(1) recognizes that there can be only one nominee of a minor political party. RCW 29A.20.171(2) provides for "a judicial determination of the right to the name of a minor political party ...." The Defendants intend to administer the State's partisan primary in a manner that denies the Party the right to nominate its candidates and the right to its name. In doing so, the State improperly protects the First Amendment right of association to minor political parties and their adherents, but denies the same protection to Plaintiffs.

DEMOCRATIC PARTY OF WASHINGTON V. REED

34. In *Reed*, the Ninth Circuit held that Washington cannot force a political party and its adherents to adulterate their nomination process. The *Reed* decision overturned Washington's blanket primary system, which—like I-872—prevented the Party from controlling its own nomination process. The court, rejecting a litany of "compelling interests" advanced by the State to justify the invasion of First Amendment rights, stated that "[t]he remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their interests is to vote for someone else,

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

not to control whom the party's adherents select to carry their message." *Reed*, 343 F.3d at 1206-07.

35. In *Jones*, the Supreme Court noted that forced political association violates the principles set forth in earlier cases, by forcing "political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." 530 U.S. at 577. The Supreme Court also noted that "a corollary of the right to associate is the right not to associate. 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' In no area is the political association's right to exclude more important than in the process of selecting its nominee." 530 U.S. at 574-575 (citations omitted). The Ninth Circuit decision followed the U.S. Supreme Court decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *Reed*, 343 F.3d at 1201.

36. There is no constitutionally significant difference between Washington's previous blanket primary system held unconstitutional by the Ninth Circuit and the "People's Choice" primary system. Indeed, the voter's pamphlet statement prepared by I-872's proponents stated that "I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary."

DEPRIVATION OF CIVIL RIGHTS BY STATE OFFICIALS UNDER COLOR OF LAW

37. The Washington State Democratic Central Committee has adopted rules governing the nomination of its candidates, requiring Democratic candidates and nominees to be selected pursuant to rules adopted by the Party, and prohibiting candidates not qualified under Party rule to represent themselves as candidates or the Party. The Party has provided those rules to the Defendants.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

38. The conduct of any partisan primary by State officials without implementation of an effective mechanism for the Party to exercise its right to limit participation in connection with that primary to adherents of the Party is action by those State officials under law and color of law that deprives Plaintiffs of their civil rights.

39. The conduct of any partisan primary by State officials in which the state promotes, permits or encourages claims by candidates in or on widely distributed State election materials, including ballots and voter's pamphlets, to be associated with, members of, endorsed by or nominated by the Democratic Party without regard to whether such candidates are in fact associated with, members of, endorsed by or nominated by the Democratic Party modulates and alters, and thus interferes with, the political message of the Democratic Party. The conduct of any partisan primary by State officials in which the Democratic Party is required to repeat in its own materials unwanted claims of association by candidates unconstitutionally compels political speech from the Party. Requiring that the officers of the Democratic Party be selected in a process that permits voters who are not affiliated with the Democratic Party to determine the outcome unconstitutionally interferes with the internal affairs of the Democratic Party. These actions by Defendants, acting under color of law, deprive plaintiffs of their civil rights.

40. If the State is permitted to conduct a "qualifying" partisan primary with multiple "Democratic" candidates listed and not chosen by the Party, plaintiffs will be denied their First Amendment rights and will be irreparably injured. Moreover, if the State conducts partisan primaries pursuant to procedures which are known to be unconstitutional, then there is a substantial risk that the results of those primaries will be invalid.

FIRST CAUSE OF ACTION: CONDUCTING AN INVALID PRIMARY

41. Plaintiffs reallege and incorporate by reference Paragraphs 1-40.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

42. An actual controversy exists between Plaintiffs and Defendants with regard to the exercise of Plaintiffs' federally protected rights. Plaintiffs are entitled to declaratory judgment establishing the unconstitutionality of the State's primary system as applied to them.

43. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the County Auditors to permit non-affiliates of the Party to participate in the Party's nominee selection process.

44. RCW 29A.04.127 and RCW 29A.52.112 are unconstitutional to the extent that they authorize the Secretary and County Auditors to facilitate cross-over voting and ticket-splitting by placing Democratic primary races on the same ballot as primary races for other political parties or affiliations over the objection of the Party and without requiring mechanisms to prevent voting in violation of the Party's associational rights.

45. Initiative 872 lacks a severability clause. Therefore, if any portion of I-872 is unconstitutional, the entire enactment is void.

~~46. The primary system implemented by the Defendants is invalid under Washington law, because it was superseded by statutes readopting the Montana primary system in 2006 and 2007. In 2007, the Legislature adopted SB 5408, requiring separate party ballots, or a consolidated ballot with a party "check-off" system for voters to affiliate with a party before nominating candidates. In 2008, a bill was introduced in the Washington legislature to adopt a "top two" system, including amendments to repeal minor party convention, nomination and name control statutes, but was not adopted.~~

~~47.~~46. Pursuant to 42 U.S.C. § 1983, *et seq.*, Plaintiffs are entitled to a declaratory judgment regarding their rights under the First Amendment and to their reasonable attorneys' fees and costs in this case.

SECOND CAUSE OF ACTION: FORCED ASSOCIATION

~~48.~~47. Plaintiffs reallege and incorporate by reference Paragraphs 1-47.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

~~49.~~48. RCW 29A.24.030, RCW 29A.24.031 and RCW 29A.36.010 are unconstitutional under the First Amendment to the extent that they permit the State to compel the Party during a primary to publicly affiliate with candidates other than those who are qualified under Party rules to represent themselves as candidates of the Party.

~~50.~~49. The State's primary system, including RCW 29A.36.170, is unconstitutional under the First Amendment to the extent that it places upon the general election ballot as a candidate of the Party for any office the name of an individual who has been selected though a voting system that deprives the Party of the ability to limit participation in nominee selection to those the Party has determined should be included.

~~51.~~50. ~~Initiative 872~~The State's primary system resulting from implementation of I-872 is unconstitutional because, both in isolation and in conjunction with other laws governing elections and election campaigns, it will confuse voters as to whether candidates publically affiliated with the Democratic Party are, in fact, affiliated with the Democratic Party or represent its views, and will further confuse voters regarding whether messages advanced by candidates bearing the Democratic Party name on ballots, in the voter's pamphlet, and in political advertising are those of the Democratic Party. Initiative 872 as implemented constitutes a misappropriation by the Defendants and potentially by unauthorized candidates of the Party's name, which is associated in the mind of the public with the Party and its positions on important issues of the day.

~~52.~~51. Initiative 872, as implemented by Defendants, is unconstitutional because it permits voters who are not adherents of the Democratic Party to elect directly officers of the Party and indirectly to select higher officials of the Party and its nominees to fill vacancies in partisan office.

THIRD CAUSE OF ACTION: DENIAL OF EQUAL PROTECTION UNDER LAW

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

~~53.~~52. Plaintiffs reallege and incorporate by reference Paragraphs 1-52.

~~54.~~53. The State, through RCW 29A.20.171 and other provisions of state law, provides protection for minor political parties from forced association with candidates who may not share the goals or objectives of the minor political party and its adherents. Through the convention process and the statutory procedures to resolve competing claims to the use of a minor political party's name, those parties and their adherents may prevent misrepresentations of affiliation on primary ballots prepared by the Defendants. The State discriminates among political parties by providing a mechanism for minor political parties to protect themselves from forced affiliation with candidates, but denying the same right to the Party and its adherents under RCW 29A.24.030 and RCW 29A.24.031 by permitting any person to represent himself or herself as a candidate of the Party.

~~55.~~54. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983, *et seq.*

~~**FOURTH CAUSE OF ACTION:**~~
~~**VIOLATION OF THE WASHINGTON STATE CONSTITUTION**~~

~~56.Plaintiffs reallege and incorporate by reference Paragraphs 1—55.~~

~~57.I-872 identified the portions of Washington's primary and general election laws both that it amended and repealed, as well as any new provisions it added to the statutory scheme.~~

~~58.I-872 did not include in its text the provisions of existing state law (or prior state law) regarding the August Montana primary, minor party convention rights, ballot format, precinct committee officer elections, campaign finance regulation, protections for unauthorized use of minor party political names by candidates or other statutes that would be repealed or amended by I-872. Nor did I-872 include such statutory provisions in its list of sections of the law to be repealed.~~

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

~~59.As approved by the voters in November 2004, Initiative 872's text violates of Article II, Section 37 of the Washington State Constitution and is void.~~

~~60.Both the text of Initiative 872 and the sponsor's materials presented to the voters in the course of its signature gathering campaign (as well as the general election campaign for the Initiative) mislead and confused voters regarding the effect of the Initiative, violating Article II, Section 37 of the State Constitution.~~

~~FIFTH~~FOURTH CAUSE OF ACTION: INJUNCTIVE RELIEF

~~61.~~55. Plaintiffs reallege and incorporate by reference Paragraphs 1-60.

~~62.~~56. There exists an imminent and ongoing threat by State officials to deprive Plaintiffs of their civil rights by selectively enforcing laws and permitting the State to blur the candidates and nominees of the Party through a primary process in which Plaintiffs are not permitted to exercise their First Amendment rights of association and exclusion.

~~63.~~57. Plaintiffs will suffer irreparable injury if the Party's candidates and nominees are selected in a process in which the Party is deprived of its right to define participation.

~~64.~~58. Plaintiffs are entitled to preliminary and permanent injunctive relief restraining State officials from:

a) conducting any partisan primary in which candidate(s) are selected to appear on a general election ballot associated with the Party's name in such a fashion as to imply affiliation of the candidate with or approval of the candidate by the Party without also limiting participation in that primary in accordance with rules adopted by the Party and conveyed to State officials in advance of the primary;~~affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;~~

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

b) referring to, reprinting, restating or distributing in any public document or communication a statement of party preference

(i) made by a candidate in connection with his or her declaration of candidacy, or in any other communication or filing with State officals

(ii) without, if the Party whose name is being used so requests, conspicuously and in close proximity making a statement disclaiming any association between the candidate and the party whose name is being used and any approval by the party of the candidate; ~~conducting any partisan primary without implementing a reasonable mechanism to effectuate the Party's exercise of its right to select the candidates who participate in that primary associated with the Party's name;~~

c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary in which candidate(s) are selected to appear on a general election ballot associated with the Party's name in such a fashion as to imply affiliation with or approval by the Party without also limiting participation in that primary in accordance with rules adopted by the Party and conveyed to State officials in advance of the primary;

~~except to the extent expressly authorized by the Party for that primary;~~

~~d) placing on a primary or general election ballot or in any officially distributed election materials the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party.~~d)

conducting elections of officers of the Party, directly or indirectly, including Precinct Committee Officers, in any manner that is not approved by the Party provided that conducting such elections in a manner that is the same as, or substantially similar to, the process approved by the Party for the selection of this state's delegates to the Party's National Convention shall be deemed acceptable for the selection of Precinct Committee Officers.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

~~65.~~59. Plaintiffs are entitled to their reasonable attorneys' fees and costs in connection with this action pursuant to 42 U.S.C. § 1983, *et seq.*

PRAYER FOR RELIEF

Plaintiffs respectfully request the Court enter judgment:

1. Declaring RCW 29A.04.127 unconstitutional;

2. Declaring RCW 29A.24.030 and RCW 29A24.031 unconstitutional under the Constitution of the United States to the extent they authorize placing on a primary ballot the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party;

3. Declaring RCW 29A.36.010 unconstitutional;

4. Declaring RCW 29A.36.170 unconstitutional;

5. Declaring RCW 29A.52.112 unconstitutional;

6. Declaring Initiative 872 unconstitutional;

7. Declaring that the primary system in effect immediately before the passage of I-872 remains in effect;

~~8. Declaring Initiative 872 unconstitutional for violating Article II, section 37 of the Washington State Constitution and declaring the primary system in effect immediately prior to passage of the Initiative remains in effect;~~

~~9~~8. Permanently restraining Defendants and all those acting in active concert and participation with them from:

a) Conducting any partisan primary in which candidate(s) are selected to appear on a general election ballot associated with the Party's name in such a fashion as to imply affiliation of the candidate with or approval of the candidate by the Party without also limiting participation in that primary in accordance with rules adopted by the Party and conveyed to State officials in advance of the primary;

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

b) Refering to, reprinting, restating or distributing in any public document or communication a statement of party preference

(i) made by a candidate in connection with his or her declaration of candidacy, or in any other communication or filing with State officials

(ii) without, if the Party whose name is being used so requests, conspicuously and in close proximity making a statement disclaiming any association between the candidate and the party whose name is being used and any approval by the party of the candidate;

c) Encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary in which candidate(s) are selected to appear on a general election ballot associated with the Party's name in such a fashion as to imply affiliation with or approval by the Party without also limiting participation in that primary in accordance with rules adopted by the Party and conveyed to State officials in advance of the primary;

d) Conducting elections of officers of the Party, directly or indirectly, including Precinct Committee Officers, in any manner that is not approved by the Party provided that conducting such elections in a manner that is the same as, or substantially similar to, the process approved by the Party for the selection of this state's delegates to the Party's National Convention shall be deemed acceptable for the selection of Precinct Committee Officers.

~~a) conducting any partisan primary without affording the Party reasonable opportunity in advance of that primary to exercise its right to define participation in that primary;~~

~~b) conducting any partisan primary without implementing a reasonable mechanism to effectuate the Party's exercise of its right to select the candidates who participate in that primary associated with the Party's name;~~

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

~~c) encouraging or facilitating, directly or indirectly, cross-over voting or ticket-splitting in connection with any partisan primary except to the extent expressly authorized by the Party for that primary;~~

~~d) placing on a primary or general election ballot or in other officially distributed election material the name of any candidate in association with the Party who has not qualified under the rules of the Party to stand for office as a candidate of the Party.~~

10. Awarding Plaintiffs their reasonable attorneys' fees and costs; and

11. Granting such further relief as the Court deems appropriate.

DATED this 1st day of December, 2008.

s/David T. McDonald
David T. McDonald, WSBA #5260
Alex Wagner, WSBA # 36856
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Tel: (206) 623-7580
Fax: (206) 623-7022
david.mcdonald@klgates.com

Attorneys for Plaintiffs in Intervention, Washington State Democratic Party and Dwight Pelz, Chair

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2008, 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 the following:

James Kendrick Pharris

Richard Dale Shepard

John James White, Jr.

Thomas Ahearne

s/David T. McDonald
David T. McDonald, WSBA #5260
Alex Wagner, WSBA # 36856
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
Tel: (206) 623-7580
Fax: (206) 623-7022
david.mcdonald@klgates.com

Attorneys for Plaintiffs in Intervention, Washington State Democratic Party and Dwight Pelz, Chair