NO.05-35774 & 05-35780

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG, Plaintiffs-Appellees,

and

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS, Plaintiff-Intervenors - Appellees,

v.

STATE OF WASHINGTON; ROB MCKENNA, Attorney General; SAM REED, Secretary of State, Defendant-Intervenors - Appellants,

and

WASHINGTON STATE GRANGE, Defendant-Intervenor - Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CV 05-00927
The Honorable Thomas S. Zilly, United States District Court Judge

SUPPLEMENTAL BRIEF OF STATE OF WASHINGTON

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I. INTRODUCTION

This supplemental brief is submitted by the State of Washington and the other state appellants in response to this Court's Order dated July 3, 2008, asking the parties to "submit supplemental briefs . . . addressing the impact of the Supreme Court's ruling in *Washington State Republican Party v. Washington*, 128 S. Ct. 1184 (2008), on the issues raised but not resolved in the appeal before this three-judge panel." The Order also asks the parties to "address any intervening authority on the ballot access and trademark claims that has been filed since these issues were originally briefed."

The Supreme Court's opinion either expressly or by necessary implication resolves all of the issues properly appealed to this Court, and none of the remaining issues has merit.

II. BACKGROUND: THE SUPREME COURT OPINION

The United States Supreme Court upheld the facial constitutionality of Initiative 872 and rejected the First Amendment challenge raised by the political parties. *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). The Supreme Court held:

> Immediately after implementing regulations were enacted, respondents obtained a permanent injunction against the

> enforcement of I-872. *The First Amendment does not require this extraordinary and precipitous nullification of the will of the people.* Because I-872 does not on its face provide for the nomination of candidates or compel political parties to associate with or endorse candidates, and because there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse voters, I-872 does not on its face severely burden respondents' associational rights. *We accordingly hold that I-872 is facially constitutional.* The judgment of the Court of Appeals is reversed.

Id. at 1195–96 (emphasis added).

The effect of the Supreme Court's decision was to reverse and vacate the injunction entered by the district court, which the Supreme Court termed an "extraordinary and precipitous nullification of the will of the people[.]" *Id.* at 1196. A decision by the Supreme Court is immediately effective, and binds the lower courts as law of the case. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427–28, 98 S. Ct. 702, 54 L. Ed. 2d 659 (1978) (mandamus lies to restrain a lower court from enforcing an injunction that the Supreme Court reversed). "The right to remedial relief falls with an injunction which events prove was erroneously issued[.]" *United States v. United Mine Workers of America*, 330 U. S. 258, 295, 67 S. Ct. 677, 91 L. Ed. 884 (1947) (citations omitted). *Hampton Tree Farms, Inc. v. Yeutter*, 956 F.2d 869, 871 (9th Cir. 1992) ("[o]nce an injunction in a civil case has been invalidated, rights granted under the injunction no longer exist and cannot be

enforced."); *I.T.S. Rubber Co. v. Tee Pee Rubber Co.*, 295 F. 479, 481–82 (6th Cir. 1924) ("[I]n this case the order of injunction was a single, unitary decree . . . and in the mandate the decree below was reversed and the cause remanded. This is not a modification of the injunction, but a vacating of the decree and a dissolution of the injunction.").[1] Thus, the injunction previously entered is no longer effective.

On April 16, 2008, the Secretary of State proposed rules to implement the initiative, and implemented emergency rules on May 2, 2008 (attached as Appendix A). During the week of June 2, candidates filed for office, and the State will conduct its first primary under the new law on August 19, 2008.

III. IMPACT OF THE SUPREME COURT'S DECISION ON ARGUMENTS NOT ADDRESSED BY THIS COURT

The Ninth Circuit's decision in this case indicated that "[b]ecause we have held Initiative 872 to be unconstitutional under the First and Fourteenth

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[1] Nor may the injunction be given effect based on the notion that its entry by the trial court was supported by an alternative ground. *Washington Legal Found. v. Henney*, 128 F. Supp. 2d 11, 14-15 (D.D.C. 2000) (an injunction cannot be enforced when the only basis for its entry is reversed). The District Court did not ground its injunction in any alternative holding, other than the theory of facial invalidity under the First Amendment that the Supreme Court rejected. *See generally Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005). Nor did this Court affirm the injunction upon any alternative basis. *See generally*, *Washington State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006).

Amendments, we do not reach any of the other arguments that the political parties advance with respect to Initiative 872." *Washington State Republican Party v. Washington*, 460 F.3d 1108, 1124 n.28 (9th Cir. 2006). To the extent the Ninth Circuit did not address some arguments, they are resolved by principles established in the Supreme Court's decision, are not properly before the Court, or otherwise are unsound.

A. Principles In The Supreme Court's Decision

There are five basic principles in the Supreme Court's decision.

First, the "I-872 primary does not, by its terms, choose parties' nominees. The essence of nomination-the choice of a party representative-does not occur under I-872 . . . [because the] top two candidates from the primary election proceed to the general election regardless of their party preferences." *Washington State Grange*, 128 S. Ct. at 1192.

Second, under I-872 "parties may now nominate candidates by whatever mechanism they choose because I-872 repealed Washington's prior regulations governing party nominations." *Id.* at 1192-93.

Third, the "First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Id.* at 1193 n.7.

Fourth, "I-872 does not on its face . . . compel political parties to associate with or endorse candidates[.]" *Id.* at 1196.

Fifth, "because there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse voters, I-872 does not on its face severely burden respondents' associational rights." *Id.*

These principles resolve many issues that this Court did not address.[2]

B. Arguments That The Ninth Circuit Did Not Address Are Resolved By The Supreme Court's Decision

1. Equal Protection

The Republican Party argued that I-872 violated the Equal Protection Clause because under it, minor parties, but not major parties, were permitted to nominate candidates for office by convention, and have their nominated candidates appear, designated as such, on the ballot. Resp. Br. of Republicans to Opening Br. of Grange at 42-46. As the Supreme Court

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[2] The District Court reserved ruling on an argument by the Republican Party that the "Montana primary" used in Washington after 2003 (and used while the constitutionality of I-872 was still pending) was also unconstitutional. State ER 586–88. If the Supreme Court had affirmed the lower courts on the constitutionality of I-872, it would have been necessary to address this "Montana primary" claim. However, in light of the Supreme Court holding that I-872 is constitutional, there is no need to conduct any more "Montana primaries" in Washington and the only issue reserved by the District Court is moot.

decision makes clear, there is no basis for this claim. Under I-872, parties may "nominate candidates by whatever mechanism they choose because I-872 repealed Washington's prior regulations governing party nominations." *Washington State Grange,* 128 S. Ct. at 1192–93. In addition, no candidate is designated as a party nominee on the ballot. "The law never refers to the candidates as nominees of any party, nor does it treat them as such." *Id.* at 1192. "[P]arties may no longer indicate their nominees on the ballot[.]" *Id.* at 1193 n.7. Wash. Admin. Code § 434-215-130 expressly addresses this point. The rule provides that under "the election system enacted as [I-872], there is no distinction between major party candidates, minor party candidates, or independent candidates filing for partisan congressional, state, or county office." Wash. Admin. Code § 434-215-130(1) (Attached as Appendix A). "All candidates filing for these partisan offices have the same filing and qualifying requirements." *Id.*

All parties may nominate their candidates however they choose, and no candidate appears on the ballot designated as a party's nominee. For these reasons, the Republicans' "equal protection" issue is now moot.

2. Ballot Access

The Libertarian Party argued that I-872 deprives the Libertarian Party of reasonable ballot access. Libertarian Resp. Br. at 19-23. The Party cited case law relating to the question of ballot access for minor parties, all of it in the context of and dependent upon, a party nominating election system. I-872 does not nominate party candidates. "The essence of nomination-the choice of a party representative-does not occur under I-872." *Washington State Grange,* 128 S. Ct. at 1192. As the Supreme Court observed, party nomination is "*simply irrelevant*" to this system. *Id.* (emphasis added).

Moreover, ballot access is wide open under I-872. The initiative establishes a two-stage election system in which any candidate (with or without expressing a party preference) may compete in the primary, and the top two vote-getters (regardless of party preference) advance to the general election. No political party will have its nominee designated on the ballot, but the "First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Id.* at 1193 n.7.

The "ballot access" argument advanced by the Libertarian Party has been rendered meaningless because I-872 is not a party candidate nominating primary, and because Washington law provides wide open ballot

access, permitting any candidate to file for office. Accordingly, there is no remaining basis for the Libertarians' minor party "ballot access" challenge to I-872.[3]

C. The Supreme Court Decision Raises No Additional Issues For Consideration By This Court

The Supreme Court reversed the decision below. In footnote 11 of its decision, the Supreme Court noted some arguments made by the Libertarian Party that were not within the Question Presented. *Washington State Grange*, 128 S. Ct. at 1195 n.11. The Supreme Court did not purport to determine whether those issues are properly before this Court. The footnote reads:

> Respondent Libertarian Party of Washington argues that I-872 is unconstitutional because of its implications for ballot access, trademark protection of party names, and campaign finance. We do not consider the ballot access and trademark arguments as they were not addressed below and are not encompassed by the question on which we granted certiorari: "Does

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[3] The Libertarian Party also raised two claims in this Court that it did not plead or brief in the district court, contending that I-872 runs afoul of the federal qualifications clause and the date upon which federal elections are to be held. Libertarian Resp. Br. at 25-28. "As a general rule, [the Ninth Circuit] do[es] not consider issues raised for the first time on appeal." *Manta v. Chertoff*, 518 F.3d 1134, 1144 (9th Cir. 2008). Moreover, arguments previously submitted demonstrate the lack of merit of these claims. Reply Br. of Appellants State of Washington at 23-27; Appellant Grange's Reply Br. at 5-6.

> Washington's primary election system . . . violate the associational rights of political parties because candidates are permitted to identify their political party preference on the ballot? Pet. for Cert. in No. 06-730, p. i. The campaign finance issue also was not addressed below and is more suitable for consideration on remand.

Washington State Grange, 128 S. Ct. at 1195 n.11. The footnote identifies three issues: ballot access, trademark protection, and campaign finance. All of these are attributed solely to the Libertarian Party. All three have been resolved by the principles established in the Supreme Court's decision, or were not properly raised in this case, and so, are not before this Court.

1. Ballot Access

The Libertarian Party made the same ballot access argument to the Supreme Court that it made in the Ninth Circuit. For reasons already explained, the principles established in the Supreme Court's decision resolve that argument. *See supra* pp. 7-8.

2. Trademark

a. The Libertarian Party's Trademark Claim Was Resolved By The Supreme Court's Decision

The Libertarian Party has a trademark on the name "Libertarian Party." Libertarian Resp. Br. at 7, citing SER 169-172. The only reference to trademark in the entirety of the Libertarians' complaint appears in its

"Facts" section, and in the context of the complaint, can only be taken as a fact offered in support of the Libertarians' First Amendment claim:

> I-872 deprives the LP of its proprietary right to the use of the party name, *thus leading to voter confusion regarding which candidate(s) are speaking for the party and which are imposters or renegades appropriating the party name for their own purposes*. The name "Libertarian Party" is a nationally trademarked name and therefore may be used by candidates only with LP consent.

Libertarian Party's Complaint To Intervene For Declaratory Judgment And Other Relief ¶ 20 (emphasis added). State ER 77. The Libertarian Party's trademark claim was made to support its First Amendment argument that I-872 was unconstitutional. Libertarian Resp. Br. at 7-13. The thrust of the Libertarian Party's argument was that the public will confuse candidates who prefer the Libertarian Party with candidates nominated by the party.

The Supreme Court rejected this argument. "I-872 does not on its face . . . compel political parties to associate with or endorse candidates[.]" *Washington State Grange,* 128 S. Ct. at 1196. Moreover, "there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse voters, I-872 does not on its face severely burden respondents' associational rights." *Id.* The fact that the Libertarian Party

has a trademark on its name does not undermine the holding of the Supreme Court on this issue.

b. A Claim Of Trademark Infringement By The Libertarian Party Is Not Properly Before The Ninth Circuit

The Libertarian Party's Complaint pleads no cause of action and seeks no relief under trademark law. Libertarian Party's Complaint To Intervene For Declaratory Judgment And Other Relief, Causes of Action ¶¶ 28-41; Prayer for Relief ¶¶ 1-10. State ER 79-83. The Libertarian Party referenced its trademark only to support its First Amendment argument that I-872 was unconstitutional.

Trademarks are governed by the Lanham Act, 15 U.S.C. §§ 1051-1141n. The Libertarians neither cited nor discussed the Lanham Act or any authority relating to trademark infringement claims. Libertarian Resp. Br. at 7–13.

For the first time in its briefing to the Supreme Court, the Libertarian Party argued that its trademark would be infringed by I-872, and referred to the Lanham Act.[4] For this reason, the Libertarian Party's trademark

[4] Pages 14 through 18 of the Libertarian Party's Supreme Court brief, which discuss a trademark claim, are attached as Appendix B.

infringement claim is not properly before the Ninth Circuit. *Sec. & Exch. Comm'n (S.E.C.) v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1167 (9th Cir. 2007) ("We will not consider arguments raised for the first time on appeal absent exceptional circumstances.").

c. Even If The Libertarian Party's Trademark Infringement Claim Were Before The Court, There Is No Merit To The Claim

Even if the Libertarian Party's trademark infringement claim were properly before the Court, there is no basis for the claim. "[T]rademark infringement law prevents only unauthorized uses of a trademark in connection with a commercial transaction in which the trademark is being used to confuse potential consumers." *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005). This is consistent with intervening trademark authority. To prevail on a claim of trademark infringement, a plaintiff must establish, among other things that, (1) defendant's use of the mark occurred in commerce, (2) defendant used the mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services, and (3) defendant used the mark in a manner likely to confuse consumers. *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1218 (11th Cir. 2008).

These statutory requirements of the Lanham Act, 15 U.S.C. § 1114(1)(a), cannot be established in the context of this case. First, the Libertarian's trademark is not infringed or diluted by allowing candidates to indicate a party preference on the ballot. Trademark infringement and trademark dilution claims only apply to "uses in commerce[.]" 15 U.S.C. § 1125(a)(1); *see also* 15 U.S.C. § 1114(1)(a). Casting a ballot in an election is not commerce; it is part of the political process. *Tax Cap Comm. v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D. Fla., 1996). Second, there is only infringement if the trademark is used in a way that will confuse consumers. The Supreme Court held that "there is no basis in this facial challenge for presuming that candidates' party-preference designations will confuse voters[.]" *Washington State Grange,* 128 S. Ct. at 1196.

3. Campaign Finance

a. The Campaign Finance Issue Raised By The Libertarian Party Is Not Properly Before This Court

The Libertarian Party also raised a campaign finance claim for the first time in the Party's briefing at the Supreme Court.[5] There is no discussion of it in either its complaint or briefs to this Court. State

[5] Pages 20 through 22 of the Libertarian Brief filed in the Supreme Court are attached as Appendix C.

ER 70-84; *see generally,* Libertarian Resp. Br. Therefore, the claim is not properly before this Court. *S.E.C.*, 509 F.3d at 1167.

b. Even If The Libertarian Party's Campaign Finance Claim Were Before The Court, There Is No Merit To The Claim

Even if the campaign finance claim were properly raised, it would have no merit, and it does not implicate I-872 in any event. A Washington statute completely different from I-872, Wash. Rev. Code § 42.17.640, sets campaign contribution limits, including limits for "bona fide political parties." Wash. Rev. Code § 42.17.640(1)(g). The Libertarians contended in their Supreme Court brief that I-872 would remove the opportunity for the Libertarian Party to qualify as a "bona fide political party" for purposes of qualifying for higher campaign contribution limits as set forth in Wash. Rev. Code § 42.17.640. The agency responsible for administering Washington's campaign finance laws has adopted an administrative rule in light of the Supreme Court's decision, expressly providing that any party that qualified as a "bona fide political party" at any time within the last five years will continue to hold that status. Wash. Admin. Code § 390-05-196 (as amended June 30, 2008) (attached as Appendix D). The claim accordingly has no merit.

Moreover, even if this campaign finance claim were before the Court, it properly would present only a challenge to the campaign finance statutes, not to I-872.

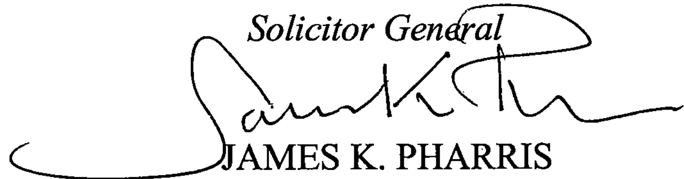
IV. CONCLUSION

For the reasons stated above, this Court should grant the State's pending motion for vacation of attorney fees previously awarded to the political parties, and dismiss this case.

RESPECTFULLY SUBMITTED this 4th day of August, 2008.

ROBERT M. MCKENNA
Attorney General

MAUREEN HART
Solicitor General



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APPENDIX A

RULE-MAKING ORDER

CR-103 (June 2004)
(Implements RCW 34.05.360)

Agency: Office of the Secretary of State, Elections Division

☐ **Permanent Rule**
☒ **Emergency Rule**

Effective date of rule:
Permanent Rules
☐ 31 days after filing.
☐ Other (specify) __________ **(If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)**

Effective date of rule:
Emergency Rules
☒ Immediately upon filing.
☐ Later (specify) ______________

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?
☐ Yes ☐ No If Yes, explain:

Purpose:
The purpose of this rule is to implement Initiative 872 for the 2008 Primary and General Elections.

Citation of existing rules affected by this order:
Repealed: 434-220-010, 434-220-020, 434-220-030, 434-220-040, 434-220-050, 434-220-060, 434-220-070, 434-220-080, 434-220-090, 434-230-020, 434-230-040, 434-230-050, 434-230-080, 434-230-150, 434-230-160, 434-230-170, 434-230-190, 434-230-200, 434-230-210, 434-230-220,
Amended: 434-208-060, 434-215-025, 434-230-010, 434-230-060, 434-250-040, 434-250-050, 434-250-310, 434-253-020, 434-253-025, 434-262-031, 434-262-160, 434-335-040, 434-335-445, 434-381-120.
Suspended:

Statutory authority for adoption: RCW 29A.04.611

Other authority :

PERMANENT RULE ONLY (Including Expedited Rule Making)
Adopted under notice filed as WSR __________________ on ______________ (date).
Describe any changes other than editing from proposed to adopted version:
If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:
Name: phone ( ) ______________
Address: fax ( ) ______________
e-mail ________________

EMERGENCY RULE ONLY
Under RCW 34.05.350 the agency for good cause finds:
☒ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
☐ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

On March 18, 2008, the United States Supreme Court issued *Washington State Grange v. Washington State Republican Party, et al.* 552 U.S. __, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). In this opinion, the Court reversed a Ninth Circuit opinion that had declared Washington's Top Two Primary system unconstitutional. The impact of this ruling is that the primary system enacted by Initiative 872 (Chapter 2, Laws of 2005) is now in effect. This change in primary election systems necessitates changes in the administrative rules relating to filing for office, the format of ballots and ballot materials, information submitted for appearance in the state voters' pamphlet, and the administration of primary and general elections. Pursuant to RCW 29A.24.081, the Secretary of State's Office and county auditors may begin to accept declarations of candidacy beginning May 16, 2008. The regular candidate filing period ends June 6, 2008. Ballots will be formatted and sent to print in June. There is insufficient time to adopt these rules through the standard rulemaking process. The Secretary of State's Office did send a draft of the proposed rules to stakeholders and interested parties on April 16, 2008, posted the draft rules on the agency's website, and accepted public comment through April 22, 2008.

Date adopted: May 2, 2008

NAME (TYPE OR PRINT) Steve Excell

SIGNATURE

TITLE Assistant Secretary of State

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: May 02, 2008
TIME: 12:20 PM

WSR 08-10-055

(COMPLETE REVERSE SIDE)

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note. A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	____	Amended	____	Repealed	____
Federal rules or standards:	New	____	Amended	____	Repealed	____
Recently enacted state statutes:	New	____	Amended	____	Repealed	____

The number of sections adopted at the request of a nongovernmental entity:

New ____ Amended ____ Repealed ____

The number of sections adopted in the agency's own initiative:

New 19 Amended 14 Repealed 20

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New ____ Amended ____ Repealed ____

The number of sections adopted using:

Negotiated rule making:	New	____	Amended	____	Repealed	____
Pilot rule making:	New	____	Amended	____	Repealed	____
Other alternative rule making:	New	____	Amended	____	Repealed	____

AMENDATORY SECTION (Amending WSR 06-23-094, filed 11/15/06, effective 12/16/06)

WAC 434-208-060 Electronic filings. In addition to those documents specified by RCW 29A.04.255, the secretary of state or the county auditor shall accept and file in his or her office electronic transmissions of the following documents:

(1) The text of any proposed initiative, referendum, or recall measure and any accompanying documents required by law;

(2) Any minor party or independent candidate filing material for president and vice-president, except nominating petitions;

(3) Lists of presidential electors selected by political parties or independent candidates;

(4) Voted ballots, provided the voter agrees to waive the secrecy of his or her ballot;

(5) Resolutions from cities, towns, and other districts calling for a special election;

(6) ((~~Filling of vacancies on the ticket by a major political party;~~

~~(7)~~)) Voter registration form.

NEW SECTION

WAC 434-208-110 Applicable dates and deadlines. If dates, deadlines, and time periods referenced in chapter 2, Laws of 2005, conflict with subsequently enacted law, such as chapter 344, Laws of 2006, the subsequently enacted law is effective.

AMENDATORY SECTION (Amending WSR 07-09-036, filed 4/11/07, effective 5/12/07)

WAC 434-215-025 ((~~Declaration of candidacy--~~))Filing fee petitions. (1) When a candidate submits a filing fee petition in lieu of his or her filing fee, as authorized by RCW 29A.24.091, voters eligible to vote on the office in the general election are eligible to sign the candidate's filing fee petition.

(2) The filing fee petition described in RCW 29A.24.101(3) does not apply. The filing fee petition must be in substantially the following form:

The warning prescribed by RCW 29A.72.140; followed by:

"We, the undersigned registered voters of [the jurisdiction of the office], hereby petition that [candidate's] name be printed on the ballot for the office of [office for which candidate is filing a declaration of candidacy]."

NEW SECTION

WAC 434-215-120 Political party preference by candidate for partisan office. (1) On a declaration of candidacy, a candidate for partisan congressional, state, or county office may state his or her preference for a political party, or not state a preference. The candidate may use up to sixteen characters for the name of the political party. A candidate's party preference, or the fact that the candidate states no preference, must be printed with the candidate's name on the ballot and in any voters' pamphlets printed by the office of the secretary of state or a county auditor's office.

(2) If a candidate does not indicate a party that he or she prefers, then the candidate has stated no party preference and is listed as such on the ballot and in any voters' pamphlets.

(3) The filing officer may not print on the ballots, in a voters' pamphlet, or other election materials a political party name that is obscene. If the name of the political party provided by the candidate would be considered obscene, the filing officer may petition the superior court pursuant to RCW 29A.68.011 for a judicial determination that the party name be edited to remove the obscenity, or rejected and replaced with "states no party preference."

(4) A candidate's preference may not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate. If the name of the political

party provided by the candidate implies that the candidate is nominated or endorsed by a political party, or that a political party approves of or associates with that candidate, the filing officer may petition the superior court pursuant to RCW 29A.68.011 for a judicial determination that the party name be edited, or rejected and replaced with "states no party preference."

NEW SECTION

WAC 434-215-130 Minor political party candidates and independent candidates. (1) In the election system enacted as chapter 2, Laws of 2005, there is no distinction between major party candidates, minor party candidates, or independent candidates filing for partisan congressional, state, or county office. All candidates filing for these partisan offices have the same filing and qualifying requirements. All candidates for partisan office have the option of stating on the ballot their preference for a political party, or stating no party preference. The party preference information plays no role in determining how candidates are elected to public office.

(2) The requirements in RCW 29A.20.111 through 29A.20.201 for minor political party candidates and independent candidates for partisan office to conduct nominating conventions and collect a sufficient number of signatures of registered voters do not apply to candidates filing for partisan congressional, state, or county office. The requirements in RCW 29A.20.111 through 29A.20.201 for minor political party candidates and independent candidates only apply to candidates for president and vice-president of the United States.

NEW SECTION

WAC 434-215-140 Voids in candidacy and vacancies in office. (1) The procedures established in RCW 29A.24.141 through 29A.24.191 for reopening candidate filing due to a void in candidacy or a vacancy in office apply to partisan congressional, state, or county office.

(2) As established in RCW 29A.24.141, a void in candidacy only occurs when no valid declaration of candidacy has been filed, or all persons who filed have either died or been disqualified. There is no void in candidacy as long as there is at least one candidate.

(3) If dates, deadlines, and time periods referenced in chapter 2, Laws of 2005, conflict with subsequently enacted law, such as chapter 344, Laws of 2006, the subsequently enacted law is

effective.

NEW SECTION

WAC 434-215-150 No major party ticket. The procedures in RCW 29A.28.011 allowing a major party to fill a vacancy on a major party ticket do not apply. The predecessor statute, RCW 29A.28.010, was repealed by chapter 2, Laws of 2005 (Initiative 872). Pursuant to chapter 2, Laws of 2005, there is no "major party ticket."

NEW SECTION

WAC 434-215-160 Ranked choice voting. If a charter county elects candidates for county office by ranked choice voting, and if the charter specifically grants political parties the authority to determine which candidates for partisan office may run as candidates of the party, the county auditor may modify the requirements of this chapter in order to accommodate the requirements of a ranked choice voting election.

REPEALER

The following chapter of the Washington Administrative Code is repealed:

WAC 434-220-010	Partisan primaries.
WAC 434-220-020	Definitions.
WAC 434-220-030	Ballot layout and color--Consolidated ballots.
WAC 434-220-040	Ballot layout and color--Physically separate ballots.
WAC 434-220-050	Order of political parties.
WAC 434-220-060	Ballot programming--Consolidated ballots.
WAC 434-220-070	Polling place procedures--Physically separate ballots.
WAC 434-220-080	No record of political party affiliation.
WAC 434-220-090	Partisan primary recounts.

AMENDATORY SECTION (Amending WSR 06-14-049, filed 6/28/06, effective 7/29/06)

WAC 434-230-010 Sample ballots. Sample paper ballots shall be printed in substantially the same form as official ballots, but shall be a different color than the official ballot. Sample ballots ((~~for counties using electronic or mechanical voting systems~~)) shall be printed in a manner that makes them easily distinguishable from the official ballot. Sample ballots shall be available ((~~starting~~)) at least fifteen days prior to an election. Such sample ballots shall be made available through the office of the county auditor and at least one shall be available at all polling places on election day.

((~~Names of the candidates in each office to appear on the primary ballot shall be arranged on the sample ballot in the order provided by RCW 29A.36.121. The names of the candidates in each office to appear on the general election ballot shall be listed on the sample ballot in the order in which their names appear on the official ballot. State measures and local measures shall be in the same order as they appear on the official ballot.~~))

At any primary or election when a local voters' pamphlet is published which contains a full sample ballot, a separate sample ballot need not be printed.

Counties with populations of over five hundred thousand may produce more than one sample ballot for a primary or election, each of which lists a portion of the offices and issues to be voted on at that election. Sample ballots may be printed by region or area (e.g., legislative district, municipal, or other district boundary) of the county, provided that all offices and issues to be voted upon at the election appear((~~s~~)) on at least one of the various sample ballots printed for such county. Each regional sample ballot shall contain all offices and issues to be voted upon within that region. A given office or issue may appear on more than one sample ballot, provided it is to be voted upon within that region. Sample ballots shall be made available and distributed to each polling place and to other locations within the appropriate region or area.

NEW SECTION

WAC 434-230-015 Ballot format. (1) Each ballot shall specify the county, the date, and whether the election is a primary, special or general.

(2) Each ballot must include instructions directing the voter how to mark the ballot, including write-in votes.

(3) Each ballot must explain, either in the general instructions or in the heading of each race, the number of candidates for whom the voter may vote (e.g., "vote for one").

(4)(a) If the ballot includes a partisan office, the ballot must include the following notice in bold print immediately above the first partisan congressional, state or county office: "READ: Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."

(b) When the race for president and vice-president appears on a general election ballot, the ballot must include the following notice in bold print after president and vice-president but immediately above the first partisan congressional, state or county office: "READ: Each candidate for president and vice-president is the official nominee of a political party. For other partisan offices, each candidate may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate."

(c) The same notice may also be listed in the ballot instructions.

(5) Counties may use varying sizes and colors of ballot cards if such size and color is used consistently throughout a region, area or jurisdiction (e.g., legislative district, commissioner district, school district, etc.). Varying color and size may also be used to designate absentee ballots, poll ballots, or provisional ballots.

(6) Ballots shall be formatted as provided in RCW 29A.36.170. Ballots shall not be formatted as stated in RCW 29A.04.008 (6) and (7), 29A.36.104, 29A.36.106, 29A.36.121, 29A.36.161(4), and 29A.36.191.

NEW SECTION

WAC 434-230-025 Order of offices. Measures and offices must be listed in the following order, to the extent that they appear on a primary or election ballot:

(1) Initiatives to the people;

(2) Referendum measures;

(3) Referendum bills;

(4) Initiatives to the legislature and any alternate proposals;

(5) Proposed constitutional amendments (senate joint resolutions, then house joint resolutions);

(6) Countywide ballot measures;