NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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

PARTIES

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

Respondents: (1) The Washington State Republican Party and the following individuals who were or are officers and adherents of that Party: Christopher Vance, Bertabelle Hubka, Steve Neighbors, Brent Boger, Marcy Collins, and Michael Young. These parties were Plaintiffs-Appellees below.

(2) The Libertarian Party of Washington State and the following individuals who were or are officers and adherents of that Party: Ruth Bennett and J.S. Mills. The parties were Intervenor Plaintiffs-Appellees below.

(3) The Washington State Democratic Central Committee and Paul Berendt (its Chair when the litigation was commenced). These parties were Intervenor Plaintiffs-Appellees below.

(4) The Washington State Grange. This party was an Intervenor Defendant-Appellant below.

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

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of the State of Washington and its Secretary of State Sam Reed, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 460 F.3d 1108 (9th Cir. 2006). App. 1a. The opinion of the United States District Court for the Western District of Washington is reported at 377 F. Supp. 2d 907 (W.D. Wash. 2005). App. 35a.

JURISDICTION

The judgment of the Ninth Circuit was entered August 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution provides:

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

Wash. Rev. Code § 29A.04.127[2] provides:

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

Wash. Rev. Code § 29A.04.206 provides:

> "The rights of Washington voters are protected by its constitution and laws and include the following fundamental rights:
>
> "(1) The right of qualified voters to vote at all elections;
>
> "(2) The right of absolute secrecy of the vote. No voter may be required to disclose political faith or adherence in order to vote;
>
> "(3) The right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate."

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[2] The lower courts declared unconstitutional all of the contents of Initiative Measure 872 (2005 Wash. Sess. Laws page nos. 9-14). The portions of the Measure which were the primary basis for challenge in this litigation are reproduced here. The entire contents of the Measure may be found in the Appendix at pages 114a through 124a.

Wash. Rev. Code § 29A.24.030 provides, in part:

> "A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:
>
> ". . . .
>
> "(3) For partisan offices only, a place for the candidate to indicate his or her major or minor party preference, or independent status[.]"

Wash. Rev. Code § 29A.04.110 provides:

> "'Partisan office' means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. The following are partisan offices:
>
> "(1) United States senator and United States representative;

> "(2) All state offices, including legislative, except (a) judicial offices and (b) the office of superintendent of public instruction;
>
> "(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise."

Wash. Rev. Code § 29A.36.010 provides:

> "On or before the day following the last day allowed for candidates to withdraw under [Wash. Rev. Code §] 29A.24.130, the secretary of state shall certify to each county auditor a list of the candidates who have filed declarations of candidacy in his or her office for the primary. For each office, the certificate shall include the name of each candidate, his or her address, and his or her party preference or independent designation as shown on filed declarations."

Wash. Rev. Code § 29A.36.170 provides, in part:

> "(1) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding

> primary, if a primary was conducted. On the ballot at the general election for an office for which no primary was held, the names of the candidates shall be listed in the order determined under [Wash. Rev. Code §] 29A.36.130."

STATEMENT

For almost seventy years, from 1935 to 2003, Washington used a "blanket primary" system to nominate candidates for partisan political office. When California adopted a similar system, the political parties challenged its constitutionality, and this Court eventually ruled that the California primary unconstitutionally abridged the constitutional rights of the political parties. *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (*Cal. Dem. Party*). Washington's major political parties then challenged the Washington primary system. The Ninth Circuit ruled that Washington's system was not distinguishable from California's and declared it invalid in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied sub nom. Reed v. Democratic Party of Washington,* 540 U.S. 1213 (2004), *and cert. denied by Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004).

In response to these cases, the Washington State Grange (which had proposed the original blanket primary in 1935) sponsored an initiative measure in 2004 to establish an election system designed to eliminate the features this Court found unconstitutional in *Cal. Dem. Party* while retaining the most popular aspect of the blanket primary: the

freedom of each voter to vote for any candidate for any office on the primary ballot, without regard to the party affiliation of the candidate or the voter. Initiative Measure 872 (I-872), incorporating this effort, was approved by the voters in November 2004 and took effect in December 2004. In May 2005, the Republican Party initiated the present litigation in the District Court for the Western District of Washington, asserting that I-872 had the same constitutional infirmities as Washington's former blanket primary. The Libertarian and Democratic parties intervened as additional plaintiffs. Both the State of Washington and the Grange intervened as defendants and took the position that I-872 is constitutionally sound.

1. Proceedings In The District Court

This action was filed in May 2005, approximately five months after I-872 had gone into effect and before any election had been conducted under the new measure. At the time the case was filed, the Republican Party moved for a preliminary injunction to prevent the state from implementing I-872. After conferring with the parties, the district court adopted an expedited briefing schedule and a hearing date, treating the motions as if they were for permanent injunctive relief. The district court (Judge Thomas Zilly) conducted a hearing on July 13, 2005, and issued an order on July 15, 2005, granting the plaintiffs declaratory and injunctive relief and finding that the implementation of I-872 would unconstitutionally impair the freedom of speech and associational rights of the plaintiff political parties. App. 35a.

The district court decided that nominating candidates for office is such a central function of a political party that even allowing a candidate to publicly state a party preference creates a constitutionally significant "association" between the candidate and the party, an "association" which states may not foster without political party consent. App. 67a-70a. The Court also found that I-872 would result in the selection of party "nominees" because a candidate stating a party preference would somehow automatically be seeking that party's "nomination" for office. App. 70a-72a.

A permanent injunction was entered on July 29, 2005, restraining Washington from implementing I-872 or from conducting any elections under the Measure.[3] App. 93a.

2. Proceedings In The Ninth Circuit Court Of Appeals

Both the State and the Grange appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. The case was argued and submitted to a three-judge panel on February 6,

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[3] The political parties had also asserted the unconstitutionality of certain aspects of the open primary system enacted by the Washington Legislature in 2004 to replace the blanket primary. The district court reserved ruling on those issues and allowed the continued use of the open primary, pending further proceedings. Under Washington's open primary (similar to those used by about half the states), a voter in the primary selects the ballot of one major political party and is confined to voting for candidates seeking that party's nomination for the offices listed on the ballot. Voters are not required to register by party or publicly declare an affiliation with a party.

2006. On August 22, 2006, the panel issued an opinion affirming the district court and finding I-872 unconstitutional in its entirety on the theory that the election system established in I-872 severely burdened the constitutional rights of the political parties and was not narrowly tailored to meet a compelling state interest. App. 1a.

The Ninth Circuit's rationale was that I-872, by permitting candidates to identify their political party preferences, creates an "overtly partisan" primary, even though party preference plays no part in determining which candidates qualify for the general election. App. 19a. Like the district court, the Ninth Circuit decided that this was sufficient to "severely burden" the rights of the political parties, and found that Washington had no "compelling state interest" in imposing such a "burden." App. 30a. The district court's permanent injunction was affirmed. App. 34a.

REASONS FOR GRANTING THE PETITION

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In Initiative 872, the voters of Washington have enacted a system designed to preserve the rights of citizens to vote freely for the candidates of their choice and to extend these rights to the primary, as well as the general election. In opposing this effort, the political parties, and not the State, seek to restrict both the rights of voters to freely participate in the selection of candidates for public office and the rights of

candidates to freely express their points of view. Unfortunately, the Court of Appeals lost sight of the need to balance the interests of political parties against the prerogatives of the State and the rights of its voters.

In *Cal. Dem. Party*, this Court carefully balanced the constitutional prerogative of each state to establish its own preferred election system with the speech and associational rights of the political parties. This Court found that California had established a system in which (1) the primary was a process which nominated political party candidates for each partisan elective office, but (2) non-members (independent voters and adherents of rival parties) were free to participate in the nomination process. This opened at least the possibility that the "nominee" of a party would not be the person who would have been selected by the membership of the party. This combination of features, this Court found, impaired the constitutional rights of the political parties.

In response to *Cal. Dem. Party* and to the case invalidating Washington's own blanket primary, the people of Washington crafted an election system correcting the constitutional infirmities of the blanket primary while preserving, to the maximum extent possible, the right of all voters to participate in the nomination process for each office. Initiative 872 eliminates the use of the primary to nominate political party candidates for office. Party affiliation would no longer play any role in qualifying candidates for the general election ballot, and party "nomination" or endorsement would be an entirely private process. To provide information that may be

important to voters, I-872 allows candidates to state their party preference on the ballot.

Nonetheless, the Ninth Circuit concluded that this primary election system unconstitutionally burdened the associational rights of the political parties. This Court should dispel the notion embraced by the Ninth Circuit that *Cal. Dem. Party* leaves so little room to the states to advance their important interests in maximizing the informed participation of their citizens in the process of choosing the officials who will govern them.

A. Initiative 872 Establishes An Election System Designed In Specific Response To This Court's Decision In *Cal. Dem. Party*

Near the end of the majority opinion in *Cal. Dem. Party*, this Court described a "nonpartisan primary" which, the Court observed, would serve many of the interests asserted by California without burdening political party rights. In the system described, after qualified candidates competed in the primary, the top two vote getters (or however many the state might prescribe) would move on to the general election. As the Court observed: "This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Cal. Dem. Party*, 530 U.S. at 585-86.

The Ninth Circuit concluded that this language forecloses a nonpartisan primary in which candidates are allowed to include their party preference on the ballot. App. 17a-18a. The lower court apparently concluded that the quoted language referred only to nonpartisan elections in which a

candidate's political party preference does not appear on the ballot. Justice Stevens, in his dissent, understood the majority opinion to be speaking of a primary such as that conducted in Louisiana. *Cal. Dem. Party*, 530 U.S. at 598 n.8 (Stevens, J. dissenting). In the Louisiana primary, broadly similar to the one established for Washington in I-872, the party affiliations of the candidates appear on the primary and general election ballots. *See Foster v. Love,* 522 U.S. 67 (1997); s*ee also Dart v. Brown*, 717 F.2d 1491 (5th Cir. 1983).

Initiative 872 establishes a "nonpartisan primary" exactly meeting the Court's description. Under I-872, the process for winnowing candidates is exactly the same for nonpartisan and for partisan offices: for each office, the top two vote getters qualify for the general election, which is in effect a runoff election. In the primary, all candidates compete for the votes of all of the voters, and party affiliation does not determine who qualifies for the general election ballot.[4] The only distinction remaining between "partisan" and "nonpartisan" offices is that, for those offices defined by state law as "partisan," candidates have the option of listing their party preference on the filing papers (or declaring themselves independents), and that party preference (if any) will appear on the primary and

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[4] This system is in sharp contrast to the blanket primaries formerly conducted by Washington, California, and Alaska. In those systems, the top vote getter under each party designation qualified for the general election. The blanket primary exhibited the feature this Court found "constitutionally crucial": primary voters chose party nominees. Initiative 872 eliminates this "crucial" feature.

general election ballots.[5] Party preference plays no role in determining the winners in the primary, but is some information about the candidate that voters may find useful and, for this reason, it is provided to them.

Yet the political parties argue, and the lower court concluded, that merely allowing self-designated party preferences on the ballot unconstitutionally interferes with the political parties' rights of free speech and association. While this Court found the "constitutionally crucial" feature of the blanket primary was that political party nominees for public office were selected by non-members, the Ninth Circuit reads *Cal. Dem. Party* as establishing a much broader "right of association", such that even permitting a candidate to state a personal preference for a party constitutes a "forced association" between the candidate and the party in question. App. 22a-25a. The Ninth Circuit found this "right of association" primarily in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). Yet the lower court failed to account for the crucial distinction between the Connecticut system at issue in *Tashjian* (a traditional "closed" primary clearly

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[5] The only distinction under Washington's law between partisan offices and nonpartisan offices is that for "partisan" offices, candidates have the option of showing their party preferences on the ballot. Wash. Rev. Code § 29A.24.030. App. 105a. The Washington statute under challenge does not require any candidate to express a party preference. *Id.* It is possible that, for some offices, every candidate filing would decline to declare a party preference, in which case the primary conducted for that office would be indistinguishable from a "traditional" nonpartisan primary.

conducted for the purpose of selecting party nominees for each office), and the system established in I-872 (primary not conducted to select party nominees but merely to winnow the "top two" vote getters).

The Ninth Circuit concluded that, under *Cal. Dem. Party*, the mere appearance of a self-designated party preference on the ballot results in selection of individuals "who may effectively become the parties' standard bearers in the general election." App. 19a. The lower court does not explain how a candidate who states the candidate's preference as "Republican" becomes the standard bearer for the Republican Party upon qualifying for the general election under I-872, or who is the Republican "standard bearer" if *both* of the top two vote getters identify "Republican" as their preferred political party. App. 19a-22a. It is sufficient for the Ninth Circuit that the party preference of a candidate "creates the impression of associational ties" between candidate and party. App. 22a.[6]

In effect, the Ninth Circuit evaluated I-872's "top two" primary through the prism of "party nomination" primaries commonly used in other states. The court assumed that voters would

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[6] Candidates for office have a constitutional right to express their views on the public issues relating to their candidacy, and this certainly includes the right to publicly identify with a political party (or decline to do so). *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Yet, the lower courts concluded that allowing an expression of party preference to appear on the ballot would somehow constitute a "forced association" between the candidate and the party for which the candidate expresses a preference.

perceive a candidate as the "Republican" candidate for an office, based on voters' experience in other times and places, and that this perception was sufficient to invalidate Washington's attempt to create a new system for winnowing candidates for public office.

It certainly is true that states may adopt primary election systems that function as taxpayer-funded party nominating primaries. But states need not do so, and Washington has not. The lower courts failed to recognize that this Court has never found that political parties are constitutionally entitled to taxpayer-funded nominating primaries tailored to satisfy each party's preference as to how to select its standard bearers for public office. States are entitled to leave this process to the political parties and to devise a nomination process that emphasizes the full participation of all voters (regardless of party affiliation). The question here is whether I-872, by accommodating the legitimate interest of the voters in having relevant information about candidates, somehow transforms its primary election system that winnows candidates for the general election without regard to party affiliation, into a party nominating process.

In *Cal. Dem. Party*, this Court left the door open for states to seek election systems that reflect the popular will while respecting the rights of political parties as private organizations. In this case, the Ninth Circuit has effectively closed that door and holds that even taking notice of a candidate's political party preference transforms any primary into a party nomination process. In misconstruing this Court's language in *Cal. Dem.*

Party, the Ninth Circuit severely limits the choices states have in deciding how to structure their election systems to best serve their citizens.

B. So Long As States Respect The Constitutional Rights Of Political Parties As Private Organizations, States Have Broad Discretion In Structuring Their Election Systems

In the California case, this Court expressly recognized that states play a central role in structuring the election process. *Cal. Dem. Party*, 530 U.S. at 572; s*ee also* discussion *id.* at 590-91 (the same point in the dissent, which describes the power to determine how state officials are elected as a "quintessential attribute of sovereignty"). More recently, this Court upheld the policy choice of a state concerning its election system in *Clingman v. Beaver*, 544 U.S. 581 (2005). In *Clingman*, the Court upheld the choice of Oklahoma to operate a semi closed primary in which participation in a given party's nomination process was limited to (1) voters who registered as affiliated with that party and (2) independent voters. The Libertarian Party sought to permit registered affiliates of other parties (Republicans, Democrats) to vote in the Libertarian primary without changing their party affiliation. The Court found that Oklahoma had not violated the constitutional rights of the Libertarian Party or of any voters in structuring its primary. *Clingman*, 544 U.S. at 596-97.

Clingman is especially significant to this case because it establishes a "two tier" analysis in

balancing state sovereignty interests against the associational rights of the political parties. Regulations that impose "severe burdens" on associational rights must be narrowly tailored to serve a compelling state interest. *Clingman*, 544 U.S. at 586-87 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). However, when state regulations impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Clingman*, 544 U.S. at 587 (internal quotation marks omitted) (quoting *Timmons*, 520 U.S. at 358).

Although the Ninth Circuit in this case cites *Clingman* and *Timmons* and recognized the two-tiered analysis (App. 14a-15a), the circuit court decision did not explicitly analyze whether I-872 "severely burdens" the political parties. The circuit court appears to have concluded that the mere inclusion of party preference on the ballot under I-872 is sufficient to "severely burden" the political parties because of the danger that it will create "false associations" between candidates and political parties. App. 28a. In other words, the circuit court concluded that it would severely burden a political party's constitutional rights for any candidate for public office to publicly state a preference for that party, unless the party has somehow permitted this "association." This Court has never defined parties' associational interests so broadly. It would be surprising to do so, given the implications of such a principle upon (1) the free speech rights of candidates to express their views, including their opinions about political parties; (2) the rights of

voters to have access to relevant information about candidates for public office, including their political views in general and the party preference more specifically; and (3) the authority of a state to recognize and balance these interests in deciding how to structure their election systems.

As noted above, I-872 eliminates the "constitutionally crucial" defect of Washington's old blanket primary by decoupling the use of the primary from the party nomination process. Parties remain free to operate as private organizations, including the exercise of their important right to advance the cause of their favored candidates for public office, but the state election system is no longer used to select party nominees. Under I-872, one or both of the "top two" candidates advancing to the general election ballot may show a party preference, but that fact in no sense makes them the "nominees" or "standard bearers" of those parties. There is no reason to think voters would be confused on that point and no reason to build an analysis on the assumption that voters are naive or ill-informed. Parties retain the full panoply of rights to recruit, support, raise funds, and publicize their preferences. If I-872 imposes any burden on the political parties, it is relatively light and insubstantial. The Ninth Circuit erred, therefore, in concluding that I-872 is invalid because it is not "narrowly tailored" to satisfy a compelling state interest.

C. The Ninth Circuit Opinion Leaves States Uncertain As To Their Constitutional Choices In Structuring Their Election Laws

In *Cal. Dem. Party*, as in *Timmons* and *Clingman*, this Court re-emphasized the central role state policy plays in determining how elections for state and federal offices are conducted. The California decision establishes that states may not (1) require political parties to nominate their candidates for public office through a state-conducted primary, and (2) force each party to accept, without consent, the participation of non-members, including adherents of other political parties, in the nomination process. In this case, unlike the one before the Court in *Cal. Dem. Party*, the state is not requiring political parties to nominate their candidates for public office through a state-conducted primary. Rather, the state is conducting a primary to choose candidates for public office without regard to their political party affiliation. Although the political party preferences of the candidates, if any, are disclosed to the voters, they do not determine who participates in the general election. Under I-872, "party nomination" is a private process to be determined by each party.

Yet, the Ninth Circuit decision concludes that even this election system, in which the only recognition of party preference is permitting candidates' party preferences (if any) to appear on the ballot, violates the associational rights of the political parties. Under the Ninth Circuit's rationale, parties have a right not only to decide how to nominate "their" candidates for office, but also a

right to restrain a state from operating an election in which the voters are informed of the candidates' party preferences. This seriously infringes on the prerogative of the state to fashion its election system to promote full and informed participation by its citizens, and suggests far greater control by political parties over the manner in which states may conduct elections than this Court has thus far recognized. Indeed, *Cal. Dem. Party* and *Clingman* strongly suggest that states can make uniform and reasonable decisions with respect to their election systems, so long as they are not "severely" interfering with the "private" aspects of party nomination.

If the Ninth Circuit decision stands, Washington and other states will face continuing uncertainty and litigation concerning how they may organize their election systems. This area of the law implicates the core of our democratic institutions. Review by this Court is necessary to provide the modicum of clarity and balance that it warrants.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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November 20, 2006