

**PETITION FOR WRIT OF MANDAMUS
AND WRIT OF PROHIBITION**

COME NOW Petitioners, pursuant to Article II, Section 1(b) and Article VI, Section 4 of the Constitution of the State of Washington, RCW 26.62.130, and Rule of Appellate Procedure (RAP”) 16.2, and petition the Supreme Court for a Writ of Mandamus or Writ of Prohibition against the Governor, Secretary of State and State Treasurer as state officers: 1) to protect rights of voters under Article VI, by conducting a lawful primary election; 2) to determine certain veto actions of the Governor unlawful under Article II, sections 19 and 38 and Article III, section 12 and 3) to prohibit unconstitutional expenditures of state funds under Article VIII, section 4. In support of this petition and the relief sought here, Petitioners complain and allege as follows.

I. NATURE OF ACTION

1. In this action, Petitioners seek to address important Washington constitutional issues which must be finally resolved before the conduct of the 2004 election, including the September primary (for which filing begins in July, 2004). These are substantial questions of public importance requiring this Court's exercise of jurisdiction.
2. Petitioners seek a Writ prohibiting respondent state officials, the Governor and the Secretary of State, from implementing a primary elections system created by unconstitutional veto action of the Governor, from using state funds not properly appropriated for that purpose, and from interfering with the rights of voters protected by this State's Constitution, Article VI (sections 1 and 6). The Governor's partial veto of Engrossed Senate Bill 6453 ("ESB 6453,") attached hereto as Exhibit 1. ESB 6453 is attached hereto as Exhibit 2.

3. Petitioners request this Court to issue a Writ of Mandamus to direct the Secretary of State and the Governor to conduct the 2004 primary election in accordance with the law of Washington, ESB 6453, as passed by the Washington Legislature (including the emergency clause immediately effectuating the “Qualifying Primary”).

4. In the alternative, the Writ should compel the Secretary of State and Governor to conduct the 2004 election in accordance with Washington pre-existing primary laws by allowing the normal conduct of the primary election while striking the provision providing for a “blanket primary” which selects nominees of the parties (by nominating candidates who receives “a plurality of votes cast for the candidates of his or her party,” RCW 29.30.095). This clause providing a “blanket primary” has been enjoined by the United States District Court, *see* Judgment (April 14, 2004) and Order Granting Summary Judgment, Declaratory Judgment, and Injunctive Relief (April

9, 2004) in *Washington State Democratic Party v. Reed*, No. C00-5419FDB, attached hereto as Exhibit 3.

5. The veto action of the Governor of ESB 6453 and Part 2 added by House amendment and the election system it purports to establish violate several provisions of the Washington State Constitution; those requiring a bill to have a single subject and the title to show that subject (Wash. Const. art. II, § 19), those limiting a Governor's veto power (Wash. Const., art. III) and these prohibiting amendments which exceed the scope and object of a bill (Wash. Const., art. II, § 38).¹

6. Petitioners further ask this Court for a declaratory judgment that the Governor's proposed resulting primary

¹Ironically, the veto also removed the repealer of Washington's historic blanket primary, leaving that statute in effect, *but see* Exhibit 3, Federal Court injunction.

system, a Montana-style² “Nominating Primary” is unconstitutional, a Writ of Prohibition order prohibiting the public officials from conduct of such a “Nominating Primary,” and a Writ of Mandamus requiring implementation of a lawful Washington primary election system which protects the rights of all voters and candidates.

7. The difference between primary systems was articulated by the United States Supreme Court decision in *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 147 L.Ed.2d 502 (2000), holding that a qualifying primary could be constitutionally conducted as a “less restrictive alternative” where the nominating “blanket” primary of California was held

²The primary has been referred to as “Montana-style,” because the veto establishes a “Nominating Primary” system, similar to Montana, by requiring voters to select one-party ballots.

unconstitutional. (California's blanket primary was much like Washington's, except for party registration of voters in California.) A valid system, the court said, provides that:

Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. 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.

530 U.S. at 585-586. This system which "qualifies" candidates for the primary regardless of party is a "Qualifying Primary." The system, which "nominates" candidates for each party is a "Nominating Primary," which the court held may not be conducted without allowing the association (party) to determine who participates.

8. Petitioners also seek to enjoin by Writ of Prohibition the Secretary of State from conducting a Montana-style "Nominating Primary" because it would block Petitioners and

all qualified Washington voters from voting “at all elections” (Wash. Const., art. VI, § 1) by use of ballots which limit or prohibit participation to candidates of a single political party and to enjoin any election system not protecting voters’ constitutional right to “absolute secrecy of the ballot” by requiring a public choice of party ballot. Wash. Const., art. V, § 6.

9. The Montana-style “Nominating Primary” violates these rights of voters by requiring qualified voters to select and disclose to poll officials the voters’ political party choice in order to receive or vote a ballot and limits voters’ choices to those candidates identified with that one party (or accomplishes the same by giving three separate party ballots, with poll workers taking from the voter and destroying all but one party’s ballot).

10. The Secretary of State and those acting with him³ should be enjoined by Writ from voiding or refusing to count any lawful vote of qualified Washington voters, *i.e.*, from not counting the votes of any voter who declines to identify a political party choice or voiding the ballot of voters who vote for candidates identified with several political parties. The latter is a particular problem with absentees—which are a majority of Washington voters today. Most will undoubtedly continue their historic practice of voting for (any) one candidate per race.

11. Because of the veto and other actions complained of, it is necessary and appropriate that a Writ of Prohibition also enjoin Governor Locke from further interfering or conspiring to

³The Secretary of State is the state's chief elections officer, but county auditors conduct elections and count votes at the county level.

interfere with the constitutional right to vote of Petitioners and all qualified Washington voters.

12. This petition also raises substantial questions of public importance relating to mis-(non-)appropriation of state funds for conduct of the proposed unlawful primary election. Wash. Const., art. VIII, § 4. The Legislature did not appropriate funding for a primary system it did not authorize (having enacted a “Qualifying Primary”).

13. The Governor separately vetoed an appropriation reduction for funding for the Secretary of State to conduct a Presidential Preference Primary in 2004. *See* Exhibit 4 hereto, the Governor’s veto letter with Section 111 of ESHB 2459, 2004 Wash. Laws, Ch. 276. This money cannot be used for different purposes than the Presidential Preference Primary for which it was appropriated, and the appropriation in question

lapses on June 30, 2004, well before the Washington primary in September.

14. The Governor, the Treasurer and Secretary of State should all be enjoined by Writ of Prohibition/Mandamus from expending any moneys from the Washington treasury not properly appropriated (violating Article VIII, section 4).

15. There are also statutory constraints allowing the Treasurer and/or Secretary of State only to disburse state funds under constitutional and defined circumstances not present here, e.g.:

. . . Reimbursements for election costs shall be from appropriations specifically provided by law for that purpose.

RCW 29A.04.420(4). The writ should enforce this statutory compliance with relevant constitutional provisions (especially Article VIII, section 4).

16. The Legislature was advised the added costs of conducting the Montana “Nominating Primary” would be over \$6,000,000 because of the need for multiple ballots, different procedures and programs, e.g., computer changes. (*See* Exhibit 5 hereto, the state-wide auditors’ estimate, submitted to the Washington Senate.)

17. The Washington Legislature did not appropriate these funds (any funds) to conduct a “Nominating Primary” partly because it did not authorize such a primary. As noted above, the appropriation for the (later-repealed) March Presidential Preference Primary⁴ cannot be used for these purposes and lapses of its own terms on June 30, 2004, months before the Washington primary.

⁴The Presidential Preference Primary was repealed for 2004. *See* 2004 Wash. Laws, Ch. 276.

18. The Legislature was aware the funding costs of a “Qualifying Primary” are the same as historical primary costs because there is no difference in ballot (one per voter, showing all candidates) or processing. Either the “Qualifying Primary” or the historical primary (as modified by the United States District Court injunction) can be conducted within existing funding.

19. Respondents Governor and/or Secretary of State propose instead to implement a Montana-style “Nominating Primary” system using funds not properly provided through the Legislature’s constitutional appropriation power; and, in order to fund an election system which violates the constitutional and statutory rights of Washington voters and candidates.

20. Such structural changes in the Washington election process may only be accomplished by constitutional amendment, where the existing primary reflects constitutional

protections for voters' rights (here in two separate sections providing "absolute secrecy" and a right to vote "at all elections," Wash. Const., art. VI, §§ 1, 6).⁵

21. Since such action of the Governor and/or Secretary of State violates the Washington State Constitution and is void, both officials should be ordered to conduct lawful elections by Writ of Mandamus and be enjoined by Writ of Prohibition from interfering with the constitutional rights of Washington voters.

22. The constitutionally appropriate and lawful primary must be determined to be either:

a) the qualifying primary adopted by the Washington Legislature, ESB 6453 Part 1 (if the Governor's action is

⁵This Court articulated some of these rights in its last case upholding the "Blanket Primary." See *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980). See, also, *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936).

declared void, *ab initio* the bill became law the 20th day after adjournment of the 2004 Legislature (Wash. Const., art. III, § 12), or

b) the pre-existing system, with the “blanket” provision removed, as the U.S. District Court has enjoined, Ex. 3. This would allow the primary to be conducted in September, but all candidates receiving over one percent would proceed to the general election. The clause providing for selection of a nominee for each political party has been enjoined. If ESB 6453 is held totally void, the prior law remains in effect except as enjoined.

II. JURISDICTION

23. This action arises under the Washington State Constitution. The jurisdiction of this Court is founded upon art. IV, § 4, RAP 16.2(a), RCW 7.16.150 *et seq.*, RCW 7.16.290 *et seq.*, and RCW 7.24.010 *et seq.*

24. Petitioners seek a Writ of Mandamus/Prohibition against Respondents, the Governor, Secretary of State and State Treasurer, all public officers, in order to protect the rights and franchises of the voters and of elected legislators and candidates, protect the funds of the State, and to require compliance with the Constitution and laws by these public officials. The order of mandamus must declare the lawful and constitutional primary system for 2004 and require such election to be conducted while prohibiting the Governor from further unconstitutional acts interfering with rights of voters or improperly spending public moneys.

III. PARTIES

A. Petitioners: Grange, Voters and Legislators.

25. The moving parties are the Washington State Grange, Terry Hunt, and Jane Hodde, each of whom are qualified voters under Washington law, and the 55,000 members of the Grange

who are also qualified voters, all of whose U.S. constitutional rights—and rights under Article VI of the Washington Constitution—will be directly and adversely affected if the Writ does not issue.

26. Grange Petitioners have exercised their constitutional right to petition and through Initiative, to create historic legal rights and protections for voters and intend to do so through an Initiative on the 2004 ballot, as well as exercising those rights through supporting as an interim measure legislation (ESB 6453) continuing a “Qualifying Primary” which may be frustrated by the Governor’s attempted veto.

27. Tim Sheldon is a state Senator from the 35th Legislative District; Joyce Mulliken is a state Senator from the 13th Legislative District, and Fred Jarrett is a State Representative from the 41st District. All are duly elected Legislators, served in the 2004 Legislature, and expect to do so in the future.

28. These Legislator Petitioners are and will be negatively affected by the Governor's veto of part of ESB 6453 because that action would establish an election system contrary to the action of the Legislature in enacting laws for the 2004 primary election.

29. The subject of the legislation, ESB 6453, expressed in the restrictive title of the bill, was to create a "Qualifying Primary," and it passed both Houses of the Legislature with this title. The Senate concurred with the House amendments which did not change the title of the legislation.

30. The Senate concurrence with the House amendments was on a calendar largely without debate and considered numerous bills coming or returning to the Senate from the House (*see* Ex. 5), and thus Senators reasonably relied on the bill title as the Constitution provides.

31. The Governor’s veto action purports to create a “Nominating Primary”—not the “Qualifying Primary” adopted by the Legislature and claims to make the “Nominating Primary” immediately effective by emergency clause.⁶ This intent is contrary to and in violation of the restrictive title of the bill (as it passed both Houses).

32. Further, the Governor has purported to fund the Montana-style “Nominating Primary” or to direct the Treasurer and/or Secretary of State to fund this primary in violation of the Constitution, which preserves to the Legislature the power of appropriation, thus detrimentally impacting the constitutionally process of the state Legislature which must enact all

⁶As will be noted further below, the emergency clause passed by the Legislature, Section 205, related only to “Qualifying Primaries.” *See* Ex. 2, § 205.

appropriation measures. The Governor's power simply does not extend to appropriating funds—and surely not by veto.

33. The Governor's veto-created primary would detrimentally affect the rights of all candidates, including Petitioners Legislators when running for re-election to the Washington House or Senate by limiting the number of voters who can support them as candidates in a primary to only those voters willing to vote the single-party ballot on which the candidate appears, e.g., voters choosing a different party ballot because of interest in the federal or state-wide offices will not be allowed to vote for Petitioners appearing on a different party ballot.

B. Respondents

34. Gary Locke, in his official capacity, is Governor of the State of Washington. Governor Locke has sworn an oath to uphold the Washington Constitution and laws.

35. The Governor's power(s) are defined and limited in the Washington Constitution, especially in Article III, section 12 and Article II, section 19, and the Governor has no power to appropriate state funds, Wash. Const., art. VIII.

36. Governor Locke has purported to make partial veto of ESB 6453 in order to create an election system contrary express intent of the Legislature through enacting this bill. This veto action, or the resulting law, 2004 Wash. Laws, Chapter 271, is also invalid as violating the Washington Constitution and rights of voters under Article VI.

37. The resulting law, were Governor Locke's veto upheld, separately violates the Washington Constitution, Article II, Section 19 in that the restrictive title of the bill is "Qualifying Primary" and the result of the unlawful veto is expressly a Montana-style "Nominating Primary" contrary to the title and

express subject of the bill. (*Compare* Part 1, especially section 1 of ESB 6453, Ex. 2, with Part 2, sections 103 and 110.)

38. The amendments by the House and the veto as attempted by Governor Locke, would create a “Nominating Primary” from a “Qualifying Primary” bill, which amendment is a different subject from the restrictive title and beyond the scope and object of the Senate Bill vehicle for this legislation in violation of Article II, Section 38.

39. The two “parts” of the bill are “sections” within the constitutional provision, and the Governor has attempted to veto only sub-parts of Part (section) 2 in violation of Article VIII, section 12.

40. Contrary to the Governor’s veto, the emergency clause, section 205 (*see* Ex. 2) did not, and does not, apply to the Montana-style “Nominating Primary” (Part 2 of ESB 6453);

compare Governor's Veto, Ex. 1, with ESB 6453, Ex. 2, p. 57, section 205).

41. Sam Reed in his official capacity is Secretary of State and chief elections officer and supervisor of all Washington State elections, RCW 29.04.055 and RCW 43.07.310.

Secretary Reed's responsibility and duties are only those set out in the Washington Constitution and laws.

42. Absent this Writ of Prohibition/Mandamus, Secretary of State Reed and other elections officials working with him or under his supervision will conduct an unconstitutional and unlawful primary election in 2004 if acting consistent with Governor Locke's purported veto and consistent with subsections of Part 2 of ESB 6453 the Governor claims effective.

43. A "Qualifying Primary" is legally and factually distinct and inconsistent with a "Nominating Primary," as decisions of

the United States Supreme Court and the Washington Legislature have determined. The difference is between a “Qualifying Primary” which allows all voters to vote for all candidates and winnows to the top two (or more) for the final general election and a (party) “Nominating Primary” which nominates candidates from each party for the general election. (*See, also*, U.S. Supreme Court quote and cite at ¶ 6, *supra*.)

44. The Writ of Mandamus is necessary to compel Secretary of State Reed to disregard the unlawful veto by Respondent Governor Locke and/or the subsections of Part 2 of the bill (codified as 2004 Wash. Laws, Ch. 271) and instead order the Secretary of State to comply with Washington elections law and Constitutional requirements in the conduct of 2004 elections.

45. Michael Murphy is the Treasurer for the State of Washington. Respondent Murphy is responsible for

maintaining the state General Fund and all other accounts and funds comprising the state treasury and for crediting receipts thereto and issuing warrants for all disbursements from the public treasury.

46. Treasurer Murphy will, unless restrained, disburse funds from the State Treasury for the conduct of the unlawful and unconstitutional “Nominating “Primary” as created by Governor Locke or by Part 2 of ESB 6453 without proper appropriation for the expenditure of state moneys as required by the Washington Constitution (especially Article VIII, section 4) and in further violation of Washington laws.

47. The Governor’s separate Appropriation (budget) veto of part of ESB 2459 (Chapter 276, Laws of 2004) purports to appropriate available moneys for this purpose: The Legislature’ \$6,000,000 reduction in amounts previously appropriated, however, was 1) money appropriated for the purpose of

conducting the March 2004 Presidential Preference Primary—such Presidential Preference Primary was repealed for 2004, *see* 2004 Wash. Laws, Chapter 276; and 2) the appropriation, of its own terms, lapses on June 30, 2004 (*see* Exhibit 4).

IV. ADDITIONAL FACTS

Petitioners re-allege all facts alleged above and further allege the following further facts in support of the Writ:

48. The Grange was the original sponsor of the blanket primary initiative as part of the primary elections system in the State of Washington, which has been utilized for 70 years.

49. In enacting the “blanket system” primary, the Grange Petitioners and predecessors in interest exercised their rights under Article II, section 1 of the Washington Constitution by sponsoring an Initiative, which was adopted by the Washington Legislature.

50. The “blanket”⁷ method of choosing candidates in the primary has been upheld in this Court on two occasions. *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936) and *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980).
51. Washington’s blanket primary was challenged again by three major political parties after the decision in *California Democratic, infra*. The Ninth Circuit Court of Appeals reversed a district court decision upholding the primary and remanded for entry of an injunction. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003).
52. A final order from the United States District Court in Tacoma has enjoined only the “blanket primary,” rejecting the political parties’ motion for further relief (*see* Exhibit 3).

⁷Under a “blanket” system, all voters may vote for all candidates and the top vote for each party nominates the candidates for the general election.

53. The remainder of Washington’s primary laws and system remain intact (e.g., the primary “shall be held . . . the third Tuesday of the preceding September or on the seventh Tuesday immediately preceding such general election, whichever occurs first,” RCW 29.13.170; voters are allowed to vote “without declaration of political faith or adherence,” RCW 29.18.200; one percent of the primary vote is required for any candidate to appear on the general election ballot, RCW 30.30.095).

54. In the Washington Legislature in 2004, Grange Petitioners and Respondent Reed proposed and supported legislation (ESB 6453) creating a “Qualifying Primary.”

55. Under both “blanket” and “qualifying” primaries system, Washington voters exercise their right to vote for any candidate without disclosing political faith or adherence, if any (RCW

29.18.200 and *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980)).

56. The 2004 legislation was restrictively titled by the Washington Legislature to create a “Qualifying Primary.” The bill, ESB 6453, was first adopted by the Washington Senate 28 to 20.

57. The Washington House passed the legislation 51 to 46 (with amendments adding a conditional section 201 as pre-condition to Part 2 to be utilized only if the “Qualifying Primary” was declared unconstitutional).

58. The Senate then concurred to enact the bill, still titled “Qualifying Primary,” with a vote by the Senate of 36 to 12 on March 10, 2004. *See* Exhibit 6, Senate calendar for March 10, 2004.

59. The U.S. District Court has acted by enjoining only a “blanket primary” and denied all other claims of the Political

Parties (Ex. 3). That court did not declare “Qualifying Primary” unconstitutional as provided in section 201, the conditional provision of section (Part) 2.

60. Washington State Grange Petitioners have duly filed with the Secretary of State and begun a campaign to encourage Washington voters to sign initiative petitions for I-872, which will also enact a “Qualifying Primary” measure for Washington long-term if approved by voters at the 2004 General Election. (A copy of I-872 is available at the Secretary of State’s Web site at www.secstate.wa.gov/elections/initiatives/people.aspx.)

61. As would the “Qualifying Primary” Part (section) 1 of ESB 6453, I-872 will protect voters’ rights to vote for any candidate in the primary election and require no declaration of political faith or adherence in order to vote. Indeed, the voters will see no changes in ballots.

62. The Legislature adopted the similar⁸ “Qualifying Primary” with Section 205 as an emergency clause to make a “Qualifying Primary” effective for the 2004 primary. The emergency was necessary because Initiative 872 will not be effective until after the 2004 primary has been conducted, since an Initiative must be voter approved at the 2004 general election, Wash. Const., art. II, § 1.

63. The creation of an unlawful primary for 2004 will detrimentally affect Petitioners’ rights and those of all Washington voters. It will cause a substantial decline in voter turnout in Washington.

64. California suffered a 3,000,000 vote loss and the lowest recorded percentage of qualified voters in a primary in

⁸To primary voters, a “blanket” and “Qualifying Primary” are identical because voters receive one ballot, with all candidates, and vote their preference.

California history when that state went from a blanket to a single-party ballot system (like the “Montana” nominating primary).

65. If such a “Nominating Primary” is imposed in Washington, there will be a substantial decline in numbers of voters in the primary, likely to be reflected in a decline in general election turnout.

66. Terry Hunt is the Master (Chief Executive Officer) of the Grange and a duly qualified voter in Washington whose rights under the United States and Washington constitutions are threatened and will be detrimentally affected if the primary as set forth in Washington law is invalidated or changed, as purports to be that by the Governor’s unlawful veto and resulting law.

67. Under the protections of Washington law and constitution, Mr. Hunt has never been compelled to choose a

single party as a condition or qualification to vote in a Washington election and will continue to decline to do so. His ballot has always been afforded “absolute secrecy,” and he has never been required to disclose party preference in order to vote. He is the voter sponsor of the Initiative 872 exercising his rights under Article II, § 1 and those rights will also be detrimentally impacted unless a Writ issues to protect those rights.

68. Jane Hodde is a member of the Grange who supported the original initiative,⁹ and her rights under the United States and Washington constitutions are threatened by Respondents in this action in a similar way to those of Mr. Hunt, referenced above.

⁹Her husband Charles W. Hodde (deceased” was one author and proponent of that Initiative in 1935 in his then capacity as Grange “Lecturer.”

69. Under the protections of Washington law and constitution, Mrs. Hodde has never been compelled to choose a single political party in order to vote in a Washington election and will continue to decline to do so though she is desirous of voting “at all elections” (Wash. Const., art. VI, § 1) and with “absolute secrecy” (Wash. Const., art. VI, § 6.). She has never been required to identify to poll workers or others a political party as a qualification to vote in a primary. The Montana “Nominating Primary” will require both, in violation of her constitutional rights.

70. The 50,000 Grange members are qualified voters and many vote for other Grange members, including members of the Washington Legislature of both major Houses and members who are identified with both of the historical major parties. Such candidates (all candidates) identify differing political parties in their declarations of candidacy and all candidates are

available to voters and appear on all primary ballots as provided in Washington law. The “Nominating Primary” system would make such voting impossible and require violation of these members rights of “absolute secrecy” by requiring the voters in polling places to ask for and/or receive only one political party ballot.

71. The Grange Petitioners participated in the litigation in federal court involving the Washington primary, specifically the “blanket primary” provision that provided for party “nominations” by allowing to the general election only the nominee from each party receiving the plurality of votes for that party.

72. The disposition of this action will impair or impede the Grange Petitioners’ ability to protect their constitutional rights and interests, and rights of those qualified voters of Washington in protecting their rights to vote “at all Washington elections”

(Art. VI, § 1), as allowed in the present primary, and allowed under a Qualifying Primary, as well as violating voters' right to vote without disclosing to poll officials which party they will be voting or have voted (in violation of the right to "absolute secrecy" provided by Article VI, Section 6 and RCW 29.18.200 and 29A.52.120).

73. The Legislature passed ESB 6453 (2004 Wash. Laws, Chapter 271) adopting a "Qualifying Primary," with a "Nominating Primary" only as a constitutional backup, to be instituted only if a court ruled the "Qualifying Primary" unconstitutional. (*See* Ex. 2, § 201.)

74. The conditional provision (section 201) is not severable and is an integral precondition to the "Nominating Primary," and thus may not be separately vetoed.

75. The United States District Court has declined to hold the "Qualifying Primary" unconstitutional, ruling only that the

“blanket primary” may no longer be utilized, i.e., the state cannot compel parties to have their nominees selected by all voters.

76. The concluding sentence of the U.S. District Court’s order reads: “The Motions of the Republican, Democratic, and Libertarian Parties . . . (are) rejected otherwise.” *See* Ex. 3, p. 2.

77. This order of the U.S. Court did not fulfill the necessary conditions in section 201 for a Montana “Nominating Primary” to become effective.

78. The Governor did not comply with applicable constitutional provisions defining and restricting the Governor’s authority to veto. Accordingly, this veto action of the Governor is void *ab initio* as unlawful and in violation of the Washington Constitution.

79. If the veto is void *ab initio*, the bill became law on April 3, 2004, as provided in Article III, section 12 of the Constitution.

80. But for the Governor's attempted partial veto of ESB 6453, the 2005 primary would have been similar (to the voters, identical¹⁰) to the historical system since a "Qualifying Primary" was adopted by both houses of the Legislature.

81. The Governor's veto purports to create a Montana-style "Nominating Primary" election system to require voters to

¹⁰We use "identical" here because voters under the "Qualifying Primary" will receive the same, identical single primary ballot, showing all candidates, which Washington voters have received under the historical blanket primary. Unlike the "blanket," however, the procedure to the general election uses primary results to "qualify" top candidates rather than "nominate" party nominees.

choose one political party and identify that political party preference to elections officials who will give each voter a political party ballot allowing the voter to vote only for candidates of that political party in the primary election. Other candidates would not be on such ballot, and votes for such candidate (e.g., write-in) would not be counted or would void the entire ballot of the voter.

82. This choice of political party ballot would be public because the required political party choice must be told to election officials in public poll places, even if a public record is not kept. The franchise of each voter is thus restricted and unconstitutionally qualified (violating Article VI, section 6).

83. The resulting Montana “Nominating Primary” election system is in direct conflict with the title of the legislation “AN ACT relating to a qualifying primary.”

84. The House amendment, adding conditional Part 2, sections 101-204 (“Nominating Primary”), was not within the scope and object of the bill since a “Nominating Primary” is dramatically opposed to a “Qualifying Primary.” The House amendment is separately void as not within the restrictive title of the bill.

85. The provisions of section (Part) 1 “Qualifying Primary” may be severed from the section (Part) 2. A majority of both Houses intended to enact and voted for Part 1, the “Qualifying Primary” and adopted an emergency clause applicable only to the “Qualifying Primary.”

86. By requiring each voter to choose one political party, or denying the same voter the right to vote in any partisan election if the voter refuses to identify political party affiliation, the Governor’s system (and that of Part 2) would impose an additional qualification on Washington voters who have already

met constitutional qualifications to exercise a right to vote “at all elections” as protected in the Washington Constitution, Article VI, Section 1.

87. The Washington Supreme Court has held that qualifications in addition to those specified in the Washington Constitution may only be added by constitutional amendment. (*Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (1998)).

**FIRST CLAIM FOR RELIEF
VIOLATIONS OF THE WASHINGTON
STATE CONSTITUTION, ART. II, §§ 19 and 38**

88. Article II, Section 19, of the Washington Constitution reads:

No bill shall embrace more than one subject,
and that shall be expressed in the title.

Wash. Const., art. II, § 19.

89. Article II, Section 38 of the Washington Constitution provides:

No amendment to any bill shall be allowed
which shall change the scope and object of the bill.

Wash. Const., art. II, § 38.

90. The title of ESB 6453, as passed by the Washington Senate, was “Qualifying Primary” and included Sections 1 through 57, specifically creating such a primary:

PART 1 - QUALIFYING PRIMARY.

. . . Sec. 1. A new section is added to
chapter 29A.52 RCW to read as follows:

(1) This act may be known and cited as the Qualifying Primary Act.

ESB 6453, Part 1, § 1.

91. The House amended the Senate bill to add Part 2, Sections 101-193, entitled “Nominating Primary” but did not change the title “Qualifying Primary” nor change Sections 1 through 100, defining a “Qualifying Primary.”

92. This House amendment is beyond the scope and object of the bill and is not embraced within the title.

93. The House amendment Part 2 allowed the “Nominating Primary” to go into effect only as a “back-up” system and only if the Qualifying Primary were held unconstitutional by courts (section 201). Part 2 is not severable from the conditional section 205.

94. The U.S. District Court did not hold the “Qualifying Primary” unconstitutional (*see* Ex. 3), and section 201 of ESB 6453 has not been met.

95. The Legislature included an emergency clause which applies only to make the Qualifying Primary effective:

Except for sections 102 through 193 of this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

ESB 6453, § 205. The excepted sections are Part 2, the “Nominating Primary.”

96. The emergency clause, Section 205, was retained from the Senate bill. That emergency clause applies to Sections 1 through 57—the “Qualifying Primary” and specifically excepts the “Nominating Primary” sections (Sections 102 through 193).

97. The effect of Governor Locke’s veto, if upheld, is to create a “Nominating Primary” while the title of the bill is a “Qualifying Primary,” which is defined in the bill. Thus, the Governor’s law is not expressed in the title, contrary to the title

and beyond the scope and object of the bill as passed by the Senate and violates the veto powers of the Governor.

**SECOND CLAIM FOR RELIEF:
VIOLATIONS OF THE WASHINGTON
STATE CONSTITUTION, ART. VI, §§ 1, 6**

98. Article VI, Section 1 of the Washington Constitution provides:

All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of this Constitution, shall be entitled to vote at all elections.

Wash. Const., art. VI, § 1, emphasis added.

99. Article VI, Section 6 of the Washington Constitution provides:

All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

Wash. Const., art. VI, § 6, emphasis added.

100. The (a) “Nominating Primary” as provided in Governor Locke’s approved sections, requires a voter to select a single party ballot and prohibits voting for candidates from other political parties and/or voids such ballots if candidates from more than one political party are voted, or will refuse to give partisan ballots to voters who refuse to make a single party selection, depriving such voters of the right to vote “at all elections.”

101. The forced public selection of a single political party ballot at a poll place violates “absolute secrecy.” The alternate implementation by providing three ballots by party and requiring voters to identify one party ballot to be counted while giving the other two to the poll workers for disposition similarly violates “absolute secrecy.”

**THIRD CLAIM FOR RELIEF:
VIOLATIONS OF THE WASHINGTON STATE
CONSTITUTION, VETO POWER OF GOVERNOR**

102. Article III, Section 12, provides in part:

Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, . . . *Provided*, That he may not object to less than an entire section, except that if the section contain one or more appropriation items, he may object to any such appropriation item or items. In case of objection he shall append to the bill, at the time of signing it, a statement of the section or sections, appropriation item or items to which he objects and the reasons therefor;

Wash. Const., art. III, § 12.

103. Under rulings of this Court, the veto may not constitutionally be used to manipulate legislation, and, if so, is invalid. *Washington Legislature v. Lowery*, 131 Wn.2d 309 (1997); *Washington State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 662 (1988).

104. The purported veto here is in violation of the above constitutional provisions in that the Governor's message

purports to veto not just Part (section) 1 of the bill but parts of Part (section) 2 and otherwise violates the Constitution by rewriting the legislation in contradiction with its title and legislative subject.

105. As passed by the Legislature, Part 2 is/was conditioned on a declaration by courts that Part 1 was unconstitutional. *See* Section 101, Part 2. This conditional declaration did not occur and thus Section 101 is not severable from Part 2. The veto is unlawful for that reason alone.

106. The veto message claims the emergency clause, Section 205, applies to Part 2, but this is false on its face, and the veto is unlawful and ineffective for that reason. *See* Section 205:

Except for sections 102 through 193 of this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

ESB 6453, Section 205, Ex. 2.

**FOURTH CLAIM FOR RELIEF:
VIOLATION OF THE WASHINGTON
STATE CONSTITUTION, ART. VIII, § 4**

107. Article VIII, Section 4 of the Washington Constitution, provides:

No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within one calendar month after the end of the new ensuing fiscal biennium, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

Wash. Const., art. VIII, § 4.

108. The total costs of administering the new Montana-style “Nominating Primary” will exceed \$6,000,000 (extra ballots, new voter counting system, etc.).

109. Governor Locke has directed or required the expenditure of some or all of these millions, which has not been

properly appropriated to conduct a Montana-style “Nominating Primary.”

110. The moneys Governor Locke has directed by used were actually appropriated for conduct of a March 2004 Presidential Preference Primary (since repealed, 2004 Wash. Laws, Chapter 276) and that appropriation lapses on June 30, 2004, months before Washington’s primary election.

111. Governor Locke does not have constitutional nor statutory authority to expend state funds for any election and not for a Montana-style “Nominating Primary.”

112. Secretary of State Reed does not have statutory authority to expend money to or through county auditors for this purpose of conducting a Montana-style “Nominating Primary.”

113. Unless enjoined, Governor Locke and Secretary of State Reed will spend and authorize others, including counties, to

spend in excess of \$6,000,000, which money has not been constitutionally appropriated.

114. Treasurer Murphy will, unless enjoined by Writ of Prohibition, commit or expend state moneys to conduct a “Nominating Primary,” and such action is in violation of Washington law and Constitution.

**FIFTH CLAIM FOR RELIEF:
VIOLATIONS OF CIVIL RIGHTS ACT**

115. Under the U.S. Constitution and laws and under the laws and Constitution of the State of Washington, all of the complained of acts are violative of rights of Petitioners and are, and would be, acting under color of state law in violation of 48 U.S.C. 1988, et seq. Accordingly, Petitioners are entitled to their costs and attorney’s fees for bringing this action under 42 U.S.C. § 1988.

V. PRAYER FOR RELIEF

WHEREFORE, Petitioners request the following relief:

1. A Writ of Prohibition/Mandamus against Gary Locke declaring that his purported veto is void and of no effect and enjoining him from interfering with the constitutional rights of Petitioners and Washington voters.
2. A Writ of Prohibition/Mandamus directing Secretary of State Reed and all those Washington election officials acting in concert with him to implement a lawful primary election in 2004, consistent with Section 1 (Part 1) of ESB 6453 or the “Qualifying Primary” provisions of prior law and bar him from implementing the Governor’s choice or Montana “Nominating Primary” or from expending any moneys for that purpose.
3. A Writ of Prohibition against Governor Locke, Secretary of State Reed and Treasurer Murphy to bar them from expending any moneys from the Washington treasury for a “Nominating Primary” or any other elections system not properly adopted and/or that violates the rights of Washington voters.
4. A Writ of Mandamus directing the Secretary of State and those officers in concert with him to conduct a “Qualifying Primary” in the State of Washington for 2004 and/or a primary which protects constitutional rights of Petitioners and all Washington voters, and allowing Washington voters to vote for all candidates for all offices.
5. Their costs and fees incurred as a result of bringing this action to protect important constitutional rights.

DATED this ____ day of April, 2004.

JAMES M. JOHNSON (WSBA #818)

Attorney for Petitioners
1110 S. Capitol Way
Suite 225
Olympia, WA 98501
Telephone: 360 357-3104
Facsimile: 360 357-5779