Nos. 11-35122, 11-35124, 11-35125

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON, ROB MCKENNA, SAM REED, AND WASHINGTON STATE GRANGE,

Defendants/Appellees.

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

No. 2:05-CV-00927-JCC
The Honorable John C. Coughenour
United States District Court Judge

BRIEF OF APPELLEES STATE OF WASHINGTON, ROB MCKENNA, AND SAM REED

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I. INTRODUCTION

In 2008, the United States Supreme Court upheld Washington's Initiative 872 (I-872) against a facial challenge brought by the Republican, Democratic, and Libertarian parties.[1] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). I-872, enacted by popular vote in November 2004, established a new "Top Two" primary as the first stage in electing candidates for partisan office. Wash. Rev. Code § 29A.04.110. The Supreme Court concluded, "[w]e are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion." *Grange*, 552 U.S. at 456.

On remand, the political parties bore the burden of proving their "factual assumptions about voter confusion." *Id.* at 457. To be successful, the political parties needed to show that the State's implementation of I-872 caused widespread voter confusion such that a reasonable, well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or that the party endorses, associates with, or approves of the candidate. The political parties failed to do so. As the

[1] A copy of I-872 is attached as Appendix A.

district court concluded, "I-872 as implemented in partisan elections is constitutional because the ballot and accompanying information eliminate the possibility of widespread confusion among the reasonable, well-informed electorate." ER 93.

This Court should affirm the decision of the district court because the political parties failed to prove that the implementation of I-872 has severely harmed their constitutional rights by causing voter confusion. This Court should similarly reject the arguments of the political parties on several ancillary issues, discussed more fully below.

II. JURISDICTIONAL STATEMENT

The State concurs in the jurisdictional statement set forth in the Brief of Appellant Washington State Republican Party at pages 3-4.

III. ISSUES

1. Does Washington's Top Two Primary, in which the ballot states the name of the political party the candidate prefers (if any), cause widespread confusion such that a reasonable, well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or that the party associates with or approves of the candidate?

2. Is Washington's Top Two primary invalid in its entirety because the district court declared Washington's system for electing precinct committee officers unconstitutional, where the initiative establishing the primary did not amend any laws governing precinct committee officer elections?

3. Did the district court abuse its discretion when it declined to exercise supplemental jurisdiction over an unrelated and novel claim based on the Washington Constitution?

4. Does Washington's Top Two primary, in which all candidates appear on the ballot to compete among all Washington voters, deny candidates supported by the Libertarian Party reasonable access to the ballot?

5. Does the appearance of candidates' personal party preferences on the ballot constitute the use of a trademark in a commercial transaction to confuse potential consumers, so as to infringe any trademark of the Libertarian Party?

6. Did the decision of the United States Supreme Court, upholding the facial constitutionality of Washington's Top Two primary, entitle the State to a judgment requiring the political parties to refund to the State attorney fees previously paid?

7. Are the political parties entitled to an award of attorney fees for this appeal?

IV. STATEMENT OF THE CASE

The Republican, Democratic, and Libertarian parties (political parties) challenged the constitutionality of I-872. The voters enacted I-872 in the 2004 general election in order to establish a "Top Two" system of electing candidates for "partisan office" in Washington. The Top Two system provides for a two-stage election process under which the primary "does not, by its terms, choose the parties' nominees." *Grange*, 552 U.S. at 453.

The election regulations specifically provide that the primary "'serves to winnow the number of candidates to a final list of two for the general election.'" *Id.* (quoting former Wash. Admin. Code § 434-262-012). Under I-872, all candidates have access to the primary election ballot, and voters may select any candidate regardless of party preference. The two candidates receiving the most votes advance to the general election. Wash. Rev. Code § 29A.36.170.

Candidates may, if they choose, express their personal preference for a political party, and have that preference shown on the ballot. Wash. Rev. Code § 29A.52.112(3). However, the election system does not use that preference in determining which candidates advance to the general election. "The law never refers to the candidates as nominees of any party, nor does it treat them as

such." *Grange*, 552 U.S. at 453. The general election becomes, in substance, a runoff between the top two candidates. ER 94. The Top Two system operates exactly like a typical primary for a *nonpartisan* office, with the single difference that the ballot may reveal a candidate's personal party preference.

Washington's voters adopted I-872 by popular vote in November 2004. In May 2005, before the State implemented I-872, the political parties commenced this action, seeking to have I-872 declared unconstitutional and its implementation enjoined. The district court initially granted summary judgment in favor of the political parties and enjoined the implementation of I-872. *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005). This Court affirmed. *Washington State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006).

The United States Supreme Court reversed. "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 designation will confuse voters, I-872 does not on its face severely burden [the political parties'] associational rights." *Grange*, 552 U.S. at 459. The Court accordingly held that I-872 is facially constitutional. *Id.* The Court concluded that the

State's implementation of I-872 in the manner described in the decision "would be consistent with the First Amendment." *Grange*, 552 U.S. at 457. On remand, the political parties accordingly faced the burden of proving that the State did not implement I-872 in the manner the Court described, by providing evidence to support their "factual assumptions about voter confusion." *Id.*

In an order entered on August 20, 2009, the district court permitted the political parties to build an evidentiary record to support their claim that "I-872, as implemented in practice, creates the sort of voter confusion that might support a First Amendment claim for violation of the political parties' associational rights." ER 65. In other words, while the political parties originally based their challenge to I-872 on "factual assumptions about voter confusion," on remand it was incumbent upon them to provide evidence supporting those assumptions. *Grange*, 552 U.S. at 457. The trial court also permitted the political parties to amend their complaints to pursue a new challenge to laws separate from I-872 that govern the manner in which Washington conducts elections for precinct committee officer (PCO), finding that, even though I-872 did not enact or amend any laws governing those elections, the two challenges were sufficiently related to be brought in the same action. ER 66-67.

The district court also resolved several issues in the State's and Grange's favor in its August 20, 2009, order. First, the district court rejected a claim by the Libertarian Party that I-872 denied their preferred candidates reasonable access to the ballot. ER 67-71. Second, the district court rejected the political parties' claims of trademark violations, based upon the inclusion on the ballot of the candidates' personal expressions of preference for a political party. ER 71-74. Finally, the court concluded that the State is entitled to a judgment ordering the political parties to reimburse attorney fees previously paid. ER 80-84.

The State and Grange later moved for summary judgment on all remaining issues. ER 93. In response, all three political parties agreed that the case presented no disputed issues of material fact. ER 185-86; SSER 150, 99-100.[2] The Democrats and Republicans cross-moved for summary judgment in their favor. ER 185-86; SSER 150. The Democrats and Republicans also sought partial summary judgment, limited to the constitutionality of Washington's method of electing PCOs. ER 93, 109-14.

[2] Plaintiffs' Excerpts of Record are referenced as ER. State's Supplemental Excerpts of Record are referenced as SSER. The Democratic Brief, Republican Brief, and Libertarian Brief will be referenced as Dem. Br., Rep. Br., and Lib. Br., respectively.

The district court granted summary judgment in favor of the State and Grange, upholding the constitutionality of the State's implementation of I-872. ER 93. The court concluded, as to the political parties' main challenge to the implementation of I-872:

> Put simply, Washington's implementation of I-872 with respect to partisan offices is constitutional because the ballot and accompanying information concisely and clearly explain that a candidate's political-party 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. These instructions—along with voters' ability to understand campaign issues and the fact that the voters themselves approved the new election system through the initiative process—eliminate the possibility of widespread voter confusion and with it the threat to the First Amendment. The reasonable, well-informed electorate understands that the primary does not determine the nominees of the political parties but instead serves to winnow the number of candidates to a final list of two for the general election.

ER 114-15. The court also granted partial summary judgment in favor of the Democrats and Republicans on one issue—holding the State's method of electing PCOs unconstitutional. ER 109-14. The State does not appeal that ruling.

V. COUNTERSTATEMENT OF FACTS

A. Washington's Implementation Of The Top Two Primary

Washington's implementation of I-872 was guided by the decision of the United States Supreme Court. From the beginning, the political parties'

challenge to I-872 has been based upon the argument that the inclusion on the ballot of candidates' personal preferences for a political party will cause voters to believe that the candidate is endorsed, nominated, or approved by the party. The Supreme Court rejected this concern as a basis for a facial challenge to I-872, observing that "whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot." *Grange*, 552 U.S. at 455. The Court went on to discuss how a constitutionally valid ballot under I-872 might read:

> [W]e must, in fairness to the voters of the State of Washington who enacted I-872 and in deference to the executive and judicial officials who are charged with implementing it, ask whether the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment.

Id. at 456.

The Court explained how the State could implement I-872 to avoid as-applied constitutional issues:

> For example, petitioners propose that the actual I-872 ballot could include prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party. They also suggest that the ballots might note preference in the form of a candidate statement that emphasizes the candidate's personal determination rather than the party's acceptance of the candidate, such as "my party preference is the Republican Party." Additionally, the State could decide to educate the public about the new primary ballots through

> advertising or explanatory materials mailed to voters along with their ballots. *We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion.*

Grange, 552 U.S. at 456 (emphasis added) (footnote omitted).

The State took all of the steps suggested by the Supreme Court in implementing I-872. On the ballot itself, the State requires "prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party."[3] *Id.* The Secretary of State adopted an administrative rule requiring that every ballot that includes a partisan office must include a notice in bold print immediately before the first partisan office, explaining:

> 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.

Wash. Admin. Code § 434-230-015(4)(a). Washington's ballots accordingly contain this explanatory statement. SSER 204-29.

The candidates' statements of party preference emphasize that these are the candidates' personal preferences. Immediately below the name of each

[3] An example of an actual ballot, from the 2008 primary, is attached as Appendix B.

candidate for partisan office, the ballot clearly states that the candidate "Prefers ____ Party," or that he or she "States No Party Preference." Wash. Admin. Code § 434-230-045(4); SSER 204-29. The political parties attempt to describe the appearance of the candidate's party preference on the ballot as if it were a continuation of past practice, but this is not so. Using the phrase, "Prefers ___ Party" was a new feature adopted for the first time in implementing I-872. Wash. Admin. Code § 434-230-045(4) (enacted 2008); *see also* SSER 286-89.[4],[5]

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[4] The Democrats and Republicans offer an incomplete quotation from campaign material published when I-872 was pending and draw an unwarranted conclusion from it. They quote the Grange as explaining that candidates' "party designations will appear after the candidates' names . . . (just as they do now in the blanket primary)." Dem. Br. 10; Rep. Br. 8-9 (ellipses by the political parties). The language they omitted from the quote, indicated by ellipses, reads, ", and the voter will be able to vote for any candidate for that office". ER 127. In the original, the phrase "just as they do now in the blanket primary" therefore related to the voters' ability to vote for any candidate they choose, not, as the parties suggest, the way in which party designations would appear.

[5] The political parties argue that I-872 was intended to continue popular features of Washington's prior blanket primary system. The Supreme Court has already rejected the notion that such a motive could provide a basis for invalidating I-872. The Court explained:

> Respondents make much of the fact that the promoters of I-872 presented it to Washington voters as a way to preserve the primary system in place from 1935 to 2003. But our task is not to judge I-872 based on its promoters' assertions about its similarity, or lack thereof, to the unconstitutional primary; we must evaluate

The State has also provided additional explanatory materials. In Washington, virtually all ballots are cast by mail. The State requires that all primary ballots distributed by mail include a notice on a separate insert explaining:

> Washington has a new primary. You do not have to pick a party. In each race, you may vote for any candidate listed. The two candidates who receive the most votes in the August primary will advance to the November general election.
>
> 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.

Wash. Admin. Code § 434-250-040(1)(j). A similar insert is required for general election ballots:

> Washington has a new election system. In each race for partisan office, the two candidates who receive the most votes in the August primary advance to the November general election.
>
> 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.

> the constitutionality of I-872 on its own terms. Whether the language of I-872 was purposely drafted to survive a *Jones*-type constitutional challenge is irrelevant to whether it has successfully done so.

Grange, 552 U.S. at 447 n.3.

Wash. Admin. Code § 434-250-040(1)(k)(i). Examples of these inserts are included in the record. SSER 204-29. For those few remaining voters who continue to vote in person, the State has required that notices reading the same as these ballot inserts be posted or displayed at every polling place. Wash. Admin. Code § 434-253-025.

The State has also explained the Top Two primary in the Voters' Pamphlet, which is distributed to every residence in the state. Wash. Const. art. II, § 1(e). The State implemented the Top Two system for the first time in 2008, and included an extensive explanation of the new primary in the primary Voters' Pamphlet. The Secretary of State began by emblazing, directly on the cover of the Pamphlet where it was highly visible:

> Washington's New Top 2 Primary
>
> Washington has a new primary. You do not have to pick a party. In each race, you may vote for any candidate listed. The two candidates who receive the most votes in the August primary will advance to the November general election.
>
> 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.

SSER 238. The first page of the Voters' Pamphlet was a letter to the voters from Secretary of State Reed, explaining the new Top Two primary and including the explanation that:

> Our new voter-approved primary no longer nominates a finalist from each major party, but rather sends the two most popular candidates forward for each office. It's a winnowing election to narrow the field. Your candidates have listed the party they prefer, but that doesn't mean the party endorses or affiliates with them. Some candidates prefer major parties, some prefer minor parties and some express no party preference. All have a chance to advance to the November ballot.

SSER 239. An entire page of the Voters' Pamphlet was devoted to an explanation of the Top Two system. This included an explanation of the "party preference":

> 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.
>
> Candidates may choose not to state a political party preference.

SSER 240. Another explanatory page appeared later in the Voters' Pamphlet. SSER 241. The notice on its front cover was also repeated on the back cover. SSER 244.

The State mandated by rule that an explanation of the party preference appear in every edition of the Voters' Pamphlet. Wash. Admin. Code § 434-381-200. The State therefore continues to explain the significance of the party-preference designation and other aspects of the Top Two primary in each succeeding edition of the Voters' Pamphlet. *See, e.g.*, SSER 246-50.

The Secretary of State also produced press kits, explaining the new system to reporters. SSER 252-60. The Secretary posted, on its web site, responses to frequently asked question and otherwise explained the Top Two system. SSER 278-82.

Additionally, the Secretary accompanied the first implementation of I-872 with a widespread public education campaign. The Secretary contracted for television and radio public service announcements that explained the Top Two system in terms such as:

> This summer, Washington State residents will vote in a new top-two primary. Approved by voter initiative, the top-two primary means you have the freedom and choice to vote for the person rather than the party for congressional, statewide, legislative and many county offices. It's simple, you can choose any candidate on the ballot regardless of their party preference. No more confusing party ballots, just one ballot. A candidate's party preference doesn't mean the party endorses or approves of that candidate. The two candidates for each partisan office with the most votes go onto the general election in November.

SSER 262; *see also* SSER 264. These public service announcements were broadcast thousands of times on television and radio throughout Washington in the weeks leading up to the 2008 primary.[6] SSER 266-76.

Testimony of leaders of both the Democratic and Republican Parties illustrated the fact that reasonable, well-informed voters understood that a candidate's expression of a preference for a political party did not mean that the candidate was affiliated with the party. Officials of both major parties described as "confusion" incidents in which voters asked whether candidates who had expressed a preference for the party were the party's nominee. In other words, they described, as indicators of confusion, conversations in which the voter clearly understood that a candidate's "preference" does not mean that the party has affiliated with that candidate. *See, e.g.*, ER 315 (declaration of Luke Esser, describing conversations with voters questioning whether party

[6] The Republicans suggest that voters may have been misled by the way the Secretary of State described the Top Two primary when soliciting bids for a vendor to prepare the public service announcements. Rep. Br. 13-14. However, the Secretary's bid solicitation was not distributed to the general public as part of the public education campaign. The actual broadcast message properly educated the general public on the nature of the Top Two primary.

The Democrats additionally claim that the public-service announcements "emphasized the ability of candidates to force themselves on political parties under the new system." Dem. Br. 11. The record passage to which they cite for this claim says no such thing. ER 261-62.

preference means party approval of a candidate); SSER 64-65 (deposition testimony of Jackson Ravens, describing voters asking "who is the Democrat in this race?"); SSER 57 (deposition testimony of Dan Brady, recounting voters asking which candidate is the party nominee); SSER 60-61 (deposition testimony of Fredi Simpson, describing voters asking "do you recognize this person as a Republican?"). In contrast, while the Secretary of State receives numerous questions from voters every election, these questions do not reveal confusion that a candidate's statement of party preference means the party prefers the candidate. SSER 93-94. Such questions demonstrate that reasonable, well-informed voters understood the difference between a candidate's personal preference for a party and a candidate's affiliation with a party.

The district court summarized Washington's implementation:

> Washington's ballot contains a prominent, unambiguous, explicit statement that a candidate's party preference does not imply a nomination, endorsement, or association with the political party. The ballot repeatedly states that candidates merely "prefer" the designated parties. Ballot inserts and the Voters' Pamphlet further explain the new system. Washington employed a widespread education campaign via various media outlets to inform voters about the new system. And Washington voters themselves, not simply their elected representatives, approved I-872. These factors demonstrate to the Court that Washington's implementation of I-872 eliminates the possibility of widespread confusion among the reasonable, well-informed electorate.

ER 99-100.

B. The Political Parties' Assertions Of Fact

The political parties attempt to demonstrate confusion through newspaper articles and other media reports, and through some of the conclusions reached by an expert they retained. They also assert that certain statements of state officers, taken out of context, constitute or reflect confusion.[7] All three political parties ask the Court to assume that press stories describing candidates as "Democrats" or "Republicans" are evidence of confusion between candidates actually nominated or approved by the parties, and candidates who have merely expressed a party preference.[8] Rep. Br. 21-24; Dem. Br. 20-23; Lib. Br. 24. The political parties also cite examples of use of such phrases by elections officials to suggest that they, too, are confused. Dem. Br. 11-12; Rep. Br. 11-14; Lib. Br. 24-25.

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[7] The political parties also assert that the state's administration of its campaign finance statutes, which are not a part of I-872 and serve a different purpose, produces confusion about the relationship between candidates and the parties for which they state a preference. Rep. Br. 17-19. However, even if those statutes were relevant in evaluating the implementation of I-872, which they are not, the political parties offer no evidence that widespread confusion actually results from the statutes.

[8] Of course, many other articles described I-872 more completely. *See* SSER 67-90.

The political parties additionally offered expert testimony. They submitted a report by Dr. Mathew Manweller, a professor of political science at Central Washington University and chair of the local county Republican Party, purporting to show that some voters do not understand the difference between saying that a candidate "prefers" a party and that a candidate "is the nominee of" that party. SSER 111-45. Washington's retained expert, Dr. Todd Donovan, submitted two reports showing numerous problems with Dr. Manweller's methodology and concluding that the results of the Manweller report are unreliable. ER 1031-96. Dr. Donovan specifically concluded that Dr. Manweller's report was "flawed on several fundamental points," including its research design, sampling problems, sample bias compounded by flawed statistical analysis, and more. ER 1048-49. The district court found Dr. Manweller's study irrelevant, concluding that it did not show "that Washington's implementation of I-872 has created the possibility of widespread voter confusion among a reasonable, well-informed electorate." ER 106.

Finally, the district court rejected the political parties' argument that financial disclosure laws create the possibility for widespread confusion among reasonable, well-informed voters. ER 107-08.

VI. STANDARD OF REVIEW

The Court of Appeals reviews an order granting or denying summary judgment de novo. *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011). Summary judgment should be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 720 (9th Cir. 2005). The court reviews denial of a permanent injunction for an abuse of discretion, but reviews the underlying determination of a statute's constitutionality de novo. *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1208 n.7 (9th Cir. 2010). This Court reviews a denial of leave to amend a pleading for abuse of discretion. *In re Korean Airlines Co.*, 642 F.3d 685, 698 n.11 (9th Cir. 2011). A district court's decision to decline supplemental jurisdiction is reviewed for abuse of discretion. *Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005).

VII. SUMMARY OF ARGUMENT

In affirming the facial constitutionality of I-872, the Supreme Court specified a series of steps that Washington could take in implementing the measure that the Court concluded "would be consistent with the First Amendment." *Grange*, 552 U.S. at 457. Washington took each of those steps,

as recounted above. The political parties failed to provide any evidence proving their "factual assumptions about voter confusion," or proving that the State's efforts to educate Washington voters in the manner the Court found "would eliminate any real threat of voter confusion," in fact caused the opposite result. *Grange*, 552 U.S. at 456. The political parties failed to show that the State's implementation of I-872 caused widespread voter confusion such that a reasonable, well-informed electorate will interpret a candidate's personal party-preference designation to mean that the candidate is the party's chosen nominee or that the party endorses, associates with, or approves of the candidate.

The political parties' remaining claims also fail. The Republicans fail in contending that I-872 is invalid because it cannot be severed from Washington's system for electing PCOs. Severability does not apply because I-872 did not enact or amend any statutes governing PCO elections. The two laws are separate.

The trial court did not abuse its discretion in declining to exercise supplemental jurisdiction over a new state constitutional claim that did not relate to the State's implementation of I-872. The trial court also acted properly in rejecting the claims of the Libertarian Party that I-872

unconstitutionally denies the Libertarians reasonable access to the ballot, because I-872 grants all candidates unfettered access to a ballot through which they can compete for support of the full electorate. The trial court similarly acted properly in rejecting the Libertarians' contention that I-872's implementation infringes the Libertarian Party's trademark rights, because the State does not use any trademark in a commercial transaction so as to confuse consumers.

Finally, this Court should affirm the trial court's order that the political parties reimburse the State for attorney fees paid with regard to an earlier stage of this litigation because the political parties did not ultimately prevail at that stage. The political parties are not entitled to attorney fees for this appeal.

VIII. ARGUMENT

A. The Political Parties Failed To Demonstrate That The State's Implementation Of I-872 Caused Widespread Voter Confusion That Severely Burdens Them

1. Confusion Must Be Measured Against The Objective Standard Of The Reasonable, Well-Informed Electorate

The United States Supreme Court rejected the political parties' facial challenge to I-872 as "sheer speculation[,]" concluding, "[t]here is simply no basis to presume that a *well-informed electorate* will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen

nominee or representative or that the party associates with or approves of the candidate." *Grange*, 552 U.S. at 454 (emphasis added). Accordingly, as the Court indicated, the question of confusion must be judged against an objective standard, in light of a reasonable, "well-informed electorate." *Id.* at 454-58.

As Chief Justice Roberts' concurring opinion confirmed, the question is not whether any voter might be confused, but whether a "*reasonable voter* in Washington State will regard the listed candidates as members of, or otherwise associated with, the political parties the candidates claim to prefer." *Id.* at 461 (emphasis added). Stated differently, the political parties' allegations regarding voter confusion must be judged from the point of view of the reasonable, well-informed voter, not based on subjective impressions of individual voters. *See id.* at 462 (Roberts, C.J., concurring) (consideration of a challenge to the implementation of I-872 would depend on "what the ballot says" rather than upon subjective evidence or studies).

The appropriateness of an objective standard in as-applied challenges also is explicit in other recent Supreme Court decisions. For example, *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007), was an "as-applied" challenge to certain

portions of the federal laws regulating the sources of campaign contributions. As the lead opinion observes, "the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the communication's substance rather than on amorphous considerations of intent and effect." *Fed. Election Comm'n*, 551 U.S. at 469. The Court observed that a test based on "actual effects" would "typically lead to a burdensome, expert-driven inquiry, with an indeterminate result." *Id*.The same principle applies to this case. The existence of voter confusion is not—cannot be—a matter for unending court battles to determine election by election, or voter by voter, whether sufficient subjective "voter confusion" exists at a particular time to justify judicial intervention into the State's chosen process for electing its officers. Rather, the question must be simply whether the State's implementing actions viewed objectively would create real confusion in a reasonable, well-informed voter.

Notwithstanding the Supreme Court's guidance, the political parties criticize the district court for adopting a "reasonable voter" standard for analyzing the implementation of I-872, denigrating it as based on a "hypothetical reasonable, well-informed voter." *See, e.g.*, Dem. Br. 53. As an alternative, the political parties offer the model of the "hypothetical selectively ignorant voter" and base their arguments on the proposition that voters (1) do

not understand I-872, a law enacted by the voters themselves; (2) do not read or do not understand any explanatory statements on the ballot concerning the way the Top Two primary works; and (3) are oblivious to any efforts by the State or by the media to educate them about the election laws; but (4) permanently retain, in indelible form, the memory of the old "party nominating process" from past elections in Washington or in other states; and (5) though otherwise almost uneducable, are strongly affected by news stories casually associating various candidates for office with political parties. The "evidence" offered by the parties makes sense only if the Court first assumes that Washington voters are unreasonable and ill-informed, and assured to remain so.

2. The Political Parties Failed To Prove Widespread Confusion In The Reasonable, Well-Informed Voter As To Whether A Candidate's Statement Of Party Preference Means That The Party Has Nominated, Endorsed, Or Supported That Candidate

In 2008, the Court observed: "We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion." *Grange*, 552 U.S. at 456. The evidence adduced below demonstrated that Washington implemented I-872 by taking each of the steps set forth by the Supreme Court. *Grange*, 552 U.S. at 456. Washington

implemented I-872 by (1) including a prominent disclaimer on the ballot explaining the limited significance of the candidates' expressions of a personal preference for a political party; (2) denoting the candidates' personal preferences in a form that emphasizes that it is the candidate's preference for the party, and not the opposite; (3) additionally explaining the preference to the public through inserts that accompany their ballots; (4) further explaining the preference in the Voters' Pamphlet and the Secretary of State's web site; and (5) accompanying Washington's initial implementation of I-872 with a major media campaign to explain the Top Two primary. S*ee supra* pp. 10-16.

The political parties cannot, and do not, offer evidence that when the ballot (for example) explains that, "[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," (Wash. Admin. Code § 434-230-015(4)(a) (emphasis added)), the reasonable, well-informed voter would believe that the ballot actually means a candidate's preference *means* that the candidate is nominated or endorsed by the party, and that the party approves of and associates with that candidate. Such a voter would hardly be the reasonable, well-informed voter with whom the Supreme Court was concerned. *Grange*, 552 U.S. at 455-56. And as the Court concluded, "without the specter

of widespread voter confusion, [the political parties'] arguments about forced association and compelled speech fall flat." *Id.* at 456-57 (footnotes omitted).

Unable to produce any credible evidence that the implementation of I-872 has produced widespread confusion of the type envisioned by the Supreme Court, the political parties primarily seek to move the goal line from where the Court placed it. They ignore the requirement of *widespread* confusion and instead speak of the possibility of *some* confusion.

The Republican Party rehashes its facial challenge by repeating arguments that the Supreme Court found insufficient. The Republicans begin their argument with the statement that I-872 "forcibly associates the Republican Party with candidates who appropriate its identity for their own electoral advantage, or for political mischief." Rep. Br. 38 (citations to the record omitted). The Republicans continue to argue that the "forced association" they assert is of the same nature as the forced association discussed in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), although the Supreme Court explicitly distinguished those cases, noting that:

> In those cases, *actual* association threatened to distort the groups' intended message. We are aware of no case in which the mere

> *impression* of association was held to place a severe burden on a group's First Amendment right . . . .

Grange, 552 U.S. at 457 n.9. Furthermore, the theme of the Republican Party's argument is that this "severe burden" results from the basic structure of I-872 (permitting candidates to express a personal political party preference and to have that preference reflected on the ballot) rather than from the manner in which I-872 has been implemented. Thus, the clear import of the Republican Party's argument is not that the State created confusion through the use of ballot language or public education, but that the State failed at what was, the Party contends, an impossible task: to dispel the confusion caused by the statute itself. Rep. Br. 41-45. In other words, the Republican Party has re-warmed the facial challenge rejected in *Grange*.[9]

The Democratic Party tries to shift its burden of proof to the State. The mere fact that the political parties assert First Amendment rights does not shift the burden to the State. *See Doe v. Reed*, 130 S. Ct. 2811, 2818, 177 L. Ed. 2d 493 (2010) ("We allow States significant flexibility in implementing their own

[9] The Libertarian Party also seeks to re-litigate the facial challenge, offering arguments that read exactly as if the Supreme Court's decision had never occurred. Lib. Br. 13-19 (complaining not about how Washington implements I-872, but about the fact that the statute permits candidates to state a personal party preference on the ballot).

voting systems."). Taking a phrase from the majority opinion in *Grange* out of context and linking it to language derived from the concurring opinion, the Democratic Party mischaracterizes *Grange* as requiring the State to "eliminate the risk of voter confusion" and to eliminate "the possibility that voters would view candidates as associated with the political party printed after their name on ballots." Dem. Br. 39. Thus, the Democratic Party contends that the political parties should prevail here unless the State shows that all possibility of widespread voter confusion has been eliminated. But the Supreme Court described a series of steps that the State could take which, in the Court's judgment, would "be consistent with the First Amendment" (*Grange*, 552 U.S. at 457), and would objectively "eliminate any real threat of voter confusion." *Id.* at 456. This does not describe a burden on the State. Even if the State bore the burden, the State met that burden.

In fact, *Grange* makes it clear that (1) the burden of showing a severe burden on First Amendment rights remains firmly with the political parties; (2) the parties can prevail only by showing *widespread* voter confusion about the import of the candidate preference statements on the "Top Two" ballot; and (3) the parties' burden is to show that, as a result of I-872's implementation, *reasonable, well-informed voters* will believe that a candidate's expression of a

political party preference means that the candidate is the nominee or is a member of the party in question.

3. The Political Parties' Evidence Is Insufficient To Prove Confusion

The political parties ask the Court to infer confusion, based on a collection of loosely-written news articles, a careful selection of expert testimony lifted out of context, and a handful of anecdotes about party efforts to choose candidates who reach the general election ballot.

The political parties put forth hundreds of newspaper articles, suggesting that they are relevant because they use the words "Democrat" or "Republican" to describe a candidate for office. Such material does not demonstrate confusion on any subject, much less support the specific inference for which it is offered—the notion that voters believe, contrary to all explanation, that a candidate's expression of a personal preference for a political party means that the political party prefers the candidate. The district court dismissed such informal descriptions of candidates as "shorthand," noting that "some voters and news media speak loosely about the relationship between political parties, the candidates, and the election process." ER 103. The court concluded:

> Washington cannot control what the newspapers print, lest it run afoul of yet another provision of the First Amendment, freedom of the press. Nor can Washington be held responsible for the words

> used by private parties that might foster some negligible confusion. And to the extent that state officials have occasionally used similar loose language, those isolated incidents do not show the type of widespread voter confusion the Supreme Court contemplated in its review.

ER 103. The political parties also point to similar shorthand references by election officials as "evidence" that they, too, are confused. Yet, those election officials are the very same people who penned the explanatory material that appears on the ballot, on the ballot inserts, in the Voters' Pamphlet, and in other official sources.

Moreover, it is clear in most of the articles that the reporters are not associating a candidate with a party because of the candidate's party-preference statement, but based on other things they know about the candidate. The vast majority of the news reports concern candidates who are described as "Democrats" or "Republicans" because by any measure they are—that is, they have been active in the party, they have held or sought party office, they have publicly supported the party, or as elected officers they have publicly identified with the party. Describing a candidate as a "Republican" in no sense implies that the Republican Party endorses that candidate, and the political parties have no basis for drawing such a conclusion.

The Republicans also assert that Washington uses candidates' party-preference statements in order to determine how to fill vacancies in office. Rep. Br. 10-11. This is untrue. The Republicans cite, as an example, the Republican Party nominating candidates for appointment to a legislative vacancy when an incumbent legislator was appointed to a cabinet position. Rep. Br. 10-11. The Republicans imply—but neither their brief nor their cited authority actually state—that the candidate's statement of party preference was the reason why the party filled this role. In fact, the party's role in filling vacancies is determined by whether the party chose to nominate the candidate whose death or resignation created the vacancy, *not* the candidate's personal party preference on the ballot. *See* ER 184 (noting the particular legislator's two-generation pedigree as a Republican legislator); *see also* Wash. Const. art. II, § 15. This is consistent with the principle that a candidate does not become a party's nominee through the Top Two primary. *Grange*, 552 U.S. at 453.

The Republican Party also claims to base its arguments on "empirical evidence," but offers no objective evidence that reasonable, well-informed voters in general, or even any specific reasonable, well-informed voters, are confused as a result of the State's implementation of I-872. Rep. Br. 40-42. The Republican Party cites first the results of a focus group organized to test

ballot design, misleadingly asserting that the results show that an expression of party preference connotes some form of "affiliation" with a party. Rep. Br. 41. The focus group, however, did not test the explanation that actually appears on the ballot. ER 234-60. The Parties' own expert's testimony is selectively cited for the notion that "conjunction of candidate and party on the ballot means the candidate is the party's representative or otherwise associated with it."[10] Rep. Br. 42. Moreover, Dr. Manweller's study was conducted in isolation, before Washington had conducted its public education campaign or prepared its Voters' Pamphlet, and without using the actual ballots presented to voters. *See* ER 1056 (State's expert opining that had Dr. Manweller's study replicated the actual voting experience, "it would have produced results showing the disclaimer is associated with far fewer voter 'errors' and less confusion about the candidates' relationship with parties").

Even if the political parties' expert offered relevant analysis, the State's expert demonstrated that it was "flawed on several fundamental points."

[10] The political parties claim that the Manweller study proves voter confusion, but chose not to provide the full report to this Court. *See* ER 322-30 (excerpts from report). The reason is clear. The full report reveals Dr. Manweller's ideological bias. *See* SSER 114-17 (discussing the policy choices reflected in the voters' decision to enact I-872); SSER 117-22 (offering his own legal analysis).

ER 1048. These flaws include a problematic research design, the use of a highly biased sample of participants not representative of actual voters, flawed statistical analysis, problems with survey response rates, a lack of statistically-significant effects, mistaken measurement of voter "errors" caused by poor survey design and flawed question wording, the failure to validly measure voters' perceptions of official party nominees, and counting responses as errors that may have been correct in the context of the survey instrument.[11] ER 1048-49.

Finally, the political parties attempt to derive an inference of confusion from anecdotes about various candidates who did not advance to the general election ballot, despite being the relevant party's preferred candidate. Such instances indicate nothing about the voters' understanding of the candidate's expression of preference for a party; rather, they suggest something about the voters' preferences for candidates.

[11] The political parties attempted to rebut Dr. Donovan's report through a late-disclosed expert. ER 285-306 (Declaration of John M. Orbell). The State moved to strike the testimony of this witness, who was disclosed after the applicable deadline. SSER 38-39. The district court denied that motion as moot when it granted summary judgment in favor of the State on the merits. ER 93. The Orbell declaration is not properly before this Court.

4. The Political Parties Failed To Prove That Confusion Is Caused By The State's Implementation Of I-872

The political parties also bear the burden of proving the element of causation, that is, of showing that any voter confusion they can establish results from Washington's implementation of I-872. *Grange*, 552 U.S. at 455 (stressing the importance of the State's implementation of I-872). The political parties cannot prevail merely by showing that a certain level of confusion regarding election systems exists among the voters; this is a truism applicable to *any* electoral system. ER 1031-46. Rather, the political parties must show that the State's implementation of I-872 caused confusion specifically as to the meaning of a candidate's statement of personal preference for a political party.

Washington's expert, Dr. Donovan, established that "confusion about matters of politics is common and widespread regardless of the political phenomena being considered." ER 1034. Indeed, "confusion about political facts—particularly about matters related to political parties and political processes—is the norm among voters." ER 1031. Voter knowledge about parties and candidate partisanship is "particularly low." ER 1035. Accordingly, when considering any evidence of "confusion" among voters, it is important to keep in mind that only "confusion" that is *caused by* the State's implementation of I-872 is at all relevant. If all that were necessary for the

political parties to meet their burden was proof of some ambient level of confusion among voters, then no change to the electoral system would ever be possible.

The Democrats go virtually this far, arguing that the State's voters will be forever imprisoned in the "party nomination" mindset as a result of the fact that candidates have been associated with parties on the ballot since statehood. Dem. Br. 9-16. The implication of this discussion is that the State's task in implementing I-872 is to erase all memory of the "old" system, lest voters continue to "associate" candidates with parties under the Top Two primary. It is more logical, however, to conclude that voters who remember previous Washington election systems (the blanket primary from 1935 to 2003, the "Montana" primary from 2004 to 2007) will be struck by the differences between those systems and the ballot and the election system prevailing under I-872. In light of the State's vigorous efforts to educate the public about these differences, the Democratic Party's assertions that the State merely sought to continue the "old" system hold no water.

The political parties also claim that I-872 is unconstitutional because a separate statutory scheme governing campaign disclosure (which the political parties do not challenge) requires that candidates' party preferences appear on

certain campaign materials. Rep. Br. 17-19; Wash. Rev. Code § 42.17.510(1). I-872 did not alter any of the provisions of campaign disclosure laws, or affect their implementation. Campaign disclosure laws, in turn, have no bearing upon the form or language of the Top Two ballot. *See* ER 108 (district court's rejection of the political parties' argument).

The political parties also claim that Washington equates party affiliation and party preference, citing an administrative rule of the Public Disclosure Commission. Wash. Admin. Code § 390-05-274. That rule, however, merely explains how to comply with a pre-existing campaign disclosure statute in light of I-872. It does not suggest any reason to believe that voters would be confused by the candidate's party preference on the ballot.

The Democrats also rely upon a voting system guidelines publication of a federal advisory body for the generalized point that when seeking partisan office, "candidates run as representatives of a political party." Dem. Br. 15 (citing ER 201). The federal publication has no force of law and merely provides a general description without reference to Washington. The Democrats do not explain why it would be reasonable to assume that Washington voters read this obscure federal publication, but disregard the

abundance of Washington-specific educational materials put forth by the Secretary of State. SSER 195-264.

The political parties can only reasonably contend that the State has caused "confusion" if it resulted from steps the Secretary has taken to implement I-872. But those steps included explicitly telling the voters that "[a] candidate's preference [for a political party] does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate." Wash. Admin. Code § 434-230-015(4)(a). The State explains to the voters, in multiple forms and locations, the meaning of the candidates' party-preference statements. It is not reasonable to suggest that this explanation could somehow cause confusion that the opposite of the explanation is true.

5. The Political Parties Have Failed To Prove That They Are Severely Burdened

Showing that they have suffered a "severe burden" through the State's implementation of I-872 is critical to the political parties' case, because without it—even if they show some modest burden—they cannot invoke strict scrutiny. As the Supreme Court explained in the context of the facial challenge, if "I-872 does not severely burden [the political parties' rights], the State need not assert a compelling interest." *Grange*, 552 U.S. at 458 (citing

Clingman v. Beaver, 544 U.S. 581, 593, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005)). "When a state electoral provision places no heavy burden on associational rights, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Clingman v. Beaver*, 544 U.S. 581, 593, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997)). As the Court has already held in this case, absent the parties demonstrating a severe burden, "[t]he State's asserted interest in providing voters with relevant information about the candidates on the ballot is easily sufficient to sustain I-872." *Grange*, 552 U.S. at 458. In other words, without a severe burden, this case is resolved under the rational basis test, and under the rational basis test the Court has already concluded that the State's Top Two primary election system is valid. *Id.*

The evidence offered by each party falls short of proving a severe burden. The Democrats assert that I-872 "interferes with consolidation of the Democratic vote behind the Democratic nominee, hampering access to the general election ballot." Dem. Br. 27-32. The Democratic Party discusses three different elections, conducted under the Top Two system in 2010, in which the Democratic Party nominated a candidate before the primary, but the

nominated candidate came in third (or lower) in the primary and, thus, did not advance to the general election ballot. In each case, there was another candidate who stated a preference for the Democratic Party, and who came in first or second in the primary and, thus, who *did* advance to the general election ballot. The Democratic Party decries these situations as "hampering" the Party's efforts to secure the election of its chosen nominees. The Republicans similarly complain that sometimes the voters vote for different candidates than the ones the Republican Party wants them to vote for. Rep. Br. 23-24.

These examples do not show that the political parties have been harmed by forced association. As the district court noted, this argument "misses the point." ER 104. These examples simply show that the Top Two primary works as the Supreme Court thought it might and as Washington's voters intended in enacting I-872. In each case, the voters of the district in question advanced two candidates to the general election—the two candidates who gained the top two positions in the primary, regardless of party preference. The candidates were selected by the voters, not by the parties. The examples illustrate only that a political party has the same opportunity as any other group to promote a candidate and help that candidate qualify for the general election and, perhaps, get elected to office. Sometimes, as in the three examples given,

the Party falls short in its efforts. This is not a constitutional defect in the Top Two primary.[12] Furthermore, the examples given are focused, like the other arguments the parties make, on the nature of the Top Two primary itself, not on the way in which it was implemented.

Moreover, the fact that their chosen nominees do not always advance to the general election cannot constitute "harm" to the political parties, severe or otherwise. As the Court has already held, the fact that a party's nominees might not advance to the general election does not constitute a severe burden on the parties because "the I-872 primary does not, by its terms, choose parties' nominees." *Grange*, 552 U.S. at 453. If a nominated candidate fails to advance, the obvious reason is that the candidate in question failed to garner enough voter support to place first or second in the primary. *Munro v. Socialist Workers Party*, 479 U.S. 189, 199, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986) (associational rights are not severely burdened merely because activity must be channeled into a campaign at the primary rather than the general election). As *Grange* establishes, the Top Two primary leaves the parties with their full panoply of associational rights, which does not include a right to see their

[12] In making this argument, the Democratic Party strongly implies that it has some right to a place on the general election ballot. As discussed below in section C.3, no such right exists.

nominated candidate advance to the general election despite failing to win the voters' support. *Grange*, 552 U.S. at 453 ("Whether the parties nominate their own candidates outside the state-run primary is simply irrelevant."); *see also id.* at 453 n.7 (noting that it is "unexceptional" that the parties may no longer indicate their nominees on the ballot, because the First Amendment does not guarantee such a right).

The Libertarian Party's "freedom of association" claims echo the other two parties in suggesting that the Top Two primary creates a "forced association" between political parties and "candidates who are antithetical to their platform and ideals." Lib. Br. 13-26. The Libertarian Party provides no actual examples relating to I-872, asserting instead that "the record below documents many instances" of what the Party characterizes as "shenanigans" involving the party affiliation of candidates. Lib. Br. 13. Notably, this statement is followed by several pages of factual assertions without a single citation to the record. Lib. Br. 13-19. Moreover, none of the asserted facts address I-872, but are all related to other states. Lib. Br. 13-19.[13] The Libertarian Party also seeks to take statements by the State's expert or state

[13] The asserted facts appear to derive from proffered expert testimony to which the State objected below. SSER 25-26. The trial court did not rule on the objection in light of its summary judgment ruling. ER 115.

officials concerning "background" voter confusion—that is, that many voters do not understand exactly how any election works—and convert that into the much more specific "confusion" that would be relevant to this case. Lib. Br. 22-26. It is not the State's duty here to eliminate all background confusion, desirable as that would be.

B. The District Court Properly Rejected The Alternative Theories Advanced By The Political Parties

1. The District Court's Declaration That Washington's System For Electing Precinct Committee Officers Is Unconstitutional Does Not Invalidate I-872

The Republican Party surprisingly asserts that I-872 must be invalidated in its entirety because another set of statutes, not enacted as part of I-872 or related to its implementation, was held unconstitutional by the trial court. The assertion is based upon the notion that two statutes enacted at different times and for different purposes may be found "not severable" from one another and, thus, must both fail if either is unconstitutional.

The Republicans' argument fails, for three reasons. First, the Republicans abandoned this theory on summary judgment below, and the theory is not preserved for appeal. Second, even if the matter were properly before this Court, Washington's laws governing precinct committee officer (PCO) elections are not part of I-872 and, therefore, no question arises as to

whether I-872 can be severed from them. Third, Washington law is clear that "[o]rdinarily, only the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact." *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 67, 109 P.3d 405 (2005). Since it cannot plausibly be maintained that Washington voters would not have enacted I-872 in the absence of the challenged procedures governing PCO elections, the Republicans could not prevail even if the issue of severability arose.[14]

"It is a general rule that a party cannot revisit theories that it raises but abandons at summary judgment." *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009). The Republicans abandoned any argument that I-872 should be invalidated because of an allegedly unconstitutional manner of conducting PCO elections. The Republicans did not raise this issue in their motion for partial summary judgment, focusing instead on a request that the district court rewrite state law to call for conducting PCO elections in a different way. SSER 184-193. In response to the Republicans' motion, the

[14] Neither the Democrats nor the Libertarians join the Republicans in this argument. The Democrats request relief that is inconsistent with the Republicans' argument that I-872 should be invalidated in its entirety. Dem. Br. 58-59 (requesting relief limited to printing "no party preference" or "independent" after the names of candidates unless the party consents to the appearance of the party name).

State pointed out that the Republicans had abandoned this argument. SSER 176-77. The Republicans implicitly acknowledged this when they failed to assert anything to the contrary either in their reply or in their response to the State's motion for summary judgment. SSER 41-49, 150-73. "A party abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case." *Ramirez*, 560 F.3d at 1026. The Republicans chose to abandon on summary judgment the argument that they now offer, and consequently, the issue is not properly presented on appeal.

Even if the Republicans had not abandoned the issue, their argument would be untenable. The question of whether one invalid statute can be severed from other valid statutes arises only if all of the statutes involved are part of the same legislative act. *See In re Parentage of C.A.M.A.*, 154 Wash. 2d at 67 (describing severability in terms of the connection between different portions of the same act). The question of severability arises "whenever part of an act under attack is sought to be defended despite the invalidity of some feature of the enactment." Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 44:2 (7th Ed. 2009).

The question of whether laws governing PCO elections can or cannot be severed from I-872 simply does not arise, because I-872 did not enact or amend any laws governing PCO elections. Only a few statutes touch upon the election of PCOs, and none of them were enacted or amended through I-872.[15] Similarly, nothing in I-872 addresses PCO elections.

The Republicans respond to this point by stressing that the district court concluded that the "implementation of I-872 *affected* PCO elections." ER 109 n.12 (emphasis added). It is true that Top Two primaries and PCO elections are conducted on the same day. But this does not mean that the statutes governing PCO elections are actually a part of I-872. Since they are not, the question of severability would not arise in this case, even if the Republicans had not abandoned it below.

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[15] One of those statutes simply directs that PCO elections occur at the same time as the state primary. Wash. Rev. Code § 29A.04.311. That statute was originally enacted in 2004, prior to the enactment of I-872, and was later amended in 2006. 2004 Wash. Sess. Laws page no. 1204 (Reg. Sess., ch. 271, § 105); 2006 Wash. Sess. Laws page no. 1656 (Reg. Sess., ch. 344, § 1). Neither act was part of I-872. *See* 2005 Wash. Sess. Laws page nos. 9-14 (Reg. Sess., ch. 2, session law compilation of I-872). The statute specifically governing PCO elections, which requires that they be conducted in conjunction with the state primary in even-numbered years, was similarly enacted in 2004, before I-872 was submitted to the voters. Wash. Rev. Code § 29A.80.051 (enacted by 2004 Wash. Sess. Laws page no. 1220 (Reg. Sess., ch. 271, § 149)). This statute was not amended by I-872, nor has it been amended since I-872 was adopted.

Finally, even if severability were at issue, it would not apply to invalidate I-872. Severability is governed by state law. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1044 (9th Cir. 2009). Under Washington law, an unconstitutional provision of an act can be severed unless "its connection to the remaining, constitutionally sound provision is so strong 'that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.'" *In re Parentage of C.A.M.A.*, 154 Wash. 2d at 67 (quoting *Guard v. Jackson*, 83 Wash. App. 325, 333, 921 P.2d 544 (1996)). The Republicans cannot plausibly contend that Washington's voters would not have enacted I-872 in the absence of laws providing for PCO elections. This is precisely what Washington's voters actually did. They enacted I-872 without enacting or amending any laws governing PCO elections.[16]

[16] The only reference to PCOs in I-872 occurs in section 9, which amends the statute governing declarations of candidacy and carries forward, without change, pre-existing language requiring a separate declaration of candidacy form for PCOs. I-872, § 9 (amending Wash. Rev. Code § 29A.24.030). Section 9 of I-872 made other amendments regarding the declaration of candidacy. Because the Washington Constitution requires that any legislation amending an existing statute set forth that statute in full (Wash. Const. art. 2, § 37), it was necessary for the initiative to set forth the reference to PCO elections even though the PCO provision was not amended.

The Republicans stress that in 2005, the district court concluded that the party preference element could not be severed from the remainder of I-872. They characterize this as "law of the case," dictating the resolution of this decidedly different issue. Rep. Br. 53-54 (citing *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907, 929-31 (W.D. Wash. 2005)). But the earlier holding bore no relationship to the Republicans' present argument. *Washington State Republican Party v. Washington*, 460 F.3d 1108, 1123-24 (9th Cir. 2006) (affirming the district court's conclusion that party preferences language was not severable from the remainder of I-872).

It strains credulity to suggest that Washington's voters would choose to discard the entire Top Two primary if it did not include PCO elections. PCOs are not public officials at all, but merely the grass roots level of political party organizations. *See* Wash. Rev. Code § 29A.80.020, 030. Since they are not public officials, the system for electing them is not a fundamental matter of public concern. The Top Two primary, in contrast, is the people's choice of the manner in which to narrow the field of candidates for everything from members of Congress and the governor to state legislators and county officials. To suggest that Washington's entire Top Two primary should be set aside on the PCOs' account is untenable.

2. The District Court Properly Declined The Political Parties' Proposal To Add An Unrelated Claim Based On Provisions Of The Washington Constitution

The political parties also contend that the district court should have allowed the Republicans and the Democrats to amend their complaint "to add novel challenges to I-872's enactment based on article II, section 37 of the Washington constitution." ER 77. This Court reviews "the denial of leave to amend a complaint for abuse of discretion." *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). Similarly, this Court also reviews the district court's decision as to whether to exercise supplemental jurisdiction over a state law claim for abuse of discretion. *O'Connor v. Nevada*, 27 F.3d 357, 362 (9th Cir. 1994). The district court did not abuse its discretion.

The district court denied the political parties' request to assert a new claim premised on the state constitution for three reasons. First, the court noted that neither party plaintiff had provided any reasonable justification for not bringing this claim in their initial complaints. ER 78-79. As this Court has noted, "a district court does not abuse its discretion in denying a motion to amend a complaint . . . when the movant presented no new facts but only new theories and provided no satisfactory explanation for his failure to fully develop his contentions originally." *William O. Gilley Enters., Inc. v. Atlantic*

Richfield Co., 588 F.3d 659, 669 n.8 (9th Cir. 2009) (quoting *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) (alterations in original).

Second, the district court reasoned, "even if the parties had a reasonable justification for failing to raise this claim at the outset, the Court would decline to exercise supplemental jurisdiction." ER 79. The political parties' argument that the enactment of I-872 conflicted with article II, section 37, of the Washington Constitution lacked a "common nucleus of operative fact" with the federal claims, because the political parties' federal claims challenged the manner in which the State implemented I-872, and not the manner in which I-872 was enacted. ER 79 (citing *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004)).

Third, "the Court may decline to exercise supplemental jurisdiction over a related claim that 'raises novel or complex issues of State law'" or "substantially predominates over the [federal] claim[s]." ER 80 (citing 28 U.S.C. § 1367(c)(1)-(2)). Federal courts should avoid unnecessarily deciding issues of state law, and should defer such matters to state court, both in the interest of comity and in the interest of justice between the parties. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) ("Needless decisions of state law should be avoided both as a

matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."). "The applicability of article II, section 37 to I-872's enactment undoubtedly raises novel and complex issues of state constitutional law best decided by the state courts." ER 80 (citing *O'Connor*, 27 F.2d at 363).[17] Thus, allegations concerning violations of state law should be litigated, if at all, in the state courts.

3. I-872, As Implemented, Does Not Impair The Constitutional Ballot Access Rights Of Any Of The Appellant Political Parties

The Libertarian Party adds two additional arguments, in which neither the Democrats nor the Republicans join. In the first of those arguments, the Libertarians contend that, even though I-872 permits the Libertarian Party

[17] The Republicans contend that the state law issue is not "novel or complex," citing a century-old decision of this Court. Rep. Br. 56 (citing *Mills v. Smith*, 177 F. 652 (9th Cir. 1910)). The Republicans fail to note that in that case this Court resolved the state law question contrary to the position they now assert. *Mills v. Smith*, 177 F. 652, 656 (9th Cir. 1910) (holding that article II, section 37 of the Washington Constitution "means only that a prior statute shall not be amended by adding to or striking out certain words or by omitting certain language and inserting certain other words in lieu thereof"). That the Republicans rely upon later Washington cases adding additional gloss to the state courts' construction of the state constitution merely demonstrates the novel and complex character of relevant state law. Moreover, "[i]t is hard to imagine issues that are more within the province of the state courts than issues requiring interpretation of the state's own constitution." *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 846 n.1 (D. Wyo. 1994).

unfettered access to field candidates who appear on a ballot presented to *all* Washington voters, they are denied reasonable ballot access. Lib. Br. 26-41. The district court dismissed this claim shortly after remand following the decision of the Supreme Court and, accordingly, the matter had already been resolved before summary judgment.[18] ER 67-71.

The Libertarians baldly assert that I-872 denied them "any opportunity for ballot access to the partisan primary or general election ballot." Lib. Br. 12. This is untrue because under I-872, there is virtually no restriction on a candidate's access to the primary ballot. To qualify for the ballot, a candidate need only timely file a declaration of candidacy, along with a filing fee equal to one percent of the annual salary for the office. Wash. Rev. Code § 29A.24.030 (declaration of candidacy requirement); Wash. Rev. Code § 29A.24.091 (filing fee). Initiative 872 imposes no signature requirement for access to the ballot, except that candidates who cannot pay the filing fee may substitute petition signatures in lieu of the filing fee. Wash. Rev. Code § 29A.24.091.

[18] The Libertarians argue that the trial court erred in failing to consider expert testimony on this subject, but in fact they did not submit any until over a year after the district court dismissed their ballot access claims on the law. ER 67-71 (dismissing all ballot access claims); Lib. Br. 31.

I-872 draws no distinctions between candidates based on which political party the candidate prefers. The top two candidates advance to the general election, without distinction based on political party. Wash. Rev. Code § 29A.56.112. If candidates preferred by the Libertarian Party fail to advance to the general election, it is not because of some restriction imposed by I-872, but because they do not have sufficient support among the voters to become one of the top two vote-getters.

The Libertarians claim that under I-872, "the Libertarian Party was denied the right to nominate candidates for Governor, Senator, or any other office." Lib. Br. 34 n.14. This is untrue because, as the Supreme Court explained, under I-872 "parties may now nominate candidates by whatever mechanism they choose because I-872 repealed Washington's prior regulations governing party nominations." *Grange*, 552 U.S. at 453.

In short, the Libertarians can nominate any candidate for any office, assist the candidate in filing and campaigning, and support that candidate in the Top Two primary. Once on the ballot, all candidates compete for support among the entire pool of registered voters. Wash. Rev. Code § 29A.56.106. The two candidates who receive the most votes then advance to the general election. Wash. Rev. Code § 29A.56.112. If the Libertarian Party's nominated

candidate does not advance to the general election, the Party can support either or neither of the top two candidates in the general election.

As the district court noted, the Libertarians' argument is based on cases in which "the general election was a minor party's only opportunity to reach the statewide electorate by ballot." ER 68 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 199, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986)). The Libertarians compare the Top Two system, under which all candidates compete among all the voters at the primary simply by filing for office, with systems in which the only way candidates could appear on the ballot at all was by gathering signatures to proceed directly to the general election. Lib. Br. 29-35. The district court correctly rejected this comparison, because "[t]he Supreme Court has long made clear that there is a 'significant difference' between a scheme like that and one, like Washington's, that 'virtually guarantees' minor parties access to a statewide primary ballot." ER 68 (quoting *Munro*, 479 U.S. at 199). Under I-872, all candidates—including those the Libertarians may nominate through any mechanism they choose—are given equal access to compete among all voters. As the Supreme Court has held, it can hardly be said that the Libertarians are in any way denied their right to ballot access "because they must channel their expressive activity into a campaign at the

primary as opposed to the general election." *Munro v. Socialist Workers Party*, 479 U.S. 189, 199, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986).

The Libertarians go so far as to assert that the Constitution grants them a "guarantee of access to general election ballot." Lib. Br. 33. Washington law, of course, draws no distinction between Libertarian nominees and any other candidates. Wash. Rev. Code § 29A.56.112 (top two vote-getters at primary advance to general election). The Libertarians' argument, unsupported by any authority, amounts to an assertion that *all* candidates have a right to advance to the general election, whether they come in first, second, third, or last at the primary. The Supreme Court has explained, however, that "it is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). Political parties do not have an absolute right for their chosen candidates to appear on the ballot. *Id.* at 359. "The primary election in Washington . . . is 'an integral part of the entire election process . . . [that] functions to winnow out and finally reject all but the chosen candidates.'" *Munro*, 479 U.S. at 196 (quoting *Storer v. Brown*, 415 U.S. 724, 735, 94 S. Ct. 1274, 39 L. Ed 2d 714 (1974)). The very purpose of the Top

Two primary is "to winnow the number of candidates to a final list of two for the general election." *Grange*, 552 U.S. at 453 (internal quotation marks omitted). Party nominations are irrelevant to determining which candidates advance. *Id.*

The Libertarians complain that "timing is everything," and that their interests are harmed because candidates who prefer the Libertarian Party appear on the primary ballot in August and only advance to the general election if they are among the top two candidates. Lib. Br. 32. The Supreme Court has already rejected this notion, concluding that "Washington has created no impediment to voting at the primary elections; every supporter of the Party in the State is free to cast his or her ballot for the Party's candidates." *Munro*, 479 U.S. at 198. The Libertarians contend that their rights are violated because voter interest in the election increases as the general election approaches, but the Supreme Court has rejected this notion as well. "We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election." *Id.*[19]

[19] The Libertarians also claim that their rights are violated based upon an allegation that it denies them an opportunity to advance to major party status. This is untrue, because Washington's statutory definition of a major party

4. The District Court Properly Rejected Claims Based On The Law Of Trademark

On remand, all three political parties sought leave to amend their complaints to allege that I-872 infringes their trademark rights by permitting candidates to state the name of the political party they personally prefer (if any) on the ballot. ER 71-72. The district court began its analysis by noting that none of the three political parties included any claim for trademark violations in their original complaints. ER 72. The court then addressed the merits of such a claim, concluding that "even if Plaintiffs had raised trademark claims at

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draws no distinction between the Libertarians and any other party. Wash. Rev. Code § 29A.04.086. The thrust of the Libertarians' argument on this point appears to be their unsupported assertion that only members of a major political party may maintain a "caucus political committee." Lib. Br. 36. State law defines a caucus political committee as "a political committee organized and maintained by the members of a major political party in the state senate or state house of representatives." Wash. Rev. Code § 42.17.020(10). However, given that there are no members of either the state House of Representatives or the state Senate who are affiliated with the Libertarian Party, the Libertarians lack standing to assert this claim. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442, 179 L. Ed. 2d 523 (2011) (standing requires a showing of an "injury in fact" as distinct from a "conjectural" or "hypothetical" showing). Similarly, the Libertarians did not preserve this argument in the trial court and it is, therefore, not properly presented here. *See Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) (this Court will not consider issues for the first time on appeal, and will not reframe an appeal to decide what would in effect be a different case than the one decided by the district court). If, at some future date, one or more Libertarians were elected to the legislature, and if those elected members were denied the right to form a caucus political committee, a ripe controversy might be presented, but none is presented here.

the start of this case, the Court would dismiss those claims as being without merit." ER 72. Neither the Democrats nor the Republicans appeal that ruling; only the Libertarians continue to assert a challenge to I-872 based on alleged trademark infringement.[20]

"The Supreme Court has made it clear that trademark 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). Thus, as a threshold issue, trademark law is inapplicable here because it is designed to protect the owners of a mark against improper *commercial* uses in the context of the sale, distribution, or advertising of *goods or services*. *Bosley*, 403 F.3d at 677 (if the use of a trademark is not "in

[20] The Libertarians seem to contend that the trial court was compelled to permit them to amend their pleadings on remand, either due to a "reservation" of the issue by the Supreme Court or an instruction by this Court. Lib. Br. 42. The Supreme Court did not instruct that trademark issues should be considered in this case, but merely noted that they were not properly presented to the Supreme Court. *Grange*, 552 U.S. at 458 n.11. Similarly, this Court remanded this case to the district court only with the instruction to permit the parties to further develop the record with regard to trademark claims "to the extent these claims have not been waived or disposed of by the Supreme Court." *Washington State Republican Party*, 545 F.3d at 1126. The Libertarians omitted this phrase when quoting this Court's instruction on remand. Lib. Br. 42.

connection with the sale of goods or services" then it does not occur "in commerce" for purposes of the Lanham Act); ER 72 ("15 U.S.C. § 1125(a) (limiting trademark confusion and misrepresentation actions to 'uses in commerce' 'in connection with any goods or services or any container for goods'); 15 U.S.C. § 1125(c)(3)(C) (specifically excluding 'noncommercial use[s] of a mark' from trademark dilution actions); and Wash. Rev. Code § 19.77.140, .160 (providing similar limitations under state law)") (citing order dated Aug. 20, 2009, at page 16). The district court correctly held that the inclusion on the ballot or in the Voters' Pamphlet of a candidate's expression of personal preference for a political party is "not covered under federal or state trademark law." ER 72.

The Libertarians rely heavily upon a Second Circuit decision extending trademark protection to political groups. *United We Stand America, Inc. v. United We Stand America New York*, 128 F.3d 86 (2d Cir. 1997). That court concluded merely that trademark law applied to political groups engaged in providing competing "services" within the meaning of the Lanham Act. *Id.* at 89-90. The case thus resolved a dispute between two political groups that were both using the same mark in direct competition with each other. *Id.*; *see also Tax Cap Comm. v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D.

Fla. 1996) (concluding that political activity of soliciting petition signatures is not a service rendered in commerce).

In contrast, the State does not compete with the Libertarian Party when it permits candidates to express a preference for the Libertarian Party. The State does not engage in political organizing, soliciting funds, or endorse candidates. The State simply conducts elections, which is not a service in commerce under the Lanham Act.

It is also not trademark infringement for a candidate to state that he or she prefers the Libertarian Party. The candidate simply states that name as a way of providing some information about himself or herself to the voters. Trademark law is not implicated by the State's decision to include that personal preference information on the ballot for certain public offices. The purpose is to provide voters with information, not to compete with a political party. *See Grange*, 552 U.S. at 461 (Roberts, C.J., concurring) (under a ballot designed like the one now at issue in this case, "voters would not regard the listed candidates as 'party' candidates, any more than someone saying 'I like Campbell's soup' would be understood to be associated with Campbell's").

Thus, even if this Court were to extend trademark principles to the non-commercial, non-services context at issue here, the Libertarians' claim of

trademark violation would fail because allowing candidates to state the name of the political party they personally prefer (if any) is not for the purpose of confusing voters. Without confusion there can be no trademark claim, under either federal or state law. *Bosley*, 403 F.3d at 676; *Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 62 Wash. 2d 28, 381 P.2d 130 (1963) ("The underlying concept [of trademark infringement] is that of unfair competition in matters in which the public generally may be deceived or misled."). Given the Supreme Court's treatment of voter confusion, there is no basis for any claim of trademark infringement.

C. The District Court Correctly Ordered The Political Parties To Refund Attorney Fees To Which They Were Not Entitled

The district court correctly concluded that the political parties are not entitled to retain attorneys' fees they were awarded based upon earlier proceedings before this Court on which they did not ultimately prevail. ER 80-83. Awards of attorney fees in § 1983 actions are predicated upon the party to whom fees are awarded qualifying as a "prevailing party." 42 U.S.C. § 1988. The reversal of a decision on the merits "removes the underpinnings of the fee award." *California Med. Ass'n v. Shalala*, 207 F.3d 575, 577-78 (9th Cir. 2000). The Supreme Court reversed the decision of this Court upon which the

political parties' fee award was predicated and, accordingly, the State is entitled to a refund of the fees it previously paid.

On the same day this Court issued its first opinion in this case, it also issued a separate order concluding that the State was liable for attorney fees pursuant to 42 U.S.C. § 1988. SSER 301-04. This Court having entered an order declaring the State *liable* for attorney fees, only the determination of the *amount* remained. The State and the political parties stipulated as to the amount of attorney fees, but liability for fees was not at that time at issue. SSER 306-08.

On remand, the district court correctly concluded that "the stipulation between the State and the political parties extended only to the 'amounts' owed to each party." ER 83. "Because the Supreme Court reversed the Ninth Circuit on the merits and the appellate panel subsequently vacated its prior order finding the State liable for fees and costs, the State is entitled to be reimbursed those funds." ER 83.

The political parties contend that the stipulation setting the *amount* of the attorney fees precluded relief after the basis for the State's *liability* for fees was removed. The underpinnings of the State's liability were removed by a reversal of the underlying decision. When the State and the political parties

agreed to the amount of fees, the only point open to negotiation between the parties at the time they stipulated was the dollar amount to be paid. *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 502, 115 P.3d 262 (2005) (under Washington law, the "intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument's execution").

The parties stated directly in the stipulation that "[n]o waiver is intended of any claims for further proceedings in the appeal or in any other aspect of the case (including district court proceedings)." SSER 307. The parties to the stipulation thus held open the possibility that any award of fees and costs might be modified based upon "further proceedings." The trial court correctly concluded that this language must be viewed within the context in which the litigants agreed to it. *See Hearst,* 115 P.3d at 267. Placing the stipulation into the context of this Court's order finding the State liable for fees, the district court concluded that "the reasonable interpretation of the contract's text is that the parties were stipulating to the specific 'amounts' the State owed each party, not to the State's overall liability for attorneys' fees." ER 82. "The parties' explicit statement that 'no waiver [was] intended of any claims for further proceedings' plainly reserved the State's right to bring any claims in further

proceedings that it could otherwise bring, including a claim that it was entitled to reimbursement of attorneys' fees because the Ninth Circuit's decision had been reversed on the merits." ER 82-83 (citing *California Med. Ass'n*, 207 F.3d at 577-78).

Dismissing the written stipulation's express disclaimer of a waiver, the political parties instead cite e-mail messages among counsel, from which they ask this Court to draw the conclusion that the stipulation means something other than what it says. But the terms of the stipulation are those set forth in the stipulation, not in preliminary e-mail discussions. "Under the parol evidence rule, 'prior or contemporaneous negotiations and agreements are said to merge into the final, written contract,'[21] and evidence is not admissible to add to, modify, or contradict the terms of the integrated agreement."[22] *Lopez v. Reynoso*, 129 Wash. App. 165, 170, 118 P.3d 398 (2005). Washington courts do not rely on unilateral intentions not expressed in the agreement. *Pierce Cnty. v. State*, 144 Wash. App. 783, 813, 185 P.3d 594 (2008). The parties agreed that in stipulating to the amount of the fees they did not waive claims

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[21] Quoting *Emrich v. Connell*, 105 Wash. 2d 551, 556, 716 P.2d 863 (1986).

[22] Citing *DePhillips v. Zolt Constr. Co.*, 136 Wash. 2d 26, 32, 959 P.2d 1104 (1998).

based on further proceedings *in the appeal or any other aspect of the case*, such as reversal by the Supreme Court. This is established by the language of the stipulation itself, into which the prior negotiations merged under Washington law. *Lopez*, 129 Wash. App. at 170.

The political parties now contend that the settlement of the *amount* of the fees must have been intended to resolve *liability* for them as well, because the State gained a financial benefit by negotiating a "discount" compared to the political parties' initial demands. Lib. Br. 49; Rep. Br. 57. This argument ignores the fact that, as the district court recognized, *both* sides faced litigation risk over the dollar amount. ER 83 n.9. Obviously, the State faced the risk that this Court might award a higher dollar amount; but the political parties equally faced the risk that this Court might award them a lower amount. This is all that the stipulation resolved.

If the political parties had intended, as they now contend, that a stipulation establishing the *amount* of the fees was also to settle *liability* for them, the stipulation naturally should have been drafted to say so. *Hearst*, 154 Wash. 2d at 504 (Washington courts "do not interpret what was intended to be written but what was written"). Instead of drafting the stipulation to resolve liability as well as agree to amounts, the stipulation avoided waiver "of any

claims for further proceedings in the appeal or in any other aspect of the case." SSER 307.

D. The Political Parties' Request For Attorney Fees Should Be Denied

The political parties all seek an award of attorney fees for this appeal, pursuant to 42 U.S.C. § 1988. This request should be denied because, for the reasons set forth above, the political parties should not prevail upon any of their arguments. Moreover, even if the political parties prevail upon any issue, special circumstances in this action would render an award of attorney fees unjust. *Thorsted v. Munro*, 75 F.3d 454, 456 (9th Cir. 1996).

"Our legal system generally requires each party to bear his own litigation expenses, including attorney's fees, regardless whether he wins or loses. Indeed, this principle is so firmly entrenched that it is known as the 'American Rule.'" *Fox v. Vice*, 131 S. Ct. 2205, 2213, 180 L. Ed. 2d 45 (2011). Congress has provided an exception for certain civil rights actions, but only if the party seeking fees prevails. 42 U.S.C. § 1988. Even then, however, the court may exercise its discretion to deny fees where "special circumstances would render such an award unjust." *Thorsted*, 75 F.3d at 456. Such special circumstances exist when, as in this case, the legislation at issue was enacted by initiative, and so a fee award serves no deterrent purpose in controlling actions of state

officials, and state officials have acted in good faith to defend a challenge against novel constitutional claims. *See Thorsted v. Gregoire*, 841 F. Supp. 1068, 1084 (W.D. Wash. 1994), *aff'd sub. nom. Thorsted v. Munro*, 75 F.3d 454 (9th Cir. 1996). The United States Supreme Court having upheld the constitutionality of I-872 from a facial challenge, the State could have pursued no other course of action than to implement it and to defend it from continued challenge. *See id.* at 1084 ("Even if a stipulation of unconstitutionality had been entered (a most unlikely event), the court would have rejected it.").

IX. CONCLUSION

For these reasons, this Court should affirm the district court in all respects.

RESPECTFULLY SUBMITTED this 11th day of August 2011.

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APPENDIX A

INITIATIVE 872

I, Sam Reed, Secretary of State of the State of Washington and custodian of its seal, hereby certify that, according to the records on file in my office, the attached copy of Initiative Measure No. 872 to the People is a true and correct copy as it was received by this office.

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

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

TITLE

NEW SECTION. **Sec. 1.** This act may be known and cited as the People's Choice Initiative of 2004.

LEGISLATIVE INTENT: PROTECTING VOTERS' RIGHTS AND CHOICE

NEW SECTION. **Sec. 2.** The Washington Constitution and laws protect each voter's right to vote for any candidate for any office. The Washington State Supreme Court has upheld the blanket primary as protecting compelling state interests "allowing each voter to keep

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party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary." *Heavey v. Chapman*, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980). The Ninth Circuit Court of Appeals has threatened this system through a decision, that, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington.

WASHINGTON VOTERS' RIGHTS

NEW SECTION. **Sec. 3.** 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.

DEFINITIONS

NEW SECTION. **Sec. 4.** A new section is added to chapter 29A.04 RCW to read as follows:

"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.

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Sec. 5. RCW 29A.04.127 and 2003 c 111 s 122 are each amended to read as follows:

"Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) winnowing candidates ((~~to~~)) for public office ((~~at the polls~~)) 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.

Sec. 6. RCW 29A.36.170 and 2003 c 111 s 917 are each amended to read as follows:

(1) ((~~Except as provided in RCW 29A.36.180 and in subsection (2) of this section, on the ballot at the general election for a nonpartisan~~)) 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((~~s~~)) of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes ((~~for that office shall appear under the title of that office, and the names shall appear in that order. If a primary was conducted,~~)) 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 ((~~any other nonpartisan~~)) an office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW 29A.36.130.

(2) ((~~On the ballot at the general election~~)) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed ((~~under the title of the office~~)) for that position on the ballot at the general election.

NEW SECTION. **Sec. 7.** A new section is added to chapter 29A.52 RCW to read as follows:

(1) A primary is a first stage in the public process by which voters elect candidates to public office.

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(2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies as provided in RCW 29A.36.170.

(3) For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots by appropriate abbreviation as set forth in rules of the secretary of state. A candidate may express no party or independent preference. Any party or independent preferences are shown for the information of voters only and may in no way limit the options available to voters.

CONFORMING AMENDMENTS

Sec. 8. RCW 29A.04.310 and 2003 c 111 s 143 are each amended to read as follows:

((~~Nominating~~)) Primaries for general elections to be held in November must be held on:

(1) The third Tuesday of the preceding September; or ((~~on~~))

(2) The seventh Tuesday immediately preceding ((~~such~~)) that general election, whichever occurs first.

Sec. 9. RCW 29A.24.030 and 2003 c 111 s 603 are each amended to read as follows:

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:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) For partisan offices only, a place for the candidate to indicate ((~~a~~)) his or her major or minor party ((~~designation, if applicable~~)) preference, or independent status;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under RCW 29A.24.090;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in RCW 29A.24.090.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

Sec. 10. RCW 29A.24.210 and 2003 c 111 s 621 are each amended to read as follows:

Filings for a partisan elective office shall be opened for a period of three normal business days whenever, on or after the first day of the regular filing period and before the sixth Tuesday prior to ((~~a primary~~)) an election, a vacancy occurs in that office, leaving an unexpired term to be filled by an election for which filings have not been held.

Any ((~~such~~)) special three-day filing period shall be fixed by the election officer with whom declarations of candidacy for that office are filed. The election officer shall give notice of the special three-day filing period by notifying the press, radio, and television in the county or counties involved, and by ((~~such~~)) any other means as may be required by law.

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Candidacies validly filed within the special three-day filing period shall appear on the primary or general election ballot as if filed during the regular filing period.

The procedures for filings for partisan offices where a vacancy occurs under this section or a void in candidacy occurs under RCW 29A.24.140 must be substantially similar to the procedures for nonpartisan offices under RCW 29A.24.150 through 29A.24.170.

NEW SECTION. **Sec. 11.** A new section is added to chapter 29A.32 RCW to read as follows:

The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

Sec. 12. RCW 29A.36.010 and 2003 c 111 s 901 are each amended to read as follows:

On or before the day following the last day allowed for ((~~political parties to fill vacancies in the ticket as provided by RCW 29A.28.010~~)) candidates to withdraw under RCW 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 ((~~designation, if any~~)) preference or independent designation as shown on filed declarations.

Sec. 13. RCW 29A.52.010 and 2003 c 111 s 1301 are each amended to read as follows:

Whenever it shall be necessary to hold a special election in an odd-numbered year to fill an unexpired term of any office which is scheduled to be voted upon for a full term in an even-numbered year, no ((~~September~~)) primary election shall be held in the odd-numbered year if, after the last day allowed for candidates to withdraw, ((~~either of the following circumstances exist:~~

~~(1) No more than one candidate of each qualified political party has filed a declaration of candidacy for the same partisan office to be filled; or~~

((~~(2)~~)) no more than two candidates have filed a declaration of candidacy for a single ((~~nonpartisan~~)) office to be filled.

In ((~~either~~)) this event, the officer with whom the declarations of candidacy were filed shall immediately notify all candidates concerned and the names of the candidates that would have been printed upon the ((~~September~~)) primary ballot, but for the provisions of this section, shall be printed as ((~~nominees~~)) candidates for the positions sought upon the ((~~November~~)) general election ballot.

Sec. 14. RCW 29A.80.010 and 2003 c 111 s 2001 are each amended to read as follows:

((~~(1)~~)) Each political party organization may((~~:~~

~~(a) Make its own~~)) adopt rules ((~~and regulations; and~~

~~(b) Perform all functions inherent in such an organization.~~

~~(2) Only major political parties may designate candidates to appear on the state primary ballot as provided in RCW 29A.28.010~~)) governing its own organization and the nonstatutory functions of that organization.

Sec. 15. RCW 42.12.040 and 2003 c 238 s 4 are each amended to read as follows:

(1) If a vacancy occurs in any partisan elective office in the executive or legislative branches of state government or in any partisan county elective office before the sixth Tuesday prior to the ((~~primary for the~~)) next general election following the occurrence of the vacancy, a successor shall be elected to that office at that general election. Except during the last year of the term of office, if such a vacancy occurs on or after the sixth Tuesday prior to the ((~~primary for that~~)) general election, the election of the successor shall occur at the next succeeding general election. The elected successor shall hold office for the remainder of the unexpired term. This section shall not apply to any vacancy occurring in a charter county ((~~which~~)) that has charter provisions inconsistent with this section.

(2) If a vacancy occurs in any legislative office or in any partisan county office after the general election in a year that the position appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified as defined in RCW ((~~29.01.135~~))

APPENDIX A

29A.04.133 and shall continue through the term for which he or she was elected.

CODIFICATION AND REPEALS

NEW SECTION. **Sec. 16.** The code reviser shall revise the caption of any section of Title 29A RCW as needed to reflect changes made through this Initiative.

NEW SECTION. **Sec. 17.** The following acts or parts of acts are each repealed:

(1) RCW 29A.04.157 (September primary) and 2003 c 111 s 128;

(2) RCW 29A.28.010 (Major party ticket) and 2003 c 111 s 701, 1990 c 59 s 102, 1977 ex.s. c 329 s 12, & 1965 c 9 s 29.18.150;

(3) RCW 29A.28.020 (Death or disqualification--Correcting ballots--Counting votes already cast) and 2003 c 111 s 702, 2001 c 46 s 4, & 1977 ex.s. c 329 s 13; and

(4) RCW 29A.36.190 (Partisan candidates qualified for general election) and 2003 c 111 s 919.

NEW SECTION. **Sec. 18.** This act takes effect only if the Ninth Circuit Court of Appeals' decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect.

--- END ---

APPENDIX A

APPENDIX B

KIR 45-3198
Ballot Code: 4675
Leg Dist: 45

VOTER, PLEASE REMOVE THIS STUB
000303

ABSENTEE

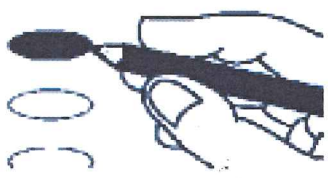
ABS1892

KIR 45-3198
Ballot Code: 4675
Leg Dist: 45

OFFICIAL BALLOT - KING COUNTY, WASHINGTON
PRIMARY AND SPECIAL ELECTIONS, AUGUST 19, 2008

INSTRUCTIONS TO ALL VOTERS

1. Use a dark pen to fill in the oval next to your choice. Fill in the oval completely.



2. **ABSENTEE VOTERS:** If you make an error in voting, draw a line through the entire candidate's name. You then have the option of making another choice.

POLL VOTERS: If you make an error in voting, ask a poll worker for a new ballot.

i To vote for a candidate whose name is not printed on the ballot, write the candidate's name on the line above the words "write-in" and fill in the oval next to the line.

! **Do not sign or make any additional marks on the ballot.**

! **Do not cut, tear or damage this ballot.**

KING COUNTY

KING COUNTY INITIATIVE 26 AND COUNCIL-PROPOSED ALTERNATIVE

The following initiative proposed ordinance (Initiative 26) and council proposed alternative ordinance (Council-Proposed Alternative) concern the election of nonpartisan county officials and the nonpartisan selection of districting committee members.

Initiative 26: If this initiative is approved by voters, it would place a charter amendment on the November 2008 general election ballot that would ask, "Shall the King County Charter be amended to make the offices of King county executive, King county assessor and King county council nonpartisan, and to establish the nonpartisan selection of districting committee members?"

Council-Proposed Alternative: If this council-proposed alternative ordinance is approved by voters, it would place a charter amendment on the November 2008 general election ballot that would ask, "Shall the King County Charter be amended to make the offices of King county executive, King county assessor and King county council nonpartisan, to allow candidates for these county offices the option of having their political party preference appear on the ballot, and to establish the nonpartisan selection of districting committee members?"

1. Should either of these proposed ordinances to place a charter amendment before the voters in November 2008 be adopted?
   - ◯ YES
   - ◯ NO

2. Regardless of whether you voted yes or no above, if one of the proposed ordinances is adopted, which one should it be?
   - ◯ INITIATIVE 26
   - ◯ COUNCIL-PROPOSED ALTERNATIVE

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.

FEDERAL

United States Representative
Congressional District No. 1
Partisan Office
Vote for One

- ◯ **Jay Inslee** (Prefers Democratic Party)
- ◯ **Larry Ishmael** (Prefers G.O.P. Party)
- ◯ _____ Write-in

STATE OF WASHINGTON

Governor
Partisan Office
Vote for One

- ◯ **Dino Rossi** (Prefers G.O.P. Party)
- ◯ **Will Baker** (Prefers Reform Party)
- ◯ **Christine Gregoire** (Prefers Democratic Party)
- ◯ **Duff Badgley** (Prefers Green Party)
- ◯ **John W. Aiken, Jr.** (Prefers Republican Party)
- ◯ **Christian Pierre Joubert** (Prefers Democratic Party)
- ◯ **Christopher A. Tudor** (States No Party Preference)
- ◯ **Javier O. Lopez** (Prefers Republican Party)
- ◯ **Mohammad Hasan Said** (States No Party Preference)
- ◯ **James White** (Prefers Independent Party)
- ◯ _____ Write-in

Lieutenant Governor
Partisan Office
Vote for One

- ◯ **Brad Owen** (Prefers Democratic Party)
- ◯ **Marcia McCraw** (Prefers Republican Party)
- ◯ **Arlene A. Peck** (Prefers Constitution Party)
- ◯ **Jim Wiest** (Prefers G.O.P. Party)
- ◯ **Randel Bell** (Prefers Democratic Party)
- ◯ _____ Write-in

STATE OF WASHINGTON

Secretary of State
Partisan Office
Vote for One

- ◯ **Sam Reed** (Prefers Republican Party)
- ◯ **Mark Greene** (Prefers Party Of Commons Party)
- ◯ **Jason Osgood** (Prefers Democratic Party)
- ◯ **Marilyn Montgomery** (Prefers Constitution Party)
- ◯ _____ Write-in

State Treasurer
Partisan Office
Vote for One

- ◯ **Allan Martin** (Prefers Republican Party)
- ◯ **Jim McIntire** (Prefers Democratic Party)
- ◯ **ChangMook Sohn** (Prefers Democratic Party)
- ◯ _____ Write-in

State Auditor
Partisan Office
Vote for One

- ◯ **Brian Sonntag** (Prefers Democratic Party)
- ◯ **Glenn Freeman** (Prefers Constitution Party)
- ◯ **J. Richard (Dick) McEntee** (Prefers Republican Party)
- ◯ _____ Write-in

Attorney General
Partisan Office
Vote for One

- ◯ **John Ladenburg** (Prefers Democratic Party)
- ◯ **Rob McKenna** (Prefers Republican Party)
- ◯ _____ Write-in

Commissioner of Public Lands
Partisan Office
Vote for One

- ◯ **Peter J. Goldmark** (Prefers Democratic Party)
- ◯ **Doug Sutherland** (Prefers Republican Party)
- ◯ _____ Write-in

Superintendent of Public Instruction
Nonpartisan Office
Vote for One

- ◯ **John Patterson Blair**
- ◯ **Don Hansler**
- ◯ **Randy Dorn**
- ◯ **David Blomstrom**
- ◯ **Enid Duncan**
- ◯ **Teresa (Terry) Bergeson**
- ◯ _____ Write-in

EXAMPLE

Vote both sides of ballot

FRONT Card 4675 RptPct 24090-10 "3198.644" Default

APPENDIX B

STATE OF WASHINGTON

Insurance Commissioner
Partisan Office
Vote for One

- Mike Kreidler (Prefers Democratic Party)
- John R. Adams (Prefers Republican Party)
- Curtis Fackler (States No Party Preference)
- Write-in

LEGISLATIVE DIST. NO. 45

Representative Position No. 1
Partisan Office
Vote for One

- Roger Goodman (Prefers Democratic Party)
- Toby Nixon (Prefers Republican Party)
- Write-in

Representative Position No. 2
Partisan Office
Vote for One

- Larry Springer (Prefers Democratic Party)
- Kevin Haistings (Prefers G O P Party)
- Write-in

STATE SUPREME COURT

Justice Position No. 3
Nonpartisan Office
Vote for One

- Mary Fairhurst
- Michael J. Bond
- Write-in

Justice Position No. 4
Nonpartisan Office
Vote for One

- Charles W. Johnson
- C. F. (Frank) Vulliet
- James M. Beecher
- Write-in

Justice Position No. 7
Short and full term
Nonpartisan Office
Vote for One

- Debra L. Stephens
- Write-in

COURT OF APPEALS
DIV. NO. 1, DIST. NO. 1

Judge Position No. 5
Short and full term
Nonpartisan Office
Vote for One

- Linda Lau
- Write-in

Judge Position No. 6
Nonpartisan Office
Vote for One

- Ann Schindler
- Write-in

SUPERIOR COURT

Judge Position No. 1
Nonpartisan Office
Vote for One

- Susan Amini
- Tim Bradshaw
- Suzanne (Sue) Parisien
- Write-in

Judge Position No. 10
Nonpartisan Office
Vote for One

- Jean Bouffard
- Regina S. Cahan
- Les Ponomarchuk
- Write-in

Judge Position No. 22
Nonpartisan Office
Vote for One

- Rebeccah Graham
- Holly Hill
- Julia Garratt
- Write-in

Judge Position No. 26
Nonpartisan Office
Vote for One

- Laura Gene Middaugh
- Matthew R. Hale
- Write-in

Judge Position No. 37
Nonpartisan Office
Vote for One

- Nic Corning
- Jean Rietschel
- Barbara Mack
- Write-in

Judge Position No. 53
Nonpartisan Office
Vote for One

- Mariane Spearman
- Ann Danieli
- Write-in

ELECTION OF POLITICAL PRECINCT COMMITTEE OFFICER

Precinct Committee Officer is a position in each major political party. For this office only: If you consider yourself a Democrat or Republican, you may vote for a candidate of that party.
For a write-in candidate, include party.

Vote for One

- Christopher Wood Republican Party Candidate
- Write-in

End Of Races

Vote both sides of ballot

BACK Card 4675 RptPct 24090-10 "3198.644" Default

APPENDIX B

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Nos. 11-35122, 11-35124, 11-35125

I certify that Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the Brief Of Appellees State Of Washington, Rob Mckenna, And Sam Reed, complies with the enlargement of brief size granted by court order dated July 7, 2011. The brief is proportionately spaced, has a typeface of 14 points or more, and contains 15,247 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

August 11, 2011
Date

s/ James K. Pharris
JAMES K. PHARRIS
WSBA #5313

9th Circuit Case Number(s) 11-35122, 11-35124, 11-35125

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Aug 11, 2011 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/James K. Pharris

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)