NO. 11-35122
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,

Plaintiff/Appellant,

v.

WASHINGTON STATE GRANGE, *et al.*,

Defendant/Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
HONORABLE JOHN C. COUGHENOUR
CASE NO. 2:05-CV-00927-JCC

BRIEF OF APPELLANT, WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE

DAVID T. MCDONALD
EMILY D. THROOP
PETER A. TALEVICH
JENNIFER S. ADDIS
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104-1158
(206) 623-7580

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OVERVIEW

The State of Washington (the "State") replaced its unconstitutional blanket partisan primary with a "Top Two" partisan election system. Under the new system, a candidate self-designates a political party to be printed after the candidate's name on ballots where Washington by statute and tradition prints the candidate's party affiliation. The two highest vote recipients in the primary, rather than the highest voter recipient in each party, advance to the general election ballot, each continuing to use the party label he or she chose at filing. The Democratic Party (the "Party") is not permitted to object to the use of its name on the ballot by candidates who are unaffiliated with it, and the Party's actual candidates and nominees are not differentiated from other candidates stating a preference for the Party. In resolving this appeal from summary judgment, the Court must determine whether this implementation forces political parties to associate with candidates. If it does, the Court should direct entry of an injunction requiring the State to print "no party preference" or "independent" after a candidate's name on ballots when the candidate designates a political party that does not consent to associate with the candidate on the ballot, and award the Party its attorneys' fees on appeal pursuant to 42 U.S.C. § 1988.

JURISDICTION

Washington's Top Two partisan election system is the implementation of Initiative 872 ("I-872"), which was passed by Washington voters in November of 2004. The Washington State Republican Party (the "Republicans") filed this action challenging the constitutionality of the Top Two partisan system in the Western District of Washington on May 19, 2005. The Washington State Democratic Central Committee (the "Democratic Party" or the "Party") and the Libertarian Party of Washington State (the "Libertarians") intervened as Plaintiffs[1], and the State and the Washington State Grange (the "Grange") intervened as Defendants. Judge Thomas S. Zilly found I-872 facially unconstitutional and entered a permanent injunction on July 29, 2005. The Ninth Circuit affirmed, but the Supreme Court reversed on March 18, 2008. The Ninth Circuit vacated its earlier opinion and remanded to the district court for further proceedings with instructions to dismiss all facial challenges.

After discovery, the State/Grange moved for summary judgment regarding the constitutionality of I-872 as implemented. In their opposition to the State and Grange's motion, the Parties counter-moved for summary judgment on the issue of I-872's unconstitutionality as applied. On January 11, 2011, Judge John C.

[1] Hereinafter, the Plaintiffs are collectively known as the "Parties."

Coughenour[2] granted partial summary judgment for the Grange and State, holding the Top Two partisan system generally constitutional as implemented, and partial summary judgment for the Parties, holding the State's method of electing party precinct committee officers under the Top Two unconstitutional, disposing of all claims. The district court entered final judgment on January 20, 2011.

The district court had jurisdiction for these claims pursuant to 28 U.S.C. §§ 1331 and 1343(a). The Democratic Party timely filed a notice of appeal on February 10, 2011. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

[2] Subsequent to his initial decision, circumstances arose that led Judge Zilly to recuse himself from further proceedings and the case was transferred to Judge Coughenour after remand from the Ninth Circuit.

STATEMENT OF THE ISSUES

1) Was it error to evaluate the risk of voter perception that candidates are associated with the political parties indicated after the candidates' names on ballots by using a hypothetical voter construct without regard to whether the construct reflected the expectations of the State's actual voters?

2) Where there is a widespread public perception that candidates who self-designate a party preference to be printed on ballots are associated with the political party so designated, is it error to conclude that voter confusion is constitutionally "negligible?"

3) In the circumstances found in Washington State, is there a material risk that reasonable, well-informed voters will conclude that the candidates are associated with a political party when they see that party printed on Top Two ballots after the candidate's name?

4) Was it error to deny amendment of the Party's complaint to add a claim of I-872's invalidity under Washington's Constitution where the amendment was sought promptly after remand and no prejudice to the party-opponents existed?[3]

[3] The Republican Party, in the related case No. 11-35124, also appealed from the district court's orders in this case. To minimize redundancy, the Democratic Party adopts by reference the arguments the Republican Party makes in the opening brief

5) Did the district court err by misapplying Washington's "context" rule for construing contracts when it ordered repayment of attorneys' fees that had been compromised by an agreement among the parties, and confirmed by a stipulated order?[4]

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filed in Case No. 11-35124 to the extent that such arguments are not addressed in this brief. In particular, the Democratic Party adopts without further elaboration the Republican Party arguments with respect to this issue, the district court's denial of leave to amend to address constitutionality issues under Article II, Section 37 of the Washington constitution, and the district court's construction of Washington's "context" rule as it pertains to the agreed payment of attorneys' fees.

[4] See preceding note.

STATEMENT OF THE CASE

In the wake of *Democratic Party of Washington v. Reed*, 343 F.3d 1198 (9th Cir. 2003), the Grange introduced, and the voters passed, Initiative 872 ("I-872") creating a "Top Two" partisan primary system to substantially replicate the unconstitutional blanket primary. In the "Top Two" primary, candidates continue the blanket primary practice of designating at filing a party to list after their name on ballots. But, in the Top Two, the two candidates with the highest vote totals advance to the general election (continuing to have the party name printed after their names), rather than the highest vote-getter from each party. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 447-48 (2008) (hereinafter referred to as "*Grange*").

The Parties challenged the constitutionality of the new system. The United States District Court for the Western District of Washington found it facially unconstitutional because the system allowed non-members of a party to in effect select its nominees and because it forced a party to be associated with any candidate stating a preference for the party, without regard to the party's consent or lack thereof. *See Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005), *aff'd*, *Wash. State Republican Party v. Washington*, 460 F.3d 1108, 1111 (9th Cir. 2006) (hereinafter referred to as "*Washington State*

Republican Party"), *rev'd*. *Grange*, 552 U.S. 442. The Supreme Court of the United States reversed, holding that I-872 did not facially require the Parties to select their nominees using the Top Two partisan primary, and that the risk of forced association or de facto nominee selection could not be evaluated until I-872 was actually implemented. *See Grange*, 552 U.S. at 444 (2008).

This case then continued as an as-applied challenge and the State implemented I-872 to create the Top Two partisan primary system. On the eve of trial, the district court granted summary judgment, incorrectly holding that the partisan Top Two system is constitutional despite substantial evidence that candidates stating a preference for the Party at filing are viewed by the public as associated with the Party, and substantial evidence that voters will, when viewing Top Two ballots, infer that candidates are associated with the political party the candidate chose to have printed after his or her name on ballots. This Court should reverse and require the State to print "no party preference" or "independent" on ballots after a candidate's name rather than the political party designated by the candidate unless the party consents to the association with the candidate.

STATEMENT OF FACTS

A. The Top Two Partisan System Allows Candidates To Have the Party's Name Printed After Theirs On Ballots Without Regard to Party Consent to the Association.

Under the Top Two partisan system, the State provides a form to every candidate for partisan office at the time of filing that allows the candidate to self-designate a political party that he or she "prefers." RCW 29A.24.030(3). The political party selected by the candidate is thereafter printed with the candidate's name on ballots, in the location in which Washington law, reflecting a long political tradition, requires the candidate's political party to be printed. RCW 29A.36.121(3); 29A.52.112(3). Political committees formed to support or oppose the candidate must report to the State (and public) the party affiliation of the candidate and are instructed by the State that the candidate's self-designation is the candidate's party affiliation. RCW 42.17.040(1)(f)[5]; WAC 390-05-234. The party designation also must be included in all campaign advertising and electioneering communications about the candidate. RCW 42.17.510(1).[6] The candidate does not require the party's consent to use its name on the ballot and in advertising, nor

[5] Effective January 1, 2012, RCW 42.17.040(1)(f) will be recodified as RCW 42.17A.205(1)(f).

[6] Effective January 1, 2012, RCW 42.17.510(1) will be recodified as RCW 42.17A.320(1).

is the political party allowed to object, even if the candidate has no actual affiliation with the party or is competing with a party nominee for votes of party adherents. All candidates self-designating a political party have identical party information printed after their names; the ballot does not indicate which candidates are party nominees or are in fact affiliated with the party. *Grange*, 552 U.S. 442, 447 (citing WAC 434-215-015). During the campaign, voters may see advertising for or read news stories identifying multiple candidates in the same race as preferring the same political party. *See, e.g.*, ER00231; ER00232-33.[7]

B. The Top Two System Is Intended to, and Does, Continue Washington's Historic Ballot Association of Candidates and Political Parties.

Since Statehood in 1889, Washington has indicated each candidates' political party on its primary and general election ballots.[8] The Top Two partisan system continues that tradition:

[7] "ER" refers to Appellants' Joint Excerpts of Record.

[8] ER00214-30 (Session Laws 1890, p. 406 ("Every ballot shall also contain the name of the party or principle which the candidates represent, as contained in the certificates of nomination"); RRS (1932 ed.) § 5187 ("He shall proceed to have printed a separate primary election ballot for each political party…") and § 5274 ("All nominations of any party or group of petitioners shall be placed under the title of such party…"); 1974 RCW 29.30.080(3) ("All nominations of any party or group of petitioners shall be placed under the title of such party…"); 1994 RCW 29.30.020 ("The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot"); 2003 Session Laws c. 111 § 912 (re-enacting RCW

> Order of offices and issues — Party indication.
> ***
> (3) The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot.

RCW 29A.36.121(3).

This continued designation of candidate's parties on ballots after implementation of the Top Two is intentional. I-872's campaign FAQ, from January 2004, asked, "How would this proposed initiative change our election laws [from the unconstitutional blanket primary]?" ER00126. Voters were told, "Candidates for partisan offices would continue to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots." *Id.* The voters were also told that "the party designations will appear after the candidates' names . . . (just as they do now in the blanket primary)." ER00127. To effectuate this purpose, I-872 required that a candidate's self-designation of party would be printed on the ballot where Washington law and tradition required the candidate's party affiliation to be printed:

> For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, then that

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29.30.020) ("The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot"); 2004 RCW 29A.36.121(3) (quoted in text *supra*)).

> preference will be shown after the name of the candidate on the primary and general election ballots . . . .

RCW 29A.52.112(3) (adopted as part of I-872); *see also* RCW 29A.36.121(1), quoted *supra*. The Party's consent is not required nor may it object. *Grange*, 552 U.S. 442, 447; ER00628-29. As Secretary of State Sam Reed, the public official responsible for elections in Washington State, put it succinctly: "The parties still have no say in determining who gets to call themselves a Democrat or a Republican . . ." ER00775.

After implementation of the Top Two partisan system, State-sponsored advertising emphasized the ability of candidates to force themselves on political parties under the new system. ER00261-62. A key advertising message was that candidates could unilaterally affiliate with political parties: "Key messages that will need to be conveyed for the primary include . . . Candidates decide their party affiliation, not political parties . . . ." ER00272 (emphasis added).

State election officials refer to candidates on the Top Two ballot as being affiliated with or "of" or "from" the same political party as indicated in their preference statements. Secretary of State Sam Reed told the *Seattle Post-Intelligencer* on August 14, 2008. "I think it's a little strange to have potentially two people of the same party in the general election[.]" ER00416 (emphasis added). Secretary Reed's comments in other media outlets are similar:

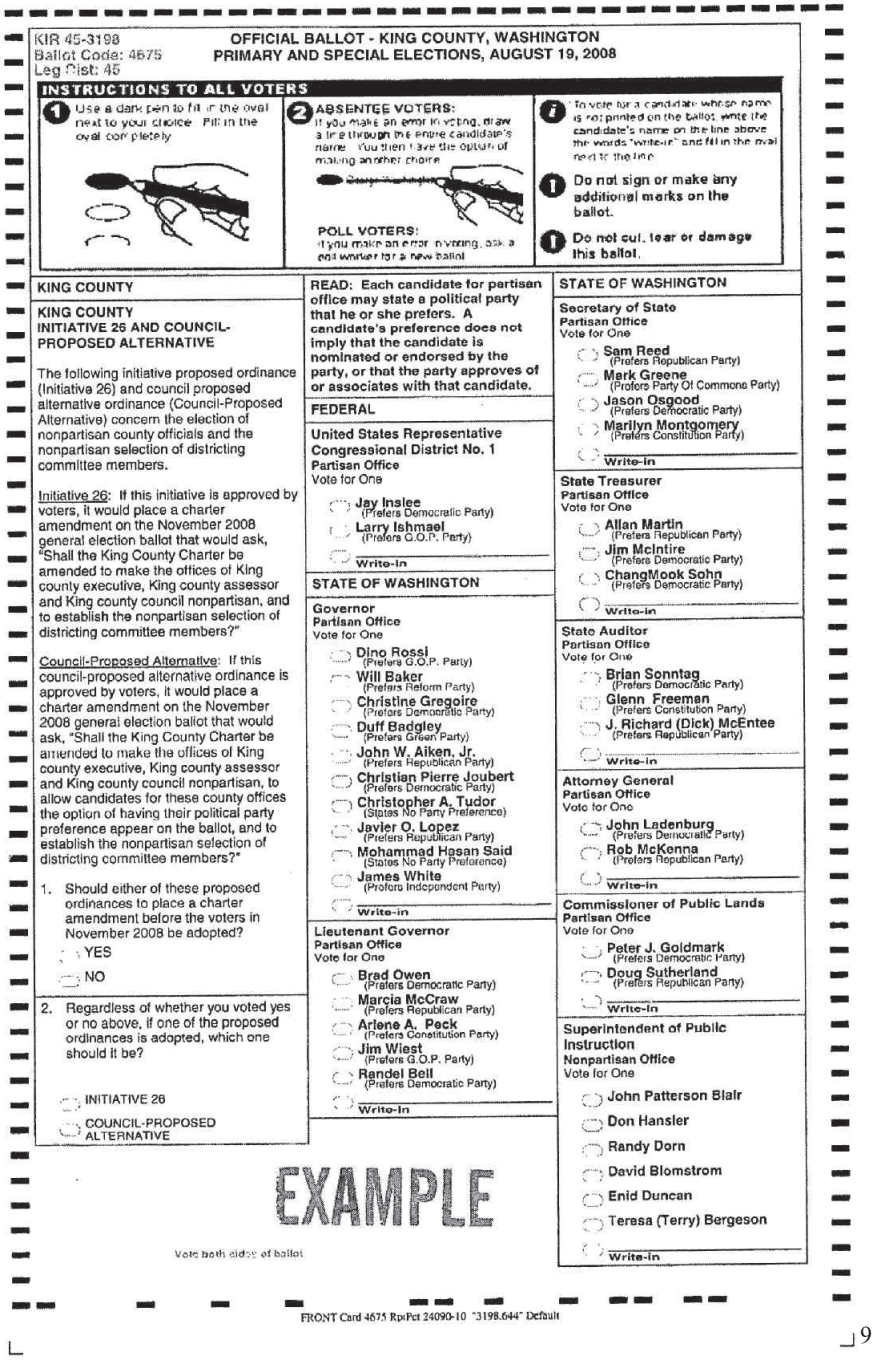
> "Reed based his higher [turnout] prediction on the empowering effect he said the new top two primary will have for voters, who can pick any candidate from any party . . . Reed, a Republican facing three opponents, said he doesn't expect any of the eight partisan statewide races on the primary to yield two candidates of the same party on the November general election ballot."

ER00436 (emphasis added).

> "Secretary of State Sam Reed . . . said . . . nearly all were signing up *as* Democrats or Republicans . . ."

ER00518 (emphasis added).

The ballots used in the Top Two partisan system reinforce the association. Offices are identified as "Partisan Office" multiple times on the ballot. WAC 434-230-035(2). A 2008 King County primary election ballot is illustrative, referring to "partisan office" eleven times:



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.

- 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

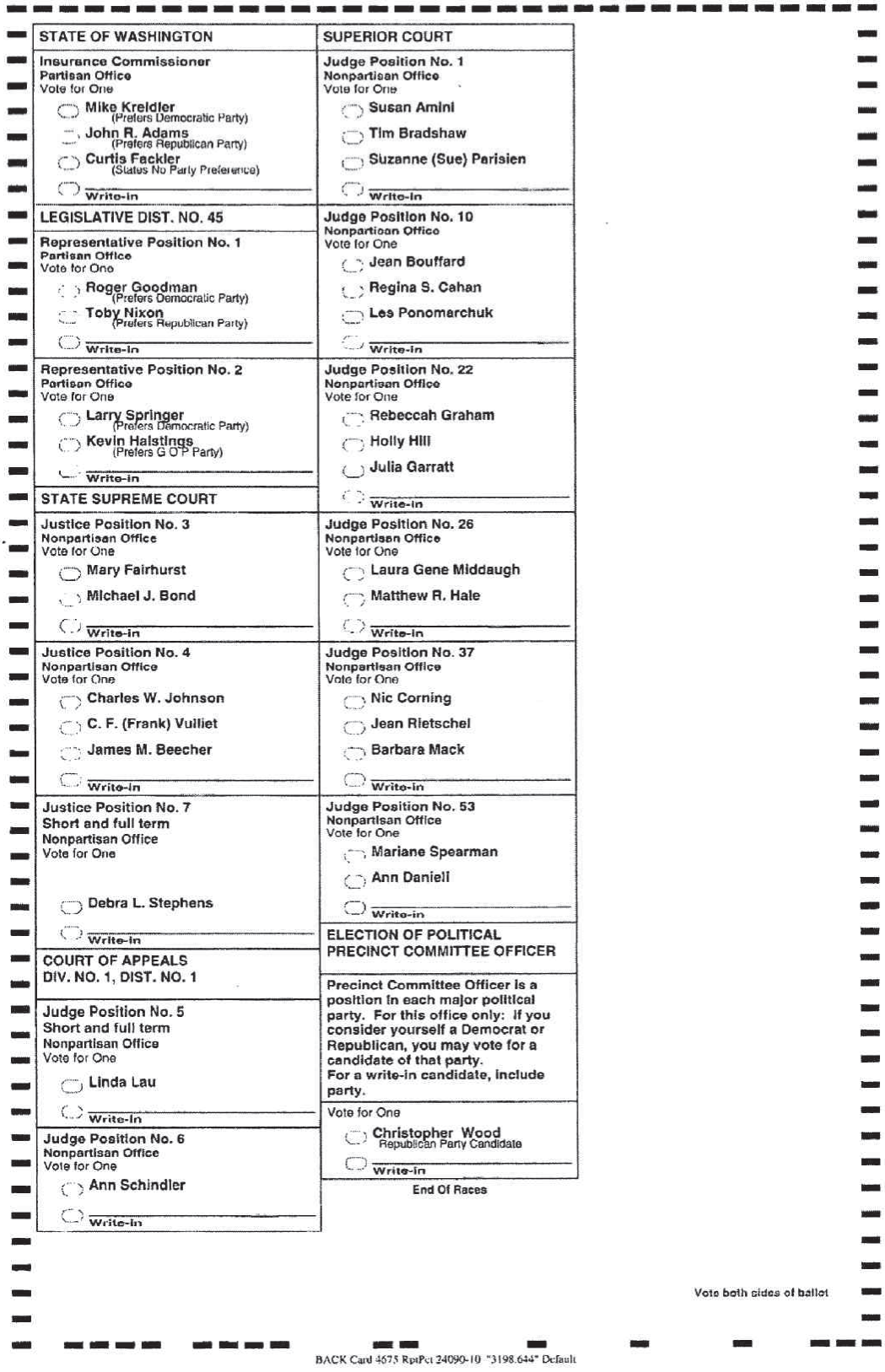
EXAMPLE

Vote both sides of ballot

FRONT Card 4675 RptPct 24090-10 "3198.644" Default

9

[9] *See* ER00159-60.



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 Halstings (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) Vuiliet
- 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 Daniell
- 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

A "partisan office" is generally understood to be "[a]n elected office for which candidates run as representatives of a political party." ER00201 (emphasis added).[10, 11] Washington State's statutory definition of "partisan office" is consistent with this understanding:

> "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.

RCW 29A.04.110.

Washington equates party affiliation with the candidate's party preference statement. *See, e.g.,* RCW 42.17.040(f) (requiring that a candidate's party affiliation be disclosed by committees supporting or opposing the candidate in their campaign reporting documents) and WAC 390-05-234 which reads:

> Party affiliation, party preference, etc.

[10] The Election Assistance Commission ("EAC") is an independent, bipartisan commission charged with developing guidance for voting requirements. *See* http://www.eac.gov/about_the_eac/. The EAC based the definitions in its Glossary on, or extracted definitions from, a wide range of sources, found at pages A-20 to A-22 of the Glossary, including the National Association of Secretaries of State Election Reform Key Terms (February 2005). ER00202-04.

[11] The State's expert, political science professor Todd Donovan, agreed with this definition. ER00210. Donovan also agrees that a "prefers XXX Party" statement is a party label on a ballot. ER00207-08. Dr. Donovan was retained by the State on February 5, 2010 to provide expert testimony in this case. ER00211-13.

> (1) "Party affiliation" as that term is used in chapter 42.17 RCW and Title 390 WAC means the candidate's party preference as expressed on his or her declaration of candidacy. A candidate's preference does not imply that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate.
>
> (2) A reference to "political party affiliation," "political party," or "party" on disclosure forms adopted by the commission and in Title 390 WAC refers to the candidate's self-identified party preference.

WAC 390-05-274.[12]

C. Washington Voters Believe Candidates Are Associated With the Party Named on the Ballot.

Implementation of the Top Two partisan system has not changed the understanding of Washington voters, developed since Statehood, that candidates are associated with the party indicated after their name on ballots.

1. Voters View Political Parties As Associated With Candidates After Whose Name the Party Name Appears.

In 2009, Mathew Manweller, Associate Professor of Political Science at Central Washington University, conducted a series of cognitive experiments on Washington voters. ER00323.[13] Voters were presented with hypothetical ballots

[12] The last sentence of WAC 390-05-234(1) is nonsensical. The word "affiliation" means the state of being associated. *See* http://dictionary.reference.com/browse/affiliation. If party affiliation is indicated by the party preference statement, it necessarily follows that the party preference statement implies association. Washington is not Orwell's Oceania.

[13] A "cognitive experiment" is a laboratory experiment testing human behavior and cognitive processes. ER00286. It is not a political poll to measure attitudes. *See*

for the Top Two primary and Top Two general election, using the party label and general format used by the State in its Top Two implementation, including the State's "disclaimer." ER00323; ER00326. The graphic below is the Top Two primary ballot used in the experiments, for example:

KITTITAS COUNTY BALLOT
Primary Election August 25th, 2008

	STATE PARTISAN OFFICES
Marking your ballot: Please use a black or blue INK PEN to mark your ballot. To vote for your choice in each contest, completely fill in the box provided to the left of your choice. To vote for a person whose name does not appear on the ballot, completely fill in the box next to the words "write-in" and write in the candidate's name on the line provided.	**Governor** **4 year term** **Vote for ONE** †□John Smith (Prefers Democratic Party) †□George Marker (Prefers Republican Party) †□Mark Allen (Prefers Republican Party) †□Joe Keen (Prefers Democratic Party) †□Kirk Freeman (States No Party Preference) †□Write-in _____
	LEGISLATIVE PARTISAN OFFICES
VOTER-PLEASE 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.	**State Representative** **Legislative District 1, Pos. 1** †□Jane Miller (Prefers Republican Party) †□Mary Johnson (Prefers Democratic Party) †□Kate Bell (States No Party Preference) □ Write-in _____

14

Seventy-three percent of participants in the experiment who had previously voted at most two times, the so-called "new voters," understood from the primary ballot

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note 15, *infra*.

[14] *See* ER00326.

above that the candidates were affiliated with the political party after their name. ER00328. Similarly, 72% of participants who were highly active voters viewed the candidates as affiliated with the party after their names. ER00330.

When viewing the experiment's general election ballot, 56.6% of the "new voter" population in the experiment perceived the candidates on the general election ballot to be the nominees of the political parties. ER00328. Thirty percent of a second group that participated in the experiment, "registered voters," perceived the candidates on the general election ballot as party nominees. ER00329. A third group made up of "active voters" also showed high rates of confusion—35% perceived candidates on the Top-Two general election ballot as party nominees. ER00330. The percentages ranged from a low of 19.1% of "active voters" who perceived candidates as nominees of the political party on a Top Two primary election ballot, to a high of 93.3% of "new voters" who viewed the candidates appearing on the Top Two general election ballot as associated with the political party. ER00330; ER00328.

In his paper, Professor Manweller concluded: "The data implies that between one-fifth to one-fourth of the voters misinterpret primary ballots and between a third to one-half misinterpret general election ballots regarding whether

the candidates on the ballots are political party nominees." ER00325.[15] He further concluded: "On the second question looking at whether voters perceive an official relationship between candidates on a nonpartisan ballot and political parties, the evidence is stronger. Across all voter types, respondents consistently misinterpreted both primary and general election ballots 80-90 percent of the time." *Id.*

Similar strong tendencies are revealed by data the State gathered in planning its implementation of the Top Two system. ER00234-60. Forty-eight percent of participants in the State's study believed that the statement "prefers XXX Party" after a candidate's name indicates that the candidate is endorsed by, associated with, or represents that party. ER00257 (Graph C). Adding parentheses to the preference statement and retesting the same group, after discussion about the group's perceptions of the purpose of the preference statement and a candidate's association with the preferred party, *see* ER00235-36, indicated that at least 15% nevertheless still believed that each candidate on the ballot is endorsed by,

[15] A cognitive experiment is used to observe cognition, i.e. how people gain knowledge and comprehension from information. People have similar cognitive processes even though they may have different political opinions. A cognitive experiment is not a political poll intended to measure opinions in a population. ER00288-89.

associated with, or represents the party named in the "prefers" statement after the candidate's name, ER00257 (Graph D).

Even the most sophisticated voters in Washington view candidates' preference statements as indicating affiliation with the political party preferred. The State's expert, Western Washington University Political Science Professor Todd Donovan, testified:

> Q. (by Mr. McDonald) At page 46 of your report, the last full sentence of the paragraph B says, "This would suggest that a reasonable person would conclude that most Democratic candidates listed on the Top Two general election ballot are in fact the official nominee of the Party." Which are the Democratic candidates listed on the ballot?
> A. Let me read the whole paragraph.
> Q. Sure.
> A. Okay, your question is which–
> Q. You said the "Democratic candidates listed on the Top Two." Did you mean the candidates who had said they preferred the Democratic Party?
> A. Yeah . . . .

ER00209.

2. The Public Understanding That Candidates Are Affiliated With the Party Named at the Time of Filing Is Widespread.

The perception that candidates are affiliated with the political party in their preference statement extends far beyond the voters in the experiments and focus groups above. Media observers report candidates to be associated with the political party they designate in their filings. Election officials do not contradict

that understanding. For example, on June 11, 2010, based on candidate filings, the Spokane *Spokesman Review* reported:

> Last week, Eastern Washington Democrats were scrambling to find one candidate to challenge Republican Rep. Cathy McMorris Rodgers for her fourth term. This week, they have four—a perennial candidate and a trio of novices, one of them a relative unknown, one known for telling television viewers about the weather and a third who lives on the other side of the state.

ER00231 (emphasis added). In fact the Democratic Party had only one candidate. *Id.* Of those three self-declared candidates, one, the *Spokesman Review* reported, had been recently arrested for DUI and possession of marijuana and had allegedly engaged in sexual misconduct with a client—hardly the candidate the Democratic Party would choose for itself as its representative but one with whom the Party was forced to be associated in public perception by the Top Two system. *Id.* Another was unknown to the Party and had no apparent connection to the Party's issues. *Id.*

Similarly, the Northwest Progressive Institute Blog's "Filing Week: Final Report" (June 6, 2008) identified each candidate who stated a Democratic Party preference as a "Democrat" in the race and noted that "only the candidates that get the most votes will advance to the November general election, regardless of party affiliation." ER00232 (emphasis added). Candidates such as "Goodspaceguy

Nelson" were improperly presented to the public as representatives of the Democratic Party. ER00232-33.

The *Yakima Herald* reported, "Republicans' State Rep. Charles Ross got a Democratic opponent Friday . . . " and, after running down a list of names of candidates noted, "all filed as Republicans on Friday." ER00501. From the *Peninsula Daily News*, "Doug Cloud . . . filed Monday as a Republican to challenge Dicks." ER00491. At the close of filing in 2008, *The Seattle Times* headline noted, "Many of November's legislative races will be single-party," stating within the article, "only Republicans or only Democrats filed for office." ER00496. The *Sammamish Review*, *Port Townsend & Jefferson County Leader*, *The Olympian*, and *The News-Tribune* all described candidates in the last election cycle as Republican or Democrat based on their filing statement. ER00482-83; ER00522-23; ER01097-98; ER01099.

During election campaigns, candidates are regularly described by party name, "Republican" or "Democrat" in the media. ER00332; ER00363; ER00383-84; ER00413-14; ER00419-20; ER00421; ER 00430-32; ER00433-32; ER00465; ER00466; ER00476-77; ER00485-86; ER00489; ER00493-95; ER00514; ER00517; ER00545; ER00570-71; ER00704-06; ER718-19; ER00723; ER734-35; ER00744; ER00745-46; ER00747-48; ER00751-52; ER00796; ER00797;

ER00798; ER00799; ER00801-02; ER00803-04; ER00805-06; ER00807; ER00818-19; ER00821; ER00822; ER00825; ER00829; ER00840; ER00841-42; ER00843; ER00846-47; ER00924. State officials not only do not correct the reports, the evidence indicates they contribute to them. *See, e.g.*, ER00983 (Secretary of State press release referring to candidates as "Democrat" or "Republican" without disclaimer). Media sources also use "affiliate" and "preference" interchangeably. ER00998; *see also* ER00507; ER00670-72; ER00677-79. This labeling of candidates as connected to the political parties is persistent and shows no sign of abating. It was no different in the partisan elections in 2009. ER00638-39; ER00640; ER00645-46; ER00647-48; ER00649-50.[16]

[16] Candidates continued to be referred to as "running as a Democrat or Republican" or representing a party in the 2010 election cycle. ER00680; ER00681; ER00933; ER00939-40; ER00944; ER01104; ER01105; *see also* ER00851; ER00852; ER00853; ER00854-55; ER00860-62; ER00865; ER00886; ER00889-90; ER00891-93; ER00901-02; ER00903; ER00915-16; ER00917-18; ER00952-53; ER00954-55; ER00963-64; ER00966; ER00969; ER00974-76; ER00984; ER00992-93; ER00994-96; ER01000; ER01004; ER01020. Media references to candidates on the general election ballot as being from or of "the same party" or "two Republicans" or "two Democrats" continue to be commonplace. ER00560-61; ER00562; ER00572-73; ER00575; ER00576-77; ER00581; ER00585; ER00586; ER00625; ER00630; ER00639; ER00775; ER00867; ER00985.

D. There Is No Evidence That the State's Ballot Format and Disclaimer Eliminate Constitutionally Significant Risk of Confusion.

The State has not done post-election testing of its ballot design nor provided any evidence that it had eliminated the risk of voter confusion about whether the party preference statement on the ballot indicates that a candidate is nominated by, endorsed by, affiliated with or associated with the party indicated. ER00194; ER00200; ER00277.

The only data the State gathered regarding voter perception of the ballot association between a candidate and the party results from a focus group done by Stewart Elway shortly after the Supreme Court upheld the facial validity of I-872. ER00195-96 ("It's the only data we have"). On April 3, 2008, the State contracted with Elway Research to "conduct a Forum of not less than forty (40) people." ER00897. The Forum was to be conducted April 10 and "will be used to test information that will be presented to voters relating to the Top Two Primary." *Id.*

The actual focus group assembled consisted of 36 voters drawn from the Central Puget Sound for a two hour interactive session of combined polling and discussion. ER00235. A moderator facilitated the discussion of each alternative ballot. *Id.* The test was done in April, without the context of repeated statements of association in political advertising or reporting during a political campaign. *Id.*

Four versions of a "disclaimer" were tested, none of which were the actual language eventually used on ballots. ER00243-44. Even so, 36% of participants found the State's first variant confusing, somewhat confusing, or very confusing. ER00243.

The State presented focus group participants with a partisan ballot that stated "prefers Republican Party" and "prefers Democratic Party" below hypothetical candidate names. ER00245. Forty-eight percent of participants viewed the language as meaning endorsed by, associated with, or representing the political party. *Id.* After discussion among focus group leaders and participants, another version was then presented listing "(prefers Republican Party)" and "(prefers Democratic Party)" to the focus group. ER00246. Fifteen percent of participants still viewed it as a statement of representation or association. *Id.* The State chose not to do any other testing, nor has it done any post-implementation testing of voter understanding of its ballot format. ER00194; ER00195-96.

The record strongly suggests Chief Justice Roberts' skepticism about the State's commitment to implementing I-872 constitutionally was warranted. *See Grange*, 552 U.S. 442, 462 ("Still, I agree with Justice Scalia that the history of the challenged law suggests the State is not particularly interested in devising ballots that meet these constitutional requirements."). The State's effort to eliminate the

risk of forced association appears minimal when compared to the steps it takes to convey other significant information to voters. For example, the "disclaimer" is printed only once on the ballot (as shown by the exemplar ballot printed above), but Top Two voters are advised to "vote for one" in connection with each office on the ballot—a total of 24 times on the exemplar ballot from King County. *See, e.g.*, ER00159-60; *see also* WAC 434-230-015 (3), (6).

The disclaimer is neither uniformly placed nor prominently featured on the ballot, ER00159-60,[17] and the record contains no evidence that it is even read by voters. It cannot be simply assumed that the disclaimer is read, understood and has the effect of negating the implied association created by the printing of the party designation after the candidate's name. The record indicates that large numbers of voters fail to follow instructions printed on the ballot, whether because they do not read them, do not understand them or simply choose not to follow them. ER00273-74; ER00278; ER00279.[18]

[17] The location of the disclaimer varies from county to county. *See, e.g.*, ER00159-60 (disclaimer appearing at center of ballot below and separate from detailed ballot instructions); ER00173-74 (top right); ER00172 (bottom left); ER00164-65 (top left); ER00168-69 (center left). The disclaimer's location may even vary within a single county from election to election. *Compare* ER00173-74 (top right)), *with* ER00172 (bottom left)). It may not even be included on the ballot. *See, e.g.*, ER00931-32.

[18] Experienced voters, long accustomed to the routine of voting in Washington

E. The Top Two Interferes With Consolidation of the Democratic Vote Behind the Democratic Nominee, Hampering Access to the General Election Ballot.

In order to advance to the general election under the Top Two system, the Democratic Party's nominee in a race must be one of the top two vote getters. RCW 29A.52.112(2). The Democratic Party nominates only one candidate for each partisan office that will be on the ballot in order to consolidate behind its nominee all the voters who vote only for Democratic candidates and avoid having Democratic votes split among multiple Democrats. ER01113.

Party labels—including party preference statements—are powerful cues that voters use to determine their vote.

> Q. Have there been any studies as to the extent to which people rely on shortcuts and heuristics?
> A. Yes. ….
> Q. What are the most important ones?
> A. Party identification—or party labels.
> Q. At what levels of election is that most important?
> A. Any partisan election. But yeah, it's probably, as you go down the ballot, more relevant than—I mean, more information about the candidates' personalities are known at the top of the ballot.

State, may not notice or understand a change in the ballot format. *See, e.g.*, Marieke H. Maartens & Micah R.J. Fox, *Do Familiarity and Expectations Change Perception? Drivers' Glances and Responses to Changes*, 10 Transportation Research Part F: Traffic Psychology and Behaviour 476, 476-492 (2007) (only two of twelve drivers responded to change of right of way sign to yield sign when driving a route with which they were familiar).

ER00205-06 (State expert Donovan). The importance of party labels in voting decisions has been recognized by this Court and the Supreme Court: "[A]ll evidence suggests party labels are indeed a central consideration for most voters." *See Grange*, 552 U.S. at 464 (2008) (Scalia, J., dissenting) (citing Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. Pa. L. Rev. 793, 804 n.34 (2001); Wendy M. Rahn, *The Role of Partisan Stereotypes in Information Processing About Political Candidates*, 37 Am. J. Pol. Sci. 472 (1993); David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 Pol. Research Q. 709 (2001)).

The fact that candidates can easily attract votes from a party's base by simply self-designating that party is well-accepted:

> Secretary of State Sam Reed said . . . "by indicating Democrat or Republican you pick up a little bit of a base. It gives you a start."

ER00520. The Top Two Partisan system, however, prevents true Democratic nominees from consolidating the Democratic vote behind their primary campaigns by placing false Democratic candidates on the ballot with a party designation that is identical to that of the Democratic nominee, drawing votes away from the nominee, particularly in down ballot races where little is known about candidates beyond their party preference. This drag on Democratic nominees' vote interferes with their ability to advance to the general election. ER01113.

Shifting only a few votes away from the party nominee to other seeming Democratic candidates in the race can have dramatic results. ER01114 (list of 14 elections with small margins of loss for Democratic Party-selected candidates). Here are some examples from the 2010 election:

1. 38th Legislative District.

The Democratic Party selected incumbent Senator Jean Berkey as its nominee for the partisan position of State Senator from the 38th District. *Id.* Nick Harper elected to run and identified himself on the primary ballot as a Democrat. ER00187 (citing Election Data, available at http://vote.wa.gov/Elections/WEI/Results.aspx?ElectionID=36&JurisdictionTypeID=5&JurisdictionID=63443&ViewMode=Results). The final results of the primary for State Senate in the 38th District were:

Legislative District 38, State Senator (Partisan office, 4-year term) Snohomish*		
Candidate	**Vote**	**Vote %**
Nick Harper (Prefers Democratic Party)	7,193	35.09 %
Jean Berkey (Prefers Democratic Party)	6,591	32.16 %
Rod Rieger (Prefers Conservative Party)	6,713	32.75 %
Total Votes	**20,497**	**100.00%**

*denotes partial county[19]

[19] The three examples contain the complete results for each legislative district.

Id. (citing election data, *supra*). Senator Berkey was eliminated from the general election by the failure to obtain a mere 122 votes of the 7,193 votes obtained by the identically designated other "Democrat," Nick Harper.

2. 22nd Legislative District

The Democratic Party nominated Stew Henderson for the position of Representative from the 22nd District. ER01114. Five other candidates were designated with the Democratic Party's name in the same race. ER00187-88 (citing Election Data, available at http://vote.wa.gov/Elections/WEI/Results.aspx?ElectionID=36&JurisdictionTypeID=5&JurisdictionID=63427&View Mode=Results). Henderson, the Party's nominee, failed to garner enough votes to advance to the general election by 4%, or 1372 votes. The five other candidates who were identified on the ballot as associated with the Democratic Party collectively received 14,768 votes.

Legislative districts are distinct from the counties, and often include only part of one of more county.

Legislative District 22, State Representative Pos. 1 (Partisan office, 2-year term) Thurston*		
Candidate	**Vote**	**Vote %**
Steve Robinson (Prefers Progressive Dem Party)	1,741	5.06 %
Jeremy Miller (Prefers Demo Party)	514	1.49 %
F. G. (Fred) Jensen (Prefers Prolife Democrat Party)	390	1.13 %
Judi Hoefling (Prefers Democratic Party)	2,701	7.85 %
Jason Hearn (Prefers GOP Party)	11,796	34.28 %
Stew Henderson (Prefers Democratic Party)	7,950	23.10 %
Chris Reykdal (Prefers Democratic Party)	9,322	27.09 %
Total Votes	**34,414**	**100.00%**

* denotes partial county

Id. (citing election data, *supra*).

3. 5th Congressional District.

In the 5th Congressional District, the Democratic Party nominated Clyde Cordero for Representative. ER01114. However, three other "Democratic candidates" appeared on the ballot with Cordero. ER00188-89 (citing Election Data, available at http://vote.wa.gov/Elections/WEI/Results.aspx?ElectionID

=36&JurisdictionTypeID=3&JurisdictionID=151&ViewMode=Results). The Democratic vote split four ways and the Party was represented by David Romeyn on the general election ballot.[20]

Congressional District 5, U.S. Representative (Partisan office, 2-year term) Adams*, Asotin, Columbia, Ferry, Garfield, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman*		
Candidate	**Vote**	**Vote %**
Randall Yearout (Prefers Constitution Party)	10,635	6.26 %
Daryl Romeyn (Prefers Democratic Party)	21,091	12.42 %
David R. Fox (Prefers Democratic Party)	5,569	3.28 %
Clyde Cordero (Prefers Democratic Party)	10,787	6.35 %
Barbara Lampert (Prefers Democratic Party)	15,538	9.15 %
Cathy McMorris Rodgers (Prefers Republican Party)	106,191	62.53 %
Total Votes	169,811	100.00%

* denotes partial county

Id. (citing election data, *supra*).

[20] The Democratic Party does not object to the decision by the various candidates to run for office; it only objects to the use of its name without competing for and winning the Party's nomination under the Party's rules and the resultant blurring or alteration of its message by false representatives.

SUMMARY OF ARGUMENT

Implementation of I-872 was constitutionally risky, given Washington's political traditions and voter expectations regarding party affiliation information on ballots. In order to achieve a constitutional implementation, the State needed to overcome those expectations and affirmatively eliminate the risk of voter confusion inherent in the situation. The State has not shown that it was successful in meeting its challenge. On the contrary, the evidence shows that it has failed.

The implementation of I-872, which created the Top Two partisan system, has caused severe injury to the Democratic Party, by diverting votes from Party nominees, causing them to be eliminated before the general election, and by creating false public representatives of the Party who distort its message. The State's Top Two partisan system is not narrowly tailored—it fails to include even the simplest protection of associational rights, namely the right of the Party to object to the use of its name by self-appointed candidates.

The district court failed to appreciate the significance of context in evaluating the constitutionality of the Top Two partisan system and erred in creating its own standard, rather than following the Supreme Court's standard, in evaluating the State's implementation. The district court also erred by utilizing as

an analytical tool a hypothetical voter who was selectively informed and not representative of actual Washington voters.

This Court should reverse the district court's summary judgment determination, grant summary judgment to the Party and direct that a permanent injunction be entered requiring the State to print "no party preference" or "independent" after the name of a candidate designating a Democratic Party preference unless the Party has consented to the use of its name by the candidate. The Court should also award the Party its attorneys' fees on appeal pursuant to 42 U.S.C. § 1988.

STANDARD OF REVIEW

An appellate court reviews an order granting or denying summary judgment de novo. *See Brodheim v. Cry*, 584 F.3d 1262, 1267 (9th Cir. 2009). On cross-motions for summary judgment, each moving party bears the burden for its own motion. *See Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978)). The constitutionality of a state law is reviewed de novo. *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir. 2004).

Although a denial of a permanent injunction is reviewed for abuse of discretion, *see E.E.O.C. v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th

Cir. 1987), the district court "necessarily abuses its discretion when it bases its decision on an erroneous legal standard . . . ." *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). When the district court is alleged to have relied on an erroneous legal premise, the court reviews the underlying issues of law de novo. *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2007).

ARGUMENT

I. The District Court Erred in Evaluating the Top Two Partisan System Under the Wrong Standard.

A. Implementation of I-872 Was Constitutionally Risky and the Supreme Court Set a High Standard Which the State Must Meet.

This case first came before this Court in 2006 as a facial challenge. The Court recognized the risk of forced association in the proposed Top Two partisan system:

> [G]iven that the statement of party preference is the *sole* indication of political affiliation shown on the ballot . . . [t]he practical result . . . is that a political party's members are unilaterally associated on an undifferentiated basis with *all* candidates who, at their discretion, "prefer" that party.

Wash. State Republican Party, 460 F.3d 1108, 1119-20 (emphasis in original). In such circumstances, the Court concluded, "voters cannot differentiate (1) bona fide

party members . . . from outsiders . . . or (2) party nominees . . . from 'spoiler' intraparty challengers." *Id.* at 1121.

The Supreme Court, however, concluded that this Court's conclusion might not be true in practice; in the absence of an actual implementation of I-872 the Supreme Court held that the Ninth Circuit could only speculate about the circumstances in which voters would encounter the party preference statement. *See Grange*, 552 U.S. 442, 457-58. The Supreme Court found that the Parties' arguments relied on "factual assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge." *Id.* at 444. The Supreme Court held that on the record before it, the Parties did not meet their facial challenge burden to establish "that no set of circumstances exists under which [I-872] would be valid." *Id.* at 449, 454 (quoting *United States v. Salerno*, 481 U.S. 739 (1987)); *see also id.* at 455 ("[W]e do not even have ballots indicating how party preference will be displayed. It stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot.").

Accordingly, for purposes of a facial challenge, the Supreme Court presumed an eventual implementation might be possible that avoided voter association between a party and a candidate's party preference and concluded that

"in the absence of evidence, [it] cannot assume that Washington's voters will be misled." *Id.* at 457. The factual determination of risk of confusion would need to await an as-applied challenge after implementation. *Id.* at 457-58. The Supreme Court's musing about the details of an implementation does not control the determination of the constitutionality of the actual implementation. The case is now an as-applied challenge and the standard is not whether the State might theoretically eliminate confusion; the standard is whether it in fact did so.[21]

The Supreme Court identified the test that the State's implementation of I-872 would have to pass in order to be constitutional in a State with a long history of displaying partisan affiliation after candidate names on ballots. It would have to "eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment." *Id.* at 456; *see also id.* at 460 (Roberts, C.J., concurring) ("If the ballot is designed in such a manner that no reasonable voter would believe that the candidates listed there are nominees or members of, or otherwise associated with, the parties the candidates claimed to 'prefer,' the I-872 primary system would likely pass constitutional muster.") (emphasis added).

[21] *See Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 861 (9th Cir. 2009) (upholding statute on facial challenge but noting "[i]f and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision"), *aff'd*, --- S.Ct. ----, 2011 WL 2039365 (May 26, 2011).

B. The District Court Applied Its Own Standard.

On remand, the district court could have used either of two separate standards, with a similar emphasis, articulated by the Supreme Court to analyze the political parties' as-applied challenge to the implementation of I-872. *Grange*, 552 U.S. at 456 (holding I-872 would be constitutional if the implementation "eliminate[d] any real threat of voter confusion") (majority holding) (emphasis added); *id.* at 460 (Roberts, C.J., concurring) (finding I-872's implementation would "likely pass constitutional muster" if the ballot was "designed in such a manner that no reasonable voter would believe that the candidates listed there are nominees or members of, or otherwise associated with, the parties the candidates claimed to 'prefer'"). The crucial issue under either standard is whether voters believe candidates are associated with the political party identified in the party preference statement printed after the candidate's name on the ballot. The district court instead applied a standard that asks only whether the State's implementation in a vacuum would cause confusion for a hypothetical voter, not whether actual voters experiencing the system in real life would see candidates as associated with the political parties designated after their names on ballots. ER00108-109. The district court's standard did not address the concern of the Supreme Court and this Court.

The Supreme Court Justices required the State to eliminate injury, and some expressed skepticism about the State's interest in doing so. *Grange*, 552 U.S. at 462 (Roberts, C.J., concurring) ("[T]he history of the challenged law suggests the State is not particularly interested in devising ballots that meet these constitutional requirements."). They required the State to eliminate the risk of voter confusion in their implementation of I-872, not ignore it. *Id.* at 456 (holding implementation must "eliminate . . . threat of voter confusion"). By creating its own standard, the district court did not require the State to achieve the result the Supreme Court required of the State.

The Supreme Court placed a burden on the State to eliminate upon implementation the possibility that voters would view candidates as associated with the political party printed after their name on ballots, not simply passively allow it to occur in the natural course by virtue of reasonable voter expectations. *Id.* The State failed to do so. Indeed, the State provided no evidence that the ballot it used in practice was any less constitutionally dangerous than the ballot contemplated by this Court in its earlier opinion in this case. *See* Statement of Facts at § D.

Even if the district court elected not to follow the Supreme Court's majority holding, it justifiably could have followed Chief Justice Roberts' substantively

similar "reasonable voter" standard. *Grange*, 552 U.S. at 462. Chief Justice Roberts reasoned that the State's implementation of the initiative would be constitutional if "no reasonable voter would believe that the candidates listed [on the ballot] are nominees or members of, or otherwise associated with, the parties the candidates claimed to 'prefer.'" *Id.* at 460 (Roberts, C.J., concurring) (emphasis added). Manifestly, the State failed to meet this standard; its own expert in the case, a Washington State political science professor and presumably a reasonable voter, exhibited exactly the confusion that the State was charged to eliminate. ER00209.

Rather than use either standard set out by the Supreme Court, the district court used its own standard and held that, as implemented, I-872 was constitutional as applied in partisan primaries because the State's "implementation of I-872 does not create the possibility of widespread confusion among the reasonable, well-informed electorate." ER00108 (emphasis added). The district court did not examine whether the State had eliminated the inherent risk of voter perception of association between candidates and the party listed after their names on the ballot, but merely whether the Top Two viewed in a vacuum created a new risk of voter confusion.

The district court concluded that Washington's implementation of I-872 eliminated the possibility of widespread voter confusion because: (1) the ballot contained a single assertion that the candidate's preference statement did not imply a nomination, endorsement, or association with the stated party; (2) the word "prefers" appears multiple times after partisan offices; (3) an insert and the Voters' Pamphlet repeated the assertion that no association is implied by the preference statement on the ballot; (4) an educational campaign occurred in 2008; and (5) the voters themselves approved the law, not their elected representatives. *See* ER00099-100.[22] The district court did not require any proof that the materials upon which its conclusion rested had been read by voters or, if they had, had altered voter perceptions of the meaning of party preference statements on ballots, and there is no evidence that the materials will be available to voters in future

[22] This last point does not seem supportive of the district court's conclusion inasmuch as the "preference not association" theory is a *post hoc* justification first asserted by I-872 defenders long after voters adopted I-872. Voters adopted a statute that they believed would continue Washington's historic practice of associating candidates and parties on the ballot:

> Candidates for partisan offices would continue to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots. . . . At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names . . . .

ER00126-127 (quoted by *Wash. State Republican Party*, 460 F.3d 1108, 1113 n. 5) (emphasis added).

elections. ER00103. The district court found the implementation to be consistent with the Supreme Court's dicta about a system that might be constitutional when implemented. ER00100.

The district court dismissed unrefuted evidence submitted by the Parties that showed voters—based on the candidates' party preference statements at filing and on the ballot—assumed that the candidates were endorsed and nominated by, or associated and affiliated with, the Parties, finding it "obvious from the ballot format that the party preference statement . . . does not imply one way or another whether the political parties endorse, approve or affiliate with the candidate." *See* ER00102. No evidence was adduced from any source that voters ever even read the disclaimer, much less that they treated it as negating any association between candidate and party they perceived from the party preference information printed elsewhere on the ballot. Instead, the district court simply held that any voter who failed to notice or understand the disclaimer the way the district court did was an unreasonable, uninformed voter whose viewpoint would not be considered by the court. ER00103.

The district court also refused to consider the ample evidence of actual voter confusion, stating that such evidence was "irrelevant and unpersuasive." ER00103. The court acknowledged the evidence that voters and news media and

even state election officials during Washington campaigns frequently state or insinuate that a candidate who lists a party preference on the ballot is that party's nominee. *Id.* The court characterized the confusion as "negligible" but failed to point to evidence—because the State did not provide any—that voters viewing Washington's ballots did not in fact view candidates as affiliated with the party identified after their names. *Id.* Although it acknowledged "general confusion about matters of politics and elections is common," ER00106, the district court concluded without evidentiary basis that the generally confused voters understood with clarity the finely nuanced meaning of the party designation printed after candidate's names. In particular, the court disregarded persuasive evidence of mistaken voter association, including (1) testimony from the Parties' expert regarding a study he performed testing voter perception of a model Top Two ballot, and (2) voluminous evidence of media coverage in which "preference" and "affiliation" were equated. *See* ER00105-107.

In sum, the court did not view as relevant to its decision whether voters in fact viewed the party preference statements on the ballot as indicating an association between candidates and parties. Whether I-872's implementation would exacerbate or facilitate ongoing voter confusion was also deemed not relevant. The court instead limited its inquiry to whether a hypothetical voter

population, assumed to be unaware of decades of election practice and current common understanding of the meaning of party preference statements, would be confused by the State's specific implementation of I-872 if it were viewing it in a vacuum. The district court's approach did not require the State to show that it had in fact met the standard required by the Supreme Court. The district court's grant of summary judgment is based on an incorrect standard and should be reversed.

II. The Use of the Top Two Partisan System in Washington State Involves a Substantial Risk of Interference With First Amendment Rights of Association That the State Failed To Eliminate as Required.

I-872 was intended to continue a system in which a candidate's party affiliation is stated at filing and then indicated on ballots by party labels. *See supra*, Statement of Facts at § B. The State's implementation of the Top Two Partisan system fulfills this intent by using a candidate's unilateral statement of party preference as the indication of the candidate's party required by RCW 29A.36.121(3), the indication of party affiliation required by RCW 42.17.510(1), and the indication of the candidate's party in regulatory filings. Washington voters read Top Two ballots through the lens of a long history of displaying party affiliations on Washington ballots, Washington's decision to utilize unilateral candidate party preference statements as party affiliation statements in connection with public disclosure and advertising requirements, and

the continuing equation of party affiliation and party preference statement in public discussions (in which election officials freely join). This context creates a high likelihood that voters understand the party preference statement they see on the ballot as indicating the candidate is associated with, a member of or nominated by the party named.

The mechanism of interference with political party rights of association may have changed slightly from that used in Washington's prior unconstitutional blanket primary, but the constitutional injury is just as severe. In the Top Two partisan system, self-selected candidates freely run as candidates of political parties that do not choose them as nominees or representative candidates, forcing the parties to associate with them and distorting or interfering with the parties' ability to control the political message presented to the public on behalf of the party.

The Supreme Court required that Washington eliminate the risk of voter confusion and forced association in implementing I-872. There can be no genuine dispute about the fact that the State failed. The record in this case is filled with statements by participants in Washington elections (voters, election officials and media observers) indicating that the public continues to believe candidates are associated with the political party for which they state a preference at filing. *See*

supra, Statement of Facts at I.B. No evidence indicates voters form a different conclusion when they view the State's Top Two ballots, nor would it be reasonable for them to do so if they did. The party preference statement on the ballot is where voters expect to see a statutorily mandated indication of the candidate's party. *See* ER00159-160; RCW 29A.36.121(3) (political party indicated next to name of candidate on ballot). The cognitive experiment performed by Dr. Manweller corroborates this common-sense conclusion. *See supra*, Statement of Facts at § C.1.

Faced with the overwhelming evidence in the Democratic Party's cross-motion for summary judgment that voters continue to believe candidates are associated with the parties appearing after their names on ballots, the State and the Grange were required to come forward with substantial evidence showing that in fact no reasonable voter in a Top Two partisan primary or election believed candidates were associated with the political party appearing after their names on the ballot. *See, e.g.*, *FTC v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001) (after Plaintiff, as moving party, made prima facie case, summary judgment was appropriate after defendant failed to put forth "evidence that is 'significantly probative' or more than 'merely colorable' that a genuine issue of material fact exists for trial"). Neither did so. Both chose to rely merely on the fact that a "disclaimer" is printed

on the ballot but provided no evidence that the disclaimer is read or, if read, mitigates in any significant degree the confusion and risk of confusion the evidence indicates is clearly present. *See supra*, Statement of Facts at § D. The district court erred in concluding, based on the State's inadequate evidence, that as a matter of law the Top Two partisan system had been implemented so as to eliminate the risk of forced association. The evidence in fact points to exactly the opposite conclusion. The Court should reverse the decision below and grant summary judgment to the Parties.

III. Forcing Political Parties To Associate With Representatives They Have Not Selected Results in Severe Injury to the Democratic Party.

This Court, using a prescient hypothetical, articulated previously the severe burden that would be placed on political parties' right of association by an implementation of the Top Two Partisan system in which the ballot contains multiple identical party preference statements and provides no information from which voters can determine the candidates' true relationship to the parties they designate. *Wash. State Republican Party*, 460 F.3d at 1120-21.

Discussing its hypothetical, this Court noted that because the ballot does not show which candidates are the political parties' official nominees (or even true party members),

> [V]oters cannot differentiate (1) bona fide party members . . . from outsiders . . . or (2) party nominees . . . from "spoiler" intraparty challengers. The net effect is that parties do not choose who associates with them and runs using their name; that choice is left to the candidates and forced upon the parties by the listing of a candidate's name "in conjunction with" that of the party on the primary ballot. Wash. Rev. Code § 29A.04.110 (2004). Such an assertion of association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights.

Id. at 1121 (footnotes omitted).

The hypothetical envisioned by the Court became a reality for the Democratic Party in 2008 under the State's implementation of I-872. *See, e.g.*, *supra* Statement of Facts at E.1-3. Fourteen party nominees found themselves sharing the primary ballot with multiple candidates identified as "Prefers Democratic Party." ER01113-1114. The ballots contained no information for the voter as to which candidates were the Party nominees or even affiliated with the Democratic Party. All 14 nominees failed to receive enough votes to advance to the general election under the Top Two system. *Id.* In each case, the number of votes they lacked was less than the number of votes given by voters to identically designated "Prefers Democratic Party" candidates in the same race. *Id.* These candidates were not in high profile races, like Governor, but were instead in races for low profile state offices where the expression of party preference may be decisive. *See Wash. State Republican Party*, 460 F.3d at 1122 n.23. The

likelihood of diversion of votes from a party's nominee to other identically designated candidates in such a low profile situation is high. ER00205-206.

Improper elimination of party nominees at the primary stage interferes with the Party's ability to articulate its message to voters in the general election and with its ability to develop future high profile leaders to carry its banner. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 578-79 (2000). There is no more severe burden on a party's associational rights. *Cf. Eu v. San Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 231 n.21 (1989) ("[R]egulating the identity of the parties' leaders . . . may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message"); *Jones*, 530 U.S. at 582 ("We can think of no heavier burden on a political party's associational freedom [than changing its message]").

The district court, however, held that there was no burden on the Democratic Party in these circumstances because:

> The primary ballot did not include "three other Democratic candidates." It included four candidates who stated a preference for the Democratic Party, one of whom the Democratic Party officially endorsed.

ER00104. The district court's conclusion was unsupported by any evidence that voters did not believe that all the identically-designated candidates were Democratic candidates. There is no such evidence. ER00194; ER00200;

ER00277. On the contrary, all the available evidence suggests that the voters likely did believe the candidates were Democratic candidates. The district court erred by ignoring the context.

An extraordinary risk of widespread confusion arises in the context in which I-872 was implemented. I-872's requirement that party preference statements be printed on ballots in the location reserved by statute and tradition for party affiliation statements creates the risk of voter confusion based on longstanding habits and expectations, the same way that a statute suddenly changing the rules of the road to require drivers to stop on green lights and go on red lights would create a risk of accidents. The question in Washington is not whether subsequent implementation of the statute creates the risk. The question is whether the implementation eliminates the constitutional risk that the implementation will necessarily encounter.

By reframing the analysis to require the political parties to focus on whether confusion would be created in a vacuum by the State's implementation and ignoring any injury allowed to result by inept or ineffective elimination of risk, the district court failed to account for the risk of constitutional injury arising from the actual confusion it acknowledged existed. *See* ER00106. Although the district court acknowledged that confusion is common, that the parties were bound to find

voters who did believed party preference statements indicated party affiliation, that election officials and observers spoke of party preference statements as indicating party affiliation and fostered confusion, it simply dismissed the voluminous evidence as showing only "negligible" confusion, ER00103, while concomitantly failing to hold the State accountable for the lack of any evidence showing that any voters were not confused. On the one hand the district court had extensive evidence showing a consistent pattern of voter and media belief that candidates are associated with the parties indicated in their party preference statements. On the other hand, the district court had no evidence that any voter in Washington thought otherwise. In such circumstances, concluding that voter confusion was "negligible" was error.

Context is important and should not be ignored. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (rejecting school district's attempt to recast pre-football game prayer as secular attempt to "solemnize" football game, as Court would not "turn a blind eye to the context in which the policy arose"). Four Supreme Court Justices made clear that context was relevant in this case by noting their skepticism that the State would seriously attempt to deal with the constitutional issues involved in implementing I-872. *Grange*, 552 U.S. 442, 462, 470 (Roberts, C.J. and Alito, J. concurring; Scalia, J. and Kennedy, J. dissenting);

see also, e.g., *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005) (noting that in Establishment Clause inquiry into purpose of religious display, "reasonable observers have reasonable memories" and are familiar with historical context in which policy arose); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (presuming in Establishment Clause endorsement inquiry that "the reasonable observer . . . must be deemed aware of the history and context of the community and forum in which the religious display appears"). The context in which the State implemented the Top Two partisan system is what makes clear that the implementation is nothing more than mere cosmetic changes in terminology that do not change the substance of constitutionally questionable activity. *Cf. Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307-08 (viewing prayer policy in historical context and reasoning that change in terminology did not convert the policy from having a religious purpose to having a secular purpose).

The Top Two partisan system resulting from I-872 is not Athena, leaping fully grown from Zeus' head, and its constitutionality should not be evaluated as if voters are newborn babes with *tabula rasa* minds. Washington's implementation of I-872 converted the potential injury described in this Court's hypothetical into

real long-term injury in the 2008 and 2010 primaries, eliminating the Party's junior candidates and thereby changing the ranks of the Party's future prominent leaders.

This severe burden upon the Parties associational right will only be tolerated if it is "narrowly tailored to serve a compelling state interest." *Grange*, 552 U.S. at 451. No compelling state interest has been identified as being advanced by Washington's implementation of I-872, nor is there any argument that the implementation is narrowly tailored.

IV. The District Court's Reliance on a Speculative Hypothetical Voter Who Had Little in Common With Actual Voters Resulted in Its Incorrect Evaluation of the State's Implementation of I-872.

The district court erred when it based its analysis on the speculative reaction of a hypothetical reasonable, well-informed voter without assuring that its hypothetical voter represented in any degree actual voters. See ER00103 (hypothetical voter assumed to read and understand all ballot instructions). The constitutional injury to First Amendment rights of association occurs when actual voters interpret party preference statements as indicating that candidates are associated with political parties.

By failing to ground the characteristics or knowledge of its "reasonable, well-informed" voters in the knowledge, experience and characteristics of actual voters, the district court essentially used a subjective standard highly dependent on

the particular court reviewing the implementation. For example, the district court apparently assumed that its reasonable, well-informed voters were only selectively informed. On the one hand, the fact that many voters do not read disclaimers and instructions was held irrelevant by the district court because all voters who do not read ballot instructions are "no longer [] reasonable voter[s]," though the State offered no evidence that any voter read the disclaimer. ER00103. On the other hand, without explanation, the district court's hypothetical voter apparently excluded voters who were aware of the many other pertinent state statutes, regulations, history and public statements of election officials in Washington that all indicate to voters that the candidate party preference statement under the Top Two partisan system is the equivalent of a party affiliation statement. Reasonable, well-informed voters are a part of the culture in which they live, not captives in an isolation booth. The district court should have assumed its voters were informed about all relevant aspects of Washington election practice. A well-informed voter is not a Goldilocks voter: not too informed and not too ill-informed; just selectively informed enough to support the State's litigation position.

The district court acknowledged, and the evidence supported, the fact that confusion among voters is common, but it did not indicate whether, and if so, why, its hypothetical reasonable, well-informed voter shared the common confusion or

was immune to it. The district court acknowledged actual confusion but did not provide any basis for concluding those confused were unreasonable or uninformed. *E.g.*, ER00103 (stating that statements by state officials and extensive news media coverage equating party preference with party endorsement did not show "widespread voter confusion"); ER00106-107 (rejecting study because it does not show that it is representative of "reasonable, well-informed voter" in Washington irrespective of whether the actual voters participating in the study are reasonable, well-informed voters).

It cannot be said that no voter with experience in Washington's political history, and knowledge of the intent and current statements by election officials and media observers, would conclude that a candidate who states a "party preference" is endorsed or nominated by, or affiliated or associated with, the party. *See Grange*, 552 U.S. at 460 (Roberts, C.J., concurring). It should not be said that a voter reaching that conclusion is unreasonable in basing opinions on this knowledge of public discourse and statutory law.

A "well-informed" electorate that adopted I-872 by public vote has a memory of what it intended to achieve by passing I-872 and thus is familiar with the history and intent of I-872, the state's prior primaries, and the state's long usage of party names after candidates' names on the ballot to indicate party

affiliation. The district court erred in failing to account for these voter expectations that they will see party affiliations on the ballots. "Party preference" in the Washington context has a connotation as well as a denotation that should be considered.

The Grange advertised I-872 as a continuation of the blanket primary system in which candidates ran with a party affiliation indicated on the ballot. ER00126; ER00127 ("[P]arty designations will appear after the candidates' names . . . (just as they do now in the blanket primary)") (emphasis added). Actual well-informed Washington voters approach the ballot with the expectation that I-872 was implemented to effectuate the promise and purpose from the campaign that won the votes to pass it.

Actual reasonable, well-informed Washington voters approach the ballot informed by the numerous media reports equating party preference with party endorsement or nomination, statements that are often made by the election officials implementing the system and, in any event, are not contradicted by those officials. ER00416-18; ER00435; ER00377; ER00426-27; ER00518.[23] Statements equating

[23] The State may not "control what the newspapers print, lest it run afoul of . . . Freedom of the Press," ER00103, but it does control its own explanations to broadcasters, newspapers and the public. The State not only offered no evidence to show any effort to correct any of the erroneous articles, the record shows it re-distributed erroneous media descriptions to other media outlets. ER00775-777.

a candidate's party preference on his or her filing papers with party affiliation, nomination by or endorsement by the party are pervasive in the public sphere in Washington, both indicating the wide-spread nature of the forced association and further reinforcing the forced association. *See* Statement of Facts at § C.2. There is almost uniform media coverage stating that candidates who stated a party preference are running "for" the party or "as" a party member. *See supra*, n.16.

Actual reasonable, well-informed Washington voters approach a ballot carrying in their minds the knowledge that state law requires a candidate's party to be shown on the ballot after her or her name, and thus understand the party preference information after the candidate's name to indicate the candidate's party. *See* RCW 29A.36.121(3). A reasonable, well-informed voter approaches the section of the ballot labeled "partisan office" with the conception that the basic distinction between a partisan office and a non-partisan office is that in elections for partisan offices candidates are running as party candidates. ER00190. That is the connotation of the term partisan office, "[a]n elected office for which candidates run as representatives of a political party." *Id.*

The widespread perception of Washington voters that party affiliation is indicated by the candidate's party preference statement at filing and on the ballot is beyond genuine dispute. Actual injury to First Amendment rights of association is

being caused by actual voters' actual confusion. It was error to ignore the real and focus only on the hypothetical. The district court's summary judgment should be reversed. The fundamental right of political parties to choose with whom they associate on ballots should be protected.

V. The Court Should Award the Democratic Party Its Attorneys' Fees on Appeal.

The rule is well-established in this Circuit that a prevailing plaintiff is presumptively entitled to costs, including reasonable attorneys fees under 42 U.S.C. §1988 for violations of the Civil Rights Act. *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1285 (9th Cir. 2004). Accordingly, the Democratic Party requests that the Court award it reasonable attorneys' fees on appeal, to be determined after the Court renders its decision.

CONCLUSION

Washington's Top Two partisan system is intended to and does provide State assistance to candidates who want to falsely associate with the Democratic Party and free-ride on its reputation and goodwill, distorting its message and interfering with its ability to advance its chosen candidates to the public at the general election. It interferes with the most fundamental of political rights—the right to join together and promote a group's common agenda to the larger public body. The district court's orders should be reversed, and the State should be

required to print "no party preference" or "independent" after the names of candidates designating a Democratic Party preference unless the Party has consented to the use of its name by the candidate.

DATED this 6th day of June, 2011.

K&L GATES LLP

By s/David T. McDonald
David T. McDonald
Emily D. Throop
Peter A. Talevich
Jennifer S. Addis
925 Fourth Ave., Suite 2900
Seattle, WA 98104
Phone: (206) 623-7580
Fax: (206) 623-7022
david.mcdonald@klgates.com
emily.throop@klgates.com

Attorneys for Plaintiff/Appellant Washington State Democratic Central Committee

STATEMENT OF RELATED CASE

Pursuant to Ninth Circuit Rule of Appellate Procedure 28-2.6, Plaintiff/Appellant, by and through its undersigned counsel, hereby states that there are two related cases to the instant appeal each captioned *Washington State Republican Party, et al. v. Washington State Grange, et al.*, whose Ninth Circuit cause numbers are 11-35124 and 11-35125, and which are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit rule 32-1, the attached Brief of Plaintiff/Appellant is proportionally spaced, has a typeface of 14 points or more and contains 11,946 words, including both text and footnotes, and excluding this Certificate of Compliance, the Table of Contents, the Table of Authorities, the Statement of Related Cases, and the Certificate of Service.

s/David T. McDonald
David T. McDonald

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket No. 11-35122

I hereby certify that I arranged for the foregoing document to be electronically filed 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 June 6, 2011.

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 arranged for service by email to the following non-CM/ECF participants:

Orrin L. Grover
Law Offices Of Orrin Grover
416 Young St.
Woodburn, OR 97071

I further certify that I served the Appellants' Excerpts of Record as follows:

by overnight delivery service to:

James K. Pharris
Jeffrey T. Even
Allyson Zipp
Office of Washington Attorney General
1125 Washington Street SE
Olympia, WA 98504

by personal delivery/messenger to:

Thomas F. Ahearne
Kathryn Carder
Marco J. Magnano Jr.
Foster Pepper, PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Signature: s/ David T. McDonald