11-35124
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 REPUBLICAN PARTY

John J. White, Jr.
Kevin B. Hansen
Livengood, Fitzgerald & Alskog, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
425-822-9281

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

"The parties still have no say in determining who gets to call themselves a Democrat or Republican [on the ballot]."

> State of Washington, describing I-872's new Top Two partisan primary to the press. ER 00775.

"A Top Two primary . . . allows candidates to file for partisan office and list on the ballot a party affiliation, regardless whether the candidate has been endorsed or nominated by that party."

> State of Washington, describing I-872 to potential bidders for its Top Two primary "education" effort. ER00270.

"[B]y indicating Democrat or Republican you pick up a little bit of a base."

> Washington Secretary of State Sam Reed, explaining why candidates will list a "party preference" on the Top Two partisan primary ballot instead of running as Independents. ER00520.

"Voters in Seattle may see two Democrats in the General, while voters in Walla Walla may see two Republicans in the General."

> Secretary Reed, explaining the effect of the Top Two partisan primary to the National Association of Secretaries of State. ER00785.

"Here are the places we know for sure two candidates from the same party will be advancing to the November General . . . ."

> Secretary Reed's staff, reporting to him the day before the first Top Two partisan primary. ER00760.

Washington has implemented Initiative 872 with not even lip service to the First Amendment[1] – just as voters were told from the day the Grange filed the initiative. From the process for filling partisan vacancies under Washington's constitution to mandatory inclusion of candidates' party affiliation in all political advertising and to repeated statements by its election administrators, Washington treats candidates' party self-designation on the ballot as affiliation with the Republican Party.

Unsurprisingly, the general public, voters, sophisticated political observers, and even Washington's expert witness and its Secretary of State all understand that the State's ballots associate candidates with the Republican Party based on candidates' unilateral designation. The record below, including the State's only pre-implementation test of ballot design, clearly demonstrated that the ballot associates candidates and the Party.

The district court erred in concluding that I-872, as implemented, does not create a forced association between candidates and the Republican Party. This Court should reverse, grant summary judgment to the Party on its First

[1] As one newspaper observed, "Top two isn't a nomination process but is instead a way to winnow the field down to two candidates. It may be a difference without a distinction, but the U.S. Supreme Court bought it . . . ." ER 00981. This Court disregards "distinctions without a difference" when First Amendment rights are at stake. *Democratic Party v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003), *cert. denied,540 U.S. 1213*, *cert. denied sub nom., Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004).

Amendment claims, and award attorneys' fees under 42 U.S.C. §1988. In the alternative, the Court should reverse the summary judgment granted to the State because the extensive factual record presented by the Party at least raised a material issue of fact regarding forced association on Washington's ballots.

The district court abused its discretion in denying the Republican Party's motion to amend its complaint promptly after remand to raise a state constitutional issue arising from the district court's and this Court's construction of I-872, and the State's ensuing implementation.

The District Court also erred in setting aside a settlement of attorneys' fees paid by the State for the prior proceedings before the Court.

II. JURISDICTIONAL STATEMENT

The Republican Party appeals from the district court's orders upholding the State of Washington's implementation of I-872, denying the Party's request to amend its complaint, and ordering the return of fees paid under a settlement agreement. The district court had jurisdiction under 28 U.S.C. §§1331, 1343, 2201 and 2202. This Court has jurisdiction under 28 U.S.C. §1291. The district court entered its order denying the request to amend the Party's complaint on August 20, 2009, ER00057-085; its order and judgment requiring the Party to return fees paid under a settlement agreement on January 5, 2010, ER00010-011, 00086-091; its order granting partial summary judgment on January 11, 2011, ER00092-0115;

and a final judgment on January 20, 2011. ER00012-13. The Party timely filed its notice of appeal on February 10, 2011. ER00001-03.

II. STATEMENT OF THE ISSUES

A. Where the State treats candidates' self-designation of party preference on the ballot as actual association when filling vacancies in partisan office under the State Constitution, did the District Court err in concluding that Washington's ballots do not associate candidates and party?

B. 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?

C. 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?"

D. 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?

E. 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?[2]

F. Did the district court err by misapplying Washington's "context" rule for construing contracts when it ordered repayment of attorney's fees that had been compromised by an agreement among the parties, and confirmed by a stipulated order?[3]

G. Is the Republican Party entitled to fees on appeal?

IV. STATEMENT OF THE CASE

In 2000, the Supreme Court prohibited states from adulterating the message of political parties through "forced association" in the guise of a "blanket primary." *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*"). In 2003, this Court invalidated Washington's blanket primary because it violated the First

[2] The Democratic Party, in the related case No. 11-35122, also appealed from the district court's orders in this case. To minimize redundancy, the Republican Party adopts by reference the arguments the Democratic Party makes in the opening brief filed in Case No. 11-35122 to the extent that such arguments are not addressed in this brief. In particular, the Republican Party adopts without further elaboration the Democratic Party arguments with respect to this issue and the district court's denial of leave to amend to address constitutionality issues under Article II, Section 37 of the Washington constitution.

[3] See preceding note.

Amendment right of the Republican Party and its adherents to select the candidates carrying the Republican standard in the general election. "The Washington scheme denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose *preference* is for the other party." *See Reed*, 343 F.3d at 1204 (emphasis added). In 2004, Washington adopted a replacement system ("the Montana Primary"), under which primary election voters were limited to voting in a single party's nomination races. ER01127.

In response to *Reed*, the Grange proposed the "modified blanket primary," approved as Initiative 872 ("I-872") by voters in November of 2004. Under I-872, a candidate self-designates his party preference, which is listed after his name on the primary and general election ballots, and voters may vote for any candidate in the primary. The two candidates with the most votes advance to the general election, regardless of party.

The Republican Party filed this action on May 19, 2005, challenging the constitutionality of I-872. The Democratic Party and the Libertarian Party intervened as plaintiffs, and the State of Washington and the Washington State Grange intervened as defendants. The district court found I-872 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. *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005), *aff'd*, *Washington State Republican Party v. Washington*, 460 F.3d 1108, 1111 (9th Cir. 2006) (hereinafter "*WSRP*"), *rev'd and vacated*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 444 (2008) (hereinafter "*Grange*").

In 2006, this Court held that I-872 violated the First Amendment on its face because it "retain[ed] a partisan primary, in which each candidate may self-identify with a particular party regardless of that party's willingness to be associated with that candidate." *WSRP*, 460 F.3d at 1112, *vacated after reversal*, 545 F.3d 1125 (2008).[4] The Supreme Court reversed on March 18, 2008, holding that I-872 possibly could be implemented to avoid forced association, and remanded to determine whether Washington applied I-872 in a constitutional manner. *Grange*,552 U.S. at 444.

The State then implemented I-872, and this case continued as an as-applied challenge. After discovery, the parties cross-moved for summary judgment. On

[4] A vacated opinion has no precedential value, *see In re Daniel*, 771 F.2d 1352, 1361 n.19 (9th Cir. 1985), but may have ongoing persuasive value. *See DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1447-48 & n.9 (9th Cir. 1996). Portions of this Court's prior analysis, such as I-872's severability, were unaffected by *Grange*.

January 7, 2011, the parties lodged their pre-trial order with the district court. Per the consent of the court, the parties submitted the trial exhibits in matrix form. On January 10, 2011, the Republican Party submitted its trial brief to the court.

On January 11, 2011, the district court granted partial summary judgment to the Grange and State, holding I-872 generally constitutional as implemented, and partial summary judgment to the political parties, holding the State's method of electing party precinct committee officers ("PCOs") unconstitutional, disposing of all claims. The district court entered final judgment on January 20, 2011.

V. STATEMENT OF FACTS

A. I-872 was always intended to associate Washington's parties with the candidates using their names on the ballot.

From the outset, Washington voters were told that I-872 continues the historical association between candidates and the parties with whom they are conjoined on the ballots. The first I-872 FAQ, from January 2004, asked, "How would this proposed initiative change our election laws?" The answer concluded, "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." ER00126 (emphasis added). Voters were told that the primary ballot would look no different and that "the party designations

will appear after the candidates' names . . . (just as they do now in the blanket primary)." ER00127. The general election might look different because "the voter might be presented with a choice in the general election between *two candidates of the same political party*." ER00127 (emphasis added). The proponents' Voters Pamphlet statement confirmed that candidates remained associated with parties on the ballot. "*All the voters* will decide who is on the November ballot. *Whether it's one Republican and one Democrat, one major and one minor party, or even an Independent* . . . ." ER00120 (first emphasis in original; second emphasis added).[5]

Voters are still told that candidates on the ballot are associated with the political parties. A July 20, 2010 editorial in *The News Tribune* noted, "[B]oth finalists may be *from the same party* is a consequence . . . ." ER00981 (emphasis added). Nor is this view isolated. On August 23, 2008, *The Daily News* stated, "Like the blanket primary, the Top 2 allows voters to choose from *candidates of all political parties* listed on a single primary ballot. Unlike the blanket primary, which advances candidates from each of the parties to the general election, the Top 2 advances only the top two vote-getters, regardless of *party affiliation*." ER00339

[5] "Party preference" as a form of unilateral association has always been a part of the State's implementation. Washington's 2005 emergency regulations distinguished between candidates listing a party preference and candidates who had "independent status." WSR 05-11-101 (WAC 434-215-015).

(emphasis added); *see also* ER 00401 (*The News Tribune* headline, August 18, 2008, "A blanket primary substitute, if voters can keep it").

B. Washington's "top two" primary and general election ballots associate partisan candidates and the parties.

1. Washington fills vacancies in partisan elected office based on the candidates' designation of party preference, applying a longstanding state constitutional process.

Washington recognizes that candidates' party preference on I-872's ballots affiliates the candidate with the party. The day before the first I-872 primary, Secretary Reed's staff informed him of "the places we know for sure two candidates from the same party will be advancing to the November General." ER00760. In Washington, partisan vacancies are filled by the relevant legislative authority:

> . . . the person appointed to fill the vacancy *must be from* the same legislative district, county, or county commissioner or council district and *the same political party* as the legislator or partisan county elective officer whose office has been vacated, and *shall be one of three persons who shall be nominated by the county central committee of that party* . . . .

Wash. Const. art. II, § 15 (emphasis added); *see also* ER00178, 00183.

When filling partisan office vacancies under the State Constitution, candidate is from the same party he lists on the ballot. The Secretary of State's office summarized the process in connection with a vacancy in the 15th legislative

district representative position formerly held by "Republican lawmaker Dan Newhouse of Sunnyside":

> The state Elections Division says Newhouse's House successor will be chosen this way: Republican precinct committee officers from throughout the sprawling 15th District will choose a ranked-order list of three favorites and the county commissioners from Yakima, Klickitat, Skamania and Clark will pick an appointee to send to Olympia post-haste . . . .

ER00184.

In 2009, Washington filled three vacancies in its legislature under Article II, §15. In addition to the Republican vacancy in the 15th district, Washington filled a Democratic vacancy in the 16th district and a Republican vacancy in the 9th district due to the officeholders' deaths. ER00179. As reported by the Secretary of State's office, Republican PCOs in the 15th district nominated the possible replacements for Representative Newhouse. ER00181.[6] This vacancy-filling process has been part of Washington's Constitution since 1956. *See also Marchioro v. Chaney*, 442 U.S. 191, 198 (1979) (discussing state party committee's role in "selecting nominees for certain interim legislative positions").

2. When implementing I-872, state officials treated candidate designations under the primary as continuing past practice enabling candidates to unilaterally associate with a party.

---

[6] "The Washington Secretary of State's blog provides from-the-source information about important state news and public services. This space acts as a bridge between the public and Secretary Sam Reed and his staff . . . ." ER00182.

Party designations under I-872 are interchangeable with designations under the earlier "blanket primary" and the "Montana primary."[7] For example, "[a]ttached are the two versions [Secretary Reed] preferred of the comparison of Minor Party candidate filings in even years over the timeframe of 2000 to 2008." ER00769. The referenced tables prepared by the State treated candidates' party preference for a minor party as the equivalent of minor party nominations under prior primary systems. These candidates were further described by election administrators as "non D or R filings." ER00770-0771.

The State re-distributed the following newspaper FAQs to a reporter who sought an explanation of the new primary that could be presented to her readers:

> Q: Why do you keep saying "party preference" instead of just "party"?
>
> A: Because the candidates are only asked which party they would prefer to have listed. The parties still have no say in determining who gets to call themselves a Democrat or a Republican and can endorse a candidate or not as they see fit. The winner isn't the party's nominee.
>
> Q: So in some races, we could have two Democrats or two Republicans in the general election?
>
> A: That's possible. It will happen in a state House race in the 7th Legislative District, because only Republicans are running. It could happen in a race with candidates of several different party preferences listed, although it's mathematically unlikely in a

[7] The "Montana primary" operated from 2004–2007. ER01127; *Logan*, 377 F.Supp.2d at 913.

> race with several candidates from one major party and a single candidate from the other major party.
>
> Q: What about the Greens, the Libertarians, the other minor parties and the independents?
>
> A: In theory, they've got the same chance as any candidate listing Democratic or Republican preference. In reality, it could be difficult for them to get to the general election if there's a Democrat and a Republican in that race.

ER00774-0776. As under the former system, "[t]he parties still have no say in determining who gets to call themselves a Democrat or a Republican." ER00775. Association on I-872's ballot exists, but it is the candidate's decision alone. "The candidate might prefer to associate with a particular party . . . but in no way does it mean the party wants to or will associate itself with that candidate." ER00731.

In other official communications last fall, the Secretary of State's office described election contests between candidates who self-designated the same "party preference" as being "all-in-the-family races."[8]

[8] David Ammons, *Top 2 Primary creates some all-in-the-family races*, Washington Secretary of State Blogs (Oct. 21, 2010), http://blogs.sos.wa.gov/FromOurCorner/index.php/2010/10/top-2-primary-creates-some-all-in-the-family-races/ (last visited June 4, 2011). This public record post-dates the filing of the summary judgment pleadings, but the Court may take judicial notice of the record. In the Pre-trial Order lodged in this matter, defendants stipulated to the authenticity of the record. ER01133. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of official information posted on a governmental website, the accuracy of which was undisputed); *United States v. Camp*, 723 F.2d 741, 744 (9th Cir. 1984) (taking judicial notice of a verifiable public record).

Washington's Request for Proposal for its I-872 media campaign expressly stated that I-872's ballot unilaterally affiliated candidates with the party, describing the primary for bidders:

> A Top Two Primary is a new type of primary that allows voters to choose among all candidates running for each office. . . . It allows candidates to file for partisan office and list on the ballot a party affiliation, regardless of whether the candidate has been nominated or endorsed by that party.

ER00270.

3. State election administrators regularly treat "party preference" as affiliation in real life.

Secretary Reed spoke across the state about the primary as part of Washington's I-872 implementation. ER00777. Other state election officials joined him. ER00471-0472. In dealings with the media, election officials regularly described candidates as of the party, from the party, of the same party. These are not mere "isolated incidents" but part of Washington's orchestrated campaign to "earn" media consistent with its message, including the key point that candidates were stating a party affiliation. When discussing matters with reporters, Washington provided no evidence of an effort to correct statements that candidates expressing a preference were "of the same party."

Internal instructions from Secretary Reed to his staff similarly treat candidates as affiliated with the party. "[T]he voter can vote across party lines" and "[t]he two finalists might happen to be members of different parties, the same

parties, or no party at all." ER00787. Secretary Reed's presentation to the National Association of Secretaries of State noted that the party identification on the ballot was the candidate's choice. Reed stated, "Voters in Seattle may see two Democrats in the General, while voters in Walla Walla may see two Republicans in the General." ER00785. Discussing the results of Reed's own 2008 primary, his staff noted, "[T]he Rs might be having a mild post primary night surge that is helping Sam and Dino. We've seen that in recent years." ER00791. I-872 did not alter how election officials viewed ballot-based affiliation from past "nominating" primaries.

The ballot "disclaimer" provides:

> 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.

ER00100. Secretary Reed testified regarding Washington's concerns about party-candidate affiliation on its ballots, "[W]e wanted to make sure we clarified that their statement was that it was candidates who preferred these parties and not necessarily the parties who preferred the candidates." ER00200. "Nominat[ion]," "endorse[ment]," "approv[al]," and "associat[ion]" by the party equates to "parties . . . preferr[ing]" the candidate.

Throughout Washington's current implementation, election officials have referred to candidates on the primary ballot being "affiliated with," "of," or "from"

the political party.[9] The statements are made without reference to a particular candidate, but instead express the connection between candidates and parties on the top two ballot in general.

Secretary Reed told the *Seattle Post-Intelligencer* on August 14, 2008, "I think it's still a little strange to have potentially two people of the same party in the general election." ER00416. 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.
>
> Reed says candidates running against each other in the general election will now have to really stand out against there [*sic*] opponent to win, especially when political parties are the same. ER00377.
>
> "We will be using the top 2 system, which means when the voters go to vote they no longer will have to pick a party. They will be able to vote for the person of either party and [*sic*] any of those races," Reed said. ER00461.
>
> Secretary of State Sam Reed, who had urged "no funny business" when candidates express their political party preference on their official filing, said state and local election officials reported strong

[9] The State's view that I-872 unilaterally establishes party affiliation is unchanged since it began implementation in 2005, when its officials confirmed that the following statement of a county election officer was correct: "Members of recognized political parties need only indicate their party membership on the Declaration of Candidacy." ER00136.

> compliance. . . . [N]early all were signing up as Democrats or Republicans . . . . ER00518.

Most telling is his acknowledgment that by affiliating with the party on the ballot, candidates get themselves an electoral boost.

> Secretary of State Sam Reed said while it's possible more candidates will decide against listing a party preference than those who filed as independents before doing so presents some risks. "We could see that happening," he said. "What offsets that quite a bit is by indicating Democrat or Republican you pick up a little bit of a base. It gives you a start."

ER00520.[10]

Other statements by election administrators link parties and top two ballot candidates. ER00381-082, 00449-050, 00471-0472, 00511-0513, 00515-0516, 00584 ("Minor party and independent candidates will file for office and appear on the ballot in the same manner as major party candidates."), 00760, 00782-00786, 00791.

C. Washington's implementation of I-872 through its campaign finance laws reinforces on-ballot association, and mandates the content of the Party's political speech.

1. Washington's campaign finance statutes are an integral part of its election system.

[10] Candidates trade on the party name, seeking to capture a part of the base vote, even if they have no connection to the party. ER00310-0311.

Like I-872, Washington's campaign finance laws were created by initiative. In adopting I-134, the voters declared, "The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate controlling influence on the *election of candidates*." RCW 42.17.610(1) (emphasis added). Years later, when expanding the statute to cover more political speech, the legislature explained, "Timely disclosure to voters of the identity and sources of funding for electioneering communications is *vitally important to the integrity of state, local and judicial elections*." RCW 42.17.561(1) (added by 2005 Wash. Sess. Laws Ch. 455 §1) (emphasis added).

State regulation of election campaigns begins long before candidates file formal declarations of candidacy – it begins when a candidate "[r]eceives contributions or makes expenditures or reserves space or facilities with intent to promote his or her candidacy for office." RCW 42.17.020(9)(a). The 2012 campaigns for Governor, Secretary of State, Attorney General, State Treasurer, Insurance Commissioner, and State Lands Commissioner all began in early 2009, when the incumbents filed papers with the Public Disclosure Commission ("PDC"). Filing candidates must state their "party affiliation." RCW 42.17.040(2)(f); ER00698-0703. The Declaration of Candidacy form, filed with election officials, is jointly designed by the Secretary of State's office and the PDC and includes an explanation to the candidate of duties under the election campaign

finance laws. ER00537-0538, 00542-0543. "A candidate for partisan office must identify his or her political party on the C-1 registration form . . . . The following abbreviations may be used in advertising. PDC believes they clearly identify political party affiliation." ER00936.

Washington's campaign finance laws are part of its election system, including I-872. The Secretary of State's training materials include campaign finance matters. ER00532 (Q&A 15). The PDC publicly discussed "how campaign finance laws are impacted by Initiative 872" and "how to implement I-872." ER00858. Katie Blinn, Assistant Director of Elections, participated in the PDC's rule-making process related to implementing I-872. ER00869-0870.

Washington's election campaign finance laws are so important to electoral integrity that if a violation "probably affected the outcome of any election," the result "may be held void." RCW 42.17.390(1). The intent of this remedy is "to protect the right of the electorate to an informed and knowledgeable vote." Id. A special rule for setting aside elections appears to apply to defamatory political advertising where "damages are presumed and do not need to be proven." RCW 42.17.530.

2. Washington's election campaign finance laws make clear that "party preference" affiliates the candidate with the political party.

Washington's implementation of I-872 expressly equates "party preference" and "party affiliation." In 2008, the State adopted the first set of "emergency rules" equating party affiliation and party preference:

> NEW SECTION
> **WAC 390-05-274 Party affiliation – Party preference.** (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.

Wash. Reg. 08-14-109; ER00633-0634. The State readopted those emergency rules, without change, in May 2009 and May 2010. Wash. Reg. 09-12-113; Wash. Reg. 10-12-114.

In evaluating whether to adopt the emergency regulation, the PDC's general counsel posed the question as "[w]hether you wish to continue to explain that a party 'affiliation' by a candidate as the term is used in RCW 42.17 and Title 390 WAC means a party 'preference.'" ER01026. The candidate's party preference is an affiliation, but a unilateral affiliation determined by the candidate. The PDC's publicly distributed materials similarly use the terms "preference" and "affiliation" interchangeably. ER00937-0938.

Once a candidate "has expressed a party or independent preference on the Declaration of Candidacy, that ***party or independent designation***" must be reproduced on all political advertising, including any independent political speech. RCW 42.17.510(1) (emphasis added). This inclusion requirement is a powerful disincentive to speak about candidates falsely using the Republican name. ER00308, 00320.

D. The continuing, pervasive references in print and other media to candidates as "party" candidates reflects even sophisticated political observers' understandings of the ballot self-designations.

Candidates file for office listing the political party preference to be printed on the ballot and on all political advertising referencing their candidacy. RCW 29A.24.030;RCW 42.17.510. Across the state, newspapers report the filing statement as an act of affiliation with the party listed in the Declaration of Candidacy. The *Yakima Herald* reported that "Republican state Rep. Charles Ross got a Democratic opponent" and, after running down a list of other candidates, noted that "all filed as Republicans." ER00501. The *Peninsula Daily News* reported that "Doug Cloud . . . filed Monday as a Republican to challenge Dicks." ER00491. At the close of filing in 2008, *The Seattle Times* noted, "Many of November's legislative races will be single-party" because "only Republicans or only Democrats filed for office." ER00496. In 2010, The *Sammamish Review*, *Port Townsend & Jefferson County Leader*, *The Olympian*, and *The News-Tribune*

all described candidates as Republican or Democrat based on their filing for office. ER00482-0483, 00522-0523, 01097-01103.

During campaigns, candidates are regularly described in the media by party name, "Republican" or "Democrat," not "prefers _____ party." ER00361-0363, 00383-0384, 00413-0414, 00419-0421 (referring to Goodspaceguy Nelson – a "perennial Democratic candidate"), 00430-0434, 00465-0466, 00476-0477, 00485-0486, 00489, 00493-0495, 00514, 00517, 00545, 00570-0571, 00704-0706, 00718-0719, 00723, 00734-0735, 00744-0749, 00751-0752, 00796-0799, 00801-0807, 00818-0819, 00821-0822, 00825, 00829, 00839-0840, 00843, 00846-0847, 00924. In the 2010 elections, candidates continued to be identified as "running as a Democrat or Republican" or representing a party. ER00680-0681, 00851-0855, 00860-0862, 00865, 00886-0893, 00901-0905, 00915-0919, 00933, 00939-0940, 00944-0946 ("The third candidate represents the Green Party"), 00947, 00952-0953 ("The state Republican Party wants to retake the district's state Senate seat in its bid to return from near political obscurity in Olympia."), 00954-0955, 00963-0964 ("In partisan races, party affiliations, such as Democrat, Republican or independent, are listed as a preference under the top-two rules."), 00966-0969, 00974-0978, 00984, 00986-0991 ("Three candidates . . . are running as Democrats"), 00992-0997, 01000 ("In Washington state's top-two system, it's possible for two candidates from the same party to advance to the November

ballot. But most likely this time . . . there will be one of each."), 01002-01005, 01020, 01104-01105. Even the Secretary of State's office still omits the "prefers" *caveat* when discussing candidates. ER00983. Other sources use "affiliate" and "preference" interchangeably. ER00507-0508, 00670-0672, 00676-0679, 00998-0999. The treatment of candidates as connected to the political parties was no different in the limited number of partisan elections in 2009. ER00640-0644, 00647-0651, 00689-0694, 00697, 00882-0883.

After the 2010 primary, *The Spokesman Review* referred to Dino Rossi as "the *Republican nominee*." ER01017-01018. Rossi had listed "Republican" as his party preference when filing, and had advanced to the 2010 general election, but was not then the Republican nominee.[11]

Media references to candidates on the general election ballot as being from or of "the same party" or "two Republicans" or "two Democrats" are also commonplace. ER00560-0562, 00572-0577, 00580-0582, 00585-0586, 00625, 00630-0631, 00638-0639, 00756, 00774-0778, 00867-0868, 00985. Even where the Republican Party has expressly rejected a candidate appearing on the ballot as a "Republican," the party designation appears on the ballot and in political discourse. In 2008, Michael Delavar filed for Congress and appeared on the ballot as "prefers Republican party." The Party nominee was Christine Webb, and the Party did not

[11] The Republican Party nominated Rossi later in August. ER00321.

recognize Delavar as a legitimate Republican candidate. Delavar advanced, Webb did not. Even after the primary, the Party offered no support for him. ER00313-0314. Before the primary, the press identified Delavar as a "Republican" candidate, notwithstanding the Party's rejection of his candidacy. ER00385. After the primary, the press continued to reflect association. "Republican congressional candidate Michael Delavar has a lot to say about why the U.S. is wrong to be in Iraq . . . . The unofficial primary results point to a familiar Republican versus Democrat scenario . . . . " ER00844.

E. The term "Republican brand" is used both locally and nationally to describe candidates and officeholders who carry the Republican name in elections.

The relative power or weakness of the Republican Party brand with the voting public is a regular topic of political discourse, both in past elections and today. ER00941-0942. The 2008 elections were not good for Republicans in Washington or nationally. Republican candidates faced substantial challenges "[i]n Washington state, where the Republican brand doesn't have the luster it used to." ER00467, 00443 (Rossi would have "to overcome the current weakness of the GOP brand"). News reports suggested that use of the party nickname "GOP" was a way to "re-brand" candidates or run under different labels. ER00797, 00884. *The Seattle Times* reported:

> Reed said that Republican Attorney General Rob McKenna had considered going with "GOP." But Reed talked him out of it and says

> he wishes Rossi and other "GOP"s had stuck to the party line. "I just think it's clearer to the voters and actually a little more respectful in some ways to give the full party name."

ER00487-0488.

In the 2008 Insurance Commissioner's race, a local Republican leader stated no party preference on the ballot. The Secretary of State's blog noted that he lost to a candidate who "touted the Republican brand." ER00930.

F. Both Washington and plaintiffs tested how voters understood candidates' party "preference."

1. The State's only organized test of its ballot design before final implementation of I-872 confirmed voters' understanding that ballot designations meant affiliation.

Shortly after the Supreme Court upheld the facial validity of I-872, the State gathered a focus group to test ballot formats.[12] Washington convened the group to address the portion of the Supreme Court decision discussing use "disclaimers" on the ballot. ER00275. "A Forum is urgently needed to test information that will be presented to voters relating to the Top Two Primary for the August Primary." ER00900. The State contracted to "[c]onduct a Forum of not less than forty (40) people" in order to "test information that will be presented to voters relating to the Top Two Primary." ER00897. The actual focus group consisted of 36 voters drawn from the Central Puget Sound region for a two-hour interactive session of

[12] Election officials had used focus groups many times previously for "these kinds of issues." ER00275.

combined polling and discussion. A moderator facilitated discussion of each alternative ballot. ER00235, 00238.

Among the "key findings" was that "[m]ost participants (20/36) believed the purpose of a primary election was to designate the party's nominees for the general election." ER00236. The State tested four disclaimer versions on the focus group participants. ER00243-0244. Washington's implementation used none of the versions presented to the focus group. Instead, it combined language from the first and second variants. Thirty-six percent of participants found the first variant confusing. ER00243. That version's second sentence is very similar to the disclaimer language currently used by the State. ER01021.

The focus group also tested ballot language regarding party identification. ER00245-0246. Washington presented a partisan ballot that stated "prefers Republican Party" and "prefers Democratic Party" below hypothetical candidate names. Forty-eight percent of participants viewed the language as meaning endorsed by, representing, or associated with the political party. Another 6% did not know what was meant. ER00245 (Variant C). The State presented another version, Variant D, to the focus group, following discussion of Variant C. Variant D added parentheses – "(prefers Republican Party)" and "(prefers Democratic Party)." ER01009. Fifteen percent of participants still viewed it as a statement of

representation or association. The portion that did not know what it meant increased to 12%. ER00246.

Washington did not conduct any outside test of the final language used for the notice or its party preference statement. ER01011. Washington did not undertake any studies after its implementation to gauge voter confusion. ER00194-0196. Professor Manweller's experiment testing perception of the State's I-872 ballot design confirms that voters understand a candidate's self-designation of "preference" affiliates him with the Party on the ballot.

In 2009, Mathew Manweller, Associate Professor of Political Science at Central Washington University, conducted a series of cognitive experiments on Washington voters to determine whether the ballot design under the top-two system confused them about the relationship between the candidates and Washington's political parties. ER00323. Voters were presented with the exact form of ballot used in Kittitas County for the 2008 top-two primary and general elections, including the same disclaimer language and party designation used by the State in its current implementation. The experiments indicate that voters are highly confused by the ballot form used in the top-two system, both in the primary and general elections. ER00323, 00325.

When viewing the ballot form used in the State's current implementation, 56.6% of "new voters" perceived the candidates on the general election ballot to be

the nominees of the political parties. Thirty percent of "registered voters" perceived the candidates on the general election ballot as party nominees. A third group of "active voters" also showed high rates of confusion – 35% perceived candidates on the general election ballot as party nominees. This confusion regarding the general election ballot occurred despite the use of disclaimer language identical to that used by the State (and in a situation where there are fewer races to consider and the disclaimer is physically much closer to the race being evaluated). Within each experiment population, high percentages perceived candidates on the top-two general election ballot to be a representative of, affiliated with, or associated with, the political party whose name appeared in connection with them on the ballot. The percentages ranged from a low of 42.3% of "registered voters" who perceived candidates as "representatives of" the political party to a high of 93.3% of "new voters" who viewed the candidates as "associated with" the political party. ER00328-0330.

High levels of confusion are also present regarding the relationship between candidates and the political parties on the top-two primary ballot. ER00324. Almost 26% of "new voters" believed candidates on the primary ballot were party nominees. Of the "registered voters," 29.4% believed candidates on the primary ballot were party nominees and 19.1% of "active voters" viewed candidates on the ballot as party nominees. ER00328-0330.

In his paper, Manweller concluded that regarding "whether voters mistakenly believe candidates on a nonpartisan ballot are the nominees of political parties, 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." ER00325. 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.

ER00325.

The State's expert, Professor Todd Donovan of Western Washington University, reflected the same critical misunderstanding that candidates expressing a party preference are party candidates:

> Q. You said the "Democratic candidates listed on the Top-Two." Did you mean the candidates who said they had preferred the Democratic Party?
>
> A. Yeah. . . .

ER01109-01110.

Donovan's deposition testimony was consistent with prior public statements regarding the connection between candidates on the I-872 ballot and political parties. Regarding the August 2010 primary, "'The only big deal on the primary ballot was the Republican U.S. Senate contest. That makes it likely that more

Republican voters than usual were mobilized,' [Donovan] said." ER00910. When discussing primary election results with *The Bellingham Herald*, Donovan stated, "'Obviously, Republicans are going to be turning out because they had a competitive (U.S.) Senate race.'" ER00922. "Todd Donovan . . . said the most visible consequence of Washington's primary system is found in safe Democratic or Republican legislative districts, where incumbents now face tougher general-election challenges from someone in their own party." ER00908. In Donovan's view, candidates on the ballot are thereby connected to the parties.

Despite hiring Donovan as an expert in February 2010, ER00211-0213, the State offered no evidence upon which to conclude that its implementation of I-872 does not confuse voters. Donovan prepared two reports: one generally discussing levels of voter knowledge and confusion, and the second criticizing the Manweller experiment. ER01031-1096. Neither report addressed whether the State's ballot form to implement I-872 misleads or confuses voters about the affiliation of candidates with the political parties conjoined with them on the ballot.

Donovan's criticisms of the Manweller experiment are fundamentally misplaced. John Orbell, professor *emeritus* at the University of Oregon with

extensive experience in social science experimentation, including political science,[13] reviewed Donovan's critique:

> Much of Professor Donovan's critique revolves around what appears to me a misunderstanding of the role of representativeness in the design and conduct of social experiments as opposed to the design and conduct of social surveys – the latter appearing from his vita to be an [*sic*] methodology that he employs in his own work.

ER00288. The factors involved in obtaining proper samples for surveys measuring opinion and attitudes are inapplicable to political science *experiments* such as Manweller's. Professor Orbell concluded that Donovan's criticisms, based on the controls and sampling technique needed in public opinion surveys, are inapplicable to experimental research. Experiments measure responses to specific inputs. ER00288-0294. Likewise, Donovan's suggestion that other ballot designs should have been tested to compare levels of confusion is irrelevant to the experiment's object – to test whether the State's actual ballot design is confusing. ER00294-0295. Professor Orbell noted that more participants in an experiment is better, but the number in Manweller's experiment does not deprive it of validity. ER00295. Professor Manweller's statistical methods were "quite normal" and the questions posed minimized influence over experiment participant's responses. ER00296.

[13] Since 1988, Professor Orbell has been associated with Oregon's Institute of Cognitive and Decision Sciences, a multidisciplinary group that conducts social science research. Social science experimentation is a regular activity of many institute members, including Professor Orbell. ER00286-0287.

2. The State presented no evidence to show that voters would notice or read the single disclaimer printed on the ballot.

The State presented no evidence other than the "disclaimer" on the ballot itself to support its contention that its actual implementation avoids voter confusion. Washington never conducted any test of how many voters read its ballot instructions. ER00200. The State provided its expert with the results of its 2008 test of ballot language (which showed that observers viewed "preference" as affiliation), but the expert did not "make much use of this" in preparing his report. ER01117. Post-implementation, the only test Washington performed was a poll to see whether voters liked I-872. ER00830-0831.

G. The Republican Party promptly sought to amend its complaint after remand. The District Court abused its discretion by denying the motion.

The Republican Party filed its original Complaint on May 19, 2005. The District Court declared I-872 unconstitutional less than two months later. The Supreme Court issued its decision reversing the declaration of facial unconstitutionality on March 18, 2008. On March 28, 2009, the Republican Party moved to amend its Complaint, including the addition of a challenge under Washington Constitution, Article II, Section 37. ER00145. On July 8, 2008, Judge Zilly struck the Republican Party Motion to Amend without prejudice and granted permission to re-note the motion after the Ninth Circuit issued a mandate. ER00147. This Court issued its mandate on October 24, 2008. On December 3,

2008, the Republican Party filed its Motion for Leave to File a Supplemental and Amended Complaint, again seeking leave to add the state constitutional claim raised in March. ER00150-0151. On August 20, 2009, the Court issued its order permitting supplementation and amendment to the Complaint, in part, but denying permission to amend to add the state constitutional claim. ER00077.

H. The State requested and obtained a final settlement of fees before the Ninth Circuit, confirmed by a stipulated order.

Shortly after the Ninth Circuit in *WSRP* affirmed the initial district court decision and issued a separate order granting attorneys' fees against the State, counsel for the State sought to settle the Party's claims for attorneys' fees. On September 11, 2006, the State's attorneys submitted a preliminary proposal to settle the parties' claims for fees and costs. ER00153.

> For now, we prefer to discuss only the attorney fees relating to the Ninth Circuit portion of the case, because (1) those are the ones immediately requiring decisions and (2) it appears likely that there will be further proceedings in the trial court.

ER00153. The State's proposed settlement included no reservation of rights or caveat regarding setting the settlement aside should the State succeed in having the Ninth Circuit's decision reversed.

On September 15, the State's counsel formally proposed settlement of the claim for attorneys' fees before the Ninth Circuit:

> I am prepared to make the following offer of compromise on the claims for costs and attorneys' fees relating to the Ninth Circuit Appeal in this case:
>
> 1. The state will agree to compromise fees and costs relating to the Ninth Circuit appeal. Since there will likely be further proceedings, fees and costs at the trial level will be deferred for later discussion. . .
>
> 2. The state will pay in full all court costs which the prevailing parties could reasonably claim under the applicable court rules.
>
> 3. The state will pay 90% of all attorneys fees claimed by each respondent as set forth in previous correspondence among the parties.
>
> ***
>
> If this compromise is agreeable, I suppose it should be incorporated in an agreed order. . . .

ER00156. This proposed settlement still contained no reservation of rights or expressed any contingency based on further appellate proceedings. Counsel for the Democratic Party responded, "We understand this settlement will be final as to our claims for attorneys fees and costs for the Ninth Circuit . . . irrespective of further proceedings in the case." ER00155. As part of the e-mail chain that same day, counsel for the Republican Party also responded:

> The Republican Party also agrees to the terms of the proposed settlement of its costs and fees in the Ninth Circuit proceeding relating to the appeal of Judge Zilly's July 2005 decision through the date of settlement, irrespective of further proceedings in the case.

ER00155.

At no point in the negotiations did the State express the intent it now asserts – that it intended to compromise fees only if a petition for *writ of certiorari* was unsuccessful.

The parties' settlement was further confirmed by a stipulated order. The stipulation related only to fees in the appeal, and each party expressly reserved the right to pursue "claims for further proceedings in the appeal or in any other aspect of the case (including District Court proceedings.)" ER00149. After the Supreme Court reversed the finding of facial invalidity, the State sought a refund of the amounts paid under the settlement and moved for an order vacating the stipulated order regarding fees. This Court vacated its stipulated order, but refused to order a refund, remanding to the district court to "make appropriate findings concerning the parties' settlement of fees and [to] determine whether restitution or further fee awards are appropriate." *WSRP*,545 F.3d at 1126.

The district court ordered the Republican Party to repay fees collected under the settlement. ER00011, 00084.

VI. 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).

Denial of a motion to amend is reviewed for abuse of discretion. *Chappel v. Laboratory Corp.*, 232 F.3d 719, 725 (9th Cir. 2000). The court reviews *de novo* the issue whether the district court had supplemental jurisdiction and for abuse of discretion the district court's decision to decline supplemental jurisdiction.. *See Hoeck v. City of Portland, 57 F.3d 781, 784* (9th Cir. 1995); *Bryant v. Adventist Health Sys./W., 289 F.3d 1162 , 1165* (9th Cir. 2002).

VII. SUMMARY OF ARGUMENT

The emperor, that is Washington's efforts to eliminate the risk of voter association of candidates and parties on I-872's ballots, has no clothes. Washington's I-872 forcibly associates the Republican Party with candidates on the ballot. Washington's pretense that it does otherwise contradicts the objective factual record. The declaration by the royal court of the clothes' beauty could not withstand the child's clear sight. Washington's voters, media and even the State itself have seen clearly that, in operation, I-872's ballot designations affiliate candidates with their chosen party. Forced political association violates the First Amendment.

In *Grange*, the Supreme Court made clear it rejected only a facial challenge. 552 U.S. at 445. The Court did not reject the conclusion that the Washington's implementation might *de facto* associate candidates and parties and thus violate the First Amendment: "In the absence of evidence, we cannot assume that Washington's voters will be misled . . . . That factual determination must await an as-applied challenge." 552 U.S. at 457-58. The Supreme Court concluded "there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion." 552 U.S. at 456.

Washington has chosen none of those ways. As applied, I-872 continues its past practice of forcibly associating the WSRP with candidates appropriating its identity on the ballot. Whether the Court looks to (1) how Washington treats officeholders elected under I-872, (2) the study evidence the State developed (but ignored) and the study evidence from Professor Manweller, or (3) the extensive factual record showing that the party designation on state ballots is affiliation – as perceived by all categories of participants in Washington's electoral process – each establishes that the ballot affiliates candidate with party.

The WSRP should have been permitted to amend its complaint promptly after remand to add a claim that I-872 violated the single-subject rule under Washington's Constitution. Leave to amend is to be freely granted. No discovery had occurred before the WSRP sought leave to amend. New case law and the manner in which Washington had begun implementing I-872 provided the basis for the proposed amendment. As Washington implemented I-872, it discovered new, unrelated statutes which I-872 impliedly repealed or amended. The district court abused its discretion by denying the motion to amend.

The district court has already declared Washington's implementation of I-872 unconstitutional in part. The district court had previously found I-872 was not severable. Unless and until Washington can design a fully constitutional implementation, the Court should enjoin further implementation of I-872.

VIII. ARGUMENT

A. I-872, as applied, actually affiliates the Republican Party with candidates, regardless whether the Party consents, and Washington voters understand that is exactly what the primary does.

1. Washington's implementation recognizes that (1) under Washington's Constitution officeholders elected and (2) candidates filing for office are affiliated with the party they self-designate on I-872's ballot.

Washington, through I-872, forcibly associates the Republican Party with candidates who appropriate its identity for their own electoral advantage, ER00520, or for political mischief. ER00792. Candidates' unilateral association with a party on the ballot carries over to their status as officeholders after election. Washington has filled multiple legislative vacancies under I-872 and recognizes the partisan officeholders as party-affiliated under the state constitution. I-872 "allows candidates to file for partisan office and list on the ballot a party affiliation, regardless of whether the candidate has been nominated or endorsed by that party." ER00270.

These are no mere impressions of association. Actual forced association violates the First Amendment. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (a state may not require a parade to include a group if the parade's organizer disagrees with the group's message); *BSA v. Dale*, 530 U.S. 640 (2000) (state law requiring the organization to admit a

homosexual scoutmaster violated the Boy Scouts' freedom of expressive association).

While this is not the only portion of its implementation that shows that I-872 really is a continuation of forced association from prior systems, it is incontrovertible evidence of *actual association* and grounds to strike I-872. The Supreme Court declined to invalidate I-872 on its face, noting, "[t]he law never refers to the candidates as nominees of any party, nor does it treat them as such." *Grange*,552 U.S. at 453. I-872's implementation under Washington's Constitution does treat candidates elected under I-872 as of the political party listed as a "preference" on the ballot.

In addition, Washington's treatment of officeholders as "of the same party" as that expressed on the ballot is Washington's *interpretation* of what its ballots mean, and a powerful indicator to any reasonable observer of the process that candidates' ballot designation is a (unilateral) act of affiliation with a party.

2. All empirical evidence submitted shows that voters perceive candidates' self-designation as a statement of association with the Republican Party.

The Supreme Court declined to invalidate I-872 facially because

> [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. The record provides more than ample evidence that a "well-informed electorate" does interpret Washington's ballot to establish an association between party and candidate. Washington's implementation violates the First Amendment because it failed to "design[] [the ballot] 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' . . . ." Id. at 460 (Roberts, C.J., concurring).

Washington immediately recognized the importance of its actual ballot design if I-872 were to survive an as-applied challenge. On an "emergency" basis it let a contract to conduct a focus group to test ballot designs and disclaimers. ER00899-0900. The project "grew" out of the portion of the Supreme Court's decision that it was possible to implement I-872 consistent with the First Amendment. ER00275-0276. The results of its test indicated that voters interpreted the ballot designations as party affiliations. The phrase "prefers Republican party" resulted in 48% of participants understanding it to be some form of affiliation with the party. Even after a two-hour discussion session, 15% of the State's test-voters thought the candidates were endorsed by or representatives of the political parties, and another 12% could not tell what the ballot meant. ER00245-0246. "Voter perceptions matter, and if voters do not actually believe the parties and the candidates are tied together, it is hard to see how the parties'

associational rights are adversely implicated." 552 U.S. at 459 (Roberts, C.J., concurring). The State conducted no further tests of voter perception of its ballot design. This was its only data. ER00194-0196. Over 25% of participants in a lengthy, interactive process still saw the ballot's party designation as establishing affiliation, or were confused by it.

The mere presence of the ballot disclaimer is insufficient to meet Washington's burden and save I-872. Where a disclaimer is necessary, the person offering the disclaimer must show that it is likely to be seen and understood. *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 439-40, 739 P.2d 1177 (1987). "Was the warning sufficient to catch the attention of persons who could be expected to use the product; to apprise them of its dangers and to advise them of the measures to take to avoid those dangers?" *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 727 P.2d 655 (1986). Washington took no steps, before or after implementation, to determine if the notice would be noticed.

A disclaimer is also ineffective if the person giving it "has reason to believe that the user will not heed the warning." *Herrera v. Louisville Ladder Group, LLC*, No. SACV 08-0375 AG, 2009 U.S. Dist. LEXIS 107384 (C.D. Cal. 2009). Washington's own focus group in April 2008 put it on notice that even after a long, interactive session on the State's view of party designation on the ballot, a significant percentage of voters did not believe the disclaimer. ER00245-0246.

Washington had been amply warned that voters would not heed its assertion that candidates on the ballot were unaffiliated with their self-designated party. The *Grange* Court rejected the facial challenge to I-872 because "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." 552 U.S. at 456. Washington's own study showed its only tested ballots failed to do so.

Manweller's study confirms what the State had already learned in its focus group. A very substantial proportion of voters understand that the conjunction of candidate and party on the ballot means the candidate is the party's representative or otherwise associated with it.

Perhaps the best objective evidence of the relationship between parties and candidates under the I-872's primary is how people talk about them in common discourse. The press, election administrators, and even Secretary Reed and the State's expert witness all talk about candidates as being "of" or "from" a party, or as the Republican/Democratic/Libertarian/Green Party candidate. The words used are objective manifestations of the speakers' understanding. And, that understanding is that the candidates are representatives, associates, affiliates or even the nominees when they appear on the ballot conjoined with the party name.

The voters' understanding is objectively manifested by the State's own focus group.

Secretary Reed admits that voters will be misled by candidates' use of the Republican Party name on the ballot. Candidates "by indicating Democrat or Republican [. . .] pick up a little bit of a base. It gives [them] a start." ER 00520 Voters cast ballots for them based on their identification with the party on the ballot. Secretary Reed's admission is consistent with political science literature that emphasizes the primacy that party identification has on how voters cast their ballots "The 'simple act' of labeling a congressman as a Republican or a Democrat systematically affects what information about the candidate will be stored in memory and what information will later be available for informing one's evaluations." Milton Lodge and Ruth Hamill, *A Partisan Schema for Political Information Processing*, 80 AMERICAN POLITICAL SCIENCE REV. 505, 520 (June 1986)

This Court observed,

> Given that the statement of party preference is the *sole* indication of political affiliation shown on the ballot, that statement creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate. The practical result of a primary conducted pursuant to Initiative 872 is that a political party's members are unilaterally associated on an undifferentiated basis with *all* candidates who, at their discretion, "prefer" that party.

WSRP, 460 F.3d at 1119-20. The Republican Party's First Amendment concern has been validated.

If I-872's practical effect is to create an association without the Party's consent, I-872 would violate the First Amendment. *See Grange*, 552 U.S. at 455. The undisputed evidence shows that this is I-872's practical effect.

Indeed, creating an involuntary affiliation between candidates on the ballot and the Republican Party is exactly what I-872 was designed to accomplish. ER 00127, 00130.

The candidates' unilateral designation of a "party preference" *continued* existing practice. ER00126. This association is perceived by voters, evidenced by both the State's focus group and the Manweller experiment.

The district court dismissed all the empirical evidence of voter perception from both the State's own test and the Manweller experiment based on the presence of the disclaimer and the existence of some of the state-published ancillary materials. ER00100-0103. These empirical studies demonstrate how voters *do in fact interpret* I-872's ballot even with disclaimers and the entirety of the State's "education" effort.

B. Even without the study evidence, I-872's purpose, the history and context of Washington's primary ballots leads reasonable observers to conclude that candidates' ballot designation represent a unilateral statement of affiliation.

The district court suggested that empirical evidence might be inappropriate to consider in evaluating voter perception of party designation on I-872's ballots. Instead, the court suggested recourse to

> Establishment Clause jurisprudence whether a reasonable observer – mindful of the history, purpose, and context of a government monument or practice – would perceive a government endorsement of religion without resort to social or cognitive experiments.

ER00105. Applying Establishment Clause jurisprudence to I-872's implementation does not save the system. Washington's primary election history, the purpose of I-872 and its context confirms, not rebuts, that reasonable observers would see ballot designations of "party preference" for exactly what they are – a continuation of Washington's past practice of enforced association with any candidate seeking to use the Republican Party for his own electoral advantage. This Court recently described how to determine reasonable observers' understanding:

> [W]e must consider the purpose of the legislation . . . as well as the primary effect . . . as reflected in context, history, use, physical setting, and other background. . . . [T]he resolution of the primary effect . . . is driven by the factual record. We do not look to the sound bites proffered by both sides but instead to the extensive factual background provided in the hundreds of pages of historical documents, declarations, expert testimony, and public records. Here, a fact-intensive evaluation drives the legal judgment.

Trunk v. City of San Diego, 629 F.3d 1099, 1102 (9th Cir. 2011).

I-872's purpose has always been clear – to mimic the unconstitutional blanket primary. "I-872 – Preserve the Blanket Primary." ER 00124. "They took our rights away from us . . . Now we're going to take them back!" ER00124. I-872 was drafted to avoid this Court's invalidation of Washington's blanket

primary. 2005 Wash. Sess. Laws Ch. 2 §18 ("This act takes effect only if the Ninth Circuit . . . decision in *Reed*, . . . holding the blanket primary . . . invalid becomes final . . . ."). I-872's primary would even look the same to voters. ER00134.

Washington's history and the ballot context is that candidates' designation of party on its ballots is a statement of affiliation. Since 1907, Washington has conducted partisan primaries, showing candidates' party affiliation on its ballots. *Logan*, 377 F. Supp. 2d at 910-11. Beginning in 1935, "candidates from all parties were placed on a single ballot and voters could select a candidate from any party." ER00093-094. Under the primary system in effect when the State adopted I-872, candidates "indicated their party." ER01127. Under I-872, "candidates . . . continue to express a political party preference when they file for office and that party designation will appear on the ballot." ER00133. The history cannot be denied:

> It is a matter of common knowledge that in campaigns at general elections such terms as "Democrat", "Democrats" and "Democratic" have been used for such a length of time as to render their beginnings almost in "time out of memory" to connote the Democratic Party, its members and candidates. The same observation is equally true of "Republican", "Republicans" and "Republican Party".

Plonski v. Flynn, 35 Misc. 2d 863, 222 N.Y.S.2d 542, 544-45 (1961). A reasonable observer would be familiar with conjoining party and candidate on the ballot.

> [T]he world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show[.]

McCreary County v. ACLU, 545 U.S. 844, 866 (2005). Yet, this is exactly what the district court did.

The district court relied on, but did not define a "reasonable well-informed electorate." In doing so, the court dismissed as "irrelevant and unpersuasive" a wide variety of evidence showing perceived affiliation resulting from candidates' party preference as shown on the ballot. ER00103. The court erred because a reasonable well-informed electorate does not live in a petri dish, fed only the ballot and a portion of Washington's explanation of I-872.

The court rejected as irrelevant to the "reasonable well-informed electorate" news coverage of candidates, campaigns, and election results. *See* ER materials cited herein *supra* at 22-23. The court relied on Washington's "extensive voter education campaign" but rejected as irrelevant widely distributed media reports of State election officials' explanations of I-872, State publications as part of that very "education" campaign, and Secretary Reed's explanation of I-872 to the national organization for election administrators. *See* ER materials cited *supra* at 15-18; ER0000783-0786.

The court even dismissed as irrelevant the State's explanation to bidders for implementing that "education" effort – I-872 "allows candidates to file for partisan office and list on the ballot a party affiliation." ER00270. The court rejected as irrelevant to a "reasonable well-informed electorate" that the state agency charged with overseeing political advertising equates "party affiliation" and I-872's "preference." ER00613; WAC 390-05-274 . The court likewise found mandated inclusion of candidates' "party affiliation" in political advertising irrelevant to a "reasonable well-informed electorate." ER00937 ("According to state law, on political advertising . . . the candidate's party affiliation must . . . appear . . . ."). The State's implementation authorized candidates to appropriate established party symbols and nicknames (such as "GOP" for "Republican") in campaign advertising. ER00937 ("Official symbols or logos adopted by the state committee of the party may be used in lieu of other identification.").

Washington's primary system from 2004-2007 used ballots that equated "preference" with affiliation. Ballots in many counties expressed voter affiliation as the voter's party preference. The pre-trial order referenced exhibits from that primary system whose authenticity (but not admissibility) was stipulated – sample ballots, voter pamphlets and election materials used by the State in conducting primaries from 2004-2006. ER01137-01138; 01131-01132 (listing of sample ballots and related materials, Exs. 466-67, 532-35, 539-40, 542-44) (copies of the

sample ballots are included in the Addendum to this brief). The Court may take judicial notice of these authentic public records. *See* note 8 *supra*.

Among the common voter inquiries to the Secretary of State during the 2010 primary season was "How do I change my party preference on my voter registration?" ER01122. The State's conjunction of the Republican Party with candidates on the ballot cannot be separated from the broader context of election campaigns. Treatment of candidates' ballot designation as affiliation with the Republican Party pervades the media, the State's own pronouncements and its constitution. The way the general public, experts and election officials actually discuss I-872's association between candidates and the Republican Party is powerful evidence of reasonable observers' understanding.

The actual "disclaimer" is little different from an assertion that prayer before school events is intended to solemnize the occasion. *See Santa Fe Independent School Dist. v. Doe*, 390 U.S. 290, 315 (2000).

> 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.

ER00100. It *does not negate* association between candidate and party. At best, it tells voters that the candidate's party "preference" might or might not be reciprocated. Secretary Reed testified, "[W]e wanted to make sure we clarified that their statement was that it was candidates who preferred these parties and *not*

necessarily the parties who preferred the candidates." ER00200 (emphasis added). Secretary Reed equates a party's preference with the disclaimer's nominat[ion], endorse[ment], or approv[al] or associat[ion] "with that candidate." Preference is understood to be a unilateral "association." ER00731. Chief Justice Roberts expressed concern that "the history of the challenged law suggests the State is not particularly interested in devising ballots that meet . . . constitutional requirements." *Grange*,552 U.S. at 462. Washington's implementation amply demonstrates the reason for concern.

Washington's expert testified that candidates' expressed preference for a party made them that party's candidates. ER01109-01110. Under I-872, the ballot lists the candidate's "party affiliation, regardless of whether the candidate has been nominated or endorsed by that party." ER00270. The district court would require a "reasonable well-informed electorate" to be able to discern nuances that neither election administrators nor the State's expert can.

The disclaimer's declaration about what it implies is entitled to no greater weight than a declaration that teaching "creation science" is for the advancement of academic freedom. *See Edwards v. Aguillard,* 482 U.S. 578 (1987).

As in *Trunk*, there is an "extensive factual background provided in the hundreds of pages of historical documents, declarations, expert testimony, and public records." 629 F.3d at 1102. The record should drive the legal judgment,

and the record shows that, in operation, I-872's "party preference" on the ballot creates "distinctions without a difference" from the prior systems' candidate-party ballot affiliation. Washington cannot invade core rights of political association on such flimsy grounds. *See WSRP*, 460 F.3d at 1203.

C. The district court should not have upheld Washington's implementation of I-872 because Washington mandates the content of the Republican Party's political speech.

The First Amendment prohibits government regulation of the content of political speech absent proof that the regulation serves a compelling governmental interest, and is narrowly tailored to serve that compelling interest. *ACLU of Nev. v. Heller*, 378 F.3d 979, 992-93 (9th Cir. 2004). This principal is so well-established to approach black-letter law. *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (governmental content regulation of political speech is "expressly and positively forbidden" by the First Amendment); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-47 (1992).

Washington, nonetheless, has boldly forged ahead, requiring that "[f]or partisan office, if a candidate has expressed a party . . . preference on the declaration of candidacy, that party . . . designation shall be clearly identified in . . . political advertising." RCW 42.17.510(1). Washington can offer no interest for its content regulation. However, the chair of the Senate Government Operations and Elections Committee sent a letter to the PDC on the topic as part of the ongoing "discussion regarding how to implement I-872." ER00618-0620, 00858. She explained that the mandated inclusion of "party preference" in political advertising

arose directly from the twenty-year-old requirement that candidates' "party affiliation" be disclosed in political advertising. ER00618. The Secretary of State's office also participated in the process, "shar[ing] the views of that office with respect of [*sic*] I-872 to the extent that it is relevant to the Commission's jurisdiction." ER00869-0870.

Having to repeat an imposter's self-designation in political advertising that the Republican Party might run about the imposter only serves to reinforce a connection. Party leaders have made clear this is a powerful disincentive for the Republican Party to speak about these candidates at all. ER00308, 00320.

The district court simply disregarded Washington's regulation of political content in upholding I-872.

D. I-872 is not severable, and its entire implementation should be enjoined as a result of the district court order declaring it unconstitutional in part.

The district court granted partial summary judgment against I-872's implementation, holding that its application to precinct committee officer ("PCO") elections violated the WSRP's right of political association. ER00109-0114. It expressly found that PCO elections were part of I-872's implementation. ER00109 at n.12. Washington did not appeal the district court's order. In the original proceedings in 2005, the district court concluded that I-872 was not severable.

Logan,977 F. Supp. 2d at 929-31. This Court affirmed. *WSRP*, 460 F.3d at 1123-24.

Severance is impossible when the connection of the unconstitutional part to the rest of the enactment is so strong that it cannot "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." *Guard v. Jackson*, 83 Wn. App. 325, 333, 921 P.2d 544 (1996) (internal quotation marks and citation omitted).[14] "[S]everability is a question of state law that we review de novo." *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (*per curiam*).

I-872 declared fundamental policy of Washington. 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." I-872, §3 ER00121. Washington's implementation of I-872 enabled voters with no connection to the Republican Party to vote for its PCOs, consistent with that fundamental policy. A sponsor's contemporaneous statements to the public

[14] I-872 lacks a severability clause. The presence of a severability clause is some evidence that voters would have enacted the constitutional portions of the Initiative without the unconstitutional portions, but a severability clause is not required to find severability. *See In re Parentage of C.A.M.A.*, 154 Wn. 2d 52, 67-68, 109 P.3d 405 (2005).

regarding legislation's scope and intent are relevant legislative history. *See Schwenk v. Hartford*, 204 F.3d 1187, 1199 (9th Cir. 2000) (bill sponsor's press release is "compelling" evidence of law's intent). The sponsor's statements regarding intent, while not necessarily controlling, "are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982). The expressed intent of I-872 in the body of the enactment itself is likewise compelling evidence. To sever PCO elections from the rest of Washington's implementation of I-872 would require the Court to determine that the fundamental declaration of voter's rights to "vote for any candidate" means to vote for most candidates and "without any limitation based on . . . affiliation" means with some limitations. I-872 still fails the "volitional severability" test this court applied in *WSRP v. Washington*, 460 F.3d 1123-24. Further, there is no practical way to sever PCO elections from the rest of the primary ballot under Washington's system. ER00527.

E. It was an abuse of discretion to deny amendment of the Party's complaint.

Leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "This policy is 'to be applied **with extreme liberality**.' " *Eminence Capital LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (emphasis added) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)). Leave to amend should be granted absent bad faith,

undue prejudice, protracted delay of the trial date, or futility of the proposed amendments. *Lazuran v. Kemp*, 142 F.R.D. 466, 468 (W.D. Wash. 1991) (citing *Loehr v. Ventura Cnty. Cmty. Coll. Dist.*, 743 F.2d 1310, 1319 (9th Cir. 1984)). These factors are not of equal weight, and "only where prejudice is shown or the movant acts in bad faith are courts protecting the judicial system or other litigants when they deny leave to amend a pleading." *United States v. Webb*, 655 F.2d 977, 978 (9th Cir. 1981). None of these narrow exceptions apply.

The court exercised discretion not to hear the state constitutional challenge, because the issue was a "novel or complex" state law question. It is neither. This Court addressed Wash. Const. art. II, §37 as long ago as 1910. *Mills v. Smith*, 177 F. 652 (9th Cir. 1910). There is a substantial body of Washington law upon which to draw, including the intervening case that prompted the proposed amendment. ER00063. Judicial economy would be served by resolution in a single proceeding rather than multiplying proceedings. The text of I-872 is before the Court. No additional discovery or evidence is needed. The claim is related because it goes to the underlying validity or invalidity of the self-same statute at issue.

F. The district court erred in ordering return of fees because the parties had settled that portion of a possible fee award.

The State is not entitled to set aside its settlement and compromise of its liability for fees. The strong public policy in favor of settlement outweighs the State's desire to repudiate the settlement. "'The construction and enforcement of

settlement agreements are governed by principles of local law . . . .'" *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). Under Washington law, settlement agreements are contracts governed by general principles of contract law. *See In re Estate of Harford*, 86 Wn. App. 259, 936 P.2d 48, 50 (1997); *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357, 1359 (1993). Washington has a long-standing public policy in favor of settlement of disputes and their finality. "The law favors amicable settlement of disputes, and is inclined to clothe them with finality." *Handley v. Mortland*, 54 Wn.2d 489, 342 P.2d 612, 616 (1959); *accord Buob v. Feenaughty Mach. Co.*, 4 Wn.2d 276, 103 P.2d 325, 334 (1940).

Here, the State agreed to settle the fee claims in the e-mail exchange among counsel. The State's counsel stated, "If this compromise is agreeable, I suppose it should be incorporated into an agreed order." The political parties expressly agreed to accept the State's offer, with its reduction of fees, "irrespective of further proceedings." ER00155-0156. The subsequent stipulation implemented the agreement, not superseded it.

The court relied on, but misread, *Hearst Communications, Inc. v. Seattle Times Co*, 154 Wn.2d 493, 115 P.3d 262 (2005).

> [W]e attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.

154 Wn.2d at 503. It disregarded the mutually *expressed* intent to settle the fee claim for the appeal. ER00155-0156.

The district court resorted to Washington's "context" rule to interpret the stipulation, but looked only to the "context" that the stipulation had been entered after a fee award. Washington's "context" rule requires more:

> The "context rule" is the framework for interpreting written contract language which involves determining the intent of the contracting parties by viewing the contract as a whole, including the subject matter and objective of the contract, all circumstances surrounding its formation, the subsequent acts and conduct of the parties, statements made by the parties in preliminary negotiations, and usage of trade and course of dealings.

Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 895, 28 P.3d 823 (2001).

The context shows a complete settlement of a discrete portion of the fees that might be awarded, leaving "claims *for* further proceedings" unaffected. Settlements will be disturbed only upon a showing of misconduct by a party in obtaining the settlement, not merely because one party comes to view the resolution of the dispute as a bad bargain. *See Maynard v. First Bank of Colton*, 56 Wash. 486, 106 P. 182 (1910). Settlements necessarily involve compromise, and parties balance certainty against the possibility of success should the matter be fully litigated. "[T]he agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).

The political parties did nothing to mislead the State. That the Supreme Court later determined that Initiative 872 was not facially invalid does not warrant allowing the State to set aside its bargain.

G. The WSRP is entitled to fees under 42 U.S.C. § 1988.

This Court awarded the Republican Party its fees in the prior litigation with the State regarding Washington's blanket primary. *See Washington State Democratic Party v. Reed*, 388 F.3d 1281 (9th Cir. 2005)(opinion regarding fee award). The rule is well-established in this Circuit that a prevailing plaintiff is presumptively entitled to costs, including reasonable attorneys fees, for violations of the Civil Rights Act, under 42 U.S.C. §1988. *See Thorsted v. Gregoire*, 841 F. Supp. 1068, 1083 (W.D. Wash. 1994), *aff'd*, 75 F.3d 454 (9th Cir. 1996). Only where "special circumstances would render an award unjust" should a prevailing plaintiff be denied its attorney's fees. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). In prior litigation over Washington's primary system, the Court rejected the presence of any "special circumstances." 388 F.3d at `1285.

IX. CONCLUSION

I-872's implementation forcibly associates the Republican Party with candidates. The voters know it. Washington knows it. Using "prefers" as a substitute word is no more than a drafting fiction that does not stand up to real

world scrutiny. The Republican Party should be awarded its fees for Washington's ongoing violation of core First Amendment rights.

If nothing else, the Republican Party has shown the existence of disputed material facts of perceived association resulting from Washington's ballots, precluding summary judgment for the State.

The District Court should have permitted the amendment of the complaint – there was no prejudice and judicial economy would be served by its resolution in the broader context of this case.

Finally, the parties' settlement of fees from the prior proceedings before this Court represented a compromise that should not have been set aside.

DATED this 6th day of June, 2011

Livengood, Fitzgerald & Alskog, PLLC

s/ John J. White, Jr.
John J. White, Jr.
Kevin B. Hansen
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
Phone: (425) 822-9281
Fax: (425) 828-0908
white@lfa-law.com
hansen@lfa-law.com

Attorneys for Plaintiff/Appellant
Washington State Republican Party

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 captioned *Washington State Republican Party, et al. v. Washington State Grange, et al.*, whose Ninth Circuit cause numbers are 11-35122 and 11-35125, and which are currently pending in this Court.

Livengood, Fitzgerald & Alskog, PLLC

s/ John J. White, Jr.
John J. White, Jr.
Kevin B. Hansen
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
Phone: (425) 822-9281
Fax: (425) 828-0908
white@lfa-law.com
hansen@lfa-law.com

Attorneys for Plaintiff/Appellant
Washington State Republican Party

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 13,570 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/ John J. White, Jr.
John J. White, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2011, 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.

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

s/ John J. White, Jr.
John J. White, Jr.