11-35122, 11-35124, 11-35125
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,

Plaintiffs/Appellants,

v.

STATE OF WASHINGTON, *et al.*,

Defendants/Appellees.

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

REPLY 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

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I. INTRODUCTION

On Washington's 2004 and 2006 partisan primary ballots, voters who indicated a "party preference" created an affiliation with the chosen political party.

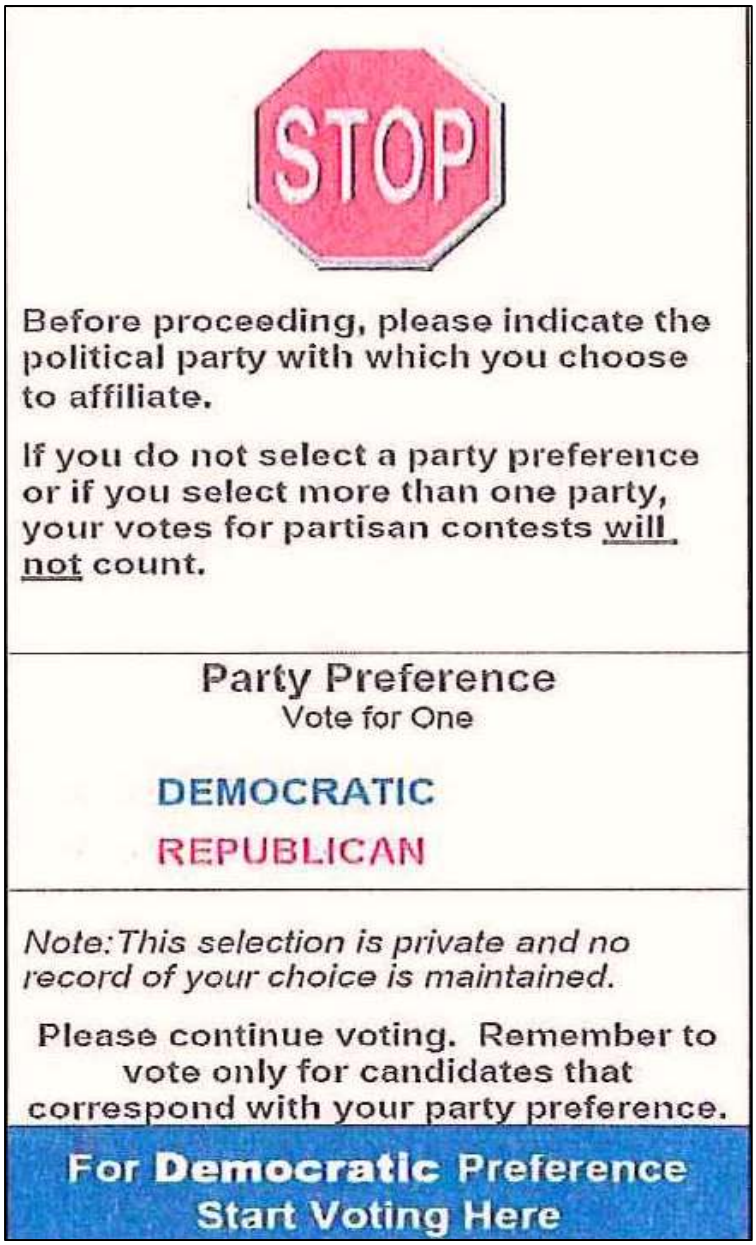

Figure 1- Official Ballot, King County, Washington, Primary and Special Elections – September 19, 2006

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Each of these ballots repeatedly refers to the voters' party preference. The chosen "party preference" establishes affiliation.

The voters who adopted I-872 in 2004 equated stating a party preference with stating party affiliation. State ballots used in 2004 told voters to affiliate with a party by picking a party preference and then to vote only for candidates who had the same party preference. The State told voters again in 2006 that they affiliated with a party by picking a "party preference." There is no evidence that the voters, who adopted I-872, understood "party preference" on I-872's ballots in any fashion other than as allowing the candidate to indicate a party affiliation.

Washington designed the I-872 ballot to incorporate identical language that it previously used to establish party affiliation. The contention that "preference" is only a personal statement with no connection to party affiliation is an after-the-fact construct for litigation purposes. That is why the State has been unable to submit any evidence that the voters understand candidate party preference statements to be anything other than a statement of party affiliation.

II. ARGUMENT

A. Washington's implementation of I-872 violates core rights of political association. Washington has neither avoided actual confusion nor the possibility of widespread confusion among voters.

Surviving a facial challenge does not give Washington a free pass to violate core First Amendment rights when implementing I-872. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803, n.22 (1984). Whether Washington's particular ballot form or implementation is consistent with its

obligations under the First Amendment was entirely unresolved by *Washington State Grange v. Washington State Republican Party*, *552 U.S. 442 (2008)*. *See FEC v. Wisc. Right to Life*, 551 U.S. 449, 475 (2007) (*WRTL II*) ("Courts do not resolve unspecified as-applied challenges in the course of resolving a facial attack . . .").

In rejecting the I-872 facial challenge, the Supreme Court asked "whether the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment." *Grange*, 552 U.S. 442, 456 (2008). Washington is wrong to re-cast the question as whether the ballot "caused" confusion. However, under either analysis, Washington's implementation of I-872 fails.

Appellees wrongly assert that this Court must, or even should, look only to the face of I-872's ballots to judge whether Washington's implementation misleads voters. The Supreme Court made no such suggestion. "It stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot." *Id.* at 455. "Significant part" is not "exclusively." The Supreme Court also expressly noted public education, including but not limited to advertising and mailers as elements of possible implementation. *Id.* at 456.

Washington may have had many ways that I-872 could have been implemented without infringing core First Amendment rights. The question for this Court is whether the actual implementation chosen passes First Amendment muster.

1. Washington treated "preference" and "affiliation" as synonyms on its primary election ballots immediately preceding I-872. I-872's voters were told that "party preference" continued past candidate-party affiliation practices.

Appellees attribute talismanic power to the use of "preference" on I-872 ballots. "Preference," they reason, precludes any reasonable understanding that candidates have unilaterally affiliated with the Republican Party. As Figures 1-4 show, Washington used "preference" and "affiliation" as synonyms on its ballots in the primary system that I-872 replaced. Voters unilaterally affiliated with the Republican Party by indicating their "party preference" on the ballot. The actual language of I-872's "disclaimer" is consistent with candidates' "party preference" likewise being an act of affiliation. Appellees do not explain how stating a "preference" and "affiliation" can be synonymous on one set of primary ballots but mutually exclusive on the next primary's ballot.

Washington ballots for the 2004 and 2006 primary ballots expressly linked an expression of "party preference" with party affiliation. The instructions were brightly colored. Some of the disclaimers included the bright red "stop" sign. *See*

Fig. 1-2. Others used "CAUTION!" to alert voters. *See* Fig. 3-4. Primary voters even had to affirmatively "vote" their "party preference" on the ballot.[1]

Further, Appellees ignore Washington's original implementation in asserting that "preference" could never be considered a form of affiliation by a reasonable observer. Washington did just that in its original implementation. Washington distinguished candidates listing a party preference from "independent" candidates. "A candidate for partisan office who does not provide a political party preference is deemed to be an *independent* candidate." WAC 434-230-015, reproduced at WSRP Op. Br., App. at 25 - (emphasis added). Independent candidates are *un*affiliated. Washington's original understanding of the meaning of "party preference" was exactly the same as what it printed on the 2004 and 2006 primary ballots. Now Washington disavows its original understanding, in order to argue that no reasonable voter could interpret political "party preference" as political party affiliation.

Neither of Appellee's responses addresses the historical context of Washington elections. Both would have the Court use an absentminded voter who was unaware of what Washington's prior ballots said about "party preference" and

[1] This affirmative "voting" of "party preference" on Washington's immediately preceding primary ballots may explain why the question "How do I change my party preference on my voter registration?" was a recurring question from voters during the 2008 election season. *See* SSER93.

"party affiliation," and who was aware of only those portions of Washington's explanations of I-872 that suit the State's purposes.

Given Washington's election history, context and what Washington voters were told that I-872 would actually do, reasonable observers would understand that "party preference" on the ballot is an affiliation statement by the candidate. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1102 (9th Cir. 2011).

While the State's motive to evade prior decisions of the Supreme Court in adopting I-872 is not determinative, its intent to continue past practices that invaded core First Amendment rights is. *See Trunk*, 629 F.3d at 1102. The Voter's Pamphlet on I-872 noted that the general election ballot after I-872 would still include "party candidates": "Whether it's one Republican and one Democrat, one major and one minor party, or even an Independent." ER00120. The Grange told voters, "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)[2] I-872 continued past practice that precluded the Republican Party from any say over which candidates would appear on the ballot as Republicans. ER00775. Candidates on the I-872 primary and general election ballots are party affiliates.

[2] Statements by legislation sponsors are normally "to be accorded substantial weight in interpreting the statute." *Fed. Energy Admin. v Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

> [T]he voter might be presented with a choice in the general election between two candidates *of the same political party*. This would only happen if both of those candidates received more votes in the primary than any other candidates (*in the same party* or any other political party).

ER00127 (emphasis added).[3] Even I-872's battle cry, "Preserve the Blanket Primary" (ER00125) is relevant to interpreting the statute and to voters' understanding of the ballot I-872 created. Reasonable observers are not absentminded. They are familiar with the history of government action on the subject and "competent to learn what history has to show." *See McCreary County v. ACLU*, 545 U.S. 844, 866 (2005).

2. I-872, as implemented, fails to eliminate the risk of widespread voter confusion.

The Supreme Court provided no explicit direction on how to evaluate voter confusion. It had no need to. The courts have a well-established body of law for evaluating the risk of confusion. Trademark and unfair competition law provide the analytical framework. In evaluating the likelihood of confusion, this Court

[3] The State's attempt to parse another sentence from the same page to interpret "just as they do now" as unrelated to candidates' ongoing ability to designate party affiliation unilaterally and its suggestion that use of an ellipsis was intended to mislead the Court fall flat, especially given the quoted material at ER00126, and in the very next Q&A on ER00127. St. Br. at 11 n.4. *See also* ER00130 ("Candidates will *continue to express a political party preference* when they file for office and that party designation will appear on the ballot.") (emphasis added).

uses a flexible, multi-factor test for determining whether confusion is likely: (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979). The list is not exhaustive, and other variables may come into play depending on the particular facts presented. The *Sleekcraft* factors are intended as an adaptable proxy for confusion, not a rote checklist. While some factors will be of varying importance, "the similarity of the marks and whether the two [users] are direct competitors - will always be important[.]" *Brookfield Comm'ns., Inc. v. West Coast Entm''t Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999).

This Court has paid particular attention to intentional adoption of identical marks, reasoning that "when the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived." *Sleekcraft*, 599 F.2d at 354.[4] Washington recognizes that candidates will appropriate the Republican Party name

[4] I-872 was always intended to continue candidates' forced association with the Republican Party from the unconstitutional blanket primary. WSRP Op. Br., 8–9; ER 00775 ("The parties still have no say in determining who gets to call themselves a Democrat or Republican."); *see also* ER00126, ER00127, ER00130.

for electoral advantage and that party voters will gravitate toward those candidate precisely because the candidate is conjoined with the party on the ballot. ER00520. From the outset, the initiative sponsor was aware that the Republican Party name would be appropriated under I-872, and intended exactly that result. The Grange even used the rights to "Midas Muffler" as an analogy. ER00131.

The principles drawn from trademark and unfair competition law are applicable in non-commercial contexts. *Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 62 Wash. 2d 28, 381 P.2d 130 (1963) ("This court has on many occasions affirmed decrees of trial courts which have enjoined the use of identical trade names or trade names so similar as to create confusion in the minds of the public. . . . The underlying concept is that of unfair competition in matters in which the public generally may be deceived or misled."). This Court has applied trademark analysis in the noncommercial context. *Comm. for Idaho's High Desert v. Yost*, 92 F.3d 814 (9th Cir. 1996. Just as the *Yost* defendant misappropriated the plaintiff's name to falsely bolster his environmentalist credentials, I-872's ballot abets and promotes candidates' misappropriation of the Republican name to falsely bolster their partisan credentials, and attract the party voters. ER00792.

Professor Donovan, alone, establishes the risk of confusion. Washington now seeks to retreat from its expert's conclusions, both on the general political context in Washington and the specifics of Washington's polity.

He testified confusion is a substantial risk, generally, for voters:

- confusion about political facts . . . is the norm among voters. ER01031.
- Q: Do you have an opinion as to whether voters are confused about the status of candidates?

  A: . . . My opinion is, voters are generally confused about most things having to do with politics, and this would be one of them. RSER 000015.
- "Put simply, confusion about matters of politics is common and widespread, regardless of the political phenomena being considered." ER01034.

Party labels on the ballot are critically important to exercising the franchise, enabling voters to know whom to hold accountable at election time. In effect, party labels serve to clear away the background confusion.

- Party identification or "party labels" are the most important cues voters use when casting votes. ER00206.
- "[T]he most important thing about political parties is, they allow voters to figure out who to hold accountable. By having candidates run under labels, that they can then figure out who's in power, who's not in power." RSER000019.

Reasonable persons, relatively sophisticated voters, and unsophisticated voters are all at risk of being misled by Washington's ballot.

- "[Because of the party's own nomination process]. . . a reasonable person would conclude that most Democratic candidates listed on the Top Two general election ballot are in fact the official nominee of the Party." ER01093.

- 'If well-informed voters were in Dr. Manweller's samples, . . . and they were aware of the [party's] policy of endorsing candidates or any party's practice of endorsing candidates, the [*sic*] may assume that a mock Top Two general election ballot listed candidates nominated or endorsed by a party." ER 01094.

- Younger voters are more likely to be confused by I-872 than more experienced voters. ER1039-41.

Washington's polity contains voters of varying degrees of sophistication. *See* ER1037-41. When courts evaluate the risk of confusion, the standard must account for the least sophisticated "consumer." Some test confusion using only the least sophisticated as the litmus test. Others look to all categories, but include the least sophisticated in the analysis. *See Brookfield Comm'ns*, 174 F.3d at 1060 (discussing cases). Whether confusing the least sophisticated consumer establishes the requisite "risk" or whether the test merely factors the least sophisticated into a "weighting" test, Washington's ballot undeniably poses the risk of confusion among all categories of voters.

Professor Donovan's evidence, while sufficient, is not the only evidence of substantial risk of, or actual, confusion. *See* WSRP Op. Br. at 11–23, 25–29.

3. Washington's implementation causes actual confusion.

Actual confusion is compelling evidence of the risk of confusion going forward. *Fuddrucker's Inc. v. Doe's B.R.*, 826 F.3d 837, 845 (9th Cir. 1987). To counter the substantial evidence that sophisticated media observers viewed ballot "preference" as a party affiliation, Washington submitted a handful of materials. Even the articles submitted by Washington conflate "preference" and "affiliation."

> Under the system, candidates will declare their own party preference and the top two vote-getters will advance to the November ballot regardless of party affiliation. That means two candidates of the same party could compete in the general election. SSER 67.
>
> Under a 'Top Two' system, whichever two candidates get the most votes advance to the general election regardless of party affiliation or the preference of the state party organizations. SSER 69.

Washington was aware of importance of general public communications and public media on voters' understanding. Its counsel recommended "At every opportunity - within reason - try to work into public communications" the State's assertion that party preference does not imply affiliation. The goal was that the point "turned up in public media." ER00635. Washington offers no evidence of efforts to correct the pervasive treatment of candidates' party preferences as unilateral statements of affiliation, but it did contact reporters to standardize press references to the primary as the "Top 2" instead of "Top Two." ER00637.

The record is replete with statements by Secretary Reed and other election officials, as part of the education effort, that indicate candidates' "party preference" is affiliation. *See, e.g.*, WSRP Op. Br. at 1, 16-17. Press statements

by Secretary Reed and other elections officials were integral parts of the "education" effort. ER00781. "Secretary of State Sam Reed, the state's chief elections official, plans a statewide media tour during the next two weeks to discuss Washington's brand new Top 2 primary, answer critics, and release his turnout prediction." ER 00777. Appellees and the District Court are wrong to disregard this part of Washington's public education effort.

Washington offers no evidence to controvert the actual confusion about its ballot, demonstrated by the results of its own focus group[5] and the Manweller experiment.[6]

Washington contends that the absence of questions from the public should demonstrate that voters read I-872's ballot as the State wishes it to be read. However, the State ignores the common question from voters about "How do I change my party preference on my voter registration?" ER01122. *See also* Figures 1–4. Washington also ignores questions it received from political reporters

[5] Notwithstanding Washington's only focus group, which showed that results showing that 48% of participants viewed the "preference" statement as affiliation (before detailed discussion with State facilitators) and that 27% afterwards still did not view the statement as the State would like, Secretary Reed told the public that "various focus groups, presentations and polling indicate that Washingtonians 'are ready and understand' the new system." ER00521.

[6] The Manweller experiment and report will be published in slightly modified form in the September 2011 edition of the Election Law Journal. Appellant shall provide the published article as additional authority.

which equated "party preference" with affiliation, "[D]o you have anything handy that shows which primary races only have candidates from the same party running?" ER00727.

B. Washington's implementation of the I-872 primary compels the Republican Party to repeat candidates' party preference statements in its own political speech.

The specter of compelled speech has always been present here. *See Grange* at 457. Mandating speech's content violates the First Amendment. *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986) (forced inclusion of opposing speech in PG&E's mailers); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974) (compelled right of reply).

Arizona Free Enterprise Club v. Bennett, 558 U.S. ___, 131 S. Ct. 2806 (2011) removes any doubt whether compelled distribution of someone else's political message violates the First Amendment. The majority and dissenting opinions agreed on that point. The majority relied on *Miami Herald Publ'g Co.* and *Pacific Gas*, reasoning "[g]overnment mandates that a speaker 'help disseminate hostile views' opposing that speaker's message" violate the First Amendment. *Id.* at 2831 (citation omitted). The dissent distinguished Arizona's public financing of elections, because "The Arizona statute does not require petitioners to disseminate or fund any opposing speech; nor does it in any way

associate petitioners with that speech." *Id.* at 2841. The Supreme Court struck down Arizona's law because it burdened speech.

In *Grange*, the Supreme Court declined to invalidate I-872 facially on this ground, noting that "because I-872 *does not actually force the parties to speak*, however, *Pacific Gas & Elec.* is inapposite. I-872 does not require the parties to reproduce another's speech against their will; nor does it co-opt the parties' own conduits for speech." 552 U.S. at 547 (emphasis added). Actually, now it does. I-872's implementation burdens the WSRP's speech by requiring repetition of candidates' party preference.

In May 2008, Washington's Public Disclosure Commission ("PDC") "discussed how campaign finance laws are impacted by Initiative 872 (Top Two Primary) . . . . The discussion regarding how to implement I-872 will continue at the Commission's June 26, 2008 meeting." ER00858. In June, the PDC considered "Possible Emergency Rulemaking to Implement I-872's Impact on Campaign Finance Provisions in 2008." ER00613. The PDC amended WAC 390-05-274 and equated a candidate's party preference with "party affiliation." Washington does not dispute that it requires the WSRP to repeat candidates' party preference in the WSRP's own political advertising. Its assertion that its implementation of I-872 does not require the inclusion is contradicted by the record.

The evidence showing harm from the compelled speech is uncontradicted. "The repeated use of the Party name to distance ourselves from unauthorized candidates would merely serve to reinforce a connection [with "opportunist and false flag" candidates]. This is a strong disincentive [to speak]." ER00320; *see* also ER00308. *Pacific Gas* is apposite, and I-872's implementation is unconstitutional.[7]

C. Washington's actual implementation of I-872 also forcibly associates the Republican Party with candidates who appropriate its name on election ballots.

For the first time in this case, Washington represents that it fills vacancies in partisan office based on political parties' private nomination processes. St. Br. at 32. It offers no evidence for this representation. The representation is contrary to its consistent treatment of party nomination rules since Washington began implementing I-872.

As Washington began implementing I-872, the WSRP provided its nomination rules to Washington elections officials. Each responded that the

[7] Strict scrutiny applies to content regulation of speech. *U.S. v. Stevens*, 559 U.S. ____, 130 S. Ct. 1577, 1584 (2010). If the State were correct that the ballot's "party preference" had no connotation of party affiliation and is merely an expression of the candidate's personal opinions, I-872 would still be unconstitutional as prohibited content regulation of political speech. The State prohibits a change of "party preference" between the primary and general elections. WAC 434-230-045(4)(d).

nomination rules were not germane to I-872, because I-872 did not take into account partisan nominations separate from the primary. RSER000001-000012.

RCW 29A.80.051 provides that for a precinct committee officer ("PCO"), "to be declared elected, a candidate must receive at least ten percent of the number of votes cast for the *candidate of the candidate's party* receiving the greatest number of votes in the precinct." In 2008, Washington adopted WAC 434-262-275 as part of a series of rules to "implement Initiative 872 (top two primary) for partisan public office, and implement the elections for precinct committee officers and president and vice-president in the context of Initiative 872." WSR 08-15-052. By regulation, Washington declared the 10% test inapplicable[8] because "there are no other candidates of that party in that precinct." ER00192. Party nomination is irrelevant in determining whether candidates are "of the party" in the context of I-872. In August 2010 (long after the State had filled vacancies under the State Constitution with candidates "of the same party"), Washington's assistant director

[8] Washington asserts that I-872 did not amend this statute (St. Br. at 46, n.15) as it must, because it went unreferenced in I-872 and WASH. CONST. art. II, § 37 requires that amended statutes be reproduced in full. St. Br. at 47 n.16. Washington's ongoing discovery of additional statutes that were "impacted" but not "amended" by I-872 after the original complaints were filed and after the Supreme Court's decision is an additional reason the District Court should have considered the WSRP's proposed complaint amendment to address the Washington State constitutional claim under Article II, § 37.

of elections testified about whether nominated candidates are "of the party" under I-872:

> Q: Has there been any discussion about basing the 10 percent . . . on the votes obtained by the highest vote-getter who was nominated by the same party . . . ?
>
> A: I don't think we've had any discussion on that. I think that's been suggested by the parties, but not by our office. ER00193.

Instead, Washington suggests that a legislator's two generation Republican pedigree was sufficient to establish him under I-872 as a candidate "of the party" under the State Constitution. St. Br. at 32, citing ER00184.

Actual, forced association is subject to strict scrutiny. *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

D. I-872's un-severability was resolved previously. There was no cause to revisit a resolved question on partial summary judgment.

The WSRP has not abandoned its long-standing assertion that I-872 is not severable. From the outset of the litigation, the WSRP has contended that I-872 is un-severable. The District Court held that I-872 was not severable in 2005. *WSRP v. Logan*, 377 F. Supp. 2d 907, 930-31 (W.D. Wash. 2005). Washington included in its supplemental excerpts a portion of the briefing on the WSRP's motion for partial summary judgment, but omitted the WSRP Reply. Relevant pages of the reply are now included. RSER000020-000027.

The WSRP motion for partial summary judgment did not waive severability. A motion for partial summary judgment simply resolves part of a controversy and reserves the balance of the claims for trial. Fed. R. Civ. P. 56(a) ("A party claiming relief may move . . . for summary judgment on all *or part* of a claim") (emphasis added); *see* CHARLES A. WRIGHT & ARTHUR R. MILLER, 5C FEDERAL PRACTICE AND PROCEDURE § 1381 (3d ed.) ("partial summary judgment will narrow, but not terminate the controversy between the parties").

On September 16, 2008 (after the WSRP response to the State's motion had been filed), Washington election officials notified the King County Republican and Democratic chairmen of application of a new rule specifically addressing PCO races under I-872 but with far broader implications. The new rule, based on I-872, purportedly severed all connection between candidates on the ballot and the party. ER01123-5. The WSRP reply outlined a wide variety of statutes thereby rendered inoperative by I-872 and concluded, "If I-872 does what the State now contends, it is unconstitutional, *in toto*." RSER000027.

E. The settlement of fees should not have been disturbed.

Washington's response ignores the course of conduct and the agreement leading up to the filing of the stipulated order with the Court. Stipulated orders (for example, stipulated orders of dismissal) need not encompass the entirety of the parties' underlying agreement. Those are often addressed in separate agreements, as was done here. Washington's rule of contract construction looks to the entirety of the parties agreement, and recognizes that a contract may have multiple components and that the following must be considered:

> 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 Wash. App. 885, 895, 28 P.3d 823 (2001). The Democratic Party, along with the Republican Party, made clear that the settlement of fees would be final, but only as to fees on that portion of the appeal.

> We understand this settlement will be final as to our claims for attorneys' fees and costs for the Ninth Circuit proceedings related to the appeal of Judge Zilly's July, 2005 decision through the date of the settlement, irrespective of further proceedings in the case.

ER0155. The State agreed to enter into the settlement. The stipulated order was filed based on and after the agreement, including the above express term.[9]

III. CONCLUSION

Washington's implementation of I-872, even viewed in the most favorable light, has continued to associate candidates with the Republican Party on state-printed ballots, impairing the core right of political association. Washington's implementation compels the Republican Party to reproduce others' political speech, impairing the core right of speaker autonomy.

The Democratic Party suggests a narrowly-tailored injunction, prohibiting Washington from printing ballots indicating a candidate's "party preference" absent

[9] The WSRP joins in the arguments advanced by the Democratic Party in its reply brief. The Republican Party also supports the Libertarian argument that the Court should apply trademark law to protect its name from misappropriation (just as it did for the noncommercial holder in *Yost*).

party consent. The Republican Party primarily urges that the possibility of such a narrowly-tailored injunction is powerful evidence that Washington did not narrowly tailor its implementation of I-872 to meet whatever interests it might have had. Chief Justice Roberts' concern about the State's lack of interest in designing a ballot to meet constitutional requirements has been more than validated. *See Grange* 552 U.S. at 462.

Further, in light of the sponsor's repeated statements of legislative intent indicating that continuing candidates' self-designation of party affiliation was one of the central objects of I-872, a narrow injunction might constitute judicial "amendment" of the statute.

I-872's other constitutional defects, including requiring the Republican Party to include candidates' unilateral party preference in Republican Party political speech, would not be resolved by an injunction limited to the printing of the party name on the ballot without consent.

The Republican Party suggests that the Court should enjoin I-872 in its entirety. Washington's political branches may then design a partisan primary that avoids forcing the Republican Party to be associated with unwanted candidates, that does not regulate the content of political speech, and that is implemented in a constitutional manner.

The District Court should be reversed and judgment granted to the WSRP.

DATED this 25th day of August, A.D. 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 11-35124 and 11-35125, and which are currently pending in this Court. This case has been consolidated with Docket No. 11-35124.

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 4,769 words, including both text and footnotes, and excluding this Certificate of Compliance, the Table of Contents, the Table of Authorities, the List of Figures, 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 August 25, 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.