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The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

WASHINGTON STATE REPUBLICAN  
PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC  
CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

LIBERTARIAN PARTY OF  
WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE,  
et al.,

Defendant Intervenors.

NO. CV-05-00927-JCC

STATE OF WASHINGTON'S  
REPLY TO LIBERTARIAN  
PARTY'S OPPOSITION TO  
STATE'S MOTION TO  
RECOVER ATTORNEY FEES  
AND COSTS

**NOTED FOR  
April 10, 2009**

1 **I. INTRODUCTION**

2 This is the response of the State of Washington, Rob McKenna, Attorney General of  
3 the State of Washington, and Sam Reed, Secretary of State of the State of Washington, (“the  
4 State”) Defendant Intervenors in the captioned action, to the Libertarian Party’s memorandum  
5 in Opposition to the State’s pending Motion to Recover Attorney Fees and for Costs. The  
6 Libertarian memo will be referred to here as Lib. Opp. Atty. Fee.

7 **II. ARGUMENT**

8 The State has moved for an order from this Court, compelling the Libertarian Party and  
9 the other Plaintiffs in this action to refund to the State all funds previously paid as attorney fees  
10 or costs in this action, based upon an appellate decision that has now been reversed by the  
11 United States Supreme Court. The State also requests an award of costs, to which Washington  
12 is now entitled as the prevailing party. The fees at issue relate solely to fees awarded by the  
13 Ninth Circuit related to work done before the Ninth Circuit.

14 **A. The State is not seeking to set aside the stipulation concerning attorney fees.**

15 The Libertarian Party begins by mistakenly mischaracterizing the State’s Motion as a  
16 “Motion to Set Aside Fee Stipulation.” Lib. Opp. Atty. Fee (cover page). As the State has  
17 pointed out in previous briefing, the parties in this case stipulated only to the *amount* of  
18 attorney fees to be paid by the State to the Plaintiffs under an order issued by the Ninth Circuit  
19 finding the State liable for attorney fees in a prior phase of the case. The order of the Ninth  
20 Circuit, not the Stipulation, established the State’s liability for fees, and the Stipulation  
21 reserved the contingency that the Ninth Circuit might be reversed and that the State would  
22 become the prevailing party.

23 As the State has shown, the “deal” made by the State with the political parties  
24 concerned the amount to be paid for the Ninth Circuit phase of the case *if* the State remained  
25 liable to the political parties for their attorney fees. By their agreement, the State conceded that  
26 the amounts agreed to were reasonable fees *if the State remained liable to pay attorney fees.*

1 All parties saved considerable time and expense by avoiding protracted wrangling over the  
 2 amount of fees recoverable. The State is not seeking to alter or set aside the Stipulation, but to  
 3 recover the amounts paid in light of the fact that the underlying basis for the agreement—the  
 4 State’s liability for attorney fees in light of the Court of Appeals’ original ruling—has been  
 5 swept aside by the Supreme Court.

6 **B. The State is the prevailing party as to proceedings before the Court of Appeals.**

7 The Libertarians assert that the determination of a prevailing party is “premature”  
 8 because, they contend, there will be further proceedings in which the political parties may  
 9 prevail. Lib. Opp. Atty. Fee at 4-5. The fees under consideration relate only to the State’s  
 10 original appeal to the Ninth Circuit, which initially resulted in the Court of Appeals’  
 11 affirmance of this Court’s Order finding I-872 unconstitutional on its face. *Washington State*  
 12 *Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006). However, this decision was  
 13 reversed by the Supreme Court in *Washington State Grange v. Washington State Republican*  
 14 *Party*, \_\_\_ U. S. \_\_\_, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). The Supreme Court granted  
 15 no relief to the political parties on any point, and the Ninth Circuit granted no relief to the  
 16 political parties on any issue that remained in place after the Supreme Court decision. As  
 17 things stand, the political parties are not the “prevailing parties” on any of the issues argued to  
 18 the Ninth Circuit.

19 It is doubtful that there will be any further proceedings in this case, as the State and the  
 20 Grange have moved to dismiss all remaining claims. The most the Libertarian Party and its  
 21 fellow Plaintiffs can hope for, however, is that they might prevail on some new issue not  
 22 considered in the previous phases of this case. Even if this were to occur, however, it would be  
 23 insufficient to “bootstrap” them into “prevailing parties” for the earlier proceedings in which  
 24 the political parties were completely unsuccessful. *Schwarz v. Sec’y of Health & Human*  
 25 *Servs.*, 73 F.3d 895, 901 (9th Cir. 1995). As to the Ninth Circuit phase at issue here, the State  
 26 is the prevailing party, and no future proceedings will alter that fact.

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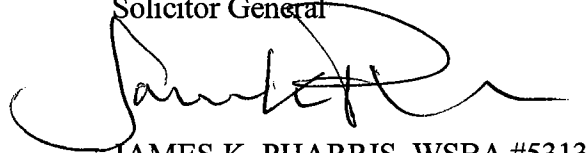
III. CONCLUSION

For the reasons stated here and those set forth in the State's previous arguments in support of its motion, this Court should grant the State's Motion to Recover Attorneys' Fees and For Costs.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of April, 2009.

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Washington, Rob McKenna, and Sam Reed

**CERTIFICATE OF SERVICE**

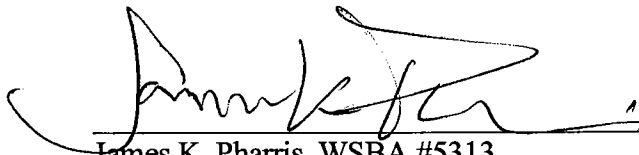
I certify that on this date I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing electronically to the following:

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Executed this 10<sup>th</sup> day of April, 2009, at Olympia, Washington.



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