

The Honorable Thomas S. Zilly

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

WASHINGTON STATE REPUBLICAN  
PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC  
CENTRAL COMMITTEE, et al.,

Plaintiff Intervenor,

LIBERTARIAN PARTY OF  
WASHINGTON STATE, et al.,

Plaintiff Intervenor,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenor,

WASHINGTON STATE GRANGE,  
et al.,

Defendant Intervenor.

NO. CV-05-00927-TSZ

DECLARATION OF JEFFREY  
T. EVEN IN SUPPORT OF  
MOTION TO RECOVER  
ATTORNEY FEES AND  
FOR COSTS

1 I, Jeffrey T. Even, being first duly sworn upon oath, declare as follows:

2 1. I am over eighteen years of age and competent to testify. I am an attorney  
3 licensed to practice law in the state of Washington and admitted to the bar of this court.  
4 I am currently employed as a Deputy Solicitor General for the state of Washington. I am  
5 one of the counsel for Defendant Intervenor State of Washington, Secretary of State Sam  
6 Reed, and Attorney General Rob McKenna in this action.

7 2. Attached as exhibits to this declaration are true and correct copies of the  
8 following documents:

- 9 a. Attached as Exhibit A is a true and correct copy of the cost bill submitted by  
10 the State of Washington to the Court of Appeals.
- 11 b. Attached as Exhibit B is a true and correct copy of an unpublished Order  
12 entered by the United States Court of Appeals for the Ninth Circuit on  
13 August 22, 2006, regarding liability for, but not the amount of, attorneys'  
14 fees in this action.
- 15 c. Attached as Exhibit C is a true and correct copy of a Stipulation and Order  
16 Regarding Attorneys' Fees and Costs on Appeal, filed in the United States  
17 Court of Appeals for the Ninth Circuit on September 18, 2006.
- 18 d. Attached as Exhibit D is a true and correct copy of an Order entered by the  
19 United States Court of Appeals for the Ninth Circuit on October 3, 2006.
- 20 e. Attached as Exhibit E are true and correct copies of three letters that my  
21 office sent to the lead counsel for the Republican, Democratic, and  
22 Libertarian Parties, respectively, on October 4, 2006. Enclosed with each  
23 letter were checks in the full amounts awarded to each party as fees and costs  
24 in this action, copies of which are also included. Each of these letters were  
25 sent via UPS for next day delivery. Copies of these letters and checks were  
26

1 provided to the Court of Appeals in this matter, in support of the State's  
2 motion to recover attorney fees.

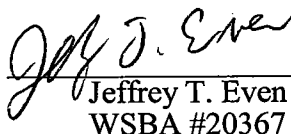
3 f. Attached as Exhibit F are true and correct copies of images of the checks,  
4 showing their front and back and showing that each of them was redeemed.

5 g. Attached as Exhibit G is a true and correct copy of a letter that I caused to be  
6 sent to the lead counsel for the Republican, Democratic, and Libertarian  
7 Parties, respectively, on April 1, 2008, requesting cooperation of each party  
8 in stipulating to reimbursement of attorneys' fees and costs paid. All three  
9 parties opposed this request before the Court of Appeals.

10 h. Attached as Exhibit H is a true and correct copy of the State's Motion to  
11 Vacate Award of Attorneys' Fees and Costs, For Judgment Awarding  
12 Restitution of Fees and Costs, and For Costs, filed in the Court of Appeals on  
13 April 23, 2008.

14 i. Attached as Exhibit I is a true and correct copy of the Order issued by the  
15 United States Court of Appeals for the Ninth Circuit on October 2, 2008,  
16 remanding this case to this Court, and vacating its orders of August 22, 2006,  
17 and October 3, 2006 (Exhibits B and D hereto).

18 3. I swear under penalty of perjury under the laws of the state of Washington that  
19 the foregoing is true and correct and of my own knowledge, and that I executed this  
20 declaration at Olympia, Washington, in the County of Thurston, this 14<sup>th</sup> day of  
21 November, 2008.

22  
23  
24   
25 Jeffrey T. Even  
26 WSBA #20367

# EXHIBIT A

NO.05-35774; 05-35780

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

WASHINGTON STATE  
REPUBLICAN PARTY, et al.,

Appellee/Plaintiffs,

WASHINGTON DEMOCRATIC  
CENTRAL COMMITTEE, et al.,

Appellee/Plaintiff Intervenors,

LIBERTARIAN PARTY OF  
WASHINGTON STATE, et al.,

Appellee/Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Appellant/Defendant Intervenor,

WASHINGTON STATE GRANGE,

Appellant/Defendant Intervenor.

COST BILL

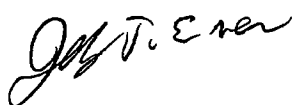
The clerk is requested to tax costs, in favor of the State of Washington, Rob McKenna and Sam Reed, and against the Appellees, Washington State Republican Party, et. al, Washington Democratic Central Committee, et. al, and Libertarian

Party of Washington State, et. al, as indicated on the attached Ninth Circuit Form  
10 (Bill of Costs).

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of April, 2008.

ROBERT M. MCKENNA  
Attorney General

MAUREEN HART, WSBA #7831  
Solicitor General



JAMES K. PHARRIS, WSBA #5313  
JEFFREY T. EVEN, WSBA # 20367  
Deputy Solicitors General  
P.O. Box 40100  
Olympia, WA 98504-0100  
360-664-3027

Counsel for Appellants State of  
Washington, Rob McKenna, and Sam Reed

**Form 10. Bill of Costs ..... (Rev. 1-1-05)****United States Court of Appeals for the Ninth Circuit****BILL OF COSTS**

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and Circuit Rule 39-1 when preparing your bill of costs.

Republican Party v. State

CA No. 05-35774; 05-35780

The Clerk is requested to tax the following costs against: Appellees Wash. State Republican Party, et al; Wash. Democratic Central Committee, et al.; and Libertarian Party, et al.

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, Circuit Rule 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.*	Pages per Doc.	Cost per Page **	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page	TOTAL COST
Excerpt of Record	7	611	.04	171.08				
Appellant's Brief	20	119	.04	95.20				
Appellee's Brief								
Appellant's Reply Brief	20	36	.04	28.80				
Other (Transcript)	1	117	.10	11.70				
TOTAL				\$306.78	TOTAL \$			

**Form 10. Bill of Costs -Continued**

**Other:** Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

\* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

\*\* Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

---

I, JEFFREY T. EVEN, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature: Jeff T. Even

Date: APRIL 23, 2008

Name of Counsel (printed or typed): Jeffrey T. Even  
Attorney for: Appellants State of Washington, Rob McKenna and Sam Reed

---

Date: \_\_\_\_\_ Costs are taxed in the amount of \$ \_\_\_\_\_

Clerk of Court By: \_\_\_\_\_, Deputy Clerk



# EXHIBIT B

**FILED**

**AUG 22 2006**

RECEIVED

NOT FOR PUBLICATION

2006 AUG 23 AM 11:25 UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

ATTORNEY GENERAL  
OF WASHINGTON

FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN  
PARTY; DIANE TEBELIUS;  
BERTABELLE HUBKA; STEVE  
NEIGHBORS; MIKE GASTON; MARCY  
COLLINS; MICHAEL YOUNG,

Plaintiffs - Appellees,

and

WASHINGTON STATE DEMOCRATIC  
CENTRAL COMMITTEE; PAUL  
BERENDT; LIBERTARIAN PARTY OF  
WASHINGTON STATE; RUTH BENNETT;  
J. S. MILLS,

Plaintiff-Intervenors - Appellees,

v.

STATE OF WASHINGTON; ROB  
MCKENNA, Attorney General; SAM REED,  
Secretary of State; WASHINGTON STATE  
GRANGE,

Defendant-Intervenors -  
Appellants.

Nos. 05-35774  
05-35780

D.C. No. CV-05-00927-TSZ  
Western District of Washington,  
Seattle

ORDER

Before: D.W. NELSON, RYMER and FISHER, Circuit Judges.

In connection with the appeal we decided in *Wash. State Republican Party v. Washington*, \_\_\_ F.3d \_\_\_ (9th Cir. 2006), appellant Washington State Republican Party argued in its brief that Washington State and the Washington State Grange, both appellees in that suit, “should be jointly and severably liable for the Party’s attorneys’ fees [on] appeal.” Appellant Washington State Democratic Central Committee also argued that it “is entitled to an award of attorney’s fees against the Grange.” And the Libertarian Party of Washington State argued generally that it “should be awarded its attorney fees for this appeal” without specifying who should pay. In a reply brief, the Grange responded to the political parties’ arguments that it should be liable for attorney’s fees, but the State of Washington remained silent on this issue. We construe all of these arguments as motions and responses to motions for attorney’s fees.

“Under our construction of 42 U.S.C. § 1988, a prevailing party in a § 1983 action should ordinarily recover an attorney’s fee unless special circumstances could render such an award unjust.” *Democratic Party of Wash. v. Reed* [hereinafter *Reed II*], 388 F.3d 1281, 1285 (9th Cir. 2004) (published order) (internal quotation marks omitted). We concluded that no such special circumstance existed when the political parties challenged Washington’s previous version of the blanket primary. *See id.* at 1288. Washington has not raised the special circumstance defense to attorney’s fees in this appeal. Because we find no

significant difference between this case and *Reed II* with respect to attorney's fees owed by Washington, we award reasonable attorney's fees to the political parties as against the State of Washington.

The Republican and Democratic parties contend that attorney's fees should also be awarded against the Grange. We disagree. In *Reed II*, we held that "§ 1988 fee awards should be made against losing intervenors, only where the intervenors' action was frivolous, unreasonable, or without foundation." *Id.* (internal quotation marks omitted). We reasoned that "[t]he relief sought by the plaintiffs was abolition of the Washington 'blanket primary.' The Grange, an intervening defendant, could neither have granted that relief nor denied it." *Id.* The Grange was likewise incapable of abolishing Initiative 872 here once it had been approved by the voters.

Further, although the Grange sponsored Initiative 872, we cannot say that this legislative effort was either frivolous, unreasonable or without foundation. Rather it was a nonfrivolous and reasonable response to the Supreme Court's ruling in *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), and our ruling in *Democratic Party of Wash. v. Reed* [hereinafter *Reed I*], 343 F.3d 1198 (9th Cir. 2003). The foundation for the Grange's effort was the Supreme Court's dictum describing a permissible nonpartisan blanket primary in *Jones*. See 530 U.S. at 585-86. Although we have concluded that the Grange's efforts to create a

constitutional primary system were unsuccessful, *see Wash. State Republican Party*, \_\_\_ F.3d at \_\_\_, we recognize that the Grange made a good faith attempt to synthesize the holdings of *Jones* and *Reed I* as well as the *Jones* dictum regarding a nonpartisan blanket primary to create an electoral system that not only comports with the requirements of the Constitution but is also true to Washington's unique political tradition. Under the circumstances, the Grange does not owe attorney's fees to the political parties in this case.

# EXHIBIT C

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WASHINGTON STATE  
REPUBLICAN PARTY, et al.,

Appellee/Plaintiffs,

WASHINGTON STATE  
DEMOCRATIC CENTRAL  
COMMITTEE, et al.,

Appellee/Plaintiff Intervenors,

LIBERTARIAN PARTY OF  
WASHINGTON STATE, et al.,

Appellee/Plaintiff Intervenors,

v.

DEAN LOGAN, King County  
Records & Elections Division  
Manager, et al.,

Defendants,

STATE OF WASHINGTON, et al.,

Appellants/Defendant Intervenors,

WASHINGTON STATE GRANGE,

Appellant/Defendant Intervenor.

Nos. 05-35774  
05-35780

Dist. Ct. No. CV05-0927Z  
Western District of  
Washington, Seattle

STIPULATION AND  
ORDER REGARDING  
ATTORNEYS' FEES AND  
COSTS ON APPEAL

Appellees Washington State Republican Party, *et al.* ("Republican Party"), Washington State Democratic Central Committee, *et al.* ("Democratic Party"), and Libertarian Party of Washington State, *et al.* ("Libertarian Party"), by and through their respective counsel of record, join with appellants State of Washington, *et al.* ("State") by and through their respective counsel of record, in stipulating that appellants are entitled to an order requiring the State to pay appellees' attorneys' fees and costs in the following amounts, incurred to date in the Ninth Circuit portion of the Appeal:

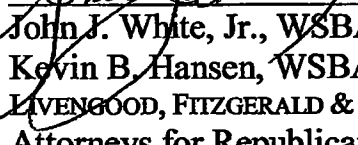
Republican Party: \$ 54,457.65 (attorneys' fees); \$639.60 (costs)

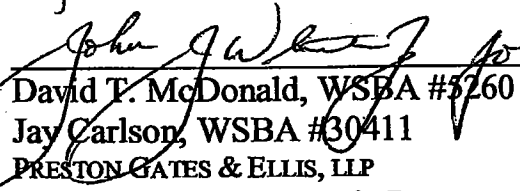
Democratic Party: \$ 37, 460.77 (attorneys' fees); \$213.20 (costs)

Libertarian Party: \$14,977.80 (attorney's fees); \$1,323.32 (costs)

The parties agree that this stipulation relates only to fees and costs incurred by appellees in the appeal of the District Court's July 29, 2005 Order ("the Appeal") to the date of this Order. Appellees are not entitled to an award of any fees or costs incurred in the Ninth Circuit portion of the Appeal beyond the amounts awarded under this stipulation and order, to the date of this Order. No waiver is intended of any claims for further proceedings in the appeal or in any other aspect of the case (including district court proceedings).

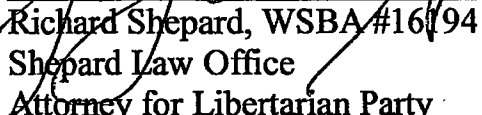
DATED this 18 day of September, 2006.

  
John J. White, Jr., WSBA #13682  
Kevin B. Hansen, WSBA #28349  
LIVENGOOD, FITZGERALD & ALSKOG, PLLC  
Attorneys for Republican Party  
121 Third Avenue  
P.O. Box 908  
Kirkland, WA 98083-0908  
(425) 822-9281  
(425) 828-0908 (fax)

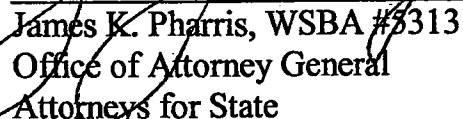
*By email authorization*  
  
David T. McDonald, WSBA #5260  
Jay Carlson, WSBA #30411  
PRESTON GATES & ELLIS, LLP  
Attorneys for Democratic Party  
925 Fourth Avenue, Ste. 2900  
Seattle, WA 98104-7078  
(206)-370-7957  
206-224-7095 (fax)



*By email authorization*

  
Richard Shepard, WSBA #16194  
Shepard Law Office  
Attorney for Libertarian Party  
818 S. Yakima Ave., #200  
Tacoma, WA 98405  
(253) 383-2235  
(253) 627-1990 (fax)

*by telephone authorization*

  
James K. Pharris, WSBA #3313  
Office of Attorney General  
Attorneys for State  
1125 Washington Street S.W.  
P.O. Box 40100  
Olympia, WA 98504-0100  
(360) 664-3027  
(360) 664-2963 (fax)

**ORDER**

Pursuant to the above stipulation,

IT IS HEREBY ORDERED that the State of Washington pay attorneys' fees and costs to the appellees in the following amounts:

Republican Party: \$ 54,457.65 (attorneys' fees); \$639.60 (costs)

Democratic Party: \$ 37,460.77 (attorneys' fees); \$ 213.20 (costs)

Libertarian Party: \$14,977.80 (attorney's fees); \$1,323.32 (costs)

DATED this \_\_\_\_ day of September, 2006.

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# EXHIBIT D

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

OCT 03 2006

GATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

WASHINGTON STATE REPUBLICAN  
PARTY; CHRISTOPHER VANCE;  
BERTABELLE HUBKA; STEVE  
NEIGHBORS; BRENT BOGER;  
MARCY COLLINS; MICHAEL  
YOUNG; DIANE TEBELIUS; MIKE  
GASTON,

Plaintiffs - Appellees,

and

WASHINGTON STATE DEMOCRATIC  
CENTRAL COMMITTEE; PAUL  
BERENDT; LIBERTARIAN PARTY OF  
WASHINGTON STATE; RUTH  
BENNETT; J. S. MILLS,

Plaintiffs - Intervenors - Appellees,

v.

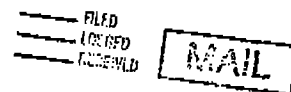
STATE OF WASHINGTON; ROB  
MCKENNA, Attorney General; SAM  
REED, Secretary of State;  
WASHINGTON STATE GRANGE,

Defendants - Intervenors - Appellants.

Nos. 05-35774, 05-35780

D.C. No. CV-05-00927-TSZ  
Western District of Washington,  
Seattle

ORDER



AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
BY



05-CV-00927-APPO

Before: Peter L. Shaw, Appellate Commissioner

No.05-35774, 05-35780

The parties have informed the court that they have reached a settlement concerning an award of attorneys' fees in these appeal. Pursuant to the terms of the stipulation, filed September 19, 2006, appellant State of Washington shall pay attorneys' fees of \$54,457.65 and \$639.60 in costs to appellee Washington State Republican Party; attorneys' fees of \$37,460.77 and \$213.20 in costs to appellee Washington State Democratic Central Committee; and attorneys' fees of \$14,977.80 and \$1,323.32 in costs to appellee Libertarian Party of Washington State. *See* 9th Cir. R. 39-1.6; 9th Cir. Gen. Order 6.3(a) & App. A, ¶ 50.

A copy of this order sent to the district court shall serve to amend this court's mandate.

  
General Order 6.3(e)

# EXHIBIT E



Rob McKenna  
**ATTORNEY GENERAL OF WASHINGTON**  
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

October 4, 2006

John J. White  
Livengood Fitzgerald & Alskog  
121 Third Avenue  
Kirkland, WA 98083

**RE: Washington State Republican Party v. Logan  
Ninth Circuit Cause Nos. 05-35774 and 05-35780  
United States District Court No. CV-05-00927-TSZ**

Dear Mr. White:

Enclosed is your check for attorneys' fees and costs in the amount of \$55,097.25 awarded pursuant to the Ninth Circuit Court of Appeals' Order filed October 3, 2006 in the above matter.

Please note that by depositing or negotiating the warrant, you are acknowledging that this judgment has been satisfied in full.

If you have any questions or concerns, please contact me at the below number.

Sincerely,

**JAMES K. PHARRIS**  
Assistant Attorney General  
(360) 664-3027

TS  
enclos.

THIS WARRANT CONTAINS AN ARTIFICIAL WATERMARK ON THE BACK. HOLD AT ANGLE TO VIEW. IF NOT PRESENT, DO NOT CASH.

**STATE OF WASHINGTON**  
OFFICE OF STATE TREASURER OLYMPIA

OFFICE OF ATTORNEY GENERAL  
(360) 586-3003

98-557 561078-E  
1251

Reg. No.	Agency	Sub. Ag.	Warrant No.	Mo.	Day	Yr.
06277	1000		561078E	10	04	2006

PAY THIS AMOUNT

PAY TO THE ORDER OF

➡➡➡ PAY ONLY FIVE FIVE ZERO FIVE SEVEN 25 CTSCTS

\$55,097.25

NEGOTIABLE FOR 180 DAYS ON OR AFTER ABOVE DATE.

LIVENGOOD FITZGERALD & ALSKOG  
121 THIRD AVE  
KIRKLAND WA 98083

*Michael J. Murphy*  
MICHAEL J. MURPHY, STATE TREASURER

⑈4321⑈ ⑆125105576⑆ 56107805⑈



Rob McKenna  
**ATTORNEY GENERAL OF WASHINGTON**  
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

October 4, 2006

David T. McDonald  
Preston Gates Ellis LLP  
925 4<sup>th</sup> Avenue, Ste 2900  
Seattle, WA 98104-1158

**RE: Washington State Republican Party v. Logan  
Ninth Circuit Cause Nos. 05-35774 and 05-35780  
United States District Court No. CV-05-00927-TSZ**


Dear Mr. McDonald:

Enclosed is your check for attorneys' fees and costs in the amount of \$37,673.97 awarded pursuant to the Ninth Circuit Court of Appeals' Order filed October 3, 2006 in the above matter.

Please note that by depositing or negotiating the warrant, you are acknowledging that this judgment has been satisfied in full.



If you have any questions or concerns, please contact me at the below number.

Sincerely,

  
JAMES K. PHARRIS  
Assistant Attorney General  
(360) 664-3027

:rs  
enclos.



THIS WARRANT CONTAINS		AN ARTIFICIAL WATERMARK ON THE BACK. HOLD AT		E TO VIEW. IF NOT PRESENT, DO NOT CASH.	
<b>STATE OF WASHINGTON</b> OFFICE OF STATE TREASURER OLYMPIA OFFICE OF ATTORNEY GENERAL (360) 586-3003				98-557 1251 <b>561080 E</b>	
Reg. No.	Agency	Sub. Ag.	Warrant No.	Mo.	Day
06277	1000		561080E	10	04
			2006		
PAY THIS AMOUNT					
PAY TO THE ORDER OF					
PRESTON GATES & ELLIS LLP 925 4TH AVE STE 2900 SEATTLE WA 98104-1158			NEGOTIABLE FOR 180 DAYS ON OR AFTER ABOVE DATE  MICHAEL J. MURPHY, STATE TREASURER		

⑈4321⑈ ⑆125105576⑆ 56108005⑈



Rob McKenna  
**ATTORNEY GENERAL OF WASHINGTON**  
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

October 4, 2006

Richard Shepard  
Attorney at Law  
818 South Yakima Street, #200  
Tacoma, WA 98405

**RE: Washington State Republican Party v. Logan  
Ninth Circuit Cause Nos. 05-35774 and 05-35780  
United States District Court No. CV-05-00927-TSZ**

Dear Mr. Shepard:

Enclosed is your check for attorneys' fees and costs in the amount of \$16,301.12 awarded pursuant to the Ninth Circuit Court of Appeals' Order filed October 3, 2006 in the above matter.

Please note that by depositing or negotiating the warrant, you are acknowledging that this judgment has been satisfied in full.

If you have any questions or concerns, please contact me at the below number.

Sincerely,

A handwritten signature in black ink, appearing to read "James K. Pharris", is written over a horizontal line.

**JAMES K. PHARRIS**  
Assistant Attorney General  
(360) 664-3027

:rs  
enclos.

THIS WARRANT CONTAINS AN ARTIFICIAL WATERMARK ON THE BACK. HOLD AT ANGLE TO VIEW. IF NOT PRESENT, DO NOT CASH.

**STATE OF WASHINGTON**  
 OFFICE OF STATE TREASURER OLYMPIA

OFFICE OF ATTORNEY GENERAL  
 (360) 586-3003

98-557 561081E  
 1251

Reg. No.	Agency	Sub. Ag.	Warrant No.	Mo.	Day	Yr.
06277	1000		561081E	10	04	2006

**PAY THIS AMOUNT**

**\$16,301.12**

PAY TO THE ORDER OF

**PAY ONLY ONE SIX THREE ZERO ONE CTS**

NEGOTIABLE FOR 180 DAYS ON OR AFTER ABOVE DATE

SHEPARD, RICHARD  
 SHEPARD LAW OFFICE INC  
 818 S YAKIMA ST #200  
 TACOMA WA 98405

*Michael J. Murphy*  
 MICHAEL J. MURPHY, STATE TREASURER

⑈4321⑈ ⑆125105576⑆ 56108105⑈

# EXHIBIT F

## TMS Warrant Inquiry

Page 1 of 1

## Warrant Inquiry

Warrant #: 561078E Warrant Amount: 55,097.25 Status: Redeemed  
 Issue Date: 10/04/2006 Agency: 1000 Register #: 06277  
 Cancel Date: Cancel JV #:   
 Redeem Date: 10/06/2006

Fund	Amount
405	55,097.25

NOTICE: Warrant images are provided to authorized agency personnel only. Any disclosure of information contained on your warrant images must be in accordance with your agency's public disclosure policies.

The "Check Clearing for the 21st Century Act" (Check 21) was implemented on October 28, 2004. This warrant image could be a "substitute check" and is the legal equivalent of the original warrant.

<b>STATE OF WASHINGTON</b> OFFICE OF STATE TREASURER OFFICE OF ATTORNEY GENERAL (360) 586-3003		Warrant #: 561078E Agency: 1000 Date: 10/04/2006	
PAY TO THE ORDER OF LIVENGOOD FITZGERALD & ALSKOG 121 THIRD AVE KIRKLAND WA 98083		PAY THIS AMOUNT <b>\$55,097.25</b>	
9509.027		PAID 10/06/06 004 017950 MICHAEL J. HUGENE, STATE TREASURER	
4321 125105576 56107805		0005509725	

123000220 10050000 0000 5/1 034 10 00 PKT 03 ACCT 00153554900014 343773658A	PAY TO THE ORDER OF US BANK TACOMA FOR DEPOSIT ONLY LIVENGOOD, FITZGERALD, ALSKOG ULTA POLLED ACCOUNT ATTENTION: The undersigned instrument contains a watermark. Hold at an angle to view.
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## TMS Warrant Inquiry

Page 1 of 1

## Warrant Inquiry

Warrant #: 561081E Warrant Amount: 16,301.12 Status: Redeemed  
 Issue Date: 10/04/2006 Agency: 1000 Register #: 06277  
 Cancel Date: Cancel JV #:   
 Redeem Date: 10/06/2006

Fund	Amount
405	16,301.12

NOTICE: Warrant images are provided to authorized agency personnel only. Any disclosure of information contained on your warrant images must be in accordance with your agency's public disclosure policies.

The "Check Clearing for the 21st Century Act" (Check 21) was implemented on October 28, 2004. This warrant image could be a "substitute check" and is the legal equivalent of the original warrant.

<b>STATE OF WASHINGTON</b> OFFICE OF ATTORNEY GENERAL (360) 586-3003		Warrant #: 561081E Agency: 1000 Issue Date: 10/04/2006 Status: Redeemed	
PAY TO THE ORDER OF SHEPARD, RICHARD SHEPARD LAW OFFICE INC 818 S YAKIMA ST #200 TACOMA WA 98405		PAY THIS AMOUNT <b>\$16,301.12</b> MICHAEL J. MURPHY, STATE TREASURER	
MICHAEL J. MURPHY, STATE TREASURER		MICHAEL J. MURPHY, STATE TREASURER	

PAY TO THE ORDER OF  
 BANK OF AMERICA  
 TACOMA WA 98405  
 SHEPARD LAW OFFICE INC.  
 818 S YAKIMA ST #200  
 TACOMA WA 98405

0750387274  
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# EXHIBIT G





Rob McKenna  
**ATTORNEY GENERAL OF WASHINGTON**  
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

April 1, 2008

*Via email and U.S. Mail*

John J. White  
Livengood Fitzgerald & Alskog  
121 Third Avenue  
Kirkland, WA 98083

David T. McDonald  
Preston Gates Ellis LLP  
925 4<sup>th</sup> Avenue, Suite 2900  
Seattle, WA 98104-1158

Richard Shepard  
Attorney at Law  
818 South Yakima Street, #200  
Tacoma, WA 98405

Re: *Washington State Republican Party v. State of Washington*,  
Ninth Circuit Nos. 05-35774, 05-35780

Dear Counsel:

Before the referenced case was heard in the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit entered an award of attorney fees in favor of each of your respective clients for your work on appeal in the Ninth Circuit, pursuant to 42 U.S.C. § 1988. As I am sure you will recall, pursuant to the court's order entered at that time, the State of Washington paid fees and costs to each of your clients.

As you know, the United States Supreme Court has now reversed the Ninth Circuit decision upon which those fee awards were based. Since your clients are no longer prevailing parties, it is now appropriate for them to refund to the State the fees and costs previously paid. It seems appropriate to file a stipulated motion to this effect, providing that each of your respective clients will refund the fees and costs within 30 days of the issuance of the Supreme Court mandate.

ATTORNEY GENERAL OF WASHINGTON

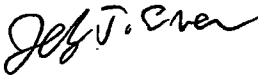
April 1, 2008

Page 2

With your concurrence, we will prepare the appropriate stipulation for filing with the Ninth Circuit.

I would appreciate your prompt responses.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jeff T. Even".

JEFFREY T. EVEN  
Deputy Solicitor General  
360-586-0728

cc: Tom Ahearne

# EXHIBIT H

NO.05-35774; 05-35780

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

WASHINGTON STATE  
REPUBLICAN PARTY, et al.,

Appellee/Plaintiffs,

WASHINGTON DEMOCRATIC  
CENTRAL COMMITTEE, et al.,

Appellee/Plaintiff Intervenors,

LIBERTARIAN PARTY OF  
WASHINGTON STATE, et al.,

Appellee/Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Appellant/Defendant Intervenor,

WASHINGTON STATE GRANGE,

Appellant/Defendant Intervenor.

MOTION TO VACATE AWARD  
OF ATTORNEYS' FEES AND  
COSTS, FOR JUDGMENT  
AWARDING RESTITUTION  
OF FEES AND COSTS, AND  
FOR COSTS

**I. PARTIES REQUESTING RELIEF**

The State of Washington, Rob McKenna, Attorney General of the State of Washington, and Sam Reed, Secretary of State of the State of Washington,

(“Washington”) Appellants/Defendant-Intervenors in the captioned action, hereby bring this Motion to Vacate Award of Attorneys’ Fees and Costs and For Judgment Awarding Restitution of Fees and Costs.

## **II. STATEMENT OF RELIEF SOUGHT**

The United States Supreme Court has reversed the decision of this Court, upon which this Court’s award of attorneys’ fees and costs against Washington was based. Because the Appellees, Washington State Republican Party, et. al (“Republican Party”), Washington Democratic Central Committee, et. al (“Democratic Party”), and Libertarian Party of Washington State, et. al (“Libertarian Party”), are not prevailing parties, Washington now requests that this Court vacate its previous order granting costs and attorney fees in their favor and ordering that they reimburse the full amount of fees and costs they were originally ordered and paid. Specifically, Washington seeks an order requiring that each of the Appellees provide restitution to the State of Washington the following amounts:

Republican Party: \$54,457.65 (attorneys’ fees); \$639.60 (costs);

Democratic Party: \$37,460.77 (attorneys’ fees); \$213.20 (costs); and

Libertarian Party: \$14,977.80 (attorneys’ fees); \$1,323.32 (costs).

Finally, as the prevailing party, Washington is entitled to recover its costs pursuant to FRAP 39(a)(3). A cost bill in the amount of \$306.78 accordingly accompanies this Motion.

The undersigned counsel anticipate that each of the Appellees will oppose this motion.

### **III. BACKGROUND**

This case was originally presented to this Court on appeal from a decision of the United States District Court for the Western District of Washington, invalidating an initiative approved by Washington's voters related to the manner of conducting primary elections. The Plaintiffs, and Plaintiff-Intervenors, below were three political parties and their respective officers: The Republican Party, Democratic Party, and Libertarian Party. This Court issued a published opinion concluding that the state law at issue, Initiative 872, was unconstitutional. *Washington State Republican Party v. Washington*, 460 F.3d 1108 (2006).

On the same day that it issued its opinion on the merits, this Court also issued a separate Order concluding that Washington was liable for attorneys' fees pursuant to 42 U.S.C. § 1988. Order at 3 (Aug. 22, 2006). A copy of that Order is attached as Exhibit A for convenience of reference. The Court noted that in their briefs on the merits of the appeal, the three political parties had all moved for an

award of attorneys' fees. Noting that 42 U.S.C. § 1988 provides for the award of attorneys' fees to prevailing parties in actions brought under § 1983, this Court awarded attorneys fees against Washington, in favor of each of the political parties as prevailing parties. Order at 2-3.

The State's liability for attorneys fees having been litigated, only the determination of the amount remained. Washington accordingly negotiated the amount of attorneys' fees and costs—but not the liability for them—with the Republicans, Democrats and Libertarians, resulting in a stipulation dated September 18, 2006. Stipulation and Order Regarding Attorneys' Fees and Costs on Appeal (copy attached as Ex. B). By that stipulation, the parties agreed only to the amount of costs and fees, and expressly did not waive claims based upon further proceedings. *Id.* Based upon that stipulation, this Court entered an order awarding fees and costs in the amount set forth in the stipulation. Order (October 6, 2006) (attached as Ex. C). The State promptly paid those awards. Decl. of Jeffrey T. Even, Ex. A, B.

Washington petitioned the United States Supreme Court for review of this Court's decision, which the Court granted. *Washington v. Washington State Republican Party*, \_\_\_ U.S. \_\_\_, 167 L. Ed. 2d 158, 127 S. Ct. 1373 (2007) (memorandum order granting petition for certiorari). The Supreme Court

ultimately reversed the decision of this Court, and held that Initiative 872 survives the constitutional challenge raised by the political parties. *Washington State Grange v. Washington Republican Party*, \_\_\_ U.S. \_\_\_, \_\_\_ L. Ed. 2d \_\_\_, 128 S. Ct. 1184, 1187 (2008) (decision on the merits in favor of Washington and co-petitioner, the Washington State Grange). Counsel for Washington proposed to counsel for the political parties that all parties stipulate for them to provide restitution for attorneys fees and costs paid pursuant to the decision that has been reversed, but counsel have not agreed to do so. Even Decl., Ex. C.

#### IV. ARGUMENT

Awards of attorneys' fees in § 1983 actions are predicated upon the party to whom fees are awarded qualifying as a "prevailing party." 42 U.S.C. § 1988. Similarly, costs are awarded on appeal only to a party who ultimately prevails. FRAP 39. This Court initially awarded attorneys' fees and costs to the Republican, Democratic, and Libertarian Parties against Washington, but those parties have not prevailed. The United States Supreme Court has reversed this Court's decision, thus depriving the political parties of their status as prevailing parties.

This Court has previously held that since a § 1988 fee award "is based on the merits judgment, reversal of the merits removes the underpinnings of the fee award." *Cal. Med. Ass'n v. Shalala*, 207 F.3d 575, 577-78 (9th Cir. 2000). Indeed,



this Court has termed it an “abuse of discretion” when a court refuses to vacate an award of attorneys fees when the decision on the merits upon which it is based is reversed. *Id.* at 577. An award “must obviously be vacated in light of” an appellate decision reversing on the merits of the case. *Id.* at 577 (quoting *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 675 (7th Cir. 1985)). As one commentator has described the matter, “some means must be found to avoid the unseemly spectacle of enforcing a fee award based on a judgment that has been reversed”. 15B Charles Alan Wright, Arthur P. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 3915.6, at 344 (2d ed. 1992) (quoted in *Cal. Med. Ass’n*, 207 F.3d at 577). As one court has noted, this is simply consistent with the black letter proposition that a party is entitled to restitution of money paid under the terms of a judgment or decree when that judgment or decree is reversed on appeal. *McGill v. Faulkner*, 144 F.R.D. 82, 84 (N.D. Ind. 1992) (citing 5b C.J.S. *Appeal and Error* § 1980 (now 5 C.J.S. § 1157 (updated Feb. 2008))).

## V. CONCLUSION

For these reasons, this Court should vacate its order awarding costs and attorney fees to the Republican, Democratic and Libertarian Parties against the State of Washington, and further order those political parties to provide restitution

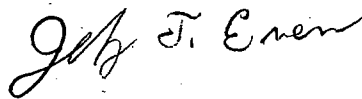
to the State of Washington in the amount of the fees previously awarded and paid.

Finally, this Court should approve the Cost Bill that accompanies this motion.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of April, 2008.

ROBERT M. MCKENNA  
Attorney General

MAUREEN HART, WSBA #7831  
Solicitor General



JAMES K. PHARRIS, WSBA #5313  
JEFFREY T. EVEN, WSBA # 20367  
Deputy Solicitors General  
P.O. Box 40100  
Olympia, WA 98504-0100  
360-664-3027

Counsel for Appellants State of  
Washington, Rob McKenna, and Sam Reed

# EXHIBIT I

**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

WASHINGTON STATE REPUBLICAN  
PARTY; CHRISTOPHER VANCE;  
BERTABELLE HUBKA; STEVE  
NEIGHBORS; BRENT BOGER; MARCY  
COLLINS; MICHAEL YOUNG,

*Plaintiffs-Appellees,*

and

WASHINGTON STATE DEMOCRATIC  
CENTRAL COMMITTEE; PAUL  
BERENDT; LIBERTARIAN PARTY OF  
WASHINGTON STATE; RUTH  
BENNETT; J.S. MILLS,

*Plaintiffs-Intervenors-  
Appellees,*

v.

STATE OF WASHINGTON; ROB  
McKENNA, Attorney General; SAM  
REED, Secretary of State;  
WASHINGTON STATE GRANGE,

*Defendants-Intervenors-  
Appellants.*

Nos. 05-35774  
05-35780

D.C. No.  
CV-05-00927-TSZ  
ORDER

On Remand from the United States Supreme Court

Filed October 2, 2008

Before: Dorothy W. Nelson, Pamela Ann Rymer and  
Raymond C. Fisher, Circuit Judges.

13980 WASHINGTON STATE REPUBLICAN V. WASHINGTON

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**ORDER**

This case was remanded to us from the United States Supreme Court. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008). In light of the Supreme Court's decision, we VACATE our opinion in *Washington State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006), VACATE our August 22, 2006 and October 3, 2006 orders granting attorney's fees and costs and REMAND to the district court with the following instructions.

The district court should DISMISS all facial associational rights claims challenging Initiative 872. *See Wash. State Grange*, 128 S. Ct. at 1187.

The district court should DISMISS all equal protection claims. The allegedly discriminatory statutes were repealed by Initiative 872. *See Wash. State Grange*, 128 S. Ct. at 1192-93.

The district court should DISMISS as waived all claims that Initiative 872 imposes illegal qualifications for federal office, sets illegal timing of federal elections or imposes discriminatory campaign finance rules because these claims were neither pled by the parties nor addressed in summary judgment by the district court.

The district court may allow the parties to further develop the record with respect to the claims that Initiative 872 unconstitutionally constrains access to the ballot and appropriates the political parties' trademarks, to the extent these claims have not been waived or disposed of by the Supreme Court.

The district court may make appropriate findings concerning the parties' settlement of fees and should determine whether restitution or further fee awards are appropriate in response to appellee Washington State's motion to vacate award of attorney's fees and costs, for judgment awarding restitution of fees and costs and for costs.

WASHINGTON STATE REPUBLICAN V. WASHINGTON 13981

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Remanded for proceedings according to the above instructions.

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