The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

Plaintiffs,

and,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, PAUL BERENDT,

Plaintiff-Intervenors,

and,

LIBERTARIAN PARTY OF WASHINGTON STATE, RUTH BENNETT, J. S. MILLS,

Plaintiff-Intervenors,

v.

WASHINGTON STATE GRANGE,

Defendant-Intervenor,

and,

STATE OF WASHINGTON, ROB MCKENNA, SAM REED,

Defendant-Intervenors.

Case No. C05-0927-JCC

ORDER

This matter comes before the Court on Defendant-Intervenor State of Washington's ("State") Motion to Dismiss (Dkt. No. 133), Defendant-Intervenor Washington State Grange's ("Grange") Motion to Dismiss (Dkt. No. 134), Plaintiff-Intervenor[1] Washington State Democratic Central Committee's ("Democratic Party") Motion to Amend and Supplement Complaint (Dkt. No. 137), Plaintiff Washington State Republican Party's ("Republican Party") Motion for Leave to File Supplemental and Amended Complaint (Dkt. No. 140), and the State's Motion to Recover Attorney Fees and for Costs (Dkt. No. 130). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby rules as follows.

I. BACKGROUND

From 1935 until 2003, candidates for state and local office in Washington State were nominated through a "blanket primary," whereby all candidates from all parties were placed on a single ballot and voters could select a candidate from any party. *See Wash. State Grange v. Wash. State Republican Party ("Grange")*, 128 S. Ct. 1184, 1187–88 (2008). The candidate who won the plurality of votes within each major party became that party's nominee in the general election. *Id.* at 1188. This "blanket primary" system was ultimately found to be unconstitutional because it forced parties to allow nonmembers to participate in selecting the parties' nominees. *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198, 1207 (9th Cir. 2003); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (striking down an identical primary system in California).

In 2004, Washington voters approved Initiative 872 ("I-872"), which established a "modified blanket primary." *Grange*, 128 S. Ct. at 1189. Under this system, all elections for "partisan office" start with a primary in which every candidate competes. *Id.* Each candidate

[1] For simplicity, the Court will refer to Plaintiff-Intervenors as "Plaintiffs" and Defendant-Intervenors as "Defendants" for the remainder of this Order.

declares his or her "party preference or independent status," which is designated on the primary ballot with the candidate's name. *See id.*; WASH. REV. CODE § 29A.24.031(3). A candidate can choose to identify with whichever party he or she designates, even if that political party would itself prefer otherwise. *See Grange*, 128 S. Ct. at 1189. Voters may select any candidate listed on the ballot, regardless of party preference, and the two candidates that receive the highest votes, regardless of their party designation, advance to the general election. *Id.*; WASH. REV. CODE § 29A.52.112(2). In this manner, the general election in essence becomes a runoff between the top-two vote getters in the primary.

On May 19, 2005, the Republican Party sued to have I-872 declared unconstitutional and to enjoin its implementation. (*See* Rep. Compl. 12 (Dkt. No. 1).) That same day, the Democratic Party and Libertarian Party moved to intervene as plaintiffs. (*See* Dkt. Nos. 2, 3.) The Republican Party alleged that the new election scheme (1) compelled it to associate with any candidate who expressed a "preference" for the party, thereby diluting the party's message; (2) allowed candidates to "appropriate" the party's name without permission; (3) allowed party nominees to be determined by voters whose beliefs were antithetical to those of the party, in violation of *Jones*, 530 U.S. at 586; and (4) impermissibly denies major parties protections that it offers to minor parties, in violation of equal protection.[2] (Compl. ¶¶ 16–23 (Dkt. No. 1 at 5–7).) The Democratic Party made identical claims. (*See* Dem. Compl. (Dkt. No. 31).) The Libertarian Party made similar First Amendment claims; additionally, it alleged that I-872 arbitrarily deprived minor parties access to the general election ballot.[3] (*See* Lib. Compl. ¶ 26–27 (Dkt. No. 28).)

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[2] Prior to the enactment of I-872, minor-party candidates, unlike major-party candidates, were selected through party nominating conventions. (*See* Order Granting Summ. J. 8 (Dkt. No. 87).) The Republican Party's equal protection argument was premised on its understanding that these provisions survived the enactment of I-872.

[3] Whereas the Republican and Democratic Party's equal protection arguments were premised on the assumption that minor parties could still nominate their candidates through

The Court set an expedited briefing schedule for Plaintiffs' summary judgment motions and required the parties to stipulate to the legal issues that would be covered in the motions. (*See* Minute Entry (Dkt. No. 45); Stipulated Statement of Legal Issues (Dkt. No. 40).) On July 15, 2005, the Court granted Plaintiffs' motions. (*See* Order Granting Summ. J. (Dkt. No. 87).) It held that the modified blanket primary system still served to "nominate" party candidates, despite having been recharacterized as a "winnowing" or a "qualifying" primary. (*Id.* at 25–26.) Based on this holding, the Court held I-872 unconstitutional on two grounds. First, like the blanket primary invalidated in *Jones*, the modified blanket primary "'force[d] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best have refused to affiliate with their party, and, at worst, have expressly affiliated with a rival,'" in violation of the First Amendment freedom of association. (*Id.* at 28 (*quoting Jones*, 530 U.S. at 577).) Second, the Court held that by "allowing *any* candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation," I-872 would "foster confusion and dilute the party's ability to rally support behind its candidates." (*Id.* at 30.) The Court found that the unconstitutional provisions of I-872 could not be severed from the remaining provisions and therefore struck down the initiative in its entirety. (*Id.* at 87.)

The Ninth Circuit affirmed. *Wash. State Republican Party v. Washington ("Wash. Rep. I")*, 460 F.3d 1108, 1125 (9th Cir. 2006). The panel held that a candidate's self-identification of party preference necessarily created an association between the candidate and the party. *Id.* at 1121. By allowing candidates to create such an association against the party's will, I-872 constituted "a severe burden on political parties' associational rights" that could not be

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nomination conventions, the Libertarian Party's ballot-access argument was based on the reverse assumption—that I-872 did not distinguish between major and minor parties, so the only way for a candidate to advance to the general election was to be in the two highest vote getters. (*See* Lib. Compl. ¶¶ 16–17, 26–27 (Dkt. No. 28).)

justified as narrowly tailored to compelling state interests. *Id.* at 1121, 1123. Accordingly, the panel held I-872 to be unconstitutional on its face. *Id.* at 1124. The panel also deemed Plaintiffs to be "prevailing parties" under 42 U.S.C. § 1988 and therefore entitled to recover attorneys' fees on appeal from the State. (*See* 8/22/06 9th Cir. Fee Order 3 (Dkt. No. 131 at 12).) Plaintiffs and the State stipulated as to the specific amount of fees and costs owed to each Plaintiff, and the Ninth Circuit approved the stipulated award. (*See* 10/3/06 9th Cir. Fee Order 2 (Dkt. No. 131 at 19).)

The Supreme Court, however, granted certiorari and reversed on the merits. *Grange*, 128 S. Ct. at 1196. The Court emphasized that Plaintiffs' challenge, as it had appeared before the lower courts, was to I-872's constitutionality *on its face* and hence could only succeed if Plaintiffs demonstrated that "the law [was] unconstitutional *in all of its applications*." *Id.* at 1190 (emphasis added) ("[A] plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid . . . ." (internal quotation and alteration omitted)). The Court found that "the I-872 primary does not, by its terms, choose parties' nominees." *Id.* at 1192. If a political party chose to nominate a candidate through outside means, this nomination would not be so designated on the ballot, but "[t]he First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Id.* 1193 n.7. Instead, the Court found that each of Plaintiffs' arguments relied on an assumption that voters would *misinterpret* a candidate's self-identified party preference as some form of endorsement by the party. *Id.* at 1195. Having concluded that each of Plaintiffs' arguments "rests on factual assumptions about voter confusion," the Court found that "each fails for the same reason: In the absence of evidence, we cannot assume that Washington's voters will be misled." *Id.* The Court explained that I-872 *could* be implemented in such a way as to make clear that a candidate's party-preference designation does not constitute an endorsement from or association with that political party. *Id.* at 1194. Therefore, the Court rejected the facial challenge to I-872 and lifted this Court's injunction. *Id.* at 1195.

On remand, the Ninth Circuit vacated its opinion and its orders granting attorneys' fees and costs. *Wash. State Republican Party v. Washington ("Wash. Rep. II")*, 545 F.3d 1125, 1126 (9th Cir. 2008). The panel remanded the case back to this Court with instructions to (1) "dismiss all facial associational rights claims challenging [I-872]"; (2) "dismiss all equal protection claims," because I-872 repealed the regulations differentiating between major and minor parties; and (3) "dismiss as waived all claims that [I-872] imposes illegal qualifications for federal office, sets illegal timing for 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." *Id.* In contrast, the panel suggested that this Court "may allow the parties to further develop the record with respect to the claims that [I-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." *Id.* Finally, the panel directed this Court to "make appropriate findings concerning the parties' settlement of fees and should determine whether restitution or further fee awards are appropriate . . . ." *Id.*

Now that the case is back before this Court, Defendants State and Grange move to dismiss the action in the entirety. (Dkt. Nos. 133, 134.) They argue that all of Plaintiffs' claims have been disposed of by the Supreme Court's opinion, either expressly or impliedly. (*See id.*) In response, Plaintiffs argue that their complaints allege both facial and *as-applied* challenges to I-872 and only the former were resolved by the Supreme Court. (Dkt. No. 150 at 6–9; Dkt. No. 146 at 10–12; Dkt. No. 179 at 6–7.) They also argue that they raised "trademark" claims that have not yet been resolved. (Dkt. No. 150 at 9–12; Dkt No. 146 at 12–20; Dkt. No. 179 at 7–8.) Finally, the Libertarian Party, and the Republican Party to a lesser extent, argues that its ballot access claims have yet to have been meaningfully resolved. (Dkt. No. 179 at 8–11; *see also* Dkt. No. 150 at 13.)

Both the Republican and Democratic Parties also seek leave to amend their Complaints. (Dkt. Nos. 137, 140.) They seek to supplement the Complaints with additional factual allegations to support as-applied challenges to the implementation of I-872 that was adopted once this Court's injunction was lifted. (*See* Dkt. No. 137 at 8; Dkt. No. 140 at 2.) They also seek to add a novel state constitutional claim, citing the intervening case of *Washington Citizens Action of Washington v. State ("WCAW")*, 171 P.3d 486 (Wash. 2007) for the argument that I-872 was an invalid enactment because it failed to identify each of the legislative provisions that it repealed. (Dkt. No. 137 at 7–8; Dkt. No. 140 at 2.)

Finally, the State seeks to recover the attorneys' fees and costs that it paid to Plaintiffs when the Ninth Circuit determined them to be "prevailing parties" and seeks instead to recover its own costs as the new prevailing party. (Dkt. No. 130.) In response, Plaintiffs argue that the fee settlement is a binding contract despite the Supreme Court's reversal and that, at a minimum, the State's claim of being the prevailing party is premature. (Dkt. No. 144 at 4–6; Dkt. No. 148 at 5–7, 9; Dkt. No. 178 at 3–5.) Moreover, the Republican Party goes further and argues that it should still be considered a prevailing party, despite its definitive loss on the merits in the Supreme Court, because the losing appeal nonetheless prompted the State to alter its implementation of I-872. (Dkt. No. 148 at 7–9.)

II. DISCUSSION

A. Motions to Dismiss

This Court may dismiss Plaintiffs' Complaints in their entirety "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1007 (9th Cir. 2009) (internal quotation omitted). In considering a motion to dismiss, the Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). Defendants State and Grange argue that the Supreme Court disposed of the only alleged claims

for which Plaintiffs were plausibly entitled to relief. (State Mot. to Dismiss 4 (Dkt. No. 133); Grange Mot. to Dismiss 8 (Dkt. No.134).) In response, Plaintiffs claim that the Complaints allege unresolved as-applied challenges to I-872, along with ballot-access and trademark claims that the Supreme Court did not consider.

1. As-Applied Challenge

The Republican Party's Complaint alleges that I-892 "*as implemented by State officials*, eliminates mechanisms . . . to protect the First Amendment rights of the Party." (Rep. Compl. ¶ 4 (Dkt. No. 1 at 3) (emphasis added); *see also id.* ¶ 23 (alleging that "Defendants intend to *administer* the State's partisan primary *in a manner* that denies the Party the right to nominate its candidates and control the use of its name." (emphasis added)).) The Complaints of the Democratic and Libertarian Parties make almost identical allegations. (*See* Dem. Compl. ¶¶ 4, 18 (Dkt. No. 31 at 3, 7); Lib. Compl. ¶¶ 17, 23 (Dkt. No. 28 at 7, 8).) When this Court decided Plaintiffs' motions for summary judgment, it noted that it had "previously directed the parties to limit their briefs to Plaintiffs' facial challenge of [I-872]. The Court reserved issues related to Plaintiffs' as-applied challenge." (Order Granting Summ. J. 13 n.13 (Dkt. No. 87).) Accordingly, the Court finds it clear that Plaintiffs' complaints alleged both facial *and* as-applied challenges to I-892.[4]

[4] The State suggests that Plaintiffs could not have brought an as-applied challenge to I-872 in May of 2005 because "the Initiative had not yet been implemented or applied." (State Reply on Mot. to Dismiss 3 (Dkt. No. 164).) However, when this Court considered Plaintiffs' facial challenge, the parties agreed that it was ripe for adjudication and that the action was justiciable based on the "alleged threat to the political parties' associational rights." (Order Granting Summ. J. 13 (Dkt. No. 87).) To the extent that this alleged "threat" was based on the actual (if partial) implementation of some portion of I-872 (*see* Lib. Compl. ¶ 15 (referencing emergency rules adopted on May 18, 2005, to implement I-872) (Dkt. No. 28 at 6–7)), Plaintiffs had grounds to bring an as-applied challenge, even if the Initiative's provisions had not yet been applied to an election. *Cf. Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) ("Courts have long recognized that one does not have to await the consummation of threatened injury to obtain preventive relief." (internal quotation omitted)).

Because this Court only addressed Plaintiffs' facial challenges, those were the only issues on appeal. That fact was crucial to the Supreme Court's reversal, which repeatedly emphasized the nature of the facial challenge before it. *See Grange*, 128 S. Ct. at 1187 (reversing because "respondents' arguments" that I-871 "impose[d] a severe burden on political parties' associational rights" "rest on factual assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge . . . ."). The Court explained that "[a]t bottom, respondents' objection to I-872 is that voters will be confused by candidates' party-preference designation." *Id.* at 1193. The Court found that to presume such confusion would be "sheer speculation." *Id.* "In the absence of evidence, we cannot assume that Washington's voters will be misled. *That factual determination must await an as-applied challenge*." *Id.* at 1195 (emphasis added).

The Court's opinion clearly left room for, indeed it invited, an as-applied challenge to I-872. Because Plaintiffs raised as-applied challenges and the Supreme Court did not resolve these claims, they retain valid claims that I-872, as implemented in practice, creates the sort of voter confusion that might support a First Amendment claim for violation of the political parties' associational rights. Those are the exact sort of "as-applied" issues that this Court previously "reserved." (Order Granting Summ. J. 13 n.13 (Dkt. No. 87).)

Finally, the State seeks to narrowly construe the meaning of I-872's "implementation" so as to exclude certain of Plaintiffs' as-applied challenges from the scope of this action. For example, Plaintiffs explain that Washington's campaign disclosure laws have been integrated into I-872's implementation, such that if a candidate for partisan office "has expressed a party or independent preference . . . , that . . . designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising." WASH. REV. CODE § 42.17.510. The State argues that this does not constitute an "implementation" of I-872, but rather a "clarification" regarding the "implementation of the separate campaign disclosure laws." (State Reply on Mot. to Dismiss 5 (Dkt. No. 164).) This distinction is beside the point.

I-872 created the concept of a "party preference" that candidates would explicitly declare and that would be designated with the candidates' names on the ballot. *See* WASH. REV. CODE § 29A.24.031(3). As explained by the Supreme Court, the core of Plaintiffs' "objection to I-872 is that voters will be confused by the candidates' party-preferences"—i.e., that voters will infer "that the parties associate with, and approve of," the candidates whose names appear next to the party on the ballot. *Grange*, 128 S. Ct. at 1193. To succeed on their as-applied challenge, Plaintiffs must demonstrate that I-872 *in practice* actually creates the sort of voter confusion that would infringe upon the political parties' associational rights. To the extent that Washington's campaign disclosure requirements increase this voter confusion, that is clearly relevant to Plaintiffs' as-applied challenge.

Plaintiffs also argue that I-872 is unconstitutional as-applied to the election of party Precinct Committee Officers ("PCOs"). Each major party's PCOs sit on that party's county central committee and certain PCOs sit on the party's state committee. *See* WASH. REV. CODE §§ 29A.08.020, .030. A major party's state committee has the power to call conventions, to provide for the election of delegates to the national party's convention and for the nomination of presidential electors, and to fill vacancies on a ticket for certain federal or state offices. *See See* WASH. REV. CODE §§ 29A.08.020. A party's county central committee also plays a role in filling vacancies when a legislator or county executive belonging to that party leaves office. WASH. CONST. art. 2, § 15. Plaintiffs claim that, since I-872's implementation, candidates for the office of party PCO are no longer required to demonstrate membership in that party. (*See* Dem. Resp. to Mot. to Dismiss 8 (Dkt. No. 146).) If true, the Court acknowledges that the "party preference" scheme established by I-872 may be particularly problematic when applied to the election of PCOs. The Supreme Court rejected Plaintiffs' argument that I-872 "allows primary voters who are unaffiliated with a party to choose the party's nominee," because the Court found that "unlike the California primary [invalidated in *Jones*], the I-872 primary does not . . . choose the parties' nominees." *Grange*, 128 S. Ct. at 1192. But party PCOs are party

leaders and they have direct control over certain party functions; therefore, it seems reasonable that the application of I-872's party-preference designations and single, undifferentiated ballot to PCO elections might raise associational claims that were not apparent on the face of the initiative.[5]

The Court concludes that Plaintiffs have alleged as-applied challenges to I-872's modified blanket primary scheme and that these claims remain unresolved. Plaintiffs may submit evidence to demonstrate that (1) the State's actual implementation of I-872 (including its interaction with the state's campaign disclosure laws) leads to voter confusion, and (2) that this resulting confusion severely burdens the political parties' freedom of association. *See Grange*, 128 S. Ct. at 1195. Plaintiffs may also demonstrate that the application of I-872 to certain elected offices (e.g., party PCOs) specifically burdens the party's right to associate. (Rep. Resp. to Mot. to Dismiss 6–9 (Dkt. No. 150).) Accordingly, Defendants' motions to dismiss are DENIED with respect to these as-applied challenges.

2. Ballot-Access Claims

In its Complaint, the Libertarian Party also alleged that "[t]he Fourteenth Amendment equal protection and due process clauses guarantee reasonable access for minor party and independent candidates to the general election ballot." (Lib. Compl. ¶ 26 (Dkt. No. 28 at 9).) It argued before this Court that any candidate showing at least a "modicum of support" may not constitutionally be excluded from the general election ballot. (Lib. Summ. J. Mot. 18 (Dkt. No.

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[5] The State argues that PCO elections "have nothing whatsoever to do with the implementation of I-872" and that these elections are governed by a "series of statutes enacted long before I-872 was enacted, and left unchanged when I-872 was approved by the voters in 2004." (State Reply to Mot. to Dismiss 4 (Dkt. No. 164).) As an initial matter, Plaintiffs' allege that the PCO elections *were* changed in the implementation of I-872 (*see* Dem. Resp. to Mot. to Dismiss 8 (Dkt. No. 146), and, for the purpose of this motion to dismiss, the Court must accept Plaintiffs' allegations as true. *See Knievel*, 393 F.3d at 1072. Moreover, that Washington has allowed PCOs to be elected from the general population since before I-872 hardly insulates the provision from challenge, given that the state's earlier election scheme was struck down as unconstitutional for exactly that reason. *See Reed*, 343 F.3d at 1203.

52); *see also* Order Granting Summ. J. 11 (Dkt. No. 87). Because this Court granted summary judgment on forced association grounds, it declined to reach the ballot-access issue. (Order Granting Summ. J. 34 (Dkt. No. 87).) For that reason, the issue was not before either the Ninth Circuit or the Supreme Court when they reviewed the case. *See Grange*, 128 S. Ct. at 1195 n.11 ("We do not consider the ballot access . . . arguments as they were not addressed below . . . ."). Therefore, the Libertarian Party argues that its ballot-access claims remain unresolved.

The ballot-access argument is based on a line of Supreme Court cases that protected minor parties' right to access the ballot. In *Williams v. Rhodes*, the Court invalidated an Ohio statute that required a new party to obtain petitions signed by electors totaling 15% of the number of ballots cast in the prior gubernatorial election, rendering it "virtually impossible for a new political party . . . to be placed on the state ballot." 393 U.S. 23, 24–25 (1968). In finding the requirement unconstitutional, the Court explained:

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied the equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Id. at 31; *see also Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983); *but see Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (noting that this right to equal ballot access is not absolute and upholding a 5% petition requirement).

As an initial matter, although the Court's statements in *Williams* seem to arguably support the Libertarian Party's position, there is much to distinguish I-872's modified blanket primary from the system invalidated in that case. Most importantly, in the election schemes at issue in *Williams* and its progeny, the general election was a minor party's only opportunity to reach the statewide electorate by ballot. *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986). The Supreme Court has long made clear that there is a "significant difference" between a scheme like that and one, like Washington's, that "virtually guarantees" minor parties access to a statewide primary ballot. *Id.* If minor parties are given equal access to compete in a

statewide primary, "[i]t can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election." *Id.*

Indeed, in the election scheme set forth by I-872, the general election becomes, for all intents and purposes, a runoff election between the top-two vote getters of the primary. Putting aside the issue of "party preference" and forced association, there can be no doubt that the "top-two" aspect of I-872 would be permissible if the "primary" were renamed a "general election," and the "general election" were renamed a "runoff." Yet the constitutionality of the election statute cannot turn on the identifiers used for its various provisions.

Most importantly, the Supreme Court has explicitly approved of the use of a "top-two" general election. In *Jones*, the Court invalidated California's blanket primary in part because it was not narrowly tailored to the state's asserted interest. 530 U.S. at 585. The Court noted that the state could satisfy those same interests by establishing a system as follows:

> [T]he State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election.

See id. (referring to such a system as a "nonpartisan primary"). When this case reached the Supreme Court, it reiterated that "Petitioners are correct that we assumed that the nonpartisan primary we described in *Jones* would be constitutional." *Grange*, 128 S. Ct. at 1192 (distinguishing between that scheme and I-872 only on the basis of the stated "party preference").

Of course, the hypothetical primary scheme that the Court endorsed in *Jones* would *by definition* exclude many parties from the general election ballot. Indeed, it is not unforeseeable that the candidates with the highest and second-highest vote totals would be from the same party, thereby excluding other major and minor political parties alike. *See id.* at 1189 & n.5.

The Supreme Court's unqualified endorsement of its top-two voting proposal is confirmation of this Court's interpretation of *Munro* and *Williams*—that after giving all political parties equal and sufficient access to a statewide primary, limiting the general election to the top-two vote getters does not violate the other parties' right to ballot access.

The Republican Party makes a variant of this claim, which it terms "*operational* denial of ballot access" (*see* Rep. Resp. to Mot. to Dismiss 13 (Dkt. No. 150)), but this argument is no more successful than the general ballot-access claim. The argument goes that "if seven candidates carrying [the same] party name each receive 10% of the vote at a partisan primary, and two candidates of other parties each receive 15%, [no candidate of the former party would appear] on the general election ballot, despite the receipt by candidates carrying [that] party's identification of 70% of the total vote." (Rep. Compl. ¶ 21 (Dkt. No. 1 at 7); Dem. Compl. ¶ 16 (Dkt. No. 31 at 6–7).)

This contrived example does not withstand close scrutiny. The Supreme Court held that "the I-872 primary does not, by its terms, choose parties' nominees"; instead, parties are now free to "nominate candidates by whatever mechanism they choose" and to advocate for and support those nominees outside the ballot. *Grange*, 128 S. Ct. at 1192. The Court also unequivocally stated that "[t]he First Amendment does not give political parties a right to have their nominees designated as such on the ballot." *Id.* at 1193 n.7. If a party nominates a candidate in the primary, it is only entitled to have its nominee advance to the general election if that nominee is one of the top-two vote getters. *See id.* at 1192 (reiterating the Court's belief that the top-two primary "described in *Jones* would be constitutional"). If six other candidates choose to identify with that party against its will, that does not entitle the party to have any one of those "imposter" candidates advance to the general election.[6] Or, on the other hand, if the

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[6] To the extent that vote dilution from the party's nominee to these "imposter" candidates stems from voter confusion about the meaning of the "party preference," the party might be able to prove an as-applied forced association claim. *See supra*, II.A.1. However,

party does not make a nomination and remains agnostic as between the seven candidates running under its banner, it will have itself brought on the risk of vote dilution and will have only itself to blame.

The Supreme Court opinions in this case and in *Jones* foreclose Plaintiffs' ballot-access claims. That applies equally to the claim that minor parties are denied access to the general election ballot and to the claim that major parties could be "operationally" denied such access. Therefore, the Court GRANTS Defendants' motions to dismiss as to Plaintiffs' ballot-access claims.

3. Trademark Claims

Plaintiffs also argue that they have unresolved "trademark" claims in this case. (Dkt. No. 150 at 9–12; Dkt No. 146 at 12–20; Dkt. No. 179 at 7–8.) Neither the Republican Party nor the Democratic Party explicitly alleged trademark violations; instead, as part of their forced association arguments, those parties alleged that "[a]ny individual may appropriate the Party's name, regardless of whether the Party desires affiliation with that person. (Rep. Compl. ¶ 17 (Dkt. No. 1 at 5); Dem. Compl. ¶ 12 (Dkt. No. 31 at 5).) The Libertarian Party came closer to raising an actual trademark claim, alleging:

> I-872 deprives the [Party] of its proprietary right to the use of the party name, thus leading to voter confusion regarding which candidate(s) are speaking for the party and which are imposters or renegades appropriating the party name for their own purposes. The name "Libertarian Party" is a nationally trademarked name and therefore may be used by candidates only with [the Party's] consent.

(Lib. Compl. ¶ 20 (Dkt. No. 28 at 8).) However, other than this passing reference, the complaint makes no allegation of trademark infringement on the part of Defendants and makes no reference to the Lanham Act, 15 U.S.C. § 1125(a), or Washington State trademark law. (*Id.*)

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there is no reason to duplicate and recharacterize this forced association claim as an "operational denial of ballot access."

Accordingly, the Court concludes that Plaintiffs did not properly raise trademark violations in their complaints.[7]

Moreover, even if Plaintiffs had raised trademark claims at the start of this case, the Court would dismiss those claims as being without merit. There can be no doubt that the mere statement of *preference* for one party over others does not implicate trademark protection for that party's name; indeed, Plaintiffs do not argue otherwise. Instead, they argue that the statements of party preference may be made in ways that lead to voter confusion or dilution of their "famous marks." (*See* Dem. Resp. to Mot. to Dismiss 16, 17 (Dkt. No. 146).) To understand these claims, the Court must distinguish between two different types of statements—those made directly by the State (e.g., on the ballot, in the voter's pamphlets) and those made by the candidates themselves (e.g., in political advertising).

As for statements made by the State on the ballot or in voter's pamphlets, the Court finds that these uses of the parties' names are not covered under either federal or state trademark law. Trademark law is designed, first and foremost, to protect the owners of a mark against improper *commercial* uses. *See, e.g.*, 15 U.S.C. § 1125(a) (limiting trademark confusion and misrepresentation actions to "uses in commerce" "in connection with any goods or services or any container for goods"); 15 U.S.C. § 1125(c)(3)(C) (specifically excluding "noncommercial use[s] of a mark" from trademark dilution actions); WASH. REV. CODE § 19.77.140, .160 (providing similar limitations under state law). Although trademark protections have been extended to nonprofit and political groups, *see United We Stand America, Inc. v. United We Stand America New York, Inc. ("United We Stand")*, 128 F.3d 86, 89–90 (2d. Cir. 1997), those protections cannot justify extending federal trademark regulation

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[7] The Supreme Court noted in a footnote that the Libertarian Party "argue[d] that I-872 is unconstitutional because of its implications for . . . trademark protection of party names . . . ." *Grange*, 128 S. Ct. at 1195 n.11. However, the fact that the Libertarian Party made that argument to the Supreme Court does not mean that it properly raised the claim in its initial Complaint.

to state ballots. In *United We Stand*, a new political organization split off from its parent political organization and began appropriating the parent organization's trademark in its political activities. *Id.* at 88. The Second Circuit held that the new organization's political activities (e.g., political organizing, endorsing candidates, distributing political literature) were "services" within the meaning of 15 U.S.C. § 1125(a), because "[a]lthough not undertaken for profit, they unquestionably render a service." *United We Stand*, 128 F.3d at 90. Unlike the organizational activities at issue in *United We Stand*, the State's administration of an election cannot reasonably be analogized to a commercial "service." Moreover, Plaintiffs fail to explain, and the Court fails to see, how the State's statements on the ballot or in the voter pamphlets can reasonably be considered to have been made "in commerce."[8] Accordingly, the Court concludes that the State's expression of candidates' party preferences on the ballot and in the voter pamphlets may not form the basis of a federal or state trademark violation.

Plaintiffs also point to Washington's campaign disclosure laws, which require that a candidate who has expressed a party preference on the declaration of candidacy clearly identify that preference in "electioneering communications, independent expenditures, or political advertising." WASH. REV. CODE § 42.17.510(1); *see also* PDC's 2008 "Political Advertising" Brochure, http://www.pdc.wa.gov/archive/guide/brochures/pdf/2008/2008.Bro.Adv.pdf (allowing common political party abbreviations or official symbols or logos to be used as identification). A candidate's electioneering and political advertising falls much closer to the sorts of "services" that could be covered under trademark law. *See United We Stand*, 128 F.3d

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[8] Certain references to "commerce" in the trademark laws are meant to broadly invoke Congress's power under the Commerce Clause, *see United We Stand*, 128 F.3d at 92, but trademark dilution actions under 15 U.S.C. § 1125(c) must actually be "commercial" in nature. *See Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316, 1324 (9th Cir. 1998) (requiring plaintiff to prove that "defendant is making a commercial use of the mark in commerce" and noting that the registration of a domain name, without more, is not a commercial use). Plaintiffs fail to demonstrate how the wording of the State's ballot or voter pamphlet falls under either definition of "commerce."

at 90. However, to the extent that a candidate's statements could constitute a trademark violation, that violation would have been committed by the candidate, not the State; the State would presumably only be liable if it had *required* the candidate to improperly appropriate a political party's trademark. Nothing in I-872 requires a candidate to state a party preference, WASH. REV. CODE § 29A.24.030(3) (allowing each "candidate to indicate his or her major or minor party preference, *or independent status*"), and nothing in Washington's campaign disclosure laws requires a candidate who has stated a party preference to disclose his or her preference in a manner that would violate that preferred party's trademark, *see* WASH. REV. CODE § 42.17.510(1) (requiring only that the "party or independent designation shall be clearly identified" on applicable communications). A candidate who has stated a party preference may satisfy the campaign disclosure laws without appropriating the party's trademark simply by identifying the party designation in a manner that makes clear that it only indicates a *preference* for that party. *Cf. Grange*, 128 S. Ct. at 1193 (finding no basis to presume that a well-informed electorate would be confused by a statement of party preference). That the state allows candidates to satisfy its campaign disclosure requirement through the use of abbreviations or logos is beside the point; many candidates (e.g., those that are supported or endorsed by the party) will presumably be allowed to use those abbreviations or logos without violating the party's trademark. If an "imposter" candidate chose to identify with a party against its will and attempted to satisfy the state's campaign disclosure laws by misappropriating the party's name, common abbreviation, or logo, then that candidate might arguably be liable for a trademark violation; however, nothing in Washington law would require or even encourage such misappropriation, so none of the Defendants in this case would be liable for that violation.

The Court finds that Plaintiffs failed to properly allege trademark violations under federal or state law and that any claims they have subsequently argued are without merit. Accordingly, the Court GRANTS Defendants' motion to dismiss any trademark violations.

B. Motions to Amend

The Republican and Democratic Parties have both moved to supplement and amend their Complaints. (Dkt. Nos. 137, 140.) Under Federal Rule of Civil Procedure 15(a), once a responsive pleading has been served, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." "The policy of allowing amendments is to be applied with extreme liberality." *Waldrip v. Hall*, 548 F.3d 729, 732 (9th Cir. 2008) (internal quotation omitted). Courts may consider several factors, including "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings." *Id.*

The Democratic Party moves to amend its Complaint in Intervention to:

> (1) Delete[] and add[] parties to reflect dismissals, withdrawals, substitutions and interventions that have occurred since the original Complaint in Intervention was filed;
>
> (2) Supplement[] the factual allegations with respect to the proposed implementation of I-872 that led to this litigation in order to conform to evidence received and considered by the Court after the date of the original pleading;
>
> (3) Supplement[] the factual allegations to set forth material transactions, events and occurrences that have happened after the date of the original Complaint in Intervention to reflect the State's abandonment of its original implementation of I-872 and its new implementation of I-872 adopted in 2008;
>
> (4) Supplement[] the Democratic Party's cause of action for forced association to enumerate further the associations forced upon the Party by the State's implementation of I-872;
>
> (5) Supplement[] the Democratic Party's cause of action for injunctive relief to include as a basis selective enforcement of election laws by State officials.
>
> (6) Add[] a new cause of action challenging the constitutionality of I-872 in light of the State's position taken in this proceeding after the date of the original Complaint in Intervention, and in its proposed implementation of I-872, that I-872 impliedly repealed or amended various election laws that were not included in the text of the initiative as required by Article II, § 37 of Washington's constitution.

(Dem. Mot. to Amend 2 (Dkt. No. 137).) The Republican Party moves to make similar amendments and substitutions to its Complaint. (*See* Rep. Mot. to Amend (Dkt. No. 140).)

As the Court has described above, Plaintiffs have alleged unresolved as-applied forced association challenges to the State's implementation of I-872. *See supra*, II.A.1. Because the implementation of I-872 has crystallized and evolved since the Complaints were first filed in 2005, the Court finds that it is imperative that Plaintiffs be granted leave to amend in order to clarify their specific challenges to the current implementation. Allowing such amendment will identify the relevant issues moving forward so as to focus and limit the scope of the litigation regarding the as-applied First Amendment claims.

Although not strictly necessary, the Court also approves Plaintiffs' requests to update their pleadings to reflect the changed parties in the litigation and to add any relevant facts that have occurred since the original filings. However, any new factual allegations should be relevant to the ongoing as-applied First Amendment challenge. For example, the Court is doubtful of the necessity of "[s]upplement[ing] the factual allegations with respect to the proposed implementation of [I-872] that led to this litigation." (Dem. Mot. to Amend. 2 (Dkt. No. 137).) One seeking declaratory and injunctive relief may only bring an as-applied challenge to a statute *as it is currently being applied.* At this juncture, therefore, any alleged deficiencies with the initial proposed implementation of I-872 are irrelevant. If Plaintiffs wish to include such facts to explain the history of the litigation or to provide necessary context, the Court is not opposed; however, Plaintiffs should limit their allegations of constitutional violations to the *current* implementation of I-872.

Moreover, it is important that Plaintiffs' amended pleadings are updated to reflect not only their specific challenges to the State's implementation of I-872 but also the specific relief they request to remedy those challenges. The initial Complaints focused on Plaintiffs' challenges to I-872's facial validity; as a result, Plaintiffs requested broad relief "[d]eclaring [I-872] unconstitutional and declaring that the primary system in effect immediately before the

passage of I-872 remains in effect." Since then, however, the Supreme Court has upheld the facial validity of I-872, explicitly finding "that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion." *Grange*, 128 S. Ct. at 1193–94 (noting that each of Plaintiffs' contentions "depend . . . on the possibility that voters will be confused as to the meaning of the party-preference designation"). Now that the Supreme Court has held that I-872 can be implemented without violating Plaintiffs' right to association, Plaintiffs will not be able to strike down I-872 in its entirety. Instead, the best that Plaintiffs can achieve is to invalidate certain portions of I-872's implementation and enjoin the State from implementing I-872 in specific ways that lead to voter confusion or other forms of forced association. For example, if Plaintiffs' challenge the specific wording used on the ballot or in the voter's guide, they should identify the language currently used and request specific relief to remedy any resulting confusion. Similarly, if Plaintiffs challenge the application of I-872 to the election of party PCOs (*see* Dem. Resp. to Mot. to Dismiss 11 (Dkt. No. 146)), they should identify how to remedy this specific application.

Finally, the Court denies the Republican and Democratic Parties' request to add novel challenges to I-872's enactment based on article II, section 37 of the Washington constitution. (*See* Dem. Mot. to Amend 2 (Dkt. No. 137); Rep. Mot. to Amend 7 (Dkt. No. 140).) Article II, section 37 provides that "[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." WASH. CONST. art. II, § 37. The purpose of this section is (1) "to avoid amendatory legislation that merely substitutes one phrase for another, without examination of the original statute, such that the amendatory statute, standing alone, conveyed no meaning at all"; (2) "to ensure disclosure of the general effect of the new legislation"; and (3) "to show its specific impact on existing laws in order to avoid fraud or deception." *WCAW*, 171 P.3d at 491. However, that section of the state constitution only applies to "amendatory" legislation, so a reviewing "'court must [first] determine whether the bill is such a complete act that the scope of the rights created or affected

by the bill can be ascertained without referring to any other statute or enactment.'" *Id.* (*quoting Citizens for Responsible Wildlife Mgmt. v. State ("CRWM")*, 71 P.3d 644, 654 (Wash. 2003). The Washington Supreme Court has read section 37 narrowly, noting that it "does not apply in all cases where a new act, in effect, amends another. Where the new law is independent, and no further search is required to know the law which the new act covers, the new act does not come within section 37." *CRWM*, 71 P.2d at 654 (internal quotation omitted).

In their initial Complaints, the Republican and Democratic Parties argued that I-872 violated equal protection by allowing minor parties to skip the modified blanket primary and instead to nominate candidates for the general election through a convention process. (*See, e.g.*, Rep. Compl. ¶ 22–23 (Dkt. No. 1).) This Court rejected that argument, concluding that I-872 treated minor parties the same as all other parties. (Order Granting Summ. J 31–34 (Dkt. No. 87).) Although the initiative did not expressly repeal, amend, or otherwise address the previous minor-party nominating statutes, it specifically defined a primary as "a procedure for winnowing candidates for public office to a *final list of two* as part of a special or general election." I-872 § 5 (emphasis added). Moreover, the Court noted that the 2004 Voter's Pamphlet expressly stated that the initiative would treat major and minor parties alike. (*See* Order Granting Summ. J 32–33 (Dkt. No. 87).) The Court concluded "as a matter of law that it was the intent of the voters who enacted [I-872] that it be a complete act in itself and cover the entire subject matter of earlier legislation governing minor parties." (*Id.* at 33.)

The Republican and Democratic Parties now argue that there are "colorable questions of state law" as to whether I-872 violated article II, section 37 of the Washington constitution by not explicitly stating that it would repeal the minor-party nominating statutes. (*See, e.g.*, Dem. Mot. to Amend 7 (Dkt. No. 137).) Accordingly, they move to amend their Complaints to add this new claim based on the state constitution. (*Id.* at 2.)

As an initial matter, neither party provides any reasonable justification for not bringing this claim in its initial Complaint. They purport to rely on *WCAW*, 171 P.3d 486, which was

decided while this case was on appeal. (*See* Dem. Mot. to Amend 7 (Dkt. No. 137); Rep. Mot. to Amend 5 (Dkt. No. 140).) However, *WCAW* concerned a narrow question: whether amendatory initiatives need to set forth the content of the statute being amended as it stands at the time the initiative is *filed* or at the time of the *vote*. *WCAW*, 171 P.3d at 496 (concluding the later). The basic requirement under article II, section 37 that "amendatory laws set forth at full length the law to be amended," *id.* at 488, had long preexisted *WCAW*. As this Court previously described, I-872 clearly intended to repeal the minor-party nomination process (*see* Order Granting Summ. J 31–34 (Dkt. No. 87)) even though it did not explicitly state that it was repealing those statutes (*id.*). As a result, the parties had the factual basis to raise their state constitutional claim back in 2005.

Moreover, even if the parties had a reasonable justification for failing to raise this claim at the outset, the Court would decline to exercise supplemental jurisdiction. Under 28 U.S.C. § 1367, this Court may exercise supplemental jurisdiction over state law claims "that are so related to claims in the action . . . that they form part of the same case or controversy under Article III." "A state law claim is part of the same case or controversy when it shares a 'common nucleus of operative fact' with the federal claims and the state and federal claims would normally be tried together." *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004). In this case, the remaining federal claims solely concern an as-applied challenge to I-872's *implementation* (i.e., whether the initiative, as applied, forces the political parties to associate with nonmembers against their will). In contrast, this newly alleged state law claim solely concerns I-872's *enactment* (i.e., whether the initiative properly identified the statutes it intended to amend and repeal so as to comply with the state constitution). These questions are entirely distinct from one another and share no apparent factual similarity; therefore, the Court is doubtful that the newly asserted state constitutional claim is sufficiently related to the remaining as-applied First Amendment challenge to assert supplemental jurisdiction under 28 U.S.C. § 1367(a).

Finally, the Court may decline to exercise supplemental jurisdiction over a related claim that "raises a novel or complex issue of State law" or "substantially predominates over the [federal] claim[s]." *See* 28 U.S.C. § 1367(c)(1)–(2). If either of these circumstances is present, the Court should decline jurisdiction if doing so "comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity." *O'Connor v. Nevada*, 27 F.3d 357, 363 (9th Cir. 1994) (internal quotation and alterations omitted). The applicability of article II, section 37 to I-872's enactment undoubtedly raises novel and complex issues of state constitutional law best decided by the state courts. *See id.* at 363 (finding a difficult question of state constitutional law "is the very sort of 'novel' issue that will usually justify declining jurisdiction over the claim").

C. Fees

Finally, the State moves to recover the attorneys' fees that it paid to Plaintiffs after the Ninth Circuit concluded that they were "prevailing parties" in the litigation before that Court. (*See* Mot. to Recover Fees 2–3 (Dkt. No. 130).) The State argues that Plaintiffs are no longer "prevailing parties" because the Ninth Circuit decision in their favor was reversed by the Supreme Court and the panel order granting attorneys' fees was vacated. *See Wash. Rep. II*, 545 F.3d at 1126. The State also claims that it is the new prevailing party, entitled to recover its own costs under Federal Rule of Appellate Procedure 39(a)(3). (*See* Mot. to Recover Fees 3 (Dkt. No. 130) (seeking $306.78 in costs).)

Plaintiffs make several arguments in opposition to the State's motion. First, the Republican Party argues that it is still a prevailing party entitled to its attorneys' fees on appeal. (Rep. Resp. to Mot. to Recover Fees 8 (Dkt. No. 148).) To support this argument, the party claims that that the State materially altered the implementation of I-872 as a result of this lawsuit—notably, the State changed the proposed ballot to make it clearer that the party-preference designations were not meant to signify actual associations between the candidates and the parties in the question. (*Id.* at 4–5.) The Republican Party cites *Farrar v. Hobby* for the

proposition that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff," 506 U.S. 103, 111 (1992), and it argues that the changed ballot constitutes a "material alter[ation]" in the parties' "legal relationship" (Rep. Resp. to Mot. to Recover Fees 9 (Dkt. No. 148)). However, the party ignores the clear statement in *Farrar* that to be considered a prevailing party "[t]he plaintiff must obtain *an enforceable judgment against the defendant* from whom fees are sought . . . or comparable relief through *a consent decree or settlement.*" 506 U.S. at 111; *see also Buckhannon Bd. & Care Home, Inc. v. West Virginia*, 532 U.S. 598, 605 (2001) (rejecting the "catalyst theory" that a plaintiff can be considered a "prevailing party" based on a defendant's voluntary change in behavior). In vacating its order granting attorneys' fees and costs, the Ninth Circuit made clear that Plaintiffs are no longer the prevailing parties in the appeal. *See Wash. Rep. II*, 545 F.3d at 1126.

In the alternative, Plaintiffs argue that even if they are no longer prevailing parties, they are entitled to keep the fees because the State is bound by the stipulation that was filed with the Ninth Circuit. (*See, e.g.*, Dem. Resp. to Mot. to Recover Fees 4–6 (Dkt. No. 144).) The parties agree that the stipulation, like any settlement, is a contract that must be interpreted under state law. *See Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). Washington follows "the objective manifestation theory of contracts," whereby courts attempt to determine the parties' intent by looking to the reasonable meaning of the words used. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 115 P.3d 262 (Wash. 2005) (explaining that the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used). Under the "context rule" set forth in *Berg v. Hudesman*, 801 P.2d 222 (Wash. 1990), certain forms of extrinsic evidence may be admissible to interpret the meanings of specific words and terms used in the agreement; such evidence may include "(1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective

interpretations urged by the parties." *See Hearst*, 115 P.3d at 266. However, extrinsic evidence is *not* admissible to "show an intention independent of the instrument or to vary, contradict or modify the written word." *Id.* at 267 (internal quotation omitted). In particular, under the parol evidence rule, "prior or contemporaneous negotiations and agreements are said to merge into the final, written contract," so evidence of those negotiations is inadmissible. *Emrich v. Connell*, 716 P.2d 863, 866 (1986).

On August 22, 2006, the day the Ninth Circuit filed its opinion in favor of Plaintiffs, the appellate panel issued an order "award[ing] reasonable attorney's fees to the political parties as against the State of Washington." (*See* 8/22/06 9th Cir. Fee Order 3 (Dkt. No. 131 at 12).) On September 18, 2006, Plaintiffs and the State filed a signed document with the Court in which they stipulated:

> "[Plaintiffs] are entitled to an order requiring the State to pay [Plaintiffs'] 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 (attorneys' fees); $1,323.32 (costs)

(9/18/06 Fee Stipulation 2 (Dkt. No. 131 at 16).) The stipulation further stated that "[n]o waiver is intended of any claims for further proceedings in the appeal or in any other aspect of the case . . . ." (*Id.*)

Under the *Berg* "context rule," this Court must consider the Ninth Circuit's prior determination of fee liability as part of the "circumstances surrounding the making of the contract" when interpreting the words of the agreement to discern the parties' mutual intent. *See Hearst*, 115 P.3d at 266. Placed in the context of this prior order, the Court finds that the reasonable interpretation of the contract's text is that the parties were stipulating to the specific "amounts" the State owed each party, not to the State's overall liability for attorneys' fees (which had already been determined by the Ninth Circuit). The parties' explicit statement that "no waiver [was] intended of any claims for further proceedings" plainly reserved the State's

right to bring any claims in further proceedings that it could otherwise bring, including a claim that it was entitled to reimbursement of attorneys' fees because the Ninth Circuit's decision had been reversed on the merits. *See Cal. Med. Ass'n v. Shalala*, 207 F.3d 575, 577–78 (9th Cir. 2000) ("Since the fee award is based on the merits judgment, reversal of the merits removes the underpinnings of the fee award.").

Both the Republican and Democratic Parties seek to introduce extrinsic evidence that they had informed the State by e-mail during negotiations that they "underst[oo]d this settlement will be final as to our claims for attorneys' fees and costs for the Ninth Circuit proceedings . . . irrespective of further proceedings in the case." (9/15/06 E-mail from James Pharris (Dkt. No. 145 at 7); *see also* 9/15/06 E-mail from John White (Dkt. No. 149 at 35).) Under the parol evidence rule, however, evidence of "prior or contemporaneous negotiations" are inadmissible to prove an intention independent of the instrument. *See Hearst*, 115 P.3d at 267. If the political parties had wished to make their subjective "understanding" of the contract binding upon the State, they should have added this additional term to the signed stipulation.

Accordingly, the Court finds that the stipulation between the State and the political parties extended only to the "amounts" owed to each party.[9] Because the Supreme Court reversed the Ninth Circuit on the merits and the appellate panel subsequently vacated its prior order finding the State liable for fees and costs, the State is entitled to be reimbursed those funds.

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[9] Both the Republican and Democratic parties argue that this interpretation of the stipulation renders the contract "illusory." (*See, e.g.*, Rep. Resp. to Mot. to Recover Fees 6 (Dkt. No. 148) ("The Republican Party would have permanently conceded a portion of the fees to which it was entitled, but the State had merely made a 'refundable deposit.').) However, the Court's plain-meaning interpretation of the stipulation is still supported by consideration from all parties. Indeed, the consideration is the same as that in any settlement agreement: each party gave up its right to undertake further litigation (as to the specific amounts owed), and in exchange it saved the resources required to undertake such litigation and the risk that the court might grant a less favorable award.

As for the State's claim that it is entitled to $306.78 in costs as the prevailing party on appeal, the Court concludes that this determination is best left for the conclusion of these proceedings. Federal Rule of Appellate Procedure 39(a)(3) provides that generally "if a judgment is reversed, costs are taxed against the appellee." However, this rule only applies "unless . . . the court orders otherwise." FED. R. APP. P. 39(a)(3). Given the small amount of funds at issue and the ongoing debate as to whether Plaintiffs would be able to recover their fees and costs from this appeal if they ultimately succeed on their as-applied challenge (*compare* Mot. to Recover Fees 7 (Dkt. No. 130), *with* Rep. Resp. to Mot. to Recover Fees 9 (Dkt. No. 148)), the Court concludes that an award of costs at this juncture would be inappropriate.

III. CONCLUSION

For the foregoing reasons, the State's Motion to Dismiss (Dkt. No. 133) and Grange's Motion to Dismiss (Dkt. No. 134) are DENIED as to Plaintiffs' as-applied forced association claims but GRANTED as to each of Plaintiffs' other claims.

The Democratic Party's Motion to Amend and Supplement Complaint (Dkt. No. 137) and the Republican Party's Motion for Leave to File Supplemental and Amended Complaint (Dkt. No. 140) are GRANTED as to amendments necessary and related to the ongoing as-applied challenge but DENIED as to Plaintiffs' proposed state constitutional law claims.

The State's Motion to Recover Attorney Fees and for Costs (Dkt. No. 130) is GRANTED as to the recovery of previously paid attorneys' fees and costs but DENIED as to reimbursement for the State's costs.

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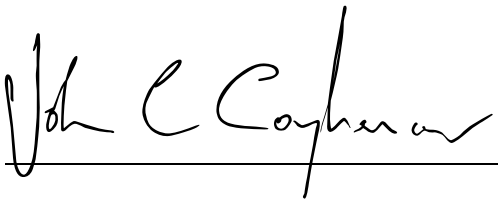
DATED this 20th day of August, 2009.



John C. Coughenour
United States District Judge