THE HONORABLE JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, v. DEAN LOGAN, et al., Defendants, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Interveners LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Interveners STATE OF WASHINGTON, et al., Interveners WASHINGTON STATE GRANGE, et al., Interveners	Case No: CV05-0927-JCC LIBERTARIAN PARTY'S MOTION FOR CONTINUANCE OF HEARING ON STATE AND GRANGE MOTIONS NOTE FOR MOTION CALENDAR FRIDAY, DECEMBER 12, 2008

SUMMARY OF MOTION

Pursuant to Fed. R. Civ. P. 6(b), the Libertarian Party of Washington State, et al., seek an order continuing hearing for no less than 90 days on the motions by the State of

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Washington for refund of attorney fees and for dismissal and a motion of the Washington State Grange for dismissal. This motion is made to allow the Libertarian Party and its principles time to locate and retain counsel who can substitute for the undersigned and allow additional time for that counsel to become familiar with the relevant issues without a serious disruption in the proceedings.

ARGUMENT

This motion for continuance is made because the undersigned is unable to continue representing his clients, the Libertarian Party or Washington State, et al., upon the terms agreed to in 2005, and there has been no new agreement for continued representation. A companion motion asking for leave for the undersigned to withdraw has been docketed for December 19, 2008.

The plaintiffs, defendants and interveners in this case have been litigating the merits of Washington's various primary election systems ever since 2000, or shortly after the U.S. Supreme Court decided *California Democratic Party v. Jones*, 530 U.S. 567, 585, 120 S.Ct. 2402 (2000). On September 13, 2003, the Ninth Circuit Court of Appeals declared Washington's "blanket primary" unconstitutional as a violation of the political parties' First Amendment rights. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (C.A.9 2003). The undersigned has been representing the Libertarian Party, its members and its candidates since 2000.

This case has, over the last three and a half years, been to the U.S. Supreme Court and is now back before the district court, expressly remanded by the higher courts for further proceedings. When the undersigned agreed to represent the Libertarian Party, et al., no one anticipated the case would require several rounds of litigation and then wind up back where it started. The Libertarian Party has indicated that it does not want to be dismissed from this case and that it is presently seeking appropriate substitute counsel.

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The State and Grange both argue there are no remaining legal issues of substantial merit, and the case should be dismissed. The State also seeks an order to refund monies paid to the Libertarian Party in connection with an order of the Ninth Circuit, in part because it contends the case is ripe for dismissal. They are wrong.

This memorandum is not intended to address every detail of the State and Grange motions, as the undersigned simply cannot afford the time and effort necessary to fully research and respond to the arguments, and implores the court to allow his clients adequate time to find a substitute counsel. Nonetheless, the undersigned points to the following obvious issues remaining in material dispute.

On November 2, 2004, voters approved I-872.[1] In May 2005, the Libertarian Party sought leave to intervene in this action (CD 3) alleging, as Judge Thomas Zilly summarized in his Order for Preliminary Injunction, "that Initiative 872 is unconstitutional because it 'places impermissible limits on access to the general election ballot' contrary to the United States Constitution, and allows a person to appropriate the Libertarian Party label without compliance with its nominating rules and without allowing the Party to define what the Party label means." (internal quotations included). (CD 87, at 2)

The proceedings to date have been focused almost exclusively on First Amendment associational rights issues raised mainly by the Democratic and Republican Parties. The Libertarian Party claims have not been addressed by either the district court (CD 87, at 34) or the court of appeals, *Washington State Republican Party v Washington*, 460 F.3d 1108, n. 28 (2006). In its current motion to dismiss (CD 133, at 3) the State acknowledges that the US Supreme Court decision, *Wash. State Grange v Wash. State*

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[1] See, http://vote.wa.gov/general/measures.aspx?a=872

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Republican Party, ___ U.S. ___, 128 S.Ct. 1184 (2008), merely declared that Initiative 872 is facially constitutional on associational rights grounds. The decision obviously left all "as applied" and not previously addressed challenges open for further litigation. See, *Wash. State Grange,* 128 S. Ct., at 1195, n.11.

Contrary to the allegations of the State in its current motion (CD 133, at 2), the substantive issues of the case were not joined by agreement upon entry of the Stipulation of Issues (CD 40). Specifically, in its summary judgment reply (CD 78, at 1-2) the Libertarian Party made clear it did not agree the case was, as the State suggested at the time, "ripe for adjudication" (CD 65, at 5). Rather, the Libertarian Party had orally expressed a preference at the June 7, 2005 status conference to conduct discovery before seeking disposition on the merits.

The Libertarian Party filed its motion for summary judgment and its reply memorandum solely because the defendant County Auditors—for whom the Secretary of State was later substituted (CD 67)—demanded an accelerated disposition of the case and this court's scheduling order (CD 44) required the parties to file cross-motions on summary judgment. To the extent the case was accelerated in 2005 to accommodate the defendants' interests the Libertarian Party's interests in a fully and properly developed record were prejudiced, and accordingly the Libertarian Party objects to the state's current suggestion that the stipulation (CD 40) replaced the original pleadings.

Judge Zilly recognized that "Initiative 872, if otherwise valid, would significantly alter Washington State's political landscape and severely limit the important role of minor parties in the State's political process." (CD 87, at 33-34, n. 25). The US Supreme Court, *Wash. State Grange,* 128 S. Ct., at 1195, n.11, and the Ninth Circuit, (CD 129-2, at 2) each directed further proceedings, including the taking of evidence, on the issues expressly raised by the Libertarian Party, ballot access and trademark, in its

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original complaint (CD 28).

Essentially, the State and Grange are before this court seeking dismissal on the basis of Supreme Court dictum, without any factual record on the application of the Initiative, without any prior formal consideration of the ballot access or trademark issues by this court, the court of appeals or by the Supreme Court, and all contrary to the express directives of both higher courts. The Ninth Circuit entered its order on remand after the State had made essentially the same arguments to that court. Thus, the State's suggestion that all issues have been fully litigated and decided is nothing less than astounding.

Plainly, the instant case returns to the district court in a different posture and with different issues of salience than were apparent in 2005. Review of the court files, as well as review of academic literature regarding matters of election law, should reveal that the remaining issues in this case are both complex and far reaching. Indeed, they strike at the very essence and meaning of the democratic franchise upon which all representative government is based.

Full and effective representation of the Libertarian Party and its adherents will require substantial efforts in both factual and legal areas only touched upon in the proceedings to date. The Libertarian Party and the undersigned regret that the undersigned is unable to continue representing the Libertarian Party and its adherents in this action. However, they do not wish that problem to adversely affect the rights of future political parties, candidates and voters who may be affected, when the Libertarian Party cannot assure that its interests and the interests of those similarly situated will be fully and effectively represented in these proceedings.

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CONCLUSION

For the foregoing reasons, this court should continue hearing on the State and Grange motions for no less than 90 days, to allow the Libertarian Party to retain a substitute attorney and for that attorney to have adequate time to become familiar with the issues.

DATED Friday, December 05, 2008, at Tacoma, Washington.

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RICHARD SHEPARD, WSBA # 16194
Attorney for Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, RUTH BENNETT, and J. S. MILLS

CERTIFICATE OF SERVICE

I, RICHARD SHEPARD, WSBA # 16194, declare on penalty of perjury under 28 USC 1746, as follows:

On this date I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system that will send notifications of such filing to: James K Pharris, Thomas Ahearne, John White and David McDonald.

DATED Friday, December 05, 2008, at Tacoma, Washington.

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