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 Intervenors,
LIBERTARIAN PARTY OF WASHINGTON, et al.,
Plaintiff Intervenors
v.
DEAN LOGAN, King County Records & Elections Division Manager; et al.,
Defendants,
STATE OF WASHINGTON, et al.,
Defendant Intervenors
WASHINGTON STATE GRANGE,
Defendant Intervenors.

No. CV05-0927Z

WASHINGTON STATE GRANGE'S OBJECTIONS TO PLAINTIFFS' PROPOSED ORDER

***[filed on July 27 pursuant this Court's July 15 Order]***





FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400

## I. SUMMARY OF THE GRANGE'S OBJECTIONS

The Washington State Grange objects to the seven page Order proposed by the political parties to make this Court's July 15 injunction "permanent". It objects for two basic reasons:

***First,*** a differently worded seven page Order is not necessary. The Secretary of State promptly amended the applicable WAC provisions to comply with this Court's July 15 Order and that Order's re-instituting the Montana system for the 2005 election cycle. Candidates and County Auditors across our State have therefore been proceeding with the July 25-July 29 filing week pursuant to the Montana system re-instituted by this Court. As explained in Part I below, the State's prompt compliance with this Court's July 15 injunction has already made this Court's injunction "permanent" as a practical matter.

***Second,*** the political parties' proposed Order changes this Court's July 15 ruling. As explained in Part II below, their proposed Order adds new mandates that were not in the 40-page Order entered on July 15. It also adds mandates which contradict the "Montana system" mandate that was in this Court's July 15 Order. And the political parties summarily submit those proposed changes without any supporting justification, argument, or authority. Especially since the 2005 election cycle is already under way pursuant to the Montana system re-instituted by this Court's July 15 Order, to now change the content of that Order is not a required (or even justifiable) exercise of this federal court's equitable power when designating its prior July 15 injunction order as being permanent.[1]

Given the State's prompt and ongoing compliance with this Court's July 15 Order, the only thing required to make this Court's July 15 injunction order "permanent" is for this Court to enter a one-sentence ruling which states "The preliminary injunction imposed by this Court's

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[1] *Cf., e.g., Miller v. Miller, 504 F.2d 1067, 1067 (9th Cir. 1974) (when a State expresses its intent to follow the Court Order, the court should likewise be hesitant to issue an injunction); Porto Rico Tel. Co. v. Puerto Rico Communications Authority, 189 F.2d 39, 41 (1st Cir. 1951) (federal courts should be hesitant to enjoin the exercise of a State's sovereign power, leaving whenever possible the construction of State laws to the courts of the State involved).*



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July 15 Order is now permanent." Since nothing more is needed or justified by the political parties' submission, a proposed form of Order to do exactly that is submitted with this pleading.

## II. DISCUSSION

### A. Short Response: *A New Seven Page Order Is Not Needed Because This Court's July 15 Injunction Is Already "Permanent" For The Current 2005 Election Cycle.*

On July 15, this Court entered a detailed 40-page Order declaring Initiative 872 unconstitutional and enjoining its implementation (docket no. 87).

Significantly, this Court's July 15 Order concluded that its "[e]njoining the implementation of Initiative 872 will return Washington to the Montana primary system enacted before Initiative 872 was approved by the voters", and thus "the law as it existed before the passage of Initiative 872, including the Montana primary system, stands as if Initiative 872 had never been approved." July 15 Order, docket no. 87, at 38:5-18 (emphasis added).

The State promptly complied. On July 15 the Washington Secretary of State immediately rescinded the WAC regulations he had issued for the Initiative's Top Two system, and on July 20 and 22 substituted in their place new WAC regulations for the Montana system re-instituted by this Court's July 15 Order.[2]

Candidates and County Auditors have likewise been complying. Pursuant to the Montana system re-instituted by this Court's July 15 Order, candidates for the upcoming September primary have been filing – and County Auditors across Washington have been accepting and processing – declarations of candidacy in the form specified by the Montana system statute for the 2005 election cycle's soon-to-be-completed July 25-29 filing week.[3]

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[2] *A courtesy copy of the July 15 rescission and new July 20 & 22 WAC regulations are submitted with the State's objections. The July 20 regulations established an August 26 deadline for minor party candidates to be nominated by minor party nominating conventions and for the candidates so nominated to file for placement on the November ballot pursuant to the re-instituted Montana system. WAC 434-215-125. The July 22 WAC regulations then completed the State's re-implementation of the Montana system pursuant to this Court's July 15 Order.*

[3] *RCW 29A.24.050 (filing week). As this Court will recall from this suit's initial status conference, the July 15 date that drove this suit's expedited briefing schedule was based on County Auditors' explanation of the date by which they as a practical matter needed a ruling for the 2005 election process (securing ballot stock, printing forms and ballots, processing candidacy declarations, preparing & mailing military and absentee materials, etc.).*



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In short, the government defendants' prompt compliance with this Court's July 15 Order has already rendered that Order's "preliminary" injunction a "permanent" one for the current 2005 election cycle. Converting this Court's "preliminary" injunction into a "permanent" one therefore does not require a seven page Order recharacterizing and revising the July 15 Court ruling that is already being followed. At most, that conversion simply requires a one-line Order that incorporates the full text of the July 15 injunction order by reference, and states that its July 15 injunction is now permanent. The proposed form of Order submitted with this pleading does that.

**B. Longer Response: *The Political Parties' Proposed Verbiage Is Improper Because It Does More Than Simply Make This Court's July 15 Injunction Permanent.***

This Court's 40-page Order was specific in its terms, described in all necessary detail the acts being enjoined, and clearly set forth the reasons for that Order's issuance. *Cf.* Civil Rule 65(d). The 2005 election cycle in now underway pursuant to that July 15 Order and its re-instituting the Montana system in existence before Initiative 872 was approved by the voters.

The political parties did not submit any authority, reasons, or arguments claiming that verbiage different from that in this Court's July 15 Order is needed to make that Order's injunction "permanent" with respect to the 2005 election cycle now in progress.

Indeed, a paragraph-by-paragraph examination of the political parties' proposed Order shows that each paragraph falls into at least one of the following four categories – none of which are proper or needed to make this Court's July 15 injunction order permanent.

**1. Unnecessary surplusage.**

Many paragraphs in the political parties' proposed Order repeat findings or conclusions that this Court already stated in its July 15 Order.[4] Repeating those paragraphs add nothing to

[4] *For example, such paragraphs include the political parties' proposed form of Order at page 2, ¶3; pages 2-3, ¶5; page 4, ¶1; page 4, ¶3; page 5, ¶10; and page 6, ¶1.*



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the ruling this Court already entered. Lifted out of their context in this Court's detailed explanation of its ruling, they are at best out-of-context surplusage unnecessary to any further Order of this Court.

**2. Improper rephrasing to comply with the political parties' liking.**

Other paragraphs in the political parties' proposed Order rephrase parts of the Court's July 15 Order to employ phrasing and terminology that is more to the political parties' liking.[5]

This Court's July 15 Order adopted much – but not all – of the phrasing proposed by the political parties' briefs and the political parties' previously proposed orders. Submitting a proposed Order that subtly revises the language of this Court's July 15 ruling to employ even more of the political parties' preferred phrasing and terminology for the political parties' anticipated use in other cases and disputes is a clever tactic.

But it is not a proper tactic. This Court directed the political parties to submit a proposed order that is "consistent with [the July 15] Order". Docket no. 87 at page 39, ¶4. They were accordingly required to submit a proposed form of Order consistent with the injunction ruling as this Court in fact did explain that ruling – not a rephrased ruling as the political parties' wish this Court had explained it.

**3. Adding new mandates after the 2005 election cycle has commenced.**

Other paragraphs in the political parties' proposed Order add new mandates and new findings which were not in this Court's July 15 ruling.[6]

Submitting a proposed form of Order that amends this Court's July 15 ruling to add mandates and findings that the political parties wish they had asked for or wish this Court had

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[5] *For example, such paragraphs include the political parties' proposed form of Order at page 2, ¶2; page 3, ¶6; page 3, ¶8; page 4, ¶2; page 4, ¶4; pages 4-5, ¶; and page 5, ¶8.*

[6] *For example, such paragraphs include the political parties' proposed form of Order at page 3, ¶6; pages 3-4, ¶¶9-10; page 4, ¶2; page 5, ¶9; page 6, ¶5 (rescinding already-rescinded regulations); pages 6-7, ¶6 (changing the "August 26" date in WAC 434-215-125 to "August 27" instead); page 7, ¶7 (writing new filing statute for minor parties and changing the "August 26" date in WAC 434-215-125 to "September 23" instead).*



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entered is another clever tactic. Especially if the political parties can secure their entry without submitting any supporting briefing, argument, or authority.

But it is not a proper tactic. Especially after the 2005 election cycle is already under way pursuant to the mandates this Court specified in its July 15 Order, and after the Secretary of State promptly complied with those mandates by withdrawing Washington's "Top Two" regulations and substituting "Montana" regulations in their place.

The political parties submitted nothing to even suggest that making this Court's July 15 injunction order "permanent" requires the new verbiage and new mandates they inserted into their proposed Order. Frankly, that is because in the circumstances of this case, the entry of a permanent injunction consistent with this Court's July 15 Order requires nothing beyond a one-sentence ruling that "The preliminary injunction imposed by this Court's July 15 Order is now permanent."

**4. Contradicting the July 15 Order's "return to Montana" mandate.**

Other paragraphs in the political parties' proposed Order go even further and change parts of the Montana system statute that is already being implemented pursuant to this Court's July 15 Order.[7]

As noted earlier, this Court's July 15 Order expressly held that its "[e]njoining the implementation of Initiative 872 will return Washington to the Montana primary system enacted before Initiative 872 was approved by the voters", and thus "the law as it existed before the passage of Initiative 872, including the Montana primary system, stands as if Initiative 872 had never been approved." July 15 Order at 38:5-18 (emphasis added).

The political parties did not file any motion for reconsideration asking this Court to reconsider, amend, or otherwise revise that July 15 ruling in any way.

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[7] *For example, such paragraphs include the political parties' proposed form of Order at page 6, ¶2; page 6, ¶3; and page 6, ¶4.*



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The State, County Auditors, and candidates promptly complied with this Court's July 15 "return to Montana" ruling, and the 2005 election process is accordingly under way in accordance with that July 15 ruling.

Submitting a proposed form of Order that contradicts this Court's July 15 "return to Montana" mandate by retroactively changing parts of the Montana statute currently being implemented pursuant to that July 15 Order is another clever tactic – especially if the political parties can secure such retroactive changes in the Montana statute (and this Court's July 15 Order) without submitting any motion for reconsideration or any supporting briefing, argument, or authority.

But inserting such changes in a proposed form of Order that is supposed to be consistent with this Court's July 15 Order mandating a return to the previously existing Montana statute is not a proper tactic – especially since the 2005 election cycle is already under way pursuant to the "return to Montana" mandate in this Court's July 15 Order.

The political parties submitted nothing with their proposed form of Order to even suggest that making this Court's July 15 injunction order "permanent" requires this Court to now change its July 15 ruling that the 2005 election process which is now under way be conducted pursuant to "the Montana primary system enacted before Initiative 872 was approved by the voters", and that "the law as it existed before the passage of Initiative 872, including the Montana primary system, stands as if Initiative 872 had never been approved." July 15 Order, docket no. 87, at 38:5-18. The political parties' proposed form of Order making that retroactive change – especially now that the 2005 election process is under way – should accordingly be rejected.

## III. CONCLUSION

The political parties did not submit anything to establish, argue, or even suggest that a new, differently worded seven page Order is necessary to make this Court's July 15 injunction



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order permanent. That if because they couldn't. The State, County Auditors, and candidates are already complying with the detailed, 40-page Order this Court entered on July 15.

Nor did the political parties submit anything to establish, argue, or suggest why their seven page proposal's clever rephrasings, additional mandates, and changes to this Court's July 15 "return to Montana" mandate are needed or justified to make this Court's July 15 injunction order permanent.

That is because at this point in time, the only thing arguably required to make this Court's July 15 injunction order "permanent" is for this Court to enter a one-sentence ruling which states "The preliminary injunction imposed by this Court's July 15 Order is now permanent." The Grange respectfully requests that this Court accordingly do that – so this matter can promptly proceed on appeal before it is too late for the State Legislature (or People via Initiative) to adopt an election system for the 2006 election cycle that complies with the Ninth Circuit's affirmance, reversal, or other disposition of the political parties' claims.

RESPECTFULLY SUBMITTED this 27th day of July, 2005.

FOSTER PEPPER & SHEFELMAN PLLC

*[Signed]*
Thomas F. Ahearne, WSBA No. 14844
Ramsey Ramerman, WSBA No. 30423
Rodrick J. Dembowski, WSBA No. 31479
Attorneys for the defendant-intervenor
Washington State Grange



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STATE OF WASHINGTON, et al.,
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WASHINGTON STATE GRANGE,
Defendant Intervenors.

No. CV05-0927Z

*[proposed]*
ORDER CONVERTING THIS COURT'S JULY 15 INJUNCTION ORDER INTO A PERMANENT INJUNCTION



FOSTER PEPPER & SHEFELMAN PLLC
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On July 15 this Court entered a 40-page Order declaring Initiative 872 unconstitutional and enjoining its implementation (docket no. 87).

That order also required the litigants to abide by the following submission schedule:

> Plaintiffs are directed to prepare, serve, and file a proposed permanent injunction consistent with this Order by July 22, 2005. Defendants may file any objection by July 27, 2005, and the Court will thereafter enter a permanent injunction.

Order, docket no. 87, page 39, ¶4.

Pursuant to that schedule, the plaintiffs submitted a proposed form of Order on July 22, 2005 (Proposed Order, docket no. 88), and the defendants submitted their objections on July 27, 2005 (docket nos. ____ and ____).

Based on those submissions, this Court hereby ORDERS as follows to convert this Court's July 15 injunction order into a permanent injunction consistent with that July 15 Order:

1. This Court's July 15 Order (docket no. 87) is fully incorporated by reference as if attached hereto; and

2. The preliminary injunction imposed by that July 15 Order is now permanent.

DONE IN OPEN COURT this ____ day of July, 2005.

_____
Hon. Thomas S. Zilly
U.S. District Court Judge

Form of Order to be consistent with the Court's July 15 Order presented by:
FOSTER PEPPER & SHEFELMAN PLLC

*[Signed]*
Thomas F. Ahearne, WSBA No. 14844
Attorneys for Defendant-Intervenor
Washington State Grange



FOSTER PEPPER & SHEFELMAN PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299 ♦ 206-447-4400