Thomas F. Ahearne
Ramsey Ramerman
Rodrick J. Dembowski
FOSTER PEPPER & SHEFELMAN PLLC
1111 Third Ave., suite 3400
Seattle, WA 98101
(206) 447-4400 (tel.)
(206) 447-9700 (fax)

Attorneys for Appellant/Defendant-Intervenor
Washington State Grange

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.

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

Defendants,

STATE OF WASHINGTON, et al.,

Appellant/Defendant Intervenors,

WASHINGTON STATE GRANGE,

Appellant/Defendant Intervenor.

No. 05-35774 *[Grange's appeal]*

No. 05-35780 *[State's appeal]*

(Dist. Ct. No. CV05-0927Z)

APPELLANT WASHINGTON STATE GRANGE'S

REPLY IN SUPPORT OF MOTION TO EXPEDITE REVIEW

PURSUANT TO CIRCUIT RULES 27-12 & 34-3(3)

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. LEGAL DISCUSSION.....2

1. Plaintiffs Do Not Dispute That The Court's Rules Grant Hearing Date Priority To This Injunction Appeal. 2

2. Plaintiffs Do Not Dispute This Court's Case Law Supports Expedited Review. 2

3. Plaintiffs Do Not Refute That The Legislative Session's February 4 Cutoff For Bills Further Supports Expedited Review. 3

4. Plaintiffs Do Not Refute That Balance & Fairness Also Support Expedited Review. 7

III. CONCLUSION.....9

I. <u>INTRODUCTION</u>

On November 2, 2004, the voters of Washington enacted Initiative 872's Top-Two election system by a 60%-40% margin.

Instead of challenging that Initiative in November 2004, the plaintiff political parties waited until right before its implementation over six months later to pursue their *facial* challenge to its constitutionality. That delay effectively forced the defendants and trial court to brief and resolve plaintiffs' injunction request in the closing weeks before implementation began at the end of July.

Plaintiffs' delay also resulted in the trial court injunction being issued far too late for the defendants to secure any appellate review for the <u>200**5**</u> election cycle.

Appellate review on a 5-month time schedule, however, would allow the Washington Legislature to enact an election system consistent with this Court's appellate decision in time for the <u>200**6**</u> election cycle.

Since the State of Washington's legislative branch (rather than the federal government's judicial branch) should be the one establishing the type of election system Washington employs for Washington's 2006 election cycle, the Appellant Grange filed a Motion requesting such a 5-month schedule. The Grange served all parties with that Motion To Expedite, and sent it via overnight mail for filing with this Court in San Francisco, on July 29 – which was the same day the trial court issued its permanent injunction, and the same day Appellants filed their appeal.

The State of Washington – on behalf of the over 1.6 million Washington voters who "overwhelming voted to adopt a top two primary system for ... the State's upcoming 2006 elections" as well as "the State's county auditors who were

originally named as defendants" – has filed a Reply in this Court supporting that July 29 Motion. State's Reply at 2. The Washington Secretary of State – as "the Chief Elections Officer of the State of Washington" similarly supports that Motion. *Id*. And the defendant Attorney General – as "the Chief legal counsel for the State of Washington, its Legislature, and its People" – supports that Motion too. *Id*.

The following is the defendant Grange's explanation of why the plaintiffs' opposition briefing does not rebut the four distinct legal grounds which that Motion sets forth in support of the Appellants' 5-month review request.

II. LEGAL DISCUSSION

1. Plaintiffs Do Not Dispute That The Court's Rules Grant Hearing Date Priority To This Injunction Appeal.

Plaintiffs do not dispute that Circuit Rule 24-3(3) provides that injunction appeals are "Priority Cases" given priority ahead of other cases for hearing dates. See July 29 Motion To Expedite at page 5 (paragraph starting "***first***").

Instead, they ignore Circuit Rule 24-3(3) – perhaps hoping this Court will ignore it too.

2. Plaintiffs Do Not Dispute This Court's Case Law Supports Expedited Review.

Plaintiffs do not address the 9th Circuit case law that confirms expedited review is proper for trial court rulings on the constitutionality of a State law or injunctions requiring specific State action. See July 29 Motion To Expedite at pages 5-6 (paragraphs starting "***second***", discussing, for example, this Court's much more expedited review in the *Daily Herald* case).

Instead, plaintiffs ignore such case law – perhaps hoping this Court will too.

3. Plaintiffs Do Not Refute That The Legislative Session's February 4 Cutoff For Bills Further Supports Expedited Review.

Plaintiffs do not dispute the **law**: expedited review is proper when, "in the absence of expedited treatment, irreparable harm may occur". Circuit Rule 27-12(3) (emphasis added). See Motion at page 6 (para. starting "***third***").

Nor do they dispute **timing**: given the February 4 cutoff for bills in "short session" years such as 2006, this Court's delaying its decision past mid-January 2006 would preclude the State Legislature from drafting legislation consistent with that ruling for the 2006 election cycle. See Motion at pages 6-7 (paragraph running from bottom of page 6 to top of page 7 & footnotes 3-5).

Instead, plaintiffs insist in a variety of ways that such a delay cannot cause any **harm** because Washington has no interest in a constitutional top two system, and because the Montana system that resulted from the trial court's injunction is exactly what the legislative authority of Washington wants.

But that is not true for many reasons.

One: Plaintiffs' "no harm" argument ignores that fact that the Washington Constitution vests the State's legislative authority in the People first. Wash. Const., Art. II, §1(a) (Legislative Powers, Where Vested: "Initiative: The first power reserved by the people is the initiative") (emphasis added).

Indeed, the lead plaintiff in this case – the Washington State Republican Party – expressly declares that this legislative initiative power is an "inalienable right" guaranteed to the People of Washington:

> We re-affirm the Proper Role of Government is to protect our inalienable rights, including: ... The initiative process provided for by the Washington State Constitution.

Washington State Republican Party Platform, "Bill of Rights for All Washingtonians" section.[1]

As a result of the former Governor's veto of the Louisiana style top two system enacted by the Legislature, Washington's voters went through a "Montana" primary for the very first time in September 2004. Two months later, over 1.6 million of those voters replaced that Montana system with the Top-Two system of Initiative 872 instead (a 60% - 40% margin).

Given the People's first and inalienable right as the ultimate legislative authority of the State of Washington, and their overwhelming rejection of the Montana system in favor of a top two system in that legislative capacity, it simply is not credible for plaintiffs to claim that delaying review causes no harm because the injunction's Montana system is what Washington's ultimate legislative authority (the People) established for the 2006 election cycle.

Two: Plaintiffs' "no harm" argument also ignores the fact that a Montana system was not the Legislature's first choice either. As noted before, the Legislature enacted a Louisiana style top two system. It was the former Governor's veto that put the Montana system in place instead.

Since a top two system was undeniably the Legislature's preference, it is not credible for plaintiffs to claim that this Court's issuing its decision on what and is not unconstitutional about a top two election system after the bill cutoff date for the 2006 election cycle causes no harm because the Legislature has no preference

[1] *W.D.Wash. docket no. 69 (segment of docket no. 69 with Dembowski Declaration Exhibit A, at page 8 of 39, which is a June 22, 2005 copy of Washington State Republican Party Platform at "http://www.wsrp.org/platform.htm").*

for or interest in enacting a constitutional top two system. And plaintiffs' "no pending legislation" observation does not refute this point – for as the plaintiff political parties well know, nothing is currently "pending consideration" because the Legislature adjourned last Spring (2005), and does not come back into session until January 9, 2006. See July 29 Motion at page 7 & footnote 4.

Three: Another variation of plaintiffs' argument is that delaying review of the trial court's injunction causes no harm because the bill previously enacted by the Legislature said its Louisiana style top two system would be abandoned in favor of the Montana system if a trial court invalidated that Louisiana system – representing to this Court that "Washington's Legislature decided that the Montana system would be used in the event of such an injunction."[2]

But that representation is not accurate.

Instead, the bill enacted by the Legislature said its Montana part would be triggered only after the exhaustion of all appellate court review. 2004 Wash. Laws 271, §101 (Montana part of no effect unless the bill's Louisiana part is invalidated ***and*** "all appeals of that court order have been exhausted or waived"). Plaintiffs turn that provision on its head when they argue its allowing a Montana system after appeals are exhausted means the Legislature wanted to instead impose Montana before appeals were exhausted.

[2] Democrats Opposition Brief at page 7, end of second full paragraph; adopted by Republicans' Opposition Brief at page 2 (joining Democrats' opposition "for the grounds stated in the Democratic Party's Opposition"); also adopted by the Libertarians at page 2 (Libertarian Party "joins the Washington State Democratic Central Committee in opposition to expedited review").

Four: Plaintiffs' suggest the Legislature prefers a Montana system because the Legislature did not repeal the Montana statute after the voters replaced it with Initiative 872. That suggestion is not credible – for the Legislature's voting to "repeal" the superceded Montana statute would have been superfluous.[3]

Indeed, the Legislature's leaving the Initiative's top two system completely in place without any changes – instead of reinstituting the Montana system preferred by the former Governor – confirms that the Legislature prefers a top two election system over the Montana system. And that preference only further confirms the need for this Court to issue its ruling on what is and is not constitutional about top two systems in time for the 2006 Legislature to draft legislation compliant with that ruling for Washington's 2006 election cycle.

Five: The plaintiff political parties ignore political reality. The State Legislature is elected by Washington's voters. And those voters adopted the Initiative's top two system by a 20-percent margin.

In other words, the Legislature's "boss" (the voters) overwhelmingly prefers a top two system. It therefore is not credible for plaintiffs to argue that this Court's delaying its decision on the constitutionality of top two elections beyond the bill cutoff date for the 2006 election cycle causes no harm – for that argument requires this Court to conclude that Washington Legislators are completely oblivious to (or deliberately violate) the unequivocally expressed will of the voters they represent.

---

[3] *See also, e.g., Wilmot v. Kaiser Aluminum and Chemical Corp., 118 Wn.2d 46, 821 P.2d 18, 26 (1991) ("We will not speculate as to the reason the Legislature rejected the proposed amendment."); Spokane County Health District v. Brockett, 120 Wn.2d 140, 839 P.2d 324, 331 (1992) (same).*

In short, plaintiffs' arguments do not support their claim that delay is acceptable because the legislative authority of Washington has no interest in adopting a constitutional top two system for the 2006 election cycle, and that the Montana system resurrected by the trial court's injunction is exactly what the legislative authority of Washington wants for that 2006 cycle.

Instead, the opposite is true. The ultimate legislative authority of the State (the People) and their elected State Legislature both prefer a top two system. But such top two legislation in compliance with this Court's decision cannot be drafted in time for the 2006 election cycle if this Court does not review this appeal on the 5-month schedule requested in Appellants' Motion. Plaintiffs' arguments accordingly do not refute the crucial point that expedited review should be granted under Circuit Rule 27-12(3) because, "in the absence of expedited treatment, irreparable harm may occur" with respect to the 2006 election cycle. See July 29 Motion at pages 6 - 7 (paragraphs after "***third***").

4. Plaintiffs Do Not Refute That Balance & Fairness Also Support Expedited Review.

Plaintiffs do not dispute that expedited review is fair. See July 29 Motion at page 8 (paragraphs starting "***fourth***", with charts and discussion showing how plaintiffs' litigation strategy of waiting until half a year to file their facial challenge to Initiative 872 forced the trial court proceedings to follow a much more expedited schedule); compare also July 29 Motion at page 4 & footnote 2 (cases confirming that constitutional challenges to Washington Initiative measures are commonly filed in court within a few weeks of their November enactment).

Nor do plaintiffs dispute that expedited review is practical. See July 29 Motion at page 2 (third paragraph, explaining that the legal issues in plaintiffs' facial challenge have already been fully briefed, the trial court record is already electronically on file, and the injunction hearing's transcript has already been completed); see also the hearing transcript subsequently filed on August 1 (W.D. Wash. docket no. 101).

Heightening the fairness of expedited review is that fact that the plaintiff Republicans are now claiming that the filing provisions of the Montana system are unconstitutional for the exact same First Amendment reason they assert against the top two system of Initiative 872.[4] And recognizing that this pending appeal will as a practical matter dispose of that allegation against the Montana system, the trial court on August 12 issued a STAY of the plaintiffs' Montana statute claims.[5] Delaying the decision in this appeal past mid-January 2006 therefore will not only preclude the Washington Legislature from drafting any top two legislation consistent with this Court's First Amendment ruling in time for Washington's 2006 election cycle, but it will also preclude the Legislature from drafting any cures to the Montana system consistent with this Court's First Amendment ruling in time

---

[4] *W.D.Wash. docket no. 105 at 1, second paragraph (Plaintiff Republicans' request re status of plaintiffs' challenge to the filing statute for the Montana system) and W.D.Wash. docket no. 93 at pages 1-5 (Plaintiff Republicans' submission arguing that the filing provisions of both Initiative 872 and the prior Montana statute are unconstitutional for the same First Amendment right-of-association reason); see also W.D.Wash. docket no. 49 at document pages 5 & 22 – 24. .*

[5] *W.D.Wash. docket no. 107 at 2, ¶(3) ("The Court concludes in the interest of justice this action should be and hereby is STAYED in light of the pending appeals to the Ninth Circuit").*

for Washington's 2006 election cycle. Plaintiffs provide no basis to conclude that fairness to the People and electorate of Washington supports the election chaos which would then result from Washington having no constitutional election system on the books for the 2006 election cycle.

III. CONCLUSION

Plaintiffs did not refute any of the four legal reasons in support of a 5-month review schedule that were set forth in the Appellants' Motion To Expedite.

Nor did plaintiffs refute the many pragmatic reasons supporting that 5-month appeal schedule:

- Plaintiffs did not dispute that appellate review on that schedule is necessary to allow the Washington Legislature to enact an election system consistent with this Court's First Amendment decision in time for the 2006 election cycle;
- Plaintiffs did not dispute that a 5-month appeal schedule is practical since the legal issues in this *facial* challenge have already been fully briefed and the trial court record (including transcript) are already on file; and
- Plaintiffs did not claim that a 5-month appeal schedule is in any way burdensome, unreasonable, or unfair.

In short, plaintiffs provided no legal, equitable, or logical reason for this Court to deny the following 5-month schedule for this appeal's resolution:

Opening Briefs	**August 29, 2005**
Response Briefs	**September 26, 2005**
Reply Briefs	**October 10, 2005**
Oral Argument	**Early November/late October, 2005**
Court Decision	**Mid-January, 2006**

And the Reply Brief of the other Appellants – the State of Washington on behalf of its voters and county auditors, the Washington Secretary of State as the State's Chief Elections Officer, and the Washington Attorney General as the Chief Counsel for the State, its Legislature, and its People – supports the pending Motion and its requested 5-month review schedule.

The Appellant Washington State Grange therefore respectfully requests that this Court GRANT the pending Motion To Expedite, and thereby allow the Washington State Legislature to draft an election system consistent with this Court's First Amendment decision on the constitutionality of top two systems in time for the 2006 election cycle.

RESPECTFULLY SUBMITTED this 16th day of August, 2005.

FOSTER PEPPER & SHEFELMAN PLLC

____

Thomas F. Ahearne, WSBA No. 14844
Ahearne@foster.com
Ramsey Ramerman, WSBA No. 30423
Ramer@foster.com
Rodrick J. Dembowski, WSBA No. 31479
Dembr@foster.com

Foster Pepper & Shefelman PLLC
1111 Third Avenue Suite 3400
Seattle, Washington 98101
Phone: 206-447-4400
Fax: 206-447-9700
Attorneys for Appellant/Defendant-Intervenor Washington State Grange

STATEMENT OF RELATED CASES

The co-defendant State of Washington (on behalf of itself, Secretary of State, Attorney General, and County Auditors) also filed an appeal from the district court's injunction orders, which was assigned 9th Circuit case no. 05-35780.

DATED this 16th day of August, 2005.

Ramsey Ramerman, WSBA No. 30423
FOSTER PEPPER & SHEFELMAN PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101

Attorneys for Intervenor-Defendant/Appellant Washington State Grange

<u>CERTIFICATE OF SERVICE</u>

RAMSEY RAMERMAN states:

I hereby certify that I served the above document upon the following parties via U.S. Mail and e-mail on **August 16**, 2005, as well as via personal service on August 17, 2005:

John J. White, Jr./Kevin B. Hansen
Livengood, Fitzgerald & Alskog
121 Third Avenue
Kirkland, WA 98083-0908
white@lfa-law.com; hansen@lfa-law.com
Attorneys for Plaintiffs Washington State Republican Party *et. al.*,

David T. McDonald/Jay Carlson
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Davidm@prestongates.com; jcarlson@prestongates.com
Attorneys for Intervenor Plaintiffs Washington Democratic Central Committee
and Paul R. Berendt

Richard Shepard
Shepard Law Office, Inc.
818 So. Yakima Ave., #200
Tacoma, WA 98405
richard@shepardlawoffice.com
Attorneys for Intervenor Plaintiffs Libertarian Party of Washington State, Ruth
Bennett and J.S. Mills

Maureen Hart/James K. Pharris/Jeffrey T. Even
1125 Washington Street SE
Olympia, WA 98501-0100
robm@atg.wa.gov;marnieh@at.wa.gov;JamesP@atg.wa.gov;
Jeffe@atg.wa.gov
Attorneys for Defendants State of Washington, Secretary of State Sam Reed and
Attorney General Rob McKenna

I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Seattle, Washington this 16th day of August, 2005.

____
Ramsey Ramerman