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THE HONORABLE THOMAS S. ZILLY

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

WASHINGTON STATE REPUBLICAN
PARTY, et al.,
Plaintiffs,

And

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE, et al.,
Plaintiff Intervenors,

And

LIBERTARIAN PARTY OF
WASHINGTON STATE, et al.,
Plaintiff Intervenors,

v.

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

And

STATE OF WASHINGTON,
Defendant Intervenors,

And

WASHINGTON STATE GRANGE,
Defendant Intervenors,

Case No: C05-9272 TSZ

LIBERTARIAN PARTY'S MOTION
FOR ATTORNEY FEES AND COSTS
AND MEMORANDUM IN SUPPORT

**NOTE ON MOTION CALENDAR:
SEPTEMBER 9, 2005**

LIBERTARIAN PARTY'S MOTION FOR
ATTORNEY FEES AND COSTS AND
MEMORANDUM IN SUPPORT - Page 1 of

SHEPARD LAW OFFICE, INC.
818 So. Yakima Ave., #200
Tacoma, WA 98405
(253) 383-2235

1
2 Intervenor Libertarian Party of Washington State, Ruth Bennett and John Mills,
3 (“Libertarian Party”), by and through counsel, move this court for an order awarding
4 attorney fees & costs under 28 U.S.C. § 1988.

5 The Libertarian Party is making this Motion now even though there is some doubt
6 whether the time is ripe for this Motion. As will be explained below there appears to be a
7 difference of opinion among the litigants whether the court’s permanent injunction (CD
8 94) is a “final order” for purposes of Fed. R. Civ. P. 54(d)(2)(B). For reasons that will be
9 explained the Libertarian Party believes there are unresolved issues before this court, and
10 that the permanent injunction is not final. Nonetheless, the Libertarian Party is making
11 this Motion to protect its interest in recovery of attorney fees if the permanent injunction
12 is determined to be a final order.

13 This motion is based upon the Declaration of Richard Shepard filed herewith and
14 the subjoined memorandum.

15
16 **FACTS**

17 Plaintiffs Republican Party of Washington commenced this matter on May 19,
18 2005. (CD 1) The Libertarian Party moved to intervene the same day. (CD 3)
19 This court granted the Libertarian Party’s Motion to Intervene and the Libertarian Party
20 Complaint was filed on June 7, 2005. (CD 27, 28) Particularly relevant for current
21 purposes is the Libertarian Party’s request for injunctive relief prohibiting the
22 government defendants from: “conducting any partisan primary without implementing a
23 reasonable mechanism to effectuate the LP’s exercise of its right to limit participation in
24 that primary to candidates who are current members of the LP.” (CD 28, at 13)

25
**LIBERTARIAN PARTY’S MOTION FOR
ATTORNEY FEES AND COSTS AND
MEMORANDUM IN SUPPORT - Page 2 of**

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1 The court held a status conference that same day and ordered, inter alia, the filing
 2 of cross-motions for summary judgment on an accelerated briefing schedule. (CD 45).
 3 Pursuant to this court's direction the litigants stipulated to five legal issues to be
 4 considered by this court. (CD 40) Briefly stated the stipulation identified the following
 5 issues to be presented to the court: (1) whether I-872 nominated political party
 6 candidates, (2) whether political parties have an independent right to nominate candidates
 7 for election, (3/4) whether I-872 improperly interferes with the political parties' right of
 8 association with voters and/or candidates, and (5) whether I-872 creates an
 9 unconstitutional ballot access barrier for minor political parties.

10 The Libertarian Party filed its Motion for Summary Judgment along with
 11 supporting documentation on June 17, 2005, briefing all five stipulated issues. (CD 51,
 12 52, 54, 58-61) The Defendants State and Grange both responded to all five issues on
 13 July 1, 2005. (CD 65, 66, 68-70) The Libertarian Party worked over the 4th of July
 14 weekend and filed its reply on July 6, 2005. (CD 78, 79)

15 Oral argument was heard on July 13, 2005. (CD 85) On July 15, 2005 this court
 16 concluded, *inter alia*:

17 The implementation of Initiative 872 will severely burden the First
 18 Amendment rights of Washington's political parties by ... (b) allowing
 19 any candidate, regardless of party affiliation or relationship to a party, to
 20 self-identify as a member of a political party and to appear on the primary
 and general election ballots as a candidate for that party.
 (CD 87, at 38, 39)

21 Accordingly the court ordered a preliminary injunction against the State of Washington
 22 prohibiting the State, *inter alia*, from implementing I-872 or the filing statute R.C.W. §
 23 29A.24.030. In so ruling, the court specifically said it was not reaching equal protection
 24 and ballot access issues raised by the political parties. (CD 87, at 34)

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1 The court also directed the Plaintiffs to submit a proposed order and the
2 Defendants submit any objections to the Plaintiff's proposal. (CD 87, at 39) The
3 proposed order, objections and a response were submitted. (CD 88, 90, 91) The court
4 entered a permanent injunction on July 29, 2005, which prohibited the State from
5 implementing I-872 or R.C.W. § 29A.24.030, as well as prohibited the State from
6 rejecting minor party nomination paperwork on timeliness grounds. (CD 94)

7 Subsequent contact with the State of Washington suggests that the State has taken
8 the position that whatever relief the political parties had requested that the court had not
9 explicitly granted (CD 94) or set aside (CD 87, at 34)—e.g., the LP's request in its
10 complaint for an order preventing the government defendants from "conducting any
11 partisan primary without implementing a reasonable mechanism to effectuate the LP's
12 exercise of its right to limit participation in that primary to candidates who are current
13 members of the LP,"—was implicitly denied.

14 This issue concerns all partisan election system models, including the "Montana"
15 model, and not just the "top two" model. The Libertarian Party further believes
16 established precedent conclusively proves it has this right. (CD 52, at 14-15; CD 78, at
17 12-14) However, in the event this court determines its permanent injunction was a final
18 order under Rule 54 (d)(2), the Libertarian Party is making this motion for recovery of its
19 attorney fees within the time required.

20 DISCUSSION

21 The Libertarian Party¹ should be given an award of attorneys' fees and costs as a

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23
24 ¹ Intervenors may recover attorneys' fees and costs under § 1988 when the intervenors play a significant
25 role in the litigation at issue. *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1534-35 (9th Cir. 1985).

1 prevailing party pursuant to 42 U.S.C. § 1988.² “[A] court is expected to award such
 2 fees [under § 1988] to the prevailing party unless there is some special circumstance
 3 which would justify the court's refusal.” *Topanga Press, Inc. v. City of Los Angeles*, 989
 4 F.2d 1524, 1534 (9th Cir. 1993). A prevailing party is any party that succeeds on any
 5 significant issue in the litigation to the benefit of that party. *Texas State Teachers*
 6 *Association v. Garland Independent School District*, 489 U.S. 782, 789, 109 S.Ct. 1486,
 7 1492 (1989); *G & G Fire Sprinklers v. Bradshaw*, 156 F.3d 893, 906 (9th Cir. 1998);
 8 *Goehring v. Brophy*, 94 F.3d 1294, 1304 (9th Cir. 1996). This Court’s declaration
 9 Initiative 872 severely burdens the Libertarian Party’s First Amendment rights (CD 87),
 10 and permanent injunction (CD 94), constitutes success on a primary issue in this
 11 litigation and immediately benefits the Libertarian Party.

12 No special circumstances make an award of attorneys’ fees and costs unjust. The
 13 government defendants expressly intended to deprive the Libertarian Party plaintiffs of
 14 their constitutional rights by implementing the “top two” election system. The right to
 15 attorney fees is NOT reduced because the case involved an associational right as opposed
 16 to a liberty right under the constitution. *Democratic Party of Wash. State v. Reed*, 388
 17 F.3d 1281, 1285 (9th Cir., 2004) “People and entities whose civil rights have been
 18 unconstitutionally abridged are generally entitled to attorneys' fees under § 1988
 19 regardless of their ability to pay their attorneys.” *Id.*

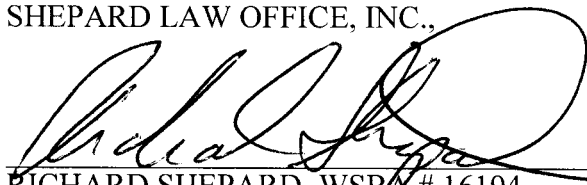
20 Indeed, the circumstances here suggest the punitive damages, if they were
 21 available in this case, would be appropriate. The issues that determined the outcome of

22
 23 ² “In any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion,
 24 may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs . . .” 42 U.S.C. §
 1988(b).

1 this case had been litigated twice before, see, *California Democratic Party v. Jones*, 530
 2 U.S. 567, 576 (U.S., 2000); *Democratic Party v. Reed*, 343 F.3d 1198 (9th Cir., 2003),
 3 and favorably to the prevailing parties here. In light of this litigation history the
 4 legislature knew the “top two” system was constitutionally suspect and included a “fall
 5 back” election system when adopting ESB 6453. The Governor expressed grave
 6 constitutional doubts when he vetoed the “top two” portion of the bill. Nonetheless, the
 7 Secretary of State (who has had knowledge from the beginning that the “top two” system
 8 was constitutionally suspect, and who voluntarily intervened as a defendant here) has
 9 continually and unabashedly claimed that the I-872 version of the “top two” system was
 10 constitutional (even before it was put to a public vote), and sought no judicial
 11 determination on the matter before he proceeded to deprive the political parties of their
 12 rights.
 13

14 DATED Wednesday, August 10, 2005, at Tacoma, Washington.

15 SHEPARD LAW OFFICE, INC.,



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