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 STATE, et al.,

Plaintiff Intervenors

v.

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

STATE OF WASHINGTON, et al.,

Defendant Intervenors

WASHINGTON STATE GRANGE,

Defendant Intervenors.

NO. 05-0927-Z

STATE OF WASHINGTON'S RESPONSE TO PROPOSED ORDER GRANTING PERMANENT INJUNCTION, INCLUDING OBJECTIONS

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The Intervenor Defendants State of Washington, Rob McKenna and Sam Reed, appearing by and through the undersigned attorneys, respond to the Proposed Order Granting Permanent Injunction as follows, without waiving for purposes of appeal any substantive arguments or positions previously asserted:

1. For the reasons articulated more fully below, it is not necessary for this Court to issue a lengthy additional order that revises, rephrases, or adds to the Order already entered by this Court. The existing Order already fully articulates this Court's reasoning and conclusions, and amplification or revision of the reasoning and conclusions is both unnecessary and counterproductive. Instead, this Court should simply issue an order stating that the preliminary injunction is made final, and that such order constitutes the final decision of the Court.

2. If the Court elects to enter an additional order, the proposed order is deficient in numerous respects:

a. Proposed Conclusions of Law Nos. 4 and 8 should be stricken from the Order because they raise issues not previously considered and are inconsistent with the law.

b. Paragraphs 2, 3, and 4, of the Proposed Order should be stricken because they raise issues beyond those considered in the summary judgment motions, are based on an erroneous reading of the case law, and would if entered constitute an unjustifiable interference with the State's authority to adopt a fair, stable, and consistent election system.

c. Paragraph 5 of the Proposed Order should be stricken because (1) the injunction against implementation of Initiative 872 necessarily precludes enforcement or implementation of the rules in question, and (2) the rules have already been rescinded by the Secretary of State. Attach. A.

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d. Paragraph 7 of the Proposed Order should be stricken because it goes beyond any reasonable relief needed by minor parties, and could frustrate the State's orderly preparations for the November general election.

POINTS AND AUTHORITIES

A. The Court should not enjoin or limit the use of RCW 29A.24.031 where used in connection with a primary in which only party members may participate in a party primary.

On July 15, this Court entered an Order finding that Initiative 872 would, if implemented, unconstitutionally impair the free speech and associational rights of political parties. As part of the Order, the Court entered a preliminary injunction against the implementation of the Initiative, and specifically against the implementation Wash. Rev. Code § 29.24.030, the portion of the Initiative that sets forth how candidates would file declarations of candidacy for partisan office. Order, July 15, 2005 at 39. The preliminary injunction was presumably based upon the Court's Conclusion that

> The implementation of Initiative 872 will severely burden the First Amendment rights of Washington's political parties by (a) allowing any voter, regardless of their affiliation to a party, to choose a party's nominee . . . and (b) allowing any candidate, regardless of party affiliation or relationship to a party, to 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.

Order, July 15, 2005, Conclusion No. 1 at 38-39 (citations omitted). In other words, the Court found that it was problematical to do *both* of the two things described in (a) and (b) of the quoted language: allow all voters to participate in selecting candidates while also along candidates to self-identify with political parties.

The Court has found (Order at 38) that the effect of the invalidity of Initiative 872 is to restore the law as it existed just before the enactment of the Initiative—that is, the Montana

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primary in used for the 2004 elections. Yet the Republican Party has proposed an order that includes a permanent injunction of the filing statute enacted as a part of the Montana primary which this Court has not found to be constitutionally defective in any way.

This view, which goes beyond the findings of the July 15 Order and raises issues not yet adequately briefed or considered, seems based on a notion that *any* filing statute is defective if it allows candidates to file for a party's nomination other than those authorized by the party's internal rules. *See* Proposed Order Granting Permanent Injunction at 4 (Proposed Conclusion of Law No. 4); *id.* at 6 (Proposed Injunction ¶¶ 2, 3, 4).

Neither the briefing nor the oral argument in this case has considered the validity of a filing statute in a primary, such as the Montana primary, where the nominees of each party are chosen by the affiliates of that party, with no opportunity to "cross over" or participate in the nomination process of any other party. In such a primary, by definition, the party candidate for each office will be nominated by those, and only those, loyal enough to the party's principles to vote that party's ballot. The Republican Party has not shown the Court why the Party's own voters cannot be trusted to nominate candidates, unless their choice is limited to those candidates authorized by internal party rules to file for office.[1]

Controlling case law demonstrates that political parties are not afforded what might be described as a "constitutional veto" over all candidates who seek their nomination. Near the beginning of *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed.

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[1] It is important to note that the Republican Party is not asking the Court to "bless" the current version of its rules concerning filing for office, but to grant the Party *carte blanche* for future changes in the those rules. Thus, a party could limit participation as a candidate in the primary to only the single candidate designated through a party convention, caucus, or other internal process, leaving voters with no choice except to ratify decisions made by the party leadership. The state's authority to "open" the process to all party voters would be rendered meaningless.

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2d 502 (2000), the Court observed that "States have a major role to play in structuring and monitoring the election process, including primaries. [Citations omitted.] We have considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion. *Id.* at 572 [citations omitted]. The clear implication of this language is that states may force parties to "open up" their nomination processes to all party members, even if the parties would prefer not to do so. This principle is consistent with any claim that parties can prevent all candidates but those favored by their hierarchy or the activists who attend conventions from seeking the nomination. Where the process of selecting the party nominee is limited to those who affiliate with the party by selecting that party's ballot, as is the case under the Montana primary, the candidate's self-designation of party does not have the same effect as under the top-two or blanket primaries. The assertion of a right by the party to eliminate such candidates from consideration is inconsistent with the principle that the State can require the parties to open up the nominating decision to the full party membership through a primary. This principle of full participation by affiliated voters can be rendered meaningless if the relatively small portion of party members who constitute its organizational hierarchy or who attend conventions can constrict the choices available to the full party membership in the electorate.

In *Clingman v. Beaver*, ___ U.S. ___, 125 S. Ct. 2029 (2005), the Supreme Court made it even clearer that political parties do not have an unlimited right to require states to accommodate their preferences concerning the conduct of party primaries. In *Clingman*, the state of Oklahoma had established a "semiclosed" primary in which only registered party

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affiliates and independent voters could participate in a party's primary. The Libertarian Party sought to allow all voters (including voters registered with other political parties) to participate in the Libertarian primary. The Supreme Court upheld the Oklahoma statute and found that it placed no severe burden on the party's associational rights. *See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997), in which the Court held that a political party has no constitutional right to nominate, as its candidate for an office, someone already on the ballot as the candidate of another party.

The Montana primary limits participation in any party's primary to those who affiliate with the party by taking its ballot, limiting their choices in the primary to candidates seeking that party's nomination. Wash. Rev. Code §§ 29A.52.151, .161. In this context, where only Republicans will nominate Republican candidates, the party leadership need not fear that "non-Republicans" will swamp the nomination process. This also means that candidates whose political philosophy is at odds with Republican views are unlikely to file for the Republican nomination for the office; their chances of success small. By the same token, even if such candidates do file, they are unlikely to be successful when the election is limited to Republican affiliates.

In seeking to control, even under the Montana system, who may file for nomination, the Republicans are not seeking to protect their rights of association as against outsiders, but to protect the decisions of the party leadership against the rank and file party members. As noted earlier, by altering its internal rules, a party could completely frustrate the purpose of holding a primary by either removing all choice (allowing only one candidate to file) or by placing impossibly high burdens on filing by candidates not favored by the party leadership. However

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mild and reasonable existing party rules might be, the proposed Order provides no protection against future changes in party procedure, and mistakenly suggests that the Constitution demands such extreme deference to party choice.

In the context of a primary in which only Republicans may vote for Republican candidates, RCW 29A.24.031 reasonably requires that a candidate seeking a party nomination file a declaration indicating party designation. With the field of candidates limited to self-designated Republicans, the membership of the Republican party at large may be trusted to make an appropriate exercise of the party's constitutional right to choose its candidates. The Constitution certainly does not compel the states to accommodate the shifting of the nomination power away from the party rank and file and toward the party leadership.

Moreover, this Court's prior order made clear that the Court considered the filing statute only in the context of the Initiative 872 "top two" primary. Order at 28 n.21. The Republican Party, in particular, challenges the filing statute as a vehicle for its assertion of a right on behalf of the party to restrict the candidates who can claim a preference for the party when filing for office. Since this Court's July 15 order reinstated the "Montana primary," election officials have proceeded to accept candidate filings pursuant to the version of the filing statute contained in the Montana primary statutes, Wash. Rev. Code. 29A.24.031. Candidate filings are currently underway using that statute, and to add an additional prohibition at this stage relating to the Montana act—not Initiative 872—would affect the current electoral cycle.[2]

[2] County auditors are required by state law to have absentee ballots available twenty days before the date of the primary. Wash. Rev. Code 29A.40.070. Because of this tight timeline, counties can be expected to begin preparing primary ballots almost immediately after the last day for parties to fill ballot vacancies, which this year

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B. There is no need to enjoin use of the emergency rules adopted by the Secretary of State to implement Initiative 872.

Paragraph 5 of the Proposed Injunction (p. 6) would specifically enjoin the State and its political subdivisions from enforcing or implementing certain rules adopted by the Secretary of State on May 18, 2005. These rules were adopted to implement Initiative 872. Since this Court has already entered a preliminary injunction against the implementation of the Initiative, the rules have no further purpose to serve, and the Secretary of State has already rescinded them. Attach. A. Thus, Paragraph 5 is unnecessary.

C. While some accommodation of minor parties is appropriate, it is unnecessary and potentially prejudicial to permit minor party candidates to file declarations of candidacy after August 27.

The Proposed Order contains findings to the effect that minor parties may have foregone the conduct of conventions, which were not a part of the "top two" system envisioned by Initiative 872 but which are required by the Montana primary statutes as a way for minor parties and independent candidates to gain places on the general election ballot. Wash. Rev. Code 29A.20.121. While the State has not barred any minor party or independent candidate from conducting a convention, the State agrees that to avoid confusion, it would be reasonable to give minor parties additional time to conduct conventions and file candidacies for the November 2005 ballot.

Paragraph 6 of the Proposed Order would require the State to accept the results of nominating conventions held on or before August 27, 2005, assuming they otherwise meet statutory requirements. This is not objectionable, and is consistent with the approach taken in

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is August 5. Wash. Rev. Code 29A.28.011. Since resolution of this issue affects ballot printing, a prompt resolution is required if the counties are to meet their printing and distribution deadlines.

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an emergency rule recently adopted by the Secretary of State. Attach. B. The secretary has also adopted rules on an emergency basis to implement the Montana Primary more generally. Attach. C.

However, Paragraph 7 of the Proposed Order would require the State to accept declarations of candidacy (based on the results of the conventions) as late as September 23, 2005. There is no compelling need for accepting filings this late, as the results of all nominating conventions would be available, given Paragraph 6, on or before August 27. Allowing an additional four weeks permits minor party and independent candidates to "hold back" to see the results of the September 20 primary before deciding whether to file for an office. Washington law does not otherwise allow this, and the parties have shown no need for such favorable treatment this year.[3]

The United States Court of Appeals for the Ninth Circuit has already rejected a similar argument, offered by the Libertarian Party, to the effect that minor parties should be permitted to file later than major party candidates. *Libertarian Party of Washington v. Munro*, 31 F.3d 759, 764 (9th Cir. 1994). In that case, in which the Libertarians sought an order permitting them to hold conventions after candidate filing week under the prior blanket primary law, the circuit court reasoned that the State is entitled to sufficient time to determine which candidates are to appear on the ballot. *Id.* In addition, the court reasoned that delays in submitting candidate materials undermines the State's interest in having an informed electorate. *Id.* at 765. Under these principles, it is not unreasonable to expect minor party and independent

[3] By September 23, the State is also well into preparation of the Voters Pamphlet, which must be mailed to military and overseas voters well ahead of the November 8 election. Allowing candidate filings this late could seriously affect the State's ability to issue the voters pamphlet in a timely manner.

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candidates to file their declarations of candidacy at the same time that they fulfill the convention requirement. To permit the requested delay would permit minor party candidates to make strategic decisions after the results of the major party primaries are known, and after which the major parties can no longer decide to advance or withdraw candidates from the general election ballot.

Candidates nominated through minor party and independent candidate conventions should be required to file their declarations of candidacy on or before August 27, the deadline for holding conventions, or no more than a few days afterward. Paragraph 7 should either be limited or modified to reflect this point.

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CONCLUSION

A separate order at this stage that restates or modifies the Order this Court already entered would be unnecessary. It would also be counterproductive for this Court to enter an order that changes the procedures outlined in this Court's prior order that affect the current, 2005, primary. For these reasons, this Court should decline to enter a new order that does anything other than make the preliminary injunction entered previously effective as a permanent injunction. If the Court does enter a further order, the proposed order should be modified as indicated.

DATED this 27th day of July, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

1. Richard Shepard (richard@shepardlawoffice.com)
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and I hereby certify that I have mailed the document, by United States Postal Service, to the following non CM/ECF participant(s): Frederick Alan Johnson, Prosecuting Attorney, PO Box 397, Cathlamet, WA 98612.

Executed this 27th day of July, 2005, at Olympia, Washington.

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