

**IN THE CIRCUIT COURT OF STATE OF OREGON  
FOR THE COUNTY OF MARION**

**INDEPENDENT PARTY OF OREGON, a minor  
political party,  
JOEL HAUGEN, an individual,  
and WORKING FAMILIES PARTY, a minor  
political party,**

**Plaintiffs,**

**v.**

**STATE OF OREGON, BILL BRADBURY,  
Secretary of State of the State of Oregon,**

**Defendant.**

**Case No. 08C-20329**

**PLAINTIFFS REPLY  
MEMORANDUM ON MOTION  
FOR INJUNCTIVE RELIEF**

Hearing August 20, 2008  
3:30 pm

**I. THIS CASE IS ABOUT STATUTORY CONSTRUCTION, NOT FUSION VOTING.**

This is not a case about "fusion" voting. Candidates for partisan office in Oregon may be nominated by more than one party. The name of a candidate can appear only once on the ballot-- a single ballot line for each candidate. Plaintiffs do not challenge that legislative decision on the design of ballots which gives but one ballot line to a candidate. They do not allege that the parties have any right to have separate ballot lines. They do, however, seek to have the current ballot design statute, ORS 254.135, correctly implemented. While a candidate's name appears but once on the ballot, the only reading of the statute which gives meaning to every word, including ORS 254.135(3)(a) and Subsections (C) and (E), allows for several political party names to appear opposite the candidate's name. For example, in this case:

"Joel Haugen	Republican; Independent"
"Jeff Merkley	Democratic; Independent"
"Ben Westlund	Democratic; Independent" <sup>1</sup>
"Peter Buckley	Democratic; Working Families"

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1. Mr. Westlund has accepted the nomination of the Independent Party and is the nominee of the Democratic Party for Treasurer.

Further, Defendant misdefines "fusion voting," which is what HB 3040 (2007) would have achieved. Fusion voting means that the name of a candidate for a particular office name can appear multiple times on the ballot, once for each party that has nominated that candidate for that office. Or, from the parties' perspective, each nominating party gets a ballot line. The winner of the race is determined by adding together all the votes for each named candidate from all of the ballots for that office. The different tallies of vote for that candidate are what is "fused" together to produce the outcome.

"Fusion" as the word is used in electoral politics is a process by which two or more political parties nominate one candidate for an office in an election. Each party picks its own candidate by primary, convention, or otherwise. Then, in states that allow fusion, a single candidate appears as a representative of two or more parties for the same office in the general election. That candidate can receive votes on each party's ticket; those votes are added together to determine the overall winner.

*Stewart v. Taylor*, 104 F3d 965, 967 (7th Cir 1997). Thus, "fusion" is defined by the adding together of more than one stream of votes for one candidate.

This action has nothing to do with fusion voting. No one claims that Oregon law requires the Secretary to print any candidate's name on the ballot more than once or "fuse" together that candidate's different vote tallies from multiple party ballot lines. Defendant's discussion of fusing voting is completely irrelevant.<sup>2</sup>

Defendant incorrectly claims (p. 9) that "Plaintiffs are attempting in this case to achieve through creative interpretation what they were unable to achieve by legislative amendment," referring to HB 3021 (2005), a bill which languished in committee. Neither the Independent Party of Oregon nor the Working Families Party even existed in 2005.<sup>3</sup> and Joel Haugen certainly did not seek to "achieve" anything in 2005 about this bill.

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2. This is particularly true of Defendant's footnote 5, which refers to 2007 testimony regarding fusion voting.
  3. Party formation documents are appended to the Declarations of Sal Peralta and Barbara Dudley, Tabs 2 and 3 to the Motion and Memorandum.

## II. STANDARD FOR GRANTING PRELIMINARY INJUNCTION.

Defendant's Memorandum in Opposition (August 19, 2008) [hereinafter "Defendant"] (pp. 5-6) cautions the court that a preliminary injunction is "a device for preserving the *status quo*" and that the courts should not make "a late change in a time-sensitive process."<sup>4</sup> These assertions depend upon Defendant's assumption that not allowing a candidate to display more than one party label on the ballot is the *status quo* and that allowing the display of two party labels would be a "change."

First, the "one and only one" party label requirement is not the legal *status quo*, because the plain meaning of ORS 254.135(3)(a) does allow more than one party label. The legal *status quo* is what the law is. Second, it is not even the factual *status quo*, as Defendant has produced no evidence that any candidate (except Plaintiff Haugen) has asked for, and has been denied, multiple party labels in the circumstances now presented to this court.<sup>5</sup> Merely because no one has sought to display two party labels on a ballot does not make Defendant's insistence on "one and only one" party label the "status quo."

## III. INACTION ON A BILL WHICH NEVER IS CONSIDERED BY THE LEGISLATURE IS NOT "LEGISLATIVE HISTORY."

While the court might resort to legislative history if it found ORS 254.135 ambiguous, The introduction of HB 3021 (2005) does not rise to the level of illustrating any legislative intent whatsoever. The text of a bill introduced in 2005 is not legislative history to an entirely different

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4. Defendant (p. 15) further asserts that Plaintiffs seek to "reverse the *status quo*."
  5. Defendant (p. 10) again asserts, with no evidence, that there was a "long-standing policy prohibiting multiple party names on the ballot." But Plaintiffs' Motion for Preliminary Injunctive Relief and Memorandum in Support (pp. 14-15) shows that multiple party names for one candidate were indeed been allowed on the Oregon ballot through 1957 (and now again since 1995).

bill (SB 183 of 1995) enacted 10 years earlier. The terms of HB 3021 (2005) do not directly alter the meaning of the text under consideration in Subsections (C) and (E) (it apparently would have given candidates more choice in choosing party designations in addition to the mandatory additions already part of Subsections (A)-(E)).

More importantly, the failure to take action on legislative amendments can occur for many reasons. The bill may not have been necessary, as it may not have changed current law. Or it may have been superfluous, or the sponsor did not fully understand the status of current law. Even less can be inferred from total *inaction* on a bill which never makes it out of committee.<sup>6</sup>

Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change.

*U.S. v. Wise*, 370 US 405, 411, 82 SCt 1354, 1359 (1962).

*U.S. v. Allen*, 179 F 13, 19 (8<sup>th</sup> Cir 1910), set out the long-standing rule:

Courts can find the intent of the Legislature only in the acts which are in fact passed, and not in those which are never voted upon in Congress, but which are simply proposed in committee. It is not contended that the bill referred to was ever brought to a vote in Congress and rejected. It was simply one of the measures which was under consideration at the time the act of May 27, 1908, was passed. To hold that such facts can be looked to for the purpose of narrowing the effect of a statute actually passed, would be to invent a new and dangerous canon of statutory interpretation.

Oregon courts agree that failure to pass an amendment has little significance.

It is said in SUTHERLAND, 506, § 5015:

\* \* \* Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. However, such rejection may occur because the bill in substance already includes those provisions.

*City of Portland v. Duntley*, 185 Or 365, 382, 203 P2d 640, 647 (1949).

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6. Defendant's Memorandum in Opposition (August 19, 2008) admits that HB 3021 died in committee at p. 9, line 1.

Oregon cases continue to find no probative value in failed amendments.

The legislative history is susceptible to two plausible interpretations. The failure of the legislature to adopt the proposed amendment could mean that it intended to include school districts within the prohibition of ORS 662.215. On the other hand, the legislature's inaction could mean that it thought that the definition of employer in ORS 662.205(2) did not require further expression in order to exclude school districts.

*Sullivan v. Kizer*, 115 OrApp 206, 212-213, 839 P2d 227, 231 (1992).<sup>7</sup>

As weak as the failure to pass an amendment may be in "proving" legislative intent, even less enlightening is legislative *inaction*, which was the fate of HB 3021. The *City of Portland v. Duntley* court declined to give weight to a bill which never was considered by the full legislature.

[W]e are satisfied that little if any light is thrown upon the legislative intent by the history of the Act under consideration. House Bill No. 362, the original bill, was

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7. The completely contradictory inferences which may be drawn from failure to pass legislation are noted in many jurisdictions.

[W]e attach little value to the Legislature's subsequent failure to pass a bill (Assem Bill No 95 (1983-1984 Reg Sess)) that would have amended section 1021.7 to clarify its reference to actions for libel and slander. We have repeatedly observed that the Legislature's failure to enact a proposed amendment to an existing statutory scheme offers only limited guidance, if any, concerning the Legislature's original intent. (E.g., *People v. Mendoza* (2000) 23 Cal4th 896, 921, 98 CalRptr2d 431, 4 P3d 265; *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal3d 721, 735, fn 7, 180 CalRptr 496, 640 P2d 115.)

*Martin v. Szeto*, 32 Cal4th 445, 451-452, 84 P3d 374, 37, 9 CalRptr3d 687, 692 (2004).

We also note that the Minnesota legislature did not adopt the even broader changes made to the federal URA in 1987. The federal URA now provides for benefits "[w]henver a program or project to be undertaken by a displacing agency will result in the displacement of any person." Pub L No. 100-17, § 405(a)(1); 42 USC § 4622(a) (2003). But the Minnesota legislature's failure to adopt the federal language is equivocal at best. We have no way of determining whether that failure should be interpreted as a rejection of the broader federal rule, as the HRA argues; or as a determination that the federal changes were unnecessary as superfluous.

*In re Wren*, 699 NW2d 758, 763-764 (Minn 2005).

never considered by either house of the legislative assembly nor by any committee. It was simply introduced, read twice, referred to a committee, and thereafter abandoned.

*City of Portland v. Duntley*, *supra*, 185 Or at 383. Federal courts continue to follow the reasoning of *U.S. v. Allen*, *supra*, according bills which stall in committee little weight.

We are mindful of the fact that Congressman Hebert introduced a bill in the 88th Congress which would have explicitly allowed offsets. Had this bill been voted on and defeated, it would be a clear indication that Congress did not intend to allow such offsets. However, the bill was never brought to a vote, and it is quite difficult to derive any Congressional intent from a lack of action, especially when the reasons for not voting on a proposed bill are multitudinous. As the standard work on statutory construction states:

\* \* \* Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. *However, such rejection may occur because the bill in substance already includes those provisions.* (Emphasis supplied by court.) 2 Sutherland, STATUTORY CONSTRUCTION, § 5015, p. 506. (Horack 3rd ed 1943.)

Here, of course, there was never even any rejection of the Hebert bill, but merely inaction on it.

*Cutler-Hammer, Inc. v. U.S.*, 416 F2d 1306, 1312 (CtCl 1969).

In this case, the inaction on HB 3204 (2005) is not of any weight.

#### **IV. THE LEGISLATIVE HISTORY OF IS UNREVEALING.**

The actual legislative history of the 1995 change (SB 183) is both scant and ambiguous. Under current law, in order to maintain their status, minor statewide parties must either have a registered membership of approximately 9,500 members or must have a combination of at least 1,509 members and a candidate who received 1% or more of the vote in a statewide race in the previous general election. ORS 248.008. Ms Sealock of the Secretary of State's office testified that SB 183 would establish that, when a minor party cross-nominates a major party candidate, the major candidate's vote count would not satisfy that crucial 1% vote requirement.

Note that her brief explanation contradicts Defendant's current position entirely. Why would the question of which party gets credit for the candidate's votes even arise, if the minor party's name did not to appear on the ballot along with the name of the major party?

Defendant is forced to try to create legislative intent in a *Hound of the Baskervilles* manner. Defendant argues (p. 12) that lack of legislative debate about the number of political party names which could follow a candidate's name must show lack of legislative intent to alter the ballot design which had previously given primacy to the "the name of the candidate's political party." While Sherlock Homes could deduce the identity of a murderer by noting that the hounds did not bark the night of the crime, this reasoning does not help in statutory construction, and we can deduce little from silence.

First of all, we have only counsel's undocumented assertion that a change which would allow several party names to be added after a candidate's name, for each party name mandated by a different section of ORS 254.135, would be controversial or would have demanded debate. There is no evidence that ballot design was a controversial issue which would have stirred debate.

Secondly, we are left to guess what Ms Sealock meant by "housekeeping" and what the committee thought she meant. Assuming that the notetaker's summary of legislative testimony is accurate (which we do not concede), we are left only with an unidentified person's recitation of some of what Ms Sealock stated. Whatever Ms Sealock might have had in mind in using the word "housekeeping" cannot be known. But we do know that legislators are presumed familiar with ordinary English usage. If they intended to restrict the party names following a candidate's name on the ballot to one and only one, they had the opportunity to use plain language to do so. There is no evidence the legislators were unfamiliar with the ordinary meaning of "a" and simply acted in a hasty or uninformed manner when they adopted the current version of ORS 254.135.

Regardless of the lack of discussion, the legislature in fact acted--it changed ORS 254.135(3)(a) significantly. Failure to discuss something else cannot alter the impact of what the legislature actually did. If the text makes sense as written and each word can be given effect, then we are to assume the legislature meant what it said.

Further, Defendant (p. 12) asserts that Ms Sealock reinforced the notion that a candidate can have only one party name, because she "explained that the bill would `clarify what party name goes on the ballot when a minor party does choose a candidate that is not a member of their party," claiming significance from "[h]er use of the singular `party name". But she was referring there to a "singular" circumstance "when a minor party does choose a candidate that is not a member of their party," with no reference to that candidate having been also nominated by a major party. And it is clear that Ms Sealock was referring to Subsection (C) in her remark.

And third and last it does clarify what party name goes on the ballot when a minor party does choose a candidate that is not a member of their party.

That circumstance is handled in Subsection (C), which states that "the name of the political party that nominated the candidate shall be added opposite the name of the candidate." Ms Sealock's testimony does not touch on the issue presented here, when Subsection (C) and Subsection (E) both apply. Nor does it supply any hint that there is a hierarchy presented whereby, Subsection (E) always trumps any other subsection.

#### **V. THE PLAIN LANGUAGE OF THE STATUTE SUPPORTS PLAINTIFFS.**

Defendant (p. 9) refers to ORS 254.135(3)(a)(B) and (D). Neither of those subsections is applicable to Plaintiffs. Subsection (B) does not apply, because this case does not involve any "candidate not affiliated with a political party" nor any candidate who has been "nominated by more than one minor party." Nor does Subsection (D) apply, because this case does not involve

any candidate "who is nominated by more than one political party of which the candidate is not a member."

Subsection (D), however, further support Plaintiffs' position. Subsection (C) provides, without any conditions:

(C) For a candidate who is a member of a political party who is nominated by a political party of which the candidate is not a member, the name of the political party that nominated the candidate shall be added opposite the name of the candidate;

Subsection (D) then handles the circumstance where such a candidate is nominated by more than one political party of which he is not a member.

(D) For a candidate who is a member of a political party who is nominated by more than one political party of which the candidate is not a member, the name of the political party selected by the candidate shall be added opposite the name of the candidate; and

Subsection (E) then provides, without any conditions:

(E) For a candidate who is nominated by a political party of which the candidate is a member, the name of the political party of which the candidate is a member shall be added opposite the name of the candidate.

These subsections are easily harmonized. Subsections (C) and (E) both apply, without conditions. That calls for (C) "the name of the political party that nominated the candidate" to be "added opposite the name of the candidate" and for (E) "the name of the political party of which the candidate is a member shall be added opposite the name of the candidate." The only way to give effect to both (C) and (E) is to list two parties next to the name of the candidate. Note that both subsections use the term "added opposite the name of the candidate." Note also that all of these subsections themselves are cumulative; they are connected by the conjunctive "and" between Subsections (D) and (E), not by the disjunctive "or."

Subsection (D) then resolves the circumstance where the candidate has received nominations from "more than one political party of which the candidate is not a member." Such

as candidate is required to choose which of those party names to display. This is entirely consistent with our reading of subsections (C) and (E). Assume that Mr. Buckley (nominated by the Democratic Party and by the Working Families Party) had also received the nomination of the Independent Party. Then he would have to choose, pursuant to Subsection (D), whether to add "Working Families" or "Independent" next to his other party label of "Democratic." The statute provides that a candidate can have two party labels but not more than two. And, pursuant to Subsection (B), it provides that a party-unaffiliated candidate (i.e., someone not a member of any party) can have one minor party label but not more than one. Plaintiffs are not seeking to have any candidate display more than one minor party label or more than two labels in total.

Defendant does not refute that Subsections (C) and (E) are each mandatory, and neither of them is awarded primacy in the statute. Defendant (p. 13) merely starts with the conclusion that the statute allows only one party label per candidate and reasons from that unsupported conclusion. And Defendant offers no reason that Subsection (C) does not apply to candidates Haugen and Buckley. Defendant does not deny that they are literally covered by Subsection (C), since each is "a candidate who is a member of a political party who is nominated by a political party of which the candidate is not a member." Defendant offers no reason for his assertion that Subsection (E) trumps and nullifies Subsection (C). Instead, Defendant (p. 14) only offers to add words to the statute which do not exist. Defendant's position requires adding the words "but not his or her own" to Subsection (C). Those words are not there.

**VI. DEFENDANT HAS NEITHER DEMONSTRATED NOR EVEN IDENTIFIED ANY HARDSHIP.**

Defendant (p. 15) does not identify any hardship or disruption that would result from granting the requested injunction. The party asserting a hardship must at least identify the hardship and provide some evidence of it. See, e.g., *Hendrickson v. Wagners, Inc.*, 598 NW2d

507, 512 (SD 1999) (granting injunction when "there was no evidence presented that hardship suffered by [defendants] would be disproportionate to the benefit gained by [plaintiffs]").

Again, the situation here, unlike Tobin, where specific hardship was shown by the party enjoined, is different since there is no evidence of any hardship or inconvenience in the operation of the schools by reason of the injunction.

*Brooks v. County School Bd. of Arlington County*, 324 F2d 303, (4th Cir 1963).

Dated: August 20, 2008

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true copy of the foregoing: PLAINTIFFS REPLY RE: PRELIMINARY INJUNCTION (1) e-mail and (2) first class mail to all parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

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Dated: August 20, 2008

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Linda K. Williams