

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN
PARTY, et al.,

Plaintiffs,

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

and

LIBERTARIAN PARTY OF WASHINGTON
STATE, et al.,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE,

Defendant Intervenor.

No. CV05-0927 JCC

DEMOCRATIC PARTY'S
OPPOSITION TO STATE'S MOTION
IN LIMINE AND/OR
CONTINUANCE (STATE'S MOTION
TO STRIKE)

**NOTE ON MOTION CALENDAR:
OCTOBER 15, 2010**

The Democratic Party joins in the Republican Party's Opposition to the State's Motion to Strike and makes the following brief additional comments:

DEMOCRATIC PARTY'S OPPOSITION TO STATE'S
MOTION IN LIMINE AND/OR CONTINUANCE (STATE'S
MOTION TO STRIKE) - 1
CV05-0927 JCC

1 The State's Motion to Strike (Dkt. No. 287) is in fact a motion in limine. It seeks to
2 bar the future testimony of witnesses about virtually any aspect of the State's implementation
3 of the 2010 elections. See State's Motion to Strike at pp. 7-8. In the alternative, the State
4 seeks a continuance.

5 The State's effort to bar the Court from seeing the State's most current implementation
6 of I-872 should be rejected. Relevant evidence should be admitted except in particular
7 circumstances. Fed. R. Evid. 402. The sole reason given by the State for excluding evidence
8 about the 2010 election is an unsupported assertion that "[i]t is neither reasonable nor feasible
9 that a trial beginning November 15, 2010 would consider in evidence events from the 2010
10 election occurring after the close of fact discovery in mid-August." The State does not
11 provide any explanation for the need for an across-the-board bar on evidence regarding the
12 2010 elections occurring after mid-August of this year. It points to no specific evidence that it
13 argues should be excluded under Evidence Rule 403. If the State has any well-founded
14 objection to a particular piece of evidence, it can state its objection if admission of the
15 evidence is sought. There is no need to prejudge in the abstract the balancing required by
16 Evidence Rule 403.

17 In fact, much of the relevant evidence about the 2010 election likely to be offered at
18 trial is evidence that was created by the State and is within the State's control. There is no
19 prejudice to the State that results from the introduction of such evidence in mid-November
20 2010, even if the evidence was created by the State after the close of discovery in this case.
21 For example, the State has largely based its defense on a purported disclaimer about the
22 meaning of party preference statements, elaborating the extent to which it has distributed this
23 notice—in 2008. State Motion for Summary Judgment (Dkt. No. 239) at 8. Evidence relating
24 to the current distribution of and the prominence of the notice is clearly material to the
25 question whether the notice is effective in current elections to negate the confusion that
26

1 otherwise arises from the State's ballots and the ongoing and future risks to First Amendment
2 rights of association. For the 2010 general elections, for example, the Secretary of State has
3 set up, in conjunction with counties around the state, an online voter guide to which voters
4 seeking candidate information are directed. The online voter guide does not have the
5 "disclaimer" notice upon which the State's defense heavily relies. *See* Declaration of David
6 T. McDonald in Support of Democratic Party's Opposition to State's Motion in Limine and/or
7 Continuance (State's Motion to Strike) ("McDonald Decl."), Exs. 3, 4. Voters from all over
8 the State are directed to this voter's guide where they see candidate names in association with
9 Party names and are given no indication of any kind that candidates are not affiliated with the
10 parties whose names appear after the candidate names.¹ It is evidence such as this, evidence
11 election officials themselves created and distributed widely over the internet, that the State
12 apparently asks the Court to bar from consideration at trial next month. Context is important.
13 The Court should not deprive itself of all relevant evidence about the context in which ballots
14 are viewed and used today and are likely to be viewed and used in the future.

15 The State has alternatively suggested that if its motion in limine is not granted, a
16 continuance should be granted. Again, the State provides no support for the need for a
17 continuance. The Democratic Party opposes a continuance of the trial date. The State did not
18 raise a concern about its ability to develop or present evidence in an orderly fashion either
19 when the trial date was continued from October 4, 2010 to November 15, 2010 (Dkt. No. 234)
20 nor did it do so when the parties stipulated to an extension of discovery deadlines (Dkt. No.
21 238), nor when the Court re-set the due date for trial briefs and completion of expert
22 discovery (Dkt. No. 253). Neither the August primary nor upcoming general election are
23 unforeseen events.

24
25 _____
26 ¹ The King County Election website provides voter tools that similarly omit the relied upon
disclaimer. *See* McDonald Decl., Exs. 1, 2.

1 The State has already had two and a half years since the Supreme Court's decision in
2 which to fully implement I-872 and prepare it for evaluation by the Court. There is no good
3 reason to further delay determining whether the State's implementation of I-872 invades
4 cherished First Amendment rights of association.

5 DATED this 12th day of October, 2010.

6 K&L GATES LLP

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16 Washington State Democratic Party and
17 Dwight Pelz, Chair

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DEMOCRATIC PARTY'S OPPOSITION TO STATE'S
MOTION IN LIMINE AND/OR CONTINUANCE (STATE'S
MOTION TO STRIKE) - 4
CV05-0927 JCC

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2010, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ David T. McDonald
David T. McDonald, WSBA # 5260

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DEMOCRATIC PARTY'S OPPOSITION TO STATE'S
MOTION IN LIMINE AND/OR CONTINUANCE (STATE'S
MOTION TO STRIKE) - 5
CV05-0927 JCC