The Honorable John C. Coughenour

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.

STATE OF WASHINGTON, et al.,
Defendant Intervenors

WASHINGTON STATE GRANGE,
Defendant Intervenor.

No. CV05-0927-JCC

WASHINGTON STATE GRANGE'S MOTION FOR SUMMARY JUDGMENT

Note on Motions Calendar:
Friday, September 17, 2010

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I. INTRODUCTION

Initiative 872 established a two stage election system for certain elected offices in this State – for example: Governor, State legislator, and County Commissioner. Initiative 872, section 7 (establishing a 2-stage, top two election system for "partisan offices") and section 4 (identifying those "partisan offices"), codified at Rev. Code. Wash. RCW 29A.52.112 and 29A.04.110.

The ballot in the first stage (the August primary) lists all the candidates who filed a declaration of candidacy for those offices, and allows the voter marking that ballot the choice of voting for any of the candidates running for each office. This first stage winnows down the number of candidates for each of those offices to the top two vote getters.

The ballot in the second stage (the November general) lists only the top two vote getters for each of those offices. The candidate who wins this top two run-off is the candidate elected.

Plaintiffs claim Initiative 872 is unconstitutional in its entirety. Trial is set to start November 15, 2010. Plaintiffs have thus far identified at least 20 different trial witnesses, including Washington's Governor, State leaders of three political parties, various States' Secretaries of State, and several testifying "experts".

But a trial is not needed because the three bases upon which plaintiffs base their constitutional claim fail as a matter of law.

First, plaintiffs attack the ballot used for the offices elected under I-872. They claim the I-872 ballot misleads the reasonable voter into thinking that when the ballot says "(Prefers Republican Party)" after a candidate's name, the ballot really means something else instead. For example, that the I-872 ballot instead means that that candidate is nominated or endorsed by the Republican Party, or that the Republican Party approves of or associates with that candidate. This claim fails for the simple, straightforward reason that the I-872 ballot tells each voter the following in bold print immediately above the first office to which Initiative 872 applies:

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> READ: Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

The I-872 ballot itself directly refutes plaintiffs' claim that a candidate's party preference statement on the ballot implies to the reasonable voter that the candidate is nominated or endorsed by that party, or that the party approves of or associates with that candidate. . *[Part II.A below.]*

Second, plaintiffs complain about alleged burdens or confusion arising out of certain Public Disclosure Commission ("PDC") laws in Washington. If those PDC laws result in unconstitutional burdens or confusion, plaintiffs can sue to strike them down. But Initiative 872 did not enact those PDC laws. The (alleged) unconstitutionality of those PDC laws does not make Initiative 872 unconstitutional instead. *[Part II.B below.]*

Third, plaintiffs claim the Washington statute allowing local Republican and Democratic party organizations to elect their Precinct Committee Officers ("PCOs") in taxpayer-funded elections is unconstitutional. If the Precinct Committee Officer election laws are unconstitutional, plaintiffs can sue to strike them down. But Precinct Committee Officers are not included in the list of "partisan offices" to which the top two system enacted by Initiative 872 applies. The (alleged) unconstitutionality of Washington's PCO election laws does not make Initiative 872 unconstitutional instead. *[Part II.C below.]*

In short, the three bases upon which plaintiffs base their constitutional claim against Initiative 872 fail as a matter of law. While a trial would be both interesting and entertaining given the witnesses and subject matter involved, that trial would serve no legitimate purpose since defendants are entitled to judgment dismissing plaintiffs' constitutional claim against Initiative 872 as a matter of law. For the reasons outlined below, the defendant-intervenor

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Washington State Grange accordingly requests that this Court enter summary judgment in the defendants' favor and dismiss plaintiffs' case with prejudice.

II. LEGAL DISCUSSION

A. The I-872 Ballot Itself Refutes Plaintiffs' Characterization Of That Ballot.

As the United States Supreme Court has already noted in this case, our federal courts maintain great faith in the ability of individual voters to inform themselves about election issues. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 454, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) ("*Grange*").

Moreover, the State's summary judgment submissions detail the widespread public information campaign that the State conducted to remind Washington voters about the top two election system that those voters had enacted when they adopted Initiative 872.[1] To save some trees from the life-ending fate noted by this Court in its prior ruling regarding the parties' motions to amend,[2] the Grange does not repeat that submission here.

The Grange does, however, point out that the State's widespread public information campaign was not even necessary in this case.

That is because it is undisputable that the one thing every voter sees when he or she votes on a ballot is the ballot itself.

And there is no factual dispute over what that ballot says to each voter concerning the "partisan offices" to which Initiative 872 applies.

[1] *Dkt. Nos. 239 - 246.*

[2] *Dkt. No. 227 at page 5 of 10, line 2 ("Many trees have died in the bringing of these motions.").*

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Every single I-872 ballot in our State tells the voter voting on that ballot the following information:[3]

> READ: Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

An objective reading of the I-872 ballot itself therefore does not allow the premise upon which plaintiffs base their constitutional claim – namely, that the I-872 ballot misleads the reasonable voter into thinking that when the ballot says "(Prefers Republican Party)" after a candidate's name, the ballot instead means that that candidate is nominated or endorsed by the Republican Party, or that the Republican Party approves of or associates with that candidate. The I-872 ballot itself directly refutes plaintiffs' claim that the I-872 ballot is unconstitutionally confusing.

Plaintiffs cannot escape this objective fact by trying to argue the federal courts in our State should institute a subjective inquiry for trials on the constitutionality of the I-872 ballot each election cycle – with the constitutionality of using that ballot in each year's election being subjected to a battle of "experts" opining on the particular races, candidates, and electorate involved in each year's case. As the State's motion correctly explains[4] (and the Grange therefore does not needlessly re-explain again here), the proper (and only workable) legal measure is an objective "reasonable voter" test focusing on the substance of the written communication made to each voter on the I-872 ballot itself – not a subjective expedition driven

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[3] *Declaration Of Catherine Blinn, Assistant Elections Director, at ¶¶3-3.7 and Exhibits B - H (Dkt. Nos. 241 - 245); accord Wash. Admin. Code WAC 434-230-015(4)(a) Ballot Format ("If the ballot includes a partisan office, the ballot must include the following notice in **bold** print immediately above the first partisan congressional, state or county office: "read: Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.").*

[4] *Dkt. No. 239 at pages 10-12.*

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by various "experts" offering their views on the types, causation, and significance of any amorphous "confusion" concerning the races, candidates, and electorate involved in the particular case being tried that year.

In short, the plaintiffs' ***first*** legal theory for striking down Initiative 872 fails as matter of law because it is directly refuted by an objective reading of the I-872 ballot itself.

B. Initiative 872 Did Not Enact The PDC Laws Plaintiffs Complain About.

The Washington State Republican Party plaintiffs and Washington Democratic Central Committee plaintiffs call them the "campaign advertising statutes".[5] The Washington State Libertarian Party plaintiffs call them the "campaign disclosure laws".[6] And the State defendants call it the "campaign sponsor identification statute".[7] But they are all the same set of laws relating to the Public Disclosure Commission ("PDC") in the State of Washington.

Plaintiffs claim those PDC laws result in unconstitutional burdens or confusion. If those PDC laws do, then plaintiffs can file suit to strike them down.

But Initiative 872 did not enact those PDC laws.

Plaintiffs' ***second*** reason for striking down Initiative 872 fails as matter of law for the simple, straightforward reason that if Washington's PDC laws are unconstitutional, then Washington's PDC laws are unconstitutional. That does not make Initiative 872 unconstitutional instead.

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[5] *E.g., Washington State Republican Party plaintiffs' Amended Complaint (Dkt. No. 206) at ¶14; Washington Democratic Central Committee plaintiffs' Amended Complaint (Dkt. No. 205) at ¶13. The Washington State Republican Party also references the "campaign finance law" that is part of the same chapter 42.17 of the Revised Code of Washington (RCW 42.17). Washington State Republican Party plaintiffs' Amended Complaint (Dkt. No. 206) at ¶¶38 & 52.*

[6] *E.g., Washington State Libertarian Party plaintiffs' Amended Complaint (Dkt. No. 232) at page 4. See also Washington State Republican Party plaintiffs' Amended Complaint (Dkt. No. 206) at ¶58; Washington Democratic Central Committee plaintiffs' Amended Complaint (Dkt. No. 205) at ¶50.*

[7] *E.g., State's Summary Judgment Motion (Dkt. No. 239) at page 14:1-5.*

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C. Initiative 872's Top Two Election System Does Not Apply To The Election Of Precinct Committee Officers.

The Washington State Republican Party plaintiffs and Washington Democratic Central Committee plaintiffs complain that the Washington statute allowing them to elect their Precinct Committee Officers ("PCOs") in publicly-funded elections is unconstitutional.[8]

If Washington's Precinct Committee Officer election laws are unconstitutional, then plaintiffs can file suit to strike them down.[9]

But the top two system enacted by Initiative 872 does not apply to the election of Precinct Committee Officers. The Initiative's top two election system applies to three (and only three) categories of public office:

(1) United States senator and United States representative;

(2) All state offices, including legislative, except (a) judicial offices and (b) the office of the superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices for which a county home rule charter provides otherwise.

Initiative 872, section 4 (codified at Rev. Code Wash. RCW 29A.04.110).

The election of Precinct Committee Officers is not one of those offices.

Plaintiffs' ***third*** reason for striking down Initiative 872 fails as matter of law for the simple, straightforward reason that if Washington's Precinct Committee Officer laws are unconstitutional, then Washington's Precinct Committee Officer laws are unconstitutional. That does not make Initiative 872 unconstitutional instead.

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[8] *E.g., Washington State Republican Party plaintiffs' Amended Complaint (Dkt. No. 206) at ¶30-33; Washington Democratic Central Committee plaintiffs' Amended Complaint (Dkt. No. 206) at ¶27-30.*

[9] *Indeed, the Grange might even join a suit to invalidate the Washington PCO laws' allowing public funds to be spent on the election of these two political parties' officers based on the Washington State Constitution's prohibition against gifts of public funds. Washington Constitution, Article VIII, sections 5 and 7.*

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III. CONCLUSION

Plaintiffs' three bases for claiming Initiative 872 is unconstitutional fail as a matter of law. For the reasons explained in this motion (as well as those in the defendant State's corresponding motion), the defendant-intervenor Washington State Grange respectfully requests that this Court therefore enter summary judgment in the defendants' favor, and accordingly dismiss plaintiffs' suit with prejudice.

RESPECTFULLY SUBMITTED this 26th day of August, 2010.

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CERTIFICATE OF SERVICE

Thomas F. Ahearne states: I hereby certify that on August 26, 2010, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties listed below:

1. WASHINGTON STATE GRANGE'S MOTION FOR SUMMARY JUDGMENT.

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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 26th day of August, 2010.

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