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 Intervenors.

No. CV05-0927JCC

WASHINGTON STATE GRANGE'S OPPOSITION TO THE DEMOCRATIC CENTRAL COMMITTEE'S MOTION TO AMEND ITS ***JUNE 2005*** COMPLAINT

Noted Without Oral Argument: December 11, 2008

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I. INTRODUCTION

The Democratic Central Committee's December ***2008*** Motion requests leave to amend the Central Committee's June ***2005*** Complaint in this case. That motion should be denied for the reasons explained in the State's Opposition Brief (Doc. #143).

The Washington State Grange files this short opposition brief to add a few additional points which further confirm why the Central Committee's motion should be denied.

II. PROCEDURAL HISTORY

The following chronology outlines the long procedural history of this case:

- *November 2004:* The citizens of this State enact Initiative 872, voting 60% - 40% to adopt that Initiative's Top Two election system effective December 2004.
- *May & June 2005:* The State Republican Party, the State Democratic Central Committee, and the State Libertarian Party file their Complaints to block implementation of that Top Two election law, asserting facial challenges under the First Amendment of the federal constitution.[1]
- *July 2005:* This Court agrees with the political parties' First Amendment challenge. This Court accordingly strikes down Washington's Top Two election law and enjoins its implementation.
- *Fall 2005:* While this Court's decision is on appeal, its injunction stands to prohibit Washington's citizens from voting in the Top Two election system they had overwhelmingly adopted.
- *Fall 2006:* While this Court's decision is on appeal, its injunction stands to prohibit Washington's citizens from voting in the Top Two election system they had overwhelmingly adopted.
- *Fall 2007:* While this Court's decision is on appeal, its injunction stands to prohibit Washington's citizens from voting in the Top Two election system they had overwhelmingly adopted.
- *March 2008:* The United States Supreme Court reverses this Court's decision. *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___,128 S.Ct. 1184, 170 L.Ed.2d 151 (2008).

[1] *In addition to challenging the constitutionality of the Top Two system enacted by I-872, the Republican Party also argued that* ***if*** *the First Amendment rendered Washington's Top Two system unconstitutional, then the First Amendment rendered the "Montana" system unconstitutional as well – an argument that was rendered moot by the Supreme Court's ruling that the First Amendment did* ***not*** *render Washington's Top Two system unconstitutional.*

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- *October 2008:* The Ninth Circuit Court of Appeals issues its Mandate remanding this case back to this Court. 2008 WL 4426713 (copy also attached as Appendix A to the State's Motion To Dismiss).

- *November 2008:* The two defendant-intervenors in this case (the Grange and the State) file motions to dismiss based upon the Supreme Court's legal rulings in *Washington State Grange v. Washington State Republican Party* and the Ninth Circuit's subsequent Mandate. Those two motions are Doc. #133 and #134.

- *December 2008:* The Democratic Central Committee and the State Republican Party file motions to amend their 2005 Complaints. (Doc.#137 and #140.)

III. LEGAL DISCUSSION

A. Motions To Amend Are Not "Freely Given" *After* The Original Complaint's Claim Has Been Rejected.

The Central Committee's Motion is based on the piece of Civil Rule 15 that references leave to amend being "freely given".

But that free giving does not apply after the claim asserted in the original Complaint has been litigated and rejected.

That makes sense. "To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." 6 *Federal Practice & Procedure* §1489, Charles Alan Wright, Arthur Miller & Mary Kay Kane, (2008 Supp.); accord Fed.R.Civ.P. 1 (the Federal Civil Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"). This skepticism against granting leave to amend after the original Complaint's claim has been rejected makes even more sense in a case like this, where the original Complaint's claim has been heard and rejected by our Nation's highest Court.

Refusing to "freely give" leave to amend after the original Complaint's claim has been heard and rejected is also the law in this Circuit. *Premo v. Martin*, 119 F.3d 764, 772 (9th Cir. 1997) ("post-judgment motions to amend are treated with greater skepticism than pre-judgment motions to amend").

In short, the Civil Rules' policy of favoring the finality of judgments and the expeditious termination of litigation requires that the Central Committee's motion to now replace its rejected Complaint with a new one (in other words, its motion for a do-over) should be denied.

B. The Central Committee's Proposed Amendment Does Not Even Correctly Reflect The Current Parties.

The Central Committee states that its proposed amendment "adds parties to reflect ... interventions that have occurred" in this case. (Doc.#137 at 2:1-4.).

But the Central Committee's proposal omits an existing party to this case – namely, the Washington State Grange, which was the lead party in the Supreme Court's decision in this case (*Washington State Grange v. Washington State Republican Party*, ___ U.S. ___,128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)).

C. The Central Committee's New Washington State Constitution Claim Is Not The Proper Subject For Federal Court Intervention.

This Court should deny the Central Committee's post-judgment demand to now add a Washington State Constitution claim under Article II, §37 of the Washington State Constitution for at least the following two reasons.

1. This (federal) Court's ruling would not resolve the Washington Constitutional law issue that the Central Committee claims it wants to now raise.

The Central Committee's proposed new Article II, §37 cause of action would require this federal Court to construe Article II, §37 of the Washington State Constitution. The Washington State Supreme Court, however, would not be bound by this Court's interpretation of the Washington State Constitution. *Nobel v. Dibble*, 119 Wash. 509, 511, 205 P. 1049 (1922) (upholding constitutionality of statute, despite federal court ruling in a suit between the same parties that statute was unconstitutional, because "the highest court of a state is not bound by the decisions of any federal court except the Supreme Court of the United States"); see also *Beezer v. City of Seattle*, 62 Wn.2d 569, 573, 383 P.2d 895 (1963), *rev'd on other grounds*, 376 U.S.

224 (1964) (holding federal court decisions, other than decisions from the U.S. Supreme Court, are not binding on the Washington State Supreme Court).[2]

In short, this Court's considering and ruling on the meaning and application of Article II, §37 of the Washington State Constitution might be an interesting academic exercise. But it would not resolve the Washington Constitutional law issue that the Central Committee claims it wants to now raise by way of a post-judgment amendment to its June 2005 Complaint.

2. The sound exercise of discretion requires this (federal) Court to decline to exercise the discretionary jurisdiction it would have to invoke to interject itself into the State Constitutional dispute that the Central Committee wants to now raise.

As this Court knows, 28 U.S.C. §1367 allows supplemental jurisdiction to resolve State law claims ***if*** the federal and State law claims "are so related . . . that they form part of the same case or controversy."

The State Constitutional law claim that the Central Committee now demands leave to inject into this case, however, is not in any substantial way related to any federal law claim in this case. To the contrary, that State Constitutional claim relates solely to the Central Committee's new thought that maybe the underlying Initiative Measure approved by Washington State voters pursuant to Article II, §1(a) of the Washington State Constitution might have violated Article II, §37 of the Washington State Constitution. The nexus threshold for supplemental jurisdiction to be allowed under 28 U.S.C. §1367 does not exist.

Moreover, even when supplemental jurisdiction does exist, this Court retains the discretion to decline jurisdiction based on any of the five factors listed in 28 U.S.C. §1367(c). This Court's exercise of that discretion should be based on "whether declining jurisdiction comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity." *O'Connor v. State of Nevada*, 27 F.3d 357, 363

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[2] *See also* Lopez v. Smiley, *375 F. Supp.2d 19, 25 (D. Conn. 2005) ("For this court to decide such a novel and significant, but as yet unresolved, issue of state law would amount to no more than a mere prediction of subsequent state law developments – a tentative answer which may be displaced tomorrow by a state adjudication") (internal quotation marks omitted).*

(9th Cir. 1994) (original marks and quotations omitted). And here, at least three of the factors listed in §1367(c) confirm that this Court should decline to exercise supplemental jurisdiction over the State Constitutional claim that the Central Committee wants to now inject.[3]

(a) This Court should decline to exercise supplemental jurisdiction because all of the Central Committee's federal claims have been dismissed.

The Ninth Circuit holds that "in the usual case in which federal-law claims are eliminated before trial, the balance of the factors of economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state-law claims." *O'Connor*, 27 F.3d at 363 (original marks and quotations omitted) (applying the factor under 28 U.S.C. §1367(c)(3) for declining supplemental jurisdiction when the district court has dismissed all claims over which it has original jurisdiction).

Here, as the two previously-filed motions to dismiss confirm (Doc. #133 and #134), the federal claims against the Top Two election law in the Central Committee's original Complaint must be dismissed based upon the rulings of the U.S. Supreme Court in this case. Accordingly, if this Court were to allow the Central Committee to amend, all that would exist for the Central Committee to actually litigate would be its newly injected Washington State Constitutional claim. This means that the Washington State Constitutional claim would "substantially predominate" the lawsuit. See 28 U.S.C. §1367(c)(2) (factor for declining supplemental jurisdiction when the State law claim would substantially predominate the federal claim over which the district court has original jurisdiction).

In short, judicial economy, convenience, fairness, and comity all weigh in favor of declining the supplemental jurisdiction that the Central Committee demands at this post-Supreme Court ruling stage of the case.

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[3] *Those three factors are (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, and (3) the district court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. §1367(c).*

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(b) This Court should also decline to exercise supplemental jurisdiction because the new claim involves a complex question of first impression harmonizing Article II, §1(a) and Article II, §37 of the Washington State Constitution.

This Court should also decline to exercise supplemental jurisdiction because the Central Committee's new Washington State Constitution claim "raises a novel or complex issue of State law". 28 U.S.C. §1367(c)(1).

Federal courts routinely follow 28 U.S.C. §1367(c)(1) to decline jurisdiction when a proposed State law claim raises "difficult questions of . . . [State] constitutional law",[4] raises "an issue of first impression",[5] or requires the court to address "ambiguity and novelty of state law questions".[6] Federal case law also holds that such "[j]urisdiction is . . . often declined to avoid construction of a state constitutional provision."[7] This federal case law holds that "needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."[8]

Thus, in *O'Connor*, the Ninth Circuit declined to exercise jurisdiction over a claim that a state election statute violated the Nevada State Constitution because it "is the very sort of 'novel' issue that usually will justify declining jurisdiction over the claim."[9]

Similarly, in *Carpenter*, this District Court declined jurisdiction over a state law claim because it "raise[d] complex state constitutional ... issues more appropriately determined by the state courts." *Carpenter v. City of Snohomish*, 2007 WL 1742161 at *8 (W.D. Wash. 2007) (Honorable John C. Coughenour).

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[4] *O'Connor, 27 F.3d at 363.*

[5] *Arpin v. Santa Clara Valley Trasport. Agency, 261 F.3d 912, 927 (9th Cir. 2001).*

[6] *Pacific Bell Tele. Co. v. City of Walnut Creek, 428 F. Supp.2d 1037, 1049 (N.D. Cal. 2006) (citation and quotation marks omitted) (declining to exercised jurisdiction over claim to resolve conflict between two state statutes).*

[7] *Lopez v. Smiley, 375 F.Supp.2d 19, 25 (D. Conn. 2005) (quotation marks omitted).*

[8] *Lopez, 375 F. Supp. at (original marks and quotations omitted).*

[9] *O'Connor, 27 F.3d at 363.*

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Likewise, in *Lopez*, the federal court denied plaintiff's motion to amend his complaint to add state constitutional claims because the proposed new claims involved complex and novel questions of state constitutional law.[10] The federal court explained that if it were to exercise supplemental jurisdiction, "it is difficult to think of a greater intrusion on state sovereignty"[11] The federal court thus ruled: "As a matter of comity, whether the acts in question violate . . . [the state] Constitution are best left to the province of . . . state court judges."[12]

Here, this federal court should similarly decline to exercise supplemental jurisdiction because the Central Committee's State Constitutional claim boils down to – and ultimately requires this federal court to answer – a complex question of first impression under the Washington State Constitution. That question is whether the Constitutional provision that the Central Committee's new claim invokes (Article II, §37 of the Washington State Constitution[13]) grants the Washington State legislature to power to defeat the Constitutional right of Washington State citizens to enact initiatives (under Article II, §1(a) of the Washington State Constitution[14]) by amending a statute that is subject to a pending Initiative Measure (here, the Washington elections statute) during the window period between when the Washington citizens submit that Initiative Measure for filing at the beginning of the year and when the November vote on that Initiative Measure is then held. Only the Washington State Supreme Court should answer that question resolving the interplay between various provisions of the Washington State Constitution.

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[10] *Lopez, 375 F. Supp. at 25.*

[11] *Lopez, 375 F. Supp. at 26 (citation omitted).*

[12] *Lopez, 375 F. Supp. at 26 (citation omitted).*

[13] *Article II, §37 requires that "the act revised or the section amended shall be set forth at full length" in the amendatory bill. This requirement applies to initiatives. Washington Citizen's Action v. State, 162 Wn.2d 142, 151, 171 P.3d 486 (2007).*

[14] *Article II, §1(a) reserves the right of initiative and referendum to the people.*

A review of the history of I-872 helps explain the Central Committee's new Article II, §37 argument more fully (and, frankly, explains why the long question stated in the above paragraph makes sense).

The Grange filed Initiative 872 with the Secretary of State in January 2004. That Initiative Measure established a Top Two election system. The text of that Initiative printed portions of Washington's election law (Title 29A RCW).

In November 2004, the people of Washington State overwhelming approved that Initiative Measure, voting to replace the election system they were voting in that year with the Top Two election system of I-872.

On April 1, 2004 (*after* I-872 had been approved by the Secretary of State but *before* the November 2004 vote on that Initiative), Washington's Governor signed portions of Engrossed House Bill 6453 into law after vetoing other portions of that bill. As eventually signed, the non-vetoed portions of that bill amended some sections in Title 29A RCW.[15]

Like the Republican Party's companion motion to amend (see Doc. #140 at 5:11-16), the Central Committee's new Article II, §37 claim is based on the argument that since the January 2004 text of Initiative 872 did not print the statutes as later amended by Engrossed House Bill 6453 in April 2004, the Washington voters' overwhelming enactment of that Initiative Measure is void under Article II, §37 of the Washington State Constitution.

It is not possible, of course, for an Initiative filed by citizens in January to print statutory language later changed by the Legislature in April. Therefore, if the Central Committee's interpretation of the Washington State Constitution is correct, Article II, §37 of the State Constitution allows the State Legislature to defeat State citizens' constitutional right to enact Initiatives under Article II, §1(c) of the State Constitution by simply amending some piece of the State statute that is subject to the pending Initiative Measure.

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[15] *The history of Engrossed House Bill 6453 is detailed in Washington State Grange v. Locke, 153 Wn.2d 475, 105 P.3d 9 (2005).*

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The Washington State Supreme Court has held, however, that "deliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate will not be looked upon favorably by this court." *Citizens for Financially Responsible Government v. City of Spokane*, 99 Wn.2d 339, 351, 662 P.3d 845 (1983) (underline added). The city council in that case had amended a taxing ordinance *after* a citizen filed a referendum to repeal the tax. 99 Wn.2d at 350. Similar to the Central Committee's proposed Article II, §37 claim in this case, the city's claim in that case was that "once an ordinance is amended, the issue of a referendum pertaining to the original ordinance is moot." 99 Wn.2d at 350. The Washington Supreme Court, however, rejected that argument, and affirmed the petitioner's right to file the referendum. 99 Wn.2d at 350-51.

Just as the Washington State Supreme Court protected the right to initiative and referendum from legislative intrusion in that *Citizens for Financially Responsible Government* case, the Washington State Supreme Court would also most likely protect the right to initiative from legislative intrusion in this case.

The Article II, §37 claim proposed by the Central Committee and Republican Party nonetheless is premised on the theory that the Washington Supreme Court would interpret its ruling in *Washington Citizens Action Of Washington v. State*, 162 Wn.2d 142 (2007), to mandate a finding that I-872 is unconstitutional under Article II, §37. See Doc. #140 at 5:11-16. But that significant extension of State Constitutional law is highly unlikely. Especially since the State Supreme Court itself expressly noted that its holding in that case only applied in the "rare circumstance[]" of a Washington Supreme Court decision that had intervened to change the statute at issue – i.e., a circumstance presenting "an amendatory initiative or bill impacted by an intervening determination that the law to be amended is unconstitutional." *Washington Citizens*, 162 Wn.2d at 162. To extend that ruling to allow the State Legislature to defeat a pending Initiative Measure by simply amending a statute printed in that Initiative before the November vote, would require the State Supreme Court to effectively overrule its

previously-noted holding in the *Citizens for Financially Responsible Government* case that ruled against "deliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate".

In short, the new State Constitutional law claim that the Central Committee wants to assert under Article II, §37 has no merit.

Moreover, even if it did somehow have some merit, the Central Committee cannot seriously dispute that the appropriate Court to resolve that Washington State Constitutional law claim is the Washington State courts – not this federal court. This federal court should therefore decline to entertain supplemental jurisdiction over the Central Committee's State Constitutional claim under Article II, §37, and accordingly deny the Central Committee's motion to amend.

IV. CONCLUSION

The fundamental purpose of the Civil Rules is "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. The United States Supreme Court's rulings in this case have rejected the Central Committee's legal challenges asserted in the Central Committee's original Complaint. This Court should deny the Central Committee's motion to now, 3½ years later, replace that rejected Complaint and start over with a new one. The Central Committee has had its day in court. Indeed, its day before our Nation's highest Court. And the Central Committee lost. It is time to put an end to this case. The Central Committee's December 2008 motion to amend should accordingly be denied.

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RESPECTFULLY SUBMITTED this 8th day of December, 2008.

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CERTIFICATE OF SERVICE

Thomas F. Ahearne states: I hereby certify that on December 8, 2008, 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. Grange's Opposition To The Democratic Central Committee's Motion To Amend Its ***June 2005*** Complaint; with this Declaration Of Service and attached Proposed Order.

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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 8th day of December, 2008.

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