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. CV05-0927-JCC

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO STRIKE

NOTE ON MOTION CALENDAR: OCTOBER 15, 2010

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I. INTRODUCTION

The State's Motion to Strike should be denied for the simple reason that the witnesses the State objects to were in fact timely disclosed. Moreover, the State has not been denied discovery of any of the witnesses – it has not asked for discovery or requested a meet and confer to discuss its need for discovery of these witnesses after the discovery deadline.[1] Indeed, the State's motion for Rule 37 sanctions violates the Court's rule that a meet and confer be held prior to making a sanctions motion. To the extent that the State seeks by its "motion to strike" to make a tardy objection to evidence about the 2010 election cycle submitted by the Republican Party in its summary judgment papers, the effort should be rejected. The State provides no excuse for filing a late motion and, in any event, a motion to exclude all evidence about the 2010 elections would not be well-founded. The State submitted evidence related to I-872's implementation and effects in 2010 in support of its own motion for summary judgment.[2]

While the motion is titled as a motion to strike, it seeks to exclude, prospectively, testimony by witnesses and evidence from being introduced at trial. In operation, the motion is a motion *in limine*, and no reply is permitted. *See* Local Rule 7(e)(5).

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[1] The availability of such remedies to ameliorate asserted prejudice if they had been requested weighs against an exclusion of evidence, even if the evidence were submitted late. *See Galentine v. Holland Am. Line - Westours, Inc.*, 333 F. Supp. 2d 991, 993-95 (W.D. Wash. 2004).

[2] *See, e.g.*, Blinn Decl. (Dkt. 241) at 4:9-15 (describing reductions in State voter education efforts during the 2010 elections); 7-8:17-6; Even Decl. (Dkt. 240) at 2:19-23 & Ex. D; Even Decl. (Dkt. 279-7), Ex. F (Esser Dep. Tr.) at 76:18-77:4, 104:16-105:23; Even Decl. (Dkt. 279-16), Ex. *I* (Pelz Dep. Tr.) at 23:6-25:17, 55:5-11; and Even Decl. (Dkt. 279-18), Ex. *I*-2 (Pelz Dep. Ex. 2). The State's motion for summary judgment relies, in part, on 2010 actions related to implementation of I-872. *See* Mot. (Dkt. 239) at 15 nn.6-7, 17:20-18:4.

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II. DISCUSSION

A. The State's ongoing implementation of I-872 is *the* issue before the Court, and the plaintiffs must be able to present evidence of the State's current implementation.

In its Order dated August 20, 2009, the Court noted that it is the constitutionality of the State's current implementation that is the issue in this case. *See* Order (Dkt. 184) at 20:4-7, 16-17, 20-21 & 21:10-12. The State now seeks to foreclose all evidence about its actual current implementation and practices – the 2010 primary and general election campaigns – on the vague and arbitrary grounds that it is impractical to present evidence about the primary election held on August 17, three months before trial, or evidence about the ballots used in the November general election, which will have been printed months before trial. The State's across-the-board request to hide its current implementation of the Top Two primary from the Court should be rejected. The Court has already received evidence about the 2010 elections in connection with the parties' summary judgment motions and the State made no timely motion to strike in its reply, as required by Local Rule 7(g). If the State has valid objections to further specific pieces of evidence that are presented to the Court, those objections should be dealt with when the evidence and foundation is before the Court. Foreclosing all evidence of how the State is currently implementing I-872 during the 2010 primary and general elections would prejudice the plaintiffs by preventing them from pursuing their as-applied challenge. Finally, the State's motion to exclude all evidence of the 2010 election cycle should be rejected pursuant to Local Rule 7(d)(4) as an improper serial motion *in limine* without any prior meet and confer on the subject.

That evidence of the State's ongoing implementation will be unhelpful to the State is no grounds to exclude it. For example, the State's 2010 online voters' guide omits the "disclaimer"

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the State relies on to defend its current implementation of I-872.[3] Sample ballots produced and distributed as part of the State's 2010 implementation lack the "disclaimer" language which the State asserts would avoid confusion about the relationship between candidates and the Republican Party. *See, e.g.*, Hansen Decl. in Opp'n to State Mot. to Strike, Ex. 1 (Kittitas County 2010 primary sample ballot). Other sample ballots produced as part of the State's implementation show that federal and state legislative offices are now "non-partisan," omitting both the "party preference" language and the "disclaimer." *See, e.g.*, Hansen Decl., Ex. 2 (Snohomish County "Auditor – Complete Ballot" retrieved October 11, 2010 from http://web5.co.snohomish.wa.us/auditorapps/audprecinct/Aud Prec04-CompleteBallot.asp).

B. Witnesses identified because of the State's 2010 implementation of the August 2010 primary were timely disclosed.

The State seeks to strike Lori Sotelo and Mary Jane Aurdal-Olson as witnesses because they have "official connections to the Republican Party" and were identified "late." Ms. Sotelo was identified as a witness in the Republican Party's Reply in Support of its Motion for Summary Judgment (filed on September 17) because on September 16, 2010, the State election administrators sent an e-mail advising that they would not be counting any votes cast for precinct committee officer ("PCO") elections where there was a single declared write-in candidate. *See* Sotelo Decl. (Dkt. 282.1), Ex. 1. Previously, the State had advised that it would issue Certificates of Election to the top vote-getter in the PCO elections and leave it to the parties to apply their rules (which reflected the 10% of party vote requirement under RCW 29A.80.051). *See* White Decl. (Dkt. 269.12 at 33), Ex. 197. The decision to simply not count votes in some

[3] *Compare* Mot. (Dkt. 239) at 7:3-9:25 *with* http://wei.secstate.wa.gov/osos/en/PreviousElections/2010/general/

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PCO races renders the State's representation that the Republican Party will be able to apply its rules in determining whom to seat illusory. The designation of Ms. Sotelo in a separate, additional and formal disclosure was provided to the State four days after the communication from the State's election officials that triggered the need for her testimony.

Ms. Aurdal-Olson was identified as a witness because the State's 2010 implementation of I-872 resulted in non-Republicans being elected as Island County PCOs for the Republican Party. Island County did not certify its 2010 election results for precinct committee officers until September 1, 2010, *see* Hansen Decl., Ex. 3, and thus it would not have been possible for the Republican Party to disclose Ms. Aurdal-Olson as a witness prior to that date. She was disclosed shortly after problems in the 2010 election of PCOs in Island County became apparent.

C. Professor Orbell's expert testimony was timely disclosed.

The State received Professor Orbell's written report rebutting Professor Donovan's report on September 13, 2010. Professor Donovan's report was provided August 12, 2010. *See* Zipp Decl., Ex. B. Under Fed. R. Civ. P. 26(a)(2)(C)(ii), the Republican Party was required to disclose Professor Orbell's report within 30 days after receiving Professor Donovan's report, so the due date for the disclosure was Saturday, September 11, 2010. Civil Rule 6(a)(3) extended the due date to Monday, September 13, 2010, and thus the disclosure of Professor Orbell's testimony was timely. The disclosure included his written report, his opinions, the information upon which they were based, and his qualifications. Professor Orbell has not previously testified as an expert witness, so no list of cases was required. Professor Orbell's declaration stated the compensation arrangement for his declaration.

Pages/OVG_20101102.aspx?ShowAll=True&ElectionID=37#ososTop (last visited October 11, 2010).

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Professor Orbell's report and testimony is simply a matter of rebuttal of Professor Donovan's methodological criticisms and was timely under Civil Rule 26(a)(2)(C)(ii). *See* Orbell Decl. (Dkt. 261 & 261.1), ¶¶ 1-30 & Ex. 1. There is no particular form of disclosure that is required under the rule, as evidenced by the State's e-mail disclosure of Professor Donovan's report on August 12, 2010. *See* Zipp Decl., Ex. B. The September 16, 2010 supplemental disclosure of witnesses, including a second copy of Professor Orbell's report, was made to comply with the Republican Party's obligation to supplement disclosures and responses under Civil Rule 26(e). It does not render the earlier disclosure untimely.

D. Disclosure of the reporters for purposes of rebuttal was timely.

In May 2010, the Republican Party provided to the State a proposed stipulation regarding admissibility of exhibits. *See* Zipp Decl, Ex. *I.* The exhibits include a number of newspaper articles. As shown in the records herein, no stipulation has been filed regarding admissibility of documents. The reporters were identified when it became apparent that a stipulation might not be ever be finalized.

Disclosure of the reporters is not necessary under Civil Rule 26(a)(3)(A) if their testimony will be used solely for impeachment. The reporters' testimony at trial will be unnecessary unless the State witnesses attempt to repudiate their previous statements, which have now been admitted as evidence as part of the Republican Response to the Defendants' Motion for Summary Judgment.

E. The State's motion should be denied for failure to comply with the "meet and confer" duty under Civil Rule 37 and Local Rule 37(a)(1)(A).

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The State's motion contains no certification that it attempted to meet and confer regarding the adequacy of any of the disclosures as required under Local Rule 37(a)(1)(A) ("A good faith effort to confer with a party or person not making a disclosure or discovery requires a face-to-face meeting or a telephone conference."). In particular, the State did not object or seek clarification regarding the expected testimony of Dave Ammons and Professor Donovan on August 31, 2010. Instead, the State waited almost a month and filed this motion. It would have been a simple matter to pick up the telephone and resolve the issue. An Amended Second Supplemental Designation of Witnesses has been served upon the State. *See* Hansen Decl., ¶ 5.

The timing of the designation of Mr. Ammons coincided with the filing of the Republican Party's Motion for Summary Judgment, which relied on a series of blog articles by Mr. Ammons.[4] *See* White Decl. (Dkt. 251), ¶¶ 8-10 & 15. Mr. Ammons was formally designated as a witness eleven days later.

Professor Donovan was added to the Republican Party's witness list based on his deposition testimony and reports. Professor Donovan was added as a witness on August 31, 2010, the day after his deposition. The State has introduced Professor Donovan's deposition testimony, his resume and his reports in full, as part of its reply brief on its motion for summary judgment. *See* Even Decl. (Dkt. 279.2-279.5), Exs. A-D.

More broadly, however, the fundamental question is whether the State has been prejudiced by any asserted defect in the disclosure of Messrs. Ammons and Donovan. Mr.

[4] The State appended copies of other documents referencing Mr. Ammons. *See* Zipp Decl., Ex. *I*. The blog articles were retrieved on August 20, 2010 and prompted Mr. Ammons' designation because of their extensive discussion of the replacement process under the State Constitution for "partisan offices" and the continuing connection between candidates elected on the ballot and the political parties after I-872's implementation.

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Ammons is a high-ranking official in the Office of the Secretary of State and Professor Donovan is the State's expert. Both witnesses are readily available to the State. The lack of prejudice, coupled with the State's failure to comply with the meet and confer obligation, and month delay in objecting to the disclosure weighs against striking these witnesses. *See Galentine v. Holland Am. Line - Westours, Inc.*, 333 F. Supp. 2d 991, 993-95 (W.D. Wash. 2004).

III. CONCLUSION

The State's motion to strike witnesses should be denied. The Republican Party's disclosure of all witnesses, except for Mr. Ammons and Professor Donovan as fact witnesses, complied with the Party's obligations under the Civil Rules. The Court should not reward the State for failing to meet and confer, especially where the witnesses it objects to are within its control.

DATED this 11th day of October, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 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.

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