Hon. 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,

vs.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-JCC

MOTION FOR LEAVE TO FILE SUPPLEMENTAL AND AMENDED COMPLAINT

NOTED ON MOTION CALENDAR: DECEMBER 12, 2008

I. INTRODUCTION

During the time this Court stayed its proceedings pending the State's appeal, the State has implemented the "modified blanket primary," adopting emergency regulations and conducting a primary election under I-872. The State has further implemented I-872 by adopting political advertising regulations equating party affiliation and candidates' expression

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of party preference. During the same period of time, the Washington Supreme Court issued a seminal decision regarding Article II, Section 37 of the Washington State Constitution which requires that legislative enactments reflect accurately all statutory changes. *See Washington Citizens Action of Washington v. State*, 162 Wn. 2d 142, 171 P3d 486 (2007). The Washington Supreme Court invalidated Initiative 747 on the grounds that the initiative did not accurately reproduce the law it was amending and because voters could have been misled by the initiative. In light of the Ninth Circuit's ruling on the implied repeal of numerous provisions of Washington election law not reproduced in I-872, Initiative 872 is similarly invalid under Washington's constitution.

Plaintiffs seek leave to supplement their complaint to address actions that have occurred since the original complaint was filed and have bearing on the claims advanced in this case. Plaintiffs seek to amend their complaint by adding a claim that Initiative 872 violates Article II, Section 37 of the Washington State Constitution. Plaintiffs' supplemental and amended complaint also reflects the stipulated dismissal of the county auditor defendants (and substitution of the State as defendant) and additional allegations regarding plaintiffs' as-applied challenge.

The Ninth Circuit standard for amendment of a complaint is one of "extreme liberality." The defendants will not be prejudiced in their preparation of their case by this amendment. The Court has already received briefing and heard argument on I-872's implied repeal of other parts of Washington's primary election system.

II. FACTS

This action was filed on May 19, 2005 challenging the constitutionality of Initiative 872, both facially and based on the defendants' conduct. At the Court's request, on June 17, 2005 the Republican, Democratic, and Libertarian Parties filed motions for summary judgment limited to facial challenges to I-872. The State and Washington State Grange filed cross-motions for summary judgment. The motions and cross-motions addressed a set of stipulated legal issues. (Dkt. 49 - 82)

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As part of its defense of the initiative, the State proffered its implementation of I-872, noting that "[t]o implement the Initiative, the Secretary of State adopted emergency rules on May 18, 2005." State's Response at 9:5-7. A copy of the implementation rules was provided as Exhibit C to the Declaration of James K. Pharris (Dkt. 66) (hereinafter "Pharris Decl.").

These implementation rules provided a new form of declaration of candidacy. *See* Pharris Decl., Ex. C, OTS-8074.3[4]. The declaration of candidacy for partisan office asked the candidate to check one of two options:

"my party preference is _____"

or

"I am an independent candidate."

The form noted that "[t]he party preference will be listed on the ballot exactly as provided unless limited space necessitates abbreviation." *Id.*

The State proposed to continue using the same ballot forms as were used prior to I-872, except that WAC 434-230-170 (the regulation specifying the ballot form) was amended to delete the following language: "together with political party designation certified by the secretary of state as provided in RCW 29A.36.010 or the word 'non-partisan' or 'NP' as applicable." In lieu of that language new language was added to the regulation stating that:

> If the position is a partisan position, the party preference or independent status of each candidate *shall be listed next to the candidate*. The party preference *must be listed exactly as provided by the candidate on the declaration of candidacy* unless limited space on the ballot necessitates abbreviation or the party description is, in the opinion of the county auditor, obscene.

WAC 434-230-170 (as amended; emphasis added).

This Court granted the political parties' motions for summary judgment based on a facial challenge to I-872, noting that it had reserved issues related to the political parties' as applied challenges to I-872. *See* Order at 13, n.13 (Dkt. 87). The Court entered a permanent injunction enjoining the implementation or conduct of elections under I-872 and separately

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enjoining the enforcement or implementation of RCW 29A.08.030 (the filing statute created by I-872).

After the State and Grange appealed the Court's order, the State repealed the emergency regulations implementing I-872. The Ninth Circuit upheld the Court, in part because the form of the ballot to be used in implementing I-872 would be the same as used under the blanket primary. The State and Grange then petitioned for a writ of *certioriari* from the United States Supreme Court, which was granted on February 26, 2007. In its reply brief on the merits before the Supreme Court, the Grange proposed for the first time that the State might use a new form of ballot rather than that specified by the State in its regulations adopted on May 18, 2005. The Supreme Court reversed the Ninth Circuit's affirmance of this Court's summary judgment, holding in part that the facial challenge to the constitutionality of I-872 depended upon the threat of confusion between the Party's actual candidates and candidates merely "preferring" the Republican Party. The Court concluded it had no evidentiary basis to evaluate the risk of confusion in the context of a facial challenge if there was no implementation of I-872 to evaluate.

The Supreme Court's decision did not grant summary judgment to the State or Grange, did not declare (as requested by the State in its answer) that "the conduct of elections under [Washington's election] laws, do[es] not deprive the Plaintiffs of any legally cognizable constitutional or other rights protected by either the Constitution and laws of the United States or of the State of Washington," did not vacate or modify this Court's injunction, and on its face did not fully resolve the case. The decision only resolved the facial challenge. The Supreme Court expressly stated that it was not reaching all issues, only those issues encompassed by the

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question on which it granted certiorari. *See Washington State Grange v. Washington Republican Party*, 128 S. Ct. 1184, 1195 n.11 (2008).

Upon learning of the Supreme Court's opinion, the Secretary of State issued new draft regulations which it proposed to adopt using emergency powers. *See* White Decl. ¶4 & Exs. 3 & 7 (2008 regulations and e-mail and from Assistant Director of Elections Katie Blinn providing new draft regulations and Declaration of Candidacy). These regulations changed the form of the declaration of candidacy from what the State had submitted to this Court in 2005 with respect to the manner in which I-872 would be implemented.[1]

On November 8, 2007, the Washington Supreme Court issued its decision in *Washington Citizens Action of Washington v. State*, 162 Wn. 2d 142, 171 P3d 486 (2007). The Court held that Initiative 747 violated Article II, Section 37 of the state constitution because at the time of the *vote* on the initiative, the text of the initiative did not accurately set forth the law it sought to amend. On April 24, 2008, the State promulgated its first installment of new regulations implementing I-872, which demonstrate that the State has little interest in

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[1] For example, these rules change the proposed ballot design submitted to the Court in 2005 while adding additional explanatory verbiage. *Compare* WAC 434-230-170 as reproduced in Pharris Decl., Ex. C (stating "party preference or independent status of each candidate shall be listed next to the candidate. The party preference must be listed exactly as provided by the candidate on the declaration of candidacy unless limited space on the ballot necessitates abbreviation . . . .") *with* proposed WAC 434-230-045(4)(a) as reproduced in White Decl. ¶ 4 & Ex. 3 at 11 ("If the candidate stated his or her preference for a political party on the declaration of candidacy, that preference shall be printed below the candidate's name, with parentheses and the first letter of each word capitalized, as shown in the following example:

JOHN SMITH
(Prefers Example Party)").

While WAC 434-215-015 presented to this Court stated that "[a] candidate for partisan office who does not provide a political party preference is deemed to be an independent candidate;" the Secretary of State's new proposed WAC 434-230-045(4)(b) eliminates independent status completely: "If the candidate did not state his or her preference for a political party, that information shall be printed below the candidate's name, with parentheses and the first letter of each word capitalized, as shown in the following example:

JOHN SMITH
(States No Party Preference)."

See McDonald Decl. ¶ 4 & Ex. 3 at 11.

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respecting constitutionally-protected rights or even the express language of I-872.[2]

The State, through additional emergency regulations promulgated today, selects among later-enacted statutes, giving effect to some provisions, and disregarding others. *See, e.g.*, White Decl., Exs. 3 & 5 (WAC 434-208-110 gives effect to later law when dates conflict, but the regulations fail to give effect to 2006 Sess. Law, Ch. 344 requiring "nominating primary" in August and authorizing minor parties and independents to nominate candidates directly to the general election). The regulations disregard later statutes that are inconsistent with its planned implementation of I-872.

The regulations redefine the statutory "office" of Precinct Committee Officer ("PCO") as a "position," *see* White Decl., Ex. 1 (WAC 434-215-020); RCW 29A.80.051, ignoring the constitutional duties of PCOs under Art. II, Sec. 15 of the State Constitution to fill vacancies in offices held by party candidates. The State's rule-making order states that "this change in primary election systems necessitates a change in the declarations of candidacy." White Decl. ¶ 4, Ex, 3, p. 1. Yet, the State's transmittal of the regulations redefining PCO states that "[t]hese rules do not address the election of [PCOs] because that position is not subject to I-872." White Decl. ¶ 2 & Ex. 7 at 1. I-872 made no reference to RCW 29A.80.051 or PCOs. The State further appears to eliminate the office of PCO from the primary ballot. *See* White Decl., Ex. 3 (WAC 434-230-025). The State either has discovered yet another part of Washington law that I-872 impliedly amended, or is amending legislation through administrative regulations.[3] Last year, Washington specified the form of the primary election

[2] As Chief Justice Roberts noted, "the history of the challenged law suggests the State is not particularly interested in devising ballots that meet . . . constitutional requirements." 128 S. Ct. at 1197 (Roberts, C.J., concurring).

[3] Because plaintiffs' as-applied challenge to I-872 was not at issue on appeal, it is collateral to the appeal and an amendment to the complaint regarding that issue is within the retained jurisdiction of this Court. *See Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97-98 (3rd Cir. 1988).

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ballot. *See* White Decl., Ex. 4 (RCW 29A.04.008 (as amended by Ch. 38, Laws of 2007)). The State's application of I-872 ignores later-enacted statutes that provide protection for the right to associate.

On October 2, 2008, the Ninth Circuit issued an order, directing dismissal of Plaintiffs' facial challenge based on the decision of the United States Supreme Court, and the equal protection claims based on the ground that I-872 impliedly repealed the minor party nomination and convention statutes. The Ninth Circuit issued its mandate on October 24, 2008.

No discovery has occurred.

III. ISSUES

Where events that occur after filing of a complaint relate to the allegations in a complaint and provide additional support for the relief requested, should the Court permit the Plaintiff to supplement the complaint?

Whether, after the U.S. Supreme Court's decision on the facial challenge and after the State Supreme Court's decision that an initiative's compliance with Article II, Section 37 of the State Constitution is determined at the time of voting, the plaintiffs may amend their complaint for the first time to add allegations regarding the operation of I-872 and state constitutional violation as an additional basis for the invalidity of I-872, before any discovery or substantial trial preparation has commenced?

IV. ARGUMENT

Leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "This policy is 'to be applied **with extreme liberality**.'" *Eminence Capital*

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LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (emphasis added) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)). Leave to amend should be granted absent bad faith, undue prejudice, protracted delay of the trial date, or futility of the proposed amendments. *See Lazuran v. Kemp*, 142 F.R.D. 466, 468 (W.D. Wash. 1991) (citing *Loehr v. Ventura County Cmty. Coll. Dist.*, 743 F.2d 1310, 1319 (9th Cir. 1984)). These factors are not of equal weight, and "only where prejudice is shown or the movant acts in bad faith are courts protecting the judicial system or other litigants when they deny leave to amend a pleading." *United States v. Webb*, 655 F.2d 977, 978 (9th Cir. 1981) (citing *Howey v. United States*, 481 F.2d 1187, 1991 (9th Cir. 1973)). None of these narrow exceptions apply. The proposed amendment should be granted.

First, plaintiffs' amendment is presented in good faith. Plaintiffs have not previously amended the complaint. *Cf. Eminence*, 316 F.3d at 1051-52 (number of previous amendments is a factor under Rule 15 standard). The bases for the amendment are an intervening decision of Washington's Supreme Court, and the U.S. Supreme Court's decision on the facial challenge to I-872. The Court has already received briefing and argument on I-872's impact on existing statutes that were not addressed in the text of the initiative.

Second, the proposed amendments will not delay this case or result in prejudice. Amendment will not impact a trial date, because none has yet been set. The Court's August 12, 2005, order staying proceedings preceded the joint status report that had been set for August 15, 2005.

The amendment is not futile. There has always been an "as-applied" challenge to I-872 before this Court.

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> The Court has previously directed the parties to limit their briefs to Plaintiffs' facial challenge of Initiative 872. The Court reserved issues related to Plaintiffs' as applied challenge.

WSRP v. Logan, 377 F. Supp. 2d 907, 916 n.3 (2005). When U.S. Supreme Court issued its decision, the State's Counsel recognized that the decision did not address plaintiffs' as-applied challenge and that "[the State was] not done, but we get to actually run it and see what happens." White Decl., Ex. 8. Furthermore, the 2007 decision by Washington's Supreme Court invalidating another initiative whose text did not accurately reflect the statutes amended demonstrates the claim's validity. Facts related to the claim appear in the original complaint's Equal Protection claim (asserting that the statues remained in effect because they had not been repealed) and in the complaint of Intervener Libertarian Party. *See* Libertarian Complaint at 7, ¶ 16 (Dkt. 28). The U.S. Supreme Court decision expressly recognized that I-872 may be unconstitutional when applied.

When considering an amendment to pleadings, "a court must be guided by the underlying purpose of Rule 15 – to facilitate decision on the merits rather than on the pleadings or technicalities." *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987) (quoting *Webb*, 655 F.2d at 979)). These purposes, combined with the absence of any undue delay, prejudice or bad faith, support amendment here.

Rule 15(d) provides that parties may upon reasonable notice and on just terms supplement pleadings to set out any transaction, occurrence or event that happened after the date of the pleading to be supplemented. The State's changed implementation after the issuance of this Court's injunction is relevant to the claims of unconstitutionality of I-872 as applied.

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Justice will be best served if this Court reviews all of the issues related to the as applied challenges to the Initiative. With respect to the Party's new claims under the Washington Constitution, the State has already raised the issue whether I-872 is constitutional under the State Constitution and federal law mandates that district courts "shall have supplemental jurisdiction" precisely to fully resolve "other claims that are so related to claim in the action … that they form part of the same case or controversy." 28 U.S.C. § 1367(a). The express purpose of this mandatory jurisdiction is to advance "the impulse [of the Federal Rules] toward entertaining the broadest possible scope of action consistent with fairness to the parties," and thus "joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966).[1] It is too plain for argument that the state law and federal law claims challenging the constitutionality of I-872 in the Amended Complaint "derive from a common nucleus of operative fact" such that a party "would ordinarily be expected to try them all in one judicial proceeding." *Id.* at 725.

Plaintiffs respectfully request that the Court grant their Motion for Leave to File Supplemental and Amended Complaint and allow filing of the Amended Complaint, attached as **Attachment A.** A mark-up version of the Amended Complaint, showing changes, is attached as **Attachment B**.

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[1] Although district courts have discretion to decline to exercise supplemental jurisdiction over state law claims based upon one of the conditions listed in § 1367(c), this decision "is informed by the *Gibbs* values 'of economy, convenience, fairness, and comity.'" *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997).

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DATED this 3rd day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on December ___, 2008, 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 the following:

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