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, et al.,

Defendant Intervenors.

NO. CV05-0927

REPLY IN SUPPORT OF WASHINGTON STATE REPUBLICAN PARTY MOTION TO SUPPLEMENT AND AMEND COMPLAINT

In 2005, the State began to implement I-872. The Washington State Republican Party challenged the statute. This Court enjoined the statute on the grounds that it was facially unconstitutional under[dtm1] the First Amendment, having previously ordered the as-applied

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challenges to be reserved. Following this Court's injunction, the State abandoned the implementation it had adopted by emergency rule in May 2005. At the reply brief stage of proceedings before the Supreme Court, the defendants introduced possible alternative implementations of the ballot under I-872. The Supreme Court reversed the lower courts on the question of facial invalidity.

In 2008, the State proceeded with a new implementation of I-872. *See* White Supp. Decl. in Opp'n to Mot. to Dismiss, Ex. 2. The State's official records contradict its assertion that the 2008 implementation is unrelated to the Complaint's as applied challenge. The State's assertion that some specific elements of its 2008 implementation (*e.g.*, election of Republican precinct committee officers by non-Republicans in contravention of *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277 (9th Cir. 2003) and adoption of regulations that equated party affiliation and party preference) were not expressly alleged in the original complaint is true, but beside the point. Under Fed. R. Civ. P. 15(d), the Court may permit the Complaint to be supplemented by setting forth events that occurred after the Complaint was filed. The Complaint objected to the I-872 implementation as applied in 2005. The State's change to a different, but still unconstitutional, implementation of I-872 should not enable it to avoid Court review. Otherwise, once a new complaint is filed, the State could again shift its implementation and argue that any challenge to that requires yet another new action.[1]

The 2008 implementation presents another unconstitutional application of I-872, not a new claim. The State's 2005 implementing regulations stated as their purpose the

[1] The State and Grange also both object to the supplemented and amended complaint not naming the Grange. The complaint does not name the Intervenor-Defendant Grange because the Grange could neither grant nor deny the relief sought in the complaint. *See Democratic Party of Wash. v. Reed*, 388 F.3d 1281, 1288 (9th Cir. 2004).

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"implementation of a new top-two primary election system pursuant to Ch. 2, Laws of 2005." Pharris Decl. in Supp. of State's Resp. to Mot. for Summ. J., Ex. C (Dkt. 66). The purpose of the State's 2008 proposed regulations was to "implement Initiative 872 (top two primary), [*sic*] for partisan public office, [*sic*] and address elections for political party precinct committee officers and president and vice-president in the context of Initiative 872." Hansen Decl. in Supp. of Mot. to Supplement and Amend Complaint, Ex. 1. The purpose of the final regulations adopted by the Secretary of State is to "implement Initiative 872 (top two primary) for partisan public office, [*sic*] and implement the elections for precinct committee officers and president and vice-president in the context of Initiative 872." Hansen Decl. in Supp. of Mot. to Supplement and Amend Complaint, Ex. 2. In June 2008, the State adopted an emergency regulation equating "party affiliation" with candidate party preferences. This was done as part of the State's broader implementation of I-872. *See* Hansen Decl. in Supp. of Mot. to Supplement and Amend, Ex. 3. I-872 is part and parcel of the State's system for carrying out partisan elections. Its burdens on First Amendment and other rights are to be analyzed in the context of that entire system. *See Clingman v. Beaver*, 544 US 581, 607 (2005) (O'Connor, J., concurring).

Under Fed. R. Civ. P. 15(d), motions to add post-complaint allegations "should be granted 'unless undue prejudice to the opposing party will result.'" *La Salvia v. United Dairymen*, 804 F. 2d 1113, 1119 (9th Cir. 1986). The State identifies no prejudice that would result from supplementation or amendment.[2] No judicial economy is served by the

[2] The claim that the constitutional challenge "as applied" has been ruled upon ignores the express language of this Court's Order, the limited nature of Supreme Court review and its opinion, and the mandate from the Ninth Circuit. *See* Order at 13, n.13 (Dkt. 87); Supreme Court Rule 14.1(a); Mandate and Order (Dkt. 129). The Ninth Circuit did *not* direct dismissal of the reserved as applied First Amendment challenges. The Supreme

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defendants' invitation to deny amendment, coupled with a re-filing. Such a course would also set the stage for later arguments that preclusion doctrines bar a future complaint.[3] The State's 2008 implementation could not have been part of the 2005 complaint. Granting the Party's motion would satisfy Rule 15(d)'s purpose of promoting "as complete an adjudication of the dispute between the parties as is possible." *Id*. (quoting C.A. WRIGHT & A.R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1504, at 536 (1971)). [dtm2]

The State's assertion that as-applied challenges are foreign to the original action is contradicted by the affirmative defense in its Answer that the State's "conduct" of the primary was constitutional under the Washington Constitution. *See* State's Answer at 8:9-12 (Dkt. 23). The State's affirmative defense introduced the subject matter of state law before this Court. The State further invoked this Court's resolution of state law issues by arguing that I-872 impliedly repealed minor party convention rights under state law principles. In its current objection to this Court's consideration of a post-complaint decision of Washington's Supreme Court and the consequences under state law of the implied repeal of minor party convention rights, the State seeks to have its affirmative relief without full consideration of the applicable law. The State has never abandoned its affirmative defense. The Party's requested supplemental allegations to reflect later events is directly relevant to the affirmative relief the State has asked of this Court.

The State does not contest that Washington's legislature readopted the minor party

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Court recognized that its disposition of this case related only to the facial challenge before it. *See Crawford v. Marion County Election Bd*., 128 S. Ct. 1610, 1621-22 (2008).

[3] The Grange has previously asserted that preclusion doctrines barred consideration of the challenge to the State's earlier version of the blanket primary. *See Democratic Party of Wash. v. Reed* , 343 F.3d 1198, 1202 (2003).

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convention statutes *after* the Complaint was filed and *after* this Court ruled on the question of I-872's implied repeal of the prior version of those statutes. This Court reluctantly ruled that the minor party statutes had been repealed *sub silentio*. *See* Order at 33, n.25 (Dkt. 87). The 2006 re-enactment of those statutes is a post-Complaint event that raises again the Party's Equal Protection claim and relates to the question whether the State is implementing I-872 in accordance with the First Amendment. The Court has already ruled on the effect of a later inconsistent enactment under Washington law. The Equal Protection claim in the Supplemental and Amended Complaint involves the same state law principles.

The Grange suggests that unreasonable delay is a factor that warrants denial of the motion to supplement and amend. There is no unreasonable delay. The Court stayed proceedings in August 2005 following entry of the permanent injunction. The mandate from the Ninth Circuit did not issue until October 24, 2008, less than two weeks before the quadrennial election. Resolution of the defendants' appeal accounted for most of the time that the Grange now contends is unreasonable. The Republican Party's as applied claims were deferred by this Court.[4] The Republican Party should be granted its day in Court on those claims and events that occurred while the proceedings were stayed. Although the Supreme Court concluded that the finding of facial invalidity threatened to short circuit the "democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution," that language should not be read to permit the defendants to short circuit the judiciary's role in reviewing the implementation to assure that it is, in fact, consistent with the Constitution. *See Washington State Grange v.*

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Washington State Republican Party, 128 S. Ct. 1184, 1191 (2008). The motion to supplement and amend the complaint should be granted.

DATED this 12th day of December, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 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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[4] The State's representation that only the challenge to the "Montana primary" filing statute was reserved, State Resp. at 5:15 (Dkt. 152), is simply incorrect. *See* Order at 13, n.13 (Dkt. 87) ("The Court reserved issues related to Plaintiffs' as applied challenge.").