The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON STATE 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-JCC STATE INTERVENORS' OPPOSITION TO LIBERTARIAN PARTY'S MOTION TO FILE FIRST AMENDED COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT AND OTHER RELIEF

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I. INTRODUCTION

Defendant-Intervenors State of Washington, Secretary of State Sam Reed, and Attorney General Rob McKenna ("the State"), oppose the Libertarian Party's Motion To File First Amended Complaint In Intervention For Declaratory Judgment And Other Relief. The State opposes the Libertarians' motion for substantially the same reasons that the State has moved to strike substantial portions of the amended complaints filed by the Democratic and Republican Parties (docket numbers 211 and 213).

The Libertarians' Amended Complaint continues to assert arguments that have already been rejected by the United States Supreme Court, the Ninth Circuit, or by this Court. The amended complaint continues to seek the very relief that the United States Supreme Court and this Court have already ruled is unavailable to plaintiffs, that of striking down Initiative 872 (I-872) in its entirety. The amended complaint also fails to comply with this Court's Order that an amended complaint identify, as its requested relief, changes to the manner in which the State implements I-872 that will remedy the political parties' specific as-applied challenge. Order at 20-21 (Aug. 20, 2009; Dkt. No. 184) (Order).

II. ARGUMENT

A. Any Amended Complaint Must Be Limited To The Narrow Issues Remaining In This Case, And Must Seek Specific Relief

This Court previously granted the Democratic and Republican Party plaintiffs leave to amend their complaints to allege a limited range of matters, reflecting the narrower range of issues that remain in this case after the United States Supreme Court upheld the facial constitutionality of I-872 in 2008. Order at 20-21; *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)

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(upholding I-872 from facial challenge). The Libertarians' amended complaint is inconsistent with this Court's ruling governing an amended pleading. The Libertarians should be held to the same standards as other political parties, and accordingly this Court should reject their proposed amended complaint.

Initiative 872 established a system for electing public officers, under which the primary election is not used to choose the nominees of any political parties. *Grange*, 128 S. Ct. at 1192. Instead, "[t]he top two candidates from the primary election proceed to the general election regardless of their party preferences." *Id.* The Supreme Court upheld the constitutionality of I-872 from facial challenge, leaving only the possibility that parties could continue to challenge particular aspects of I-872's implementation. *Id.* at 1194 ("We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion.").

The issues have further narrowed upon remand, as first the Ninth Circuit, and then this Court, ruled that various arguments offered by the political parties either had been resolved by the Supreme Court or otherwise lacked merit. *Washington State Republican Party v. Washington*, 545 F.3d 1125, 1126 (9th Cir. 2008) (instructing this Court to dismiss "all facial associational rights claims", "all equal protection claims", and "all claims that Initiative 872 imposes illegal qualifications for federal office, sets illegal timing of federal elections, or imposes discriminatory campaign finance rules".). This Court further narrowed the range of remaining issues, rejecting the political parties' arguments that I-872 impermissibly restricts ballot access. Order at 15 ("The Supreme Court opinions in this case and in [*California Democratic Party v. Jones*, 530 U.S. 567 (2000)] foreclose Plaintiffs'

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ballot-access claims."). This Court also rejected the political parties' trademark claims. Order at 18 ("The Court finds that Plaintiffs failed to properly allege trademark violations under federal or state law and that any claims they have subsequently argued are without merit."). This Court additionally rejected the political parties' proposal to inject into this case "novel" state constitutional claims concerning the manner of amending laws. Order at 21 ("Finally, the Court denies the Republican and Democratic Parties' request to add novel challenges to I-872's enactment based on article II, section 37 of the Washington constitution.").

This Court limited the scope of amended complaints only to provisions that "clarify [the parties'] specific challenges to the current implementation" of I-872. Order at 20. "Allowing such amendment will identify the relevant issues moving forward so as to focus and limit the scope of the litigation regarding the as-applied First Amendment claims." *Id.* To that end, this Court authorized the political parties to:

> submit evidence to demonstrate that (1) the State's actual implementation of I-872 (including its interaction with the state's campaign disclosure laws) leads to voter confusion, and (2) that this resulting confusion severely burdens the political parties' freedom of association. [Citation omitted.] Plaintiffs may also demonstrate that the application of I-872 to certain elected offices (e.g., party PCOs) specifically burdens the party's right to associate.

Order at 11. The Court also authorized amendments that update the political parties' factual allegations in specific ways:

> [T]he Court also approves Plaintiffs' requests to update their pleadings to reflect the changed parties in the litigation and to add any relevant facts that have occurred since the original filings. However, any new factual allegations should be relevant to the ongoing as-applied First Amendment challenge. . . . [A]ny alleged deficiencies with the initial proposed implementation of I-872 are irrelevant. If Plaintiffs wish to include such facts to explain the history of the litigation or to provide necessary context, the

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> Court is not opposed; however, Plaintiffs should limit their allegations of constitutional violations to the *current* implementation of I-872.

Order at 20 (emphasis in original).

Importantly, the Court also admonished the parties to be specific regarding the relief they request. "[I]t is important that Plaintiffs' amended pleadings are updated to reflect not only their specific challenges to the State's implementation of I-872 but also the specific relief they request to remedy those challenges." Order at 20. The Court instructed:

> Now that the Supreme Court has held that I-872 can be implemented without violating Plaintiffs' right to association, *Plaintiffs will not be able to strike down I-872 in its entirety*. Instead, the best that Plaintiffs can achieve is to invalidate certain portions of I-872's implementation and enjoin the State from implementing I-872 in specific ways that lead to voter confusion or other forms of forced association. For example, if Plaintiffs' challenge the specific wording used on the ballot or in the voter's guide, they should identify the language currently used and request specific relief to remedy any resulting confusion. Similarly, if Plaintiffs challenge the application of I-872 to the election of party PCOs (*see* Dem. Resp. to Mot. to Dismiss 11 (Dkt. No. 146)), they should identify how to remedy this specific application.

Order at 21 (emphasis added).

This is an essential point, because the Court has already emphasized that the political parties may not continue to assert that I-872 should be struck down in its entirety. Order at 21. Rather, this Court admonished the political parties to "request specific relief to remedy" any challenge they bring to the implementation of I-872. *Id.* This instruction stems directly from the Supreme Court's conclusion that I-872 *can* be implemented constitutionally. *Grange*, 128 S. Ct. at 1194.

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B. The Libertarians' Amended Complaint Does Not Comply With This Court's Instructions As To The Limited Scope Of The Remaining Issues

The objective of amended complaints, as this Court explained, was for the political parties to "clarify their specific challenges to the current implementation" of I-872. Order at 20. Amended complaints must, accordingly, be "updated to reflect not only [the political parties'] specific challenges to the State's implementation of I-872 but also the specific relief they request to remedy those challenges." *Id.* The Libertarians' proposed amended complaint does neither. Amended complaints must "identify the relevant issues moving forward so as to focus and limit the scope of the litigation", (*id.*) not set forth a mixture of outdated and irrelevant allegations that fail to clarify the remaining issues. This Court should accordingly deny the Libertarians' motion for leave to file their amended complaint. More specifically, the State objects to various paragraphs as set forth below.

Para.	Nature of Paragraph/Argument to Strike
Sum. of Action	**Nature of Paragraphs:** Summary of Action. **Objection:** The opening, unnumbered, paragraphs continue to assert legal arguments that have already been rejected. The Supreme Court has already rejected the assertion that I-872 interferes with political party nominations. *Grange*, 128 S. Ct. at 1192. This Court has already rejected the Libertarians' claims that I-872 denies their right to ballot access, and that I-872 impermissibly allows candidates to identify their preference for the Libertarian Party. Order at 15 (dismissing ballot access claims); *id* at 18 (dismissing trademark claims).

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7-21	**Nature of Paragraphs:** Irrelevant and largely inaccurate description of state election laws. **Objection:** These paragraphs continue to broadly assert the unconstitutionality of I-872, which the Supreme Court has already rejected. *Grange,* 128 S. Ct. at 1194. These paragraphs are largely based upon the notion that I-872 provides for nomination of party candidates and is indistinguishable from the prior blanket primary. The Supreme Court has rejected this argument. *Grange*, 128 S. Ct. at 1192. Because the Supreme Court has already concluded the Top Two Primary established by I-872 is not used to select party nominees, these paragraphs all proceed from a false premise. Paragraph 7 continues to assert that the Libertarians have a constitutional right for its nominees to appear on the general election ballot, a notion this Court has already rejected. Order at 15. Paragraph 12 asserts that I-872 necessarily invades the Libertarians' right to freedom of association, an argument also rejected by the Supreme Court. *Grange*, 128 S. Ct. at 1194. This Court has also previously rejected claims in the nature of trademark, which continue to permeate these paragraphs of the proposed amended complaint. Order at 18.
23-27	**Nature of Paragraphs:** Continued description of state election laws. **Objection:** These paragraphs continue to assert that the Top Two Primary under I-872 is used to select party nominees and that the appearance on the ballot of a candidate's statement of preference for a party constitutes an unconstitutional association with the party. The Supreme Court has rejected these notions. *Grange,*

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	128 S. Ct. at 1192. Paragraphs 26 and 27 assert that the Libertarian Party has a constitutional right for its nominees to appear on the general election ballot, a notion this Court has rejected. Order at 15.
28-32	**Nature of Paragraphs:** Supplemental factual allegations. **Objection:** This Court approved the concept of amending the complaints to "add any relevant facts that have occurred since the original filings", but limited such allegations to those that are "relevant to the ongoing as-applied First Amendment challenge." Order at 20. These paragraphs contain allegations that are not material to any remaining issues, including allegations regarding amendments to state law in 2007 that are not relevant to any issues remaining before this Court. *See* Order at 21-23 (declining to entertain state constitutional issue). This Court has declined to entertain state law questions regarding the enactment of Washington's laws, finding such claims to be entirely distinct from the political parties' First Amendment challenge to the implementation of I-872. Order at 23.
34-35	**Nature of Paragraphs:** Additional supplemental allegations of fact. **Objection:** Paragraphs 34 and 35 concern the actions of private parties—the news media—unrelated to the State's actions in implementing I-872. Accordingly, it represents an attempt to revisit the facial validity of I-872, an issue already resolved by the Supreme Court. This Court has also rejected the notion that statements made by candidates in their declarations of candidacy could give rise to claims against the State. Order at 16-17 (rejecting trademark claims).
37-39,	**Nature of Paragraphs:** First cause of action, declaratory relief.

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41-43	**Objection:** These paragraphs continue to assert arguments premised upon the notion that the Top Two Primary is used to select a political party's nominees, an argument already rejected by the Supreme Court. *Grange*, 128 S. Ct. at 1192. They also fail to recognize this Court's ruling that statutes incompatible with the Top Two Primary were impliedly repealed by I-872. *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907, 927-29 (W.D. Wash. 2005). Paragraph 43 asserts that I-872 can be struck down in its entirety, a claim this Court has rejected. Order at 21.
46-48	**Nature of Paragraphs:** Second cause of action, injunctive relief. **Objection:** These paragraphs improperly attempt to relitigate the facial validity of I-872, and are premised upon the notion that I-872 can be invalidated in its entirety. The Unites States Supreme Court has already ruled that I-872 can be implemented in a constitutional manner. *Grange* 128 S. Ct. at 1194. These paragraphs additionally presuppose that the Top Two Primary established by I-872 is used to select the nominees of political parties. The Supreme Court has also rejected this claim. *Id.* at 1192. These paragraphs fail to identify any remedy by which I-872 might be implemented in a constitutional manner.
Prayer for relief	**Nature of Paragraphs:** Request for relief. **Objection:** This Court has already ruled that "Plaintiffs will not be able to strike down I-872 in its entirety." Order at 21. This is, nonetheless, precisely the relief requested in the proposed amended complaint. To the contrary, however, this Court has instructed the political parties to state specific ways in which the State's

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implementation of I-872 could be modified in order to remedy any asserted constitutional violation. Order at 21. The amended complaint fails to do so, and continues to request relief based upon the notion the Top Two Primary is used to select party nominees. The prayer for relief should be stricken in its entirety for this reason. More specifically:

- Paragraph 1 seeks a declaration that RCW 29A.24.031 and WAC 434-215-015 are unconstitutional, seeking to reargue the facial validity of I-872;
- Paragraph 2 seeks a declaration that RCW 29A.20.110 through RCW 29A.20.201 remain valid law, ignoring the fact that this Court has already ruled to the contrary. *Washington State Republican Party*, 377 F. Supp. 2d at 927-29;
- Paragraphs 4 and 5 seek a broad declaration that I-872 is unconstitutional, a proposition already rejected by the Supreme Court. *Grange*, 128 S. Ct. at 1194;
- Paragraph 6 seeks to re-argue the resolved issue of whether the Top Two Primary automatically creates an association between a party and a candidate who expresses a party preference;
- Paragraph 7 seeks broad injunctive relief, apparently based in large part on the notion that party nomination is affected by the state primary and/or that the state primary creates a constitutionally objectionable association between candidates and party, notions rejected by the Supreme Court. *Grange*, 128 S. Ct. at 1192.

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III. CONCLUSION

For these reasons, the Court should deny the Libertarian Party's Motion to File First Amended Complaint In Intervention For Declaratory Judgment And Other Relief.

DATED this 16th day of February, 2010.

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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed State Intervenors' Opposition to Libertarian Party's Motion To File First Amended Complaint in Intervention for Declaratory Judgment and Other Relief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Executed this 16th day of February, 2010, at Olympia, Washington.

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