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, et al.,

Defendant Intervenors.

NO. CV05-0927-JCC

STATE'S OPPOSITION TO DEMOCRATIC PARTY'S MOTION TO AMEND AND SUPPLEMENT COMPLAINT IN INTERVENTION

Noted for December 11, 2008

No Oral Argument Requested

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

I. INTRODUCTION

The Washington State Democratic Central Committee (Democrats), an intervenor plaintiff, seeks to amend its original complaint in intervention. The Court should deny this motion.

All of the claims the Democrats originally pleaded in this matter have been rejected, either expressly or by necessary implication. *Wash. State Grange v. Wash. State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). The Supreme Court ruled that this case is a facial challenge to the Top-Two primary system enacted by Initiative Measure No. 872 (I-872), and on that basis has rejected all the political parties' claims with respect to the Top-Two primary. There are no lingering "as applied" issues for this Court because the Top-Two primary had not been applied at the time the case was filed, and so could not have included facts constituting an "as applied" challenge. Furthermore, the Court of Appeals for the Ninth Circuit has instructed this Court to dismiss numerous claims as more fully discussed in the State's pending motion to dismiss.

The Democrats also seek to inject into this litigation new claims based entirely on state law. Allowing these claims would, in effect, allow the Democrats to start a new case on new issues, with nothing in common with the current case save its caption and case number. Furthermore, the state law issues are not legitimately supplemental to the federal law issues, and, if they need to be addressed at all, should be addressed in the state courts.

II. STATEMENT OF FACTS

The Republicans, quickly joined by the Democratic and Libertarian Parties, challenged I-872 in May, 2005, seeking an injunction against the implementation of the Top-Two primary. The United States Supreme Court has reversed the injunction granted by this Court, and reinstated the system selected by the voters for conducting primary elections. *Grange*, 128 S. Ct. at 1196 (noting the "precipitous nullification of the will of the people"

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

resulting from the injunction against I-872, and holding "that I-872 is facially constitutional").

The Democrats now ask this Court for leave to amend their complaint.

- First, they seek leave to update their complaint to reflect changes in the identities of some of the parties. Democrats' Mot. to Amend and Supplement Compl. in Intervention for Declaratory J. and for Injunctive Relief Regarding I-872 and Primary Elections ("Democrats' Mot.), Attach. 2, ¶¶ 9-10.[1]
- Second, the Democrats offer a redrafting of several paragraphs of their complaint describing Washington's primary. Democrats' Mot., Attach. 2, ¶¶ 13, 17-19. The evident purpose of this proposed language is to set up an argument that I-872 was improperly adopted as a matter of state constitutional law.
- Third, the Democrats seek to amend their complaint by adding a series of "supplemental allegations" relating to events occurring since the filing of the original complaint. Democrats' Mot., Attach. 2, ¶¶ 20-25. These allegations concern changes in the Secretary of State's rules implementing I-872 (Democrats' Mot., Attach. 2, ¶¶ 20-21); the enactment of legislative amendments to the state's election law in 2006 and 2007, when the State was enjoined from implementing I-872 (Democrats' Mot., Attach. 2, ¶ 22); and the Secretary of State's emergency rules implementing I-872, adopted soon after the Supreme Court upheld the Initiative's constitutionality (Democrats' Mot., Attach. 2, ¶ 23). The Democrats also allege that in implementing I-872, state officers "ignored" various statutes and rules that were rendered inoperative or impliedly amended by I-872 (Democrats' Mot., Attach. 2, ¶¶ 24-25). The

[1] In and of itself, this would be unobjectionable, except that the proposed amended complaint ignores that the Washington State Grange has participated throughout the litigation as an Intervenor Defendant.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

import of these paragraphs appears to be that I-872 could not be properly implemented because its terms were inconsistent with other statutes enacted during the time when I-872 was not in force. These allegations are reflected in a proposed amendment to the Democrats' "First Cause of Action." Democrats' Mot., Attach. 2, ¶ 46. This is a novel state law issue, unrelated to the present case.

- Fourth, the Democrats seek to insert suggestions (unsupported by any specific factual allegations) that the election coverage of the 2008 election by the press might have led to voter confusion as to which candidates were endorsed or supported by the Democratic Party, or supported the party and its objectives. Democrats' Mot., Attach. 2, ¶¶ 26, 31.
- Fifth, the Democrats propose to add several paragraphs alleging that the statutes relating to the election of precinct committee officers (statutes which are not a part of I-872 and were not amended by it) are unconstitutional to the extent that they permit non-Democrats to participate in such elections. Democrats' Mot., Attach. 2, ¶¶ 27-30. A related allegation is set forth in proposed ¶ 52 (Second Cause of Action). These allegations are unrelated to a challenge to the constitutionality of I-872, and amount to a challenge to separate statutes.
- Sixth, the Democrats seek to revive an argument previously rejected by this Court that RCW 29A.20.121, providing for minor party conventions under the previous "Montana" primary, survives the implementation of the I-872's Top-Two system and leads to a denial of equal protection among the political parties. Democrats' Mot., Attach. 2, ¶ 32.
- Seventh, the Democrats seek to revive their failed federal constitutional claims by expanding on previous allegations to the effect that implementation

of a Top-Two primary would violate their civil rights. Democrats' Mot., Attach. 2, ¶¶ 37-40. These precise claims were rejected by the Supreme Court. Yet, the Democrats propose to amend their Second Cause Action to assert a "forced association" claim. Democrats' Mot., Attach. 2, ¶ 51.

- Eighth, the Democrats seek to add a Fourth Cause of Action asserting that I-872 was not properly enacted because of an alleged violation of a provision of the Washington Constitution concerning how proposed bills should be drafted. Democrats' Mot., Attach. 2, ¶¶ 56-60. This is a new issue relating to the state constitution and, to the extent it has any merit, would best be considered by the state courts.
- Ninth, the Democrats propose to add language asserting that state officials will "selectively enforce" state laws in such a manner as to "blur" the candidates and nominees of the Democratic Party. Democrats' Mot., Attach. 2, ¶ 62.[2] This is, again, a new claim unrelated to the constitutionality of I-872, and should not be appended to the current litigation.

III. ARGUMENT

A. The Democrats Have No Claims Pending Before This Court To Form The Basis For Amendment

This Court should deny the Democrats' motion because the claims properly raised in their original complaint have been fully resolved. They have no remaining pending claims that could form the basis for amending their complaint, but propose to continue asserting claims that the Court of Appeals has instructed this Court to dismiss.

A review of the Democrats' original complaint demonstrates that all of the claims advanced within it have been rejected. The complaint begins with an introductory section

[2] The Democrats also seek to amend their prayer for relief by adding language referring to the state constitutional issue and by slightly modifying some pre-existing language. Democrats' Mot., Attach. 2, Prayer for Relief, ¶¶ 8-9.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

and with allegations concerning jurisdiction, venue, the identity of the parties, and the history of Washington's partisan primary. Compl. in Intervention for Declaratory J. & for Injunctive Relief Regarding I-872 & Primary Elections ¶¶ 1-20 (Compl.). The complaint in intervention then asserts the following legal claims:

- The Democrats alleged that there is no constitutionally significant difference between the Top-Two primary and the former blanket primary, previously held unconstitutional by the courts. Compl., ¶¶ 21-24. This argument was rejected by the Supreme Court. *Grange*, 128 S. Ct. at 1192-93.
- The Democrats alleged that the Top-Two primary would be used to select the nominees of political parties and that this would impair their constitutional rights. Compl., ¶¶ 22-24. The Democrats restated and expanded this allegation in their first cause of action. Compl., ¶¶ 25-30. To the contrary, the Supreme Court held that the Top-Two primary would not be used to select party nominees, and that political party nominations would be "simply irrelevant" to the primary established by I-872. *Grange*, 128 S. Ct. at 1192. The Democrats' proposed amended complaint continues to assert that the Top-Two primary would be used to select their party's nominees, despite the Supreme Court's express rejection of this contention. Democrats' Mot., Attach. 2, ¶ 43.
- The Democrats alleged as their second cause of action that, by permitting candidates to state their personal preference for a political party, I-872 would force the political parties into an unconstitutional association with those candidates. Compl., ¶¶ 31-33. The Supreme Court disagreed, concluding, "There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Grange*, 128 S. Ct. at 1193. Additionally, the Democrats now propose to add to this cause of action allegations

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

based upon campaign finance rules (Democrats' Mot., Attach. 2, ¶ 25), in clear disregard of the order of the Ninth Circuit that this Court dismiss all claims that state law[3] "imposes discriminatory campaign finance rules". *Wash. State Republican Party*, 545 F.3d at 1126.

- The Democrats alleged that I-872 denied them the equal protection of the law by permitting minor parties, but not major parties, to nominate candidates through a convention process. Compl., ¶¶ 17-18. The Democrats restated this allegation in their third cause of action. Compl., ¶¶ 34-36. This Court rejected that allegation, concluding that I-872 impliedly repealed the minor party convention statutes as inconsistent with the fundamental character of the Top-Two primary as one that did not involve party nominations. *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 927-29 (W.D. Wash. 2005). The Ninth Circuit agreed, and on remand from the Supreme Court instructed this Court to dismiss this claim. *Wash. State Republican Party v. Wash.*, 545 F.3d 1125, 1126 (9th Cir. 2008). In disregard of the Ninth Circuit's decision, the Democrats propose an amended complaint that continues to assert this rejected claim. Democrats' Mot., Attach. 2, ¶¶ 53-55.[4]
- The Democrats requested preliminary and permanent injunctive relief, alleging that if the State were permitted to implement the Top-Two primary established by I-872, they would suffer irreparable injury. Compl., ¶¶ 37-41. The Supreme Court again disagreed, concluding that this request to enjoin the Initiative before it had ever been

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[3] Notably, this allegation would not challenge I-872, but other state laws governing political advertising and administered as part of the state's campaign finance statutes. Even if the Court permitted the Democrats to breathe new life into this completed case through this proposed amendment, the constitutionality of the Top-Two primary would not be placed into issue.

[4] The Democrats may argue that the proposed amendment raises a different claim from the one previously rejected by the Supreme Court, on the theory that this argument is revived by the state legislature's amendment of the minor party convention statute during the time when implementation of I-872 was enjoined by this Court and the state was conducting a "Montana" style primary. If this claim has any merit at all, it depends upon an argument based on state law regarding any effect of subsequent legislation, and is best resolved by a state court.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

implemented "threaten[ed] 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." *Grange*, 128 S. Ct. at 1191.

A complaint should not be amended after all the allegations made in that complaint have already been fully litigated and rejected. "While Rule 15(a) establishes that leave to amend should be 'freely given,' post-judgment motions to amend are treated with greater skepticism than pre-judgment motions." *Premo v. Martin*, 119 F.3d 764, 772 (9th Cir. 1997) (quoting Fed. R. Civ. P. 15(a), and citing 6 Charles Alan Wright & Arthur Miller, *Fed. Prac. & Proc.* § 1489 (1990)). This rule makes perfect sense where, as here, the claims originally asserted in the Complaint have been fully litigated and resolved. "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 Charles Alan Wright, Arthur Miller & Mary Kay Kane, *Fed. Prac. & Proc.* § 1489 (Supp. 2008). For this reason, the Democrats' motion to amend their complaint should be denied.

B. The Proposed Amended Complaint Raises No "As Applied" Challenge to I-872

The political parties' original complaints asserted only a facial challenge to I-872 because their claims were not grounded in the context of an actual election. They were merely based upon speculation as to what might occur if I-872 were implemented. *Grange*, 128 S. Ct. at 1190 ("Respondents object to I-872 not in the context of an actual election, but in a facial challenge."). The Supreme Court noted that the political parties filed the complaint, "[i]mmediately after the State enacted regulations to implement I-872," (*id.* at 1189), but before the State had an opportunity to implement it. *Id.* at 1190.

The Democrats assert that the various courts that have considered this case have construed it to raise an "as applied" challenge, but this misstates the nature of the case. The Supreme Court merely noted that certain arguments advanced by the Libertarians were not presented on certiorari, and had not been addressed below. *Grange*, 128 S. Ct. at 1195, n.11.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

On remand, the Ninth Circuit directed this Court to dismiss specified claims. *Republican Party*, 545 F.3d at 1126. Remaining issues should now be dismissed—indeed, have already been resolved or were never properly raised—as described in the State's pending motion to dismiss. Finally, the Democrats could not have pleaded facts constituting an "as applied" challenge because no such facts had occurred when the case was commenced.[5]

The proposed amended pleadings at issue here show that the Democrats still do not propose a true "as applied" challenge to Washington's new election laws, based on specific facts relating to the conduct of the 2008 election. The Democrats still seek to prevent the Top-Two system from being implemented at all. Rather than treating I-872 as a law that could be generally implemented in a constitutional manner but might in some factual circumstances impact their constitutional rights, the proposed amended complaint repeats and even expands its broad assertions that I-872 and related statutes and regulations would, without regard to any particular fact pattern, violate their constitutional rights. It is especially significant that the Democrats continue to seek declarative and injunctive relief restraining the implementation of I-872 and related laws on the basis that they are unconstitutional, without reference to any specific application of those laws. Democrats' Mot., Attach. 2, Prayer for Relief.[6]

C. The Democrats Should Not Be Allowed To Amend Their Complaint To Assert New State Law Claims

In addition to reiterating rejected federal law claims, the Democrats seek to amend their complaint to assert new claims which are based entirely upon state law. The clearest example of this is the Democrats' proposed Fourth Cause of Action. Democrats' Mot.,

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[5] The Democrats seem to equate the adoption of administrative rules with implementing I-872. This is not the case. Adding arguments based on administrative rules to a facial challenge to a statute at most adds a facial challenge to the rules. In order to bring an "as applied" challenge, the Democrats must allege facts as to its actual application.

[6] It is telling that the Democrats' Complaint alleges no specific way in which I-872 might have been applied unconstitutionally, and that the remedy they seek is to abandon the Top-Two system altogether, rather than to identify and remediate specific applications of the new law.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Attach. 2, ¶¶ 56-60. This proposal asserts that I-872 was drafted in such a way as to violate the provisions of article II, section 37 of the Washington Constitution.

The Democrats also propose to amend their First Cause of Action to assert that I-872 was "superseded by statutes readopting the Montana primary system in 2006 and 2007." Democrats' Mot., Attach. 2, ¶ 46. The question whether statutes enacted by the state legislature in 2006 and 2007 either could or did supersede an initiative adopted in 2004 is purely a state law question, requiring an analysis of the state constitutional provisions and case law concerning the interplay between the state constitutional right of initiative and the powers of the legislature.

A federal court may only exercise supplemental jurisdiction over a state law claim when a federal claim is also pending and, as noted, all of the Democrats' original claims have been rejected. 28 U.S.C. § 1367(a); *see also Peacock v. Thomas*, 516 U.S. 349, 355, 116 S. Ct. 862, 133 L. Ed. 2d 817 (1996) ("a federal court lacks the threshold jurisdictional power" to hear and determine a state law claim when no federal claim is pending). Once the federal issues have been decided, as is true here, there is no longer a basis to exercise supplemental jurisdiction over state law claims.

Additionally, federal courts should avoid unnecessarily deciding issues of state law, and should defer such matters to state court, both in the interest of comity and in the interest of justice between the parties. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) ("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."). "It is hard to imagine issues that are more within the province of the state courts than issues requiring interpretation of the state's own constitution." *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 846 n.1 (D. Wyo., 1994). This is particularly true relating to the State's sovereign decisions regarding the manner of conducting its own elections. *See* U.S. Const., art. I, § 4 (assigning to the states the authority

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

to conduct elections). Thus, if there is any merit to the allegations concerning violations of state law at all, they should be litigated in a new case, preferably in the state courts.

IV. CONCLUSION

For these reasons, the Democratic Party's Motion for Leave to File an Amended Complaint in Intervention should be denied.

DATED this 8th day of December, 2008.

ROBERT M. MCKENNA
Attorney General

MAUREEN A. HART, WSBA #7831
Solicitor General

JAMES K. PHARRIS, WSBA #5313
JEFFREY T. EVEN, WSBA #20367
Deputy Solicitors General
PO Box 40100
Olympia, WA 98504-0100
360-664-3027

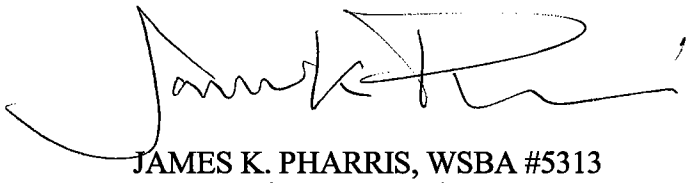
Counsel for Intervenor Defendants State of Washington, Rob McKenna, and Sam Reed

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed State's Opposition to Democratic Party's Motion to Amend and Supplement Complaint in Intervention with the Clerk of the Court using the CM/ECF system, which will send notification of such filing electronically to the following:

John White
Kevin Hansen
Richard Shepard
Thomas Ahearne
David McDonald

Executed this 8th day of December, 2008, at Olympia, Washington.



JAMES K. PHARRIS, WSBA #5313
Deputy Solicitor General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
360-664-3027
jamesp@atg.wa.gov