

Nos.11-35122, 11-35124, and 11-35125

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WASHINGTON STATE
REPUBLICAN PARTY, et al.,

Appellants,

v.

STATE OF WASHINGTON,
ROB MCKENNA, SAM REED, AND
WASHINGTON STATE GRANGE,

Appellees.

APPELLEES' JOINT MOTION
TO CONSOLIDATE CASES AND
FOR AN EXTENSION AND
ENLARGEMENT UNDER
CIRCUIT RULE 28-4

NOS. 11-35122, 11-35124,
and 11-35125

Appellees, the State of Washington, Rob McKenna, Attorney General of the State of Washington, and Sam Reed, Secretary of State of the State of Washington, (hereinafter "State") and Washington State Grange ("Grange") hereby move to consolidate the three above-captioned appeals, currently docketed separately before the Court. Appellees State and Grange seek consolidation in order to facilitate their concurrent request each to file single responses, by the State and the Grange, respectively, to Appellants' multiple opening briefs, and to obtain the concomitant extension of time and enlargement of briefing allowed by Circuit Rule 28-4.

FRAP 3(b)(2) provides that when parties have filed separate notices of appeal, “the appeals may be joined or consolidated” by this Court. Here, consolidation is wholly appropriate: these three appeals arise from the same underlying case and, on appeal, are essentially being treated as one case already.

These three appeals comprise a single case. Appellants, Washington State Democratic Central Committee (“Central Committee”) (No. 11-35122), Washington State Republican Party, et al. (“WSRP”) (No. 11-35124), and Libertarian Party of Washington State, et al. (“Libertarians”) (No. 11-35125), (hereinafter collectively “political parties”) challenge the constitutionality of Washington’s system for conducting primary elections under Initiative Measure 872 (I-872). The political parties previously mounted a facial challenge to the constitutionality of I-872, which challenge was rejected by the United States Supreme Court. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). On remand, the political parties pursued their residual as-applied challenge to the manner in which Washington implemented its system for conducting primary elections under I-872, which challenge the District Court dismissed on summary judgment. *Washington State Republican Party v. Washington State*

Grange, 2011 WL 92032 (W.D. Wash. 2011).¹ The political parties now appeal from that dismissal, as well as from various interlocutory rulings entered earlier in the case.

Before this Court, these three appeals are essentially being treated as one case already. For example, the political parties in their respective opening briefs adopt, in part, each others' arguments.² Moreover, granting a joint motion of the Central Committee and WSRP, this Court has assigned all three

¹ On a second issue, the political parties prevailed on their claim that the State's method for electing Precinct Committee Officers is unconstitutional. Neither the State nor the *Grange* appeal that ruling.

² The Central Committee and the WSRP adopt each other's arguments to the extent such arguments are not addressed in their own briefs, and the Libertarians adopt both parties' arguments to that same extent. Brief of Appellant, Washington State Democratic Central Committee, No. 11-35122 (Dkt. 15) at 4 n.3 ("The Republican Party, in the related case No. 11-35124, also appealed from the district court's orders in this case. To minimize redundancy, the Democratic Party adopts by reference the arguments the Republican Party makes in the opening brief filed in Case No. 11-35124 to the extent that such arguments are not addressed in this brief."); Brief of Appellant Washington State Republican Party, No. 11-35124 (Dkt. 15-1) at 5 n.2 ("The Democratic Party, in the related case No. 11-35122, also appealed from the district court's orders in this case. To minimize redundancy, the Republican Party adopts by reference the arguments the Democratic Party makes in the opening brief filed in Case No. 11-35122 to the extent that such arguments are not addressed in this brief."); Appellants' Opening Brief, No. 11-35125 (Dkt. 10-1) at 4 n.1 ("The Democratic and Republican Parties, in related Case Nos. 11-35122 & 11-35123 [sic], also appealed from the district court's orders in this case. To minimize redundancy, the Libertarian Party adopts by reference the arguments the Democratic and Republican Parties make in their opening briefs filed in Case Nos. 11-35122 & 11-35123 [sic] to the extent that such arguments are not addressed in this brief.")

appeals to the original panel that heard the earlier facial challenge. Order (Jun. 23, 2011), No. 11-35122 (Dkt. 21). Thus, in effect, the appeals are being treated as consolidated for purposes of panel assignment. In sum, consolidating these appeals simply reconciles for purposes of this Court's docket what, in practice, is already in place.

As indicated above, Appellees seek consolidation as a prerequisite to the State and Grange each filing a single response to the multiple opening briefs of the political parties and obtaining the 21-day extension of time and 1400 word enlargement of briefing provided by Circuit Rule 28-4. The extension and enlargement are available “[i]f no previous extension of the filing deadline or enlargement of brief size has been obtained and the case has not been expedited.” Appellees have obtained no previous extensions or enlargements.

Nor has this case been expedited. The Central Committee and WSRP have requested priority in hearing date³ which this Court has taken under submission. Order (Jun. 23, 2011), No. 11-35122 (Dkt. 21) (“Appellants’ requests for a priority hearing date are taken under submission.”). Granting Appellees the 21-day extension provided by Circuit Rule 28-4 will not

³ Letter from Emily D. Throop to Office of the Clerk (Jun. 2, 2011), No. 11-35122 (Dkt. 13); Letter from John J. White, Jr., to Office of the Clerk (Jun. 2, 2011), No. 11-35124 (Dkt. 13).

significantly affect the Court's ability to set a priority hearing date, if it so chooses. No hearing would occur until briefing is complete on all three appeals in the case, and applying Circuit Rule 28-4 will only extend the collective briefing schedule by a single week.⁴

Currently, Appellees' latest due date, set for their briefs in response to the Libertarians, is July 21, 2011. Order (Jun. 23, 2011), No. 11-35125 (Dkt. 11). If Appellees were granted oral requests for a single extension of 14 days to complete these briefs pursuant to 9th Cir. R. 31-2.2(a)--as were each of the political parties with respect to their opening briefs--that due date would become August 4, 2011. Alternatively, Circuit Rule 28-4 provides a 21-day extension of time calculated from the latest due date, which would be August 11, 2011. Thus, applying Circuit Rule 28-4, the collective briefing

⁴ On June 24, 2011, Counsel for the State contacted opposing counsel by telephone and advised them that the State would be moving to consolidate these appeals for the purpose of requesting application of Circuit Rule 28-4. Counsel for the Libertarians, Orrin Grover, Esq., had no objection to consolidation or to the application of Circuit Rule 28-4.

Counsel for WSRP, John White, on behalf of his client and the Central Committee, clarified through email of June 27, 2011, that they were "willing to stipulate to the State's filing of a longer, consolidated brief." However, Mr. White noted that "[t]he rule permitting the 21-day extension is inapplicable where the case has been 'expedited'" and "[t]he political parties have requested expedition of the case." Furthermore, Mr. White stated that "[e]ven absent the pending request to expedite, [they] would object to a 21-day extension because it might delay oral argument."

schedule would be extended by merely one week. A shift of a single week in the filing of response briefs appears to be a trivial delay with regard to the ability of the Court, if it so chooses, to set a priority hearing date in this case.

Because Appellees each desire to file a single response brief to the political parties' opening briefs, one response brief by the State and one by the Grange, Appellees respectfully request that the Court consolidate Case Nos. 11-35122, 11-35124, and 11-35125. At this time, the State and the Grange also request that the Court grant their individual requests each to file a single response brief to the political parties' opening briefs, including an extension of time and word enlargement, as allowed by Circuit Rule 28-4, with such briefs being due on August 11, 2011.

RESPECTFULLY SUBMITTED this 28th day of June, 2011.

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9th Circuit Case Number(s)

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