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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 OF WASHINGTON'S
REPLY ON MOTION TO STRIKE
REPUBLICAN PARTY'S
SUPPLEMENTAL AND
AMENDED COMPLAINT

1 I. INTRODUCTION

2 The current motion, like a parallel motion relating to the Democratic Party's proposed
3 amended complaint, arises out of differing perceptions about the purpose for which the
4 political parties were granted leave to amend their complaints, and this Court's instructions to
5 the parties regarding those amended complaints. When the case was remanded to this Court
6 for additional proceedings following a Supreme Court decision on the merits of the main
7 claim and Ninth Circuit motion practice, the Republican and Democratic parties both sought
8 leave to file amended complaints.
9

10 In its order dated August 20, 2009, the Court granted these motions in part, in order
11 for the parties "to clarify their specific challenges to the current implementation [of Initiative
12 872]." Order at 20. To that end, the Court instructed that the amendments should "focus and
13 limit the scope of the litigation" to certain specified matters that remained for decision after
14 the Supreme Court opinion, excluding both matters that had already been expressly or
15 impliedly resolved and new matters unrelated to the original case. Order at 20-21.
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17 Based on the Court's Order, the State expected that if the parties chose to file
18 amended complaints, these pleadings would serve as a blueprint for the next phase of the
19 litigation. In other words, the State expected that the amended complaints would:
20 (1) identify the specific applications of Initiative 872 that the political parties still intend to
21 litigate (within the parameters set by the Court's August 20 Order); (2) specify the relief
22 sought with respect to those issues; and (3) remove allegations and claims relating to matters
23 already decided or matters excluded from consideration.
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1 The amended complaints filed by both the Democratic and Republican parties were
 2 unsatisfactory in this respect. Although the Republican's amended complaint included new
 3 material and identified certain applications of Initiative 872 (I-872) as objectionable, this
 4 material was incorporated within the framework of the original complaint filed in 2005. The
 5 supplemental material was folded into older material, with nothing identifying the specific
 6 matters the Republican Party expects to litigate in the next phase of the case. The proposed
 7 complaint leaves the State, and the Court, in the dark about what is going to happen next, or
 8 how the parties may best prepare for discovery, motion practice, and a possible trial on the
 9 issues remaining for decision.¹

11 II. DISCUSSION

12 A. Material Carried Forward From The Original Complaint

13 The Republican Party defends much of the objectionable material in its proposed
 14 amended complaint with an argument that the Court's August 20 Order limits what can be
 15 added to the complaint, but does not require that existing material be deleted from it.
 16 However, this Court has already instructed that amended complaints should serve the
 17 purpose of "identify[ing] the relevant issues moving forward so as to focus and limit the
 18 scope of the litigation regarding the as-applied First Amendment claims." Order at 20. The
 19 continued inclusion of allegations already resolved is confusing, particularly as it relates to
 20 claims for relief. Either these claims should be stricken or some alternative means (such as a
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 24 ¹ A reader of the Republican Party's proposed amended complaint would surely conclude that its
 25 primary focus is an effort to declare I-872 unconstitutional in its entirety. Of the four causes of action set forth
 26 in the amended complaint, the first three ("Conducting an Invalid Primary", "Forced Association", and "Denial
 of Equal Protection Under Law") are all essentially frontal assaults on the validity of I-872. Rep. Am. Compl.,
 ¶¶ 47-63. The fourth cause of action ("Injunctive Relief") contains more specific allegations, but in context is
 hard to distinguish from the other three. Rep. Am. Compl., ¶¶ 64-68.

1 pretrial order) should be employed to clarify that these issues will not be re-argued in the
2 next phase of the case.²

3 The Republican Party argues that its proposed amended complaint meets the general
4 standards for pleading as set forth in the civil rules and in the case law. Rep. Resp. at 3-5.
5 This argument misses the point that the amended complaints to be filed in this case are for a
6 specific purpose as set forth in the Order, and general case law about “notice pleading” is not
7 helpful.
8

9 **B. Material Asserted to Be Relevant to an “As Applied” Challenge**

10 The Republican Party defends many of the challenged allegations on the theory that
11 they relate in some way to an “as applied” challenge to the implementation of I-872. Rep.
12 Resp. at 5-10. The Court observed in the August 20 Order that “the best that Plaintiffs can
13 achieve is to invalidate certain portions of I-872’s implementation and enjoin the State from
14 implementing I-872 in specific ways that lead to voter confusion or other forms forced
15 association.” Order at 21. Yet, the Republican Party is not identifying *specific* aspects of
16 I-872’s implementation that require relief in asserting that I-872 is “indistinguishable in
17 operation from a primary that formally nominates party candidates” (Rep. Resp. at 8), or that
18 I-872 is not severable and must therefore fall in its entirety (*id.* at 9), or that the State has re-
19 adopted minor party convention rights and thereby resurrected an equal protection claim (*id.*
20
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23 ² The Republican Party suggests that if the extraneous “old” material is deleted from the complaint,
24 this would constitute an abandonment of those arguments for purposes of possible appeal. Rep. Resp. at 2.
25 This suggestion is far-fetched. Many of the issues in question have already been the subject of an appeal and
26 have been decided by the Supreme Court. There is no need to preserve any appeal rights as to those. As to any
remaining issues, it is difficult to see how filing a supplemental complaint in this Court would be construed to
waive or abandon the right to appeal otherwise appealable actions. The State’s purpose in the striking motions
is not to maneuver the Plaintiffs into waiving their appeal rights but to determine how future proceedings will
be conducted.

1 at 10).³ Rather, the Party is effectively asserting that I-872 is unworkable in its entirety.
 2 These allegations go beyond what the Court identified as permissible in an amended
 3 complaint, and should be stricken.

4 **C. Prayer for Relief**

5 In response to the State's concern that the amended complaint fails to identify the
 6 specific relief requested, the Republican Party points to its request for somewhat more
 7 specific relief incorporated in Paragraph 8 of the Prayer for Relief in its proposed amended
 8 complaint. Paragraph 8 is more specific than the remainder of the Prayer contained in the
 9 proposed amended complaint. However, if Paragraphs 1 through 6 remain in the Prayer, they
 10 assert that the primary relief sought is still a declaration that I-872 is entirely
 11 unconstitutional.⁴ Similarly, the Republicans continue to assert causes of action that are not
 12 consistent with this Court's order, as explained in the State's motion. If these other
 13 paragraphs are not simply stricken, the Court should enter an order determining that the
 14 contents of these paragraphs are not material to the current phase of the litigation and should
 15 be disregarded for purposes of this phase.
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21 ³ Paragraphs 61 and 63 of the proposed amended complaint are especially problematical because they
 22 attempt to assert a claim unrelated to the implementation of I-872: that certain statutes enacted by the
 23 legislature to implement the *Montana* primary in use before I-872 was upheld should be read as either
 24 superseding the Top Two primary or rendering it unworkable. Aside from the obvious answer that the Supreme
 25 Court's decision rendered these statutes obsolete because they cannot be squared with I-872, this is a purely
 state law issue: how to harmonize state statutes when their language is inconsistent. The third cause of action
 in the Republican amended complaint (¶¶ 60-63) is not an objection to a specific application of I-872 but a
 convoluted argument that the entire initiative should be invalidated, based not upon I-872's language or the
 manner of its implementation, but upon a strained and unreasonable reading of statutes enacted to facilitate the
 superseded "Montana" primary.

26 ⁴ The parties agree that Paragraph 7 of the Republican amended complaint, which relates to an issue
 excluded from this case by the Order, should be stricken. Rep. Resp. at 11.

1 While Paragraph 8 of the Prayer for Relief is more specific, it still contains language
2 implying that the Top Two Primary somehow selects the party's candidates for public office,
3 such as by referring to "cross-over voting or ticket-splitting"—ideas which are simply
4 irrelevant to a Top Two Primary. The language could be re-crafted to show that it is limited
5 to the application of I-872 to specific circumstances, as the Court has ordered. Even
6 Paragraph 8 fails to fully comply with this Court's instruction to state specifically how the
7 implementation of I-872 could be changed to meet the Party's objections. Order at 20-21.
8 At the very least, these matters could be resolved by an appropriate pre-trial order or similar
9 document specifying the precise issues "on the table" for consideration in the next phase of
10 the case.
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III. CONCLUSION

For these reasons, the Court should grant the State's Motion to strike portions of the Republican Party's proposed amended complaint.

DATED this 26th day of February, 2010.

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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed State Of Washington's Reply On Motion To Strike Republican Party's Supplemental and Amended Complaint 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 26th day of February, 2010, at Olympia, Washington.

ROBERT M. MCKENNA
Attorney General

s/ James K. Pharris
James K. Pharris

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