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The Honorable Thomas S. Zilly

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,

vs.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-TSZ

REPLY IN SUPPORT OF MOTION
TO AMEND COMPLAINT

NOTE ON MOTION CALENDAR:
May 2, 2008

Plaintiffs Washington State Republican Party, *et al.*, respectfully submit this reply in support of their motion to amend.

A. Plaintiffs expressly raised an as-applied challenge to the modified blanket primary, which remains unresolved.

Plaintiffs' complaint was filed on May 19, 2005, the day after the State issued emergency regulations to implement I-872. Pharris Decl., Ex. C (Dkt. #66). The complaint

1 alleged:

2 The Initiative, *as implemented by State and local officials*, eliminates
3 mechanisms previously enacted by the state to protect [the First Amendment
4 rights of the Party and its adherents] and provides no effective substitute
5 mechanisms for the Party and its adherents to protect their rights of association
6 an of determining the Party's message.

7 Complaint at 3:5-8 (emphasis added). It further alleged that I-872 was "intended to establish
8 a *de facto* blanket primary," *id.* at 6:9, and that "[t]he Defendants intend to administer the
9 State's partisan primary in a manner that denies the Party the right to nominate its candidates
10 and control the use of its name." *Id.* at 7:17-18. Both the State and Grange responses ignore
11 the complaint's express language, which provided ample notice of plaintiffs' claims that the
12 statute on its face and as it was being applied violated the federal constitution.

13 The State and Grange responses also disregard this Court's statement in its Opinion
14 granting summary judgment to plaintiffs:

15 The Court has previously directed the parties to limit their briefs to Plaintiffs'
16 facial challenge of Initiative 872. The Court reserved issues related to
17 Plaintiffs' as applied challenge.

18 *WSRP v. Logan*, 377 F. Supp. 2d 907, 916 n.3 (2005). Notwithstanding this Court's express
19 reservation of the as-applied challenge, the State asserts that any suggestion that plaintiffs
20 "originally pled an as applied challenge . . . is meritless." State Opp. at 2:17. The Grange
21 likewise asserts that "[t]he only claim" in plaintiffs' complaint was "a facial challenge" to I-
22 872. Grange Opp. at 3:2.

23 Defendants' answers to the complaint also contradict their current position. The State
24 expressly claimed that I-872 is constitutional as applied, seeking a declaratory judgment that
25 "Washington's election laws, *and the conduct of elections under those laws*, do not deprive"
26 plaintiffs of any rights. State Ans. at 8:9-12 (emphasis added). In its answer, the Grange
27 recognized the complaint's as-applied challenge and asserted the same prematurity arguments
28 now advanced against its amendment. Grange Ans. at 9:23-24.

29 The State contends that the Supreme Court's statement that it was not addressing the
30 question of "ballot access" should be disregarded because it referred to the Libertarian Party's
31 claims. State Opp. at 6 n.2. The Supreme Court did not reach those claims because they were

1 outside the scope of the question for which *certiorari* had been granted.¹ *Wash. State Grange*
 2 *v. Wash. Republican Party*, 128 S. Ct. 1184, 1195 n.11 (2008). Plaintiffs' complaint raised I-
 3 872's operational denial of ballot access to the Republican Party where its vote may be split
 4 by multiple candidates. Complaint at 7:2-8. This Court expressly declined to reach the
 5 question on summary judgment. *Logan*, 377 F. Supp. 2d at 929.

6 Further, in representing that this Court has previously disposed of plaintiffs' equal
 7 protection claims, the State ignores the Court's August 12, 2005 order. "The Court's Order
 8 on Summary Judgment '[did] not reach the equal protection argument raised by the Republican
 9 Party' because the Court found Initiative 872 unconstitutional on other grounds. See Order,
 10 docket no. 87, at 34." Court Dkt. #107, 2:20-22. As a result, the constitutionality of I-872's
 11 application to the Republican Party is, and always has been, before the Court.

12 **B. The State's implementation of I-872 was unconstitutional three years ago, and its**
 13 **re-configured implementation today continues to violate federally protected rights**
 14 **of the Republican Party and its adherents.**

15 The State is already implementing I-872 for the 2008 election. Candidate filing forms
 16 will be distributed May 12 and accepted beginning May 16. On April 24, 2008, the State
 17 promulgated its first installment of new regulations implementing I-872, which demonstrate
 18 that the State has little interest in respecting constitutionally-protected rights or even the
 19 express language of I-872.²

20 The State, through additional emergency regulations promulgated today, selects among
 21 later-enacted statutes, giving effect to some provisions, and disregarding others. *See, e.g.*,
 22 White Decl. Exs. 3 & 5 (WAC 434-208-110 gives effect to later law when dates conflict, but
 23 the regulations fail to give effect to 2006 Sess. Law, Ch. 344 requiring "nominating primary"

24 _____
 25 ¹ "In the ordinary course we do not decide questions neither raised nor resolved below. As a general rule,
 26 furthermore, we do not decide issues outside the questions presented by the petition for certiorari. Whether these
 27 issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court
 28 to consider and determine in the first instance." *Glover v. United States*, 531 U.S. 198, 205 (2001) (internal
 citations omitted).

² As Chief Justice Roberts noted, "the history of the challenged law suggests the State is not particularly interested
 in devising ballots that meet . . . constitutional requirements." 128 S. Ct. at 1197 (Roberts, C.J., concurring).

1 in August and authorizing minor parties and independents to nominate candidates directly to
 2 the general election). The regulations disregard later statutes that are inconsistent with its
 3 planned implementation of I-872.

4 The regulations redefine the statutory “office” of Precinct Committee Officer (“PCO”)
 5 as a “position.” White Decl. Ex. 1 (WAC 434-215-020); RCW 29A.80.051. The State
 6 redefines PCO to be a “position,” ignoring the constitutional duties of PCOs under Art. II, Sec.
 7 15 of the State Constitution to fill vacancies in offices held by party candidates. The State’s
 8 rule-making order states that “this change in primary election systems necessitates a change
 9 in the declarations of candidacy.” Yet, the State’s transmittal of the regulations redefining PCO
 10 states, “These rules do not address the election of [PCOs] because that position is not subject
 11 to I-872.” White Decl. Ex 7. I-872 made no reference to RCW 29A.80.051 or PCOs. The
 12 State further appears to eliminate the office of PCO from the primary ballot. White Decl., Ex.
 13 3 (WAC 434-230-025). The State either has discovered yet another part of Washington law
 14 that I-872 impliedly amended, or is amending legislation through administrative regulations.³

15 Last year, Washington specified the form of the primary election ballot. White Decl.,
 16 Ex. 4 (RCW 29A.04.008 (as amended by Ch. 38 Laws of 2007)). The State’s application of
 17 I-872 ignores later-enacted statutes that provide protection for the right to associate.

18 **C. Pendent jurisdiction is proper because defendants already requested the Court**
 19 **declare I-872 compliant with Washington’s Constitution, the state claim is based**
 20 **on the same nucleus of operative facts and judicial economy is served by a single**
 21 **proceeding.**

22 District courts’ ability to exercise jurisdiction over non-federal claims is to advance
 23 “the impulse [of the Federal Rules] toward entertaining the broadest possible scope of action
 24 consistent with fairness to the parties,” and “joinder of claims, parties and remedies is strongly
 25 encouraged.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966).

26 _____
 27 ³ Because plaintiffs’ as-applied challenge to I-872 was not at issue on appeal, it is collateral to the appeal and
 28 an amendment to the complaint regarding that issue is within the retained jurisdiction of this Court. *See Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97-98 (3rd Cir. 1988).

1 [A] federal court may decide a state law claim arising from the same set of facts
2 as a federal question regardless of whether the court decides the federal claim
3 or even in the plaintiff loses the federal claim. In fact, the Supreme Court has
4 said that because federal courts should avoid unnecessary constitutional rulings,
5 federal courts should decided pendent state law claims before reaching the
6 federal constitutional ones.

7 ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.4 at 332 (4th ed. 2003) (emphasis added).

8 The State's Answer expressly invoked this Court's jurisdiction over I-872's compliance
9 with the Washington State Constitution, seeking a declaration that "Washington's election
10 laws . . . do not deprive the Plaintiffs of any legally cognizable constitutional or other rights
11 protected by . . . the Constitution and laws . . . of the State of Washington." State Ans. at 8:9-
12 12. The Grange likewise prayed for "a judgment declaring that . . . Initiative 872 does not
13 deprive the Plaintiffs of any legally cognizable rights protected by the constitution or laws of
14 the . . . State of Washington." Grange Ans. at 10:15-17.

15 In *Washington Citizens Action of Washington v. State*, 162 Wn.2d 142, 171 P.3d 486
16 (2007) ("*WCAW*"), the State Supreme Court synthesized nine decades of jurisprudence under
17 Art. II, Sec. 37 of the state constitution. Washington has a well-developed body of law
18 regarding voter initiatives and *WCAW* sets out detailed guidance for interpreting and applying
19 the provision to initiatives. I-872's signature drive was not launched until *after* the 2004
20 Montana primary became effective, White Decl. Ex. 6, and its sponsors elected to proceed,
21 even after being warned and knowing that the text of I-872 did not reflect current law. White
22 Decl., Ex. 2. As in *WCAW*, the "proponents could have filed a new initiative" that accurately
23 reproduced the law it was amending. 162 Wn. 2d at 158.

24 Defendants offer no reason why this Court should decline jurisdiction over plaintiffs'
25 Art. II, Sec. 37 claim, particularly when they have already sought a blanket declaration of the
26 constitutionality of I-872 under Washington's Constitution.

27 "[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its
28 justification lies in considerations of judicial economy, convenience and fairness to litigants."
Executive Software North America, Inc. v. Page, 24 F.3d 1545, 1552 (9th Cir. 1994). The

1 default position under §1367 is that a court “shall” exercise pendent jurisdiction unless

- 2 (1) the claim raises a novel or complex issue of State law,
3 (2) the claim substantially predominates over the claim or claims over which
4 the district court has original jurisdiction,
5 (3) the district court has dismissed all claims over which it has original
6 jurisdiction, or
7 (4) in exceptional circumstances, there are other compelling reasons for
8 declining jurisdiction.

9 28 U.S.C. §1367(c). If one or more of the four factors is present, the court may exercise
10 discretion and decline pendent jurisdiction. *Executive Software*, 24 F.3d at 1557. None of the
11 four factors that would warrant a departure from the general rule of supplemental jurisdiction
12 under §1367(a) are present.

13 Given Washington’s highest court’s recent decision in *WCAW*, there is no basis for
14 arguing that the state law claim “raises a novel or complex issue of State law.” This Court’s
15 determination of whether I-872 complies with Art. II, Sec. 37 would be neither novel nor
16 complex. The state law does not predominate over plaintiffs’ remaining as-applied federal
17 constitutional challenge to the initiative, so the second factor does not apply. The third factor
18 does not apply because, as explained above, this Court has not dismissed the claims over which
19 it has original jurisdiction. Finally, defendants have identified no exceptional circumstances
20 or other compelling reasons for declining jurisdiction.

21 DATED this 2nd day of May, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 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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