

The Honorable John C. Coughenour

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WASHINGTON STATE REPUBLICAN
PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC
CENTRAL COMMITTEE, PAUL
BERENDT,

Plaintiff Intervenor

LIBERTARIAN PARTY OF
WASHINGTON STATE, RUTH
BENNETT and J. S. MILLS,

Plaintiff Intervenor

v.

STATE OF WASHINGTON, et al.,

Defendants,

WASHINGTON STATE GRANGE, et
al.

Defendant Intervenor

Case No: CV05-0927-JCC

LIBERTARIAN PARTY'S
REPLY TO
OPPOSITION TO FILE
FIRST AMENDED COMPLAINT
IN INTERVENTION FOR
DECLARATORY JUDGMENT AND
OTHER RELIEF

Noted for February 19, 2010

No oral argument requested

Pursuant to Rule 15 of the Federal Rules of Civil Procedure
and CR 15[a] & [d] the Libertarian Party of Washington State has

LIBERTARIAN PARTY'S REPLY ON
MOTION TO AMEND COMPLAINT -
Page 1 of 5

ORRIN L. GROVER, ESQ.
Orrin L. Grover, P.C.
416 Young Street
Woodburn, OR 97071
(503) 981-5836

1 requested leave of the court to amend and supplement its complaint in
2 intervention.

3
4 **I.**
THIS COURT'S AUGUST 20, 2009 ORDER

5 The court has already granted leave to amend to two of
6 the three Plaintiffs in Intervention:

7 Although not strictly necessary, the Court also approves
8 Plaintiffs' requests to update their pleadings to reflect the
9 changed parties in the litigation and to add any relevant
10 facts that have occurred since the original filings. However,
11 any new factual allegations should be relevant to the
12 ongoing as-applied First Amendment challenge. ...If
13 Plaintiffs wish to include such facts to explain the history of
the litigation or to provide necessary context, the Court is
not opposed; however, Plaintiffs should limit their
allegations of constitutional violations to the *current*
implementation of I-872.

14 Order, pp. 20.

15 [Italics emphasis in original.

Underline emphasis added.]

16
17 This court's order does not require that old allegations
18 from the original complaint need be removed from any proposed
19 amended complaint.

20 It is within the context of this order that the opposition to
21 the motion to amend is judged. Judge Edward Leavy, a distinguished
22 senior member of the Ninth Circuit, once opined from the bench that,
23 "It is almost always error to deny a party the right to amend." While
24 Judge Leavy's comment certainly has limitations and exceptions, his
25

1 expression parallels the policy underlying the Rule 15 of the Federal
2 Rules of Civil Procedure that leave “should [be] freely give[n]....”
3 Federal Rules of Civil Procedure, Rule 15[a][2].

4
5 **II.**
6 **PRE-EXISTING ALLEGATIONS**

7 The court granted leave to amend to two of the three
8 Plaintiffs, the Democratic Party of Washington and the Republican
9 Party of Washington. Oddly, the State has objected to [and moved to
10 strike] these amended complaints after this court granted leave for
11 the amended complaints to be filed. The State and the Grange have
12 opposed the Libertarian Party’s motion to amend with similar
13 objections.

14 The State of Washington and the Grange argue that any
15 amended complaint must have all older allegations “scrubbed” from its
16 face. This is not the law. Plaintiffs are not required to delete
17 allegations simply because they represent theories already decided,
18 particularly where the allegations are appropriate for factual context.

19
20 **III.**
21 **THE SUPREME COURT DID NOT BAR AN ASSOCIATIONAL**
22 **CHALLENGE IN AN AS-APPLIED CONTEXT**

23 The decision of the Supreme Court in *Washington State*
24 *Grange v. Wash. State Republican Party* [2008] 128 S. Ct. 1184

1 ["Grange"] does not bar the plaintiffs from asserting an as-applied,
 2 associational challenge based on subsequent events:

3 [The] factual determination [between permissible and
 4 impermissible burdens on association] must await an as-
 5 applied challenge.

Grange, supra, at 1195.

6 Because I-872 does not on its face provide for the
 7 nomination of candidates or compel political parties to
 8 associate with or endorse candidates, and because there is
 9 no basis in this facial challenge for presuming that
 10 candidates' party-preference designations will confuse
 11 voters, I-872 does not on its face severely burden
 12 respondents' associational rights.

Id.

13 See also, this court's August 20, 2009 order, at p. 9.

14 **IV. SPECIFIC OBJECTIONS**

15 The State has organized its objections in a chart. For ease
 16 of comparison with the State's individual objections, the Libertarian
 17 Party responds in the same form:

18 Paragraphs	Response to Objection
19 Introduction	These paragraphs are merely an introduction. The portions to which the State and the Grange object are unchanged from the original complaint and, thus, are not "amendments."
20 ¶¶ 7-21	The allegations to which the State and the Grange object are unchanged from the original complaint and are not "amendments." 21 As discussed above, the Plaintiff is not required 22 to delete all of the paragraphs of the complaint

23 LIBERTARIAN PARTY'S REPLY ON
 24 MOTION TO AMEND COMPLAINT -
 25 Page 4 of 5

ORRIN L. GROVER, ESQ.
 Orrin L. Grover, P.C.
 416 Young Street
 Woodburn, OR 97071
 (503) 981-5836

1		regarding matters on which the court has already ruled. Nor is leaving such allegations in the
2		Amended Complaint a violation of the court's
3		August 20, 2009 order which addressed what could
4		be <i>added</i> to the complaint. The order did not
5		require deletion of any allegations. This Court is
6		well aware of the issues on which it has already
7	¶¶ 23-27	ruled.
8		With the exception of an additional paragraph
9		in ¶26, the allegations of these paragraphs are
10		allegations that were contained in the original
11		complaint. As such, the Plaintiff Libertarian Party is
12		under no obligation to delete those allegations.
13		Additionally, with respect to the allegations
14		and the added allegations of ¶26, these are
15		asserted as part of the as-applied challenge
16		permitted by the decision of the Supreme Court
17		and this court's order.
18	¶¶ 28-32	
19		These are additional factual allegations pleaded
20		to "add relevant facts that have occurred since the
21		original filings," as permitted by this court's order
22		of August 20, 2009. See order, p. 20. This is
23		wholly within the contemplation of this court's
24		August 20, 2009 order. See Order, p. 20.
25	¶¶ 34-35	
		These are additional factual allegations pleaded
		to "add relevant facts that have occurred since the
		original filings," as permitted by this court's order
		of August 20, 2009. See Order, p. 20. The
		allegations specifically relate to events that have
		occurred since the original complaint was filed that
		may bear on the Plaintiff's as-applied challenge. To
		judge an as-applied challenge, this court must
		interpret the as-applied challenge in light of the
		conduct of all persons and groups that participate
		in the electoral process. Judging whether the
		actions of a particular private or government actor
		bear on the challenge is not an issue to be
		determined at the pleading stage but, instead, as a
		matter of relevance when evidence is presented.

¶¶ 37-39	No actual objection is asserted to these paragraphs.
¶¶ 41-43	These allegations are virtually unchanged from the original complaint and are not "amendments."
¶¶ 46-48	These paragraphs are modified to eliminate the allegations regarding the original facial challenge to I-872 and to focus on the as-applied challenge and the "forced association" resulting from the application of the Defendant's implementation of I-872.
Prayer	The opposition on the prayer is a combination of arguing against portions of the prayer from the original complaint [regarding which this court has ruled] and ignoring the changes to modify relevant portions of the original prayer to fit the as-applied challenge.

V. CONCLUSION

The motion for leave should be granted.

DATED: February 24, 2010 at Woodburn, Oregon.

ORRIN L. GROVER, P.C.
/s/ Orrin L. Grover
 ORRIN L. GROVER, OSB NO. 78010

Attorney for Plaintiff Intervenors
 Appearing Pro Haec Vice
 LIBERTARIAN LP OF WASHINGTON
 STATE, RUTH BENNETT, and J. S. MILLS
 Email: orrin@orringrover.com

JOHN S. MILLS, WSBA #15842
 Attorney for Plaintiff Intervenors
 LIBERTARIAN LP OF WASHINGTON
 STATE, RUTH BENNETT, and J. S. MILLS
 Email: jmillslaw@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2010, I electronically filed the foregoing Plaintiffs' Motion to File the First Amended Complaint for the Plaintiff Libertarian Party, with the clerk of the Court using the CM/ECF system which will send notification of such filing electronically to the following:

- David T. McDonald and Jay Carlson, attorneys for the Democratic Central Committee;
- John J. While, Jr., attorneys for the Washington Republican Party;
- Rob McKenna, Attorney General;
- Maureen A. Hart, Solicitor General;
- James K. Pharris, Sr. Assistant Attorney General; and
- Jeffrey T. Even, Assistant Attorney General;
- Thomas F. Ahearne, Attorney for Defendant-Intervenor Washington State Grange;

DATED this 24th day of February, 2010.

/s/ Orrin L. Grover

Orrin L. Grover
In Pro Haec Vice