

Honorable John C. Coughenour

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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,

Defendant Intervenors.

NO. CV05-0927-JCC

REPLY IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT

1 **A. The question in the Motion for Partial Summary Judgment is not whether the PCO**
 2 **election statute violates the First Amendment on its face, but whether the State’s**
 3 **implementation does.**

4 Ninth Circuit precedent prohibits exactly the consolidated ballot Washington uses to elect
 5 Republican PCOs: “[A]llowing nonmembers to vote for party precinct committeemen violates
 6 the . . . Party’s associational rights.” *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277,
 7 1281 (2003). In its motion for summary judgment, the State argues that *Bayless* is
 8 distinguishable because PCO elections in Washington are conducted differently than in Arizona.
 9 The State asserts that Washington “does not authorize unaffiliated voters or members of third
 10 parties to participate in the election of a party’s PCOs.” State Mot. at 19 (Dkt. 239). The use of
 11 the consolidated ballot, however, allows non-party members to vote for Republican PCOs, just as
 12 the Arizona law allowed unaffiliated voters to participate in the election of Libertarian PCOs.

13 Nothing in the PCO election statute mandates the State’s use of a consolidated ballot for
 14 PCO elections as part of implementing I-872.¹ The statute provides:

15 The statutory requirements for filing as a candidate at the primaries apply to
 16 candidates for precinct committee officer. The office must be voted upon at the
 17 primaries, and the names of all candidates must appear under the proper party and

18 ¹ The Republican Party’s Motion for Partial Summary Judgment (Dkt. 250) addressed only the consolidated
 19 ballot part of the State’s implementation of I-872. It did not address other defects in the implementation identified
 20 in the Party’s Opposition to the State’s Motion for Summary Judgment (Dkt. 260), including the State’s refusal to
 21 enforce the PCO statute as written. The State’s assertion that broader claims are waived by a motion for partial
 22 summary judgment is contrary to Civil Rule 56 and the law of this district.

23 Under ordinary circumstances, an argument that partial summary judgment waives unmoved-upon
 24 claims would, of course, fail. A motion for partial summary judgment simply resolves part of a
 25 controversy and reserves the balance of the claims for trial. FED. R. CIV. P. 56(a) (“A party claiming
 relief may move . . . for summary judgment on all *or part* of a claim”) (emphasis added); *see* CHARLES
 A. WRIGHT & ARTHUR R. MILLER, 5C FEDERAL PRACTICE AND PROCEDURE § 1381 (3d ed.) (“partial
 summary judgment will narrow, but not terminate the controversy between the parties”). The cases that
 Defendants cite are inapposite.
Conservation Northwest v. Rey, 674 F. Supp. 2d 1232, 1256 (W.D. Wash. 2009). The State’s citation to a run-of-
 the-mill prohibition on raising new issues in a reply brief at the Court of Appeals in no way supports the notion that
 a motion for partial summary judgment amounts to a waiver of other claims for relief.

1 office designations on the ballot for the primary for each even-numbered year, and
 2 the one receiving the highest number of votes will be declared elected. However,
 3 to be declared elected, a candidate must receive at least ten percent of the number
 4 of votes cast for the candidate of the candidate's party receiving the greatest
 number of votes in the precinct. The term of office of precinct committee officer
 is two years, commencing the first day of December following the primary.

5 RCW 29A.80.051.² The statute merely requires that intraparty competition be resolved
 6 democratically and that elected PCOs achieve sufficient levels of support (at least 10% of other
 7 party candidates so that they may be said to be representative of the party voters in their
 8 precinct).

9 The State may regulate parties because of its interest in the integrity of its election
 10 process and ensure that election machinery runs smoothly. *Eu v. San Francisco County*
 11 *Democratic Cent. Comm.*, 489 U.S. 214, 227, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989);
 12 Among the election-related duties the State assigns to precinct committee officers (the
 13 statutorily-defined members of the county central committees) is filling vacancies in partisan
 14 office held by members of the same party. *See* WASH. CONST. Art. II, §15. As noted by the
 15 Supreme Court in this case, where a statute has a "plainly legitimate sweep," it will not be held
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 18 ² As of yesterday, it appears election administrators have discovered yet another statute rendered obsolete in
 19 part by the State's implementation of I-872 PCO elections. King County election administrators advised Lori
 20 Sotelo, chair of the King County Republican Party that the county would not tabulate votes for declared write-in
 candidates for PCO "as a cost savings measure . . . under the newly revised WAC # 434-262-075." Sotelo Decl. Ex.
 1. The email from the county also included the text of the statute governing counting of write-in ballots, which
 provides,

21 (1) For any office at any election or primary, any voter may write in on the ballot the name of any person for an
 office who has filed as a write-in candidate for the office in the manner provided by RCW 29A.24.311 and *such vote*
shall be counted the same as if the name had been printed on the ballot and marked by the voter. . . .

22 (2) *The number of write-in votes cast for each office must be recorded and reported with the canvass for the*
 23 *election.*

24 RCW 29A.60.021. (emphasis added). The refusal to count and report write-in votes makes testing the 10%
 threshold for PCO election impossible. Sotelo Decl. ¶3.

1 unconstitutional on its face. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442,
 2 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). However, the State cannot leverage its interest
 3 in integrity of its election system to impinge on core rights of political association. *See Eu*,
 4 *supra* at 227; *Cal. Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502
 5 (2000).

6 Despite concerns that the State's implementation of I-872 regarding PCO elections was
 7 another issue that put the entire initiative at risk,³ the State decided to use the consolidated ballot,
 8 rejecting any effort to obtain even a minimal expression of affiliation from voters. "To avoid
 9 needing a pick a party box, we are putting all the candidates under the same contest – grouped by
 10 party – and when a voter votes for one candidate, that is their [*sic*] party affiliation statement."
 11 White Decl., Ex. 107 (Dkt. 269.6) at 2. The State's published summary of its Top Two Primary
 12 rules states:
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- 14 • Voters are not required to affiliate with a political party in order to vote in the
 Primary.
- 15 • For each race, voters may vote for any candidate listed on the ballot.
- 16 • Voters in the Primary are voting for candidates, not choosing a political party's
 nominees.
- 17 • The purpose of the Primary is to winnow the number of candidates to two for the
 General Election

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 19 ³ "My main comment on PCOs – and I know this is not doable at this time – is that they may kill the Top-Two
 20 all by themselves, so, at the least, move them to the General." White Decl., Ex. 129 (Dkt. 269.7) (e-mail from
 21 David Cunningham, Elections Supervisor, Skagit County). The State implemented the consolidated ballot in the
 22 face of warning from its counsel that the single-ballot option imperiled all of I-872:

23 From a legal standpoint, including precinct committee officers on the Top Two Primary ballot
 24 could cause voter confusion. . . . To emphasize the difference between PCOs and other offices, the
 25 Attorney General's Office has recommended that a separate ballot be required.
 White Decl., Ex. 109 (Dkt. 269.6) at 2. The State received feedback from election administrators. *See, e.g.*, White
 Decl, Ex. 112 (Dkt. 269.6). Some of the feedback indicated that separate ballots would be an administrative burden.
 One even suggested that in view of the administrative burdens, "[i]f we can't handle it, then let the Top Two
 Primary go down." White Decl., Ex. 108 (Dkt. 269.6) (e-mail from Delores Gilmore, Kitsap County Elections
 Manager).

1 White Reply Decl., Ex. 1. Republican PCOs are selected at the primary, where “voters may vote
2 for any candidate listed on the ballot.” The instructions for voting for PCOs do not prevent
3 nonmembers from voting for Republican PCOs.
4

5 Q Do you know whether Washington has undertaken any steps to ensure that
6 only voters who are affiliated with the Republican Party vote for Republican
7 Precinct Committee Officer candidates?

8 A We have not. We've had discussions, but we have not.

9 Reed dep. 45:14-17 (White Supp. Decl. Ex. 1). As the Court has previously noted, *allowing*
10 nonmembers to elect PCOs is the problem.
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12 Moreover, that Washington has allowed PCOs to be elected from the general
13 population since before I-872 hardly insulates the provision from challenge, given
14 that the state’s earlier election scheme was struck down as unconstitutional for
15 exactly that reason. *See Reed*, 343 F.3d at 1203.

16 Dkt. 184 at 11, fn. 5. I-872’s consolidated ballot continues to allow nonmembers to vote for
17 Republican PCOs, and is unconstitutional under *Bayless* and *Democratic Party v. Reed*, 343 F.3d
18 1198 (2003).
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20 **B. In response, the State defends its implementation of PCO elections under I-872 in
21 their entirety. There are other defects, which cannot be fixed by a narrow,
22 affirmative injunction and I-872 must fall.**

23 The State’s response incorporates its motion for summary judgment, asserting the
24 constitutionality of its administrative decision to treat a portion of the PCO election statute as
25 repealed by I-872, because there are no longer any candidates of the Republican party on the
ballot. *See* WAC 434-262-075 (“ ... candidates for public office do not represent a political
party”). Under the State’s implementation, I-872 does away with political affiliation between
candidates and parties entirely – negating the concept of nomination – and rendering illusory its

1 representations throughout this litigation that the Republican Party may still nominate its
2 candidates.

3 “Major political party” status under RCW 29A.04.086 requires that “[a]t least one
4 nominee for president, vice president, United States senator, or a statewide office receive at least
5 5% of the total vote cast at the last preceding state general election in an even-numbered year.”
6 This status continues “until the next even-year election at which a *candidate of that party* does
7 not achieve at least 5% of the vote from one of the previously specified offices.” RCW
8 29A.04.086 (emphasis added). “If *none* of these offices appear on the ballot in an even-year
9 general election, the major party retains its status as a major party through that election.” *Id.*
10 (emphasis added).
11

12 The only statewide race on this year’s ballot is the U.S. Senate race, in which Dino Rossi
13 is the Republican nominee. *See* Esser Decl. (Dkt. 252), ¶ 22. The Republican Party, through its
14 State Committee, has also nominated candidates for Congress. All are candidates of the
15 Republican Party. Under RCW 29A.80.051, a PCO candidate “must receive at least ten percent
16 of the number of votes cast for the *candidate of the candidate's party* receiving the greatest
17 number of votes in the precinct.” (Emphasis added) *See also* WASH. CONST. Art. II, § 15 (“the
18 person appointed to fill the vacancy must be from the same legislative district, county, or county
19 commissioner or council district and the same political party” and if the local legislative
20 authority does not act timely, the governor shall appoint a successor “of the same political party”
21 as the departing officeholder). However, “[u]nder the law for Initiative 872 . . . , there’s really
22 no denominator anymore.” White Decl., Ex. 330 (Dkt. 269.21) at 8:2-4.
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1 By the State's implementation, Washington will cease to have *any* major political parties
2 after the 2010 general election.⁴ The implementation of I-872 appears to be a backdoor effort to
3 abolish major political parties without legislative authorization. The existence and operation of
4 "major political parties" permeates Washington's election and governmental system. All other
5 political parties in the state are defined in counterpoint to a "major political party." RCW
6 29A.04.097. The Presidential Primary is conducted regarding candidates seeking "a major
7 political party nomination for president . . ." RCW 29A.56.030(1). The State's process for
8 "certification and training of election administrators, assistant election administrators, and county
9 canvassing board members" requires notice of reviews be given to "the chairs of the state
10 committees of any major political party," as does processing of absentee ballots. WAC 434-260-
11 040; WAC 434-250-110. The Secretary of State must develop a checklist for review of county
12 election procedures and provide it "to the chairs of the state central committees of each major
13 political party at least once per year." WAC 434-26-110. A "caucus political committee" is "a
14 political committee organized and maintained by the members of a major political party in the
15 state senate or state house of representatives." RCW 42.17.020(10). The legislative "joint
16 committee on energy supply and energy conservation" is made up of "four members from the
17 senate" and "four members from the house of representatives." "Two members from each major
18 political party must be appointed [from each house]." RCW 44.39.015. *See also e.g.* RCW
19 90.86.020 (Joint legislative committee on water supply during drought); RCW 47.60.310(3)
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23 ⁴ This is so unless the statutes are construed so that, for example, Rossi is a "candidate of the party" under RCW
24 29A.04.086, but not a "candidate of the . . . party" under RCW 29A.80.051. Such is an absurd construction, and
25 especially so given that the 5% and 10% thresholds under the two statutes both look to votes cast for the candidate
on the State's ballot.

1 (ferry/board) (“ . . . not more than three members shall at the time of their appointment be
2 members of the same major political party.”)

3 The State implementation of I-872’s ballot *severs* all connection between candidates on
4 the ballot and parties, and has effects and implications far beyond the PCO statute. It has no
5 support in the language of I-872 itself, and negates both the right to nominate (privately) and to
6 affiliate with or be members of a major political party. The implementation directly impairs core
7 First Amendment rights of association.

8
9 **CONCLUSION**

10 The consolidated ballot defect could be addressed through a narrow, affirmative
11 injunction directed at the manner in which State election officials are carrying out the legislative
12 directive to conduct public elections of PCOs. The Republican Party suggested alternative
13 approaches to an affirmative injunction, consistent with the State’s administration of other
14 election laws as a guide (which clearly indicates that the suggested alternatives do not impose
15 insurmountable burdens). None of the Party’s suggested alternatives alter the PCO election
16 statute, RCW 29A.80.051. In contrast, the State has already clearly demonstrated its willingness
17 to disregard the 10% threshold, an express requirement in the statute. Faced with a prohibitory
18 injunction, it is likely that the State would merely fail to cure its regulations and refuse to hold
19 PCO elections in the future, notwithstanding the express requirement of RCW 29A.80.051.

20 The State is implementing I-872, however, in a manner that abolishes major political
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1 parties two out of every four years.⁵ That cannot be cured by a narrow affirmative injunction. If
2 I-872 does what the State now contends, it is unconstitutional, *in toto*.

3 DATED this 17th day of September, 2010

4 /s/ John J. White, Jr.
5 John J. White, Jr., WSBA #13682
6 Kevin B. Hansen, WSBA #28349
7 of Livengood, Fitzgerald & Alskog, PLLC
8 Attorneys for Plaintiffs
9 121 Third Avenue
10 P.O. Box 908
11 Kirkland, WA 98083-0908
12 Ph: 425-822-9281
13 Fax: 425-828-0908
14 E-mail: white@lfa-law.com
15 hansen@lfa-law.com

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23 ⁵ The State concedes that the President and Vice-President candidates appear as party nominees, so there would
24 be major political parties following those elections if their presidential nominees achieved the 5% vote threshold of
25 RCW 29A.04.086.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2010, 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 all counsel of record.

/s/ John J. White, Jr.
John J. White, Jr., WSBA #13682
Kevin B. Hansen, WSBA #28349
of Livengood, Fitzgerald & Alskog, PLLC
Attorneys for Plaintiffs
121 Third Avenue, P.O. Box 908
Kirkland, WA 98083-0908
Ph: 425-822-9281 Fax: 425-828-0908
E-mail: white@lfa-law.com
hansen@lfa-law.com