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 DEMOCRATIC PARTY'S FIRST AMENDED AND SUPPLEMENTAL COMPLAINT

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I. INTRODUCTION

The current motion arises out of differing perceptions about the role of amended complaints in this case. When the case was remanded to this Court for additional proceedings following a Supreme Court decision on the merits of the main claim and Ninth Circuit motion practice, the Republican and Democratic parties both sought leave to file amended complaints. In its Order dated August 20, 2009, the Court granted these motions in part, but limited the amendments to certain matters that remained for decision after the Supreme Court opinion, excluding both matters that had already been expressly or impliedly resolved and new matters unrelated to the original case. Order at 20-21.

Based on the Court's Order, the State expected that if the parties chose to file amended complaints, these pleadings would serve as a blueprint for the next phase of the litigation. In other words, the State expected that the amended complaints would: (1) identify the specific applications of Initiative 872 (I-872) that the political parties still intend to litigate (within the parameters set by the Court's August 20 Order); (2) specify the relief sought with respect to those issues; and (3) remove allegations and claims relating to matters already decided or matters excluded from consideration.

The amended complaints filed by both the Democratic and Republican parties were unsatisfactory in this respect.[1] Although the complaint included new material and identified certain applications of I-872 as objectionable, this material was incorporated within the

[1] Counsel for the Democratic Party points out that he submitted a draft amended complaint to the Defendants several months ago inviting comments and suggestions. He is correct on that point, and the State appreciated his courtesy and consideration. However, this procedure left the Defendants in the uncomfortable position of being asked to offer drafting suggestions to the Plaintiffs as to how best to craft a lawsuit against themselves. Although the Plaintiffs and Defendants' counsel did have some general discussions with one

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framework of the original complaint filed in 2005. The original causes of action and claims for relief were retained in the amended complaint, with a few additions, leaving the clear impression that the Democratic Party hopes or expects to continue to assert that I-872 is unconstitutional on its face. Nothing in the amended complaint separates out the specific matters the Democratic Party expects to litigate in the next phase of the case, or excludes the possibility of re-plowing old ground. The proposed complaint leaves the State, and the Court, in the dark about what is going to happen next, or how the parties may best prepare for discovery, motion practice, and a possible trial on the issues remaining for decision.

The Democratic Party's response to the striking motions somewhat clarifies the Party's intentions and points toward a possible resolution of the issues raised by the amended complaint. However, the amended complaint is still objectionable in many respects.

II. DISCUSSION

A. Material Carried Forward From The Original Complaint

The Democratic Party points out that much of the material relating to the motions to strike is not new, but was in the original complaint, and is carried forwarded for continuity and completeness. The State accepts counsel's assurance that "the Democratic Party has no intention of ignoring decisions of this Court or any other Court." Dem. Resp. at 4. However, this Court has already instructed that amended complaints should serve the purpose of "identify[ing] the relevant issues moving forward so as to focus and limit the scope of the litigation regarding the as-applied First Amendment claims." Order at 20. The continued inclusion of allegations already resolved is confusing, particularly as it relates to claims for

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another about the future of the case, the State chose not to comment specifically on the draft amended complaint.

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relief. Either these claims should be stricken or some alternative means (such as a pretrial order) should be employed to clarify that these issues will not be re-argued in the next phase of the case.[2]

B. New Causes Of Action For Which Leave Was Not Granted

The Democratic Party points out that it has complied with the Court's Order and has deleted a proposed cause of action based on article II, section 37 of the state constitution. Dem. Resp. at 4. However, paragraph 19 of the amended complaint appears to be related directly to this issue, and led the State to conclude that the issue might still be raised.[3] The State accepts counsel's assurance that it will not, but nonetheless in the spirit of producing complaints that serve as an accurate guide to the remaining issues (*see* Order at 20), paragraph 19 should be stricken.

C. Supplemental Allegations

The Democratic Party asserts that the supplemental allegations contained in its proposed amended complaint are intended to relate solely to issues remaining in the case as set forth in this Court's August 20 Order. Dem. Resp. at 4-5. However, so long as the supplemental material is simply incorporated into the original complaint and appears side by side with original causes of action and claims for relief, it is difficult to determine whether the "new" material relates solely to the specific relief claimed in this phase of the case or is somehow intended to provide support either for renewing arguments already disposed of or for injecting new issues into the case. Either the extraneous material should be stricken or

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[2] If it is sufficiently clear that only the "new" elements are to be argued in the next phase, the State does not object to the inclusion of factual allegations that provide history, continuity, or context.

[3] The drafting of the Republican Party's amended complaint gave rise to the same concern.

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other steps should be taken to clarify what issues remain for consideration, and how the supplemental allegations relate to these issues.

D. Issues Relating To Specific Relief Requested

In response to the State's concern that the amended complaint fails to identify the specific relief requested, the Democratic Party points to its request for relatively specific relief incorporated in paragraph 8 of the Prayer for Relief in the proposed amended complaint. Paragraph 8 is considerably more specific than the remainder of the Prayer contained in the proposed amended complaint. However, if Paragraphs 1 through 7 remain in the Prayer, they assert that the primary relief sought is still a declaration that I-872 is entirely unconstitutional. Similarly, the Democrats continue to assert causes of action that are not consistent with this Court's order, as explained in the State's motion. If these other paragraphs are not simply stricken, the Court should enter an order determining that the contents of these paragraphs are not material to the current phase of the litigation and should be disregarded for purposes of this phase.

While Paragraph 8 of the Prayer for Relief is more specific, it still contains language implying that the Top Two Primary somehow selects the Party's candidates for public office, such as by referring to "cross-over voting or ticket-splitting"—ideas which are simply irrelevant to a Top Two Primary. The language could be re-crafted to show that it is limited to the application of I-872 to specific circumstances, as the Court has ordered. Moreover, even Paragraph 8 fails to fully comply with this Court's instruction to state specifically how the implementation of I-872 could be changed to meet their objections. Order at 20-21. At the very least, these matters could be resolved by an appropriate pre-trial order or similar

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document specifying the precise issues "on the table" for consideration in the next phase of the case.

III. CONCLUSION

For these reasons, the Court should grant the State's motion to strike the Democratic 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 Democratic Party's First Amended And Supplemental 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.

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