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,

and

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

and

WASHINGTON STATE GRANGE,

Defendant Intervenor.

No. CV05-0927 JCC

REPLY IN SUPPORT OF WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: September 17, 2010

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Grange opposes the Democratic Party's Motion using an argument made by the State in an earlier Motion to Dismiss this case, namely that I-872 does not apply to PCO elections. The argument was correctly rejected by the Court when made by the State. It should be rejected by the Court when made by the Grange.

The State, for its part, essentially opposes the Democratic Party's Motion on the basis that it need not enforce laws passed by the Legislature. The State has not provided any adequate justification for failing to carry out laws passed by the State Legislature that:

(1) limit voting in Democratic PCO races to voters who have affiliated with the Democratic Party as evidenced by having voted only for Democratic candidates on the ballot (RCW 29A.52.151(1)(a),(b)); and

(2) require candidates for Democratic PCO to receive a minimum vote of 10% of the highest vote getter of the Democratic Party otherwise on the ballot before being declared elected (RCW 29A.80.051).

It should not require an injunction from this Court before State officials follow unambiguous statutes adopted by the State Legislature but the State's opposition to the Democratic Party's Motion suggests that it will. The Court should grant the Democratic Party's Motion and enter an appropriate injunction.

II. ARGUMENT

1. The Arguments Made by the Grange Ignore the Fact that the State Says I-872 Did Change PCO Elections.

The Grange opposes the Democratic Party's Motion for Partial Summary Judgment on the basis that I-872 does not, on its face, indicate that it affects or involves PCO elections. Grange Resp. at 1. The Court previously addressed this argument in its Order rejecting defendants' Motions to Dismiss this claim:

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> I-872 created the concept of a "party preference" that candidates would explicitly declare and that would be designated with the candidates' names on the ballot….Plaintiffs claim that, since I-872's implementation, candidates for the office of party PCO are no longer required to demonstrate membership in that party…If true, the Court acknowledges that the "party preference" scheme established by I-872 may be particularly problematic when applied to the election of PCO's…party PCOs are party officers and they have direct control over certain party functions; therefore it seems reasonable that the application of I-872's party preference designations and single, undifferentiated ballot to PCO elections might raise associational claims that were not apparent on the face of the initiative.

Order, Dkt. 184 at 10,11 ("Order").

It is the "party preference" scheme created by I-872, as implemented by the State, that creates the issue raised by the Democratic Party's Motion for Partial Summary Judgment: The State contends that a Democratic "party preference" designation, even when used by a party nominee, does not mean a candidate is a candidate of the same political party as a Democratic PCO candidate and therefore state election officials are free to ignore laws passed by the legislature that:

a) limit voting in Democratic PCO elections to affiliates of the Democratic Party; and

b) assure that party officers had a minimum level of support from Democratic voters.

But for the State's implementation of I-872 and its assertion that I-872 changed or made irrelevant statutes on the books governing PCO elections, this issue would not be before the Court.

The Grange' argument is the same one previously made by the State and rejected by the Court. *See* Order at n.5. The argument is no stronger coming from the Grange than it was when it was made by the State. The only material difference in circumstances between the time the Court rejected the State's argument and today is that in August 2009 the Democratic Party was merely "alleg[ing] that the PCO elections were changed in the implementation of I-

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872." Order at n.5. Today the State is in fact asserting that PCO elections were changed in the implementation of I-872. The Grange argument—that PCO elections were not changed by I-872—would be true if the State implemented I-872 as it was apparently intended: that party preferences are the same as party designations that had been appearing on the ballot for decades. But it is not true if State officials implement I-872 as they have done and seek to change the meaning of party designations on ballots and to ignore statutes using I-872 as the justification.

2. The State's Implementation of I-872 Ignores State Statutes Governing PCO Elections

The State argues that election officials can ignore RCW 29A.80.051 (requiring a 10% minimum vote to be elected as a party PCO) because "candidates do not appear on the ballot as candidates of any political party." State Resp. at 3. RCW 29A.36.121(3), however, clearly requires that "The political party or independent candidacy of each candidate for partisan office shall be indicated next to the name of the candidate on the primary and election ballot." PCOs appear on the same ballot as all other candidates for partisan office. In virtually all cases there are candidates of the same party as the Democratic PCO candidate's identified on the ballot. Voters apparently know how to identify Democratic candidates on the ballot:

> Q. …Which are the Democratic candidates listed on the ballot?
> A. Let me read the whole paragraph.
> Q. Sure.
> A. Okay, your question is which --
> Q. You said the "Democratic candidates listed on the Top Two [general election ballot]." Did you mean the candidates who had said they preferred the Democratic Party?
> A. Yeah…

McDonald Decl., Dkt. 258, Ex. 4 (Donovan Dep. 50:18-51:1). Potential inaccuracies in using the self-supplied "prefers Democratic Party" designation to identify the Democratic candidates are readily curable by simply asking the Party if the candidates using the designation on the ballot are in fact Democratic candidates.

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The State asserts, without any support, that under I-872 candidates "do not appear on the ballot as candidates of any political party." There is no language in I-872 that supports the State's assertion. While I-872 does not treat candidates as "nominees" of a political party under I-872 they remain candidates of the party just as they always have been:

> **How would this proposed initiative change our election laws?**
>
> …[Under the proposed system] Candidates for partisan offices *would continue to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots. . .* At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names...

Dkt. #8-2 (Exhibit 3) at pages 13 and 14 of 21. (FAQ posted on Grange sponsored website supporting I-872).

As the Ninth Circuit noted earlier in this case:

> the primary envisioned by Initiative 872 is still overtly partisan. The Initiative redefined the concept of "partisan office," but those offices remain partisan and so does the primary.

Wash. State. Repub. Party v. State of Wash., 460 F.3d 1108, 1118 (9th Cir. 2006), *cert. granted*, *judgment vacated and case remanded*, 128 S.Ct. 1184 (2008), 545 F.3d 1125 (2008)

In addition to its argument that State officials should simply be allowed to ignore laws passed by the Legislature, the State makes the disingenuous argument that the "ten percent" standard cannot be meaningfully applied in the context of a primary conducted under I-872 *as the State has implemented it*. The State claims it cannot enforce the statute because "the law does not require parties to nominate candidates, nor does it provide any mechanism for official recognition of private acts of nomination." State Resp. at 4. Under the State's logic, vacancies in the Legislature and in local partisan office must be left unfilled because neither state law nor the constitution provide any "mechanism" to implement the constitutional directive found in Article II, Section 15.

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Article II, Section 15 of the state Constitution requires vacancies in partisan office to be filled from a list of nominees submitted by the appropriate political party. Government officials and political parties have been communicating for decades on such issues without the need for special enabling statutes of the kind the State is suddenly demanding in connection with determining which candidates belong to a political party. Indeed, the State expressly takes the position that this constitutional limitation on appointments to fill vacancies is enforceable even as to parties for which the State has not even defined a county central committee. State Resp. to Republican Party's Motion for Summary Judgment at n.3 and text accompanying. If State officials feel the need to pass a regulation to allow themselves to ask the political parties who the party nominees are then they can readily do so. But it is hardly necessary to have regulations. Even without the adoption of specific regulations implementing the filling of legislative vacancies, State and local officials and the parties have managed to communicate successfully for decades.

There is no reason to suspect that communication would fail to occur with respect to the identity of party nominees if state officials needed information in order to enforce the 10% standard. Election officials and the parties communicate on similar election issues regarding status of individuals, dates, declarations, regularly without the need for the special enabling legislation the State seeks in its brief. *See, e.g.,* RCW 29A.60.170(1) ("The counting center in a county using voting systems is under the direction of the county auditor and must be observed by one representative from each major political party, if representatives have been appointed by the respective major political parties and these representatives are present while the counting center is operating"). *See, e.g.,* also 29A.56.020(2), (3), 29A.56.050(4). There has been no need for special legislation defining how to determine the political party of members of State Boards and Commissions in order to enforce statutory requirements such as RCW 42.17.350(1) ("No more than three members shall have an identification with the same

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political party") or RCW 42.52.350(3) ("No more than three members may be identified with the same political party") or RCW 82.03.020 ("no more than two of whom at the time of appointment or during their terms shall be members of the same political party.").

The Secretary of State has adopted regulations telling elected officials to ignore unambiguous statutes in light of I-872. *See, e.g.,* WAC 434-230-015(6) ("Ballots shall not be formatted as stated in …29A.36.104, 29A.36.106, 29A.36.121, 29A.36.161 (4), …"). The State's argument that it is incapable of adopting simple regulations, if necessary, allowing election officials to enforce the unambiguous requirements of RCW 29A.80.051 lacks credibility.

The problem is not that State officials are unable to comply with existing laws. The issue is that State officials choose to ignore those laws.

III. CONCLUSION

The State has not provided any adequate justification for failing to carry out laws passed by the State Legislature that limit voting in Democratic PCO races to voters who have affiliated with the Democratic Party and requiring that candidates for Democratic PCO receive a minimum vote before being declared elected. The State can readily carry out these laws using existing, tested mechanism and machinery. It should be ordered to do so.

DATED this 17th day of September, 2010.

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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/ David T. McDonald
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