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

MOTION TO AMEND AND SUPPLEMENT COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF REGARDING INITIATIVE 872 AND PRIMARY ELECTIONS

Noted for December 11, 2008

No oral argument requested

Pursuant to CR 15(a) and (d), the Washington State Democratic Central Committee requests leave of court to amend and supplement its Complaint in Intervention as set forth in

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the attached proposed First Amended and Supplemental Complaint in Intervention. The proposed amended and supplemental pleading:

1) Deletes and adds parties to reflect dismissals, withdrawals, substitutions and interventions that have occurred since the original Complaint in Intervention was filed;

2) Supplements the factual allegations with respect to the proposed implementation of Initiative-872 ("I-872") that led to this litigation in order to conform to evidence received and considered by the Court after the date of the original pleading;

3) Supplements the factual allegations to set forth material transactions, events and occurrences that have happened after the date of the original Complaint in Intervention to reflect the State's abandonment of its original implementation of I-872 and its new implementation of I-872 adopted in 2008;.

4) Supplements the Democratic Party's cause of action for forced association to enumerate further the associations forced upon the Party by the State's implementation of I-872;

5) Supplements the Democratic Party's cause of action for injunctive relief to include as a basis selective enforcement of election laws by State officials; and

6) Adds a new cause of action challenging the constitutionality of I-872 in light of the State's position taken in this proceeding after the date of the original Complaint in Intervention, and in its proposed implementation of I- 872, that I-872 impliedly repealed or amended various election laws that were not included in the text of the initiative as required by Article II, § 37 of Washington's constitution.

A copy of the proposed First Amended and Supplemental Complaint in Intervention, as well as a mark-up version showing changes to the original complaint, are attached as **Attachments 1 and 2**, respectively.

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BACKGROUND

In November 2004 the voters of Washington passed Initiative 872 ("I-872") which was intended to replace the State's unconstitutional blanket primary system with a blanket primary in which only the top two voter getters would advance to the general election, rather than one candidate from each major political party. On May 18, 2005 the Secretary of State adopted regulations implementing I-872 for the September 2005 primary election. On May 19, 2005 the Republican Party brought this action challenging the constitutionality of I-872 as implemented by State and local officials.

Immediately thereafter, the Democratic Party intervened, challenging I-872 because "The Initiative, as implemented by State and local officials, eliminates mechanisms previously enacted by the state to protect [the First Amendment rights of the Party and its adherents] and provides no effective substitute mechanisms for the Party and its adherents to protect their rights of association and of determining the Party's message." Complaint in Intervention 3:8-12 (Dkt. #2).

On May 26, 2005 the Republican Party moved for a preliminary injunction.

The State of Washington moved to intervene as a defendant and, in its answer, requested the Court enter judgment that "Washington's election laws, and the conduct of elections under those laws, do not deprive the Plaintiffs of any legally cognizable constitutional or other rights protected by either the Constitution and laws of the United States or of the State of Washington." Answer of State of Washington Intervenors 8:9-12.

At the Court's request, on June 17, 2005 the Republican, Democratic, and Libertarian Parties filed early motions for summary judgment limited based on facial challenges to I-872.

The State of Washington responded to the political parties' motions for summary judgment with a cross-motion for summary judgment in its favor. As part of its response, the

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State tendered to the Court for consideration its implementation of I-872, noting that "To implement the Initiative, the Secretary of State adopted emergency rules on May 18, 2005." State's Response at 9:5-7. A copy of the implementation rules was provided as Exhibit C to the Declaration of James K. Pharris. (Dkt. No. 66) (hereinafter "Pharris Decl.").

These implementation rules provided a new form of declaration of candidacy. Pharris Decl., Exhibit C, OTS-8074.3[4]. The declaration of candidacy for partisan office asked the candidate to check one of two options:

"my party preference is _____"

or

"I am an independent candidate."

The form noted that "The party preference will be listed on the ballot exactly as provided unless limited space necessitates abbreviation."

The State proposed to use continue using the same ballot forms as it had been using prior to I-872, except that WAC 434-230-170 (the regulation specifying the ballot form) was amended to delete "together with political party designation certified by the secretary of state as provided in RCW 29A.36.010 or the word 'non-partisan' or 'NP' as applicable." In lieu of that language new language was added to the regulation stating that:

> If the position is a partisan position, the party preference or independent status of each candidate *shall be listed next to the candidate*. The party preference *must be listed exactly as provided by the candidate on the declaration of candidacy* unless limited space on the ballot necessitates abbreviation or the party description is, in the opinion of the county auditor, obscene.

RCW 29A.36.010 (as amended; emphasis added).

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This Court granted the political parties' motions for summary judgment based on a facial challenge to I-872, noting that it had reserved issues related to the political parties' as applied challenge to I-872. *Washington State Republican Party v. Logan*, 377 F.Supp.2d 907, 916 n.13 (W.D. Wash. 2005). Thereafter the Court entered a permanent injunction enjoining the implementation or conduct of elections under I-872 and separately enjoining the enforcement or implementation of RCW 29A.08.030 (the filing statute created by I-872).

The State and Grange appealed the Court's order. Thereafter the State repealed the implementation of I-872 that had been tendered by it to this Court for review. The Ninth Circuit upheld the Court, based in part upon the fact that the form of the ballot to be used in implementing I-872 was to be the same as used under the blanket primary. The State and Grange then petitioned for a writ of *certioriari* from the United States Supreme Court, which subsequently was granted on February 26, 2007. In its Reply Brief on the merits before the Supreme Court, the Grange proposed for that the State might use a new form of ballot rather than the one specified by the State in the proposed implementation adopted by the State on May 18, 2005. The Supreme Court reversed the Ninth Circuit's affirmance of this Court's summary judgment, holding in part that the facial challenge to the constitutionality of I-872 depended upon the threat of confusion between the party's actual candidates and candidates merely "preferring" the Democratic Party. The Court concluded it had no evidentiary basis to evaluate the risk of confusion in the context of a facial challenge if there was no implementation of I-872 to evaluate. The Supreme Court's decision did not vacate or modify this Court's injunction, and on its face did not fully resolve the case, only the facial challenge.

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The Supreme Court expressly recognized that it was not reaching all issues, only those issues encompassed by the question on which it granted certiorari. *Washington State Grange v. Washington Republican Party*, 128 S. Ct. 1184, 1195 n.11 (2008).

Upon learning of the Supreme Court's opinion, the Secretary of State immediately announced that I-872 would be implemented for the August 2008 primary elections. *See* Declaration of Alex Wagner in Support of Motion to Amend and Supplement Complaint ("Wagner Decl.") ¶2, Exhibit A (E-mail from Secretary Reed, stating "I am thrilled to announce that the U.S. Supreme Court upheld the Top Two Primary, I-872! We plan to implement the Top Two in 2008."). His office then filed emergency regulations to implement I-872. *Id.* at ¶3, Exhibit B. These regulations changed the form of the declaration of candidacy from what the State had submitted to this Court in 2005 with respect to the manner in which I-872 would be implemented.[1]

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[1] For example, these rules change the proposed ballot design submitted to the Court in 2005 while adding additional explanatory verbiage. *Compare* WAC 434-230-170 as reproduced in Pharris Decl., Exhibit C (stating "party preference or independent status of each candidate shall be listed next to the candidate. The party preference must be listed exactly as provided by the candidate on the declaration of candidacy unless limited space on the ballot necessitates abbreviation . . . .") *with* WAC 434-230-045(4)(a) as reproduced in Wagner Decl. ¶3, Exhibit B ("If the candidate stated his or her preference for a political party on the declaration of candidacy, that preference shall be printed below the candidate's name, with parentheses and the first letter of each word capitalized, as shown in the following example:

John Smith
(Prefers Example Party)").

Moreover, while WAC 434-215-015 presented to this Court stated that "A candidate for partisan office who does not provide a political party preference is deemed to be an independent candidate;" the Secretary of State's new proposed WAC 434-230-045(4)(b) does away with independent status completely: "If the candidate did not state his or her preference for a political party, that information shall be printed below the candidate's name, with parentheses and the first letter of each word capitalized, as shown in the following example:

John Smith
(States No Party Preference)."

See Wagner Decl. ¶3, Exhibit B.

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In addition, while appeal was pending in this matter, the Washington Supreme Court issued its opinion in *Washington Citizens Action of Washington v. State*, 162 Wn.2d 142, 171 P.3d 486 (2007), determining that an initiative is unconstitutional if it does not comply with the Washington Constitution's requirement (Article II, Section 37) that proposed legislation print in full the text of statutes it seeks to amend and identify statutes it will repeal. The Court found that such a requirement "protects [both] legislators and voters by insisting that amendatory legislation *accurately* set forth the law to be amended as measured at the time of the enacting vote." *Id.* at 162 (emphasis in original). Because this Court's 2005 decision, in part, held that various statutes affecting minor political parties were repealed even though not mentioned in I-872, this subsequent State Supreme Court opinion raises colorable questions of state law as to whether (1) I-872 was is a valid enactment in the first place and (2) the extent to which it can be held to have repealed or amended statutes by implication.

When the State adopted its new implementation of I-872, the Democratic Party moved to amend and supplement its complaint to reflect the State's new implementation of I-872 and to include the issues raised by *Washington Citizens Action of Washington v. State*. However, the Court concluded that it lacked jurisdiction to consider the motion because of the pending appeals by the State and Grange and struck the motion without prejudice to seek leave to amend after the Court received the mandate of the 9th Circuit disposing of the appeals.

On October 2, 2008 the Ninth Circuit issued its opinion directing this Court dismiss facial challenges to I-872 in light of the Supreme Court's decision in this case and returning

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all other issues to the trial court for further proceedings. The Ninth Circuit's mandate issued on October 24, 2008.

ARGUMENT

In light of the Supreme Court's opinion reversing this Court's grant of summary judgment of facial invalidity, this case must go on to consider other challenges to I-872.[2] The proposed supplementation of the complaint does not alter the essence of this case; it simply updates the pled facts to reflect the repeal by the State of the implementation of I-872 held unconstitutional by this Court and the State's new substitute implementation of I-872. In addition, the supplementation elaborates on the events surrounding the drafting, passage and implementation of I-872, many of which are already part of the record in this case and largely reflected in this Court's order of July 15, 2005. *See, e.g.*, *Washington State Republican Party v. Logan*, 377 F.Supp.2d at 910-14. There is no prejudice to the State or the Grange from permitting this supplementation.

The Complaint is amended to reflect the substitution of parties that has occurred during the case and to add a new cause of action based on Article II, Section 37 of the Washington Constitution. The State in its answer to the original complaint in this matter asked for declaratory judgment that implementation of I-872 would not violate any right protected by the Washington Constitution. Allowing the Democratic Party to explicitly include a cause of action based on the constitutionality of I-872 under the Washington

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[2] The Supreme Court, the Ninth Circuit and this Court have all recognized that this case is broader than a mere facial challenge to I-872. *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1195 n.11 (2008); *Washington State Republican Party v. Washington*, 460 F.3d 1108, 1124 n.28 (9th Cir. 2006); *Washington State Republican Party v. Logan*, 377 F.Supp.2d at 926 n.13.

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Constitution will not materially expand the case and no prejudice to the State or Grange will arise.

Federal Rule of Civil Procedure 15(a) provides that leave of court to amend a pleading should be "freely given when justice so requires." FED. R. CIV. P. 15(a). Moreover, Rule 15(d) provides that parties may upon reasonable notice and on just terms supplement pleadings to set out any transaction, occurrence or event that happened after the date of the pleading to be supplemented.

Justice will be best served if this court reviews all of the issues related to the as applied challenges to the Initiative. With respect to the Party's new claims under the Washington Constitution, the State, in its counterclaim, has already raised the issue whether I-872 is constitutional under the State Constitution. Federal law mandates that district courts "shall have supplemental jurisdiction" precisely to fully resolve "other claims that are so related to claim in the action … that they form part of the same case or controversy [.]" 28 U.S.C. § 1367(a). The express purpose of this mandatory jurisdiction is to advance "the impulse [of the Federal Rules] toward entertaining the broadest possible scope of action consistent with fairness to the parties," and thus "joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966).[3] It is too plain for argument that the state-law and federal law claims challenging the constitutionality of I-872 in the Amended Complaint "derive from a common nucleus of

[3] Although district courts have discretion to decline to exercise supplemental jurisdiction over state law claims based upon one of the conditions listed in § 1367(c), this decision "is informed by the *Gibbs* values 'of economy, convenience, fairness, and comity.'" *Acri v. Varian Associates, Inc.* 114 F.3d 999, 1001 (9th Cir. 1997).

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operative fact" such that a party "would ordinarily be expected to try them all in one judicial proceeding." *Id.* at 725.

CONCLUSION

Permitting amendment and supplementation of the Complaint in Intervention does not alter the nature or direction of this case; it brings the pleadings up to date. Discovery has not yet begun in the case. Granting leave will not prejudice to the Defendants. The motion to amend and supplement should be granted.

DATED this 2nd day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on December 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:

James Kendrick Pharris

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The Honorable John C. Coughenour

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WASHINGTON STATE GRANGE,

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No. CV05-0927 JCC

[PROPOSED] ORDER GRANTING MOTION TO AMEND AND SUPPLEMENT COMPLAINT IN INTERVENTION

The Court having considered Plaintiff Intervenors' First Amended Complaint in Intervention, and the supporting pleadings, attachments, and exhibits, as well as the

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pleadings of defendants' in response thereto, and the records and files contained herein, hereby **GRANTS** Plaintiff Intervenors leave to file and serve their First Amended and Supplemental Complaint in Intervention, a copy of which was attached as **Attachment 1** to the Motion to Amend and Supplement.

DONE IN OPEN COURT this _____ day of December, 2008.

_____
Honorable John C. Coughenour
UNITED STATES DISTRICT JUDGE

Presented by:

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