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 OF WASHINGTON STATE DEMOCRATIC PARTY TO STATE AND GRANGE'S OPPOSITION TO MOTION TO AMEND AND SUPPLEMENT COMPLAINT

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The State of Washington Defendants' ("State") and Washington State Grange ("Grange") oppositions to the Motion of the Washington State Democratic Central Committee's ("Democratic Party") Motion to Amend and Supplement its Complaint are primarily premised on an assertion that the Supreme Court's resolution of the political parties' facial challenge resolved all the issues in the case—extending beyond the questions presented to the Court—and thus, the case should be dismissed.[1] State Opp. to Motion to Amend and Supplement at 2 ("Supreme Court … has rejected all the political parties' claims"); Grange Opp. to Motion to Amend and Supplement at 2 (claiming "original complaint has been litigated and rejected"). The Supreme Court made clear that it did not reach any issue beyond the facial challenge upon which it limited its grant of *certiorari*. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (recognizing that "[a]s a general rule … we do not decide issues outside the questions presented by the petition for certiorari. This Court's Rule 14.1(a).").

The State and the Grange omit the fact that the Ninth Circuit has already ruled against their argument. Both defendants made this argument to the Ninth Circuit this summer and asked for this case to be dismissed.[2] The Ninth Circuit did not grant their requests to dismiss. Instead, the Ninth Circuit directed dismissal of certain claims while authorizing this Court to allow the political parties to further develop certain other claims.

Stripped of its reliance upon arguments that disregard the limited nature of the *certiorari* grant and have already been rejected by the Ninth Circuit, the Grange's present opposition raises three questions: First, should the Democratic Party's motion be denied

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[1] The Supreme Court recognized that its decision was confined to addressing only a facial challenge to I-872. "Only a few weeks ago we held that the Court of Appeals for the Ninth Circuit had failed to give appropriate weight to the magnitude of that burden when it sustained a preelection, facial attack on a Washington statute regulating that State's primary election procedures. *Crawford v. Marion County Election Bd*., 128 S. Ct. 1610, 1621-22 (2008)."

[2] *See* Supplemental Brief of State of Washington in the Ninth Circuit at 15: "For the reasons state above, this Court…should dismiss this case." *See also* Supplemental Brief of the Washington State Grange at 5: "The impact of the Supreme Court's ruling in this case is thus simple and straightforward: the political parties' suit must be dismissed."

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because it did not identify the Grange as a party? Second, should the Democratic Party's amendment with respect to the constitutionality of I-872 under Article II, Section 37 of the State Constitution be denied because it implicates issues of State law? Third, should the motion be denied because the case was filed in 2005?

With respect to the failure to add the Grange as a party, the Democratic Party has never sued the Grange nor sought relief against the Grange. Indeed, with the facial challenges to I-872 resolved, there seems little reason for the Grange to continue to be involved in the case. However, the Democratic Party's proposed amendments were not intended as a *sub silentio* motion to dismiss the Grange from the case. The Party simply did not desire to have a complaint that reflected a suit and defendant against which the Party has not taken action.

Lastly, the Grange is wrong that no basis for supplemental jurisdiction exists for a state law claim in this case. The Democratic Party's challenge to I-872 election scheme is the only controversy at issue in this case, as both the state and federal claims derive exclusively from the application, operation, and effect of I-872. *See Gilder v. PGA Tour, Inc*., 936 F.2d 417, 421 (9th Cir. 1991) (finding pendent jurisdiction where a rule change gave rise to both the state breach of fiduciary duty claims and federal antitrust claims). The law simply requires that the underlying facts upon which the state and federal claims are based "form part of the same case or controversy." 28 U.S.C. § 1367(a).[3]

Indeed, it appears that what defendants want is to have their cake and eat it, too. The Grange and State obtained dismissal of the Party's initial equal protection claims on the basis that all minor party statutes had been impliedly repealed by the passage of I-872 as a matter of

[3] The Grange's continued reliance on the comity argument in *Lopez v. Smiley* neither *reflects* the law of this Circuit nor is it appropriate given the fact-specific nature of that case. *Lopez* involved claims that presented "a broad array of novel (and to this Court's reading, questionable) causes of action for money damages based on numerous provisions of the Connecticut Constitution, but without citing a single Connecticut case in the prison litigation context . . . . [and where] the Connecticut Supreme Court has expressly rejected many of the state constitutional tort claims that Mr. Lopez seeks to assert in the action." 375 F. Supp. 2d 19, 24 (D. Conn. 2005). Far from "expressly rejecting" the Democratic Party's Article 2, Section 37 claim, the Washington Supreme Court's decision in *Washington Citizens Action* appears to have substantiated the Party's allegations.

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State law. *See* Transcript of District Court Summary Judgment Hearing ("District Court Hearing"), July 13, 2005, at 80-83, esp. 82:4-11 (State); and 100:4-101:3 (Grange) (Dkt. #101). The doctrine of implied repeal under state law is inherently related to the requirements of state law (including constitutional) that proposed laws give clear notice of their impact and the existing laws they will change. Having previously asked this Court to rule, as a matter of state law, that a wide range of existing state statutes never mentioned in I-872 have been impliedly repealed by its passage, defendants now request that this Court recuse itself from determining the effect of that implied repeal under another portion of Washington law. It would be unfair to allow them to pick and choose which state law notice requirements should be considered by this Court and which should not.[4] The Grange had every opportunity to disclose to the voters the statutes that I-872 would amend. It chose not to do so. Instead, it misled voters about the impact on minor parties. The Democratic Party is not asking the Court to circumvent a holding of the Washington Supreme Court that disfavors deliberate attempts by a legislature to circumvent an initiative. It asks the Court to uphold state requirements of fair notice and clarity with voters where initiatives are concerned.

The Grange's final argument, that this case has been in Court for over three years, is similarly inapposite. This case was in the District Court for only ten weeks before it was stayed. There has been no undue delay in prosecuting the case.

The State's argument that this Court deny the Motion to Amend and Supplement requires this Court to accept the claim that the Democratic Party's as applied challenges to implementation of I-872 be dismissed because the State abandoned its original implementation as a result of this litigation, and thus the Court should refuse to hear a case

[4] If this argument by the defendants has any merit at this late date, this Court should (1) reverse its earlier decision that the minor party nominating statutes are impliedly repealed by the passage of I-872 determine that I-872 violates equal protection in the absence of repeal of the minor party statutes and (2) continue the Court's existing injunction against implementation of I-872 which—as the Court noted at oral argument—is as a practical matter, "the death knell" for minor parties. District Court Hearing at 100:5-6.

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about the State's revised implementation substituted while proceedings in this case were stayed. The upshot of the State's argument is a suggestion that the Democratic Party start a new case to raise the same issues that are already in this case. There is no judicial economy in what the State suggests. Its argument should be rejected. It amounts to further delay.

The State also objects to the Democratic Party supplementing its complaint with allegations detailing events since the original complaint was filed—which is exactly the purpose of a supplemental pleading pursuant to FRCP 15(d) ("[T]he court may … permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened *after the date of the pleading to be supplemented*" (emphasis added)). The Democratic Party's claims are factual allegations related to the way the State has implemented I-872, not speculation about how it would be implemented. These factual allegations simply flesh out the basis for the as applied challenge to the implementation, detailing ways in which implementation of I-872 intersects with other existing statutes to cause injury to the Party. The facial challenge resolved by the Supreme Court related to the damage caused (at the time) by an unspecified ballot design standing alone. The supplemented complaint sets forth, on a notice pleading basis, the groundwork for analyzing I-872 as part of a system. This is exactly the analysis called for by Justices O'Connor in her concurrence in *Clingman v. Beaver*:

> [T]he Court would want to examine the cumulative burdens imposed by the overall scheme of electoral regulations upon the rights of voters and parties to associate through primary elections. A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms.

544 US 581, 607 (2005).

Moreover, the State erroneously, but perhaps understandably, argues that proposed allegations about the State's unconstitutional implementation of I-872 with respect to the election of precinct committee officers ("PCOs") are a challenge to "separate statutes." I-872,

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however, expressly grants to voters "[t]he right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate." RCW 29A.04.206(3) (I-872, §3). There is no exemption for the office of precinct committee officer. The State's implementation of I-872 resulted in ballots for Democratic PCO elections being issued to voters who were not Democrats. The State also adopted emergency regulations ignoring its statutes with respect to the requirements for election of PCOs as part of its implementation of I-872. As implemented, I-872 follows a course that has been previously determined by the Ninth Circuit to be unconstitutional. *See Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003). The State should not get immunity for its blatantly unconstitutional implementation just because it waited until the last minute to spring its surprises.

Finally, the State complains that the Democratic Party did not strike in its Amended Complaint allegations that the State asserts have been ruled upon. State Opp. to Mot. to Amend and Supplement at 6:19-8:3. It was not the intent of the Democratic Party to withdraw allegations that have been at issue and thus leave the record unclear as to how and whether they were adjudicated. The allegations complained of by the State will no doubt be resolved by the Court in due course. The Democratic Party's Motion to Amend and Supplement its Complaint should be granted.

DATED this 11th day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 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:

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