The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON STATE REPUBLICAN 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

WASHINGTON STATE REPUBLICAN PARTY'S RESPONSE IN OPPOSITION TO STATE AND GRANGE INTERVENORS' MOTIONS TO STRIKE SUPPLEMENTAL AND AMENDED COMPLAINT

NOTE ON MOTION CALENDAR: FEBRUARY 26, 2010

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I. RELIEF REQUESTED

Plaintiffs Washington State Republican Party and Luke Esser (collectively, "the Party" or "the Republican Party") respectfully requests that the Court deny the State and Grange intervenors' motions to strike plaintiffs' supplemental and amended complaint. The State's motion merely repeats its earlier arguments to the Party's motion for leave to file an amended complaint, which this Court rejected when granting the Party's motion in part. Much of the relief sought by the State and Grange relates to portions of the complaint that are neither amended nor supplemented. The supplemental and amended complaint adds detailed allegations regarding events that occurred since the original complaint was filed and complies both with this Court's August 20, 2009 order and the obligation to give notice to the defendants of the claims made.

II. ARGUMENT

A. The Court's August 20, 2009 order does not require the Republican Party to *delete* portions of its original complaint; instead, it limits what the Party may *add* to its amended and supplemental complaint.

The State overstates this Court's August 20, 2009 order. The order does not require the Party to delete portions of its original complaint, but rather limits what the Party may add to the complaint. *See* Order at 20 ("Although not strictly necessary, the Court . . . approves Plaintiffs' requests to update their pleadings . . . to add any relevant facts that have occurred since the original filings. However, any new factual allegations should be relevant to the ongoing as-applied First Amendment challenge."). The Party is not required to abandon its ability to appeal this Court's earlier rulings by eliminating allegations and claims from the complaint. As a result, the Court should not strike the following paragraphs in the amended

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and supplemental complaint, which remain unchanged from the original complaint: 1, 2, 4, 6[1], 16[2], 40 – 43[3], 48 – 50[4], 53[5], 56 – 57[6], and paragraphs 1 – 5 of the prayer for relief. Similarly, the following paragraphs are unchanged in substance from the original complaint and should not be stricken: 12 – 15[7], 17[8], 39[9], 44[10], 61[11], and paragraph 6 of the prayer for relief. In its motion, the State merely recycles arguments it made in response to the Party's motion for leave to file a supplemental and amended complaint. *Compare* State Mot. at 5 – 11 *with* State's Opp'n to Mot. (Dkt. No. 152) at 3-10. Although this Court denied the Party's motion as to the state constitutional claims, it rejected the State's arguments when it granted the Party's motion as to the Party's as-applied challenge. *See* Order at 28.

B. The State's challenges to the amended and supplemental complaint are meritless under the notice pleading standard.

This Court's August 20, 2009 order authorizing the filing of the Amended and Supplemental Complaint did not alter the standard for pleading, or require that the Republican Party prove the alleged violations of its First Amendment rights in the complaint itself. Under FED. R. CIV. P. 8(a), allegations in a complaint are to be "short and plain." Under the Supreme Court notice pleading standard, "[s]pecific facts are not necessary" for pleadings to satisfy Rule 8(a)(2). *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).

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[1] Paragraph 6 is identical to paragraph 5 in the original complaint.
[2] Paragraph 16 is identical to paragraph 20 in the original complaint.
[3] Paragraphs 40 – 43 are identical to paragraphs 23 - 26 in the original complaint.
[4] Paragraphs 48 – 50 are identical to paragraphs 31 - 33 in the original complaint.
[5] Paragraph 53 is identical to paragraph 34 in the original complaint.
[6] Paragraphs 56 – 57 are identical to paragraphs 37 - 38 in the original complaint.
[7] Paragraphs 12 – 15 are substantially the same as paragraphs 16 - 19 in the original complaint.
[8] Paragraph 17 is substantially the same as paragraph 21 in the original complaint.
[9] Paragraph 39 is substantially the same as paragraph 22 in the original complaint.
[10] Paragraph 44 is substantially the same as paragraph 27 in the original complaint.
[11] Paragraph 61 is substantially the same as paragraph 40 in the original complaint.

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Motions to strike are disfavored and "should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991); *see also In re UTStarcom, Inc. Secs. Litig.*, 617 F. Supp. 2d 964, 969 (N.D. Cal. 2009). "[A]llegations supplying background or historical material or other matter of an evidentiary nature will not be stricken unless unduly prejudicial to defendant." *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992). Therefore, where a complaint's allegations, "when read with the complaint as a whole, give a full understanding thereof, they need not be stricken." *Id.* "Under the liberal federal pleading rules," furthermore, "notice and clarity of claims is all that is required." *Id.*

The State asserts that the Party's claim that I-872 is not being implemented constitutionally should be stricken because the Party has not, in its supplemental and amended complaint, identified the specific ways the primary might be implemented in accordance with the First Amendment. The paragraphs squarely allege confusion resulting from the misappropriation of the Party's name, nicknames, and abbreviations, and that the candidates bearing the Party name are associated in the mind of the public with the Party. The State attempts to treat these paragraphs in isolation. The detailed relief sought may be found in the prayer for relief, specifically in paragraph 8. Among the possible remedies identified is a disclaimer in immediate proximity to the "preference" language of unauthorized candidates that would inform voters that those candidates are not actually affiliated with the Republican Party; not republishing unauthorized candidates' use of the Republican Party name in State publications (thereby giving the State's imprimatur to the

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designation, and reinforcing the appearance of association in the public's mind); or alternatively, limiting participation in the primary for candidates who have designated the Republican Party as their preference to persons authorized by the party to participate. The extent to which other specific steps the State might undertake to alleviate confusion would be developed during discovery, and presented at trial.

C. The Amended and Supplemental Complaint adequately alleges that the State's ongoing implementation of I-872 violates the First Amendment.

1. Paragraphs 1 – 6.

The State argues that paragraphs 1 – 6 "reiterate legal arguments that have already been rejected, and inaccurately imply that I-872 interferes with the Republicans' selection of nominees for public office," and misstates the Supreme Court's decision in *Grange*, claiming that the Court has "rejected the assertion that I-872 interferes with political party nominations." State Mot. at 5:14-17 (citing *Grange*, 128 S. Ct. at 1192). The Court rejected the assertion that under I-872, the primary election voters select the Party's nominees, but did not address the issue of interference on an as-applied basis, as a result of voter confusion from the State's method of implementing the modified blanket primary.

Paragraph 3 states, as it has from the beginning of the case, that I-872 will confuse voters. Plaintiffs added language specifically alleging that voter confusion is the result of the implementation of the Initiative. Paragraph 5 again alleges confusion regarding the Republican message resulting from State's implementation of I-872. The State objects to the allegation that I-872 is unconstitutional in Paragraph 6 because "it is a flat assertion" that I-872 is unconstitutional. State Mot. at 6:19-20. The State does not allege it is misled or that the allegation is unclear. The State's objection to the allegation is its substance, which is not

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a ground to strike it from the complaint. As noted above, the paragraph remains unchanged from the original complaint.

2. Paragraphs 12 – 20.

Paragraphs 12 – 17 are either identical or substantially the same as paragraphs 16 – 21 of the original complaint. The allegations, as amended, are relevant to the State's implementation of I-872 and the association in the minds of voters between the Republican Party and candidates claiming a "preference for" the Party and resulting voter confusion. The supplemental paragraphs 18 – 20 are relevant to the issues of voter confusion resulting from the State's implementation of the Initiative and severability, which requires a determination of the voters' intent when enacting the Initiative. *See Guard v. Jackson*, 83 Wn. App. 325, 333, 921 P.2d 544 (1996).

3. Paragraphs 23 – 27.

Paragraphs 23 – 27 contain detailed allegations regarding the State's implementation of I-872 since its enactment, providing relevant information regarding the effect of I-872 on the plaintiffs. For example, paragraph 23 makes clear that the State's implementation mandates the conjoining of the Republican name on the ballot with the name of any candidate who wishes to appropriate the name. The ballot used by the State continues to conjoin the Republican Party name on the ballot and in the mind of voters, the press and public with candidates who are not actually affiliated with the Party, nor carry its message. The State's authorization of this conjoining is directly related to the question to be presented to the Court whether the State's administration of the primary system results in confusion. If

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the State did not permit the conjunction of the Republican Party with all comers, there would be no risk of confusion among voters.

4. Paragraphs 29 and 34.

In objecting to paragraphs 29 and 34, the State urges the Court to disregard the overall political and public context of elections in Washington, which is relevant to whether voters, in fact, are confused about the relation between the candidates carrying the Party name on the ballot and the Republican Party.

5. Paragraphs 36 – 38.

In objecting to paragraphs 36 – 38, the State misapprehends the nature of the allegations. As part of its implementation of I-872, the State has taken the position that party nominations are ineffective under Washington election law, even though the precinct committee officer ("PCO") statutes tie the election of PCOs to votes received by party candidates. Whether or not the ballot indicates the party nominee, the State may not deprive the Republican Party of the ability to nominate candidates and vest those candidates with the status of being of the GOP. The paragraphs also allege facts that give rise to confusion among voters.

Paragraph 38 specifically addresses the State's administration of its election laws and is directly relevant to whether there is an increased risk of confusion among voters, because the Republican Party is subjected to unique restrictions on its ability to convey information about its endorsed candidates to its own members. The ability of the Party to speak to its members and make clear which candidate carrying the Party name on a ballot is actually the

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Party's nominee is an essential prerequisite to avoiding ballot confusion among voters most loyal to the Party.

6. Paragraphs 39 – 40.

Paragraph 39 was amended to describe events in 2006, but is otherwise identical to paragraph 22 of the original complaint. Paragraph 40 is identical to paragraph 23 of the original complaint. These paragraphs are relevant to the Party's as-applied challenge to the State's implementation of the Initiative.

7. Paragraphs 41 – 43.

Paragraphs 41 – 43 are identical to paragraphs 24 – 26 of the original complaint. Under this Court's August 20, 2009 order, the WSRP is entitled to introduce evidence that as implemented by the State, the primary election under I-872 is indistinguishable in operation from a primary that formally nominates party candidates. These paragraphs are relevant for that purpose.

8. Paragraphs 44 – 46.

Paragraph 44 is substantially the same as paragraph 27 in the original complaint. Paragraphs 45 – 46 are similar to paragraphs 28 – 29 of the original complaint, and have additional allegations regarding the State's implementation of the Initiative. These paragraphs are relevant to the Party's as-applied challenge.

7. Paragraphs 48 – 53.

Paragraphs 48 – 50 and 53 are identical to paragraphs 31 – 34 of the original complaint. Paragraphs 51 – 52 supplement the original complaint to address the State's

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implementation of the Initiative. In its motion, the State cites to a portion of the Supreme Court's decision, but disregards the following language:

> Of course, it is possible that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties. But these cases involve a facial challenge, and we cannot strike down I-872 on its face based on the mere possibility of voter confusion.

Grange, 128 S. Ct. at 1193. To the extent that voters are confused, I-872 is an invalid primary as alleged in paragraphs 48 – 53.

No court has ruled on the severability of I-872; no court has determined whether the whole should fall if part of it is unconstitutional as applied and whether voters would have adopted its constituent parts piecemeal. This Court's order authorizing the filing of the Amended and Supplemental Complaint did not alter the standard for pleading, or require that the Party prove the alleged violations of its First Amendment rights in the complaint itself.

8. Paragraphs 56 – 59.

Paragraphs 56 – 57 are identical to paragraphs 37 – 38 of the original complaint. The Republican Party's second cause of action explicitly alleges that the statutes, as applied, compel the Party to be affiliated with unauthorized candidates. The supplemental paragraphs allege confusion and that candidates carrying the party name are associated in the mind of the public with the Republican Party. In *Grange*, this is exactly the sort of result that could invalidate the primary in an as-applied challenge. *See Grange*, 128 S. Ct. at 1195 ("That factual determination must await an as-applied challenge."). The State seeks to preclude fact-finding by the Court on the question.

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9. Paragraphs 61 and 63.

Paragraph 61 is substantially the same as paragraph 40 in the original complaint. Paragraph 63 supplements the original complaint to address the State's implementation of the Initiative. The equal protection claim relates to the State's implementation of the primary system, including re-adoption of minor party convention rights. This is in accordance with this Court's direction to supplement with later events after initial filing of complaint. The equal protection claim is still subject to appellate review unless it is abandoned by the Republican Party in its pleadings. The Party has no intention of abandoning the claim.

10. Paragraphs 65 – 67.

The State's request to strike paragraphs 65 – 67 renews its assertion that the Supreme Court's narrow ruling that I-872 was not unconstitutional on its face was actually a ratification of the Initiative as applied. The Supreme Court made no such ruling, and if this Court determines that the Initiative is unconstitutional as applied to the Republican Party, the Party will be entitled to injunctive relief. These paragraphs identify the types of steps the State could take to avoid confusion on the ballot and in other election materials produced and distributed by the State that cause confusion among voters regarding the status of candidates' affiliation with the Party.

11. Prayer for Relief.

Paragraphs 1 – 6 of the prayer for relief in the supplemental and amended complaint are either identical to or substantially the same as paragraphs 1 – 6 of the original complaint. The Republican supplemental and amended complaint is modeled on the Democratic Party's supplemental and amended complaint, because that document had been circulated to

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opposing counsel and no objection was received. Through inadvertence, the prayer for relief in paragraph 7 relating to the state constitutional claim was not deleted from the final draft. Based on the Court's order, this relief should be stricken. Paragraph 8 is substantially similar to paragraph 7 of the original complaint. The prayer for relief is fully consistent with an as-applied challenge to the statute.

D. The Republican Party was not required to file another motion for leave to amend when this Court already granted its prior motion, with the exception of the state constitutional claim.

The Grange argues that the Republican Party's supplemental and amended complaint should be stricken because the Party "failed to seek leave from this Court to file an amended complaint as required by Federal Rule of Civil Procedure 15(a)(2)." Grange Mot. at 2. The Grange asserts that the Party cannot rely on this Court's August 20, 2009 order because "the amended complaint falls outside its scope." *Id.* at 3. The Grange ignores that when the Party filed its Motion for Leave to File Supplemental and Amended Complaint on December 3, 2008, the Party attached a proposed amended complaint, which is substantially the same as the supplemental and amended complaint filed on January 22, 2010, except for allegations related to the Party's proposed state constitutional law claims. This Court granted the Republican Party's motion for leave to amend "as to amendments necessary and related to the ongoing as-applied challenge" and denied the Party's motion "as to [the] proposed state constitutional claims." Order at 28. The Party complied with the Court's order, and the Grange's contention that another motion was required is without merit.

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DATED this 22nd day of February, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 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.

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