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 INTERVENORS' MOTION TO STRIKE REPUBLICANS' SUPPLEMENTAL AND AMENDED COMPLAINT

NOTE ON MOTION CALENDAR:

FEBRUARY 26, 2010

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I. MOTION

Defendant-Intervenors State of Washington, Secretary of State Sam Reed, and Attorney General Rob McKenna ("the State"), move for an Order striking specified paragraphs of the Supplemental and Amended Complaint For Declaratory Judgment and For Injunctive Relief Regarding Initiative 872 and Primary Elections (Republicans' Am. Compl.), filed by Plaintiff Washington State Republican Party, *et al.* (Republicans), and ordering the Republicans to file, with an appropriate motion, a new amended complaint that complies with the Order this Court entered on August 20, 2009.

The Republicans' Amended Complaint continues to assert arguments that have already been rejected by the United States Supreme Court, the Ninth Circuit, or by this Court. The amended complaint continues to seek the very relief that the United States Supreme Court and this Court have already ruled is unavailable to plaintiffs, that of striking down Initiative 872 (I-872) in its entirety. The amended complaint also fails to comply with this Court's Order that an amended complaint identify, as its requested relief, changes to the manner in which the State implements I-872 that will remedy the political parties' specific as-applied challenge. Order at 20-21 (Aug. 20, 2009; Dkt. No. 184) (Order).

II. ARGUMENT

A. This Court Granted The Democratic And Republican Parties Leave To Amend Their Complaints Only To Raise Limited Issues, Seeking Specific Relief

This Court previously granted the Democratic and Republican Party plaintiffs leave to amend their complaints to allege a limited range of matters, reflecting the narrower range of issues that remain in this case after the United States Supreme Court upheld the facial constitutionality of I-872 in 2008. Order at 20-21; *see also Washington State Grange v.*

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Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (upholding I-872 from facial challenge). The Republicans have filed an amended complaint that does not comply with this Court's ruling governing an amended pleading, and this Court should strike its noncompliant portions.

Initiative 872 established a system for electing public officers, under which the primary election is not used to choose the nominees of any political parties. *Grange*, 128 S. Ct. at 1192. Instead, "[t]he top two candidates from the primary election proceed to the general election regardless of their party preferences." *Id.* The Supreme Court upheld the constitutionality of I-872 from facial challenge, leaving only the possibility that parties could continue to challenge particular aspects of I-872's implementation. *Id.* at 1194 ("We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion."). The issues have further narrowed upon remand, as first the Ninth Circuit, and then this Court, ruled that various arguments offered by the political parties either had been resolved by the Supreme Court or otherwise lacked merit. *Washington State Republican Party v. Washington*, 545 F.3d 1125, 1126 (9th Cir. 2008) (instructing this Court to dismiss "all facial associational rights claims", "all equal protection claims", and "all claims that Initiative 872 imposes illegal qualifications for federal office, sets illegal timing of federal elections, or imposes discriminatory campaign finance rules".). This Court further narrowed the range of remaining issues, rejecting the political parties' arguments that I-872 impermissibly restricts ballot access. Order at 15 ("The Supreme Court opinions in this case and in [*California Democratic Party v. Jones*, 530 U.S. 567 (2000)] foreclose Plaintiffs' ballot-access claims."). This Court also rejected the

political parties' trademark claims. Order at 18 ("The Court finds that Plaintiffs failed to properly allege trademark violations under federal or state law and that any claims they have subsequently argued are without merit."). This Court additionally rejected the political parties' proposal to inject into this case "novel" state constitutional claims concerning the manner of amending laws. Order at 21 ("Finally, the Court denies the Republican and Democratic Parties' request to add novel challenges to I-872's enactment based on article II, section 37 of the Washington constitution.").

This Court granted the Republican and Democratic Parties leave to amend their complaints, but only to "clarify their specific challenges to the current implementation" of I-872. Order at 20. "Allowing such amendment will identify the relevant issues moving forward so as to focus and limit the scope of the litigation regarding the as-applied First Amendment claims." *Id.* To that end, this Court authorized the political parties to:

> submit evidence to demonstrate that (1) the State's actual implementation of I-872 (including its interaction with the state's campaign disclosure laws) leads to voter confusion, and (2) that this resulting confusion severely burdens the political parties' freedom of association. [Citation omitted.] Plaintiffs may also demonstrate that the application of I-872 to certain elected offices (e.g., party PCOs) specifically burdens the party's right to associate.

Order at 11. The Court also authorized amendments that update the political parties' factual allegations in specific ways:

> [T]he Court also approves Plaintiffs' requests to update their pleadings to reflect the changed parties in the litigation and 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. . . . [A]ny alleged deficiencies with the initial proposed implementation of I-872 are irrelevant. If Plaintiffs wish to include such facts to explain the history of the litigation or to provide necessary context, the Court is not opposed; however, Plaintiffs should limit their allegations of constitutional violations to the *current* implementation of I-872.

Order at 20 (emphasis in original).

Importantly, the Court also admonished the parties to be specific regarding the relief they request. "[I]t is important that Plaintiffs' amended pleadings are updated to reflect not only their specific challenges to the State's implementation of I-872 but also the specific relief they request to remedy those challenges." Order at 20. The Court instructed:

> Now that the Supreme Court has held that I-872 can be implemented without violating Plaintiffs' right to association, *Plaintiffs will not be able to strike down I-872 in its entirety*. Instead, the best that Plaintiffs can achieve is to invalidate certain portions of I-872's implementation and enjoin the State from implementing I-872 in specific ways that lead to voter confusion or other forms of forced association. For example, if Plaintiffs' challenge the specific wording used on the ballot or in the voter's guide, they should identify the language currently used and request specific relief to remedy any resulting confusion. Similarly, if Plaintiffs challenge the application of I-872 to the election of party PCOs (*see* Dem. Resp. to Mot. to Dismiss 11 (Dkt. No. 146)), they should identify how to remedy this specific application.

Order at 21 (emphasis added).

This is an essential point, because the Court has already emphasized that the political parties may not continue to assert that I-872 should be struck down in its entirety. Order at 21. Rather, this Court admonished the political parties to "request specific relief to remedy" any challenge they bring to the implementation of I-872. *Id.* This instruction stems directly from the Supreme Court's conclusion that I-872 *can* be implemented constitutionally. *Grange*, 128 S. Ct. at 1194.

B. The Republicans' Amended Complaint Does Not Comply With This Court's Instructions As To The Limited Scope Of The Remaining Issues

On January 22, 2010, the Republicans filed an amended complaint that fails to comply with the Court's Order granting the party's motion to file an amended complaint. The objective of amended complaints, as this Court explained, was for the political parties to

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"clarify their specific challenges to the current implementation" of I-872. Order at 20. Amended complaints must, accordingly, be "updated to reflect not only [the political parties'] specific challenges to the State's implementation of I-872 but also the specific relief they request to remedy those challenges." *Id.* The Republicans' amended complaint does neither. Amended complaints must "identify the relevant issues moving forward so as to focus and limit the scope of the litigation", (*id.*) not set forth a mixture of outdated and irrelevant allegations that fail to clarify the actual issues remaining before the Court. This Court should accordingly strike those paragraphs of the amended complaint identified in the table below.

Para.	Nature of Paragraph/Argument to Strike
1-6	**Nature of Paragraphs:** Introductory paragraphs to complaint. **Reason to Strike:** These paragraphs reiterate legal arguments that have already been rejected, and inaccurately imply that I-872 interferes with the Republicans' selection of nominees for public office. The Supreme Court has already rejected the assertion that I-872 interferes with political party nominations. *Grange*, 128 S. Ct. at 1192. Paragraph 5 attempts to reintroduce trademark claims that this Court has already rejected. Order at 18. Paragraph 6 contains a flat assertion that I-872 is unconstitutional, a contention already rejected. Order at 21.
12-20	**Nature of Paragraphs:** Irrelevant and partially inaccurate description of state election laws. **Reason to Strike:** These paragraphs continue to assert the facial unconstitutionality of I-872, based upon the rejected claim that I-872 interferes with

	the ability of political parties to select their own nominees. It does not, as I-872 does not select party nominees. *Grange*, 128 S. Ct. at 1192. These paragraphs also continue to assert that, facially, I-872 creates an "association" between candidates and parties, an assumption rejected by the Supreme Court. *Id.* at 1193. Paragraphs 18-19 additionally assert allegations that have already been rejected, and paragraph 20 is relevant only to a "novel" state constitutional issue that this Court has excluded from this case. Order at 21.
23-27	**Nature of Paragraphs:** Supplemental factual allegations. **Reason to Strike:** This Court approved the concept of amending the complaints to "add any relevant facts that have occurred since the original filings", but limited such allegations to those that are "relevant to the ongoing as-applied First Amendment challenge." Order at 20. These paragraphs contain allegations that are not material to any remaining issues, including allegations regarding amendments to state law in 2007 that are not relevant to any issues remaining before this Court. *See* Order at 21-23 (declining to entertain state constitutional issue). This Court has declined to entertain state law questions regarding the enactment of Washington's laws, finding such claims to be entirely distinct from the political parties' First Amendment challenge to the implementation of I-872. Order at 23.
29	**Nature of Paragraph:** Additional supplemental allegations of fact. **Reason to Strike:** Paragraph 29 concerns the actions of private parties—the news media—unrelated to the State's actions in implementing I-872. Accordingly, it represents an attempt to revisit the facial validity of I-872, an issue already resolved

	by the Supreme Court.
34	**Nature of Paragraph:** Additional supplemental allegations of fact. **Reason to Strike:** Paragraph 34 also sets forth allegations regarding the actions of private parties unrelated to the State's actions in implementing I-872. In particular, this Court has already rejected the notion that statements made by candidates in their declarations of candidacy could give rise to claims against the State. Order at 16-17 (rejecting trademark claims).
36-38	**Nature of Paragraphs:** Supplemental allegations of fact. **Reason to Strike:** The United States Supreme Court has already rejected the notion that the Top 2 Primary is used to select the nominees of political parties, or that the State is obligated to reflect party nominations on the ballot. *Grange*, 128 S. Ct. at 1192. Paragraph 38 sets forth allegations apparently based on the misconception that the enforcement of the State's campaign finance laws is part of the implementation of I-872.
39-40	**Nature of Paragraphs:** Equal Protection Claim. **Reason to Strike:** By direction of the Ninth Circuit, this Court has already dismissed all equal protection claims. *Washington State Republican Party v. Washington*, 545 F.3d at 1126; Order at 6. Moreover, this Court rejected the asserted challenges to RCW 29A.20.121 and .171 in 2005. *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907, 927-29 (W.D. Wash. 2005).
41-43	**Nature of Paragraphs:** Characterization of earlier case (misnamed in heading). **Reason to Strike:** These paragraphs recite allegations that have already been

	rejected in an apparent attempt to relitigate the facial constitutionality of I-872. Paragraph 43, in particular, asserts that there is no distinction between the Top 2 Primary enacted by I-872 and the prior blanket primary, an argument explicitly rejected by the Supreme Court. *Grange*, 128 S. Ct. at 1192.
44-46	**Nature of Paragraphs:** Allegations related to the party's rules regarding the nomination of candidates, asserting a violation of civil rights. **Reason to Strike:** The Supreme Court has already determined that I-872 does not violate the rights of political parties to nominate candidates, because the Top 2 Primary is not used to select party nominees. *Grange*, 128 S. Ct. at 1192.
48-53	**Nature of Paragraphs:** First cause of action, alleging that a primary conducted under I-872 is unconstitutional. **Reason to Strike:** The United States Supreme Court has already ruled that I-872 can be implemented in a constitutional manner. *Grange*, 128 S. Ct. at 1194. These paragraphs assume that I-872 is entirely unconstitutional, and further assume that I-872 affects the determination of political parties' nominees. They fail to identify the specific aspects of the State's implementation of I-872 that are alleged to be unconstitutional, or any remedy for such implementation. Paragraph 53 asserts that I-872 can be struck down in its entirety, a claim this Court has rejected. Order at 21.
56-59	**Nature of Paragraphs:** Second cause of action, alleging that I-872 compels the political parties into a forced association with candidates. **Reason to Strike:** These paragraphs fail to identify any aspect of the

	implementation of I-872 that implicates a right to free association, and fail to allege any specific remedy to cure any alleged defect in implementation. The United States Supreme Court has already ruled that I-872 does not constitute a forced association between a party and candidates. "We are satisfied that there are a variety of ways in which the State could implement I-872 that would eliminate any real threat of voter confusion. And without the specter of widespread voter confusion, respondents' arguments about forced association and compelled speech fall flat." *Grange*, 128 S. Ct. at 1194 (footnotes omitted).
61, 63	**Nature of Paragraph:** Third cause of action, alleging an equal protection violation. **Reason to Strike:** By direction of the Ninth Circuit, this Court has already dismissed all equal protection claims. *Washington State Republican Party v. Washington*, 545 F.3d at 1126; Order at 6. Moreover, this Court has rejected the injection into this case of novel state law claims that are distinct from the political parties' federal claims. Order at 23-24.
65-67	**Nature of Paragraphs:** Fourth cause of action, requesting injunctive relief. **Reason to Strike:** These paragraphs improperly attempt to relitigate the facial validity of I-872, and are premised upon the notion that I-872 can be invalidated in its entirety. The United States Supreme Court has already ruled that I-872 can be implemented in a constitutional manner. *Grange*, 128 S. Ct. at 1194. These paragraphs fail to identify any aspect of I-872 that might be enjoined, and fails to identify any remedy by which I-872 might be implemented in a constitutional

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	manner. Paragraph 67 incorrectly assumes that permitting candidates to state a party preference in and of itself violates the political party's rights, a notion already rejected by the United States Supreme Court. *Id.* at 1192-93.
Prayer for relief	**Nature of Paragraphs:** Request for relief. **Reason to Strike:** This Court has already ruled that "Plaintiffs will not be able to strike down I-872 in its entirety." Order at 21. This is, nonetheless, precisely the relief requested in the amended complaint. To the contrary, however, this Court has instructed the political parties to state specific ways in which the State's implementation of I-872 could be modified in order to remedy any asserted constitutional violation. Order at 21. The amended complaint fails to do so, and the prayer for relief should be stricken in its entirety for this reason. More specifically: • Paragraph 1 seeks a declaration that RCW 29A.04.127 is unconstitutional without specifying any particular aspect of the Top 2 Primary that is at issue, and seeks to re-argue the facial validity of the statute; • Paragraph 2 seeks to re-argue the resolved issue of whether the Top 2 Primary automatically creates an "association" between a party and a candidate who expresses party preference; • Paragraph 3 seeks a declaration that RCW 29A.36.010 is unconstitutional without specifying any particular aspect of the Top 2 Primary that is at issue, apparently based on the incorrect assumption that recognizing party preference creates an "association" between candidate and party;

- Paragraph 4 seeks a declaration that RCW 29A.36.170 is unconstitutional without specifying any particular aspect of the Top 2 Primary that is at issue, apparently re-arguing whether the "top two" aspect of the primary violates party rights, an argument rejected by the Supreme Court (*Grange*, 128 S. Ct. at 1192-93);
- Paragraph 5 seeks a declaration that RCW 29A.52.112 is unconstitutional without specifying which aspect the statute is at issue, or how it could be amended to correct the alleged defect;
- Paragraph 6 seeks a declaration that the entire Top 2 Primary is unconstitutional, a notion rejected by the Supreme Court (*Grange*, 128 S. Ct. at 1194), and seeks a declaration that the primary system in effect immediately prior to the passage of I-872 remains in effect, apparently based on the notion that I-872 is unconstitutional, a notion rejected by the Supreme Court (*id.*);
- Paragraph 7 seeks a declaration that I-872 violates article II, section 37 of the Washington Constitution, an allegation this Court expressly excluded from this case. Order at 21;
- Paragraph 8 seeks broad injunctive relief, apparently based in large part on the notion that party nomination is affected by the state primary and/or that the state primary creates a constitutionally objectionable "association" between candidates and party, notions rejected by the Supreme Court. *Grange*, 128 S. Ct. at 1192.

III. CONCLUSION

For these reasons, the Court should strike specified paragraphs of the Supplemental and Amended Complaint in Intervention For Declaratory Judgment and For Injunctive Relief Regarding Initiative 872 and Primary Elections, filed by Plaintiffs Washington State Republican Party, *et al.*, and order Plaintiffs to file a new amended complaint that complies with the Order this Court entered on August 20, 2009.

DATED this 5th day of February, 2010.

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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed State Intervenors' Motion To Strike Republicans' Supplemental and Amended Complaint and proposed Order 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 5th day of February, 2010, at Olympia, Washington.

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