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' REPLY IN SUPPORT OF MOTION TO STRIKE UNTIMELY DISCLOSED WITNESSES **NOTE ON MOTION CALENDAR:** **October 15, 2010** NO ORAL ARGUMENT REQUESTED

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

I. INTRODUCTION

Defendant-Intervenors State of Washington, Rob McKenna, Attorney General of the State of Washington, and Sam Reed, Secretary of State of the State of Washington (State), have by motion asked this Court to strike seven lay witnesses and one expert witness who were untimely disclosed in three separate disclosures by Plaintiff Washington State Republican Party (Plaintiffs). After the State filed its motion, the Plaintiffs collectively submitted their pretrial statement to the State on October 6, 2010. That October 6 document identified four additional trial witnesses, none of whom had been previously identified as a potential witness by any party. These consist of Sheryl Moss and Brian Zylstra of the Secretary of State's Office, Stuart Elway, and Senator Pam Roach. The arguments the State previously offered regarding the other untimely disclosed witnesses apply equally to these four, even more untimely identified, witnesses. This Court should exclude any witnesses whose name was not disclosed before the applicable pretrial cutoff dates in this Court's pretrial orders; namely, August 17, 2010, for fact witnesses, and September 10, 2010, for expert witnesses, with the exception of rebuttal witnesses who could not reasonably be anticipated.

II. ARGUMENT

A. The State's Motion To Strike Witnesses Is a Motion To Enforce The Court's Pre-Trial Scheduling Order

Plaintiffs respond to the State's motion by mischaracterizing the nature of the relief that the State has requested. The State's motion is not a motion in limine but a motion to enforce the pretrial scheduling order that this Court entered on May 25, 2010 (Dkt. 234). Pursuant to that Order, all parties were to complete fact discovery by August 17, 2010. This necessarily includes disclosing all fact witnesses (other than rebuttal witnesses who could not be reasonably

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anticipated) by that date. Similarly, the State seeks to enforce this Court's pretrial scheduling order setting a September 10, 2010, deadline for the completion of expert discovery, which necessarily encompasses the disclosure of expert witnesses by that date. (Dkt. 253).

The Republican Party seeks to recharacterize the State's motion as a motion in limine, for the purpose of denying the State the opportunity to reply. But the present motion is precisely what the State captioned it as: a motion to enforce the Court's pretrial scheduling orders by striking untimely disclosed witnesses. It does not seek to bar the introduction of testimony or evidence on particular subjects, merely to exclude primary fact witnesses that Plaintiffs knew about but did not timely disclose.

Plaintiffs' contention that the State failed to comply with the meet and confer procedure for discovery disputes is similarly misdirected. The procedure Plaintiffs cite applies to discovery motions, but this is not a motion to compel discovery or to seek a protective order relating to discovery. The meet and confer requirement avoids presenting discovery disputes to the Court that the parties can work out on their own during the discovery phase of a lawsuit. The present motion is not of that kind. The discovery phase of this suit is over.

Plaintiffs are also mistaken in asserting that the deadline for disclosing Professor Orbell's expert report was September 13, 2010, the day on which Plaintiffs filed Professor Orbell's September 8 Declaration in response to the Defendants' motions for summary judgment (which was the first indication that Plaintiffs intended to add this new expert witness). Federal Rule of Civil Procedure 26(a)(2)(C) requires that reports of expert witnesses offered for purposes of rebuttal be disclosed by the date established by court order. This Court's pretrial scheduling order established a deadline of September 10, 2010, for the *close* of

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1125 Washington Street SE
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(360) 753-6200

all expert witness discovery, which necessarily must include the disclosure of rebuttal expert witnesses.

Finally, Plaintiffs err in contending that the State's motion seeks to exclude all evidence of the State's implementation of I-872 in 2010. The State seeks no such relief, and would be glad to include any 2010 materials in the case, to the extent consistent with the pretrial schedule. The State seeks to enforce this Court's pretrial scheduling order in order to avoid trial by ambush. The danger of such an event is illustrated by the Republican Party plaintiffs' persistent additions of numerous potential trial witnesses after the pretrial cut-off dates set by this Court.

The Washington State Democratic Central Committee plaintiffs go a step further, and actually attempt to rename the State's Motion, calling it both a "motion in limine" and a motion for continuance. To be clear, the State does not request any continuance of the impending November trial, but merely asks this Court to enforce its existing pretrial scheduling orders.

B. This Court's Cutoff Date For Disclosing Witnesses Must Be Enforced In Order To Avoid Trial By Ambush

The foundation of this Court's pretrial scheduling orders is the establishment of specific cut-off dates. The State does not seek to exclude testimony or evidence at trial regarding the implementation of I-872 in 2010 if it is presented in compliance with this Court's pretrial scheduling order, but does seek to avoid trial by ambush. The arguments offered by Plaintiffs raise the spectre of new witnesses, and new evidence, continually being injected by Plaintiffs during the period leading up to the trial, and presumably during the course of the trial as well. This clearly cannot be, if the trial is to proceed based upon developed facts that all parties have adequate opportunity to examine and respond to. Elections are ongoing events, and the conduct of the 2010 election is well under way. Plaintiffs knew that this would be the case when they

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(360) 753-6200

stipulated to their suit's November 15, 2010 trial date. Even though elections continue to occur and new events accordingly continue to take place, in order for trial to be based upon properly vetted evidence to which all parties have a meaningful opportunity to respond, the record must close at some point. That point is the cut-off dates set by the court order in this case – cut-off dates to which all parties agreed.

The Washington State Republican Party plaintiffs' apparent intent to continually rely upon newly disclosed evidence, without regard to this Court's pretrial scheduling orders, is further illustrated by the documents attached to the Declaration of Kevin B. Hansen in Support of Plaintiffs' Response in Opposition to Motion to Strike. These exhibits reveal some of the dangers inherent in permitting Plaintiffs to ignore deadlines and inject new material at every stage of the case, because at some point such evidence cannot be properly examined and rebutted and may induce inaccurate factual findings. For example, Exhibit 1 to the Hansen Declaration is a sample ballot from Kittitas County for the August 2010 primary. The Washington State Republican Party plaintiffs fail to reveal that Kittitas County provided every voter a proper explanation of the candidates' personal statement of party preference by providing the appropriate explanatory insert with every ballot. Decl. of Catherine S. Blinn Supporting Motion to Strike Untimely Disclosed Witnesses, Ex. A; *see also* Blinn Decl., ¶ 4 (every other county provided not only that same insert language with every ballot, but also redundantly printed that explanatory language on their primary ballots). More strikingly, the document that the Washington State Republican Party plaintiffs identify as a "ballot" for Snohomish County is no such thing. A true and correct copy of the real ballot reveals that Snohomish County properly provided both the required explanation on the ballot itself and the

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explanatory ballot insert. Blinn Decl., Ex. B. Finally, although the Washington State Republican Party plaintiffs complain that the State's online voters guide at one time did not contain yet another discussion of the candidates' personal statements of party preference; such discussion does now appear there. Blinn Decl., Ex. C.

C. The Republican Party's Belated Attempt To Change Its Description Of What Witnesses Will Talk About Does Not Change The Fact That They Were Not Timely Disclosed

Finally, the Washington State Republican Party plaintiffs now recharacterize some of their witnesses as being offered only for the purpose of "rebuttal". This attempt does not render their disclosure timely for purposes of listing them as primary witnesses for their case in chief.

III. CONCLUSION

For these reasons, and for the reasons set forth in the State's Motion to Strike Untimely Disclosed Witnesses and the Washington State Grange's joinder, this Court should strike the seven lay witnesses and one expert witness discussed in the State's motion. (Those same reasons also require this Court to strike the four additional untimely fact witnesses identified for the first time in Plaintiffs' October 6 pretrial statement.)

RESPECTFULLY SUBMITTED this 15th day of October, 2010.

ROBERT M. MCKENNA
Attorney General

By: s/ Jeffrey T. Even
James K. Pharris, WSBA #5313
Jeffrey T. Even, WSBA #20367
Allyson Zipp, WSBA #38076
Deputy Solicitors General
PO Box 40100
Olympia, WA 98504-0100
Attorneys for Defendant Intervenors
State of Washington, et al.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I electronically filed the foregoing State Intervenors' Reply In Support Of Motion To Strike Untimely Disclosed Witnesses with the clerk of the court using the CM/ECF system which will send notification of such filing to the following:

John White and Kevin Hansen, attorneys for Washington State Republican Party

David McDonald and Emily Throop, attorneys for Washington State Democratic Central Committee

Orrin Grover and John Mills, attorneys for Libertarian Party of Washington State

Thomas Ahearne, Marco Magnano, and Kathryn Carder, attorneys for Washington State Grange

Gordon Sivley, attorney for Snohomish County

DATED this 15th day of October, 2010.

s/ Jeffrey T. Even
Jeffrey T. Even

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