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The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WASHINGTON STATE REPUBLICAN
PARTY, et al.,

Plaintiffs,

WASHINGTON 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,

Defendant-Intervenor.

NO. CV05-0927-JCC

STATE'S RESPONSE TO
REPUBLICAN PARTY'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
SEPTEMBER 17, 2010

1 **I. INTRODUCTION**

2 The Defendant-Intervenors, State of Washington, Attorney General Rob McKenna,
 3 and Secretary of State Sam Reed (collectively, “the State”), respectfully oppose Plaintiffs’
 4 Motion for Partial Summary Judgment. Plaintiffs Washington State Republican Party, *et al.*,
 5 (“Republican Party”) request an order granting partial summary judgment, declaring
 6 unconstitutional the method used by the State to conduct elections for precinct committee
 7 officers, and entering a mandatory affirmative injunction modifying state law to conduct
 8 elections for those internal political party officers in the manner the Republican Party prefers.
 9 This Court should instead grant the State’s Motion for Summary Judgment (Dkt. No. 239),
 10 and should decline to rewrite state law as requested by the Republican Party.
 11

12 **II. ARGUMENT**

13 **A. Washington’s System for Electing Precinct Committee Officers is Constitutional**

14 Precinct Committee Officers (PCO’s) are not public officials, but rather form the
 15 grass roots level of the private organization of major political parties. *See* Wash. Rev. Code
 16 § 29A.80.020, .030. Although PCO’s are not public officials, they are elected at public
 17 expense on the same day as the State’s primary. Wash. Rev. Code § 29A.80.051.
 18

19 The State has previously set forth the reasons why Washington’s current system for
 20 electing PCO’s survives constitutional scrutiny. State’s Motion for Summary Judgment
 21 (“State’s Mot. for SJ”) at 17-19. Those reasons need not be repeated here, and are
 22 incorporated by this reference.
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1 **B. The Republican Party Has Abandoned Its Claim That This Court Should**
 2 **Invalidate Initiative 872 In Its Entirety Based Upon Arguments About The**
 3 **Election of Precinct Committee Officers**

4 The Republican Party's amended complaint asks this Court to declare that Initiative
 5 872 ("I-872") is unconstitutional in its entirety, based upon the proposition that the State has
 6 conducted PCO elections in an unconstitutional manner. Supplemental and Am. Compl. for
 7 Declaratory Judgment and for Injunctive Relief Regarding I-872 and Primary Elections ¶ 59
 8 (Dkt. No. 206).¹ As the State demonstrated in its motion for summary judgment, this request
 9 for relief is untenable. State's Mot. for SJ at 19-20. PCO elections form no part of I-872. If
 10 the Republican Party were correct in asserting the unconstitutionality of the current system
 11 for electing PCO's, then the relief would logically be limited to invalidating the system for
 12 electing PCO's. This Court has so indicated in the order entered on August 20, 2009.
 13 August 20 Order at 21 (Dkt. No. 184).

14
 15 Given these points, the Republican Party correctly abandons its argument that this
 16 Court should invalidate I-872 in its entirety based upon the method for electing PCO's. Their
 17 motion for partial summary judgment makes no mention of this requested relief, focusing
 18 instead on their alternative request that the Court rewrite state statutes.² Pls.' Mot. for Partial
 19 Summary Judgment ("Reps.' Mot. for PSJ") at 8-9 (Dkt. No. 250). Accordingly, the relief of
 20 invalidating I-872 as a consequence of the alleged infirmity of PCO elections is no longer
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 24 ¹ The Democratic Party makes a parallel request in their amended complaint. First Amended and
 25 Supplemental Complaint in Intervention for Declaratory Judgment and for Injunctive Relief Regarding
 Initiative 872 and Primary Elections ¶ 51 (Dkt. No. 205). The Libertarian Party, in contrast, makes no similar
 claim and the issues raised in this motion have no application to them. *See* State's Mot. for SJ at 17 n. 9.

26 ² The same is true regarding the Democratic Party's companion motion for partial summary judgment.
 Mot. for Partial Summary Judgment at 4-5 (Dkt. No. 247).

1 before the Court. *See Alaska Ctr. for Env't v. United States Forest Service*, 189 F.3d 851,
2 858 n.4 (9th Cir. 1999) (party may not raise issue for first time in its reply brief).

3 **C. This Court Should Not Rewrite State Law To Amend The Manner In Which**
4 **Precinct Committee Officers Are Elected**

5 Instead of seeking the invalidation of I-872, the Republican Party asks this Court to
6 rewrite Washington law to compel the State to conduct PCO elections in a way in which they
7 have never been conducted. Their argument is based upon two untenable notions. First, they
8 suggest that the Washington Constitution compels the State to conduct public elections for
9 officers of a private organization—a political party. Second, they suggest that because
10 Washington uses a particular method for conducting presidential primaries, it can be
11 compelled to use the same method for the election of PCO's. Neither contention bears
12 scrutiny.
13

14 The basic premise of the political parties' arguments in this case has been that
15 political parties are private organizations whose internal operations deserve "special
16 protection" under the First Amendment. *Washington State Grange v. Washington State*
17 *Republican Party*, 552 U.S. 442, 453, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). Indeed, the
18 Supreme Court has recognized a sphere of private associational rights for political parties, as
19 private entities, concerning the selection of their party officers and their internal party
20 organization. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229-33,
21 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) (invalidating California law dictating the
22 organization and composition of internal party governing bodies). It is inconsistent for the
23 political parties to contend, on the one hand, that they are private organizations free to
24 determine their own organization, but on the other hand, that they are entitled to demand that
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1 precinct committee officers be categorized as “public officers” and elected through the use of
2 the state electoral machinery.

3 Precinct committee officers are officers of the political party they serve; they are not
4 public officials. Wash. Rev. Code § 29A.80.030 (PCO’s form the county central committee
5 of the political party); *see also Eu*, 489 U.S. at 230-31 (treating members of the county
6 central committee as officers of the private political party organization). The Secretary of
7 State has recognized the private character of PCO’s by rule. Wash. Adm. Code § 434-230-
8 100(5) (“Precinct committee officer is a position in each major political party.”). The fact
9 that PCO’s perform certain functions under state law, such as nominating candidates to be
10 appointed to fill vacancies in office, does not mean that they are public officials. Far less
11 does it mean that state law requires them to be publicly elected.
12

13 The Republican Party seems to locate a requirement that PCO’s be elected in article
14 II, section 15, of the state constitution. That provision simply provides a role for the county
15 central committees of political parties when vacancies occur in certain elected public offices
16 during a term. That provision provides the county legislative authority (i.e. county council or
17 county commissioners) the ability to appoint a person to fill a vacancy in the legislature or in
18 a partisan county elective office. Wash. Const. art. II, § 15. It limits their choice, however,
19 to a list of three people “nominated by the county central committee of that party”. *Id.* The
20 obvious purpose of this limitation on the appointing power is to effectuate the constitutional
21 requirement that the person appointed be “from the same . . . political party as the legislator
22 or partisan county elective officer whose office has been vacated”. *Id.*
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1 The constitution is silent as to how the members of the party's county central
 2 committee are selected. It simply provides that the county central committee can nominate a
 3 list of three individuals for appointment to fill a vacancy. *Id.* Nothing in the state
 4 constitution requires that members of the county central committee be *elected*, or that county
 5 central committees be composed of "precinct committee officers."³ The constitution merely
 6 limits the power of the county legislative authority when making appointments to fill
 7 vacancies by requiring that they choose among nominees put forth by the local party body.
 8 Even if PCO's were not elected at all, this constitutional provision would still serve its
 9 function of precluding public officials from filling a vacancy with someone other than an
 10 individual put forward by the party organization.
 11

12 The Republican Party also suggests that, because Washington conducts its
 13 presidential primary in a particular way, this Court can order that this method be used for
 14 electing PCO's. Reps.' Mot. for PSJ at 7-8. Voters at the presidential primary are required
 15 to sign oaths, prepared by the political parties, declaring themselves members of that party
 16 for the purpose of participating in the presidential nominating process. Wash. Rev. Code
 17 § 29A.56.050. Certainly, Washington could use a similar system to elect PCO's if its
 18 legislature made the policy choice to do so, and enacted a statute making such a procedure
 19 applicable to PCO elections. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wash.
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 23 ³ The state laws providing for the election of PCO's are statutory, not constitutional, and they provide
 24 for election of PCO's only for major political parties. Wash. Rev. Code § 29A.80.051 (requiring election of
 25 PCO's); Wash. Rev. Code § 29A.80.030 (limiting scope of statute governing county central committees to
 26 major political parties). If a vacancy occurred in a legislative position or partisan county office that had
 previously been filled by the nominee of a minor political party, article II, section 15 would nonetheless apply.
 Wash. Const. art. II, § 15 (not restricting provision to major political parties). In such a case, the party body
 putting forth names to fill the vacancy would not be composed of elected PCO's, and nothing in the state
 constitution suggests that it must.

1 2d 284, 289, 174 P.3d 1142 (2007) (the state legislature is vested with plenary authority to
 2 determine what Washington's laws should be). The legislature has never done so, and PCO
 3 elections have never been conducted in the way the Republican Party urges. Nothing in
 4 Washington's presidential primary statutes has anything to do with PCO elections. Wash.
 5 Rev. Code §§ 29A.56.010 through 29A.56.060 (governing presidential primaries).⁴

7 The Republican Party suggests no basis upon which this Court could rewrite state law
 8 to provide a different system for conducting PCO elections than the one called for under
 9 statute. The Republican Party suggests that because the legislature has chosen to provide for
 10 PCO elections, this Court can order that they be conducted in a different way. Reps.' Mot.
 11 for PSJ at 8. If, however, this Court were to find a constitutional infirmity in Washington's
 12 current law, it would be up to the legislature, not this Court, to determine the choice of an
 13 alternative statutory scheme. This Court's role is limited to determining whether current law
 14 passes constitutional scrutiny. "It is not our role as a court to rewrite the plain language of a
 15 state statute." *Palmer v. United States*, 945 F.2d 1134, 1136 (9th Cir. 1991). While courts
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18 ⁴ The Republican Party also observes that the political parties' county central committees, composed
 19 of PCO's, provide names of workers for election boards at polling places. Reps.' Mot. for PSJ at 5. This point
 20 is both misleading and irrelevant. It is misleading because all but one of Washington's 39 counties have
 21 replaced polling places with vote-by-mail elections under Wash. Rev. Code § 29A.48.010 (elections by mail).
 22 See <http://wei.secstate.wa.gov/osos/en/voterinformation/Pages/VotebyMailFAQ.aspx> (Secretary's Web site
 23 showing that 38 of 39 Washington counties conduct elections by mail). Even in the one county that still uses
 24 some polling places (Pierce), the vast majority of votes are cast by mail under Wash. Rev. Code § 29A.40,040
 (ongoing requests for absentee ballots). See http://www.sos.wa.gov/elections/absentee_stats.aspx (Secretary's
 Web site showing that 88.71% of all votes cast statewide in 2008 were cast by mail, including 83.05% of those
 cast in Pierce County). Nor is the Republican Party's polling place point even relevant. As with the role of
 party observers allowed elsewhere during the election process in general, their allowance at polling places
 merely reflected a recognition of the parties' ability to provide individuals with diverse stakes in the election's
 outcome.

25 Similarly, the Republican Party cites to outdated law when offering the irrelevant observation that two
 26 decades ago the state used separate absentee ballots for PCO elections. Reps.' Mot. for PSJ at 6 (citing to a
 1991 statute). The legislature amended the cited statute in 2001, years before the enactment of I-872, to remove
 the requirement that PCO candidates appear on separate absentee ballots. Laws of 2001, c. 241, § 6 (amending
 former Wash. Rev. Code § 29.36.030).

1 will indulge a reasonable construction of a state statute in order to avoid a constitutional
2 deficiency, federal courts do not “‘rewrite’ the statute to save it”. *Planned Parenthood of*
3 *Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004).

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5 Moreover, the cases that the Republican Party cites for the notion that this Court can
6 rewrite state law by issuing an affirmative injunction do not support their position. Reps.’
7 Mot. for PSJ at 8-9. To the contrary, the authorities they cite establish that mandatory
8 injunctions are strongly disfavored, and when issued are subject to heightened scrutiny on
9 appeal. *Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (mandatory
10 injunctions subject to heightened scrutiny); *Anderson v. United States*, 612 F.2d 1112, 1114-
11 15 (9th Cir. 1980) (mandatory injunctions strongly disfavored). They “should not be issued
12 unless the facts and law clearly favor the moving party.” *Dahl*, 7 F.3d at 1403.

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14 Likewise inapposite are those cases that the Republican Party cites for the notion that
15 “mandatory affirmative injunction is appropriate when . . . a party with notice of a pending
16 claim for an injunction performs an action sought to be restrained in those proceedings.”
17 Reps.’ Mot. for PSJ at 9. Those cases merely stand for the proposition that an affirmative
18 injunction can be issued to restore the situation to the status quo that prevailed at the time the
19 case was filed. *Porter v. Lee*, 328 U.S. 246, 251, 66 S. Ct. 1096, 90 L. Ed. 1199 (1946)
20 (court could order that certain evicted tenants be returned to possession of premises); *F.*
21 *Alderete Gen. Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983)
22 (approving use of injunction to restore the prior status quo). The State, however, has never
23 conducted PCO elections in the manner the Republican Party urges this Court to order. A
24 return to some past status quo is not the relief that the Republican Party seeks. They ask this
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1 Court instead to rewrite Washington law to require that PCO elections be conducted in a way
2 in which they have never been conducted. This the Court may not do. *Palmer*, 945 F.2d at
3 1136.

4
5 **III. CONCLUSION**

6 For these reasons, and for the reasons expressed in the State's Motion for Summary
7 Judgment, the Court should deny the Plaintiffs' Motion for Partial Summary Judgment.

8 DATED this 13th day of September, 2010.

9
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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed State’s Response To Republican Party’s Motion For Partial Summary Judgment 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 13th day of September, 2010, at Olympia, Washington.

ROBERT M. MCKENNA
Attorney General

s/ James K. Pharris
James K. Pharris

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