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, et al.,

Defendant Intervenors.

NO. CV05-0927-JCC

STATE'S OPPOSITION TO REPUBLICAN PARTY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AND AMENDED COMPLAINT

Noted for December 12, 2008

No Oral Argument Requested

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I. INTRODUCTION

The United States Supreme Court has resolved all of the claims originally pleaded by Plaintiff Washington State Republican Party (Republicans). Most of the claims were expressly resolved by the Supreme Court decision; others were resolved by necessary implication. The only question this Court had initially reserved has been rendered moot. *Wash. State Grange v. Wash. State Republican Party*, (Grange) ___ U.S. ___, 128 S. Ct. 1184, 170 L. Ed. 2d 151, (2008). The Supreme Court ruled that this case is a facial challenge to the Top-Two primary system enacted by Initiative Measure No. 872 (I-872), and on that basis has rejected all the political parties' claims with respect to the Top-Two primary. There are no lingering "as applied" issues for this Court because the Top-Two primary had not been applied at the time this case was filed, and so could not have included facts constituting an "as applied" challenge. Furthermore, the Court of Appeals for the Ninth Circuit has instructed this Court to dismiss all of these issues, as discussed below.

The Republicans also seek to inject into this litigation new claims based entirely on state law that are not legitimately supplemental to the federal law issues, and, if they need to be addressed at all, should be addressed in the state courts.

II. STATEMENT OF FACTS

The Republicans, quickly joined by the Democratic and Libertarian Parties, challenged I-872 in May, 2005, seeking an injunction against the implementation of the Top-Two primary. The United States Supreme Court has reversed the injunction granted by this Court, and reinstated the system selected by the voters for conducting primary elections. *Grange*, 128 S. Ct. at 1196 (noting the "precipitous nullification of the will of the people" resulting from the injunction against I-872, and holding "that I-872 is facially constitutional").

The Republicans now ask this Court for leave to amend their complaint, replacing a large portion of its original text with new allegations. Allowing this amendment would, in

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effect, allow the Republicans to start a new case on new issues, with little in common with the current case save its caption and case number.

III. ARGUMENT

A. The Supreme Court Has Rejected The Republicans' Claims, Leaving No Pending Claims To Form The Basis For Amendment

1. Every Claim Originally Asserted By The Republicans Has Either Been Rejected Or Rendered Moot

A review of the Republicans' original complaint demonstrates that all of the claims advanced within it have already been rejected, either by the express language of the Supreme Court decision or by necessary implication from that decision. After a brief introduction, and allegations describing the original parties to the case and basis for the Court's jurisdiction, the original complaint set forth the Republicans' challenge to the Top-Two primary. Compl. for Declaratory J. And For Injunctive Relief Regarding I-872 And Primary Elections (Compl.), ¶¶ 16-46. The following allegations, each of which has already been rejected, can be distilled from that original complaint:

- The Republicans alleged that the Top-Two primary would be used to select the nominees of political parties. Compl., ¶¶ 16, 19, 21. The Republicans restated this allegation in their first cause of action. Compl., ¶¶ 30-35. To the contrary, the Supreme Court held that the Top-Two primary would not be used to select party nominees, and that political party nominations would be "simply irrelevant" to the primary established by I-872. *Grange*, 128 S. Ct. at 1192.
- The Republicans alleged that, by permitting candidates to state their personal preference for a political party, I-872 would force the political parties into an unconstitutional association with those candidates. Compl., ¶¶ 17-19. The Republicans restated this allegation as their second cause of action. Compl., ¶¶ 36-38. The Supreme Court disagreed, concluding, "There is simply no basis to

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presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Grange*, 128 S. Ct. at 1193. The Ninth Circuit has directed this Court to dismiss this facial claim. *Wash. State Republican Party v. Wash.*, 545 F.3d 1125, 1126 (9th Cir. 2008).

- The Republicans alleged that I-872 denied them the equal protection of the law by permitting minor parties, but not major parties, to nominate candidates through a convention process. Compl., ¶¶ 22-23. The Republicans restated this allegation in their third cause of action. Compl., ¶¶ 39-41. This Court rejected that allegation, concluding that I-872 impliedly repealed the minor party convention statutes as inconsistent with the fundamental character of the Top-Two primary as one that did not involve party nominations. *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 927-29 (W.D. Wash. 2005). The Ninth Circuit agreed, and on remand ordered this Court to dismiss this claim.[1] *Wash. State Republican Party*, 545 F.3d at 1126.
- The Republicans set forth several paragraphs characterizing the prior decisions in *Cal. Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000), and *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), contending that those decisions could not be distinguished from the present challenge to I-872. Compl., ¶¶ 24-26. The Supreme Court disagreed, distinguishing both cases. *Grange*, 128 S. Ct. at 1192-93 (distinguishing *Jones*); *id.* at 1189 (noting that *Reed* followed *Jones*).

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[1] The Republicans appear to argue that, under their amended complaint, they seek to raise a different claim from the one previously rejected on the theory that this argument is revived by the state legislature's amendment of the minor party convention statute during the time when implementation of I-872 was enjoined by this Court and the state was conducting a "Montana" style primary. If this claim has any merit at all, it depends upon an argument based on state law regarding any effect of subsequent legislation, and is best resolved by a state court.

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- The Republicans then alleged that the party had adopted internal party rules governing its candidate nominating process, and alleged that the State would violate the party's civil rights if it conducted a primary by any method that did not honor those party rules. Compl., ¶¶ 27-29. The Supreme Court again disagreed, concluding that since the Top-Two primary would not be used to select party nominees, the party's private nominating decisions are "simply irrelevant". *Grange,* 128 S. Ct. at 1192.
- The Republicans requested preliminary and permanent injunctive relief, alleging that if the State were permitted to implement the Top-Two primary established by I-872 they would suffer irreparable injury. Compl., ¶¶ 42-46. The Supreme Court again disagreed, concluding that this request to enjoin the Initiative before it had ever been implemented "threaten[ed] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Grange*, 128 S. Ct. at 1191.

This Court did reserve one issue for possible future consideration, but that issue has been rendered moot by the Supreme Court's decision on appeal. On August 12, 2005, this Court entered an Order clarifying its prior ruling on summary judgment in order to explain that the Republicans' proffered challenge to Wash. Rev. Code 29A.24.031 was not properly before the Court on summary judgment. In that challenge, the Republicans contended that, even if I-872 were set aside, the Republicans' associational rights would also be violated under the alternative "Montana" primary because of the freedom that system gave candidates to declare a party affiliation. Order at 2 (Aug. 12, 2005). The cited statute is not a part of I-872, but rather forms part of the "Montana" primary system that I-872 replaced. The Republicans' challenge was thus dependent upon the Court concluding that I-872 was invalid, because if I-872 were ultimately held to be constitutional, then Wash. Rev. Code 29A.24.031 would be superseded and would not be effective. This Court accordingly stayed

the Republicans' challenge to that statute pending appeal "in the interest of justice". Order at 2. Since Wash. Rev. Code 29A.24.031 would be the law only if I-872 were declared unconstitutional, the Supreme Court's conclusion that I-872 is constitutional rendered that claim moot. *See Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007) (change in applicable statutory law renders challenge to prior statute moot).[2]

The Republicans' original complaint has been fully resolved. There is no complaint to "amend" at this point in the case. The Republicans' new claims should be brought in a new action, to the extent they can be asserted at all.

2. Leave To Amend Should Be Denied Where, As Here, A Party's Original Claims Have Been Resolved

A complaint should not be amended after the allegations made in that complaint have already been fully litigated and rejected. "While Rule 15(a) establishes that leave to amend should be 'freely given,' post-judgment motions to amend are treated with greater skepticism than pre-judgment motions." *Premo v. Martin*, 119 F.3d 764, 772 (9th Cir. 1997) (quoting Fed. R. Civ. P. 15(a), and citing 6 Charles Alan Wright & Arthur Miller, *Fed. Prac. & Proc.* § 1489 (1990)). This rule makes perfect sense where, as here, the claims originally asserted in the complaint have been fully litigated and resolved, or rendered moot. A complaint in which the original claims have already been rejected—here, rejected by the nation's highest court—does not present an appropriate vehicle for continuing to litigate new claims the parties may devise after their original claims prove unsuccessful. "To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." 6 Charles Alan Wright, Arthur Miller & Mary Kay Kane, *Fed. Prac. & Proc.* § 1489 (Supp. 2008). For this reason, the Republicans' motion to amend their complaint should be denied.

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[2] Nor may the Republicans rely upon footnote 11 of the Supreme Court's majority opinion for the proposition that claims remain pending in this case. That footnote solely describes claims asserted by the Libertarian Party as intervenors, and not claims asserted by the Republicans. *Grange*, 128 S. Ct. at 1195 n.11.

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B. The New Claims The Republicans Request Leave To Add Would Inject Entirely New Issues Into This Case, Which Would Be Best Resolved In A New Action

The amendments to their complaint that the Republicans propose are so extensive as to essentially amount to beginning an entirely new lawsuit. The new claims are at best tangential to the original facial challenge to I-872. They amount to challenges to state statutes not previously at issue or to challenges based entirely upon state law theories which are not supplemental to the original federal law claims. Their proposed changes assert the following new claims:

- After updating their complaint to reflect changes in the identities of some of the parties,[3] the amended complaint would substitute an almost entirely new set of factual allegations for those set forth in their original complaint. Mot. For Leave To File Supplemental and Amended Compl. (Mot. to Amend), Attach. B, ¶¶ 15-29. The new text includes new factual allegations concerning the enactment of I-872 in 2004, the enactment of other legislation by the state legislature, and the State's implementation of an alternative form of primary while this Court's injunction against I-872 was in effect. Mot. to Amend, Attach. B, ¶¶ 15-29.
- The proposed amended complaint also includes allegations regarding the election of precinct committee officers and the application of state campaign finance laws, neither of which were the subject of I-872 or the original complaint. Mot. to Amend, Attach. B, ¶¶ 24-29. All that remains of the Republicans' original text from this portion of their complaint is a portion of the description of the "Montana primary system" used while the injunction was in place, along with allegations about the nature of the party's associational rights that the Supreme Court has already rejected.[4]

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[3] These proposed amendments would be unobjectionable in and of themselves, except that they omit the Washington State Grange, which has participated throughout this litigation as an Intervenor Defendant.

[4] *Wash. State Grange*, 128 S. Ct. at 1192 (I-872 "never refers to the candidates as nominees of any party, nor does it treat them as such").

Mot. to Amend, Attach. B, ¶¶ 19-21. The extensive changes amount to an attempt to shift the focus of the case from their original unsuccessful challenge to the substance of I-872 to a procedural challenge not previously asserted, coupled with challenges to unrelated state laws. Mot. to Amend, Attach. B, ¶¶ 15-29.

- The Republicans next propose to add new allegations regarding the contents of the State's Voters' Pamphlets, and regarding the election of precinct committee officers. Mot. to Amend, Attach. B, ¶¶ 36-37. Neither allegation is related to I-872, and they constitute entirely new challenges to separate state statutes.
- Turning to their various causes of action, the Republicans propose to retain their first cause of action, despite the Supreme Court's holding that I-872 does not facially violate their associational rights. *Grange*, 128 S. Ct. at 1191-92. They seek to revive the claim by adding new language cast in terms of an "as applied" challenge to I-872, but without alleging any specific facts as to how the law has been applied. Mot. to Amend, Attach. B, ¶¶ 42-43. The Republicans additionally seek leave to add allegations regarding the enactment of other state laws after the voters enacted I-872, raising issues of state law best resolved in state court. Mot. to Amend, Attach. B, ¶ 46.
- Their proposed amendments to their second cause of action similarly would add "as applied" language to their prior facial allegation, as well as a new challenge to the manner in which precinct committee officers are elected, a subject not implicated by I-872. Mot. to Amend, Attach. B, ¶¶ 50-51.
- Finally, the Republicans seek to add an entirely new fourth cause of action, based entirely on state law. Mot. to Amend, Attach. B., ¶¶ 56-62. They similarly seek to add additional state-law allegations regarding the relationship between the voter-approved I-872 and other enactments of the legislature that took place while implementation of I-872 was enjoined. Mot. to Amend, Attach. B, ¶ 46. For the

reasons specified in part (D), below, core state law claims such as these should not be resolved in federal court.

C. The Republicans' "Voter Confusion" Language Is Nothing More Than A Restatement Of Their Rejected Claims

The Republicans propose to add a paragraph to their original first cause of action ("Conducting an Invalid Primary"), setting forth an assertion that I-872 "will confuse voters regarding whether candidates identified with the Republican Party are affiliated with the Republican Party or represent its views, and will further confuse voters regarding whether messages advanced by candidates bearing the Republican Party name on ballots are those of the Republican Party." Mot. to Amend, Attach. B., ¶ 42. The proposed paragraph would also assert that I-872 "constitutes a misappropriation" of the Republican Party's name. Mot. to Amend, Attach. B., ¶ 42.

The purpose of this language is unclear. To the extent it is intended to amend the Republicans' complaint to state an "as applied" challenge to I-872, the impropriety of such an amendment already has been addressed. The language itself, however, simply reiterates the very claim that the Supreme Court has explicitly rejected—the claim that I-872 would, on its face, deprive the Republican Party of federally guaranteed constitutional rights. The Supreme Court characterized the arguments of the Republican Party as variations on the theme that "voters will be confused by candidates' party-preference designations." *Grange*, 128 S. Ct. at 1193. In the following paragraph, the Court noted that "[w]e reject each of these contentions" for the reason that "[t]here is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Id.*[5]

[5] Moreover, the Republicans phrase this claim in the future tense, as they phrased their original complaint. Again, this illustrates that the Republicans address future events they speculate might occur, and do not base their claim upon the actual application of I-872.

Even if it otherwise were appropriate to allow the Republicans to amend their complaint, and for reasons previously explained it is not, courts recognize that it is pointless to allow amendments that are simply futile. *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043 (9th Cir. 2006) (upholding the denial of leave to amend adding a claim based on a statute that would have afforded no relief). *See also, Bell Consumers, Inc. v. Lay*, 203 F. Supp. 2d 1202 (W.D. Wash. 2002). In this case, it would be pointless and futile to allow this restatement of "voter confusion" that the Supreme Court has already rejected, especially when the Court recognized that "voter confusion" was at the heart of the case and dealt with it explicitly.

D. The Republicans Should Not Be Allowed To Amend Their Complaint To Assert Their New State Constitutional Claim

The Republicans seek to amend their complaint to assert a new cause of action, which is unrelated to the issues of the original complaint and is based entirely upon the state constitution. The District Court may exercise supplemental jurisdiction over a state law claim only if the Republicans already have a federal claim pending before this Court. 28 U.S.C. § 1367(a); *see also Peacock v. Thomas*, 516 U.S. 349, 355, 116 S. Ct. 862, 133 L. Ed. 2d 817 (1996) ("a federal court lacks the threshold jurisdictional power" to hear and determine a state law claim when no federal claim is pending); *Manufactured Home Communities, Inc. v. City of San Jose*, 420 F.3d 1022, 1034 (9th Cir. 2005) (same). As described above, the Republicans do not have a federal claim pending, as all of the claims originally asserted by the Republicans have been rejected or rendered moot. *See generally*, pages 3-6, above.

Even if the Court could assert supplemental jurisdiction over the Republicans' proposed state constitutional claim, this claim would present complex issues of state law more appropriately addressed by the state courts. 28 U.S.C. § 1367(c)(1). The Republicans request leave to amend their complaint in order to challenge I-872 under article II, section 37,

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of the Washington Constitution. That provision requires that amendatory acts set forth in full the acts they amend. Wash. Const. art. II, § 37. This Court should decline to consider this challenge, leaving it and the construction of the state constitution and the validity of the state initiative under state law for determination by the state courts. 28 U.S.C. § 1367(c)(1).

"Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). "It is hard to imagine issues that are more within the province of the state courts than issues requiring interpretation of the state's own constitution." *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 846 n.1 (D. Wyo., 1994).

The Republicans assert that they base their state constitutional challenge upon a single, recent decision of the Washington Supreme Court. Mot. to Amend at 2 (citing *Wash. Citizens Action v. State*, 162 Wn.2d 142, 171 P.3d 486 (2007)). Article II, section 37 has been part of Washington's Constitution from statehood. *Citizens Action* neither created a claim previously unavailable under Washington law, nor has any clear application to I-872. In a closely divided decision in *Citizens Action*, the state court invalidated an initiative measure under the authority of article II, section 37 of the Washington Constitution on the basis that the law the initiative amended had been judicially held unconstitutional during the period the initiative was pending. *Citizens Action*, 162 Wn.2d at 153-54.

No such allegation can be proffered in the present case because I-872 did not amend any statute held unconstitutional while I-872 was pending. Instead, the Republicans' argument appears to be that an intervening legislative amendment somehow blocked the voters from exercising their constitutionally reserved authority to enact I-872. Mot. to Amend at 2. The Republicans thus ask this federal court to determine a significant state constitutional question by extrapolating a single state court decision and applying it to

different facts. It is far from certain that the state supreme court would apply the law in this manner.

State law governing the potential application of article II, section 37 to I-872 thus raises a novel question of state constitutional jurisprudence that should be entrusted to the state court. For a federal court to consider the validity of I-872 based on an unsettled question of state constitutional law would intrude upon the state court's clear province to interpret the state's own constitution.[6] *Clajon Prod. Corp.*, 854 F. Supp. at 846 n.1.

IV. CONCLUSION

For these reasons, the Republican Party's Motion For Leave to File Supplemental and Amended Complaint should be denied.

DATED this 9th day of December, 2008.

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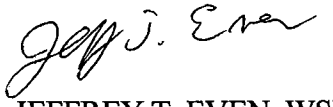

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[6] Additionally, deference to the state court better promotes "justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers*, 383 U.S. at 726. The parties are not well served by litigating this novel state issue of state constitutional law in a court that can only speculate as to the application of state law that the state court might hypothetically apply.

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed State's Opposition to Republican Party's Motion for Leave to File Supplemental and Amended Complaint with the Clerk of the Court using the CM/ECF system, which will send notification of such filing electronically to the following:

John White
Kevin Hansen
Richard Shepard
Thomas Ahearne
David McDonald

Executed this 9th day of December, 2008, at Olympia, Washington.

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