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HONORABLE THOMAS S. ZILLY

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,

vs.

DEAN LOGAN, King County Records & Elections
Division Manager, et al.,

Defendants,

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-TSZ

PLAINTIFFS' RESPONSE IN
OPPOSITION TO STATE AND
GRANGE MOTIONS TO STRIKE
SUPPLEMENT TO MOTION FOR
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
WEDNESDAY, JULY 13, 2005

WITH ORAL ARGUMENT

I. INTRODUCTION

1
2 Claiming prejudice and irrelevance, the State and Grange ask the Court to strike the
3 Republican Party's supplement to its motion for summary judgment. The Party respectfully
4 requests that the Court deny their motions and consider the Party's equal protection argument, either
5 as part of the Party's motion for a preliminary injunction or as part of the Party's motion for
6 summary judgment.

II. ARGUMENT

7
8 **A. The State and Grange cannot claim prejudice because the documents relied upon for**
9 **the Party's supplement to its motion for summary judgment were internally generated**
10 **by the State and communicated to the Grange.**

11 The State and Grange claim to be prejudiced by the Party's equal protection challenge to
12 I-872, submitted immediately following the disclosure of Secretary of State Reed's internal
13 documents. There is no prejudice to either party. Equal protection was raised in the Party's motion
14 for a preliminary injunction filed on May 26. In addition to having more than a week to respond
15 to the incorporation of the equal protection argument in the Party's motion for summary judgment,
16 the State can hardly claim surprise at having its internally-generated documents relied upon to
17 demonstrate the invalidity of the Secretary's bootstrapping regulations. The Grange was also "in
18 the loop" regarding internal communications about the regulations. *See Hansen Decl., Ex. 3 at 467*
19 ("We need to communicate our change in thinking on this to the Grange soon.").

20 **B. The State and Grange cannot claim prejudice because they were both aware of and**
21 **prepared for the Party's equal protection argument prior to this litigation.**

22 **1. The State's records show that Secretary Reed sought to address minor party**
23 **nominating rights beginning in December of 2004.**

24 Both the State and Grange were aware of and prepared for the Party's equal protection
25 argument before this litigation began. The Secretary's internal documents demonstrate the State's
26 awareness that I-872 had no effect on minor party convention rights. By December 1, 2004, the
27 Secretary had already outlined bills amending I-872 and was preparing for the need to have the bill
28 approved by two-thirds of the legislature because it was amending a recently-adopted initiative.
See id. at 228-29. The Secretary's proposed "fix it" bill included an amendment eliminating minor

1 party nominating convention rights in RCW 29A.20.121. *See id.* at 302-03. The Secretary
2 circulated to county election officials and others, including the Attorney General's office, bullet
3 points on the draft bill, summarizing the draft bill as "[f]ill[ing] in the blanks and cur[ing] conflicts
4 between I-872 and current law." *Id.* at 231. Among other changes to I-872, the draft bill would
5 "[e]liminate[] the minor party . . . convention process, except for the nomination of President and
6 Vice-President." *Id.* A later summary contains a similar bullet point regarding minor party rights,
7 but adds the following: "Minor party and independent candidates file and appear in the primary just
8 like major party candidates." *Id.* at 453.

9 When the legislature balked at amending these rights, John Pearson, the retired deputy
10 director of elections and then serving as special assistant to the director of elections, recognized the
11 resulting difficulty to the Secretary's litigation position: "This is not good news." *Id.* at 728.

12 By March 24, the Secretary's bill was dead, and his staff was designing strategy with the
13 Attorney General's office and the Grange to deal with the legislature's rejection of his proposed
14 amendment to strike minor party convention and name rights. His deputy, Nick Handy advised
15 Secretary Reed that the legislature's rejection of the proposed legislation "supports our
16 recommendation last week to resolve this issue through the rulemaking process." *Id.* at 467.

17 While the legislation was being considered, the Secretary and his staff advised the public
18 that eliminating the minor party convention process would constitute a change in the law. At the
19 request of Secretary Reed in February 2005, his office responded to a question from a member of
20 the public:

21 We are in the process of passing legislation In that legislation, we are changing
22 the way minor parties . . . gain access to the ballot. They used to have a petition and
convention system. The new legislation removes all those requirements.

23 *Id.* at 583. That advice and interpretation was also given to county elections officials. A month
24 before this lawsuit was filed, Katie Blinn, the Secretary's Assistant Director of Elections, responded
25 to a request from King County to confirm the accuracy of certain "statements" regarding the
26 primary election, including: "Minor political parties do not need to have nominating conventions
27 anymore." Ms. Blinn responded: "NOT ADDRESSED IN THE INITIATIVE." *Id.* at 11.

1 One month later, immediately prior to this lawsuit, the Secretary attempted to repeal the
2 minor party convention rights by regulation, apparently because he wanted to avoid the major
3 parties' equal protection argument. In her presentation to County Auditors at the 2005 Elections
4 Conference on May 12, Ms. Blinn provided the following information on one of the slides:

5 Lawsuit

- 6 • Expect the political parties to argue that the
7 nominating system for minor party and
8 independent candidates should still be
9 required.
 - If minor parties can hold nominating
conventions, major parties should be allowed
to also.

10 *Id.* at 41. On May 13, the Secretary advised the County Auditors of the urgency to adopt the
11 regulations before the political parties' lawsuits were filed. *Id.* at 7.

12 **2. The Grange's I-872 campaign materials expressly stated that the Initiative**
13 **would not affect minor party convention rights.**

14 In response to a "frequently asked question" regarding the effect of I-872 on minor party
15 candidates, the Grange responded: "Minor parties would continue to select candidates the same way
16 they do under the blanket primary." Declaration of John J. White, Jr. in Support of Plaintiff's
17 Motion for Preliminary Injunction, Ex. 3. The Grange cannot now complain when the Republican
18 Party uses this undisputed statement of the Initiative's intent to support its equal protection
19 argument.

20 **C. The State and Grange are not prejudiced by the Party's equal protection argument**
21 **because it was already included in the Party's pending motion for a preliminary**
22 **injunction.**

23 Both the State and Grange were also provided with the Republican Party's motion for a
24 preliminary injunction, filed on May 26. The motion included an equal protection argument as one
25 of the bases for this Court to grant injunctive relief, and has been re-noted for July 13. The State's
26 lack of response to the motion for a preliminary injunction and its equal protection argument does
27 not preclude the Court from considering the argument. Although the Grange responds to the motion
28 for preliminary injunction, it fails to substantively address the Party's equal protection argument.
The Party's contention that I-872 violates its right to equal protection under the law is properly

1 before the Court and should be decided either by a preliminary injunction or by invalidating the
2 Initiative as part of the Party's motion for summary judgment. Finally, the State cannot claim
3 prejudice because it controlled the timing of the disclosure of the Secretary's documents, which
4 were not received by counsel for the Republican Party until after June 17, the due date for the
5 political parties' motions.

6 **D. The Secretary of State's communications with county election officials and members
7 of the public were intended to be, and were received as, official communications.**

8 The State also contends that the Secretary of State's communications to the public and other
9 elections officials should be disregarded because the state employees involved were merely
10 "speaking as individuals to one another." State's Resp. at 11 n.9. This contention is directly
11 contradicted by the communications themselves. One expressly states that Secretary Reed had
12 asked the writer to respond on his behalf to a member of the public. *See Hansen Decl., Ex. 3 at 583.*
13 In another communication to county elections officials, the writer expresses both his and the
14 Secretary's thanks for the officials' help on the proposed legislation. *See id.* at 381. Still another
15 is the distribution of "talking points" from the Secretary's office to county elections officials. *See*
16 *id.* at 228. It is clear that the communications were intended to be, and were received as, official
17 communications from the Secretary's office.

18 **III. CONCLUSION**

19 The State and Grange are not prejudiced by the Republican Party's supplement to its motion
20 for summary judgment, in which the Party raises an equal protection argument that is repeated from
21 the Party's motion for a preliminary injunction, which is also scheduled to be heard by this Court
22 on July 13. The lack of response to that motion suggests that there is no possible rejoinder to I-
23 872's preservation of minor party nominating rights, and the resulting violation of the Republican
24 Party's right to equal protection.

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DATED this 6th day of July, 2005.

/s/ John J. White, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2005, 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 the following:

James Kendrick Pharris

Richard Dale Shepard

Thomas Ahearne

David T. McDonald

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