The Honorable Thomas S. Zilly

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, and LIBERTARIAN PARTY OF WASHINGTON STATE, et al, Plaintiff Intervenors, v. STATE OF WASHINGTON, et al, Defendant Intervenors, and WASHINGTON STATE GRANGE, et al, Defendant Intervenors.	No. CV05-0927 TSZ MEMORANDUM OF WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE IN SUPPORT OF WASHINGTON STATE REPUBLICAN PARTY'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND IN REPLY TO THE STATE OF WASHINGTON AND THE GRANGE'S OPPOSITION TO THE REPUBLICAN PARTY'S MOTION

The Washington State Republican Party's Motion for Leave to File Amended Complaint should be granted for the following reasons:

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1. The Assertion that the Republican Party's Original Complaint was Limited to a Facial Challenge is Not Well-Grounded and Mischaracterizes the Pleadings and Proceedings to Date.

The Grange's Response in Opposition ("Grange Resp.") is premised on its assertion that "the only claim against the Top Two asserted in the Republican Party's Complaint is a facial challenge under the first amendment of the federal constitution." Grange Resp. at 1:17-19. The State similarly argued that based on the Supreme Court's decisions, the "claims originally asserted in the [Republican Party's] complaint have been fully litigated and resolved, or rendered moot." State Resp. at 6. These assertions are simply wrong. The Republican Party's Complaint was a challenge to I-872 as implemented, not a facial challenge. The State adopted its regulations implementing I-872 on May 18, 2005. Zilly Order ("Order") at 9-10 (referring to Declaration of James Pharris, Exhibit C) (Dkt. # 87). The next day the Republican Party filed suit alleging that:

> The Initiative, *as implemented by State and local officials*, eliminates mechanisms previously enacted by the state to protect [the First Amendment rights of the Party and its adherents] and provides no effective substitute [.]

Complaint at ¶4 (emphasis supplied). "Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal citation omitted). Indeed, a party need only allege facts sufficient to "raise a right to relief above the speculative level." *Id.* at 1965. Moreover, the Grange's current position is—at best—odd, since in its Answer to the Republican's Complaint it stated as a defense that the Republican's "as applied" challenge to the Initiative was premature. Grange Answer, at ¶50 (Dkt. # 37).

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An as implemented or "as applied" challenge, of course, inherently includes a facial challenge. The summary judgment motion that the Republican Party later made and which was the subject of the Supreme Court decision was limited to a facial challenge. But that limitation was at this Court's request, not because the Complaint was limited to a facial challenge. As this Court noted in its Order granting summary judgment:[1] "The Court has previously directed the parties to limit their briefs to Plaintiffs' facial challenge of Initiative 872. The Court reserved issues related to Plaintiff's as applied challenge." Order at 13 n.13.

This case has always been an as applied challenge. The State is now modifying its implementation of I-872 in response to decisions in this case. The Republican Party should be allowed to update its pleadings to encompass the changes in the implementing regulations and proposed conduct of the State as a result of the parties' lawsuit.

2. The Republican Party's Claims Based on Article II, Section 37 are Appropriate.

Article II, Section 37 of the Washington State Constitution, requiring the inclusion of the full text of statutes to be revised or amended, is "intended both to ensure disclosure of the general effect of the new legislation and to show its specific impact on existing laws in order to avoid fraud or deception." *Washington State Citizens Action of Washington v. State*, 162 Wn 2d 142, 152, 171 P.3d 486 (2007). An initiative that does not comply with Article II, Section 37 is unconstitutional. *Id.* It is not burdensome to require I-872 to reflect actions taken by the Legislature in the early part of 2004. Indeed, the Washington Supreme Court expressly recognized as much: "Proponents of an initiative can effectively 'amend' an

[1] The Supreme Court also acknowledged that it was not fully resolving the case with its decision and that further issues remained for trial below. *See Washington State Grange v. Washington Republican Party*, 128 S.Ct. 1184, 1195 n.11 (2008).

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initiative simply by filing a new version of the initiative under a different number." *Id.* at 157.

Here it is undisputed that I-872 sought to amend statutes that had been repealed, *see,* Order at 28 n.21 (with respect to code reviser's note following RCW 29A.24.030), and that the any implementation of I-872 by the State is premised on the conclusion that it impliedly repealed numerous statutes, including statutes that had not even been enacted when the Initiative was filed in January. Of course, there was ample opportunity for proponents of the Initiative to comply with Article II, Section 37: the Montana primary system became law on April 1, 2004; I-872 and its supporting signatures did not have to be submitted for verification until July of that year.

The State is implementing I-872 not by following the text of the Initiative. It is implementing the Initiative by considering numerous validly enacted statutes as impliedly repealed by I-872. Whether this implementation through implied repeal is lawful and appropriate is already before the Court. *See, e.g.*, Transcript of Proceedings at 61 (Dkt. # 101):

> THE COURT: … But from the state's standpoint, what was the legal effect of the voters adopting I-872 as it relates to the Montana primary?
>
> MR. PHARRIS: Our position is that it repeals any inconsistent provisions of the Montana primary.

The State certainly admitted: "the voters didn't have a chance to deal with the Montana Primary," "[a]nd so there was no way for the initiative to include language repealing bills that the legislature had not even enacted." *Id.* at 62, 63.

The Republican Party's amendment does not raise a new and complex issue. It simply asks the Court to apply and interpret Washington case law on the subject. This is no more

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complex or inappropriate than the State and Grange's asking the Court to hold that Washington's entire election system and substantial minor political party rights provisions were repealed by implication as a matter of state law. Justice requires that this Court consider all aspects of relevant state law, not just the aspects that the Defendants feel favor their case.

3. It is Not Premature to Bring an As Applied Challenge.

The State mistakenly implies that the U.S. Supreme Court decided that promulgating rules dictating how an election is to be run does not give rise to an as applied challenge. *See Clingman v. Beaver*, 544 U.S. 581, 586 (2005) ("*Election regulations* that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are narrowly tailored to serve a compelling state interest." (emphasis added)). The Supreme Court, however, in its recent opinion in this case made clear that it was not deciding issues except as to the question upon which it granted certiorari—the facial challenge to the statute.[2] It did not decide procedural issues governing the further conduct of the case or review the regulations that the State now proposes to use to implement I-872. In any event, the State has gone beyond merely adopting rules: it has announced it will not conduct the Montana primary and has formally issued rules implementing the Top Two primary, in addition to training sessions and preparing to accept candidate filings.[3] Indeed, on May 2, 2008, the

[2] Any "factual determination [as to the existence of voter confusion] must await an as-applied challenge. On its face, I-872 does not impose any severe burden on respondents' associational rights." *Washington State Grange*, 128 S.Ct. at 1195.

[3] The State suggests in a footnote that this Court lacks jurisdiction and should not consider this motion until the Court has received a mandate from the Ninth Circuit. State Resp. at 3 n.1. This Court is not totally divested of jurisdiction by a pending appeal. It may issue, modify or vacate injunctions, for example, and may consider issues collateral to the appeal. *See Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97-98 (3rd. Cir 1988). This motion to amend relates strictly to issues that were not before the appellate court and not resolved by it. It should be viewed as a collateral matter to the appeal and within the Court's jurisdiction.

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Secretary of State issued a final rulemaking order implementing I-872 through emergency regulations. This order was effective upon issuance. There is now even less need to wait for an actual election to be conducted where the parties believe their rights surely would be violated: the Secretary of State's final rulemaking order prescribes the format of, and descriptions used for, the ballot as well as additional language relating to candidates for partisan office in new WAC 434-230-015(4)(b).

For these reasons the Republican Party's Motion to amend should be granted.

DATED this 2nd day of May, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2008, 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:

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