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

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE REPLY TO STATE AND GRANGE RESPONSES TO MOTION TO AMEND AND SUPPLEMENT COMPLAINT

Plaintiffs in Intervention, Washington State Democratic Central Committee ("Democratic Party") and Dwight Pelz, Chair, respectfully submit this reply in support of their motion to amend. Neither the State nor the Grange's responses identify any prejudice to

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them that would result from granting the Democratic Party's motion to amend its complaint. Absent such prejudice, this Court should grant the Democratic Party's Motion to Amend.

1. The Supreme Court's Opinion Did Not Foreclose Further Proceedings in this Case

The State's conclusory argument that liberal leave to amend does not apply where a case has been "fully litigated and rejected," State Resp. at 6, is not supported by the facts or record in this case. As the Democratic Party stated in its Motion to Amend, the original complaint in this matter was not limited to a facial challenge and both this Court (in its Order at note 13) and the U.S. Supreme Court (in its opinion at note 11) expressly reserved the political parties' additional claims, since striking down I-872 on its face necessarily obviated the need for immediate consideration of any other claims. The State and Grange response briefs simply ignore this record and argue that the Supreme Court's expressly limited opinion resolves all potential issues in the case. Their position is not well-supported in the law. *See, e.g.*, *Rogers v. Hill*, 289 U.S. 582, 587-588 (1933) (holding that absent dismissal by "unequivocal and direct means," the scope of an appellate court's decision "would not prevent the District Court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues[.]"); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 181 (1920) (same); *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (citing *Rogers*).

2. The Party's "As Applied" Challenge is Not Premature

Both the State and the Grange suggest that because Washington has not held both a primary and a general election under I-872, that the Democratic Party cannot prove any injury as a result of I-872, and therefore an as applied challenge is premature. This is not an accurate recital of the law. Where valid, final regulations exist that the State intends to

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enforce, an actual election need not occur for regulations to form the basis for an as applied challenge. Moreover, any implementation of I-872 creates immediate consequences because of election statutes already on the books. For example, RCW 42.17.510(1) will *require* that the Democratic Party reprint in any advertising trying to disassociate itself from a false flag candidate that same candidate's association with the Democratic Party claimed on his or her declaration of candidacy.[1]

A recent decision from the Fourth Circuit in the election law context is instructive: In *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, the plaintiffs' challenged a revised campaign finance law, facially and as applied, immediately after the regulations received pre-clearance from the Department of Justice ("DOJ") and *before* they were ever implemented. 2008 WL 1903462, at *2 (4th Cir. May 1, 2008). The district court found the regulations both facially invalid and as applied, and the Fourth Circuit affirmed. Subsequently, the U.S. Supreme Court granted *certiorari* and vacated in light of its major campaign finance decision in *McConnell v. FEC*, 540 U.S. 93 (2003). On remand to the district court, the state-defendants argued "that the plaintiffs lacked standing because they had failed to take action after the statutes in question had been enjoined," and thus had no basis for an as applied challenge.[2] *Id.* at *3. This contention was

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[1] RCW 42.17.510(1) provides, in part: "For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising." Communications by the Democratic Party distinguishing itself from a candidate will be regulated by this statute.

[2] The plaintiffs' as applied challenge involved the statute's political contribution limits to candidates. North Carolina Right to Life ("NCRL") contended that they had "the resources and desire to make direct contributions to candidates and to make independent expenditures totaling over $3,000," however, they "did not make any such contributions because it did not want to be deemed a 'political committee' under North Carolina election law regulations and, as a result, become subject to the requirements imposed upon such committees." *North Carolina Right to Life, Inc. v. Leake*, 482 F. Supp. 2d 686, 689 (E.D.N.C. 2007). In rejecting the state's argument that since NCRL didn't challenge the contribution limits, they lacked the relevant standing to bring an as applied

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rejected and the district court "found that, even after *McConnell* . . . North Carolina's contribution limits remained unconstitutional as applied to independent expenditure committees." *Id.* On appeal, the Fourth Circuit affirmed, despite the plaintiffs (1) bringing an as applied challenge to the contribution limits immediately after the law received DOJ pre-clearance and (2) never making any contribution to a candidate or political committee that exceeded the regulation. *Id.* at *17.

Not only has the State issued final emergency regulations implementing a "Top Two" election for the August primary election and beyond, but the regulations contain the precise language the State intends to disclaim party affiliation or endorsement on the ballot and the way in which a candidate's "party preference" is to appear.[3] The proposed amended complaint merely updates the facts "as applied" to reflect the State's changed litigation posture in response to the Democratic Party's lawsuit.

3. Supplemental Jurisdiction Over State Law Claims is Proper

The Grange's suggestion the Democratic Party's proposed inclusion of a claim under Article II, § 37 of the Washington State Constitution is untimely is both spurious and devoid of any legal support. As an initial matter, "[a]n amendment can be proper after remand even if the claim … was not presented to the District Court in a timely fashion." *City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir.1983); *see also Jones v. St. Paul Fire & Marine Ins Co.*, 108 F.2d 123, 125 (5th Cir. 1939) (recognizing that the parties were free "to introduce other evidence and to present by amendment new issues, if not inconsistent with

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claim, the court stated: "*The harm here is in the existence of the statute*, which abrogates Defendant's claim that the harm is merely speculative because Plaintiffs have not acted under the statute." *Id.* at 693 (emphasis added).

[3] *See* proposed WACs 434-230-015(4) ("Ballot Format") and 434-230-045(4) ("Candidate Format") as reproduced in Dem. Party Mot. to Amend, Decl. of David T. McDonald, Exhibit B-3.

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what the appellate court had adjudged" upon reversal of a district court judgment). The Grange's additional assertion of "impropriety" also ignores both the Democratic Party's rationale for inclusion of an Article II, § 37 claim, which is explained at length both in its Motion (Dem. Mot. at 7, 1:14) and in the proposed First Amended Complaint (¶13 and ¶¶43-47). It bears repeating that the Washington Supreme Court issued its opinion in *Washington Citizens Action of Washington v. State*, 162 Wn.2 142, 171 P.3d 486 (2007), *after* the U.S. Supreme Court heard oral argument on the political parties' facial challenge to I-872. Since the essential holding of *Washington Citizens Action* raises colorable questions of state law both as to I-872's validity and the extent to which it may have repealed or amended statutes by implication, the opportunity to raise an Article II, § 37 claim only became available in the last six months, four of these prior to the Supreme Court's opinion.

The Grange's Response mistakenly argues that a federal district court should, in the interest of comity, decline to interpret constitutional claims of state law. The Grange's reliance on the comity argument put forth by the Connecticut district court in *Lopez v. Smiley* is neither the law of this Circuit nor appropriate given the fact-specific nature of that case.[4] In *Kuba v. 1-A Agr. Ass'n*, the Ninth Circuit held that:

> Nonfederal claims are part of the same "case" as federal claims when they derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily be expected to try them in one judicial proceeding. Here, the California constitutional claims challenge exactly the same actions as the federal claims. The district court did not err in exerting its supplemental

[4] *Lopez* involved claims that the district court acknowledged presented "a broad array of novel (and to this Court's reading, questionable) causes of action for money damages based on numerous provisions of the Connecticut Constitution, but without citing a single Connecticut case in the prison litigation context . . . . [and where] the Connecticut Supreme Court has expressly rejected many of the state constitutional tort claims that Mr. Lopez seeks to assert in the action." 375 F. Supp. 2d 19, 24 (D. Conn. 2005). Application of *Lopez* to the Democratic Party's Article 2, § 37 claim, particularly after the Washington Supreme Court's decision in *Washington Citizens Action* is, to put it mildly, a stretch.

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jurisdiction over [plaintiff's] claims under the California Constitution.

387 F.3d 850, 855-56 (9th Cir. 2004) (internal quotation and citation omitted). Similarly, the Democratic Party's state and federal constitutional claims derive exclusively from the application, operation, and effect of I-872. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991) (finding pendent jurisdiction where PGA a rule change banning certain golf clubs gave rise to both the state breach of fiduciary duty claims and federal antitrust claims). Despite the Grange's assertion to the contrary, the law simply requires that the underlying facts upon which the state and federal claims are based "form part of the same case or controversy." 28 U.S.C. § 1367(a). The Democratic Party's challenge to I-872 election scheme is the only controversy at issue in this case.[5]

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

DATED this 12th day of May, 2008.

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[5] Even if this Court were to accept the State's specious argument that "all allegations made in [the Democratic Party's] complaint have already been fully litigated and rejected," the law of this circuit recognizes, that both "[t]he ultimate lack of merit of the federal claim does not mean that supplemental jurisdiction cannot attach," and that "[t]he court may retain jurisdiction even if the federal claims over which it had original jurisdiction are dismissed." *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995).

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 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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