The 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,

v.

STATE OF WASHINGTON, et al.,
Defendant Intervenors,

WASHINGTON STATE GRANGE,
Defendant Intervenors.

No. CV05-0927TSZ

WASHINGTON STATE GRANGE'S OPPOSITION TO DEMOCRATIC PARTY'S MOTION TO AMEND ITS JUNE 2005 COMPLAINT

Noted Without Oral Argument: Monday, May 12, 2008

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I. INTRODUCTION

This Opposition brief is short because the same arguments detailed in the defendants' April 29 briefs opposing the Republican's motion to amend apply to the Democrats' motion as well.

Like the Republican Party, the Democratic Party requests leave to amend its early 2005 Complaint for two principle purposes:

(1) adding allegations for an "as applied" challenge to Washington's Top Two election law, and

(2) adding a new, unrelated challenge based on an unrelated section of the Washington State Constitution.

Like the Republican's motion to amend, the Democrat's motion should be denied.[1]

II. LEGAL DISCUSSION

A. Motions To Amend Are Not "Freely Given" *After* The Original Complaint's Claim Has Been Rejected.

The Civil Rules' otherwise liberal attitude of freely granting leave to amend a Complaint does not extend to a case such as this where the claim in the original Complaint was litigated and rejected. Grange's April 29 Opposition To The Republican Party's Motion To Amend (doc. 118) at 2:19-3:14.

Instead, the Civil Rules' philosophy favoring the finality of judgments and the expeditious termination of litigation steps into that free giving's place. Grange's April 29 Opposition To The Republican Party's Motion To Amend (doc. 118) at 2:19-3:14.

[1] *The Democratic Party also states that its proposed amendment "adds parties to reflect ... interventions that have occurred" in this case. Democratic Party's May 1, 2008 Motion To Amend And Supplement Complaint In Intervention For Declaratory Judgment And For Injunctive Relief Regarding Initiative 872 (doc. 120) at 2:5-6. But like the Republican Party's proposed amendment, the Democratic Party's proposal omits an existing party to this case and its recent Washington State Grange v. Washington State Republican Party U.S. Supreme Court decision – i.e., the Washington State Grange itself.*

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As with the Republicans' motion, the Democrats' motion fails to address this important distinction or establish that allowing the amendment that the political parties now belatedly demand is appropriate under the Civil Rules.

B. The Political Party's "As Applied" Amendment Is Really A Rehash Of Its Previously Alleged (& Rejected) Facial Challenge.

The First Amendment claim that the political parties used to block Washington's Top Two election theses past three years was their argument that the face of Washington's Top Two election law – the election statutes (RCW) and election regulations (WAC) – made Washington's Top Two election unconstitutional.

The United States Supreme Court rejected that challenge.

Now the Democratic Party wants to amend its Complaint to allege the Washington election statutes and regulations as instead being "facts" for an "as applied" challenge.

But dressing up elections statutes and regulations as implementing "facts" does not transform the underlying claim into something other than a facial challenge to those statutes and regulations. No matter what the Democratic Party now wants to call its "amended" challenge in name, that challenge remains in substance a facial challenge to Washington's election statutes and regulations. In other words, it is in substance the exact same pre-election facial attack route that the U.S. Supreme Court rejected. Putting lipstick on a pig doesn't change the fact that it's a pig.

C. An Actual "As Applied" Challenge Must Await A Top Two Election Actually Being Carried Out.

The November 2008 election is six months away. The State of Washington's elections officials have not yet had an opportunity to begin – never mind complete – their educational campaign to remind and educate voters about the Top Two system that the United States Supreme Court has now ruled those voters can (finally) be allowed to participate in. For example, the State-wide Voters' Pamphlet for the upcoming general election will not even be distributed until around mid-October 2008. As the Grange's April 29, 2008 Opposition To The

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Republican's Motion pointed out, an "as-applied" constitutional challenge to strike down a not-yet-been-allowed-to-be-applied statute is nothing short of an oxymoron.[2]

Indeed, the U.S. Supreme Court has made it clear that the Respondent political parties' arguments fail as a matter of constitutional law before a Top Two election can actually be carried out:

> Respondents ask this Court to invalidate a popularly enacted election process that has never been carried out. ... The First Amendment does not require this extraordinary and precipitous nullification of the will of the people. ... The judgment of the Court of Appeals is reversed.

Washington State Grange v. Washington State Republican Party, 128 S.Ct. 1184, 1195-96 (2008).

In short, the U.S. Supreme Court's decision made it clear that if the political parties want to mount an "as applied" challenge to Washington's Top Two election system, then the political parties must wait until such a Top Two election is actually carried out.

If the political parties wish to file an "as applied" suit after the November 2008 Top Two election, that's their choice. But the Civil Rules do not allow the political parties to assert a "placeholder" claim six months before that election is carried out to reserve a spot on this Court's dance card if that November 2008 election ends up producing some sort of evidence to support what the political parties currently speculate might happen at that November 2008 election.

[2] *Washington State Grange's Opposition To Republican Party's Motion To Amend Its May 2005 Complaint (doc. 118) at 3:15-5:3 & n.3 (noting Webster's definition: "oxymoron: a combination of contradictory or incongruous words." Webster's Ninth New Collegiate Dictionary (1991) at 844).*

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D. The Political Party's "New" State Constitutional Law Claim Is Neither New Nor Proper.

The Grange's April 29 Opposition to the Republican Party's motion explained at length why the State Constitutional claim that the political parties wish to now inject into their 2005 suit is not proper under the Supplemental Jurisdiction they invoke.[3]

The political parties' subsequent filings only confirm the untimeliness and impropriety of their demand that a federal court now determine the State Constitutional law issue they want to insert with their proposed amendment.

With respect to the untimeliness of their proposed amendment, the political parties' own briefing acknowledges that there has been "nine decades of jurisprudence under Art. II, Sec. 37 of the state constitution."[4] A party's ability to file suit to challenge whether the enactment of a particular piece of legislation fell within the State legislative branch's legislative authority under Article II, §37 is therefore nothing "new" that the political parties could not reasonably think of back when they filed suit three years ago.

Nor does their assertion of that State Constitutional claim require any "facts" that have arisen since filing three years ago in the Spring of 2005. Moreover, the "facts" upon which that State Constitutional claim is based – the text of the State election laws during 2004 – have nothing to do with the "facts" upon which their new "as applied" federal claims are based. There simply is no common nucleus of operative facts between these two distinctly different types of claims.

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[3] *Washington State Grange's Opposition To Republican Party's Motion To Amend Its May 2005 Complaint (doc. 118) at 5:4-11:18. Those six pages of the Grange's April 29 brief confirm the inaccuracy of the assertion in the Republican Party's May 2 Reply (doc. 123) at 5:22-23 that "Defendants offer no reason why the Court should decline jurisdiction over plaintiffs' Art. II, Sec. 37 claim".*

[4] *Republican Party's May 2 Reply In Support Of Motion To Amend (doc. 123) at 5:14-15.*

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And finally, with respect to the impropriety of a federal court resolving the State constitutional law issue that the political parties now want to belatedly inject, the Democratic Party's motion simply avoids the fact that the State Constitutional provisions that it wants a federal court to harmonize and apply are the organic provisions of the Washington Constitution governing the State sovereign's legislative branch.

Article II of the Washington State Constitution sets forth the legislative authority of the State sovereign's legislative branch. Section 1 of Article II establishes that the State sovereign's legislative authority can be exercised by the State legislature through legislative enactments (representative democracy) or by the State voters through Initiatives and Referenda (direct democracy). And section 37 of Article II contains one of the State Constitution's many interrelated requirements for State legislation passed under that State legislative authority. As the Grange's prior Opposition brief explained, the political parties' proposed new State Constitutional law claim asks this federal court to interpret §37 to provide the State legislature a weapon to defeat the legislative authority guaranteed to the State voters under §1. If such a reading is to be given to the Washington State Constitution, it in all propriety should be given by the Washington courts – not by a federal judge. To quote another federal district court's conclusion regarding the exercise of Supplemental Jurisdiction over State Constitutional claims, "it is difficult to think of a greater intrusion on state sovereignty," and "As a matter of comity, whether the acts in question violate ... [the state] Constitution are best left to the province of ... state court judges."[5]

[5] *Washington State Grange's Opposition To Republican Party's Motion To Amend Its May 2005 Complaint (doc. 118) at 8:1-4 (quoting Lopez v. Smiley, 375 F. Supp.2d 19, 26 (D. Conn. 2005)), accord, Grange's Opposition at 8:5-7 (citing O'Connor v. State of Nevada, 27 F.3d 357, 363 (9th Cir. 1994), where Ninth Circuit declined to exercise jurisdiction over a claim that a state election statute violated the Nevada State Constitution because it "is the very sort of 'novel' issue that usually will justify declining jurisdiction over the claim"). It is also relevant to note that issue of whether §37 should be interpreted to provide the State legislature a weapon to defeat the legislative authority guaranteed to the State voters under §1 was not raised – never mind determined – in the Washington Citizens Action of Washington v. State case that the political parties cite in their motions to amend.*

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III. CONCLUSION

The political parties' pre-election challenge was litigated and rejected. The United States Supreme Court ruled that the justiciable pre-election challenge made by the political parties in this case – their challenge to the face of Washington's Top Two election statutes and regulations – has no merit. The political parties' demand that this Court now allow them to amend to add allegations for an "as applied" challenge is premature because a Top Two election has not yet been carried out. And their demand that this Court allow them to now amend to add a new State Constitutional claim unrelated to their federal claims is not proper under the Supplemental Jurisdiction they invoke.

For the reasons summarized above, and detailed further in the Grange's April 29 Opposition to the Republican's similar motion, the Democratic Party's motion to amend should be denied.

RESPECTFULLY SUBMITTED this 7th day of May, 2008.

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CERTIFICATE OF SERVICE

Thomas F. Ahearne states: I hereby certify that on May 7, 2008, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties listed below:

1. Washington State Grange's Opposition To Democratic Party's Motion To Amend Its June 2005 Complaint; with this Declaration Of Service.

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I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Seattle, Washington this 7th day of May, 2008.

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