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 REPUBLICAN PARTY'S MOTION TO AMEND ITS MAY 2005 COMPLAINT

Noted Without Oral Argument: Friday, May 2, 2008

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1. This (federal) Court's ruling would not resolve the Washington Constitutional law issue that the Republican Party claims it wants to now raise. 5

2. The sound exercise of discretion requires this (federal) Court to decline to exercise the discretionary jurisdiction it would have to invoke to interject itself into the State Constitutional dispute that the Republican Party wants to now raise. 6

(a) This Court should decline to exercise supplemental jurisdiction because all of the Republican Party's federal claims have been dismissed. *6*

(b) This Court should also decline to exercise supplemental jurisdiction because the new claim involves a complex question of first impression harmonizing Article II, §1(a) and Article II, §37 of the Washington State Constitution. *7*

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I. INTRODUCTION

The United States Supreme Court has rejected the one and only claim asserted against Washington's Top Two election law in the Republican Party's original Complaint. As the Supreme Court's concluding paragraph unequivocally declared:

> 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. ... We accordingly hold that I-872 is facially constitutional. The judgment of the Court of Appeals is reversed. *It is so ordered.*

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

For the reasons outlined below, the sponsor of that Top Two election law – the Washington State Grange – opposes the Republican Party's motion for a do-over.

II. PROCEDURAL HISTORY

November 2004: The citizens of this State enact Initiative 872, voting 60% - 40% to adopt that new Top Two election system to replace the "Montana" system they had been forced to use that year.

May 2005: The Washington State Republican Party files this suit to block implementation of that Top Two election law. The only claim against the Top Two law asserted in the Republican Party's Complaint is a facial challenge under the First Amendment of the federal constitution.[1]

July 2005: This Court agrees with the facial challenge asserted in the Republican Party's Complaint, and therefore strikes down the new Top Two election law as unconstitutional and enjoins its implementation.

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[1] *In addition to challenging the Top Two system enacted by I-872, the Republican Party had also sought a ruling that if the Top Two system were unconstitutional, then the "Montana" system would be unconstitutional as well.*

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1 Fall 2005: While this Court's decision is on appeal, its injunction stands to prohibit
2 Washington's citizens from voting in the Top Two election system they had overwhelmingly
3 adopted.

4 Fall 2006: While this Court's decision is on appeal, its injunction stands to prohibit
5 Washington's citizens from voting in the Top Two election system they had overwhelmingly
6 adopted.

7 Fall 2007: While this Court's decision is on appeal, its injunction stands to prohibit
8 Washington's citizens from voting in the Top Two election system they had overwhelmingly
9 adopted.

10 March 18, 2008: The United States Supreme Court reverses this Court's decision on the
11 only claim against the Top Two election law asserted in the Republican Party's Complaint (i.e.,
12 the facial challenge to that law).

13 March 28, 2008: The Republican Party files a Motion To Amend its May 2005
14 Complaint to now replace its rejected facial challenge with two new claims instead – namely
15 (1) an as-applied challenge to the not-yet-applied Top Two election law, and (2) a State
16 Constitutional claim based on an over 100-year-old section of the Washington State
17 Constitution.

18

19 **III. LEGAL DISCUSSION**

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

21 The Republican Party's Motion is based on the piece of Civil Rule 15 that references
22 leave to amend being "freely given".

23 But that free giving does not apply after the claim asserted in the original Complaint has
24 been litigated and rejected.

25 That makes sense. "To hold otherwise would enable the liberal amendment policy of
26 Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of

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1 judgments and the expeditious termination of litigation." 6 *Federal Practice & Procedure* §1489, Charles Alan Wright, Arthur Miller & Mary Kay Kane, (2008 Supp.); accord Fed.R.Civ.P. 1 (the Federal Civil Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"). This skepticism against granting leave to amend after the original Complaint's claim has been rejected makes even more sense in a case like this, where the original Complaint's claim has been heard and rejected by our Nation's highest Court.

Refusing to "freely give" leave to amend after the original Complaint's claim has been heard and rejected is also the law in this Circuit. *Premo v. Martin*, 119 F.3d 764, 772 (9th Cir. 1997) ("post-judgment motions to amend are treated with greater skepticism than pre-judgment motions to amend").

As explained further below, the Civil Rules' philosophy favoring the finality of judgments and the expeditious termination of litigation requires that the Republican Party's motion to now replace its rejected facial claim with two new claims should be denied.

B. The Republican Party's New As-Applied Challenge It Is Premature.

The Republican Party's motion indicates that it wants to now add an as-applied challenge to its May 2005 Complaint.[2]

But until a Top Two election is actually completed in this State, an as-applied challenge simply is not ripe. The Republican Party's demand that it must now be allowed to file an

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[2] *Republican Party's Motion at 2:5-7, stating that its Amended Complaint adds allegations for the Republican Plaintiffs' "as-applied challenge." Presumably those new allegations are the Republican Party's proposed amendment to paragraph 32 of its original May 2005 Complaint. The Republican Party does not claim there was any legitimate reason or justification for its omitting such an as-applied challenge from its May 2005 Complaint because, frankly, there is none. This amendment request is just a naked attempt to inject further litigation costs and delays against implementation of the Top Two election system in our State.*

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1 "as-applied" constitutional challenge to strike down a not-yet-been-allowed-to-be-applied
2 statute is nothing short of an oxymoron.[3]

3 The United States Supreme Court expressly rejected the Republican Party Complaint's
4 challenge to this statute before the November election because "the ballot could conceivably be
5 printed in such a way as to eliminate the possibility of widespread voter confusion".
6 *Washington State Grange*, 128 S.Ct. at 1194. Thus, while it did not categorically rule out the
7 possibility of an as-applied challenge to Washington's Top Two election law after the
8 November 2008 election, the Supreme Court did make it clear that any person filing such a
9 constitutional challenge would have to base their suit on how the Top Two election had in fact
10 been conducted and implemented. See, e.g., *Washington State Grange*, 128 S.Ct. at 1194
11 (whether or not unconstitutional voter confusion resulted from Top Two elections would have to
12 depend on evidence concerning how the State of Washington conducted and implemented the
13 Top Two statute in actual elections).

14 Here, the November 2008 election is over six months away. The State of Washington's
15 chief elections officer (the Washington Secretary of State) has not yet had an opportunity to
16 begin – never mind complete – his office's educational campaign to remind and educate voters
17 about the Top Two system that the United State Supreme Court has now ruled those voters can
18 (finally) be allowed to participate in. For example, the State-wide Voters' Pamphlet for the
19 upcoming general election will not even be distributed until around mid-October.

20 Without a single Top Two election season having ever been conducted at this point, the
21 Republican Party's as-applied challenge to such a future election is simply premature.[4] This
22 Court should accordingly deny the Republican Party's demand to now add it. Accord, e.g.,
23

24 [3] *Indeed, Webster's Dictionary confirms the exact application of that term to the Republican Party's demand: "oxymoron: a combination of contradictory or incongruous words." Webster's Ninth New Collegiate Dictionary*
25 *(1991) at 844.*

26 [4] *As noted by the State, the Republican Party's motion is also premature becausse the Ninth Circuit has not yet remanded this case to this Court.*

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PUD No. 1 v. Bonneville Power Admin., 947 F.2d 386, 397 (9th Cir. 1991) (until defendant had implemented its regulation, any claim that it was unreasonable was only "hypothetical" and "unripe for judicial review").

C. The Republican Party's New Washington State Constitution Claim Is Not The Proper Subject For Federal Court Intervention.

This Court should deny the Republican Party's post-judgment demand to now add a Washington State Constitution claim for at least the following two reasons.

1. This (federal) Court's ruling would not resolve the Washington Constitutional law issue that the Republican Party claims it wants to now raise.

The Republican Party's proposed new cause of action would require this federal Court to construe the Washington State Constitution. The Washington State Supreme Court, however, would not be bound by this Court's interpretation of the Washington State Constitution. *Nobel v. Dibble*, 119 Wash. 509, 511, 205 P. 1049 (1922) (upholding constitutionality of statute, despite federal court ruling in a suit between the same parties that statute was unconstitutional, because "the highest court of a state is not bound by the decisions of any federal court except the Supreme Court of the United States"); see also *Beezer v. City of Seattle*, 62 Wn.2d 569, 573, 383 P.2d 895 (1963), *rev'd on other grounds*, 376 U.S. 224 (1964) (holding federal court decisions, other than decisions from the U.S. Supreme Court, are not binding on the Washington State Supreme Court).[5]

In short, this Court's considering and ruling on the meaning and application of the Washington State Constitution might be an interesting academic exercise. But it would not resolve the Washington Constitutional law issue that the Republican Party claims it wants to now raise by way of a post-judgment amendment to its May 2005 Complaint.

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[5] *See also Lopez v. Smiley, 375 F. Supp.2d 19, 25 (D. Conn. 2005) ("For this court to decide such a novel and significant, but as yet unresolved, issue of state law would amount to no more than a mere prediction of subsequent state law developments – a tentative answer which may be displaced tomorrow by a state adjudication") (internal quotation marks omitted).*

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2. The sound exercise of discretion requires this (federal) Court to decline to exercise the discretionary jurisdiction it would have to invoke to interject itself into the State Constitutional dispute that the Republican Party wants to now raise.

28 U.S.C. §1367 allows supplemental jurisdiction to resolve State law claims if the federal and State law claims "are so related . . . that they form part of the same case or controversy."

The State Constitutional law claim that the Republican Party now demands leave to inject into this case, however, is not in any substantial way related to any federal law claim in this case. To the contrary, that State Constitutional claim relates solely to the Republican Party's new thought that maybe the underlying Initiative Measure approved by Washington State voters pursuant to Article II, §1(a) of the Washington State Constitution might have violated Article II, §37 of the Washington State Constitution. The nexus threshold for supplemental jurisdiction to even be allowed here therefore does not exist.

Moreover, even when supplemental jurisdiction does exist, this Court retains the discretion to decline jurisdiction based on any of the five factors listed in 28 U.S.C. §1367(c). This Court's exercise of that discretion should be based on "whether declining jurisdiction comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity." *O'Connor v. State of Nevada*, 27 F.3d 357, 363 (9th Cir. 1994) (original marks and quotations omitted). And here, at least three of the factors listed in §1367(c) confirm that this Court should decline to exercise supplemental jurisdiction over the State Constitutional claim that the Republican Party wants to now inject.[6]

(a) This Court should decline to exercise supplemental jurisdiction because all of the Republican Party's federal claims have been dismissed.

The Ninth Circuit holds that "in the usual case in which federal-law claims are eliminated before trial, the balance of the factors of economy, convenience, fairness, and comity

[6] *Those three factors are (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, and (3) the district court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. §1367(c).*

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will point toward declining to exercise jurisdiction over the remaining state-law claims." *O'Connor*, 27 F.3d at 363 (original marks and quotations omitted) (applying the factor under 28 U.S.C. §1367(c)(3) for declining supplemental jurisdiction when the district court has dismissed all claims over which it has original jurisdiction).

Here, the federal claim against the Top Two election law in the Republican Party's original Complaint (its facial First Amendment challenge) was rejected by the U.S. Supreme Court. Accordingly, if this Court were to allow the Republican Party to amend, all that would exist for the Republican Party to litigate before the Top Two election in November would be the newly injected Washington State Constitutional claim. This means that the Washington State Constitutional claim would "substantially predominate" the lawsuit. See 28 U.S.C. §1367(c)(2) (factor for declining supplemental jurisdiction when the State law claim would substantially predominate the federal claim over which the district court has original jurisdiction).

In short, judicial economy, convenience, fairness, and comity all weigh in favor of declining to supplemental jurisdiction at this post-Supreme Court ruling stage of this case.

(b) This Court should also decline to exercise supplemental jurisdiction because the new claim involves a complex question of first impression harmonizing Article II, §1(a) and Article II, §37 of the Washington State Constitution.

This Court should also decline to exercise supplemental jurisdiction because the Republican Party's new Washington State Constitution claim "raises a novel or complex issue of State law". 28 U.S.C. §1367(c)(1).

Federal courts routinely follow 28 U.S.C. §1367(c)(1) to decline jurisdiction when a proposed State law claim raises "difficult questions of . . . [State] constitutional law",[7] raises "an issue of first impression",[8] or requires the court to address "ambiguity and novelty of state law

[7] *O'Connor*, 27 F.3d at 363.

[8] *Arpin v. Santa Clara Valley Trasport. Agency*, 261 F.3d 912, 927 (9th Cir. 2001).

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questions".[9] Federal case law also holds that such "[j]urisdiction is . . . often declined to avoid construction of a state constitutional provision."[10] This federal case law holds that "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."[11]

Thus, in *O'Connor*, the 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."[12]

Similarly in *Carpenter v. City of Snohomish*, Judge Coughenour of this Court declined jurisdiction over a state law claim because it "raise[d] complex state constitutional . . . issues more appropriately determined by the state courts."[13]

Similarly in *Lopez*, the court denied plaintiff's motion to amend his complaint to add state constitutional claims because the proposed new claims involved complex and novel questions of state constitutional law.[14] The court explained that if it were to exercise supplemental jurisdiction, "it is difficult to think of a greater intrusion on state sovereignty"[15] The court thus ruled: "As a matter of comity, whether the acts in question violate . . . [the state] Constitution are best left to the province of . . . state court judges."[16]

Here, this Court should similarly decline to exercise supplemental jurisdiction because the Republican Party's State Constitutional claim would require this Court to answer a complex

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[9] *Pacific Bell Tele. Co. v. City of Walnut Creek, 428 F. Supp.2d 1037, 1049 (N.D. Cal. 2006) (citation and quotation marks omitted) (declining to exercised jurisdiction over claim to resolve conflict between two state statutes).*

[10] *Lopez v. Smiley, 375 F.Supp.2d 19, 25 (D. Conn. 2005) (quotation marks omitted).*

[11] *Lopez, 375 F. Supp. at (original marks and quotations omitted).*

[12] *O'Connor, 27 F.3d at 363.*

[13] *Carpenter v. City of Snohomish, 2007 WL 1742161 at *8 (W.D. Wash. 2007).*

[14] *Lopez, 375 F. Supp. at 25.*

[15] *Lopez, 375 F. Supp. at 26 (citation omitted).*

[16] *Lopez, 375 F. Supp. at 26 (citation omitted).*

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question of first impression: whether Article II, §37 of the Washington State Constitution[17] grants the Washington State legislature to power to defeat the Constitutional right of Washington State citizens to enact initiatives under Article II, §1(a) of the Washington State Constitution[18] by amending a statute that is subject to a pending Initiative Measure during the window period between when the Washington citizens submit that Initiative Measure for filing at the beginning of the year and when the November vote on that Initiative Measure is then held. Only the Washington State Supreme Court should answer that question resolving the interplay between various provisions of the Washington State Constitution.

A review of the history of I-872 helps explain the Republican Party's new §37 argument more fully. The Grange filed Initiative 872 with the Secretary of State in January 2004. That Initiative Measure established a Top Two election system. The text of that Initiative printed portions of Washington's election law (Title 29A RCW).

In November 2004, the people of Washington State overwhelming approved that Initiative Measure, voting to replace the election system they were voting in that year with the Top Two election system of I-872.

On April 1, 2004 (*after* I-872 had been approved by the Secretary of State but *before* the November 2004 vote on that Initiative), Washington's Governor signed portions of Engrossed House Bill 6453 into law after vetoing other portions of that bill. As eventually signed, the non-vetoed portions of that bill amended some sections in Title 29A RCW.[19]

The Republican Party is arguing that because the January 2004 text of Initiative 872 did not print the statutes as later amended by Engrossed House Bill 6453 in April 2004, the

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[17] Article II, §37 requires that "the act revised or the section amended shall be set forth at full length" in the amendatory bill. This requirement applies to initiatives. Washington Citizen's Action v. State, 162 Wn.2d 142, 151, 171 P.3d 486 (2007).

[18] Article II, §1(a) reserves the right of initiative and referendum to the people.

[19] The history of Engrossed House Bill 6453 is detailed in Washington State Grange v. Locke, 153 Wn.2d 475, 105 P.3d 9 (2005).

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Washington voters' overwhelming enactment of that Initiative Measure is void under Article II, §37 of the Washington State Constitution. It is not possible, of course, for a January Initiative to print statutory language later changed by the Legislature in April. Therefore, if the Republican Party's interpretation of the Washington State Constitution is correct, Article II, §37 of the State Constitution allows the State Legislature to defeat the People's constitutional right to enact Initiatives under Article II, §1(c) of the State Constitution by simply amending a piece of the law that is subject to a pending Initiative Measure.[20]

The Washington State Supreme Court has held, however, that "deliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate will not be looked upon favorably by this court." *Citizens for Financially Responsible Government v. City of Spokane*, 99 Wn.2d 339, 351, 662 P.3d 845 (1983). The city council in that case had amended a taxing ordinance *after* a citizen filed a referendum to repeal the tax. 99 Wn.2d at 350. Similar to the Republican Party in this case, the city in that case asserted that "once an ordinance is amended, the issue of a referendum pertaining to the original ordinance is moot." 99 Wn.2d at 350. The Washington Supreme Court rejected that argument and affirmed the petitioner's right to file the referendum. 99 Wn.2d at 350-51.

Just as the Washington State Supreme Court protected the right to initiative and referendum from legislative intrusion in the *Citizens for Financially Responsible Government v. City of Spokane* case, the Washington State Supreme Court would also most likely protect that right from legislative intrusion in this case.

The Republican Party nonetheless claims that the Washington Supreme Court would interpret its ruling in the *Washington Citizens* case to mandate a finding that I-872 is

[20] *That the Washington State Republican Party would make this claim premised on the government's power to defeat the People's constitutional right to enact legislation by initiative is ironic since the Washington State Republican Party Platform states the "Proper Role of Government is to protect our inalienable rights, including: ... The initiative process provided for by the Washington State Constitution." 2004 Washington State Republican Party Platform, Ex. A to the July 1, 2005 Grange Document Dec. already on file with this Court.*

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1 unconstitutional under Article II, §37. But that significant extension of State Constitutional law
2 is highly unlikely. Especially since the State Supreme Court itself expressly noted that its
3 holding in that case only applied in the "rare circumstance[]" of the Washington Supreme Court
4 decision that had intervened to change the statute at issue in that case – i.e., a circumstance
5 presenting "an amendatory initiative or bill impacted by an intervening determination that the
6 law to be amended is unconstitutional." *Washington Citizens*, 162 Wn.2d at 162. The
7 Republican Party's claim that the Washington Supreme Court would now extent that ruling to
8 apply to just about any circumstance to allow the State Legislature to defeat a pending Initiative
9 Measure by simply amending a statute printed in that Initiative before the November vote would
10 require the State Supreme Court to effectively overrule its previously-noted holding in the
11 *Citizens for Financially Responsible Government v. City of Spokane* case against "deliberate
12 efforts by a legislative body to circumvent the initiative or referendum rights of an electorate".
13 In short, the new State Constitutional law claim that the Republican Party wants to assert
14 has no merit. But even if it did, the Republican Party cannot seriously dispute that the
15 appropriate Court to resolve that Washington State Constitutional law claim is the Washington
16 State courts – not this federal court. This Court should therefore decline to entertain
17 supplemental jurisdiction over the Republican Party's State Constitutional claim, and
18 accordingly deny the Republican Party's motion to amend.
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IV. CONCLUSION

The fundamental purpose of the Civil Rules is "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. The United States Supreme Court has determined that the one and only claim asserted in the Republican Party's May 2005 Complaint against Washington's Top Two election system has no merit. This Court should deny the Republican Party's motion to now replace that rejected claim with a premature as-applied claim and a purely State-law State Constitutional claim.

RESPECTFULLY SUBMITTED this 29th day of April, 2008.

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CERTIFICATE OF SERVICE

Thomas F. Ahearne states:

I hereby certify that on April 29, 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 Republican Party's Motion To Amend Its May 2005 Complaint;

2. Proposed Order Denying Republican Party Leave To Amend; and this

3. 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 29th day of April, 2008.

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