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, et al.,

Plaintiff Intervenors,

vs.

DEAN LOGAN, et al.,

Defendants,

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-TSZ

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO PROPOSED PERMANENT INJUNCTION

Plaintiff Washington State Republican Party respectfully submits this consolidated reply in support of the political parties' proposed order granting a permanent injunction.

The State objects that "[n]either the briefing nor the oral argument in this case has

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considered the validity of a filing statute in a primary . . . where the nominees of each party are chosen by affiliates of that party, with no opportunity to 'cross over' or participate in the nomination process of any other party." State Objection at 4. The Grange objects that the proposed permanent injunction contradicts this Court's July 15 Order. Both the State and the Grange suggest that the Court simply order that its preliminary injunction be made final. Neither the objections nor the suggestion are well-taken.

In suggesting a permanent injunction order that incorporates by reference the July 15 Order, the State and the Grange overlook the requirements of Fed. R. Civ. P. 65(d):

> Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, *and not by reference to the complaint or other document*, the act or acts sought to be restrained. . . .

(Emphasis added) The Court undoubtedly had these requirements in mind when it asked the political parties to prepare a proposed permanent injunction "consistent with this Order." Order at 39, *ll.* 19-20. Had the Court intended its preliminary injunction to be a permanent injunction, it presumably would have done so. The political parties have complied with the Order by setting forth a proposed permanent injunction with findings of fact and conclusions of law, derived from the findings and conclusions in the Court's preliminary injunction.

The assertion by the State and Grange that the political parties' right to determine the qualifications of their candidates was neither at issue nor addressed in this lawsuit is puzzling. The constitutionality of the filing statutes under Initiative 872 and under Washington's prior, Montana-style, primary has been at issue from the beginning of this lawsuit and was fully briefed for the July 13 hearing. In the Party's complaint, the issue was explicitly raised as part of the second cause of action:

> RCW 29A.24.030, RCW 29A.24.031 and RCW 29A.36.010 are unconstitutional under the First Amendment to the extent that they permit the State to compel the Party during a primary to publicly affiliate with candidates other than those who are qualified under Party rules to represent themselves as candidates of the Party.

Republican Complaint, Doc. 1, ¶ 37. As part of the fourth cause of action, the Party asserted that it was entitled to an injunction restraining the County Auditors from "placing on a primary ballot the name of any candidate carrying the Party's name who is not qualified under the rules

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of the Party to stand for office as a candidate of the Party." *Id.*, ¶ 45(d); *see also id.* at 12, *ll.* 5-7, 23-24.[1] In their answers, both the State and Grange denied these allegations.

The issue was briefed in the Party's motion for preliminary injunction. *See* Mot. for Prelim. Inj. at 3, *ll.* 6-8; at 9, *l.* 19 through 10, *l.*12. The issue was again briefed in greater detail in the Party's motion for summary judgment. *See* Republican Mot. for Summary Judgment at 22-24. The Party asserted:

> The filing statutes under both I-872 and prior state law also constitute an unconstitutional effort by the State to force the Party to be affiliated with candidates who may not be qualified under Party rules to run as "Republican" candidates. *See* RCW 29A.24.030 and .031. Both statutes force the Party to be publicly associated with any candidate who seeks to appropriate the Republican Party's name, regardless of whether they share or oppose Republican positions.

Id. at 22. This Court summarized the political parties' position on this issue in its Order. *See* Order at 11, *ll.* 1-20.

The State and the Grange cannot claim to be surprised that this issue would be addressed in a permanent injunction.[2] The Grange directly acknowledged the issue in its brief opposing the motions for summary judgment[3]:

> [T]he Republican Party demands that this federal Court invalidate the top-two election system established by Initiative 872, and then effectively re-enact the prior "Montana" system after severing out and invalidating the parts of that system that the Republican Party claims are equally unconstitutional.
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> ***
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> Here, plaintiffs demand a declaration not only that Initiative 872 is unconstitutional, but also that parts of the former "Montana" statute were also invalid.

Grange Resp. at 38, *ll.* 16-20; at 40, *ll.* 5-6. In its brief opposing summary judgment to the

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[1] Similar challenges appear in both the Democratic and Libertarian parties' complaints. *See* Democratic Party Complaint, ¶ 40(d); Libertarian Party Complaint, ¶ 40(b).

[2] Each political party also submitted evidence of its rules for candidate eligibility. *See* White Decl. in Support of Mot. for Prelim. Inj., ¶ 8; Berendt Decl. in Support of Democratic Party Mot. for Summ. J., ¶¶ 6-7, 10; Shepard Decl. in Support of Libertarian Party Mot. for Summ. J., ¶ 6.

[3] The Grange actually addressed the issue in the portion of its brief opposing the Party's motion for a preliminary injunction. In response to the stipulated issue regarding the filing statute, the Grange simply argued that the political parties' position constituted "a gag on free speech in the political arena." Grange Resp. at 33, *ll.* 1-8.

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political parties, the State quoted and cited a portion of the Party's brief discussing both RCW 29A.24.030 and .031. State Resp. at 26, *ll.* 14-17. The State and Grange cannot now credibly assert that the constitutionality of *both* statutes were not raised and briefed. It is too late for either party to complain that *its* briefing on the issue was inadequate.[4]

In addition, the proposed order does not contradict this Court's July 15 Order. Proposed Conclusion of Law No. 4 provides:

> The political parties cannot be forced to associate on a ballot with unwanted candidates. Allowing any candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates. There is no material difference between the filing statute under I-872, RCW 29A.24.030, and the prior filing statute, RCW 29A.24.031.

Each sentence is expressly stated in this Court's Order. According to the Order, "[t]he difference between Washington's two filing statutes is not significant to the Court's analysis." Order at 28 n.21, *ll.* 22-23. The Court recognized that "[p]arties cannot be forced to associate on a ballot with unwanted party adherents," *id.* at 29, *ll.* 24-25:

> The Grange's characterization of ballot labels of "party preference" as a permissible exercise of free speech must also fail. An individual has no right to associate with a political party that is an "unwilling partner." See Duke v. Cleland, 954 F.2d 1526, 1530 (11th Cir. 1992), cert. denied, 502 U.S. 1086 (1992). This is not an infringement on the candidate's rights because the political party has a right "to identify the people who constitute the association and to limit the association to those people only." Id. at 1531 (internal quotations omitted). Free speech rights of a candidate "do not trump the [political party's] right to identify its membership based on political beliefs . . . ." Duke v. Massey, 87 F.3d 1226, 1232-33 (11th Cir. 1996). A candidate's free speech right to express a "preference" for a political party does not extend to disrupting the party's First Amendment associational rights.

Id. at 23, *l.* 24 through 24, *l.* 7. Finally, the Court stated that it "is persuaded by Plaintiffs' arguments that allowing any candidate, including those who may oppose party principles and

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[4] For the first time, the State expresses concerns that the Party's right to determine the extent of its association would constitute a "constitutional veto" over all candidates seeking nomination with the Party and would "constitute an unjustifiable interference with the State's authority to adopt a fair, stable, and consistent election system." State Resp. at 2, *ll.* 19-20; at 4, *ll.* 19-20. The State and Grange have been in possession of substantially identical political party rules since 2001 as part of the *Reed* litigation. However, neither the State nor the Grange challenge the reasonableness of party rules governing the qualifications of candidates, and neither present evidence that a political party's exercise of its First Amendment rights will unjustifiably interfere with the State's authority. Instead, the State relies on speculative assertions and arguments that could have, and should have, been brought before the Court at the proper time. Should a political party adopt rules at a later date that are unreasonable, that is a different case for another day.

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goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates." *Id.* at 30, *ll.* 14-17.

In its attempt to re-characterize the Court's Order to its liking, *see* State Objection at 3, *ll.* 20-23, the State ignores this Court's express holding that

> Initiative 872 imposes a severe burden on the Plaintiffs' First Amendment right to associate on two separate grounds: (1) [it] forces political parties to have their nominees chosen by voters who have refused to affiliate with the party and may have affiliated with a rival; and (2) [it] forces the parties to associate with any candidate who expresses a party "preference."

Order at 30, *ll.* 18-22 (emphasis added).

Proposed Conclusions of Law Nos. 4 and 8, and paragraphs 2, 3, and 4 of the Proposed Order properly set forth either the express ruling of the Court or the direct implications of the Court's ruling on issues that have been raised from the beginning of the lawsuit. If the Court determines not to resolve those issues in this permanent injunction, further proceedings will be necessary.

The State points out that the Secretary of State has already rescinded the emergency rules adopted on May 18, 2005, and asserts that paragraph 5 of the Proposed Order is therefore unnecessary. To this the Party merely responds that the State is a "repeat offender" in its determination to violate the political parties' associational rights, and the Secretary's voluntary rescission of the May 18 rules does not prevent the Secretary from re-promulgating them.

Finally, the State objects that paragraph 7 of the Proposed Order unnecessarily benefits minor parties and would impair the State's ability to prepare and issue the voter's pamphlet. However, the date provided in paragraph 7 should not affect preparation of the voter's pamphlet, as the county canvassing boards do not certify the results of the primary election until September 30, 2005. *See* White Decl. in Support of Prelim. Inj. (Document 8), Ex. 9. The problem with the date provided in the Secretary's new emergency regulation on minor party filing requirements, WAC 434-215-125 (State Resp., Attach. B), is that minor party candidates are required to declare candidacy and pay a filing fee before the candidates know that the State has validated the minor party's nominating convention, as required by RCW 29A.20.191. The

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political parties suggest that the minor party filing date in paragraph 7 of the Proposed Order be changed to September 16, 2005, which would accommodate both the State's and the minor parties' concerns.

DATED this 29th day of July, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 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:

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