

Hon. Thomas S. Zilly

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN
PARTY, et al.,

Plaintiffs,

NO. CV05-0927-TSZ

WASHINGTON DEMOCRATIC CENTRAL
COMMITTEE, et al.,

Plaintiff Intervenors,

MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT

LIBERTARIAN PARTY OF
WASHINGTON STATE, et al.,

Plaintiff Intervenors,

NOTED ON MOTION CALENDAR:
MAY 2, 2008

vs.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

I. INTRODUCTION

During the time this Court stayed its proceedings pending the State's appeal, the Washington Supreme Court issued a seminal decision regarding Article II, Section 37 of the Washington State Constitution which requires that legislative enactments reflect accurately all statutory changes. *Washington Citizens Action of Washington v. State*, 162 Wn. 2d 142, 171

1 P3d 486 (2007). The Washington Supreme Court invalidated Initiative 747 on the grounds that
2 the initiative did not accurately reproduce the law it was amending and because voters could
3 have been misled by the initiative.

4 Plaintiffs seek leave to amend their complaint, primarily to add a claim that Initiative
5 872 violates Article II, Section 37 of the Washington State Constitution. Plaintiffs' amended
6 complaint also reflects the dismissal of the county auditor defendants and allegations regarding
7 Plaintiffs' as-applied challenge.

8 The Ninth Circuit standard for amendment of a complaint is one of "extreme
9 liberality." The defendants will not be prejudiced in their preparation of their case by this
10 amendment. The Court has already received briefing and heard argument on I-872's implied
11 repeal of other parts of Washington's primary election system.

12 II. FACTS

13 This action was filed on May 19, 2005, and the Court entered its permanent injunction
14 against Initiative 872 on July 29, 2005. The Court reserved ruling on the plaintiffs' "as-
15 applied" challenge to the initiative, on First Amendment grounds, as well as equal protection
16 and ballot access claims.

17 No discovery has occurred.

18 On November 8, 2007, the Washington Supreme Court issued its decision in
19 *Washington Citizens Action of Washington v. State*, 162 Wn. 2d 142, 171 P3d 486. The Court
20 held that Initiative 747 violated Article II, Section 37 of the state constitution because at the
21 time of the *vote* on the initiative, the text of the initiative did not accurately set forth the law
22 it sought to amend.

23 On March 18, 2008, the United States Supreme Court reversed the decision of the
24 Ninth Circuit (which had affirmed this Court's Order) holding that Initiative 872 violated the
25 First Amendment on its face.

III. ISSUE

Whether, after the U.S. Supreme Court's decision on the facial challenge and the State Supreme Court's decision that an initiative's compliance with Article II, Section 37 of the state constitution is determined at the time of voting, the plaintiffs may amend their complaint for the first time to add allegations regarding the operation of I-872 and state constitutional violation as an additional basis for the invalidity of I-872, before any discovery or substantial trial preparation has commenced?

IV. ARGUMENT

Leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "This policy is 'to be applied **with extreme liberality**.'" *Eminence Capital LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (emphasis added) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990))). Leave to amend should be granted absent bad faith, undue prejudice, protracted delay of the trial date, or futility of the proposed amendments. *Lazuran v. Kemp*, 142 F.R.D. 466, 468 (W.D. Wash. 1991) (citing *Loehr v. Ventura County Community College District*, 743 F.2d 1310, 1319 (9th Cir. 1984)). These factors are not of equal weight, and "only where prejudice is shown or the movant acts in bad faith are courts protecting the judicial system or other litigants when they deny leave to amend a pleading." *United States v. Webb*, 655 F.2d 977, 978 (9th Cir. 1981) (citing *Howey v. United States*, 481 F.2d 1187, 1991 (9th Cir. 1973)). None of these narrow exceptions apply. The proposed amendment should be granted.

First, Plaintiffs' amendment is presented in good faith. Plaintiffs have not previously amended the complaint. *Cf. Eminence*, 316 F.3d at 1051-52 (number of previous amendments is factor under Rule 15 standard). The bases for the amendment are an intervening decision of Washington's Supreme Court, and the U.S. Supreme Court's decision on the facial challenge to I-872. The Court has already received briefing and argument on I-872's impact on existing statutes that were not addressed in the text of the initiative.

1 Second, the proposed amendments will not delay this case or result in prejudice.
2 Amendment will not impact a trial date, because none has yet been set. The Court's August
3 12, 2005, order staying proceedings preceded the joint status report that had been set for
4 August 15, 2005.

5 The amendment is not futile. To the contrary, the recent decision by Washington's
6 Supreme Court invalidating another initiative whose text did not accurately reflect the statutes
7 amended demonstrates the claim's validity. Facts related to the claim appear in the original
8 complaint's Equal Protection claim and in the complaint of Intervener Libertarian Party. (§16,
9 p.7). The U.S. Supreme Court decision expressly recognized that I-872 may be
10 unconstitutional when applied.

11 When considering an amendment to pleadings, "a court must be guided by the
12 underlying purpose of Rule 15 - to facilitate decision on the merits rather than on the pleadings
13 or technicalities." *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987) (quoting *Webb*, 655
14 F.2d at 979). These purposes, combined with the absence of any undue delay, prejudice or bad
15 faith, support amendment here. Plaintiffs respectfully request that the Court grant their Motion
16 to Amend and allow filing of the Amended Complaint, attached as **Exhibit A**. A mark-up
17 version of the Amended Complaint, showing changes, is attached as **Exhibit B**.

18 DATED this 28th day of March, 2008.

19
20 /s/ John J. White, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 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:

- James Kendrick Pharris**
- Richard Dale Shepard**
- Thomas Ahearne**
- David T. McDonald**

/s/ John J. White, Jr.
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