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, et al.,

Defendant Intervenors.

NO. CV05-0927-TSZ

STATE'S OPPOSITION TO DEMOCRATIC PARTY'S MOTION FOR LEAVE TO AMEND AND SUPPLEMENT COMPLAINT IN INTERVENTION



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## I. INTRODUCTION

The Washington State Democratic Central Committee (Democrats), an intervenor plaintiff in the case, seeks to amend and supplement the complaint in intervention filed in this case shortly after it was commenced in 2005. Although the Democrats' motion is couched in slightly different terms from a motion previously filed by the Republicans, it is based on the same misreading of the Supreme Court opinion in this case, and should be denied for similar reasons.

The United States Supreme Court has rejected all of the claims originally pleaded by the Democrats. *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, ___ L. Ed. 2d ___, 128 S. Ct. 1184 (2008). The Supreme Court has ruled that this case is a facial challenge to the Top-Two primary system enacted by Initiative Measure No. 872, and on that basis has rejected all the political parties' claims with respect to the Top-Two primary. There are no lingering "as applied" issues for this Court because the Top-Two primary has not been applied.

Like the Republicans, the Democrats seek to inject into this litigation a new claim based entirely on state law, unrelated to the federal issues litigated previously. If it can be raised at all, it is appropriately resolved by the state courts, rather than in this litigation.

## II. ISSUE

Should this Court permit the Democrats to amend their complaint, on remand after the United States Supreme Court has rejected their federal constitutional claims, in order to add a novel state law claim that in no sense relates to the issues previously raised in this case,



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and to amend a previously-rejected cause of action to assert a new and premature "as applied" claim?

## III. STATEMENT OF FACTS

The Republicans, quickly joined by the Democratic and Libertarian Parties, challenged Initiative 872 ("I-872") in May of 2005, seeking an injunction from this Court against the implementation of the Top-Two primary. Although this Court granted such an injunction, the United States Supreme Court has now reversed, and reinstated the system selected by the voters for conducting primary elections. *Grange*, 128 S. Ct. at 1196 (noting the "precipitous nullification of the will of the people" resulting from the injunction against I-872, and holding "that I-872 is facially constitutional").

The Democrats now ask this Court for leave to amend their complaint and add additional language.

- First, they seek leave to update their complaint to reflect changes in the identities of some of the parties. Democrats' Mot. for Leave to Amend, Attach. 2 ¶¶ 9-10 (proposed amended complaint).[1]
- Second, the Democrats offer a redrafting of several paragraphs of their complaint describing Washington's primary. Democrats' Mot., Attach. 2 ¶¶ 11-18. The evident purpose of this proposed language is to support an argument that Initiative 872 did not effectively amend certain portions of the previous "Montana-style" primary, thus allegedly creating difficulties in implementing I-872 in a constitutional manner.

[1] In and of itself, this would be unobjectionable (except that they omit the Grange), but it is not necessary because all of the claims the Democrats originally asserted have been resolved against them.



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- Third, the Democrats seek to amend their complaint by asserting a premature "as-applied" challenge to I-872, which still has not yet been applied. Democrats' Mot., Attach. 2 ¶¶ 28-29.
- Fourth, the Democrats seek to add a Fourth Case of Action asserting that Initiative 872 was not properly enacted because of an alleged violation of a provision of the Washington state constitution concerning how proposed bills should be drafted. Democrats' Mot., Attach. 2 ¶¶ 43-47. In this regard, the Democrats' motion is parallel to that of the Republicans, and should be rejected for the same reasons.
- Fifth, the Democrats propose to add language asserting that State officials will "selectively enforce" state laws in such a manner as to "blur" the candidates and nominees of the Democratic Party. Democrats' Mot., Attach. 2 ¶ 49.[2]

## IV. ARGUMENT

### A. This Court Should Await Return of Jurisdiction To Rule Upon This Motion

The filing of a notice of appeal divests the District Court of jurisdiction over the case. *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997) (citing *Marrese v. Am. Academy of Ortho. Surgeons*, 470 U.S. 373, 379, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985)). The Rules of the Supreme Court provide for the return of jurisdiction by sending to the clerk of the lower court a copy of the opinion and a certified copy of the judgment. Sup. Ct. R. 45(3). To the knowledge of the undersigned counsel, the Supreme Court has issued its judgment

[2] The Democrats also seek to amend their prayer for relief, by adding language referring to the state constitutional issue and by slightly modifying some pre-existing language. Democrats' Mot., Attach. 2, Prayer for Relief ¶¶ 8-9. The Democrats still seek a permanent injunction against implementation of Initiative 872 and certain other statutes.



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and sent it to the Ninth Circuit, but jurisdiction has not yet been tendered back to this Court. Since jurisdiction has not yet been returned to this Court, consideration of this motion would be premature until that occurs.

**B. The Supreme Court Has Rejected The Democrats' Claims, Leaving No Pending Claims To Form The Basis For Amendment**

This case was commenced by the state's three largest political parties in 2005, shortly after the enactment of Initiative 872 and before it had ever been applied, as a facial challenge to the new state statute. *Grange*, 128 S. Ct. at 1190 ("Respondents object to I-872 not in the context of an actual election, but in a facial challenge."). The Democrats now seek to convert the case to an as-applied challenge, even though the initiative still has not been applied. Democrats' Mot. to Amend at 7-8. As the Supreme Court pointed out, the State "has had no opportunity to implement I-872, and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions. *Grange*, 128 S. Ct. 1184 at 1190-91 (citation omitted). Nothing has changed the force of this statement.

A review of the Democrats' original complaint demonstrates that either this Court or the United States Supreme Court has already rejected all of the claims advanced within it. The complaint begins with an introductory section and with allegations concerning jurisdiction, venue, the identity of the parties, and the history of Washington's partisan primary. Democrats' Compl. in Intervention ¶¶ 1-20.

The complaint in intervention then asserts the following legal claims:

- The Democrats alleged that I-872 denied them the equal protection of the laws by permitting minor parties, but not major parties, to nominate candidates through a



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convention process. Compl. in Intervention ¶¶ 21, 22. The Democrats restated this allegation in their third cause of action. Compl. in Intervention ¶¶ 40-42. This Court rejected that allegation, concluding that I-872 impliedly repealed the minor party convention statutes as inconsistent with the fundamental character of the Top-Two primary as one that did not involve party nominations. *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907, 927-29 (W.D. Wash. 2005). This ruling was not appealed.

- The Democrats alleged that there is no constitutionally significant difference between the Top-Two primary and the former blanket primary, previously held unconstitutional by the courts. Compl. in Intervention ¶¶ 23-25. This argument was rejected by the Supreme Court. *Grange*, 128 S. Ct. at 1192-93.
- The Democrats alleged that the Top-Two primary would be used to select the nominees of political parties and that this would impair their constitutional rights. Compl. in Intervention ¶¶ 26-29. The Democrats restated and expanded this allegation in their first cause of action. Compl. in Intervention ¶¶ 30-35. To the contrary, the Supreme Court held that the Top-Two primary would not be used to select party nominees, and that political party nominations would be "simply irrelevant" to the primary established by I-872. *Grange*, 128 S. Ct. at 1192.
- The Democrats alleged as their second cause of action that, by permitting candidates to state their personal preference for a political party, I-872 would force the political parties into an unconstitutional association with those candidates. Compl. in Intervention ¶¶ 36-39. The Supreme Court disagreed, concluding, "There is simply



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no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Grange*, 128 S. Ct. at 1193.

- The Democrats asserted in their fourth cause of action that it would violate their constitutional rights not to the permit the Democratic Party to "define participation" in party affairs. Compl. in Intervention ¶¶ 43-47. The Supreme Court necessarily rejected this contention by concluding that the Top-Two primary would not nominate political party candidates for office. *Grange*, 128 S. Ct. at 1192 (terming political party nominations "simply irrelevant" to the primary established by I-872).
- The Democrats requested preliminary and permanent injunctive relief, alleging that if the State were permitted to implement the Top-Two primary established by I-872 they would suffer irreparable injury. Compl. in Intervention, Prayer for Relief. The Supreme Court again disagreed, concluding that this request to enjoin the initiative before it had ever been implemented "threaten[ed] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Grange*, 128 S. Ct. at 1191.

A complaint should not be amended after all the allegations made in that complaint have already been fully litigated and rejected. "While Rule 15(a) establishes that leave to amend should be 'freely-given,' post-judgment motions to amend are treated with greater skepticism than pre-judgment motions." *Premo v. Martin*, 119 F.3d 764, 772 (9th Cir. 1997) (quoting Fed. R. Civ. P. 15(a), and citing 6 Charles Allan Wright & Arthur Miller, *Fed. Prac.*



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*& Proc.* § 1489 (1990)). This rule makes perfect sense where, as here the claims originally asserted in the complaint have been fully litigated and resolved. "To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." 6 Charles Allan Wright, Arthur Miller & Mary Kay Kane, *Fed. Prac. & Proc.* § 1489 (Supp. 2008). For this reason, the Democrats' motion to amend their complaint should be denied.

**C. An As-Applied Challenge Remains Premature**

The political parties' original complaints asserted only a facial challenge to I-872, because their claims were not grounded in the context of an actual election. They were merely based upon speculation as to what might occur if I-872 were implemented. *Grange*, 128 S. Ct. at 1190 ("Respondents object to I-872 not in the context of an actual election, but in a facial challenge."). The Supreme Court noted that the political parties filed the complaint, "[i]mmediately after the State enacted regulations to implement I-872," (*id.* at 1189), but before the State had an opportunity to implement it. *Id.* at 1190. The facts today are the same. The sole action the political parties cite as "implementation" of I-872 is the development of administrative rules, but this is precisely the circumstance that, according to the Supreme Court, gave rise only to a facial challenge. *Id.* at 1189-90.

The fact remains that no Top-Two election has been conducted. As the Court noted, implementing rules were in place when the case was filed, but a challenge to the implementing rules is as much a facial challenge as a challenge to the underlying statute. *See, e.g., Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (challenge to regulations implementing National Parks Omnibus



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Act treated, and rejected, as a facial challenge), and *Watson v. Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996) (challenge to military's "Don't Ask, Don't Tell" policy treated as a facial challenge and on that basis rejected).[3]

The proposed amended pleadings at issue here show that the Democrats do not propose an "as-applied" challenge to Washington's new election laws, but still seek to prevent those laws from being implemented at all. Rather than treating I-872 as a law that could be generally implemented in a constitutional manner but might in some factual circumstances impact their constitutional rights, the proposed amended complaint repeats and even expands its broad assertions that I-872 and related statutes and regulations would, without regard to any particular fact pattern, violate their constitutional rights. It is especially significant that the Democrats continue to seek declarative and injunctive relief restraining the implementation of I-872 and related laws on the basis that they are unconstitutional, without reference to any specific application of those laws. Democrats' (Proposed) First Am. Compl. in Intervention, Prayer for Relief.

The Democrats (like the Republicans) cannot assert an as-applied challenge to I-872, because this statute has never been applied to them. There is still no "evidentiary record against which to assess [the political parties'] assertions that voters will be confused." *Grange*, 128 S. Ct. at 1194.[4] Such an "evidentiary record" must consist of actual facts

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[3] Thus, any challenge to the 2008 implementing rules is a facial challenge, just as any challenge to the 2005 implementing rules was part of the original facial challenge already considered and disposed of by the courts.

[4] The clear message of the Supreme Court opinion is that Washington is entitled to implement I-872's Top-Two primary, and should be given the chance to avoid voter confusion and other constitutional issues through the form of the ballot and the "variety of ways in which the State could implement I-872 . . . [to] eliminate any real threat of voter confusion." *Grange*, 128 S. Ct. at 1194. The political parties continue to ignore this language, and still seek to prevent implementation of I-872 in any manner.



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relating to the conduct of a Top-Two election. *See Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, ___ U.S. ___, 127 S. Ct. 2652, 2663-64, 168 L. Ed. 2d 329 (2007) (finding an as-applied challenge only after the law at issue had been applied to specific facts). The actual implementation of I-872 will inevitably involve more facts than merely the development of administrative rules, including numerous events that have not yet occurred. These include the act of candidates filing for office and stating (if they choose) their personal party preferences, efforts to educate voters concerning the nature of those preferences and of the Top-Two election more generally, including through mail and other media, whether or how political parties nominate or endorse candidates and inform the public of their views, and the content of the Voters' Pamphlet. These issues cannot now be resolved through speculation based on implementing regulations, any more than they could when the parties presented their case in the same posture three years ago.

**D. The Democrats Should Not Be Allowed To Amend Their Complaint To Assert A New State Constitutional Claim**

Like the Republicans, the Democrats seek to amend their complaint to assert a new cause of action, which is unrelated to the issues of the original complaint and is based entirely upon the state constitution. Democrats' (Proposed) First Compl. in Intervention, Fourth Cause of Action ¶¶ 43-47. A federal court, however, may only exercise supplemental jurisdiction over a state law claim when a federal claim is also pending and, as noted, all of the Democrats' original claims have been rejected. 28 U.S.C. § 1367(a); *see also Peacock v. Thomas*, 516 U.S. 349, 355, 116 S. Ct. 862, 133 L. Ed. 2d 817 (1996) ("a federal court lacks the threshold jurisdictional power" to hear and determine a state law claim when no federal claim is pending). Additionally, federal courts should avoid unnecessarily deciding issues of



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state law, and should defer such matters to state court both in the interest of comity and in the interest of justice between the parties. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) ("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."). "It is hard to imagine issues that are more within the province of the state courts than issues requiring interpretation of the state's own constitution." *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 846 n.1 (D. Wyo., 1994). This Court should deny the motion to amend for the reasons stated in the State's Response to the Republicans' Motion to Amend at 9-12 and the Grange's Response to the Republicans' Motion to Amend at 5-12.

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## V. CONCLUSION

For these reasons, the Democratic Party's Motion For Leave to File an Amended Complaint in Intervention should be denied.

DATED this _____ day of May, 2008.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 7, 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:

John White
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