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 MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

TABLE OF CONTENTS

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

TABLE OF AUTHORITIES

Cases

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Constitutional Provisions

Statutes

Rules

Treatises

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

I. INTRODUCTION

The United States Supreme Court has resolved all of the claims originally pleaded by Plaintiff Washington State Republican Party (Republicans), either by rejecting the Republicans' arguments or by rendering moot the only question this Court had initially reserved. *Washington State Grange v. Washington State Republican Party*, (Grange) ___ U.S. ___, ___ L. Ed. 2d ___, 128 S. Ct. 1184 (2008).

It is neither necessary nor proper to allow the Republicans to graft a newly-raised and unrelated state law claim, or a new and premature federal claim, onto a complaint which has been fully litigated in an action that is concluded. The Court should accordingly reject the Republicans' present motion for leave to amend their complaint.

II. ISSUE

Should this Court permit the Republicans 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, 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*, at 1196 (noting the

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

"precipitous nullification of the will of the people" resulting from the injunction against I-872, and holding "that I-872 is facially constitutional").

The Republicans now ask this Court for leave to amend their complaint in two ways. First, they seek leave to assert a wholly new cause of action, based not on federal law but upon the Washington State Constitution. Republicans' Motion for Leave to File Amended Complaint (Mot.), Ex. A, ¶¶ 11-12 (proposed amended complaint). Second, they seek to add a new "as applied" cause of action alleging "voter confusion". *Id.* at 9-10. As the Republicans explain:

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

Mot. at 2.

To the extent that the Republicans' description of their amended complaint as "reflect[ing] allegations regarding Plaintiffs as-applied challenge" is meant to suggest that the Republicans originally pled an as-applied challenge, the suggestion is meritless. *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 Court noted that they filed the complaint, "[i]immediately 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. Indeed, the purpose of this litigation was to prevent I-872 from being applied, not to challenge it "as applied".

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

IV. ARGUMENT[1]

A. The Supreme Court Has Rejected The Republicans' Claims, Leaving No Pending Claims To Form The Basis For Amendment

1. Every Claim Originally Asserted By The Republicans Has Either Been Rejected Or Rendered Moot

A review of the Republicans' original complaint demonstrates that either this Court or the United States Supreme Court has already rejected all of the claims advanced within it. After a brief introduction, and allegations describing the original parties to the case and basis for the Court's jurisdiction, the original complaint set forth the Republicans' original challenge to the top-two primary. Complaint for Declaratory Judgment and For Injunctive Relief Regarding Initiative 872 and Primary Elections (Compl.), ¶¶ 16-46. The following allegations, each of which has already been rejected, can be distilled from that original complaint:

- The Republicans alleged that the top-two primary would be used to select the nominees of political parties. Compl., ¶¶ 16, 19, 21. The Republicans restated this allegation in their first cause of action. Compl., ¶¶ 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.

---

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

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

- The Republicans alleged 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., ¶¶ 17-19. The Republicans restated this allegation as their second cause of action. Compl., ¶¶ 36-38. The Supreme Court disagreed, concluding, "There is simply 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 Republicans 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 convention process. Compl., ¶¶ 22-23. The Republicans restated this allegation in their third cause of action. Compl., ¶¶ 39-41. 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 Republicans set forth several paragraphs characterizing the prior decisions in *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000), and *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213, 541 U.S. 957 (2004), contending that those decisions could not be distinguished from the present challenge to I-872. Compl.,

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

¶¶ 24-26. The Supreme Court disagreed, distinguishing both cases. *Grange*, 128 S. Ct. at 1193 (distinguishing *Jones*); *Id.* at 1189 (noting that *Reed* followed *Jones*).

- The Republicans then alleged that the party had adopted internal party rules governing its candidate nominating process, and alleged that the State would violate the party's civil rights if it conducted a primary by any method that did not honor those party rules. Compl., ¶¶ 27-29. The Supreme Court again disagreed, concluding that since the top-two primary would not be used to select party nominees, the party's private nominating decisions are "simply irrelevant". *Grange,* 128 S. Ct. at 1192.
- The Republicans 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., ¶¶ 42-46. 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.

This Court did reserve one issue for possible future consideration, but that issue has been rendered moot by the Supreme Court's decision on appeal. On August 12, 2005, this Court entered an Order clarifying its prior ruling on summary judgment in order to explain that the Republicans' proffered challenge to Wash. Rev. Code 29A.24.031 was not properly before the Court on summary judgment. In that challenge, the Republicans contended that, even if I-872 were set aside, the Republicans' associational rights would also be violated under the alternative "Montana" primary because of the freedom that system gave candidates

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

to declare a party affiliation. Order at 2 (Aug. 12, 2005). The cited statute is not a part of I-872, but rather forms part of the "Montana" primary system that I-872 replaced. The Republicans' challenge was thus dependent upon the Court concluding that I-872 was invalid, because if I-872 were ultimately held to be constitutional then Wash. Rev. Code 29A.24.031 would be superseded and would not be effective. This Court accordingly stayed the Republicans' challenge to that statute pending appeal "in the interest of justice". Order at 2. Since Wash. Rev. Code 29A.24.031 would be the law only if I-872 were declared unconstitutional, the Supreme Court's conclusion that I-872 is constitutional rendered that claim moot. *See Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007) (change in applicable statutory law renders challenge to prior statute moot).[2]

The Republicans' original complaint has been fully resolved. The Republicans' new claims should be brought in a new action, to the extent they can be asserted at all.

2. Leave To Amend Should Be Denied Where, As Here, A Party's Original Claims Have Been Resolved

A complaint should not be amended after 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, *Federal Practice & Procedure* § 1489 (1990)). This rule makes perfect sense where, as here, the claims originally asserted in the complaint have been fully litigated and resolved, or rendered moot.

[2] Nor may the Republicans rely upon footnote 11 of the Supreme Court's majority opinion for the proposition that claims remain pending in this case. That footnote solely describes claims asserted by the Libertarian Party as intervenors, and not claims asserted by the Republicans. *Grange*, 128 S. Ct. at 1195 n.11.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

A complaint in which the original claims have already been rejected—here, rejected by the nation's highest court—does not present an appropriate vehicle for continuing to litigate new claims the parties may devise after their original claims prove unsuccessful. "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 Alan Wright, Arthur Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1489 (Supp. 2008). For this reason, the Republicans' motion to amend their complaint should be denied.

B. Even If It Otherwise Were Appropriate To Permit The Republicans To Amend Their Complaint, Their As-Applied Challenge Would Be Premature

As the United States Supreme Court recognized, "[r]espondents object to I-872 not in the context of an actual election, but in a facial challenge." *Grange*, 128 S. Ct. at 1190. They 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. I-872 still has not been applied. The State still has not conducted a primary under I-872. Although the Secretary of State is currently in the process of developing administrative rules for use in conducting such a primary, the fact remains that no top-two primary has been conducted. The Supreme Court made clear that the mere act of adopting rules does not constitute actually implementing the initiative, and does not give rise to an as-applied challenge. *Id.* at 1189-90.

Thus, even if amendment of the complaint were otherwise appropriate, and it is not, any as-applied challenge to I-872 remains premature.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

C. The Republicans' "Voter Confusion" Language Is Nothing More Than A Restatement Of Their Rejected Claims

The Republicans propose to add a paragraph to their original First Cause of Action ("Conducting an Invalid Primary") setting forth an assertion that Initiative 872 "will confuse voters regarding whether candidates identified with the Republican Party are affiliated with the Republican Party or represent its views, and will further confuse voters regarding whether messages advanced by candidates bearing the Republican Party name on ballots are those of the Republican Party." Mot., Ex. A, ¶ 32. The proposed paragraph would also assert that Initiative 872 "constitutes a misappropriation" of the Republican Party's name. *Id.*

The purpose of this language is unclear. To the extent it is intended to amend the Republican's complaint to state an as-applied challenge to I-872, the impropriety of such an amendment already has been addressed. The language itself, however, simply reiterates more precisely the very claim that the Supreme Court has explicitly rejected—the claim that Initiative 872 would, on its face, deprive the Republican Party of federally guaranteed constitutional rights. The Supreme Court characterized the arguments of the Republican Party as variations on the theme that "voters will be confused by candidates' party-preference designations." *Grange*, 128 S. Ct. at 1193. In the following paragraph, the Court noted that "[w]e reject each of these contentions" for the reason that "[t]here is simply no basis to presume that a well-informed electorate will interpret a candidate's party-

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

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." *Id.*[3]

Even if it otherwise were appropriate to allow the Republicans to amend their complaint, and for reasons previously explained it is not, courts recognize that it is pointless to allow amendments that are simply futile. *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043 (9th Cir. 2006) (upholding the denial of leave to amend adding a claim based on a statute that would have afforded no relief). *See also, Bell Consumers, Inc. v. Lay*, 203 F. Supp. 2d 1202 (W.D. Wash. 2002). In this case, it would be pointless and futile to allow this restatement of "voter confusion" that the Supreme Court has already rejected, especially when the Court recognized that "voter confusion" was at the heart of the case and dealt with it explicitly.

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

The Republicans 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. The District Court may exercise supplemental jurisdiction over a state law claim only if the Republicans already have a federal claim pending before this Court. 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); *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1034 (9th Cir. 2005) (same). As

[3] Moreover, the Republicans phrase this claim in the future tense, as they phrased their original complaint. Again, this illustrates that the Republicans address future events they speculate might occur, and do not bring an as-applied challenge.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

described above, the Republicans do not have a federal claim pending as all of the claims originally asserted by the Republicans have been rejected or rendered moot. *See generally*, pages 4-6, above.

Even if the Court could assert supplemental jurisdiction over the Republicans' proposed state constitutional claim, this claim would present complex issues of state law more appropriately addressed by the state courts. 28 U.S.C. § 1367(c)(1). The Republicans request leave to amend their complaint in order to challenge I-872 under article II, section 37, of the Washington Constitution. That provision requires that amendatory acts set forth in full the acts they amend. Wash. Const. art. II, § 37. This Court should decline to consider this challenge, leaving it and the construction of the state constitution and the validity of the state initiative under state law for determination by the state courts. 28 U.S.C. § 1367(c)(1).

"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." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). "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).

The Republicans assert that they base their state constitutional challenge upon a single, recent decision of the Washington Supreme Court. Mot. at 2 (citing *Washington Citizens Action v. State*, 162 Wn.2d 142, 171 P.3d 486 (2007)). Article II, section 37 has been part of Washington's constitution from statehood. *Citizens Action* neither created a claim previously unavailable under Washington law, nor has any clear application to I-872.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

In *Citizens Action*, the state court invalidated an initiative measure under the authority of article II, section 37 of the Washington Constitution on the basis that the law the initiative amended had been judicially held unconstitutional during the period the initiative was pending. *Citizens Action*, 162 Wn.2d at 153-54. No such allegation can be proffered in the present case, because I-872 did not amend any statute held unconstitutional while I-872 was pending. Instead, the Republicans' argument appears to be that an intervening legislative amendment somehow prohibited the voters from exercising their constitutionally-reserved authority to enact I-872. Mot. at 2. The Republicans thus ask this federal Court to determine a significant state constitutional question, as to which the analysis of the state court is far from certain.

State law governing the potential application of article II, section 37 to I-872 thus raises a novel question of state constitutional jurisprudence that should be entrusted to the state court. For a federal court to consider the validity of I-872 based on an unsettled question of state constitutional law would intrude upon the state court's clear province to interpret the state's own constitution.[4] *Clajon Prod. Corp.*, 854 F. Supp. at 846 n.1.

[4] Additionally, deference to the state court better promotes "justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of Am.*, 383 U.S. at 726. The parties are not well served by litigating this novel state issue of state constitutional law in a court that can only speculate as to the application of state law that the state court might hypothetically apply.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

V. CONCLUSION

For these reasons, Plaintiffs' Motion For Leave to File Amended Complaint should be denied.

DATED this 29th day of April, 2008.

ROBERT M. MCKENNA
Attorney General

/s/ Maureen A. Hart
MAUREEN A. HART, WSBA #7831
Solicitor General

/s/ James K. Pharris
JAMES K. PHARRIS, WSBA #5313
Deputy Solicitor General

/s/ Jeffrey T. Even
JEFFREY T. EVEN, WSBA #20367
Deputy Solicitor General

PO Box 40100
Olympia, WA 98504-0100
360-753-2536

E-mail: jeffe@atg.wa.gov
jamesp@atg.wa.gov
sgoolyef@atg.wa.gov

Counsel for Intevenor Defendants State of Washington, Rob McKenna and Sam Reed

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 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
Kevin Hansen
Richard Shepard
Thomas Ahearne
David McDonald

ROBERT M. MCKENNA
Attorney General

/s/ Jeffrey T. Even
JEFFREY T. EVEN, WSBA #20367
Deputy Solicitor General
PO Box 40100
Olympia, WA 98504-0100
360-586-0728
E-mail: jeffe@atg.wa.gov