Hon. Tiffany M. Cartwright

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE ALLIANCE FOR RETIRED AMERICANS,

Plaintiff,

v.

STEVE HOBBS, in his official capacity as Washington State Secretary of State, MARY HALL, in her official capacity as Thurston County Auditor, and JULIE WISE, in her official capacity as King County Elections Director,

Defendants.

JIM WALSH and MATT BEATON,

[Proposed] Intervenor-Defendants.

No. 3:23-cv-06014-TMC

REPLY IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

Four days after Auditor Beaton and Chairman Walsh filed this Motion, the United States Court of Appeals for the Ninth Circuit issued its decision in *Arizona Alliance for Retired Americans v. Mayes*, No. 22-16490, 2024 WL 4246721 (9th Cir. Sept. 20, 2024). Represented by Elias Law Group LLP and attorney Tina M. Morrison, the Arizona chapter of this same plaintiff lost its challenge to an Arizona elections law because "the plaintiff organizations lack standing to challenge" elections laws. *Id.* at *4.

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That decision goes unmentioned in the response to this Motion, because the parties to the un-litigated settlement in this matter don't want it examined, questioned, and subjected to a genuinely adversarial litigation process. However, the reasons they give for preserving an agreement which they jointly drafted and presented to this Court are sufficient to demonstrate that the named parties lacked the adversity required to create federal jurisdiction. WSAFRA can't name a single member who was, is now, or ever would be adversely affected by the laws it connived to have this Court erase, nor can it plausibly allege the existence of such a person. And Secretary Hobbs only complains that allowing actual litigation of the matter would require his staff to re-do a rule making that would amount to nothing more than reverting to the version of a rule that was in force just earlier this year and can still be found on the Washington Code Reviser's website. While the Oppositions do try to check all the boxes on the standards for intervention, they fail to show that the nominal plaintiff or its co-operative defendant ever had anything at stake in this "litigation" other than having this Court bless the predetermined outcome. The Oppositions also essentially concede that both proposed intervenors, and especially Auditor Beaton, have interests that were adversely affected by the settlement.

II. Argument.

A. The Court Lacked Authority To Act.

The plaintiff organization lacks standing, and the response from its cooperative defendant, Secretary Hobbs, shows that the underlying litigation lacked any adversity. For both reasons, the Court had no constitutional authority to enter the settlement. That settlement, however, but not any action by the Washington legislature, is the supposed authority on which Secretary Hobbs re-wrote the state elections code. That settlement, purportedly invoking this Court's authority, is the legal authority binding Auditor Beaton to act in a manner contrary to laws actually passed by the Washington Legislature, of which Chairman Walsh is a member.

Proposed Intervenors made clear in the Motion to Intervene and its accompanying proposed Motion to Dismiss that, because WSAFRA lacks standing, this Court lacks the authority to enter the settlement proffered by the cooperative litigants. They also showed that "friendly"

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litigation is equally constitutionally infirm, even if a plaintiff could show the requisite injury and redressability. Instead, they showed that WSAFRA and Secretary Hobbs have enlisted this Court to act as a substitute for the Washington State Legislature in order to eliminate Chairman Walsh's role in crafting state elections law and to compel Auditor Beaton to act in a manner contrary to laws actually passed by the legislature.

But the Court quite apparently lacked any power to enter the settlement. Indeed, just four days after the Motion was filed, the Ninth Circuit threw out an identical lawsuit, brought by the same plaintiff, same law firm, and same lawyer, for lack of standing. As demonstrated in the proposed Motion to Dismiss, attached (as required by the rules) to the Motion to Intervene, this voids, *ab initio*, any action by this Court. The cooperative parties' responses pretend that WSAFRA's standing is hardly relevant to the settlement, but "[t]he parties have no power to confer jurisdiction on the district court by agreement or consent." *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). Without jurisdiction—lacking then and now—the settlement is void.

1. The Existing Litigants Continue Their Cooperation.

Neither Secretary Hobbs nor the WSAFRA want this Court to consider that the organization lacks standing. That is the biggest tell demonstrating that they are cooperating to use litigation and this Court as a means to bypass the Legislature and re-write state elections law in a manner preferred by Secretary Hobbs and Attorney General Ferguson. And it is also the biggest tell in their coordinated response to this Motion to Intervene. After all, the very day of this Court's hearing on the Motion, WSAFRA's counsel lost an identical challenge, on behalf of an identical organization, at the Ninth Circuit, because the Arizona chapter lacked organizational standing. How did the parties respond? WSAFRA didn't cite that dispositive decision in its brief asserting that it meets the Ninth Circuit's standing requirements. Neither did Secretary Hobbs and Attorney General Ferguson bring that recent decision to the Court's attention. Instead, three days later, Hobbs' counsel ordered a transcript of the hearing, to work ***with*** WSAFRA and its counsel in an attempt to direct this Court's attention ***away*** from the complete lack of constitutional authority to

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ever have entered the settlement. *See* ECF No. 42, Sep. 23, 2024 (TRANSCRIPT REQUEST by Defendant Steve Hobbs for proceedings held on 9/20/2024. Requesting Attorney: William McGinty.). They ask the Court to carefully focus only on the timing of the proposed Intervenors' Motion and cite the brief remarks at the scheduling conference as though that restores the constitutional authority that has always been lacking here.

From the outset of this case, the parties have cooperated to use the Court to re-write state elections law. They are not adverse, and, as shown in the Motion to Intervene, that alone eliminates this Court's authority to give legal force to their jointly preferred outcome. In "the absence of a genuine adversary issue between the parties … a court may not safely proceed to judgment, especially when it assumes the grave responsibility of passing upon the constitutional validity of legislative action." *United States v. Johnson*, 319 U.S. 302, 304 (1943). "Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them." *Id.* at 305.

It is not a conspiracy theory as claimed by the cooperating parties, but demonstrable, historical fact that the proposed intervenors are members of the ***other*** of two major U.S. political parties than are Secretary Hobbs, Attorney General Ferguson, Auditor Hall, and Elections Director Wise. It is also demonstrable, historical fact that the founder of the plaintiff organizations' law firm has represented the highest profile, national political candidates for the ***same*** political party as that of the organization's nominal opponents. It is by no means true that Democrats suing Democrats or Republicans suing Republicans, even in politically charged cases such as elections law, are necessarily non-adverse. But here, the overt cooperation by the litigants to evade scrutiny of the constitutional shortcomings of the case demonstrates that the litigation is friendly, and thus, as shown in the Motion, infirm.

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2. Plaintiff Lacks Standing.

"Article III standing bars parties from using the courts merely to vindicate abstract political and societal goals." *Arizona Alliance for Retired Americans v. Mayes*, No. 22-16490, 2024 WL 4246721, at *4 (9th Cir. Sept. 20, 2024). Substitute "Washington" for "Arizona" and the Court doesn't even need to change the surname of the defendant Secretary of State—by happy coincidence, the Arizona Secretary of State is also named Hobbs. But this suit fails just as that one did, because "[u]nder *Hippocratic Medicine*, the plaintiffs must allege more than that their mission or goal has been frustrated—they must plead facts showing that their core activities are directly affected by the defendant's conduct." *Id.* (citing *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 382 (2024)). No such facts were ever pled here, and none could be. WSAFRA does not satisfy Article III *nunc pro tunc* simply because Secretary Hobbs and Attorney General Ferguson never alerted the Court to the lack of standing of its sister organizations in North Carolina and Arizona. Instead, this chapter, like the Arizona chapter, cannot use the federal courts "to seek out and challenge laws that they disagree with based on disagreement alone." *Id.* at *5.

WSAFRA defends its supposed standing by relying on *California Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094 (9th Cir. 2024). That case affirms that an association has standing on behalf of its members when it plausibly alleges that it actually has a real member that meets the long-established Article III test for standing: "To satisfy associational standing requirements, an organization must demonstrate that (1) at least one of its members has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, not merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 1099. But, as Auditor Beaton and Chairman Walsh showed, that simply wasn't possible for WSAFRA to show on the day the lawsuit was filed, many months ***before*** any election. How could a member have already been harmed by the thirty-day residency requirement, far more than thirty days before an election? They showed, therefore, that WSAFRA's bare allegation of harm on behalf of an un-named member was not plausible. And indeed, no other court—when actually presented with an

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adversarial challenge to standing by this group—has agreed with the team of WSAFRA, Elias Law Group, Secretary Hobbs, and Attorney General Ferguson. They claim that the issue is so simple, so plain, and the outcome so pre-determined in favor of WSAFRA that they made the reasonable decision not to contest it but simply negotiate state elections law away. The Ninth Circuit disagrees, as did the district court *North Carolina Alliance for Retired Americans v. Hirsch*, No. 5:24-CV-275-D, 2024 WL 3507677, at *4 (E.D.N.C. July 19, 2024) (no associational standing for the Alliance to challenge a thirty day residency requirement in North Carolina where the pleadings "fail[] to tell the court how many potential future members of the Alliance face a 'certainly impending' injury or a 'substantial risk' of injury because of the 30-day durational residency requirement.").[1]

3. The Settlement Is Void For Lack Of Any Court Authority.

Auditor Beaton and Chairman Walsh showed that since as early as 1949, the Ninth Circuit has cautioned against settlements in non-adversarial litigation, a position reinforced by the United States Supreme Court. *See* Proposed Motion to Dismiss at 3-4 (citing *Waialua Agr. Co. v. Maneja*, 178 F.2d 603 (9th Cir. 1949) and *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43 (1997)). The cooperating litigants asked this Court to oversee their decision to re-write state elections law in a manner that Auditor Beaton must follow unless he is granted intervention. But, as shown above, the Court lacked any authority to do so. The proposed intervenors must be permitted to enter the case to provide the actual adversity required for court action.

B. Intervenor's Motion Satisfies The Standards For Intervention.

The Motion showed that, although this case is closed, intervention is nonetheless appropriate. It showed that the only window during which either intervenor would have realized that the Attorney General and Secretary had elected to cooperate with the plaintiff was a single

[1] The Court will not be surprised to see that the North Carolina Alliance was represented by lawyers from Elias Law Group LLP including Ms. Morrison. The organizational names are identical, and the same lawyer participated in a case with the same allegations and same legal issues. Yet Secretary Hobbs and Attorney General Ferguson had so little curiosity about the fundamental constitutional prerequisite of standing that they apparently didn't even bother to do enough research to locate the case. This further demonstrates the cooperative, non-adversarial nature of this litigation.

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week in March. The cooperative litigants now ask the Court to maintain their infirm settlement on the grounds that the Intervenors should have arrive earlier, but the arguments don't wash.

First, even the cooperating parties must concede that Auditor Beaton is bound by the settlement and the corresponding re-write of state elections law compelled by Secretary Hobbs' acquiescence. And, by naming two friendly county elections officials in the original Complaint, WSAFRA also concedes that county elections officials are necessary parties. But Auditor Beaton wasn't served. Instead, WSAFRA contends that he should have spent his time monitoring the PACER docket for the Western District to see whether there might ever be litigation affecting his duties. Fed. R. Civ. P. 4 says otherwise. Nor do either the emails or the rule making cited by the parties satisfy any kind of notice requirement. Compare them, for example, to the kind of notice to non-parties required by Fed. R. Civ. P. 23: did the parties actually inform Auditor Beaton that they had proposed a settlement that would dispositively and adversely affect his interests? Did they offer an opportunity for him to present objections to this Court before the settlement was entered? Did they even alert him that this litigation, and the jointly agreed disposition, was the reason for the changes being made to elections law? Of course not.

The cooperating parties also cite the testimony against the rule making from a candidate for Secretary of State, implying that Chairman Walsh should be charged with having gained knowledge of the litigation and settlement long ago. The leap is immense. Mr. Whitaker is not, as stated, the Republican candidate for Secretary of State. Washington state has no party candidates. Candidates may independently inform voters of a party preference, and parties may independently endorse and support candidates. But Mr. Whitaker's party preference, and any state party support for him, does not result in Chairman Walsh's knowledge of Mr. Whitaker's campaign activities, much less confirm that Mr. Whitaker knew the reason for the rulemaking, told Mr. Walsh about the reason, and that Mr. Walsh subsequently declined to act promptly.

WSAFRA shows no prejudice, because it shows no member harmed by the prior law. It still cannot name a member, nor even plausibly allege the existence of a member, whose registration or voting would be hampered by restoring the status quo *ante*. The supposed prejudice of now

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recognizing the lack of constitutional basis for the court actions the cooperative litigants extracted is (of course) a prediction of doom that would result from reverting to codes and forms used in the state as recently as March. There's no prejudice, harm, or disaster in the making from simply voiding the rulemaking, reverting to the previous WAC, and using the same old forms for registration that the state used for years. And in any event, how can these friendly litigants show that genuine prejudice results from them being prevented from improperly using a federal court to enter a re-write of state elections law ginned up by the Secretary of State and Attorney General? Neither of them have any authority to write state law. Without federal constitutional authority for this Court to enter their settlement, the result they procured is void. They are not prejudiced by being forced to abide by the state constitutional limits on the authority of their respective offices.

III. Conclusion.

This Court should grant the Motion to Intervene and enter the proposed Intervenor's Motion to Dismiss.[2]

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October 10, 2024.

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By: _____

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[2] Specifically, proposed Intervenors request that the Court allow their intervention and direct them to file a responsive pleading. The subsequent Motion to Dismiss will correct a few typos and errors in the Exhibit A filed with the Motion to Intervene.