

District Judge Martinez

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON ASSOCIATION OF
CHURCHES, et al.,
Plaintiffs,

v.

SAM REED, in his official capacity as
Secretary of State for the State
of Washington,
Defendant.

Civil Action No. CV 06-0726 RSM

**UNITED STATES' RESPONSE TO
DEFENDANT'S MOTION TO
COMPEL JOINDER OF UNITED
STATES AS PARTY DEFENDANT**

NOTE ON MOTION CALENDAR:
JUNE 30, 2006

This litigation was commenced on May 24, 2006 by a group of organizational Plaintiffs, challenging certain actions of Defendant Reed with regard to voter registration for elections for federal office in Washington as violative of, among other things, the Help America Vote Act of 2002, 42 U.S.C. §§ 15301 et seq. ("HAVA"). On June 12, 2006, the Defendant filed his Answer to the Complaint. On that same date, the Defendant moved this Court, pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, to compel Plaintiffs to add the United States as a necessary party-defendant in this litigation (Docket #31). On June 26, 2006, Plaintiffs filed their Response to Defendant's Motion (Docket #32).

This Court should deny Defendant's joinder motion. First, the doctrine of sovereign immunity bars suit against the United States, insofar as there is no express waiver of sovereign immunity contained in any of the federal statutes on which Plaintiffs base their claims. Second,

U.S. Response to Joinder Motion
(CV 06-0726 RSM)

U.S. Department of Justice
950 Penn. Ave., N.W.
Washington, D.C. 20530
202-514-4755

1 Defendant has not met the clear standards set forth in Rule 19(a), Fed. R. Civ. P. for joinder of a
2 necessary party.¹

3 I. The Court Should Deny Defendant's Motion For Joinder

4 Rule 19(a), Fed. R. Civ. P., reads in pertinent part:

5 (a) Persons to be Joined if Feasible. A person who is subject to service of process and
6 whose joinder will not deprive the court of jurisdiction over the subject matter of the
7 action shall be joined as a party in the action if....(2) the person claims an interest
8 relating to the subject of the action and is so situated that the disposition of the action
9 in the person's absence may....(ii) leave any of the persons already parties subject to a
10 substantial risk of incurring double, multiple or otherwise inconsistent obligations by
11 reason of the claimed interest.

12 The essence of Defendant's Joinder Motion is that the United States should be added as a
13 party defendant because the United States allegedly claims to have an interest in this action and
14 because failure to add the United States as a party allegedly would subject the State of Washington to
15 a "substantial risk" of "double, multiple or otherwise inconsistent obligations." Motion, p. 4, citing
16 to Rule 19(a)(2)(ii), Fed. R. Civ. P. This is so, Defendant alleges, because the United States has
17 certain enforcement obligations pursuant to Section 401 of HAVA, 42 U.S.C. § 15511, and
18 Defendant alleges that proceeding in this litigation without the United States' presence as a party
19 poses a substantial risk of subjecting the State of Washington in the future to duplicative, additional
20 or inconsistent obligations due to potential action by the United States. Defendant's Motion is
21 without merit. The United States is not a necessary party in this litigation.

22 A. The Doctrine of Sovereign Immunity Precludes Suit Against the United States

23 It is elementary that "[t]he United States, as sovereign, is immune from suit save as it
24 consents to be sued ..., and the terms of its consent to be sued in any court define that court's
25 jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941). It is

26 ¹ Despite the fact that Defendant seeks to add the United States as a party to this case,
Defendant did not in any manner, formal or informal, serve the United States, which it views as an
"indispensable" party, with its joinder motion at the time it was filed. Counsel for the United States only
learned of the pendency of the Defendant's motion on June 23, 2006, pursuant to a conversation with
an official of the State of Washington. The United States subsequently received email copies of the
Motion papers from Defendant. Insofar as Defendant seeks to make the United States a party in this
case, the United States has sought leave of this Court to file this response to Defendant's motion.

1 axiomatic that suit will not lie against the United States, its agencies, or its officers in their official
2 capacities, without an express waiver of sovereign immunity. United States v. Mitchell, 445 U.S.
3 535, 538 (1980); Gilbert v. DaGrossa, 756 F. 2d 1455, 1458 (9th Cir. 1985). A waiver "must be
4 unequivocally expressed in statutory text ... and will not be implied." Lane v. Pena, 518 U.S. 187,
5 192 (1996). With respect to its scope, any waiver of sovereign immunity must be strictly construed
6 in favor of the sovereign. Orff v. United States, 125 S. Ct. 2606, 2610 (2005).

7 It should be noted first that, plainly, Plaintiffs here have not alleged any cause of action
8 against the United States in their Complaint and, indeed, as evidenced in their Response to
9 Defendant's Motion, eschew any present disagreement with the United States with regard to their
10 extant claims. Notwithstanding this, neither the Plaintiffs, nor Defendant Reed, have alleged, nor
11 can they, any specific waiver of the United States' sovereign immunity here which would allow for
12 subject matter jurisdiction of any claims against the United States.

13 Plaintiffs claim that this Court has jurisdiction over this matter under various federal statutes
14 and various provisions of the United States Constitution, which they allege have been violated by the
15 State of Washington. However, Plaintiffs claim no violation of law by the United States, and none
16 of the statutory or constitutional provisions relied upon by the Plaintiffs actually waive sovereign
17 immunity or confer jurisdiction upon this Court over the United States. Plaintiffs assert violations of
18 the First and Fourteenth Amendments to the United States Constitution. Citation to constitutional
19 provisions, by itself, is insufficient to waive the United States' sovereign immunity. An independent
20 statute that contains a waiver of sovereign immunity must be referenced to establish jurisdiction.
21 Lane, 518 U.S. at 192; California v. NRG Energy, 391 F. 3d 1011, 1023-24 (9th Cir. 2004). No such
22 waiver appears in any of the federal statutes which Plaintiffs claim have been violated by Defendant
23 Reed - HAVA, the Voting Rights Act and the National Voter Registration Act, and we are aware of
24 no court that has found a waiver of the United States' sovereign immunity in any of these statutes.
25 Finally, 42 U.S.C. § 1983, upon which Plaintiffs' rely for jurisdiction, does not contain a waiver of
26 the federal government's sovereign immunity, and does not provide a basis for claims against federal
27 agencies or federal officials acting under federal law. Settles v. United States Parole Commission,

1 429 F.3d 1098, 1105 (D.C. Cir. 2005).

2 B. The United States Has Not Claimed An Interest In This Action Which Would Compel Joinder

3 Rule 19(a)(2), Fed. R. Civ. P., states that, for compulsory joinder of a party to be proper, such
4 party must “claim[] an interest relating to the subject of the action.” (emphasis added). See United
5 States v. Bowen, 172 F. 3d 682, 688-89 (9th Cir. 1999) (a claim of interest is an essential prerequisite
6 to joinder under Rule 19(a)(2)); Northrop Corp. v. McDonnell Douglas Corp., 705 F. 2d 1030, 1043
7 (9th Cir. 1983). Indeed, “Rule 19(a) is intended ‘to protect a[n absent] party’s right to be heard and to
8 participate in adjudication of a claimed interest.’” In Re Republic of the Philippines, 309 F. 3d 1143,
9 1152 (9th Cir. 2002), citing to Shermoen v. United States, 982 F. 2d 1312, 1317 (9th Cir. 1992).

10 Contrary to Defendant’s representations in its Motion, the United States has not made such a claim.
11 Under HAVA, the United States has enforcement authority for the election technology and
12 administration requirements set forth in Title III. This includes the statewide voter registration list
13 requirements which are part of the subject of this action. See 42 U.S.C. § 15483(a). However, while
14 the United States has an “interest” in enforcement of HAVA, that does not translate, in the absence
15 of more specific claims, into an interest mandating inclusion of the United States as a party in this
16 case. If that was the case, as Plaintiffs point out in their Response to Defendant’s Motion, the United
17 States potentially would be a necessary party in every HAVA-related lawsuit filed throughout the
18 nation (and for that matter, in every lawsuit filed pursuant to a statute in which the United States has
19 enforcement authority). Such a scenario is hardly the intent of Congress, and is not practicable from
20 a common sense as well as resource point of view. “A claimed interest must be more than
21 speculation about future events.” Dawavendewa v. Salt River Project Agricultural Improvement and
22 Power District, 276 F. 3d 1150, 1155 n.5 (9th Cir. 2002), citing McLaughlin v. Int’l Ass’n of
Machinists & Aerospace Workers, 847 F. 2d 620, 621 (9th Cir. 1988).

23 C. There Is No Showing of a Substantial Risk of Double, Additional or Inconsistent Obligations

24 Defendant has not, and cannot, point to any indication that the United States is intending to
25 pursue enforcement action against the State of Washington for violations of HAVA. As set forth

1 immediately above, such pure speculation is not sufficient to establish the existence of a claimed
2 interest on the part of the United States. Thus, there is no substantial risk of inconsistent or other
3 obligations needed to satisfy the criteria in Rule 19 for compulsory joinder.

4 **II. Conclusion**

5 For the reasons stated above, the United States submits that the Defendant's Motion for
6 Joinder should be denied.

7 Dated: June 30, 2006

8 Respectfully submitted,

9 ALBERTO GONZALES
Attorney General

10 WAN J. KIM
Assistant Attorney General
Civil Rights Division

11 JOHN K. TANNER
Chief, Voting Section

12 T. CHRISTIAN HERREN JR
13 BRIAN F. HEFFERNAN
14 Room 7254--NWB
15 Voting Section
16 Civil Rights Division
17 U.S. Department of Justice
18 950 Pennsylvania Avenue, NW
19 Washington, DC 20530
(202) 514-4755 (telephone)
(202) 307-3961 (facsimile)

20 JOHN McKAY
United States Attorney

21 /s/ Anastasia Bartlett
22 ANASTASIA BARTLETT, WSBA # 7142
23 Assistant United States Attorney
24 700 Stewart Street, Suite 5220
25 Seattle, WA 98101-1271
26 Tel: 206-553-7970
Fax: 206-553-0882
E-mail: anastasia.bartlett@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the United States Attorney Office for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers.

That on June 30, 2006, she electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the plaintiff(s) and defendant(s):

Evan Norris
PAUL WEISS RIFKIND WHARTON & GARRISON
1285 AVE OF THE AMERICAS
2ND FLOOR
NEW YORK, NY 10019-6064
212-373-3548
Fax: 212-757-3990
Email: enorris@paulweiss.com

Justin Michael Levitt
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 AVENUE OF THE AMERICAS
12 FL
NEW YORK, NY 10013
212-992-8158
Fax: 212-995-4550
Email: justin.levitt@nyu.edu

Louis David Peterson
HILLIS CLARK MARTIN & PETERSON
1221 SECOND AVE
STE 500
SEATTLE, WA 98101-2925
206-623-1745
Fax: 206-623-7789
Email: ldp@hcmp.com

Robert A Atkins
PAUL WEISS RIFKIND WHARTON & GARRISON
1285 AVE OF THE AMERICAS
2ND FLOOR
NEW YORK, NY 10019-6064
212-373-3183
Email: ratkins@paulweiss.com

1 Sarah A Dunne
HILLIS CLARK MARTIN & PETERSON
2 1221 SECOND AVE
STE 500
3 SEATTLE, WA 98101-2925
206-623-1745
4 Email: sad@hcmp.com

5 Wendy Robin Weiser
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
6 161 AVENUE OF THE AMERICAS
12 FL
7 NEW YORK, NY 10013
212-998-6130
8 Fax: 212-995-4550
Email: wendy.weiser@nyu.edu

9 Greg Overstreet
ATTORNEY GENERAL OF WASHINGTON (40100-OLY)
10 PO BOX 40100
OLYMPIA, WA 98504-0100
360-586-4802
11 Email: grego@atg.wa.gov

12 James Kendrick Pharris
ATTORNEY GENERAL OF WASHINGTON (40100-OLY)
13 PO BOX 40100
OLYMPIA, WA 98504-0100
14 360-664-3027
Email: jamesp@atg.wa.gov

15 Jeffrey T Even
ATTORNEY GENERAL'S OFFICE
16 PO BOX 40100
OLYMPIA, WA 98504-0100
17 360-753-6200
18 Fax: 360-664-2963
Email: jeffe@atg.wa.gov

19

20 DATED this 30th day of June, 2006.

21

/s/ Jing Y. Xu
JING Y. XU
Legal Assistant
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
FAX: 206-553-4073
E-mail: Jing.Xu@usdoj.gov

22

23

24

25

26

U.S. Response to Joinder Motion
(CV 06-0726 RSM)

U.S. Department of Justice
950 Penn. Ave., N.W.
Washington, D.C. 20530
202-514-4755