No. 72322-7-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

IN RE: BALLOT TITLE APPEAL OF CITY OF SEATTLE INITIATIVES 107-110,

And

IN RE: BALLOT TITLE APPEAL OF CITY OF SEATTLE PROPOSITION NO. 1B (ORDINANCE 124509),

And

YES FOR EARLY SUCCESS, A non-profit corporation, LAURA CHANDLER, and BARBARA FLYE,

Appellants,

v.

CITY OF SEATTLE and KING COUNTY,

Respondents.



# BRIEF OF RESPONDENT CITY OF SEATTLE

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## I. INTRODUCTION

The City of Seattle (the "City") is obligated to follow the general laws of the State. That obligation trumps provisions of the City Charter. And that obligation includes laws pertaining to exercise of the initiative power. In RCW 29A.36.071 the legislature determined that local governments such as the City must use the prescribed forms of ballot titles set forth in RCW 29A.72.050. RCW 29A.72.050 specifies ballot titles that must be used for different types of initiatives. After the City Council rejected I-107 and put forth an alternative measure on the same subject (the "Preschool Plan"), as allowed in the City Charter, the City Attorney followed the ballot title form in RCW 29A.72.050 applicable to initiatives for which the legislative body has proposed an alternative. The trial court correctly ruled that the City's compliance with state law was proper. The trial court also correctly ruled that the Preschool Plan was an alternative on the same subject as I-107, a determination that Appellants have not appealed.[1]

Rather than focus on these controlling statutes, Appellants attempt to obscure the facts of this case and to apply inapposite case law. But Appellants' suggestion that the RCW does not apply to the initiative provisions in the City Charter is contrary to Washington law. Appellants'

[1] Consequently, any such argument is waived.

other arguments are based on material mischaracterizations of the record and lack legal support. For example, Appellants argue that it was error to dismiss their Open Public Meetings Act ("OPMA") claim, citing a phrase in the trial court's order that the judge was not deciding whether the OPMA was violated. But the Court's ruling was that such a determination was unnecessary because the record was clear that any alleged violation had been cured by the public debate and open vote on adoption of the City's Preschool Plan and the determination that the plan was an alternative to I-107. Finally, no legal support exists for the arguments that Appellants have a constitutional right to any particular form of initiative or that the State's regulation on local initiatives raises constitutional questions. Tellingly, Appellants did not seek relief before the trial court based on any of their alleged constitutional claims.

The trial court should be affirmed.

## II. STATEMENT OF THE ISSUES

1. Did the trial court correctly rule that provisions of the Seattle City Charter relating to the initiative process are subject to state law, and specifically do RCW 29A.36.071 and RCW 29A.72.050 apply to initiatives under the Charter?

2. Did the trial court correctly rule that the ballot title under RCW 29A.72.050(3) for "an initiative to the legislature for which the legislature has proposed an alternative" was appropriate where the City Council rejected I-107 and proposed the Preschool Plan as an alternative, different measure on the same subject of early learning?

3. Should the trial court's ruling that the City properly cured any potential OPMA violations stand where Appellants do not raise the issue in their brief and, if not, was the OPMA violated where the City Council held executive sessions to seek legal advice on I-107 and then debated whether to reject I-107 in a subsequent open public meeting at which Appellants offered public testimony?

4. Did the trial court properly dismiss Appellants' remaining causes of action, including their constitutional claims, because Appellants did not seek relief on those claims, the claims are not ripe for review, and/or the claims are without merit?

## III. STATEMENT OF THE CASE

### A. The City researches and starts to develop a preschool plan.

On September 18, 2013, the City Council adopted Resolution 31478, which established a formal goal of developing and instituting a high-quality preschool program for three- and four-year-old children in Seattle. *See* App. 501, § 1.[2] The Resolution directed the City's Office for Education ("OFE") to consult relevant experts and stakeholders and to present a proposed plan to the Council. App. 503, § 4.

OFE proceeded to develop a research-based proposal in consultation with numerous stakeholders. *See* Supp. App. 94–95, ¶¶ 3–7. OFE hired a consultant to conduct an in-depth study, brought in early learning experts from around the country to present their research, and also organized visits to cities that have successfully launched universal

[2] Throughout this brief, the City will use "App." to refer to the Appendix to Appellants' Motion for Discretionary Review and "Supp. App." to refer to the Supplemental Appendix of Respondent City of Seattle.

preschool programs to learn best practices. *Id.*, ¶¶ 3, 5. OFE also engaged in broad community outreach, conducting focused workgroups and holding individualized meetings with over 80 organizations, including preschool providers, unions, educational coalitions, and others. *Id.*, ¶ 4.

### B. The City and Appellants meet to discuss the contents of the Preschool Plan and Appellants put forth I-107 in response.

Beginning in February 2014, the City held a series of meetings and discussions with "Kids First," a joint labor partnership of Service Employees International Union Local 925 ("SEIU 925") and American Federation of Teachers – Washington ("AFT-WA"). *See* App. 469, ¶¶ 2-3.[3] The goal of these meetings was for organized labor to provide input on the City's Preschool Plan so that the City could propose a broadly supported plan to voters in the fall. App. 470, ¶ 4.

On March 11, 2014, Appellants filed a petition form for I-107. App. 518. The initiative's subject is self-described as "early learning and child care." *Id.*, § 704. I-107 proposes requirements that would apply to, among others, any facilities participating in "a City-wide pre-school program," including "any program implementing the City's 'preschool for

[3] Kids First, SEIU 925, and AFT-WA are the primary members and funders of Appellant Yes for Early Success, which is the I-107 political committee. *See* http://www.yesforearlysuccess.com/fact-sheet/about-2/ (last visited Aug. 22, 2014). Indeed, SEIU 925 and AFT-WA are the only donors to Yes for Early Success to date. *See* Seattle Ethics and Elections Commission – Campaign Contributor List for Yes for Early Success, *available at* http://web6.seattle.gov/ethics/elections/poplist.aspx?cid=378&listtype=contributors (last visited Aug. 23, 2014).

all' initiative." *Id.*, § 601. To that end, I-107 provides a framework for teacher certification, training, professional development, and communications that would apply to any City preschool program. *Id.*, §§ 101-503. I-107 would require that the City hire a private "provider organization" to provide input on such matters through joint control of a new Early Care and Education Workforce Board and a new Professional Development Institute and through the sole ability to facilitate communications between preschool teachers and the City. *Id.* Teachers and staff would be required to obtain certification from the Professional Development Institute in order to "deliver services in the City's [preschool program]." *Id.*, § 501. The "provider organization" must have existed for more than five years, have already successfully "negotiated an agreement" increasing wages and benefits for child care teachers and staff, not be "dominated by advocates for employer or government interests," and offer controlling membership to teachers and staff. *Id.*, § 503. The uncontested evidence presented in the trial court was that SEIU 925 and Kids First are two of the few, if not the only, organizations that would qualify. *See* App. 471, ¶ 10. Further, I-107 sets requirements to address teacher compensation and affordability of early learning programs. App. 518, §§ 201, 301.

Once filed, I-107 provided the framework for Appellants' demands in their discussions with the City. Appellants made clear that if the City did not integrate similar provisions into its Preschool Plan, Appellants would move forward with placing I-107 on the ballot. App. 471, ¶ 9. Indeed, at the time, a spokesperson for the I-107 campaign stated that "the newly launched initiative push . . . will only be necessary if the City Council fails to develop a universal pre-k plan that teachers find adequate" and that the initiative "is about the future of early childcare in Seattle and who decides how it will work." App. 520. The I-107 campaign further emphasized: "The citizen initiative would also set training and other important standards through a Professional Development Institute to ensure the City Council's much anticipated Universal Pre-K program succeeds. . . . Yes for Early Success . . . is committed to making sure the City Council's program is a success for all of Seattle's children by supporting proposals that [include the Initiative's contents]." App. 526. In short, the campaign stated that the Initiative was about putting teachers and staff "at the table to design the new Universal Pre-K system." *Id.*

### C. Initiative 107's ballot title.

On March 26, 2014, Appellant Laura Chandler filed an appeal challenging the City Attorney's formulated ballot title for I-107. Supp. App. 385–90. Chandler requested that the subject of I-107 be changed to

"early learning and childcare"—the exact same language contained in the text of I-107 concerning its subject. Supp. App. 387. On April 2, 2014, the trial court ordered that I-107's statement of subject be "support and standards for early learning and child care." App. 648.

The sponsors proceeded to collect signatures in support of I-107 for presentation to the Council. App. 531. The City Clerk confirmed that the signatures were sufficient for presentation of I-107 to the Council pursuant to Seattle Charter Article IV, § 1.B. App. 534.

### D. The Council adopts its Preschool Plan as a different measure on the same subject as I-107.

On June 23, 2014, the Council met in full and open session. For over 77 minutes, it heard extensive public comment on I-107 and the Preschool Plan, including testimony from Appellants and other supporters of I-107, engaged in debate on the measures, and took several formal actions.[4] City Councilmembers actively debated the City Council's actions on I-107 vis-à-vis the Preschool Plan. *See, e.g., id.* (Councilmember Sawant at 35:13, Councilmember O'Brien at 44:06, Councilmember Licata at 45:09). Ultimately, pursuant to its powers under Charter Article IV, § 1.C, the Council rejected I-107 on a divided vote.

[4] Complete video of the Council meeting is available online. *See* Video of Full Council Meeting (June 23, 2014) 1:48-79:22, available at http://www.seattlechannel.org/videos/video.asp?ID=2021450. For public testimony by Appellants, see 5:15 (Karen Strickland, President of AFT-WA, a primary member of Yes for Early Success); 7:19 (Laura Chandler, sponsor of I-107).

App. 536. The Council then adopted Council Bill 118114—now Ordinance 124509—which submits to voters a proposed "comprehensive approach" to early learning (the Preschool Plan). App. 538–39. The Preschool Plan would establish a City-wide early learning program funded through a property tax levy. *Id.* It provides a framework for teacher certification, training, professional development, and communications. App. 539–43, §§ 1, 5–7, 10, App. 547. The Preschool Plan addresses teacher compensation and affordability of early learning programs. App. 560, 568. The Preschool Plan would give discretion to the City to develop such standards further and to adjust "[p]olicy, funding priorities and specific requirements" over time. App. 539–43, §§ 1, 8. Finally, the Preschool Plan would establish an Oversight Committee to monitor the preschool program and provide official recommendations. *Id.* § 7.

In rejecting I-107 and adopting the Preschool Plan, the Council stated it was proposing "an alternative measure dealing with the same subject" as I-107 pursuant to the discretion vested in the Council by Charter Article IV, § 1.C, and directed that both measures be placed "in conjunction" on the November 4, 2014 ballot "in accordance with applicable law." App. 578, §§ 2–5.

### E. The City Attorney formulates a new joint ballot title to comply with the RCW and receives relief from the trial court's prior ballot title order for I-107.

Pursuant to RCW 29A.36.071, which mandates that local ballot titles "must conform with the requirements and be displayed substantially as provided under RCW 29A.72.050," the City Attorney formulated a joint ballot title for the Preschool Plan and I-107 using the form required by RCW 29A.72.050(3) for "an initiative to the legislature for which the legislature has proposed an alternative." This joint ballot title requires a statement of subject that describes both measures which the City Attorney drafted as "early learning programs and providers of such services for children." The joint ballot title uses the 75-word concise description the trial court previously approved to describe I-107, with a separate concise description to describe the Preschool Plan.

The City sought relief from the trial court's prior ballot title order for I-107 so that it could employ the new joint statement of subject for both I-107 and the Council's alternative measure in accord with RCW 29A.72.050(3). *See* App. 449–63. Appellants opposed the City's motion and filed two new actions—a petition for writs alleging constitutional and OPMA violations and a challenge to the Preschool Plan's ballot title

language.[5] By agreement, the Superior Court consolidated the three actions for hearing on August 15, 2014. Superior Court Judge Helen Halpert heard argument, granted the City's motion for relief, and issued an opinion and order. App. 18–22.

## IV. ARGUMENT

Despite Appellants' attempts to obscure the issues, this case requires the Court to decide three questions: first, are the City Charter provisions relating to the initiative process subject to state law? Second, do RCW 29A.36.071 and RCW 29A.72.050 apply to the initiatives at issue? And, third, is the ballot title under RCW 29A.72.050(3) for "an initiative to the legislature for which the legislature has proposed an alternative" appropriate here? The answer to all three questions is "yes." Therefore, the City properly employed the joint ballot title form in RCW 29A.72.050(3).

Further, Appellants do not appeal the trial court's determination that the Preschool Plan is an alternative on the same subject as I-107 or that the City's subsequent open public meeting adopting the Preschool Plan and designating it as an alternative cured any potential violation of the OPMA. Appellants have waived those issues. Regardless, they are without merit. Finally, Appellants did not seek relief on their

[5] The ballot title language is not before this Court as the trial court's order on the language is not appealable. RCW 29A.36.090.

constitutional claims before the trial court. Indeed, such claims have no merit and to the extent any could be concocted they are not ripe for adjudication until after the election. The trial court properly dismissed all of Appellants' claims and ordered the City to follow the RCW ballot title form.

### A. Appellate review is appropriate.

Appellants are seeking discretionary review based on alleged probable error by the trial court. As demonstrated below, the trial court was correct and there was no error. Appellate review, however, is appropriate because the trial court issued final orders on all issues subject to appeal. The open claim related to the concise description of the Preschool Plan is not subject to appeal. RCW 29A.36.090. This Court should treat the discretionary review request as an "Incorrectly Designated Notice" under RAP 5.1(c). Moreover, had Appellants asked, the City would have stipulated that the trial court "order involves a controlling question of law" under RAP 2.3(b)(4).

### B. The City must use the joint ballot title form mandated by the legislature in RCW 29A.72.050(3).

#### 1. The Seattle Charter is subject to the general laws of the State of Washington.

The Constitution grants power directly to cities to enact charters for their own local government, but explicitly commands that such

charters "shall be subject to and controlled by general laws." Const. art. XI, § 10. The Washington Supreme Court has repeatedly held that where a charter's provisions are not in accord with state law, state law governs. *See, e.g. Martin v. Tollefson*, 24 Wn.2d 211, 217, 163 P.2d 594 (1945) (holding that a general law amended the election procedures provided in the charter of the City of Tacoma because "the overall, comprehensive grant to the cities to frame charters for their own government is limited by reserving to the legislature the right to control such charters by general laws").[6] This rule holds true even where the general law was enacted after the city charter provision in question. *See, e.g., Oakwood Co. v. Tacoma Mausoleum Ass'n*, 22 Wn.2d 692, 695–96, 157 P.2d 595 (1945) (general law enacted in 1943 controlled despite existing provision of the 1927 charter of the City of Tacoma); *Neils v. City of Seattle*, 185 Wash. 269, 274–75, 53 P.2d 848 (1936) (general law first enacted in 1903 superseded provision of the 1890 Seattle City Charter).

Appellants fail to distinguish the above authority and point to no other legal authority for this Court to ignore a statute that on its face

[6] *See also State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 582–83, 183 P.2d 813 (1947) ("We have held, in numerous cases, . . . that city charters are subject to the control of the general laws of the state. This interpretation is sound because of the specific provision of the constitution that all city charters shall be subject to and controlled by general laws."); *Hindman v. Boyd*, 42 Wash. 17, 29, 84 P. 609 (1906) ("It is the evident policy of the state Constitution that the charters of cities of the first class and amendments thereto shall be subject to the control of general laws. . . . The power is vested in the people to adopt their own charter, and also to amend it; but the matter is subject to the control of general laws.").

regulates local initiatives simply because the local initiative process predated the state statute. *Hartig v. Seattle*, 53 Wash. 432, 102 P. 408 (1909), does not support Appellants' argument that the initiative and referendum powers outlined in the Seattle City Charter are not subject to the general laws of the state. In *Hartig*, the Supreme Court upheld the initiative and referendum amendment to the Seattle Charter, holding that it did not conflict with a general law vesting the legislative powers of cities in a mayor and city council. Thus, *Hartig* does not stand for the proposition that Seattle's initiative and referendum powers are exempt from the Constitution's mandate that city charters shall be subject to and controlled by general laws; the Court simply found no conflict with the then-existing general laws.

**2. RCW 29A.36.071 and 29A.72.050(3) require the use of a joint ballot title for I-107 and the Preschool Plan.**

The state legislature has passed a general law governing the form of ballot title for local measures. *See* RCW 29A.36.071. The requirements of RCW 29A.36.071 are clear, unambiguous, and mandatory: the statute requires, *inter alia*, that ballot titles for local government measures "**must** conform with the requirements and be displayed substantially as provided under RCW 29A.72.050" (emphasis added). Appellants cannot dispute that the plain language of the statute

applies to the initiatives at issue or that the statute uses mandatory language.

RCW 29A.72.050 specifies the form of ballot title for state initiatives and referendums; through incorporation by reference in RCW 29A.36.071 its forms are mandatory for local measures. *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 48–49, 272 P.3d 227 (2012) (Washington law imposes certain "procedural requirements for initiatives," including "a ballot title form that local initiatives are to follow"); *see also Knowles v. Holly*, 82 Wn.2d 694, 700–01, 513 P.2d 18 (1973) (where one statute is incorporated by reference, the "precepts and terms to which reference is made are to be considered and treated as if they were incorporated into and made a part of the referring act, just as completely as if they had been explicitly written therein"). The only remaining question then is which ballot title form applies in this case.

The only initiative procedure provided under Seattle's Charter is substantially the same as the procedure for state initiatives to the legislature. The State Constitution creates two forms of state initiative. Const. art. II, § 1. The first is an initiative directly to the people, whereby an initiative is circulated for signature and if the requisite number of signatures is obtained, the initiative goes directly to a vote by the people without any action by the legislature. *Id.* The second is an initiative that

goes to the legislature. *Id.* There, an initiative is circulated for signature and if the requisite number of signatures is obtained, the initiative is presented to the legislature. *Id.* The legislature then has the option to 1) adopt the initiative as law; 2) adopt the initiative and refer it to a vote; 3) reject the initiative in which case the initiative is sent to the people for a vote; or 4) reject the initiative and propose a different one dealing with the same subject, in which case both alternatives go to the people. *Id.*

The City initiative process is most analogous to the state initiative to the legislature. The City's legislative powers are vested in the Mayor and City Council. RCW 35.22.200; Charter, art. IV, § 1.A. The Charter provides that all initiatives receiving sufficient signatures must be forwarded to the City Council. Once forwarded, the Council must take one of three actions: 1) it may adopt the initiative and enact it into law; 2) it may reject the initiative, which has the effect of placing the initiative on the ballot to be voted on by the people; or 3) it may reject the initiative and propose a different measure on the same subject as an alternative and both measures are placed on the ballot together. Charter, art. IV, §§ 1.B, 1.C. Seattle's Charter provides no mechanism for an initiative directly to the people; all City initiatives always go before the City's legislative body before they can be placed upon the ballot. The City Council has the almost identical options that the State Legislature does under the initiative

to the legislature process. Here, the City Council chose to reject I-107 and propose an alternative. Under the statutory scheme, then, the required form of ballot title is that for "an initiative to the legislature for which the legislature has proposed an alternative." RCW 29A.72.050(3). Appellants' argument that the Seattle initiative process is more analogous to the state initiative processes for initiatives to the people or for initiatives to the legislature where the legislature has not proposed an alternative is simply wrong.

Appellants' citations to RCW 35.17.260 and 35A.11.100 are irrelevant. These provisions regulate the initiative procedures for non-charter code cities where there is no option for the legislative body to reject an initiative and propose a different measure on the same subject. The statutes have no application to charter cities such as Seattle.

Further, Appellants' claim that the use of the term "a question" in 29A.36.071 precludes use of the joint ballot title form also fails. The joint ballot specified by the legislature is in the form of a question. "A" does not only mean "one" as urged by Appellants. Indeed, the same language is used in RCW 29A.72.050(1), which requires that the ballot title for an initiative to the State Legislature contain "a question," but then goes on to specify that the proper ballot title where the legislature has proposed an alternative is the joint ballot title in RCW 29A.72.050(3).

Finally, Appellants' argument that the Legislature was required to express its intent to preempt the initiative process contained in the Seattle Charter when it passed RCW 29A.36.071 completely misses the mark. Under the State Constitution, all the provisions of a city's charter are always subject to the State's general laws: "Any city containing a population of ten thousand inhabitants, or more, shall be permitted to frame a charter for its own government, **consistent with and subject to the Constitution and laws of this state**." Const. art. XI, § 10 (emphasis added). Here, the Legislature acted clearly to regulate the form of ballot titles for "any . . . question submitted to the voters of a local government." RCW 29A.36.071. Accordingly, the Legislature need not communicate any particular additional intent to preempt Seattle's initiative procedures, express or otherwise, in order for RCW 29A.36.071 to control.

*Brown v. City of Yakima*, cited by Appellants, is wholly inapposite. 116 Wn.2d 556, 807 P.2d 353 (1991). In *Brown*, the question was whether the City, under the broad police powers granted to it by Article XI, § 11 of the Constitution, could pass an ordinance more restrictive than the state statute regulating fireworks sales and use. The language of Article XI, § 11, concerning the grant of police powers, is different from Article XI, § 10, concerning the incorporation of cities. It allows municipalities to enact ordinances pursuant to the police power as long as

they "are not **in conflict with** general laws." Const. art. XI, § 11 (emphasis added). Thus, the outcome of the case depended upon a conflict analysis: whether or not the state statute was intended to be exclusive, preventing the City from passing any ordinance on the matter. Here, preemption is simply not an issue because the question is not whether a City ordinance conflicts with a general law, but whether the general laws govern Seattle's initiative procedures in the City Charter. Article XI, § 10 is the applicable constitutional provision, not Article XI, § 11. Regardless, the language in *Brown*, establishing "minimum standards" and contemplating "local rules . . . that are more restrictive," is substantively different from the language in RCW 29A.36.071. In the latter, the scope of the Legislature's enactment includes "any . . . question submitted to the voters of a local government" which leaves no room for local regulation of the form of ballot title.

Appellants' argument based on the exemption contained in RCW 29A.36.071(3), which provides that the ballot title forms do "not apply if another provision of law specifies the ballot title for a specific type of ballot question or proposition," is similarly misplaced. Consistent with RCW 29A.36.071 when read as a whole, "another provision of law" references other **state** laws such as RCW 29A.36.210(2) ("The ballot proposition authorizing a taxing district to impose a permanent regular tax

levy under RCW 84.52.069 must contain in substance the following . . .") and RCW 35.61.030(3) ("The proposition shall include the following terms . . ."). The provision cannot be read to create a loophole to exempt all local initiatives from state regulation. Accordingly, the joint ballot title form in RCW 29A.72.050(3) must be used.

### 3. I-107 and the Preschool Plan are different measures on the same subject.

The Preschool Plan is a different measure on the same subject as I-107. The Seattle Charter provides that the City Council may reject an initiative and propose an alternative measure "dealing with the **same subject**." Charter, art. IV, § 1.D (emphasis added). Here, the trial court determined that I-107 and the Preschool Plan "address the same subject." App. 27. Appellants do not challenge this ruling and therefore the trial court's determination must stand.[7]

Appellants confine their argument to the separate question whether the City Council's determination that both measures were on the same subject was *ultra vires*. That determination is plainly allowed by the Charter: "The City Council may enact, or reject, any initiative bill or measure, but shall not amend or modify the same. It may, however, after

[7] Appellants may not challenge the trial court's finding that the measures are on the same subject in their Reply brief. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); RAP 10.3(c).

rejection of any initiative bill or measure, propose and pass a different one dealing with the same subject." Charter, art. IV, § 1.C. The Council exercised its discretion under the Charter to reject I-107 and propose the Preschool Plan as an alternative. It entered a finding, as it was required to do in order to place both I-107 and the Preschool Plan before the voters, that the Preschool Plan deals with the same subject as I-107. App. 577–79. The Council's finding that the Preschool Plan was a different measure on the same subject as I-107 was not *ultra vires*. *See, e.g., Washington State Farm Bureau Fed'n v. Reed*, 154 Wn.2d 668, 675, 115 P.3d 301 (2005) (legislative declarations of emergency that render laws immune from referendum are legislative decisions upheld by courts unless "obviously false").[8]

Appellants' argument regarding the separate finding by the Council that I-107 and the Preschool Plan conflict in particular parts has no place here. The trial court decided that the joint ballot title was required because the two measures were on the same subject, a

[8] Regardless, I-107 and the Preschool Plan both have as their primary subject early learning. The measures set forth different approaches to teacher certification, teacher training, teacher compensation, communications between teachers and the City, affordability of early learning programs, and control over program standards and requirements. *See* App. 456–59.

determination not appealed, not because the two measures conflicted in any particular.[9]

Additionally, the cases cited here by Appellants are not relevant. In *Eyman v. McGehee*, a city clerk refused to transmit an initiative petition to the county auditor for determination of sufficiency because the initiative was beyond the initiative powers stated in Title 35A RCW. 173 Wn. App. 684, 691–92, 294 P.3d 847 (2013). The court held that the determination of whether an initiative fell within the initiative power, i.e., the validity of the initiative, was "exclusively a judicial function." *Id.* at 692. *Filo Foods LLC v. City of SeaTac* dealt with the constitutionality of a state law requiring that a city strike all signatures, including the original, of each person who signs a petition two or more times, and has no bearing on this case. 179 Wn. App. 401, 319 P.3d 817 (2014). And *City of Tacoma v. O'Brien* stands only for the proposition that legislatures cannot serve an adjudicatory function. 85 Wn.2d 266, 273, 534 P.2d 114 (1975). None of those situations is present here, where the Council made no determination

[9] Regardless, the measures do conflict in the areas of overlap described above. Thus, even under Appellants' reading of the Charter the ultimate outcome will be the same. Under the Charter, if the two measures conflict "in any particular," only one measure will be adopted—the measure "receiving the highest number of affirmative votes"—and the other rejected. Charter, art. IV, § 1.G. The RCW's joint ballot title form informs voters of their choice and allows voters to express their intent regarding which of the alternative measures they prefer at the ballot box.

on the validity of I-107 or its qualification for the ballot, and its action was one the City Charter explicitly vests in the Council.

### C. The trial court properly denied Appellants' claim of an OPMA violation.

Appellants mischaracterize the trial court's holding denying their OPMA claim. The trial court found on the merits of the claim that even had there been a violation of the OPMA (a question the Court did not decide), "the subsequent public vote and public discussion **cured any violation**." App. 27 (emphasis added). Appellants do not challenge this finding of cure and therefore waive their right to appeal it. *See Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5 (a). Regardless, the trial court's denial of the OPMA violation claim accords with the facts and the law.

The OPMA allows the City Council to hold an executive session, *inter alia*, "to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party," and defines "potential litigation" to include "[l]itigation that the agency **reasonably believes** may be commenced by or against the agency, the governing body, or a member acting in an official capacity." RCW 42.30.110(1)(i) (emphasis added). In this instance, the City Council held

executive sessions in order to seek and receive legal advice regarding I-107's requirements and the Initiative's legal impact vis-à-vis the City's Preschool Plan, including a legal analysis of potential conflicts between the two measures and I-107's requirements in light of collective bargaining laws. *See* Supp. App. 90, ¶ 3. Appellants point to no evidence that any policy matters were discussed or actions taken during these executive sessions. Nor could they as no such discussions or votes were taken by Councilmembers. *Id.*, ¶ 4.

Even had any policy matters been discussed or actions taken during the executive sessions (which the City denies), "the statute does not . . . require that **subsequent** actions taken in compliance with the Act are also invalidated." *Org. to Pres. Agric. Lands v. Adams County* ("*OPAL*"), 128 Wn.2d 869, 883, 913 P.2d 793 (1996) (emphasis added). In *OPAL*, the Supreme Court held that the discussions among the county commissioners in private about how they would vote on an issue at an upcoming meeting "were irrelevant because the final vote occurred in a proper, open public meeting." *Id.* at 883–84. That is exactly what the trial court ruled here.

The City Council met on June 23, 2014, in full and open session. For over 77 minutes, it heard extensive public comment on I-107 and the Preschool Plan, engaged in debate on the measures and took several

formal actions. *See supra*, n.4. Indeed, Appellants themselves provided public testimony on these issues. *Id.* at 5:15 (Karen Strickland, President of AFT-WA, a primary member of Yes for Early Success); 7:19 (Laura Chandler, sponsor of I-107). Further, City Councilmembers actively debated the City Council's actions on I-107 vis-à-vis the Preschool Plan. *See, e.g., id.* (Councilmember Sawant at 35:13, Councilmember O'Brien at 44:06, Councilmember Licata at 45:09). The City Council's statement of intent in regard to rejection of I-107 and putting forth the Preschool Plan as an alternative measure was discussed at length and three council members voted no.[10] *Id.* at 45:50. As the trial court correctly ruled, the City Council cured any alleged OPMA violation when it heard extensive public testimony, debated the issue on the record, and voted to take actions related to I-107 and the Preschool Plan at the June 23rd meeting. *Eugster v. City of Spokane*, 118 Wn. App. 383, 423, 76 P.3d 741 (2003), *review denied*, 151 Wn.2d 1027 (2004) (holding subsequent action at open meeting cures prior potential OPMA violations).

### D. Appellants' remaining causes of action, including their constitutional claims, were properly dismissed.

Appellants continue to argue the merits of their constitutional and other claims without asking for relief in an attempt to improperly color

[10] This statement of intent is at App. 536. Resolution 31530 passed on a split 8–1 vote. App. 577.

this Court's review of the issues. The trial court's dismissal of Appellants' constitutional claims and remaining arguments was proper. First, these claims are not yet ripe for review. Courts in Washington "refrain from inquiring into the validity of a proposed law, including an initiative or referendum, until it has been enacted." *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005); *see also State ex rel. O'Connell v. Kramer*, 73 Wn.2d 85, 87, 436 P.2d 786 (1968) ("[W]e cannot pass on the constitutionality of proposed legislation, whether by bills introduced in the House or Senate, or measures proposed as initiatives, until the legislative process is complete and the bill or measure has been enacted into law. Then, and then only, can the constitutional issue now urged upon us be properly considered."). Appellants' claims do not fall within the narrow exception allowing for pre-election review of proposed initiatives to determine whether they fall within the scope of the initiative power. *See Philadelphia II v. Gregoire*, 128 Wn.2d 707, 717, 911 P.2d 389 (1996). Because no measure has yet been enacted into law, this Court should decline to address Appellants' claims. *See Coppernoll*, 155 Wn.2d at 298 (substantive pre-election review "involves issuing an advisory opinion, violates ripeness requirements, undermines the policy of avoiding unnecessary constitutional questions, and constitutes unwarranted judicial interference with a legislative process").

Second, Appellants have not demonstrated that the City's efforts to comply with the state ballot title laws would deprive voters of their constitutional rights. Appellants' allegations that the use of the RCW joint ballot form imposes a "severe restriction" on petitioning, speech, and voting rights ignores that the First Amendment is not implicated by laws that determine the process by which legislation is enacted. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098–1101 (10th Cir. 2006) (holding state law requirement that initiative measures that relate to wildlife management must receive a two-thirds supermajority vote does not implicate the First Amendment). "Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise." *Id.* at 1099. "The distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Id.*; *see also Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1211 (10th Cir. 2002) (holding that "the right to free speech and the right to vote are not implicated by the state's creation of an initiative procedure, but only by the state's attempts to regulate speech associated with an initiative procedure, which is not the case here"); *Campbell v. Buckley*, 11 F. Supp. 2d 1260 (D. Colo. 1998)

(state single-subject requirement for initiatives did not violate First Amendment). This is true even if the election regulation may make some political outcomes less likely than others. *Initiative & Referendum Inst.*, 450 F.3d at 1100–01. Here, Appellants' abilities to make their views heard on I-107 are in no way burdened. The First Amendment is not implicated.

Nor can Appellants sustain their "vote stripping" arguments because under the RCW's joint ballot title procedures, all eligible voters will be able to vote on the measures and all votes will be counted equally. Indeed, if requiring voters to choose between an initiative and a conflicting legislative alternative constitutes an equal protection violation, then the Seattle City Charter, RCW 29A.72.050, and Article II, § 1 of Washington's constitution are all unconstitutional—something that Appellants have not alleged and cannot argue without joining the State's Attorney General in this action. *See* RCW 7.24.110. Furthermore, the right to bring an initiative is not a fundamental right under the U.S. Constitution that implicates the Equal Protection Clause. *See Save Palisade FruitLands*, 279 F.3d at 1210–11 (holding law that provides the initiative power to some counties but not others does not violate the Equal Protection Clause).

Third, Appellants' "levy lid lift" argument is unsupported by citation to any case law, and if accepted would render invalid all alternative measures raising taxes proposed by the legislature and adopted by voters. In both votes under the alternative ballot language, each question receives a majority vote up or down. *See League of Educ. Voters v. State*, 176 Wn.2d 808, 823, 295 P.3d 743 (2013) ("The language and history of the constitution evince a principle favoring a simple majority vote for legislation."). Indeed, past legislative alternatives—despite employing the joint ballot title form for presentation to the electorate—have contained tax provisions, further negating Appellants' argument that the joint form precludes the establishment of majority approval. *Cf. Kreidler v. Eikenberry*, 111 Wn.2d 828, 830, 766 P.2d 438 (1989) (initiative and legislative alternative containing tax provisions). Appellants' argument that majorities will not decide the questions in the joint ballot was properly rejected by the trial court.

Fourth, Appellants' argument that the trial court could not find, in the context of ruling on a CR 60 motion, that RCW 29A.72.050 applies defies logic and must be rejected. In order to change I-107's statement of subject, the City properly returned to the trial court that set the statement and requested relief under Rule 60(b). To rule on the City's CR 60 motion, the Court necessarily had to consider whether RCW 29A.72.050

applies because required compliance with the RCW's joint ballot title form following the Council's proposal of an alternative measure was the change in circumstances upon which the City's argument for relief was based. *See* App. 460. Regardless, Appellants' newly-filed case No. 14-2-21112-1, which was consolidated for argument and decision, clearly raised the joint ballot title issues decided by the Court.

Fifth, Appellants' claim that the trial court was barred from altering the ballot title for I-107 after voters signed the petition bearing the title is similarly illogical and furthermore is unsupported by any citation to case law. If followed to its logical conclusion, Appellants' argument would in effect make it impossible for the State Legislature ever to propose an alternative measure for presentation to the voters and would nullify RCW 29A.72.050(3) because a joint statement of subject could never replace the original statement of subject used to obtain sufficient signatures for presentation of an initiative to the legislature in the first instance. Again, Appellants have not challenged the validity of the Constitutional procedure, RCW 29A.36.071 or RCW 29A.72.050 here. Appellants' claim must therefore be denied.

## V. CONCLUSION

The City, including its Charter, must follow the general laws related to local ballot title forms Under the City Charter, once the City

Council rejects an initiative and proposes a different measure on the same subject, the joint ballot title form in RCW 29A.72.050(3) applies. Here, the City Council rejected I-107 and proposed its own Preschool Plan as a different measure on the same subject of early learning. Indeed, the two measures offer alternative approaches to many aspects of early learning. Accordingly, the City must use the joint ballot title form. This Court should affirm the trial court.

RESPECTFULLY SUBMITTED this 25th day of August, 2014.

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## CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 25th day of August, 2014 I caused the original to be filed with the Court of Appeals and a true and correct copy of the foregoing document to be served upon the following pursuant to the electronic service agreement:

| | |
|---|---|
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of August, 2014.

Katie Dillon