ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 91551-2

(Court of Appeals No. 31887-7-III)

ENVISION SPOKANE,

Appellant,

v.

SPOKANE ENTREPRENEURIAL CENTER, SPOKANE COUNTY, DOWNTOWN SPOKANE PARTNERSHIP, GREATER SPOKANE INCORPORATED, THE SPOKANE BUILDING OWNERS AND MANAGERS ASSOCIATION, SPOKANE ASSOCIATION OF REALTORS, THE SPOKANE HOME BUILDERS ASSOCIATION, THE INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, AVISTA CORPORATION, PEARSON PACKAGING SYSTEMS, WILLIAM BUTLER, NEIL MULLER, STEVE SALVATORI, NANCY MCLAUGHLIN, MICHAEL ALLEN, AND TOM POWER,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION AND IDENTITY OF PETITIONERS

The Petitioners seeking discretionary review, under RAP 13.4(a), of the Court of Appeals' decision in *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, No. 31887-7-III, 2015 WL 410344 (Jan. 29, 2015) (unpublished) ("Opinion"),[1] are a coalition of Spokane voters, elected officials, non-profit corporations, local businesses, and Spokane County.[2] Together, these Petitioners brought a pre-election challenge to a local initiative. The Superior Court found Petitioners had standing under the Uniform Declaratory Judgment Act ("UDJA") to pursue their pre-election challenge, and invalidated the initiative because it exceeds the scope of the local initiative power. The Court of Appeals reversed on standing grounds, without reaching the merits of the initiative sponsors' appeal. This Court should accept discretionary review of the Opinion under RAP 13.4(b)(1), (2), and (4) for the following reasons:[3]

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[1] Petitioners attach as Appendix A to this Petition a true and correct copy of the Opinion in this matter along with the Court of Appeals' Order Denying Motion to Publish (filed March 3, 2015) and Order Denying Motion for Reconsideration (filed March 10, 2015). RAP 13.4(c)(9).

[2] The case caption contains a complete list of Petitioners. Petitioners base this Petition on the facts in the record that existed at the time the trial court entered declaratory judgment.

[3] RAP 13.4(b)(3) applies when a Court of Appeals decision raises significant questions of Washington or federal constitutional law. Although that rule does not apply to the Opinion here, the underlying merits of the case involve substantial issues of First Amendment law, as well as other Constitutional rights. *See infra* Part V.C; App. C.

First, the heightened test for standing under the UDJA that the Court of Appeals adopted in the Opinion—requiring Petitioners to show they are "clearly" at the "center of the zone of interest" and suffered immediate harm—conflicts with multiple decisions of the Supreme Court and Court of Appeals. RAP 13.4(b)(1)-(2). These decisions include: *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (defining a two-part test for standing in a declaratory judgment action); *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 46, 272 P.3d 227 (2012) (applying same two-part test to a private party's pre-election challenge to local initiative); and *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 260 P.3d 245 (2011) (same).

Second, the Court's holding that Petitioners could not invoke the public importance exception to standing because the initiative at issue would not apply outside of Spokane and had not yet become law conflicts with multiple decisions of this Court and the Court of Appeals. RAP 13.4(b)(1)-(2). These decisions include *Washington Natural Gas Co. v. Public Utility District No. 1 of Snohomish County*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969), and many of its progeny, such as *American Traffic*, 163 Wn. App. 427, and *City of Longview v. Wallin*, 174 Wn. App. 763, 783, 301 P.3d 45, *review denied*, 178 Wn.2d 1020, 312 P.3d 650 (2013).

Third, both of these holdings and the underlying initiative involve issues of substantial public interest. RAP 13.4(b)(4). The Court's revision of the UDJA and public importance standing tests based on the subject of the case and parties before it creates a split within the Court of Appeals. Litigants will face uncertainty as to whether other courts may further deviate from previously settled standing principles. In addition, the underlying initiative would impact the lives and Constitutional rights of hundreds of thousands of people across Washington and Idaho.

II. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' new and heightened test for standing under the UDJA conflict with Supreme Court and Court of Appeals precedent, meriting review under RAP 13.4(b)(1)-(2)?

2. Does the Court's significant narrowing of the public importance exception to Washington's settled standing doctrine conflict with Supreme Court and Court of Appeals precedent, warranting discretionary review under RAP 13.4(b)(1)-(2)?

3. Does the Court's Opinion involve issues of substantial public interest under RAP 13.4(b)(4), given the Court adopted a new and heightened test for standing under the UDJA and narrowed the public importance exception to standing?

III. STATEMENT OF THE CASE

The Petitioners in this case filed a pre-election suit seeking a declaratory judgment that a proposed initiative exceeded the scope of the local initiative power. The Spokane County Superior Court held: (1) Petitioners had standing under the UDJA because the suit contained a justiciable controversy and Petitioners were "within the zone of interests the initiative seeks to regulate and have demonstrated sufficient injury"; and (2) the initiative exceeded the local initiative power because its provisions would infringe on the city's administrative powers, interfere with federal or state laws, and/or modify or remove constitutional rights and obligations. App. B at 6-8, 14.[4]

The initiative sponsor, Envision Spokane, appealed. Although Envision conceded on appeal that Petitioners had standing under the UDJA, the Court of Appeals, *sua sponte*, held Petitioners did not. Op. at 1, 6. The Court concluded: (1) Petitioners were "***not so clearly situated*** in the ***center*** of the zone of interests, nor as certainly to suffer ***immediate harm*** from the adoption of the initiative" to have standing under the UDJA, Op. at 16-17 (emphasis added); *see also id.* at 11-12 (refusing to

[4] Petitioners attach as Appendix B to this Petition a true and correct copy of the transcript of the oral decision of the Spokane County Superior Court in this matter and its Order Granting Plaintiff's Motion for Declaratory Judgment. RAP 13.4(c)(9).

apply this Court's test for standing under the UDJA); and (2) the public importance exception to standing did not apply, *id.* at 15-16.[5]

IV. ARGUMENT

A. The Court Rejected Precedent and Imposed a New and More Burdensome Standing Test Under the UDJA

In the Opinion, the Court of Appeals departed from settled law and announced a new and ambiguous standing rule for private parties seeking pre-election declaratory judgments concerning whether a proposed initiative exceeds the scope of the local initiative power. Specifically, the Court stated a private party bringing a pre-election challenge to a local initiative "must establish both that it is in the ***center*** of the zone of interests affected by the initiative ***and*** that the certainty of ***immediate specific harm*** to that party is such that a post-election lawsuit is not a practical remedy for the party." Op. at 17 (first emphasis and bolded emphasis added).[6]

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[5] That the Court of Appeals did not publish its decision does not matter. This Court regularly accepts review of unpublished Court of Appeals opinions. *See, e.g.*, *State v. Deskins*, 180 Wn.2d 68, 76, 322 P.3d 780 (2014); *Jones v. City of Seattle*, 179 Wn.2d 322, 326, 314 P.3d 380 (2013); *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *Preview Props., Inc. v. Landis*, 161 Wn.2d 383, 389, 165 P.3d 1 (2007). Nor does the Court of Appeals' decision not to publish its Opinion diminish the public importance of the standing tests the Court announced, or the substance of the underlying initiative. *See* Part IV.C, *infra*.

[6] The Court stated this test in various, equally burdensome and unsupported ways, rendering the test ambiguous. *See* Op. at 16-17

The Court correctly quoted this Court's UDJA standing rules, but then declined to apply them because, in its view, "more should be required" from plaintiffs "in the context of a pre-election challenge." *Id.* at 11. In doing so, not only did the Court depart from the traditional declaratory judgment standing analysis, but also it imposed a "heightened" standing requirement in pre-election challenges brought by private parties to local initiatives. *Id.* at 6. These rulings conflict with controlling authority from this Court and the Court of Appeals.

1. The Opinion's New and Heightened Standing Test Conflicts with Decisions of this Court

As the Court of Appeals recognized, this Court has repeatedly used a clear, two-part test to determine when a party may sue for declaratory judgment. First, the party must show that the "interest sought to be protected is '***arguably*** within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Grant Cnty.*, 150 Wn.2d at 802 (emphasis added) (quoting *Save a Valuable Env't*

(holding Petitioners "were not so ***clearly*** situated in the center of the zone of interests, nor as ***certainly*** to suffer immediate harm from adoption of the initiative, that they have demonstrated standing to pursue this action") (emphasis added); *id.* at 18-19 ("There needed to be a showing that the respondents would ***truly*** be affected by the initiative and that the harm from the initiative would require ***immediate court intervention***.") (emphasis added). Even if the Court's new test followed Washington law (and it does not), the Court's varying articulations of the test will cause confusion and uncertainty absent Supreme Court review.

v. City of Bothell, 89 Wn.2d 862, 866, 576 P.2d 401 (1978)). Second, the party must show an "injury in fact, economic or otherwise." *Id.* Washington courts have applied this standard to a wide range of cases, none of which support the proposition that the subject matter or party of the case changes the standing test under the UDJA.

In fact, the Court of Appeals appropriately acknowledged that, "[l]iberally construed, the fact that both Spokane County and Avista use the Spokane River might 'arguably' put them 'within the zone of interests' of the Environmental Rights provision since it addresses the same river." Op. at 11. Yet it rejected this Court's well-established test and instead, adopted a more burdensome rule because it believed "[t]he initiative must . . . more directly relate" to the Petitioners' interest. *Id.* at 12. The Court of Appeals may not simply replace the long-settled "arguably within the zone of interests" test, *see, e.g.*, *Grant Cnty.*, 150 Wn.2d at 802, with its own heightened standard of "***clearly situated*** in the ***center*** of the zone of interests," Op. at 16 (emphasis added). Nor may it revise this Court's "injury in fact" prong, *see, e.g.*, *Grant Cnty.*, 150 Wn.2d at 802, by adding a requirement that the injury be "clear" or "immediate," Op. at 17, 19. Rather, this Court's statements about what the law is constrain the Court of Appeals' opinion about what the law should be.

In addition, the Court used its newly created and heightened

standard for showing "zone of interests" and "injury" to reach a conclusion that conflicts with decisions in which this Court held that private plaintiffs had standing under the UDJA to bring pre-election initiative challenges. In *Grant County*, for instance, plaintiffs challenged the method for annexation of non-incorporated land into existing municipal entities. 150 Wn.2d at 797-98. This Court held plaintiffs had established standing under the UDJA, even though the only "injury in fact" was the possibility that residents of those areas might "face different tax rates following annexation." *Id.* at 803.

Similarly, in *Washington Association for Substance Abuse & Violence Prevention v. State* ("*WASAVP*"), this Court held a private association had standing to bring a post-election challenge to the constitutionality of a statewide initiative permitting private liquor sales in Washington. 174 Wn.2d 642, 653, 278 P.3d 632 (2012). In doing so, this Court again applied the generous standing requirements under the UDJA, reasoning: "WASAVP's goal of preventing substance abuse and violence places it within the zone of interests of I–1183, which broadly impacts the State's regulation of alcohol. . . . [WASAVP's] goals of preventing substance abuse could reasonably be impacted by I–1183's restructuring of Washington's regulation of liquor . . . [and] the increase in liquor availability would injure WASAVP's goals." *Id.* at 653-54.

The interests of the plaintiffs in both *Grant County* and *WASAVP* were more attenuated, and the harm more speculative, than here. The residents in *Grant County* would be harmed only if the municipalities subsequently determined and enforced an increased level of taxation, and in *WASAVP*, even though the law had passed, the association's harm turned on as-yet-unproven assertions that privatized liquor sales would increase the availability of alcohol and the rate of substance abuse. Even though the plaintiffs in both cases had not yet suffered harm at the time of suit, the Court still found plaintiffs had established standing.

Despite these decisions, the Court here held that, "[u]ntil the initiative passes, any harm to the respondents is necessarily speculative, and would be dependent upon someone trying to use the initiative against them." Op. at 13. The Court so concluded even though Petitioners showed the initiative would impair their First Amendment rights, and would subject them to new regulations that would affect their rights and impair their current projects. CP 227-29. The Court's holding contradicts *Grant County* and *WASAVP*, in which this Court permitted declaratory judgment actions seeking to prevent harm from the ***future*** application of a law. *See, e.g.*, *Grant Cnty.*, 150 Wn.2d at 802-03 ("the property owners satisfy the requirements of actual injury for the 'injury in fact' test because they face different tax rates following annexation"); *WASAVP*, 174 Wn.2d

at 653-54 (private organization had standing because enacted initiative could impact organization's goals).

The Court of Appeals' new and heightened standing test for private parties in pre-election suits also conflicts with at least four decisions in which this Court reached the merits of declaratory judgment actions in pre-election suits filed by private parties. *See Mukilteo Citizens*, 174 Wn.2d 41; *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 170-71, 149 P.3d 616 (2006); *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 620 P.2d 82 (1980); *Ford v. Logan*, 79 Wn.2d 147, 483 P.2d 1247 (1971). None of these decisions applied the standing requirements announced in the Opinion, or even suggested that a heightened test would be appropriate in private party pre-election lawsuits.

The Court of Appeals analyzed only one of these decisions in the Opinion, the *Mukilteo Citizens* decision. Op. at 13-14. The Court correctly noted that in *Mukilteo Citizens*, this Court held the plaintiff had associational standing on behalf of its members because the association "consists of Mukilteo residents who are eligible to vote." *Id.* at 14 (quoting *Mukilteo Citizens*, 174 Wn.2d at 46). But the Court of Appeals disregarded this statement because it did "not believe" this Court was "conferring standing to challenge an initiative on any person who could vote on the initiative." Op. at 14.

This Court's statement concerning standing was essential to its holding, however, and therefore is not dicta that a lower court can choose to "believe" or ignore. *See Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001) (defining dicta as statements "not essential to our disposition of any of the issues contested in" the case). Absent personal standing, associational standing is impossible. *Mukilteo Citizens*, 174 Wn.2d at 46. This Court provided only one reason for its conclusion that the association had standing to pursue a pre-election challenge: the association consisted of eligible voters. *Id.*[7]

The briefing in *Mukilteo Citizens* makes clear that the parties raised standing before this Court. In their reply brief, the private plaintiffs devoted over four pages to showing they met every element of the UDJA's standing test and the public interest exception. *See* Appellant's Reply Brief, *Mukilteo Citizens v. City of Mukilteo*, 2010 WL 6234480, at *5-9 (Wash. Aug. 25, 2010) (arguing the private group met the zone of interests test because it wished to ensure that "its elected representatives . . . do not act unlawfully" and "there is a strong public interest in determining whether the Initiative is outside the scope of the local initiative power").

[7] The Court of Appeals appears to have implicitly invited this Court to expand on its reasoning in *Mukilteo*, stating "[i]f the court meant more [by its standing analysis than that the association had standing because its members had standing], it will undoubtedly develop its reasoning in terms of individual standing in a future case." Op. at 14.

With the issue squarely before it, this Court held the private association (with lesser interests than Petitioners here, who showed the initiative would subject them to new regulations and requirements that would impair their current businesses and functions, CP 225-26) had standing to challenge a local initiative, pre-election. The Court of Appeals' Opinion casts aside this precedent and imposes a different rule that creates a contrary result.[8]

This Court has also reached the merits of declaratory judgment actions filed by private plaintiffs challenging local initiatives in three other instances. *See Seattle Bldg.*, 94 Wn.2d at 750 (affirming declaratory judgment for private group invalidating initiative as beyond the scope of the local initiative power); *Ford*, 79 Wn.2d at 157 (same regarding a King County initiative). *See also 1000 Friends*, 159 Wn.2d at 170 (same in a

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[8] If this Court had applied the standing test announced in the Opinion, the *Mukilteo Citizens* plaintiffs would have failed the test. The members of the plaintiff group were simply "Mukilteo residents," without any particular connection to the traffic cameras at issue in the case. 174 Wn.2d at 45. Further, their only claimed injury was the possibility that their elected representatives would "act unlawfully, ... in an inefficient manner, ... outside their authority," and through an unlawful delegation of their authority. 2010 WL 6234480, at *5. As such, their injury was generalized and speculative, and far more remote than the harms facing Respondents. *See* CP 227-29 (Envision initiative would impair Petitioners' First Amendment free speech rights, as well as current projects and rights permitted under present regulations that the initiative would amend).

suit a private group and King County jointly prosecuted).

In *Seattle Building*, for example, the City argued the private association plaintiff lacked standing to challenge a proposed local initiative pre-election. It claimed any injury the association's members suffered as taxpayers was not sufficiently burdensome, and plaintiff could not show any particular pre-election injury. App. C at 3.[9] In response, the association cited *Ford* and argued the availability of a pre-election injunction "is so well established as to be beyond challenge." *Id.* at 12-13. It also argued the Court should affirm the declaratory judgment for the association, noting the interest in judicial economy. *Id.* at 11-12.

In four cases, this Court has reached the merits of pre-election challenges to local initiatives brought by private parties. When the parties litigated standing, this Court applied the well-settled UDJA test to find the private plaintiffs had standing. The Court of Appeals deviated from this precedent when it imposed a new and heightened standing test for private parties seeking pre-election declaratory judgments.

2. The Opinion Conflicts with Decisions of the Court of Appeals

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[9] Petitioners attach as Appendix C to this Petition a true and correct copy of the relevant portions of the Supreme Court briefing in *Seattle Building*, obtained from the University of Washington School of Law Gallagher Law Library archives. RAP 10.4(c); RAP 13.4(c)(9). The archives did not contain the Supreme Court briefing from *Ford*.

Not surprisingly given this Court's precedent, the Court of Appeals has consistently and frequently applied the standing test from *Grant* and *WASAVP* to pre-election challenges involving private plaintiffs. For instance, in *American Traffic*, the Court of Appeals relied on the standard UDJA test to hold that a company with a contract to install and maintain red light traffic cameras had standing to challenge a proposed city initiative to ban the use of those cameras. 163 Wn. App. at 432-33. Here, the Court of Appeals distinguished Petitioners from the plaintiff in *American Traffic* on factual grounds, but did not explain or justify its creation and application of an entirely new standing test—a test Division One did not apply in *American Traffic*. Op. at 12-13.[10] The Court's Opinion conflicts with *American Traffic*, supporting discretionary review.

B. The Court of Appeals Improperly Narrowed the Scope of the Public Interest Exception

The Court of Appeals also held the public importance exception to Washington's standing doctrine did not apply. Op. at 15-16. It reasoned

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[10] In addition to *American Traffic*, the Court of Appeals has routinely reached the merits of pre-election challenges to local initiatives. *See, e.g.*, *Longview*, 174 Wn. App. 763; *Eyman v. McGehee*, 173 Wn. App. 684, 294 P.3d 847 (2013); *City of Monroe v. Wash. Campaign for Liberty*, 173 Wn. App. 1027, 2013 WL 709828 (Feb. 25, 2013); *City of Bellingham v. Whatcom Cnty.*, No. 691520, slip op. (Wash. Ct. App. Sept. 21, 2012) (unpublished). None of those courts have departed from the two-prong standing test set forth in *Grant County*, or have suggested that a higher burden should apply to private plaintiffs.

that "[w]hile the Envision initiative is recurring in Spokane, there do not appear to have been several similar initiatives in other local jurisdictions nor any evidence suggesting that this initiative presents questions of concern outside the Spokane area." *Id.* at 16. The Court concluded that "[f]ew proposed laws present an issue of public importance prior to adoption." *Id.* This holding, too, conflicts with decisions of this Court.

1. Supreme Court Precedent Confirms that Local Issues Can Be of Substantial Public Importance

In *Washington Natural Gas Co. v. Public Utility District No. 1 of Snohomish County*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969), this Court stated:

> Where a controversy is of serious public importance and immediately affects substantial segments of the population and its outcome will have a direct bearing on the commerce, finance, labor, industry or agriculture generally, questions of standing to maintain an action should be given less rigid and more liberal answer.

See also Farris v. Munro, 99 Wn.2d 326, 330, 662 P.2d 821 (1983) (plaintiff had standing to challenge constitutionality of statewide initiative because the "issue [was] a matter of continuing and substantial interest, it present[ed] a question of a public nature which [was] likely to recur, and it [was] desirable to provide an authoritative determination for the future guidance of public officials").

Rather than apply this established test, the Court of Appeals simply stated that the public importance exception did not apply.[11] In doing so, it appears to have implied a geographical test that nowhere exists in Supreme Court precedent. *See* Op. at 16. In fact, this Court has often applied the public importance exception to cases that only impacted one county. *See, e.g.*, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903, (2005) ("This case presents a prime example of an issue of substantial public interest. . . .[It] has the potential to affect every sentencing proceeding in Pierce County."); *Vovos v. Grant*, 87 Wn.2d 697, 701, 555 P.2d 1343 (1976) ("The public importance of the issue presented, and the direct effect its resolution will have upon all juveniles in Spokane County . . . reinforce our conclusion."); *Wash. Natural Gas*, 77 Wn.2d at 96 (private party challenging public entity's grant of inducements to homeowners in certain developments in Snohomish County satisfied public importance exception). The Court's adoption of a geographic threshold requirement for the public importance doctrine conflicts with multiple decisions of this Court.

[11] In addition to its legal errors, the Court's factual analysis of the public importance of the initiative in this case was also mistaken. This initiative will impact substantial rights of hundreds of thousands of people in at least two states (Washington and Idaho). *See infra* Part V.C.

2. The Court of Appeals Has Routinely Held that Pre-Election Challenges to Local Initiatives Are Matters of Public Importance

The Court also held the public importance exception did not apply because, according to it, "[f]ew proposed laws present an issue of public importance prior to adoption." Op. at 16. But the Court of Appeals has held three times in the last five years that a proposed local initiative is an issue of substantial public importance that justifies applying the public importance exception.

In *American Traffic*, for example, Division One held that "even if the question of [American Traffic]'s standing were debatable, we would still address the issues presented in this appeal, because they involve significant and continuing matters of public importance that merit judicial resolution." 163 Wn. App. at 433 (citing *Farris*, 99 Wn.2d at 330; *Wash. Natural Gas*, 77 Wn.2d at 96). Similarly, Division Two held in *City of Longview* that "even if Longview did not have clear standing, we would address its claims because they 'involve significant and continuing matters of public importance that merit judicial resolution.'" *Longview*, 174 Wn. App. at 783 (quoting *Am. Traffic*, 163 Wn. App. at 433). And in *Eyman v. McGehee*, Division One explained that questions about the administration of local initiatives are "matters of continuing and substantial public interest" that permit a court to "exercise its discretion and decide an

appeal," even absent the traditional requirements of standing. 173 Wn. App. at 688-89 (holding local election did not moot pre-election challenge to local initiative).

The Court did not, in any of these cases, rest its application of the public importance exception on the geographic scope of the initiative. This makes sense, for an initiative is a matter of public importance ***in the relevant jurisdiction***, and even before its enactment. Here, in conflict with these decisions, the Court held that local initiatives do not generally justify applying the public importance exception to standing.

C. This Case Involves Issues of Substantial Public Interest

The Court should also accept discretionary review because this case involves issues of substantial public interest. The Court of Appeals' new standing test will affect not only pre-election initiative challenges, but also any declaratory judgment action because the decision suggests that standing under the UDJA, and the public importance exception, apply differently to different types of cases and parties. Thus, absent review, litigants seeking a declaratory judgment in Division Three will face a different legal standard than litigants in Divisions One and Two, and parties with legitimate injuries and interests that could have received relief in other parts of the state will lose that opportunity. In addition, litigants in all three Divisions now face the uncertainty of whether the well-

established UDJA standing principles apply to their case, or whether the Court of Appeals will announce a new version of those principles based on the subject matter or parties before the court.[12]

The underlying merits of the initiative also involve issues of substantial public interest. As the Superior Court held, the proposed initiative would rewrite Spokane's zoning rules, conflict with numerous state and federal laws governing the management of the Spokane River and Spokane Valley-Rathdrum Prairie Aquifer (which extends into Idaho), rewrite private contracts, and conflict with federal and state law regarding labor relations and corporate rights, including free speech rights. App. B at 6-8. Each of these provisions raises issues of substantial public interest. Further, contrary to the Court's belief that the initiative is limited to the Spokane, *see* Op. at 16, similar proposals have been raised in dozens of

[12] The Court of Appeals' new standing test also conflicts with the language of the UDJA, raising yet another issue of substantial public interest. The UDJA merely requires that a person's rights, status, or legal relations be "affected" by a statute or ordinance. RCW 7.24.020. The statute is "remedial" and "to be liberally construed and administered." RCW 7.24.120. In the Opinion, however, the Court required Petitioners to show the initiative's effect was "clear," "certain," "immediate," and irreparable absent pre-election intervention. Op. at 16-19. Whether a court can modify statutory language in this way—changing the burdens and rights of the litigants before it—raises an issue of substantial public interest. *See* App. D (attaching RCW 7.24.020 & RCW 7.24.120).

cities across the country, including in Bellingham.[13]

V. CONCLUSION

For the reasons discussed above, the Court should grant discretionary review, reverse the Court of Appeals' decision,[14] hold that Petitioners have standing under the UDJA and public interest exception, and remand to the Court of Appeals for a determination on the merits of Envision Spokane's appeal.

Respectfully submitted this 9th day of April, 2015.

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[13]Community Environmental Legal Defense Fund, available at http://www.celdf.org/about-us (last visited April 8, 2015) (website of national organization supporting Envision Spokane claiming "nearly 200 municipalities in ten states have adopted CELDF-drafted Community Bills of Rights laws"); *City of Bellingham v. Whatcom Cnty.*, No. 691520, slip op. (Wash. Ct. App. Sept. 21, 2012) (invalidating similar proposal as outside the local initiative power).

[14] If the Court accepts this Petition for Discretionary Review, Petitioners will file supplemental briefing that demonstrates the grounds under which the Petitioners have standing to challenge each and every provision of the proposed initiative, pursuant to RAP 13.7(d). *See* Op. at 6 (noting that Envision conceded that Petitioners have standing in its Court of Appeals briefing and at oral argument); *id.* at 7 n.12 (noting Court of Appeals did not request supplemental briefing on the issue).

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APPENDICES

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APPENDIX A

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SPOKANE ENTREPRENEURIAL CENTER, SPOKANE COUNTY, DOWNTOWN SPOKANE PARTNERSHIP, GREATER SPOKANE INCORPORATED, THE SPOKANE BUILDING OWNERS AND MANAGERS ASSOCIATION, SPOKANE ASSOCIATION OF REALTORS, THE SPOKANE HOME BUILDERS ASSOCIATION, THE INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, AVISTA CORPORATION, PEARSON PACKAGING SYSTEMS, WILLIAM BUTLER, NEIL MULLER, STEVE SALVATORI, NANCY MCLAUGHLIN, MICHAEL ALLEN, and TOM POWER, Respondents, v. SPOKANE MOVES TO AMEND THE CONSTITUTION, ENVISION SPOKANE, VICKY DALTON, SPOKANE COUNTY AUDITOR, in her official capacity, THE CITY OF SPOKANE, Appellants.	No. 31887-7-III UNPUBLISHED OPINION

KORSMO, J. — This case involves a pre-election challenge to a Spokane initiative measure by a large number of individuals and organizations. We conclude that a pre-election challenge to a local initiative by private citizens can be brought only in very narrow circumstances and that this initiative does not constitute one of those occasions. The respondents lack the strong showing of standing necessary to prosecute this case as a pre-election challenge. We reverse.

FACTS

The respondents are 17 individuals, associations, businesses, and county government who initially brought this action in 2013 against the proponents of two separate Spokane initiatives. The first of those initiatives, sponsored by Spokane Moves to Amend the Constitution (SMAC), sought to address the *Citizens United*[1] decision by prohibiting corporations from lobbying public officials or making contributions to political campaigns. The second initiative was sponsored by Envision Spokane, the appellant in this action.

The Envision initiative sought to amend the city charter to create or guarantee individual rights.[2] It includes (1) a Neighborhood Rights provision that requires a neighborhood vote on zoning changes in conjunction with a "major commercial, industrial, or residential development;" (2) an Environmental Rights provision that gives the Spokane River and the Spokane Valley – Rathdrum Prairie Aquifer rights and grants standing to the city, citizens of the city, and groups of residents to enforce these rights; (3) a Workplace Rights initiative that adopts the federal and state[3] Bill of Rights and purports to extend them to the workplace and also gives unionized workers the right to collective bargaining; and (4) a Corporate Rights provision that strips corporations of

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[1] *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

[2] The entire initiative can be found as an appendix to this opinion.

[3] The initiative does not explain what constitutes the state Bill of Rights.

their legal status should they violate any of the other three provisions of the initiative. The initiative also contains a severability clause.

Envision had brought the same initiative to the ballot in 2011, and a much different version had appeared on the ballot in 2009. Both failed with the voters of Spokane, although the 2011 initiative had received 49.1 percent of the vote. The SMAC proposal likewise had failed at the ballot in 2011.

Both initiatives again qualified for the ballot in 2013. The Spokane City Attorney prepared a memorandum for the City Council suggesting that the initiatives were invalid. The City Attorney also obtained a memorandum from a private law firm reaching the same conclusion. However, when presented with the two initiatives, the City Council on June 3, 2013, declined to take legal action[4] and, instead, forwarded the two initiatives by resolution to the Spokane County Auditor for inclusion on the 2013 general election ballot.

The respondents filed actions to enjoin both initiatives and to obtain declaratory judgments invalidating them. The initiative sponsors, the City of Spokane, and the Spokane County Auditor were named as defendants. The respondents filed numerous affidavits describing their disagreement with the two initiatives as well as the potential repercussions on their business interests if the initiatives were enacted. Envision answered the complaint and challenged standing, the availability of a declaratory judgment as a

[4] The Spokane Municipal Code permits the City Council, by a five vote supermajority, to challenge an initiative after forwarding it to the ballot. SMC 2.02.115(C).

remedy, the merits of the complaint, and raised an anti-SLAPP defense.[5] The County Auditor answered the complaint, recognized that she was sued only in her professional capacity, and asked that the trial court act rapidly with clear directions since time was of the essence. The City's answer is not part of the record of this appeal.[6]

In response to the request for a preliminary injunction, Envision filed a motion to strike pursuant to RCW 4.24.525 of the anti-SLAPP statute. In the course of its argument, Envision contended, *inter alia*, that the plaintiffs lacked standing to pursue the injunction. The trial court denied the preliminary injunction that sought to keep both initiatives off the 2013 ballot, concluding that respondents had not established imminent irreparable harm. The two initiatives then proceeded to a declaratory judgment hearing the following month. Because the two initiatives were joined for hearing, respondents' memorandum and affidavits addressed both. Respondents' contentions in support of standing largely addressed free speech rights imperiled by the SMAC initiative. Clerk's Papers (CP) at 222-29. Envision challenged justiciability, arguing respondents had no genuine controversy prior to adoption of the initiative and had not been harmed simply by placing the issue on the ballot. The County Auditor advised the court that after September 4, 2013, it would be impossible to remove the initiatives from the ballot.

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[5] Strategic Lawsuits Against Public Participation, RCW 4.24.500-.525.

[6] The City's position at the declaratory judgment was to advise the court that if any initiatives were invalid, they should not be put on the ballot lest city tax money be wasted.

The trial court heard argument August 23, 2013, and orally ruled at the conclusion of the hearing. With respect to the issue of standing, the court indicated that it stood by its earlier ruling on the injunction request that the parties had standing and that a justiciable controversy existed.[7] The court struck down both the SMAC initiative and the Envision initiative. The trial court concluded that the entire subject matter of both initiatives was outside the scope of the initiative power.[8] The County Auditor was directed not to place them on the ballot.

Written findings of fact and order on declaratory judgment were entered August 29. Envision promptly appealed to this court.[9] Envision also sought an emergency stay of the ruling in an effort to maintain its position on the ballot. By written order entered September 3, 2013, a commissioner of this court declined to grant the stay. In light of the fact that the following day was the deadline for inclusion on the ballot, no motion to modify the ruling was filed.

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[7] The transcript of the injunction hearing is not part of the record of this appeal. While the absence of the transcript is understandable in light of the issues argued by the parties, that fact complicates our review.

[8] The trial court concluded that the Neighborhood Rights provision was administrative rather than legislative in nature and also attempted to exercise power delegated to a legislative body; the Environmental Rights provision failed because it was administrative rather than legislative in nature, it attempted to exercise power not granted to cities, and it conflicted with state or federal law; the Workplace Rights provision failed because it exercised power not granted to cities and conflicted with state or federal law; and the Corporate Rights provision conflicted with state or federal law.

[9] The ruling on the SMAC initiative was not appealed.

In its brief, Envision briefly argued that the respondents lacked standing to pursue injunctive relief, but did have standing to pursue the declaratory judgment action.[10] It reiterated that opinion at oral argument.

ANALYSIS

The sole issue we address is whether the respondents had standing to bring this pre-election challenge.[11] After looking generally at standing and related issues governing judicial review of the pre-election process, we will address respondents' standing claims. We conclude that a heightened showing of standing is in order for pre-trial election challenges and the respondents have not satisfied that standard in this case.

Efforts to derail prospective legislation through a lawsuit necessarily bring the judicial and legislative powers into conflict. When the legislative process in question involves the constitutionally or statutorily protected right of citizens to initiate legislation, courts have an additional reason to step gingerly. In order to avoid significant separation of powers problems, courts have recognized both substantive and prudential limitations on the exercise of judicial authority when addressing potential legislation.

One substantive limitation, applicable to all litigation, is the standing doctrine. In actions under the Uniform Declaratory Judgment Act (UDJA), the Washington Supreme

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[10] In view of the fact that Envision prevailed on the injunction and, therefore, is not an aggrieved party within the meaning of RAP 3.1, we need not discuss standing to pursue the injunction.

[11] We express no opinion concerning the trial court's ruling that the Envision initiative is invalid.

Court "has established a two-part test to determine standing." *Grant County Fire Prot. Dist. v. Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). First, the test asks "whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute" in question. *Id.* (internal quotation and citation omitted). Second, "the test considers whether the challenged action has caused injury in fact, economic or otherwise, to the party seeking standing." *Id.* (internal quotations omitted).

The issue of standing is reviewed de novo by appellate courts. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). Standing is a jurisdictional concern that can be presented for the first time on appeal. RAP 2.5(a)(1); *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212-13 n.3, 45 P.3d 186 (2002). An appellate court can even raise the issue sua sponte.[12] *In re Recall of West*, 156 Wn.2d 244, 248, 126 P.3d 798 (2006); *Branson v. Port of Seattle*, 152 Wn.2d 862, 875 n.6, 101 P.3d 67 (2004).

Justiciability is another substantive doctrine applicable to declaratory judgment actions. Broadly speaking, justiciability requires that there be a genuine controversy between two parties. As defined for purposes of a declaratory judgment action, justiciability requires (1) an actual, present and existing dispute (2) between parties

[12] When the parties do not present evidence or argument on the issue, an appellate court typically will allow the parties the opportunity to brief or otherwise be heard on an issue. RAP 10.1(h). Here, the parties did develop the standing issue in the trial court and discussed it in their briefing in that court and this one.

having genuine and opposing interests (3) that are substantial rather than potential or theoretical (4) that a court can conclusively resolve. *Coppernoll v. Reed*, 155 Wn.2d 290, 300, 119 P.3d 318 (2005). "Justiciability is a threshold inquiry and must be answered in the affirmative before a court may address the merits of a litigant's claim." *Id.*

Various prudential doctrines also have shaped the judicial approach to pre-election litigation. Washington courts have long declined to issue advisory opinions. *Id.* at 297-98; *State ex rel. Campbell v. Superior Court of Pierce County*, 25 Wash. 271, 274, 65 P. 183 (1901). Courts also have a long history of avoiding political questions since those matters may require a court to interfere with the political authority of another branch of government. *Brown v. Owen*, 165 Wn.2d 706, 719, 206 P.3d 310 (2009); *State v. Manussier*, 129 Wn.2d 652, 670-71, 921 P.2d 473 (1996) (expressly recognizing a challenge to the initiative process as presenting a political question); *Parmeter v. Bourne*, 8 Wash. 45, 50, 35 P. 586 (1894) (declining to consider challenge to election results). Accordingly, courts must also respect, and not interfere with, the legislative process, including the initiative process. *Coppernoll*, 155 Wn.2d at 296-97.

Consideration of these prudential doctrines led the *Coppernoll* court to authoritatively address the role of the judiciary in responding to pre-election challenges to an initiative or referendum. It concluded that pre-election challenges could be entertained only when they involved either (1) procedural challenges to placing the initiative on the ballot or (2) the subject matter of the initiative was beyond the initiative power. *Id.* at 297. The court

characterized these as "prudential" exceptions to the non-involvement doctrine. *Id.* at 301.

Two years later, the court nicely summarized its *Coppernoll* decision:

> Preelection review of initiative measures is highly disfavored. The fundamental reason is that 'the right of initiative is nearly as old as our constitution itself, deeply ingrained in our state's history, and widely revered as a powerful check and balance on the other branches of government.' Given the preeminence of the initiative right, preelection challenges to the substantive validity of initiatives are particularly disallowed. Such review, if engaged in, would involve the court in rendering advisory opinions, would violate ripeness requirements, would undermine the policy of avoiding unnecessary constitutional questions, and would constitute unwarranted judicial meddling with the legislative process. Thus, preelection substantive challenges are not justiciable. Further, substantive preelection review could unduly infringe on the citizens' right to freely express their views to their elected representatives.
>
> We will therefore consider only two types of challenges to an initiative prior to an election: that the initiative does not meet the procedural requirements for placement on the ballot (a claim that appellants do not make here) and that the subject matter of the initiative is beyond the people's initiative power. If an initiative otherwise meets procedural requirements, is legislative in nature, and its 'fundamental and overriding purpose' is within the State's broad power to enact, it is not subject to preelection review. That the law enacted by an initiative might be unconstitutional does not mean that it is beyond the power of the State to enact. Therefore, a claim that an initiative would be unconstitutional if enacted is not subject to preelection review.

Futurewise v. Reed, 161 Wn.2d 407, 410-411, 166 P.3d 708 (2007) (internal citations and footnote omitted).

"Standing requirements tend to overlap the requirements for justiciability under the UDJA." *Am. Legion Post v. Dep't of Health*, 164 Wn.2d 570, 593, 192 P.3d 306 (2008). This observation highlights the heart of the problem presented in this case. UDJA standing

and justiciability in the pre-election context both require that there be an existing actual dispute that is substantial rather than potential. *Coppernoll*, 155 Wn.2d at 300. Standing typically is liberally granted in UDJA actions. However, the noted prudential concerns require courts to narrowly construe the scope of the UDJA in pre-election challenges, putting the liberal standing of typical declaratory judgment cases and the limited justiciability of pre-election challenges in tension, if not in conflict. With these issues in mind, it finally is time to turn to the standing problem in this case.

In their motion for declaratory judgment, the plaintiffs claimed standing to challenge the Envision initiative under the zone of interests test in this manner:

> The Envision initiative seeks to regulate zoning, river rights, employment relationships, and corporate rights, each of which affects Plaintiffs' interests.
>
> Plaintiff business associations' and owners' abilities to continue or launch development projects will be regulated by the zoning provision, which purports to overturn the process for obtaining zoning variances. . . .
>
> The initiative's river rights provision will impair the present sanitary sewage collection, treatment, and disposal system operations of Plaintiff Spokane County, and the hydroelectric power operations of Plaintiff Avista. . . .
>
> The workplace provision will prevent Plaintiffs from enforcing workplace policies and from communicating effectively with their employees. . . .

CP at 225-26 (internal citations to supporting documents omitted). The plaintiffs also claimed that the public importance of the two initiatives justified standing. CP at 224, 229. In terms of perceived injury from the initiatives, the plaintiffs primarily stressed an infringement on free speech and communication. CP at 226-29.

Notably, the plaintiffs did not argue to the trial court their standing to challenge the Corporate Rights provision. Their remaining assertions of interest vaguely allege fear of potential litigation. The best developed arguments involved the effect of the Environmental Rights provision on use of the Spokane River.[13] Spokane County's interest in the Environmental Rights provision stems from its assertion that the initiative will "impair" its sewage collection and treatment operations. Its supporting declaration shows that it maintains a sewage treatment plant on the Spokane River and that passage of the Envision initiative might increase costs by subjecting the County to additional litigation. Avista Corporation made similar claims, citing the potential for litigation as one of its concerns about the Environmental Rights provision.[14] It gave as an example the possibility that it might be sued over the storage of water in Lake Coeur d'Alene, as required by its federal licensing agreement, by someone who prefers a stronger river flow.

Liberally construed, the fact that both Spokane County and Avista use the Spokane River might "arguably" put them "within the zone of interests" of the Environmental Rights provision since it addresses the same river. However, in the context of a pre-election challenge, we think that more should be required than simply

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[13] For this reason, we will only address the standing claims involving the Environmental Rights provision. Other assertions included contentions that the Workplace Rights provision would make it impossible for employers to talk to employees or even more generalized complaints that the initiatives were bad for business.

[14] Avista was the only plaintiff/respondent to assert standing with respect to all four provisions of the Envision initiative.

the fact that those plaintiffs can hypothesize someone asserting a claim against them on behalf of the river system. The initiative must, in our opinion, more directly relate to Spokane County or Avista's use of the river.[15]

An example of a direct relationship is found in *Am. Traffic Solutions v. Bellingham*, 163 Wn. App. 427, 260 P.3d 245 (2011), *review denied*, 173 Wn.2d 1029 (2012). There the City of Bellingham had entered into a contract with American Traffic Solutions (ATS) to install an automatic traffic safety camera system ("red light cameras"). *Id.* at 430. Opponents filed an initiative to prohibit use of the cameras and ATS sued to block the initiative from the ballot. *Id.* at 430-31. On appeal, the opponents contended ATS lacked standing to bring the action, thus rendering the matter non-justiciable. *Id.* at 432. Division One of this court concluded that because ATS was "a party to the contract," it "clearly" had standing to challenge the initiative. *Id.* at 433. In our view, ATS was in the center of the zone of interests since it had a contract with the city that would be affected if the initiative passed. This aspect of standing was satisfied.

The other aspect of standing is whether the party has suffered an "injury in fact, economic or otherwise." *Grant County*, 150 Wn.2d at 802. Here, while both Avista and Spokane County express a fear of potential litigation, they can point to no direct harm

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[15] A different situation would be presented if the initiative had, for instance, expressly attempted to authorize litigation concerning water returned to the river following use for hydroelectric generation or sewage treatment. Those examples would specifically target current usage and bring Avista and Spokane County squarely within the zone of interests of the initiative.

from the initiative. There is no existing project that is named in the initiative or that specifically would be impacted by the broad and very general terms of the initiative. We believe a more concrete showing of likely harm is necessary to establish an injury in fact that would justify a pre-election challenge. Once again, *American Traffic* provides an example. There an existing contract would be impaired immediately upon passage of the initiative, leaving very little time in which to seek relief. That is a sufficiently direct injury to supply standing.

In contrast here, post-election litigation still would be a practical remedy for Spokane County or Avista were the Envision initiative to pass. Either could bring a post-election declaratory action or defend a suit against it on the basis of the initiative's invalidity. Until the initiative passes, any harm to the respondents is necessarily speculative and would be dependent upon someone trying to use the initiative against them. This is too indefinite to justify pre-election judicial intervention.

None of the existing pre-election standing cases require a different result. One such case is *Mukilteo Citizens v. City of Mukilteo*, 174 Wn.2d 41, 272 P.3d 227 (2012). That case involved another challenge by one group of city residents to an anti-automatic traffic safety camera initiative offered by another group of city residents. *Id.* at 43-44. The trial court denied the opponents' request for an injunction, the initiative was enacted at the ensuing election, and the opponents appealed. *Id.* at 44-46. The initiative proponents challenged the standing of the opponents, who were acting as an association.

Id. at 46. The court determined that there was associational standing. *Id.* The first prong of the test for associational standing is whether the individual members of the group have individual standing.[16] *Id.* In answering that question in *Mukilteo*, the court stated that the "members have standing to sue in their own right as it consists of Mukilteo residents who are eligible to vote." *Id.*

We do not believe that the *Mukilteo* court was conferring standing to challenge an initiative on any person who could vote on the initiative. In addition to being a roadmap to detouring every local initiative to the courtroom, it simply was not the issue before the court in *Mukilteo*. The court conducted no analysis of the issue of individual standing in accordance with its traditional zone of interest test and cited no relevant authority in support of its statement. Instead, the statement seems simply to indicate that the association's members had standing and, therefore, the association could act in their behest. If the court meant more, it will undoubtedly develop its reasoning in terms of individual standing in a future case.

Most other cases of pre-election standing involve actions brought by the local government against proponents of an initiative. *E.g.*, *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45 (2013) (city blocked red light camera initiative). The

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[16] It is for this reason we need not address standing claimed by the business association respondents. Their membership cannot establish individual standing, so the association cannot. We do not address whether the associations' participation in this lawsuit was "germane to the purpose" of each association. *Am. Legion*, 164 Wn.2d at 595-96.

effected government typically will have standing to challenge an initiative due to the expense of holding the election and the need to defend the initiative should it pass. In some private party cases, our courts have rejected pre-election challenges without addressing the party's standing. *E.g.*, *Futurewise*, 161 Wn.2d at 407 (determining challenges were substantive and could not be considered pre-election); *Coppernoll*, 155 Wn.2d at 290 (ruling that initiative did not exceed scope of legislative power). In still other cases, the basis for private party standing was not explained. *E.g.*, *Seattle Bldg. and Constr. Trades Council v. Seattle*, 94 Wn.2d 740, 620 P.2d 82 (1980); *Ford v. Logan*, 79 Wn.2d 147, 483 P.2d 1247 (1971).

One basis that might have applied in *Seattle Building* and in *Ford* is public interest standing, an argument also raised by the respondents in their briefing to the trial court.[17] In general, public interest standing is granted when the case presents an issue of great significance that needs court resolution. *Farris v. Munro*, 99 Wn.2d 326, 330, 662 P.2d 821 (1983) (upholding standing to challenge constitutionality of state lottery due to tax importance of the lottery). Citing the proliferation of red light traffic camera challenges,

[17] Although not raised in the trial court briefing, several of the respondents claimed taxpayer standing in their declarations. However, taxpayer standing is not appropriate unless the "proper public official," typically the Attorney General, first declines a request to bring suit on behalf of all taxpayers. *Farris v. Munro*, 99 Wn.2d at 329. *Accord*, *Friends of North Spokane County Parks v. Spokane County*, __ Wn. App. __, 336 P.3d 632, 640 (2014). There was no such request in this case and we, therefore, do not consider this as a case of taxpayer standing.

Division One stated that public interest standing was an alternative basis for finding standing in *American Traffic Solutions. Am. Traffic Solutions*, 163 Wn. App. at 433.

We conclude this is not a case for granting public importance standing. While the Envision initiative is recurring in Spokane, there do not appear to have been several similar initiatives in other local jurisdictions nor any evidence suggesting that this initiative presents questions of concern outside of the Spokane area. Thus, the situation presented by *American Traffic Solutions* is not involved in this case. Similarly, we are not convinced that a pending local initiative is equivalent to a voter approved state constitutional provision. The critical fact in *Farris* was that the constitutional provision had become law and was not merely a potential law. Few proposed laws present an issue of public importance prior to adoption. While there certainly may be local initiatives that present questions of public importance[18] prior to adoption by the voters, this is not one of those cases.[19]

Accordingly, we conclude that the respondents lacked standing to prosecute this pre-election challenge. They were not so clearly situated in the center of the zone of interests, nor as certainly to suffer immediate harm from adoption of the initiative, that

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[18] In contrast, an effort to rescind a county's charter by initiative does provide an example of a question of public importance. *See Ford*, 79 Wn.2d at 157.

[19] While there may have been several reasons for its decision, the failure of the Spokane City Council to challenge the initiative despite the legal advice of the City Attorney, can also be viewed as evidence that the initiative did not present an issue of public importance. Local governments are the local policy making bodies and have a better view than the judiciary concerning which issues are of public importance.

they have demonstrated standing to pursue this action. Similarly, the public importance standing doctrine does not extend to this potential local law prior to its adoption by the voters. There thus was no justiciable question presented.

This case, however, does contrast nicely with the situation presented by the SMAC initiative. As previously noted, that initiative attempted to impose limits on corporations by controlling their ability to contribute to elections or lobby public officials. Since the thrust of the initiative was to limit corporate speech as defined in part by the *Citizens United* decision, the corporate respondents in this case—and those who dealt with them—were easily in the center of the zone of interests of that initiative. Additionally, those respondents faced an immediate harm from the initiative in the form of restriction on free speech rights that could not have been timely parried by a post-election lawsuit. There was standing to challenge the SMAC initiative.[20] The plaintiffs were not similarly situated with respect to the Envision initiative.

In summary, we conclude that, in order for a *private* party to bring a *pre-election* challenge to a local initiative, the party must establish both that it is in the center of the zone of interests affected by the initiative *and* that the certainty of *immediate specific harm* to that party is such that a post-election lawsuit is not a practical remedy for the party. In the absence of this strong showing of standing, the pre-election challenge is not

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[20] The ease with which the respondents could demonstrate standing in the SMAC case may be the basis why the standing ruling is not as well-developed in Envision. In a sense, the Envision case rode on the coattails of the SMAC case in the trial court, but cannot do so here.

justiciable. Speculative standing based on fears about how a provision, if adopted by voters, might potentially be used in some future litigation is too unspecific a fear to justify judicial intervention in the electoral process. A court would have to give an advisory opinion on a political question—two practices that courts generally attempt to avoid.

The need for a strong showing of standing is highlighted by cases—such as this one—where both parties now prefer judicial approval for their position. The respondents understandably want to avoid yet a third election campaign and put this matter to rest for good. Envision, having been denied a place on the 2013 ballot, equally understandably now would like to have a court prospectively inform the electorate that its initiative, in whole or in part, is valid. These desires should not unnecessarily draw the judiciary into deciding a political question that might not actually present itself if the voters again decline to adopt the Envision initiative. Instead, the prudential concerns that limit justiciability should also apply to ensure that would-be plaintiffs have undisputable standing to raise their challenge before they are allowed to derail an election.

The City of Spokane had standing to challenge the Envision initiative if it had desired to do so. However, respondents could not obtain that same standing simply by making the same arguments that the City could have presented.[21] There needed to be a

[21] We do not opine on the respondents' post-election standing other than to note that the standards of pre-election standing do not apply.

showing that the respondents would truly be affected by the initiative and that the harm from the initiative would require immediate court intervention. That has not happened here.

The order granting the declaratory judgment against Envision is reversed and this matter is remanded for the City of Spokane to place the initiative on the next available ballot in accordance with its June 3, 2013 resolution.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

APPENDIX

A CITY CHARTER AMENDMENT ESTABLISHING A COMMUNITY BILL OF RIGHTS

Whereas, the people of the City of Spokane wish to build a healthy, sustainable, and democratic community;

Whereas, the people of the City of Spokane wish to build that community by securing the rights, freedoms, and well-being of residents, workers, neighborhoods, and the natural environment;

Whereas, the people of the City of Spokane recognize their responsibility to be well-informed and involved citizens of the City of Spokane, to be stewards of the natural environment, and to assume the responsibility for enforcing their rights and the rights of others;

Whereas, the people of the City of Spokane have adopted a Comprehensive Plan for the City of Spokane, which envisions the building of a healthy, sustainable, and democratic community, but the people recognize that the Comprehensive Plan is not legally enforceable in many important respects;

Whereas, the people of the City of Spokane wish to create a Community Bill of Rights which would, among other goals, establish legally enforceable rights and duties to implement the vision laid out in the Comprehensive Plan; and

Whereas, the people of the City of Spokane wish to create a Community Bill of Rights, which would elevate the rights of the community over those of corporations.

NOW, THEREFORE, THE PEOPLE OF THE CITY OF SPOKANE HEREBY ORDAIN:

Section 1. A new section be added to the beginning of the Charter of the City of Spokane, which shall be known as the "Community Bill of Rights," and which provides as follows:

FIRST, NEIGHBORHOOD RESIDENTS HAVE THE RIGHT TO DETERMINE MAJOR DEVELOPMENT IN THEIR NEIGHBORHOODS.

> Neighborhood majorities shall have the right to approve all zoning changes proposed for their neighborhood involving major commercial, industrial, or residential development. Neighborhood majorities shall mean the majority of registered voters residing in an official city neighborhood who voted in the last general election. Proposed commercial or industrial development shall be deemed major if it exceeds ten thousand square feet, and proposed residential development shall be deemed major if it exceeds twenty units and its construction is not financed by governmental funds allocated for low-income housing.
>
> It shall be the responsibility of the proposer of the zoning change to acquire the approval of the neighborhood majority, and the zoning change shall not be effective without it. Neighborhood majorities shall also have a right to reject major commercial, industrial, or

residential development which is incompatible with the provisions of the City's Comprehensive Plan or this Charter.
Approval of a zoning change or rejection of proposed development under this section shall become effective upon the submission of a petition to the City containing the valid signatures of neighborhood majorities approving the zoning change or rejecting the proposed development, in a petition generally conforming to the referendum provisions of the Spokane municipal code.

SECOND, THE RIGHT TO A HEALTHY SPOKANE RIVER AND AQUIFER.

The Spokane River, it tributaries, and the Spokane Valley-Rathdrum Prairie Aquifer possess fundamental and inalienable rights to exist and flourish, which shall include the right to sustainable recharge, flows sufficient to protect native fish habitat, and clean water. All residents of Spokane possess fundamental and inalienable rights to sustainably access, use, consume, and preserve water drawn from natural cycles that provide water necessary to sustain life within the City. The City of Spokane, and any resident of the City or group of residents, have standing to enforce and protect these rights.

THIRD, EMPLOYEES HAVE THE RIGHT TO CONSTITUTIONAL PROTECTIONS IN THE WORKPLACE.

Employees shall possess United States and Washington Bill of Rights' constitutional protections in every workplace within the City of Spokane, and workers in unionized workplaces shall possess the right to collective bargaining.

FOURTH, CORPORATE POWERS SHALL BE SUBORDINATE TO PEOPLE'S RIGHTS.

Corporations and other business entities which violate the rights secured by this Charter shall not be deemed to be "persons," nor possess any other legal rights, privileges, powers, or protections which would interfere with the enforcement of rights enumerated by this Charter.

Section 2. Effective Date of Amendment to City Charter. If approved by the electors, this City Charter amendment shall take effect and be in full force upon issuance of the certificate of election by the Spokane County Auditor's Office.

Section 3. All ordinances, resolutions, motions, or orders in conflict with this City Charter amendment are hereby repealed to the extent of such conflict. If any part or provision of these Charter provisions is held invalid, the remainder of these provisions shall not be affected by such a holding and shall continue in full force and effect.

FILED
MARCH 3, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SPOKANE ENTREPRENEURIAL CENTER, SPOKANE COUNTY, DOWNTOWN SPOKANE PARTNERSHIP, GREATER SPOKANE INCORPORATED, THE SPOKANE BUILDING OWNERS AND MANAGERS ASSOCIATION, SPOKANE ASSOCIATION OF REALTORS, THE SPOKANE HOME BUILDERS ASSOCIATION, THE INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, AVISTA CORPORATION, PEARSON PACKAGING SYSTEMS, WILLIAM BUTLER, NEIL MULLER, STEVE SALVATORI, NANCY MCLAUGHLIN, MICHAEL ALLEN, and TOM POWER, Respondents, v. SPOKANE MOVES TO AMEND THE CONSTITUTION, ENVISION SPOKANE, VICKY DALTON, SPOKANE COUNTY AUDITOR, in her official capacity, THE CITY OF SPOKANE, Appellants.	No. 31887-7-III ORDER DENYING MOTION TO PUBLISH OPINION FILED JANUARY 29, 2015

THE COURT has considered respondent's motion to publish this Court's opinion of January 29, 2015, and the record and file herein, and is of the opinion the motion to publish should be denied. Therefore,

No. 31887-7-III

IT IS ORDERED the motion to publish is denied.

DATED: March 3, 2015

PANEL: Judges Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

LAUREL SIDDOWAY
Chief Judge

FILED
MARCH 10, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SPOKANE ENTREPRENEURIAL CENTER, SPOKANE COUNTY, DOWNTOWN SPOKANE PARTNERSHIP, GREATER SPOKANE INCORPORATED, THE SPOKANE BUILDING OWNERS AND MANAGERS ASSOCIATION, SPOKANE ASSOCIATION OF REALTORS, THE SPOKANE HOME BUILDERS ASSOCIATION, THE INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, AVISTA CORPORATION, PEARSON PACKAGING SYSTEMS, WILLIAM BUTLER, NEIL MULLER, STEVE SALVATORI, NANCY MCLAUGHLIN, MICHAEL ALLEN, and TOM POWER,

Respondents,

v.

SPOKANE MOVES TO AMEND THE CONSTITUTION, ENVISION SPOKANE, VICKY DALTON, SPOKANE COUNTY AUDITOR, in her official capacity, THE CITY OF SPOKANE,

Appellants.

No. 31887-7-III

ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

No. 31887-7-III

IT IS ORDERED, the motion for reconsideration of this court's decision of January 29, 2015 is hereby denied.

DATED: March 10, 2015

PANEL: Judges Korsmo, Fearing & Lawrence-Berrey

FOR THE COURT:

LAUREL SIDDOWAY
Chief Judge

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

SPOKANE ENTREPRENEURIAL CENTER, SPOKANE COUNTY, DOWNTOWN SPOKANE PARTNERSHIP, GREATER SPOKANE INCORPORATED, THE SPOKANE BUILDING OWNERS AND MANAGERS ASSOCIATION, SPOKANE ASSOCIATION OF REALTORS, THE SPOKANE HOME BUILDERS ASSOCIATION, THE INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, AVISTA CORPORATION, PEARSON PACKAGING SYSTEMS, WILLIAM BUTLER, NEIL MULLER, STEVE SALVATORI, NANCY MCLAUGHLIN, MICHAEL ALLEN, and TOM POWER, Plaintiffs, vs. SPOKANE MOVES TO AMEND THE CONSTITUTION, ENVISION SPOKANE, VICKY DALTON, SPOKANE COUNTY AUDITOR, in her official capacity, THE CITY OF SPOKANE, Defendants.	Cause No. 13-2-02495-5 VERBATIM REPORT OF PROCEEDINGS

MOTION HEARING EXCERPT: COURT'S ORAL RULING

August 23, 2013

Spokane County Courthouse
Spokane, Washington
Before the
HONORABLE MARYANN C. MORENO

Terri A. Cochran, CSR No. 3062
Official Court Reporter
1116 W. Broadway, Department No. 7
Spokane, Washington 99260
(509)477-4418

APPEARANCES

For the Plaintiffs:	ROBERT J. MAGUIRE Davis Wright Tremaine, LLP 1201 - 3rd Avenue Suite 2200 Seattle, Washington 98101
For the Defendant Envision Spokane:	MICHAEL D. WHIPPLE Whipple Law Group, PLLC 905 W. Riverside Avenue, Suite 408 Spokane, Washington 99201
For the Defendant Spokane Moves to Amend the Constitution (SMAC):	TERRENCE V. SAWYER Attorney at Law 1918 S. Audubon Ct Spokane, Washington 99224
Also Present, Special Counsel to Defendant City of Spokane:	MICHAEL K. RYAN K&L Gates, LLP 618 W. Riverside Avenue Suite 300 Spokane, Washington 99201
Also Present for Defendant City of Spokane:	NANCY DYKES ISSERLIS City Attorney City of Spokane Office of the City Attorney 808 W. Spokane Falls Blvd, Floor 5 Spokane, Washington 99201
Also Present for Defendant Vicky Dalton, Spokane County Auditor:	DAN L. CATT Sr. Deputy Prosecuting Attorney Spokane County Prosecutor's Office 1100 W. Mallon Avenue Spokane, Washington 99260

August 23, 2013 - A.M. Session

(The following motion hearing excerpt encompasses the Court's oral ruling. The portion of hearing that preceded the Court's ruling was not requested to be transcribed.)

THE COURT: All right. Well, I too want to thank the attorneys for their advocacy, all of the lawyers. The briefing has been superb. The advocacy and the oral presentations have been marvelous. I think I've read every case in the State of Washington on these issues. You know, a lot of towns really don't like those traffic lights, do they? So they all seem to be about the red light cameras and that sort of a thing. But there are lots of cases that talk about other issues, federal cases in particular.

And again, I -- I admire the proponents of the initiatives' advocacy. I -- I saw in one of the responses, either from SMAC or Envision, some affidavits with regard to the signature gatherers. And we've all seen them standing outside of the Rosauers or Albertsons, "Would you like to sign the petition?" And sometimes you don't make eye contact; sometimes you run the other way. But they're out there tirelessly, in the heat, in the cold, in the rain. And I've got to hand it to you folks. You know, there's really a lot of other things that I'd really rather be doing on my Saturday. And I see you folks out there, and I think it's just marvelous.

I, of course, respect the democratic process. And I too am a citizen of this community. But there's really no room in this particular case for my personal opinions about anything, because when I took my oath as a judge my oath was to interpret legal precedent, to apply the law as it's handed to me. We don't make any laws when we sit up here. We're interpreting and we're applying -- applying the law.

I made some rulings last time; and I don't need to repeat myself with regard to several of the issues that were, again, brought out today. At the injunction hearing, I made a determination at that time that I believed that this was a justiciable controversy and that the plaintiffs had standing; that they had proved that they were within the zone of interest; and that this was a public interest case for the City of Spokane. So I've already made those conclusions, and my intent is to move forward with a ruling on declaratory judgment.

The only issue left is whether or not the initiatives that are spelled out in the two documents that we've seen today and the two documents that I've had in front of me for about the last month are outside of the initiative power. And courts routinely address the scope of an initiative preelection. And the scope of the initiative is not a call by a court to make a ruling as to whether an initiative is constitutional. The court is not weighing the substantive merits of the initiative.

It's simply focused on whether or not these initiatives are outside the scope of what the initiative power is. And the courts are allowed to do this preelection, because, as one court said, "It doesn't get any better after the election." The initiatives are the same preelection as they are after election. They don't change. It doesn't get any better than what we've got today. So that's -- that's one of the reasons why courts are allowed in minimal circumstances to make preelection decisions as to the validity of an initiative. The focus is strictly on whether or not it's within the initiative power.

So I went through each initiative, just to explain my procedure, and I parsed out every single section of each of the two different initiatives. And then I sort of whittled them down so that they were manageable for me. My understanding of the -- and I'll just start with the Envision initiative, is that the Envision initiative seeks to amend the city charter to create a community bill of rights. That community bill of rights would address several issues, including zoning. It would create a -- something called a "neighborhood majority" which would have the right to approve of zoning changes and any major developments in their neighborhood. That initiative also addresses the Spokane River, the Spokane-Rathdrum Aquifer; and it would create rights for Spokane residents in those bodies of water. That same initiative would create workplace rights for

all employees who work within the city of Spokane, and it also would withdraw protections for corporations and other business entities if there were any kind of violation of those -- of that bill of rights.

The SMAC initiative is a bit more focused on corporations. It would seek to, just very generally, prevent corporations from contributing to elections, would prevent corporate representatives from communicating with elected officials for lobbying purposes unless they were in an open forum and that sort of a thing. So what I found that I had to do was really go through each piece of each initiative to make a determination as to whether or not the initiative was within the initiative power.

So again, going back and starting with the Envision initiative, first of all, zoning. As has been pointed out, the power to implement zoning rules are basically given to the legislative bodies of municipalities. And that's under the -- pursuant to statute, RCW Title 35. Zoning is an administrative function. And this particular piece of the initiative would change or hinder a code that's already in place, so that would be outside of the initiative power.

With regard to water rights, it would grant Spokane citizens the right to sustainably use, access, consume, and preserve water; and it would give them standing to enforce and protect those rights. My understanding from the briefing and

from my own knowledge is that these particular bodies of water are subject to federal regulation and state laws. That would include the Clean Water Act, the Water Rights Code, the Growth Management Act; and the overarching agency would be the Department of Ecology. The initiative would add requirements, and it would interfere with the regulations that are already in place. Because of that conflict, it would be outside the scope of the local initiative power. And that piece would be administrative in nature as well.

Problematic is the fact that part of the aquifer is not even in the State of Washington; it's in the State of Idaho. It would be outside of the scope of what a -- the City of Spokane could -- could possibly manage. And it appears to create some new constitutional rights, which would be outside, of course, the scope of initiative power.

The workplace provisions, as I understand them, would create constitutional protections in all workplaces. At this point public employees have those constitutional protections. It would unionize workplaces, and there would be a right to collective bargaining. That would expand the constitutional protections to all employers, including provisions that would require private employers to comply with the constitution. It would result in expanding constitutional protections where none currently exist. And again, that is also outside the scope of local initiative power. Labor negotiations are regulated by

federal and state law. This would be an attempt to redefine and expand the law, which would be, again, outside of the initiative power.

The restriction on corporate rights would change the state of the law as we now know it. In the State of Washington and most states, corporations have rights. So this would conflict with federal and Washington law, and initiatives cannot be used to enact legislation that conflicts with federal or state law.

Moving on to the SMAC initiative, the prohibitions that are contained in that initiative that prohibit contributing to campaigns and lobbying. There's a First Amendment right that would be affected; and it's a right that has been confirmed, if you will, or clarified in *Citizens United*. Local initiative power cannot limit this decision by the U.S. Supreme Court. It also conflicts with state law with regard to campaign disclosure law, which defines "person" as including a corporation. The initiative would also strip corporations of their First Amendment rights and their Fifth Amendment rights, and that would conflict with Supreme Court decisions. So again, that's outside the scope of initiative power.

Again, I admire the passion and the advocacy of the proponents. I don't see any severability issues that I really need to address today. So in sum, my ruling is that I will grant declaratory judgment in favor of the plaintiffs, declare

that both initiatives are invalid as outside of the scope of legislative -- of initiative power. Neither of them shall appear on the ballot, and the Auditor is directed not to include them on the ballot.

I will rely on the plaintiffs to provide the documentation. If you have an order, I will sign it. And I think you provided one, but if you have an original?

MR. MAGUIRE: I -- I do, your Honor.

THE COURT: And I don't know if you need to amend that or adjust that.

MR. MAGUIRE: Would -- would the Court like us to fill in some of the reasoning you described today or not?

THE COURT: I think it's best, particularly if there's going to be a Court of Appeals challenge. So I think the more you can have in there, the better.

MR. MAGUIRE: Okay. Why -- why don't I --

THE COURT: So I'm going to step down, and I'm probably going to go back across the way to my courtroom. So when you folks are finished, you can find me over there and I will sign it.

MR. MAGUIRE: Thank you, your Honor.

THE COURT: Okay. All right.

(Proceeding concluded.)

/////

C E R T I F I C A T E

I, TERRI A. COCHRAN, Official Court Reporter for Department No. 7 of the Spokane County Superior Court, do hereby certify that the foregoing transcript, entitled "Verbatim Report of Proceedings," was taken by me stenographically and reduced to the foregoing typewritten transcript at my direction and control and that the same is true and correct as transcribed.

DATED at Spokane, Washington, this 26th day of August, 2013.

_____
Terri A. Cochran, CSR No. 3062.

SUPERIOR COURT OF THE STATE OF WASHINGTON
SPOKANE COUNTY

SPOKANE ENTREPRENEURIAL CENTER, SPOKANE COUNTY, DOWNTOWN SPOKANE PARTNERSHIP, GREATER SPOKANE INCORPORATED, THE SPOKANE BUILDING OWNERS AND MANAGERS ASSOCIATION, SPOKANE ASSOCIATION OF REALTORS, THE SPOKANE HOME BUILDERS ASSOCIATION, THE INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, AVISTA CORPORATION, PEARSON PACKAGING SYSTEMS, WILLIAM BUTLER, NEIL MULLER, STEVE SALVATORI, NANCY MCLAUGHLIN, MICHAEL ALLEN, and TOM POWER,

Plaintiffs,

v.

SPOKANE MOVES TO AMEND THE CONSTITUTION, ENVISION SPOKANE, VICKY DALTON, SPOKANE COUNTY AUDITOR, in her official capacity, and THE CITY OF SPOKANE,

Defendants.

No. 13-02-02495-5

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT

THIS MATTER came before the Court upon the Plaintiffs' Motion for Declaratory Judgment, noted for consideration on August 23, 2013. The Court has considered Plaintiffs' Motion and Memorandum of Authorities in Support of Plaintiffs' Motion, the declarations and exhibits in Support of Plaintiffs' Motion for Preliminary Injunction, Plaintiffs' Replies in

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Support of Their Motion for Declaratory Judgment, Envision Spokane's and Spokane Moves to Amend the Constitution's oppositions to Plaintiffs' Motion for Declaratory Judgment, the City of Spokane's response to Plaintiffs' Motion for Declaratory Judgment, the Auditor's response to Plaintiffs' Motion for Declaratory Judgment, the parties' arguments, and all papers and pleadings on file. The Court now finds as follows:

1. A justiciable controversy exists. There is an actual, present, and existing dispute between parties with genuine and opposing interests that are direct and substantial. Postelection events will not further sharpen the issue whether Initiative 2013-3 and Initiative 2013-4 (the "SMAC and Envision initiatives") are within the scope of the local initiative power.

2. Plaintiffs have standing. Plaintiffs fall within the zone of interests the initiatives seek to regulate and have demonstrated sufficient injury, and this case involves significant and continuing issues of public importance that merit judicial resolution.

3. The Envision initiative exceeds the local initiative power and is invalid.

   a. The zoning provision exceeds the local initiative power because it is administrative in nature and involves powers delegated under RCW Title 35 to the legislative bodies of municipalities. Zoning is an administrative function. The Envision initiative's zoning provision is administrative because it would change or hinder a pre-existing zoning code.

   b. The water provision exceeds the local initiative power because it conflicts with federal and state law, and is administrative in nature. The provision seeks to regulate bodies of water that are subject to the Clean Water Act, Washington's water code, and the Growth Management Act. The water provision would add requirements to these pre-existing regulations, and would interfere with pre-existing

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regulations. The water provision therefore conflicts with federal and state law and is outside the scope of the local initiative power. The provision is also administrative because it seeks to change or hinder pre-existing water regulations. The water provision is also outside the scope of the local initiative power because it attempts to impose rights on Spokane residents regarding water outside the state of Washington, and it attempts to create new constitutional rights. The City of Spokane lacks jurisdiction to enact such legislation.

c. The workplace provision exceeds the local initiative power because it attempts to expand constitutional protections, which is beyond the City of Spokane's jurisdiction to enact. The provision also conflicts with federal and state labor laws by attempting to redefine and expand labor rights in the City of Spokane.

d. The corporate rights provision exceeds the local initiative power because it attempts to change the rights of corporations under federal and state law. The provision therefore conflicts with federal and state law, and is outside the scope of the initiative power.

4. The SMAC initiative exceeds the local initiative power and is invalid.

a. The SMAC initiative exceeds the local initiative power because its prohibitions on campaign contributions and lobbying conflict with federal and state law. The First Amendment and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), protect the right of corporations to engage in political speech. The local initiative power does not include the ability to limit U.S. Supreme Court precedent. The initiative also conflicts with Washington's campaign disclosure law, which defines a "person" as including corporations.

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b. The SMAC initiative exceeds the local initiative power because it attempts to strip corporations of their First and Fifth Amendment rights, which would conflict with U.S. Supreme Court precedent.

5. The Envision and SMAC initiatives are not severable because all provisions of both initiatives are invalid.

Now, therefore, it is hereby ORDERED that Plaintiffs' Motion for Declaratory Judgment is GRANTED. The Court DECLARES that the Envision and SMAC initiatives are invalid as outside the scope of the local initiative power. The Court further DECLARES that neither initiative shall appear on the November 5, 2013 ballot, and directs the Auditor not to include them on that ballot. Final judgment shall be entered in favor of Plaintiffs in accordance with this Order.

DATED this 29 day of Aug, 2013.

Maryann C. Moreno
Superior Court Judge

Presented by:

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Approved as to form:

Terrence V. Sawyer
Attorney for Defendant Spokane Moves to Amend
The Constitution

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APPENDIX C

#47189-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL, an unincorporated association; WILLIAM E. CROAKE,

Respondents,

vs.

THE CITY OF SEATTLE, a municipal corporation; TIM HILL, Comptroller of The City of Seattle; KING COUNTY, a county of the State of Washington; CLINT G. ELSOM, Manager, Records and Elections Division of King County; DONALD R. PERRIN, Superintendent of Elections of King County,

Appellants.

BRIEF OF APPELLANTS

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effect. No single part -- not even an important one -- comprises the total. If any part be within the initiative powers, the electorate should be allowed to vote on the whole.

F. Inequity of Injunctive Relief

An injunction is an extraordinary relief that may be granted or withheld by a court sitting in equity in the exercise of its discretion.

A court of equity ought not exercise its jurisdiction when only political questions are involved and no property rights are affected. Cf. Weyerhaeuser Timber Co. v. Banker 186 Wash. 332, 344, 58 P.2d 285 (1936); Wilton v. Pierce County, 61 Wash. 386, 389, 112 Pac. 386 (1910); Gottstein v. Lister, 88 Wash. 462, 515, 153 Pac. 595 (1915). Neither the complaint nor any supplemental material shows any injury to the persons or property rights of the plaintiffs from holding the election. If Initiative Measure No. 21 were to pass, no city expenditures need to be restrained. No change would occur in any judicially-enforceable right or liabilities. When the election expense itself is the sole basis for standing, a case is surely political in nature.

Standing was claimed as a taxpayer to spare the public the cost of a useless election, cf. Yakima v. Huza, 67 Wn.2d 351, 407 P.2d 815 (1965); State ex rel. Berry v. Superior Court, 92 Wash. 16, 159 Pac. 92 (1916); 26 American Jurisprudence 2nd 33, Elections § 201.

(Complaint ¶ 1.1-2, CP 253) Out-of-state cases discount the complainant's interest as a taxpayer when the additional cost is low. Power v. Ratliff 112 Miss. 88, 72 So. 864, 865-866 (1916); Brumfield v. Brock, 169 Miss. 784, 142 So. 745 (1932). The incremental cost of placing Initiative Measure No. 21 upon the November 4, 1980 ballot is about $5,000 (Defendants' Memorandum, Ex 1, Affidavit of Clint G. Elsom, p. 1, CP 48). With a project of I-90's magnitude, that cost would be a worthwhile investment if the election could accelerate the project's ultimate fate by even a single day.

The pendency of the election is not causing any delays to the I-90 project. The I-90 project is now in a holding pattern. (Defendants' Memorandum, Ex 8-15, CP 90-128) No approvals are pending before any City officials or agencies nor does the City anticipate any during 1980. The State Department of Transportation has expressed no concern about the initiative nor is it a party to these proceedings.

In contrast enjoining the election would disrupt the orderly course of judicial review that might occur if Initiative Measure No. 21 were to pass. If it passes and political processes fail to resolve the antagonism between Initiative Measure No. 21 and the I-90 project, Section 7 would direct the City Attorney to maintain all actions necessary to enforce its provisions. As an ordinance, Initiative Measure No. 21 would be entitled

to a presumption of validity; its severability clause in Section 9 (if necessary) could be given effect; and, like contingent appropriations and statutes (e.g. Chapter 239, Laws of 1979, 1st Ex. Sess., RCW 35.92.360, and Chapter 116, Laws of 1980), the facts current when the law takes effect would be determinative. More importantly, an enforcement action would bring all parties to the Memorandum Agreement before the court. Discovery would present facts and place information in clear focus. The parties would frame the issues against a precise background. By comparison, the time to respond to Building Trades Council motion caused the City on a matter of great magnitude to supply newspapers clippings, hearsay evidence, in order to provide background facts. A decree in a post-election action would bind the concerned parties on the merits.

Judicial intrusion into a political dispute has insidious effects on the electoral process. If available, injunctions will become an instrument in political tactics. The opponents of an initiative would gain an additional weapon since enjoining an election by its nature would not help the proponents. A lawsuit to enjoin an election can impair the proponents' campaign -- its pendency alone can dampen fund raising; a preliminary injunction can disrupt momentum; and the cost of intervening or

an appeal could deplete the proponents' resources. A judge's remarks in rendering an oral decision could become fodder for partisans. Even if the injunction is dissolved in this case, the opponents of Initiative Measure No. 21 could use remarks in the Superior Court's oral decision to further their purpose.

Finally, the injunction will set a precedent that Washington courts are available as policemen in the political process. That is not a judicial function. State ex rel. Case v. Superior Court, 81 Wash. 623, 634, 143 Pac. 461 (1914); Parmeter v. Bourne, 8 Wash. 45, 38 Pac. 586, 757 (1894) [removal of county seat]; State ex rel. Fawcett v. Superior Court, 14 Wash. 604 45 Pac. 23 (1896) [election contest]; Whitten v. Silverman, 105 Wash. 238, 177 Pac. 737 (1919 [election contest].

CONCLUSION

Keep the courts out of politics: Quash the injunction, not the election! Let the judgment be reversed.

Respectfully submitted,

DOUGLAS N. JEWETT, City Attorney

PHILIP MORTENSON, Assistant

Jorgen G. Bader

JORGEN G. BADER, Assistant
Attorneys for Defendants
The City of Seattle and
Tim Hill, City Comptroller

In the

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 47189-4

SEATTLE BUILDING AND CONSTRUCTION TRADE COUNCIL, an unincorporated association; WILLIAM E. CROAKE,

Respondents,

v.

THE CITY OF SEATTLE, a municipal corporation; TIM HILL, Comptroller of the City; KING COUNTY, a county of the State of Washington; CLINT G. ELSOM, Manager, Records and Elections Division of King County; DONALD R. PERRIN, Superintendent of Elections of King County,

Appellants.

BRIEF OF RESPONDENTS

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Attorneys for Respondents

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metropolitan area. In December, 1976 a Memorandum Agreement was entered into by the Washington State Highway Commission, King County, the Muncipality of Metropolitan Seattle, and the three affected cities. To make it clear that the determination by the board of review could be modified, the 1977 legislature amended RCW 47.52.180 to provide that a modification of the findings of the board of review may be made by stipulation of the parties. Section 3, ch. 77, Laws of 1977 (effective under an emergency clause of March 30, 1977) (see Appendix VI to Plaintiff's Memorandum at Trial, CP 224-237).

With the adoption of the Memorandum Agreement, the design was finalized.

IV.

ARGUMENT IN SUPPORT OF JUDGMENT

A. Injunctive Relief is Appropriate Where Initiative 21 Is Beyond the Initiative Power.

1. The Courts Have Consistently Held That Challenges Going to the Scope of the Initiative Power Will Support Injunctive Relief.

The City of Seattle has argued that an injunction should not be issued to prevent the

submission of the initiative measure to the voters and its adoption by the voters. The City fails to draw the necessary distinction between a challenge addressing the substance of the legislation proposed, such as a contention that the legislation is unconstitutional, as contrasted with a procedural challenge addressed to the validity of the use of the initiative process to accomplish the desired result. It is respondents' argument that Initiative 21 is not a valid exercise of the initiative process and that contention frames the context in which the appropriateness of pre-election relief must be addressed.

Similar questions have been specifically presented and ruled upon by the Washington courts. Thus, Ford v. Logan, 79 Wn.2d 147, 483 P.2d 1247 (1971), challenged an initiative measure brought under the King County Charter. Ford filed a complaint for a declaratory judgment and injunction relief seeking the same relief sought here -- a determination that the initiative measure was invalid as beyond the scope of the initiative power and an injunction preventing its submission

to the voters. The opinion announcing the decision of the court posed and answered the question as follows:

> Do our courts have jurisdiction to determine whether the subject matter of a proposed initiative is within the scope of the initiative power before the proposal is enacted by the electorate? We conclude that they do.

79 Wn.2d at 151. (Opinion by Justice Neill concurred in by Justices McGovern and Stafford. Two additional justices concurred in the result and three justices dissented.) The court further concluded that the proposed initiative involved a matter which could not properly be dealt with by initiative and affirmed the trial court's injunction.

The principle thus stated is so well established as to be beyond challenge. Thus, as long ago as 1916 the state Supreme Court enjoined proceeding with an initiative measure even before signatures were obtained on the grounds that the form of the initiative was invalid. State ex rel. Barry v. Superior Court, 92 Wash. 16, 159 Pac. 92 (1916); Leonard v. Bothell, 87 Wn.2d 847, 557 P.2d

1306 (1976), citing Ford v. Logan, stated that referenda are limited to acts which are legislative in nature and refused to permit a referendum where the court determined that the proposed referendum was beyond the scope of the referendum power. See also Durocher v. King County, 80 Wn.2d 139, 492 P.2d 547 (1972), and Neils v. Seattle, 185 Wash. 269, 53 P.2d 848 (1936). Accord, In re Certain Petitions, Etc., 154 N.J. Super. 482, 381 A.2d 1217 (App. Div. 1977); Amalgamated Transit Union, Division 575 v. Yerkovich, 24 Or. App. 221, 545 P.2d 144 (1976). The common thread running through these cases is the holding that elections, whether purporting to be under the initiative or referendum power, can and will be enjoined when the proposed statute or ordinance does not properly fall within the initiative or referendum power.

2. Principles of Judicial Economy Justify This Court Reaching the Merits of the Controversy.

Even if the court should conclude that the trial court should not have granted injunctive relief before the election, we respectfully urge

that this court should consider the case on the merits and affirm the declaratory judgment entered below. The record is sufficient for a determination on the merits and a clear determination now, precluding subsequent litigation, will serve the ends of judicial economy. See Bolser v. Washington State Liquor Control Board, 90 Wn.2d 223, 580 P.2d 629 (1978). Principles of political economy would equally be served by preventing a hasty (five-week) campaign and an unnecessary election on an initiative destined to be declared illegal.

B. The Provisions of Initiative Measure No. 21 Are Invalid as Beyond the Scope of the Initiative Power.

Initiative 21 attempts to affect the Interstate 90 project by declaring it to be the policy of the City of Seattle to withdraw from the Memorandum Agreement of December 21, 1976 and to prohibit construction of any new bridge or the expansion of any existing bridge across Lake Washington. Specifically, the initiative provides that the City will not modify any street or other public right-of-way in connection with an expansion of State Route 90 (I-90) or State Route 520

APPENDIX D

West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.24. Uniform Declaratory Judgments Act (Refs & Annos)

West's RCWA 7.24.020

7.24.020. Rights and status under written instruments, statutes, ordinances

Currentness

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Credits
[1935 c 113 § 2; RRS § 784-2.]

Notes of Decisions (122)

West's RCWA 7.24.020, WA ST 7.24.020
Current through Chapter 4 of the 2015 Regular Session

End of Document

West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.24. Uniform Declaratory Judgments Act (Refs & Annos)

West's RCWA 7.24.120

7.24.120. Construction of chapter

Currentness

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Credits
[1935 c 113 § 12; RRS § 784-12.]

Notes of Decisions (8)

West's RCWA 7.24.120, WA ST 7.24.120
Current through Chapter 4 of the 2015 Regular Session

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. _____

(Court of Appeals No. 31887-7-III

ENVISION SPOKANE,

Appellant,

v.

SPOKANE ENTREPRENEURIAL CENTER, SPOKANE COUNTY, DOWNTOWN SPOKANE PARTNERSHIP, GREATER SPOKANE INCORPORATED, THE SPOKANE BUILDING OWNERS AND MANAGERS ASSOCIATION, SPOKANE ASSOCIATION OF REALTORS, THE SPOKANE HOME BUILDERS ASSOCIATION, THE INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, AVISTA CORPORATION, PEARSON PACKAGING SYSTEMS, WILLIAM BUTLER, NEIL MULLER, STEVE SALVATORI, NANCY MCLAUGHLIN, MICHAEL ALLEN, AND TOM POWER,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby declares that on April 9, 2015, pursuant to the parties' agreement regarding electronic service under CR 5(b)(7), I sent an e-mail attaching a copy of the following documents to counsel of record whose names and addresses are listed below:

1. Petition for Discretionary Review ;
2. Appendices; and
3. this Certificate of Service.

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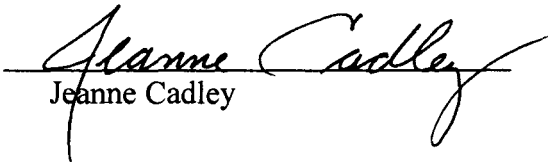
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed this 9th day of April in Seattle, Washington.



Jeanne Cadley