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Court of Appeals Case No. 49263-6-II

SUPREME COURT
OF THE STATE OF WASHINGTON

Port of Tacoma, Economic Development Board for Tacoma-Pierce County, Tacoma-Pierce County Chamber, City of Tacoma,

Respondents,

v.

Save Tacoma Water,

Appellant,

and

John and Jane Does 1-5 (Individual sponsors and officers of Save Tacoma Water), Donna Walters, Sherry Bockwinkel, City of Tacoma, Julie Anderson in her official capacity as Pierce County Auditor,

Defendants.

PETITION FOR REVIEW

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For one hundred years, this Court has authorized itself, and lower courts, to veto proposed legislation by the people of Washington State and its localities. This judicial veto power has been entirely constructed by the Court. No constitutional text, statute, or other rule authorizes it.

Shortly after the people created the initiative process, this Court began to assert judicial authority to veto duly-qualified initiatives from appearing on the ballot. Originally the Court claimed this veto power in limited circumstances. But those limited circumstances expanded over time. Now, following *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 369 P.3d 140 (2016), the Court has expanded the judicial veto power to effectively allow any legal challenge to a citizen initiative before it has even gone onto the ballot. In short, the Court has authorized "judicial review" of *proposed* laws.[1]

Yet this Court has never provided adequate justification for its judicial veto power. Namely, it has not explained why it can veto proposed legislation by the people, when it obviously could not do the same for a bill or proposed ordinance by the people's representatives in state and

1 *Marbury v. Madison* established judicial review as the power to say what the law is, not the power to say what a proposed law is. 5 U.S. 137, 177-78, 1 Cranch 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . . This is of the very essence of judicial review.") Thus, we use quotation marks around "judicial review" when referring to that act applied to proposed laws.

local government. Nor has this Court considered or ruled upon the fundamental political rights infringed by judicially-striking a duly-qualified initiative from appearing on the ballot.[2] Given the tremendous importance of separation of powers between the judicial and legislative branches of government, and the people's core political rights, these important issues need an answer from this Court.

This case challenges the legitimacy of the judicial veto power. Judicial restraint is most difficult when it must be exercised by the judiciary against its own perceived power. Nevertheless, that is the task required here.

A. Identity of Petitioners

Save Tacoma Water asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

Save Tacoma Water is a grassroots all-volunteer organization dedicated to ensuring sustainable water use in Tacoma. After studying the methanol plant proposal (where a single industrial user would have used as much municipal water per day as all of Tacoma's residents combined) and seeing their governments refuse to question the sustainability of this

2 In 2015, this Court stated that Washington courts have not "answer[ed] the question of whether subject matter, substantive, or procedural preelection review of an initiative implicates the First Amendment to the United States Constitution or article I, section 5 of our constitution." *Huff v. Wyman*, 184 Wn.2d 643, 655, 361 P.3d 727 (2015).

water use, Save Tacoma Water drafted and circulated two initiatives in the City of Tacoma in 2016, collecting nearly 17,000 signatures to qualify the initiatives for the ballot. Whether those initiatives should go on the ballot is the subject of this appeal.

B. Court of Appeals Decision

The Court of Appeals affirmed the trial court veto, and in so doing ignored or misstated the foundational substantive issues of separation of powers and political rights that Save Tacoma Water raised against the legitimacy of judicial vetoes of citizen initiatives. Essentially, the Court of Appeals reasoned that this Court has been authorizing judicial vetoes for a long time, so it must be ok.

Save Tacoma Water filed a Motion for Reconsideration (in the Appendix to this Petition at A-29 to A-48). That Motion first noted that the Court of Appeals had ignored issues raised by Save Tacoma Water that needed to be addressed prior to upholding the trial court's judicial veto. Then the bulk of the Motion for Reconsideration addressed the Court of Appeal's misapplication of *Angle v. Miller*, 673 F.3d 1122 (9th Cir. 2012), as authority for the Court of Appeal's holding that the First Amendment is not implicated when considering government actions that pose a severe burden on the initiative process. The Court of Appeals denied the Motion for Reconsideration without comment.

Save Tacoma Water seeks review by this Court of all parts of the Court of Appeals decision, as these issues all concern the legitimacy of the judicial veto power and its application to these initiatives. A copy of the decision is in the Appendix at pages A-14 through A-28. A copy of the order denying Save Tacoma Water's motion for reconsideration is in the Appendix at page A-49.

C. Issues Presented for Review

This Court created pre-election substantive / subject matter[3] review of citizen initiatives and authorized judicial veto orders keeping duly-qualified initiatives off the ballot. But it did so without considering that such review impermissibly infringes the peoples' constitutional political speech and petition rights and violates the separation of powers doctrine. Currently, the Court has not addressed the following issues, which Save Tacoma Water raised and preserved in this case:

1. Does preelection judicial veto of proposed legislation by the people violate separation of powers because it is undisputed that the Court would never entertain a similar pre-enactment lawsuit against a city council for attempting to pass an ordinance since a lawsuit seeking judicial review must wait until the proposed law is a law?

3 *See infra* at 10.

2. Does a judicial order that shuts down meaningful political discussion about a policy idea severely burden the First Amendment speech rights of the initiative proponents and the electorate as a whole?
3. Does Washington Constitution Article I, Section 5, which this Court has previously held to provide more protection for political expression than the First Amendment, and which states in its entirety that "Every person may freely speak, write and publish *on all subjects*, being responsible for the abuse of that right" (emphasis added), require strict scrutiny review when a court vetoes an initiative precisely because of the subject of the initiative?
4. Does the people of Tacoma's right of local community self-government protect the people's inherent power to make laws to protect their rights, health, safety, and welfare?
5. *Arguendo*, if the Court can judge the substantive constitutionality of a proposed initiative pre-election, do the rules of statutory construction apply, namely, a high beyond-a-reasonable-doubt burden to prove unconstitutionality, presumptions and assumptions in favor of constitutionality, and not entertaining hypotheticals that would show unconstitutionality?

D. Statement of the Case

Save Tacoma Water circulated two initiatives in the spring of 2016. (CP 563, 585.) Both initiatives sought the same substantive policy change: ensure a democratic check on industrial water applications to Tacoma Public Utilities, by adding a popular vote requirement to any industrial water use application over one million gallons per day. (CP 28, 31.) (Currently, there is only one such user, and the proposed law grandfathers that user in. (*Id.*)) One initiative would amend the city charter, the other initiative proposed an ordinance. (*Id.*) Save Tacoma Water collected nearly 17,000 signatures on the initiative petitions in three months, with all volunteers. (CP 585, ¶ 14.)

Before Save Tacoma Water even turned in the signed petition forms, the Port of Tacoma, the Tacoma-Pierce County Economic Development Board, and the Tacoma-Pierce County Chamber sued Save Tacoma Water, named and unnamed members of Save Tacoma Water, the City of Tacoma, and the County Auditor, seeking a declaratory judgment and an injunction preventing the initiatives from appearing on the ballot. (CP 1, 563, 584-86.) The City promptly joined the Plaintiffs. (CP 32, 70.)

Save Tacoma Water responded with a Motion to Dismiss, which challenged the trial court's authority to do "judicial review" of *proposed* laws as a violation of separation of powers and the principles of judicial

restraint, and also argued that a trial court order enjoining the initiatives from appearing on the ballot violated core political rights in the First and Fourteenth Amendments and the Washington Constitution, as such an order is a content-based prior-restraint of core political speech, and also infringes the people's right of petition. (CP 595 *et seq.*)

Three weeks after the Plaintiffs filed their Complaint, the trial court denied Save Tacoma Water's Motion to Dismiss and granted a permanent injunction vetoing the initiatives off the ballot. (CP 672 *et seq.* and RP 53:5-56:11.) Save Tacoma Water appealed. (CP 679, 690.)

E. Argument Why Review Should be Accepted

The issues presented for review have not been addressed by this Court and thus this Court has not justified its self-appointed authority to wade into the people's legislative process and kill the people's proposed legislation before it goes to a vote. This Court has not explained why judicial veto orders are not state action that infringes political rights and is therefore subject to strict scrutiny. *Huff v. Wyman*, *supra* fn. 2. This Court has not explained why judicial review cannot wait until the proposed initiative becomes law and is challenged in a proper case – with real facts.

As a result, the judicial veto power effectively makes the courts into a political branch of government. When initiative opponents anticipate that the proposed initiative might win at the ballot, they bring an

action in court to get a judge to veto it before the people even get to vote. This is not a legitimate role for the courts.

Specifically, this Court should accept review for the following reasons, all of which are both "a significant question of law under" our constitutional structure, and "issue[s] of substantial public interest that should be determined by" this Court. RAP 13.4(b)(3), (4).

I. The judicial veto violates separation of powers by invading the people's legislative process.

This issue is fundamental to the well-being of our democracy, as it concerns one branch of government exercising the powers of another branch of government, and notably, the infringing branch is also the branch with the power to say whether its actions actually violate separation of powers.

Here, this Court has given itself the power to veto duly-qualified proposed legislation by the people. We all recognize that the Court would never tell the state legislature or a city council that it cannot enact proposed legislation. Since the origin of judicial review in 1803, the Court's role is to say what the law is, not to say what proposed laws *might* be. But since 1916, this Court has been unable to restrain itself from ruling on proposed laws when they are proposed by the people through the initiative process.[4] An illegitimate and unjustified practice is

4 Back in 1916, the Court was more frank about its disdain for the initiative process, referring to it as the product of unfounded "distrust and dislike of" legislatures and

not made right through the passage of time, or repeated applications.

Yet that erroneous conclusion is found in the Court of Appeals Opinion, when it held that this Court must have addressed separation of powers since the Court has been authorizing the judicial veto for a long time. (Op. at 7 (stating that *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 104, 369 P.3d 140 (2016), *Our Water-Our Choice! v. City of Port Angeles*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010), *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005), and *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980), "implicitly hold that their analyses observe the proper separation of powers").)

A matter as important as judicial invasion of the people's legislative power is not to be left to purported implicit holdings.[5] But more

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calling the initiative itself "the primitive system of direct legislation." *State ex rel. Berry v. Super. Ct. Thurston Cnty.*, 92 Wash. 16, 22, 159 P. 92, 93 (1916). Apparently, the Court did not share the populist and progressive anti-corporate sentiments of the people of Washington and its localities, who put those sentiments into constitutional form that the Court should be bound to respect. (*See* STW Br. at 23-30.)

5 Further, the concept of "implicit holdings" used by the Court of Appeals is likely not consistent with Washington law, and thus demands review by this Court under RAP 13.4(b)(1). *See In re Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014) ("Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein . . . ." (quotations and citations omitted)); *State v. Rudolph*, 141 Wn. App. 59, 70, 168 P.3d 430 (2007) (recalling a Supreme Court "admonition" that lower courts should not treat as dispositive the higher court's rulings that do not answer the questions presented in the case at bar (quotations and citations omitted)); *and, regarding the theory for stare decisis analysis, Windust v. Dept. of Labor and Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958).

to the point, this Court has not actually addressed this issue. For example, this Court's recent justification for the justiciability of the judicial veto action was that "our limits on preelection review ensure that we do not address the substantive validity of a statute before it is enacted." *Spokane Entrepreneurial*, 185 Wn.2d at 105, 369 P.3d 140.

But in spite of these purported limits, the holding in *Spokane Entrepreneurial* then opened the door to a judicial veto for any reason, because the Court deemed any potentially unconstitutional measure to be "beyond the scope of the initiative power." *Id.* at 104, 110. In short, there is no longer a difference between "subject matter" and "substantive," which is the claimed difference that purportedly justifies judicial vetoes.

The rule as it now stands is that initiative opponents can bring any legal challenge to a qualified local initiative proposal to get a judge to veto it from appearing on the ballot. Thus, here, the trial court entertained hypothetical preemption and constitutional arguments in order to veto the proposed initiatives from appearing on the ballot, which the Court of Appeals affirmed. There are no "limits on preelection review [that] ensure that [courts] do not address the substantive validity of a statute before it is enacted," *id.* at 105, even though those purported limits are what this Court has said make the judicial veto legit and justiciable in the first place.

But all this raises a more fundamental question of why the

Court can veto proposed initiatives for being *ultra vires*, but obviously would not be able to enjoin a vote of legislative representatives on the exact same measure. The Court has never addressed this question, which is at the heart of the judicial veto's legitimacy.

II. Judicial veto orders are subject to strict scrutiny as they severely burden the people's fundamental political rights.

The Court of Appeals Opinion failed to apply strict scrutiny, as required by *Angle*, *Collier*, and *Meyer*, regardless of whether the trial court's judicial veto was content-based or content-neutral.

The express text of Washington Constitution Article I, Section 5, does not allow subject based restrictions: "Every person may freely speak, write and publish *on all subjects*, being responsible for the abuse of that right" (emphasis added). Issues 2 and 3 below arise under both the state and federal constitutions. Each of the following issues independently require that the courts apply strict scrutiny to judicial veto orders.

1. The Court of Appeals Opinion misstates the holding in *Angle* and therefore dramatically minimizes First Amendment protections for the citizen initiative power.

The Court of Appeal's Opinion misapplies a sentence from *Angle* – and by so doing, severely limits First Amendment protections for initiative lawmaking. *Angle* does not stand for the assertion that the Opinion uses it for – that the First Amendment does not limit government interference with the initiative power – and therefore the Court of Appeal's

Published Opinion risks confusing established First Amendment case law.

Save Tacoma Water discussed this issue extensively in its Motion for Reconsideration before the Court of Appeals, and incorporates that argument here (A-33 to A-44), with a summary below.

Angle does contain a sentence that can be read out of context to suggest that the First Amendment does not apply to initiatives. That is what the Court of Appeals did here. But the *Angle* court goes on to hold that "[r]egulations that make it more difficult to qualify an initiative for the ballot . . . may indirectly impact core political speech [and t]hus, as applied to the initiative process, we assume that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Angle*, 673 F.3d at 1133.

The First Amendment analysis in *Angle* did not end with "[t]here is no First Amendment right to place an initiative on the ballot." *Id.* But unfortunately, that is where the Court of Appeals ended its analysis. (Op. at 13.) The Opinion thereby reduces the protection of the First Amendment, in conflict with Ninth Circuit precedent.

The judicial veto power clearly "significantly inhibit[s] the ability of initiative proponents to place initiatives on the ballot," and therefore triggers strict scrutiny under the First Amendment. *See Angle*,

673 F.3d at 1133.[6]

2. The Court of Appeals Opinion vetoed the initiatives precisely because of their content, yet the Court of appeals ruled that its action was not content-based.

The Court of Appeal's Opinion holds that looking at the text of an initiative to decide whether to veto it from appearing on the ballot is not a content-based decision. (Op. at 14.[7]) This holding cannot be reconciled with the content-based versus content-neutral jurisprudence framework.[8]

That distinction between content-based and content-neutral restrictions is often foundational in First Amendment jurisprudence. The United States Supreme Court has held that "above all else, the First

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6 While other federal circuit courts are split on the issue, Appellant has found no Ninth Circuit case directly addressing the subject matter issue, and thus the rule in *Angle* should control here in Washington as it is the Ninth Circuit's application of the First Amendment to restrictions on ballot access for the initiative power. *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (First Amendment applies to subject matter restrictions); *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) (First Amendment does not apply); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (same); *see also, for review of the circuit court split*, Anna Skiba-Crafts, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305 (2009).

7 The Opinion held "Neither the injunction nor the principles on which it is based distinguish among measures or in associated speech activities on the basis of content or subject matter."

8 "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Turner Broadcasting System, Inc. v. Fed. Comm. Commn.*, 512 U.S. 622 (1994) (citing, as examples, "*Burson v. Freeman*, 504 U.S. 191, 197 [...] (1992) ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign"); *Boos v. Barry*, 485 U.S. 312, 318-319 [...] (1988) (plurality opinion) (whether ordinance permits individuals to "picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not")). It is the act of discriminating on the basis of content that makes a government restriction content-based, regardless of whether the government does so for an asserted content-neutral purpose. *Id.* at 642-43 ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." (citations omitted)).

Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

This Court defines content-based and content-neutral similarly for the Washington Constitution. *See Collier v. City of Tacoma*, 121 Wn.2d 737, 746, 854 P.2d 1046 (1993).[9] Notably, when analyzing whether the law at issue in *Collier* was content-based, the Court observed that "[t]he trial court found that Tacoma Public Works Department personnel have to read the signs in order to determine whether they are prohibited at a particular time." *Id.* at 749.

Here, the Court of Appeals professed a content-neutral purpose: enjoining proposed laws that are ostensibly "beyond the local initiative power." (Op. at 14.) But that content-neutral purpose is not enough to make its action content-neutral, because what the trial court actually did was entirely content-based: the court looked at the text of the initiatives and thereby decided whether to veto them because of their subject matter.

9 "We recognize that the free speech clauses of the state and federal constitutions are different in wording and effect, but that the result reached by previous Washington cases in general adopted much of the federal methodology for application to state constitutional cases. The federal cases cited here and in our prior decisions are used for the purpose of guidance and do not themselves compel the result the court reaches under our state constitution." (citation omitted).

This is just the same as looking at the text on yard signs (*Collier, supra*) or protesters' signs (*Burson* and *Boos, supra)* before deciding whether they are allowed. A government action that rests entirely on the content is content-based.[10]

The government has the duty in strict scrutiny review to justify its content-based infringement of core political rights. Instead, the Court of Appeals Opinion put the burden on Save Tacoma Water. (*See* Op. at 14 ("STW cites to no other authority for its contention that pre-election review of a local initiative violates article I, section 5."); *see also* STW Br. at 33 fn.23 (quoting this Court in *Huff v. Wyman* stating that Washington Courts had not addressed this question).) Lack of authority on this issue demands this Court take up this case, and address this content-based infringement under both the state and federal constitutions.

3. A judicial veto is a prior restraint on political speech.

"[T]he circulation of a petition involves the type of interactive

10 The Opinion equates Save Tacoma Water's challenge of the constitutionality of a judicial veto order with an argument that that initiative proponents "have a constitutional right to place an initiative on the ballot, whether or not authorized by state or local law." (Op. 13.) Thus, the Opinion ignores the basic fact that the trial court's judicial veto was a state action that placed a severe burden on core political speech, as if the ends (keeping an ostensibly *ultra vires* initiative off the ballot) justify the means (a judicial order that stops any meaningful political policy debate – that stops core political speech). But case law on political speech protections places severe restrictions on prior restraints on political expression, precisely because of the danger of letting the government decide in advance what is legitimate political expression. (*See infra*, at 16-17.) The issue is not whether the ballot is a public forum. The issue is whether a judge can legitimately enjoin a duly-qualified initiative from ballot access, and if the judge does so, and thus cuts off further meaningful political discussion on the issue, is that a severe burden on core political speech?

communication concerning political change that is appropriately described as core political speech." *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). So too is campaigning for or against a measure that will appear on the ballot. The public debate that happens *because an issue will appear on the ballot* is also core political speech. The reasoning in *Meyer* that found "circulation of petition" to be core political speech applies equally well to the debate that precedes a vote of the people on a duly-qualified initiative. *See id.* at 422-23 (holding government action is unconstitutional when it "limits the number of voices who will convey appellees' message . . . and, therefore, limits the size of the audience they can reach" and it "limit[s] their ability to make the matter the focus of statewide discussion" by qualifying the initiative to appear on the ballot, since it "has the inevitable effect of reducing the total quantum of speech on a public issue.").

In this case, some of the Respondents' representatives said that they sought a judicial veto action precisely because of the political expression that would result from the initiative appearing on the ballot. (STW Br. at 8-9.) Respondents sued to cut off this speech.

Save Tacoma Water also presented an example where the vote on an initiative caused the Washington state legislature to change its policy, even though the initiative was not legal. (STW Br. at 38-39.)

Here, the trial court judge infringed on that speech by vetoing

the initiatives, which killed the political debate on the policy and prevented meaningful political expression by initiative proponents and opponents. *See Meyer*, 486 U.S. at 422 n.5. This violated Save Tacoma Water's (and the people of Tacoma's) political rights under the Washington Constitution[11] and United States Constitution. The judge could instead have reviewed the new law if and after it is enacted following the vote (i.e., the judicial veto action is not a narrowly-tailored remedy). In addition, keeping ostensibly "beyond the scope" initiatives off the ballot is not a compelling government purpose, or even a necessary one. *See id.* at 426 n.7 (citing *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.")).

Political speech does not lose its constitutional protection because it is actually connected to direct law making. Court orders that end meaningful public debate on a policy change are prior restraints on political speech.

III. The people's initiative power derives from their right of local community self-government, which protects their inherent authority to make laws to protect their rights, health, safety, and welfare.

In its opening brief, Save Tacoma Water traced the extensive

11 *E.g.*, *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 801, 231 P.3d 116 (2010) (noting that "unlike the First Amendment, article I, section 5 categorically prohibits prior restraints on constitutionally protected speech" (citation omitted)).

history, and constitutional textual expression, of the right of local community self-government, as well as the judicial attack on that right (which limits local government lawmaking power, and is known today as Dillon's Rule), and argued that this right means the courts lack authority to veto the people's proposed legislation. (STW Br. at 10-30.) The Court of Appeals simply ignored this argument, instead of considering whether there is such a right, and if so, whether preelection judicial veto unlawfully infringes it. (Op. *passim*; Mot. for Reconsideration, *infra*, A-31 to A-32.)

As Professor Spitzer has pointed out, this Court's recourse to Dillon's Rule is "zombie jurisprudence" and Dillon's Rule should remain dead. Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 SEATTLE U.L. REV. 809, 858-60 (2015). Dillon's Rule has never been the law in Washington State for first class cities, yet the courts' treatment of city charters, and the people's lawmaking procedures in city charters, is entirely derived from Dillon's Rule. It is as if the home rule provisions that were meant to and attempted to revive the right of local community self-government do not exist in our state constitution.

The Court should accept review to admonish its prior Dillon's Rule opinions and hold that the people of Tacoma's legislative power is protected by their right of local community self-government and derives from their Charter, not from state statute. *See Spokane Entrepreneurial*,

185 Wn.2d at 104, 369 P.3d 140.

IV. *Arguendo*, the judicial veto, if it is legitimate, should have standards at least as stringent as a real case challenging the validity of an enacted law.

If the judicial veto is legitimate, then the standards that apply for challenges to enacted laws should also apply in judicial veto actions. STW Br. 40-43 (providing those standards).

But this Court, and lower courts, have never articulated review standards for judicial veto actions. Here, this has led the City to actually argue for weaker review standards pre-election, which produces an absurd incentive for initiative opponents to attack the initiative in court pre-election, rather than in a political campaign at the ballot or a post-enactment court challenge. (City's Br. at 21, Reply Br. at 17-19.) This incentivizes the judicial veto and politicizes the courts.

If the Court is going to continue to authorize judicial veto actions, it should at least provide some standards for this "judicial review." But really, the fact that the Court has never articulated standards only shows that the judicial veto is an ends-oriented political tool, as commentators have frequently suggested. *E.g.*, Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 87 (1973) ("In short, whether stated or not, the controversial nature of the particular issue may well bear upon the judicial determination of whether

the matter is legislative or administrative [and thus subject to veto]." (footnote omitted)).

Without review standards, the courts are free to entertain hypothetical facts and assume preemption or other constitutional problems, and use those presumptions to veto proposed initiatives. That the Court has not established review standards only underscores why the judicial veto is an illegitimate political weapon that this Court must definitively denounce.

F. Conclusion

This Court should grant review of the Published Opinion in order to repudiate the judicial veto power. Specifically, the Court should rule that the judicial veto is prohibited as a violation of separation of powers, First Amendment and Article I, Section 5 rights (as a severe burden on ballot access, a content-based speech restriction, and a prior restraint on speech), and an unconstitutional expansion of Dillon's Rule limiting local lawmaking in violation of the people of Tacoma's right of local community self-government.

Arguendo, the Court should establish standards for judicial veto actions at least as strict as real judicial review.

Respectfully submitted on November 27, 2018,

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Appendix A – Complete Text of Charter Amendment 5[12]

The People's Right to Water Protection Amendment

WHEREAS, the Residents of Tacoma do not want to return to our polluted past; and

WHEREAS, since 1980, Tacoma has spent an immense amount of money, time and effort cleaning up the Superfund Sites left behind by the Asarco copper smelter, Occidental Chemical, Kaiser Aluminum and others; and

WHEREAS, City residents use almost half of the water produced by City-owned Tacoma Public Utilities; and

WHEREAS, the City of Tacoma is projecting, and preparing for, an increase in population of 127,000 more residents by 2040; and

WHEREAS, a 2009 state survey of public utilities shows that the Pierce County Large Water Users Sector is 13.7% while in King County the Large Water Users Sector is only 1.9%; and

WHEREAS, the City of Tacoma is responsible to the city's residents and small businesses first and must use all caution when issuing water utility services to any potential water user that wants to use more than one million gallons of water per day; and

WHEREAS, the Tacoma Public Utility gets water from the Green River Watershed and the concerns for the environmental impacts of large water users are valid as more increasing demands for water for people and community development must take into account droughts that will become more frequent in the Pacific Northwest as the result of climate change; and

WHEREAS, the people want policies and contractual requirements to make industry secondary to the human needs of the citizens and households, schools, hospitals, and homes for the aged, for fresh potable water should take priority except in the case of emergency fire fighting needs or any other natural disaster that cannot be reasonably forecasted; and

WHEREAS, the sustained availability of affordable and potable water for

12 In Clerk's Papers at 28.

the residents and businesses of Tacoma must be paramount over considerations such as potential tax revenues or investor profits; and

WHEREAS, industrial users that would require excessive amounts of water to operate will have potential long-term negative impacts on the local and regional environment and future community development in the City of Tacoma; and

WHEREAS, residents and businesses of Tacoma have been asked in the recent past and may be required in the future to conserve water; and

WHEREAS, large water users pay discounted rates while residents as ratepayers carry an extra financial burden for the conservation, maintenance, protection and development of potable water sources; and

WHEREAS, industries that use large amounts of water daily would place human, economic, environmental and homeland securities at risk; and

WHEREAS, the Citizens of Tacoma want to encourage clean and renewable energy industries operating in the City of Tacoma; and

WHEREAS, the Citizens of Tacoma find that a proposed methanol refinery does not meet the requirements of a clean, renewable and sustainable energy production facility; and

WHEREAS, the City of Tacoma Charter provides for Initiative and Referendum rights which provides the city's citizens the right to place this Charter amendment before the voters; and

WHEREAS, the people of the City of Tacoma possess an inherent and inalienable right to govern our own community as secured by the Declaration of Independence's affirmation of the right of people to alter or abolish their government if it renders self-government impossible, and this inherent right is reaffirmed in the Tacoma City Charter, the Washington State Constitution, and the United States Constituion;

Therefore be it ordained by the voters in the City of Tacoma that:

(1) The people of Tacoma adopt the following amendments to the Tacoma City Charter, Article IV (Public Utilities):

Section 4.24 – The People's Right to Water Protection

(A) People's Vote on Large Water Use Applications.
The people of the City of Tacoma find that there is a compelling need to carefully consider the consequences of providing water utility service to an applicant that intends to use large amounts of fresh water. Before providing water utility service to any applicant for 1336 CCF (one million gallons), or more, of water daily from the City, the City shall place the applicant's request for water utility service before the voters on the next available General Election Ballot, in a manner substantially conforming to the rules for Section 2.22 of this Charter. The applicant shall pay for the costs of the vote of the people. Only if a majority of the voters approve the water utility service application and all other application requirements are met may the City provide the service. The vote by the people is binding, and not advisory. Any water users currently authorized to use 1336 CCF or more of water daily are grandfathered in, however, their water utility service is not transferable.

(B) Sustainable Water Protection is an Inviolable Right that Government Cannot Infringe.
The people of the City of Tacoma protect their right to water through their inherent and inalienable right of local community self-government, and in recognition that clean fresh water is essential to life, liberty, and happiness, and the City of Tacoma has a foundational duty to maintain a sustainable provision of water for the people. The People's Right to Water Protection vote provides a democratic safeguard, on top of the City's existing application process, to ensure that large new water users do not threaten the sustainability of the people's water supply. To prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights or mandates of this Article.

(C) Water Protection supersedes Corporate Interests.
As the People's Right to Water Protection is foundational to the people's health, safety, and welfare, and must be held inviolate, no government actor, including the courts, will recognize as valid any permit, license, privilege, charter, or other authorization, that would violate the rights or mandate of this Article, issued for any corporation, by any state, federal, or international entity. In addition, corporations that violate, or seek to violate the rights and mandates of this Article shall not be deemed “persons” to the extent that such treatment would interfere with the rights or mandates enumerated by this Article, nor shall corporations possess any other legal

rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by this Article. “Rights, powers, privileges, immunities, and duties” shall include the power to assert international, federal, or state preemptive laws in an attempt to overturn this Article, and the power to assert that the people of the City of Tacoma lacked the authority to adopt this Article.

(D) Enforcement.
The City or any resident of the City may enforce this section through an action brought in any court possessing jurisdiction over activities occurring within the City of Tacoma, including, but not limited to, seeking an injunction to stop prohibited practices. In such an action, the City of Tacoma or the resident of the City of Tacoma shall be entitled to recover damages and all costs of litigation, including, without limitation, expert, and attorney's fees.

(2) In enacting this Charter Amendment through our Initiative Power, the people of Tacoma declare our intent that:

(A) The provisions of this Charter Amendment are severable, and the petitioners intend that all valid provisions of the initiative be placed on the ballot and enacted into law even if some provisions are found invalid.

(B) The provisions of this Charter Amendment be liberally construed to achieve the defined intent of the voters.

(C) We support each of the provisions of this section independently, and our support for this section would not be diminished if one or more of its provisions were to be held invalid, or if any of them were adopted by the City Council and the others sent to the voters for approval.

(D) This section shall take effect 15 (fifteen) days after election certification. The City shall not accept any applications for water utility service for 1336 CCF or more between the election and effective date.

Appendix B – Complete Text of Tacoma Initiative 6[13]

The People's Right to Water Protection Ordinance

WHEREAS, the Residents of Tacoma do not want to return to our polluted past; and

WHEREAS, since 1980, Tacoma has spent an immense amount of money, time and effort cleaning up the Superfund Sites left behind by the Asarco copper smelter, Occidental Chemical, Kaiser Aluminum and others; and

WHEREAS, City residents use almost half of the water produced by City-owned Tacoma Public Utilities; and

WHEREAS, the City of Tacoma is projecting, and preparing for, an increase in population of 127,000 more residents by 2040; and

WHEREAS, a 2009 state survey of public utilities shows that the Pierce County Large Water Users Sector is 13.7% while in King County the Large Water Users Sector is only 1.9%; and

WHEREAS, the City of Tacoma is responsible to the city's residents and small businesses first and must use all caution when issuing water utility services to any potential water user that wants to use more than one million gallons of water per day; and

WHEREAS, the Tacoma Public Utility gets water from the Green River Watershed and the concerns for the environmental impacts of large water users are valid as more increasing demands for water for people and community development must take into account droughts that will become more frequent in the Pacific Northwest as the result of climate change; and

WHEREAS, the people want policies and contractual requirements to make industry secondary to the human needs of the citizens and households, schools, hospitals, and homes for the aged, for fresh potable water should take priority except in the case of emergency fire fighting needs or any other natural disaster that cannot be reasonably forecasted; and

WHEREAS, the sustained availability of affordable and potable water for

13 In Clerk's Papers at 31.

the residents and businesses of Tacoma must be paramount over considerations such as potential tax revenues or investor profits; and

WHEREAS, industrial users that would require excessive amounts of water to operate will have potential long-term negative impacts on the local and regional environment and future community development in the City of Tacoma; and

WHEREAS, residents and businesses of Tacoma have been asked in the recent past and may be required in the future to conserve water; and

WHEREAS, large water users pay discounted rates while residents as ratepayers carry an extra financial burden for the conservation, maintenance, protection and development of potable water sources; and

WHEREAS, industries that use large amounts of water daily would place human, economic, environmental and homeland securities at risk; and

WHEREAS, the Citizens of Tacoma want to encourage clean and renewable energy industries operating in the City of Tacoma; and

WHEREAS, the Citizens of Tacoma find that a proposed methanol refinery does not meet the requirements of a clean, renewable and sustainable energy production facility; and

WHEREAS, the City of Tacoma Charter provides for Initiative and Referendum rights which provides the city's citizens the right to place this ordinance before the voters; and

WHEREAS, the people of the City of Tacoma possess an inherent and inalienable right to govern our own community as secured by the Declaration of Independence's affirmation of the right of people to alter or abolish their government if it renders self-government impossible, and this inherent right is reaffirmed in the Tacoma City Charter, the Washington State Constitution, and the United States Constituion;

Therefore be it ordained by the voters in the City of Tacoma:

That a new Ordinance is adopted and a new section of Tacoma Municipal Code Title 12 is hereby adopted, which deals with issuing water utility service to any applicant for one million gallons, or more, of water daily from the City of Tacoma, and is to be known as “The People's Right to

Water Protection Ordinance”:

A. People's Vote on Large Water Use Applications. The people of the City of Tacoma find that there is a compelling need to carefully consider the consequences of providing water utility service to an applicant that intends to use large amounts of fresh water. Before providing water utility service to any applicant for 1336 CCF (one million gallons), or more, of water daily from the City, the City shall place the applicant's request for water utility service before the voters on the next available General Election Ballot. The applicant shall pay for the costs of the vote of the people. Only if a majority of the voters approve the water utility service application and all other application requirements are met may the City provide the service. The vote by the people is binding, and not advisory. Any water users currently authorized to use 1336 CCF or more of water daily are grandfathered in, however, their water utility service is not transferable.

B. Limitations on Government Infringement of the People's Inviolable Right of Sustainable Water Protection. The people of the City of Tacoma protect their right to water through their inherent and inalienable right of local community self-government, and in recognition that clean fresh water is essential to life, liberty, and happiness, and the City of Tacoma has a foundational duty to maintain a sustainable provision of water for the people. The People's Right to Water Protection vote provides a democratic safeguard, on top of the City's existing application process, to ensure that large new water users do not threaten the sustainability of the people's water supply. To prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights or mandates of this Ordinance.

(C) Water Protection supersedes Corporate Interests. As the People's Right to Water Protection is foundational to the people's health, safety, and welfare, and must be held inviolate, no government actor, including the courts, will recognize as valid any permit, license, privilege, charter, or other authorization, that would violate the rights or mandate of this Ordinance, issued for any corporation, by any state, federal, or international entity. In addition, corporations that violate, or seek to violate the rights and mandates of this Ordinance shall not be deemed “persons” to the extent that such treatment would interfere with the rights or mandates enumerated by this Ordinance, nor shall corporations possess

any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by this Ordinance. “Rights, powers, privileges, immunities, and duties” shall include the power to assert international, federal, or state preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of the City of Tacoma lacked the authority to adopt this Ordinance.

D. Enforcement. The City or any resident of the City may enforce this Ordinance through an action brought in any court possessing jurisdiction over activities occurring within the City of Tacoma, including, but not limited to, seeking an injunction to stop prohibited practices. In such an action, the City of Tacoma or the resident of the City of Tacoma shall be entitled to recover damages and all costs of litigation, including, without limitation, expert, and attorney's fees.

E. Severability and Construction. The provisions of this Ordinance shall be liberally construed to achieve the defined intent of the voters. The provisions of this Ordinance are severable, and the petitioners intend that all valid provisions of the initiative be placed on the ballot and enacted into law even if some provisions are found invalid. We – the people of Tacoma – support each of the provisions of this Ordinance independently, and our support for this Ordinance would not be diminished if one or more of its provisions were to be held invalid, or if any of them were adopted by the City Council and the others sent to the voters for approval.

F. Effect. This section shall take effect 15 (fifteen) days after either adoption or election certification. The City shall not accept any applications for water utility service for 1336 CCF or more between the adoption or election and the effective date of this Ordinance.

Appendix C - statutes and constitutional provisions relevant to the issues presented for review

1. U.S. Const., Amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. U.S. Const., Amend. IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

3. U.S. Const., Amend. X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

4. Wash. Const., Art. I, § 1, Political Power.

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

5. Wash. Const., Art. I, § 4, Right of Petition and Assemblage.

The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

6. Wash. Const., Art. I, § 5, Freedom of Speech.

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

7. Wash. Const., Art. I, § 29, Constitution Mandatory.

The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

8. Wash. Const., Art. I, § 30, Rights Reserved.

The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

9. Wash. Const., Art. I, § 32, Fundamental Principles.

A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

10. Wash. Const., Art. II, § 1, Legislative Powers, Where Vested.

The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. . . .

11. Wash. Const., Art. XI, § 10, Incorporation of Municipalities.

Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized, or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election, shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution shall be subject to and controlled by general laws. Any city containing a population of ten thousand inhabitants, or more, shall be permitted to frame a charter for its own government, consistent with and subject to the Constitution and laws of this state, and for such purpose the legislative authority of such city may cause an election to be had at which election there shall be chosen by the qualified electors of said city, fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election and qualified electors, whose duty it shall be to convene within ten days after their election, and prepare and propose a charter for

such city. Such proposed charter shall be submitted to the qualified electors of said city, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said city, and shall become the organic law thereof, and supersede any existing charter including amendments thereto, and all special laws inconsistent with such charter. Said proposed charter shall be published in the daily newspaper of largest general circulation published in the area to be incorporated as a first class city under the charter or, if no daily newspaper is published therein, then in the newspaper having the largest general circulation within such area at least once each week for four weeks next preceding the day of submitting the same to the electors for their approval, as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given as required by law. Said elections may be general or special elections, and except as herein provided shall be governed by the law regulating and controlling general or special elections in said city. Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter, or amendment thereto, any alternate article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others.

12. Wash. Const., Art. XI, § 11, Police and Sanitary Regulations.

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

13. Wash. Const., Art. XII, § 1, Corporations [other than Municipal], How Formed.

Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law.

14. Tacoma City Charter, Art. II, Powers of the People, § 2.18.

Amendments to this charter may be submitted to the voters by the City

Council or by initiative petition of the voters in the manner provided by the state constitution and laws.

15. Tacoma City Charter, Art. II, Powers of the People, § 2.19.

Citizens of Tacoma may by initiative petition ask the voters to approve or reject ordinances or amendments to existing ordinances, subject to any limitation on topics in state law, by the following process:

(a) The petitioners shall file an Initiative Petition with the City Clerk.

(b) The City Clerk shall forward the petition to the City Attorney within one (1) working day of receipt.

(c) Within ten (10) working days of receipt, the City Attorney shall review the petition and make contact with the petitioner as necessary, and if the petition is proper in terms of form and style, the City Attorney will write a concise, true, and impartial statement of the purpose of the measure, not to exceed the number of words as allowed under state law for local initiatives. The statement will be phrased in the form of a positive question.

(d) The City Attorney shall file this concise statement with the City Clerk as the official ballot title.

(e) The City Clerk shall assign an initiative number to the ballot title and notify the petitioner that the ballot title becomes final and signature gathering may begin in ten (10) working days if there is no judicial review. Notification of the ballot title shall be posted at City Hall and on the City's web page.

(f) Persons dissatisfied with the ballot title prepared by the City Attorney may seek judicial review by petitioning the Pierce County Superior Court within ten (10) working days of the notification of the ballot title having been posted as required under (e). The Court shall endeavor to promptly review the statements and render a decision as expeditiously as possible. The decision of the Court is final.

(g) Petitions must include the final, approved ballot title, initiative number, the full text of the ordinance, or amendment to existing ordinance, that the petitioners seek to refer to the voters, and all other text and warnings required by state law.

(h) Petitioners have one hundred and eighty (180) calendar days to collect signatures from registered voters.

(i) The number of valid signatures shall be equal to ten percent (10%) of the votes cast in the last election for the office of Mayor.

(j) The City Clerk shall forward the signatures to the County Auditor to be verified. Based on the Auditor's review, the City Clerk shall determine the validity of the petition. If the petition is validated, the City Council may enact or reject the Initiative, but shall not modify it. If it rejects the Initiative or within thirty (30) calendar days fails to take final action on it, the City Council shall submit the proposal to the people at the next Municipal or General Election that is not less than ninety (90) days after the date on which the signatures on the petition are validated.

16. RCW 35.22.200 Legislative powers of charter city—Where vested—Direct legislation.

The legislative powers of a charter city shall be vested in a mayor and a city council, to consist of such number of members and to have such powers as may be provided for in its charter. The charter may provide for direct legislation by the people through the initiative and referendum upon any matter within the scope of the powers, functions, or duties of the city. The mayor and council and such other elective officers as may be provided for in such charter shall be elected at such times and in such manner as provided in Title 29A RCW, and for such terms and shall perform such duties as may be prescribed in the charter, and shall receive compensation in accordance with the process or standards of a charter provision or ordinance which conforms with RCW 35.21.015.

Filed
Washington State
Court of Appeals
Division Two

July 25, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PORT OF TACOMA, a Washington State Municipal Corporation; ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY, a Washington State Non-Profit Corporation; TACOMA-PIERCE COUNTY CHAMBER, a Washington State Non-Profit corporation, Respondents, v. SAVE TACOMA WATER, a Washington political committee, Appellant, DONNA WALTERS, sponsor and Treasurer of SAVE TACOMA WATER; JON AND JANE DOES 1-5; (Individual sponsors and officers of SAVE TACOMA WATER); CITY OF TACOMA, a Washington State Municipal Corporation; and JULIE ANDERSON, in her capacity as PIERCE COUNTY AUDITOR, Defendants.	No. 49263-6-II PUBLISHED OPINION

BJORGEN, J. — Save Tacoma Water (STW) appeals from the superior court's declaratory judgment and permanent injunction preventing it from placing two initiatives on the Tacoma municipal ballot. STW argues that the superior court did not have the authority to conduct a pre-election review of the proposed initiatives, that the superior court erred by determining that

various provisions were beyond the scope of the local initiative power and conflicted with state law, and that the injunction violated STW's right to free speech.

We hold that the superior court had the authority to review whether the proposed initiatives exceeded the scope of the local initiative power and that its review did not offend separation of power principles. We also hold that the superior court properly determined that the challenged provisions were beyond the scope of the local initiative power and that one of the provisions conflicted with state law. Finally, we hold that the injunction preventing the initiatives from appearing on the ballot did not violate STW's right to free speech. Consequently, we affirm the superior court.

FACTS

In 2016, STW, a political committee, began circulating two initiative petitions among Tacoma residents in order to place the proposed initiatives on the upcoming municipal ballot. One initiative proposed an amendment to the Tacoma City Charter (Charter Initiative) and the other sought to enact a new municipal ordinance. The two initiatives contained text that was substantially identical in effect. The following are the provisions of common effect that are of significance to this appeal.

> [From the Charter Initiative]
>
> (A) People's Vote on Large Water Use Applications [(Water Provision)].
>
> . . . . Before providing water utility service to any applicant for 1336 CCF [(centum cubic feet)] (one million gallons), or more, of water daily from the City, the City shall place the applicant's request for water utility service before the voters on the next available General Election Ballot, in a manner substantially conforming to the rules for Section 2.22 of this Charter. The applicant shall pay for the costs of the vote of the people. Only if a majority of the voters approve the water utility service application and all other application requirements are met may the City provide the service. . . .
>
> (B) Sustainable Water Protection is an Inviolable Right that Government Cannot Infringe [(Preemption Provision)].

> . . . . The People's Right to Water Protection vote provides a democratic safeguard, on top of the City's existing application process, to ensure that large new water users do not threaten the sustainability of the people's water supply. To prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights or mandates of this Article.
>
> (C) Water Protection supersedes Corporate Interests.
> As the People's Right to Water Protection is foundational to the people's health, safety, and welfare, and must be held inviolate, no government actor, including the courts, will recognize as valid any permit, license, privilege, charter, or other authorization, that would violate the rights or mandate of this Article, issued for any corporation, by any state, federal, or international entity. [Subordination of Judicial Review Provision]. In addition, corporations that violate, or seek to violate the rights and mandates of this Article shall not be deemed "persons" to the extent that such treatment would interfere with the rights or mandates enumerated by this Article, nor shall corporations possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by this Article [(Subordination of Corporate Rights Provision)]. . . .
>
> (D) Enforcement.
> The City or any resident of the City may enforce this section through an action brought in any court possessing jurisdiction over activities occurring within the City of Tacoma, including, but not limited to, seeking an injunction to stop prohibited practices. . . .
>
> [From the initiative amending Tacoma ordinance]
>
> (E) Severability and Construction.
> The provisions of this Ordinance shall be liberally construed to achieve the defined intent of the voters. The provisions of this Ordinance are severable, and the petitioners intend that all valid provisions of the initiative be placed on the ballot and enacted into law even if some provisions are found invalid.

Clerk's Papers (CP) at 28-31.

On June 6, 2016, the Port, the Economic Development Board for Tacoma-Pierce County, and the Tacoma-Pierce County Chamber filed a complaint in superior court for declaratory judgment and injunctive relief against STW, various sponsors of that organization, the City and the Pierce County Auditor. The City filed an answer to the complaint, which included cross-

claims against STW and the additional parties named as defendants. The City then filed a motion for a preliminary and a permanent injunction to prevent STW's initiatives from appearing on the municipal ballot.

On July 1, the superior court granted the Port's motion for declaratory judgment and permanently enjoined the Pierce County Auditor from placing the initiatives on the 2016 ballot. The court determined that the Water Provision, Part A in the excerpt above, concerned an administrative matter beyond the scope of the local initiative power. The court further ruled that the Water Provision conflicted with state law and determined also that the Preemption Provision, Part B above, was beyond the scope of the local initiative power because the provision attempted to subordinate all other law to the Water Provision. The court additionally determined that the Subordination of Corporate Rights Provision, part of Part C above, was beyond the scope of the local initiative power because it attempted to alter corporations' rights under existing law. Similarly, the court ruled that the Subordination of Judicial Review Provision, part of Part C above, was beyond the scope of the local initiative power because it conflicted with existing law. Finally, the court concluded that the remaining initiative provisions were not severable and that no portion of the initiatives could be placed on the ballot.

According to the declaration of Sherry Bockwinkel, STWs signature collection effort "stalled when people heard that [STW] was being sued for circulating the petition" and its "signature turn-ins" went down. CP at 585. The Bockwinkel declaration also states that "[m]any volunteer signature gatherers were now afraid that they would be named individually in a lawsuit" for their efforts. CP at 585.

On July 29, STW filed an appeal of the superior court's grant of a permanent injunction and declaratory judgment.[1] We affirm the superior court.

ANALYSIS

I. STANDARD OF REVIEW

We review whether a proposed initiative is beyond the scope of the local initiative power de novo as a question of law. *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010). We review constitutional issues de novo. *Washington Citizens Action of Washington v. State*, 162 Wn.2d 142, 151, 171 P.3d 486 (2007).

II. AUTHORITY OF SUPERIOR COURT

STW asserts that the superior court lacked authority to conduct a pre-election review of its proposed local initiatives and that such review violated separation of powers principles. We disagree.

Generally, courts will refrain from considering the substantive validity of a proposed law to avoid interfering with electoral and legislative processes and to avoid rendering potentially advisory opinions. *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 745-46, 620 P.2d 82 (1980). However, our Supreme Court has identified an exception to this rule which authorizes courts to "review local initiatives and referendums to determine . . . whether 'the proposed law is beyond the scope of the initiative power.'" *Our Water-Our Choice!*, 170 Wn.2d at 7 (quoting *Seattle Bldg.*, 94 Wn.2d at 746). Our Supreme Court has explained that under the state constitution, municipal governments are not fully sovereign and derive their authority to utilize the initiative process from statute, rather than the constitution.

[1] STW's notice of appeal states that Sherry Bockwinkel, Donna Walters, and Jon and Jane Does 1-5, defendants in the case before the superior court, are not participating in this appeal.

Our Water-Our Choice!, 170 Wn.2d at 8. Under RCW 35.22.200, a charter city such as Tacoma may "provide for direct legislation by the people through the initiative," but only "upon any matter within the scope of the powers, functions, or duties of the city." Under *Our Water-Our Choice!*, 170 Wn.2d at 7, a court may properly review whether a measure exceeds the scope of the initiative power.

STW further asserts that "[t]he Court should abide by the established justiciability rules and recognize that it has no authority to interfere with proposed legislation." Br. of Appellant at 30. Our Supreme Court has held that an issue presents a justiciable controversy when it presents (1) "'an actual, present and existing dispute, or the mature seeds of one,'" rather than a "'possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests,'" (3) which involves direct and substantial interests, "'rather than potential, theoretical, abstract or academic'" interests, "'and (4) a judicial determination of which will be final and conclusive.'" *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Industr. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973)). "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *To-Ro*, 144 Wn.2d at 411. STW does not offer any analysis or argument on why the present issue is not justiciable under these standards, but rather appears to argue that this cause is not justiciable because it offends the separation of powers.

Spokane Entrepreneurial Center v. Spokane Moves to Amend Constitution, 185 Wn.2d 97, 100, 369 P.3d 140 (2016) and *Our Water-Our Choice!*, 170 Wn.2d at 7, each held that courts may entertain pre-election challenges to local initiatives based on the claim that the initiative is beyond the local initiative power. In addition, *Spokane Moves* recognized that "the local

initiative power is limited to legislative matters that are within the authority of the city." *Spokane Moves*, 185 Wn.2d at 107. Consistently with this, *Spokane Moves* also recognized that municipalities may not enact legislation that conflicts with state or federal law. *Spokane Moves*, 185 Wn.2d at 108, 110. Thus, the inquiry into whether a measure conflicts with state law is part of determining whether it is beyond the local initiative power.

In *Spokane Moves*, the Supreme Court prefaced its analysis with a caution:

> We have expressed great concern about reviewing initiatives prior to enactment. This concern has been attributed to . . . "the constitutional preeminence of the right of initiative," *Coppernoll [v. Reed]*, 155 Wn.2d [290,] 297, 119 P.3d 318 [(2005)]. There are also general concerns that "the courts should not interfere in the electoral and legislative processes, and that the courts should not render advisory opinions." *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980).

185 Wn.2d at 104. Similarly, *Our Water-Our Choice!* recognized that "[g]enerally, judicial pre[-]election review of initiatives and referendums is disfavored." 170 Wn.2d at 7.

These considerations lie at the heart of the inquiry into the separation of powers. Especially, the court's concern for the "'constitutional preeminence'" of the right of initiative, its avoidance of interference "'in the electoral and legislative processes,'" and its shunning of advisory opinions show that its analysis took into account and honored the boundaries between legislative, executive, and judicial authority. *Spokane Moves*, 185 Wn.2d at 104 (quoting *Coppernoll*, 155 Wn.2d at 297) (quoting *Seattle Bldg.*, 94 Wn.2d at 746). These cases thus implicitly hold that their analyses observe the proper separation of powers. With that, we hold that the superior court had authority to conduct a pre-election review of the proposed local initiatives, and we turn to the challenged aspects of the superior court decision.

III. SCOPE OF LOCAL INITIATIVE POWERS

STW argues that the superior court erred by determining that the proposed initiatives were beyond the scope of the local initiative power. We disagree.

As noted, "the local initiative power is limited to legislative matters that are within the authority of the city." *Spokane Moves*, 185 Wn.2d at 107. The court has identified at least three limits on the local initiative power. *Spokane Moves*, 185 Wn.2d at 107. First, "'administrative matters, particularly local administrative matters, are not subject to initiative or referendum.'" *Spokane Moves*, 185 Wn.2d at 107 (quoting *Our Water-Our Choice!*, 170 Wn.2d at 8). Second, "a local initiative 'is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself.'" *Spokane Moves*, 185 Wn.2d at 108 (quoting *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006)). Third, municipalities may not enact legislation which conflicts with state or federal law. *Spokane Moves*, 185 Wn.2d at 108, 110.

A. Administrative vs. Legislative Matters

STW maintains that the superior court improperly determined that the Water Provision in its initiatives is administrative and, therefore, beyond the scope of the local initiative power. We disagree.

Generally, "'a local government action is administrative if it furthers (or hinders) a plan the local government . . . has . . . adopted.'" *Spokane Moves*, 185 Wn.2d at 107 (quoting *Our Water-Our Choice!*, 170 Wn.2d at 10). Our Supreme Court has also distinguished legislative from administrative matters by determining, respectively, "'whether the proposition is one to make new law or declare a new policy, or merely to carry out and execute law or policy already

in existence.'" *Spokane Moves*, 185 Wn.2d at 107-08 (quoting *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973)).

STW claims that the Water Provision contained in its initiatives creates a new policy and is therefore legislative. However, our Supreme Court has held that attempting to graft a voter approval requirement onto an existing regulatory system constitutes an administrative matter which is outside the scope of the local initiative power. In *Spokane Moves*, the Supreme Court considered whether a local initiative requiring "any proposed zoning changes involving large developments to be approved by voters in the neighborhood" was administrative. 185 Wn.2d at 108. The court held that the initiative provision was administrative, and beyond the scope of the local initiative power, because "the city of Spokane has already adopted processes for zoning and development" and the "provision would modify those processes for zoning and development decisions." *Spokane Moves*, 185 Wn.2d at 108.

In this case, chapter 12.10 of the Tacoma Municipal Code governs how the City processes applications for water service. STW's initiatives would require applicants for "water utility services" who are projected to use more than 1336 CCF of water to submit their application to a vote of the people of the City, in addition to complying with "*all other application requirements*." CP at 30 (emphasis added). Furthermore, the initiatives state, "The People's Right to Water Protection vote provides a democratic safeguard, *on top of the City's existing application process*." CP at 28 (emphasis added).

As in *Spokane Moves*, STW's initiatives are administrative because they attempt to modify local permit processes already adopted by the City by adding a voter approval requirement to them. Therefore, we hold that the initiative's voter approval provision is beyond the scope of the local initiative power.

B. Conflict With RCW 43.20.260

Pre-election challenges to initiatives based on substantive invalidity are generally not allowed. *Coppernoll*, 155 Wn.2d at 297-98. However, the court does consider claims that the subject matter of a measure is not proper for direct legislation (ballot measures), usually in the context of the more limited powers of initiatives under city or county charters or enabling legislation. *Id.* at 299. More specifically, *Spokane Moves* held in its analysis of a pre-election challenge to a local initiative that "'[w]hile the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law.'" 185 Wn.2d at 108 (quoting *Seattle Bldg.*, 94 Wn.2d at 747).

RCW 43.20.260 states, in pertinent part:

> A municipal water supplier, as defined in RCW 90.03.015, has a duty to provide retail water service within its retail service area if: (1) Its service can be available in a timely and reasonable manner; (2) the municipal water supplier has sufficient water rights to provide the service; (3) the municipal water supplier has sufficient capacity to serve the water in a safe and reliable manner as determined by the department of health; and (4) it is consistent with the requirements of any comprehensive plans or development regulations.

In determining whether an ordinance conflicts with state law under the Washington Constitution, article I, section 11, "'the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.'" *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998) (quoting *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960)). "'Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.'" *Weden*, 135 Wn.2d at 693 (quoting *Schampera*, 57 Wn.2d at 111).

RCW 43.20.260 places a duty on the City to provide retail water service if its requirements are met. The initiative measure at issue would require the City to deny water service to certain applicants even if all the requirements of RCW 43.20.260 were met. Thus, the

effect of the initiative would be to prohibit the City from carrying out a duty imposed by state law, a stark conflict under the test in *Weden*. Under *Coppernoll*, *supra*, and *Spokane Moves*, *supra*, this conflict supplies an additional basis for upholding the superior court's decision.

C. Severability

Having determined that the Water Provision is beyond the scope of the local initiative power, we must consider whether the remaining provisions are severable from the invalid provision. STW asserts that the superior court erred by not placing any remaining valid provisions of the initiative on the ballot. We disagree.

To determine whether an invalid portion of an initiative is severable, we consider "whether the [invalid] provisions are so connected to the remaining provisions that it cannot be reasonably believed that the legislative body would have passed the remainder of the act's provisions without the invalid portions." *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 411, 355 P.3d 1131 (2015). Stated another way, an invalid provision may be severed from the remaining provisions "unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes." *League of Women Voters*, 184 Wn.2d at 411-12.

In this case, the Water Provision of STW's initiatives represents the core of each measure. All of the remaining provisions are designed to either implement or protect the proposed right to require all applicants for water services with a projected daily usage of 1336 CCF of water or more to submit their applications to a vote of the people. If the Water Provision is invalid, then the other initiative provisions would be robbed of practical effect. For instance, without the Water Provision there is no manner in which state law would preempt a provision of the initiatives, corporations would violate a provision of the initiatives, or a person would bring a

cause of action under the provisions of the initiatives. Without the Water Provision, there is no triggering mechanism that would allow the remaining provisions to take effect. Therefore, we hold that the remaining initiative provisions are not severable, and the initiatives fail in their entirety.

IV. FREE SPEECH

STW contends that the superior court violated its right to free speech under the First Amendment of the United States Constitution and article I, sections 4 and 5 of the Washington Constitution. STW argues that the violations lie in the superior court's determination that STW's initiatives exceeded the scope of the local initiative power and issuance of an injunction to prevent the initiatives from appearing on the ballot. We disagree.

The First Amendment to the United States Constitution mandates that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Article I, section 4 of the Washington Constitution states, "The right of petition and of the people peaceably to assemble for the common good shall never be abridged." Article I, section 5 states, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

A. The First Amendment

In *Meyer v. Grant*, the United States Supreme Court held that "the circulation of a[n initiative] petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" 486 U.S. 414, 421, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988). STW is correct that barring the initiatives from the ballot would diminish this political speech generated through the process of gathering signatures.

We hold above, though, that STW's initiative is outside the scope of the local initiative's power. STW's position, therefore, reduces to the argument that it has a constitutional right to place an initiative on the ballot, whether or not authorized by state or local law.

This argument was rejected by the Ninth Circuit in *Angle v. Miller*, 673 F.3d 1122, 1133 (2012) (citing *Meyer*, 486 U.S. at 424), which held that "[t]here is no First Amendment right to place an initiative on the ballot." STW has not cited to any authority for the proposition that one has a free speech right to have a local measure beyond the scope of the initiative power appear on a ballot. In the absence of authority, we "may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Under *Angle*, STW does not have a First Amendment right to place a local initiative on the ballot. STW has not presented any reasons why *Angle* is ill-considered or inconsistent with Washington case law. Therefore, its argument fails.

B. Article I, Section 5 of Washington Constitution[2]

STW also argues that pre-election review of a local initiative violates its right to free speech under article I, section 5 of the Washington Constitution. For support, STW cites to our Supreme Court's decision in *Collier v. City of Tacoma*, 121 Wn.2d 737, 854 P.2d 1046 (1993). *Collier* involved a challenge under the state and federal constitutions to city ordinances that restricted the posting of political signs in residential areas to a period beginning 60 days before the election and ending 7 days after it. *Collier* held that the ordinances were viewpoint-neutral

[2] Although STW refers to both article I, sections 4 and 5 of the Washington Constitution as part of its argument, it has not cited to any cases for an analysis of this issue under article I, section 4. We do not consider conclusory arguments unsupported by citation to authority or rational argument. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Therefore, we do not separately consider STW's claims under article I, section 4.

but content-based in that they classified permissible speech in terms of subject matter. *Collier*, 121 Wn.2d at 752-53. The court deemed the ordinances to be time, place, and manner restrictions and held that such restrictions on speech that are viewpoint-neutral but subject-matter based are valid so long as they are narrowly tailored to serve a compelling state interest and leave open ample alternative channels of communication. *Collier*, 121 Wn.2d at 752-53. The court then concluded that the ordinances' durational requirements failed this test and therefore violated the First Amendment of the United States Constitution and article I, section 5 of the Washington Constitution. *Id.* at 758-60.

For several reasons, the holdings and rationale of *Collier* do not serve STW's position. First, the challenged injunction before us does not classify speech on the basis of subject matter or content as did the measures in *Collier*. Instead, the injunction rests on the principles that a measure is beyond the local initiative power if it is administrative or in conflict with state law. Neither the injunction nor the principles on which it is based distinguish among measures or in associated speech activities on the basis of content or subject matter. Thus, *Collier* does not show that the injunction at issue violates article I, section 5.

Second, if the inquiry into whether a measure is administrative or in conflict with state law were deemed to make it content-based, STW's position would still reduce to the claim that it has a constitutional right to place an initiative on the ballot, without regard to the scope of the initiative power under state law. As noted above, the Ninth Circuit held to the contrary with respect to the First Amendment in *Angle*. *Collier* did not decide whether placing a local initiative on the ballot constitutes political speech protected under article I, section 5, and STW cites to no other authority for its contention that pre-election review of a local initiative violates

article I, section 5. For these reasons also, we hold that the injunction at issue does not violate article I, section 5 under *Collier*.[3]

CONCLUSION

The superior court had authority to review whether the proposed initiatives exceeded the scope of the local initiative power, and its review did not offend the separation of powers. In exercising that authority, the superior court properly determined that the challenged provisions were beyond the scope of the local initiative power and that one of the provisions conflicted with state law. Finally, the injunction preventing the initiatives from appearing on the ballot did not violate STW's right to free speech.

We affirm the superior court.

Bjorgen, J.

We concur:

Worswick, P.J.

Melnick, J.

[3] With the holdings in this opinion, it is unnecessary to reach any other issues raised by the parties.

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Port of Tacoma, Economic Development Board for Tacoma-Pierce County, Tacoma-Pierce County Chamber, City of Tacoma, *Respondents*, v. Save Tacoma Water, *Appellant*, and John and Jane Does 1-5 (Individual sponsors and officers of Save Tacoma Water), Donna Walters, Sherry Bockwinkel, City of Tacoma, Julie Anderson in her official capacity as Pierce County Auditor, *Defendants*.	Case No. 49263-6-II **APPELLANT'S** **MOTION FOR** **RECONSIDERATION**

August 13, 2018

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Appellant Save Tacoma Water respectfully moves for reconsideration of the Court's Opinion of July 25, 2018.

The Opinion did not discuss argued issues pertinent to assignments of error, concerning the right of local community self-government, and separately, the application of statutory construction rules.

The Opinion determined, without explanation, that the trial court's judicial veto action was not a content-based infringement of core political speech. Finally, the Opinion misinterpreted *Angle* in a way that severely limits political rights protections for the people's initiative power. The Opinion should have applied strict scrutiny when analyzing the trial court's action.

Discussion

I. Right of local community self-government

Save Tacoma Water identified two connected issues pertaining to its first Assignment of Error that were not discussed in the Opinion. "Do the people of Tacoma possess an inviolable right of local community self-government, through which they have the political power to enact laws to protect their rights, health, and safety?" and "Did the court violate the people's right of local community self-government when it prevent [sic] the people from voting on duly-qualified citizen initiatives?"

(Appellant's Amended Opening Brief (hereinafter "Op. Br.") at 3.)

These issues were not discussed or decided by this Court, even though they were necessary for this Court to affirm the trial court. (*See* Op. Br. at 9 ("To affirm the trial court, this Court must find that (1) the people of Tacoma have no right of local community self-government . . . ."), and 10-30 (Appellant's argument on the right of local community self-government).)

II. Statutory construction rules

Save Tacoma Water also identified an issue pertaining to its second Assignment of Error: "Should the court follow established statutory construction rules when it evaluates the legality of laws proposed by initiative?" (Op. Br. at 3, *see also* Op. Br. at 40-43 (presenting relevant statutory construction rules).)

The Court's Opinion did not cite or apply any statutory construction rules.

Nor did the Court's Opinion follow statutory construction rules. For example, the Opinion disregarded the statutory construction rules that require courts to make all presumptions, assumptions, and inferences in favor of the validity of the law, and only strike the law with proof beyond a reasonable doubt, when the Opinion concluded that the initiatives proposed administrative rather than legislative policies. (Op. at 9.) Also,

the Opinion used a hypothetical situation to find conflict preemption: "The initiative measure at issue would require the City to deny water service to certain applicants *even if all the requirements of RCW 43.20.260 were met*." (Op. at 10 (emphasis added).)

The lack of standards here is not surprising. Most court opinions that veto initiatives from appearing on the ballot do so without any regard for statutory construction rules. This does not make any sense, since it should be harder for a court to veto proposed legislation while it is still in the legislative process than it would be to void the law through judicial review after it is enacted, as otherwise pre-election attacks on proposed laws seeking judicial vetoes would be a preferred remedy over post-enactment judicial review. But instead, court opinions that veto initiatives consistently fail to cite or apply statutory construction rules.

Thus, Save Tacoma Water merely asks for an answer about whether statutory construction rules apply, and if not, why not.

III. Political rights under both the Washington Constitution and the United States Constitution

Save Tacoma Water moves for reconsideration of the Opinion's analysis of political rights affected by the trial court's judicial veto, as the Opinion misapplies a sentence from *Angle* – and by so doing, severely limits First Amendment protections for initiative lawmaking – and also because the Opinion concludes without explanation that the trial court's

judicial veto was not content-based. The Opinion failed to apply strict scrutiny, as required by *Angle*, *Collier*, and *Meyer*, regardless of whether the trial court's judicial veto was content-based or content-neutral.

A. The specific sentence in *Angle* relied on by the Court is taken out of context and misinterpreted.

Angle v. Miller is a Ninth Circuit case concerning the constitutionality of Nevada's "All District Rule," which set a procedural requirement for initiative qualification requiring signatures from at least 10% of the voters in each of the state's congressional districts. 673 F.3d 1122 (9th Cir. 2012). *Angle* does not stand for the assertion that the Opinion uses it for, and therefore this Published Opinion risks confusing established First Amendment case law.

In their briefs, Respondents cited one sentence from *Angle*, and never explained the case:

The Port's Brief quoted *Angle*, on page 46, "[T]here is *no* First Amendment right to place an initiative on the ballot," (emphasis in Port's Brief) and then cited *Angle* with a parenthetical noting that *Angle* was "(citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988))."

The City's Brief, at 19-20, quoted the same sentence, but followed it up with a citation parenthetical to another case that does get to the issue that the *Angle* court is actually discussing.

In this abused sentence, *Angle* is reiterating that the First

Amendment does not create a right to place an initiative on the ballot. This is clear from the citation parenthetical in *Angle* itself (which was omitted from Respondents' Briefs): "There is no First Amendment right to place an initiative on the ballot. *See Meyer*, 486 U.S. at 424 (recognizing that "the power of the initiative is a state-created right")." *Angle*, 673 F.3d at 1133. In other words, the First Amendment does not mandate direct democracy rights (initiative and referendum).[1]

Immediately after this sentence and citation, the *Angle* court goes on to hold that "[r]egulations that make it more difficult to qualify an initiative for the ballot . . . may indirectly impact core political speech [and t]hus, as applied to the initiative process, we assume that ballot access restrictions place a sever burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Id.*

The First Amendment analysis in *Angle* did not end with "[t]here is no First Amendment right to place an initiative on the ballot." *Id.* But

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1 If it were otherwise, then the United States Constitution would require initiative procedures in every state. In *Meyer*, the Court emphasized that while the people of the state have the power to delegate their legislative authority (i.e., referendum and initiative) through their constitution to a representative legislature, the First Amendment precludes the state's power to limit discussion on political issues raised in initiative petitions. *Meyer*, 486 U.S. at 420, 424-25. This section of *Meyer* is also paraphrased with the same interpretation in *Angle*, 673 F.3d at 1133, n.5. It is the people, not the state, that decides who has legislative authority. *See* WASH. CONST. Art. II, § 1 (vesting legislative authority for the state in the legislature, "but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature . . . .").

unfortunately, that is where this Court ended its analysis. (Op. at 13.) This analysis thus misstates the meaning of that sentence in *Angle*, and thereby reduces the protection of the First Amendment.

This Court should reconsider its First Amendment analysis, as it is based on a misinterpretation of the holding in *Angle*. Instead of dismissing the First Amendment claim, the *Angle* court analyzed whether the plaintiff initiative proponents had shown that the All Districts Rule significantly inhibited their ability to place initiatives on the ballot, and thus triggered strict scrutiny as a "severe burden" on core political speech. The court concluded that the plaintiffs' assertions were "too vague, conclusory and speculative to create a triable issue that the All Districts Rule significantly reduces the chances that proponents will be able to gather enough signatures to place initiatives on the ballot." *Angle*, 673 F.3d at 1134. Therefore, the court did not apply strict scrutiny analysis and instead used intermediate scrutiny analysis. *Id.* at 1134-35.

Here, in contrast, there is no question that the trial court judge's action "significantly inhibit[ed]" Save Tacoma Water's ability to place initiatives on the ballot: the trial court judge vetoed the duly-qualified initiatives, enjoining them from appearing on the ballot. This is a "severe burden on core political speech" that triggers strict scrutiny. *Id.* at 1133 ("Thus, as applied to the initiative process, we assume that ballot access

restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot.").

Notably, the First Amendment test that the *Angle* court used – for a content-neutral procedural rule – was more robust than the analysis provided by the Opinion here. Even if the Court concludes that the trial court's judicial veto was not content-based, *Angle* still requires strict scrutiny analysis.

B. Content-based restrictions differentiate based on viewpoint or subject matter, which is what the trial court did here.

The Court's Opinion holds that looking at the text of an initiative to decide whether to veto it from appearing on the ballot is not a content-based decision. (Op. at 14 ("Neither the injunction nor the principles on which it is based distinguish among measures or in associated speech activities on the basis of content or subject matter.").) This holding cannot be reconciled with the framework of content-based versus content-neutral jurisprudence.

The United States Supreme Court has recognized that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broadcasting System, Inc. v. Fed. Comm. Commn.*, 512 U.S. 622 (1994). However, that Court makes clear that "[a]s a general rule, laws that by their terms distinguish favored speech from

disfavored speech on the basis of the ideas or views expressed are content-based." *Id.* (citing, as examples, "*Burson v. Freeman*, 504 U.S. 191, 197, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992) ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign"); *Boos v. Barry*, 485 U.S. 312, 318-319, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988) (plurality opinion) (whether municipal ordinance permits individuals to "picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not")).

It is the act of discriminating on the basis of content that makes a government restriction content-based, regardless of whether the government does so for an asserted content-neutral purpose. *Id.* at 642-43 ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content. *Arkansas Writers' Project*, supra, at 231-232; *Carey v. Brown*, 447 U.S. 455, 464-469, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980).").

The Washington Supreme Court defines content-based and content-neutral similarly for the Washington Constitution. *See Collier v. City of Tacoma*, 121 Wn.2d 737, 746, 854 P.2d 1046 (1993) ("We recognize that the free speech clauses of the state and federal constitutions are different in wording and effect, but that the result reached by previous

Washington cases in general adopted much of the federal methodology for application to state constitutional cases. The federal cases cited here and in our prior decisions are used for the purpose of guidance and do not themselves compel the result the court reaches under our state constitution." (citation omitted)). Notably, when analyzing whether the law at issue in *Collier* was content-based, the Court observed that "[t]he trial court found that Tacoma Public Works Department personnel have to read the signs in order to determine whether they are prohibited at a particular time." *Id.* at 749.

That distinction between content-based and content-neutral restrictions is often foundational in First Amendment jurisprudence. The United States Supreme Court has held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Here, the Court professes a content-neutral purpose: enjoining proposed laws that are ostensibly "beyond the local initiative power." (Op. at 14.) But that content-neutral purpose is not enough to make its action content-neutral, because what the trial court actually did was entirely

content-based: the court looked at the text of the initiatives and thereby decided whether to veto them. This is just the same as looking at the text on yard signs (*Collier, supra*) or protesters' signs (*Burson* and *Boos, supra)* before deciding whether they are allowed. A government action that rests entirely on the content is content-based.[2]

Appellants respectfully request the Court reconsider its determination that the trial court's action was content-neutral (*see* Op. at 14) and revise its analysis from there. The lack of case law authority on this issue should not cut against Appellant – it is the government that has the duty to justify its content-based prior restraint, namely, its judicial veto ruling.[3]

C. The First Amendment principles assembled in *Meyer* should guide the Court's analysis and prohibit allowing judicial veto actions.

The Court's Opinion dismissing Save Tacoma Water's political

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2 The Opinion equates Save Tacoma Water's challenge of the constitutionality of a judicial veto order with an argument that that initiative proponents "have a constitutional right to place an initiative on the ballot, whether or not authorized by state or local law." (Op. 13.) Thus, the Opinion ignores the basic fact that the trial court's judicial veto was a state action that placed a severe burden on core political speech, as if the ends (keeping an ostensibly *ultra vires* initiative off the ballot) justify the means (a judicial order that stops any meaningful political policy debate – core political speech). But political speech protections case law places severe restrictions on prior restraints on political expression, precisely because of the danger of letting the government say in advance what is legitimate political expression (see subsection C below). The issue is not whether the ballot is a public forum. The issue is whether a judge can legitimately enjoin a duly-qualified initiative from appearing on the ballot, and if the judge does so, and thus cuts off any further meaningful political discussion on the issue, is that a severe burden on core political speech?

3 Instead, the Opinion put the burden on Save Tacoma Water. (See Op. at 14 ("STW cites to no other authority for its contention that pre-election review of a local initiative violates article I, section 5.").)

expression arguments relies heavily on the Court's assertion that it is legitimate for the court to prevent duly-qualified citizen initiatives from appearing on the ballot because they are ostensibly beyond "the scope of the initiative power." (*See* Op. at 14.)

But this reasoning goes against the purpose of protecting political expression as a right, which is to prevent the government from telling the people what they can meaningfully discuss. The *Meyer* Court quoted three earlier cases as reminders that it is not the government's job to protect the public from ideas:

"The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' *NAACP v. Button*, 371 U.S. 415, 445 (1963). 'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.' *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)." *Meyer v. Grant*, 486 U.S. 414, 419-20 (1998). "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* at 421 (quoting *Roth v. United States*, 354 U.S. 476 (1957)); *see also* WASH. CONST. Art.

I, § 32 (“A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.”).

By vetoing initiatives from appearing on the ballot because of the law proposed in those initiatives – after volunteer signature gatherers collected nearly 17,000 signatures on those initiatives – one trial court judge did exactly what is prohibited by the very purpose of the First Amendment: government telling the people what they can consider for their own public policy.

Yes, the *Meyer* Court held that “the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as core political speech.” *Meyer*, 486 U.S. at 421-22. Here, Save Tacoma Water is arguing that campaigning for a ballot measure, and the public debate that happens *because an issue will appear on the ballot*, is also core political speech. The reasoning in *Meyer* that found “circulation of petition” to be core political speech applies equally well to the debate that precedes a vote of the people on a duly-qualified initiative. *See id.* at 422-23 (The government action is unconstitutional when it “limits the number of voices who will convey appellees’ message . . . and, therefore, limits the size of the audience they can reach” and it “limit[s] their ability to make the matter the focus of statewide discussion” by qualifying the initiative to appear on the ballot.

In sum, it "has the inevitable effect of reducing the total quantum of speech on a public issue.").

In its Opening Brief, Save Tacoma Water quoted some of the Respondents' representatives saying that they sought a judicial veto action because of the political expression that would result from the initiative appearing on the ballot. (Op. Br. at 8, *see also id.* at 9.)

Save Tacoma Water also presented an example from Washington where the vote on an initiative caused the state legislature to change its policy, even though the initiative was not legal. (Op. Br. at 38-39.)

Here, the trial court judge infringed on that debate by vetoing the initiatives, which killed the political debate on the policy and prevented meaningful political expression by initiative proponents and opponents. *See Meyer*, 486 U.S. at 422 n.5. This violated Save Tacoma Water's (and the people of Tacoma's) political rights under the Washington Constitution and United States Constitution, because the judge could instead review the new law after it is enacted following the vote (i.e., the judicial veto action is not a narrowly-tailored remedy) and keeping ostensibly "beyond the scope" initiatives off the ballot is not a compelling government purpose. *See id.* at 426 n.7 (citing *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech."))).

Conclusion

The Court's Opinion omitted consideration of issues pertaining to assignments of error that should have been necessary for affirming the trial court: right of local community self-government, and statutory construction review standards.

In addition, the Court misstated *Angle* with regard to the application of the First Amendment to initiatives, when instead *Angle* calls for strict scrutiny analysis, which the *Angle* court applied to a content-neutral law. As a Published Opinion, this application of *Angle* should be corrected.

Although strict scrutiny applies regardless (see *Angle*), the Opinion should also not consider a judicial veto action content-neutral when it relies entirely on the textual content of the specific initiative in question.

For these reasons, and in furtherance of a robust discussion prior to petitioning for Supreme Court review, Appellant Save Tacoma Water respectfully requests reconsideration of these issues.

Respectfully submitted on August 13, 2018,

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Community Environmental Legal Defense Fund

/s/ Fred Michael Misner

Fred Michael Misner, WSBA No. 5742

/s/ Stacy Monahan Tucker

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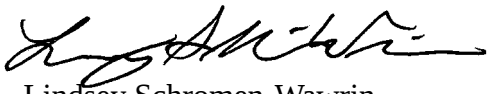

Lindsey Schromen-Wawrin

Of attorneys for Appellant Save Tacoma Water

SHEARWATER LAW PLLC

August 13, 2018 - 3:40 PM

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Appellate Court Case Number:	49263-6
Appellate Court Case Title:	Port of Tacoma, et al, Respondents v. Save Tacoma Water, et al, Appellants
Superior Court Case Number:	16-2-08477-5

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PORT OF TACOMA, a Washington State Municipal Corporation; ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY, a Washington State Non-Profit Corporation; TACOMA-PIERCE COUNTY CHAMBER, a Washington State Non-Profit corporation,

Respondents,

v.

SAVE TACOMA WATER, a Washington political committee,

Appellant,

DONNA WALTERS, sponsor and Treasurer of SAVE TACOMA WATER; JON AND JANE DOES 1-5; (Individual sponsors and officers of SAVE TACOMA WATER); CITY OF TACOMA, a Washington State Municipal Corporation; and JULIE ANDERSON, in her capacity as PIERCE COUNTY AUDITOR,

Defendants.

No. 49263-6-II

ORDER DENYING MOTION FOR RECONSIDERATION

Appellant has filed a motion for reconsideration of the opinion filed on July 25, 2018. After review, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Jjs.: Bjorgen, Worswick, Melnick

For the Court:

Bjorgen, J.

Declaration of Service

I certify that on November 27, 2018, I filed this document through the Washington State Appellate Courts' Secure Portal for electronic filing, which emails a copy of all uploaded files to all active parties on the case, including:

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November 27, 2018 - 4:51 AM

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