NO. 97755-1

SUPREME COURT OF THE STATE OF WASHINGTON

RESPECT WASHINGTON,
Appellant,

v.

BURIEN COMMUNITIES FOR INCLUSION, a Washington political committee; KING COUNTY ELECTIONS; JULIE WISE, KING COUNTY DIRECTOR OF ELECTIONS, in her official capacity at KING COUNTY ELECITONS; and THE CITY OF BURIEN
Respondents.

RESPONDENT BURIEN COMMUNITIES FOR INCLUSION'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The central, dispositive issue in this case is whether a municipal ballot measure that exceeds the scope of the local initiative power is invalid and was therefore properly enjoined from appearing on the ballot. Under precedent of this Court and the Court of Appeals, the answer is clearly yes, making review here unnecessary and inappropriate.

The Court of Appeals Division One affirmed the trial court's ruling that Measure 1, which would repeal Ordinance 651, City of Burien's (City) Burien's immigration status ordinance, should not appear on the City of Burien ballot due to the fact that Measure 1 exceeds the scope of the City's initiative powers because it deals with administrative matters, not legislative ones. *Burien Communities for Inclusion v. Respect Wash., et al.*, No. 77500-6-I (Sept. 9, 2019) (unpublished) (Opinion).

Washington's highest court has definitively carved out two areas in which courts will hear pre-election challenges to local ballot measures and issue injunctions keeping local measures off of the ballot. This case falls squarely within both. Injunctions are properly granted where the subject matter of the measure is outside the scope of the City's initiative power and where there are procedural deficiencies in the petition or the ballot.

In order to "foster trust and cooperation between city personnel and law enforcement officials and immigrant communities to heighten

crime prevention and public safety," the Burien City Council concluded it was good public policy to enact Ordinance 651. That decision brought Burien among the growing number of "sanctuary cities" throughout the United States that prohibit City employees and law enforcement personnel from conditioning City services on – or making certain inquiries into – the citizenship or immigration status of any individual. Burien Municipal Code (BMC) § 2.26.010, .020. (CP 45-47).

Beyond protecting Burien communities from exclusion from services and security based on citizenship or immigration status, the City Council included provisions in Ordinance 651 to provide its residents "fair and equal access to services, opportunities and protection" regardless of their religion. *Id*. It did so by prohibiting City officials from establishing or using religious registries or any similar classification system. BMC § 2.26.030. The Ordinance became effective on January 18, 2017.

Measure 1 would not only repeal the Ordinance in its entirety, but it would also hamstring the Burien City Council by prohibiting it from "regulat[ing] the acquisition of immigration status or religious affiliation" unless a majority of the City Council *and* a majority of voters approved the regulation. Measure 1, § 1 (CP 57).

Burien Communities for Inclusion (BCI) is a Washington political committee whose members consist of Burien residents, and their friends

and allies, who will suffer injury, including fear of and reluctance to engage with City personnel, offices and services if Measure 1 passes into law. Its members want it to be safe for Burien residents to contact local law enforcement to report a crime or to seek emergency health care; however, they believe that when city officials are allowed to ask about, or condition services on, a person's immigration status or religion, residents will be more afraid to report a crime or to otherwise interact with local government services, adversely affecting public safety and local communities.

BCI sought and obtained a temporary restraining order (TRO), and later a preliminary injunction (PI), prohibiting King County Elections from including or placing Measure 1 on the November 7, 2017, ballot. The TRO and PI were both entered on the grounds that Measure 1 exceeds the scope of the initiative authority granted to the people of the City of Burien and that the petition used to gather signatures for the measure violated RCW 35.21.005 by deviating from the requirements for the contents and form of a petition, as set forth in RCW 35.17.240 - 35.17.360.

Review should not be granted because the Court of Appeals decision presents no conflict with decisions of this Court or the Court of Appeals, no significant question of state or federal constitutional law is

presented, and there is no "issue of substantial public interest" warranting review.

STATEMENT OF FACTS

On January 9, 2017, the Burien City Council passed Ordinance 651 (Ordinance). The Ordinance is now codified at Burien Municipal Code (BMC) 2.26.010-.030. The Ordinance provides that "a City office, department, employee, agency or agent shall not condition the provision of City services on the citizenship or immigration status of any individual," except as otherwise required by law; prohibits City personnel from initiating any inquiry or enforcement action based solely on a person's civil immigration status, race, inability to speak English, or inability to understand City personnel or officers; and forbids City officials from creating a registry for the purpose of classifying people on the basis of religious affiliation, or conducting a study related to the collection of such information. *Id.*

In the summer of 2017, Respect Washington, a Washington political committee, submitted an initiative petition to the City to ask that an initiative repealing the Ordinance (Measure 1) be submitted to a vote of the City's registered voters. Measure 1 would also add a limitation on the City of Burien that it "shall not regulate the acquisition of immigration

status or religious affiliation" unless the regulation is approved by both a majority of the City Council **and** a majority vote of the voters.

On September 8, BCI filed a complaint for declaratory and injunctive relief, arguing that Measure 1 exceeds the scope of the City's initiative power and that the petition used to gather signatures to place Measure 1 on the ballot violated RCW 35.21.005. BCI sought injunctive relief to keep Measure 1 from being included on the November 2017 ballot.

On September 14, 2017, the trial court granted BCI a preliminary injunction, and Measure 1 did not appear on the November 2017 ballot. Respect Washington appealed the PI, arguing, among other things, that Measure 1 was within the scope of the City's initiative power, that the injunction violated the free speech rights of the City's voters, that the trial court erred in altering the status quo, and that BCI failed to show injury sufficient to obtain a preliminary injunction.

The Court of Appeals affirmed the trial court's preliminary injunction in an unpublished Opinion issued on September 9, 2019.

ARGUMENT

I. Review is only appropriate if the case meets one or more of the RAP 13.4(b) criteria.

RAP 13.4(b) provides the standard for the Supreme Court's review

of a decision terminating review by the Court of Appeals. A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals;
> (3) If a significant question of law under the constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court reviews questions of law *de novo*, including whether Proposition 1 exceeded the scope of the local initiative power. *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7, 239 P.3d 589.

II. None of the RAP 13.4(b) criteria have been met.

In addressing and rejecting numerous arguments asserted by Appellants, Division One of the Court of Appeals applied *Global Neighborhood v. Respect Washington*, 7 Wn. App. 2d 354, 434 P.3d 1024, *rev. denied* 193 Wn.2d 1019 (2019), to Respect Washington's claims. The Court noted that the timing of the complaint, TRO, and PI proceedings in relation to the deadline for printing ballots was different here than in *Global Neighborhood*, but Respect Washington's statute of limitations and laches challenges fail for the same reasons they failed in *Global Neighborhood*. Opinion at 5-9.

The Opinion also determined that the PI was based on the initiative exceeding the scope of the local initiative power, not the substance of the policy stance taken in it. Therefore, the Court held, the preliminary injunction keeping Measure 1 off the ballot did not violate the free speech rights of the City's voters and was proper because Measure 1 exceeds the scope of Burien's initiative power. Respect Washington attempted to distinguish this case from *Port of Tacoma v. Save Tacoma Water*, 4 Wn. App. 2d 562, 422 P.3d 917 (2018), *rev. denied*, 192 Wn.2d 1026 (2019). In the Opinion, this Court held that a distinction between Respect Washington's free speech rights, and the rights of the City's voters, is not meaningful. Opinion at 12. In holding that the PI does not violate the free speech rights of the City's voters, it likewise is consistent with—and does not conflict with—the Courts of Appeal in *Global Neighborhood*, 7 Wn. App. at 389-91, and *Save Tacoma Water*, 4 Wn. App. 2d at 577 Opinion at 11-13.

Also consistent with *Global Neighborhood*, 7 Wn. App. at 386-88, Division One held that the trial court did not abuse its discretion in finding that Measure 1's placement on the ballot would result in actual and substantial injury based on the harms alleged in the declarations submitted by BCI. Opinion at 16-19. The Court distinguished *Clapper v. Amnesty International, USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264

(2013) from the facts of the instant case, as *Clapper* dealt with whether a party can "manufacture standing" based on "fears of hypothetical harm," *Id.* at 416, while this case specifically addresses whether residents would be harmed by Measure 1 appearing on the ballot and being passed—risks that this Court noted were "neither speculative nor manufactured." Opinion at 18-19.

This Court denied review of the Court of Appeals decision in *Global Neighborhood*. 193 Wn.2d 1019 (2019).

Respect Washington has requested review under RAP 13.4(b), paying lip service to the contention that the Court of Appeals' decision does not correctly apply prior decisions of this Court and of the Court of Appeals. In fact, however, Respect Washington bases its argument almost entirely on the assertion that conceded Washington precedent, as well as the ruling below, violates the First Amendment to the United States Constitution. *See generally,* Petition for Review. Respect Washington's arguments fail, and this Court should deny review.

Precedent of this Court confirms that limited pre-election judicial review of local initiatives is appropriate, and this case does not present issues requiring revisiting a substantial body of established precedent. Moreover, Respect Washington's efforts to challenge the settled law upon which the Court of Appeals decision rests based on an alleged

constitutional infirmity in those prior decisions requires it to ignore controlling and well-established case law. It therefore has not and cannot establish either the "substantial public interest" or "significant question of law" prongs of RAP 13.4(b).

III. The Court of Appeals decision holding that Measure 1 was subject to preelection judicial review is consistent with this Court's decisions and with published Court of Appeals decisions.

Pre-election challenges asserting that an initiative is not within the scope of the legislative authority granted to local residents are an exception to the general reluctance of courts to review ballot initiatives before they have been enacted into law. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 185 Wn.2d 97, 100, 369 P.3d 140 (2016) (affirming trial court pre-election injunction striking from the ballot a measure that exceeded the scope of the local initiative power).

Although this Court has acknowledged the constitutional implications of pre-election review, the importance of courts not interfering in the electoral and legislative processes, and the need for courts to avoid rendering advisory opinions, it has repeatedly kept from the ballot in pre-election review those measures that exceed the scope of the power granted to local residents to engage in direct legislation. *Id.* at 104. It cannot seriously be disputed either that this is settled law or that the facts of the instant case fall squarely within the scope of pre-election

review that has been expressly and repeatedly permitted by this Court.

IV. Respect Washington's arguments based on the First Amendment have no merit.

Respect Washington's unsupported contention that voters have an unrestricted First Amendment right to vote on even invalid ballot measures also flies in the face of settled law. Washington Courts of Appeal have repeatedly held that there is no First Amendment free speech right to place on the ballot an initiative that is beyond the scope of a local government's initiative power. *Global Neighborhood*, 7 Wn. App. at 389-91 (rejecting identical argument made by Appellant regarding nearly identical ballot measure); *Port of Tacoma v. Save Tacoma Water*, 4 Wn. App. 2d at 577; *City of Longview v. Wallin*, 174 Wn. App. 763, 790, 301 P.3d 45 (2013), *rev. denied*, 178 Wn.2d 1020 (2013) (because local initiative power derives from statute, not the state constitution, "the 'constitutional preeminence of the right of initiative' discussed in *Coppernoll*[1] is not a concern in the present case and the local powers of initiative do not receive the same vigilant protection as the constitutional powers addressed in *Coppernoll*…"); *accord Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) (holding that "[t]here is no First Amendment

[1] *Coppernoll v. Reed*, 155 Wn.2d 290, 296-97, 119 P.3d 318 (2005).

right to place an initiative on the ballot.").[2]

Appellant's effort to characterize a vote on a ballot measure as a "public forum" for speech, Petition for Review at 11, such that a pre-election action to declare an initiative beyond the scope of the initiative power infringes on the First Amendment rights of petition and speech has already been rejected by the Court of Appeals.

> Wallin nevertheless contends that "the initiative process, as a whole, is protected political speech under the First Amendment" and "the initiative process is a limited-public forum for political speech." Thus, he argues, preelection denial of requests to put any automated traffic safety camera related initiative on the ballot is an impermissible content restriction on speech in a public forum….Wallin asserts a First Amendment right to have any initiative, regardless of whether it is outside the scope of the initiative power, placed on the ballot. But he has failed to articulate a basis in law for this right when the protected political speech, obtaining signatures for the petition, was not impaired here. Accordingly, Wallin's First Amendment claims fail.

City of Longview, 174 Wn. App. at 791-92 (distinguishing cases involving restrictions on the circulation of ballot petitions for signatures).[3]

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[2] Courts have recognized that "requiring a city to place an invalid initiative on the ballot would result in an undue financial burden on local government," as allowing an initiative that exceeds the scope of the initiative power to be placed on the ballot would incur the costs of the election process for a measure that "could never take effect, even if it received a sufficient number of votes to pass." *City of Longview*, 174 Wn. App. at 782.

[3] Appellant has not even mentioned *City of Longview*, explained why it is not controlling, or why the court's holding that there is no First Amendment right that is infringed by a pre-election review challenging a local ballot measure as outside the scope of the City's initiative power does not apply equally to the public as it does to the petition sponsors

The foregoing cases establish that voters do not have a limitless First Amendment right to schedule an election and vote on any question at any time. *See also State v. Wilson*, 137 Wash. 125, 132-33, 241 P. 970 (1925); *Protect Marriage Ill. v. Orr*, 463 F.3d 604, 606 (7th Cir. 2006), *cert. denied*, 549 U.S. 1208, 1208 (2007) ("A state no more has a federal constitutional obligation to permit advisory questions on its ballot than it has to permit them to be painted on the walls of the state capitol."). Appellant does not meaningfully distinguish *Spokane Entrepreneurial Ctr.* or any of the authority cited therein, *Port of Tacoma*, or *City of Longview*, holding that there is no constitutional right to have an initiative that is beyond the scope of the initiative power go to the voters. Instead it quotes sweeping phrases out of context from inapposite cases.

There is no constitutional right to the placement of an invalid local measure on the ballot. "[P]reelection challenges regarding the scope of the initiative power address the fundamental question of whether the subject matter of the measure was 'proper for direct legislation.' It is well-settled that it is proper to bring such narrow challenges prior to an election." *City of Sequim v. Malkasian*, 157 Wn.2d 251, 255, 138 P.3d 943 (2006)

(which, of course, Respect Washington is). Instead, it continues its reliance on *Coppernoll*, ignoring that the Court of Appeals noted that "the Supreme Court in *Coppernoll* recognized an exception to the general prohibition on preelection review of an initiative 'where the subject matter of the measure was not proper for direct legislation.'" *Id*. at 790-91.

(internal citations omitted). The Court of Appeals correctly held that Appellant's First Amendment arguments to the contrary fail. Opinion at 13.

V. The court below properly held that Measure 1 is invalid because it exceeds the scope of the City's initiative power because it is administrative in nature.

The Court of Appeals correctly held that Measure 1 is beyond the scope of the initiative power of the City of Burien and should be kept off the ballot because it is administrative in nature. Opinion at 27. "[A]dministrative matters, particularly local administrative matters, are not subject to initiative or referendum." *Spokane Entrepreneurial Center*, 185 Wn.2d at 107 (quoting *City of Port Angeles*, 170 Wn.2d at 8). While there are "several ways of determining whether an action [is] legislative or administrative," *City of Port Angeles*, 170 Wn.2d at 11, "[g]enerally speaking, a local government action is administrative if it furthers (or hinders) a plan the local government or some power superior to it has previously adopted." *Id*. at 10; *Spokane Entrepreneurial Center*, 185 Wn.2d at 107.

Thus, local initiatives like Measure 1 that modify or restrict laws or policies already put in place by the local legislative body like the Burien City Council are outside the scope of the local initiative power and are invalid. *See* Opinion at 22-27; *Global Neighborhood*, 7 Wn. App. at 391-

401 (holding that similar ballot measure by same proponent was invalid and properly enjoined because it is administrative in nature); *Spokane Entrepreneurial Center*, 185 Wn.2d at 107-08 (holding local measure was administrative and should not be put on the ballot where it would require any proposed zoning changes involving large developments to be approved by voters and was contrary to established water rights system); *City of Port Angeles*, 170 Wn.2d at 13-15 (holding initiatives concerned administrative matters because they attempted to "*interfere with or effectively reverse"* the implementation of city water fluoridation program) (emphasis added); *Ruano v. Spellman*, 81 Wn.2d 820, 825, 505 P.2d 447 (1973) (holding repeal resolution authorizing stadium project and selection of a contractor and other conditions incident to a building contract for stadium were administrative and outside scope of county's initiative power); *Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984) (same holding as to referendum that sought to undo a comprehensive street name ordinance); *Seattle Bldg. & Const. Trades Council*, 94 Wn.2d 740, 749, 620 P.2d 82 (1980) (same holding as to initiative which sought to "nullify past acts of the Mayor and City Council of Seattle with respect to the improvement of Interstate 90" and prohibit expansion of highway facilities on a lake for the accommodation of privately owned motor vehicles; "In substance, the proposal is an attempt

to reverse administrative decisions of city officials and dictate the future course of such decisions. As such it is invalid."). As in these cases, Measure 1 would both reverse or undo a city action and also require voter approval of future regulations on the same subject.

Ordinance No. 651, codified at BMC 2.26, brought City operating procedures in line with King County law enforcement policies in order to foster trust and cooperation between city personnel and law enforcement officials and immigrant communities to heighten crime prevention and public safety. *See* CP 45-46 (BMC § 2.26.010). It does this by prohibiting city personnel, including law enforcement personnel, from conditioning the provision of city services on the citizenship or immigration status of any individual or inquiring into that status. *Id.* at .020. It also prohibits city personnel from collecting information regarding the religious affiliation of any person. CP 47 (BMC § 2.26.030). These rules clearly govern how City personnel conduct their jobs, identify certain conduct City staff must not do, and do not otherwise create or limit substantive rights or benefits.

Under the foregoing authorities, Measure 1, which undoes these rules and conditions future rules on a public vote, would thus change existing administrative policy, making the measure administrative in nature and outside the scope of the initiative power.

Measure 1 is invalid because it concerns administrative matters; accordingly, the Court of Appeals properly affirmed the trial court's ruling that the Measure should not be placed on the ballot. Opinion at 27.

VI. The Court of Appeals properly held that Respect Washington's arguments based on the statute of limitations and laches fail.

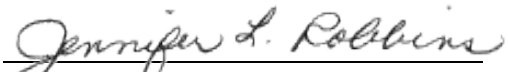
The Court of Appeals rulings regarding the statute of limitations and laches likewise are consistent with Court of Appeals decisions on these issues and do not justify review. The Court below and Division Three in *Global Neighborhood* considered in detail and rejected Respect Washington's arguments that the timing of the community groups' efforts to keep the repeal measures off the ballots precludes injunctive relief. Opinion at 5-9; *Global Neighborhood*, 7 Wn. App. at 380-85. These Courts of Appeal decisions are, in turn, consistent with precedent from this Court. The Petition fails to state any grounds why review of these issues is appropriate.

CONCLUSION

Respect Washington's Petition for Review fails to demonstrate that the Court of Appeals opinion conflicts with any precedent established by this Court or by the Court of Appeals. The Petition fails to demonstrate that the Court of Appeals rulings pose a "significant question of law" under the state or federal constitution, and it fails to show that there is an

issue of substantial public interest that should be determined by the Supreme Court. Therefore, under RAP 13.4 and the authority set forth above, this Court should deny review.

Respectfully submitted this 8th day of November, 2019.

By: 

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DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the State of Washington that on November 8, 2019, I caused the foregoing document to be electronically filed with the Washington State Supreme Court, which will automatically provide notice of such filing to all required parties.

SIGNED this 8th day of November, 2019, at Seattle, WA.

Jennifer Woodward

Jennifer Woodward, Paralegal

BARNARD IGLITZIN & LAVITT

November 08, 2019 - 8:27 AM

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