Supreme Court No. 97755-1
Court of Appeals No. 77500-6-I
(King County Superior Court Case No. 17-2-23799-0)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

BURIEN COMMUNITIES FOR INCLUSION,

Respondent and Plaintiff Below,

v.

RESPECT WASHINGTON,

Petitioner, Appellant and Defendant Below,

and

KING COUNTY ELECTIONS; JULIE WISE, KING COUNTY DIRECTOR OF ELECTIONS, in her official capacity at KING COUNTY ELECTIONS, and the CITY OF BURIEN,

Defendants Below.

PETITION FOR REVIEW
(Corrected)

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I.
Identity of Petitioner

Petitioner Respect Washington is the sponsor of Measure 1, an initiative to the City of Burien and a defendant and appellant below.

II.
Decision of the Court of Appeals

Respect Washington seeks review of the September 9, 2019, Court of Appeals decision in *Burien Communities for Inclusion v. Respect Wash.*, No. 77500-6-1 (Ct. App. Sept. 9, 2019) (Decision). A copy of the Decision is attached hereto as Appendix A.

II.
Issues Presented for Review

1. Did the Court of Appeals err in concluding that the First Amendment provides no protection for the voters of the City to express their views at the polls whether in criticism or support of an issue of public controversy?

2. Did the Court of Appeals err in concluding that fear of public discourse was sufficient injury to justify an injunction prohibiting people from expressing their views by casting ballots?

3. Did the Court of Appeals err in concluding that Measure 1 was beyond the scope of the initiative power in that it was administrative in nature or that it was withheld by the Legislature in giving exclusive authority to the City Council to govern all actions of City employees?

4. Did the Court of Appeals err by approving the last minute filing of lawsuits seeking to enjoin election matters within days of printing the ballots?

III.
Statement of the Case

On January 9, 2017, the Burien City Council enacted Ordinance 651, creating Burien Municipal Code ("BMC") 2.26.010-.30. This provision prohibited city employees from initiating any inquiry into individuals' citizenship or immigration status. In common parlance, Burien was establishing itself as a "Sanctuary City." As in other locations, the Sanctuary City status was a subject of substantial local controversy.

Some citizens in Burien opposed to the Sanctuary City ordinance began gathering signatures on an initiative to repeal the recent enactment. Using an existing organization, Respect Washington, they submitted signed petitions to the City. Two weeks later the King County Department of Elections found

sufficient signatures on the ballot. On August 7, 2017, the City Council voted to place Measure 1 on the ballot.

On Friday, September 8, 2017, Burien Citizens for Inclusion (BCI) sued Respect Washington, the City, the King County Elections Department and the Director of Elections seeking a declaration and injunction prohibiting placement of the initiative on the ballot. On Monday, September 11, 2017, BCI received a temporary restraining order prohibiting the placement of Measure 1 on the ballot. At the same time, a preliminary injunction motion was scheduled to be heard on Wednesday September 13, 2017. The deadline for printing ballots was Thursday September 14. On the morning of the deadline for sending ballots to the printer, September 14, the Superior Court issued an injunction prohibiting the placement of Measure 1 on the ballot.

Because the issuance of a preliminary injunction was not an appealable order, Respect Washington filed a Motion for Discretionary Review. The Court of Appeals Commissioner granted the motion and determined that the Motion would be treated as an appeal. On September 9, 2019, the Court of Appeals

issued the Decision attached as Appendix A, affirming the trial court decision.

V.
Argument

The considerations governing acceptance of review in RAP 13.4(b) apply to this case because the decision below conflicts with decisions of this Court and other Courts of Appeals, a significant question of law under the First Amendment is involved, and the petition involves issues of substantial public interest regarding the standards and procedures which impact the right express one's views on the ballot. These considerations permeate the argument that follows.

A. The Court should grant review to decide whether the prohibition of a vote on an initiative due to its subject matter violates the First Amendment rights of all voters to express their views at the polls.

1. The initiative process creates opportunity to have one's approval or disapproval about a controversial civic issue counted.

The gathering of signatures for an initiative is clearly an activity which the First Amendment protects. *Meyer v. Grant*, 486 U.S. 414 (1988). As the Supreme Court stated in *Mills v. State of Alabama*, "there is practically universal agreement that a

major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 384 U.S. 214, 218 (1966). Initiatives by their very nature discuss governmental affairs; Measure 1 is no different. A vote is the way all voters can express their support or disapproval of the initiative's message and the City's policies.

While there is no federal requirement that the state or a city provide an initiative process, when provided it is "obligated to do so in a manner consistent with the Constitution." *Meyer,* 486 U.S. at 420. The initiative process, as a whole, is protected political speech under the First Amendment. *Id. at* 421 (invalidating a state law making it a crime to pay people to solicit signatures on initiative petitions).

As to the manner in which political speech was burdened, the Supreme Court explained in *Meyer* that the state law made "it less likely that [the initiative proponents] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Meyer,* 486 U.S. at 422.

Not only does allowing an initiative to be placed on the ballot encourage the free discussion of governmental affairs generally, but it also specifically allows people to express their views on the ballot and have their voice counted one way or the other on the particular governmental issue. The Superior Court's last minute injunction prohibiting placement of an initiative on the ballot despite compliance with all time, place and manner restrictions conflicts with these major decisions of the Supreme Court on an issue at the core of the First Amendment.

The more controversial the issue is, the greater is the incentive of political opponents to thwart efforts to bring the issue to a vote.

> A lawsuit to strike an initiative or referendum from a ballot is one of the deadliest weapons in the arsenal of the measure's political opponents. With increasing frequency, opponents of ballot proposals are finding the weapon irresistible and are suing to stop elections.

John D. Gordon III and David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums,* 64 NOTRE DAME L. REV. 298, 298 (1989). Not only do judicial injunctions prior to the election ensure the proposed ordinance is never enacted by the people, it

silences the people's views that would otherwise be expressed—and counted—at the polls.

> [The dramatic power of an initiative that attains ballot status to shape the agenda of state and even national politics. This agenda-setting function comprises pressuring political actors, influencing candidate elections, fostering interest group and political party growth, and simply introducing an otherwise overlooked political position into the arena of public debate.

John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1464 (2007). This free speech function exists regardless of whether the initiative is within the scope of the initiative power and should be protected.

2. **This Court has recognized the free speech impacts of a vote on even invalid initiatives.**

In *Coppernoll v. Reed*, 155 Wn.2d 290 (2005), this Court observed that "after voter passage of [a specific initiative] ..., it was ruled invalid by the trial court. A nearly identical measure was quickly passed by the legislature and signed by the governor before an appeal could be heard." *Id.* at 296-97. "Because ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential

subsequent invalidation of the measure), *substantive preelection* review may also unduly infringe on free speech values." *Id.* at 298 (emphasis added). While this Court referred to "substantive preelection review" (based on asserted illegality of the initiative's provisions), the reality is that any action that prohibits a vote creates the same infringement on free speech values, whether on the validity of the substance of the initiative or on the initiative's validity as a legislative as opposed to administrative measure.

If the people of Burien resoundingly voted against Measure 1, it would send a message. If they resoundingly voted in favor, it would send a different message, but a message nonetheless. The manner in which the people of Burien express their views on a matter on the ballot is by voting, and the Court of Appeals decision ensures that particular opportunity for expression is halted solely based on the content of the initiative. Prohibiting a vote on the initiative based on the conclusion that what the proposal says is beyond the scope of the initiative power is a content-based restriction on speech.

While the Court of Appeals concluded that the initiative is not barred because of its content but rather because it is beyond the

scope of the initiative power (Decision at 13), that conclusion is inconsistent with what it means to be based on content. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 2227 (2015). While the injunction is supposedly not based on the policy of Measure 1, it is based on the wording of Measure 1—that it repeals a law which the Court believes is administrative in nature. It is a content-based decision.

3. **The prohibition of a First Amendment-protected activity cannot be based on the unclear standards of the scope of the initiative power.**

This Court has recognized that the distinction between administrative and legislative nature is a thin line. "Discerning whether a proposed initiative is administrative or legislative in nature can be difficult." *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1 (2010) (citations omitted).

In deciding, this Court used a phrase which seems on its face to suggest a contradictory standard: "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 (emphasis added).

Because every measure that changes policy is likely to hinder or further some related city plan, the people of Washington have to operate under a vague standard—a situation long recognized to pose danger to the freedom of expression. *See, e.g., Forsyth County v. Nationalist Movement,* 505 U.S. 125, 130-31 (1992) (discretionary condition for access to public forum); *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968) (vague standard affecting First Amendment rights not cured by judicial review). This uncertain, content-based criterion makes the conflict between the Court of Appeals' decision and the Supreme Court's decisions on the First Amendment in the initiative context even more egregious.

The distinction between legislative and administrative matters is too thin a thread to suspend the weighty interests in public discourse and the tallying of public views on matters of public controversy. This is an issue that calls for this Court's resolution.

4. **The First Amendment is not implicated by post-election review of initiatives.**

The First Amendment creates no bar to judicial conclusions that an initiative fails to enact a law because it addresses

administrative matters and not legislative ones after the election. Determining that an initiative is ineffective to enact a new statute or ordinance *after the election* fully protects both the subject matter limits on the initiative process and the right of citizens to express their views on matters of public controversy.

The Court has found initiatives to be invalid after elections and that should be the process on every challenge in order to protect the First Amendment right to cast one's approval or disapproval. *See Lee v. State,* 185 Wn.2d 608 (2016); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183 (2000). The Court of Appeals' decision in this case has silenced the people of Burien in the public forum of the ballot box and in the form of a prior restraint without undergoing any First Amendment scrutiny.

There is no First Amendment right to enact an invalid ordinance. However, '[t]here can be no more definite expression of opinion than by voting on a controversial public issue." *Miller v. Town of Hull,* 878 F.2d 523, 532 (1st Cir. 1989). This Court should grant this Petition to fully protect this right.

B. This petition presents this Court with an opportunity to issue much-needed clarification as to the standards for determining whether an initiative is within the scope of the initiative power.

As illustrated in the decision below, the application of the judicially created principle that a ballot measure must be legislative, rather than administrative, has resulted in a smorgasbord of factors that arise from the unique facts of each case to be weighed against each other with no longer a clear governing standard.

1. The distinction between legislative and administrative matters is not always clear.

This Court has repeatedly observed that determining whether an initiative is legislative or administrative is "difficult." *E.g.*, *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 107 (2016). This difficulty is compounded by the variety of rules that courts have applied. In *Citizens for Financially Responsible Gov't v. Spokane*, this Court reaffirmed two tests for determining whether an initiative is legislative or administrative:

> (1)"[a]ctions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative" and (2) "[t]he

> power to be exercised is legislative in its nature if it prescribes a new policy or plan."

99 Wn.2d 339, 347–48 (1983) (quoting 5 E. McQuillin, § 16.55, at 194) (numbering added). This is the longstanding two-part test. *See Seattle Bldg. & Constr. Trades Council v. Seattle*, 94 Wn.2d 740, 748 (1980); *Ruano v. Spellman*, 81 Wn.2d 820, 823 (1973); *Durocher v. King Cty.*, 80 Wn.2d 139, 152–53 (1972).

Measure 1 would represent a new policy if passed at the polls and is not temporary in nature. It, like every measure, represents potential change. The Court should grant the petition to clarify the standards under which this right of the people to propose legislation operates.

2. **The Court of Appeals has taken language out of this Court's decision in *Our Water—Our Choice!* to rule that any initiative that hinders or furthers City plans is banned thereby opening the door for prohibiting every initiative.**

As addressed above, in deciding *Our Water-Our Choice!*, 170 Wn.2d 1, this Court used language that "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 (emphasis added).

The Court of Appeals also takes the "or hinder" language out of context. To the extent that hindering an existing policy renders such hindering to be administrative makes perfect sense when referring to a plan that is required by a superior power, which was the case in *Our Water-Our Choice!*. That initiative would have interfered with water plans governed by "detailed state administrative regulations." 170 Wn.2d at 12 (and later citing Department of Health regulations).

Here, the Court of Appeals says Measure 1 would hinder pre-existing City policies. Decision at 26. Under that standard every initiative would fail the test because the nature of the initiative process is to propose a change.

By ignoring the traditional test of legislative action, *i.e.*, permanent and policy-based, and elevating the reference to "hindering" a plan, the Court of Appeals ignored the context and rationale of this Court in *Our Water-Our Choice!*. Nonetheless, initiative opponents hold on to the "or hinder" reference in that case because every ballot measure that changes and thereby hinders any existing policy (which meets the traditional standard of being legislative) is now outside the scope of initiatives. The

Court of Appeals' reasoning virtually wipes out the initiative process because the imposition of any new policy by the people could be considered to "hinder" a pre-existing policy put in place by elected officials and eliminate direct democracy in Washington's legal traditions.

This new standard seems to constitute a drastic restriction on direct democracy if "hindering" a prior practice disqualifies the proposal from the ballot. For example, any initiative to decriminalize an activity that a city previously had made criminal would "hinder" the city's previous plan. The legalization of cannabis use, the change in a minimum wage, the ban on animal traps all changed or hindered a pre-existing plans.[1]

The apparent conflict in the law here is obvious. Under *Citizens for Financially Responsible Gov't,* an initiative such as Proposition 1 that puts in place in new policy is legislative. Under the misreading of *Our Water-Our Choice!,* however, such an initiative is administrative because the new policy hinders the old policy, even though the initiative here purports only to remove a

[1] *See* Initiative 502, Laws of 2013, ch. 3 (legalization of recreational marijuana); *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770 (2015) (initiative on minimum wage); *Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d 622 (2003) (initiative banning animal trapping).

restriction. This issue needs resolution by this Court

3. **The Court of Appeals conclusion that Measure 1 is beyond the scope of the initiative power because the legislature has delegated regulation of employees to the City Council conflicts with *Our Water—Our Choice!*, resulting in confusion.**

The Court of Appeals concludes that RCW 35A.11.020 gives the power to regulate City employee conduct solely to the City Council and excludes the people through the initiative process. Decision at 20. In *Our Water—Our Choice!*, this Court recognized the problem with using this statute to conclude the legislature was intending to preclude initiatives because, to conclude that an initiative is invalid in that it affects municipal employees' functions, would render all initiatives at the city level invalid and the statute authorizing local initiatives "largely a nullity." *Our Water-Our Choice!,* 170 Wn.2d at 14 n.7 (citation omitted). The scope of this statute should be addressed by this Court because it potentially impacts all future initiatives.

C. This Court should review the Court of Appeals' conclusion that perceived harm from public discourse is sufficient injury to prohibit people from voting.

In order to obtain injunctive relief, a plaintiff must prove, among other requirements, that the action to be restrained would result in "actual and substantial injury." *Huff v. Wyman*,

184 Wn.2d 643, 651 (2015). A heightened standard of evidence must be met for a preliminary injunction against speech activities to be upheld. *Fed. Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn. 2d 261, 267 (1986).

The Court of Appeals recognized that the only claim BCI made to show injury sufficient to support an injunction was alleged injuries from having the public debate on Measure 1. Decision at 16-17. *See, e.g.*, CP 105 ("The polarizing debate over Measure 1 has raised fears").

Can public debate over a ballot measure be an injury in fact under the law and, more importantly, can public debate over a ballot measure satisfy the heightened standard for injury required for an injunction? This Court should make clear that fear of public discourse over a controversial issue cannot be a legally sufficient injury to justify an injunction to stop a vote.

Then Judge Alexander when on the Court of Appeals recognized that the initiative process is far from perfect.

> "The people have a right to adopt any system of government they see fit to adopt. In its workings, it may not meet their expectations; it may be unwieldy and cumbersome; it may tend to inconvenience and prodigality; it may be the expression of a passion or sentiment rather than of sound reason; but it is the people's government and,

> until changed by them, must be observed by the legislature and protected by the courts."

Save Our State Park v. Hordyk, 71 Wn. App. 84, 90 (1993) (quotations omitted)).

This Court should determine whether objection to having public debate is a legitimate ground for stopping a public vote. *See Ranjel v. City of Lansing,* 417 F.2d 321, 325 (6th Cir. 1969) ("Nor do we think that citizens should be deprived of their right of suffrage merely because a riot was threatened. It would be more appropriate to enjoin unlawful acts of rioters than to deprive the electorate of their right of franchise.") While there was no suggestion of riots in the present case, the basic principle is that same—fear of democratic processes is no ground to ban them.

The Court of Appeals reached the unfathomable conclusion here that the First Amendment right to exercise political free speech is a substantial harm sufficient to support injunctive relief. This Court should grant review to settle whether this rule should stand.

D. This Court should review the Court of Appeals' approval of requests for judicial intervention in a matter slated for the ballot within days of the printing deadline.

Given there is no statute of limitations in the Uniform

Declaratory Judgments Act (Chapter 7.24 RCW), the Court of Appeals have historically used statutes of limitations that are analogous to the underlying claim. *See e.g., Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 163 (2013).

After rejecting other ballot-related statutes of limitations, the Court of Appeals concludes that the pre-election challenge to a ballot initiative is analogous to a challenge to an adopted ordinance or statute and that no limitations period applies. Decision at 7 (citations omitted). While the constitutionality of a statute or ordinance may always be challenged, the challenge here is not that voting on Measure 1 is an unconstitutional act, but that Measure 1 is defective because it is beyond the scope.[2]

This Court should determine whether a challenge to a City decision to place an initiative on the ballot can be filed over a month after the decision was made and within days of the ballot printing deadline, leaving the Superior Court and defenders of the proposition to scurry with hasty briefing and argument and no opportunity to examine any of factual submissions.

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[2] Courts have held that challenges to city ordinances can be time-barred. *See Brutsche v. City of Kent*, 78 Wn. App. 370 (1995) (73 days to challenge ordinance was too late); *City of Federal Way v. King County*, 62 Wn. App. 530 (1991) (20 days to challenge ordinance).

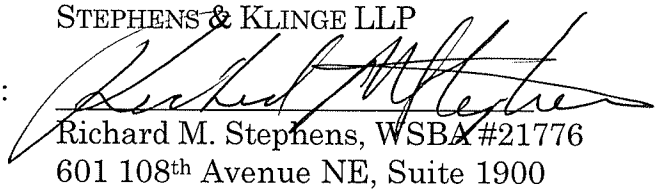
Preelection review is a political weapon. This Court should be concerned about fairness and measured decision-making process.

VI.
Conclusion

This Court should review the Court of Appeals' decision in this case, reverse the conclusion of the Court of Appeals, hold that Measure 1 is legislative in nature, and order that Measure 1 be submitted to the voters of the City whereby they can express their support or opposition.

RESPECTFULLY submitted this 14th day of October, 2019.

STEPHENS & KLINGE LLP

By: 

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DECLARATION OF SERVICE

I, Richard M. Stephens, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Stephens & Klinge LLP in Bellevue, Washington.

On October 14, 2019, I caused a true copy of the foregoing to be served on the following by email:

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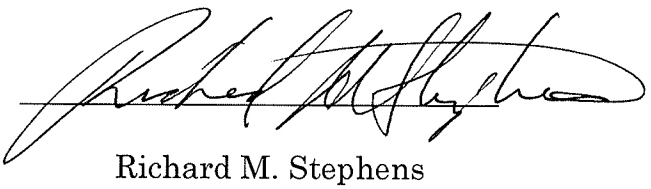
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 14th day of October, 2019, at Woodinville, Washington.



Richard M. Stephens

Appendix A

FILED
9/9/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BURIEN COMMUNITIES FOR INCLUSION, a Washington political committee,

Respondent,

v.

RESPECT WASHINGTON, a Washington political committee,

Appellant,

KING COUNTY ELECTIONS; JULIE WISE, King County Director of Elections, in her official capacity at King County Elections; and CITY OF BURIEN,

Defendants.

No. 77500-6-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: September 9, 2019

APPELWICK, C.J. — On September 14, 2017, the trial court granted Burien Communities for Inclusion (BCI) a preliminary injunction, prohibiting Burien Initiative 1 (Measure 1) from being placed on the November 2017 ballot. Respect Washington appeals the preliminary injunction, arguing that (1) it violates the free speech rights of the city of Burien's (City) voters, (2) the trial court erred in altering the status quo, and (3) BCI failed to show substantial injury. It also contends that Measure 1 is within the scope of the City's initiative power. We affirm.

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. BMC 2.26.020 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. It 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. BMC 2.26.020(4) And, it 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. BMC 2.26.030.

On July 7, 2017, Craig Keller, the campaign manager, treasurer, and officer of Respect Washington, a Washington political committee submitted an initiative petition to the City. The petition asked that an initiative repealing the Ordinance, Measure 1,[1] be submitted to a vote of the City's registered voters. In addition to repealing the Ordinance, Measure 1 would add the following chapter to the BMC:

> New Chapter 9.20 is hereby added to the Burien Municipal Code "Public Peace, Morals and Welfare" to read as follows:
> 9.20 Citizen Protection of Effective Law Enforcement: The City of Burien shall not regulate the acquisition of immigration status or religious affiliation unless such regulation is approved by a majority vote of the City Council and a majority vote of the people at a municipal general election.

[1] Both parties refer to this initiative as "Measure 1."

Two weeks later, the King County Department of Elections found that a sufficient number of signatures had been submitted for Measure 1, and issued a certificate of sufficiency. The Burien City Council then voted to place Measure 1 on the November 7, 2017 ballot.

On September 8, 2017, Burien Communities for Inclusion (BCI), a Washington political committee, filed a complaint for declaratory and injunctive relief against Respect Washington, King County Elections, King County Director of Elections Julie Wise, and the City. It sought a declaratory judgment that Measure 1 is invalid, arguing in part that (1) it exceeds the scope of the City's initiative power, and (2) the petition used to gather signatures violates RCW 35.21.005. It also asked the trial court to enjoin Measure 1 from being included on the November 2017 ballot.

Three days later, BCI sought and obtained a temporary restraining order (TRO). The TRO prohibited King County Elections and Wise from placing Measure 1 on the November 7, 2017 ballot. As a result, King County removed Measure 1 from the ballot. In granting the TRO, the trial court ordered that, on September 13, the matter be heard on a motion for a preliminary injunction, at which time the TRO would expire.[2] The deadline for King County Elections to send the ballots to the printer was the next day, September 14.

[2] On September 12, 2017, BCI filed a motion for a preliminary injunction, asking the trial court to enjoin King County Elections and Wise from including Measure 1 on the ballot.

On September 14, 2017, the trial court granted BCI's motion for a preliminary injunction. In doing so, it ordered the following:

> 1. City of Burien Initiative Measure No. 1 ("Measure 1") is invalid on the grounds that (a) Measure 1 exceeds the scope of the initiative authority granted to the people of the City of Burien, that it is administrative in nature, and (b) the petition used to gather signatures for Measure 1 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 through 35.17.360;
> 2. Defendants King County Elections, Julie Wise, King County Director of Elections, and all agents of King County Elections are prohibited from including or placing Measure 1 on the November 7, 2017 ballot.

Respect Washington appeals.[3]

DISCUSSION

Respect Washington makes six arguments.[4] First, it argues that BCI is not entitled to any relief because its complaint is barred by the statute of limitations

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[3] Respect Washington did not seek a stay of the trial court decision. Instead, on October 27, 2017, it filed a motion with this court, asking the court to treat the order as an appealable order under RAP 2.2(a)(3), or, alternatively, to grant discretionary review. On January 3, 2018, this court ordered that review would go forward as an appeal. The court explained that, despite not obtaining a declaratory judgment or permanent injunction, as a practical matter, BCI obtained the relief it requested.

[4] As an initial matter, BCI argues that all of Respect Washington's claims are moot. This case may be moot, because Measure 1 can no longer be placed on the November 2017 ballot. See Randy Reynolds & Assocs., Inc. v. Harmon, 193 Wn.2d 143, 152, 437 P.3d 677 (2019) (finding that an appeal was moot because the Court of Appeals could no longer offer effective relief). However, Respect Washington contends that Measure 1's placement on another ballot is relief that this court can provide. Even if a case becomes moot, "the court has discretion to decide an appeal if the question is of continuing and substantial public interest." Id. "Washington courts have repeatedly entertained suits involving the right of initiative or referendum despite possible mootness because the suits entail substantial public interest." Glob. Neighborhood v. Respect Wash., 7 Wn. App. 2d 354, 379, 434 P.3d 1024 (2019). Accordingly, regardless of whether Respect Washington's claims are moot, we reach the merits of this case.

and laches. Second, it argues that the preliminary injunction violated the free speech rights of the City's voters. Third, it argues that the trial court erred in granting a preliminary injunction that altered the status quo. Fourth, it argues that BCI failed to show that substantial injury would result from Measure 1's placement on the ballot. Fifth, it argues that Measure 1 does not exceed the scope of the City's initiative power, and is legislative in nature. And sixth, it argues that the petition used to gather signatures did not violate RCW 35.21.005.[5]

I. Statute of Limitations and Laches

Respect Washington argues that BCI was not entitled to any relief because its claims were "barred by the statute of limitations or laches." It points out that the Burien City Council voted to place Measure 1 on the November 2017 ballot at a public meeting on August, 7, 2017. BCI did not file its complaint until September 8, 2017.

[5] Respect Washington also argues that the trial court "erred by shortening the time to respond to motions." It states that, on September 11, 2017, BCI filed its motion for a TRO, the trial court "scheduled a preliminary injunction hearing two days later," and this time frame "did not permit any party to comply with the rules governing the filing of motions." It relies on King County Local Civil Rule 7(b)(4)(a), which provides that "[t]he moving party shall serve and file all motion documents no later than six court days before the date the party wishes the motion to be considered." However, under King County Local Civil Rule 65(b)(2), a preliminary injunction hearing "shall be set in conformance with the timing requirements of CR 65(b)." Thus, Local Civil Rule 7(b)(4)(a) does not apply. Under CR 65(b), "[i]n case a [TRO] is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character." And, "[n]o preliminary injunction shall be issued without notice to the adverse party." CR 65(a)(1). Respect Washington does not argue that it lacked notice of the preliminary injunction. As a result, the trial court did not err in setting a preliminary injunction hearing two days after it granted BCI a TRO.

Respect Washington asserts first that BCI brought its claims under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW. Because the UDJA does not have its own statute of limitations, it states that "courts are to apply an analogous statute of limitations." Respect Washington points to three election related statutes of limitations as examples.

First, a challenge to the ballot title or summary for a state initiative or referendum must be brought within 5 days from the filing of the ballot title. RCW 29A.72.080. Second, a challenge to the ballot title for a local ballot measure must be brought within 10 days from the filing of the ballot title. RCW 29A.36.090. Third, a challenge to the Secretary of State's refusal to file an initiative or referendum petition must be brought within 10 days after the refusal. RCW 29A.72.180.

This court recently considered an identical argument in Global Neighborhood v. Respect Washington, 7 Wn. App. 2d 354, 434 P.3d 1024 (2019). There, on February 22, 2016, the Spokane City Council placed Proposition 1 on the November 2017 ballot. Id. at 369. Global Neighborhood did not file its complaint addressing the validity of Proposition 1 until May 2017, and did not move for a declaratory judgment prohibiting Proposition 1 from being placed on the ballot until July 28, 2017. Id. at 372-73. The trial court declared Proposition 1 invalid because it was administrative in nature and exceeded the local initiative power and entered an injunction directing its removal from the ballot. Id. at 374.

On appeal, Respect Washington asserted the statute of limitations as a defense, and provided this court with the same election related statutes of limitations. Id. at 380-81. This court stated that "[s]ignificant differences lie

between a challenge to the title of an initiative and a challenge to the substance of an initiative." Id. at 381. It explained,

> The initiative if adopted will take effect regardless of any defect in its title. If any lawsuit will remedy the flaw in the initiative's name, the lawsuit should be brought in advance of the election and in time for the secretary of state or local government official to place a proper title on the ballot. A challenge to a refusal to place an initiative on the ballot also should be brought quickly in order to remedy any wrongful refusal to consign the measure to the ballot.
>
> A challenge to a local initiative as exceeding the scope of a municipality's legislative power may be brought after the initiative election. If the challenge can be brought after the vote, we should erect no impediment by reason of a statute of limitations applying before the effectiveness of initiative as an ordinance.

Id.

As a result, it deemed the preelection challenge to a ballot initiative "analogous to a challenge to an adopted ordinance or statute." Id. In Washington, "no statute of limitations applies to a challenge to the constitutionality of a statute or other action." Id. This court held that, similarly, "no statute of limitations should apply to the challenge of an ordinance that exceeds the authority of the entity adopting the measure whether by its legislative body or the voters by initiative." Id. at 382. It also pointed out that many Washington decisions have "entertained preelection initiative challenges without suggesting a statute of limitations that applied before the election might bar such a challenge." Id. We adhere to that decision, and that find that BCI's claims were not barred by a statute of limitations.

Alternatively, Respect Washington argues that BCI's claims should have been barred by laches.

"Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them." Buell v. City of Bremerton, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). The elements of laches are: "(1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to the defendant resulting from the unreasonable delay." Id. None of these elements alone raises a laches defense. Id.

Respect Washington also raised a laches defense in Global Neighborhood. 7 Wn. App. 2d at 380. There, the trial court issued its decision prohibiting Proposition 1's placement on the ballot a week before the deadline for printing ballots. Id. at 384. Respect Washington did not seek accelerated review by this court. Id. at 385. This court determined that, even if Global Neighborhood's delay in filing its complaint was unreasonable, the delay did not harm Respect Washington. Id. at 384.

This court noted that Respect Washington failed to cite authority for the proposition that a delay in appellate review constitutes harm for purposes of laches. Id. at 384-85. Its claim also "assume[d] that this court would reverse the superior court's decision and allow Proposition 1 to be submitted for a vote." Id. at 385. And, it assumed that "it had the right to vote on an initiative that exceeded the initiative power." Id. This court pointed out that, "[i]f anything, the Spokane public is prejudiced by the expense incurred by the city of Spokane in conducting a special election for an initiative beyond the scope of the initiative power." Id.

Last, it noted that Respect Washington assumed that "this court lacks authority to direct placement of Proposition 1 on a later ballot," and "fail[ed] to recognize the possibility of accelerated review by this court." Id.

Similarly here, Respect Washington argues that "[t]he delay until . . . the eve of printing the ballots—never before done in the context of an initiative challenge—was an unreasonable delay." Unlike Global Neighborhood, BCI sought a TRO three days before the printing deadline, sought a preliminary injunction two days before the printing deadline, and was granted a preliminary injunction on the same day as the printing deadline. Respect Washington makes the same assumptions that it did in Global Neighborhood. Its claim of harm assumes that this court would reverse the trial court's decision, and that it has the right to vote on an initiative that exceeds the initiative power. And, again, it fails to recognize the possibility of accelerated review by this court.[6]

We adhere to our decision in Global Neighborhood and find that Respect Washington was not harmed by BCI's delay in seeking a TRO and preliminary injunction.

II. Preliminary Injunction

Respect Washington makes three arguments regarding the trial court's decision to grant a preliminary injunction.[7] It argues that the trial court (1) violated

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[6] In this case, Respect Washington did not seek accelerated review by this court, or a stay of the trial court's decision. Instead, on October 27, 2017, it filed a motion to determine whether the preliminary injunction was an appealable order, and, alternatively, a motion for discretionary review.

[7] Respect Washington also argues that the injunction is invalid because the trial court did not require BCI to post a bond. Under CR 65(c), "Except as otherwise provided by statute, no . . . preliminary injunction shall issue except upon the giving

the free speech rights of the City's voters, (2) improperly altered the status quo, and (3) failed to show substantial injury.

This court reviews a trial court's decision to grant a preliminary injunction and the terms of that injunction for an abuse of discretion. Resident Action Council v. Seattle Hous. Auth., 177 Wn.2d 417, 428, 327 P.3d 600 (2013). "A trial court necessarily abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary." Kucera v. Dep't of Transp., 140 Wn.2d 200, 209, 995 P.2d 63 (2000).

A party seeking a preliminary injunction must show "'(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.'" Tyler Pipe Industries, Inc. v. Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (quoting Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958)). This listed criteria "must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public."

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of security by the applicant." (Emphasis added.) Respect Washington agrees that BCI brought its complaint under the UDJA. Under that Act, "The court, in its discretion and upon such conditions and with or without such bond or other security as it deems necessary and proper may . . . restrain all parties involved in order to secure the benefits and protect the rights of all parties to the court proceedings." RCW 7.24.190 (emphasis added). Accordingly, under RCW 7.24.190, no bond was required. See Yamaha Motor Corp. v. Harris, 29 Wn. App. 859, 865, 631 P.2d 423 (1981) (holding that the trial court did not err in failing to require Yamaha to post a bond where RCW 4.44.480 provides that the court may order a party to deposit money into the court "with or without security"). The trial court did not err in failing to require BCI to post a bond.

Id. If a party fails to establish any one of these requirements, "the requested relief must be denied." Kucera, 140 Wn.2d at 210.

A. Free Speech

Respect Washington argues that the preliminary injunction violates the First Amendment rights of the City's voters. Relying on Coppernoll v. Reed, 155 Wn.2d 290, 119 P.3d 318 (2005), it asserts that the State Supreme Court "has noted that there are free speech implications in even invalid initiatives."

The Coppernoll court examined the extent to which the Washington Constitution permits preelection review of a statewide initiative. Id. at 297, 299. In doing so, it explained that "[b]ecause ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential subsequent invalidation of the measure), substantive preelection review may also unduly infringe on free speech values." Id. at 298. But, it recognized that Washington courts have entertained preelection review of two types of challenges to statewide initiatives: (1) whether a ballot measure fails to comply with procedural requirements, and (2) whether a ballot measure exceeds the scope of the legislative power under article II, section 1 of the Washington Constitution. Id. at 298-99. Thus, the court recognized that some circumstances warrant preelection review.

Next, Respect Washington attempts to distinguish this case from Port of Tacoma v. Save Tacoma Water, 4 Wn. App. 2d 562, 422 P.3d 917 (2018), review denied 192 Wn.2d 1026, 435 P.3d 267 (2019). There, the trial court issued a permanent injunction preventing Save Tacoma Water (STW) from placing two

initiatives on the Tacoma municipal ballot that would limit the availability of Tacoma's water service. Id. at 566-67. It determined that the initiatives were beyond the scope of the local initiative power. Id. at 566.

On appeal, STW argued that the trial court's determination and issuance of an injunction violated its free speech rights under the federal and state constitutions. Id. at 576. This court disagreed. Id. at 577, 579. It explained that this argument was rejected by the Ninth Circuit in Angle v. Miller, 673 F.3d 1122 (2012),[8] and differentiated the injunction from one that classifies speech on the basis of subject matter or content. Port of Tacoma, 4 Wn. App. 2d at 577-78. It stated,

> [T]he 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.

Id. at 578.

Similarly here, the preliminary injunction rests on the principle that a measure is beyond the local initiative power if it is administrative in nature. Respect Washington asserts that, unlike Port of Tacoma, "it is the First Amendment right of the people of Burien which has been violated." This distinction between Respect Washington's free speech rights, and the rights of the City's voters, is not meaningful. Respect Washington cites no authority for the proposition that the City's voters have a free speech right under the federal or state

[8] The Angle court held that "[t]here is no First Amendment right to place an initiative on the ballot." Id. at 1133.

constitutions to vote on an initiative that exceeds the scope of the local initiative power. Where no authorities are cited in support of a proposition, this court "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). Therefore, we do not consider this argument. RAP 10.3(a)(6) (requiring arguments to be supported by legal authority).

The preliminary injunction was based on the initiative exceeding the scope of the local initiative power, not the substance of the policy stance taken. It does not violate the free speech rights of the City's voters.

B. Status Quo

Respect Washington argues that the trial court improperly disposed of the entire case by granting BCI "all that they sought in their [c]omplaint." It states that, by issuing the preliminary injunction on the same date as the deadline for sending ballots to the printer, the trial court "ensured that Measure 1 would not appear on the ballot and thus disposed of the case under the guise of granting a preliminary injunction." Respect Washington also contends that, by removing Measure 1 from the ballot, the trial court improperly altered the status quo that existed prior to BCI filing its complaint.

First, Respect Washington asserts that the trial court erred by effectively disposing of this case on the merits when it granted the preliminary injunction. It relies on a proposition from a 1940 State Supreme Court case providing that, where a preliminary injunction would effectively grant all the relief that could be obtained by a final decree and would practically dispose of the whole case, it will

not be granted. State ex rel. Pay Less Drug Stores v. Sutton, 2 Wn.2d 523, 532, 98 P.2d 680 (1940).

In BCI's complaint, it sought a declaratory judgment that "Measure 1 is procedurally and substantively invalid," an injunction preventing Measure 1's placement on the November 2017 ballot, attorney fees and costs, and "further relief as the [c]ourt deems just and proper." On September 14, 2017, the same day as the printing deadline, the trial court issued a preliminary injunction finding Measure 1 invalid and preventing its placement on the November 7, 2017 ballot. The court appeared to contemplate future action in the case, stating that "[t]he injury if Measure No. 1 is placed on the ballot now outweighs any delay in having the Measure on the ballot at a future point in time; mere delay is not the same as an outright denial."

After the trial court issued the preliminary injunction, Respect Washington did not seek a stay of the court's decision, or accelerated review by this court. Rather, it waited until October 27, 2017 to file a motion with this court, asking us to treat the order as an appealable order under RAP 2.2(a)(3), or, alternatively, to grant discretionary review. In January 2018, this court found the order appealable, and, in July 2018, the trial court proceedings were stayed.

As a practical matter, the preliminary injunction granted BCI the relief it sought—a determination that Measure 1 is invalid, and an injunction preventing its placement on the November 2017 ballot. But, the preliminary injunction was not a final determination on the merits of the case. It was final only in the sense that the issue did not appear on the November 2017 ballot. But, the trial court appeared

to contemplate future action in the case by referring to the "delay" in having Measure 1 "on the ballot at a future point in time." And, we agree that placing the measure on a future ballot was relief that remained available when the preliminary injunction issued.

Accordingly, because the preliminary injunction was not a final determination on the merits, the trial court did not improperly dispose of the case.

Second, Respect Washington argues that the trial court improperly altered the status quo by granting BCI a preliminary injunction. It states that the status quo as of August 7, 2017 "was that Measure 1 was to appear on the ballot."

A preliminary injunction is designed to preserve the status quo until the trial court can conduct a full hearing on the merits. Serv. Emps. Int'l Union Local 925 v. Univ. of Wash., 4 Wn. App. 2d 605, 621, 423 P.3d 849 (2018), review granted 192 Wn.2d 1016, 438 P.3d 111 (2019). But, the State Supreme Court has repeatedly upheld trial court decisions preventing an initiative's placement on a ballot. See, e.g., Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution, 185 Wn.2d 97, 100-01, 369 P.3d 140 (2016) (affirming trial court's instruction that initiative be struck from ballot after enough signatures were gathered to place it on ballot); Ruano v. Spellman, 81 Wn.2d 820, 821-22, 829, 505 P.2d 447 (1973) (affirming trial court's decision to enjoin initiative from being placed on ballot after it was certified that initiative had sufficient signatures).

The status quo was that the Ordinance was in effect. The initiative sought to alter the status quo. Its placement on the ballot was contingent upon satisfying the legal requirements for an initiative. Whether it had done so had not been

established and was the subject of the litigation. Respect Washington does not cite authority to the contrary. Where a party fails to cite authority in support of a proposition, this court "may assume that counsel, after diligent search, has found none." DeHeer, 60 Wn.2d at 126.

The trial court did not improperly alter the status quo by issuing the preliminary injunction.

C. Substantial Injury

Respect Washington argues that BCI has not shown "any kind of substantial injury resulting from Measure 1 on the ballot." It asserts that, in BCI's motion, the only specific injury it identified was the "vague claim" of fear of and reluctance to engage with City personnel, offices, and services if Measure 1 becomes law.

In issuing the preliminary injunction, the trial court stated,

> The Court has carefully balanced the relative interests of the parties and the interests of the public. The injury if Measure No. 1 is placed on the ballot now outweighs any delay in having the Measure on the ballot at a future point in time; mere delay is not the same as an outright denial. The Court finds that Plaintiff has established a clear legal right, a well-grounded fear of immediate invasion of that right, and that the action sought to be enjoined will result in actual and substantial injury.

BCI attached to its preliminary injunction motion several declarations addressing future injury. One BCI member, Hugo Garcia, stated that he has close friends who shared that "they have stayed home and limited the time they go out to restaurants or grocery shop due to the anxiety and fear [from] the uncertainty of the sanctuary city ordinance." Rich Stolz, another BCI member and Executive Director of OneAmerica, an immigrant and refugee advocacy organization,

discussed the effects of Measure 1 on the immigrant and refugee community. He stated that the "polarizing debate over [Measure 1] has raised fears in the immigrant and refugee community that they should not contact local law enforcement if they need to report crimes or violations of their own rights or property."

Sandy Restrepo, another BCI member and attorney, discussed the effect of Measure 1 on her immigrant clients. She shared that many of her immigrant clients "have stated that they are afraid to send their children to school, go to the grocery store and even call the police to report a crime because the anti-immigrant sentiment has increased since Respect Washington began collecting signatures." She offered one example: undocumented immigrant parents came to her office seeking legal advice, because they were afraid to report to City police that their child was a victim of sexual assault. They went to Restrepo first to see if they would risk deportation if they spoke to police officers. She asserted that "[i]f these repeal efforts continue, our community will only continue to grow more afraid and not be able to access basic services they are entitled to."

Respect Washington argues that, even if BCI's claim of fear is not too vague, BCI's claimed injury "fails to support an injunction because of a lack of causation." It relies on Clapper v. Amnesty International, USA, 568 U.S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013).

In Clapper, the plaintiffs sought an injunction against surveillance authorized by Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a. Id. at 401. They argued that they were suffering ongoing injuries fairly traceable to the law "because the risk of surveillance under § 1881a require[d] them to take costly and burdensome measures to protect the confidentiality of their communications." Id. at 415. The United States Supreme Court rejected this argument. Id. at 416. It found that "[r]espondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending." Id. Thus, the Court concluded that "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm." Id.

Unlike Clapper, the issue here is not standing, or manufacturing standing. At issue here is whether residents of the City will be harmed by Measure 1's placement on the ballot and passage. The declarations make clear that harm will result when residents need to contact City employees regarding services or assistance they are entitled to receive. Specifically, they make clear that, if Measure 1 is placed on the ballot, residents' fear of engaging with City personnel would persist. The mere possibility of Measure 1's placement on the November 2017 ballot made residents fearful of deportation and question whether they should report crimes to police. Even if the fear of deportation is a hypothetical future harm, residents' decisions not to report crimes based on that fear would result in harm to the community. And, if Measure 1 passes, residents risk forgoing City assistance

they are entitled to receive in order to avoid inquiries into their immigration status. These harms are neither speculative nor manufactured.

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.

III. Local Initiative Power

Respect Washington argues that Measure 1 should not have been stricken from the ballot, because it is within the scope of the local initiative power and legislative in nature. The trial court determined that Measure 1 is invalid because it exceeds the scope of the initiative power and is administrative in nature. Whether an initiative is beyond the scope of the local initiative power is a question of law that this court reviews de novo. Protect Pub. Health v. Freed, 192 Wn.2d 477, 482, 430 P.3d 640 (2018).

This court generally disfavors preelection review. Id. But, there are narrow exceptions to this prohibition. Id. One exception "involves determining whether the 'proposed law is beyond the scope of the initiative power.'" Id. (quoting Seattle Bldg. & Constr. Trades Council v. City of Seattle, 94 Wn.2d 740, 746, 620 P.2d 82 (1980)). While statewide initiatives are subject to the scope of the state legislative power, local initiatives are subject to the scope of the local legislative power. Id. "These powers are not equivalent." Id.

Under Amendment 7 to the Washington Constitution, "the people secured for themselves the right to legislate directly." City of Port Angeles v. Our Water-Our Choice!, 170 Wn.2d 1, 7-8, 239 P.3d 589 (2010). However, Amendment 7 does not apply to municipal governments. Id. The scope of the local initiative

power is instead governed by statutes and county charters, "and preelection challenges are subject to a different analysis." Protect Pub. Health, 192 Wn.2d at 482. The State Supreme Court has recognized multiple limits on the local initiative power, including the limit that "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.'" Id. at 482-83 (quoting City of Sequim v. Malkasian, 157 Wn.2d 251, 261, 138 P.3d 943 (2006)).

A municipality's governing body, also referred to as its "legislative authority," "includes the mayor and the city council, but not the electorate." Id. at 483. "When the legislature enacts a general law granting authority to the legislative body (or legislative authority) of a city, that legislative body's authority is not subject to 'repeal, amendment, or modification by the people through the initiative or referendum process.'" Mukilteo Citizens for Simple Gov't v. City of Mukilteo, 174 Wn.2d 41, 51, 272 P.3d 227 (2012) (quoting Malkasian, 157 Wn.2d at 265). This court looks to the language of the relevant statute to determine the scope of the authority granted by the legislature to the local governing body. Id.

BCI argues that the legislature has delegated to the City's governing body, not the City itself, "the powers that Measure 1 seeks to wield through initiative." The City is a code city. BMC 2.26.010. Under RCW 35A.11.020, "The legislative body of each code city shall have power to organize and regulate its internal affairs within the provisions of this title and its charter, if any; and to define the functions, powers, and duties of its officers and employees." (Emphasis added.)

Measure 1 seeks to repeal an ordinance that, under RCW 35A.11.020, the legislature granted the Burien City Council authority to pass—the power "to define the functions, powers, and duties of its officers and employees." Measure 1 would also add a chapter to the BMC providing that the City "shall not regulate the acquisition of immigration status or religious affiliation unless such regulation is approved by a majority vote of the City Council and a majority vote of the people at a municipal general election." This provision would further constrain the Burien City Council from exercising its authority to define the functions, powers, and duties of its officers and employees on the subject of immigration and religious inquiries.

Respect Washington argues that, in Our Water-Our Choice!, the State Supreme Court rejected a similar argument regarding RCW 35A.11.020. There, this court struck two initiatives relating to the regulation of Port Angeles's water supply on the grounds that the legislature intended Port Angeles's legislative body, not the city as a whole, to manage its water system. Our Water-Our Choice!, 170 Wn.2d at 5, 14-15 n.7. It relied on the provision in RCW 35A.11.020 that "'[t]he legislative body of each code city shall have all powers [necessary for] operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns.'" Id. at 14 n.7 (alteration in original).

The State Supreme Court affirmed this court on an alternative grounds, finding that the initiatives were administrative in nature. Id. at 15-16. It did not reach the issue of whether the legislature intended only for Port Angeles's legislative body to manage its water system. Id. at 14-15 n.7. But, it observed in

a footnote that, when read out of context, the citation to RCW 35A.11.020 "could have unintended consequences." Id. It explained,

> Given that the same chapter of the RCW specifically authorizes noncharter code cities to "provide for the exercise . . . of the powers of initiative and referendum upon electing to do so," RCW 35A.11.080, reading RCW 35A.11.020 expansively strains the statutory fabric. In our view, RCW 35A.11.020 grants code cities broad, though specific, powers . . . and does not necessarily speak to whether the state legislature intended to grant those powers only to its municipal counterpart.

Id. (first alteration in original). Thus, the court indicated that the powers the legislature granted the legislative bodies of code cities in RCW 35A.11.020 may not be exclusive, and may be subject to a city's initiative power. If that is the case, BCI's argument fails.

Alternatively, the trial court here found that Measure 1 is invalid because it is administrative in nature. "[A]dministrative matters, particularly local administrative matters, are not subject to initiative or referendum." Our Water-Our Choice!, 170 Wn.2d at 8. Generally, "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. The State Supreme Court has noted that discerning whether a proposed initiative is administrative or legislative in nature can be difficult. Spokane Entrepreneurial Ctr., 185 Wn.2d at 107. In one case, it described the question as "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." Ruano, 81 Wn.2d at 823-24.

Measure 1 seeks to repeal the Ordinance, which prohibits City employees from conditioning services on an individual's immigration status, and prohibits City personnel from initiating an enforcement action based solely on an individual's immigration status, race, and other factors. The Ordinance also states,

> A goal of this legislation is to foster trust and cooperation between city personnel and law enforcement officials and immigrant communities to heighten crime prevention and public safety.
>
> Since 1992, the King County sheriff's office has embraced this goal and outlined supporting policies in its operations manual, with which this ordinance is consistent.
>
> Another goal of this legislation is to promote the public health of City of Burien residents.
>
> On April 22, 2008, King County Superior Court affirmed the principle that our courts must remain open and accessible for all individuals and families to resolve disputes on the merits by adopting a policy that warrants for the arrest of individuals based on their immigration status shall not be executed within any of the superior court courtrooms unless directly ordered by the presiding judicial officer and shall be discouraged in the superior court courthouses, unless the public's safety is at immediate risk. Shortly after the affirmation's adoption, the King County Executive and Immigration and Customs Enforcement agreed to honor this policy.

In Global Neighborhood, this court found that a similar initiative was administrative in nature, because it hindered a plan previously adopted by the local government. See 7 Wn. App. 2d at 399-400. There, the Spokane City Council had enacted two ordinances prohibiting Spokane Police Department officers from engaging in bias-based profiling, and, unless required by law, from inquiring into a person's immigration status. Id. at 367-68. These ordinances codified two previously adopted Spokane Police Department policies. Id. at 367. One month later, Respect Washington submitted a proposed initiative, Proposition 1, that

would (1) amend one of the ordinances to eliminate citizenship status from the list of prohibited factors for city police to consider during investigations, (2) repeal the other ordinance, and (3) add a new code section that would prohibit Spokane from limiting any city employee from collecting immigration status information and sharing that information with federal authorities. Id. at 360, 368.

In March 2017, Proposition 1 was placed on the November 2017 ballot. Id. at 369. But, before the election, the trial court entered an injunction removing it from the ballot. Id. at 374. It determined that Proposition 1 was invalid because it was "administrative in nature and thereby exceed[ed] the local initiative power." Id.

This court affirmed the trial court on appeal. Id. at 405. In doing so, it recognized that Proposition 1 had at least one characteristic in common with legislative acts—it adopted "a rule of government permanent in nature." Id. at 398. And, it agreed with Respect Washington that Proposition 1 maintained some legislative character "in that the initiative modifie[d], if not reverse[d] in part, legislative policy established by the city council." Id. at 398-99. But, this court stated that in "analyzing the legislative or administrative nature of a municipal act, courts consider the framework of the action." Id. at 399. It explained that Proposition 1 challenged a Spokane policy, "whose framework's base consists of administrative building blocks." Id.

Specifically, this court noted that Proposition 1 interfered with "Spokane Police Department policy to limit the circumstances under which law enforcement officers inquire about immigration and citizenship status." Id. Thus, it determined

that Proposition 1 hindered a policy previously adopted by the local government. Id. It also observed that, though it was unaware of any decision expressly holding that directions to employees constitute administrative policy, logic supports the conclusion that "directions to employees constitute administrative, not legislative, policy." Id. at 400. And, it emphasized "the need for expertise on the challenging and charged question of whether local government agents should question individuals about immigration or citizenship status." Id. It concluded that questioning regarding one's citizenship status should "be reserved to the expertise of law enforcement administrators." Id. at 401.

Here, BCI does not argue that the Ordinance was based on policies adopted by the Burien Police Department, similar to the ordinances in Global Neighborhood. But, a goal of the Ordinance is to "foster trust and cooperation between city personnel and law enforcement officials and immigrant communities to heighten crime prevention and public safety." The Ordinance is consistent with policies supporting this goal in the King County Sheriff's Office operations manual.[9] The Ordinance also notes that the King County Superior Court has adopted a policy that "warrants for the arrest of individuals based on their immigration status shall not be executed within any of the superior court courtrooms unless directly ordered by the presiding judicial officer." And, it states that the Ordinance is "intended to be consistent with federal laws regarding communications between local jurisdictions and federal immigration authorities."

[9] Consistency with the King County Sheriff's Office operations manual is relevant, because the City contracts with the King County Sheriff's Office for police services.

Measure 1's attempt to repeal the Ordinance and forbid the Burien City Council from regulating immigration and religious affiliation inquiries is an attempt to hinder a plan already adopted by the City. Rather than a new law or policy, it is an obstacle to implementing the Ordinance, which is meant to be consistent with King County policies and federal law.

The Ordinance also involves directions to City officials, employees, and agents. It forbids them from taking certain actions. Measure 1 would repeal these directions. At oral argument, Respect Washington agreed that Measure 1 is "untying [City staffs'] hands," and "saying . . . they are no longer prohibited from asking about immigration." As this court noted in Global Neighborhood, logic supports the conclusion that "directions to employees constitute administrative, not legislative, policy." 7 Wn. App. 2d at 400. Administrative matters are not subject to initiative or referendum. Our-Water-Our Choice!, 170 Wn.2d at 8.

And, as this court also noted, there is a need for expertise on the question of whether local government agents should question individuals about immigration or citizenship status. Global Neighborhood, 7 Wn. App. 2d at 400. The "need to weigh conflicting goals before establishing a policy of asking or withholding questioning regarding one's citizenship status" is recognized in case law and literature. Id. at 400-01. "Local law enforcement agencies must also navigate constitutional protections afforded residents before asking for information on one's status." Id. at 401. Because these factors implicate the success of law enforcement efforts, "questioning should be reserved to the expertise of law enforcement administrators." Id.

Accordingly, we hold that Measure 1 is invalid because it is administrative in nature.[10]

We affirm.

WE CONCUR:

[10] Because we hold that Measure 1 is invalid, we need not reach Respect Washington's argument regarding the petition used to gather signatures for Measure 1.

STEPHENS & KLINGE LLP

October 14, 2019 - 1:06 PM

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