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COURT OF APPEALS, DIVISION II
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PORT OF TACOMA, et al.,
Respondents

v.

SAVE TACOMA WATER, et al.,
Appellants

RESPONDENTS' BRIEF

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ORIGINAL

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I. STATEMENT OF THE CASE

The Washington Supreme Court's February 2016 decision in *Spokane Entrepreneurial*¹ is directly on point and controls the outcome of this case. In *Spokane*, the Supreme Court upheld the trial court's ruling invalidating a local initiative nearly identical to the local initiatives at issue in this case because they "attempt[ed] to regulate a variety of subjects outside [local initiative] authority, including administrative matters, water law, and constitutional rights."²

Similarly, the local initiatives at issue in this case attempted to intrude on administrative matters, intruded on matters reserved to the local legislative bodies, and were inconsistent with state and federal laws and state and federal Constitutions. The trial court did not err in entering an injunction prohibiting the local initiatives from appearing on the ballot.

Despite Appellants' suggestion to the contrary, no individual or entity is above judicial review, including activists who attempt direct legislation through the initiative process. The Supreme Court has repeatedly recognized its authority to review whether the subject matter of a local initiative is proper for direct legislation. Appellants' arguments regarding the judiciary's supposed lack of authority to conduct pre-election

¹ *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 185 Wn.2d 97, 369 P.3d 140 (2016).

² *Spokane Entrepreneurial*, 185 Wn.2d at 100 – 01.

review of local initiatives attempts to circumscribe the authority of an independent branch of government designed to serve as a check on the exercise of authority. Pre-election judicial review of an initiative is already restricted to a small number of circumstances out of deference to the electoral process.

Respondents Port of Tacoma (individually, the “Port”), Economic Development Board for Tacoma-Pierce County (individually, “EDB”) and the Tacoma-Pierce County Chamber (individually, the “Chamber,” collectively “Respondents”) are a coalition of municipal and nonprofit corporations which filed a pre-election challenge to two local initiatives submitted to the City of Tacoma. The City of Tacoma was joined as a party and has filed a separate response to this appeal, as has the Port.

After briefing and argument, the trial court properly entered judgment declaring that Tacoma Code Initiative 6 (individually, the “Code Initiative”) and Charter Initiative 5 (individually, the “Charter Initiative,” collectively, the “STW Initiatives”) were beyond the proper scope of the local initiative power and invalid on their face. Specifically, the STW Initiatives were invalid because they involved administrative matters, intruded on matters reserved to local legislative bodies, and were inconsistent with state and federal laws and state and federal Constitutions.

The STW Initiatives were wholly invalid and could not be severed, salvaged, or salvaged in part. The trial court properly granted declaratory relief declaring the STW Initiatives invalid and prohibiting the STW Initiatives from appearing on the ballot. Respondents ask that this Court to affirm the trial court's rulings.

II. ASSIGNMENTS OF ERROR

Respondents do not assign any error to the trial court's rulings.

III. ISSUE STATEMENTS

1. Under *Spokane Entrepreneurial*, the trial court has jurisdiction to conduct a pre-election review of initiatives. Did the trial court have jurisdiction to grant Respondents' Motion for temporary and permanent injunction prior to a vote on the STW Initiatives when exercise of such jurisdiction does not implicate constitutional rights to free speech or to petition the government under the First Amendment of the United States Constitution or Article I, §§ 4 and 5 of the Washington Constitution?
Yes.

2. Local initiatives cannot (1) involve administrative matters, (2) intrude on legislative matters delegated to the City, (3) conflict with state or federal law, or (4) limit the Courts' authority to engage in review. Did the trial court properly find that the STW Initiatives were invalid when the STW Initiatives (1) involved administrative matters, (2) intruded on matters

reserved to the local legislative bodies, and (3) were inconsistent with state and federal laws and state and federal Constitutions. **Yes.**

IV. FACTS

The City is a first class, charter city organized and operating under Title 35 RCW and the Tacoma City Charter.³ Tacoma has operated a municipal water system for over one hundred twenty three years.⁴ Under the Tacoma City Charter, Tacoma Water is a regional water utility established in the City's Department of Public Utilities.⁵ Tacoma has a lengthy history of administering the supply of water to commercial, manufacturing, technological and industrial consumers.⁶

Tacoma's Charter, Section 2.19, includes a citizen initiative process.⁷ Appellant Save Tacoma Water ("STW") is a political action

³ Clerk's Papers ("CP") at 259. "A first class city is a city with a population of 10,000 or more at the time of organization or reorganization that has adopted a charter." RCW 35.01.010, 35.22.010. "The form of the organization and the manner and mode in which cities of the first class shall exercise the powers, functions and duties conferred upon them by law, with respect to their own government, shall be as provided in the charters thereof." RCW 35.22.020.

⁴ CP at 259. *See also Griffin v. Tacoma*, 49 Wn. 524, 526-7, 95 P. 1107 (1908) ("Under the terms of Ordinance No. 790 the electors of the city [of Tacoma] did hold an election in 1893 to determine, among other things, whether the city should purchase of the Tacoma Light and Water Company its water works and all sources of water supply then owned or operated by said company as part of its water system").

⁵ CP at 259.

⁶ CP at 259.

⁷ Section 2.19 – Citizens of Tacoma may by initiative petition ask the voters to approve or reject ordinances or amendments to existing ordinances, subject to any limitation on topics in state law, by the following process:

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

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

committee, which has sponsored the STW Initiatives that are the subject of this suit.⁸ Defendant Donna Walters is listed as the “sponsor” and “treasurer” of STW.⁹

STW’s Code Initiative seeks to have the City Council enact the changes to the Tacoma Municipal Code.¹⁰ STW’s Code Initiative seeks to impose a requirement that any land use proposal requiring water

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

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

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

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

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

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

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

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

⁸ CP at 378, 382.

⁹ CP at 382.

¹⁰ CP at 386.

consumption of 1336 CCF (one million gallons) of water or more daily from Tacoma be submitted to a public vote prior to “the City” “providing water service” for such a project.¹¹ The Initiative would accomplish this by requiring developers seeking that water use to fund the “costs of the vote on the people” and only if “a majority of voters approve the water utility service application and all other application requirements may the City provide the service.”¹²

STW’s Code Initiative expressly purports to elevate its proposed amendment above state law, by pronouncing that “all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of the City of Tacoma only to the extent that they do not violate the rights or mandates of this Article.”¹³ The Code Initiative expressly purports to overrule and/or disavow the United States Constitution, along with “international, federal [and] state laws” that “interfere” with the proposed amendment, and to curtail the jurisdiction of state and federal courts, and to eliminate certain rights of corporations, in conflict with the Washington and Federal Constitutions, as well as U.S. Supreme Court rulings.¹⁴ The Initiative deprives corporations of their right

¹¹ CP at 386 (*Code Initiative* at § A).

¹² CP at 386 (*Code Initiative* at § A).

¹³ CP at 386 (*Code Initiative* at § B).

¹⁴ CP at 386 (*Code Initiative* at § C).

under the Washington State Constitution to sue and defend against lawsuits in courts, “like natural persons,” WASH. CONST. art. I, § 12, and seeks to deprive the courts and other “government actors” from recognizing any “permit, license, privilege, charter or other authorizations” that would violate the Initiative.¹⁵

The STW Initiatives also give “any resident of the city” the right to enforce the Initiative.¹⁶ The STW Initiatives make no attempt to define any of its terms, lending extra confusion which will lead to further litigation.¹⁷

On June 6, 2016, Respondents filed a Complaint asking the court to find that the STW Initiatives were invalid and seeking to enjoin the Pierce County Auditor from validating signatures and placing the STW Initiatives on the November 2016 ballot.¹⁸ The City of Tacoma, as a party defendant, answered and filed cross-claims against STW and other defendants seeking declaratory judgment that the STW Initiatives were invalid and enjoining their placement on the November 2016 and 2017 ballots.¹⁹

Soon thereafter, the City filed a Motion for Preliminary and Permanent Injunction.²⁰ Respondents also filed a Motion for Declaratory

¹⁵ CP at 386 (*Code Initiative* at § C).

¹⁶ CP at 386 (*Code Initiative* at § D).

¹⁷ See CP at 386.

¹⁸ CP at 1 – 27.

¹⁹ CP at 32 – 63.

²⁰ CP at 175 – 193.

Judgment & Preliminary & Permanent Injunctive Relief.²¹ Respondents argued that the STW Initiatives exceeded the proper scope of local initiative power and were invalid on their face.²² Respondents also argued that the STW Initiatives attempted to repeal or amend the United States and Washington Constitutions; created new inalienable and fundamental constitutional rights; interfered with administrative matters; and usurped authority delegated exclusively to the Tacoma City Council.²³ In response, STW filed a Motion to Dismiss, alleging that the trial court lacked subject matter jurisdiction over the case, because, *inter alia*, the trial court lacked jurisdiction to conduct a pre-election review of initiatives.²⁴

The trial court denied STW's Motion to Dismiss, finding that it had jurisdiction to decide the justiciable controversy and that the Respondents and City had standing to challenge the STW Initiatives.²⁵ The trial court also found that the STW Initiatives exceeded the scope of the local initiative power, were not severable, and were invalid.²⁶ The trial court granted Respondents and the City a temporary and permanent injunction prohibiting

²¹ CP at 318 – 64.

²² CP at 319.

²³ CP at 321.

²⁴ CP at 595 – 606.

²⁵ CP at 674, 678; *see also* Verbatim Report of Proceedings (“VRP”) (July 1, 2016) at 53 – 54.

²⁶ CP at 677; VRP (July 1, 2016) at 54.

the STW Initiatives from appearing on the 2016 ballot or any future ballot.²⁷
STW submitted this timely appeal.

V. ANALYSIS

Much of STW's Appellant's Brief appears to focus on implicitly asking this Court to overrule a long body of case law in Washington allowing pre-election judicial review of local initiatives. Despite STW's fascinating academic discussion of American jurisprudential history, this case involves a settled issue of law that does not require this Court to create new Constitutional rights, as requested by STW. Washington courts have clear authority to conduct pre-election reviews of initiatives. Additionally, the STW Initiatives at issue in this case were properly invalidated as they intruded on administrative matters, intruded on rights reserved to local legislative bodies, conflicted with state and federal law, and attempted to restrict judicial review. The STW Initiatives were wholly invalid and no part was severable. Notably, even STW fails to identify what specifically should have been saved, and having failed to make such argument in their opening brief, they have waived this issue.²⁸

As an initial matter, Appellants have not argued on appeal that Respondents lacked standing, that there was not a justiciable controversy,

²⁷ CP at 688 – 89.

²⁸ RAP 10.3(c); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

or that the requirements for injunctive relief were not met. As such, those standards and issues are not addressed. Instead, Appellants focus their argument on the trial court's jurisdiction to conduct a pre-election review of the STW Initiatives and whether the STW Initiatives were within the local initiative power. Respondents' similarly focus their arguments on those issues as well.

A. Standard of review.

A ruling on a trial court's subject matter jurisdiction is a legal question reviewed de novo.²⁹ Whether an initiative exceeds the local initiative power and is thus subject to pre-election review is also a question of law reviewed de novo.³⁰

B. Local initiative power does not preempt state or federal laws.

Appellants suggest that alleged rights of "self-government" allows municipalities to preempt state or federal laws. This is incorrect. The Washington Constitution and case law are explicit that the initiative authority it grants is limited to the extent that the initiatives do not conflict with other laws.

Local initiative power differs from statewide initiatives. The right of the people to file a statewide initiative is laid out in the Washington

²⁹ *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075 (2012).

³⁰ *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 172, 149 P.3d 616 (2006).

Constitution, art. II, § 1(a). Because it is a constitutional right, Washington courts interpret the rules regarding statewide initiatives to facilitate this right.³¹ However, the right to file a local initiative is not a constitutionally granted right.³²

A municipality, as a creation of the State, is limited and subordinate to higher authority:

While the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law. [The Washington Constitution] authorizes municipal charters “consistent with and subject to the Constitution and laws of this state.” The fundamental proposition which underlies the powers of municipal corporations is the subordination of such bodies to the supremacy of the legislature.³³

Contrary to the suggestion of Appellants, Washington recognizes a number of limits on the initiative authority. For example, local initiatives are invalid if they violate or conflict with state or federal laws.³⁴ Initiatives are also invalid if they attempt to interpret or override federal and state constitutions or create new constitutional rights.³⁵ STW Initiatives that seek

³¹ *Spokane Entrepreneurial*, 185 Wn.2d at 104.

³² *Spokane Entrepreneurial*, 185 Wn.2d at 104 (citing RCW 35.22.200)).

³³ *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82 (1980).

³⁴ *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719, 911 P.2d 389 (quoting WASH. CONST. art. XI, § 10 (authorizing municipal charters “consistent with and subject to the Constitution and the laws of this state”)), *cert. denied*, 519 U.S. 862 (1996).

³⁵ See U.S. CONST. art. VI, cl. 2, WASH. CONST. art. I, § 2; see also *Ford v. Logan*, 79 Wn.2d 147, 156, 483 P.2d 1247 (1971) (“the initiative power . . . does not include the power to directly amend or repeal the constitution itself.”).

to legislate outside the city's jurisdiction are similarly invalid because a city cannot legislate beyond its geographic borders.³⁶ Thus, a city has no inherent authority to supersede state and federal laws and constitutions.³⁷

The authority in the City's Charter similarly recognizes that the local initiative power is circumscribed, despite Appellants' argument that the initiative power is "not a gift from the state legislature – and the courts lack jurisdiction to veto the people's proposed legislation."³⁸

Tacoma City Charter Sections 2.18 and 2.19, for instance, recognize that their terms are subordinate to State authority. "Amendments to this charter may be submitted to the voters by the City Council or by initiative petition of the voters in the manner provided by the state constitution and laws."³⁹ Additionally, Section 2.19 of the Charter imposes limits on the citizen initiative process: "Citizens of Tacoma may by initiative petition ask the voters to approve or reject ordinances or amendments to existing

³⁶ WASH. CONST. art. XI, § 11 ("Any county, city, town, or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."); *City of Spokane v. Coon*, 3 Wn.2d 243, 346, 100 P.2d 36 (1940) ("Under art. XI, § 11, of our state constitution, cities of the first class enjoy the same police power within their borders as does the state itself.").

³⁷ See *Massie v. Brown*, 84 Wn.2d 490, 492, 527 P.2d 476 (1974) (finding no inherent right to self-government and that municipal corporations are not exempt from legislative control); *Lauterbach v. City of Centralia*, 49 Wn.2d 550, 554, 304 P.2d 656 (1956) ("A municipal corporation is a body politic established by law as an agency of the state – party to assist in the civil government of the county, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district. . . . It has neither existence nor power apart from its creator, the legislature, except such rights as may be granted to municipal corporations by the state constitution).

³⁸ *Appellant's Brief* at 30.

³⁹ CP at 272 (TACOMA CITY CHARTER, § 2.18).

ordinances, *subject to any limitation on topics in state law.*⁴⁰ These limitations mirror the restrictions set forth in Sections 10 and 11 of Article XI of the Washington Constitution discussed above.

Despite Appellants' lengthy explanation of American constitutional history, there is no unchecked right of the people to self-govern in violation of higher laws enacted by the State and Federal governments and State and Federal Constitutions. The local initiative authority is derivative and subject to limitations.

C. The trial court had jurisdiction to consider Respondents' pre-election challenge to the STW Initiatives, and exercise of that jurisdiction did not abridge Appellants' free speech rights.

This matter is decided by *Spokane*, in which the Washington Supreme Court unanimously held that superior courts have jurisdiction to hear declaratory judgment pre-election actions challenging local initiatives. This authority does not violate the separation of powers or Appellants' free speech rights.

1. The superior court's pre-election review of the STW Initiatives did not violate separation of powers.

Pre-election challenges to local initiatives are routinely reviewed by Washington courts. There is nothing remarkable about the relief being sought in this case. Appellants argue that the act of conducting a

⁴⁰ TACOMA CITY CHARTER, § 2.19 (emphasis added).

pre-election review of the STW Initiatives violates the separation of powers.⁴¹ However, Washington courts regularly exercise their power to enjoin an initiative from appearing on ballots where, as here, the initiative exceeds the scope of the initiative power.⁴²

In deciding whether the separation of powers doctrine has been violated, “[t]he question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch [of government] threatens the independence or integrity or invades the prerogatives of another.”⁴³ “The importance of judicial independence and the need for the judiciary, as well as the two other branches, to maintain effective control over their respective affairs cannot be overstated.”⁴⁴ Conducting a pre-election review of local initiatives does not threaten the independence, integrity, or prerogatives of another branch of government. Appellants cite to no such authority applicable to Washington courts.

⁴¹ *Appellant’s Brief* at 30.

⁴² See *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 749 (affirming court’s grant trade association’s request to enjoin initiative from appearing on the ballot); *Ruano v. Spellman*, 81 Wn.2d 820, 830, 505 P.2d 447 (1973) (affirming court’s grant of private intervenors’ request to enjoin initiative from appearing on ballot); *Ford v. Logan*, 79 Wn.2d at 151 (affirming court’s grant of taxpayer’s declaratory judgment action, enjoining initiative from appearing on ballot). See also *Philadelphia II*, 128 Wn.2d at 720 (attorney general should have “sought to enjoin [an initiative’s] placement on the ballot” when attorney general believed it exceeded the initiative power).

⁴³ *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

⁴⁴ *Spokane County v. State*, 136 Wn.2d 663, 668, 966 P.2d 314 (1998).

Under the Uniform Declaratory Judgment Act, the trial court has the “power to declare rights, status and other legal relations.”⁴⁵ Out of deference to the initiative process, courts conduct a pre-election review of initiatives in only two limited circumstances, namely (1) procedural challenges to placing the initiative on the ballot or (2) when the subject matter of the initiative was beyond the initiative power.⁴⁶ Courts will not consider, by way of contrast, a challenge to the substantive validity of a *statewide* initiative prior to the election.⁴⁷ However, as was the case here, trial courts may declare the pre-election status of a *local* initiative as beyond the scope of the local initiative power and enjoin the Auditor from placing such invalid measures on the ballot.⁴⁸

Reviewing the substance of an initiative to determine whether it improperly exceeds the initiative power presents “exclusively a judicial function.”⁴⁹ Courts engage in such pre-election review “to prevent public

⁴⁵ RCW 7.24.010.

⁴⁶ *Coppernoll v. Reed*, 155 Wn.2d 290, 298 – 99, 119 P.2d 318 (2005).

⁴⁷ *Spokane Entrepreneurial Cntr.*, 185 Wn.2d at 104.

⁴⁸ See, e.g., *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 746 (affirming declaratory judgment for private plaintiffs declaring local initiative exceeded initiative power); *Ford*, 79 Wn.2d at 151 (affirming declaratory judgment for private plaintiffs declaring local initiative exceeded initiative power); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 432 – 433, 260 P.3d 245 (2011) (upholding pre-election challenge to scope of initiative as exceeding initiative power and therefore invalid), *rev. denied* 173 Wn.2d 1029 (2012); *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386, 93 P.3d 176 (2004) (affirming declaratory judgment “striking [initiative] from the ballot”), *rev. denied*, 153 Wn.2d 1020 (2005).

⁴⁹ *Eyman v. McGehee*, 173 Wn. App. 684, 686 – 87, 294 P.3d 847 (2013).

expense on measures that are not authorized by the constitution while still protecting the initiative power from review of an initiative's provisions for possible constitutional infirmities."⁵⁰ And a court may undertake pre-election review of an initiative's subject matter "because postelection events will not further sharpen the issue (i.e., the subject of the proposed measure is either proper for direct legislation or not)."⁵¹

The limited review conducted through a pre-election challenge to local initiatives does not threaten the integrity of the electoral or legislative process. The judiciary is not asked to review the substance of the law, only whether the procedural requirements, such as the number and validity of signatures, are met, or whether the initiative is beyond the scope of local authority. There is no violation of the separation of powers.

2. *Pre-election review of the STW Initiatives does not violate free speech.*

Appellants suggest that they have a First Amendment right to place an initiative on the ballot, regardless of whether it would be legal if passed. However, federal and state case law hold otherwise.

Constitutional questions are issues of law that this Court reviews de novo.⁵² Local initiatives are creatures of statutory creation, not a

⁵⁰ *Philadelphia II*, 128 Wn.2d at 718.

⁵¹ *Coppernoll*, 155 Wn.2d at 299.

⁵² *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

constitutional right.⁵³ As the U.S. Supreme Court has held multiple times, “[b]allots serve primarily to elect candidates, not as forums for political expression.”⁵⁴ Washington has similarly ruled, noting that the local initiative power derives from statute, not the Constitution, so “local powers of initiative do not receive the same vigilant protection as the constitutional powers” given to statewide initiatives.⁵⁵

Moreover, Washington’s Supreme Court recognized an exception to the general prohibition on pre-election review of an initiative “where the subject matter of the measure was not proper for direct legislation.”⁵⁶ An inquiry into whether an initiative exceeded the scope of initiative power is “separate and distinct from a challenge to the measure’s substantive validity.” Suggesting that the limited review conducted by the trial court into the Local Initiative’s scope violates the First Amendment rights to petition the government and free speech must fail.

Further, reviewing whether an initiative exceeds the scope of local authority does not violate free speech rights because there is no content-based review.⁵⁷ Review of a local initiative’s substance is

⁵³ *Spokane Entrepreneurial Cntr.*, 185 Wn.2d at 104.

⁵⁴ *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 441, 452 n.7, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997)).

⁵⁵ *City of Longview v. Wallin*, 174 Wn. App. 763, 790, 301 P.3d 45, *rev. denied*, 178 Wn.2d 1020 (2013).

⁵⁶ *City of Longview*, 174 Wn. App. at 790 – 91 (quoting *Coppernoll*, 155 Wn.2d at 299).

⁵⁷ See *Appellant’s Brief* at 33 – 37.

specifically prohibited prior to an election, and instead must focus on procedural elements and the scope of authority.

Although the Washington Supreme Court has not addressed whether a limited pre-election review of local initiatives violates free speech rights,⁵⁸ this Court has rejected a similar argument.⁵⁹ In *City of Longview*, this Court held that a pre-election review on whether the scope of an initiative exceeded local authority did not violate free speech protections.⁶⁰ The Court noted that the right of free speech was not restricted because “the petition sponsors were permitted to circulate their petition for signatures and to submit that petition to the county auditor to have the signatures counted.”⁶¹

Similarly, the Appellants’ free speech rights were not abridged by the superior court in this case. As in *City of Longview*, the Appellants here were able to draft the STW Initiatives, circulate them for signature, gather signatures, and submit the STW Initiatives to the Auditor to have the signatures counted.

In addition, there has been no content-based review. The “principal inquiry” in determining whether a regulation is content-neutral or

⁵⁸ *Huff v. Wyman*, 184 Wn.2d 643, 647, 361 P.3d 727 (2015).

⁵⁹ *City of Longview v. Wallin*, 174 Wn. App. At 791 – 92.

⁶⁰ 174 Wn. App. at 792.

⁶¹ *City of Longview*, 174 Wn. App. at 792.

content-based “is whether the government has adopted the regulation because of agreement or disagreement with the message it conveys.”⁶² “[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.”⁶³

The limited exceptions to reviewing the propriety of an initiative are content-neutral. There is no agreement or disagreement with any message from a particular type of initiative, nor any mechanism by which some speech is favored or disfavored. There is no metric for determining the propriety of an initiative based on the views it expresses or the content it contains. Instead, judicial review focuses on the process by which an initiative is brought (the number and validity of signatures) and whether it exceeds the scope of local authority. In this case, the Superior Court considered whether the STW Initiatives did exceed local authority, not what “message” they delivered.

Similarly, judicial review did not violate Article I, § 4 of the Washington Constitution.⁶⁴ As an initial matter, Article I, § 4 does not provide any more rights than the First Amendment to the U.S. Constitution, and Washington Courts “interpret Const. art. I, § 4 consistent with the First

⁶² *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)), *cert. denied*, 520 U.S. 1117 (1997).

⁶³ *Id.*

⁶⁴ See *Appellant’s Brief* at 37 – 40.

Amendment.”⁶⁵ To the extent Appellants are suggesting that there are rights under Article I, § 4 that are independent of the First Amendment, such argument should be rejected. Regardless, Appellants’ argument should still fail. Appellants suggest that even a faulty initiative is entitled to end up on the ballot because the ballot could generate political discussion that spurs legislative action.⁶⁶ Appellants cite no authority that this is the standard by which to measure Article I, § 4 rights. In reality, there is no such thing as an “inviolable right of community self-government.” The United States Supreme Court has recognized the right and importance of allowing states to regulate the election process: “States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”⁶⁷ Indeed, the U.S. Supreme Court has recognized “States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.”⁶⁸ As stated above, Appellants were able to petition and engage in the political process.

⁶⁵ *Richmond v. Thompson*, 130 Wn.2d 368, 383, 922 P.2d 1343 (1996).

⁶⁶ *Appellant’s Brief* at 38 – 39.

⁶⁷ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L.Ed.2d 589 (1997).

⁶⁸ *Buckley v. Am. Constitutional Law Foundation*, 525 U.S. 182, 191, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999).

Limited judicial review of the STW Initiatives did not violate Appellants' free speech rights.

D. The trial court did not err in invalidating the STW Initiatives because they are administrative, exceeded the authority of local government, and conflict with state and federal law, and no portion of the STW Initiatives could be saved.

The STW Initiatives make serious attacks on Respondents' rights and interests. The STW Initiatives attempt to repeal or amend the United States and Washington constitutions; create new inalienable and fundamental constitutional rights; interfere with administrative matters; and usurp authority delegated exclusively to the Tacoma City Council. Thankfully, the law protects Respondents from such abuse of the initiative power. Under Washington law, the local initiative power is limited in scope and does not authorize using local legislation to amend the constitution, enact laws conflicting with superior law,⁶⁹ or otherwise intrude on administrative matters or matters delegated to the City's legislative authority. Local initiatives that exceed the scope of the initiative power of a city are invalid and should not be placed on the ballot. Pre-election challenges to the scope of the initiative power are both permissible and appropriate. This Court should hold that the trial court did not err.

⁶⁹ The City of Tacoma's Charter echoes this requirement for local initiatives and provides that the initiatives submitted to voters are "subject to any limitation on topics in state law." CP at 272 (TACOMA CITY CHARTER, § 2.19).

1. The trial court did not err in invalidating the STW Initiatives because they are administrative in nature.

Administrative matters, and “particularly local administrative matters, are not subject to initiative or referendum.”⁷⁰ “Generally 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.”⁷¹ In analyzing the legislative or administrative nature of an initiative, courts ask “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.”⁷²

1.1 The STW Initiatives Would Interfere with Existing Tacoma Utility Water Operations & Management

Tacoma’s city council regularly performs both legislative and administrative functions. “Generally 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.”⁷³

In *Port Angeles*, the Court held that the decision to add fluoride to a municipal water system is administrative in nature, because it

⁷⁰ *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 8, 239 P.3d 589 (2010) (initiatives seeking to repeal city council’s decision to fluoridate city’s water supply were administrative).

⁷¹ *City of Port Angeles*, 170 Wn.2d at 10.

⁷² *City of Port Angeles*, 170 Wn.2d at 10 (quoting *Ruano v. Spellman*, 81 Wn.2d 820, 505 P.2d 447 (1973) (initiative blocking construction of stadium after county council had approved constructing it and had sold bonds to finance it was administrative)).

⁷³ *City of Port Angeles*, 170 Wn.2d at 10 (citing *Ruano*, 81 Wn.2d at 823).

“administer(s) the details of the city’s existing water system.”⁷⁴ Washington’s Supreme Court has long held that setting water rates for the city’s utility also constitutes “administrative” action.⁷⁵ And in *Spokane Entrepreneurial*, the Court held that provisions of the initiative requiring voter approval of zoning changes was administrative because “the city of Spokane has already adopted processes for zoning and development [and t]his provision would modify those processes.”⁷⁶ Similarly, the City of Tacoma’s municipal utility’s decision to permit a company to connect to the existing system administers the details of the city’s existing water system. Tacoma has operated a municipal water system for one hundred twenty three years.⁷⁷ The City of Tacoma has a lengthy history of administering the supply of water to commercial, manufacturing and municipal large water volume customers.⁷⁸ Like Spokane, Tacoma already has administrative processes in place to regulate development. STW’s STW Initiatives would infringe upon Tacoma’s existing water service administrative processes through its “water service by ballot” provisions.⁷⁹

⁷⁴ 170 Wn.2d at 13.

⁷⁵ *State ex rel. Haas v. Pomeroy*, 50 Wn.2d 23, 28, 308 P.2d 684 (1957).

⁷⁶ 185 Wn.2d at 108.

⁷⁷ *Griffin v. Tacoma*, 49 Wash. 524, 526 – 27, 95 P. 1107 (1908) (“Under the terms of Ordinance No. 790 the electors of the city [of Tacoma] did hold an election in 1893 to determine, among other things, whether the city should purchase of the Tacoma Light and Water Company its water works and all sources of water supply then owned or operated by said company as part of its water system.”).

⁷⁸ CP at 259.

⁷⁹ CP at 202 (*Code Initiative* at § A).

Here, the STW Initiatives involve solely administrative matters, not legislative ones, because they seek to regulate Tacoma’s water utility management and operations. In this way, the STW Initiatives do not announce the “details of ‘a new policy or plan,’ but instead, “[modifies] . . . ‘a plan already adopted by the legislative body itself, or some power superior to it.’”⁸⁰ Therefore, the Washington Supreme Court’s holdings in *City of Port Angeles* and *Spokane Entrepreneurial Center* require that the Court reject the STW Initiatives.

1.2 The STW Initiatives Improperly Intrude on Administrative Affairs: “Development by Ballot.”

The STW Initiatives’ “development by ballot” sections concern administrative matters and thus, fall outside the scope of the initiative power.

First, the STW Initiatives’ requirement for a vote for certain water use applications is a backdoor attempt to zone. As such, this section performs administrative, not legislative functions. “Generally, when a municipality adopts a zoning code and comprehensive plan, it acts in a legislative policy-making capacity.”⁸¹ “Thus, “[a]mendments of the zoning code or rezones usually are decisions by a municipal body implementing

⁸⁰ *City of Port Angeles*, 170 Wn.2d at 14 (quoting *Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984) (referendum blocking change of street name was administrative)).

⁸¹ *Leonard v. City of Bothell*, 87 Wn.2d 847, 850, 557 P.2d 1306 (1976).

the zoning code and a comprehensive plan.”⁸² In these instances, “[the legislative body essentially is then performing its administrative function.”⁸³

The STW Initiatives do not expressly announce a new zoning code but instead, seek to amend the City of Tacoma’s zoning code, or to amend how the City implements that code, by requiring that a majority vote approve water users of more than 1 million gallons of water per day.⁸⁴ In this way, the Initiative is administrative in nature, not legislative, and thus an invalid use of the initiative process.⁸⁵

Second, the STW Initiatives’ water rights section also intrudes on administrative matters because it seeks to regulate water use that Washington’s water law and Growth Management Act govern. Washington’s water laws, and the Growth Management Act, as implemented by the Department of Ecology, set the policy for and comprehensively govern water use as a critical resource. The STW Initiatives’ water rights section seeks to interfere with these policies and plans.

⁸² *Leonard*, 87 Wn.2d at 850.

⁸³ *Leonard*, 87 Wn.2d at 850.

⁸⁴ CP at 202 (*Code Initiative* at § A).

⁸⁵ *See Leonard*, 87 Wn.2d at 850 (referendum seeking to rezone property and modify comprehensive plan to reflect anticipated land-use change was administrative).

The GMA, for instance, requires local legislative bodies to “adopt development regulations that protect critical areas that are required to be designated” under the Act, which include “areas critical to recharging aquifers used for potable water” and “areas used for fish and wildlife habitat conservation.”⁸⁶

The STW Initiatives thus seek to legislate in areas within the GMA’s scope.⁸⁷ By creating “fundamental and inalienable rights” in residents, it also “explicitly seek[s] to administer the details” of Tacoma’s water system, which the Clean Water Act and Washington’s water laws govern.”⁸⁸ The STW Initiatives therefore impermissibly involve administrative, not legislative, matters.⁸⁹ The trial court did not err.

2. *The trial court did not err in invalidating the STW Initiatives because they interfered with powers delegated to local government legislative bodies.*

In addition, the trial court did not err because the STW Initiatives would interfere with the powers delegated to local government legislative bodies.

⁸⁶ *1000 Friends of Wash.*, 159 Wn.2d at 183.

⁸⁷ *See Id.* (referendum regarding ordinances regulating surface water flows and clearing and grading fell within GMA’s scope).

⁸⁸ *See City of Port Angeles*, 170 Wn.2d at 13.

⁸⁹ *See City of Port Angeles*, 170 Wn.2d at 13-14 (initiatives attempting to reverse city fluoridation program were administrative); *1000 Friends of Wash.*, 159 Wn.2d at 185 (surface water and clearing and grading initiatives “passed pursuant to GMA’s requirement that critical areas be designated and protected . . . implement state policy and are not subject to local referenda”).

2.1 STW Initiatives Impermissibly Interfere with City's Operation of Water Utility

For a matter to be subject to petition and initiative, the legislative power sought to be exercised must be expressly delegated by the legislature to “the city” and not to the “legislative body” or “legislature” of the city. “An 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.”⁹⁰ Therefore, for an issue to qualify for the citizen initiative process, it must (1) be expressly delegated (2) by the legislature (3) to “the city” and not the governing body of the city.

Washington State law strictly construes “the city” as the corporate entity, and not the “legislative body” of the city. So, any authority granted to the legislative body of the city and not to the city itself falls outside the scope of citizen initiatives.

The intent of STW's Initiative is to thwart the legislative purpose of “classifying customers served or service furnished” announced in RCW 35.92.010.⁹¹ Water customer typing fails the three prong criteria

⁹⁰ *Am. Traffic Sols.*, 163 Wn. App. at 433.

⁹¹ A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate waterworks, including fire hydrants as an integral utility service incorporated within general rates, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, including water power and other power derived therefrom, with full power to regulate and control the use, distribution, and price thereof: PROVIDED, That the rates charged must be uniform for the same class of customers or service. Such waterworks may include facilities for the generation of electricity as a

above. RCW 35.92.010 applies to classifying water service customers. That statute, in relevant part, directs that action expressly to the legislative body: “In classifying customers served or service furnished, the **city or town governing body** may in its discretion consider any or all of the following factors: [factors omitted].”⁹² The STW Initiatives’ attempts to classify utility customers thus delve into an expressly legislative matter and exceed the scope of initiative powers.

Further, Washington’s legislature vests the city council only with the authority to levy a reasonable and equitable connection charge. “Cities and towns are authorized to charge property owners seeking to connect to the water or sewerage system of the city or town as a condition to granting the right to so connect, in addition to the cost of such connection, such reasonable connection charge as the legislative body of the city or town shall determine proper in order that such property owners shall bear their

by-product and such electricity may be used by the city or town or sold to an entity authorized by law to distribute electricity. Such electricity is a by-product when the electrical generation is subordinate to the primary purpose of water supply.

In classifying customers served or service furnished, the city or town governing body may in its discretion consider any or all of the following factors: The difference in cost of service to the various customers; location of the various customers within and without the city or town; the difference in cost of maintenance, operation, repair, and replacement of the various parts of the system; the different character of the service furnished various customers; the quantity and quality of the water furnished; the time of its use; the achievement of water conservation goals and the discouragement of wasteful water use practices; capital contributions made to the system including, but not limited to, assessments; and any other matters which present a reasonable difference as a ground for distinction. No rate shall be charged that is less than the cost of the water and service to the class of customers served.

⁹² RCW 35.92.010 (emphasis added).

equitable share of the cost of such system.”⁹³ “RCW 35.92.025 authorizes municipalities to require property owners pay a fee to the city or town in order to connect to its water or sewage system. The statute allows the city or town to set the fee so that all system users pay their equitable share of the cost of such system.”⁹⁴

RCW 35.92.025 vests the authority to set the conditions of connecting to the water in the legislative body. RCW 35.92.025 does not authorize the municipality to conduct a public vote incidental to the connection, since RCW 35.92.025 vests the authority to set the connection conditions in the City’s legislative body and not the voters at large. The trial court properly invalidated the STW Initiatives because setting water connection conditions contingent on a public vote falls outside the scope of a local citizen initiative, as that power is vested in the legislative body.

2.2 STW Initiatives Impermissibly Interfere with City Zoning Powers.

The trial court properly enjoined the STW Initiatives from appearing on the ballot because any requirement for a public vote for certain water use applications is a backdoor attempt to zone, and as such interferes with powers delegated to the Tacoma City Council. “An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the

⁹³ RCW 35.92.025.

⁹⁴ *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 569, 980 P.2d 1234 (1999).

legislature to the governing body of a city, rather than the city itself.”⁹⁵

“[A] grant of power to the city’s legislative authority or legislative body means exclusively the mayor and city council and not the electorate.”⁹⁶

First, “zoning ordinances and regulations are beyond the power of initiative or referendum in Washington because the power and responsibility to implement zoning was given to the legislative bodies of municipalities, not to the municipality as a whole.”⁹⁷ Specifically, “Washington’s general law grants and limits zoning powers to legislative bodies of charter cities as well as code cities”-in particular, “to the city council.”⁹⁸ The Washington Supreme Court has explained the policy reasons behind granting zoning power to municipal legislative bodies, such as city councils, but not to municipal entities themselves (i.e., the city):

Amendments to the zoning code or rezone decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community. . . . In a referendum election, the voters may not have an adequate opportunity to read the environmental impact statement or any other relevant information concerning the proposed land-use changes.⁹⁹

⁹⁵ *Mukilteo Citizens for Simple Gov’t v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227 (2012) (quoting *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006)).

⁹⁶ *Mukilteo Citizens for Simple Gov’t*, 174 Wn.2d at 51. (quoting *City of Sequim*, 157 Wn.2d at 265).

⁹⁷ *1000 Friends of Wash.*, 159 Wn.2d at 174.

⁹⁸ *Lince v. City of Bremerton*, 25 Wn. App. 309, 312, 607 P.2d 329 (1980).

⁹⁹ *Leonard*, 87 Wn.2d at 843.

Consistent with these principles, Washington courts have repeatedly held invalid initiatives or referenda that seek to enact zoning ordinances or regulations, or that seek to amend zoning ordinances or regulations.¹⁰⁰

Here, the STW Initiatives' zoning section requires approval by majority vote "by the people of the City of Tacoma" for certain water uses.¹⁰¹ These sections further provide the people's vote is "binding and not advisory." *Id.* Because Washington law delegates zoning power to the City Council, not the City, the STW Initiatives' zoning sections exceed the scope of the local initiative power.

Second, through the Growth Management Act, Chapter 36.70A RCW ("GMA"), Washington law likewise delegates to city councils and county legislative bodies the authority to develop comprehensive growth plans, which affect water drawn from aquifers. The GMA only authorizes city councils or boards, or county legislative bodies—not cities or counties themselves—to adopt and administer comprehensive growth plans.¹⁰² GMA requires local legislative bodies to establish comprehensive plans and

¹⁰⁰ See, e.g., *Leonard*, 87 Wn.2d at 853 (referendum challenging rezoning decision invalid because legislature granted zoning power to city council, not the corporate entity of the city); *Lince*, 25 Wn. App. at 312-13 (initiative to amend city zoning ordinance invalid because Washington law delegates zoning power to the city Council); *Save Our State Park v. Bd. of Clallam Cnty. Comm'rs*, 74 Wn. App. 637, 647, 875 P.2d 673 (1994) (initiative to repeal a zone from a county zoning code invalid because legislature granted zoning power to county's legislative authority, not to the county as an entity).

¹⁰¹ CP at 199 (*Charter Initiative* at § 4.24(A)); CP at 202 (*Code Initiative* at § A).

¹⁰² RCW 35.63.110; RCW 6.70A.210(2).

development regulations “to plan their growth, protect the environment, protect the property rights of individuals, and designate and protect “critical areas,”” which include recharge aquifers and fish and wildlife habitat conservation area.¹⁰³

Consistent with this statewide mandate and delegation to local legislative bodies, the Tacoma Municipal Code (TMC) contains an entire chapter on “Critical Area Preservation,” (TMC Chapter 13.11) and a section on “Aquifer Recharge Areas” (TMC13.11.800) which classifies aquifers to the extent that they are an essential source of drinking water and which requires development in aquifer recharge area to be in accordance with “other local, state and federal regulation.”¹⁰⁴ In addition, the Tacoma City Council developed a GMA-compliant comprehensive plan, “One Tacoma,” which addresses Watershed Health (Chapter 4) of which one goal is to: “Ensure that all Tacoman’s have access to clean air and water, can experience nature in their daily lives and benefit from development that is designed to lessen the impacts of natural hazards and environmental contamination and degradation, now and in the future and ‘water quality’.”¹⁰⁵

¹⁰³ *1000 Friends of Wash.*, 159 Wn.2d at 169 (citing RCW 36.70A.020; RCW 36.70A.030(5)).

¹⁰⁴ CP at 422 (Tacoma Municipal Code at 13.11.810c and 13.11.820).

¹⁰⁵ CP at 380, ¶ 9; CP at 433 (GOAL EN-3).

Despite the GMA's delegation to local legislative bodies, and despite the City Council's Comprehensive Plan, the STW Initiatives attempt to give Tacoma residents "inherent, inalienable right of local community self-government", and recognize that "clean fresh water is essential to livability and happiness" and that City of Tacoma has a "fundamental duty" to maintain "sustainable provisions of water for the people" which any resident of Tacoma may enforce.¹⁰⁶ Under the STW Initiatives, then, Tacoma residents could seek to amend or change the comprehensive plans or development regulations that the City Council has adopted under the GMA. But the Washington Supreme Court has stated "[t]he GMA is a clear example of legislation that creates public policy to be implemented in large part at the local level, by representatives more attuned to the individual needs, wants, and characteristics of their areas."¹⁰⁷

Because the legislature granted the power to enact ordinances falling within the GMA's scope to the legislative bodies of cities and counties, "the enactment of [such ordinances] cannot be accomplished by initiative."¹⁰⁸

Cases in which Courts prohibit use of initiative powers in zoning matters include the following:

¹⁰⁶ CP at 199 (*Charter Initiative* at § 4.24 B & D); CP at 202 (*Code Initiative* at § B & D).

¹⁰⁷ *1000 Friends of Wash.*, 159 Wn.2d at 174; *see also id* at 181 ("allowing referenda is structurally inconsistent with [the GMA's] mandate").

¹⁰⁸ *City of Seattle*, 122 Wn. App. at 393; *see also 1000 Friends of Wash.*, 159 Wn.2d at 174, 181.

- In *Leonard v. Bothell*, the Washington Supreme Court held that the Legislature, pursuant to RCW 35A et seq., had vested the power to adopt and modify a zoning code with the city council. Because the Legislature granted that power to the city council and not the “corporate entity,” referendum rights were necessarily “precluded.”¹⁰⁹ The Supreme Court, therefore, struck down a proposed referendum challenging the decision to rezone certain property.¹¹⁰
- In *Lince v. Bremerton*, Division II reached a similar conclusion in a case involving a proposed initiative to amend a city zoning ordinance. The Court held there that the Legislature had granted the zoning power to the legislative body of the city, the city council, and not to the City of Bremerton. In reaching that decision, the Court rejected the argument that Bremerton was chartered under the state constitution, and therefore, was subject to different rules than Bothell, a “code city.” Division II noted in *Lince* that “Washington’s general law grants and limits the zoning power to the legislative body of charter cities as well as code cities.”¹¹¹ Citing RCW 35.63.110 and RCW 58.17.070, the Appeals Court further observed that both zoning and platting power were delegated to the legislative body and, therefore, initiative was not permitted in those areas. Finally, the Court cited a California case for the proposition that “the initiative law and the zoning law are hopelessly inconsistent and in

¹⁰⁹ 87 Wn.2d at 853.

¹¹⁰ *Save Our State Park*, 74 Wn. App. at 645.

¹¹¹ 25 Wn. App. at 312.

conflict as to the manner of the preparation and adoption of a zoning ordinance.”¹¹²

- In *Save Our State Park*,¹¹³ the Court struck down a proposed referendum challenging the decision to rezone certain property.

Given the clear authority previously enunciated by Washington courts, the trial court did not err in finding that the STW Initiatives interfered with powers delegated to local government legislative bodies.

3. *The trial court did not err in invalidating the STW Initiatives because they conflict with state and federal law.*

Furthermore, the trial court did not err in finding that the STW Initiatives were invalid because they conflict with state and federal law and the state and federal Constitutions.

3.1 The STW Initiatives improperly attempt to amend or interpret Constitutional law.

The City does not have the authority to amend the United States or Washington State constitutions. STW Initiatives “must be within the authority of the jurisdiction passing the measure.”¹¹⁴ The separation of powers doctrine vests authority to interpret federal and state constitutional law with the judiciary, not the legislature: “The construction of the meaning

¹¹² 25 Wn. App. at 313 (quoting *Hurst v. Burlingame*, 207 Cal. 134, 141 (1929)). *Save Our State Park*, 74 Wn. App. at 645 – 46.

¹¹³ 74 Wn. App. at 645.

¹¹⁴ *Philadelphia II*, 128 Wn.2d at 719; see also *City of Port Angeles*, 145 Wn. App. at 875 (“Local initiatives . . . must be within the *local* legislative power.”).

and scope of a constitutional provision is exclusively a judicial function,” not a legislative one.¹¹⁵ And a constitutional “[a]mendment . . . is not a legislative act and thus is not within the initiative power reserved to the voters”; rather, constitutional amendments must follow constitutionally mandated procedures that do not permit amendment by direct legislation only.¹¹⁶

In *Spokane Entrepreneurial*, the Court held that a provision that attempted to expand the Bill of Rights exceeded the scope of local initiative power “because (1) municipalities cannot expand constitutional protections and (2) the provision would conflict with state and federal labor laws.”¹¹⁷

The City of Tacoma lacks the power to amend or interpret the federal and state constitutions. Because the STW Initiatives attempt to eliminate rights of non-profit and for profit corporations under federal and state law, it exceeds the City’s power to enact.

Whether or not one agrees with the goals of the STW Initiatives, it is simply not within the City of Tacoma’s power to alter, amend, reduce, or interpret federal or state constitutional provisions.¹¹⁸ This principle applies

¹¹⁵ *Wash. Off Hwy Vehicle Alliance NMA v. State*, 176 Wn.2d 225, 234, 290 P.3d 954 (2012).

¹¹⁶ *Ford*, 79 Wn.2d at 156 (explaining right of direct legislation derives from different constitutional article than process for constitutional amendments, and latter requires bicameral agreement on proposed amendment and voter ratification).

¹¹⁷ 185 Wn.2d at 109.

¹¹⁸ *Philadelphia II*, 128 Wn.2d at 720 (initiative seeking to establish a federal initiative process invalid because Washington lacks the power to enact federal law). *See also Seattle*

with equal force to the STW Initiatives' effort to amend the federal and state constitutions to deprive corporations of their "personhood" rights under them, and of their rights under the First and Fifth Amendments.¹¹⁹

Sound policy reasons support this result. "The people in their legislative capacity are not . . . superior to the written and fixed Constitution."¹²⁰ Thus, constitutional amendments must follow a constitutionally-mandated approval and ratification process.¹²¹ Under this process, the "legislature can only propose, it cannot effectuate, amendments," unlike the legislature's role with "the mere enactment of laws."¹²² This distinction in the process for constitutional amendments and legislative enactments protects against the risk that "any given majority [could by direct action] remove all protections contained within constitutional frameworks."¹²³ For instance, under Washington's

Bldg. & Constr. Trades Council, 94 Wn.2d at 749 (invalidating initiative that related "to matters upon which the City [had] no authority to legislate").

¹¹⁹ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343, 130 S. Ct. 876, 75 L. Ed. 2d 753 (2010) (corporations have free speech rights of persons under First Amendment); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) (collecting U.S. Supreme Court cases affording corporations protections of constitutional guarantees under the First, Fourth, and Fourteenth Amendments, and explaining states may not deny corporations guarantees such as due process and equal protection); *Pembina Consol. Silver Mining Co. v. Penn.*, 125 U.S. 181, 189, 8 S. Ct. 737, 31 L. Ed. 650 (1888) (corporations are persons for purposes of the Fourteenth Amendment). See also WASH. CONST. art. XII, § 5 (corporations have litigation rights of persons).

¹²⁰ *Ford*, 79 Wn.2d at 153.

¹²¹ *Ford*, 79 Wn.2d at 155.

¹²² *Ford*, 79 Wn.2d at 155.

¹²³ *Ford*, 79 Wn.2d at 155.

constitution, “these safeguards consist of the deliberative nature of a legislative assembly, the public scrutiny and debate made possible during the legislative process, the requirement of a two-thirds vote in each independent house of a bicameral body, and the tempering element of time.”¹²⁴ “[T]hese safeguards against hasty or emotional action are of fundamental importance,” and “are not lightly cast aside in an understandable zeal for the right of the people to act directly on matters of common legislation.”¹²⁵ STW may not do by initiative what the City cannot do by legislation.

3.2 The STW Initiatives Exceed the Local Initiative Power By Impermissibly Conflicting with Federal and State Law.

Nor may STW use the initiative process to enact a law that conflicts with federal or state law. “While the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts” with superior law.¹²⁶ “The fundamental proposition which underlies the powers of municipal corporations is the subordination of such [municipal] bodies to the supremacy” of federal and state law.¹²⁷

¹²⁴ *Ford*, 79 Wn.2d at 156.

¹²⁵ *Ford*, 79 Wn.2d at 155 – 56 (holding home rule charters “cannot be repealed by initiative”).

¹²⁶ *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747 (citing WASH. CONST. art. XI, § 10).

¹²⁷ *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747.

Here, the STW Initiatives conflict with federal and state law by attempting to strip corporations of their “personhood” rights under federal and state law, including under the First and Fifth Amendments.¹²⁸

Another provision of the *Spokane Entrepreneurial* initiative would “strip the legal rights of any corporation” which “appear[ed] to be a response to the United States Supreme Court’s decision in *Citizens United*.”¹²⁹ The Court affirmed the trial court’s ruling that the provision exceeded the scope of local initiatives “because municipalities cannot strip constitutional rights from entities and cannot undo decisions of the United States Supreme Court.”¹³⁰

As noted in *Spokane Entrepreneurial*, federal law guarantees such rights to corporations.¹³¹ Similarly, Washington law treats corporations as “persons” for purposes of litigation rights,¹³² as well as for campaign and lobbying contributions and expenditures.¹³³ In particular, the STW

¹²⁸ CP at 199 (*Charter Initiative* at § 4.24(C)); CP at 202 (*Code Initiative* at § C).

¹²⁹ *Spokane Entrepreneurial*, 185 Wn.2d at 109.

¹³⁰ *Spokane Entrepreneurial*, 185 Wn.2d at 110.

¹³¹ See, e.g., *Citizens United*, 558 U.S. at 343 (First Amendment); *Sanders Cnty. Republican Cent. Cmte. v. Bullock*, 698 F.3d 741, 745 (9th Cir. 2012) (same); *Pembina*, 125 U.S. at 189 (Fourteenth Amendment); *Bellotti*, 435 U.S. at 778 n.14 (collecting U.S. Supreme Court cases affording corporations protections of constitutional guarantees under the First, Fourth, and Fourteenth Amendments, and explaining states may not deny corporations guarantees such as due process and equal protection).

¹³² See WASH. CONST. art. XII, § 5 (corporations “shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons”).

¹³³ See RCW 42.17A.005(35) (“person” for purposes of campaign contributions includes a “partnership, joint venture, public or private corporation, [or] association”); RCW 42.17A.005(31) (“lobbyist” includes “person”).

Initiatives seek to deprive corporations of their right to sue and defend against lawsuits related to the STW Initiatives' provisions.¹³⁴ But a home-rule charter must be “consistent with and subject to the Constitution and laws of this state.”¹³⁵

By attempting to deprive non-profit and for-profit corporations of these rights, the STW Initiatives conflict with federal and state law and thus, impermissibly exceed the local initiative power.¹³⁶

3.3 The STW Initiatives Exceed the Local Initiative Power by Conflicting and Interfering with State Water Law.

The STW Initiatives' water rights section also conflicts with federal and state law by attempting to create “fundamental” rights to water protection, and by creating a private right of action for Tacoma residents to enforce those rights.¹³⁷

However, in Chapter 90 of the Revised Code of Washington, the State of Washington, which has “[t]he power . . . to regulate and control the waters within it,” has enacted a comprehensive scheme regulating water

¹³⁴ See CP at 202 (*Code Initiative* at § C), (corporations that violate the Initiative will not “possess any other legal rights, powers, privileges, immunities or duties which would interfere with the enforcement of rights enumerated by this Charter”); WASH. CONST. art. XII, § 5 (stating corporations “shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons”); *State ex rel. Long v. McLeod*, 6 Wn. App. 848, 849, 496 P.2d 540 (1972) (same) (quoting WASH. CONST. art. XII, § 5)).

¹³⁵ WASH. CONST. art. XI, § 10.

¹³⁶ See *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747.

¹³⁷ See CP at 202 (*Code Initiative* § C).

rights and uses.¹³⁸ Among other things, the Code gives the Department of Ecology the authority to “establish minimum water flows or levels for streams, lakes or other public waters,” to regulate “underground waters,” to “promulgate regulations implementing its water laws, to enforce such laws,” and “to develop and implement . . . a comprehensive state water resources program.”¹³⁹

In addition, Washington’s Growth Management Act, RCW 36.70A, et seq., requires that local legislative bodies “plan their growth, protect the environment, protect the property rights of individuals, and designate and protect ‘critical areas.’”¹⁴⁰ The Act defines “development regulations” as “controls placed on development or land use activities by a county or city, including, but not limited to . . . critical areas.”¹⁴¹ And it defines “critical areas” as including “wetlands, areas that recharge aquifers used for potable water, fish and wildlife habitat conservation areas, areas that are frequently flooded, and areas that are geologically hazardous.”¹⁴²

In addition, TPU has a legal obligation under state laws (RCW 80.28.110, 80.04.010, 80.04.380, and 80.04.385) to serve water and

¹³⁸ RCW 90.03.010.

¹³⁹ See RCW 90.22.020; RCW 90.48.030, .035, .037, .140; RCW 90.54.040.

¹⁴⁰ *1000 Friends of Wash.*, 159 Wn.2d at 169 (citing RCW 36.70A.020, .060; WAC 365-190-040); see also *City of Seattle*, 122 Wn. App. at 388. (GMA requires local legislative bodies to “develop comprehensive growth plans and development regulations to meet the comprehensive goals”).

¹⁴¹ *City of Seattle*, 122 Wn. App. at 388 n.1 (quoting RCW 36.70A.030(7)).

¹⁴² *1000 Friends of Wash.*, 159 Wn.2d at 169 (citing RCW 36.70A.030(5)).

power demand in its service territories, and to acquire supplies and develop facilities (if necessary) to do so.

Spokane Entrepreneurial Center re-affirmed that initiatives that purport to adjudicate water rights are also beyond the scope of local initiative powers:

The second provision would give the Spokane River the legal right to “exist and flourish,” including the rights to sustainable recharge, sufficient flows to support native fish, and clean water. CP at 40. It would also give Spokane residents the right to access and use water in the city, as well as the right to enforce the Spokane River’s new rights. *Id.* **The trial court ruled that this provision was outside of the scope of the local initiative power because it conflicted with state law, which already determines the water rights for the Spokane River.** The trial court noted that this provision was particularly problematic because it dealt with an aquifer that is actually located in Idaho, which is outside of the city’s authority. The trial court also ruled that this provision was administrative in nature because it would deal with how an existing regulatory scheme is implemented. We affirm. **This broad provision is directly contrary to the water rights system established by the State and is outside the scope of the city’s authority.**¹⁴³

Thus, federal and state law comprehensively governs and regulates water protection. The STW Initiatives fail by conflicting and interfering with those state laws.

¹⁴³ *Spokane Entrepreneurial Cntr.*, 185 Wn.2d at 109 (emphasis added).

3.4 The STW Initiatives Exceed the Local Initiative Power by Conflicting & Interfering with Federal & State Water Laws by Creating A Private Right Of Action.

Further, the STW Initiatives' water rights sections create a private right of action, "foundational" rights for residents that do not exist under federal or state law which "any resident" can enforce.¹⁴⁴ The STW Initiatives' water rights section thus exceeds the City's authority because it attempts to confer a private right of action on Tacoma residents to enforce rights that purportedly extend beyond the City of Tacoma's boundaries. *Id.* Under the STW Initiatives, a Tacoma resident could sue the City of Tacoma or another organization or individual that seeks to use the threshold amount of water, regardless whether the offending conduct affects Pierce County, Black Diamond, City of Fife or any other area outside Tacoma city limits for which Tacoma supplies water.¹⁴⁵ Yet the City of Tacoma cannot enact laws regulating the conduct or rights of residents, citizens, or property outside city limits.¹⁴⁶ The STW Initiatives may not obtain by direct legislation what the City could not by its own legislative powers.¹⁴⁷

¹⁴⁴ CP at 202 (*Code Initiative* §§ B & D).

¹⁴⁵ CP at 259.

¹⁴⁶ *See* WASH. CONST. art. XI, § 11 ("Any county, city, town or township may make and enforce *within its limits* all such local police, sanitary and other regulations as are not in conflict with general laws." (emphasis added)); *City of Spokane v. Coon*, 3 Wn.2d at 246 ("Under art. XI, § 11, of our state constitution, cities of the first class enjoy the same policy power within their borders as does the state itself.").

¹⁴⁷ *See Philadelphia II*, 128 Wn.2d at 719.

As a result, the water rights section irreconcilably conflicts with federal and state law, and the Court must invalidate it.¹⁴⁸ That STW, like the Clean Water Act and Washington's water laws, has the goal of conserving water makes no difference—"a] state law is pre-empted if it interferes with the methods by which the federal statute was designed to reach" the common goal.¹⁴⁹

To the extent the STW Initiatives' water rights section grants a private right of action and "fundamental rights of water protection" to Tacoma residents' which conflicts with Washington water statutes or the Growth Management Act, the entire section fails. "Any county, city, town, or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."¹⁵⁰ "[A] local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits."¹⁵¹ "A local

¹⁴⁸ See, e.g., *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 – 94, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987) (Clean Water Act preempted state nuisance law to the extent the law sought to impose liability on an out-of-state point source because it interfered with the Act's method of eliminating water pollution); *Parkland Light & Water Co. v. Tacoma-Pierce Cnty.*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004) (invalidating board resolution that irreconcilably conflicted with statutory authority granted to water districts); *City of Seattle*, 122 Wn. App. at 388 (affirming invalidation of initiative that conflicted with GMA); *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747 (initiatives may not conflict with state law).

¹⁴⁹ *Int'l Paper Co.*, 479 U.S. at 494.

¹⁵⁰ WASH. CONST. art. XI, § 11 (emphasis added).

¹⁵¹ *Parkland Light & Water*, 151 Wn.2d at 433 (invalidating board resolution that irreconcilably conflicted with statutory authority granted to water districts) (citing *HJS Dev., Inc. v. Pierce Cnty. ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 482, 61 P.3d 1141 (2003)).

regulation that conflicts with state law fails in its entirety.”¹⁵² The City cannot, through the initiative power, enact legislation conflicting with the State’s water utility or protection laws.

The STW Initiatives conflicted with state and federal law and the state and federal Constitutions and, thus, were invalid. The trial court did not err.

4. *The trial court did not err in invalidating the STW Initiatives because no portion could be saved.*

No part of the STW Initiatives could be saved by their severance clause because no part of the STW Initiatives were valid. Notably, the Appellants do not attempt to identify any part of the STW Initiatives that were valid and should have been saved.¹⁵³

The STW Initiatives’ severability clauses cannot save them.¹⁵⁴ An “initiative may not be severed . . . if the valid and invalid portions are so connected that the valid portions would be ‘useless to accomplish the legislative purpose.’”¹⁵⁵ For instance, in *City of Seattle v. Yes for Seattle*, the court invalidated an initiative that sought to enact Growth Management Act development regulations because the “development aspects” of the initiative pervaded its sections, and the “non-development sections on their

¹⁵² *Parkland Light & Water*, 151 Wn.2d at 434.

¹⁵³ See *Appellant’s Brief* at 49.

¹⁵⁴ CP at 202 (*Code Initiative* at § E).

¹⁵⁵ *City of Seattle*, 122 Wn. App. at 393.

own would not accomplish the [development and land use control] goals of the initiative.”¹⁵⁶ Similarly, here, the Court should affirm the trial court’s ruling invalidating the STW Initiatives in their entirety because the interference with city administrative functions and overreach of state and federal laws permeate the Initiatives.¹⁵⁷ Even if the Court were to sever those provisions, little, if anything, would remain to accomplish the STW Initiatives’ goals. Indeed, the Code Initiative describes its purpose as:

The People’s Right to Water Protection vote provides a demonstrative safeguard, on top of the City’s existing application process, to ensure that large new water users do not threaten the sustainability of the people’s water supply. To prevent subsequent denial of the People’s Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights or mandates of this Article.¹⁵⁸

The STW Initiatives’ titles characterize their purpose as primarily concerned with requiring the “people” of Tacoma to control regional water use: “The People’s Right to Water Protection.”¹⁵⁹ “Given the nature of the Initiative and ballot titles, the valid portions of the initiative (if any,) are not severable from the invalid portions.”¹⁶⁰

¹⁵⁶ *Id* at 394.

¹⁵⁷ *See* CP 202 *generally*.

¹⁵⁸ CP at 202 (*Code Initiative* at § B).

¹⁵⁹ *Id.*

¹⁶⁰ *City of Seattle*, 122 Wn. App. at 395.

The Court should hold that the trial court did not err in invalidating the STW Initiatives because invalidating the offending sections – the “development by ballot” zoning (*Initiative § A*), invalidation of any conflicting Washington and state agency laws and rules” (*Initiative § B*), and non-recognition of “conflicting” of international, federal or state laws, courts and the invalidation of corporation personhood (*Initiative § C*) would leave nothing to accomplish the STW Initiatives’ goal to subordinate the right of unincorporated residents and corporations to those of Tacoma city residents. This theme of “people’s” management of water by public vote permeates both STW Initiatives entirely, each section of which purports to confer expanded or new rights for Tacoma residents, while reducing the rights of unincorporated residents and corporations.¹⁶¹ Thus, severing the invalid portions of the STW Initiatives would render the STW Initiatives “useless to accomplish the legislative purpose.”¹⁶²

VI. CONCLUSION

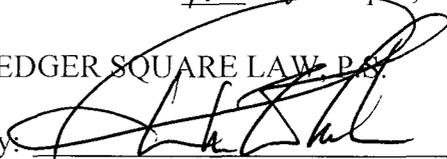
For the foregoing reasons, Respondents ask that this Court hold that the trial court did not err in finding that the STW Initiatives were invalid and enjoining them from appearing on the 2016 ballot or any future ballot.

¹⁶¹ *See Id.*

¹⁶² *City of Seattle*, 122 Wn. App. at 393. *See also Priorities First v. City of Spokane*, 93 Wn. App. 406, 414, 968 P.2d 431 (1998) (“The savings clause does not preserve the remaining portions of the initiative because the severed portion is vital to the intended legislative purpose.”). *rev. denied*, 137 Wn.2d 1035 (1999).

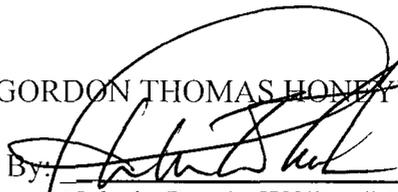
RESPECTFULLY SUBMITTED this 12th day of April, 2017.

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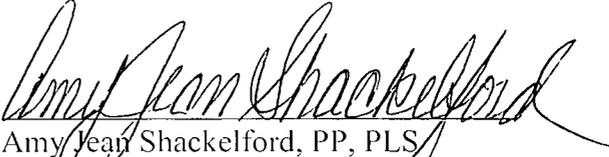
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 10th day of April 2017, at Tacoma, Washington.


Amy Jean Shackelford, PP, PLS
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