

FILED
COURT OF APPEALS
DIVISION II

2017 JUN -2 AM 11:43

STATE OF WASHINGTON
Case No: 492636-11

BY AP
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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

Respondents,

v.

Save Tacoma Water,

Appellant,

and

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

Defendants.

APPELLANT'S REPLY BRIEF

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June 1, 2017

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Save Tacoma Water replies herein to the Appellate Response Briefs of the City of Tacoma (“City”), the Port of Tacoma (“Port”), and the Economic Development Board and Chamber of Commerce (“EDB” or “EDB/Chamber”) (collectively, “Respondents”).¹

Introduction

Respondents' arguments ignore or misrepresent critical issues in this case. Namely, Respondents dismiss scientific evidence of water scarcity, Respondents ignore the lack of justification for the courts' violation of separation of powers, Respondents recast Save Tacoma Water's political speech argument as a positive right, and, *arguendo*, Respondents ignore the judicial review standards that apply in deciding whether an initiative may be vetoed by the court.

Discussion

I. The City of Tacoma does not have unlimited water.

Respondents' arguments against the initiatives' validity are premised on the erroneous assumption that Tacoma has, or can acquire, unlimited water. They discount the facts that Save Tacoma Water presented that show that Tacoma Water faces a real water shortage problem. (Appellant's Amended Opening Brief (hereinafter “Op. Br.”) at 4-7.) Those facts are based on government studies. (*Id.* (citing CP 561-63

¹ Here, Save Tacoma Water addresses the critical issues in Respondents' briefs, and does not concede arguments Respondents make that are not directly replied to.

(citing City of Tacoma's own forecasting studies)).²

Respondents ignore the water availability reality in Washington State. Fortunately, the courts do not share Respondents' optimism about unlimited water availability, and the courts recognize that water availability is a genuine limitation on development activities, even in wet western Washington.³ There is no basis for assuming that Tacoma will have adequate water availability to meet all development needs in the future, as was made clear by one industrial project – the methanol production plant – that proposed to use 14.4 mgd of water: as much as all Tacoma residents combined. This reality sparked Save Tacoma Water's initiatives, which would provide a democratic check on the City's internal water allocation decisions that lock in large industrial uses (and thus foreclose other, more sustainable, development options).

II. Separation of powers forbids judicial review of proposed laws.

Separation of powers is an inherent principle in American government, at the federal, state, and local levels. When the legislative or executive branch violates separation of powers, the remedy is easy: the judicial branch – with the power to “say what the law is” – reviews the

² Further, the EDB/Chamber claim that Tacoma has a duty “to acquire supplies” of fresh water. (EDB Br. at 41-42.) If that is the case, then the City of Tacoma is in serious trouble.

³ *E.g.*, *Swinomish Indian Tribal Cmty. v. Dept. of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013) (holding the Department of Ecology violated instream flow rules by making instream flow water available for development); *Whatcom Cnty. v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016) (holding a county failed to comply with Growth Management Act requirements by not protecting water resources).

executive or legislative action and declares whether that action intruded into the power of another branch of government.

But what is the remedy when the judicial branch intrudes into the power of the legislative or executive branch? This question haunts our legal system, and has given rise to the doctrines of justiciability. Since only the judicial branch has the power to police the boundaries between the branches of government, it is incumbent on the judiciary to restrain itself from infringing into the powers of the legislature or executive.

Fundamentally, the judiciary does not review *proposed* actions of the legislative or executive branch. (Op. Br. at 30-31.)⁴ When a horrible bill is winding its way through the legislature, the bill's opponents will not find any assistance from the courts. (*Id.*) Judges wait until a case is justiciable, which fundamentally means that the proposed law has actually become law. (*Id.*) The courts must wait, because failing to do so would infringe on the powers of the legislative branch.⁵ Judges exercise self-restraint by not conducting judicial review of a bill proposed in the

4 See also, e.g., *Minish v. Hanson*, 64 Wn.2d 113, 390 P.2d 704 (1964) (“[I]t is the rule in this state that the courts will not enjoin proposed legislative action.” (citations omitted)); *State ex rel. Gunning v. Odell*, 58 Wn.2d 275, 278-79, 362 P.2d 254 (1961).

5 E.g., *Smith v. City of Centralia*, 55 Wash. 573, 576, 104 P. 797 (1909) (“It undoubtedly is a general rule that the courts will not interfere with an action of a body exercising legislative functions, to correct mere errors or mistakes in its proceedings, or to prevent the passage of a law or ordinance duly pending before a legislative body, because it may conceive that the law or ordinance will be ineffective if passed, but clearly the courts have power to inquire into the validity of a law or ordinance after it has passed the legislative body and an attempt to enforce it is made or threatened to the injury of the personal or property rights of the citizen.”).

state legislature, or a proposed ordinance by a city council, or even proposed actions by the elected officials of special purpose local governments. (*Id.*)

The judicial branch does not “say what a *proposed* law is.”

That is, unless the proposed law is proposed by the people themselves through “the primitive system of direct legislation” – the initiative. *State ex rel. Berry v. Super. Ct. Thurston Cnty.*, 92 Wash. 16, 22, 159 P. 92, 93 (1916). Since the beginning of the initiative process in Washington, the courts have struck proposed laws before they were enacted by the people. *See id.* So while a proposed law by the people's representatives could proceed without judicial review through to enactment, when the people themselves – through their direct democracy power – propose the same law, the courts give themselves the power to review it before the people get to vote on it.

For most of the history of this judicial veto, the courts have justified their infringing on the people's legislative power by claiming that the courts only will do a limited judicial review for certain issues. These issues include procedural compliance with the initiative process (and *Save Tacoma Water* does not take issue with genuine procedural review preelection). But the courts also slowly expanded their preelection veto power over “subject matter,” which ostensibly was different from

“substantive” review (which cannot happen preelection):

Preelection review of initiative measures is highly disfavored. *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005). The fundamental reason is that “the right of initiative is nearly as old as our constitution itself, deeply ingrained in our state’s history, and widely revered as a powerful check and balance on the other branches of government.” *Id.* at 296-97. Given the preeminence of the initiative right, preelection challenges to the substantive validity of initiatives are particularly disallowed. *Id.* at 297. Such review, if engaged in, would involve the court in rendering advisory opinions, would violate ripeness requirements, would undermine the policy of avoiding unnecessary constitutional questions, and would constitute unwarranted judicial meddling with the legislative process. *Id.* at 298. Thus, preelection substantive challenges are not justiciable. *Id.* at 300-01. Further, substantive preelection review could unduly infringe on the citizens’ right to freely express their views to their elected representatives. *Id.* at 298.

We will therefore consider only two types of challenges to an initiative prior to an election: that the initiative does not meet the procedural requirements for placement on the ballot (a claim that appellants do not make here) and that the subject matter of the initiative is beyond the people’s initiative power. *Id.* at 298-99. If an initiative otherwise meets procedural requirements, is legislative in nature, and its “fundamental and overriding purpose” is within the State’s broad power to enact, it is not subject to preelection review. *Id.* at 302-03. That the law enacted by an initiative might be unconstitutional does not mean that it is beyond the power of the State to enact. *Id.* at 302-04. Therefore, a claim that an initiative would be unconstitutional if enacted is not subject to preelection review. *Id.*

Futurewise v. Reed, 161 Wn.2d 407, 410-11, 166 P.3d 708 (2007)

(footnote omitted).⁶

6 Respondents will surely claim that the limitations on judicial veto power stated in cases like *Coppernoll* and *Futurewise* only apply to preelection review of state wide initiatives, and not to local initiatives. For that to be true, justiciability limitations on

But the breadth of the judicial veto power has expanded further over the last ten years, particularly for local initiatives. This expanded judicial veto power has caused the “subject matter” versus “substance” distinction to collapse (if it ever really existed). Now, initiative opponents – as illustrated by the case here – bring every argument to bear in a judicial veto action, because they would prefer to defeat a proposed law in the courtroom rather than through the legislative process.

A. *1000 Friends* illustrates the political and ends-oriented nature of judicial veto actions, when the Court abandoned the textual requirement of the “delegation” test.

The Court dramatically expanded the scope of its “delegation” test when it departed from the textual requirement for the test in *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2006). The “delegation” test says that “[i]f the grant of power [from the state] is to the city as a corporate entity, direct legislation [(the initiative and referendum)] is permissible insofar as the statute is concerned. On the other hand, if the grant of power is to the legislative authority of the city, the initiative and referendum are prohibited.” Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 82-83 (1973). For example, in an early Growth Management Act

the courts (*i.e.*, separation of powers limitations) simply do not apply when the courts consider local matters proposed by the people, and, further, the people of local governments have a lesser “right to freely express their views to their elected representatives.” If that is really the rule, then the courts owe the people a better explanation for this vast exception to foundational constitutional principles.

referendum case (which followed the long established textual rule for the “delegation” test) the Court held that a citizen's referendum could not repeal a county wide planning policy because the state statute mandated the “legislative authority” of the county draft and adopt it. *Snohomish Cnty. v. Anderson*, 123 Wn.2d 151, 153-56, 868 P.2d 116 (1994).

In *1000 Friends*, the Court also held that a citizen's referendum was invalid when used to override a local legislative body's state-mandated actions under the Growth Management Act. 159 Wn.2d 165, 149 P.3d 616. But the important part is how the Court got there. The *1000 Friends* Court derided “laser focus on the words 'legislative authority'” in the statute itself, and instead endorsed courts “glean[ing the legislative intent] from the statutory schema as a whole.” *Id.* at 175-76, 149 P.3d 616. To support its departure from the textual requirement in the “delegation” test, the *1000 Friends* Court quoted Professor Trautman, but only in part:

“One wonders whether the state legislature in delegating certain powers to local government is very often thinking of the initiative and referendum when it authorizes the 'city council' or the 'legislative body' rather than the 'city' to do something, or whether the particular choice of words is happenstance. One wonders whether the legislature is not more likely concerned with the subject matter of the particular legislation and the felt need for delegation of authority to the local level without thinking about who at the local level should exercise the power. . . .

“If in reality, the legislature did intend that only the municipal

legislative body should have power in a particular instance, that must control. The danger, of course, is that the wording in the statute will be taken at face value and will substitute for reasoning in the particular instance.”

Id. at 177 (quoting Trautman, *Initiative*, *supra* at 83 (footnotes omitted)).

1000 Friends quoted Trautman to support the Court's expanded power to prevent citizen action by referendum. But notice that ellipsis (“ . . .”) in the middle of the quote, which is supposed to indicate an omission of the original text *without altering its meaning*. This what Trautman said, which the ellipsis in *1000 Friends* covered up:

One further wonders whether the general predisposition in favor of participation by the people should not lead the court in doubtful cases to sustain the use of the initiative and referendum, regardless of the particular language used in the delegation, unless there is something in the particular legislation which otherwise suggests or calls for the denial of participation by the electorate.

Trautman, *Initiative*, *supra* at 83. Yes, where Professor Trautman said there is a “general predisposition *in favor of participation by the people*,” the *1000 Friends* Court cut that sentence out, and quoted the Professor's preceding and following sentences as authority supporting an expanded “delegation” test with a predisposition *against* participation by the people.

Thus, the *1000 Friends* Court expanded the judicial veto power by expressly (albeit through an omission) stripping away the predisposition in favor of direct democracy. Now, whenever an initiative even remotely touches land-use issues, the plaintiffs seeking a judicial

veto argue that the initiative is in conflict with the comprehensive plan, and since the comprehensive plan is required by the Growth Management Act, and the Growth Management Act supposedly delegated all decision making power to the city council or the county commissioners, the “delegation” test requires that no initiative can address any subject that remotely touches land-use. (See EDB Br. at 33.) This logical chain is rife with errors and assumptions (see Op. Br. at 46), but that does not matter if it sounds like it gives the court a reason to veto the initiative.

B. *Spokane* completes the collapse of the “subject matter” versus “substantive” review distinction, and allows full judicial review of any proposed law.

Commentators like Professor Trautman predicted the expansion of the judicial veto power over local initiatives. See Trautman, *Initiatives*, *supra* at 79-80. This expansion was almost inevitable given the courts' combining Dillon's Rule with the “subject matter” judicial veto.

The Port's Brief illustrates that Dillon's Rule is sorely misunderstood. Indeed, the Port even claims that Dillon's Rule “is not relevant to or raised in this case.” (Port Br. at 1 n.1.) “Dillon's Rule” is the name given to the 19th century theory that local governments only have the power the state gives them. See, e.g., Hugh Spitzer, “*Home Rule*” vs. *Dillon's Rule for Washington Cities*, 38 SEATTLE U. L. REV. 809 (2015). Corporate lawyers and judges created and promoted Dillon's Rule as a

conceptual foil against the right of local self-government. *E.g., id.* The people rebelled against the rise of Dillon's Rule, and attempted to reenact aspects of the right of local self-government through Home Rule constitutional amendments. *Id.* Thus, Dillon's Rule is relevant to any case in which there is a question of the source and situs of local governmental authority. One of the leading local government lawyers and professors in Washington advocates for the abolition of Dillon's Rule. Spitzer, "*Home Rule,*" *supra* at 860 ("The court should . . . treat Dillon's Rule as 'zombie jurisprudence' that needs to remain permanently dead.").

Whether state or federal law preempt a local law is really a "substantive" issue that should not be justiciable preelection. But under Dillon's Rule, the question of whether a local law is within the local legislative authority is intertwined with the question of whether the local law is preempted, since the local legislative authority ends where state preemption begins. Thus, in a Dillon's Rule world, since the courts have given themselves the power to issue judicial vetoes based on the "subject matter" of an initiative, and since "subject matter" includes scope of legislative authority, and since the local government's scope of legislative authority ends where preemption begins or where a constitutional right is violated, then the courts can issue a preelection judicial veto of a local initiative for any reason. Therefore, "subject matter" challenges have

merged with “substantive” challenges for local initiatives.

Spokane completed the collapse of the “subject matter” versus “substantive” distinction for local initiative judicial vetoes. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Const.*, 185 Wn.2d 97, 369 P.3d 140 (2016). There, the Court was not able to strike all the substantive provisions of a local initiative using either the established “delegation” test or the legislative/administrative distinction test. *Id.* at 109-10, 360 P.3d at 146. In order to veto the remaining provisions, the Court relied on state law preemption or hypothetical corporate constitutional rights violations. *Id.* In doing so, the court collapsed the “subject matter” versus “substantive” wall that purportedly had been legitimizing the courts' preelection judicial veto power.

However, in *Spokane*, the Court did not stop to explain how the judicial veto was justiciable when it concerned “substantive” matters. The Court merely stated – erroneously – that the local initiative power came from a state statute enacted in 1927,⁷ and therefore, apparently, the Court was not bound to consider justiciability issues before vetoing a local initiative. *Id.* at 104, 369 P.3d at 143. This is Dillon's Rule on steroids.

The people have a right to have their government – including the judicial branch – limit its activities to those things lawfully delegated by

⁷ In Tacoma, through their city Charter, the people provided a procedure for the initiative power back in 1909. (*See Op. Br.* at 28-29.)

the people in the Washington Constitution. The courts have violated separation of powers by vetoing proposed legislation. There is no constitutional justification to sustain this.

C. Due to the expanded scope of judicial review of proposed laws, the judicial veto power now exercised by the courts is an unconstitutional infringement of the people's direct democratic legislative power.

Neither *1000 Friends*, *Spokane*, or the other judicial veto cases from the Court provide justification for judicial review of proposed laws. The Court has not directly answered the question of why it can review a proposed local law put forward by the people through the initiative, but not review a city council-proposed law.⁸

In each new case, instead of justifying the Courts' long history of infringing the people's direct democracy powers, the Court instead points to that long history of case law as self-evident justification for the courts' continued violation of separation of powers.⁹

Based on that long history, Respondents argue that this Court must overturn precedent in order to agree with Save Tacoma Water that the

8 When vetoing local initiatives, the Court does distinguish *Coppernoll* by claiming that the state wide initiative power is constitutionally-protected in Article II, Section 1. But that holding does not actually answer the question of why the Court cannot review a city council-proposed law when it can do so for an initiative-proposed law.

9 When examining this history of the judicial veto over the citizen initiative, it seems that the people were right back in 1909 to 1912 to enact the initiative power out of concern that their elected officials would not represent their interests. (Op. Br. at 26-30.) Unfortunately, the initiative advocates failed to anticipate that it was not just their elected *legislative* officials who would abuse the structure of government power in order to prevent the people from enacting laws to protect their rights, health, and safety.

judicial veto violates separation of powers and is not justiciable. But while Respondents cite many cases in which the courts wield their veto power (*E.g.*, EDB Br. at 9, 14, n. 42), Respondents do not cite to any parts of those opinions that explain how full substantive review of a proposed law is legitimate and justiciable. They do not cite it, because it does not exist; those cases are not precedent because they do not address the issues now before the court. *In re Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014) (“Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court’s duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein” (quotations and citations omitted)).¹⁰

Here, the trial court reviewed a proposed law and issued a judicial veto order, declaring the proposed law illegal and ordering the City and County Auditor not to put the proposed law before the people to vote on whether to enact it. In doing so, the trial court violated foundational principles of separation of powers that forbid the courts from reviewing proposed laws. This court should reverse the trial court’s denial

¹⁰ See also *State v. Rudolph*, 141 Wn. App. 59, 70, 168 P.3d 430 (2007) (recalling a Supreme Court “admonition” that lower courts should not treat as dispositive the higher court’s rulings that do not answer the questions presented in the case at bar (quotations and citations omitted)); and, regarding the theory for stare decisis analysis, *Windust v. Dept. of Labor and Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958).

of Save Tacoma Water's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

III. The trial court's order violated Save Tacoma Water's (and the people of Tacoma's) political rights under the First Amendment and Washington Constitution Article I, Sections 4 and 5.

Save Tacoma Water has consistently argued that a trial court order based on the content of a proposed initiative is state action that infringes on political rights, and thus the court's order is only constitutional if it is narrowly-tailored to serve a compelling state interest. (Op. Br. at 33-40, CP 596-602, and RP 35:9-37:6.)

Rather than attempt to counter this argument, Respondents instead completely recast it. They claim that Save Tacoma Water is arguing that it has a First Amendment (and/or Washington Constitutional) right to have an initiative on the ballot. They want this Court to believe that such is Save Tacoma Water's argument, because prior opinions have said that the ballot itself is not a forum for constitutionally-protected speech.¹¹ They do not want this Court to analyze Save Tacoma Water's

¹¹ Respondents' recasted argument is categorically different from Save Tacoma Water's actual argument. The difference is easily seen when the two arguments are analyzed from the framework of "negative rights" versus "positive rights." Generally, the federal Bill of Rights and Washington's Declaration of Rights provide "negative rights" in that they are limitations on what the government can do to the people. The First Amendment and Article I, Sections 4 and 5 are restrictions on government infringing on people's free speech, expression, assembly, and petition. They are "negative rights" in that they restrict the government's actions. Generally, they do not mandate that the government itself take affirmative actions to ensure free speech, expression, assembly, and petition – they are not "positive rights" conferring a duty to act upon the government.

Respondents' recasted argument fails (and has failed in past cases) because it

actual argument, indeed, they make no attempt to counter it at all. It is their burden to show a compelling state interest and that the court's order is narrowly-tailored to meet that interest, and they have failed to do so. *See, e.g., State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

As Save Tacoma Water explained (with authorities) in its Opening Brief, at 33 to 40, the First Amendment and Article I, Sections 4 and 5 require that the government not infringe the people's political speech, expression, assembly, and petition, unless the government's action is narrowly-tailored to serve a compelling state interest. A court order is state action. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Ohno v. Yasuma*, 723 F.3d 984, 993-94 (9th Cir. 2013).

Here, the trial court's order is based on a review of the initiatives' content – the actual proposed laws. Thus, it is a content-based restriction on political speech. It goes without saying that the First Amendment is “at its zenith” when protecting political speech from content-based government restrictions. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Washington's Declaration of Rights also provides the highest protections for political expression. *Collier v. City of Tacoma*, 121 Wn.2d 737, 854

attempts to make the First Amendment and Article I, Sections 4 and 5 into positive rights that require the government to provide a forum – the ballot – for the petitioner's preferred political speech. Prior court opinions have rejected this argument. While Respondents hope that this Court thinks that Save Tacoma Water is making this argument again, Save Tacoma Water is arguing something completely different.

P.2d 1046 (1993). The trial court's order wiped out any further discussion in Tacoma of the proposed law; thus, it was a prior restraint on Save Tacoma Water's (and the people of Tacoma's) political rights. *See, e.g., Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 166 P.3d 1174 (2007) (“[A]rticle 1, section 5 categorically rules out prior restrains on constitutionally protected speech under any circumstances.” (quotation and citations omitted)).

Thus, the trial court order is an unconstitutional violation of Save Tacoma Water's (and the people of Tacoma's) First Amendment and Article I, Section 4 and 5 rights, unless the Respondents can present a compelling government purpose, and show how the trial court's order was narrowly-tailored – *i.e.*, necessary – to serve that compelling interest. Respondents made no attempt to present such an argument, because no such argument exists.

A judicial veto of a proposed law is inherently unnecessary, since the proposed law may never be enacted. A judicial veto that wipes a duly-qualified initiative completely off the ballot is both the antithesis of a narrowly-tailored infringement of the people's rights, and a prior restraint.

Any argument that a compelling government interest exists in “protecting the integrity of the initiative process” rings as mere paternalism against the nearly 17,000 citizen signatures on these initiative

petitions that demanded – as is the people's right – a vote on these proposed laws. That paternalism is the reason the people of Tacoma enacted a procedure to exercise their direct democratic power of initiative back in 1909. Democracy is protected best when the people use it; not when the courts lock it away – at the government's request.

IV. *Arguendo*, the trial court was wrong to invalidate these initiatives and strike them from the ballot.

A. Even if the trial court had the lawful power to review a proposed law, it must apply a standard of review that is at least as strict as would apply in an actual case reviewing an enacted law.

Save Tacoma Water explained that the judicial review rules, including statutory construction and presumptions in favor of a law's constitutionality, are the same regardless of whether a court is reviewing a statute, ordinance, or charter provision, or whether the law was enacted by the people or their elected representatives. (Op. Br. at 40-43; *see also*, for an additional case summarizing the standards, *In re Binding Decl. Ruling of Dept. of Motor Vehicles*, 87 Wn.2d 686, 690-91, 555 P.2d 1361 (1976).)

For the most part, Respondents do not attempt to counter these standards.¹² However, the City's Brief attempts to counter the rule that the

¹² The Port's Brief claims, at 46, that one of the statutory construction rules only applies when the law is ambiguous, which the Port claims is not the case here. However, the EDB/Chamber claim the initiatives at issue here are ambiguous. (EDB Br. at 7.) This disagreement among the Respondents merely shows the importance of the court applying the proper review standards, which here means that the court assumes the proposed laws are constitutional, does not fish for possible unconstitutional hypotheticals, and makes every presumption and inference in favor of constitutionality.

same judicial review standards apply in preelection judicial veto actions. (City Br. at 21.) The City claims that there are no cases that apply the judicial review standards to a *proposed* law (the City points out that Save Tacoma Water's cited case authorities are reviewing *enacted* laws), and thus the City concludes that the same judicial review standards do not apply to proposed laws. The City's argument is troubling.

First, just because the parties have not found a case on point does not mean that the judicial review standards do not apply.

Second, by arguing for lower standards for judicial review of a proposed law, the City is inviting a rule that further weakens protections for citizen initiative lawmaking. If it is easier for a court to conclude that a law is unconstitutional while it is still a *proposed* law, then the laws opponents will not wait until the proper time to challenge the law (the proper time being after it is enacted). Opponents will rush to court as soon as the ink dries on a proposal if the court lets them attempt to strike the proposed law with minimal judicial review standards. This would be akin to making the standards for the moving party to win a Motion to Dismiss easier than the standards to win a Motion for Summary Judgment.

Third, the fact that the parties cannot find cases that provide a review standard for proposed laws is itself troubling. As discussed throughout the briefing in this case, there is a long history of the courts

exercising veto power over citizen initiatives before they go to the ballot. Thus, there are numerous published opinions that review proposed laws. But none of these opinions provide a standard of review for the judicial veto power, in regard to how the rules of statutory construction and presumptions of constitutionality should apply. In other words, in this sordid campaign against direct democracy, the courts have never stopped to even propose basic standards for the judicial veto power.

The City's effort to make it easier to strike a proposed law before it is enacted should be rejected. The normal rules of statutory construction, which apply everywhere else, also apply here.

B. The initiatives' water protection provision is valid initiative legislation because it is legislative, not delegated to the city council, and not preempted by state or federal law.

The water protection provision is the heart of the initiatives. The substantive text of the provision is the same in both the Charter

Amendment and Ordinance proposals:

Before providing water utility service to any applicant for 1336 CCF (one million gallons), or more, of water daily from the City, the City shall place the applicant's request for water utility service before the voters on the next available General Election Ballot Only if a majority of the voters approve the water utility service application and all other application requirements are met may the City provide the service.

Proposed Charter Amendment § 4.24(A) and Ordinance § A, at CP 28, 31, and in Appendices below.

Respondents' Briefs lay out a laundry list of this provisions' purported offenses. None of them justify the trial court's order that nullified this proposed law.

First, Respondents claim this provision is administrative rather than legislative. If the provision called for a public vote on a particular water service applicant (*e.g.*, the methanol plant), then that would be administrative. But instead, the provision calls for a new policy of requiring a public vote on all new large water service applications. Respondents' version of the legislative/administration distinction test is too narrow: it calls any new law administrative when that new law is on a topic that already has some law in place. Since almost every topic has existing law – even “space law” – Respondents' version of this test effectively forecloses the initiative power from any use. The exception would swallow the rule. Fortunately, existing case law does not support Respondents' expansive version of this test. *E.g.*, compare *State ex rel. Payne v. Spokane*, 17 Wn.2d 22, 24, 134 P.2d 950 (1943) (fixing salaries is legislative) and *Paget v. Logan*, 78 Wn.2d 349, 474 P.2d 247 (1970) (selecting the site of a stadium is legislative) with *Heider v. City of Seattle*, 100 Wn.2d 874, 675 P.2d 597 (1984) (changing street names is administrative) and *Durocher v. King Cnty.*, 80 Wn.2d 139, 492 P.2d 547 (1972) (issuing an unclassified use permit is administrative).

Second, Respondents claim the water protection provision exercises powers that the state legislature has statutorily delegated to the city council, and thus the people cannot take up those powers by initiative. To make this argument, Respondents get creative, and call this provision – at different times – the “zoning” provision, the “water rights” provision, or the “land-use” provision. (Port Br. at 21, 34, 42; EDB Br. at 25-26, 31-33, 40-41; City Br. at 24-25, 33.) Respondents characterize this provision in these ways because Respondents want to pigeonhole it into one of the topical areas where the courts have said state law delegates power to the city council exclusively. This is where *1000 Friends'* expansion of the “delegation” test comes in, and why Respondents are saying that this provision affects critical area designations (which is a Growth Management Act mandate, but unrelated to whether a water applicant gets service through Tacoma Water) or that this provision usurps the Department of Ecology's authority to permit new water rights (which has nothing to do with how Tacoma internally distributes the water appropriated through its water right). Reality is, the state has not delegated the power to decide the water protection provision to the city council.

Finally, unable to show that this initiative is invalid under either of the long-established “subject matter” tests for the judicial veto (the above two paragraphs), Respondents resort to arguing preemption – an

area that was “substantive” (and thus ostensibly off limits for preelection judicial review) until *Spokane*. Respondents' best argument here is that the state requires municipal water providers to provide water to applicants. RCW 43.20.260. But examining the criteria listed in that statute shows that this statutory requirement only applies if there is sufficient water, which is an assumption (and an erroneous one based on the facts of the case). Thus, this statute may not apply when a new water applicant submits a 1 mgd or larger application. As preelection review is only available where “postelection events will not further sharpen the issues,” *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005), and since the court is required to make all presumptions in favor of the law's constitutionality (particularly when the proposed constitutional infirmity is itself a hypothetical), the court cannot use this statute to veto the water protection provision preelection because we do not yet know whether all the criteria in RCW 43.20.260 would be met. At best, this argument is an as-applied challenge that would not strike the provision in its entirety.

None of Respondents' arguments provide a basis for vetoing the water protection provision. The trial court erred in voiding this provision and enjoining it from appearing on the ballot.

C. The other initiative provisions are valid initiative legislation because they are legislative, not delegated to the city council, and not preempted by state or federal law.

Respondents attack three other provisions in the initiatives.

First, they claim the provision “The applicant shall pay for the costs of the vote of the people” violates state statutes that require reasonable rates for water applicants. Their argument merely presupposes that the water protection provision is itself not reasonable. Absent that presupposition, all this provision does is require an applicant to pay for the cost of the application, which is a fair and reasonable policy. It is not surprising that an application to use more water may cost more.

Second, Respondents are offended by the proposed laws prioritizing the people's water protection over state law preemption. Respondents say that federal law always trumps state law which always trumps local law. But Respondents ignore that this standard preemption scheme does not apply for human rights protections.¹³ Here, the people of Tacoma are adding a provision to their local constitution to protect their human right to water, which is a prerequisite for other civil liberties.¹⁴

13 We need to look no further than Washington Constitution Article I, Section 5, which often provides greater free speech protections than the federal First Amendment. *E.g.*, *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 801, 231 P.3d 116 (2010) (noting that “unlike the First Amendment, article I, section 5 categorically prohibits prior restraints on constitutionally protected speech”) (citation omitted). Or “Article I, section 7 of our state constitution grants greater privacy protection to individual privacy rights than the Fourth Amendment.” *E.g.*, *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009) (citations omitted). These state constitutional provisions are not preempted by their federal analogues.

14 The United Nations General Assembly “recognizes the right to safe and clean

Respondents deride Save Tacoma Water's argument on the people's right of local community self-government. Yet this “deeply rooted history” shows that the people have long called for – and at times possessed – the right to make local laws that are immune from state or federal preemption. This immunity applies when local laws provide greater human rights protections than the state or federal law. That immunity is necessary for government to fulfill its purpose of protecting the people's rights, health, and safety.¹⁵ The initiatives' preemption provisions are rooted in this immunity for local laws that are more protective of human rights.

Third, Respondents say the initiatives cannot strip corporations of rights. Respondents do not carefully read this provision of the proposed laws, as it only provides a punishment for corporations that violate the people's water protection provision, and does not change the rights of those corporations who follow the law.

Even if these other initiative provisions were not valid initiative legislation, they could be severed from the water protection provision and still maintain the purpose and integrity of the initiative. Severability rules

drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.” UN Gen. Assembly Resolution 64/292 (July 28, 2010).

15 A recent study by the National League of Cities shows how the current preemption system allows state legislatures to weaponize preemption by making it a tool to prevent local governments from protecting the people, in areas like economic justice and anti-discrimination. National League of Cities, *City Rights in an Era of Preemption: A State-by-State Analysis* (Feb. 2017), available at nlc.org/preemption.

forbid a court from striking a provision of a proposed law that is not invalid. When a duly-qualified provision can be placed on the ballot, it must be. (Op. Br. at 49.) This Court must reverse the trial court on all valid provisions of the initiatives.

Conclusion

The Court cannot violate the people's core political speech and petition rights through making content-based discrimination that does not pass strict scrutiny. In addition, the Court must restrain its review of laws proposed by the people in the same way that it withholds review of laws proposed by the people's representatives. Therefore, here, the Court should rule that courts have no authority to veto duly-qualified initiatives from the ballot, and thus it should dismiss this action for lack of subject matter jurisdiction, while ordering the City and County Auditor to proceed with putting the initiatives onto the ballot.

Arguendo, the trial court's declaratory judgment and permanent injunction was not supported by the arguments claiming that the initiatives were "beyond the scope of the initiative power" and therefore this Court should reverse the trial court's injunction and order the City and County Auditor to proceed with putting the initiatives onto the ballot.

Respectfully submitted on June 1, 2017,



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Appendix A – Complete Text of Charter Amendment 5¹⁶

The People's Right to Water Protection Amendment

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

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

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

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

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

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

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

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

WHEREAS, the sustained availability of affordable and potable water for

¹⁶ In Clerk's Papers at 28.

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

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

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

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

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

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

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

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

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

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

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

Section 4.24 – The People's Right to Water Protection

(A) People's Vote on Large Water Use Applications.

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

(B) Sustainable Water Protection is an Inviolable Right that Government Cannot Infringe.

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

(C) Water Protection supersedes Corporate Interests.

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

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

(D) Enforcement.

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

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

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

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

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

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

Appendix B – Complete Text of Tacoma Initiative 6¹⁷

The People's Right to Water Protection Ordinance

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

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

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

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

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

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

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

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

WHEREAS, the sustained availability of affordable and potable water for

¹⁷ In Clerk's Papers at 31.

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

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

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

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

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

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

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

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

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

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

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

Water Protection Ordinance”:

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

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

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

any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by this Ordinance.

“Rights, powers, privileges, immunities, and duties” shall include the power to assert international, federal, or state preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of the City of Tacoma lacked the authority to adopt this Ordinance.

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

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

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

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DIVISION II

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Declaration of Service

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