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(Spokane County Superior Court No. 17-02-01621-1)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

GLOBAL NEIGHBORHOOD; REFUGEE CONNECTIONS OF SPOKANE; SPOKANE CHINESE ASSOCIATION; ASIAN PACIFIC ISLANDER COALITION - SPOKANE; SPOKANE CHINESE AMERICAN PROGRESSIVES; and the SPOKANE AREA CHAPTER OF THE NATIONAL ORGANIZATION OF WOMEN,

Respondents,

v.

RESPECT WASHINGTON;
Appellant-defendant

VICKY DALTON, SPOKANE COUNTY AUDITOR, in her official capacity; and the CITY OF SPOKANE,
Defendants.

APPELLANT'S REPLY
BRIEF

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INTRODUCTION

Respect Washington (Appellant) has appealed an order of the Superior Court directing that Proposition 1 be removed from the November 2017 ballot. Proposition 1 would have repealed provisions of the Spokane Code limiting local cooperation with federal authorities in immigration law enforcement and added a new section requiring a public vote for new policies on this subject.

The Court below essentially issued an injunction prohibiting a public vote based on impermissible grounds and deprived all citizens of the City of Spokane the right to be heard on this subject. As addressed below, the injunction was improper because Respondents failed to prove a significant injury caused by a mere vote, because the measure is neither administrative, nor moot, and because the prohibition of a vote deprives all citizens of the City of Spokane the right to express themselves at the polls.

ARGUMENT

I. The trial court's issuance of a preliminary injunction to prohibit voting on Proposition 1 was improper.

A. The First Amendment is implicated by the injunction prohibiting a public vote on Proposition 1.

Respondents appear particularly concerned that Appellant argues that Proposition 1 should be placed on the ballot regardless of its validity. Brief of Respondents ("Resp. Br.") at 6; City Brief (passim). As addressed below, Proposition 1 is valid and all citizens of the City of Spokane should

have been allowed to cast their vote either for or against, or even send a message of apathy on this subject by not voting at all. The First Amendment to the United States Constitution is relevant to considering the restrictions on the initiative process because courts typically interpret laws so as to avoid a constitutional problem if possible. *Ryan v. State, Department of Social and Health Services*, 171 Wn. App. 454, 467 (2012). There is no reason this principle should not apply to the application of case law derived restricting initiatives exclude those that are administrative in nature. Uncertainty should be resolved in favor of allowing a vote.

The Supreme Court's recent approach is evident from *Huff v. Wyman*, 184 Wn. 2d 643 (2015). Opponents of state-wide initiative sued to enjoin the measure from the ballot. The court recognized there was a free speech argument at stake, but the court preserved the right of the people to vote without having to actually decide the free speech issue. *Id.* at 647. Nonetheless, the Court ultimately held the initiative to be invalid after the election. *Lee v. State*, 185 Wn. 2d 608 (2016). While Appellant believes Proposition 1 should not be held invalid if people are ever allowed to vote and in fact pass the measure, the free speech implications should be recognized in the application of the criteria for determining whether an initiative may go forward.

However, even if the initiative falls outside the permissible bounds for

enacting new local ordinances, which the State is free to regulate, the free speech aspects of the ballot box as a public forum compel the conclusion that people should be allowed to vote on the measure and send their message even if the measure is never enacted into law, either because it fails to obtain the requisite number of votes or because it falls within some prohibition on ordinance-enactment by initiative. *See* Appellant-Defendant's Opening Brief ("Op. Br.") at 4–9.

Respondents do not dispute the state and the citizens of Spokane have created in initiative process whereby the signers of petitions can present matters to the voters on a public ballot. Nor can they dispute that the initiative process involves core political speech. *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988). Nor can they dispute that the initiative process is essentially a public forum for not just the initiatives proponents, or the signers of petitions, but every lawful voter in the City to send a message to city leaders and to the public at large. Despite these truths, Respondents argue that keeping the voters from voting for or against Proposition 1 is a proper role of the Superior Court. It is not.

Time, place and manner restrictions which are content-neutral, such as the required number of signatures on petitions, or timelines for submitting petitions do not run afoul of the First Amendment. But content-based restrictions, such as whether the text relates solely to administrative matters,

is suspect. While citizens may not be entitled to enact purely administrative regulations, are the people of Spokane lawfully restrained from speaking about the administrative function of the city? No.

As recognized by the First Circuit in *Witzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), “[a] state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative.” *Id.* at 276. Whether an initiative is a state or local initiative might affect the geographic scope of its spurring effect, it does not eliminate its speech-encouraging nature.

Importantly, initiatives are more than just a proposal to enact a new city ordinance.

[The dramatic power of an initiative that attains ballot status to shape the agenda of state and even national politics. This agenda-setting function comprises pressuring political actors, influencing candidate elections, fostering interest group and political party growth, and simply introducing an otherwise overlooked political position into the arena of public debate. Importantly, these effects of ballot qualification occur regardless of an initiative’s success on Election Day—that is, regardless of whether a proponent succeeds in using the initiative process to make law.

John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437 (2007); *see also Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989) (“There can be no more definite expression of opinion than by voting on a controversial public issue.”).

The Washington Supreme Court in *Coppernoll v. Reed*, 155 Wn.2d 290 (2005), recognized the same thing—that even though Initiative 695 was invalid for violating several constitutional provisions, the mere vote on the measure likely influenced the legislature to make specific changes in state law. *Id.* at 298. The Supreme Court is clear that subject matter restrictions on initiatives are permissible as long as the election is held.

It cannot be denied that a proposed initiative contains elements of speech and a non-speech element, namely the enactment of law. If the initiative were invalid for any reason (and Appellant believes there is none), that may prohibit the initiative from actually enacting law. But it should not prohibit the public vote. As Appellant has shown, the Superior Court has violated the free speech rights of Spokane citizens by depriving them of the ability to participate in a public forum and express their views at the ballot box on this measure. Op. Br. at 11–19.

Respondents list several cases with parentheticals that make nice sound bites, but a closer look reveals they fail to persuade. Resp. Br. at 8–9. For instance, Respondents cite *City of Longview v. Wallin*, 174 Wn. App. 763, 791 (2013). While the Court in *Wallin* found that First Amendment rights were not violated, the Court only addressed the rights of the proponents to submit petitions. *Id.* at 791 (“we hold that his claims that the preelection challenge here violated **his right to petition** the government

and right to free speech fail”) (emphasis added). “[T]he protected political speech, **obtaining signatures for the petition**, was not impaired here. *Id.* at 792 (emphasis added). *Wallin* did not address the First Amendment right of all voters in the City to express their approval, disapproval or disinterest in a matter of public controversy.¹

Respondents also cite several federal cases. While the Court in *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012), noted there was no First Amendment right to place an initiative on the ballot, Respondents leave out the immediately following citation to *Meyer*, 486 U.S. at 423, that makes clear that, while there is no federal right of initiative, if provided as it is in Spokane, the exercise of that right is guarded by the First Amendment. *Id.*

Similarly, the parenthetical from *Protect Marriage Illinois v. Orr*, 463 F.3d 604, 606 (7th Cir. 2006) that suggests no right to place matters on the ballot (cited in Resp. Br. at 8) is immediately followed by the qualifier, “[e]xcept in states that authorize referenda, initiatives, or other modes of direct democracy.”²

¹ Of course, a decision of Division II of the Court of Appeals is not binding on this Court.

² The Seventh Circuit used the colorful reference to no right to paint messages on the State Capitol. Here, the state has provided a place for messages to be placed on the ballot, like a public bulletin board at the capitol, but appears to be restricting them based on the content of the mes-

The City argues there are two reasons that invalid initiatives should be stripped from the ballot. One is that elections cost money and, therefore, having public views on a controversial matter regarding how the City interacts with its citizens is not worth the cost. City Br. at 7. It is wholly inappropriate to weigh the value of a public vote in terms of dollars. The cost of an invalid election may be miniscule compared to the cost to the judiciary caused by review of measures slated for the ballot.

Moreover, the concept that elections should not occur because they cost money is antithetical to American democracy and the high status of direct democracy in Washington. *See Coppernoll*, 155 Wn.2d at 305. The Court is not the City's budget cutter and the citizens of Spokane chose to institute an initiative process that would invariably cost taxpayers' money.

Two, the City argues that having invalid initiatives on the ballot somehow denigrates the initiative process. The City quotes the California Supreme Court decision in *AFL-CIO v. Eu*, 686 P.2d 609, 615 (Cal. 1984), where it concluded there was no

value in putting before the people a measure which they have no power to enact. The presence of an invalid measure on the ballot (1) steals attention, time and money from numerous valid propositions on the same ballot. It will (2) confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor the

sage, for instance, whether it seeks changes in legislative versus administrative policy.

measure, (3) tends to denigrate the legitimate use of the initiative process.

Id. at 615 (numbering added). The California court's paternalistic attitude toward the exercise of free speech has never been adopted in Washington courts.

As to the California court's first point numbered as (1), the notion that invalid initiatives steal time, attention and money from worthier subjects of public debate is simply not the role of Washington courts. Public discourse and the right of the public to express themselves through the vote has a free speech value regardless of the ultimate legality of the measure. *See Coppernoll*, 155 Wn.2d at 298.

Plebiscites are a form of political speech near the very center of democratic values. Free speech values should lead to the conclusion that if a measure's proponents have properly qualified the measure for a plebiscite, they are entitled to have one, even if the measure will never be enforced.

James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 312 (1989), *cited in Coppernoll*, 155 Wn.2d at 297.

As to the California court's second point, the notion that people should not be allowed to vote on something because they might be confused is no basis for judicial intervention any more than courts should weigh in on other election matters because some voters might be confused about the qualifications of candidates for public office or confused about proposed

constitutional amendments or referenda initiated by the legislature.

The initiative is a legislative process³ and there is simply no justification for courts to step in and prohibit legislators or city councilmembers from voting on a proposal on the basis that the proposal is confusing. Neither is it the court's role in Washington to protect citizens from the frustration of voting for something that is later declared invalid. *Cf. Huff*, 184 Wn.2d 643 (preelection attempt to keep initiative off the ballot unsuccessful) and *Lee*, 185 Wn.2d 608 (same initiative declared invalid). A vote on any subject is going to leave some people frustrated and others not regardless of the judiciary's involvement.

As to the California court's third point, Washington law recognizes that it is the court's duty to declare invalid initiatives invalid after the election regardless of whether some might perceive it to "denigrate the initiative process." 686 P.2d at 615. As recognized by then Court of Appeals Judge Alexander in *Save Our State Park v. Hordyk*, 71 Wn. App. 84 (1993), *cited in* City's Brief at 7 n.11, Washington courts are more in keeping with the free speech values inherent in the initiative process and the value of direct democracy despite its potential for inefficiency.

The people have a right to adopt any system of government they see fit to adopt. In its workings, it may not meet their expectations; it may be unwieldy and cumbersome; it may tend to

³ *Ruano v. Spellman*, 81 Wn. 2d 820, 823 (1973).

inconvenience and prodigality; it may be the expression of a passion or sentiment rather than of sound reason; but it is the people's government and, until changed by them, must be observed by the legislature and protected by the courts.

Id. at 90 (quoting *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 320 (1915)).

As Appellant has shown, the Superior Court has violated the free speech rights of Spokane citizens by depriving them of the ability to participate in a public forum and express their views at the ballot box on this measure. Op. Br. at 11–19. This is reversible error.

B. The injunction prohibiting a public vote on Proposition 1 was not supported by proof of substantial injury that would occur if people were allowed to vote.

The Supreme Court has recognized that a higher standard of evidence must be met to uphold a preliminary injunction against speech activities. *Fed. Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn. 2d 261, 267 (1986) (“[W]here important constitutional rights are involved [the Washington Supreme Court is] reluctant to uphold a preliminary injunction against speech activities unless substantial evidence exists in the record to support the injunction.”). As addressed below, there was not substantial evidence to support all requirements for an injunction—especially the requirement for substantial injuries.

Respondents never even address Appellant's argument on the injury

requirement for obtaining injunctive relief, Op. Br. at 9-11, that they never demonstrated substantial injury as required for injunctive relief. Instead, they assert that they have shown sufficient injury to have standing, and repeatedly assert that standing has been conceded. Resp. Br. at 11–15.⁴ But *allegations* that are sufficient to give standing are not evidentiary proof sufficient to show a significant injury that would occur from allowing people to cast their vote for or against Proposition 1. This injunction that prohibits the vote is not justified because of the absence of the very basis for injunctive relief.

Respondents provide no substantive response to the Supreme Court’s treatment of the initiative in *Huff*, 184 Wn.2d at 651, that challengers had insufficient injury to prohibit allowing people to vote on a matter even though it unanimously concluded that measure was invalid after the election, after people were able to express their views through the ballot box on the subject. *Lee*, 185 Wn.2d 608.

Respondents claim that “Proposition 1 will increase fear and reluctance on the part of immigrant domestic violence survivors to seek assistance from law enforcement or the courts, and uncertainty on the part of

⁴ Standing is a jurisdictional question. *Knight v. City of Yelm*, 173 Wn. 2d 325, 328 (2011). As such, it cannot be conceded, and may be raised at any time. *Wash. Beauty Coll. v. Huse*, 195 Wash. 160, 166 (1938)).

Respondents, on how to advise immigrant survivors.” Resp. Br. at 12–13. Yet the only evidence Respondent provided that the hypothetical **enactment** of Proposition 1 would cause these psychological injuries is their claim that it would do so. Resp. Br. at 12; *see Fed. Way Family Physicians*, 106 Wn. 2d at 266 (holding that when the record in a case “is composed entirely of affidavits, lacking photographs and live testimony the trial court’s findings of fact are deserving of less deference”).

While Appellant believes there is insufficient proof that such injuries will occur, it is important that Respondents’ allegations of injury are only injuries that could possibly occur if Proposition 1 was enacted and implemented. Resp. Br. at 12 (“if passed, Proposition 1 would cause injury”). Even if passed and if Proposition 1 is invalid, it could be declared invalid before any of these theoretical and speculative injuries could occur. There is no injury from allowing people to vote.

This is implicit in the Court’s decision in *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427 (2011):

A party seeking injunctive relief must demonstrate, at a minimum, that the challenged acts will result in actual and substantial injury. *Kucera v. Dep’t of Transp.*, 140 Wn. 2d 200, 209, 995 P.2d 63 (2000); RCW 7.40.020. ...

Because Initiative No. 2011–01 is beyond the scope of the initiative power, it is **invalid**. Even if placed on the ballot and passed by a majority of the voters the initiative would have no legal force. Consequently, **it cannot result in actual and substantial injury** to ATS’s contractual interests, and ATS cannot

demonstrate any injury justifying injunctive relief. ATS's request to enjoin the election is therefore denied.

163 Wn. App. at 435 (emphasis added).

To obtain an injunction to stop an election, one must prove actual and substantial injury. Because invalid initiatives have no legal force, there is no injury associated with having the election. While Appellant contends Proposition 1 is valid, even if Respondents are correct about invalidity, the measure will have no legal force and impose no injury on Respondents. The only injury they can show is the injury of having an opportunity vote—that is not a legally cognizable injury worthy of the courts' injunctive power.

If this Court were to adopt something as nebulous as “fear and reluctance” as either a substantial injury this injury requirement would be meaningless. Anyone can claim a given action creates a fear of something. It is not surprising that Respondent cites no precedent recognizing such injuries.

Indeed, claims of such vague mental state injuries have not been found sufficient in other courts. For example, in *Amnesty Int'l United States v. Clapper*, 638 F.3d 118, 129 (2d Cir. 2011), plaintiffs seeking an injunction claimed the injury of “Fear of Future Surveillance.” On review, the Supreme Court rejected this speculative injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013); *see also Laird v. Tatum*, 408 U.S. 1, 13–

14 (1972) (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”). Although no evidence was produced showing injuries expected to occur from the mere vote, courts have not accepted that as being sufficient to stop the voice of the people at the polls. *Ranjel v. City of Lansing*, 417 F.2d 321, 325 (6th Cir. 1969) (“[C]itizens should be deprived of their right of suffrage merely because a riot was threatened. It would be more appropriate to enjoin unlawful acts of rioters than to deprive the electorate of their right of franchise.”)

Respondents also claim they will suffer “organizational injury” because they will have to divert resources to educating the people they serve on the effects of Proposition 1 if it passes. Resp. Br. at 14-15. Again, the injury is not caused by a vote. Not only is this claimed organizational harm derivative from the vague mental state injuries discussed above, but Respondents also fail even to address how their missions will be frustrated, a necessary element in the organizational standing found by the Ninth Circuit in the housing discrimination cases respondents cite. Resp. Br. at 14. Allegations of the diversion of resources alone are not enough. Of course, if it were, then Courts will be routinely enlisted in becoming a weapon of political campaigns instead of a forum for redress or prevention of actual injuries.

II. Proposition 1 should not have been removed from the ballot based on the theory that it was merely administrative in nature.

Respondents assert that Proposition 1 is administrative in nature and therefore not subject to initiative. Resp. Br. at 15–20. The distinction between administrative and legislative is often not clear. In light of such ambiguity in the legal distinctions, the court should err in favor of allowing people to vote, as discussed above.

Nonetheless, Washington courts have adopted various tests to determine whether an action is legislative or administrative. *E.g.*, *Mission Springs, Inc. v. City of Spokane*, 134 Wn. 2d 947, 969 (1998) (“An act which applies generally to the community is a legislative one, while an act directed at one or a few individuals is an executive one.”). *Durocher v. King Cty.*, 80 Wn.2d 139, 152–53 (1972) (“Actions relating to subjects of a permanent and general character are usually regarded as legislative . . . The power to be exercised is legislative in its nature if it prescribes a new policy or plan.”).

Citing *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn. 2d 97, 107 (2016), Respondents misstate the test as “[l]ocal initiatives that deal with administrative matters, including those like Proposition 1 that modify or restrict laws or policies already put in place by the legislative body, are outside the scope of the local initiative

power and are invalid.” Resp. Br. at 16. Yet the source they cite states: “the question [of whether an action is legislative or administrative] [i]s **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.” 185 Wn. 2d at 107–08 (emphasis added). As Respondents recognize, Proposition 1 repeals the policy put in place by the Spokane City Council, and replaces it with a new, opposing policy. Resp. Br. at 19. Thus, Proposition 1 is a new policy, not an administrative modification of an existing one, and is clearly legislative in nature.

Respondents attempt to deal with this problem by declaring that Proposition 1 repeals an earlier “administrative policy.” *Id.* Respondents cite no definition of an administrative policy. Instead, Respondents argue that Proposition 1’s new citywide policy (of not prohibiting city employees from collecting immigration information and to cooperate with federal authorities) affects administrative issues and is, therefore, administrative. *See* Resp. Br. at 17–19. Nearly every initiative would be administrative under that standard, because nearly all have direct or indirect effects on what city employees actually do. This does not make the policy purely administrative. For example, an initiative that imposes a minimum wage would be considered administrative because administrative action is required to enforce it. *Cf. Filo Foods, LLC v. City of SeaTac*, 183 Wn. 2d 770 (2015)

(upholding an initiative imposing a minimum wage).

The Supreme Court rejected a similar argument in *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn. 2d 1 (2010). The challengers to an initiative argued that RCW 35A.11.020 was evidence that the legislature intended to keep all functions of city staff solely in the hands of the city council and to exclude the voters. The Supreme Court rejected that reading of the statute essentially because, to conclude that an initiative is invalid because it affects municipal employees' functions would render all initiatives at the city level invalid. *Our Water-Our Choice!*, 170 Wn.2d at 14 n.7. The same applies here. That Proposition 1 affects the behavior of City employees does not mean that it is not a policy and therefore administrative. The fact that it creates a new policy that Respondents oppose is the entire reason Respondents brought this suit.

Oddly, Respondents argue that removing broad restrictions on the police concerns "the minutia of how police do their very difficult job." Resp. Br. at 19. In point of fact, Proposition 1 does not dictate how the police do their job. Proposition 1. More specifically, it does not direct the police to "profile immigrants," as Respondents claim. Resp. Br. at 19. Proposition 1 would simply remove restrictions on immigration enforcement that apply to all city employees. Proposition 1.

Proposition 1 is not proposing mere administrative regulations, but is a

broad reversal of the City's own enacted policy. Like the ordinance it seeks to amend, Proposition 1 is legislative in nature.

III. Proposition 1 is not moot and mootness is no longer a ground for issuance of an injunction prohibiting people from voting on a measure.

According to Respondents, the City of Spokane's recodification of relevant provisions of the code addressed by Proposition 1 renders the measure moot. Resp. Br. at 20–24. It is notable that Respondents do not address the issue of the scope of pre-election judicial review. *Id.* The only pre-election challenges to a referendum are to “noncompliance with procedural requirements” and “limited pre-election review ... where the subject matter of the measure was not proper for direct legislation.” *Coppernoll*, 155 Wn.2d at 298, 299. Pre-election challenges to the substantive invalidity of a referendum specifically are “not allowed in this state because of the constitutional preeminence of the right of initiative.” *Id.* at 297. The question of whether Proposition 1 is moot cannot be decided until after it has been enacted by the voters. *Id.*

In support of their mootness argument, Respondents rely on *Yakima v. Huza*, 67 Wn.2d 351 (1965). But (as Respondents recognize, Resp. Br. at 23), *Huza* has been limited to its facts in *Citizens for Financially Responsible Gov't v. Spokane*, 99 Wn.2d 339, 351 (1983).

And the facts here, of course, are quite different from those in *Huza*.

For one thing, Proposition 1 does not merely repeal a prior ordinance that has been replaced by a different ordinance; it also creates a new section of the code. In any event, the reason *Huza* was limited to its particular facts is operative here. The Supreme Court made clear that a legislative body can no longer prevent a vote on a ballot measure simply by moving challenged provisions to different locations in the code.

[W]e find persuasive the dissent's argument in *Huza* that a repealing and reenacting procedure by a legislative body should not be allowed to frustrate the initiative/referendum process. *Yakima v. Huza, supra* at 362, 407 P.2d 815 (Hill, J., dissenting). ... We note, however, that deliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate will not be looked upon favorably by this court.

Citizens for Financially Responsible Gov't, 99 Wn.2d at 350–51).

Similar circumstances exist here. The City Council knew that Proposition 1 had garnered enough signature to place it on the ballot. In fact, on February 22, 2016, it had passed its own resolution placing Proposition 1 on the ballot. *See* City Br. at 5. It knew that Proposition 1 purported to amend certain sections of the City Code. And, after knowing that Proposition 1 was headed to the ballot, the City Council in March of 2017 moved the sections being amended from one title of the code to another so that the particular sections identified in the initiative were no longer where the initiative language identified them. City's Brief at 4. These decisions by the City Council were deliberate. While the Court should not assume that

the City Council did not know what it was doing, it should make little difference whether the purpose was to thwart Proposition 1 or whether there was in fact some legitimate purpose. The impact on voters is the same.

Finally, even if some portions of Proposition 1 were moot (which Appellant contends they are not), there is simply no argument that Section 3 is moot. It is a completely new section and the council's moving of other sections have no impact on the potential enactment of something new. Instead, Respondents claim the enactment of the new Section 3 would conflict with new sections of the code, asking, "[h]ow would these be reconciled?" Resp. Br. at 21. This argument ignores canons of statutory construction that courts have applied for centuries.

- (1) "the statutory provision that appears latest in order of position prevails unless the first provision is more clear and explicit than the last," and
- (2) "the latest enacted provision prevails when it is more specific than its predecessor."

State v. Landrum, 66 Wn. App. 791, 796-97 (1992). And other canons may also be relevant to deciding how to implement Proposition 1 with pre-existing law if Proposition 1 were placed on the ballot and if Proposition 1 was approved by the voters. But the time to interpret Proposition 1 is not now, but after the election and only if the measure passes.

To the extent that interpreting Proposition 1's effect on preexisting code sections requires discerning voter intent, there is no reason to believe

that future courts would find that task beyond their capabilities.

IV. Delaying a year and bringing this action at the last minute before ballot printing is barred by either a statute of limitations which is borrowed for purposes of a declaratory relief claim or the doctrine of laches.

Respondents hardly respond to Appellant's statute of limitations argument. They don't dispute that their motion under appeal was brought under the Uniform Declaratory Judgments Act (UDJA), RCW 7.24.010. Nor do they dispute that suits under the UDJA must be brought within a reasonable time and reasonableness is determined by applying the statute of limitation from an analogous claim. *See Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 159 (2013); *Brutsche v. Kent*, 78 Wn. App. 370, 376 (1995).

For an election-related challenge, the analogous statutes of limitations are quite short. For instance, a challenge to a ballot title must be commenced within five days. RCW 29A.72.080. A judicial challenge of a refusal to file an initiative must be filed in court within ten days. RCW 29A.72.180. A challenge to a ballot title for a City initiative is only ten days. RCW 29A.36.090.

Respondents claim no other statute of limitations as being analogous to their claim under the UDJA. Respondents' complaint was filed in May of 2017, over a year after they knew or should have known Proposition 1 would be on the ballot. CP 109-114. This violates any analogous statute of

limitations. Injunctive relief should have been denied

Laches is an alternative ground in equity for denying relief.

The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay.

Buell v. Bremerton, 80 Wn.2d 518, 522 (1972). On the first factor, Respondents claim that “there is no proof presented that there was knowledge or opportunity to proceed with an action or that an unreasonable delay occurred by Respondents in bringing this action.” Resp. at 25. But Respondents knew about this matter, or had every reason to know about it, for a year. CP 109-114 (showing it was widely known in the winter of 2016 that Proposition I would be on the 2017 ballot.).

Is a year’s delay to challenge the placement of a ballot initiative excessive? On that question, Respondents incorrectly assert that, “[i]n finding that laches applies, courts find a delay is unreasonable when the delay in litigation is a matter of years (or decades), not months.” Resp Br.. at 26. Yet in *Lopp v. Peninsula Sch. Dist.*, 90 Wn.2d 754 (1978), a **ballot case**, the Supreme Court held that “appellant’s delay of 1 month after the special election constitutes an unreasonable delay.” *Id.* at 761. The Supreme Court has also cited an “enumeration of instances in which delays of from one to ten months have been held to constitute laches.” *Stewart v. Johnston*,

30 Wn.2d 925, 936 (1948) (citing *Fed. United Corp. v. Havender*, 11 A.2d 331, 337 (Del. 1940)). “Generally, laches depends upon the particular facts and circumstances of each case.” *Lopp*, 90 Wn.2d at 759. This Court should find that Respondents’ delay to challenge a ballot measure, only to challenge it **one week before the ballots were due at the printer**, was unreasonable.

Here, Respondents’ long delay, followed by their ambush of Spokane voters a week before ballots were to be printed, clearly injured Appellant and Spokane voters by making appellate review before the election impossible prior to the election, and ensuring that the citizens of Spokane would have no opportunity to vote on Proposition 1 in that upcoming election. The timing was certain to ensure that the judges of this Court would have no time to review the court order prior to the election. This is certainly an injury more concrete than Respondents’ vague claims of injury from the hypothetical enactment of Proposition 1. Resp. Br. at 12.

Respondents further argue that there must be a showing of “unusual circumstances” to invoke laches. Resp. at 25–27 (citing *In re Marriage of Capetillo*, 85 Wn. App. 311 (1997)). But that requirement only exists when there is a statute of limitations and the laches period is sought to expire before the statute of limitations expires. *Capetillo*, 85 Wn. App. at 317. Appellant contends that an analogous statute of limitations applies,

317. Appellant contends that an analogous statute of limitations applies, but if one does not, then laches applies without the showing of “unusual circumstances.” Nonetheless, the circumstances here are that Respondents should have known Proposition 1 would be placed on the ballot over a year before they filed suit and scheduled their motion to deprive Spokane city voters of the right to vote.

Election-related disputes need to be resolved early. Waiting over a year and scheduling one’s motion immediately before ballots need to be printed is an abuse of the judicial process. The trial court’s ruling should be reversed.

CONCLUSION

For the reasons stated above, the Court should reverse the superior court’s decision of August 29, 2017, and order the City of Spokane to hold a special election for Proposition 1.

Respectfully submitted this 18th day of May, 2018,



Richard M. Stephens
Attorney for Appellant
Respect Washington

DECLARATION OF SERVICE

I, Richard M. Stephens, declare:

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

On May 18, 2018, I caused a true copy of the foregoing to be served on the following:

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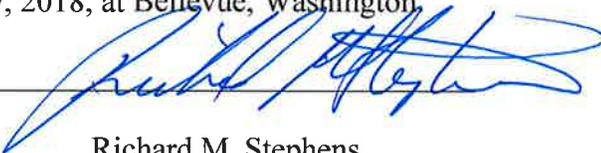
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 18th day of May, 2018, at Bellevue, Washington.



Richard M. Stephens

STEPHENS & KLINGE LLP

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