NO. 72322-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

YES FOR EARLY SUCCESS, LAURA CHANDLER, and BARBARA FLYE, Petitioners/Plaintiffs,

v.

CITY OF SEATTLE, and KING COUNTY, Respondents/Defendants.

PETITIONERS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR DISCRETIONARY REVIEW

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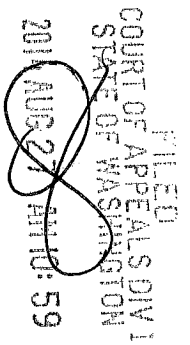

I. INTRODUCTION

Petitioners ask the Court to protect the people of Seattle's century-old right to direct democracy, by allowing voters to vote "yes" for their popular initiative concerning support and standards for child care (I-107), ***and*** "yes" for the City of Seattle's preschool demonstration project. These two measures help Seattle's children in distinct but compatible ways.

As part of its misguided campaign, the City of Seattle asks the Court to make every assumption in favor of finding a conflict, dismantling its own Charter, and restricting Seattle voters' rights. The black letter law mandates the opposite approach. The Court can and should preserve Seattle voters' options, and let the people decide their own policy, rather than sanctioning the City's politically-motivated actions to change the rules in the middle of the campaign.

Petitioners' motion for emergency discretionary review properly presents the issues that must be decided before next week's ballot-printing deadline, and asks the Court to remand the remaining issues to the trial court. The City's attempts to deprive Petitioners of their right to have all of their claims heard in due course should be rejected.

II. ARGUMENT

A. The Seattle City Charter's guarantee of a clean vote on every qualified popular initiative does not conflict with state laws.

The trial court erroneously held that the Charter's guarantee that every qualifying citizen initiative be put to the voters for an up or down vote (even if the City proposes a legislative alternative) is preempted by state statutes regarding ballot titles. In doing so, the trial court ignored the text of the local ballot title statute and the binding precedent that mandates the court construe statutes to avoid preempting local laws and infringing upon constitutionally-protected rights.

1. The City Charter, not the ballot title statutes, defines the scope of Seattle voters' initiative power.

The City's arguments indicate a fundamental misunderstanding of the nature of Seattle voters' power of local initiative.

The state reserved broad powers to the people of the City of Seattle. *See Hartig v. Seattle,* 53 Wn. 432, 435, 102 P. 408 (1909). The people in turn reserved the power of initiative to themselves in the City Charter. *Id.* The Charter thus defines the scope of the local power of initiative, including the circumstances under which a city council alternative will be enacted over a popular initiative. Seattle Charter (Charter), art. IV, § 1.G.

Once the power of initiative is reserved to the people, it takes on the status of a fundamental right, and the full scope of that right is constitutionally protected. *Angle v. Miller*, 673 F.3d 1122, 1128 (9th Cir. 2012) (citing *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1076 (9th Cir. 2003)); *Filo Foods LLC v. City of SeaTac*, 179 Wn. App. 401, 406, 319 P.3d 817 (2014).

The state constitution defines the scope of the statewide power of initiative. Wash. Const., art. II, § 1. The scope of that power is different, and there are different circumstances under which a legislative alternative will be enacted over a popular initiative at the statewide level. *See id.* Cases cited by the City provide additional examples of laws that define the scope of the initiative power in various jurisdictions, such as one requiring a super-majority vote for certain initiatives, and laws that grant some local governments the power but not others. *See* City's Brief at 26-27. The salient point is that whatever the scope of the power of initiative, once reserved or granted, the full extent of it is a fundamental right. *Angle*, 673 F.3d at 1128.

Regulations that hinder the full exercise of the people's initiative rights are subject to constitutional scrutiny, regardless of the level of government that promulgates the regulation. *E.g., Buckley v. American Const. Law Found., Inc.,* 525 U.S. 182, 192-94 (1999) (burden imposed by

the state constitution itself did not escape exacting scrutiny); *Filo Foods*, 179 Wn. App. at 403 (state statute requiring local initiative petition signatures to be stuck subject to strict scrutiny). *See also Stone v. City of Prescott,* 173 F.3d 1172, 1175 (9th Cir. 1999).

The City's argument that the scope people of Seattle's initiative power is automatically curtailed by a state regulation on the form of ballot titles ignores the crucial distinction between laws that define the scope of the power and laws that regulate the details of how it is exercised. *See id.*

Washington's state ballot title statutes regulate one aspect of the initiative processes, namely how measures are displayed on the ballot. *Mukilteo Citizens for Simple Gov't v. City of Mukilteo,* 174 Wn.2d 41, 48-49, 272 P.3d 227 (2012); RCW 29A.36.071; 29A.72.050 (governing ballot title "formulation" and "display"). Application of the ballot title statute to the local level was merely legislative housekeeping as part of the recodification of the statutes 14 years ago. Substitute H.B. 2587 56th Leg., Reg. Sess. (Wash. 2000). The ballot title statues do not expand, shrink, or otherwise alter the scope of the initiative power on the state or local level. *See* RCW 29A.36.071; 29A.72.050.

2. The local ballot title statutes must be construed to avoid infringing upon Seattle voters' fundamental rights.

Application of the two-question form of ballot denies the more than 30,000 people who signed the I-107 petition of their fundamental right, reserved in the Charter, to put a qualifying initiative on the ballot for a clean vote of the electorate for or against it. *Compare* RCW 29A.72.050(3) *and* Charter, art. IV, §§ 1.B, 1.D. Application of the two-question form of ballot also denies all Seattle voters of the right, again, reserved in the Charter, to vote for both measures. *See id.* The City has not offered any justification for these drastic deprivations of fundamental rights, thus application of the two-question form of ballot would be unconstitutional. *See Filo Foods LLC,* 179 Wn. App. at 406 (citing *Meyer v. Grant,* 486 U.S. 414, 420 (1988)); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992). This result can and therefore must be avoided by applying the single question form of ballot. *Compare* RCW 29A.72.050(2) *and* Charter, art. IV, §§ 1.B, 1.D, *and see State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972).

3. The local ballot title statutes must be construed to avoid a conflict with the local initiative power.

The ballot title statutes must similarly be construed to avoid a preemptive conflict with the Charter. Again, a conflict can easily be avoided by applying the single question form of ballot at RCW 29A.72.050(2). The trial court did not offer any reason for mandating the

two-question form of ballot, so as to render the Charter unconstitutional. *See* App. at 26. The City's only argument is that the two-question form is designed for the statewide legislative alternative, which it claims is "analogous" to Seattle's process. But the state and City processes differ in fundamental ways that are at the heart of this litigation. Whereas the two-question form parrots the statewide process set out in the State Constitution, the Charter mandates an independent vote on each measure.[1,2] As the trial court recognized, the two are not analogous. App. at 25. The City fails to offer any other reason why the single-question ballot form cannot be used, thereby avoiding a preemptive conflict.

Instead, the City argues that, because local laws are subordinate to the laws of the state, the Legislature's intent to preempt the Charter's reservation of initiative power should be presumed, and thus "preemption is simply not an issue." The City's arguments fly in the face of preemption jurisprudence. *See Brown v. Yakima*, 116 Wn. 2d 556, 560-63 (1991). The party asserting preemption bears a heavy burden precisely because every presumption is made in favor of upholding local enactments

[1] *Compare* Wash. Const., art. II, § 1.RCW 29A.72.050(3), *and* Charter, art. IV, §§ 1.B, 1.D.

[2] The City mischaracterizes the law when it states that the Charter directs an initiative and a legislative alternative on the ballot "together". City's Brief at 15. The Charter mandates that the two measures receive separate, independent votes at the same election. Charter, art. IV, §§ 1.D, 1.G.

and against preemption. *Id.* at 563. Thus, legislative intent to preempt local laws must either be explicit or necessary by implication. *Id.* at 560.

For similar reasons, the City's contention that RCW 29A.36.071(3), the explicit exemption from the *local* ballot title statute for measures that have a specific process found elsewhere, should be construed to be limited to other *state* laws must be rejected. The City is making every effort to create a conflict, when the case law is clear that conflicts should be avoided whenever possible. *Brown v. Yakima*, 116 Wn. 2d at 563. The City offers no basis for construing the exemption for "another provision of law" to exclude local laws. One need only look to *Mukilteo Citizens* for an example of a specific type of ballot question – a local advisory vote - that lacks a state-mandated form and is thus exempted from the ballot title form statutes. *See* 174 Wn.2d at 49.

4. The trial court's order wreaks havoc on the election process and ensures more litigation.

The trial court's order to use a two-question ballot form should be reversed for the additional reason that it wreaks havoc on the election process and raises a plethora of legal questions for future litigation.

The order below alters the ballot title that appeared on the petition that over 30,000 voters signed – a title that was "established" and made "final" by court order. RCW 29A.36.090. The City argues that despite its

unambiguous text, RCW 29A.36.090 cannot really mean the ballot title must remain "final." The City argues that would be a problem because it would imply that the statement of subject on statewide initiatives must not be altered to accommodate legislative alternatives. City's Brief at 29. Indeed that is exactly what state law specifies: when the state legislature proposes an alternative, a concise description of the alternative is added to the title for the initiative, without changing the statement of subject. RCW 29A.72.280. This makes sense, because a legislative alternative that is truly on the same subject will be fairly encompassed by the same statement of subject. That is not the case here, as demonstrated by the City's need to move the trial court to change I-107's statement of subject to accommodate the City's preschool measure. App. at 449. Furthermore, there is no exception to RCW 29A.36.090's finality requirement.[3]

Using the two-question form of ballot for the City's levy lid lift is also at odds with the requirement that local property tax increases be approved by a majority. RCW 84.55.050. The City's one example of a *statewide* legislative alternative that contained a tax on hazardous materials is irrelevant, since such statewide measures are not subject to the same majority requirement.

[3] RCW 29A.72.280 applies only to statewide initiatives.

Indeed, the statewide initiative process operates under a wholly different set of rules, set forth in the constitution, which allow a measure to be enacted on a plurality vote. Wash. Const., art. II, § 1. There is no similar allowance at the local level. The City's argument that using the two-question form of ballot means "each question receives a majority vote" is both incorrect and irrelevant. *See* App. at 229 (two-question form cannot gauge a majority vote). The Seattle Charter requires that a *measure* receive in its favor the majority of votes cast for or against it to become law. Charter, art. IV, § 1.F. If the measures are not presented for separate votes, the question of how to count the votes is therefore likely to require more litigation. If the trial court's order holding sections 1(D) and (G) of article IV of the Charter unconstitutional is not reversed, counting the votes will be even more difficult, if not impossible, as the City will not have *any* governing provisions.

B. Petitioners' motion for discretionary review is proper and does not waive Petitioners' arguments or claims.

The trial court has not disposed of all of the issues in the consolidated matter. The ballot title for the City's measure remains to be decided. App. at 27. Thus, there has not been a "final judgment" entered below, nor has there been a decision that "prevents a final judgment or discontinues the action." RAP 2.2(a)(1)-(3). As the trial court has not

entered a decision that can be appealed pursuant to Rule 2.2, Petitioners have properly designated this appeal as discretionary.

Petitioners did not waive their right to appeal any of the trial court's cursory decisions by filing a notice of and emergency motion for discretionary review, as the City contends. Petitioners' notice of appeal, designates the trial court's entire decision, thereby preserving Petitioners' rights on appeal. RAP 2.4(a). Petitioners have not filed an opening brief with assignments of error that might cabin the Court's review. *See* RAP 10.3(a)(4).

Petitioners filed an emergency motion for discretionary review that, due to page and time limitations, necessarily focuses argument on the issues most essential to the Court's pre-election review. Thus, for example, while Petitioners' motion does assert that the City Council's "same subject" determination is *ultra vires* and must be overturned, it focuses argument on the choice among ballot forms and the City Council's erroneous determination that the two measures conflict, which are the source of greater injury to Petitioners. Correction of these errors will nullify the trial court's "same subject" assessment.[4] The City's argument

[4] As a practical matter, the erroneous "same subject" determination will be of little consequence to Petitioners so long as the measures are presented independently on the ballot and in the voters' pamphlet, and the City's determination that the two conflict is invalidated. With those two corrections, Petitioners anticipate that voters will not feel directly forced to choose between the measures.

that Petitioners' 20-page emergency motion should be held to the same standard as a 50-page opening brief is not supported by the Rules or case law.[5] That the City took an extra 10 pages to make these baseless arguments without seeking or receiving the Court's permission is particularly irresponsible.

C. The Court should reverse and remand the trial court's Open Public Meetings Act (OPMA) decision.

The trial court erred in denying Petitioners' OPMA claim without deciding it. The Court held that City Council "cured" the alleged OPMA violation, but this is not supported by the record, and is an inadequate basis for denying Petitioners' OPMA claim in its entirety.

The cases cited by the trial court and City merely hold that a discussion held in violation of OPMA need not invalidate a subsequent OPMA-compliant final action. *Org. to Preserve Agri. Lands v. Adams County*, 128 Wn.2d 869, 913 P.2d 793 (1996) ("*OPAL*") (final decision reached in open meeting after extensive public input); *Eugster v. City of Spokane*, 118 Wn. App. 383, 76 P.3d 741 (2003) (final decision itself did not violate OPMA). These decisions certainly does not suggest that there can be no OPMA *violation* so long as there is eventually a meeting that complies with the statute. *See id.*

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[5] The City's authority in support of its waiver argument addresses opening and reply briefs, not motions. City's Brief at 19 n. 7.

Here, the precise violation alleged is the City's discussion *and determination* that the two measures conflict in an improper executive session. App. at 444. The City Council discussed the supposed conflict in executive sessions, but never discussed it in open session. Supp. App. 90; App. at 230-31. Accordingly, the subsequent open session cannot "cure" the precise OPMA violation complained of. *Clark v. City of Lakewood*, 259 F.3d 996, 1014, n. 10 (9th Cir. 2001) ("If the decisions made in secret meetings are only formally ratified in a public setting, that formal ratification is null and void.") (*citing Miller v. Tacoma*, 138 Wn.2d 318, 329-31 (1999). Petitioners' complaint thus requests that the court the void the portions of the Council's resolution that announces the Council's determination made in violation of OPMA. App. at 447. However, even if the trial court were to find a subsequent OPMA-compliant action obviated the need for voiding parts of the decision, the claim should not be denied, as other relief, including declaratory relief, can be granted.

Petitioners did not waive their right to appeal the trial court's *sua sponte* OPMA decision.[6] As the forgoing discussion indicates, Petitioners'

[6] The City only cites inapposite authority dealing with a party's failure to raise an issue in the *trial court* as a basis for its argument that Petitioners waived their OPMA argument. City's Brief at 22 (citing *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5(a). Petitioners did address the supposed "cure" for the OPMA violation from the outset in the trial court. *See, e.g.*, App. at 230-31. Plainly, Petitioners could not challenge the trial court's *sua sponte* OPMA decision in the trial court itself.

motion for emergency review properly states that the trial court failed to decide their OPMA claim, and asks the Court to remand the claim to for a full hearing. The trial court's outright dismissal of Petitioners' OPMA claim, without a finding on liability, should therefore be reversed and remanded for a determination of liability and the appropriate relief. *See Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422, 886 P.2d 172 (1994) (findings must be made on all significant issues).

D. The determination of conflict must be overturned to stop the ongoing injury to Petitioners.

The City's claim that its determination that I-107 and the City's measure conflict in their particulars does not warrant review ignores the ongoing injury Petitioners are suffering as a result. The City's determination has cost the I-107 campaign endorsements and supporters. App. at 222-24. It has forced Petitioners to run a different campaign than the one they petitioned for. *Id.* The City's official pronouncement that the measures conflict has been widely disseminated and pervaded the campaigns, such that even if the measures are presented independently on the ballot, voters are likely to continue to feel compelled to choose only one measure unless this Court takes further action. *See* App. at 224-26, 71-73. Moreover, if left intact, the City's determination of conflict means that one measure will be invalidated even if both pass with a majority

vote. *See* App. at 333-34. The City's argument that it has not determined the validity of the measures is therefore disingenuous. This premature adjudication of the relative validity of the measures is *ultra vires* and cannot stand.[7] *Eyman v. McGehee*, 173 Wn. App. 684, 692, 294 P.3d 847 (2013).

E. The Court should remand Petitioners' constitutional claims, which are ripe.

The trial court erroneously dismissed Petitioners' claims alleging that the City's actions violated the state and federal constitutions *sua sponte* without so much as mentioning these issues.[8] *See Federal Signal Corp.*, 125 Wn.2d at 422.

The City's argument that these claims are unripe because the measures have not been enacted yet is nonsensical, as Petitioners are not challenging the constitutionality of the measures. Rather, it is the City's June 23 resolution that determined only one of the two measures could be enacted, and the City's ongoing actions to deny 42 percent of Seattle

[7] The City's claim that the Charter vests the City Council with authority to predetermine a conflict is directly contradicted by the Charter's mandate that a conflict determination is only made if and when both measures are pass by a majority of voters. *See* Charter, art. IV, § 1.G. The Charter does not delegate this judicial function to the City Council. *Id.*

[8] The City seems to be confused when it complains that Petitioners "continue to argue the merits of their constitutional claims...without asking for relief." City's Brief at 24. To be clear, Petitioners' claims for relief on the basis of the ***City's*** actions that deprive Petitioners of their constitutionally-protected rights are separate from Petitioners' argument that the state ballot title statutes should be construed in the manner that avoids infringing upon fundamental rights.

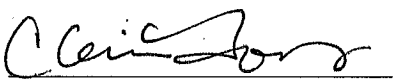
voters their right to vote their conscience in favor of both that give rise to the constitutional claims. *See* App. at 222-27. In contrast to the 42 percent of voters who favor both measures, voters who favor only one measure will have their preference fully counted even if the City uses the two-question ballot form. Petitioners' uncontroverted affidavits demonstrate ongoing and imminent injuries to Petitioners' fundamental rights as a result of the City's final actions. *See, e.g., id.,* App. at 176-77. Thus, Petitioners' claims meet the ripeness requirements that "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *First United Methodist Church v. Hearing Examiner*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996) (internal quotation marks omitted).

Unless there is immediate intervention by the Court, voters like Petitioner Barbara Flye will be further deprived of their right, secured by the Charter and protected by the state and federal constitutions, to vote "yes" on both measures. App. at 176-77.

III. CONCLUSION

The Court should reverse the trial court's order, order Seattle and King County to present both measures independently on the ballot and in the voters' pamphlet, and remand Petitioners' remaining claims to the trial court.

Respectfully submitted this 27th day of August, 2014.

By: 

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CERTIFICATE OF SERVICE

I, Jessie Sherwood, hereby certify under penalty of perjury of the laws of the State of Washington that on this 27th day of August, 2014, I caused the foregoing Reply in Support of Emergency Motion to be delivered via legal messenger to:

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And a true and correct copy of the same to be delivered via electronic mail, per agreement of counsel, to:

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