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Spokane Entrepreneurial Center, Spokane County, Downtown Spokane Partnership, Greater Spokane Incorporated, The Spokane Building Owners and Managers Association, Spokane Association of Realtors, The Spokane Home Builders Association, The Inland Pacific Chapter of Associated Builders and Contractors, Avista Corporation, Pearson Packaging Systems, William Butler, Neil Muller, Steve Salvatori, Nancy McLaughlin, Michael Allen, and Tom Power,

Respondents,

v.

Envision Spokane,

Appellant,

and

Spokane Moves to Amend the Constitution, Vicky Dalton in her official capacity as Spokane County Auditor, City of Spokane,

Defendants.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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May 11, 2015

ORIGINAL

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Court Rules

Appellate Briefs

Statement of the Case

This case is about who can bring a pre-election challenge – an unusual action in which a challenger asks a court to remove the people of a community's ability to vote on a duly qualified ballot initiative. The pre-election challenge is typically brought as a combined declaratory judgment and injunction; the challenger asking the court to declare the initiative "beyond the scope of the initiative power" and then remove it from appearing on the ballot.

In 2009, people representing over twenty environmental, labor, and neighborhood organizations within the coalition Envision Spokane qualified an expansive Community Bill of Rights initiative to appear on the ballot. Many of the Respondents/Petitioners ("Challengers") campaigned against the initiative. The initiative failed, garnering only 25% of the votes of the electorate.

Two years later, in 2011, the coalition qualified another, shorter Community Bill of Rights initiative to appear on the ballot. That Community Bill of Rights was almost identical to the initiative at issue in this action. Again, many of the Challengers campaigned against the initiative. The initiative narrowly failed, losing by less than one percent of the votes cast. (The above legislative history, as well as the City of Spokane's role in opposing the initiative, is recounted in more detail in

CP 81-84.)

In 2013, Envision Spokane again qualified the Community Bill of Rights initiative for the ballot. This time, however, the Challengers decided that the people of Spokane could not be trusted to vote on it again. So rather than fight the initiative through a political campaign, the Challengers filed a pre-election challenge, and succeeded in getting a trial court to remove the initiative from the ballot.

Nearly a year and a half later, in January 2015, the Court of Appeals ruled that the Challengers never had standing to bring their pre-election challenge. The Court of Appeals recognized that the Challengers "now prefer judicial approval for their position" and declined to consider Challengers' "[s]peculative standing based on fears about how a provision, if adopted by voters, might potentially be used in some future litigation [because it] is too unspecific a fear to justify judicial intervention in the electoral process." (Unpublished Opinion at 18.)

Now, Challengers seek Supreme Court review in an attempt to delay this initiative vote – which should have occurred in 2013 – until 2016 at the earliest. This Court should reject the Challengers' appeal because the Court of Appeals decision does not meet any criteria for review by this Court.

Argument

The unpublished Court of Appeals decision rests on sound principles consistent with jurisprudence of Washington courts and, therefore, its decision should not be disturbed. Pre-election challenges allow political opponents to bring their campaigns into the courtroom, which – at its best – compromises the electoral-legislative political process. At its worst, it creates a substantial judicial invasion into the people's lawmaking, ripping apart two fundamental principles of American government: separation of powers, and the inherent political power of the people. It does so by inviting the court "to give an advisory opinion on a political question." (Unpublished Opinion at 18.)[1]

Recognizing that hazard in this case, the Court of Appeals applied justiciability and standing rules to resolve it. (Unpublished Opinion at 8-10, 17-18.) While Challengers attempt to characterize this as a "new" and "heightened" test, it is actually simply the Court's application of the existing justiciability and standing tests to declaratory judgment actions.

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1 The City's Answer, at 4-10, argues that justiciability concerns are not so important for local initiatives. But even if pre-election challenges for local initiatives do not connect to the people's Article II, Section 1, initiative right, four other justiciability policy concerns still apply (separation of powers, advisory opinions, political questions, and judicial restraint). Thus, the City's argument is irrelevant, as the Unpublished Opinion had plenty of good reasons to carefully apply the justiciability and standing rules.

I. Review must be denied because none of the considerations governing acceptance of review apply to the Unpublished Opinion.

This Court must deny review of the Court of Appeals decision because it does not trigger any of the RAP 13.4(b) considerations. The Challengers' failure to satisfy those four considerations is addressed below.

A. The Court of Appeals decision does not conflict with decisions of this Court.

The Court of Appeals observed that a pre-election challenge action seeking a declaratory judgment placed "the liberal standing of typical declaratory judgment cases and the limited justiciability of pre-election challenges in tension, if not in conflict." (Unpublished Opinion at 10.) Challengers simply disregard this tension, ignoring the serious policy considerations (judicial encroachment into the legislative branch and the people's initiative power, advisory opinions, political questions, and judicial restraint) that warrant disfavoring pre-election challenges. Those policy considerations require strictly enforcing standing requirements in pre-election challenges (*See* Unpublished Opinion at 8-9). Challengers, however, seek to remake the standing justiciability rules in conflict with this Court's decisions. In their attempt to do so, the Challengers cite a handful of authorities that all fail to show a conflict. Thus, RAP 13.4(b)(1) consideration must result in denying review.

Grant County II – heavily relied on in both the Unpublished Opinion and the Petition for Review – explained that "a justiciable controversy [requires] allegations of harm *personal* to the party that are substantial rather than *speculative or abstract*." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (emphasis added) (citing *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994)).

Here, the Court of Appeals found that Challengers lacked this required concrete harm, since Challengers' claim to standing was based on possible future litigation that may never occur. (Unpublished Opinion at 11-13, 18.) This holding did not create a new heightened standing threshold, but rather an enforcement of the "injury in fact" element. Accordingly, the holding does not conflict with *Grant County II*.[2]

As far as public importance standing is concerned, *Grant County II* noted that this test has multiple elements: "when a controversy is of substantial public importance, *immediately* affects significant segments of the population, *and* has a *direct* bearing on commerce, finance, labor, industry, or agriculture, this court has been willing to take a 'less rigid and

2 In *Grant County I* this Court found the fire districts had standing, but in *Grant County II* this Court found they did not. *Id.* at 801. Standing is sometimes difficult to determine and judges may disagree, but that does not equate to a conflict of decisions as required by RAP 13.4(b) (1) or (2).

more liberal' approach to standing." *Id.* at 803 (emphasis added) (citing *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 96, 459 P.2 633 (1969)).

Here, the Unpublished Opinion is compatible with this description of the public importance test. Allowing an initiative onto the ballot does not "immediately affect[] significant segments of the population" nor does it have "direct bearing" on industry because the initiative may not pass and, thus, never affect anyone's legal relations. While initiatives are intrinsically matters of substantial public importance because they potentially create new law, that is not what "public importance" means for this standing test, as otherwise any party could bring a pre-election challenge against any initiative. The Court of Appeals' conclusion appropriately observed that "the public importance standing doctrine does not extend to this potential local law prior to its adoption by the voters." (Unpublished Opinion at 17.) This is fully compatible with the rule and holding in *Grant County II.*

Challengers claim that the pre-election challenge cases *1000 Friends*, *Seattle Building*, and *Ford* are in conflict with the Unpublished Opinion. (Petition at 10, 12-13.) But none of these cases discuss standing or justiciability. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2006); *Seattle Bldg. & Constr. Trades Council v. City of Seattle*,

94 Wn.2d 740, 620 P.2d 82 (1980); *Ford v. Logan*, 79 Wn.2d 147, 483 P.2d 1247 (1971) (the only mention of justiciability is in Justice Hale's dissent in *Ford*, at 164-67). The issues of justiciability and standing were not discussed in any of these decisions, and so they cannot be in conflict with the Unpublished Opinion.

Challengers' also rely on "a *post-election* challenge to the constitutionality of a statewide initiative permitting private liquor sales in Washington." (Petition at 8 (emphasis added) (referencing *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 653, 278 P.3d 632 (2012)).) A *post-election* challenge is categorically different from a *pre-election* challenge in regard to how strictly the court should enforce the standing requirements, and therefore, this case cannot show a conflict between decisions.

Challengers also claim the Unpublished Opinion conflicts with *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 46, 272 P.3d 227 (2012). (Petititon at 10.) *Mukilteo* started as a pre-election challenge, but metamorphosed into a post-election challenge by the time this Court heard the case, because the initiative had since passed and become law. *Mukilteo Citizens*, 174 Wn.2d at 45. Thus, a lenient application of standing requirements in *Mukilteo* does not conflict with the policy considerations disfavoring pre-election review. In addition,

the Mukilteo initiative explicitly proposed to give the people of Mukilteo power over traffic safety camera installation by requiring "a majority vote of the people before any Safety Camera may be installed or used." *Mukilteo Citizens*, Appellant's Opening Brief at 3, Supreme Court No. 84921-8 (filed Aug. 20, 2010). Because the Court was considering the initiative post-election (it had become a law), and because the new law purported to confer decision-making power over safety camera installation onto the voters of Mukilteo, this Court appropriately concluded that "Mukilteo residents who are eligible to vote" have standing to challenge that law. *Mukilteo Citizens*, 174 Wn.2d at 46.

The Unpublished Opinion does not conflict with *Mukilteo Citizens* simply because the Court of Appeals strictly applied the standing requirements while the *Mukilteo Citizens* court liberally applied the standing requirements, simply because liberal standing was warranted by the intervening adoption of the initiative.

The Unpublished Opinion is an appropriately strict application of the justiciability and standing rules for declaratory judgment and does not conflict with the decisions of this Court. Therefore RAP 13.4(b)(1) is not a consideration for granting review.

B. The Court of Appeals decision does not conflict with other Court of Appeals decisions.

American Traffic is the key case Challengers rely on to argue a conflict between decisions of the Courts of Appeals. (Petition at 13.) In *American Traffic* the proposed initiative "would potentially mandate termination or modification of [the challengers'] contract with the City to install and maintain the automatic traffic safety cameras, causing specific and perceptible harm." 163 Wn. App. 427, 433, 260 P.3d 245 (2011). So the court held that "[a]s a party to that contract, [the challenger] clearly has standing to challenge the proposed action." *Id.* The Unpublished Opinion, at 12-13, distinguished this "existing contract [which] would be impaired immediately upon passage of the initiative" from the speculative harm presented by Challengers. While both decisions apply the same rule, they reach different outcomes based on different facts. That, by itself, does not create a conflict between the decisions.

Challengers also cite two published, and two unpublished, Court of Appeals decisions for their argument that no "higher burden should apply to private plaintiffs." (Petition at 14 fn.10.) But none of these cases support that argument. *City of Longview v. Wallin* is not on point because it concerns a city's pre-election challenge and finds the city had standing by virtue of its oversight of the city ballot. 174 Wn. App. 763, 777-78, 301

P.3d 45 (2013). The Unpublished Opinion, at 18, agrees with that reasoning. *Eyman v. McGehee* is a mandamus action, not a declaratory judgment action, and so is also not on point. 173 Wn. App. 684, 686, 294 P.3d 847 (2013). *City of Monroe v. Wash. Campaign for Liberty* also concerns a city's pre-election challenge, although it does not discuss justiciability or standing. Wash. App. Ct. Div. I, No. 68473-6 (decided Feb. 25, 2013) (unpublished). *City of Bellingham v. Whatcom County* was also a pre-election challenge brought by the sponsoring city, and thus also not on point.

As far as public importance standing is concerned, Challengers' urged conflicts between the Unpublished Opinion and other Court of Appeals decisions all lack any substance. (Petition at 17-18.) Each of the cited decisions Challengers rely on merely state – without any analysis or even a full recitation of the public importance standing test – that the court would have found public importance standing if it had not already found that the challenger had standing. *Am. Traffic*, 163 Wn. App. at 433 (providing no analysis for why the court would have found public importance standing); *City of Longview*, 174 Wn. App. at 783 (merely stating the city's claims would be addressed under public importance standing, and quoting from *American Traffic* for justification); *see also Eyman*, 173 Wn. App. at 688 (deciding to reach the merits despite

mootness of the mandamus plaintiff's claims; not addressing standing). There is not enough information here to determine *why* these courts would have held that the municipal challengers would have public importance standing, and thus we are unable to conclude that those reasons and the reasons provided in the Unpublished Opinion for not using public importance standing are in conflict.

C. The Court of Appeals decision does not involve a significant question of law under the Constitution of the State of Washington or of the United States.

Challengers do not raise this consideration in their Petition for Review. (Petition at 1 fn.3.) The City of Spokane raises RAP 13.4(b)(3) in conjunction with its argument that the Unpublished Opinion gave too much deference to the people's initiative power when a local initiative is at play. (City's Answer at 10.) But the Unpublished Opinion did not rest on the local initiative power being derived from Washington Constitution Article II, Section 1. (*See* Unpublished Opinion at 6 ("When the legislative process in question involves the constitutionally *or statutorily* protected right of citizens to initiate legislation, courts have an additional reason to step gingerly." (emphasis added)).) The City's Answer mischaracterizes the Unpublished Opinion in an attempt to manufacture conflicting opinions and constitutional questions.

D. The Court of Appeals decision does not involve an issue of substantial public interest that should be determined by the Supreme Court.

Challengers claim that the Unpublished Opinion will upset various applecarts across Washington. They say it throws out uniformity in declaratory judgment standing rules, and that "[t]he underlying merits of the initiative also involve issues of substantial public interest." (Petition at 18-19.)

The Unpublished Opinion very clearly expresses that it speaks only to pre-election challenges, and spells out in detail why additional policy considerations warrant strictly applying standing in the pre-election challenge context. (Unpublished Opinion at 8-10, 17-18.) Outside of that context, other litigants will have difficulties attempting to use this Unpublished Opinion to argue for stricter interpretation of declaratory judgment standing requirements. Challengers give the Unpublished Opinion too much power. It is not precedent. GR 14.1(a) ("A party may not cite as an authority an unpublished opinion of the Court of Appeals."). And even if it were, it is limited only to pre-election challenges.

With regard to the "underlying merits of the initiative" the Challengers will have ample opportunity to challenge the initiative when it becomes law, but until then, their concerns are too speculative and abstract. The Unpublished Opinion does not prevent Challengers from

bringing an action post-election. In addition, the City of Spokane did have standing as the sponsoring government, but chose not to interfere with the electoral process. Challengers essentially attempted to use the courts to overrule the political decision of the City of Spokane.

Under a broad reading of "public interest," which Challengers encourage, every pre-election challenge should be determined by the Supreme Court. That is not the point of the RAP 13.4(b)(4) consideration.

Conclusion

The Court of Appeals strictly applied the justiciability and standing rules to a pre-election challenge and determined that the Challengers lacked standing to bring their action. This decision does not trigger any of the RAP 13.4(b) considerations, as it is not in conflict with other court precedent and does not raise constitutional issues or issues of substantial public interest. Since "[a] petition for review will be accepted by the Supreme Court only" if it meets one or more of those considerations, this petition must be denied. RAP 13.4(b).

Respectfully submitted on May 11, 2015,

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Community Environmental Legal Defense Fund

Attorney for Appellant Envision Spokane

Declaration of Service

I declare under penalty of perjury and the laws of the State of Washington that on May 11, 2015, I sent a true and correct copy of this filing by e-mail, per counsels' prior agreement under GR 30(b)(4), to the following:

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Please find attached Envision Spokane's Answer for the case:

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Thank you,
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