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SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

CORRECTED RESPONDENTS' BRIEF

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I. INTRODUCTION

The Washington Supreme Court has long recognized the importance of refraining from providing advisory opinions, instead restricting its review to cases involving actual disputes, actual injuries, and direct and substantial interests. *E.g., Walker v. Munro*, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994). In this case, the trial court followed this principle and dismissed Mr. West's lawsuit challenging Initiative 502 (I-502) because Mr. West could identify no actual, present injury and presented only hypothetical and speculative harms. This Court should affirm.

Specifically, Arthur West filed a complaint requesting that I-502 be declared unconstitutional, be "voided," and that an injunction be issued barring its implementation. Mr. West claimed that, as a medical marijuana user, provisions in I-502 might subject him to criminal prosecution for driving under the influence of marijuana, and that passage of I-502 could lead to other legislation impacting medical marijuana.

The trial court correctly determined that Mr. West's complaint did not present a justiciable controversy under the Uniform Declaratory Judgment Act. Undisputed facts show that Mr. West has not suffered an actual injury and his claims present hypothetical and speculative harms rather than the actual and personal harm required for a plaintiff to bring an

action to declare a statute unconstitutional. Because it dismissed the lawsuit for lack of justiciability, the court never ruled on the merits of Mr. West's lawsuit, and the merits are therefore not a decision of the trial court subject to review on appeal.

II. COUNTERSTATEMENT OF THE ISSUES

A. Does Mr. West's complaint present a justiciable controversy where it fails to present an actual, present, and existing dispute and his interests are not direct or substantial?

B. Does Mr. West have standing to pursue this litigation where he has not yet suffered an injury in fact but asserts hypothetical and speculative harms?

III. STATEMENT OF THE CASE

Preliminarily, nearly all of Mr. West's statement of the case is improper and should be disregarded.¹ First, the statement of the case primarily contains argument rather than a fair statement of facts and procedure, as required by RAP 10.3(a)(5). The numbered statements in the statement of the case that contain argument include numbers 2-6, 10-12, 14, 17-18, and 20-24. Second, nearly all of Mr. West's factual

¹ A party may point out improper evidence that the Court should not consider in a brief; it is not necessary to file a motion to strike. *Engstrom v. Goodman*, 166 Wn. App. 905, 909, n.2, 271 P.3d 959, *review denied*, 175 Wn.2d 1004, 271 P.3d 959 (2012).

assertions cite to voluminous records without pinpoint citations, which does not allow this Court or the State to review the accuracy of his assertions. See RAP 10.4(f) (requiring reference to page number); cf. *Litho Color, Inc. v. Pac. Emp'rs Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999) (“The purpose of these rules is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs”) Third, Mr. West cites almost exclusively to his Complaint and the text of I-502 rather than to actual evidence establishing any injury. On summary judgment, Mr. West is not entitled to rely solely on unsubstantiated allegations in his complaint. CR 56(e). Thus, the Court should disregard Mr. West’s improper portions of the statement of the case.

The voters of Washington approved I-502 in the general election held on November 6, 2012. CP at 180 (Turcott Decl. at ¶ 2). Over 55 percent of voters approved the measure, and it took effect on December 6, 2012. CP at 263 (Ex. C, Turcott Decl.). I-502 makes various changes to state law regarding marijuana. It removes civil and criminal penalties for persons over 21 to produce, process, and sell marijuana in limited amounts and creates a licensing and regulatory system. See generally I-502, §§ 4-25, CP at 192-222 (attached as Ex. A to Turcott Decl.; see also Online Voters’ Guide, 1-3, CP at 248-250 (“Explanatory Statement”) (attached as

Ex. B to Turcott Decl.). It imposes taxes and fees on various marijuana-related activities, creates a dedicated marijuana fund, and directs disbursements from the fund. *See* I-502, §§ 26-30, CP at 222-228.

Initiative 502 also adds provisions to existing laws on driving under the influence of drugs (DUI), including a prohibition on driving with an active THC concentration, as measured by a blood test, equal to or greater than 5.0 nanograms per milliliter of whole blood.² *See* I-502, §§ 31-37, CP at 228-246. It does not make any changes to the legal standard law enforcement officers use for making traffic stops. *See generally* I-502, CP at 184-247. Nor does I-502 change the requirement that an officer must have reasonable grounds to believe that a person has been driving or was in actual physical control of a vehicle while under the influence of alcohol or drugs (including marijuana) in order to request a blood test. *See* I-502 §31, CP at 228-236 (amending RCW 46.20.308(1) to include that drivers consent to a test of their blood for THC concentration, but leaving unchanged the requirement in RCW 46.20.308(2) that to administer the test, officers must have “reasonable grounds to believe the person to have been driving or in actual physical control of a motor

² The blood test for THC concentration considers only active THC, or delta-9 tetrahydrocannabinol, rather than testing for other THC metabolites that remain in a person’s blood for long periods of time. *See* RCW 69.50.101(jj) (defining THC concentration as measured by delta-9 tetrahydrocannabinol).

vehicle within this state while under the influence of intoxicating liquor or any drug . . .”).

Initiative 502 also did not change existing law which provides that no person is entitled to claim protection from arrest and prosecution or an affirmative defense under statutes governing medical marijuana for using medical marijuana in a way that endangers the health or well-being of any person through the use of a motor vehicle. RCW 69.51A.060(8).

Law enforcement training materials reflect that I-502 is not likely to change the standards officers use in determining whether to request a blood test. For example, in materials publicly available from the Washington State Criminal Justice Training Commission,³ officers are advised that their investigations for driving under the influence of drugs should not be affected by the new 5 nanogram per millileter THC standard:

What impact will I-502’s THC blood concentration per se limits of 5.00 ng/ml and zero tolerance limits for persons under 21 years old have on Driving Under the Influence investigations?

None. Officers should continue business as usual with impaired driving investigations. The per se THC limits and zero tolerance for minors is an additional means for

³ The Washington State Criminal Justice Commission is a state agency created by statute for the purpose of providing “programs and standards for the training of criminal justice personnel.” RCW 43.101.020.

prosecutors to charge impaired drivers under the statutes. These limits do not alter the probable cause standard to arrest an individual for an impaired driving offense. The officer must rely on his or her training, experience, and articulable facts presented by the situation to determine whether probable cause exists to arrest the driver. If the officer has reasonable grounds to suspect the driver is impaired by marijuana (or is under 21 and consumed marijuana), the officer should read the implied consent warning for blood and request a blood draw. If the driver refuses the blood test, the officer may apply for a search warrant for the driver's blood pursuant to agency policy.

(emphasis added) *I-502 Guidance for Law Officers*, CP at 513 (attached as Ex. 3 to Lamoreaux Decl.) ((also available at: https://fortress.wa.gov/cjtc/www/index.php?option=com_content&view=article&id=253&Itemid=71 [click on Guidance for Law Officers, DUI, and Questions and Answers], last visited February 13, 2014); *see also id.* at 23 (“If recent marijuana use is confirmed, *in conjunction with indicia of impairment*, avoid further delay and read the Implied Consent Warnings for blood.”) (emphasis added); *id.* at 25 (“Base your arrest on the objective facts of evidence of consumption and impairment.”).

The Washington State Patrol, which developed these training materials, similarly instructs its officers that the new THC per se limits should not impact the requirement that an officer have reasonable grounds to believe a person is under the influence of marijuana before requesting a blood test. CP at 377 (Lamoreaux Decl., ¶ 7). Reflecting the change in

the law because of I-502, the Washington State Patrol has modified its implied consent warnings to inform drivers that a blood test result of 5 nanograms per milliliter of whole blood will result in a license suspension. CP at 378 (Lamoreaux Decl., ¶ 9). But it still instructs its officers that the new THC per se standard should not affect their DUI investigations. CP at 377(Lamoreaux Decl., ¶7).

Mr. West filed a complaint seeking declaratory and injunctive relief, alleging I-502 violates article II, sections 1, 19, 20, and 37 of the state constitution. CP at 3-13. He alleged that he is a medical marijuana user and regular driver on the roads and highways of the state of Washington. CP at 4-5, ¶¶ 2.1, 2.2. Mr. West alleged that he is “in imminent danger of having his blood drawn and having charges filed against him for DUI despite the fact that at 5 nanograms per milileter [sic] of THC, he does not demonstrate any acute signs of impairment.” CP at 5, ¶ 2.2.

After Mr. West filed his complaint, he moved for a preliminary injunction, which was denied. CP at 14-24, 43-44. The State then moved for summary judgment, arguing Mr. West did not present a justiciable controversy. CP at 45-58. The trial court granted the motion and dismissed the complaint. CP at 122-123. Mr. West moved for

J. Sutton Dec. 7, 2012
March 29, 2013

May 24, 2013

reconsideration, submitting new materials. His motion was denied. CP at 175. This appeal followed.

The orders specified in Mr. West's notice of appeal are the trial court's grant of summary judgment to the State for lack of justiciability and the trial court's subsequent denial of a motion for reconsideration.⁴ CP at 176. Neither order addressed the merits of Mr. West's claim. Rather, the initial order granting summary judgment dismissed Mr. West's claim because the "complaint does not present a justiciable controversy under the Uniform Declaratory Judgment Act." CP at 123. The motion for reconsideration was denied because it was untimely and because the new submissions did not warrant reconsideration. CP at 175.

IV. STANDARD OF REVIEW

Appellate courts review grants of summary judgment de novo, and engage in the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 129 P.3d 574 (2006). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Frizzell v. Murray*, 179 Wn.2d 301, 303, 313 P.3d 1171 (2013); CR 56. For purposes of summary judgment, the issue

⁴ The motion for reconsideration was styled by Mr. West as a "Motion and Declaration Re New Evidence and Authority." CP at 160. It amounted to a motion for reconsideration, which is how Mr. West referred to it in his Amended Notice of Appeal. CP at 176.

of fact must be both genuine and material. Minor, inconsequential issues do not preclude summary judgment, as a material fact is one on which the outcome of the litigation depends. *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 364, 324 P.2d 1113 (1958).

Defendants may move for summary judgment by pointing out that plaintiffs lack sufficient evidence to support their claims, or by establishing through affidavits that no genuine issue of material fact exists. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993). If, after considering all the evidence, a reasonable person could conclude only in favor of the moving party, that party is entitled to summary judgment. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 421 P.2d 674 (1966). Here, there are no disputed material facts with respect to whether Mr. West has presented a justiciable controversy. Accordingly, the State respectfully requests that the Court affirm the trial court's dismissal of Mr. West's complaint.

V. ARGUMENT

The superior court properly dismissed Mr. West's complaint for lack of a justiciable controversy because there is no actual, present, and existing dispute, and Mr. West's interests are not direct or substantial. Mr. West also lacks standing because he has suffered no actual injury. Even if the Court finds there is a justiciable controversy and that Mr. West has

standing, the Court should remand the case to the superior court because the trial court did not reach the merits of Mr. West's complaint.

A. Mr. West's Complaint Does Not Present A Justiciable Controversy Because It Fails To Present An Actual, Present, And Existing Dispute And His Interests Are Not Direct Or Substantial

Mr. West's complaint requests that I-502 be "voided" and declared unconstitutional, and that an injunction be issued barring its application. CP at 13 . Although Mr. West does not state the legal basis for these claims, the Uniform Declaratory Judgment Act, Title 7.24 RCW, authorizes actions for declaratory judgment, as Mr. West is seeking. *See* RCW 7.24.020. In order to seek such a declaratory judgment, a litigant must present a justiciable controversy. *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004). A justiciable controversy requires:

- (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) (emphasis removed). Absent these elements, the court "steps into the prohibited area of advisory opinions." *Walker v. Munro*,

124 Wn.2d 402, 411-12, 879 P.2d 920 (1994) (quoting *Diversified Indus.*, 82 Wn.2d at 815).

Here, Mr. West fails to meet at least two of these four requirements. First, he fails to present an actual, present, and existing dispute, as opposed to a speculative one. Second, he fails to show that the case involves interests that are direct and substantial, rather than potential, theoretical, abstract, or academic.

1. Mr. West Fails To Present An Actual, Present, And Existing Dispute

A plaintiff claiming relief under the Uniform Declaratory Judgment Act must present an actual, present, and existing dispute, as opposed to “a possible, dormant, hypothetical, speculative, or moot disagreement.” *To-Ro Trade Shows*, 144 Wn.2d at 411. In *To-Ro Trade Shows*, a promoter of recreational vehicle shows challenged a requirement that sellers of recreational vehicles who wished to participate in trade shows must be licensed as vehicle dealers. *Id.* at 410. The Court held the plaintiff had failed to demonstrate an actual, present, and existing dispute because it had not shown that unlicensed dealers were “waiting in the wings” to display their vehicles. *Id.* at 415. The Court explained that it has “repeatedly refused to find a justiciable controversy where the event at

issue has not yet occurred or remains a matter of speculation” *Id.* at 415-16.

The Court cited as examples its prior opinions *Diversified Indus. Dev. Corp. v Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) (holding matter was not ripe for declaratory relief where minor child’s tort claim against lessor remained an “unpredictable contingency”); *Port of Seattle v. Wash. Utils. & Transp. Comm’n*, 92 Wn.2d 789, 806, 597 P.2d 383 (1979) (holding declaratory judgment was not appropriate where issue of Port’s future actions on certain contract rights were based on a “hypothetical factual situation”); *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 331, 684 P.2d 1297 (1984) (holding case was not “ripe” for declaratory judgment where person who was neither pregnant nor terminally ill challenged statute nullifying health care directive for such persons); and *Lawson v. State*, 107 Wn.2d 444, 460, 730 P.2d 1308 (1986) (holding property owner’s challenge to statute permitting recreational use of certain rights of way was premature where railroad had not abandoned right of way and county had expressed no interest in acquiring it).

Like the plaintiff in *To-Ro* and the cases discussed therein, Mr. West presents only a hypothetical, potential, and speculative controversy rather than an actual, present one. Mr. West alleges that as a medical marijuana user, I-502 could adversely impact his ability to travel on state

roadways. Appellant Br. at 27-28. His case thus depends on the occurrence of a series of hypothetical, speculative, and potential circumstances before an actual and present controversy would exist. The first hypothetical, potential occurrence would be that Mr. West would be stopped by a peace officer for a traffic infraction or criminal offense. The second would be that, after Mr. West was stopped, the peace officer would have reasonable grounds to believe that Mr. West was driving under the influence of marijuana. As explained above, Washington State Patrol training and training materials for other peace officers show that despite the allegations in Mr. West's complaint, the determination of such reasonable grounds would likely still be based on objective evidence that the driver was under the influence of marijuana—the same determination before the passage of I-502. The third would be that the peace officer, after stopping Mr. West for a traffic infraction and having reasonable grounds to believe he was under the influence of marijuana, would ask him to submit to a blood test. The fourth would be that Mr. West agreed to submit to a blood test. The fifth would be that the blood test result showed 5 nanograms per milliliter of active THC in whole blood. And the sixth hypothetical, potential occurrence would be that, despite a result of 5 nanograms per milliliter of active THC in his blood, Mr. West was nevertheless not impaired while driving. If, and only if, all six of these

hypothetical, potential occurrences were to happen would Mr. West's complaint ripen into an actual, present, and existing dispute.

Just as the trade show promoter in *To-Ro* failed to show there were unlicensed dealers waiting in the wings to display their vehicles at its trade shows, Mr. West fails to show there are law enforcement officials waiting in the wings to stop him for a traffic violation and request a blood draw despite having seen no signs of his being under the influence of marijuana. Mr. West's claimed hypothetical of being stopped, arrested, and subjected to a blood test for driving under the influence of marijuana is even more speculative than that presented in *To-Ro* because in that case, the promoter could point to at least one instance where part of its promotional show was actually shut down due to enforcement of the licensing statute. *To-Ro Trade Shows*, 144 Wn.2d at 406-07 (challenge to statute where part of promotional show shut down due to unlicensed dealer displaying recreational vehicles). In contrast, Mr. West shows no past, present, or future indication that he will be subject to prosecution for driving while under the influence of marijuana despite displaying no objective signs of actually being under the influence of marijuana. Because Mr. West cannot demonstrate an actual, existing, and present dispute, his complaint fails to present a justiciable controversy, and the superior court's order of dismissal should be affirmed.

2. Mr. West's Interests Are Not Direct Or Substantial

Mr. West also fails to present a justiciable controversy because the interests he asserts are not direct or substantial, but rather are potential and theoretical. *See To-Ro Trade Shows*, 144 Wn.2d at 411. To challenge a statute under the Uniform Declaratory Judgment Act, one must show “that he will be *directly* damaged in person or in property by its enforcement.” *Id.* at 412 (quoting *DeCano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941) (emphasis added by *To-Ro* court)). Thus, in *To-Ro*, the Court concluded the promoter failed to present a justiciable controversy where the mere possibility that its promotional business would suffer because unlicensed dealers would not be permitted to participate in trade shows caused no “demonstrably direct or substantial financial harm to To-Ro.” *Id.* at 414.

Similarly, the Washington Supreme Court held that a fire district failed to show a direct and substantial interest sufficient to challenge homeowner agreements even though the agreements greatly increased the likelihood of the fire district losing tax revenue. *Yakima Cnty. (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 379-80, 858 P.2d 245 (1993). The Court in *Yakima County* reasoned that although the homeowners had agreed to support annexation to a city, which in turn

would reduce the tax base of the fire district, the agreements amounted to only 66 percent of the necessary 75 percent of property value required for annexation, and additional government review would be necessary. *Yakima County*, 122 Wn.2d at 379-80. Because the fire district would only be impacted financially if annexation were ultimately successful, the Court concluded that the fire district's interest was not sufficient to bring an action pursuant to the Uniform Declaratory Judgment Act. *Id.*; see also *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 80 P.2d 403 (1938) (holding that beauty school failed to show a direct or substantial interest affected by a statute requiring beauty school students to have a high school diploma where the school had not shown an immediate effect on its enrollment) (cited with approval in *To-Ro Trade Shows*, 144 Wn.2d at 412).

Mr. West asserts interests here that are not direct and substantial, and are far more speculative and hypothetical than those of the plaintiffs in the *To-Ro* and *Yakima County* cases. Mr. West alleges that he is in "imminent danger of having his blood drawn and having charges filed against him for DUI despite the fact that at 5 nanograms per millileter [milliliter] of THC, he does not demonstrate any acute signs of impairment." CP at 5, ¶ 2.2. First, Mr. West's status as a medical marijuana user does not distinguish him from other legal, regular users of

marijuana who drive on Washington highways, so he cannot show that he will be directly damaged by enforcement of the DUI provisions of I-502. *To-Go Trade Shows*, 144 Wn.2d at 412. Second, the alleged impact of the change in DUI laws on Mr. West depends on numerous speculative and hypothetical situations occurring, as discussed above. Finally, Mr. West's alleged interests are not only speculative and hypothetical, but his asserted interests are not impacted by the enactment of I-502.

Under the laws both before and after enactment of I-502, driving while under the influence of marijuana is a criminal offense. *See* RCW 69.50.504 and former RCW 46.61.504(b) (2011) (criminalizing driving or being in physical control of a vehicle while under the influence of any drug). Both before and after enactment of I-502, an officer must have reasonable grounds to believe a person has been driving under the influence of marijuana in order to request a blood test. *See* RCW 69.50.308 and former RCW 46.20.308 (2011). Law enforcement training materials and Washington State Patrol procedures show that this determination of reasonable grounds to believe a person is under the influence of marijuana will likely not change under the new law as enacted by I-502. CP at 381-439, 477-516 (Lamoreaux Decl., Ex. 1, 3).

Therefore, Mr. West's alleged concern that he will be asked to submit to a blood test or be prosecuted despite showing no signs of

impairment is not, as a matter of law, implicated by I-502. To be sure, I-502 does add a standard of 5 nanograms per milliliter of active THC in whole blood as a per se violation of driving under the influence of marijuana. RCW 46.61.504 But the addition of this standard does not affect the particular concern alleged by Mr. West, that he will be asked to submit to a blood draw and be prosecuted despite showing no signs of impairment. Accordingly, Mr. West fails to show a direct and substantial interest, and he therefore fails to present a justiciable controversy. There is no uncertainty, as Mr. West alleges, as to how I-502 applies to Mr. West's interests.

3. Justiciability To Challenge A Statute Cannot Be Based On Harms Caused By Subsequent, Independent Legislative Action By Local Government

Mr. West's second alleged harm is also hypothetical and indirect, and fails to demonstrate justiciability. Mr. West alleges that the passage of I-502, which itself does not affect medical marijuana laws, led to local government actions, such as imposing moratoriums on collective gardens, and potential or otherwise unidentified state action that impacted (or might in the future impact) medical marijuana. Appellant Br. at 29-31. Mr. West cites no authority for his argument that justiciability to challenge a statute can be based on harms caused not by the statute itself, but by subsequent, entirely independent legislative action by local government.

The State is not aware of any such authority. Also, the allegation relies on speculation that the cities would not have passed the moratoriums absent the enactment of I-502. It also relies on speculation regarding what actions future legislatures or executive officials will undertake. See Appellant Br. at 30-31. Mr. West's disagreement with local government moratoriums or any future, potential state legislation or executive action should be brought as challenges to those actions on their own terms, provided that Mr. West can establish a justiciable controversy with respect to that other legislative or executive action. But such legislative or executive action cannot form the basis for Mr. West's challenge to I-502, which itself establishes no moratoriums on collective gardens and makes no changes to Washington's medical marijuana laws. Mr. West cannot establish justiciability to challenge I-502 based on the subsequent legislative actions of local governments, and the Court should affirm.

B. Mr. West Lacks Standing Because He Has Not Suffered an Actual Injury

Mr. West also lacks standing because he has suffered no actual injury; he alleges only a potential, future prosecution. As the Washington Supreme Court has noted, the requirements of standing tend to overlap with justiciability. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203, 11 P.3d 762 (2000); *To-Ro Trade Shows*, 144 Wn.2d at

414 (“Th[e] third justiciability requirement of a direct, substantial interest in the dispute encompasses the doctrine of standing.”). In addition, other limiting doctrines inherent in the four justiciability requirements are mootness, ripeness, and the federal case-or-controversy requirement. *To-Ro Trade Shows*, 144 Wn.2d at 411.

The standing doctrine is based on the Constitution’s case-or-controversy requirement. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000) (citing U.S. Const. art. III, § 2). Standing is determined at the time a lawsuit is filed. “The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Id.* at 189; *see also Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808, 814 (8th Cir. 2006).

Washington courts apply a two-part test for standing under the Uniform Declaratory Judgment Act. *Grant Cnty. Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419, 423 (2004). The party must be within the zone of interests to be protected by the statute in question, and the party must have suffered an “injury in fact.” *Id.* “One cannot urge the invalidity of a statute unless harmed by the particular feature which is challenged.” *State v. McCarter*, 91 Wn.2d 249, 253, 588

P.2d 745 (1978), *overruled on other grounds by Matter of McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984).

While Mr. West may be within the zone of interests to be protected or regulated by the statute in the sense that he asserts he is a medical marijuana patient and drives on Washington roads, he fails to show any injury in fact. “To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm *personal to the party* that are substantial rather than speculative or abstract.” *Grant Cnty. Fire Prot. Dist. 5*, 150 Wn.2d at 802. (emphasis added); *accord, Am. Legion Post #149 v. Wash. State Dep’t of Health*, 164 Wn.2d 570, 593-94, 192 P.3d 306 (2008). As discussed above, Mr. West has suffered no actual injury. He has not been arrested for DUI and been tested above the legal limit for marijuana despite not being impaired.

Similarly, Mr. West’s claim that he is adversely impacted by I-502 because he opposed its passage fails to present an allegation of harm that is personal to him, rather than abstract. He argues, without authority, that anyone must have standing to litigate the constitutionality of initiatives. Appellant Br. at 31-33. But this argument ignores that the standing requirement itself is rooted in the constitution.

Here, for many of the same reasons discussed above that show Mr. West does not present an actual controversy or direct and substantial

interests that are at issue rather than potential and hypothetical ones, Mr. West does not even allege a sufficiently “substantial” harm personal to him. Rather, the harm alleged is hypothetical and speculative and would only occur, if at all, if he were charged with DUI based on the five nanograms per milliliter standard. Accordingly, he does not have standing, and the order of dismissal should be affirmed.

Nor does Mr. West’s reliance on a recently issued Washington Supreme Court opinion give him standing in this case. *See* Appellant Br. at 22 (citing *Wash. Ass’n for Substance Abuse and Violence Prevention (WASAVP) v. State*, 174 Wn.2d 642, 278 P.3d 632 (2012)). In that case, the Washington Supreme Court held that an advocacy organization had standing to challenge a statute under the Uniform Declaratory Judgment Act because the organization’s goals of preventing substance abuse and violence could reasonably be impacted by the statute. *WASAVP*, 174 Wn.2d at 653-54. This holding is inapplicable here for two reasons. First, the Court in that case did not address the other justiciability requirements that Mr. West cannot meet here, such as requiring a direct and substantial interest and a real and present controversy. Second, Mr. West has not filed his complaint on behalf of any advocacy organization, and even if he had filed on behalf of the “No On I-502” campaign that he alleges an association with, the interests of the advocacy organization in *WASAVP*

affected by the statute were not simply opposition to the statute, but broader goals that were impacted by the statute. *Id.* In that regard, *WASAVP* was not formed to oppose an initiative, but had been in existence for years before the initiative at issue was proposed. See <http://wasavp.org/history/> (last visited Feb. 3, 2014) (stating that *WASAVP* was formed in 2000 and describing general goals of reducing effects of substance abuse); *WASAVP*, 174 Wn.2d at 646 (stating initiative challenged by *WASAVP* was approved in November 2011).

Likewise, Mr. West's argument for a "liberal interpretation" of the Uniform Declaratory Judgment Act does not help him obtain standing. He cites *Farris v. Munro*, 99 Wn.2d 326, 662 P.2d 821 (1983), where the Court found a taxpayer lacked standing for failure to comply with the requirements for bringing a taxpayer suit but went on to consider the constitutionality of the State Lottery Act. Appellant Br. at 23-24. The case is distinguishable because it raised an issue "vital to the state revenue process" and might have affected another ballot measure. *Farris*, 99 Wn.2d at 330. This Court has taken a liberal approach to standing only where necessary to ensure that important public issues did not escape review. *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d at 803. Here, there is no such risk, because if the hypothetical injuries and interests Mr. West asserts become real injuries in a different case, then

judicial review will be available, e.g., a prosecution for driving under the influence of marijuana. Similarly, other issues that he asserts are of broad public import, regarding federal preemption and licensee self-incrimination, are likely to be resolved in litigation or criminal prosecutions, if they do arise as disputes.

Mr. West also argues that he has standing because I-502 creates a “chilling effect” on his behavior. Appellant Br. at 27, 48-50. First, the potential for a “chilling effect” does not amount to an actual, substantial injury personal to him. Second, cases discussing a “chilling effect” primarily involve exercise of First Amendment free speech rights, which are subject to a distinct analysis due to the nature of that constitutional right. *E.g., Walker v. Munro*, 124 Wn.2d 402, 416, 879 P.2d 920 (1994) (“In the First Amendment context, a ‘chilling effect’ on First Amendment rights is a recognized present harm, not a future speculative harm, which allows third party standing when the law in question burdens constitutionally protected conduct.”)

Even when applied to potential enforcement of criminal statutes, courts have required more than a possibility of prosecution. Persuasive authority from federal courts requires a genuine threat of imminent prosecution before allowing a pre-enforcement challenge to a criminal statute. *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010); *see*

also *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99, 99 S. Ct. 2301, 60 L. Ed.2d 895 (1979) (requiring person to declare an intention to violate the criminal rule and a credible threat of prosecution). The *Wolfson* court identified three factors in determining whether there was a genuine threat of imminent prosecution: “(1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute.” *Wolfson*, 616 F.3d at 1058 (citing *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-28 (9th Cir. 1996)).

Here, Mr. West has not articulated a concrete plan to violate the DUI laws by driving while impaired, there have been no specific threats of prosecution of Mr. West or others who drive unimpaired, and Mr. West can show no history of prosecuting drivers who display no evidence of the influence of marijuana, as Mr. West alleges. Accordingly, Mr. West has no standing. The Court should affirm.

C. The Court Should Not Address Mr. West's Arguments Regarding the Merits of His Lawsuit

The Court should reject Mr. West's attempts to address the merits of his claim that I-502 is unconstitutional. The issue is not presented in

this appeal, is not included within the orders Mr. West is appealing, and the lack of litigation of the issues below and concomitant lack of a record would unfairly hamper this Court's review. Accordingly, if the Court finds that Mr. West has suffered actual injury rather than hypothetical and speculative ones, it should remand to the trial court for further proceedings.

Initially, the State notes that Mr. West raises various arguments not argued to the trial court, which this Court should disregard out of hand. *See, e.g., Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002) (“[a]rguments not raised in the trial court generally will not be considered on appeal.”); RAP 9.12 (“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.”). Those issues include alleged federal preemption (Appellant Br. at 7, 36-41); alleged conflict with United States treaties (Appellant Br. at 7, 39); alleged compelled self-incrimination due to tax and record-keeping requirements of I-502 (Appellant Br. at 8, 41); and potential application of NEPA and SEPA (Appellant Br. at 10).

In addition, the Court generally reviews only orders or rulings designated in the notice of appeal. RAP 2.4(a). Here, the specific orders included in the notice of appeal are the trial court's grant of summary

judgment to the State for lack of justiciability and the trial court's subsequent denial of a motion for reconsideration. CP at 176. Neither order addressed the merits of the claim. Rather, the initial order granting summary judgment dismissed Mr. West's claim because the "complaint does not present a justiciable controversy under the Uniform Declaratory Judgment Act." CP at 123. The motion for reconsideration was denied because it was untimely and because the new submissions did not warrant reconsideration. CP at 175.

The Court may also review trial court orders, even if not designated in the notice of appeal, if the order or ruling "prejudicially affects the decision designated in the notice." RAP 2.4(b). Here, there are no trial court rulings, designated or otherwise, that address the merits of Mr. West's claim. Instead, the only other trial court ruling of consequence was the order denying Mr. West's motion for preliminary injunction, which Mr. West did not designate in the Notice of Appeal.⁵ CP 43-44, 154-157, 176-178. The order does not address the merits of Mr. West's claim. CP at 43-44. It only finds that Mr. West failed to meet the criteria for obtaining a preliminary injunction, and Mr. West does not address the requirements for granting a preliminary injunction in his appellant's brief.

⁵ Appellant's Opening Brief claims that he is appealing the trial court's order denying Mr. West's motion for preliminary injunction, but the Notice of Appeal does not include that order.

CP at 43-44. Accordingly, the order denying a preliminary injunction does not prejudicially affect the decisions designated in the notice, RAP 2.4(b), and there is no trial court decision regarding the merits of Mr. West's claim for this Court to review.

Not only do the Rules of Appellate Procedure preclude Mr. West's arguments regarding the merits of his appeal, but this Court does not have an adequate record to review Mr. West's claims and factual assertions because the issues were not litigated below. Accordingly, the record offers little basis for a substantive review of those claims, and the Court should not address the merits here.

VI. CONCLUSION

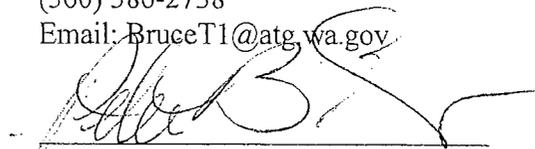
The State respectfully requests that the Court affirm the trial court's dismissal of Mr. West's complaint for failure to present a justiciable controversy. There is no actual, present, and existing dispute, and Mr. West's interests are neither direct nor substantial. Mr. West also

lacks standing because he has suffered no actual injury. The superior court properly dismissed the case.

RESPECTFULLY SUBMITTED this 28th day of April, 2014.



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PROOF OF SERVICE

I, Rachel Gibbons, certify that I caused a copy of this document, **Corrected Respondents' Brief**, to be served on all parties or counsel of record by U.S. mail via Consolidated Mail Services:

Arthur West
120 State Ave. NE #1497
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Electronically filed: supreme@courts.wa.gov

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of April, 2014, at Olympia, Washington.


RACHEL GIBBONS, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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From: Gibbons, Rachel (ATG) [mailto:RachelG@ATG.WA.GOV]
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Cc: Turcott, Bruce (ATG); Gonick, Peter (ATG); awestaa@gmail.com
Subject: West v. State et al.; No 88759-4; Corrected Respondent's Brief

Attached for filing please find Corrected Respondent's Brief and letter regarding filing:

Thank you,

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