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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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No. 82225-5

SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE and PROTECT OUR WATERS,  
Petitioners,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC  
Respondent.

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STATE OF WASHINGTON

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SUPPLEMENTAL BRIEF OF RESPONDENTS

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ORIGINAL

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## 1. IDENTITY OF RESPONDENTS AND INTRODUCTION

Respondents City of Port Angeles (“City”) and Washington Dental Service Foundation, LLC, (“WDSF”) submit this joint Supplemental Brief Of Respondents and request the Court uphold the decision of the Court of Appeals in *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008).

This case concerns local initiative petitions filed with the City by two political action committees (“PACs”): Protect Our Waters (“POW”) and Our Water-Our Choice (“OWOC”). The thrust of those initiatives is to stop fluoridation of the City’s municipal water utility. This case, however, is not about the merits of fluoridation. The issues in this case are only whether these particular initiatives are within the scope of the local initiative power.

The Court of Appeals decision is solidly founded on controlling Supreme Court precedent. Based on the undisputed facts found by the trial court, the Court of Appeals held that the proposed initiatives did not meet two of the three tests for determining whether a local initiative is within the scope of the local initiative power.

### **1.1 The Administrative Action Test.**

The first test is whether an initiative's subject matter is legislative or administrative. Only legislative matters can be enacted by initiative.<sup>1</sup>

The Court of Appeals held that the initiatives deal with administrative matters – how the City operates its proprietary municipal water utility.

### **1.2 The Delegation to the Legislative Body Test.**

The second test is whether the subject matter of an initiative is expressly delegated to the legislative body of the city rather than to the city as a corporate body. Matters expressly delegated to the legislative body are not subject to initiative.<sup>2</sup> The Court of Appeals held that the Legislature in RCW 35A.11.020 expressly delegated to city councils the operating and supplying of utility services, and that the PACs' initiatives would interfere with that expressly delegated authority.

### **1.3 The Substantive Invalidity Test.**

The third test for local initiatives is whether the subject matter of the initiative is within the City's power to enact. This third test is called the "substantive invalidity" test. For *statewide* initiatives, this

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<sup>1</sup> *E.g., Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984)

<sup>2</sup> *E.g., Priorities First v. City of Spokane*, 93 Wn. App. 406, 411, 968 P.2d 431 (1998), *review denied*, 137 Wn.2d 1035 (1999).

“substantive invalidity” test is disfavored.<sup>3</sup> For *local* initiatives, the Supreme Court has held that cities have limited powers, and if an initiative is outside those powers, it is outside the local initiative power.<sup>4</sup> The “substantive invalidity” of the PACs’ initiatives is not an issue in this appeal, because the Court of Appeals declined to decide that issue:

[W]hile differences between state-wide and local initiatives arguably dictate that a court should employ different methods of preelection review, in this case it is unnecessary for us to decide this point. Both initiatives clearly fail because they are administrative in nature and improperly infringe on rights delegated by the legislature to the city council.

*City of Port Angeles*, 145 Wn. App. at 880.

## **2. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW**

### **2.1 Restatement of Petitioners’ Issues 1 and 5.** RCW 35A.11.020

specifically delegates “operating and supplying of municipal services” to the “legislative body” of the City. Are the PACs’ initiatives invalid because they interfere with that delegated authority to the Port Angeles City Council to manage its municipal water system.

### **2.2 Restatement of Petitioners’ Issues 2 and 5.** City decisions

regarding additives to drinking water are made pursuant to detailed

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<sup>3</sup> Washington Const., Art. 2, §1; see *Coppernoll v. Reed*, 155 Wn.2d 290, 298-300, 119 P.3d 318 (2005).

<sup>4</sup> *Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82 (1980); *Close v. Meehan*, 49 Wn.2d 426, 432, 302 P.2d 194 (1956).

regulatory plans adopted and administered by the State Department of Health and State Board of Health. Are the PACs' initiatives invalid because they direct City administrative actions in the operation of the City's proprietary water system, which is operated under the detailed regulations of the Department of Health and Board of Health?

**2.3 Restatement of Petitioners' Issue 2a.** The trial court refused to admit the PACs supposed evidence regarding other water systems operating the City, which was submitted a month after trial. The PACs did not assign error to that trial court ruling. Should this Court supply a finding regarding alleged other water systems operating in the City when?

**2.4 Restatement of Petitioners' Issue 3.** In *Coppernoll v. Reed*,<sup>5</sup> and later Supreme Court cases, the Court considered the "fundamental and overriding purpose" of legislation only when applying the substantive invalidity test to statewide initiatives. Should the Court adopt an entirely new test for local government actions by engrafting that "fundamental and overriding purpose" language into the established test for determining administrative action; and should the Court do so here, where the trial court did not make any finding of the fundamental and overriding purpose

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<sup>5</sup> 155 Wn.2d 290, 119 P.3d 318 (2005).

of the PACs' initiatives and was not requested by the PACs to make any such finding?

**2.5 Restatement of Petitioner Issues 4.** The Court of Appeals decided that the initiatives are beyond the scope of the local initiative power for two independent reasons: a) the initiatives are administrative in nature; and b) the initiatives interfere with the legislative body's exclusive authority to operate and supply municipal utilities. The Court of Appeals made no decision as to the substantive invalidity of the initiatives. Should the Supreme Court address this issue of substantive invalidity of local initiatives when that issue was not necessary for, and was not a basis of, the Court of Appeals' decision?

**3. RESPONDENTS' STATEMENT OF THE CASE<sup>6</sup>**

A more detailed statement of facts is included in the Brief Of Respondents to the Court of Appeals.

**3.1 The City's Establishment and Operation of Its Water Utility.**

The City has operated a municipal water system for over 85 years. RCP 210 - 213. The City owns and operates that water utility in its

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<sup>6</sup> Citations to the record are in the following form: Appellants Designation of Clerk's Papers ("ACP \_\_\_\_"); Respondent's Supplemental Designation of Clerk's Papers ("RCP \_\_\_\_"); Verbatim Report of Proceedings from the December 11, 2006, hearing on the merits ("VRP1 at \_\_\_\_ (line \_\_\_\_)"); and Verbatim Report of Proceedings from the January 19, 2007, presentation of the final order and judgment ("VRP2 at \_\_\_\_ (line \_\_\_\_)").

proprietary capacity.<sup>7</sup> Over the years, the City has provided water for its citizens, operating under regulations of the Washington Department of Health, State Board of Health, and other regulatory agencies in treating the water and complying with state regulations . *Id.*

One of the tasks in operating a municipal water system is to decide what chemicals to add to the water, and balance those against naturally occurring chemicals. RCP 213. In performing this task and testing for water quality, the City complies with the comprehensive state regulations for drinking water utilities. RCP 206 - 207; *see* Chapter 246-290 WAC. Those state regulations include detailed rules about how and under what circumstances fluoride may be added to municipal water systems. WAC 246-290-460.

### **3.2 The City's Decision to Accept the Fluoridation System from WDSF.**

In 2003, a group of local citizens and health care professionals in Port Angeles asked the City to consider fluoridation of the City's water supply. RCP 132. In February 2003, after extensive research and extensive public hearings, the City Council passed a motion approving fluoridation of the City's water supply. The City conditioned its approval

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<sup>7</sup> *See Kaul v. City of Chehalis*, 45 Wn.2d 616, 618, 277 P.2d 352 (1955) (municipality owning and operating a municipal water system is acting in

on the availability of assistance for the cost of equipment and installation.  
RCP 133-144.

On March 2005, the City Council approved an agreement with WDSF to accept a fluoridation system. RCP 149; RCP 170-178. The Agreement obligated WDSF to construct and install a fluoridation system. The system would be given to the City at no cost, but subject to City repayment for construction costs if the City did not continue use of the system. *Id.*

The City's decision to accept the fluoridation system was challenged and upheld in *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 151 P.3d 1079 (2007). In that case, Division II specifically found that the decision to fluoridate the public water supply was an action taken under a program administered by the Washington Department of Health. *Id.* at 220.

### **3.3 The PACs' Initiative Petitions Impose Unmanageable Regulations on the City's Water Utility.**

In September 2006, OWOC filed an initiative petition with the City for a proposed ordinance titled the "Medical Independence Act." RCP 220-221. The proposed ordinance first defines fluoridation as "enforced medication" and then declares that fluoridation affects a  

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its proprietary capacity).

“property right” and is “a takings” [sic]. The initiative would specifically overturn the City Council action approving fluoridation of the City’s water supply, would require all fluoridation to cease, and would prohibit addition to the City water of any substance for the purpose of affecting bodily functions.

Also in September 2006, POW filed an initiative petition with the City for a proposed ordinance titled the “Water Additives Safety Act.” RPC 222-223. The Water Additives Safety Act purports to regulate substances added to drinking water. The POW proposal requires that no substance may be added to drinking water intended to affect physical or mental functions, unless the substance is approved by the U.S. Food and Drug Administration (“FDA”). The proposed ordinance makes no attempt to reconcile this requirement with the fact that the FDA does not regulate additives to drinking water.<sup>8</sup> The initiative also requires all additives to be independently analyzed on a batch-by-batch basis, which is inconsistent

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<sup>8</sup> FDA Memorandum Of Understanding 225-79-2001. RPC 180-183; RPC 216-217. The FDA and the U.S. Environmental Protection Agency (“EPA”) have agreed that the federal Safe Drinking Water Act of 1974 repealed FDA’s authority “over water used for drinking water purposes” and that, as a result, the EPA has the sole authority to promulgate federal standards for drinking water additives. *See* Pub. L. 93-523; 42 U.S.C. § 300g-1.

with Washington Department of Health requirements,<sup>9</sup> would place significant administrative burdens on the City's water utility operation; and, as with the OWOC petition, would require fluoridation of the City's water supply to cease. RCP 206 - 208.

### **3.4 The City Filed a Declaratory Judgment Action to Determine the Validity of the Initiatives.**

On September 13, 2006, the City Council held a public meeting to consider the initiatives. ACP 164-166. Because of concerns about the validity of initiatives, the City Council authorized a declaratory judgment action. Shortly after the City's action was filed, the PACs filed a lawsuit seeking to require the City to place the initiatives on the ballot. ACP 150-156; 179-188.

### **3.5 The Trial Court and Appellate Court Decisions.**

Based on undisputed facts, the trial court entered an oral ruling on December 11, 2006, and detailed findings and conclusions on January 19, 2007. The trial court held the initiatives beyond the scope of the local initiative power. VRP1 at 102 – 113; VRP1 at 2 – 23; ACP 25 – 35.

The PACs did not ask the trial court for a finding specifying the “fundamental and overriding purpose” of the initiatives, so the court made no such finding. VRP2 at 2 – 23; ACP 36 – 49; ACP 25 – 35. On appeal,

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<sup>9</sup> See Chapter 246-290 WAC.

the PACs did not assign error to the trial court for failure to make such a finding.

In its decision of January 15, 2008, the Court of Appeals upheld the trial court on two independent grounds: 1) the initiatives are invalid because they call for administrative actions, not legislative actions; and 2) the initiatives are invalid because they interfere with the operation and supply of utility service, which is a power expressly delegated by the Washington Legislature to the City's legislative body. The Court of Appeals declined to decide whether the initiatives are within the power of the City to enact.

#### 4. ARGUMENT

##### 4.1 **The PACs' Initiatives Are Invalid Because They Are Directed at Administrative, Not Legislative, Subjects.**

The local initiative power is limited to legislative actions. Administrative actions are outside the initiative power. *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1981). A local government action is administrative if: (1) it is pursuing a plan that the local government itself has adopted; or (2) the local government action is in pursuit of a plan adopted by some power superior to it. *Ruano*, 81 W.2d at 823-24; *Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984). The Court of Appeals correctly held that the actions required by the PACs' initiatives are administrative.

The Legislature has charged the State Board of Health (a division of the Department of Health) with establishing drinking water standards. RCW 43.20.050(2); RCW 70.142.010. The Board of Health has adopted detailed standards for additives (including fluoride) to public drinking water systems, which include water quality standards, monitoring requirements, laboratory certification requirements, operation and maintenance requirements, and management and reporting requirements. Chapter 246-290 WAC. The City's decisions regarding additives to its drinking water are administered under that detailed regulatory program adopted by a "power superior to" the City. In the earlier case regarding fluoridation of the City's water supply, the Court of Appeals expressly found that the City action was taken pursuant to a program administered by the Department of Health. *Clallam County Citizens*, 137 Wn. App. at 220. The PACs initiatives would regulate what additives are allowed and how those additives are tested by the City's public drinking water utility. But these City actions are administrative actions undertaken pursuant to the plan adopted by the Legislature and Board of Health. The Court of Appeals found the initiatives invalid for that reason. *City of Port Angeles*, 145 Wn. App. at 877-878.

The only argument raised by the PACs is that the City *itself* does not have an ordinance expressly setting permissible maximum levels for

drinking water additives and testing methods.<sup>10</sup> Therefore, the PACs argue, their proposed initiatives must be legislative because they allegedly set local maximum levels for fluoride, provide other local standards for additives to drinking water (measured by non-existent FDA standards<sup>11</sup>), and provide local methods for testing additives to drinking water.

The PACs' argument misstates the long-established standard employed by this Court. The standard is not whether the City itself has adopted a plan regulating additives to public drinking water, but whether a plan has been adopted "by the legislative body [of the City] itself **or some power superior to it.**" *Ruano*, 81 Wn.2d at 873 (emphasis added); *Bidwell v. Bellevue*, 65 Wn. App. 43, 46, 827 P.2d 339, *review denied*, 119 Wn.2d 1023 (1992) (same). Here, the Washington Legislature and the Washington Board of Health are powers superior to the City; and their comprehensive regulations constitute a plan regulating additives to public drinking water. For that reason, the City actions implementing that general plan are administrative, not legislative. Because the ordinances in

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<sup>10</sup> This is not surprising because the Legislature has delegated the task of setting science-based drinking water standards and testing methods to the Washington Board of Health. RCW 70.142.010(2). Only boards of health in counties with a population of 250,000 or greater may establish stricter local standards. RCW 70.142.040.

the PACs' initiative petitions would affect administrative matters, not legislative matters, the PACs' initiatives are beyond the scope of the local initiative power for Washington noncharter Code cities.<sup>12</sup>

Allowing the initiatives in this case to determine the details of how the City administers its drinking water utility could have important consequences for city and county utilities statewide. Technical questions involving the operation of municipal utilities would become the subject of initiative petitions. Where a city electric utility could purchase power, how an electric utility could set rates, how a local solid waste utility could treat or haul solid waste, how a city storm water utility could be operated, and/or what types of pipe to use, could all become subject to ballot measures. As the Court of Appeals correctly found in this case, the management and operation of utilities is administrative, not legislative, action and is therefore outside the scope of the local initiative power.

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<sup>11</sup> The FDA has determined that it has no jurisdiction to set drinking water standards because Congress delegated that power exclusively to the federal EPA. FDA Memorandum of Understanding 225-79-2001.

<sup>12</sup> In a "sub-issue", the PACs request the Court to supply a finding regarding evidence it submitted one month after trial about supposed other water systems operating within Port Angeles. The trial court ruled it would not admit that evidence. VRP2 at 15-19. The City's position was that the evidence was not relevant. *Id.* In any case, the PACs did not assign error to that trial court ruling, and have therefore waived that issue. RAP 10.3(g); *United and Informed Citizen Advocates Network v.*

#### **4.2 The PACs' Initiatives Interfere with Authority Expressly Granted to the City Council.**

A local initiative is beyond the scope of the initiative power if it interferes with powers or functions that have been granted by the Legislature to the governing body of the city, rather than to the city as a corporate entity. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261-266, 138 P.3d 943 (2006) (initiative requiring revenue bonds to be subject to voter ratification interfered with the authority granted to the city's legislative body over revenue bonds); *Priorities First v. City of Spokane*, 93 Wn. App. 406, 410-411, 968 P.2d 431 (1998), *review denied*, 137 Wn.2d 1035 (1999) (initiative requiring vote prior to creating a public development authority interfered with the authority granted to the city legislative body to create a special fund for municipal facilities).

In this case, the Court of Appeals held that the PACs' initiatives would interfere with the Port Angeles City Council's authority to operate and supply municipal water utility services, as granted specifically to the City Council by the Legislature in RCW 35A.11.020. That statute expressly grants to the "legislative body" of a code city the power of:

operating and supplying of utilities and municipal services  
commonly or conveniently rendered by cities or towns.

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*Washington Utilities and Transportation Commission*, 106 Wn. App. 605, 616, 24 P.3d 471, *review denied*, 145 Wn.2d 1021 (2002).

RCW 35A.11.020. The undisputed facts in this case showed that the PACs' initiatives would regulate the manner in which the City operates its proprietary water utility. The Court of Appeals correctly determined the initiatives were invalid for that reason.

The PACs argue that the City has other, general authority to adopt water quality additive standards. This argument fails for two reasons. First, the existence of general authority that would arguably allow a city's corporate body to regulate the City's water utility is irrelevant if a proposed initiative would interfere with a power expressly granted to the legislative body of that city. *City of Seattle v. Yes For Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1228 (2005).

In *Yes For Seattle*, creek protection activists proposed an initiative to place development restrictions on property near creeks. In rejecting that argument, the court held that this was a development regulation as defined by the Growth Management Act ("GMA") and that the Legislature had granted authority to a city's legislative body to enact GMA development regulations, not to the city as a corporate body. *Yes For Seattle*, 122 Wn. App. at 389.

In *Yes For Seattle*, the creek activists made the identical argument that the PACs are making in this case – that there were broad grants of authority to cities generally for regulating creeks. The court held that

these grants of authority were not controlling, because the creek activists' proposed initiative would interfere with the Legislature's specific grant of power to the legislative body to enact development regulations.

Second, the PACs argument lacks a legal basis. The PACs rely on a sentence fragment from a 1907 statute that allows cities to protect water works from pollution. They then claim broadly that this allows any city to set standards for additives to public drinking water systems. This 1907 law, which predated both the initiative authority to Code cities and the State Board of Health control of public water systems, gives cities jurisdiction over water works, reservoirs, lakes and streams that constitute the source of the municipal water to protect the water source from pollution. RCW 35.88.010. This unremarkable authority allows protection of water supply sources from polluting sources (such as drainfields, mines, tanneries, and other operations that may have been problematic in the early 1900s). The statute does not address standards for additives to public drinking water systems. Even if this statute could be read expansively enough to grant authority to set standards for drinking water additives, it would be irrelevant. The legal test for the validity of a local initiative is not whether some general law might supply authority to the city as a corporation, but whether the proposed initiative would interfere with the exercise of a power delegated by the Legislature to the

legislative body of the City. *King County v. Taxpayers*, 133 Wn.2d 584, 608, 949 P.2d 1260 (1997). In this case, the proposed initiatives would clearly interfere with the City Council's authority to manage its water utility, which is a power expressly delegated to the City Council by the Legislature in RCW 35A.11.020.

**4.3 The Court of Appeals Decision Does Not Conflict With the Supreme Court's Holding in *Coppernoll*.**

The Court of Appeals decision is not in conflict with *Coppernoll v. Reed*, 155 Wn.2d 290, 119 P.3d 318 (2005). In *Coppernoll*, this Court held that, when reviewing a statewide initiative to determine if it is within the state's power to enact (the substantive invalidity test), the court should review the "fundamental and overriding purpose" of the legislative initiative. *Coppernoll*, 155 Wn.2d at 303. The Court has never applied the "fundamental and overriding purpose" evaluation to determine whether a local government action is administrative of legislative.

The PACs request that this "fundamental and overriding purpose" review be extended beyond *Coppernoll* and incorporated into a distinct test that determines whether a city's action is legislative or administrative (the administrative action test). Such review has never been used by the Court outside the substantive invalidity test and has never been extended to the administrative action test for the validity of local initiatives. More

recently, the Supreme Court decisions on statewide initiatives confirm the limited application of the “fundamental and overriding purpose” review:

If an initiative otherwise meets procedural requirements, is legislative in nature, and its “fundamental and overriding purpose” is within the State’s broad power to enact, it is not subject to preelection review.

*Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007) (emphasis supplied). The Court of Appeals, recognizing the distinction, held that the legislative/administrative action test is a separate and different consideration from the substantive invalidity test; and a court may review more than merely the “fundamental and overriding purpose” of a local initiative when determining whether an initiative is legislative or administrative in nature. *City of Port Angeles*, 145 Wn. App. 875-876.

As the Court of Appeals also noted, the trial court did not make any finding of the “fundamental and overriding purpose” of the initiatives, and the PACs did not request such a finding, so there is no factual background to allow Court review of this issue. *City of Port Angeles*, 145 Wn. App. at f.n. 4.

#### **4.4 The Issue of Substantive Invalidity Was Not Decided by the Court of Appeals and Is Not Part of the Supreme Court’s Review of the Court of Appeals Decision.**

The Court’s third test for *local* initiatives is whether the subject matter of the initiative is within the city’s power to enact – the

“substantive invalidity” test. The Court of Appeals expressly declined to decide this issue. 145 Wn. App. at 879-880.

The Court of Appeals understood and discussed the Supreme Court’s contrasting treatment of *statewide* initiatives and *local* initiatives under this “substantive invalidity” test. Because local governments have limited powers, the Supreme Court has held that a local initiative is outside the authority of a city to enact, it is outside the local initiative power. *Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82 (1980); *Close v. Meehan*, 49 Wn.2d 426, 432, 302 P.2d 194 (1956). This “substantive invalidity” test for local initiatives, however, is no longer an issue in this case, because the Court of Appeals specifically declined to decide that issue:

[W]hile differences between state-wide and local initiatives arguably dictate that a court should employ different methods of preelection review, in this case it is unnecessary for us to decide this point. Both initiatives clearly fail because they are administrative in nature and improperly infringe on rights delegated by the legislature to the city council

*City of Port Angeles*, 145 Wn. App. at 880.

The Petition for Review asks the Court to address this issue and issue an advisory opinion about preelection review of local initiatives for substantive invalidity. The Court should decline that invitation. *See*

*Mathewson v. Gregoire*, 139 Wn. App. 624, 638, 161 P.3d 486 (2007)  
(merits of issues not decided below should not be addressed on appeal).

Moreover, consideration of this issue would not change the outcome of the case. The Court of Appeals declined to rule on the substantive invalidity issue because the initiatives were invalid under either of the Court's other two tests: administrative action and subject matter dedicated to the City Council. There was no reason to consider the substantive invalidity test. Any decision on that issue would be surplusage—the initiatives are invalid regardless of what the Court might decide about the substantive invalidity test.

**5. CONCLUSION**

For the reasons set forth above and in the Brief Of Respondents, the City of Port Angeles and Washington Dental Service Foundation, LLC, respectfully request the Court uphold the Court of Appeals.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of June 2009.

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