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COURT OF APPEALS
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Case Number 318877

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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.

APPELLANT'S OPENING BRIEF

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Introduction

The Community Bill of Rights is a citizen's initiative that would amend the City of Spokane's Home Rule Charter to provide greater protections for City residents, workers, and the natural environment. In response to a pre-election challenge filed by business interests seeking to remove the initiative from the ballot, the trial court struck the duly qualified Community Bill of Rights from the November 2013 ballot.

The trial court's reasoning dramatically expanded the scope of judicial review for pre-election initiative challenges. Washington law generally bars substantive challenges to the validity of an initiative, yet the trial court rested its opinion almost entirely on the ways in which the initiative could theoretically be preempted by state or federal law after its adoption.

This Court must reject this dramatic expansion of the scope of pre-election judicial review of citizen's initiatives.

Assignments of Error

The trial court erred in granting declaratory judgment voiding *all* substantive provisions of the Community Bill of Rights, and in enjoining the entire Community Bill of Rights from appearing on the ballot. RP 42:19-46:10, 46:25-47:5. The substantive text of the Community Bill of Rights is included in the Statement of the Case, below. The issues

pertaining to these errors are:

1. Should initiative provisions recognizing the rights of neighborhood residents to approve large-scale development that deviates from City plans be struck in a pre-election challenge when the provisions apply to actions that have not been legislatively delegated to the governing body? (Argument § I.A)

2. Should initiative provisions recognizing the rights of neighborhood residents, and heightened protections for the natural environment, be struck in a pre-election challenge when the provisions are legislative, creating new law of general applicability? (Argument § I.B)

3. Should initiative provisions recognizing heightened environmental protections, workplace rights, and enforcement mechanisms within the city be struck in a pre-election challenge when the provisions do not attempt to wield state or federal powers? (Argument § I.C)

4. Should the initiative be immune from pre-election challenge because it broadens the civil, political, and environmental rights of the Spokane community within the City's boundary, and the authority to expand those rights beyond the floor of state and federal law is an inherent power of both the municipal government and the people of the City of Spokane? (Argument §§ II, III)

5. Should private party challengers have standing to pursue injunctive relief in a pre-election challenge even though they will not suffer actual and substantial damages caused by the mere appearance of the initiative on the ballot? (Argument § V)

Statement of the Case

In 2012 and 2013, Envision Spokane (an organization composed of City residents active in neighborhood, labor, and environmental groups), seeking "to build a healthy, sustainable, and democratic Spokane through the recognition of the rights of neighborhoods, the natural environment, and workers," CP 111, collected over 5,000 petition signatures to place the Community Bill of Rights initiative on the ballot. CP 40-41, 100-12. In May 2013, the Spokane City Council unanimously adopted a resolution requesting the Spokane County Auditor

> to hold a special election on November 5, 2013 in conjunction with the scheduled general election for the purpose of submitting to the voters of the City of Spokane for their approval or rejection the following proposition to amend the City Charter:
>
> **CITY OF SPOKANE**
> **PROPOSITION NO. 1**
> **A CITY CHARTER AMENDMENT**
> **ESTABLISHING A COMMUNITY BILL OF RIGHTS**
>
> Shall the City Charter be amended to add a Community Bill of Rights, which secures the right of neighborhood residents to approve re-zoning proposed for major new development, recognizes the right of neighborhood

> residents to reject development which violates the City Charter or the City's Comprehensive Plan, expands protections for the Spokane River and Spokane Valley-Rathdrum Prairie Aquifer, provides constitutional protections in the workplace, and elevates Charter rights above rights claimed by the corporation[s]?

CP 108-09. The substantive portions of the Community Bill of Rights are reproduced below. The full initiative, including recitals and boilerplate, is at CP 112.

> **A CITY CHARTER AMENDMENT ESTABLISHING A COMMUNITY BILL OF RIGHTS**
>
> Section 1. A new section be added to the beginning of the Charter of the City of Spokane, which shall be known as the "Community Bill of Rights," and which provides as follows:
>
> [Neighborhood Rights provisions:] **First, Neighborhood Residents Have the Right to Determine Major Development in Their Neighborhoods.**
>
> Neighborhood majorities shall have the right to approve all zoning changes proposed for their neighborhood involving major commercial, industrial, or residential development. Neighborhood majorities shall mean the majority of registered voters residing in an official city neighborhood who voted in the last general election. Proposed commercial or industrial development shall be deemed major if it exceeds ten thousand square feet, and proposed residential development shall be deemed major if it exceeds twenty units and its construction is not financed by governmental funds allocated for low-income housing.
>
> It shall be the responsibility of the proposer of the zoning change to acquire the approval of the neighborhood majority, and the zoning change shall not be effective without it. Neighborhood majorities shall also have a right to reject major commercial, industrial, or residential development which is incompatible with the provisions of

the City's Comprehensive Plan or this Charter.

Approval of a zoning change or rejection of proposed development under this section shall become effective upon the submission of a petition to the City containing the valid signatures of neighborhood majorities approving the zoning change or rejecting the proposed development, in a petition generally conforming to the referendum provision of the Spokane municipal code.

[Environmental Rights provisions:] **Second, The Right to a Healthy Spokane River and Aquifer.**

The Spokane River, its tributaries, and the Spokane Valley-Rathdrum Prairie Aquifer possess fundamental and inalienable rights to exist and flourish, which shall include the right to sustainable recharge, flows sufficient to protect native fish habitat, and clean water. All residents of Spokane possess fundamental and inalienable rights to sustainably access, use, consume, and preserve water drawn from natural cycles that provide water necessary to sustain life within the City. The City of Spokane, and any resident of the City or group of residents, have standing to enforce and protect these rights.

[Workplace Rights provisions:] **Third, Employees Have the Right to Constitutional Protections in the Workplace.**

Employees shall possess United States and Washington Bill of Rights' constitutional protections in every workplace within the City of Spokane, and workers in unionized workplaces shall possess the right to collective bargaining.

[Remedy provision:] **Fourth, Corporate Powers Shall be Subordinate to People's Rights.**

Corporations and other business entities which violate the rights secured by this Charter shall not be deemed to be "persons," nor possess any other legal rights, privileges, powers, or protections which would interfere with the enforcement of rights enumerated by this Charter.

In June 2013, Respondents ("Challengers") filed a complaint seeking a declaratory judgment voiding the initiative, and an injunction removing it from the ballot. CP 5-34. The Spokane County Superior Court ("trial court") ruled against all provisions of the Community Bill of Rights in an August 2013 hearing, declaring them "invalid as outside of the scope of legislative – of initiative power," and directing the auditor not to include the initiative on the ballot. RP 42:19-47:5; *see also* RP 47:6-47:23 (discussing conforming the Order to the court's oral ruling).

Envisions Spokane appeals this ruling.

Argument

Under established Washington law, judicial pre-election review of a citizen's initiative is narrow. It only examines whether the initiative seeks to exercise a power that has been legislatively-delegated to the local legislative body, or whether the initiative is legislative in nature. It explicitly bars an examination of whether the initiative is constitutional or otherwise legal – inquiries that must wait until after the initiative is adopted.

Here, the trial court refused to properly apply that settled law, which the initiative satisfies. Instead, the Challengers encouraged the court to apply a broad pre-election review, one that considered the initiative as if it were already enacted. The trial court accepted that

invitation, anchoring its opinion on the assertion that the initiative was preempted by state and federal law. The trial court also misapplied the established pre-election challenge rules.[1]

Even assuming that the trial court applied the proper standard, local governments,[2] especially home rule governments, may – using their inherent powers as governments – recognize broader rights (and restrictions that protect those rights) than provided by state or federal law, as long as those rights are limited by the boundaries of the municipality.

Finally, the people of the City of Spokane may choose to exercise greater powers than those currently claimed by their elected local government officials, by virtue of their constitutionally-guaranteed right to local self-government. When the people assert their self-government right to protect health, safety, and welfare, through the expansion of rights, their lawmaking (a vote of the citizenry) cannot be preempted.

---

1 This Court reviews the trial court's legal decision de novo, giving no deference to the trial court's legal determination voiding the initiative. *See Cedar River Water & Sewer Dist. v. King Cnty.*, 178 Wn.2d 763, 777, _ P.3d _ (2013) (citations omitted).

2 "Local governments" in this brief means general purpose local governments, like cities, not special purpose local governments, like fire districts.

I. The Community Bill of Rights initiative is a legislative measure that does not interfere with state-delegated authority, and other assertions of substantive invalidity cannot serve as grounds for removal of the initiative from the ballot.

In any pre-election challenge, all doubts must be resolved in favor of an initiative's validity. "[T]he burden is on the challenger of an initiative proposal to show that the people's legislative authority to effectuate charter amendments is restricted." *Maleng v. King Cnty. Corr. Guild*, 150 Wn.2d 325, 334, 76 P.3d 727 (2003). That stringent test is applied to protect the sanctity of the direct lawmaking process. "[T]he right of initiative is nearly as old as our constitution itself, deeply ingrained in our state's history, and widely revered as a powerful check and balance on the other branches of government. Accordingly, this potent vestige of our progressive era past must be vigilantly protected by our courts." *Coppernoll v. Reed*, 155 Wn.2d 290, 296-97, 119 P.3d 318 (2005) (citation omitted); *see also State ex rel. Mullen v. Howell*, 107 Wash. 167, 170-72, 181 P. 920 (1919) (refusing "a rule of strict construction [that would apply against the people's referenda power, because] the power of the whole people is in question").

Thus, it is the judiciary's duty to not block proposed law unless an initiative interferes with state legislative delegation of authority, or proposes something that is not legislative in nature. Judicial restraint

demands this.[3] Separation of powers demands this.[4]

The trial court voided the Community Bill of Rights provisions using both of those exceptions, in addition to creating a dramatic new expansion of judicial authority to examine the substantive validity of an initiative prior to an election. Specifically, the trial court applied that new rule to examine whether the local Bill of Rights could theoretically be preempted by state or federal law after approval by the voters.

The court did not strike every initiative section under every theory, as shown below, where X indicates the ground upon which the court removed the provision:

---

3 "Importantly, the relevant limitations [to local government authority] arise as much from narrow state judicial construction as from clear textual command. The texts of home rule grants contain a variety of ambiguities that state courts are free to interpret. The resulting interpretations may reflect judges' particular political ideologies and their hostility to certain forms of governmental regulation of private property. Alternatively, they might reflect a more general judicial uneasiness with creative local action and a corresponding preference for uniformity." David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2347-48 (2003).

4 "An unbounded view of property rights would relegate to the courts nearly all disputes over the propriety of a police-power regulation. This is *precisely* why the courts should be reluctant to allow property-rights absolutists to 'constitutionalize' the line of demarcation between property rights and police power. Public-policy disputes should remain in the popular branches of government." Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 859-60 (2000).

Community Bill of Rights section:	delegation to legislative body	administrative in nature	"state or federal preemption"
1. Neighborhood Rights	X	X	
2. Environmental Rights		X	X
3. Workplace Rights			X
4. Remedy provision subordinating corporate violators' rights			X

The trial court removed the first two sections of the initiative by misapplying the established narrow exceptions to pre-election review, and then proceeded to undertake an inquiry of the substantive validity of the initiative. In doing so, the trial court erroneously removed all provisions of the initiative from the ballot.

A. The initiative's Neighborhood Rights provision does not interfere with powers legislatively delegated to the local legislative body because it operates independently of the requirements of the Growth Management Act.

"An initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself." *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006) (citations omitted).

Unique to local initiatives, this rule arises when a statute grants authority to the legislative body of the local government rather than the

local government itself. *See* Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 82-83 (1973) (citations omitted). "If the grant of power is to the city as a corporate entity, direct legislation is permissible insofar as the statute is concerned. On the other hand, if the grant of power is to the legislative authority of the city, the initiative and referendum are prohibited." *Id.* at 83 (citations omitted); *see also, e.g.*, *Snohomish Cnty. v. Anderson*, 123 Wn.2d 151, 153-56, 868 P.2d 116 (1994) (holding that a citizen's referendum could not be used to repeal a countywide planning policy, because the state statute mandating the policy ordered the "legislative authority" of the county to draft and adopt it).[5]

5 Despite this rule's focus on the text of state legislation, two more recent cases, *Brisbane* and *1000 Friends*, encourage a court to look beyond the text in order to restrict the delegation of authority to the "legislative authority," and thus deny the people the tools of referendum and initiative even when the statute's text does not. *Whatcom Cnty. v. Brisbane*, 125 Wn.2d 345, 349, 884 P.2d 1326 (1994) (reasoning that "[u]nder the Growth Management Act, RCW 36.70A, the Legislature used the words 'county' or 'city' interchangeably with the words 'legislative body' of the county or city. Thus, the power to act under the Growth Management Act was delegated to the 'county legislative body'"); *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 175-76, 149 P.3d 616 (2006) (deriding "laser focus on the words 'legislative authority,'" and endorsing courts "glean[ing the legislative intent] from the statutory schema as a whole"); *see also, for criticism of this expansion, Brisbane*, 125 Wn.2d at 356-57, 884 P.2d 1326 (Madsen, J. dissenting); Trautman, *Initiative*, *supra*, at 83. Because *Brisbane* and *1000 Friends* dramatically flip this pre-election challenge rule on its head, with dire consequences for local direct democracy, courts should view these cases as limited to their facts. Specifically, these cases hold

Here, the initiative seeks to give residents of Spokane neighborhoods the ability to approve zoning changes necessary for large-scale developments. In the trial court, the Challengers sought to portray this approval authority as interfering with the mandates of the Growth Management Act ("GMA"). However, while there may be some overlap in specific situations, this neighborhood approval provision operates independently of GMA requirements.

Zoning is an independent police power inherent in cities, and thus, does not rely on state delegation for validity. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). The potential for conflict between the neighborhood rights provision and the GMA only occurs if amendments made to the City's Comprehensive Plan require parallel zoning changes to maintain consistency with the Plan as required by RCW 36.70A.130(d). Other zoning changes within the City operate independently of the concurrency requirement, and thus, do not interfere with the operation of state-delegated authority through the GMA. For example, rezones to other uses already allowed under the existing Comprehensive Plan, conditional use permits, and variances, are all zoning actions that can occur without triggering the procedures (and

that referenda are invalid when used to override a local legislative body's state-mandated actions under the Growth Management Act. Outside of this specific context, the express textual rule – which existed for over eighty years prior to *Bisbane* – must control.

thus the possible delegated authority) in the GMA. The initiative provisions may thus be validly applied in circumstances where the power has not been delegated.[6] The court must interpret the initiative to be in harmony with the GMA: the initiative provides additional protections to the residents of Spokane, it does not limit the GMA's authority or purpose.[7] The neighborhood rights provision cannot be struck from the

6 The City of Spokane is one of only two cities in the state that has chosen to maximize the scope of the people's power over actions of the municipal body. CITY OF SPOKANE CHARTER art. I, § 4 ("All power of the City, unless otherwise provided in this Charter, shall be exercised by the mayor and city council in a strong-mayor form of government. They shall be subject to the control and direction of the people at all times by the initiative, referendum, and recall provided for in this Charter."); *see also* CHARTER OF THE CITY OF BREMERTON art. I, § 5. In addition, several of the planning statutes at issue use the permissive "may." *E.g.*, RCW 35.63.080, 35.63.100. There is no concern about the local government failing to fulfill its state creature function when the "duty" is actually discretionary. It follows that a permissive statute that delegates authority should not automatically remove the people's direct democracy power, especially when the local government charter has expressed intent to maximize the people's power, as in Spokane.

7 The initiative's purpose is clearly to support the City's Comprehensive Plan, not work against it. The preamble to the initiative declares:

> Whereas, the people of the City of Spokane have adopted a Comprehensive Plan for the City of Spokane, which envisions the building of a healthy, sustainable, and democratic community, but the people recognize that the Comprehensive Plan is not legally enforceable in many important respects;
>
> Whereas, the people of the City of Spokane wish to create a Community Bill of Rights which would, among other goals, establish legally enforceable rights and duties to implement the vision laid out in the Comprehensive Plan . . . . .

CP 112. The Comprehensive Plan's vision, meanwhile, is supported by the decision-making right created in the initiative: "Growth will be

ballot simply because it might later be argued that it applies in a way that creates a conflict with the state's planning law.[8]

B. The Community Bill of Rights initiative is legislative, not administrative.

Article II, Section 1, of the Washington Constitution reserves the authority for citizen initiatives. Courts have declared that the initiative power must be used to propose legislative measures, rather than administrative ones.

"'Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for

managed to allow a mix of land uses that fit, support, and enhance Spokane's neighborhoods, [and] protect the environment . . . ." City of Spokane's Comprehensive Plan, ch. 3.3 (rev. ed. Jan. 2012), *available at* www.spokaneplanning.org/docs/Comp_Plan_2012_full.pdf. "The things that are important to Spokane's future include: Acquiring and preserving the natural areas inside and outside the city. . . . Protecting the character of single-family neighborhoods. . . ." *Id.* The Neighborhood Rights provision incentivizes working within the Comprehensive Plan, which furthers the Comprehensive Plan policies. *E.g.*, *id.*, ch. 11.4, N 8 ("developing a neighborhood planning process that is all-inclusive, maintains the integrity of neighborhoods, implements the comprehensive plan, and empowers neighborhoods in their decision-making").

8 In the trial court, the Challengers argued that the Environmental Rights section also violated the delegation theory. CP 240. The trial court properly did not accept this argument. *See* RP 44:23-45:16. We briefly mention it here in case the Challengers renew their argument in this appeal.

The legislature has made no express delegation of power limiting the people's authority to recognize environmental rights or the human right to water. There is no statute limiting authority to create the rights in the third section of the Community Bill of Rights specifically to the local legislative body.

subjects of a temporary and special character are regarded as administrative.'" *Durocher v. King Cnty.*, 80 Wn.2d 139, 152-53, 492 P.2d 547 (1972) (quoting 5 E. McQuillin, *The Law of Municipal Corporations*, § 16.55 (3d ed. 1969 rev. vol.)) (cited in *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 11, 239 P.3d 589 (2010)).

> "The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it."

Id. at 153 (quoting McQuillin, *supra*).

The first section of the Bill of Rights empowers residents to participate in the determination of the future course of new major development in their own neighborhoods that would require changes in the current zoning for the neighborhood. This establishes a new procedural right applicable throughout the city, and thus it is of a permanent and general nature. The Neighborhood Rights provision is legislative because the establishment of this new neighborhood approval process makes new general law within the City of Spokane – creating a right where one previously did not exist.

The second section of the Community Bill of Rights establishes heightened protections for the Spokane River and aquifer through the recognition of rights for those entities. Specifically, the provisions establish the rights of those water systems to "exist and flourish" and the rights of Spokane residents to "sustainably access, use, consume, and preserve water drawn from natural cycles." CP 112. These are general and permanent rights. Administrative action does not create new general rights. This provision makes new law, which is a legislative act.

C. Removal of the initiative from the ballot on the grounds of state and federal preemption defies settled Washington jurisprudence and would dramatically expand the role of the judiciary in pre-election initiative challenges.

Pre-election challenges based on an initiative's substance are generally barred. *Coppernoll*, 155 Wn.2d at 297, 119 P.3d 318 ("It has been a longstanding rule of our jurisprudence that we refrain from inquiring into the validity of a proposed law, including an initiative or referendum, before it has been enacted." (citations omitted)). "Courts offer a number of reasons for this rule, among them that the courts should not interfere in the electoral and legislative processes, and that the courts should not render advisory opinions." *Seattle Bldg. and Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980) (citation omitted).

Courts have created a narrow exception to this rule when state initiatives attempt to directly make federal law, or when local initiatives attempt to directly override state agency decision-making on state projects. *See Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718-20, 911 P.2d 389 (1996) (voiding a state-wide initiative that sought "to create a federal initiative process" because "it is simply not within Washington's power to enact federal law"); *Seattle Building*, 94 Wn.2d at 741, 744, 620 P.2d 82 (voiding a city initiative that would "prohibit expansion of [state and federal] highway facilities on Lake Washington").

Both *Philadelphia II* and *Seattle Building* illustrate that this narrowly construed exception to the general prohibition on review of substantive invalidity applies only when a local government attempts to wield a "higher" jurisdiction's power, like amending the Federal Constitution or determining the siting of a state highway. The Community Bill of Rights does not attempt this, and thus, it cannot be removed from the ballot on those grounds.[9]

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9 "So far as the state-local relationship is concerned, the legislature has ample opportunity to make its wishes known and to protect its prerogatives in relation to municipalities. In those instances in which there is doubt as to legislative intent, and in which there is a local interest in the matter in question, the court's approach should be that of giving the fullest opportunity to the local government to resolve problems as it sees them and to effectuate its policies." Philip A. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 WASH. L. REV. 743, 783 (1963).

1. The initiative's expansion of rights in Spokane workplaces does not attempt to wield a state or federal power.

While constitutional rights are traditionally "adopted to protect individuals against actions of the state," *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 422, 780 P.2d 1282 (1989) (emphasis in original removed), a state action element is not required, *see The Civil Rights Cases*, 109 U.S. 3, 23, 3 S. Ct. 18, 27 L. Ed. 835 (1883) (interpreting the Federal Thirteenth Amendment to not require state action); *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 989 P.2d 524 (1999) (holding the test for proper exercise of the people's initiative clause power does not consider state action as a threshold issue).

Thus, if the people intend to protect their constitutional rights against other private actors, the people have the authority to do so. *See Alderwood Assocs. v. Wash. Env't Council*, 96 Wn.2d 230, 635 P.2d 108 (1981); *see also* James M. Dolliver, *The Washington Constitution and "State Action": The View of the Framers*, 22 WILLAMETTE L. REV. 445, 455 n.42 (1986); Justice Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157, 181-84 (1984-85).

At a minimum, such rights are authorized by the police power. Dolliver, *supra*, at 456 ("The power the state uses to defend its citizens

from each other, however, is its police power. . . . The state does have the power to enforce one person's 'constitutional' rights against another. It is done under its police power, which is exercised by the legislature, not the courts." (citation omitted)). Workplace rights and protections are valid exercises of the police power. *See, e.g.*, *Seattle Newspaper-Web Pressman's Union Local No. 26 v. City of Seattle*, 24 Wn. App. 462, 604 P.2d 170 (1979).

Here, the initiative recognizes two distinct workplace rights. The first is that "[e]mployees shall possess United States and Washington Bill of Rights' constitutional protections in every workplace within the City of Spokane . . . ." CP 112. The provision uses the city's police power to expand employee workplace protections within Spokane. Thus, employees in private workplaces would have the same protections against their employers as public employees already have against their governmental employers. The need for these protections was well-expressed by Justice Utter almost thirty years ago:

> Employers can exert great control over the private as well as the working lives of their employees and can significantly impede their freedom of expression. Because of the economic and social dependence of employees on their jobs and the imbalance in the employer-employee bargaining position, employees may be unable to protect their own rights when, as is often the case, the option to quit and find comparable work elsewhere is not a viable alternative.

Utter, *supra*, at 192. Incorporating state and federal constitutional rights standards as the scope for workplace protections allows local rights to evolve as the interpretation of those state and federal rights evolves.[10] Such reference does not redefine the constitutional rights, but makes the same bundle of rights applicable in a new context using local law-making authority. This provision thus does not attempt to wield a state or federal power.

The second provision of the Workplace Rights section concerns the right to collectively bargain. Labor law is not an inherent federal power, nor has Congress preempted the field through the National Labor Relations Act. *See Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 664, 880 P.2d 988 (1994); *Stoddard-Wendle Motor Co. v. Automotive Machinists Lodge 942*, 48 Wn.2d 519, 522-23, 295 P.2d 305 (1956).

Here, the Community Bill of Rights proposes to amend the city's charter by adding "[w]orkers in unionized workplaces shall possess the right to collective bargaining." CP 112. Federal law, state law, and the proposed local law exist in harmony on this issue. Each asserts a right to

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10 If the provision spelled out every right (for example, "an employer must have reasonable suspicion before searching an employee's car parked on employer's property"), instead of just referencing the Washington Declaration of Rights and Federal Bill of Rights, it would accomplish a similar end: expanding rights in the private workplace. Referencing the Constitutions is expeditious, not necessary.

organize, which is not in conflict with a "higher" governmental authority. It is thus easily distinguishable from the narrow exceptions applied in *Philadelphia II* and *Seattle Building*, as this provision does not attempt to dictate to the National Labor Relations Board or mandate action by any other state or federal agency. The Challengers find conflict when there is instead harmony, as the local law merely reiterates, and broadens enforcement of, substantive rights already recognized by state and federal law.

2. The initiative's elevating the community rights above the "rights" of corporations that violate the community rights, does not attempt to wield a state or federal power.

The fourth section of the initiative provides for enforcement of the initiative by elevating the Bill of Rights above competing "rights" claimed by corporate violators.

Laws are ineffective without a remedy. Remedies frequently involve a loss of a right or privilege. *E.g.*, CONST. art. VI, § 3 ("All persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise."); *Adoption of Dobbs*, 12 Wn. App. 676, 531 P.2d 303 (1975) (revoking a father's right to consent to his child's adoption because he abandoned the child). The police power may even burden fundamental rights when the government acts to protect health and safety. *E.g.*, *State v. Balzer*, 91 Wn. App. 44, 56-58, 954 P.2d

931 (1998).

Laws may distinguish between corporations and natural persons. *E.g.*, *Adult Entm't Ctr. v. Pierce Cnty.*, 57 Wn. App. 435, 446 n.7, 788 P.2d 1102 (1990) (collecting the "long line of cases in which the Supreme Court has held that corporations cannot claim the protection of the privileges and immunities clause of the Fourteenth Amendment" (citations omitted)). Corporations are subservient to both the people and their governments. CONST. art. XII, § 1 ("all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law").

In addition to that authority, this provision is limited to only those corporations violating the rights contained within the initiative: "Corporations and other business entities *which violate the rights secured by this Charter* shall not be deemed to be 'persons,' nor possess any other legal rights, privileges, powers, or protections *which would interfere with the enforcement of rights enumerated by this Charter.*" CP 112 (emphasis added). The provision thus only affects corporations that violate the charter, and only to the extent necessary to enable enforcement of the underlying community rights.

This provision does not redefine the nature of corporations as "persons" within the City of Spokane. Instead, the initiative establishes that corporate "persons" violating the Community Bill of Rights shall not

have the authority to evade enforcement of the bill of rights by asserting competing corporate "rights."

The people have the right to express their preferred remedy. The local government has the authority to enforce its laws by appropriate measures. Limiting a violating entity's rights only to the extent necessary to provide that people's rights will not be violated is an appropriate measure. Doing so does not wield a state power as corporations would maintain their state and federal rights except in the context of their violation of the Community Bill of Rights.

3. The initiative's heightened protection for the natural environment does not attempt to wield a state or federal power.

Federal power does not include "residual authority that enables it to define 'property' in the first instance." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84, 100 S. Ct. 2035, 64 L. Ed. 741 (1980).

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

At the state level, goals articulated by water protection statutes since the 1950s include ecosystem preservation. *See Swinomish Indian Tribal Cmty. v. Wash. Dept. of Ecology*, 178 Wn.2d 571, 588-97, 311 P.3d 6 (2013) (outlining the "statutory scheme" of Washington water law, noting one of "the overall goal[s] of preserving natural resources and aesthetic values").

Here, the initiative provides that the Spokane River and the Spokane aquifer – from which all city drinking water supplies are drawn – shall have "the right to sustainable recharge, flows sufficient to protect native fish habitat, and clean water." CP 112. The initiative also provides that residents have a right to sustainable use of water supplies. *Id.* Establishing these rights does not appropriate a state or federal power, because both the proposed initiative and the water code emphasize an environmental protection policy. This provision is thus distinguishable from the narrow exception of *Philadelphia II* and *Seattle Building* because the initiative does not attempt to control the actions of the Department of Ecology, or usurp its authority to regulate water rights. Instead, the provision merely expands and broadens rights within the City boundaries consistent with the state policy protection of surface and ground water.

II. The City of Spokane possesses the inherent authority to expand the rights of people, and thus, the initiative must remain on the ballot.

The American system of government is premised on the recognition that governments exist to protect and secure the rights of people. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* Washington Enabling Act, ch. 180, 25 Stat. 676 (1889) (requiring the state constitution to "not be repugnant to the Constitution of the United States and *the principles of the Declaration of Independence*" (emphasis added)). The Washington Constitution further recognizes this role of government, declaring that governments "are established to protect and maintain individual rights." CONST. art. I, § 1; *see also* Talmadge, *supra*, at 861-88 (tracing the history of government power from ancient Greece to modern Olympia).

As part of that constitutional structure, local governments possess locally-plenary police powers. CONST. art. XI, § 11 ("Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."). "This is a direct delegation of the police power as ample within its limits as that possessed by the Legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, the regulation reasonable and consistent with the general laws."

Detamore v. Hindley, 83 Wash. 322, 326-27, 145 P. 462 (1915) (citation omitted). "[T]he court accords to municipalities plenary police power within their limits." *Kimmel v. City of Spokane*, 7 Wn.2d 372, 374, 109 P.2d 1069 (1941).

The people framing Washington's Constitution did not just endow local governments with expansive police powers, they also recognized the right of people to create home rule local governments with even broader powers. CONST. art. XI, § 10 ("Any city containing a population of ten thousand inhabitants, or more, shall be permitted to frame a charter for its own government, consistent with and subject to the Constitution and laws of this state . . . .").[11] This home rule provision "give[s] to cities of the first class, of which the city of Spokane is one, the largest measure of local self-government compatible with the general authority of the state." *Malette v. City of Spokane*, 77 Wash. 205, 224, 137 P. 496 (1913). Home rule authority

> [r]ecognize[s] that large, growing cities should be empowered to determine for themselves, and in their own way, the many important and complex questions of local

11 Home rule is an intentional empowerment of the local government, a clear move away from the concept of local government as mere state creature. *See* Barron, *supra*, at 2290, 2323-24 ("Substantive disagreements over the content of home rule, therefore, did not detract from the shared conviction that the [nineteenth century] urban crisis could not be solved by making Dillon's Rule even stricter or state legislative control more complete. . . . All of the home rulers opposed the state creature idea of local power.").

> policy which arise, and it is only when some act in the execution of that policy conflicts with the general law or contravenes the constitution, that the act can be questioned. . . . Whether we treat the [local power] as being derived from the constitution subject to the control of the general law, or as derived from the latter, the result will be the same. If derived from the constitution, it does not conflict with the general law, and if derived from the latter it is within its spirit and purpose.

Hilzinger v. Gillman, 56 Wash. 228, 234, 105 P. 471 (1909).

> If a state standard-setting or regulatory law was considered to determine both the ceiling as well as the floor for regulation, there would be no space for local regulation once the state had acted. That would choke off home rule and frustrate the democratic, decentralizing, and innovative goals that animate it.

Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URBAN LAWYER 253, 264-65 (2004).

A local government has plenary police power as broad as the legislature, regardless of whether the local government also has home rule. So when home rule is considered along with police power, the additional constitutional authority is "intended to do more than repeat what was already contained in the otherwise governing constitutional provisions."[12]

12 Also, the limitations on local governments' power in each constitutional provision is not the same. The police power provision requires that local government regulations "are *not in conflict with general laws*." CONST. art. XI, § 11 (emphasis added). The home rule provision requires the charter to be "*consistent with and subject to the Constitution and laws of this state* . . . ." CONST. art. XI, § 10 (emphasis added). These textual differences, adopted at the same time, can not mean the same thing. They suggest expanded power for home rule governments, power to act consistent with the policies of the state,

Darrin v. Gould, 85 Wn.2d 859, 871, 540 P.2d 882 (1975) (discussing CONST. art. XXXI). In *Malette*, the court described this combined power (authority from both Sections 10 and 11 of Article XI) as authorizing any local action not "contrary to some public policy of the state." 77 Wash. at 225, 137 P. 496.

The Community Bill of Rights initiative seeks to create a municipal bill of rights for Spokane residents by expanding civil, political, and environmental rights. Instead of doing so by ordinance through the municipal governing body, the initiative seeks to create that bill of rights within the local constitution – the home rule charter of the City. The additional power provided by the charter in this respect is constitutional in nature and import. It is the power to raise-rights – to exceed the state rights "floor" and add a new story of rights.[13]

Such power is analogous to the recognized power of state constitutional rights to exceed the "floor" of federal constitutional rights. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Shea v. Olson*, 185 Wash.

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which means immunity from preemption for rights-raising actions compatible with state policy goals.

13 "Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights. But states of course can raise the ceiling and afford greater protections under their own constitutions." *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010).

143, 153, 53 P.2d 615 (1936) ("Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered.").

Here, the initiative seeks to expand the rights of the people of Spokane solely within the City's boundaries by providing constitutional rights to employees in the workplace, expanding protections for the natural environment and neighborhood residents, and by restricting corporate interference with community rights. In doing so, the City is carrying out its core duty – as a government of this nation and as a home rule municipality – to secure and protect the rights of the community within its territory. As such, the initiative is a valid exercise of the authority of the municipality, and the initiative must proceed to a vote of the people.

III. The people of Spokane have an inherent right to local self-government, and that right cannot be preempted when exercised to protect the health, safety, and welfare of the Spokane community.

The people's right to local self-government is a constitutionally-guaranteed right held separate and apart from the authority of a municipal corporation.[14] This right requires that the initiative proceed to a vote.

14 For a short survey of legal thinking on the right to local self-government, *see* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1113-15 (1980).

A. The Washington Constitution guarantees the people's inherent right to local self-government.[15]

While the municipal corporation of the City of Spokane is a creation of the State of Washington, the people of the City constitute a separate, higher authority. *See Martin v. Tollefson*, 24 Wn.2d 211, 216, 163 P.2d 594 (1945) ("The people, under our system of government, are the source of all governmental power, and they adopted the constitution for the purpose of creating certain agencies through which that power should be exercised.").

The powers to create law to protect the rights of people to health, safety, and general welfare, are not created by the state constitution. Rather, they precede it. *Conger v. Pierce County*, 116 Wash. 27, 35, 198 P. 377 (1921) ("It is probable that this power is the most exalted attribute of government, and, like the power of eminent domain, it existed before and independently of constitutions."). Indeed, the power to create rights-protecting law is so foundational that this nation's system of governance guarantees the right of people to change or abolish those

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15 As we are arguing constitutional rights, we frame this argument through the six common approaches to constitutional interpretation. *See* Hugh Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence:* "Gunwall *is Dead – Long Live* Gunwall*!*", 37 RUTGERS L.J. 1169, 1185 (2006). This formulation covers the same ground as a *Gunwall* analysis, although *Gunwall* is not required here as there is no federal analog to the right to local self-government. *See id.* at 1200.

forms of governance that fail to protect their rights. *See* CONST. art. I, § 1 ("governments derive their just powers from the consent of the governed"); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That whenever any Form of Government becomes destructive of [people's rights], it is the Right of the People to alter or to abolish it . . . .").

The people's authority to govern, the right to local self-government, like the public trust doctrine,[16] is reserved in a free society regardless of constitutional expression.[17] *See Indiana ex rel. Holt*

16 The public trust doctrine is an ancient quasi-constitutional right. *See Caminiti v. Boyle*, 107 Wn.2d 662, 668-69, 732 P.2d 989 (1987). Washington Constitution Article XVII, Section 1, declaring state ownership of tidelands, "was but a formal declaration by the people of rights which our new State possessed by virtue of its sovereignty . . . ." *Id.* at 666 (citation omitted). In other words, the people would have that same public right without the textual expression in the constitution. Nor did Article XVII circumscribe the public trust doctrine's scope. *See Orion Corp. v. State*, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987) ("Recognizing modern science's ability to identify the public need, state courts have extended the [public trust] doctrine beyond its navigational aspects." (citations omitted)). As the public trust doctrine illustrates, constitutional expression does not deracinate an inherent right, or limit its scope. Thus the home rule and local police power provisions in Article XI, Sections 10 and 11, do not contain the entire scope of the inherent right to local self-government, nor divest that right from the people in favor of the municipality.

17 Most natural right theories become judicial limitations on the legislative power and thus can be criticized for furthering the "immense power" courts have "to change our lives." Alex Kozinski, *Natural Law Jurisprudence: A Skeptical Perspective*, 36 HARV. J. L. & PUB. POL'Y 977, 982 (2013). The right to local self-government operates in the inverse of this concern, in that it liberates the local legislative power from limitations that have been created by courts. It

v. Denny, 118 Ind. 449, 457-75, 21 N.E. 274 (1889) (recognizing an inherent right of local self-government embedded in the constitutional structure); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ."). For the people of Washington Territory to join the United States on equal footing, the people had to agree to adopt the Declaration of Independence's foundational principles. Washington Enabling Act, ch. 180, 25 Stat. 676 (1889). And they did.

The Washington Constitution recognizes this fundamental right – declaring, in the first section of the first article, that "[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." CONST. art. I, § 1. The framers relied on other state constitutions for inspiration and guidance. At the time of the Washington constitutional convention, the state from which the framers modeled their Declaration of Rights, Indiana,[18] recognized the right to local

enables the people to create law, rather than courts creating law.

18 "It is well-known that the delegates to the Washington Convention

self-government. "In the State of Indiana there can be no question that the doctrine of an inherent right of local self-government has been unequivocally accepted and applied . . . ." Howard Lee McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 198 (1916) (citing *Holt*, 118 Ind. 449, 21 N.E. 274). Our state constitution's framers worked from the same raw material, the same fundamental structure, as Indiana. The right to local self-government is an inherent part of that structure.

The people who ratified Washington's constitution recognized that it secured their inherent right to self-government. CONST. art. I, §§ 1, 32 ("A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."). The people would have recognized their right to local self-government in the reserved rights, especially in light of the express inclusion of a formation process for city charters provided in Article XI, Section 10. *See* CONST. art. I, § 30 ("The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.").

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borrowed heavily from the constitutions of other states. The Washington Declaration of Rights, for example, was largely based on W. Lair Hill's proposed constitution and its model, the Oregon Constitution. The Oregon Constitution in turn borrowed heavily from the Indiana Constitution." Robert F. Utter & Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 9 (2002) (citation omitted).

> It was undoubtedly part of the people's intent to create a system of government and guaranteed individual rights that conformed with all the then-current principles of democracy, representative government, state sovereignty, and fundamental human rights. This general intent should be considered and honored whenever a party urges a construction of the constitution that appears to violate any of these basic principles, whether expressly stated in the constitution or not.

Utter & Spitzer, *supra*, at 9.

This recognition, that the people of a community constitute a power separate from their municipal corporation, is foundational law within the United States as it implements the right to self-government at the local level. *See Holt*, 118 Ind. at 469, 21 N.E. 274, 281 ("the right of local self-government in towns and cities of this State is vested in the people of the respective municipalities"). Yet, Washington courts have historically curtailed this right.[19] The courts have instead endorsed the "state creature" concept of local governments over the democratic polis concept.[20]

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19 This argument invites judicial enforcement of the people's right to local self-government. The court has so far discussed the right to local self-government only as a right held by the municipality, not the people. *See Meehan v. Shields*, 57 Wash. 617, 620, 107 P. 835 (1910); *State ex rel. Clausen v. Burr*, 65 Wash. 524, 526-30, 118 P. 639 (1911). These cases erroneously find sovereign power originating in the state legislative branch, not the people. *See* Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 26-34 (2012); *Holt*, 118 Ind. at 457-59, 21 N.E. 274.

20 In the era of Washington State's formation, local government theorists believed "[h]ome rule would create a city republic, a new sort of sovereignty, a republic like unto those of Athens, Rome, and the

It is past time for the courts to enforce the rights inherent in the democratic concept of local governments. State-sponsored studies of local governments in Washington suggest that changes over the last half-century require a "conscious effort to adapt our traditions, laws, and practices to the new challenges that local governments face." *A History of Washington's Local Governments: Washington State Local Governance Study Commission Report* (Update Oct. 2007), at D-6, *available at* www.leg.wa.gov/JointCommittees/JSCJTD/Documents/2007HistoryofWALocalGov.pdf. To the extent that some of these "traditions, laws, and practices" are judicially-created, the court must finally align its jurisprudence with the scope of the pre-existing right to local self-government. Two recent trends highlight this prudential necessity.

Today, we face an ecological crisis unprecedented in history, and unimaginable by policy-makers mere decades ago. *See, e.g.*, James Hansen et al., *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future*

mediæval Italian cities, a republic related to the state as the states are now related to the nation at large." Frederic C. Howe, THE CITY: THE HOPE OF DEMOCRACY 164 (1905). "This agitation for home rule is but part of a larger movement. It is more than a cry for charter reform; more even than a revolt against the misuse of the municipality by the legislature. It partakes in a struggle for liberty, and its aim is the enlargement of democracy and a substitution of simpler conditions of government. It is a demand on the part of the people to be trusted, and to be endowed with the privileges of which they have been dispossessed." *Id.* at 167-68.

Generations and Nature, 8 PLOS ONE at 20 (Dec. 3, 2013), *available at* www.plosone.org/article/info:doi/10.1371/journal.pone.0081648 ("Our parent's generation did not know that their energy use would harm future generations and other life on the planet. If we do not change our course, we can only pretend that we did not know."). Locally, the Spokane River and aquifer are already imperiled. *See, e.g.*, City of Spokane's Comprehensive Plan, *supra*, ch. 9.1 ("Latah Creek and the Spokane River do not run as clean nor do they support fish and wildlife the way they used to, the air is not as easy to breath, and the aquifer is increasingly pressured by pollution."). Researchers predict numerous climate change impacts that will exacerbate stress on aquatic ecosystems and water resources, such as the Spokane River. *See* Dept. of Ecology, *Climate Change Impacts: Preparing Washington for a Changing Climate*, Pub. No. 12-01-010 (Aug. 2012), *available at* https://fortress.wa.gov/ecy/publications/publications/1201010.pdf. International, federal, and state policies to mitigate the causes of this crisis have failed to avert impending ecological collapse, and theorists see local innovation as a necessary driver for required policy changes. *See, e.g.*, David W. Orr, *Governance in the Long Emergency*, *in* STATE OF THE WORLD 2013: IS SUSTAINABILITY STILL POSSIBLE? ch. 26 (WorldWatch Institute 2013), *available at* www.postcarbon.org/article/1650005-

governance-in-the-long-emergency (discussing building robust democracies as necessary for sustainability).

People in local communities, pursuant to the inherent right to self-government recognized by the state and federal constitutional frameworks, have the authority to create heightened environmental rights.

Second, today, corporations are as powerful as nation-states. *See* Sarah Anderson & John Cavanagh, *Top 200: The Rise of Corporate Global Power* 3, Institute for Policy Studies (2000), *available at* www.ips-dc.org /files/2452/top200.pdf ("Of the 100 largest economies in the world, 51 are corporations; only 49 are countries (based on a comparison of corporate sales and country GDPs). To put this in perspective, General Motors is now bigger than Denmark, DaimlerChrysler is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela . . . ."). Corporations pose the new threat to human rights, *see, e.g.*, Gary Ruskin, *Spooky Business: Corporate Espionage Against Nonprofit Organizations* (Essential Information Nov. 20, 2013), *available at* www.corporatepolicy.org/spookybusiness.pdf (investigating corporate spying on civil society often using former federal intelligence agents), and environmental health, *see, e.g.*, David W. Orr, *Governance*, *supra* ("In our time, strong democracy may be our best hope for governance in the long emergency, but it will not develop, persist, and flourish without significant

changes. The most difficult of these will require that we confront the age-old nemesis of democracy: economic oligarchy."). Just as the people adopted the Federal Bill of Rights in the eighteenth century out of fear of federal tyranny, communities today must adopt new rights-frameworks which protect them from state-created corporate entities.

If the right of people to local self-government was enforced, solutions to these problems could emerge at the local level. The experimentation policy of federalism provides a parallel:

> In an era when the federal government has seemed unable or unwilling to address a variety of pressing societal problems, states have taken the lead in providing their own solutions. This trend of state-level reform represents a kind of return to the early Progressive movement of the late nineteenth and early twentieth centuries, when state-sponsored programs constituted the core of the Progressive agenda. It was the great progressive Justice Louis Brandeis who extolled the virtues of the states as "laboratories" for experimenting with novel social policies. The main concern for Brandeis, along with other Progressives, was for the federal government to get out of the way and allow state policies to flourish.

Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 33 (2009) (citation omitted). Local government reformers actually preceded Brandeis' policy argument for federalism when they identified cities as policy "experiment station[s]." Howe, *supra*, at 303. The experimentation policy that bolsters federalism is magnified a hundred times when it is employed at the local

level. The vitality of local experimentation depends on the scope of judicial enforcement of pre-existing local self-government authority:

> Importantly, early home rulers were also aware, in a way now too often forgotten, that the rules that constitute local power help determine the kind of experiments local governments may undertake. The present state law rules cannot be taken as given. Rather, they may need to be changed to open up possibilities for the exercise of local power along currently foreclosed substantive lines.

Barron, *supra*, at 2344.

For the right to local self-government to be vindicated, courts must recognize that the right consists of both a procedural right and a substantive right. The procedural right consists of the right to propose new rights-based laws to the electorate, laws that seek to protect health, safety, and welfare within local borders. The substantive right consists of the power to adopt and enforce those laws.

B. The trial court's removal of the initiative from the ballot violates the people's procedural right to local self-government.

The procedural right to local self-government must allow the people of a community to propose new rights-based laws that protect health, safety, and general welfare.

The people of Spokane, exercising their self-government right to propose new rights-protections, placed the Community Bill of Rights on the ballot for a popular vote. CP 111-12. In refusing to dismiss the

pre-election challenge to the initiative and proceeding to strip the initiative from the ballot the trial court violated the people's procedural right to local self-government. That action directly nullified the people's ability to govern themselves by stopping them from proposing the initiative to the electorate. Indeed, the Spokane City Council requested that the initiative be placed on the ballot, CP 104-09, thus the trial court invalidated the law-making rights of both the electorate and the elected city government. The people followed the proper procedure for placement of the initiative onto the ballot. CP 40-41, 100-09. They have the right to vote on it.

It is ironic that while legislative bodies – operating through powers given to them by the people – are immune from pre-adoption challenges to proposed legislation, people of a community proposing direct legislation are not. At the very least, the people should be as protected in the exercise of their right to local self-government as their chosen legislative bodies are protected in their lawmaking process. In this case, private actors sought to constrain both the electorate and the City's legislative body – something this Court should definitively reject.

C. The initiative – as a rights-based law protecting the health, safety, and welfare of the Spokane community – is an exercise of the people's substantive right to local self-government.

The people of Spokane possess not only a procedural right to local self-government – which protects their right to propose

rights-expansions – they also possess a substantive right to local self-government. That substantive right provides the authority to adopt and enforce the initiative. It also insulates rights-based initiatives from preemption by state or federal law.

Preemption is a concept foreign to the creation and recognition of people's rights. Rights recognized by different levels of government overlap, they cannot be preempted. *See, e.g.*, *State v. Gunwall*, 106 Wn.2d 54, 65-66, 720 P.2d 808 (1986) (holding Washington Constitution, Article I, Section 7, is "more expansive" than, and read "independently of," the Federal Fourth Amendment). The most expansive right controls (regardless of which level of government recognizes that right), and that controlling right cannot "preempt" or nullify the others.

With the adoption of a local bill of rights, residents of Spokane would possess rights derived from their local constitution, in addition to the rights they already have under the Washington Constitution and the Federal Constitution. Just like the Washington Declaration of Rights cannot restrict Federal Bill of Rights protections guaranteed to Washington residents (or vice versa); a local bill of rights cannot restrict state or federal rights protections guaranteed to Spokane residents.

Put simply, residents of Spokane are citizens of all three levels of government, and the extent of their rights is defined by the most extensive

right guaranteed by any of those three levels of government. The legal concept of preemption, therefore, is inapplicable to rights-creation and expansion, because the failure of a "higher" level of government to recognize certain rights cannot serve to bar another level from doing so.

The substantive right to local self-government, of course, does not insulate *any* local law from state or federal preemption. Two criteria must be met. First, the measure must create new rights or expand existing rights. Second, the creation or expansion of rights must seek to protect the health, safety, or welfare of the community within its borders.

Thus, the substantive right to local self-government derives from the core principle of American governance – the ability and authority of the people collectively to protect themselves from harm by securing new rights.

The Community Bill of Rights meets those criteria. First, it is purely a rights-based law, proposing new rights for neighborhood residents, the natural environment, and workers in the workplace. Second, the expansion of rights seeks to protect the health, safety, and welfare of the people of Spokane.

The initiative is thus an assertion of the people's substantive right to local self-government, and it must be protected as such. The issue on this appeal is nothing less than the question of whether the voters of

Spokane can decide whether to recognize these community rights. State and federal constitutional guarantees require that the issue be answered in the affirmative.

IV. Each provision of the initiative is severable from other provisions.

"In general, if part of an initiative is within the scope of the initiative power, the governmental entity must place the valid part on the ballot." *Priorities First v. City of Spokane*, 93 Wn. App. 406, 412, 968 P.2d 431 (1998) (citation omitted). Courts can engage in extensive redaction of invalid initiative language and still order the initiative onto the ballot. *See, e.g.*, *State ex rel. Griffiths v. Super. Ct. Thurston Cnty.*, 92 Wash. 44, 45-47, 159 P. 101 (1916).

Here, each of the substantive sections each contain multiple rights, so the title "Community Bill of Rights" is not misleading even if only one of those sections, or only a few provisions, were valid. The Community Bill of Rights also contains a severability clause. CP 112 ("If any part or provision of these Charter provisions is held invalid, the remainder of these provisions shall not be affected by such a holding and shall continue in full force and effect."). This Court has the authority and duty to order all valid portions of the Community Bill of Rights onto the ballot, even if the Court were to remove part of the original initiative.

V. Challengers lacked standing for injunctive relief as only the sponsoring local government may pursue injunctive relief in a pre-election challenge, and here the City of Spokane was not a Plaintiff to the action.

The standing requirements for injunctive relief are higher than for a declaratory judgment. *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 435, 260 P.3d 245 (2011). In a pre-election challenge, private parties may have standing to receive declaratory judgment, but do not have standing for an injunction. *See id.* Only the sponsoring local government, the municipality through which the people propose the initiative, may have the requisite standing to keep an initiative off the ballot. *Compare id.* (no sponsoring government plaintiff, no injunction), *with City of Longview v. Wallin*, 174 Wn. App. 763, 782-87, 301 P.3d 45 (2013) (sponsoring government plaintiff receives injunction).

Here, the City of Spokane was not a Plaintiff. CP 5, 9. Private parties and a non-sponsoring local government brought the action. CP 5, 9-14. While these Challengers may have standing for a declaratory judgment, they have failed to prove standing necessary for injunctive relief. CP 89-96. The trial court should not have struck the initiative from the ballot because the City of Spokane was not a Plaintiff.[21]

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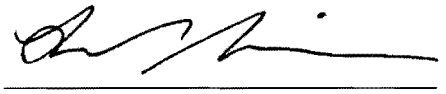
21 Not only was the City not a Plaintiff, but the City Council voted against bringing a pre-election challenge to the initiative, CP 83-84, even after being briefed on this injunction standing issue, *see* CP 66 fn.8.

Conclusion

This Court must reverse the trial court's declaratory judgment, which dramatically expanded the scope of pre-election review and used that expanded scope to strike the Community Bill of Rights from the ballot. Even if this Court does not find all provisions of the Community Bill of Rights valid, it must reverse the trial court on the specific provisions that are valid. In addition, as the trial court struck the initiative from the November 2013 ballot based on its declaratory judgment ruling, this Court should issue an order to the Spokane County Auditor that the valid parts of the initiative should be placed on the next available ballot.

Respectfully submitted on January 6, 2014,



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Declaration of Service

I declare under penalty of perjury and the laws of the State of Washington that on January 6, 2014, 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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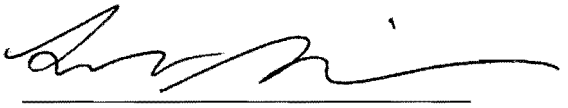

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