No. 91551-2

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

ENVISION SPOKANE,

Appellant,

v.

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.

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I. INTRODUCTION

Respondents are a coalition of Spokane voters, elected officials, nonprofit corporations, local businesses, and Spokane County. Consistent with well-established Washington law, Respondents filed a routine pre-election challenge of a local initiative proposed for the City of Spokane. After extensive briefing and argument, the trial court properly entered a declaratory judgment declaring that Envision Spokane, Inc.'s ("Envision's") initiative was beyond the scope of the limited local initiative power because it sought to create local laws changing constitutional rights, conflicting with superior law, or otherwise intruding on administrative matters or matters delegated to the City or County's legislative authority.[1]

The trial court correctly exercised its power under the Uniform Declaratory Judgment Act to "declare rights, status and other legal relations" concerning the proposed initiative. RCW 7.24.010. That power includes declaring the status of a local initiative as beyond the scope of the local initiative power, and the right of the County Auditor to refrain from placing invalid measures on the ballot. *See, e.g.*, *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746 (1980) (affirming declaratory judgment for private plaintiffs declaring local initiative

[1] The trial court proceedings involved two proposed local initiatives, both of which were declared invalid. The sponsor of the other initiative, Spokane Moves to Amend the Constitution ("SMAC") did not appeal the trial court's judgment declaring its proposed local initiative invalid. As a result, this appeal involves only Envision's initiative.

exceeded initiative power); *Ford v. Logan*, 79 Wn.2d 147, 151 (1971) (affirming declaratory judgment for private plaintiffs declaring local initiative exceeded initiative power); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 432-33 (2011) (reversing denial of declaratory judgment for private plaintiff; declaring local initiative exceeded initiative power); *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386 (2004) (affirming declaratory judgment "striking [initiative] from the ballot"). Washington courts routinely exercise this power in pre-election challenges such as this case. Indeed, the trial court's decision here was at least the sixth time in the previous year alone that Washington courts have found an initiative exceeds the local initiative power.[2]

Unlike the statewide initiative power found in the constitution, the local initiative power is based on a statutory grant of limited authority to cities. Well-established Washington law recognizes that courts should engage in pre-election review of local initiatives to ensure they do not exceed the limited scope of the local initiative power. Here, Petitioner Envision asks the Court to adopt a new and conflicting standard that

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[2] *See Patella v. City of Vancouver*, No. 13-2-01866-1, Mem. of Op. (Clark Cnty. Super. Ct. July 31, 2013) (proposed local initiative prohibiting the use of resources to promote light rail declared beyond scope of local initiative power and ineligible for the ballot because it interfered with administrative matters and exceeded the powers delegated to the local legislative authority); *see also City of Longview v. Wallin*, 174 Wn. App. 763(2013) (local automated traffic camera initiative exceeded scope of local initiative power because power was delegated to local legislative authority not the local electorate); *Eyman v. McGhee*, 173 Wn. App. 684 (2013) (same); *City of Monroe v. Wash. Campaign for Liberty*, 173 Wn. App. 1027 (2013) (same); *City of Bellingham v. Whatcom Cnty.*, No. 691520 (Wn. Ct. App. Sep. 21, 2012) (invalidating proposed local initiative changing the rights of natural communities and prohibiting the transportation of coal through the city).

would allow invalid measures to appear on local ballots. Washington law is plain, however, and the Court should resist Envision's effort to change the law. The citizens of an individual city may not use the local initiative power to enact local laws that change constitutional rights, conflict with superior law, or intrude on administrative matters or matters the state has delegated to the county or city legislative authorities. The trial court properly applied this well-established standard to declare Envision's initiative beyond the scope of the initiative power. Consistent with the County Auditor's and the City of Spokane's requests, the trial court declared the invalid initiative was, therefore, ineligible for the ballot. The trial court should be affirmed.

II. ISSUES

1. Did the trial court correctly determine that Respondents satisfied the procedural requirements for obtaining a declaration that Envision's initiative was invalid and properly declare the County Auditor's right not to place an invalid initiative on the ballot? (Sections IV.A & IV.F).

2. Did the trial court correctly declare that the zoning provision and the water and aquifer rights provision are invalid because they are administrative in nature and involve powers delegated to local legislative bodies? (Sections IV.C.1-2).

3. Did the trial court correctly declare that the workplace provision exceeds the City of Spokane's legislative authority when it purports to create new constitutional rights and conflicts with existing laws governing

collective bargaining? (Sections IV.C.3).

4. Did the trial court correctly declare that the personhood provision exceeds the City of Spokane's legislative authority when it purports to strip constitutional and statutory rights from Spokane's corporate citizens? (Sections IV.C.4).

5. Should this Court recognize new local government rights that are superior to state and federal law and expand the local initiative power to allow invalid initiatives to appear on the ballot? (Section IV.D.1-3)

6. Did the trial court correctly declare that the initiative's offending provisions are not severable when severing any single provision would render the initiative's ballot title misleading. (Section IV.E).

III. STATEMENT OF THE CASE

Respondents are Spokane County, elected officials in the City of Spokane, small business owners, local community associations, and corporations. They are dedicated to the City of Spokane, striving to improve its parks, amenities, economic vibrancy, job opportunities, and workplace protections. Envision's initiative sought to use the local initiative power to strip Respondents of their constitutionally protected rights, and to burden Respondents' development activities, water use, and employee relations.[3] Respondents challenged Envision's initiative to

[3] *See, e.g.* CP 132-33, ¶ 4 (Declaration of Mark Richard); CP 198-99, ¶ 3 (Declaration of Kate McCaslin); CP at 177-79 ¶ 5(Declaration of Michael Cathcart); CP 149-50 , ¶ 3 (Declaration of Neil Muller); CP 138-139 ¶ 3 (Declaration of Richard Hadley); CP at 166-168, ¶¶ 3-5 (Declaration of Al French); CP at 190-92, ¶ 6 (Declaration of Spokane

protect their constitutional rights and to prevent an invalid local initiative from attempting to change state and local zoning requirements, and federal and state water and workplace laws.

Envision is a corporation headquartered in Spokane that has sponsored several similar unsuccessful local initiatives since 2009. CP 16 ¶ 33. Among other things, Envision's initiatives have sought to take away rights the United States and Washington Constitutions confer on for-profit and non-profit corporations. *Id.* This case concerns Envision's latest effort which Envision calls a "Community Bill of Rights." CP 112.

A. The Initiative Would Strip Constitutional and Statutory Rights From Spokane's Corporate Citizens.

The Envision initiative's "corporate rights" provision states:

> [c]orporations 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. The initiative would thus deprive entities that run afoul of its provisions of their right under the Washington state constitution to defend themselves in court, just "like natural persons." Wash. Const. art. XII, § 12. The initiative would also strip rights guaranteed to corporate citizens by federal law, with free speech, equal protection, and due process foremost among them. *Citizens United v. Fed. Election Comm'n*, 558

Entrepreneurial Center); CP 172-173, ¶ 3(Declaration of Building Owners and Managers Association).

U.S. 310, 342-43 (2010) (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986)).

B. The Initiative Would Create New Constitutional Rights and Contradict State and Federal Laws Governing Zoning, Water Resources, and Collective Bargaining.

Envision's initiative also seeks to (i) alter the manner in which decisions about new developments are made under Spokane's zoning code (the "zoning provision"), (ii) change the way water resources are regulated under federal, state, and local law (the "river and aquifer provision"), and (iii) confer new collective bargaining rights and constitutional rights on employees within Spokane (the "workplace provision"). CP 112.

Envision's Zoning Provision. As Washington's state land use laws require, zoning decisions about new real estate developments in the City of Spokane are made by the city council through the council's comprehensive land use plan and the Spokane Municipal Code. *See* Spokane Mun. Code Title 17 (zoning regulations); Spokane City Charter Art. XV, § 128. Envision's initiative attempts to change this state-mandated process by vesting decision-making authority with local residents rather than local legislative bodies.

Envision's zoning provision gives "neighborhood majorities" the authority to approve or reject "major commercial, industrial or residential developments." CP 112. The provision requires parties seeking zoning approval for certain new developments to obtain signatures from over half of "neighborhood residents" who voted in the last general election, and to

submit a "petition to the City." *Id.* Neighborhood residents may veto "all major commercial, industrial, or residential developments" by a simple vote. *Id.* The provision also expressly gives "neighborhood majorities" the authority to interpret the Comprehensive Plan (developed by the City Council pursuant to the GMA) and reject developments that are incompatible with it. *Id.*

Envision's River and Aquifer Provision. A latticework of interrelated federal, state, and local regulations govern and protect the Spokane River and the Spokane Valley-Rathdrum Prairie Aquifer—two bodies of water shared by Spokane residents with residents of cities and counties throughout Idaho and Washington. CP 112. These laws include Washington's Growth Management Act, the federal Clean Water Act, the Spokane County Code, and the City of Spokane Municipal Code.

Envision's river and aquifer provision would make three significant changes to these laws. ***First***, the provision would bestow "fundamental and inalienable" rights to exist and flourish on the "Spokane River, its tributaries, and the Spokane Valley-Rathdrum Prairie Aquifer…" *Id.* ***Second***, the provision would vest "fundamental and inalienable rights" with Spokane residents "to sustainably access, use, consume, and preserve water drawn from natural cycles that provide water necessary to sustain life within the City." *Id.* ***Third***, the provision would create a private right of action for Spokane residents, giving them "standing to enforce and protect these rights." *Id.* This provision contains

no geographic limitations, presumably allowing Spokane residents to exercise these rights against residents of cities and counties throughout Idaho and Washington.

Envision's Workplace Provision. State and federal labor laws, including the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.* and the Washington Public Employees' Collective Bargaining Act, RCW ch. 41.56, currently govern the obligation of employers to collectively bargain with their employees in Washington. Private employers are not, however, subject to the federal Bill of Rights or the Bill of Rights in the Washington State Constitution, nor are any other private citizens. The long ago established "state action" doctrine ensures these rights (and obligations) apply only to state actors. *Pub. Util. Comm'n of D.C. v. Pollack*, 343 U.S. 451, 461 (1952) (First and Fifth Amendments restrict government, not private persons); *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (Fourteenth Amendment restricts only state action).

Envision's workplace provision would contradict the U.S. and Washington Constitutions by eliminating the state action requirement and extending the Bill of Rights' protections and obligations "in every workplace within the City of Spokane." CP 112. In other words, the provision purports to create new constitutional rights for American citizens—but only for those who live in Spokane. Envision's workplace provision would also confer "the right to collective bargaining" on "workers in unionized workplaces," whether or not allowed by the NLRA,

the Public Employee's Collective Bargaining Act, or negotiated agreements that currently exist between Spokane employers and their employees. *Id.*

C. The City was Required to Place the Initiative on the Ballot Until Declared Invalid.

In 2013, Envision collected the requisite number of signatures to submit its initiative to the Spokane City Council. CP 108-109. As the Spokane City Charter requires, the City Council performed its ministerial duties by passing a perfunctory resolution requesting the County Auditor place the initiative on the November 5, 2013 ballot. *Id.* Spokane's City Charter gives the City Council no discretion in this regard. The Council must pass such a resolution for any initiative that is supported by the requisite number of signatures—regardless of how outlandish it might be. Spokane City Charter § 82; CP 108. Washington courts have made plain that reviewing a local initiative to determine whether it exceeds the scope of the local initiative power is "'exclusively a judicial function.'" *Eyman v. McGehee*, 173 Wn. App. 684, 686 (2013 (quoting *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 714 (1996)). Indeed, after the resolution passed, several city council members joined the coalition, in their personal capacity, as plaintiffs bringing this challenge to the initiative. CP 4-5.

D. Respondents Sought to Protect Their Rights and the Rights of Spokane Citizen's From an Invalid Initiative.

Respondents filed a complaint on Jun 3, 2013 challenging the validity of the initiative. CP 4-33. Respondents asked for the trial court's

protection because the initiative sought to circumscribe the rights of non-profit and for-profit entities and the County, and to upset existing law governing zoning, water resources, and employee-employer relations. *Id.* Respondents asked for two forms of relief: (i) immediate, emergency injunctive relief precluding the county Auditor from placing the initiative on the ballot, and (ii) a declaration "that the … Initiative[s] [are] beyond the scope of the initiative power of the City of Spokane, [are] otherwise invalid and unenforceable, and should not be placed on the ballot." CP 33.

Respondents moved for a preliminary injunction the same day they filed their complaint, seeking to enjoin the initiative from appearing on the ballot. CP 126. The trial court denied Respondents' preliminary injunction motion, recognizing there was sufficient time to hold a subsequent declaratory junction hearing before the deadline to print the ballots. CP 210-12.

E. The Trial Court Declared Envision's Initiative Invalid and Ineligible for the Ballot.

Respondents moved for a declaratory judgment declaring the initiative exceeded the local initiative power and as such was not a "proposed ordinance" that could appear on the ballot. CP 213. The City of Spokane, also named as a defendant, did not oppose Respondents' request for a declaration that the initiative was invalid and may not be placed on the ballot. To the contrary, if the initiatives were declared invalid, the City requested:

> that the Court issue a declaratory judgment declaring that the Spokane County Auditor is under no legal compulsion to place the invalid initiative(s) on the ballot.

CP 255. The City made this request because of the harm "an election that is without legal force or effect" would cause. CP 252. Such an election, the City confirmed, wastes taxpayer money and "would undermine the integrity of the local initiative process" and "create voter confusion." *Id.*

The trial court granted Respondents' motion for declaratory judgment. CP 460-64. The trial court held Envision's initiative invalid because: (i) "the zoning provision is … administrative in nature and involves powers delegated … to the legislative bodies of municipalities;" (ii) the water provision "conflicts with state and federal law, and is administrative in nature;" (iii) the workplace provision "attempts to expand constitutional protections, which is beyond the City of Spokane's jurisdiction … [and] conflicts with federal and state labor laws;" and (iv) the corporate rights provision conflicts with federal and state law, including the constitutions, because it "attempts to change the rights of corporations." CP 461-62.

Envision's initiative was not severable, the trial court held, because all of its provisions were invalid—leaving nothing the voters could legally enact. The court declared:

> the Envision and SMAC initiatives are invalid as outside the scope of the local initiative power. The Court further DECLARES that neither initiative shall appear on the November 5, 2013 ballot, and directs the Auditor not to include them on that ballot.

CP 463. The trial court entered final judgment. Envision appealed.

F. The Appellate Commissioner Ruled Respondents' Standing To Obtain Declaratory Relief Was "Not Debatable."

Envision filed with this Court an emergency motion to stay the trial court's ruling and allow the initiative to appear on the ballot. Emergency Mot. for Stay at 1 ("Mot. for Stay"). A stay was proper, Envision argued, because the trial court's ruling was in fact a preliminary injunction that Respondents lacked standing to obtain. *Id.* at 5. Under Envision's theory, the ***only*** party with standing to obtain a declaration that a city-wide initiative is invalid and may not appear on the ballot is the city itself. The City of Spokane disagreed. The City opposed Envision's motion, contending, among other things, that the City would be harmed if an invalid initiative were placed on the ballot. Resp. Br. of City of Spokane in Opp. to Req. for Emergency Stay at 1-2.

Envision's motion did not argue the trial court was incorrect in determining the initiative was invalid. Mot. for Stay at 1-25. Instead, Envision claimed the United States and Washington constitutions create a fundamental right to place an ***invalid*** initiative on the ballot. *Id.* at 9. But there is no constitutional right to have any local initiative appear on the ballot and certainly no right for an invalid measure to appear. The Spokane charter allows local initiative's for proposed ordinances only, not for advisory votes. The Commissioner denied Envision's request for a stay. Ruling re Mot. to Stay at 5. She held that Respondents' standing to

obtain declaratory relief was not "debatable." *Id.* at 2-4. The Commissioner also agreed the City is not the only party with standing to obtain a declaration that an invalid initiative from appearing on the ballot—private parties like Respondents can do so, too. Envision Spokane continued with this appeal.

IV. ARGUMENT

Washington courts regularly grant the relief Respondents obtained in this case—a declaratory judgment determining, pre-election, that an initiative exceeds the scope of the initiative power. *See, e.g.*, *Ford*, 79 Wn.2d at 157 (affirming declaration for private taxpayer challenging local initiative as exceeding initiative power); *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747-49 (affirming declaration for private trade association challenging local initiative as exceeding initiative power); *Am. Traffic Solutions*, 163 Wn. App. at 433-34 (reversing denial of a declaratory judgment for private company challenging local initiative as exceeding initiative power). Here, the trial court properly determined Respondents met the criteria for declaratory judgment and correctly declared the initiative is invalid because it seeks to legislate in areas outside the local legislative power, intrudes on administrative affairs, and infringes on duties delegated to the City Council or County Commission.

A. Respondents Satisfied the Procedural Requirements to Obtain Declaratory Relief.

When a justiciable controversy exists and there is standing, declaratory relief is proper. *See id.* On appeal, Envision appears to

concede these issues. Opening Br. at 44 (conceding Respondents "may have standing for declaratory judgment"). Indeed, cases involving pre-election challenges do not raise justiciability concerns because no post-election event can change the answer to the question of whether a measure is or is not within the scope of the initiative power. Either the subject is proper for direct local legislation or it is not, and the fact of an election does not change the analysis. *Am. Traffic Solutions*, 163 Wn. App. at 432 (quoting *Coppernoll v. Reed*, 155 Wn.2d 290, 299 (2005); *see also City of Sequim v. Malkasian*, 157 Wn.2d 251, 255, 260 (2006) (en banc) (reaffirming same). And there is no reasonable question this case involved a justiciable dispute when Respondents challenged the validity of the initiative and Envision vigorously defended it. *See City of Longview v. Wallin*, 174 Wn. App. 763, 777-81 (2013).

The trial court and this Court's commissioner also properly recognized Respondents satisfied the test for standing in pre-election initiative challenges seeking declaratory relief because they demonstrated: "(1) that [they] fall[] within the zone of interests that a statute or ordinance protects or regulates and (2) that [they have] or will suffer an injury in fact, economic or otherwise, from the proposed action." *Am. Traffic Solutions*, 163 Wn. App. at 432-33.[4] The trial court also correctly

[4] *See also* RCW 7.24.020 ("A person . . . whose rights, status or other legal relations are affected by a statute [or] municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder.")

recognized that Respondents would have standing under the public importance standing doctrine because pre-election initiative challenges involve "significant and continuing matters of public importance that merit judicial resolution." *See id.* at 433; *Wallin*, 174 Wn. App. at 781.[5]

B. The Trial Court Correctly Held that Envision's Initiative Exceeds the Initiative Power.

Respondents fully support the ability of citizens to engage in direct legislation; direct legislation must comply with state law, however. Wash. Const. art. XI, ¶ 10; Spokane Charter art. IX, §§ 81-82; RCW 35.22.200; *Save Our State Park v. Bd. of Clallam Cnty. Comm'rs*, 74 Wn. App. 637, 644 (1994) (initiative power conferred in county home rule charter limited to compliance with state law). An initiative exceeds the initiative power if it seeks to legislate in areas outside the local legislative power, intrudes on administrative matters, or interferes with responsibilities delegated to the City Council or Mayor (or County Commissioners), not the electorate. *See Seattle Bldg. & Constr. Trades Council*, 94 Wn. 2d at 746 (local initiatives may not conflict with state law); *Save Our State Park*, 74 Wn. App. at 644 (local initiatives may address only legislative, not administrative matters, and may not touch on matters delegated to the city council). The Envision initiative purports to change zoning and land use

[5] Envision asks this Court to adopt a rule making it more difficult for courts to review local initiatives pre-election, yet the existence of the public importance doctrine demonstrates that the law is the opposite. That is, pre-election review of local initiatives is of such great public importance that ordinary standing rules are relaxed to ensure courts may address the validity of the proposed initiative.

laws, water rights and use laws, and constitutional rights. As numerous courts have held, each of those subjects is beyond the scope of the local initiative power.

C. Envision's Initiative Exceeds the Scope of the Local Initiative Power.

Envision's initiative exceeds the scope of the local initiative power because: (1) the zoning provision is administrative in nature and interferes with powers delegated to local legislative bodies; (2) the river and aquifer rights provision conflicts with federal and state law, is administrative in nature, and interferes with powers delegated to local legislative bodies; (3) the workplace provision conflicts with federal and state law; and (4) the personhood provision conflicts with federal and state law.

1. The Zoning Provision is Administrative in Nature and Involves Powers Delegated to Local Legislative Bodies.

a. The Zoning Provision is Administrative.

The Envision initiative's zoning section performs administrative, not legislative functions, because it seeks to amend the City of Spokane's zoning code, or how the City Council implements that code, by requiring "neighborhood majorities" approve "***zoning changes*** ... involving major commercial, industrial, or residential development." CP 112 (emphasis added). The local initiative power does not, however, "encompass[] the power to administer the law, and administrative matters, particularly local administrative matters, are not subject to initiative or referendum." *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn. 2d 1, 14 (2010).

A matter is administrative when it involves "modifications of 'a plan already adopted by the legislative body itself, or some power superior to it.'" *Id.* To determine whether an initiative concerns legislative or administrative matters, courts ask "whether the proposition is one to make new law or declare a new policy, or merely to carry out and execute law or policy already in existence.'" *Id.* at 10 (citation omitted).

The Washington Supreme Court consistently has held initiatives that seek to change zoning codes are administrative, not legislative, and therefore are outside the scope of the initiative power. *See Leonard v. City of Bothell*, 87 Wn.2d 847, 850 (1976) (referendum seeking to rezone property and modify comprehensive plan to reflect anticipated land-use change was administrative); *Durocher v. King Cnty.*, 80 Wn.2d 139, 152-53 (1972) (council's grant of "unclassified use permit" was administrative and not subject to referendum).

Envision does not rely on a single case supporting its contention that the zoning provision is legislative rather than administrative. None exists. Indeed, the authority uniformly forecloses Envision's arguments. *See* Sub. 100, Supp. CP __ (Amended Table of Auth. in Supp. of Pla.' Mot. for Dec. Judgment). Washington's Supreme Court has made clear that once a city performs the legislative function of adopting a zoning code and comprehensive plan, "[a]mendments of the zoning code or rezones usually are decisions by a municipal legislative body implementing the zoning code and a comprehensive plan" by which "[t]he legislative body

essentially is then performing its administrative function." *Leonard*, 87 Wn.2d at 850.

With precedent uniformly against it, Envision argues, again without legal support, that its zoning provision is not administrative in nature because the "right" it gives to "neighborhood majorities" to review and reject developments is a new "right" that operates independently of the GMA and might not interfere with the Comprehensive Plan. Opening Br. at 12. But that misunderstands the legislative-administrative distinction. The distinction does not turn on whether an initiative creates a new right or whether the initiative is consistent with existing regulation, but whether the initiative "furthers or (hinders) a plan the local government . . . has previously adopted." *Our Water-Our Choice!*, 170 Wn.2d at 10. If it does so, the initiative is administrative in nature and beyond the scope of the local initiative power. *Id.* That is the case here.

Envision admitted to the trial court that the zoning provision would hinder implementing the City's and County's zoning code by giving "neighborhoods" "the opportunity to participate in the decisions about how… zoning changes occur," and by requiring developers to seek neighborhood approval "***prior to*** asking the City to approve the desired zoning change." Sub. No. 86, Supp. CP __ at 22:5-9 (Defendant Envision Spokane's Response in Opposition to Motion for Declaratory Relief)

(emphasis added).[6] In other words, by Envision's own account, the zoning provision would not create a new zoning code but instead would add an additional layer of review to the existing review and approval process. *Id.*

Envision's own authority similarly contradicts its contention that allowing the people to substitute their judgment for the City's on zoning matters is not an administrative action. Opening Br. at 14 (quoting *Durocher*, 80 Wn.2d at 139). In *Durocher*, the Supreme Court considered whether a county council's decision to grant a development permit under existing zoning regulations was subject to a local referendum. *Durocher*, 80 Wn.2d at 139. The Court held that decision to "grant[] … a permit pursuant to an established zoning ordinance" was an administrative act not subject to local referendum. *Id.*[7]

b. The Zoning Provision Involves Areas Delegated to Local Legislative Bodies, Not the Electorate, and is Not Within the Scope of the Local Initiative Power.

The local initiative power similarly does not include the ability to enact law on matters the state legislature has delegated to the county

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[6] Envision made numerous admissions to the trial court that its initiative would involve zoning changes. Sub. No. 86, Supp. CP __ at 21:4-8 (initiative would require "that proposers of ***zoning changes*** necessary to accommodate major new development must acquire neighborhood approval for those ***zoning changes***") (emphasis added); *id.* at 22:5-6 (describing initiative as giving neighborhoods "the opportunity to participate in the decisions about how those ***zoning changes*** occur") (emphasis added); *id.* at 22:7-9 ("a developer proposing those major projects would work together with the neighborhood – prior to asking the City to approve the desired ***zoning change***") (emphasis added); *id.* at 22:17 (admitting "[t]he implementation of this provision will thus involve a universe of ***zoning changes***") (emphasis added).

[7] Envision's police power argument does not save the zoning provision from its administrative character, as discussed below. *See infra* § D.1.

commissioners or city council, rather than to the electorate. "'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.'" *Mukilteo Citizens for Simple Govt. v. City of Mukilteo*, 174 Wn.2d 41, 51 (2012) (quoting *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261 (2006)). "'[A] grant of power to the city's' legislative authority or legislative body 'means exclusively the mayor and city council and not the electorate.'" *Id.* (citation omitted). This is because "legislative authority" cannot be carried out "by initiative or referendum." *Id.*

Land use regulation is among the most common examples of a subject matter for which the state legislature has delegated authority to local legislative bodies. In particular, "zoning ordinances and regulations are beyond the local initiative power in Washington because the power and responsibility to implement zoning was given to the legislative bodies of municipalities" not the electorate. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 174 (2007) (citing the GMA, RCW 36.70A *et seq.*); *see also City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 391 (2004) (local initiative purporting to place controls and restriction on developments and zoning exceeded the initiative power because it involved powers delegated to the City legislative authority); *Lince v. City of Bremerton*, 25 Wn. App. 309, 313 (1980) (ordinance adopted by local initiative changing zoning code to prevent construction or alteration of

dwellings in zoning district was invalid because involved powers delegated to the City Council).

The Envision initiative's zoning provision seeks to amend the City's or County's zoning code or comprehensive plan because it attempts to impose additional levels of review and approval on land use decisions in Spokane. CP 112. As a result, and because Washington law delegates the zoning power to local legislative bodies, the zoning provision exceeds the local initiative power. *See 1000 Friends*, 159 Wn.2d at 174.[8]

Every Washington court to consider this issue has held likewise. *See, e.g.*, *id.* at 188; *Lince*, 25 Wn. App. at 312 ("Washington's general law grants and limits the zoning power to the legislative body of charter cities as well as code cities."; citing RCW 35.63.110, which grants city councils exclusive zoning power, and invalidating initiative that prevented construction of multi-family dwellings in certain zones invalid); *Save Our State Park v. Bd. of Clallam Cnty. Comm'rs*, 74 Wn. App. 637, 649-50 (1994) ("initiative … are not compatible with zoning ordinances"). As the Supreme Court explained, this result reflects good policy: "[a]mendments to the zoning code or rezone decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community." *Leonard*, 87 Wn.2d at 853-54 (citing statute governing code cities and

[8] *1000 Friends* and *Whatcom Cnty. v. Brisbane*, 125 Wn.2d 345, 349 (1994) each hold that the power to act under the GMA was delegated to the county legislative body and not to the local electorate.

explaining and zoning amendments are not subject to initiative).[9]

Envision acknowledges the Supreme Court has twice held that the power to act under the GMA has been delegated to the local legislative body, not to the electorate, thereby precluding local initiatives on matters implicating the GMA. Opening Br. at 11 (referring to *Brisbane*, 125 Wn.2d at 349 and *1000 Friends*, 159 Wn.2d at 175-76). Remarkably, however, Envision asks the Court to ignore those cases because, in Envision's view they "dramatically flip this pre-election challenge rule on its head, with dire consequences for local direct democracy . . . ." Opening Br. at 11, n. 5. Envision may not like *Brisbane* and *1000 Friends*, but they are controlling Supreme Court precedent making clear local initiatives cannot implicate matters within the scope of the GMA.

Moreover, the Supreme Court has already considered and rejected a similar invitation "to revisit and overrule *Brisbane*." *See 1000 Friends*, 159 Wn.2d at 178. In the same case, the Court also rejected Envision's argument that pre-*Brisbane* delegations of authority to legislative bodies required any "magic words":

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[9] *See also* RCW 35.63.080 (city council or planning commission board may provide for adoption and enforcement of coordinated plans for municipality's physical development); RCW 35.63.100 (council may adopt comprehensive plan by resolution or ordinance); RCW 36.70.320 (county board must approve planning commission's comprehensive plan); RCW 36.70.410 (county board must approve amendments to comprehensive plan); RCW 36.70.750 (county board may establish zoning classifications by ordinance); RCW 36.70A.040(3)(a) ("The county legislative authority shall adopt a countywide planning policy under RCW 36.70A.210."); RCW 36.70A.130(1)(a) ("a county or city shall take legislative action to review, and if needed, revise its comprehensive land use plan and development regulations"); RCW 36.70A.210(2) ("The legislative authority of a county that plans under RCW 36.70A.040 shall adopt a countywide planning policy.").

> We disagree that prior to *Brisbane,* the legislature consistently signaled its intent to create general state policy to be implemented locally by delegating power to "the legislative authority of a county" as opposed to "the county" as a corporate body. Instead, that language is simply one of many tools that this court has used to determine relevant legislative intent.

Id.

Brisbane and *1000 Friends* control. Envision does not dispute that the GMA requires local legislative bodies (here, the Spokane City Council) to develop comprehensive zoning plans. Opening Br. at 12. Envision concedes the zoning decisions implementing these plans lay within the purview of the city council. *Id.* Envision also admits that under its initiative, decisions by "neighborhood majorities" approving (or denying) new developments may conflict with the GMA. *Id.* "[T]here may be some overlap in some specific situations," Envision says. *Id.*

To Envision's credit, these admissions are correct. But they are also fatal to Envision's case. Envision's zoning provision would result in amendments to Spokane's zoning code because it seeks to change zoning requirements, approval, and review in Spokane; thus, the zoning provision constitutes a development regulation under the GMA. *See* RCW 36.70A.030(7) ("'[d]evelopment regulations' or 'regulation' means the controls placed on development or land use activities by a county or city, including … zoning ordinances"). Even if the zoning provision were not a development regulation under the GMA, courts reviewing zoning initiatives under other Washington statutes addressing city or county land

use have consistently invalidated those initiatives based on delegations to local legislative bodies. *See, e.g.*, *Lince*, 25 Wn. App. at 312 (citing RCW 35.63.110); *Save Our State Park*, 74 Wn. App. at 647 (1994) (citing RCW 36.70 *et seq.*).

Envision argues only that, in practice, decisions by neighborhood majorities will usually be consistent with the city council's. *Id.* This is because "neighborhood majorities" will surely reject only major developments that are "incompatible with the provisions of the City's Comprehensive Plan or this Charter." Opening Br. at 4-5. Envision misses the point. The question is not whether neighborhood majorities might end up at odds with the city council over zoning decisions but rather whether zoning decisions have been delegated to the city council (or county commission) in the first place. Envision does not address this question.

Moreover, the text of the zoning provision belies Envision's argument that the initiative merely "provides additional protections to the residents of Spokane, it does not limit the GMA's authority or purpose." Opening Br. at 13. The provision purports to give "[n]eighborhood majorities … the right to approve ***all*** zoning changes proposed for their neighborhood involving major commercial, industrial, or residential development," regardless whether they comply with the City's Plan or Charter. CP 112 (emphasis added). The provision states that "[n]eighborhood 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 Charter. *Id.* (emphasis added). The initiative thus does ***not*** limit neighborhood majorities' power to reviewing only projects that do not comply with the City's Comprehensive Plan or Charter or authorize acts only consistent with the Plan or Charter. *Id.* Envision's contention to the contrary is incorrect.

Finally, Envision cites no authority for its contention that courts have narrowly applied the GMA's delegation only to those initiatives which sought to "override a local legislative body's state-mandated actions under the Growth Management Act." Opening Br. at p.12 n.5. Envision's characterization is simply wrong. *See, e.g.*, *Yes for Seattle*, 122 Wn. App. at 389 (stating "citizens cannot use the initiative process to enact development regulations under the GMA," without addressing a "consistency requirement"); *1000 Friends*, 159 Wn.2d at 174 ("zoning ordinances and regulations are beyond the power of initiative").

2. The River and Aquifer Provision Conflicts with Federal and State Law, is Administrative in Nature, and Involves Powers Delegated to Local Legislative Bodies.

The Envision initiative purports to give the Spokane River and aquifer new fundamental rights and to provide standing to anyone who might sue on their behalf. But Washington courts have consistently rejected, as beyond the scope of the local initiative power, local initiatives seeking to change water use or regulation. *See, e.g.*, *City of Port Angeles*

v. Our Water-Our Choice, 145 Wn. App. 869, 877, 881 (2008) (affirming declaratory judgment that local fluoridation initiative interfered with administrative matters regulated by federal and state law and involved powers delegated exclusively to the City Council), *aff'd* 170 Wn.2d 1, 15 (2010) (affirmed on administrative intrusion grounds); *Yes for Seattle*, 122 Wn. App. at 391 (local initiative concerning creek-side development and restoration exceeded the initiative power because it involved matters delegated to the City Council and was administrative in nature). Just as in these cases, the river and aquifer rights provision at issue exceeds the local initiative power because it (i) conflicts with federal and state law, (ii) is administrative rather than legislative in nature, and (iii) interferes with powers delegated exclusively to local legislative bodies.

a. The River and Aquifer Rights Provision Conflicts with Federal and State Law.

The river and aquifer rights provision exceeds the City's jurisdiction—and thus the scope of the City's authority to enact direct legislation—because it attempts to give Spokane residents extra-territorial rights, and because it conflicts with federal and state water laws, including the Clean Water Act, Washington water code, and the GMA. Envision characterizes this issue as "preemption." Opening Br. at 10. But this is more accurately an issue of whether the City has the authority to enact certain types of laws.

As a creation of the State, a city's legislative power—whether exercised by the city council or by its residents—is limited and

subordinate to superior law:

> While the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law. [The Washington Constitution] authorizes municipal charters "consistent with and subject to the Constitution and laws of this state." The fundamental proposition which underlies the powers of municipal corporations is the subordination of such bodies to the supremacy of the legislature.

Seattle Bldg. & Const. Trades Council, 94 Wn. 2d at 747; *see also Philadelphia II*, 128 Wn. 2d at 719 (holding an initiative "must be within the authority of the jurisdiction passing the measure"). A local initiative exceeds the initiative power, therefore, if the legislation it proposes lies beyond the local government's authority to enact laws.

Local initiatives—or any local legislation— can be found to impermissibly cross this boundary in more than one way. Local initiatives are invalid if they violate or conflict with state or federal law. *See id.* (quoting Wash. Const. Art. XI, § 10 (authorizing municipal charters "consistent with and subject to the Constitution and the laws of this state.")). So, too, are local initiatives that purport to interpret or override the federal and state constitutions or create new constitutional rights. Of course, "the initiative power ... does not include the power to directly amend or repeal the constitution itself." *Ford*, 79 Wn.2d at 156 (en banc).[10] And local initiatives that are not local in application are equally

[10] For the same reason "[i]t is simply not within Washington's power to enact federal law." *Philadelphia II*, 128 Wn.2d at 720.

outside a city's jurisdiction to act because a city may not legislate on subjects beyond its geographic borders. *See* Spokane City Charter art. I, § 2 (defining City's boundaries); Wash. 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." (emphasis added)); *City of Spokane v. Coon*, 3 Wn.2d 243, 346 (1940) ("Under art. XI, § 11, of our state constitution, cities of the first class enjoy the same police power ***within their borders*** as does the state itself." (emphasis added)).

The river and aquifer provision conflicts with this fundamental concept of the structure of government and exceeds the limitations of Spokane's legislative power in the following ways.

First, Envision's river and aquifer provision exceeds the City's authority to enact legislation because it attempts to confer a private right of action on Spokane residents to enforce rights that extend beyond the City's (and the State's) geographic boundaries. CP 112. The City cannot enact laws regulating the conduct or rights of citizens or property of another state, such as Idaho (from which the affected river waters originate and under which a significant portion of the aquifer resides). *See* Spokane City Charter art. I, § 2 (defining City's boundaries).

Second, the river and aquifer rights provision conflicts with federal and state law by attempting to create "fundamental and inalienable" rights in rivers and residents, and by creating a private right of action for

Spokane residents to enforce those rights. CP 112. To the extent Envision is attempting to confer constitutional rights on waterways, it is plainly outside the scope of the local initiative power to amend the constitution. *Ford*, 79 Wn.2d at 156.

To the extent Envision seeks to confer some lesser right, the initiative still exceeds the scope of the local initiative power because, as discussed below, those rights conflict with existing federal and state statutory rights and regulations.

"[A] local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits." *Parkland Light & Water Co. v. Tacoma-Pierce Cnty. Bd. of Health*, 151 Wn.2d 428, 433 (2004) (invalidating board resolution that irreconcilably conflicted with statutory authority granted to water districts) (citation omitted). Here, Envision's initiative conflicts with at least three statutory schemes governing the Spokane River and Aquifer.

The federal Clean Water Act, 33 U.S.C. § 1362(7), requires "each state [to] establish, subject to federal approval, comprehensive water quality standards." *Pub. Util. Dist. No. 1, of Pend Oreille Cnty. v. State, Dep't of Ecology*, 146 Wn.2d 778, 806 (2002). The Act provides a limited right of actions by citizens for violations of any "effluent standard or limitation." 33 U.S.C. § 1365(a). The Washington State Department of Ecology "is the designated state agency for purposes of securing the benefits of and meeting the requirements of the Clean Water Act." *Pend*

Oreille Cnty., 146 Wn.2d at 807 (citing RCW 90.48.260). It must establish water quality standards, "'taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational,' and other purposes." *Id.* at 806-807 (quoting 33 U.S.C. § 1313(c)(2)(A)). The Department has therefore "promulgated comprehensive, specific water quality standards for regulating state navigable waters, …." *Id.* at 807. The EPA has "reviewed and approved" these regulations, as the Act requires. *Id.* at 808.[11]

Similarly, the State of Washington, which has "[t]he power … to regulate and control the waters within it," has enacted a comprehensive scheme regulating water rights and uses. RCW 90.03.010 *et. seq.* Among other things, Washington's water rights statute gives the Department of Ecology the authority to "establish minimum water flows or levels for streams, lakes or other public waters," to regulate "underground waters," to promulgate regulations implementing its water laws, to enforce such laws, and "to develop and implement … a comprehensive state water resources program." *See* RCW 90.22.020; RCW 90.48.030, .035, .037, .140; RCW 90.54.040.

In addition, the GMA requires that local legislative bodies "plan their growth, protect the environment, protect the property rights of individuals, and designate and protect 'critical areas.'" *1000 Friends*, 159

[11] The federal Safe Drinking Water Act also governs the Aquifer, as a "sole source" drinking water supply. 42 U.S.C. § 300f *et seq.* This means all federally assisted projects must use aquifer protection measures. *Id.*

Wn.2d at 169 (citing RCW 36.70A.020, .060; WAC 365-190-040); *see also Yes for Seattle*, 122 Wn. App. at 389 (GMA requires local legislative bodies to "develop comprehensive growth plans and development regulations to meet the comprehensive goals"). The GMA defines "development regulations" as "controls placed on development or land use activities by a county or city, including, but not limited to … critical areas." *Yes for Seattle*, 122 Wn. App. at 389 (quoting RCW 36.70A.030(7)). And the GMA defines "critical areas" as including "wetlands, areas that recharge aquifers used for potable water, fish and wildlife habitat conservation areas, areas that are frequently flooded, and areas that are geologically hazardous." *1000 Friends*, 159 Wn.2d at 169 (citing RCW 36.70A.030(5)). Thus, federal and state law comprehensively govern and regulate the Spokane River, its tributaries, and the Spokane Valley-Rathdrum Aquifer.

Yet the river and aquifer rights provision creates a private right of action, and fundamental and inalienable rights in rivers and residents, that do not exist under federal or state law. CP 112. So, under the initiative, a Spokane resident could sue Spokane County or another organization or individual that uses the Spokane River or aquifer for affecting water levels or for uses that the Clean Water Act or Washington's water law permit. *See id.* (seeking to establish on behalf of rivers the "right to sustainable recharge, flows sufficient to protect native fish habitat, and clean water"). As a result, the river and aquifer rights section irreconcilably conflicts

with federal and state law, and the Court properly invalidated it. *See, e.g.*, *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747 (initiatives may not conflict with state law); *Yes for Seattle*, 122 Wn. App. at 388 (invalidating initiative that conflicted with GMA). *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987) (Clean Water Act preempted state nuisance law to the extent the law sought to impose liability on an out-of-state point source because it interfered with the Act's method of eliminating water pollution).

Envision contends that the water provision is within the local initiative power because it "emphasize[s] an environmental protection policy" and does not attempt to control the actions of the Department of Ecology, or usurp its authority to regulate water rights." Opening Br. at 24. That is, Envision offers its assurances that the citizens who might sue to enforce the rights its initiative creates will share a common goal with the EPA and Washington's Department of Ecology. But Envision's assurance that the rights its initiative tries to create will be exercised towards the same ends as state and federal law does not help its case. "A state law is pre-empted if it interferes with the methods by which the federal statute was designed to reach" the common goal. *Ouellette*, 479 U.S. at 494. Envision's water rights provision does exactly that. It interferes with an existing and complex federal and state water regulatory regime which is an act beyond the power of the City.

b. The River and Aquifer Rights Provision is Administrative in Nature.

The river and aquifer rights provision is administrative in nature because it seeks to regulate waterways that the Clean Water Act, state water code, and GMA already govern. *See infra* § C.2.a. As with the zoning provision, the water rights provision intrudes on existing regulatory regimes and is, therefore, administrative in nature and not a proper subject for a local initiative.

The GMA, for instance, requires local legislative bodies to "adopt development regulations that *protect* critical areas that are required to be designated" under the Act, which include "areas critical to recharging aquifers used for potable water" and "areas used for fish and wildlife habitat conservation." *1000 Friends*, 159 Wn.2d at 183. Envision's initiative thus seeks to legislate in areas within the GMA's scope. *See id.* (holding referendum regarding ordinances regulating surface water flows and clearing and grading fell within GMA's scope). By creating "fundamental and inalienable rights" in rivers and residents, Envision's initiative also "explicitly seek[s] to administer the details" of Spokane's water system, which the Clean Water Act and Washington's water laws govern. *See Our Water-Our Choice!*, 170 Wn.2d at 13. The initiative therefore impermissibly treads on administrative matters. *See id.* at 13-14 (initiatives attempting to reverse city fluoridation program were administrative); *1000 Friends*, 159 Wn.2d at 185 (surface water and clearing and grading initiatives "passed pursuant to the GMA's

requirement that critical areas be designated and protected … implement state policy and are not subject to local referenda").

Envision does not dispute that these federal and state laws govern Spokane's water resources. Instead, Envision argues only that the provision is not administrative because it "expands and broadens rights within the City boundaries consistent with the state policy protection of surface and ground water." Opening Br. at 24. As with its argument concerning zoning, Envision misses the issue. The legislative-administrative distinction does not turn on whether an initiative creates a new right for some people—after all, that is what most laws do. Rather, an initiative is administrative if it "furthers (or hinders) a plan the local government or some power superior to it has previously adopted." *Our Water-Our Choice!*, 170 Wn.2d at 10.

While the parties may disagree as to whether the proposed water rights provision "expands" rights or reduces them, the purported new rights fall within the pre-existing regulatory framework discussed above. To the extent these rights change anything, they change how those regulations are implemented and enforced. In other words, the provision "pursues a plan already adopted by the legislative body itself [i.e., the Spokane City Council], or some power superior to it [the Spokane County Commissioners]." *See Leonard* , 87 Wn.2d at 850.

c. The River and Aquifer Rights Provision Involves Areas Exclusively Delegated to Local Legislative Bodies.

The GMA delegates to city councils and county commissions—not cities or counties themselves or the electorate—the authority and obligation to develop comprehensive growth plans, which affect water drawn from aquifers.[12] RCW 35.63.110; RCW 36.70A.210(2); *1000 Friends*, 159 Wn.2d at 169. The City Council and County Commission here have enacted comprehensive plans. Despite the GMA's delegation to local legislative bodies, and despite the City Council's and County Commissioner's comprehensive plans, the Envision initiative gives Spokane residents the "right to sustainably access, use, consume and preserve water drawn from natural cycles that provide water necessary to sustain life within the City." CP 112. But, as discussed above with respect to the zoning provision, the Washington Supreme Court has held initiatives attempting to enact or amend GMA regulations infringe on duties delegated to local legislative bodies and thus, exceed the local initiative power. *See 1000 Friends*, 159 Wn.2d at 174. Indeed, cases addressing water regulation uniformly hold such regulation is beyond the scope of the local initiative power for this precise reason. *See id.*

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[12] As discussed above, water rights and water quality are the subject of complex federal and state laws. Most regulation of water rights and quality are reserved by the federal and state governments, without delegation to local governments. For example, the Washington Department of Ecology administers the state's water quality program under the supervision of the federal EPA, all pursuant to the federal Clean Water Act. Local governments have no authority to set water quality standards, such as for end-of-pipe dischargers. The City, therefore, lacks the authority to enact laws concerning most aspects of water rights and water quality. The GMA, however, does permit city councils and county legislative authorities to develop comprehensive growth plans, which affect water drawn from Washington. As discussed above, such authority has been delegated to the legislative bodies, not the electorate, and is not a proper subject for local initiative.

(ordinances enacted under GMA governing wetlands, aquatic areas, and storm water not subject to referendum); *Yes for Seattle*, 122 Wn. App. at 388-89 (creek restoration initiative beyond local initiative power).

Envision wastes little space defending the water provision. In a footnote, Envision claims the provision does not impermissibly tread on legislative delegations under state and federal water regulations because "[t]he 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." Opening Br. at 14 n.8.

But as discussed above, the question is not whether the legislature expressly "limited the people's authority." Rather, the Court should determine whether considering "the entirety of the statutory schema established by the legislature"; "the state legislature instruct[ed] a local governmental body to implement state policy, the power and duty is vested in the legislative (or executive entity), not the municipality as a 'corporate' entity." *1000 Friends*, 159 Wn. 2d at 182, 174.

3. The Workplace Provision Conflicts with Federal and State Law.

Envision's workplace provision exceeds the scope of the local initiative power because it conflicts with federal and state labor laws or otherwise enacts laws outside of the City's legislative authority. The trial court correctly invalidated the provision for the following reasons.

First, the trial court correctly determined the workplace provision runs afoul of state and federal law by attempting to "redefine and expand labor rights in the City of Spokane." The federal National Labor Relations Act, 29 U.S.C. §§ 151-69, and the state Public Employees' Collective Bargaining Act, RCW 41.56 *et seq.*, govern collective bargaining rights in private sector and public sector workplaces, respectively. The NLRA's reach is broad. The statutory scheme "preempts a state law claim that is based on conduct arguably subject to sections 7 or 8 of the Act." *Kilb v. First Student Transp., LLC*, 157 Wn. App. 280, 285 (2010). "Section 7 of the Act guarantees the right of employees to organize and collectively bargain," while "Section 8 prohibits employer interference with employees engaging in activities protected under section 7." *Id.* (citing 29 U.S.C. §§ 157, 158(a)(1)). Because Congress has, through the NLRA, exercised its power to preempt private sector employee collective bargaining claims, Envision may not seek to use the local initiative process to enact legislation that purports to grant a municipal right to collective bargaining.

Likewise, because the Public Employees' Collective Bargaining Act does not mandate collective bargaining, the provision conflicts with Washington law by providing a mandatory collective bargaining right. The Court should affirm the trial court's ruling on this basis. *See Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747.

Envision contends that the workplace provision does not conflict

with state or federal labor laws because the NLRB has not preempted the field and the initiative "does not attempt to dictate to the [NLRB] or mandate action by any state or federal agency." Opening Br. at 20-21. But Washington courts hold otherwise. "[F]ederal law generally preempts the field of labor law," excepting from preemption state labor laws like the Public Employees' Collective Bargaining Act. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 828 (2008). But even if the NLRA did not stand in the way, the provision would be superfluous and thus, meaningless. Workers in unionized workplaces already have the right to collective bargaining under the NLRA (for private employees) and the state Public Employees' Collective Bargaining Act (for public employees). *See* 29 U.S.C. §§151-169; RCW 41.56 *et seq.*

Second, the trial court correctly held the workplace provision falls outside of the City's legislative authority because it improperly attempts to eliminate the state action doctrine within Spokane's city limits and apply the Bill of Rights to limit conduct by private citizens. As a general matter, the Bill of Rights restricts only government action, not private action. *See, e.g.*, *Pollack*, 343 U.S. at 461 (First and Fifth Amendments restrict government, not private persons); *Tarkanian*, 488 U.S. at 191 (Fourteenth Amendment restricts state action, not private conduct). The trial court's ruling should be affirmed because neither the City nor its residents may contravene the federal constitution or interpret its provisions to apply the Bill of Rights to private employer conduct. *See Ford*, 79 Wn.2d at 156.

Envision contends that the workplace provision "does not redefine the constitutional rights but makes the same bundle of rights applicable in a new context." Opening Br. at 19. As Envision would have it, cities may interpret the United States and Washington constitutions to create new rights, protections, and obligations. But as discussed above, cities lack the authority to contravene the constitution—regardless of whether they purport to "redefine" existing rights, create new rights, or take rights away. And Spokane residents may not do so by direct legislation either. *See Ford*, 79 Wn.2d at 156.

4. The Personhood Provision Conflicts with Federal and State Law.

The Envision initiative's personhood provision conflicts with federal and state law because it attempts to amend the federal and state constitutions to deprive corporations of their personhood rights, which are subjects beyond the scope of the local initiative power. CP 112.

Federal law guarantees certain rights and protections to corporations, including free speech, equal protection, and due process. *See, e.g.*, *Citizens United*, 558 U.S. at 343 (First Amendment); *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 745 (2012) (same); *Pembina Consol. Silver Mining v. Penn*, 125 U.S. 181, 189 (1888) (Fourteenth Amendment); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765m 778 n.14 (1978) (explaining states may not deny corporations guarantees such as due process and equal protection). Washington law also treats corporations as "persons" including the right to sue and be sued

"in like cases as natural persons," Wash. State Const. art. XII, § 5, as well as for campaign contributions and expenditures, RCW 42.17A.005(35) ("person" campaign contribution purposes includes a "partnership, joint venture, public or private corporation, [or] association").

Envision's corporate rights provision would strip these rights and protections from any non-profit or for-profit corporations that "violate the rights secured by [the initiative]." Opening Br. at 5. In particular, the initiative would deprive corporations of their right to sue and defend against lawsuits related to the initiative's provisions. *Id.* (corporations that violate the initiative will not "possess any other legal rights, privileges, powers, or protections which would interfere with the enforcement of rights enumerated by this Charter"). *Id.*

But as discussed above, local governments like the City of Spokane lack the power to interpret or amend the United States or Washington constitutions, and so, neither may their citizens. *See Ford*, 79 Wn.2d at 156; *Philadelphia II*, 128 Wn.2d at 719. Indeed, even Envision concedes "a local bill of rights cannot restrict state or federal rights protections guaranteed to Spokane residents." Opening Br. at 41. The trial court's ruling that the corporate rights provision is invalid should be affirmed for this reason.

Envision makes no attempt to explain how its personhood provision comports with the protections that state and federal law confer upon Spokane's corporate citizens. Instead, Envision argues that

depriving some (corporate) citizens of their fundamental rights is acceptable. "The people have the right to express their preferred remedy," Envision says. *Id.* at 23. Stripping the statutory and constitutional personhood rights from some citizens is acceptable because "[r]emedies frequently involve a loss of a right or privilege." *Id.* at 24. In Envision's view "[c]orporations are subservient to both the people and their governments," their rights are therefore subject to the whims of local governments (and their electorates). But the only cases on which Envision relies for this novel theory concern denials of parental rights for child abandonment and voting rights for felons, *id.* at 22, they are irrelevant to the local initiative power at issue here.

D. The Court Should Reject Envision's Unsupported Invitation To Expand the Local Initiative Powers.

Envision argues Spokane's "locally-plenary police powers" and Spokane's status as a "home rule" city shield its initiative from pre-election review on any basis. Opening Br. at 24-25. Envision also asks the Court to recognize a new "local self-government right" to place an initiative on the ballot "regardless of constitutional expression." *Id.* at 31. Alternatively, Envision claims Washington's constitution affords special protections to local initiative. None of these arguments support the local initiative power expansion that Envision proposes.

1. Spokane's Police and Home Rule Powers Do Not Expand the Local Initiative Power.

Envision argues that because "[t]he court accords to municipalities

plenary police power within their limits," the local initiative power "requires no legislative sanction for its exercise so long as the subject matter is local, the regulation reasonable, and consistent with the general laws." *Id.* at 24-26. Envision goes so far as to say "the police power may even burden fundamental rights when the government acts to protect health and safety." *Id.* at 21. But the cases Envision cites for this broad extension of the local initiative power address cities' powers to install parking meters and railroad crossings—they are irrelevant to the scope of the initiative power at issue here. *See Id.* (relying on *Kimmel v. City of Spokane*, 7 Wn.2d 372 (1941) (city's authority to install parking meters); *Detamore v. Hindley*, 83 Wn. 322 (1915) (city's authority to dictate railroad crossing locations)).

Cases directly addressing the police power issue contradict Envision's arguments. The Supreme Court clarified that "[t]he fact that an independent police power exists is not relevant to whether the county was acting pursuant to a statewide policy." *1000 Friends*, 159 Wn.2d at 187. "[T]he 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 rather whether the initiative exceeds the local initiative power. *Our Water-Our Choice*, 145 Wn. App. at 882 (emphasis added). Invalid initiatives may not "proceed on the basis of police power, or some other general theory." *Id.* at 882; *see also Yes for Seattle*, 122 Wn. App. at 393-94 (police and other powers did not bring water regulations within initiative power).

Envision's argument regarding home rule powers is also misplaced. "The presence of broad initiative powers in a county home rule charter does not ... justify unlimited application of that power." *Save Our State Park*, 74 Wn. App. at 644. Initiative powers under a county charter must be consistent with the constitution and laws of the State of Washington." *See id.* (initiative power conferred in county home rule charter limited to compliance with state law). Indeed, Spokane's home rule charter makes clear that the initiative power may be exercised only "in accordance with the general laws of the state." Spokane Charter art. IX, §§ 81-82. So does the Washington State Constitution. Wash. Const. art. XI, § 10 (city "shall be permitted to frame a charter ... consistent with and subject to the Constitution and laws of this state").

2. "Self-Government Rights" Do Not Expand the Local Initiative Power.

Envision spends the majority of its opening brief improperly raising a new argument it never made to the trial court that "[t]he people's right to local self-government is a constitutionally-guaranteed right held separate and apart from the authority of a municipal corporation." Opening Br. at 29. Envision contends that the "people of the City," "constitute a separate, higher authority" than the state government. *Id.* at 30. As in "Athens, Rome and the medieval Italian cities," Envision argues, "the right to local self-government, like the public trust doctrine, is reserved in free society regardless of constitutional expression. *Id.* at 34-35 n.20. This "requires that the initiative proceed to a vote." *Id.* at 29.

Not true. The Supreme Court rejected Envision's argument in *Ruano v. Spellman*, 81 Wn.2d 820, 823 (1973). "The right to act directly through either the initiative or referendum is not an inherent power of the people. In fact, that right was nonexistent under our state constitution until Amendment 7 was adopted in 1912." *Id.* "The people in their legislative capacity are not … superior to the written and fixed constitution." *Amalgamated Transit Union Local 587 v. State*, 142 Wn. 2d 183, 239 (2000) (citation omitted). This has been the rule in Washington for nearly a century, *see* quoting *Berry v. Superior Ct.*, 92 Wash 16, 92 (1916), and the rule is no different than under the federal constitution, *see Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999) ("Plaintiffs insist that the Supreme Court recognized a right to a referendum under the Tenth Amendment … They are mistaken.").

In any event, whatever Envision says is or was law in "Athens, Rome and the medieval Italian cities," Opening Br. at 34-35 n.20, the trial court should be affirmed because Envision acknowledges Washington has "instead endorsed the 'state creature' concept of local governments over the democratic polis concept." *Id.* at 34-35.

3. Washington Recognizes a Distinction Between the Scope of the Statewide and Local Initiative Powers.

Envision argues that Washington's constitution narrowly circumscribes challenges to the "substance" of local initiatives. Opening Br. at 16-17. By invalidating the water, workplace, and personhood

provisions because they exceed the city's power to enact law, Envision argues the trial court "creat[ed] a dramatic new expansion of judicial authority to examine the substantive validity of an initiative prior to an election." *Id.* at 9. Envision relies now, as it did in at the trial court, on two cases, *Coppernoll*, 155 Wn.2d at 291 and *Philadelphia II*, 128 Wn.2d at 720. Envision consistently misapplies and misinterprets these cases. Neither case supports Envision.

Washington's constitution does indeed confer special protections to the initiative process—***but only the statewide initiative process***. Wash. Const. art. 2, § 1. A challenge to the substance of statewide initiatives "is not allowed … because of the constitutional preeminence of the right of initiative." *Coppernoll*, 155 Wn.2d at 297. But "our constitution does not extend the initiative and referendum power to cities." *Our Water-Our Choice!*, 170 Wn. 2d at 8. As the cases on which Envision relies make clear, courts should invalidate local initiatives "where the subject matter of the measure was not proper for direct legislation." *Coppernoll*, 155 Wn.2d at 299. This is because, unlike challenges to statewide initiatives, "[t]hese challenges usually address ***the more limited powers*** of initiatives under city or county charters, or enabling legislation." *Id.* (emphasis added); *see also Philadelphia II*, 128 Wn.2d at 719 (citing with approval opinion "preventing a vote on a citywide initiative because it conflicted with state law").

Unlike the statewide initiative power, the local initiative power is

based on, and limited by, a statutory grant of authority from the legislature. A city may in its charter provide for direct legislation by the people—but only upon matters "***within the scope of the powers, functions, or duties of the city***." RCW 35.22.200; *see also* Spokane City Charter § 81 (limiting initiatives to "local legislative matters"). In short "the [local] initiative power here does not derive from our state constitution; rather, it has been authorized by statute … the 'constitutional preeminence of the right of initiative' discussed in *Coppernoll* is not a concern in the present case and the local powers of initiative do not receive the same vigilant protection." *City of Longview v. Wallin*, 174 Wn. App. 763, 790 (2013) (citation omitted).

Reviewing Envision's initiative pre-election to determine whether it conflicts with state or federal law "is both permissible and appropriate." *Am. Traffic Solutions*, 163 Wn. App. at 432; *Wallin*, 301 P.3d at 52; *see also.*, *King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 608, 612 (1997) (affirming declaration invalidating local initiative because, among other things, initiative would have conflicted with state law); *Ford*, 79 Wn.2d at 155-57 (affirming declaration invalidating local initiative because it conflicted with the state constitution); *State ex rel. Close v. Meehan*, 49 Wn.2d 426, 430-32 (1956) (affirming denial of writ of mandamus because local initiative violated state statutory sewage treatment planning requirements).

E. The Trial Court Correctly Declared That the Initiative's Offending Provisions Are Not Severable.

The trial court correctly declared that the "Envision … initiative [is] not severable because all provisions of both initiatives are invalid." CP 463. Removing the offending sections—the zoning, river rights, workplace, and personhood sections—would leave nothing to accomplish the initiative's goal of creating a comprehensive "Community Bill of Rights" that subordinates the right of incorporated residents to those of unincorporated residents, employees, and, apparently, rivers. *See* CP 112. This theme of subordinating corporate rights permeates the entire initiative, each section of which purports to confer expanded or new rights on unincorporated residents, employees, and waterways, while reducing the rights of incorporated residents. *See id.* Severing the invalid portions of the Envision initiative would therefore render the initiative "useless to accomplish the legislative purpose." *Yes for Seattle*, 122 Wn. App. at 393. *See also Priorities First v. City of Spokane*, 93 Wn. App. 406, 414 (1998) ("The savings clause does not preserve the remaining portions of the initiative because the severed portion is vital to the intended legislative purpose.").

The trial court's declaration that the auditor should not place the initiative on the ballot should be upheld even if the Court were to reverse the trial court's finding of invalidity regarding some, but not all, of its provisions. Initiative ballot titles must, among other things, provide "a true and impartial description of the measure's essential contents." *See,*

e.g., RCW 29A.72.050; Spokane City Charter § 13 ("The subject of every ordinance shall be set out clearly in the title thereof."). This is because "[w]e can safely assume that not all voters will read the text of the initiative … Some voters may cast their votes based on the ballot title as it appears on their ballots. Thus, the outcome of the vote may be affected by the tenor of the ballot title." *Ballot Title for Initiative 333 v. Gorton*, 88 Wn.2d 192, 198 (1977); *Wash Assoc. for Substance Abuse & Violence Prevention v. State*, 278 P.3d 632, 643 (2012).

Envision contends that the initiative's Ballot Title is: "Community Bill of Rights." Opening Br. at 43. Envision thus argues that the title would not be misleading "even if only one of those sections, or only a few provisions, were valid." *Id.* Envision is mistaken. The initiative's ballot title could not be clearer. It reads:

BALLOT TITLE

> Shall the City Charter be amended to add a Community Bill of Rights, which secures the right of neighborhood residents to approve re-zonings 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 corporations?

CP 111. The title thus includes reference to all four of the initiative's substantive provisions. Severing any or all of the offending provisions from the Envision Initiative would render the Ballot Title for the initiative misleading to voters because certain subjects addressed in the title would

no longer be part of the initiative on the ballot.

F. Envision's Arguments Concerning Injunctive Relief are Misplaced.

Although Envision apparently concedes the justiciability and standing issues for declaratory relief, Envision argues Respondents "have failed to prove standing necessary for injunctive relief." Opening Br. at 44. But Respondents did not obtain an injunction; they obtained a declaratory judgment:[13]

> The Court DECLARES that the Envision and SMAC initiatives are invalid as outside the scope of the local initiative power. The Court further DECLARES that neither initiative shall appear on the November 5, 2013 ballot, and directs the Auditor not to include them on the ballot.

CP 255. This is exactly what the Declaratory Judgments Act, RCW 7.24.010, authorizes. The Act allows the court to "declare the rights and status and other legal relations" of the parties. The Court declared the status of the initiative as invalid and the rights of the Spokane County Auditor to keep the initiative from the ballot.

Because Envision's initiative was invalid, it was not a "proposed ordinance" that may appear on the ballot through direct legislation.

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[13] Even if the standards for injunctive relief applied, Respondents would meet the standards. Pre-election injunctions are frequently granted to private parties challenging initiatives. *See, e.g.*, *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 745 (affirming court's grant of trade associations request for declaratory and injunctive relief to enjoin initiative from appearing on ballot); *Ruano*, 81 Wn.2d at829 (affirming court's grant of private intervenors' request to enjoin initiative from appearing on the ballot); *Ford*, 79 Wn.2d at 148, 157 (affirming taxpayer's declaratory judgment action, enjoining initiative from appearing on ballot).

Spokane Charter Art. IX, § 82. The declaratory judgment confirmed the Auditor had the right (indeed, the obligation) not to place the invalid initiative on the ballot. In any event, Envision admits (as it must) that the City may properly prevent an initiative from appearing on the ballot. *See* Opening Br. at 14. And here, City here explicitly asked the trial court to issue such a declaration if the court declared the initiative invalid. *Id.*

Nor is there any reason to put an invalid initiative on the ballot as Envision suggests. The ballot is for enacting laws. The Spokane Charter does not provide for advisory votes by initiative and the ballot is not a forum for political expression. Washington and federal courts have consistently rejected any claim there is a constitutional right for a measure to appear on a ballot. *See Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012) ("There is no First Amendment right to place an initiative on the ballot."); *Georges v. Carney*, 691 F.2d 297, 300-01 (7th Cir. 1982) ("there is no constitutional right to use the ballot box as a forum"); *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 389 (2001) ("There is no constitutional right to place an invalid initiative on the ballot."). "[T]here is no value in putting before the people a measure which they have no power to enact." *Id.* at 394.

V. CONCLUSION

Respondents respectfully request the Court affirm.

RESPECTFULLY SUBMITTED this 5th day of February, 2014.

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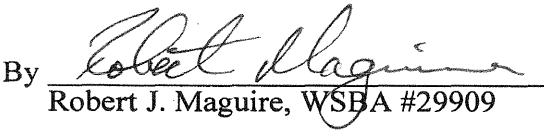
By 
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DECLARATION OF SERVICE

The undersigned hereby declares that on February 5, 2014, pursuant to the parties' agreement regarding electronic service under CR 5(b)(7), I sent an e-mail attaching the foregoing document to counsel of record whose names and addresses are listed below:

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

Executed this 5th day of February, 2014 in Seattle, Washington.

Barbara J. McAdams

Barbara J. McAdams