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

v.

Envision Spokane,  
Respondent,  
and

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

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**SUPPLEMENTAL BRIEF  
OF RESPONDENT ENVISION SPOKANE**

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October 2, 2015

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## Argument

This supplemental brief provides additional authority supporting the Court of Appeals' justiciability and standing ruling in this case.

### **I. This case exemplifies the corporate power issues against which the people's democratic initiative right must be protected.**

The people of Washington and the people of Spokane reserved the direct democracy power of initiative during an era of concern over corporate powers controlling governments.

In 1889, the Framers of our state constitution sought to limit corporate power:

The growth of power, and the arrogant disregard of laws and the rights of the people, by corporations made the question of limiting corporate power one of the most vital and earnestly discussed questions before the constitutional convention. The members were keenly awake to the situation, and knew that the growth and menacing attitude of this unscrupulous power must be curbed in some way.

Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 WASH. HIST. Q. 227, 239 (1913).<sup>1</sup>

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<sup>1</sup> See also *id.* at 247 (“None of the members [of the Constitutional Convention] favored a very small house, for the reason, as they expressed it, that there would be danger of corporate control.”), 249 (“The attempts and success of great corporations in influencing legislation, and the administration of laws at the period of the state convention is well known.”), available at [lib.law.washington.edu/waconst/Sources/Knapp.pdf](http://lib.law.washington.edu/waconst/Sources/Knapp.pdf) (last accessed Oct. 2, 2015).

At the beginning of the twentieth century, still concerned with the danger of corporate control over the political branches of government, the people reclaimed their initiative powers in charter cities and statewide.<sup>2</sup> In 1910, the people of the City of Spokane adopted an amended Charter that included their “power of direct legislation by the Initiative and the Referendum.” CITY OF SPOKANE CHARTER art. IX, § 81 (as adopted Dec. 28, 1910) (the full text of this charter's sections 81, 82, and 125 are provided in the Appendix to this brief). Thus, the people of Spokane restored their direct democracy powers prior to the people of Washington as a whole. *Compare id.* (initiative power in 1910) *with* CONST. art. II, § 1 (where the people approved Amendment 7 – the people's reservation of the initiative power – in November 1912).

The people created the initiative power – both locally and statewide – to check corporate power: to ensure that the people could create positive social change through lawmaking even if corporations controlled the

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<sup>2</sup> Claudius O. Johnson, *The Adoption of the Initiative and Referendum in Washington*, 35 PAC. NW. Q. 291, 294 (1944) (“Washington had had ample experience with old-time machine politicians who were dominated, often bought, by the railroad companies and other corporate interests. It had been found impossible, for example, to get the legislature to enact a statute creating a railroad commission.”), 303 (“[T]he movement for direct legislation in Washington . . . was part and parcel of a general reform program for restoring government to the people.”), *available at* [lib.law.washington.edu/waconst/Sources/Johnson.pdf](http://lib.law.washington.edu/waconst/Sources/Johnson.pdf) (last accessed Oct. 2, 2015).

elected legislative bodies.

This case, then, exemplifies the people's use of the initiative. Here, the charter amendment proposed by a grassroots coalition has consistently been opposed and outspent five-to-one<sup>3</sup> by the corporate opponents who are now before this Court. CP 81-84. Statewide corporate lobbyists joined in to bring the case up to this Court.<sup>4</sup> Rather than spend their campaign funds in the political marketplace of ideas, the initiative proponents have instead had to pay lawyers.

The people intended their initiative power to be a popular check on corporate control of the lawmaking process. This fundamental purpose is

3 In the 2009 campaign, PAC opponents of the Community Bill of Rights spent \$342,480.46 (\$199,603.52 by JOBS Coalition, <http://www.pdc.wa.gov/rptimg/default.aspx?batchnumber=100340835>; \$75,305.68 by Washington Realtors Quality of Life PAC, <http://www.pdc.wa.gov/MvcQuerySystem/CommitteeData/expenditures?param=UkVBTFMIDUwNw%3D%3D%3D%3D&year=2009&type=continuing> (see expenses from Oct. 15 to 26, 2009 re Spokane Proposition 4); and \$67,571.26 by Save Our Spokane, <http://www.pdc.wa.gov/rptimg/default.aspx?batchnumber=100336372>) compared to \$69,715.46 spent by Envision Spokane, <http://www.pdc.wa.gov/rptimg/default.aspx?batchnumber=100345447>. In the 2011 campaign, where the final vote was 49.1% for the Community Bill of Rights, PAC opponent spent \$130,346.89 (by JOBS Coalition, <http://www.pdc.wa.gov/rptimg/default.aspx?batchnumber=100446201>) compared to \$23,699.59 spent by Envision Spokane, <http://www.pdc.wa.gov/rptimg/default.aspx?batchnumber=100456819>. (All links last accessed Oct. 1, 2015.)

4 Also joining them in *amici* briefs were the Washington State Association of Counties and the Washington State Association of Municipal Attorneys, illustrating a point the direct democracy advocates a century ago well-understood: that the people's interests and their governments' interests are not necessarily aligned.

thwarted when corporate interests can easily divert a grassroots initiative campaign into a multi-year court process.

**II. Recognizing serious separation of powers concerns, this Court has maintained a general rule against pre-election challenges.**

From the beginning of the people's exercise of their initiative power, this Court has held that “[w]ith the ultimate question of the validity of this proposed legislation we have no present concern. Courts will not determine such questions as to contemplated legislation which may, perchance, never be enacted.” *State ex rel. Griffiths v. Super. Ct. in and for Thurston Cnty.*, 92 Wn. 44, 47, 159 P. 101 (1916). This remains the rule. *See Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005) (citations omitted); *see also Brown v. Owen*, 165 Wn.2d 706, 720, 206 P.3d 310 (2009) (citation omitted) (“The right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of government.”). This rule applies even for *local* decisions by the people. *Minish v. Hanson*, 64 Wn.2d 113, 115, 390 P.2d 704 (1964) (holding that “it is the rule in this state that the courts will not enjoin proposed legislative action,” where the legislative action in question was a proposition to be voted on by the people of a water district on whether to dissolve the district).

**A. Judicial restraint is thus warranted, and justiciability must be strictly adhered to, in pre-election challenges.**

“The foremost reason for restraint by the judiciary, particularly in controversies with significant political overtones, is the separation of powers inherent in our political structure.” Philip A. Talmadge,

*Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U.L. REV. 695, 697 (1999).

“Justiciability constraints constitute the essence of judicial restraint . . . .”

*Id.* at 707.

Justiciability issues are particularly important when private interests ask the courts to interfere with the public legislative process. Justice

Charles Johnson noted:

[The] effort to enact a legislative proposal has consistently been recognized by this court as a political legislative action in which courts have not interfered, nor should they. Because of the multitude of possible outcomes, the essence of the political legislative process involves many competing political choices into which courts should not intrude to act as referee.

*League of Educ. Voters v. State*, 176 Wn.2d 808, 831, 295 P.3d 743 (2013)

(C. Johnson, J., dissenting).<sup>5</sup>

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<sup>5</sup> The Court's political question doctrine is also at play in pre-election initiative challenges. *See id.* at 833-34 (citing, among other cases, *State ex rel. Donohue v. Coe*, 49 Wn.2d 410, 417, 302 P.2d 202 (1956) (determination of questions arising incidental to the submission of an initiative measure to the voters is a political and not a judicial question, except when there may be express statutory or written constitutional law making the question judicial)).

**B. Justiciability and standing have always been integral threshold elements in declaratory judgment actions.**

It is a “virtually universal rule that, before the jurisdiction of a court may be invoked under [Washington's declaratory judgment act], there *must* be a justiciable controversy.” *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) (emphasis added) (citations omitted); *see also To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001) (collecting cases). Cases consistently present the declaratory judgment test as four requirements:

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

*To-Ro*, 144 Wn.2d at 411, 27 P.3d 1149 (quoting *Diversified Indus.*, 82 Wn. 2d at 815, 514 P.2d 137) (additional citation omitted). “This third justiciability requirement of a direct, substantial interest in the dispute encompasses the doctrine of standing.” *Id.* at 414.

Thus, the Court of Appeals decision here is nothing new. It is an application of the justiciability and standing requirements that should be part of every pre-election challenge case.

**III. Given the essential separation of powers issues in pre-election challenges, the courts should not set aside justiciability requirements in order to issue advisory opinions.**

A court issues a prohibited advisory opinion when it addresses a declaratory judgment action without meeting the four justiciability requirements. *Id.* at 416.

However, a court may provide “advisory opinions only 'on those rare occasions where the interest of the public in the resolution of an issue is overwhelming' and where the issue has been 'adequately briefed and argued.’” *Id.* (quoting *In re Disciplinary Proceeding Against Deming*, 108 Wn.2d 82, 122-23, 736 P.2d 639, 744 P.2d 340 (1987) (Utter, J., concurring)) (additional quotations and citation omitted). The Court applies this exception either to get around mootness,<sup>6</sup> or to clarify a procedural issue for the legislature.<sup>7</sup> Neither exceptional circumstance

<sup>6</sup> *E.g.*, *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 496 P.2d 512 (1972) (where the city's freeholder qualifications included property ownership and the declaratory judgment plaintiff challenged that requirement on equal protection grounds, but the challenge had been rendered moot and thus would have been dismissed but for the public interest exception).

In the pre-election challenge context, the Court relies on the public interest exception to overcome mootness arguments that result from the election occurring during appeal, so that the Court may decide a pre-election challenge after the particular election. *E.g.*, *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 712, 911 P.2d 389 (1996). That is certainly not the same as relying on the public interest exception to make a case justiciable when the challengers fail to meet all four justiciability requirements in the first place.

<sup>7</sup> *E.g.*, *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972) (citations omitted) (holding that judicial

applies here to warrant pre-election judicial intervention over a duly-qualified initiative.

Just because an initiative is, inherently, a matter of public interest does not mean the court can apply the public interest exception in order to issue an advisory opinion. *Walker v. Munro*, 124 Wn.2d 402, 414-15, 879 P.2d 920 (1994) (concluding that “even if we do not always adhere to all four requirements of the justiciability test, this court will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged”); *see also DeGrief v. City of Seattle*, 50 Wn.2d 1, 14, 297 P.2d 940 (1956) (denying justiciability on a constitutional question and not applying the public interest exception). Thus, the public interest exception cannot get Challengers around standing and the other key justiciability requirements in a pre-election challenge; otherwise, the exception would swallow the rule, and reduce the legislative process to a judicial contest between litigants who can afford it.

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guidance on the meaning of a constitutional provision concerning legislative process “would be beneficial to the public and to the other branches of the government”). This Court has noted however that the broad public interest exception language in *Distilled Spirits* “does not refer to review of issues not yet ripe” and should be “easily distinguished from this case where the challenged measures are not yet in effect, and where there is no present harm to taxpayers even alleged . . . .” *Walker v. Munro*, 124 Wn.2d 402, 414-15, 879 P.2d 920 (1994). Thus, the legislative procedure cases that rely on the public interest exception in order to issue an advisory opinion do not provide an analogy for pre-election challenges.

### **Conclusion**

With these justiciability and standing considerations in mind, and in light of the democratic initiative right of the people, separation of powers, advisory opinions, political questions, and judicial restraint, the rule should be clear: if a party's alleged injury could be remedied in a post-election challenge, then that party may not bring a pre-election challenge. Here, the Challengers lack standing to sue because any injuries they *might* suffer can be remedied after the people vote on the initiative and it becomes law. Unless and until this is a law, there is no injury.

Respectfully submitted on October 2, 2015,



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## Appendix: 1910 Spokane City Charter Provisions

The provisions below are produced from a pamphlet titled “Charter of the City of Spokane State of Washington, Commission Form of Government, As Adopted December 28, 1910, with Additions and Amendments, published by the authority of the Commissioners of the City of Spokane (Printed August, 1946),” available at the Gonzaga Law Library.

### ARTICLE IX. LEGISLATION BY THE PEOPLE.

Section 81. **General Power:** The people of Spokane, in addition to the method of legislation hereinbefore provided, shall have power of direct legislation by the Initiative and the Referendum.

Section 82. **The Initiative:** The initiative shall be exercised in the following manner:

(a) **Petition:** A petition signed by registered and qualified electors of the city, accompanied by the proposed legislation or measure in the form of a proposed ordinance, and requesting that such ordinance be submitted to a vote of the people, if not passed by the council shall be filed with the clerk.

(b) **Clerk's Certificate:** Within two days from the filing of such petition the clerk shall certify the number of votes cast at the last general municipal election and the number of signers of such petition, and shall present such certificate, petition and proposed ordinance to the council.

(c) **Action by Council Upon Petition – Fifteen Per Centum Petition:** If such petition be signed by registered and qualified electors in number equal to 15 per centum of the total number of votes cast at the last preceding general municipal election, the council, within ten (10) days after the receipt thereof, except as otherwise provided in this charter, shall either pass such ordinance without alteration, or submit it to popular vote at a special election which must be held within 30 days after the date of the ordering thereof. Provided, however, that if any other municipal election is to be held within 60 days after the filing of the petition said proposed ordinance shall be submitted without alteration to be voted upon

at such election.

**Less Than Fifteen Per Centum Petition:** If such petition be signed by registered and qualified electors in number equal to five and less than 15 per centum of the total number of votes cast at the last preceding general municipal election and the said proposed ordinance be not passed by the council without alteration before the commencement of publication of notice of the next municipal election it shall be submitted to popular vote at such election. Provided, however, that such petition must be filed at least 30 days before the date fixed for such election. (As amended November 2, 1915.)

Section 83. **Referendum:** . . .

. . .

ARTICLE XIV.  
AMENDMENT.

Section 135. **Amendment of the Charter.** This charter may be amended by majority vote on such amendments. The provisions of this charter, with respect to submission of legislation to popular vote by the initiative, or by the council of its own motion, shall apply to and include the proposal, submission and adoption of amendments.

The council may make further regulations for carrying out the provisions of this article, not inconsistent herewith.

## Declaration of Service

I declare under penalty of perjury and the laws of the State of Washington that on the date signed below I sent a true and correct copy of the foregoing document by email to the following:

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Supreme Court Clerk,

Please find attached Envision Spokane's Supplemental Brief for the case:

Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution, No. 91551-2

Thank you,  
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