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No. 95134-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PROTECT PUBLIC HEALTH, CITY OF SEATTLE

Respondents,

v.

JOSHUA FREED, IMPACTION,

Appellants,

And

CITIZENS FOR A SAFE KING COUNTY, KING COUNTY, and
JULIE WISE, in her official capacity,

Defendants.

BRIEF OF RESPONDENT CITY OF SEATTLE

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I. INTRODUCTION

Appellants IMPACTion and Joshua Freed (collectively “Appellants” or “IMPACTion”) seek to resurrect an unlawful initiative that the Superior Court properly enjoined from appearing on the ballot. In response to the opioid crisis sweeping our nation, the King County Board of Health adopted a plan to improve access to treatment and other supportive services for individuals experiencing opioid addiction. King County Initiative 27 (“I-27”) sought to prevent King County (the “County”) from implementing part of that plan by forbidding the County from funding any supervised drug consumption site and prohibiting the operation or maintenance of any such site within the County.

While Appellants take issue with the Superior Court’s disposal of I-27 on a pre-election challenge, pre-election review was perfectly appropriate in this context, as courts often entertain pre-election challenges to determine whether a local initiative falls within the scope of the local initiative power. Furthermore, in holding that I-27 exceeded the scope of the initiative power, the Superior Court correctly applied well-settled law. State law delegates local health regulatory power to the Board of Health, precluding the people from exercising such power by initiative. Moreover, I-27 is a budget measure, in contravention of state law that reserves budgetary authority to the County’s “legislative authority.”

The Superior Court’s ruling that I-27 exceeded the scope of the initiative power is also defensible on other grounds, which were presented to, but not relied upon by, the Superior Court. Section 2 of I-27 is a development regulation governed by the Growth Management Act (“GMA”). It is also an administrative zoning regulation. Both types of actions are beyond the scope of the initiative power. I-27 is also an invalid county-wide regulation, as counties only have authority to regulate within municipalities when acting through a board of health.

Because the initiative is not severable, each of these grounds provides an independent basis for affirming the Superior Court’s decision and barring I-27 from appearing on the ballot. Accordingly, the Superior Court’s decision was sound and should be affirmed.

II. FACTUAL BACKGROUND

In March 2016, King County Executive Dow Constantine, Seattle Mayor Ed Murray, Renton Mayor Denis Law and Auburn Mayor Nancy Backus convened the Heroin and Prescription Opiate Addiction Task Force (“Task Force”). The Task Force, co-chaired by the King County Department of Community and Human Services and Public Health – Seattle & King County, was charged with developing strategies to improve access to treatment and other supportive services for individuals experiencing opioid addiction. CP 427-528.

The City of Seattle (the “City”), through its participation in both the King County Board of Health (“Board of Health”)¹ and Public Health – Seattle & King County, has been an active participant in the Task Force.²

The Task Force’s final recommendation included the establishment of Community Health Engagement Locations (“CHEL”) sites. CP 431. These CHEL sites were designed to prevent fatal opioid overdoses by providing a supervised place for opioid users to use drugs. The Task Force’s recommendation included a pilot project under which two CHEL sites would be established on a three-year provisional basis, one within Seattle and the other outside the City. *See generally* CP 427-528.

On January 20, 2017, the Board of Health adopted the Task Force’s recommendations, including its recommendations as to CHEL sites. CP 161-167.

On June 28, 2017, the King County Council passed Ordinance

¹ Three Seattle City Councilmembers are members of the Board of Health. KCC 2.35.021(A)(2).

² Two of the City’s representatives on the Board of Health, Councilmembers Bagshaw and Juarez, voted in favor of the recommendation. Councilmember Gonzalez was excused and was not present. *See* <http://www.kingcounty.gov/depts/health/board-of-health/proceedings/~/media/depts/health/board-of-health/documents/proceedings/2017-january-proceedings.ashx>

18544, which contained various appropriations. CP 628. Section 37 of that ordinance appropriated \$118,091,000 to the County’s Mental Illness and Drug Dependency Fund, of which \$2,127,000 was earmarked for implementing the recommendations of the Task Force.³ *Id.*

Section 37 also contained a budget proviso or spending restriction stating, “Of this appropriation, no funds shall be expended or encumbered to establish[,] except in any city which chooses to establish such a location by vote of its elected governing body[,] any community health engagement locations[...].” *Id.*

Subsequently, IMPACTion collected sufficient signatures to place I-27 on the ballot. Section 1 of I-27 provides in relevant part that “[n]o public funds may be spent on the registration, licensing, construction, acquisition, transfer, authorization, use, or operation of a supervised drug consumption site.” CP 631. Section 2 of I-27 provides in pertinent part that, “[i]t is unlawful for any person to operate or maintain any building, structure, site, facility or program with a function of providing a space or area for the use, consumption, or injection of heroin or other controlled substances listed in Schedule I by RCW 69.50.204, except for those substances which may be possessed in accordance with

³ In its budget for 2018, the City Council added \$1.3 million for a CHEL site in Seattle. Seattle Ordinance 125475, C.F. 314384, GS 259-10-A-1.

RCW 69.50.4013.” CP 632.

III. PROCEDURAL HISTORY

On August 21, 2017, Protect Public Health filed a complaint for declaratory and injunctive relief against IMPACTion, King County, and Julie Wise (King County Elections Director). CP 1-23. Protect Public Health sought a declaration that I-27 was beyond the scope of the initiative power, arguing, among other grounds, that I-27 interfered with King County’s budget authority and exercised regulatory power conferred on the King County Board of Health. It further sought a court order enjoining the County from placing the measure on the ballot. *Id.*

Protect Public Health filed a dispositive motion on September 15, 2017, noting oral argument for October 13, 2017. CP 24-50 (Motion for Declaratory Judgment and Injunctive Relief); CP 575 (reflecting the hearing date). On September 22, 2017, the City filed a motion to intervene as a plaintiff, seeking a declaratory judgment that I-27 was beyond the initiative power. CP 383-403. The City’s intervention motion was granted on October 2, 2017. CP 585-586. In addition to supporting arguments made by Protect Public Health, the City argued that the County did not have the power to enact county-wide land use regulations or adopt police regulations within a municipality that were not promulgated by a board of health. CP 383-403. The City filed its own motion for

declaratory and injunctive relief on October 5, 2017 and noted its motion for November 3, 2017. CP 609-623.

On September 29, 2017, IMPACTion's then counsel filed a motion for a continuance in the Protect Public Health matter and did not file a responsive brief on the October 2, 2017 due date. CP 575-584. On October 9, 2017, the Superior Court denied the motion for a continuance. CP 659-660. That day, the City filed a reply brief, highlighting to the Superior Court that the City had filed a separate dispositive motion, and stating that,

Some of the issues raised by Protect Public Health are addressed in a different manner in that motion. The City also raises new reasons why Initiative 27 is beyond the scope of the initiative power.

CP 637. The City's dispositive motion was attached for the Superior Court's reference. CP 640-655.

On October 12, 2017, the day before oral argument, IMPACTion's new counsel filed a responsive brief along with a motion for the court to accept its late filing. CP 667-683.

On October 16, 2017, the Superior Court granted Protect Public Health's motion, declaring I-27 beyond the scope of the initiative power

and enjoining King County from placing the measure on the ballot.⁴ Specifically, the Superior Court held that I-27 exceeded the scope of the initiative power because state law granted exclusive budgetary authority to the King County Council and conferred health regulatory power on the King County Board of Health, not the County Council or the people through the initiative power. CP 690-695.

At the hearing on Protect Public Health’s motion, the City argued in support of the motion. Because the Superior Court ruled in favor of Protect Public Health prior to hearing the City’s motion, the hearing date on the City’s separate motion was stricken, as it was no longer necessary.

IV. ARGUMENT

A. Courts routinely strike down local initiatives that exceed the scope of the local initiative power.

IMPACTion’s focus on the rare application and limited scope of pre-election review is misplaced. “[W]hile ‘[g]enerally judicial preelection review of initiatives is disfavored,’” it is well established that “‘courts *will* review local initiatives and referendums to determine . . . whether the proposed law is beyond the scope of the initiative power.’” *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*,

⁴ In its order, the Superior Court indicated that it had considered both the City’s reply brief and IMPACTion’s untimely responsive brief. CP 691.

185 Wn.2d 97, 104-05, 369 P.3d 140 (2016) (quoting *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010) (emphasis added). Pre-election review is well-suited to such challenges because “postelection events will not further sharpen the issue (i.e., the subject of the proposed measure is either proper for direct legislation or it is not).” *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005).

Indeed, courts frequently entertain pre-election challenges to determine whether a proposed law lies outside the scope of the initiative power. *See, e.g., Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 107; *City of Port Angeles*, 170 Wn.2d at 6-7; *Seattle Bldg. and Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980).

Here, Respondents’ challenge concerns whether I-27 exceeds the initiative power. *See* Sections IV.B-C, *infra*; CP 24-382 (Protect Public Health’s motion for declaratory judgment and injunctive relief); CP 609-623 (City’s motion for same). As such, it falls squarely within the class of cases in which pre-election review is appropriate. Accordingly, there is no basis for disturbing the Superior Court’s decision to undertake a pre-election review of I-27.

None of IMPACTion’s objections to pre-election review are persuasive. *See* Br. of App’t at 6-13. First, in emphasizing the extraordinary nature of pre-election review, Appellants neglect to

“distinguish between statewide and local initiatives.” *Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 103. While statewide initiatives are rooted in the state constitution, local initiatives, such as I-27, derive from statutes or charters. *Id.* at 104. Given the “more limited powers of initiatives under city or county charters,” courts will review local initiatives to determine whether they involve a subject matter that is proper for direct legislation. *Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 104 *see also* *City of Port Angeles*, 170 Wn.2d at 8; *City of Longview v. Wallin*, 174 Wn. App. 763, 790, 301 P.3d 45 (2013) (noting that “local powers of initiative do not receive the same vigilant protection as the constitutional powers” exercised in statewide initiatives).

Thus, it is unsurprising that IMPACTion relies almost exclusively on cases involving statewide initiatives to argue that pre-election review is confined to extraordinary circumstances. *See Br. of App’t* at 7-8 (citing *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 911 P.2d 389 (1996); *State ex rel. O’Connell v. Kramer*, 73 Wn.2d 85, 436 P.2d 786 (1968); *State v. Superior Court In and For Thurston County*, 92 Wash. 44, 159 P. 101 (1916). Indeed, the only local initiative case IMPACTion cites for the proposition that Washington courts should refrain from pre-election review is *Seattle Building and Construction Trades Council v. City of Seattle*, a case in which the court *agreed* to conduct a pre-election review

and *upheld* the superior court’s injunction keeping the initiative off the ballot. 94 Wn.2d at 749; *see* Br. of App’t at 7-8.

Second, IMPACTion’s objections to declaratory relief are unavailing. Any court that reviews a proposed initiative before it is placed on the ballot runs the risk of rendering an advisory opinion, but as detailed above, courts frequently entertain pre-election challenges notwithstanding that risk. *See, e.g., Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 107; *City of Port Angeles*, 170 Wn.2d at 7; *Seattle Bldg. and Constr. Trades Council*, 94 Wn.2d at 746. Moreover, courts “address these concerns” by “strictly limit[ing] the type of preelection challenges courts will review”—not by avoiding pre-election review altogether. *Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 104 (citing “general concerns that...the courts should not render advisory opinions”) (internal quotation omitted). As noted, the challenge before this Court falls squarely within those strict limits.

Third, and by the same token, IMPACTion’s arguments with respect to injunctive relief are unpersuasive. Just as courts entertain pre-election challenges despite the risk of issuing advisory opinions, courts routinely enjoin proposed initiatives from appearing on the ballot without regard to the four-part test set forth in *Tyler Pipe Industries, Inc. v. State, Department of Revenue*, 96 Wn.2d 785, 638 P.2d 1213 (1982). *See, e.g., Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 110; *City of Port Angeles*,

170 Wn.2d at 15; *Seattle Bldg. and Constr. Trades Council*, 94 Wn.2d at 750. In fact, where an initiative lies outside the initiative power, it is axiomatic that excluding the initiative from the ballot is the appropriate remedy, as the invalidity of the initiative establishes the requisite right, invasion, and injury, and neither the parties nor the public benefit from the inclusion of an invalid initiative on the ballot. *See Tyler Pipe Industries, Inc.*, 96 Wn.2d at 792.

Fourth, IMPACTion’s impassioned appeals to the rights of the “1.3. million registered voters in the County” are misplaced. *See Br. of App’t* at 12. Where, as here, a proposed law falls outside the scope of the initiative power, pre-election review *protects* popular sovereignty by preserving the integrity of the initiative process.

The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

AFL-CIO v. EU, 36 Cal.3d 687, 697, 686 P.2d 609 (1984). For each of these reasons, this Court should affirm the trial court’s decision to entertain a pre-election challenge to I-27.

B. The Superior Court correctly concluded that I-27 exceeded the scope of initiative power by usurping powers reserved for the King County Board of Health and King County Council.

The Superior Court correctly concluded that “[t]he legislature adopted RCW Chapter 70[.05] delegating the decision-making authority to the Board of Health, the Local Health Officer, and the County Council.” CP 694. County boards of health have supervisory authority over all public health matters in their jurisdictions. RCW 70.05.060. The King County Council makes budgetary decisions related to public health work. *See* RCW 70.12.025.⁵

By banning supervised injection sites and overturning King County’s budgetary decision on public health work, I-27 interferes with these delegations of powers and conflicts with state law, exceeding the scope of the initiative power. *Cf. King County v. Taxpayers of King County*, 133 Wn.2d 584, 949 P.2d 1260 (1997) (holding, in a pre-election challenge, that power to issue bonds was delegated to legislative authority and therefore not subject to initiative); *accord, City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006). Thus, the Superior

⁵ IMPACTion cites many statewide public health initiatives for the proposition that initiatives are appropriate means to make public health decisions. *See* Statement of Grounds at 12, n. 10. However, those examples are inapposite. This case concerns a local initiative in direct conflict with state law—not a state initiative on equal footing with a state statute.

Court correctly concluded that “I-27 is in direct conflict with RCW Chapter 70[.05]” and that a “[l]ocal initiative cannot usurp state law.” CP 694.

1. The state delegated the County’s local health regulatory power to the King County Board of Health.

“Each local board of health shall have supervision over all matters pertaining to the preservation of the life and health of the people within its jurisdiction...” RCW 70.05.060. IMPACTion argues that because this delegation of authority is not to the “legislative authority,” the case law regarding specific delegation is inapposite. IMPACTion is wrong.

The Board of Health has the power to enact such regulations as are necessary to preserve, promote and improve the public health and provide for the enforcement thereof. *Id.* “Under this statute [Ch. 70.05 RCW], the rules and regulations of [a board of health] . . . have the force of law.” *State v. Hampton*, 143 Wash. 2d 789, 795, 24 P.3d 1035 (2001).⁶ The Board of Health regulations are not subject to referendum. *See* Chs.70.05 and 70.46 RCW. Nor should they be subject to the initiative power.

While counties may have concurrent jurisdiction to enact police and sanitary laws, the state legislature has given boards of health

⁶ For example, the only regulation and enforcement provisions of the bicycle-helmet law in King County are in the Board of Health Code, not the King County Code or the Seattle Municipal Code. *See* Bicycle Helmets, King County Board of Health Code, Title 9.

supervisory power over all regulations related to preserving life and health.

IMPACTion notes that:

[A]ll activities relating to drug use are not matters of public health alone. For example, the Legislature has determined that various drug-related activity is illegal, subject to Washington criminal law. There are many other laws, including criminal laws.

Br. of App't at 25. However, this Court has held that a decision of a board of health pursuant to Chapter 70.05 RCW takes precedence over other authority. *See Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 147-49, 839 P.2d 324 (1992). In the arena of public health, when there is a conflict of laws, the decision of a board of health controls. *Id.* Thus, I-27 exceeds the scope of the initiative power insofar as it purports to negate a decision of the Board of Health.

2. The Superior Court correctly determined that I-27 invaded the power exclusively granted to a county's legislative authority to enact budgeting provisions.

The Superior Court faithfully applied the relevant statutes and case law in concluding that “I-27 proposes to engage in the appropriations process through prohibition of funding and therefore impinges on the legislative authority of the county.” CP 694.

Washington courts have consistently held that where state law gives a power to a municipality's “legislative authority” or “governing

body,” local direct legislation through initiative or referendum may not usurp that function, hamper it, or place any conditions or limits on the legislative body’s exercise of that power. *Taxpayers of King County*, 133 Wn.2d at 611; *accord, City of Sequim*, 157 Wn.2d at 261; *Seattle Bldg. and Constr. Trades Council*, 94 Wn.2d at 750.

Here, state law unequivocally vests the authority to enact budget measures in the County’s “legislative authority,” precluding the people from exercising this authority by initiative.

Chapter 36.40 RCW concerns county budgets. RCW 36.40.080 provides, “Upon the conclusion of the budget hearing *the county legislative authority* shall fix and determine each item of the budget separately....” *Id.* (emphasis added). Additionally, RCW 36.40.100 provides that the appropriations in the budget can only be changed by “the board of county commissioners.”⁷ Finally, RCW 70.12.025 provides that “[e]ach county legislative authority shall annually budget and appropriate a sum for public health work.”

⁷ Here, the King County Council is the equivalent of a board of county commissioners. RCW 36.32.005 states, “The term “county commissioners” when used in this title or any other provision of law shall include the governmental authority empowered to so act under the provisions of a charter adopted by any county of the state.” King County, through its Charter, has assigned the legislative powers of the county to a nine-member council. King County Charter Article II, §§ 210 & 220.

The funding prohibition in I-27, which provides that “[n]o public funds may be spent on the registration, licensing, construction, acquisition, transfer, authorization, use, or operation of a supervised drug consumption site,” CP 631, expressly restricts the County’s spending. As such, it is not just a “yes or no” policy decision, *see* IMPACTion’s brief at 22, but rather, a budgetary measure that lies outside the scope of the local initiative power.

IMPACTion argues that “[t]he purpose of I-27 is not merely budgetary but rather to prohibit the establishment of heroin injection sites in King County.” Br. of App’t at 22. However, the County’s budget ordinance contains a proviso⁸ that speaks directly to the funding of CHEL sites: “Of this appropriation, no funds shall be expended or encumbered to establish[,] except in any city which chooses to establish such a location by vote of its elected governing body[,] any community health engagement locations ...” CP 629.

By categorically prohibiting the expenditure of public funds on CHEL sites, I-27 renders this proviso meaningless, directly interfering

⁸ A proviso is a spending restriction on an appropriation. This Court has held that a proviso is part of a budget process. *See Washington State Legislature v. State*, 139 Wn.2d 129, 138, 985 P.2d 353 (1999).

with the King County Council's exclusive authority to enact budgetary measures.

C. This court may affirm the Superior Court's decision on other grounds.

This Court may affirm the trial court on any grounds established by the pleadings and supported by the record. *State v. Lakotiy*, 151 Wn.App. 699, 707, 214 P.3d 181 (2009) ("We may affirm the trial court on an alternative theory, even if not relied on below, if it is established by the pleadings and supported by proof."); accord *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn. 2d 751, 766, 58 P.3d 276 (2002); see RAP 2.5(a). Accordingly, this Court may affirm the trial court's ruling on grounds that (1) I-27 amounts to a development regulation the enactment of which is limited to local legislative authorities and/or (2) I-27 provides for the unlawful exercise of police power by a county within established municipalities.⁹

⁹ Should the Court find that the record below was insufficiently developed with respect to these issues, it should remand the case to allow the Superior Court to fully consider these issues, which were fully briefed in the City's motion for declaratory and injunctive relief. CP 609-623. Because the trial court struck the City's motion as moot after granting Protect Public Health's motion, any other remedy would deny the City its day in court.

1. I-27, Section 2 exceeds the local initiative power because it invades power exclusively granted to local legislative authorities to enact development regulations.

As stated above, I-27 seeks to prohibit any supervised injection sites in King County.¹⁰ Br. of App't at 22. As such, it is effectively a proposition to enact land use controls that amount to “development regulations” under the GMA (Ch. 36.70A RCW). The I-27 proponents thus attempt to trample on a power granted exclusively to the legislative authorities of cities and counties.

Washington courts have held that citizens cannot use the initiative process to enact GMA development regulations. *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 389, 93 P.3d 176 (2004). Under the GMA, “development regulations” or “regulations” are controls placed on development or land use activities by a city or county, including zoning ordinances and official controls. RCW 36.70A.030. I-27’s prohibition on certain uses of land amount to exactly that. CP 22 (no person may “operate or maintain any building, structure, site, facility or program with a function of providing a space or area for the use, consumption or injection” of certain controlled substances).

¹⁰ If IMPACTion had wanted to limit sites only in the unincorporated area it would have proposed an initiative applicable only to the unincorporated area, as allowed by King County Charter 230.50.

Development regulations, including land use controls, promulgated pursuant to the GMA are beyond the local referendum or initiative power in Washington. *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2007). Because Section 2 of I-27 attempts to enact land use control regulations, the initiative process is not available here.

Even if Section 2 of I-27 were not a development regulation under the GMA, I-27 would require a legislative authority to adopt a zoning amendment, as it purports to limit where certain land use activities can occur. Washington courts have long recognized that Washington's general law grants county and city councils exclusive zoning power. *1000 Friends of Wash.*, 159 Wn.2d at 174; *Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 108; *Save Our State Park v. Bd. Of Clallam Cnty Comm'rs*, 74 Wn. App. 637, 649-50, 875 P.2d 673 (1994); *Lince v. City of Bremerton*, 25 Wn. App. 309, 312-13, 607 P.2d 329 (1980). Here, I-27 invades not only the province of the King County Council but also that of the Seattle City Council, and in so doing, exceeds the local initiative power.

2. I-27's Countywide regulations are invalid, because a county may not exercise regulatory police power within a municipality unless it is acting through a board of health.

Chapter 70.05 RCW establishes a general law that gives boards of health coextensive powers within the City. *See Snohomish Cty. Builders Ass'n v. Snohomish Health Dist.*, 8 Wn. App. 589, 595-96, 508 P.2d 617

(1973). “This concept of overlapping of phases of the police power has long been with us. Law enforcement, fire protection, and health protection, all of which are carried on at the city, county, and state levels, in many instances territorially overlap and readily demonstrate this.” *Municipality of Metro. Seattle v. City of Seattle*, 57 Wn.2d 446, 455–56, 357 P.2d 863 (1960). Here, Chapter 70.05 RCW gives the Board of Health a specific grant of power to enact local health regulations that apply inside the City of Seattle. Without that specific grant of authority by the state to local boards of health, the County has the power to make and enforce police and sanitary regulations only within the unincorporated area of the County. *See, e.g.*, Steve Lundin, *The Closest Governments to the People: A Complete Reference Guide to Local Government in Washington State*, 27 (2007).¹¹

Counties have dual natures and are considered to be both political subdivisions of the State and separate municipal corporations.

Modern county government is confusing and not well understood. The confusion arises from this unique dual nature of counties and a related disconnection with some of their voters. County voters include all voters residing in the county, including voters residing in cities and voters residing in unincorporated areas outside of cities. These

¹¹ Available at <http://mrsc.org/getmedia/1c25ae05-968c-4edd-8039-af0cf958baa7/closest-governments-to-the-people.pdf.aspx?ext=.pdf>.

voters elect county officials and vote on county ballot propositions.

However, counties do not exercise their powers uniformly throughout their boundaries. Counties exercise some powers countywide, primarily when they function as political subdivisions or agents of the State. However, counties also exercise more visible general governmental powers primarily in unincorporated areas outside of cities.

Id. at 27.

The City of Seattle has the power to enact police and sanitary regulations that are not in conflict with general laws. Const. art. XI, § 11. In Washington, the state constitution affords broad home-rule rights to municipal corporations. Cities and counties have exclusive regulatory authority within their territorial limits, provided there is no conflict with general law. *See* 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.”).

California law is also instructive on this issue, as the relevant provision of the Washington State Constitution is parallel to the broad home-rule rights granted by California’s state constitution. *See* Cal. Const. art. XI, § 7 (“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.”). The provisions of each constitution are identical in language and, it stands to reason, scope

and application. In fact, Washington's home-rule provision was modeled on California's own. Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WILLIAM & MARY L. REV. 269, 290 (1968). Where Washington's state constitution employed California's as a model, or borrowed a given provision verbatim, the Supreme Court of Washington has held California case law to be persuasive authority. *See, e.g., Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 493, 90 P.3d 42 (2004) (holding that California cases are "are particularly instructive because they interpret constitutional language that served as a basis for, or is nearly identical to, our own."); *State v. Coe*, 101 Wn.2d 364, 377, 679 P.2d 353 (1984) (holding that interpretation of California's constitution was "particularly apposite here because Const. art. 1, § 5 was modeled after the California provision.").

California case law has been clear in its determination that counties do not have concurrent jurisdiction with incorporated cities situated inside their boundaries. In *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853, 44 P.3d 120 (2002), the Supreme Court of California considered whether a county could regulate the sale of firearms on county property located within an incorporated city. The court's holding distinguished between the proprietary and regulatory capacities of a county: where a county attempts to regulate within an incorporated city,

such attempts are unlawful. *Id.* at 871 (“*Pfirrmann* and *Knight* establish the principle that cities and counties generally speaking do not exercise concurrent jurisdiction over regulatory matters.”). In so holding, the court relied on the well-established principle that, where a city incorporates, it withdraws from its respective county, severing any power of the county to enforce regulations within city boundaries. *See Ex parte Roach*, 104 Cal. 272, 277, 37 P. 1044 (1894) (holding that the principles of local government within the state constitution served to, on incorporation, “withdraw the city from the control of the county, and to deprive the county of any power to annul or supersede the regulations of the city upon the subjects which have been confided to its control”); *see also In re Knight*, 55 Cal. App. 511, 518, 203 P. 777 (1921) (holding that, on incorporation, a city is “withdrawn from the county, and any ordinances passed by the latter can have no binding or any force upon the municipality as to any matters or subjects as to which the latter is vested with the power to enact prohibitory or regulatory local laws”).

To the extent that I-27 attempts to limit the operation of supervised injection site programs within the City of Seattle (or any other municipality in King County), the initiative improperly attempts to utilize the County’s police powers to enact a police power regulation within those jurisdictions. This is not a power that a county possesses outside of the

board of health. King County cannot do by initiative what it is not permitted to do by ordinary legislation. *See Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 746-47.

D. The entirety of I-27 must be enjoined from being placed on the ballot because separate provisions of initiatives are not severable.

While I-27 contains a severability clause, the presence of such a clause is not dispositive. *McGowan v. State*, 148 Wn.2d 278, 295, 60 P.3d 67 (2002). If this Court determines that any portion of I-27 is invalid, it should keep the entire initiative off the ballot. This is so because there is no way to know whether the initiative proponents would have been able to garner sufficient signatures to place I-27 on the ballot if certain portions were not part of the petition when it was circulated for signatures. There is simply no way to know whether someone who signed the initiative petition would have supported I-27 absent certain provisions. Perhaps a voter in Kent signed the petition because she did not believe the County should be expending taxpayer funds to support injection sites. The same voter may have had no objection to the City of Seattle zoning an injection site within City limits. *Cf. Leonard v. City of Spokane*, 127 Wn.2d 194, 201, 897 P.2d 358 (1995) (noting severability cannot be accomplished when it is unknown whether legislature “would have passed” the constitutional provisions with the unconstitutional provisions).

Because it is impossible to know whether any person signing the petition to the place I-27 on the ballot was against using tax funds, but in favor of such sites elsewhere, or vice versa, this Court should not engage in any severability analysis.¹²

V. CONCLUSION

IMPACTion proposed I-27 to institute a county-wide ban on supervised injection sites. I-27 is invalid on multiple grounds—as a health regulation for which the Board of Health has superior decision-making power, a restriction on spending County funds that interferes with budgetary powers vested in the county legislative authority, a development regulation not subjective to initiative, and an unlawful exercise of regulatory police power within a municipality. Because the initiative is not severable, each of these grounds provides an independent basis for upholding the Superior Court’s decision and excluding I-27 from the ballot. For these reasons, the City respectfully requests that the Court affirm the Superior Court’s decision.

¹² While the City is aware of numerous cases that have kept local initiatives off the ballot in their entirety, it is not aware of any reported cases where a court severed certain portions out of an initiative *after* all of the petition signatures were collected. This is likely so because changing the “substance” of an initiative “in court [would create] a significant possibility that the title would no longer accurately state the subject and/or provide a concise description.” *Coppermoll*, 155 Wn.2d at 299 n.6.

RESPECTFULLY SUBMITTED this 22nd day of January 2018.

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PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 18 years, competent to be a witness in the above action, and not a party thereto; that on the 22nd day of January 2018, I caused to be served, a true copy of the foregoing BRIEF OF RESPONDENT CITY OF SEATTLE upon the parties listed below via the Court's electronic filing system:

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SEATTLE CITY ATTORNEY'S OFFICE - GOVERNMENT AFFAIRS

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