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No. 95134-9

SUPREME COURT
OF THE STATE OF WASHINGTON

PROTECT PUBLIC HEALTH, and
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.

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A. INTRODUCTION

“The first power reserved by the people is the initiative.” Wash. Const. art. II, § 1. “The right of the people to enact laws through the initiative process is, of course, one of the foremost rights of the citizens of the State of Washington.” *Save Our State Park v. Bd. of Clallam County Comm’rs*, 74 Wn. App. 637, 643, 875 P.2d 673 (1994) (analyzing a local initiative). Respondents Protect Public Health (“PPH”) and City of Seattle (“City”) unpersuasively argue that the people are precluded from exercising that fundamental right in this case. They contend that because the Legislature granted general powers to public health boards, the people are precluded from *ever* exercising their initiative power on *any* matter that touches public health. They ignore this Court’s jurisprudence that absent a grant of *specific* power to a local legislative body, the people retain their right to self-govern by initiative.

To support their position, PPH and the City rely on distinguishable cases where the people’s initiative power was limited by specific grants of power to local legislative bodies. They claim that the local public health boards have absolute authority over matters concerning public health, yet they ignore the profoundly critical decision of the King County Council (“Council”) to override the Seattle King County Public Health Board’s (“Board’s”) recommendations and allow cities to opt out of providing

heroin injection sites. They fail to perceive I-27's purpose – to allow the people of King County (“County”) to decide whether or not to allow heroin injection sites – arguing incorrectly that I-27 is a budgeting and/or zoning law. This Court should protect the right of the people to self-govern and allow a vote on I-27.

B. ARGUMENT

(1) Respondents Ignore This Court's Recent Precedent Regarding Pre-Election Challenges to Initiatives and Fail to Meet Their High Burden to Keep I-27 Off the Ballot

Unsurprisingly, PPH and the City do not cite *Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727, 732 (2015), this Court's recent decision regarding pre-election challenges to initiatives. In *Huff*, the Court refused to allow injunctive relief to prevent a vote on an initiative, an initiative that was found unconstitutional in a later case *after* the voters enacted it. See *Lee v. State*, 185 Wn.2d 608, 374 P.3d 157 (2016). PPH and the City ignore *Huff* because they cannot overcome the high burden it places on pre-election review of initiatives.

As this Court explained in *Huff*, the “long-standing rule” in Washington is to “refrain from inquiring into the constitutionality or validity of an initiative before it has been enacted.” *Huff*, 184 Wn.2d at 648. Pre-election injunctive relief is only appropriate in cases where it is “clear” that an initiative is outside the legislative power.” *Id.* at 652 (quoting

Coppernoll v. Reed, 155 Wn.2d 290, 305, 119 P.3d 318 (2005)). The party seeking pre-election injunctive relief bears a “high threshold burden” to show that an initiative is “clearly beyond the scope of the initiative power.” *Id.* at 654 n.7.

Huff illustrates that courts will not grant injunctive relief, except the most egregious cases where there can be no dispute that the initiative is invalid. The Court allowed an initiative to go to the ballot, even though one year later – after the initiative had been enacted – every member of the Court would hold that it violated some portion of the State Constitution. *Lee*, 185 Wn.2d at 629, 632 (González, J., concurring). The Court explained that when considering a pre-election challenge, courts do not “definitively determine” whether an initiative is outside the scope of the people’s legislative power.¹ *Huff*, 184 Wn.2d at 654 n.7. Rather, courts ask whether

¹ Related to the Court’s unwillingness to “definitively determine” the merits of a pre-election initiative are the limitations on declaratory relief. Declaratory relief under RCW 7.24 is unavailable unless there is “(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.” *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994).

Pre-election challenges to initiatives hypothetical, academic arguments over the validity of an ordinance which may never go into effect. Just as this Court waited until the initiative at issue in *Huff* went into effect before evaluating its constitutionality, so should the trial court have waited until after an election before evaluating a hypothetical ordinance. If this Court held otherwise, courts would be inundated with requests to evaluate proposed legislation. Logically, those requests could come not just from citizens but from disgruntled members of the Legislature and local legislative authorities. PPH and the City’s arguments on this point are lacking.

the party seeking to bar the initiative has shown without a doubt that it is.

As discussed below, PPH and the City fail to make that showing.

(2) I-27 Is Not Clearly Beyond the Scope of the Legislative Power

A local initiative is valid, unless it “deprive[s] the city legislative authority of the power to do what the constitution and/or a state statute *specifically* permit it to do.” *City of Sequim v. Malkasian*, 157 Wn.2d 251, 265, 138 P.3d 943 (2006) (emphasis added). Courts limit the right of initiative only when a “provision presents no ambiguity” that the Legislature delegated the authority exclusively to the legislative authority. *State ex rel. Guthrie v. City of Richland*, 80 Wn.2d 382, 386, 494 P.2d 990 (1972). In this context, “legislative authority” “means *exclusively*” the local council and local chief executive. *City of Sequim*, 157 Wn.2d at 265 (emphasis added).

The Legislature has never specifically granted local legislative bodies the power to create heroin injection sites. The Council acted under its general legislative authority in permitting injection sites, and the people share that authority to legislate for themselves by initiative. Wash. Const. art. II, § 1; RCW 35A.11.080; King County Charter art. 2, § 230.50. To be clear, this is not a case about whether the County could create heroin injection sites. The only question for the Court is whether in the absence of

a specific grant of power to create heroin injection sites, the people are precluded from bringing an initiative to ban them. The people have a right to do so.

(a) RCW 70.05 Is Not a Grant of Specific Legislative Power as Evidenced by Respondents' Own Authority

The County did not act under a grant of specific legislative authority, but rather engaged in general policy-making when it permitted heroin injection sites. This new policy decision – new, not just for the County or state, but for the country as a whole – was born out of a task force with no legislative or constitutional authority. PPH and the City rely on RCW 70.05 – a general statute establishing local health boards – arguing that it provides specific and exclusive authority to the Board to enact heroin injection sites. Yet in support of that proposition, PPH and the City cite cases involving specific and detailed grants of legislative power, very different from a general statute establishing local health boards. These cases are clearly distinguishable. In each, the Legislature conferred *specific* authority on the local legislative body to perform a *specific* function.

City of Port Angeles v. Our Water-Our Choice!, 170 Wn.2d 1, 10, 239 P.3d 589 (2010), involved a specific statute allowing the local governing body to “fluoridate the water supply system of the water district.” RCW 57.08.012. In *King County v. Taxpayers of King County*, 133 Wn.2d

584, 949 P.2d 1260 (1997), the court reviewed constitutional and statutory provisions setting a debt ceiling on local governments and outlining the precise means for a city to exceed that ceiling. Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227 (2012), involved a statute permitting local legislative bodies the power to use automated traffic safety cameras to issue traffic infractions. RCW 46.63.170. The statute placed specific restrictions on the cameras' use, added restrictions based on city population size, and required local legislative authorities to prepare an analysis of locations before implementing traffic cameras. *See* RCW 46.63.170(1). In each case, the Court held that these specific, discrete powers granted to local governing bodies precluded local citizens from limiting those powers by initiative.

RCW 70.05 is not a specific grant of legislative power akin to authorizing the fluoridation of water, setting the means to exceed a debt ceiling, or allowing traffic cameras. No statute specifically authorizes heroin injection sites (indeed state and federal law arguably prohibit them), nor does any statute outline provisions for their use. If the Legislature had intended to specifically grant such a novel power to local governments – a

power in direct conflict with drug and other laws² – one would think it would provide at least as much context as it did for traffic cameras. Absent such specific legislation, the people retain their right to self-govern on this issue via initiative.

PPH and the City rely heavily on *Spokane Health District v. Brockett*, 120 Wn.2d 140, 868 P.2d 116 (1994), a case which did not involve the scope of the initiative power. Even so, *Brockett* does not support their argument. The Court in *Brockett* analyzed specific legislation regarding AIDS treatment. The Court “center[ed]” its analysis on the omnibus AIDS act which authorized local AIDS service networks to offer “needle sterilization” and the “use of appropriate materials” to prevent AIDS infection. 120 Wn.2d at 146. The Court found that “needle sterilization” encompassed needle exchange. *Id.* at 152. To be specific, the Legislature *authorized* local governments to operate needle exchange programs, notwithstanding the criminal laws pertaining to drug use. Nothing like that occurred here.

There is no similar statute regarding heroin injection sites. No statute grants the specific power to create such sites. There is no legislative

² *E.g.*, RCW 69.50.204 (classifying heroin as a Schedule I controlled substance); RCW 69.50.4013 (criminalizing possession); 21 U.S.C. § 844 (same); KCC § 12.81.010 (regulating the display of drug paraphernalia in the County); and KCC § 12.82 (establishing drug-free zones).

mandate, so clear, that local voters are precluded from legislating in this arena. I-27 does not exceed the scope of the initiative power.

(b) The Growth Management Act Cases Are Likewise Distinguishable

PPH and the City also cite to a set of cases involving the Growth Management Act, RCW 30.70A (“GMA”), in support of their position. *See, e.g., Whatcom County v. Brisbane*, 125 Wn.2d 345, 346, 884 P.2d 1326 (1994); *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 167, 149 P.3d 616 (2006), as amended (Jan. 8, 2007).³ Again, the difference between the GMA and RCW 70.05 is obvious.

The GMA specifically mandates detailed and extensive powers to local legislative bodies, as opposed to the general powers outlined by RCW 70.05. The GMA is a massive statute, mandating that counties develop comprehensive land-use plans to account for sustainable growth. It delineates plan requirements and a schedule for their implementation and review. The GMA contains special provisions for local shorelines, aquifers,

³ PPH also miscites *1000 Friends* arguing that I-27 is a line item-veto referendum prohibited in the arena of “comprehensive planning.” PPH br. at 27 (citing 159 Wn.2d at 180-81). As discussed in this section, “comprehensive planning” contemplated by the GMA is nothing like the general administration of public-health contemplated by RCW 70.05. Regardless of the respondents’ labeling, no statute requires a “comprehensive plan” to address opioid misuse. The term “comprehensive plan” does not appear in all of RCW 70.05, whereas it is a term of art in the GMA. *See, e.g., RCW 30.70A.070-115*. The voters of King County are not precluded from voting on a major policy shift – the creation of heroin injection sites – just because it was packaged with other provisions for opioid treatment.

wetlands, forests, floodplains, mineral lands, schools, historic towns, and airports, to name just a few. The GMA is meticulously detailed, containing 107 distinct sections specifically directing power to the legislative authorities of the State’s counties. *See, e.g.*, RCW 36.70A.040(3) (requiring that qualifying “county legislative authorit[ies]” adopt plans pursuant to the GMA). This extensive grant of specific powers is nothing like the general grant of authority given to public health boards to “supervise” matters related to public health. RCW 70.05.060. No statute, including RCW 70.05, grants local legislative bodies the specific power to run heroin injection sites.

This is not a case about whether a local initiative undermines a statutorily-mandated plan like the plans required by the GMA.⁴ Rather the Court must decide whether the voters of King County have a right to weigh in on an optional policy decision, adopted by an appointed board, acting under no specific grant of legislative authority. The people have that right.

(c) The Council Exercised Its General Policy Making Power – a Power Subject to Citizen Initiative – as Evidenced by the Opt-Out Proviso

⁴ PPH and the City’s suggestion that I-27 is a “development regulation” is patently wrong. Nothing in the task force recommendations, the Board policy, or the Council ordinance purported to amend zoning codes. Those materials do not even mention zoning, let alone the GMA.

Absent a specific grant of power, a local government is free to act under its general authority as a municipal body – as was the case here evidenced by the opt-out proviso. If PPH and the City are correct that 70.05.060 gives the Board absolute authority to legislate in this area, then the Council could not override that authority by adopting the opt-out proviso. Nor could cities override the Board’s decision by banning injection sites within their borders.

By including the proviso, the County recognized that the authorization of heroin injection sites was a *policy choice*. The Council knew that the matter would be controversial, so it altered the plan endorsed by the Board and proceeded with the opt-out. The Council’s power to do so did not come from a specific grant of statutory authority. Rather, the Council acted under its general legislative authority as a municipal body.⁵ King County citizens share the right to legislate in this arena. Clearly, the Board does not have *exclusive* power to regulate all matters concerning public health, and the trial court erred in concluding it does.

PPH and the City fail to recognize the importance of the opt-out proviso. PPH claims that the voters of “one jurisdiction cannot use the

⁵ The Council regularly acts under this general authority when it comes to drugs. For example, KCC § 12.81 regulates the display of drug paraphernalia and KCC § 12.82 authorizes drug-free zones. These are indistinguishable from what I-27 seeks to achieve. If the Court were to accept the respondents’ arguments, then these ordinances would also violate the Board’s “exclusive” control of all matters pertaining to public health.

initiative and referendum process to undermine such coordinated, multi-jurisdictional action to stem an epidemic.” PPH br. at 36. Yet by including the opt-out proviso, the Council recognized that the people’s opinion should be considered in implementing injection sites.

Even the Board recognized the importance of public approval when it adopted the Task Force recommendations. After making findings and “endorsing” the Task Force’s recommendations, the only substantive action the Board took was to “call[] upon state, county and city actors, as well as Public Health - Seattle & King County, to implement the public health policies outlined [in the task force report].” CP 161-67.

PPH claims that the “Board of Health’s decision was informed by ten public briefings held on the opioid epidemic as well as other information.” PPH br. at 5. Yet the Board’s own findings indicate that *only one* of those public meetings specifically addressed heroin injection sites – the last meeting held on October 20, 2016 where the Board discussed the Task Force recommendations. CP 162-64.⁶ The public had almost no chance to participate in this important policy decision. And when given the chance, many cities chose to opt out. *See* Br. of Appellants at 2-4.

⁶ The Board’s findings indicate that most of the public briefings addressed portions of the Task Force recommendations that I-27 does not challenge, such as safe medicine return and naloxone distribution. CP 162-64.

It is hypocritical to “call upon county actors” to implement steps toward addressing opiate abuse, while excluding local citizens themselves from participating in that process. King County’s people are the most important actors in local government and have a right to have their voices heard via the initiative power. To silence them is unfounded in law and undemocratic in action.

(d) The Legislature Never Specifically Granted Powers to the Legislative Authority, Thus the Initiative Is Not Beyond the Scope of the Initiative Power

As stated above, to invalidate an initiative the Court must find that the Legislature granted specific authority – which it did not – to the local legislative authority – which it also did not. *City of Sequim*, 157 Wn.2d at 265. The power must be transferred to the governing body, meaning exclusively the local council or chief executive. *Id.* It may not be delegated down the line to a board that is not directly elected by the people. *See Benton v. Seattle Electric Co.*, 50 Wash. 156, 96 P. 1033 (1908) (cited in Br. of Appellants at 21 n.14, 25). Subdelegation to agencies like public health boards would further remove the people’s power to meaningfully participate in government. This Court should not permit this dilution of the people’s first-reserved constitutional power. Wash. Const. art. II, § 1.

PPH admits in its response that local public health boards are not “legislative authorities.” PPH writes that local public health boards are not

asked by the Legislature to “legislate,” but rather are authorized to “take action” and that the plan to implement heroin injection sites “is not a legislative decision.” PPH br. at 32-33. How true. After all, the Council made the legislative decision to adopt heroin injection sites with an opt-out proviso for cities. Yet RCW 70.05.060 does not give that power to the Council. No statute does. Rather, the Council acted under its general authority as a municipal body, and therefore I-27 does not go beyond the scope of the people’s initiative power.

(e) I-27 Is Not an Administrative Initiative

Though not decided by the trial court, PPH and the City argue that I-27 does not go beyond the scope of the initiative power by interfering with administrative matters. Neither PPH nor the City can demonstrate that I-27 involves administrative action under this Court’s precedents. “[A] power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.” *Leonard v. City of Bothell*, 87 Wn.2d 847, 850, 557 P.2d 1306 (1976). Here, the County did not pursue a plan by some power greater than itself. An appointed board is not a superior power to the local legislative authority. If it were, the Council would have been powerless to allow cities the power to opt out of the Board’s recommendations. Rather, the County made a policy

choice under its own authority as a municipal body. I-27 allows citizens the opportunity to exercise their initiative power and make that policy choice for themselves.

PPH and the City try to mask the obvious purpose of I-27 by claiming that its operating clauses – the bans on funding and operating supervised drug use sites – impermissibly interfere with administrative matters. They are wrong.

(i) I-27 Is Not a Budgetary Law

I-27 does not impermissibly interfere with local budgeting. Courts are tasked with evaluating ballot measures by looking at this “fundamental and overriding purpose” of the measure. *Huff*, 184 Wn.2d at 652; *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719, 911 P.2d 389, *cert. denied*, 519 U.S. 862 (1996). PPH and the City and the trial court ignore that purpose and the reality of implementing a public policy decision which the voters are entitled to make for themselves.

I-27’s goal is clear – it presents the voter with a binary decision whether or not to declare that “[t]he use of supervised drug consumption sites is inconsistent with the county’s goal of preventing substance use disorder and overdoses across King County.” *See* Br. of Appellants at Appendix. To implement that policy choice, I-27 prohibits “the funding and operation” of injection sites in the County. *Id.* These implementation

measures are necessary and appropriate to restrict government action in light of the stated policy of the initiative. Just as there is no right without a remedy, there can be no policy choice without a means to enforce it.

PPH and the City argue that RCW 70.12.025, a statute requiring local councils to fund local public health boards, precludes all initiatives related to public health. They are wrong – and for good reason. Should this Court find that an unelected board has exclusive authority over all matters touching on public health, the Court would gut the people’s power of self-governance. Nearly every major government decision affects public health – for example, environmental protections, family and reproductive laws, and transportation and infrastructure decisions all impact the health of local communities. *See also*, Br. of Appellants at 27 n.4 (listing examples of past initiatives). Absent a specific Legislative mandate to the contrary, local citizens have a fundamental right to make policy decisions that affect the health of their communities.

(ii) I-27 Is Not a Zoning Law

The City argues that I-27 is a zoning law that is barred by the GMA. This is a gross misunderstanding of the law. The GMA does not regulate sites for supervised illegal drug use – a preposterous notion given that no such site has ever existed before in this country. In fact, “[n]either the GMA nor the comprehensive plans adopted pursuant thereto directly regulate site-

specific land use activities.” *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 126, 118 P.3d 322 (2005). It is the local zoning regulations “which act as a constraint on individual landowners.” *Id.* Unsurprisingly, the City fails to cite a single zoning provision or development regulation affected by I-27. There are none.

Again, the City misunderstands the nature of I-27. I-27 is a policy choice to outlaw heroin injection sites within the County. In order to implement that policy, the measure would ban the operation of drug use sites within the County. This is not a bar on the City’s power to designate land use zones (*e.g.*, residential, commercial, or mixed use). It is a ban on an activity – operating a drug use site – whether the activity take place in a downtown high-rise or a single-family home. The City’s argument is a meritless distraction from I-27’s clear purpose.⁷

C. CONCLUSION

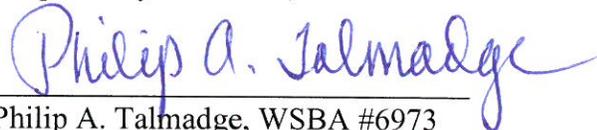
Appellants and the over 60,000 concerned citizens who petitioned to put I-27 on the ballot deserve to vote on the Board’s novel and drastic shift in public policy. To be clear, the question is not whether the local

⁷ The City’s severability argument is likewise meritless. I-27’s clear goal is preventing heroin injection sites within King County. The opt-out proviso adopted by the Council shows that the County knew these sites would be controversial and that some people would not want them operating in their communities at all. It is disingenuous to argue that there is “no way to tell” what the proponents of I-27 would want, should the Court invalidate some portion of the law’s implementation clauses. *See City br.* at 24.

health board could create heroin injection sites, given the lack of a *specific* grant of authority to do so.⁸ Rather, the question is whether the Board's general, non-legislative powers clearly extend so far as to preclude the people of King County from ever weighing in on the groundbreaking policy decision to permit heroin injection sites within the County. PPH and the City have failed to meet their high burden to show that I-27 is clearly beyond the scope of the people's initiative power, and the trial court's decision to block I-27 from public vote should be overturned.

DATED this 31st day of January, 2018.

Respectfully submitted,



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⁸ For example, I-27 does not challenge the board's recommendations to increase educational efforts involving opioid misuse, to promote safe storage and disposal of medications, to create access to buprenorphine, or to increase the distribution of naloxone, a lifesaving overdose treatment, in King County. *See, e.g.*, CP 431. Regardless of the outcome of I-27, the County may still use all \$2,127,000 it earmarked to implement these and other goals.

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DECLARATION OF SERVICE

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

DATED: January 31, 2018 at Seattle, Washington.



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