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No. 95134-9

SUPREME COURT OF THE STATE OF WASHINGTON

PROTECT PUBLIC HEALTH,

Respondent,

v.

JOSHUA FREED, IMPACTION,

Appellants,

And

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

Defendants.

RESPONSE BRIEF

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I. INTRODUCTION

From a purely legal perspective, this appeal presents a garden-variety case in which the trial court properly conducted narrow pre-election review into the scope of a local initiative measure and invalidated the initiative after finding it conflicted with state law. The law is clear that such pre-election “scope challenges” are proper. The trial court properly enjoined King County Initiative 27 (“I-27”) from the ballot because it directly interferes with explicit statutory authority granted to the County Council and the local Board of Health, and was inconsistent with the legislative scheme for protecting public health. These conflicts, as well as the initiative’s numerous other infirmities, require this Court to affirm.

In addition to being legally correct, the trial court’s action here was particularly important to protecting the public interest. The purpose of I-27 was to veto an evidence-based opioid epidemic response plan that was adopted by the Seattle-King County Board of Health (“Board of Health”) and funded by the King County Council. The Legislature specifically granted such authority to local health officials and the County Council to ensure that urgent public health matters could be addressed immediately, without delay or veto through the local initiative process. To allow citizens to delay or veto a carefully crafted and properly adopted epidemic

response plan would create a precedent that jeopardizes the health of all Washingtonians.

II. STATEMENT OF THE CASE

A. The local Board of Health exercised its statutory authority by adopting an evidence-based epidemic response plan.

The existence of the opioid public health crisis is undeniable. In 2015, 229 individuals died from heroin and prescription opioid overdose in King County alone.¹ In that year, teen deaths from overdoses rose by 19% nationally.²

To confront this crisis, 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 (the “Task Force”).³ The Task Force, co-chaired by the King County Department of Community and Human Services and the Department of Public Health – Seattle & King County, was charged with developing both short- and long-term strategies to prevent opioid use disorder, prevent overdose, and improve access to treatment and other supportive services for individuals experiencing

¹ (CP62)

² See CNN, “Teen drug overdose death rate climbed 19% in one year,” August 16, 2017, available at <http://www.cnn.com/2017/08/16/health/teen-overdose-death-rate/index.html>.

³ (CP181)

opioid use disorder.⁴ Task Force members represented 38 entities, including the University of Washington Alcohol and Drug Abuse Institute, behavioral health services providers, hospitals, human service agencies, the recovery community, criminal justice partners, first responders, and others.⁵

The Task Force met over a six-month period from March to September 2016 and ultimately adopted eight primary recommendations to address this public health crisis – essentially an eight-point action plan – which were published in a 99-page report that documented the Task Force’s work and supporting evidence.⁶

The Task Force spent significant time and resources investigating the evidence supporting Community Health Engagement Locations (“CHELs” or “CHEL sites”) and ultimately decided to recommend CHEL sites as one pillar of the epidemic response plan.⁷ “[T]he primary purpose of [CHEL] sites is to engage individuals experiencing opioid use disorder using multiple strategies to reduce harm and promote health, including,

⁴ (CP62)

⁵ (CP70)

⁶ (CP60)

⁷ (CP87-90, 140-142, 143-148, 149-155)

but not limited to, overdose prevention through promoting safe consumption of substances and treatment of overdose."⁸

After intensive investigation and research, the Task Force concluded that CHEL sites could play a critical role in engaging current drug users, preventing loss of life, reducing the transmission of communicable diseases, improving other health outcomes, and connecting individuals to treatment and health services.⁹ The Task Force found no countervailing evidence that supervised consumption practices increase drug use, increase crime, or are associated with negative effects on neighborhoods

CHEL sites are an evolution of needle exchanges which King County has been utilizing since the 1990s.¹⁰ Indeed, a core function of the CHEL sites is to provide needle exchange services. However, the opioid epidemic provides new threats and new opportunities to save lives that are not addressed by traditional needle exchanges.¹¹ Specifically, lethal

⁸ The purpose of CHEL sites is to "engage individuals experiencing opioid use disorder using multiple strategies to reduce harm and promote health," including, but not limited to, providing needle exchanges to avoid transmission of blood-borne diseases, connecting individuals with drug treatment and other services, and preventing overdoses through offering safe consumption facilities and providing treatment of overdose. (CP63)

⁹ See n. 21; *see also* declaration of Dan Otter, R.N./M.P.H, at ¶ 8 *et seq.* (CP250) and declaration exhibits B – D (CP 254 to 330).

¹⁰ See Carney Decl. ¶ 20 (CP336) and Wood Decl. ¶ 25. (CP346)

¹¹ Needle exchanges presently send known injection drug users back into the streets to consume drugs in locations that are, by default, unsupervised, unsafe and unsanitary (as well as potentially problematic for neighborhoods and businesses). See Carney Decl. ¶ 20 (CP336) and Wood Decl. ¶ 25. (CP346)

overdoses are a leading cause of death for opioid users, but naloxone (brand name Narcan) and the administration of oxygen can reverse an overdose and save a life if administered promptly.¹² CHEL sites save lives by ensuring that this life saving treatment can be timely administered.

On January 19, 2017, the King County Board of Health voted 12-0 to adopt the Task Force’s recommendations as the County's opioid epidemic response plan.¹³ The Board of Health’s decision was informed by ten public briefings it held on the opioid epidemic as well as other information.¹⁴

The King County Board of Health specifically adopted all of the recommendations of the Task Force, including the establishment of a CHEL site pilot program. It decided to establish two CHEL sites in King County, as recommended by the Task Force, finding that *CHEL sites are a “specific evidence-based user health and overdose prevention response.”*¹⁵

B. The King County Council exercised its statutory authority by providing funding for the Board of Health’s epidemic response plan, specifically funding Community Health Engagement Locations.

¹² Otter Decl. ¶ 9 (CP250)

¹³ (CP161)

¹⁴ *Id.* at p. 2-3.

¹⁵ *Id.*

On June 28, 2017, the King County Council appropriated initial funding to implement the opioid epidemic response plan adopted by the King County Board of Health. *See* King County Ordinance 18544.¹⁶

The Council rejected a proposed amendment that would have eliminated funding for CHEL sites.¹⁷ Instead, the Council passed an amendment that specifically appropriated funds to operate CHEL sites.¹⁸ Because only a few CHEL sites will be part of the pilot program, the Council adopted a budget proviso stating that County funds will only be used for CHEL sites operated in welcoming jurisdictions. This was a proviso on the initial budget appropriation for the pilot CHELs, and nothing more. The Council did *not* adopt any ongoing regulations about CHELs or their location as the Appellants repeatedly state.

This proviso for the pilot program funding appropriation was consistent with the Task Force’s recommendation, which recognized that the success of CHEL sites depended upon positive community engagement and decided that citing priorities should be based in part upon “local government and community engagement.”¹⁹

¹⁶ (CP175-176)

¹⁷ Carney Decl. ¶ 14. (CP335)

¹⁸ **Ex. C** (p. 21). (CP176)

¹⁹ (CP 89, 93)

On February 14, 2017, the Washington State Board of Health

acknowledged:

*Local health jurisdictions, such as Seattle and King County, have broad authority to take certain actions in response to local health care crises, such as the opioid epidemic. We believe that this is the approach that Seattle and King County are taking as they plan to open Community Health Engagement Locations which include safe injection sites.”*²⁰

After the King County Board of Health voted unanimously to adopt the epidemic response plan, the County issued a press release stating that “King County is moving forward on all eight recommendations presented by a task force of experts to confront the heroin and opioid epidemic. The eight recommendations focus on prevention, increased access to treatment on demand, and reducing the number of fatal overdoses... The goal is to create a ***unified approach*** ...”²¹

More recently, the City of Seattle appropriated an additional \$1.3 million to pool with the King County appropriation for the establishment of a CHEL site within the City of Seattle.²² At this time, implementation

²⁰ (Washington State Board of Health, Letter to Jalair Box, February 14, 2017). (CP188)

²¹ (Press Release, Moving Forward on Expert Recommendations to confront the heroin and opioid epidemic, January 27, 2017) (emphasis added). (CP178)

²² See <http://www.kiro7.com/news/local/seattle-budget-includes-money-for-safe-injection/651500019> and [Seattle budget documents](#). The Court can take judicial notice of this fact under ER 201(f), which allows Washington courts to take judicial notice at “any stage of the proceeding” of “legislative facts.” See *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 652 (1980).

of the County’s epidemic response plan, including the work necessary to open the pilot-program CHEL sites, is well underway.²³

C. I-27 seeks to veto a key element of King County's multi-prong response to a public health crisis.

King County Initiative 27 (“I-27”) admits that “[h]eroin and prescription opioid use constitutes a public health crisis in King County, resulting in a growing number of deaths,” but it disagrees with and seeks to veto one of the core strategies for combating the epidemic in the County’s epidemic response plan.²⁴ In its prefatory language, I-27 states its sponsors’ opinion 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.”²⁵ Thus, the stated intent of I-27 is “to prohibit the funding and operation of supervised drug consumption sites in King County.”²⁶

I-27 does not seek to directly overturn the Board of Health policy decision reflected in the adopted epidemic response plan. It does not merely present, as Appellants repeatedly argue, a “binary, yes or no, policy decision” on CHEL sites. Rather, I-27 *prohibits the County from taking steps to implement* the epidemic response plan in two ways.

²³ See (Ordinance 18544) (CP 174); Declaration of Molly Carney ¶¶ 16-18 (CP 335).

²⁴ I-27, p. 1 (Statement of Facts). (CP51)

²⁵ *Id.*

²⁶ *Id.*

First, section 1 of I-27 prohibits the County Council from devoting any public funds for “the registration, licensing, construction, acquisition, transfer, authorization, use, or operation” of CHEL sites.²⁷ If the County were to violate this prohibition by implementing the epidemic response plan, I-27 allows any person or class of persons to sue the County for injunctive relief, civil penalties, and an award of attorney’s fees and costs.²⁸

Second, section 2 declares it unlawful for the County, the County Board of Health, the Department of Health, or any of its private or municipal partners, to “operate or maintain any building, structure, site, facility or program” that includes a CHEL site.²⁹

Thus, the operative sections do not attack the epidemic response plan, but rather take aim at the final administrative steps that must be taken to carry out the plan: registration, licensing, construction, acquisition, operation, maintaining buildings, providing spaces, etc.

On approximately August 18, 2017, the County determined that Sponsors had collected sufficient signatures to qualify I-27 for the ballot.

Protect Public Health filed a declaratory judgment action seeking to invalidate I-27 as beyond the scope of the local initiative process. The

²⁷ I-27 § 1. (CP51)

²⁸ I-27 § 1. (CP51)

²⁹ I-27 § 2. (CP52)

City of Seattle was allowed to intervene as a plaintiff. All of the briefing was narrowly focused on the single issue that is appropriate for pre-election review: whether I-27 exceeded the permissible scope of the local initiative process.

On October 16, 2017, the trial court concluded that I-27 was invalid in its entirety and prevented its placement on the ballot. *See* Order Granting Plaintiffs’ Motion for Declaratory Judgment and Injunctive Relief (“Trial Court Order”). This appeal followed.

III. ISSUES

1. Did the trial court properly entertain a pre-election challenge to determine whether I-27 exceeded the proper scope of a local initiative?
2. Should this Court affirm the trial court’s decision that I-27 exceeded the scope of the local initiative process for one or more of the following reasons:
 - a. I-27 seeks to veto and interfere with the County Council’s explicit authority to make public health funding decisions pursuant to RCW 36.40 and RCW 70.12.015, and also constitutes an impermissible referendum on the County’s appropriation ordinance.
 - b. I-27 seeks to veto and interfere with the Board of Health’s and local health officers’ ability to take action to make and implement public health decisions under chapter 70.05 RCW.
 - c. I-27 interferes with a comprehensive legislative scheme for local public health decision-making. That scheme authorizes local health officials to adopt and implement epidemic response plans, and does not allow

opponents to delay or veto such epidemic response merely by collecting signatures.

d. I-27 addresses administrative, not legislative matters.

e. Allowing one jurisdiction's initiative process to delay or veto a regional epidemic response plan is inconsistent with the statutory scheme favoring regional cooperation to protect public health.

f. Allowing an initiative to delay or veto an epidemic response plan would open a floodgate to initiatives seeking to halt critical, yet controversial, local actions to protect public health.

IV. ARGUMENT

A. **Pre-election challenge to I-27 is permissible and appropriate.**

Appellants' primary argument in this case is that "[n]one of the exceptions to Washington's policy disfavoring pre-election challenges to popular measures applies here." Appellants' Brief at 5. In fact, the trial court decided this case under the most well-established exception to the general prohibition against pre-election review. Specifically, "courts will review local initiatives and referendums to determine, notably, whether 'the proposed law is beyond the scope of the initiative power.'" *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 104, 369 P.3d 140 (2016). On the local level, "[i]t is well established [] that a pre-election challenge to the *scope* of the initiative

power is both permissible and appropriate.” *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 432, 260 P.3d 245 (2011) (emphasis in original), *review denied*, 173 Wn.2d 1029 (2012).

Appellants misleadingly rely upon cases about statewide initiatives. “[I]t is important to distinguish between statewide and local initiatives. The right of the people to file a statewide initiative is laid out in the Washington Constitution. Because it is a constitutional right, Washington courts interpret the rules regarding statewide initiatives to facilitate this right. However, the right to file a *local* initiative is not granted in the constitution.” *Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 103-104 (emphasis in original). As a result, statewide initiatives are rarely subject to pre-election review, since they are superior to statutory laws, whereas the body of statutory laws define the allowable scope of a local initiative. *Compare id. at 107 et seq.* and *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005) (“Because the people's legislative power is coextensive with the legislature's, on only one occasion have we considered a [pre-election] challenge to a statewide initiative, where the relevant challenge was that the initiative measure exceeded the scope of the legislative power”).

Courts routinely rule on the validity of legislation proposed or adopted by initiative in declaratory judgment proceedings, removing the

measures from the ballot if they are not within the scope of the local initiative and referendum process. *See, e.g., City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386, 391, 93 P.3d 176 (2004) (affirming trial court's grant of city's motion for declaratory judgment, "striking [an initiative] from the ballot"); *Am. Traffic Solutions*, 163 Wn. App. at 433-34 (reversing denial of declaratory judgment for company challenging local initiative as exceeding initiative power); *Bidwell v. City of Bellevue*, 65 Wn. App. 43, 49 827 P.2d 339 (1992) (affirming declaratory judgment invalidating local initiative because, among other things, initiative would have conflicted with state law); *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 747-49, 620 P.2d 82 (1980) (affirming declaratory judgment for private trade association challenging local initiative as exceeding initiative power); *Ford v. Logan*, 79 Wn.2d 147, 155-57, 483 P.2d 1247 (1971) (affirming declaration invalidating local initiative because it conflicted with the state constitution).

It is well established that when the challenge involves the scope of the local initiative or referendum, there exists a justiciable controversy subject to the Declaratory Judgment Act. *See Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 107-110 (issuing declaratory judgment and barring local initiative from the ballot based only on a showing of standing and that the initiative exceeded scope of local initiative process); *Am. Traffic*

Solutions, 163 Wn. App at 432. (“Subject matter challenges do not raise concerns regarding justiciability 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).”)

B. Appellants do not contest standing.

As Appellants do not assign error to or provide arguments against the trial court’s finding that both Protect Public Health and City of Seattle have standing to bring this challenge, it is a verity on appeal. Trial Court Order, Finding of Fact 11. *In re Disciplinary Proceeding Against Jackson*, 180 Wn.2d 201, 206, 322 P.3d 795 (2014).

In any event, the trial court entered its judgment only after receiving extensive evidence of Protect Public Health’s standing. To show standing for this type of pre-election review, Protect Public Health need only show: (1) that “the interest they are seeking to protect is arguably within the zone of interests that the initiative will protect or regulate” and (2) “injury in fact, economic or otherwise,” which can be met by showing “that they would suffer an injury in fact if the law were to pass.” *Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 105-106.

First, the interests that Protect Public Health seeks to protect are within the zone of interest that I-27 seeks to regulate since both are

focused on public health and epidemic response in particular.³⁰ The organization's members include a range of public health professionals who have devoted their time and expertise to help the County develop its opioid epidemic response plan, as well as others who would be harmed if public health decisions were subject to delay or veto through local initiative or referenda.³¹

Second, Protect Public Health would suffer an injury in fact if I-27 were to be placed on the ballot, and even more so if it were to be enacted. If I-27 were to be placed on the ballot, the organization's members would be forced to expend resources to defeat the illegal initiative.³² I-27's very existence had a chilling effect on the implementation of the County's epidemic response plan,³³ and its passage would unwind years of work by Protect Public Health's members and prevent them from implementing the County's epidemic response plan.³⁴

³⁰ Protect Public Health's mission is to defend the County's epidemic response plan and other evidence-based public health decision from interference from the local initiative and referendum process. Wood Decl., ¶¶ 11-18. (CP342-344)

³¹ *Id.* at ¶ 11 (Members include individuals involved in HIV/AIDS and hepatitis C prevention, epidemiology, infectious disease prevention and control, tobacco control, palliative care, and efforts to combat the opioid epidemic— all of which involve controversial public health decisions.).

³² *Id.* ¶ 15.

³³ Wood Decl., ¶ 16 (CP344); Carney Decl. ¶ 19 (CP335).

³⁴ Wood Decl. ¶ 17 (CP344). At least one member runs a non-profit organization that is considering the operation of a CHEL site for the County and that opportunity would be eliminated by I-27's passage Carney Decl. ¶ 17 (CP335). Additionally, one member is an addiction medicine specialist who works directly with patients with opioid use disorder. His patients will benefit from all elements of the county's opioid epidemic response plan,

Finally, Protect Public Health's members are King County voters.³⁵ See *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 46, 272 P.3d 227 (2012) (association had standing to challenge a proposed initiative because its members had standing as “residents who are eligible to vote”).

Even absent such proof of standing, the trial court could have properly decided this case because pre-election initiative challenges involve “significant and continuing matters of public importance that merit judicial resolution.” *Am. Traffic Solutions*, 163 Wn. App. at 433, see also *Farris v. Munro*, 99 Wn.2d 326, 330 (1983) (addressing challenge even though plaintiff lacked standing.)³⁶ “Where a controversy is of serious public importance the requirements for standing are applied more liberally.” *City of Seattle v. State*, 103 Wn.2d 663, 668 (1985).

The trial court properly recognized that Protect Public Health’s members “are at risk of harm” if I-27 proceeds to the ballot.³⁷ In contrast, ***nobody*** – not those who signed the petition nor voters – would benefit

including safe consumption sites; I-27’s passage would, therefore, negatively affect this member’s ability to protect the health of his patients. Wood Decl. ¶ 18. (CP344)

³⁵ Wood Decl. ¶ 9. (CP342)

³⁶ The County’s ability to respond to an undisputed public health crisis through an evidence-based plan is certainly of significant public importance. Moreover, I-27 would create a precedent that controversial public health decisions can be delayed or derailed merely by collecting signatures, posing a threat to countless public health policies, from mandatory vaccines to medically necessary quarantine to the control of sexually transmitted diseases. Wood Decl. ¶ 13-14. (CP343)

³⁷ Trial Court Order, Finding of Fact 11.

from placing an invalid initiative on the ballot. *See e.g., AFL-CIO v. Eu*, 36 Cal. 3d 687, 697, 686 P.2d 609 (Cal. 1984) (“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 ... tends to denigrate the legitimate use of the initiative procedure.”).

C. I-27 exceeds the local initiative power.

As the trial court correctly concluded, “[t]here are multiple limits on the local initiative power.” *Spokane Entrepreneurial Ctr.*, 185 Wn.2d at 107. For example, “[w]hile the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law.” *Id.* at 108. Additionally, “a local initiative ‘is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body’” of the city or county rather to the city or county itself. *Id.* (quoting *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747, and *City of Sequim v. Malkasian*, 157 Wn.2d 251, 264-5, 138 P.3d 943 (2006)). Also, “administrative matters, particularly local administrative matters, are not subject to initiative.” *Id.* at 107.

Appellants’ central theme is that I-27 merely “calls for a binary –

yes or no – decision” on CHELs. *See* Appellants’ Brief at 1, 2, 5, 13, 14, 15, 22. Repetition will not make that statement true. I-27 is an enforceable ordinance that prohibits local health authorities’ and the County Council from exercising their statutory authority to protect public health. It doesn’t overturn the County’s established policy favoring CHELs, but prohibits the many administrative steps necessary to carry out that policy.

The trial court’s ruling focused on just the clearest examples of the measure’s invalidity. This brief will support those first and then discuss the alternative bases upon which this Court can affirm the trial court’s ruling.

1. The trial court correctly found that I-27 interferes with the County Council’s statutory authority to make public health funding decisions.

The most straightforward basis on which to affirm is the first issue addressed by the trial court’s decision: Chapter 36.40 RCW vests the local legislative authority (the County Council) with the authority to fix and determine budgets, and RCW 70.12.015 specifically gives the County Council the authority to adopt budgets and make appropriations for public health work. “I-27 proposes to engage in the appropriation process though prohibition of funding and therefore impinges upon the legislative authority of the county.” Trial Court Order at p. 5.

“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. ... When the legislature enacts a general law granting authority to the legislative body (or legislative authority) of a city, that legislative body's authority is not subject to repeal, amendment, or modification by the people through the initiative or referendum process.” *Mukilteo Citizens for Simple Gov't*, 174 Wn.2d at 51 (2012) (internal citations omitted); *Snohomish County. v. Anderson*, 123 Wn.2d 151, 155-7, 868 P.2d 116 (1994) (applying the same rule to counties). Stated another way, “The people cannot deprive the [local] legislative authority of the power to do what the constitution and/or a state statute specifically permit it to do.” *Malkasian*, 157 Wn.2d at 264-5 (because the legislature granted the power to legislate the use of automated traffic safety cameras to local legislative bodies, an initiative to regulate such devices was beyond the local initiative power).

I-27 is invalid for this reason. Chapter 36.40 RCW and RCW 70.12.025 grants the County Council with the authority to establish the budget and make public health funding decisions. RCW 70.12.025 provides that “Each *county legislative authority* shall annually budget and appropriate a sum for public health work.” RCW 70.12.025 (emphasis added). This is consistent with chapter 36.40 RCW, which provides all

budgeting power to the county legislative authority. *See e.g.*, RCW 36.40.080 (“the *county legislative authority* shall fix and determine each item of the budget separately and shall be resolution adopt the budget as so finally determine and enter the same in detail in the official minutes of the board...”); RCW 36.40.250 (“*county legislative authority*” to enact biennial, supplemental, and emergency budgets).

When a statute delegates authority to the “legislative authority,” it means the elected governing body (city council or county council), and such authority is beyond the scope of the initiative or referendum power. *Anderson*, 123 Wn.2d at 156.

The County Council exercised its statutory power under RCW 70.12.025 and chapter 36.40 RCW by appropriating funding to implementation of the Board of Health’s epidemic response plan, including the establishment of the pilot CHEL sites.³⁸ Because that authority is statutorily granted to the County Council, “it is not subject to repeal, amendment, or modification by the people” through initiative. *Mukilteo Citizens*, 174 Wn.2d at 51.

Yet, the purpose and effect of I-27 is to veto the County Council’s exercise of its statutory authority, and restrict that authority going forward.

³⁸ (CP174)

Its stated purpose is “to prohibit the funding and operation of supervised drug consumption sites in King County.” I-27 (statement of facts). I-27 provides that “No public funds may be spent on the registration, licensing, construction, acquisition, transfer, authorization, use, or operation of a supervised drug consumption site,” and enforces that prohibition with a private right of action and civil penalties against the County. I-27 § 1.

The County Charter reflects that the Legislature has given the authority over budgetary matters exclusively to the County Council. Under the King County Charter, § 230.40, “[a]n appropriation ordinance ... shall not be subject to referendum.”³⁹ By retroactively prohibiting the County from carrying out its appropriation ordinance, I-27 constitutes an impermissible referendum on the County's appropriation decision.⁴⁰ *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 232, 11 P.3d 762 (2000) (invalidating a state initiative that would effectively call for referendum without complying with constitutional requirements).

The Court should affirm the trial court’s conclusion that I-27 is beyond the scope of the initiative process.

2. The trial court correctly found that I-27 is invalid because it interferes with the ability of local health officials to carry out their statutory duties.

³⁹ (excerpt of King County Charter). (CP227)

⁴⁰ *See* I-27 p. 1 (intent is “to prohibit the funding ... of supervised drug consumption sites in King County”). (CP51)

Similarly, the trial court correctly determined that I-27 is beyond the scope of the local initiative process because it interferes with authority that is statutorily delegated to the King County Board of Health, the County's Local Health Officer, and the County Council.

The Legislature authorizes counties like King County operating under a home rule charter to establish a local board of health and appoint a local health officer. RCW 70.05.036. Apart from the Council's funding decisions, discussed above, the Board of Health and Local Health Officer have plenary power to make and implement public health decisions within King County.

RCW 70.05.060 provides:

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 and shall: ...

(2) Supervise the maintenance of all health and sanitary measures for the protection of the public health within its jurisdiction;...

(4) Provide for the control and prevention of any dangerous, contagious or infectious disease within the jurisdiction of the local health department;

(5) Provide for the prevention, control and abatement of nuisances detrimental to the public health

Similarly, the Legislature has empowered King County's Local Health

Officer to:

(2) Take such action as is necessary to maintain health and sanitation supervision over the territory within his or her jurisdiction;

(3) Control and prevent the spread of any dangerous, contagious or infectious diseases that may occur within his or her jurisdiction;

...

(5) Prevent, control or abate nuisances which are detrimental to the public health;[and]

(9) Take such measures as he or she deems necessary in order to promote the public health, to participate in the establishment of health educational or training activities...

RCW 70.05.070.

This delegation of powers directly to the Board of Health and Local Health Officers is decidedly “broad,” *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 148-149, 839 P.2d 324 (1992), and its exercise is not subject to delay or veto through the local initiative and referendum process. These statutes requires these public health officials – not the general public – to decide what actions are necessary and take action to prevent the spread of disease, abate nuisances, and promote public health. *Id.* (“Use of the word ‘shall’ [in RCW Ch. 70.05] mandates that officials perform these duties.”).

The Legislature empowered and indeed requires these local officials to “take such measures as *he or she deems necessary* in order to promote the public health,” which clearly means that their judgment is not

subject to a veto even if it may be controversial or even unpopular. RCW 70.05.070 (emphasis added); see *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 10, 239 P.3d 589 (2010) (“The legislature has explicitly vested the power to decide whether or not to fluoridate in the board of commissioners of a water district. RCW 57.08.012. Nothing in chapter 57.08 RCW creates the power of initiative or referendum to check such board decisions.”) (holding initiative beyond scope of local initiative process).

Appellants argue that even if I-27 involves authority delegated to the Board of Health, Local Health Officers and County Council, I-27 is nonetheless valid because general statutes give the County “plenary police powers.” Appellants’ Brief at 23. The Courts have rejected this exact argument and struck local initiatives off the ballot for interfering with powers delegated to the local legislative authority despite statutes granting broad general powers to the corporate entity. See *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 292, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1020 (2005) (“Allowing cities to enact development regulations outside the requirements of the GMA would defeat the comprehensive nature of the GMA and could serve to frustrate its purposes. Thus, Yes for Seattle’s reliance on alternative statutory authority is misplaced. All

enactments that fall under the GMA definition of development regulations are subject to the requirements of the GMA.”).

3. The trial court properly invalidated I-27 under *Brockett* and because I-27 interferes with a comprehensive state regime for protecting public health.

The trial court’s third reason for invalidating the initiative was based upon the Supreme Court’s directly analogous decision in *Brockett*, which held that the authority of local health officers to take actions to protect public health is so broad and critical that it is often beyond *judicial* control and preempts even the State’s criminal law. *Brockett*, 120 Wn.2d at 146-50. The Supreme Court confirmed that local health agencies have sufficiently broad authority under the Public Health Act, including the authorities cited above, that they can operate needle exchanges for heroin users, even though such programs were argued to violate state criminal laws. *Id.* In ruling in favor of the needle exchange, the court in *Brockett* stated that “the broad powers given local health boards and officers under Const. art. 11, § 11 and RCW 70.05 authorize them to institute needle exchange programs in an effort to stop the spread of HIV and AIDS,” despite state criminal laws arguably to the contrary. *Brockett*, 120 Wn.2d at 155.

Brockett's rejection of the attack on needle exchanges is binding and requires the invalidation of I-27. As discussed, state laws are superior to the local initiative and referendum process. If *state* criminal laws do not impede County efforts to combat an epidemic with needle exchanges, then a *local* initiative or referendum process certainly does not have the power to do so. *Brockett* directly applies to this case since the CHEL sites are an enhanced version of needle exchanges, updated to respond more holistically to the current crisis and to offer lifesaving tools.⁴¹ Also, the public health decision-making at issue in *Brockett* is analogous to King County's decision-making that I-27 seeks to overturn.

As the trial court recognized, I-27 cannot be squared with the Board of Health's broad statutory authority recognized in *Brockett*. In addition to re-writing the epidemic response plan, I-27 explicitly subjects King County to *civil lawsuit* and *civil penalties* for carrying out its statutory duty to protect public health. I-27 § 2. The proposed initiative would make it "unlawful" for the County's public health agencies to carry out the County's epidemic response. *Id.*

In addition to undermining state law, I-27 threatens the statewide interest of protecting public health and containing epidemics. Public health

⁴¹ See Carney Decl. ¶ 20. (CP336) and Wood Decl. ¶ 25. (CP346)

policy, while carried out on a local level, is a matter of statewide concern and therefore is not subject to local initiative and referenda. Indeed, the public health of the entire state would be jeopardized if a local initiative or referenda could derail local public health authorities' actions to stem an epidemic, which is precisely what I-27 seeks to do. *See Brockett*, 120 Wn.2d at 146-50 (recognizing that the State Constitution authorizes local action to protect public health); *Snohomish County v. Anderson*, 123 Wn.2d 151, 159, 868 P.2d 116 (1994) (“Permitting the referendum would jeopardize an entire state plan and thus would extend beyond a matter of local concern.”). The threat is even greater where a local initiative seeks to carry out a line item veto – a rewrite – of the epidemic response plan. *See 1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 180-181, 149 P.3d 616 (2006) (“[R]eferendum in many jurisdictions does not merely act as a veto but in some counties can strike individual portions of ordinances. That is inconsistent with integrated, comprehensive planning.”).

The Washington Supreme Court has repeatedly invalidated local initiatives that interfere with comprehensive state statutory regimes for planning that flow down to the local level, such as the Growth Management Act. *See, e.g., id.* at 188. This line of authority, when coupled with the decidedly broad, comprehensive, and even

“extraordinary power” the Legislature delegated exclusively to public health boards, requires I-27’s invalidation.

In *1000 Friends of Washington v. McFarland*, the Washington Supreme Court decided that county ordinances enacted to implement Washington’s Growth Management Act were not subject to veto by local initiative or referendum. Recognizing that “[i]t would violate the constitutional blueprint to allow a subdivision of the State to frustrate the mandates of the people of the State as a whole,” the Supreme Court held that the local referendum was invalid:

Initiatives or referenda that attempt to graft limits onto a grant of power by the people of the State, or to modify obligations imposed on local legislative or executive authority by the people of the State, are invalid as in conflict with state law.

159 Wn.2d at 168.

Thus, the local initiative and referendum process cannot be used where the Legislature has adopted a comprehensive scheme for decision-making that does not contemplate local initiatives and referendum and/or would be frustrated by their use. *Whatcom Cnty. v. Brisbane*, 125 Wn.2d 345, 351, 884 P.2d 1326 (1994) (“The purpose of the Growth Management Act, RCW 36.70A, would be frustrated if the people of Whatcom County were permitted by referendum to amend an ordinance adopted to implement the goals of a comprehensive land use plan.”);

Seattle Bldg. & Constr. Trades Council, 94 Wn.2d 740, 747, 750 (1980) (concluding, in view of the statutory and history of the I-90 expansion, that the Legislature intended that the city's approval was a matter for the city municipal authorities and therefore not subject to initiative).

Similar to the Growth Management Act, the Legislature has adopted Title 70 RCW, a comprehensive regime for making and implementing *urgent, evidence-based* decisions to protect public health. It did this by delegating plenary and final decision-making authority on public health matters to the Board of Health, the Local Health Officer, and the County Council. Specifically, RCW 70.05.060 provides that “[e]ach 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” and requires the boards to carry out a comprehensive set of duties, including implementation of state health laws and regulations. RCW 70.05.070 imposes similar comprehensive duties on local health officers, acting under the authority of the local board. RCW 70.12.025 then gives the County Council the authority to make public health funding decisions.

The absence of the local initiative process in this scheme prohibits its use. *Whatcom Cnty v. Brisbane*, 125 Wn.2d at 351 (“The absence of any mention of referenda [in the Growth Management Act] indicates the statute's rejection of referendum rights.”).

4. I-27 addresses administrative actions and is therefore invalid.

Having invalidated on other grounds, the trial court did not address Protect Public Health's argument that I-27 is invalid because it addresses administrative matter, but this legal defect provides an alternative grounds for affirming. *LK Operating, LLC v. Collection Grp.*, 181 Wn.2d 48, 73, 331 P.3d 1147 (2014) (appellate court can affirm on any basis supported by the record.) "[A]dministrative matters, particularly local administrative matters, are not subject to initiative or referendum." *Our Water-Our Choice!*, 170 Wn.2d at 8. I-27 should be deemed administrative for several reasons.

First, where the Legislature gives a health agency the authority and responsibility to administer science-based programs, and the agency does so, citizen initiatives may not attempt to interfere with and effectively reverse that implementation. *Id.* at 13, 15. Such initiatives are themselves administrative in nature and prohibited. *Id.* This situation is directly analogous to *Our Water-Our Choice!* Both involve an attempt to overturn an evidence-based public health decision made by an agency that had been statutorily delegated such decision-making authority.

Second, rather than trying to adopt a new County policy, I-27's *operative sections* focus only on interfering with the administrative steps

necessary to carry out the County’s policy. Specifically, section 1 of I-27 prohibits the County Council from devoting any public funds for “the registration, licensing, construction, acquisition, transfer, authorization, use, or operation” of a CHEL sites.⁴² Section 2 declares it unlawful for the County, the County Board of Health, the Department of Health, or any of its private or municipal partners, to “operate or maintain any building, structure, site, facility or program” that includes a CHEL site.⁴³

I-27 is administrative because its operative sections seek to hinder the implementation of the Board of Health’s existing policy. “Generally speaking, a local government action 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. Stated another way, a measure is administrative if it “attempts to interfere with and effectively reverse the implementation” of already established policy. *Id.* at 15; *see also Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973) (question of whether an initiative is legislative or administrative is “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.”).

⁴² I-27 § 1. (CP51)

⁴³ I-27 § 2. (CP52)

While the Appellants argue that I-27 is about a yes or no policy question, that argument is only supported by the measure’s “policy fluff,” which must be disregarded in the Court’s legal analysis, as it is “no part of the law.”

The distinction between a proposed measure's legal substance and its policy fluff was tersely drawn in an early opinion of this court: "*A law is a rule of action. An argument is not. . . . [A] preface or preamble stating the motives and inducement to the making of [the law] . . . is without force in a legislative sense It is no part of the law.*" *State ex rel. Berry v. Superior Court for Thurston County*, 92 Wash. 16, 30-32, 159 P. 92 (1916). Just as the common inclusion of dicta in judicial opinions does not compromise the legal effect of a decision, policy expressions in a bill or initiative are "no part of the law."

Pierce Cnty. v. State, 150 Wn.2d 422, 433-435, 78 P.3d 640 (2003)

(emphasis added). It is the operative sections of I-27 – which are administrative – that matter.

Third, I-27 must also be deemed administrative because the Legislature has decided that local health policy shall be adopted and carried out *administratively* by the Board of Health, combined City-County Department of Public Health, and by the Local Health Officer. RCW 70.05.060, 070, and chapter 70.08 RCW. They are not required to legislate; they are empowered to *take action* – to “control and prevent the spread of any dangerous, contagious or infectious disease” and “take such measures as he or she deems necessary in order to promote the public

health.” *Accord* KCC 2.35A.010(3) (“The department shall achieve and sustain healthy people and healthy communities throughout King County by providing public health services that promote health, prevent disease and reduce health inequities, including, but not limited to: providing needed or mandated prevention or intervention services to address individual and community health concerns ... preventing disease, injury, disability and premature death ...”)

The public health policy that I-27 seeks to reverse is an *administrative* policy adopted pursuant to these state and local authorities; it is not a legislative decision. King County's Board of Health originally adopted the policy supporting CHEL sites ten years ago.⁴⁴ Then, it adopted the recommendations of the Task Force to implement this policy as part of its opioid epidemic response plan. Implementation of this administrative policy is well underway, as the County has already adopted detailed policies for siting and operation of CHEL sites; it solicited, received and considered proposals from organizations applying to operate the CHEL sites; it has helped to secure funding; and is actively working to site and open the facilities.⁴⁵

⁴⁴ See (2007 Board of Health Resolution). (CP245)

⁴⁵ See Carney Decl. ¶ 18. (CP335)

Appellants have tried to argue that I-27 is not administrative because it was proposed early after the adoption of the epidemic response plan. But it is the effect of the operative sections of I-27 and the statutory decision-making scheme that make I-27 administrative, not merely because I-27 comes well into the policy’s implementation. In any event, where Courts do consider the timing of an initiative in a legal challenge, it is the timing of the *election* that matters, not when the initiative was filed. *Wash. Citizens Action v. State*, 162 Wn.2d 142, 145, 171 P.3d 486 (2007) (amendment to statute after initiative’s filing but prior to passage rendered measure invalid); *Pierce Cnty. v. State*, 159 Wn.2d at 22 (bonds sold “prior to passage of I-1776” rendered measure unconstitutional). Due to Appellants’ own choices,⁴⁶ the earliest I-27 could reach the ballot is late in 2018, far into implementation of the epidemic response plan, when nothing but administrative matters remain. In such a situation, a local initiative is administrative and prohibited. *Ruano*, 81 Wn.2d at 824.

5. Use of the local initiative and referenda process is inconsistent with the multi-jurisdictional approach to public health.

Recognizing that epidemics do not stop at municipal boundaries, the Legislature has authorized a multi-jurisdictional approach to public

⁴⁶ Appellants filed their initiative measure too late to reach the 2017 ballot and then acquiesced to the trial court’s injunction rather than seeking a stay from this Court.

health. This would be frustrated if the citizens of *one jurisdiction* could derail a *regional response* to a public health emergency.

The County's opioid epidemic response plan is a product of this multi-jurisdictional coordination and regional cooperation. Pursuant to chapters 70.08 and 70.12 RCW, and an interlocal agreement, the City of Seattle and King County operate a joint board of health and joint department of health and pool public health funds.⁴⁷ Seattle and King County, along with other local governments, jointly convened the Task Force, which was co-chaired by the *joint* Department of Public Health of Seattle and King County.⁴⁸ The Task Force's recommendations were then adopted by the King County Board of Health, which is comprised of elected officials from King County, the City of Seattle, and suburban cities.⁴⁹

In addition to the County's appropriation for the CHEL pilot program, the City of Seattle has appropriated \$1.3 million towards opening a CHEL in Seattle. Both the County and City appropriations constitute a "public health pool fund" under chapter 70.12 RCW (providing for establishment of such funds).

⁴⁷ See (Seattle-King County interlocal agreement for joint operation of public health entities) (CP229); Wood Decl. ¶ 27. (CP347)

⁴⁸ (CP62)

⁴⁹ KCC 2.32.021.

The citizens of one jurisdiction cannot use the initiative and referendum process to undermine such coordinated, multi-jurisdictional action to stem an epidemic. *See Brisbane*, 125 Wn.2d at 351 (striking the referenda because “the GMA seeks coordinated planning. ... allowing referenda is structurally inconsistent with this mandate.”). Nor does chapter 70.12 RCW allow one jurisdiction’s initiative process to restrict the use of regionally pooled public health funds. *See* chapter 70.12 RCW.

D. Allowing local initiatives and referenda on epidemic response will open the floodgates to other initiatives and referenda on public health and threaten the health of all Washingtonians.

By interfering with public health officials’ efforts to combat an epidemic, I-27 constitutes a fundamental attack on the Constitutional and statutory scheme for protecting public health. I-27 would create a precedent that controversial public health decisions can be delayed or derailed merely by collecting signatures, posing a threat to countless public health policies from mandatory vaccines, to medically necessary quarantine, to the control of sexually transmitted diseases.⁵⁰

While the epidemic response plan at issue targets opioid use, it seeks to save the lives of opioid users and also to stop the spread of communicable diseases such as hepatitis and HIV/AIDS among the wider

⁵⁰ Wood Decl. ¶ 13-14. (CP343)

population. Future epidemic response plans inevitably will target more virulent pathogens, whether in the course of a flu pandemic or other disease outbreak. A minority group cannot be allowed collect signatures on a local initiative or referenda petition and effectively stop the government from protecting the public from such threats.

V. CONCLUSION

For the reasons stated herein, the Court should affirm.

DATED this 22nd day of January, 2018.

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