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No. 95134-9

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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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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APPELLANTS' RESPONSE  
TO AMICI PROFESSORS

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Mark C. Lamb, WSBA #30134  
The North Creek Law Firm  
12900 NE 180th Street, Suite 235  
Bothell, WA 98011  
(425) 368-4238

Andrew R. Stokesbary, WSBA #46097  
Stokesbary PLLC  
1003 Main Street, Suite 5  
Sumner, WA 98390  
(206) 486-0795

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Appellants IMPACTion and Joshua Freed

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## A. INTRODUCTION

Various academics have submitted a brief to this Court in which they tout the importance of public health, advancing the anti-democratic proposition that anything merely touching upon the concept of public health generally may not be the subject of popular legislation. They claim that all decisions relating to public health are entrusted by the Legislature exclusively to unelected local public health boards.

The amici academics' entire theoretical argument is belied by the facts in this case. Despite the academics' assertion that local public health boards have absolute authority over matters concerning public health, the King County Council ("Council") here made a *policy* decision to override the Seattle King County Public Health Board's ("Board's") recommendations and allow cities to opt out of providing heroin injection sites. And most cities in King County, in fact, opted out. The academics fail to even acknowledge this key issue.

I-27, like the Council's opt-out decision, addresses a *policy* decision. Given the central importance of the initiative power in Washington, the people are no less entitled than the Council to make such a decision.

## B. STATEMENT OF THE CASE

In the guise of argument, the professors offer factual arguments that go far beyond the parameters of the record here. For example, the professors' contention that public health issues require a "coordinated approach" is a factual argument that is entirely unsupported on this record; given the speed with which PPH and the City sought to foreclose placement of I-27 on the ballot, IMPACTion and I-27's sponsors were effectively deprived of any real opportunity to develop the fact that no evidence supports the use of heroin injection sites as a legitimate means of stopping opioid use. Contrary to the amici's repeated, unsupported assertion that heroin injection sites are an "evidence-based" decision, amici br. at 4, 5, 11, there is, in fact, *no evidence* in the record that heroin injection sites are essential to a coordinated approach to the opioid problem in King County, or that such sites are anything other than a magnet for illegal heroin use with its attendant criminal activity, and damage to community values.<sup>1</sup> The trial court did not endorse such a

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<sup>1</sup> Only one city in North America has opted for heroin injection sites – Vancouver, B.C. The outcome of that experiment is decidedly mixed, at best. JoNel Aleccia, *As Seattle eyes supervised drug-injection sites, is Vancouver a good model?* *Seattle Times*, November 30, 2016, <https://www.seattletimes.com/seattle-news/health/is-vancouvers-safe-drug-use-site-a-good-model-for-seattle/>; Brian Hutchinson, *Canada's first safe injection site struggles with the rise of fentanyl*, *Macleans*, September 1, 2017, <https://www.macleans.ca/news/canada/canadas-first-safe-injection-site-struggles-with-the-rise-of-fentanyl/>. Deputy Attorney General Rod J. Rosenstein stated in an August 27, 2018 *New York Times* op-ed that such sites "are very dangerous and would only make the opioid crisis worse." He noted that such sites "destroy the surrounding community." <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html>. The danger of such sites prompted federal authorities to warn of "aggressive action,"

position. CP 690 (“To be clear, the decision of this Court is not about the merits of the response by the County to the opioid crisis, the Court neither embraces nor indicts the decision to implement what the local task force refers to as Community Health Engagement Locations.”). In fact, the County’s effort to address the opioid abuse problem and to implement the Task Force report, apart from heroin injection sites, was unaffected by I-27. Br. of Appellants at 22 n.15.

The Court should disregard those factual arguments.<sup>2</sup>

C. ARGUMENT

(1) The Court Should Reject the Professors’ Antidemocratic Position

The professors’ discussion of the legal issues in this case overlooks the central importance of the people in Washington’s governmental structure and flatly misstates the law with respect to the same.<sup>3</sup> From their

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including injunctive actions, against cities opening them, given that heroin use is illegal. <https://www.seattletimes.com/seattle-news/homeless/threat-of-federal-enforcement-complicates-seattles-proposed-safe-injection-site/>.

<sup>2</sup> The professors echo the claim of PPH and the City that the Task Force process was open and inclusive. Amici br. at 3. That assertion is simply false, as IMPACTion has previously articulated. Br. of Appellants at 2-4; reply br. at 11. The public had little, if any, real opportunity to address the issue of heroin injection sites in the Task Force process or thereafter before the Council.

<sup>3</sup> “I-27 would create a precedent that this type of evidence-based public health decision *can be overturned merely by collecting signatures.*” Amici br. at 5. (emphasis added). Nothing can be overturned by “merely” gathering the support of fellow citizens for legislation through the initiative process; signature gathering simply ensures that any proposed legislation has sufficient public support to proceed to an election where it can only be enacted by a majority vote. What the amici fear and seek to prevent is not the

academic roost, they assume that the people are too ignorant to make an enlightened decision on public health issues generally or the opioid problem in the County specifically. That contention is patently false,<sup>4</sup> and severely underestimates the voters' ability to make reasoned decisions on public health matters. Amici br. at 6-9.<sup>5</sup>

(2) The Professors Fail to Address the Constitutional Basis for the Initiative Power and This Court's Historic Rejection of Pre-Election Challenges to Initiatives

“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

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“mere” gathering of signatures, but rather the constitutional right of citizens to legislate on matters of public importance (*i.e.* whether heroin injection sites should be legalized).

<sup>4</sup> In recent years, for example, Washington voters enacted Initiative 1000 in 2008 that allowed terminally ill patients to obtain lethal prescriptions. They adopted Initiative 1029 (2008) and 1163 (2011) on long term care for the elderly and the disabled. They enacted Initiative 502 in 2012 that legalized marijuana. In 2014 and 2016, they enacted Initiatives 594 and 1491 relating to firearms background checks and extreme risk protection orders. *All* of these issues arguably fall within the ambit of public health.

<sup>5</sup> Voters are, the academics contend, lacking in expertise “to evaluate complex health considerations facing the citizens of their jurisdictions, gather the necessary information from others in the community, and quickly and flexibly enact solutions,” amici br. at 6. But this argument bears an unsettling resemblance to that of public health officials in the last century who believed their judgment was beyond review because they were intellectually superior to the masses. Those officials used their positions to support such abhorrent practices as mandatory sterilization of persons with developmental disabilities and minorities, and lobotomies for the mentally ill. *See, e.g., Buck v. Bell*, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927) (justifying surgical sterilization of resident of Virginia’s State Colony for Epileptics and Feeble Minded); *Madrigal v. Quilligan*, 639 F.2d 789 (9th Cir. 1981) (sterilization of Mexican-American women at Los Angeles County General Hospital 1971-74). *See generally, Lobotomy: Surgery for the Insane*, 1 Stan. L. Rev. 463 (1949). History has not been kind either to the “public health advocates” in such cases or to the jurists who protected their assertion of power over the lives of their fellow citizens. This Court should reject such an insulting, elitist perspective.

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).<sup>6</sup> *See also*, Wash. Const., art. II § 1. (“The first power reserved by the people is the initiative.”). Merely because the Legislature granted *general* powers to public health boards, the people are not precluded from exercising their initiative power on *any* matter that touches public health. Absent a grant of *specific* power to a local legislative body, the people retain their right to self-govern by initiative.

Like respondents, the professors do not cite *Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727, 732 (2015), where this 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). In *Huff*, this Court reiterated the “long-standing rule” in Washington 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)). A party seeking pre-election injunctive relief bears a

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<sup>6</sup> It is for this reason that pre-election challenges to initiatives are *disfavored*. *City of Port Angeles v. Our Water – Our Choice!*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010).

“high threshold burden” to show that an initiative is “clearly beyond the scope of the initiative power.” *Id.* at 654 n.7.

Illustrative of that high burden is Division II’s recent decision in *Port of Tacoma v. Save Tacoma Water*, \_\_ Wn. App. 2d \_\_\_, 422 P.3d 917 (2018). There, local initiatives were proposed to amend Tacoma’s city charter and to enact an ordinance to mandate popular approval for any large water utility service requests. The court recognized that the initiatives were administrative, not legislative, in nature because they merely engrafted voter approval on already existing processes.<sup>7</sup> Moreover, the measures expressly contradicted the legislative direction that water providers have a duty to serve any customers who request service. *None* of such problems are present here, despite the academics’ arguments.

This Court’s distaste for pre-election challenges to initiative measures was further articulated in its recent order in *Ball v. Wyman* (No. 96191-3), rejecting statutory and common law writ of mandamus arguments in justification of barring I-1639 from this November’s ballot.

(3) Local Public Health Boards Do Not Have “Plenary” Power Over Public Health Policy as the Council Opt-Out Decision Documents

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<sup>7</sup> Legislative policy making involves making a new law or policy, as opposed to carrying out or executing already existing law or policy. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 185 Wn.2d 97, 107-08, 369 P.3d 140 (2016).

In their brief at 5-6, the professors echo the position of PPH and the City on the authority of local public health boards. They ignore crucial contrary facts. No statute authorizes heroin injection sites, unlike situations discussed in this Court's decisions where the Legislature authorized water fluoridation or traffic cameras. Reply br. at 5-6. The policy of allowing heroin injection sites specifically or addressing the opioid abuse issue generally is not entrusted exclusively to local public health boards. Br. of Appellants at 23-27.

The principal authority for the professors' conception of the power of local boards is *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 839 P.3d 324 (1992). Amici br. at 5-6. But this Court in *Brockett* never insulated all board decisions from the initiative power. Rather, this Court analyzed specific legislation regarding AIDS. The Legislature's omnibus AIDS act authorized local AIDS service networks to offer "needle sterilization" and the "use of appropriate materials" to prevent AIDS infection. *Id.* at 146. The Court found that "needle sterilization" encompassed needle exchange. *Id.* at 152. Thus, the Legislature *authorized* local governments to operate needle exchange programs, notwithstanding the criminal laws pertaining to drug use. There is no similar statute regarding heroin injection sites; *no statute* grants the

specific power to create such sites. There is no legislative mandate that local voters are precluded from legislating in this arena.

More critically, the amici are entirely silent on the Council's opt-out decision in discussing local public health board authority, a silence that is deafening. If amici are correct that the Board has "absolute" authority to legislate in public health matters, 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 (as so many have already done); under the academics' logic, the Board's decision to allow heroin injection sites in the County must preempt any such political decision-making by the County or cities. However, by including the proviso, the County belied the academics' entire argument, recognizing that the authorization of heroin injection sites is, in fact, a *policy choice*. The Council knew that the matter would be controversial, so it altered the Board's plan and allowed cities to make a policy decision to opt out of heroin injection sites within their boundaries. 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. Clearly, the Board does not have *exclusive* power to regulate all

matters concerning public health. *King County citizens share the right to legislate in this area.*<sup>8</sup>

D. CONCLUSION<sup>9</sup>

Nothing presented in the amici professors' brief should deter this Court from reversing the trial court and placing I-27 on the earliest ballot for consideration by King County's voters. Those academics impugn the people's power to legislate. Left entirely unaddressed by the professors' theoretical conception of local public health board authority is the Council's determination to override Board policy and to allow cities to opt out of the location of heroin injection sites in their communities – a *policy* decision. Obviously, if the Council can make such a policy decision, despite the academics' contention that the Legislature conferred “plenary” or “exclusive” authority over public health matters upon local public health boards, the people are not precluded from *ever* weighing in on the groundbreaking policy decision to permit heroin injection sites within the County. I-27 is not clearly beyond the scope of the people's initiative

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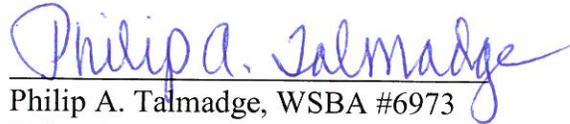
<sup>8</sup> The Council acted under its general legislative authority in permitting injection sites, or allowing cities to opt out of providing them, and the people share that authority to legislate for themselves by initiative. Wash. Const. art. II, § 1; RCW 35A.11.080; King County Charter art. 2, § 230.50.

<sup>9</sup> The professors' brief does not purport to address arguments in support of the trial court's decision such as the contention that I-27 trenches upon the County's budgetary, administrative, or GMA authority. Consequently, appellants do not address those questions, resting on their merits briefing.

power, and the trial court's decision to block I-27 from the public vote should be overturned.

DATED this 4th day of September, 2018.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Mark C. Lamb, WSBA #30134  
The North Creek Law Firm  
12900 NE 180th Street, Suite 235  
Bothell, WA 98011  
(425) 368-4238

Andrew R. Stokesbary, WSBA #46097  
Stokesbary PLLC  
1003 Main Street, Suite 5  
Sumner, WA 98390  
(206) 486-0795

Attorneys for Appellants  
Joshua Freed and IMPACTion

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Appellants' Response to Amici Professors* in Supreme Court Cause No. 95134-9 to the following parties indicated below:

Knoll Lowney, WSBA #23457  
Clare Tonry, WSBA #44497  
Smith & Lowney, PPLC  
2317 E. John Street  
Seattle, WA 98122

Jennifer Stacy, WSBA #30754  
King County Prosecuting Attorney's Office  
516 Third Avenue, Room W400  
Seattle, WA 98104-2388

Janine Joly, WSBA #27314  
Office of the Prosecuting Attorney  
500 Fourth Avenue, Suite 900  
King County Administration Building  
Seattle, WA 98104-2316

Mark C. Lamb, WSBA #30134  
The North Creek Law Firm  
12900 NE 180th Street, Suite 235  
Bothell, WA 98011

Andrew R. Stokesbary, WSBA #46097  
Stokesbary PLLC  
1003 Main Street, Suite 5  
Sumner, WA 98390

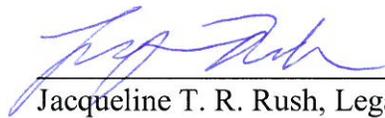
Carlton W.M. Seu, WSBA #26830  
Michael K. Ryan, WSBA #32091  
Jeff Slayton, WSBA #14215  
Seattle City Attorney's Office  
701 Fifth Avenue, Suite 2050  
Seattle, WA 98104-7095

Theresa M. DeMonte, WSBA #43994  
Claire Martirosian, WSBA #49528  
McNaul Ebel Nawrot & Helgren, PLLC  
One Union Square  
600 University Street, Suite 2700  
Seattle, WA 98101

Original e-filed with:  
Washington Supreme Court  
Clerk's Office

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: September 4, 2018 at Seattle, Washington.

  
\_\_\_\_\_  
Jacqueline T. R. Rush, Legal Assistant  
Talmadge/Fitzpatrick/Tribe

**TALMADGE/FITZPATRICK/TRIBE**

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- knoll@smithandlowney.com
- lise.kim@seattle.gov
- mark@northcreeklaw.com
- michael.ryan@seattle.gov
- monica.erickson@kingcounty.gov
- tdemonte@mcnaul.com
- tdo@mcnaul.com

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Appellants' Response to Amici Professors

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Sender Name: Jacqueline T R Rush - Email: assistant@tal-fitzlaw.com

**Filing on Behalf of:** Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:  
2775 Harbor Avenue SW  
Third Floor Ste C  
Seattle, WA, 98126  
Phone: (206) 574-6661

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