

FILED
SUPREME COURT
STATE OF WASHINGTON
8/30/2018 2:51 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
9/10/2018
BY SUSAN L. CARLSON
CLERK

No. 95307-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

END PRISON INDUSTRIAL COMPLEX,

Respondent,

v.

KING COUNTY,

Petitioner.

ON APPEAL FROM THE COURT OF APPEALS DIVISION II

NO. 49453-1-II

BRIEF OF AMICUS CURIAE

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509)735-3591

REID W. HAY,
Deputy Prosecuting Attorney
Benton County Prosecuting
Attorney's Office
BAR NO. 34584
OFFICE ID 91004

Attorney for the Washington Association of Prosecuting Attorneys

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES | ii |
| I. INTEREST OF AMICUS CURIAE | 1 |
| II. ISSUES PRESENTED..... | 1 |
| III. AMICUS CURIAE’S STATEMENT OF THE CASE..... | 1 |
| IV. ARGUMENT | 1 |
| A. The Role of the Prosecuting Attorney in Crafting Ballot Titles..... | 2 |
| B. EPIC’s suit was untimely..... | 8 |
| 1. The scope of a ballot title challenge in superior court | 12 |
| 2. Ripeness | 15 |
| 3. EPIC’s suit is a ballot title challenge | 18 |
| V. CONCLUSION..... | 20 |

TABLE OF AUTHORITIES

WASHINGTON CASES

Ballot Title for Initiative 333 v. Gorton, 88 Wn.2d 192, 558 P.2d 248 (1977).....15, 19
Brown v. Spokane Fire Protection Dist. No. 1, 100 Wn.2d 188, 668 P.2d 571 (1983).....7
Brutsche v. City of Kent, 78 Wn. App. 370, 898 P.2d 319 (1995)..... 9-10
Coppernoll v. Reed, 155 Wn.2d 290, 119 P.3d 318 (2005).....6
End Prison Industrial Complex v. King County, 200 Wn. App. 616, 402 P.3d 918 (2017).....9-10, 12, 15-16, 18, 20
Kreidler v. Eikenberry, 111 Wn.2d 828, 766 P.2d 438 (1989)..... 8, 13-14
Lakoduk v. Cruger, 48 Wn.2d 642, 296 P.2d 690 (1956).....7
Ley v. Clark County Public Transportation Benefit Area, 197 Wn. App. 17, 386 P.3d 1128 (2016)..... 17-18
Malnar v. Carlson, 128 Wn.2d 521, 910 P.2d 455 (1996)16
Philadelphia II v. Gregoire, 128 Wn.2d 707, 911 P.2d 389 (1996).....6
Reid v. Dalton, 124 Wn. App. 113, 100 P.3d 349 (2004)..... 9-10
Rosso v. State Personnel Bd., 68 Wn.2d 16, 411 P.2d 138 (1966).....7
Sane Transit v. Sound Transit, 151 Wn.2d 60, 85 P.3d 346 (2004)19
State ex rel. Banks v. Drummond, 187 Wn.2d 157, 385 P.3d 769 (2016)...6
State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011).....6

CONSTITUTIONAL PROVISIONS

WASH. CONST. art. XI, § 56

WASHINGTON STATUTES

RCW 4.16.13010
RCW 29.27.06014
RCW 29.79.04014
RCW 29.79.060 14-15
RCW 29.79.29014
RCW 29A.36.060.....3, 5, 19
RCW 29A.36.071..... 1-5, 8, 13
RCW 29A.36.071(1).....3-4, 6-7, 14
RCW 29A.36.090.....3-5, 8-14, 16-17, 19
RCW 29A.68.013.....10
RCW 29A.72.010.....6
RCW 29A.72.050..... 2-3, 5, 7

| | |
|------------------------|----------------|
| RCW 29A.72.050(1)..... | 14-15, 19 |
| RCW 29A.72.060..... | 3-4, 8 |
| RCW 29A.72.080..... | 3-5, 14 |
| RCW 29A.72.280..... | 14 |
| RCW 35A.11.100..... | 6 |
| RCW 35A.11.80..... | 6 |
| RCW 35A.11.90..... | 6 |
| RCW 36.27.020 | 5 |
| RCW 36.27.020(4)..... | 2 |
| RCW 36.32.120 | 16 |
| RCW 84.55.050 | 11, 13, 16, 19 |
| RCW 84.68.060 | 10 |

OTHER AUTHORITIES

| | |
|--|----|
| 6 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 21.02 (3d rev. ed. 2018)..... | 16 |
|--|----|

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (“WAPA”) is a statewide association of the thirty-nine elected prosecuting attorneys. WAPA assists prosecuting attorneys in carrying out their statutory duties. One of the ways WAPA accomplishes its purpose is by appearing as amicus curiae or intervenor in pending lawsuits, proposing legislation, or testifying regarding legislation proposed by others.

II. ISSUES PRESENTED

When preparing a ballot title for a local measure as required under RCW 29A.36.071, is a county prosecuting attorney acting in a neutral, impartial role, rather than as an advocate for the measure’s sponsors?

Is a non-constitutional challenge to the adequacy of a ballot title prepared by the prosecuting attorney untimely when it has been brought more than three and a half years after the election?

III. AMICUS CURIAE’S STATEMENT OF THE CASE

Amicus curiae adopts the Statement of the Case provided by King County in its Supplemental Brief to this Court.

IV. ARGUMENT

Washington’s prosecuting attorneys play a key role in protecting the integrity of our electoral system, including by fulfilling their statutory duties in the preparation of ballot titles, RCW 29A.36.071, and in defending the

results of local elections, *see* RCW 36.27.020(4). End Prison Industrial Complex’s (“EPIC”) arguments in this case reveal a lack of understanding that in the preparation of ballot titles a prosecutor acts not as an advocate for the measure’s sponsors but rather in a neutral, statutorily driven role. In addition, prosecuting attorneys statewide are concerned that the lower court decision, if allowed to stand, will hollow-out established law providing for the timely resolution of ballot title challenges, and embroil prosecuting attorneys and local governments of every type in untimely post-election litigation.

The ballot title language crafted by the King County Prosecuting Attorney’s Office in this instance was legally appropriate. Other briefing has ably addressed the specifics of the chosen language. Instead, here we shine a spotlight on the crucial role of the prosecuting attorney in drafting ballot titles, and the requirement for challenges to that title to be timely made under the challenge statute.

A. The Role of the Prosecuting Attorney in Crafting Ballot Titles

When crafting a ballot title to go before the voters, a prosecuting attorney is acting under statutory direction and as a neutral party. RCW 29A.36.071; RCW 29A.72.050. Prosecuting attorneys are frequently

obligated by statute to prepare ballot titles for local measures. RCW 29A.36.071(1).

When doing so, the duties of the prosecuting attorney parallel those imposed upon the Washington Attorney General when preparing ballot titles for statewide measures. This includes a parallel statutory structure both for the obligation to prepare ballot titles, and for judicial consideration of timely challenges to those ballot titles.¹

EPIC's arguments in this matter show its misunderstanding of the role of the prosecuting attorney in the preparation of ballot titles. EPIC repeatedly and falsely conflates "the County"—meaning the measure's sponsors—with the office of the prosecuting attorney, which independently reviews ballot titles under statutory direction as a neutral party, *see* RCW 29A.36.071; RCW 29A.72.050.

EPIC uses its misunderstanding as a weapon to imply—or to assert directly—that the ballot title as drafted by the prosecuting attorney was

¹ Whereas the Prosecuting Attorney is required to prepare ballot titles for local measures under RCW 29A.36.071, the same obligation is imposed on the Attorney General for statewide measures under RCW 29A.72.060, and both statutes reference the same statute for organization—RCW 29A.72.050. The statutes for judicial consideration of timely challenges to the ballot title are also parallel and they use nearly identical language; the statute for ballot title challenges for statewide measures is at RCW 29A.72.080, and the parallel statute for local measures is found at RCW 29A.36.090. There is also another nearly identical statute concerning challenges to the ballot titles for proposed constitutional amendments at RCW 29A.36.060.

written to deliberately misinform voters to advance a political goal. For example, EPIC wrote:

King County clearly knew how to present voters with the express statement mandated by RCW 84.55.050, as shown by the proposed title in Ordinance 17301, [sic] but made the political decision not to do so. Instead, it provided voters with a ballot title that was ambiguous, if not outright deceptive.

Br. of Appellants at 20. Similar confusion is littered throughout EPIC's briefing, confusing "the County" with the prosecutor's office as the author of the final ballot title. *See, e.g.*, Br. of Appellants at 20, 30; Appellant's Reply Br. at 11, 17; EPIC's Supplemental Br. at 6, 14.

"King County," however, did not write the ballot title presented to voters. A measure's sponsors do not control ballot title wording. *See* RCW 29A.36.071. The sponsors of a measure customarily put forth wording, but it is the prosecuting attorney (or, in other circumstances, the attorney general or a city attorney) that actually writes the ballot title language that goes before the voters, subject to pre-election court review. RCW 29A.36.071(1) (prosecuting attorney and city attorney); RCW 29A.72.060 (attorney general); RCW 29A.36.090 (local measures ballot title challenge); RCW 29A.72.080 (ballot title challenge for statewide measures). In this way, the legislature has placed the composition of ballot titles at all levels of government—whether it be state, county, or city—in the hands of a neutral

party, rather than leaving it to a measure's backers to determine. The final backstop is provided by allowing pre-election review in superior court brought by "any persons . . . dissatisfied with the ballot title"—before it goes to the voters. RCW 29A.36.090 (local measures); RCW 29A.72.080 (statewide measures); RCW 29A.36.060 (proposed constitutional amendments).

EPIC's misunderstanding may stem from the unusual circumstance that here the prosecuting attorney's office has been required to wear different hats in different roles. In many circumstances, the prosecuting attorney is acting as a legal advisor to the County, and in defending Proposition 1 before this Court, the prosecuting attorney's office is now acting as an advocate, as is also provided among its duties. *See* RCW 36.27.020. However, when reviewing the ballot title proposed in Ordinance 17304, the prosecuting attorney was *not* acting as the County's counsel or advocate. *See* RCW 29A.36.071 (incorporating RCW 29A.72.050 which requires impartiality and the absence of prejudice in the ballot title prepared by the prosecuting attorney). The prosecuting attorney was wearing a different hat to fulfill a different statutory role.

More broadly, under Washington's unbundled system of county government, a prosecuting attorney is a separately elected official with his or her own duties and obligations to the people—not simply to county

government or the county commissioners. *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 179-83, 385 P.3d 769, 781-83 (2016); *see* WASH. CONST. art. XI, § 5; *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551, 555 (2011) (prosecutor often functions in a quasi-judicial capacity “as the representative of the people”). The county prosecutor does not serve at the pleasure of the county commissioners, nor is he or she simply a legal hired gun for the legislative branch. *See Drummond*, 187 Wn.2d at 179-83.

When reviewing or drafting ballot titles, the prosecuting attorney is typically doing so for any one of a multitude of entities to which he or she is not ordinarily connected, such as school districts, fire districts, port districts, hospital districts and so forth. *See* RCW 29A.36.071(1). For statewide measures, or in counties or cities that provide for referenda or initiatives by the people, measures may also be sponsored by a host of private entities or individuals. *See* RCW 29A.72.010; *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318, 322 (2005) (noting the power of initiative granted under city and county charters); RCW 35A.11.80-100. From time to time, the prosecuting attorney and a measure’s sponsors may even be at odds; but even then the prosecuting attorney is obligated to prepare a proper and neutral ballot title to the best of his or her abilities. *See, e.g. Philadelphia II v. Gregoire*, 128 Wn.2d 707, 712-16, 911 P.2d 389, 392-93 (1996) (holding that the attorney general had a ministerial duty to

prepare a ballot title even though in her view the proposed measure was outside the power of an initiative). In any of these circumstances, the prosecuting attorney (or a city attorney or the attorney general operating in the same role) is not acting as counsel for or an advocate for a measure's sponsors but is acting neutrally to fulfill a statutory duty. *See* RCW 29A.36.071(1); RCW 29A.72.050. Similarly, when drafting ballot title text for a County-sponsored measure, the prosecuting attorney's role and duties are no different than when the measure is sponsored by some other person or entity. *See id.*

It was in that neutral role that here the prosecuting attorney drafted the final ballot title. Absent evidence to the contrary, public officers are presumed to properly and legally perform their duties, *Rosso v. State Personnel Bd.*, 68 Wn.2d 16, 20, 411 P.2d 138, 140 (1966), and to do so "fairly, impartially, and in good faith." *Lakoduk v. Cruger*, 48 Wn.2d 642, 658, 296 P.2d 690, 699 (1956) (*superseded by statute on other grounds as stated in Brown v. Spokane Fire Protection Dist. No. 1*, 100 Wn.2d 188, 192, 668 P.2d 571, 574 (1983)). It was not politics; it was not deception. The final ballot text was not even an act of "the County," in the sense of being an act of the measure's sponsors, as EPIC claims. It was the ordinary and accepted work of a prosecuting attorney, performing that office's duties as required by statute.

Washington's ballot title challenge statutes emphasize the importance of timeliness and a policy interest in swift and final resolution of claimed inadequacies in a ballot title. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 833, 766 P.2d 438, 441 (1989). That policy is particularly necessary when one recalls that because the final ballot title language is independently prepared by a prosecuting attorney, city attorney, or the attorney general, it is outside the control of a measure's proponents. *See* RCW 29A.36.071; RCW 29A.72.060. The decision below would subject school districts, fire protection districts, municipalities, and others to surprise suits that do not even arise from a measure itself; often after entering into binding contracts relying on revenues approved years before by voters in certified elections. It may be understandable for a measure itself—which, if passed, continues in force after the election—to remain subject to post-election legal contest, but the function of ballot title challenge statutes such as RCW 29A.36.090 is to allow questions arising instead from the ballot title—which is comparatively ephemeral—to be promptly brought out and resolved before the issue goes to the voters.

B. EPIC's suit was untimely

Prosecutors statewide are interested in continued recognition of the longstanding statutory structure in which claims of ballot title deficiencies are timely resolved before a vote of the people. Regrettably, the Court of

Appeals' decision below erroneously discarded application of the limitations period for local ballot title challenges—and put nothing in its place.

To be timely, challenges to the adequacy of a ballot title for a local measure must be brought within 10 days of when the ballot title is filed with the county auditor. RCW 29A.36.090. EPIC did not bring its action within that timeframe, instead filing suit years after the election. *See End Prison Industrial Complex v. King County*, 200 Wn. App. 616, 621, 402 P.3d 918, 921 (2017) (“*EPIC*”) (noting that the election took place in 2012, but the action was not brought until April 2016).

EPIC's suit was brought as a declaratory judgment action, CP 4-5, but “[f]iling an action for declaratory judgment, rather than one for direct relief, [does] not avoid the statute of limitation[s].” *Reid v. Dalton*, 124 Wn. App. 113, 122, 100 P.3d 349, 354 (2004). “[T]he statutes governing . . . declaratory judgment proceedings do not establish a time period in which the actions must be brought,” and so such actions must be brought in a “reasonable time.” *Brutsche v. City of Kent*, 78 Wn. App. 370, 376, 898 P.2d 319, 322 (1995). “What constitutes a reasonable time,” in turn, “is determined by analogy to the time allowed for appeal of a similar decision as prescribed by statute, rule of court, or other provision.” *Id.* In short then, *some* limitations period applies, by analogy to an existing “statute, rule of

the court, or other provision.” *Id.* If not the limitations period for ballot title challenges at RCW 29A.36.090, then some other analogous limitations period would apply as if EPIC had brought its action directly. *See id.* at 376-80, 898 P.2d at 322-24.²

In this case, the Court of Appeals rejected the superior court’s application of the 10-day limitations period for ballot title challenges under RCW 29A.36.090, but then inexplicably moved on to a premature ruling on the substance of the case without first grappling with the question of what limitation period would then apply in its place. *See EPIC*, 200 Wn. App. at 626-28, 402 P.3d at 923-24. This was error.

A declaratory judgment action is not a magic spell to circumvent statutory limitations periods, *Reid*, 124 Wn. App. at 122, 100 P.3d at 354, and neither the Court of Appeals nor EPIC have proposed what limitations period would apply in lieu of RCW 29A.36.090, or, crucially, whether EPIC’s suit filed more than three and a half years after the election would be timely under such a hypothetical alternative.³

² It should be noted EPIC does not raise a constitutional claim.

³ There are a number of alternative statutory time limits the Court of Appeals could have examined, such as the limit of 10 days to challenge a measure’s certification of election at RCW 29A.68.013, or, under RCW 84.68.060, the deadline of June 30 of the year following payment for actions to recover taxes paid, or the generic two year limit under RCW 4.16.130 for “[a]n action for relief not hereinbefore provided for[.]” This court need not be detained by those hypotheticals here, however, because even if they were applicable, none of them stretch so far as the more than three and a half years that EPIC’s suit would require.

That stated, the facts, policy, and law, all direct that the correct limitations period to apply is that required for ballot title challenges in RCW 29A.36.090. That statute applies generally to any challenge to a ballot title for a local measure drafted by a prosecuting attorney or a city attorney, and so is applicable to a ballot title for a levy lid lift, or any other local measure. *See* RCW 29A.36.090. Because EPIC's suit alleges that it was an inadequacy of the ballot title that constituted a violation of RCW 84.55.050, it is the ballot title challenge statute that one looks to for a private right of action. EPIC's suit is barred by its failure to bring such a timely challenge.

In its effort to evade the statutory bar, EPIC has presented three arguments. First, EPIC contends that the superior court was without jurisdiction to hear its challenge within the ordinary pre-election period, because EPIC's dissatisfaction with the ballot title concerned a requirement arising out of ch. 84.55 RCW, rather than ch. 29A.36, RCW. Second, EPIC asserts that it could not have brought its challenge pre-election because it would have been unripe until King County's later tax collection made its case actionable. Third, EPIC maintains that its suit was to enforce the ballot title as written, and so was not a ballot title challenge. We will address each of those contentions in turn.

1. The scope of a ballot title challenge in superior court

EPIC claims that it could not have brought a timely challenge to the alleged inadequacy of the ballot title because, in its view, the basis of its challenge was outside the jurisdiction of the superior court under the challenge statute, RCW 29A.36.090.

The challenge statute provides that “any persons . . . dissatisfied with the ballot title” may bring an action in superior court within 10 days of the ballot title’s filing, and the court will “examine the proposed measure, the ballot title filed, and the objections to it and may hear arguments on it, and shall as soon as possible render its decision and certify to and file with the county auditor a ballot title that it determines will meet the requirements of this chapter.” *Id.* EPIC seizes upon the final words of the above sentence to argue that because the ballot title submitted by the superior court is to meet the requirements of “this chapter,” then the scope of the superior court’s jurisdiction only extends so far as hearing challenges from persons dissatisfied with a ballot title’s compliance with ch. 29A.36, RCW. The Court of Appeals appeared to agree. *See End Prison Industrial Complex v. King County*, 200 Wn. App. 616, 627-28, 402 P.3d 918, 924 (2017) (“*EPIC*”).

Much was amiss with EPIC’s and the Court of Appeals’ reasoning. First, the challenge statute at RCW 29A.36.090 does not contain the

limitation that EPIC suggests. The statute broadly provides for timely challenges brought by “any persons . . . dissatisfied with the ballot title” for the court to hear “the objections to it[.]” RCW 29A.36.090. The statute’s provision that a ballot title fashioned by the superior court be consistent with the chapter does not read as a limitation on the superior court’s jurisdiction. Regardless of where the law authorizing a local measure is codified, RCW 29A.36.090 is the applicable statute for any challenge to a ballot title prepared by prosecuting attorney or city attorney, *see* RCW 29A.36.090; RCW 29A.36.071, and RCW 84.55.050 contains no exemption from the general ballot title challenge statute.

Second, in a case interpreting the similarly worded ballot title challenge statute for statewide measures, this Court has already determined that the superior court has jurisdiction to hear challenges arising from laws *other than* those mentioned in the challenge statutes. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 830-31, 766 P.2d 438, 439-40 (1989).

In *Kreidler*, a citizens group that had proposed an initiative brought a pre-election ballot title challenge to the ballot title drafted by the Attorney General for a competing alternative measure introduced by the legislature. *Id.* The source of the citizens group’s dissatisfaction with the ballot title for the alternative measure was that it failed to “identify the essential differences” between the citizens group’s measure and the proposed

alternative, as required in former RCW 29.79.290 (now codified at RCW 29A.72.280). *Id.* at 831, 839, 766 P.2d at 440, 444. Much as the challenge statute for local measures at RCW 29A.36.090 provides for the superior court to submit “a ballot title that it determines will meet the requirements of this chapter,” the challenge statute at issue in *Kreidler*, RCW 29.79.060 (now codified at RCW 29A.72.080) then similarly provided for the court to submit a “ballot title or summary as it determines will meet the requirements of RCW 29.27.060 and 29.79.040.” RCW 29.79.060 (1989). The citizen group’s suit did not arise out of either of those statutes, but in *Kreidler* the Court nonetheless upheld the superior court’s pre-election jurisdiction. *Kreidler*, 111 Wn.2d at 830, 839, 766 P.2d at 439, 444. *Kreidler* thus demonstrates under the same structure and similar wording as present-day RCW 29A.36.090, that the superior court’s jurisdiction over ballot title challenges is *not* limited to addressing claims arising under “this chapter,” chapter 29A.36 RCW. *See id.*

Third, even if a challenge were for some reason limited to chapter 29A.36 RCW, that chapter is broad enough to encompass the challenge at issue. In the decision below, the Court of Appeals briefly summarized the contents of RCW 29A.36.071(1) and RCW 29A.72.050(1) (the latter of which is incorporated by reference into the former) but regrettably omitted mention of the requirement in RCW 29A.72.050(1) that the ballot title set

forth the measure’s “essential contents”—the alleged absence of which is the heart of EPIC’s claim. *See End Prison Industrial Complex v. King County*, 200 Wn. App. 616, 627, 402 P.3d 918, 924 (“*EPIC*”). That purpose of a ballot title challenge was emphasized by this Court in *Ballot Title for Initiative 333 v. Gorton*, 88 Wn.2d 192, 195-96, 558 P.2d 248, 250 (1977), where this Court underscored that pre-election ballot title challenges are there for those wishing to contest whether the wording of a ballot title “accurately reflects the purpose” of the measure. (discussing the ballot title challenge statute formerly at RCW 29.79.060).

Here, EPIC’s claim that the ballot title was “insufficiently ‘express’ and ‘clear’” in its description of the purpose of Ordinance 17304, *see EPIC*, 200 Wn. App. at 628, 402 P.3d at 924, would, if timely brought, have been a standard challenge to whether the ballot title “accurately reflect[ed] the purpose” of the measure, *see Ballot Title for Initiative 333*, 88 Wn.2d at 195-96, 558 P.2d at 250, and set forth its “essential contents.” *See* RCW 29A.72.050(1).

2. Ripeness

EPIC next argues that it could not have brought a timely challenge because, it asserts, its “claims did not exist until King County began to act inconsistently with the ballot title approved by the voters” by collecting property taxes at the lifted rate beyond the first year. Br. of Appellants at

32. EPIC asserts that if it had brought a timely pre-election challenge under RCW 29A.36.090 “[s]uch a claim would be speculative at best and probably frivolous.” Appellant’s Reply Brief at 18. Generally, a claim “accrues when a party has a right to apply to a court for relief.” *Malnar v. Carlson*, 128 Wn.2d 521, 529, 910 P.2d 455, 458 (1996).

In addition to the reasons set out in the prior section, EPIC’s action was ripe pre-election because it is a challenge to the adequacy of the ballot title to provide authority for the undertakings set forth in the measure. “EPIC claims that the ballot title language approved by voters was *insufficient* under RCW 84.55.050” for the County to use the authority granted in the text of the measure itself. *EPIC*, 200 Wn. App. at 627-28, 402 P.3d at 924 (emphasis added). Ordinance 17304 itself called for the 2013 levy amount to serve as the base for the eight succeeding years.⁴ *See id.* at 622, 402 P.3d at 921 (quoting the text of the measure). Both the measure and the ballot

⁴ EPIC contends that the Court should ignore the language in Ordinance 17304 specifying the use of the 2013 levy as the base for the eight succeeding years, because, in EPIC’s view, the prosecuting attorney “dropped,” Appellant’s Reply Br. at 11, “deleted,” Appellant’s Reply Br. at 17, and “rejected,” Appellant’s Supplemental Br. at 14, that language when that specific wording was not employed by the prosecuting attorney in the ballot title. But although the prosecuting attorney prepares the ballot title, he or she does not and cannot amend, delete, or otherwise change the text of the underlying ordinance passed by the County Council. 6 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 21.02 (3d rev. ed. 2018) (“[o]rdinarily power to amend municipal legislation rests only in the legislative branch of the municipality”); *see* RCW 36.32.120 (granting to county legislative authorities the power to pass resolutions and ordinances). Accordingly, the text of Ordinance 17304 remained unchanged.

title existed pre-election. As a result, no subsequent event was necessary to give rise to the alleged disharmony between the two as claimed by EPIC.

This case is unlike one in which following an election the government entity attempts to make use of authority granted by the electorate for purposes outside the scope of the measure, such as if a measure to build a juvenile justice center were instead used to construct a bridge, or to upgrade council chambers.⁵ An action in such a case would concern the scope of the measure, rather than merely the ballot title, and it would naturally be unripe until the governing entity acted outside the measure's authority.

If, in contrast, a challenge asserts that the text of the ballot title is inadequate to provide authority for the undertakings set forth in the measure, then it would be ripe pre-election; the disharmony between the measure and the ballot title purporting to describe it would be evident by comparing those two documents. Both would exist pre-election, and within the time-frame for a timely challenge under RCW 29A.36.090. Nothing following the election would be necessary to make the challengers aware of the intentions of the measure, as its purpose could already be found within the four corners of that document.

⁵ The above hypotheticals could also be subject to challenge as violations of article VII, § 5 of the Washington Constitution. *See Ley v. Clark County Public Transportation Benefit Area*, 197 Wn. App. 17, 25-26, 386 P.3d 1128, 1134 (2016).

Here, EPIC’s action is of the second type. It is alleging an inadequacy of the ballot title to contain the measure’s essential contents and to provide authority to carry out the measure’s stated purpose—the full nine-year levy lift set forth in Ordinance 17304. But the text of the measure already existed during the pre-election challenge period, as did the ballot title prepared by the prosecutor. There was no further development needed to create justiciability, and EPIC’s failure to bring a timely challenge bars its suit.

3. EPIC’s suit is a ballot title challenge

The Court of Appeals erroneously held that EPIC’s suit is not a ballot title challenge because it “seeks to enforce the terms of the ballot title as written[.]” *EPIC*, 200 Wn.App. at 628, 402 P.3d at 924. The Court of Appeals’ formulation, however, is meaningless under Washington law because the ballot title is not the enabling legislation. *See Ley v. Clark County Public Transportation Benefit Area*, 197 Wn. App. 17, 26, 386 P.3d 1128, 1134 (2016). It is the *measure* that is the enabling legislation. *Id.* A ballot title is seen by the voters, but it is the measure that is or is not “enforced.” *See id.*

A ballot title is simply a shortened characterization of a measure, with the necessary limitations that implies. It is not the measure itself. Elections

and voters do not pass ballot titles. *See Sane Transit v. Sound Transit*, 151 Wn.2d 60, 71-73, 85 P.3d 346, 351-52 (2004). They pass measures.⁶ *See id.*

Here, EPIC is dissatisfied, claiming the ballot title at issue was insufficiently express to satisfy RCW 84.55.050; but that statute is one of many that provide authority to call a vote on a local measure, and the remedy for “any persons . . . dissatisfied” with the ballot title for a local measure is a timely challenge under RCW 29A.36.090. EPIC’s claim that the ballot title lacked the “essential contents,” *see* RCW 29A.72.050(1), needed to “accurately reflect the proposers’ purpose,” *see Ballot Title for Initiative 333*, 88 Wn.2d at 195-96, 558 P.2d at 250, and was thus inadequate to provide authority to carry forth the undertakings set out in the underlying measure, is a characteristic ballot title challenge. It challenges not the measure, but the adequacy of the ballot title. Accordingly, EPIC’s suit is barred by its failure to bring a timely challenge using the method provided by law.

⁶ To illustrate the point: if a party alleged that the ballot title for a state constitutional amendment omitted some feature in the language of the amendment itself, could that party file a post-election action seeking, as claimed here, to “enforce the ballot title as written”? Would the constitutional amendment then be enforced only as it was described in the ballot title? Obviously, no, the text subject to enforcement would be the measure passed by the voters (including the full text of the constitutional amendment) not its mere summary in the ballot title, and post-election suit would be barred by the ballot title challenge statute for constitutional amendments at RCW 29A.36.060.

V. CONCLUSION

The Court of Appeals' cursory treatment of the application of the ballot title challenge statute suggests that it did not fully think-through the future ramifications of the changes that its decision would impose upon Washington law. The court missed the significance of the neutral role of the prosecutor in drafting ballot titles, the scope of ballot title challenges, and the fact that voters and elections pass measures, not ballot titles. The resulting ill-considered exception to timeliness requirements the court below carved out for challenges purporting to "enforce [a] ballot title as written," *EPIC*, 200 Wn. App. at 627, 402 P.3d at 923, would have unintended consequences going far beyond the confines of this case. In contrast, the superior court's analysis of this case was correct, and its earlier dismissal of EPIC's untimely action should accordingly be affirmed.

RESPECTFULLY SUBMITTED this 30 day of August, 2018.



REID W. HAY
Deputy Prosecuting Attorney
Bar No. 34584

BENTON COUNTY PROSECUTOR'S OFFICE

August 30, 2018 - 2:51 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95307-4
Appellate Court Case Title: End Prison Industrial Complex v. King County
Superior Court Case Number: 16-2-07355-2

The following documents have been uploaded:

- 953074_Briefs_20180830144817SC560390_7225.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was EPIC v King County Br. of Amicus Curiae.pdf
- 953074_Cert_of_Service_20180830144817SC560390_6979.pdf
This File Contains:
Certificate of Service
The Original File Name was EPIC v King County Proof of Service.pdf
- 953074_Motion_20180830144817SC560390_7964.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was EPIC v King County Mtn for leave to file Amicus Curiae.pdf

A copy of the uploaded files will be sent to:

- Dawn.taylor@pacificallawgroup.com
- claire@smithandlowney.com
- david.hackett@kingcounty.gov
- dbh@reynoldsburton.com
- elamb@spokanevalley.org
- janine.joly@kingcounty.gov
- jweiss@wsac.org
- knoll@smithandlowney.com
- kymberly.evanson@pacificallawgroup.com
- paoappellateunitmail@kingcounty.gov
- paul.lawrence@pacificallawgroup.com
- shae.blood@pacificallawgroup.com
- sydney.henderson@pacificallawgroup.com
- thomas.kuffel@kingcounty.gov

Comments:

Sender Name: Demetra Murphy - Email: deme.murphy@co.benton.wa.us

Filing on Behalf of: Reid Hay - Email: reid.hay@co.benton.wa.us (Alternate Email: prosecuting@co.benton.wa.us)

Address:
7122 W. Okanogan Place
Kennewick, WA, 99336
Phone: (509) 735-3591

Note: The Filing Id is 20180830144817SC560390