No. ________

In The
Supreme Court of the United States

SAVE TACOMA WATER,

Petitioner,

v.

PORT OF TACOMA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Washington State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Washington State Courts recognize this Court's opinions applying the First Amendment to protect the circulation of signature petitions to put an initiative on the ballot for a direct vote of the people. However, the Washington Courts have authorized themselves to veto qualified initiatives from appearing on the ballot if the court believes the proposed law is "beyond the scope of the initiative power." Washington Courts assert that there is no First Amendment protection for the subsequent political campaign, education, debate, and vote that necessarily accompany an initiative appearing on the ballot. Other state and federal courts are split on the question of the application of the First Amendment to subject matter restrictions on initiatives. Petitioner asserts that Washington Courts' judicial veto cuts off the political communication of an initiative campaign and the people's subsequent vote, which raises content-based, prior restraint, vagueness, and severe ballot access burden issues. Thus, the specific question presented is:

Whether the First Amendment prohibits a state court from enjoining a qualified initiative from appearing on the ballot because the court believes that, if enacted, the law proposed by the initiative would be invalid.

PARTIES TO THE PROCEEDING

Petitioner Save Tacoma Water was a Defendant and Appellant below.

Respondents Port of Tacoma, Economic Development Board for Tacoma-Pierce County, and Tacoma-Pierce County Chamber were Plaintiffs and Appellees below.

Respondent City of Tacoma was originally named as a Defendant, but cross-claimed and joined the Plaintiffs, and was thus an Appellee below.

John and Jane Does 1-5 (Individual sponsors and officers of Save Tacoma Water), Donna Walters, and Sherry Bockwinkel are or were all members of Save Tacoma Water, and were named as Defendants in the trial court, but did not participate in the appeal.

Julie Anderson, in her official capacity as Pierce County Auditor, was named as a Defendant in the trial court and has taken no position on appeal.

RULE 29.6 STATEMENT

Petitioner Save Tacoma Water is a Washington State nonprofit corporation. It has no parent corporation or shares held by a publicly traded company.

TABLE OF CONTENTS

Page

Question Presented ... i

Parties to the Proceeding ... ii

Rule 29.6 Statement ... ii

Table of Contents ... iii

Table of Authorities ... vii

Opinion Below ... 1

Jurisdiction ... 1

Constitutional Provisions Involved ... 2

Statement of the Case ... 2

Reasons for Granting the Writ ... 7

I. Introduction ... 7

II. How the Washington Courts developed second-class lawmaking for the people, unprotected from judicial interference ... 9

III. Federal and state courts do not agree on how or whether the First Amendment applies to pre-election judicial vetoes ... 12

A. This Court's opinion in *Meyer v. Grant* articulated foundational principles for the First Amendment's application to initiative campaigns ... 12

B. Maine's court applied *Meyer* to hold that the government's refusal to furnish petition forms for signature circulation, based on the content of the proposed legislation, violates the First Amendment ... 14

TABLE OF CONTENTS – Continued

Page

C. Circuit courts have split over whether the First Amendment applies when initiative campaigns are restricted from specific subject matters 15

D. The Ninth Circuit applies strict scrutiny to severe burdens on ballot access for initiatives, but the opinion below ignored this analysis 19

E. In sum, courts have disagreed on whether, and how, the First Amendment applies to restrictions on initiative campaigns, thus leading to the possibility of content-based pre-election review receiving anything from no First Amendment protection, all the way up to strict scrutiny 20

IV. The Washington Courts' judicial veto is a vague content-based prior restraint on political speech, expression, assembly, and petition that severely burdens ballot access, yet the Washington Courts do not believe their veto actions implicate the First Amendment at all 20

A. The judicial veto is a severe burden on ballot access, thus triggering strict scrutiny review 21

B. The judicial veto is a content-based restriction on core political speech, thus triggering strict scrutiny review 23

TABLE OF CONTENTS – Continued

Page

C. The judicial veto is a prior restraint on political speech, expression, assembly, and petition, thus triggering strict scrutiny review 26

D. Washington Courts' "beyond the scope" judicial veto standard is vague and overbroad, thus triggering strict scrutiny review 28

E. The judicial veto undermines the goals and purposes of initiative proponents' activities, and thus, the First Amendment prohibits the courts from deciding which political debates the people get to have 31

Conclusion.. 37

APPENDIX

Washington Court of Appeals, Published Opinion, July 25, 2018 ....App. 1

Pierce County Superior Court, Order, July 1, 2016 ....App. 21

Washington Court of Appeals, Order Denying Motion for Reconsideration, October 29, 2018......App. 30

Washington Supreme Court, Order Denying Petition for Review, March 6, 2019....................App. 32

Save Tacoma Water's Motion to Dismiss, Pierce County Superior Court, June 29, 2016..........App. 33

TABLE OF CONTENTS – Continued

Page

Save Tacoma Water's Motion for Reconsideration, Washington Court of Appeals, August 13, 2018 .... App. 48

Complete Text of Charter Amendment 5 .... App. 65

Complete Text of Tacoma Initiative 6 .... App. 71

TABLE OF AUTHORITIES

Page

CASES

Alexander v. United States, 509 U.S. 544 (1993)........26

Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 11 P.3d 762 (2000).........................34

Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012) .. 6, 19, 22, 23

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)...26

Biddulph v. Mortham, 89 F.3d 1491 (11th Cir. 1996)...14

Boos v. Barry, 485 U.S. 312, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988)...24, 26

Brown v. Hartlage, 456 U.S. 45 (1982) 35

Brown v. Owen, 165 Wn.2d 706, 206 P.3d 310 (2009)...9

Burson v. Freeman, 504 U.S. 191, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992) 24

City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) 31

City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) 26

Coppernoll v. Reed, 155 Wn.2d 290, 119 P.3d 318 (2005)...10

Global Neighborhood v. Respect Washington, 7 Wn. App. 2d 354 (Jan. 29, 2019) 21

Gregory v. Chicago, 394 U.S. 111 (1969) 29

TABLE OF AUTHORITIES – Continued

Page

Huff v. Wyman, 184 Wn.2d 643, 361 P.3d 727 (2015) 12

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 33

Initiative & Referendum Inst. v. Walker, 450 F.3d 1082 (10th Cir. 2006), *cert. denied*, 549 U.S. 1245 (2007) 17, 29

Libertarian Party of Ohio v. Blackwell, 462 F.3d 579 (6th Cir. 2006) 33

Marbury v. Madison, 5 U.S. 137, 1 Cranch 137 (1803) 11

Marijuana Policy Project v. U.S., 304 F.3d 82 (D.C. Cir. 2002) 15, 29

Meyer v. Grant, 486 U.S. 414 (1988) .... *passim*

Minish v. Hanson, 64 Wn.2d 113, 390 P.2d 704 (1964) 9

Mooney v. Holohan, 294 U.S. 103 (1935) 35

NAACP v. Button, 371 U.S. 415 (1963) 29, 31

Near v. Minnesota, 283 U.S. 697 (1931) 26

Ohno v. Yasuma, 723 F.3d 984 (9th Cir. 2013) 35

Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) 25

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 25

Reed v. Town of Gilbert, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) 24, 25, 26

Roth v. United States, 354 U.S. 476 (1957) 31

TABLE OF AUTHORITIES – Continued

Page

Shelley v. Kraemer, 334 U.S. 1 (1948)........................35

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 26

Smith v. City of Centralia, 55 Wash. 573, 104 P. 797 (1909) 9

Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution, 185 Wn.2d 97, 369 P.3d 140 (2016)..10

State ex rel. Berry v. Super. Ct. Thurston Cnty., 92 Wash. 16, 159 P. 92 (1916).................................10

State ex rel. Griffiths v. Super. Ct. in and for Thurston Cnty., 92 Wn. 44, 159 P. 101 (1916)..........9

State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135 Wn.2d 618, 957 P.2d 691 (1998)...32

Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291 (6th Cir. 1993)............................14, 25

Thomas v. Collins, 323 U.S. 516 (1945).....................31

Turner Broadcasting System, Inc. v. Fed. Comm. Commn., 512 U.S. 622 (1994).................................24

Washington v. Econ. Dev. Bd. for Tacoma-Pierce Cnty., Wash. Ct. App. No. 49892-8-II, decided May 21, 2019 5

Williams v. Rhodes, 393 U.S. 23 (1968).....................32

Wirzburger v. Galvin, 412 F.3d 271 (1st Cir. 2005), *cert. denied*, 546 U.S. 1150 (2006)..............16, 29, 30

TABLE OF AUTHORITIES – Continued

Page

Wyman v. Secretary of State, 625 A.2d 307 (Me. 1993) 15

Zwickler v. Koota, 389 U.S. 241 (1967) 29

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. I .... *passim*

STATUTES

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2403(b) 2

2000 Wash. Sess. Laws 950-51, ch. 136 34

RCW 84.36.595 34

RULES

Sup. Ct. R. 10(b) 8

Sup. Ct. R. 10(c) 8

Sup. Ct. R. 13.1 1

OTHER AUTHORITIES

Anna Skiba-Crafts, Note, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305 (2009) 18

Page

J. Michael Connolly, Note, *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129 (2008) 18

John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment*, 107 COLUM. L. REV. 1437 (2007) 17

Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55 (1973) 29

Save Tacoma Water respectfully petitions for a writ of certiorari to review the opinion of the Washington State Court of Appeals.

OPINION BELOW

Port of Tacoma v. Save Tacoma Water, 422 P.3d 917, 4 Wn. App. 2d 562 (2018), *review denied by Washington State Supreme Court*, 192 Wn.2d 1026 (2019). The Court of Appeals' opinion is in the Appendix to this petition, at App. 1 to 20. The Court of Appeals' order denying reconsideration is at App. 30-31. The Washington State Supreme Court denied review on March 6, 2019. App. 32.

JURISDICTION

Petitioner seeks review of the decision of the Washington State Court of Appeals entered on July 25, 2018. App. 1. That court denied Petitioner's timely motion for reconsideration on October 29, 2018. App. 30.

On March 6, 2019, the Washington Supreme Court issued an Order denying Petitioner's timely petition for review, and thereby terminating review before the Washington Courts. App. 32. *See also* Sup. Ct. R. 13.1.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

This case challenges the constitutionality of the Washington Courts' judicial veto power over qualified initiatives, which Petitioner asserts is not derived from state statute. However, in case other parties, the State, or the Court disagrees, Petitioner hereby recites that 28 U.S.C. § 2403(b) may apply, and Petitioner has served this Petition on the Washington State Attorney General.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

In Tacoma, Washington, the city charter establishes initiative campaigns by the people as a method of directly enacting charter amendments and ordinances. In the spring of 2016, the grassroots community group Save Tacoma Water circulated two initiatives in order to qualify the proposed laws for the ballot. Both initiatives sought the same substantive policy change: ensure a democratic check on industrial water applications to Tacoma Public Utilities, by adding a popular

vote requirement to any industrial water use application over one million gallons per day. (Currently, Tacoma has only one such user and the proposed law grandfathers that user in.) One initiative would amend the city charter, and the other initiative proposes an ordinance. The full text of the initiatives is included in the appendix to this petition at 65 to 77. Save Tacoma Water collected nearly 17,000 signatures on the initiative petitions in three months, all with volunteers.

Save Tacoma Water proposed these initiatives based on its belief that there needed to be a popular check on unsustainable municipal water use. The group developed this belief after observing their own municipal government's refusal to question the sustainability of one industrial water proposal that would have used as much municipal water per day as all of Tacoma's residents combined.

Prior to Save Tacoma Water's well-publicized petition turn-in date of June 15, 2016, the Port of Tacoma, Tacoma-Pierce County Chamber, and Economic Development Board for Tacoma-Pierce County ("EDB") filed an action for declaratory judgment and injunction in Pierce County Superior Court asking the court to enjoin the initiatives from the ballot, claiming they are "beyond the scope of local initiative power" because they purportedly conflict with federal, state, or local law or interfere with Tacoma's existing administrative operations.

Two days later, the City, originally named as a Defendant, joined the Plaintiffs. The Plaintiffs also sued named and unnamed members of Save Tacoma Water, which caused volunteer signature gatherers concern that they would be named as "John Doe" Defendants identified by the Plaintiffs, and be individually sued, for merely gathering signatures for an initiative. Save Tacoma Water subsequently submitted signature petitions on the ordinance initiative, which the Pierce County Auditor verified as having sufficient valid signatures.

When they brought the action in the trial court, the Plaintiffs acknowledged that this case was actually a political campaign brought into the courthouse. As the local daily paper reported:

> All three [Plaintiff] organizations say both issues would chill economic development in the county if they are allowed to go to a public vote, whether or not they passed.
>
> "The fact that it's illegal and unconstitutional is, from our perspective, almost beside the point," said EDB CEO Bruce Kendall. "If this passes or comes close to passing, what's next? What else are we going to have public votes on?"

Another journalist commented that "Anti-business interests are blamed whenever the Chamber of Commerce feels its investment schemes may have to be scrutinized. Accordingly, it is the danger of a stifled business environment – not the legal case – that is given the most shrift in [Plaintiffs'] media publicity

against the initiative." The political nature of this case was not lost on the public. Another citizen filed complaints to the state Public Disclosure Commission claiming that the Port is now illegally using government resources to oppose ballot measures. *See Washington v. Econ. Dev. Bd. for Tacoma-Pierce Cnty.*, Wash. Ct. App. No. 49892-8-II, decided May 21, 2019.[1]

Plaintiffs and the City filed preliminary injunction motions, also requesting permanent injunction, following Washington Courts' longstanding practice of striking initiatives from the ballot when their "subject matter" is "beyond the scope of the initiative power." Save Tacoma Water filed a motion to dismiss, arguing that the court lacked jurisdiction over the subject matter because courts have no authority to consider the content of proposed legislation before it is enacted into law. App. 33-47. The motion included arguments on the First Amendment under a section heading: "The Federal Constitution prohibits pre-enactment review of an initiative's content." App. 34-38. The trial court scheduled a July 1, 2016, preliminary injunction hearing, at which it denied Save Tacoma Water's motion to dismiss and issued a permanent injunction. App. 21-29. The case was over in less than three weeks.

Save Tacoma Water appealed to the Washington State Court of Appeals, which affirmed the trial court. On the First Amendment arguments, it held "that the injunction preventing the initiatives from appearing

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[1] Slip Opinion available at http://www.courts.wa.gov/opinions/pdf/D2%2049892-8-II%20Published%20Opinion.pdf.

on the ballot did not violate STW's right to free speech." App. 2. The Court of Appeals claimed that *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012), supported the Court's opinion that the First Amendment did not apply to a judicial veto action. App. 17.

Save Tacoma Water timely moved for reconsideration before the Court of Appeals, focusing specifically on federal issues. The motion included a section on the Court of Appeals' misrepresentation of *Angle.* App. 52-55. It also included a section providing more details on federal content-based jurisprudence, App. 55-58, arguing specifically against "[t]he Court's Opinion hold[ing] that looking at the text of an initiative to decide whether to veto it from appearing on the ballot is not a content-based decision. (Op. at [App. 19] ("Neither the injunction nor the principles on which it is based distinguish among measures or in associated speech activities on the basis of content or subject matter.").) This holding cannot be reconciled with the framework of content-based versus content-neutral jurisprudence." App. 55. Finally, the motion included a repeated plea to apply this Court's *Meyer* principles instead, *see infra*. App. 59-61.

The Court of Appeals denied Save Tacoma Water's motion for reconsideration on October 29, 2018. App. 30-31. Save Tacoma Water timely petitioned for discretionary review before the Washington State Supreme Court. The state Supreme Court denied the petition for review on March 6, 2019, terminating the case without further opinion. App. 32.

REASONS FOR GRANTING THE WRIT

I. Introduction

The people's right to propose and enact laws by popular vote lies at the heart of our democracy. Today, nearly half the states have some form of initiative campaigns for direct legislation by the people. Over one hundred years ago, the people of charter cities in Washington, including Tacoma, created initiative campaigns to formalize their power of direct lawmaking. They did this before the people of Washington State amended the state Constitution to reserve the state-wide initiative power. The people created initiative lawmaking because they were concerned that their elected officials would not enact laws to protect the people's rights, health, and safety. The people chose obtaining a certain number of petition signatures as the threshold requirement to decide which initiatives go onto the ballot.

But almost from the beginning of the people's exercise of direct democracy through initiative campaigns, the courts gave themselves the power to decide which initiatives go onto the ballot. Particularly for local initiatives, Washington Courts have now expanded their judicial veto power to the point where a judge can prevent an initiative from going onto the ballot for almost any reason. For example, here, one of the principle reasons used by the opinion below is that the initiative might violate a state law under certain circumstances. App. 13-14. Thus, for one hundred years, the Washington Supreme Court has authorized itself,

and lower courts, to veto proposed legislation by the people of Washington State and its localities. The Washington Courts have entirely constructed this judicial veto power: no constitutional text, statute, or other rule authorizes it. An illegitimate and unjustified practice is not made right through the passage of time, or repeated applications, yet at this point, the Washington Courts justify their judicial veto actions simply by pointing to precedent.

Save Tacoma Water asserts that this judicial veto power violates the people's political rights protected under the First Amendment, incorporated against the states by the Fourteenth Amendment. When the courts veto a duly-qualified initiative from appearing on the ballot because the courts believe the proposed law would be invalid if enacted, then the courts stifle the political debate that is at the heart of First Amendment protections and invade the people's lawmaking campaigns.

In this case, the Washington Courts have decided this important federal question in a way that conflicts with the decisions of other state courts of last resort and the United States Court of Appeals, which are themselves split on this issue. Sup. Ct. R. 10(b). This issue is also an important question of federal law that has not been, but should be, settled by this Court. *Id.* at 10(c).

II. How the Washington Courts developed second-class lawmaking for the people, unprotected from judicial interference.

Washington Courts have long established justiciability rules that recognize that the courts have no authority to interfere with proposed legislation. *E.g.*, *Smith v. City of Centralia*, 55 Wash. 573, 576, 104 P. 797 (1909) (no court interference is allowed even when the court "may conceive that the law or ordinance will be ineffective if passed"). "With the ultimate question of the validity of this proposed legislation we have no present concern. Courts will not determine such questions as to contemplated legislation which may, perchance, never be enacted." *State ex rel. Griffiths v. Super. Ct. in and for Thurston Cnty.*, 92 Wn. 44, 47, 159 P. 101 (1916). This remains the general rule. *Brown v. Owen*, 165 Wn.2d 706, 720, 206 P.3d 310 (2009) (citation omitted) ("The right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of government."). This rule is not limited to just the state legislature, it also applies for local decisions by the local legislative body and by the people. *Minish v. Hanson*, 64 Wn.2d 113, 115, 390 P.2d 704 (1964) (holding that "it is the rule in this state that the courts will not enjoin proposed legislative action," where the legislative action in question would be decided by a vote of the people of a water district).

Unfortunately, and in contradiction with the cases described above, Washington Courts have also entertained a line of cases that authorize the courts to interfere with initiative campaigns. This judicial veto began

shortly after the people formalized their direct democracy powers, and the court's contempt of governance by the people was evident in the first decision:

> During the last 40 years of the Nineteenth Century there arose and grew in democratic republics and commonwealths a powerful distrust and dislike of their parliaments. They became tired of the representative system. In the latter part of that period the people of the democracies submitted to their representative Legislatures only under the pressure of stern necessity. The growing distrust and contempt for legislative bodies, municipal, state, and federal, and the tendency to restrict them, culminated, with the beginning of this century in numerous returns by states to the primitive system of direct legislation, modified by modern systems of election.

State ex rel. Berry v. Super. Ct. Thurston Cnty., 92 Wash. 16, 22, 159 P. 92, 93 (1916).

As the judicial veto power grew, the courts justified it by claiming that they can do a pre-election assessment of initiatives for "subject matter," even though initiatives cannot be assessed pre-election for their "substance." *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005). However, that "subject matter" versus "substance" distinction (if there was ever really a difference) has now imploded after the Washington Supreme Court decided in 2016 that all possible legal arguments are available in an action to strike a local initiative from appearing on the ballot. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the*

Constitution, 185 Wn.2d 97, 369 P.3d 140 (2016). The exception has swallowed the rule, and pre-election litigation – as the present case illustrates – is nothing short of full "judicial review" of *proposed* legislation. To do this, the Washington Courts use hypothetical facts and no statutory construction review standards. *See* App. 50-51 (quoting opinion below at App. 14, which held "[t]he initiative measure at issue would require the City to deny water service to certain applicants *even if all the requirements of RCW 43.20.260 were met*." (emphasis added)). Thus, when stopping a qualified initiative from going on the ballot, the judicial branch apparently does have the power to say what *a proposed* law *might* be. But we know that *Marbury v. Madison* established judicial review as the power to say what the law is, not the power to say what a proposed law might be. 5 U.S. 137, 177-78, 1 Cranch 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . . This is of the very essence of judicial review.").

Thus, while the Washington Courts would never entertain an action to veto proposed legislation by the Tacoma City Council, the courts have authorized themselves to veto proposed legislation by the people of Tacoma, even when all the required procedural steps have been followed.

The Washington Supreme Court has expressly acknowledged that Washington Courts have not "answer[ed] the question of whether subject matter,

substantive, or procedural preelection review of an initiative implicates the First Amendment to the United States Constitution or article I, section 5 of our constitution." *Huff v. Wyman*, 184 Wn.2d 643, 655, 361 P.3d 727 (2015). Yet here, the opinion below used the lack of case law authority on this issue as a reason to rule against Petitioner's First Amendment argument. App. 17. The Washington Supreme Court's subsequent denial of review appears to indicate its satisfaction with a legal system where judges can veto proposed laws by the people before they even go to the ballot for possible enactment. App. 32.

Because of this, initiative opponents bring every argument to bear in a judicial veto action, because they would prefer to defeat a proposed law in the courtroom rather than through the legislative process by campaigning before the people to try to win at the ballot.

III. Federal and state courts do not agree on how or whether the First Amendment applies to pre-election judicial vetoes.

With an acknowledged circuit split, and apparently no attempt to bring this issue to this Court in over a dozen years, this issue is ripe for review.

A. This Court's opinion in *Meyer v. Grant* articulated foundational principles for the First Amendment's application to initiative campaigns.

Once a state has initiative campaigns, the First Amendment applies to them. However, this Court's

precedent has frequently been narrowly interpreted to only apply the First Amendment to signature gathering, and not to the subsequent political campaign and vote. This Court held in *Meyer v. Grant* that "the circulation of a[n initiative] petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" 486 U.S. 414, 421-22 (1988) (footnote citation omitted). *Meyer* struck a Colorado ban on paying initiative signature gatherers because the law "impedes the sponsors' opportunity to disseminate their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions." *Id.* at 419.

The *Meyer* Court rejected arguments that "the State has the authority to impose limitations on the scope of the state-created right to legislate by initiative," holding instead that in the area of citizen initiative lawmaking "the importance of First Amendment protections is 'at its zenith'" and the state's burden to justify restrictions is "well-nigh insurmountable." *Id.* at 424-25.

The *Meyer* Court reaffirmed that it is irrelevant that the people may have other means to express themselves: the government must justify restricting any means of speech. "The First Amendment protects [the people's] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Id.* at 424. The state infringes on the people's core political rights when it "limits the size of the audience they can reach" or "limit[s] their ability to make the matter the focus of [jurisdiction-wide] discussion." *Id.* at 423.

"[T]he principle stated in *Meyer* is that a state that adopts an initiative procedure violates the federal Constitution if it unduly restricts the First Amendment rights of its citizens who support the initiative." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); *see also Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996) (holding *Meyer* applies when the "initiative process substantially restricts political discussion of the issue [sought] to [be] put on the ballot").

Based on these principles from *Meyer*, Petitioner asserts that a court order that rules on the substantive validity of proposed legislation and strikes that measure from appearing on the ballot will necessarily limit subsequent discussion of the proposed policy because it will not be an item on the ballot for consideration by the voters, and thus the judicial veto infringes and violates the people's First Amendment rights. The opinion below ruled that the First Amendment did not apply at all. App. 17.

B. Maine's court applied *Meyer* to hold that the government's refusal to furnish petition forms for signature circulation, based on the content of the proposed legislation, violates the First Amendment.

Applying *Meyer*, the Supreme Judicial Court of Maine found the state's system of pre-election review by state officials unconstitutional. The court held that

vesting discretionary authority in election officials to determine the constitutionality of proposed measures pre-election violated the First Amendment. *Wyman v. Secretary of State*, 625 A.2d 307, 312 (Me. 1993) ("The potential invalidity of the subject of an initiative petition, however, is not a sufficient reason to pre-empt the petition process itself or to bar the discussion of the issues raised in the petition.").

C. Circuit courts have split over whether the First Amendment applies when initiative campaigns are restricted from specific subject matters.

Several circuit court decisions have split on the issue of whether the First Amendment applies when the legislature, or the people through their constitution, restrict an entire subject from legislation by initiative.

The D.C. Circuit decided that a federal statute prohibiting the District from enacting any law reducing marijuana penalties did not implicate the First Amendment, reversing the district court. *Marijuana Policy Project v. U.S.*, 304 F.3d 82, 82 (D.C. Cir. 2002). The district court had held that the federal statute "interfered with D.C. citizens' First Amendment rights to use the city's ballot initiative process to enact medical marijuana legislation." *Id.* The D.C. Circuit reversed, holding that "the legislative act – in contrast to urging or opposing the enactment of legislation – implicates no First Amendment concerns." *Id.*

In contrast, subsequently, the First Circuit recognized the communicative value of the initiative campaign when analyzing state constitutional restrictions on an initiative's subject matter. *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005), *cert. denied*, 546 U.S. 1150 (2006). "We do not find that there is any serious debate as to this point. A state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative. The United States Supreme Court has made clear that the process involved in proposing legislation by means of initiative involves core political speech." *Id.* (citations omitted). The First Circuit held that the First Amendment applies to subject matter restrictions, and applied intermediate scrutiny when assessing subject matter restrictions established by the people of Massachusetts in the state constitution. *Id.* The court upheld the particular, very specific, content restrictions in the Massachusetts Constitution because they were "narrowly drawn to further a significant state interest, and thus survive intermediate scrutiny." *Id.* The contrast here with the Washington Courts' judicial veto is stark: in Washington, the vague standard is that any initiative can be struck from appearing on the ballot if its contents are "beyond the scope of the local initiative power." App. 20. Under the First Circuit's analysis in *Wirzburger*, it is doubtful that Washington's judicial veto would survive First Amendment review.

The Tenth Circuit has also addressed subject matter initiative issues, and attempted to parse a

difference between where the First Amendment limits the government's restrictions on communicative conduct, but not where the government screens pre-submission content. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1085, 1099 (10th Cir. 2006), *cert. denied*, 549 U.S. 1245 (2007) ("The First Amendment undoubtedly protects the political speech that typically attends an initiative campaign, just as it does speech intended to influence other political decisions. . . . Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise."). The Tenth Circuit did not give the procedural restrictions at issue, which required a super-majority vote on wildlife management initiatives, any scrutiny because the restrictions were clearly codified, and were similar to restrictions applied upon the legislature itself. This contrasts with Washington's broad court-created subject matter restriction, the vague "beyond the scope" standard, which is not codified. Further, Washington's restriction is implemented by pre-enactment judicial veto, a restriction that does not apply to the legislature or local legislative bodies. But regardless, the Tenth Circuit expressly split with the First Circuit: "In any event, we disagree with *Wirzburger's* premise that a state constitutional restriction on the permissible subject matter of citizen initiatives implicates the First Amendment in any way." *Id.* at 1102.

Three law review articles also describe these three decisions as a circuit split. John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject*

Matter of Ballot Initiatives Offend the First Amendment, 107 COLUM. L. REV. 1437, 1462 (2007) ("*Marijuana Policy Project*, *Wirzburger*, and *Walker* amount to a circuit split on a straightforward question: Do restrictions on the subject matter open to a state initiative process burden political expression protected by the First Amendment?"); J. Michael Connolly, Note, *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129, 138 (2008) ("The constitutionality of content- and viewpoint-based regulations of ballot initiatives is currently disputed among the circuits, which have split on two key questions. First, do content- and viewpoint-based regulations of ballot initiatives implicate speech protected under the First Amendment? Second, what type of scrutiny must the courts apply if these regulations do implicate the First Amendment?"); Anna Skiba-Crafts, Note, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305 (2009)[2] (advocating for strict scrutiny in these cases).

This case provides a clean vehicle for the Court to resolve these longstanding issues.

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[2] Available at http://repository.law.umich.edu/mlr/vol107/iss7/5.

D. The Ninth Circuit applies strict scrutiny to severe burdens on ballot access for initiatives, but the opinion below ignored this analysis.

Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012), appears to be the leading case in the Ninth Circuit on the First Amendment's application to initiative ballot access restrictions. *Angle* concerns the constitutionality of Nevada's "All District Rule," which set a procedural requirement for initiative qualification requiring signatures from at least 10% of the voters in each of the state's congressional districts. The *Angle* court analyzed whether the plaintiffs had shown that the All Districts Rule significantly inhibited their ability to place initiatives on the ballot, and thus triggered strict scrutiny as a "severe burden" on core political speech. *Id.* at 1133 ("Thus, as applied to the initiative process, we assume that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot."). However, the court concluded that the plaintiffs' assertions were "too vague, conclusory and speculative to create a triable issue that the All Districts Rule significantly reduces the chances that proponents will be able to gather enough signatures to place initiatives on the ballot." *Id.* at 1134. Therefore, the court did not apply strict scrutiny and instead used intermediate scrutiny. *Id.* at 1134-35.

E. In sum, courts have disagreed on whether, and how, the First Amendment applies to restrictions on initiative campaigns, thus leading to the possibility of content-based pre-election review receiving anything from no First Amendment protection, all the way up to strict scrutiny.

In sum, if a judicial veto is considered a severe ballot access restriction in the Ninth Circuit, it would get strict scrutiny. If it is considered a subject matter restriction in the First Circuit, it would get intermediate scrutiny. But if it is considered a subject matter restriction in the D.C. or Tenth Circuits, or Washington Courts, it gets no First Amendment protection at all.

This Court should grant the petition to remedy these conflicting standards when a court reviews the content of a duly-qualified initiative to decide its substantive validity before allowing it to appear on the ballot.

IV. The Washington Courts' judicial veto is a vague content-based prior restraint on political speech, expression, assembly, and petition that severely burdens ballot access, yet the Washington Courts do not believe their veto actions implicate the First Amendment at all.

This case concerns an important issue of federal law that this Court should decide. Washington Courts

have given themselves the authority to review the content of a proposed law and strike it from the ballot, depriving the people of the opportunity to campaign, discuss, debate, and vote on it. Washington Courts say their judicial veto does not even implicate the First Amendment, let alone infringe it.

A. The judicial veto is a severe burden on ballot access, thus triggering strict scrutiny review.

The opinion below dismissed any application of the First Amendment to the judicial veto by claiming that "[t]his argument was rejected by the Ninth Circuit in *Angle v. Miller*, 673 F.3d 1122, 1133 (2012) (citing *Meyer*, 486 U.S. at 424), which held that '[t]here is no First Amendment right to place an initiative on the ballot.'" App. 17. This is simply wrong: that was not *Angle's* holding. And worse, this misinterpretation has reinterpreted and severely limited First Amendment protections for initiative lawmaking campaigns.

The opinion below is a published opinion and needs to be corrected, as it has already been relied upon for its erroneous First Amendment ruling. *Global Neighborhood v. Respect Washington*, 7 Wn. App. 2d 354 (Jan. 29, 2019) ("This court observed [in the opinion below] that the United States Supreme Court held that the circulation of an initiative petition involves the type of interactive communication concerning political change that entails core political speech. Nevertheless, barring an initiative from the ballot does not

violate the constitution when the initiative lies outside the scope of the local initiative's power.").

Angle does not say what the opinion below uses it for. In the mis-used sentence, "[t]here is no First Amendment right to place an initiative on the ballot," *Angle* merely reiterated that the First Amendment does not mandate initiative lawmaking everywhere in the United States, as otherwise the United States Constitution would require the initiative in every state and every locality. This is clear from the citation parenthetical in *Angle* itself: "There is no First Amendment right to place an initiative on the ballot. *See Meyer*, 486 U.S. at 424 (recognizing that 'the power of the initiative is a state-created right')." *Angle*, 673 F.3d at 1133.

Immediately after this sentence and citation, the *Angle* court correctly opines that *if* a state has an initiative process, the First Amendment applies, and "[r]egulations that make it more difficult to qualify an initiative for the ballot . . . may indirectly impact core political speech [and t]hus, as applied to the initiative process, we assume that ballot access restrictions place a severe burden on core political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative proponents to place initiatives on the ballot." *Id.*

The First Amendment analysis in *Angle* appropriately did not end with "[t]here is no First Amendment right to place an initiative on the ballot." *Id.* But unfortunately, that is where the Washington Courts

ended their analysis. App. 17, 30-32. This analysis thus misstates the meaning of that sentence in *Angle*, and thereby reduces the protection of the First Amendment to initiative campaigns.

Here, there is no question that the trial court judge's judicial veto action, affirmed by the opinion below, "significantly inhibit[ed]" Save Tacoma Water's ability to place initiatives on the ballot: the trial court judge vetoed the duly-qualified initiatives, enjoining them from appearing on the ballot, and thereby cutting off any further meaningful political discourse on these policies. This is a "severe burden on core political speech" that triggers strict scrutiny. *See id.* at 1133.

B. The judicial veto is a content-based restriction on core political speech, thus triggering strict scrutiny review.

The opinion below cannot be reconciled with this Court's framework of content-based versus content-neutral jurisprudence. Notably, the intermediate scrutiny First Amendment test that the *Angle* court used – for a content-neutral procedural rule – was stronger than the analysis provided by the opinion below, which ruled on the *content* of the initiative and yet held that the First Amendment did not apply at all. The opinion below argued its action was not content-based by claiming that "[n]either the injunction nor the principles on which it is based distinguish among measures or in associated speech activities on the basis of

content or subject matter." App. 19. That holding cannot be reconciled with this Court's jurisprudence.

This Court has recognized that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broadcasting System, Inc. v. Fed. Comm. Commn.*, 512 U.S. 622 (1994). However, this Court makes clear that "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Id.* (citing, as examples, "*Burson v. Freeman*, 504 U.S. 191, 197, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992) ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign"); *Boos v. Barry*, 485 U.S. 312, 318-319, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988) (plurality opinion) (whether municipal ordinance permits individuals to "picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not")).

It is the act of discriminating on the basis of content that makes a government restriction content-based, regardless of whether the government does so for an asserted content-neutral purpose. *Turner Broadcasting*, 512 U.S. at 642-43 ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." (citations omitted)); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228, 192 L. Ed. 2d 236 (2015) ("[A]n innocuous justification cannot transform a facially

content-based law into one that is content neutral."). The courts' legitimate role in initiative campaigns is enforcing "nondiscriminatory, *content-neutral* limitations on the [people's] ability to initiate legislation," like the signature threshold for ballot placement. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) (emphasis added).

The distinction between content-based and content-neutral restrictions is fundamental to First Amendment jurisprudence. This Court has held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (quoted in *Reed*, 135 S. Ct. at 2226). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). "Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2227 (citations omitted).

Here, the Washington Courts profess a content-neutral purpose: enjoining proposed laws that are ostensibly "beyond the local initiative power." App. 19. But that content-neutral purpose is not enough to make the courts' action content-neutral, because what the trial court actually did (affirmed *de novo* by the opinion below) was facially content-based: the court analyzed the text of the initiatives and thereby decided

whether to veto them. This is just the same as looking at the text on yard signs (*Reed, supra*) or protesters' signs (*Burson* and *Boos, supra*) before deciding whether they are allowed. A government action that rests entirely on the content is content-based.

C. The judicial veto is a prior restraint on political speech, expression, assembly, and petition, thus triggering strict scrutiny review.

Washington Courts' judicial veto actions are a prior restraint on political speech, expression, assembly, and petition. The First Amendment is "at its zenith" when protecting political speech from content-based government restrictions, *Meyer v. Grant*, 486 U.S. 414, 425 (1988), particularly when the government's actions are prior restraints. The term "prior restraint" describes administrative and judicial orders that block expressive activity before it occurs. *Alexander v. United States*, 509 U.S. 544, 550 (1993). Under a system of prior restraint, the lawfulness of speech turns on the advance approval of government officials. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). Laws that impose a prior restraint on free speech have been disfavored by the courts as tantamount to censorship and thought control. *See Near v. Minnesota*, 283 U.S. 697, 713 (1931). "Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citations omitted); *see also City of Lakewood v. Plain*

Dealer Pub. Co., 486 U.S. 750, 757-60 (1988) (collecting cases).

The people decided on the signature threshold as the mechanism to determine which proposed initiatives will appear on the ballot. But in Washington, the courts have given to themselves the power to dissect the content of duly-qualified initiatives, and decide that the proposal cannot appear on the ballot. In other words, the courts are assuming the power to restrict "core political speech" precisely *because of* the proposed initiative's content.

Whether a measure appears on the ballot determines whether people campaign for or against it, learn about it, talk about it, debate it, and vote on it. The issue has relevance and political significance because it will be on the ballot. For example, only because it is on the ballot will it appear in the official voters' pamphlet, one of the final communicative, educational, and politically interactive components of an initiative campaign, which is available to every measure that meets procedural requirements. Thus, the Washington Courts' veto actions stop political speech and expression. This goes directly to *Meyer's* rule that the state infringes on the people's core political rights when the state "limits the size of the audience they can reach" or "limit[s] their ability to make the matter the focus of [jurisdiction-wide] discussion." *Meyer*, 486 U.S. at 423. *Meyer* held the state violates the First Amendment when it "necessarily reduces the quantity of expression" *Id.* at 419 (quotation omitted).The Washington Courts infringe and violate core political rights by

cutting off the political campaigning, discussions, and debates that happen after an initiative qualifies for the ballot. Thus, the same reasoning that lead *Meyer* to protect signature gathering should also protect the subsequent stages of initiative campaigns.

The opinion below attempted to dodge this reality by first holding "that STW's initiative is outside the scope of the local initiative's power" and thus reasoning that "STW's petition, therefore, reduces to the argument that it has a constitutional right to place an initiative on the ballot, whether or not authorized by state or local law." App. 17. Here is where the Washington Courts have attempted to weasel their content-based "judicial review" into an attempt to appeal to government efficiency or voter confusion. But those government interests do not justify this infringement of core political rights, or at the very least require a higher standard of review, which the opinion below did not apply.

D. Washington Courts' "beyond the scope" judicial veto standard is vague and overbroad, thus triggering strict scrutiny review.

Washington Courts' pre-enactment veto of an initiative campaign, based on its "beyond the scope" standard, is unconstitutionally vague and overbroad, and thus chills political speech. Vague and overbroad governmental regulations lend themselves to selective enforcement against unpopular causes. *NAACP v.*

Button, 371 U.S. 415, 435 (1963). Overbroad regulations "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Zwickler v. Koota*, 389 U.S. 241 (1967). In efforts to promote order while safeguarding First Amendment freedoms "this Court has repeatedly warned States and governmental units that they cannot regulate conduct connected with these freedoms through use of sweeping, dragnet statutes that may because of vagueness, jeopardize these freedoms." *Gregory v. Chicago*, 394 U.S. 111, 188 (1969).

The procedural or subject matter restrictions placed on initiative campaigns and upheld in the most prevalent circuit court cases, *Wirzburger*, *Initiative & Referendum Inst.*, and *Marijuana Policy Project*, discussed *supra*, had restrictions that were plainly codified, and explicitly related to discrete subject matters of initiative campaigns. In contrast, here, Washington Courts have created restrictions on initiative campaigns on their own volition or through very liberal interpretation of constitutional phrases. Washington Courts' judicial veto applies to any initiative that is "beyond the scope of the initiative power," a vague standard that really amounts to ends-oriented jurisprudence. *See* Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 87 (1973) ("In short, whether stated or not, the controversial nature of the particular issue may well bear upon the judicial determination of whether the matter is legislative [and thus not beyond the scope of the initiative power] or administrative [and thus subject to veto]." (footnote omitted)). In contrast to a case like

Wirzburger, where the First Circuit applied intermediate scrutiny to a very specific constitutional provision that excluded narrow subjects from the initiative process, the Washington Courts apply no scrutiny to their vague "beyond the scope" standard used to prohibit initiatives from the ballot. This approach to restricting initiative campaigns has dangerous constitutional implications on the political speech surrounding initiative campaigns and needs the attention of this Court. Washington's restrictions on initiative campaigns are too vague to be understood by a petitioner of common intelligence and thus has a chilling effect on speech by discouraging the use of initiative campaigns.

This Court has only established concrete First Amendment protections for the signature gathering stage of an initiative campaign, even though the *Meyer* principles should also be read to apply to subsequent stages of an initiative campaign. Due to the lack of clarity involving the First Amendment protections over subsequent stages of an initiative campaign, Washington Courts have created a dangerous precedent in a state's ability to restrict political speech and influence normally associated with an initiative campaign. Without clarity from this Court, Washington Courts' judicial veto will remain unconstitutionally vague and overly broad, and thus create a chilling effect on political speech.

E. The judicial veto undermines the goals and purposes of initiative proponents' activities, and thus, the First Amendment prohibits the courts from deciding which political debates the people get to have.

With an initiative, as with a law passed by a legislature, judicial review is always available after the legislative campaign. An injured party can bring a facial challenge to strike the enacted law entirely, or an as-applied challenge.

The foundational principles of the First Amendment forbid the government from deciding which political debates the people get to have. "The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *Meyer*, 486 U.S. at 419 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)) (additional quotation omitted). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (quoted in *Meyer*, 486 U.S. at 420). "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Meyer*, 486 U.S. at 421 (quoting *Roth v. United States*, 354 U.S. 476 (1957)). In *City of Cuyahoga Falls*

v. Buckeye Community Hope Foundation, this Court again emphasized the importance of popular measures like initiatives and referenda, as basic instruments of democratic government, and that governments cannot restrict the people's petitioning because of the content of their ideas. 538 U.S. 188, 196 (2003) (citations omitted). The judicial veto, which lets a court decide which political speech is valid, is antithetical to the fundamental purpose of the First Amendment, which is to prevent the government from telling the people what they can meaningfully discuss for their own public policy.

The First Amendment is about protecting the debate and does not allow for censoring it to "valid" proposals through judicial validation. *See*, *e.g.*, *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 626, 957 P.2d 691 (1998) ("The State cannot substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." (quotation and citation omitted)). Further, this Court has recognized that it does not matter that the debate could continue without the actual nexus to a ballot measure: relevance matters when the government infringes core political rights. *See Williams v. Rhodes*, 393 U.S. 23, 41 (1968) (Harlan, J., concurring in the result) ("It is true that Ohio has not directly limited appellants' right to assemble or discuss public issues or solicit new members. Instead, by denying the appellants any opportunity to participate in the procedure by which the President is selected, the State has eliminated the

basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights." (citations omitted)); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression." (citations omitted)); *see also Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588, 592 (6th Cir. 2006) (applying strict scrutiny when regulations thwarted the goals of a political party, even though it could still have meetings and discussions).

Similarly, the goal for an initiative sponsor like Save Tacoma Water is not only to make policy by putting the measure on the ballot, but also to initiate awareness, public debate, and interactive communication on a local political issue that received nearly 17,000 petition signatures in support. For the state to justify replacing this interactive public debate with confined oral arguments made in secluded courtrooms, the First Amendment would surely require strict scrutiny. Strict scrutiny is required here because the judicial veto completely prohibits the measure from the ballot, neutralizing the goal that animates an initiative campaign's political communications.

Washington State even has an example of how an invalid initiative that passed at the ballot successfully influenced state policy, which Petitioner showed to the Washington Courts from the very beginning of this case. App. 40-41. This example shows that putting an

initiative on the ballot – even a flawed initiative – is an important act of political expression. Even if the law fails judicial review after enactment, the people's vote sends an important message to elected officials. That is what political expression is all about. That example is a vehicle tax initiative that passed by 56% but was then struck down as unconstitutional due to, among other things, a faulty ballot title. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 191-93, 11 P.3d 762 (2000). After the trial court had voided the law, but before the Supreme Court issued its affirming opinion, the legislature "paid[] homage to the 'will of the people'"[3] and passed a bill that put the (now void) initiative-proposed tax cut into statute. 2000 Wash. Sess. Laws 950-51, ch. 136. In other words, that initiative served the central purpose of political expression: it influenced policy. That policy would probably not be law today, as RCW 84.36.595, had a court vetoed the initiative and prevented it from appearing on the ballot.

The fact that there are other ways to influence policy or express political views does not justify the judicial veto based on the initiative's content. Thus, the Washington Courts should only be allowed to veto duly-qualified initiatives from appearing on the ballot, based on their content, by meeting strict scrutiny. But instead, the Washington Courts do not even consider their content-based judicial veto actions to implicate core political rights at all, so they apply no level of

[3] www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2000/04/03/initiative-695-haunts-state-government-in-washington.

scrutiny, not even intermediate scrutiny like in *Wirzburger* or *Angle*, or even just rational basis review. *See* App. 17.

Save Tacoma Water is not arguing that government is required to provide a forum – the ballot – for initiative petitioners' preferred political speech. Instead, Save Tacoma Water has consistently argued throughout this case (*e.g.*, App. 36-42, 59-61) that a trial court order based on the content of a proposed initiative is state action that infringes on political rights, and thus the court's order is only constitutional if it is narrowly-tailored to serve a compelling interest. *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (holding state action includes any action of a state, including "through its courts"); *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948) (holding a court order is state action); *Ohno v. Yasuma*, 723 F.3d 984, 993-94 (9th Cir. 2013) (same).

Any argument that a compelling government interest exists in "protecting the integrity of the initiative process" rings as mere paternalism against the nearly 17,000 citizen signatures on these initiative petitions that demanded – as is the people's right – a vote on these proposed laws. That paternalism is the reason the people of Tacoma enacted a procedure to exercise their direct democratic power of initiative back in 1909. Democracy is protected best when the people use it; not when the courts lock it away at the government's request. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.").

In this case, Petitioner exemplifies the use of the initiative to attempt to make or influence policy. Save Tacoma Water gathered nearly 17,000 signatures in 100 days with all volunteers and a budget of less than $5,000. With that minimal budget, they would have marginal political influence without an initiative campaign. Their political expression, and the broader public debate, continued in earnest while the initiative would appear on the ballot. When the trial court vetoed the initiative and struck it from the ballot, the court also killed that political debate.

Here, Save Tacoma Water petitions this Court to answer the question of whether campaigning for a ballot measure, and the public debate that happens *because an issue will appear on the ballot*, is also core political speech. The reasoning in *Meyer* that found "circulation of petition" to be core political speech applies equally well to the campaign that precedes a vote on an initiative. *See Meyer*, 486 U.S. at 422-23 (The government action is unconstitutional when it "limits the number of voices who will convey appellees' message . . . and, therefore, limits the size of the audience they can reach" and it "limit[s] their ability to make the matter the focus of statewide discussion" by qualifying the initiative to appear on the ballot. In sum, it "has the inevitable effect of reducing the total quantum of speech on a public issue.").

CONCLUSION

Political speech does not lose its constitutional protection because it is connected to direct lawmaking after signature gathering. Therefore, judicial veto orders that prohibit initiatives from appearing on the ballot because of their content are state actions that infringe core political rights and are thus subject to strict scrutiny.

Instead of ruling as such, the opinion below held that Washington Courts can review the content of an initiative to determine whether the law, if enacted, would be valid, and thereby decide whether to strike the initiative from appearing on the ballot, without any First Amendment scrutiny at all.

The federal courts, meanwhile, have split on this issue, some saying the First Amendment does not apply at all, and others using higher scrutiny.

This Court should grant this petition to review this important question of whether, and how, the people's fundamental political rights protect their campaigns for direct lawmaking from judicial veto.

Respectfully submitted on June 4, 2019,

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