IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PORT OF TACOMA, a Washington State Municipal Corporation; ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY, a Washington State Non-Profit Corporation; TACOMA-PIERCE COUNTY CHAMBER, a Washington State Non-Profit corporation, Respondents, v. SAVE TACOMA WATER, a Washington political committee, Appellant, DONNA WALTERS, sponsor and Treasurer of SAVE TACOMA WATER; JON AND JANE DOES 1-5; (Individual sponsors and officers of SAVE TACOMA WATER); CITY OF TACOMA, a Washington State Municipal Corporation; and JULIE ANDERSON, in her capacity as PIERCE COUNTY AUDITOR, Defendants.	No. 49263-6-II PUBLISHED OPINION (Filed Jul. 25, 2018)

BJORGEN, J.—Save Tacoma Water (STW) appeals from the superior court's declaratory judgment and permanent injunction preventing it from placing two initiatives on the Tacoma municipal ballot. STW argues that the superior court did not have the authority to conduct a pre-election review of the proposed initiatives, that the superior court erred by determining that various provisions were beyond the scope of the local initiative power and conflicted with state law, and that the injunction violated STW's right to free speech.

We hold that the superior court had the authority to review whether the proposed initiatives exceeded the scope of the local initiative power and that its review did not offend separation of power principles. We also hold that the superior court properly determined that the challenged provisions were beyond the scope of the local initiative power and that one of the provisions conflicted with state law. Finally, we hold that the injunction preventing the initiatives from appearing on the ballot did not violate STW's right to free speech. Consequently, we affirm the superior court.

FACTS

In 2016, STW, a political committee, began circulating two initiative petitions among Tacoma residents in order to place the proposed initiatives on the upcoming municipal ballot. One initiative proposed an amendment to the Tacoma City Charter (Charter Initiative) and the other sought to enact a new municipal ordinance. The two initiatives contained text that was

substantially identical in effect. The following are the provisions of common effect that are of significance to this appeal.

> [From the Charter Initiative]
>
> (A) People's Vote on Large Water Use Applications [(Water Provision)].
>
> . . . . Before providing water utility service to any applicant for 1336 CCF [(centum cubic feet)] (one million gallons), or more, of water daily from the City, the City shall place the applicant's request for water utility service before the voters on the next available General Election Ballot, in a manner substantially conforming to the rules for Section 2.22 of this Charter. The applicant shall pay for the costs of the vote of the people. Only if a majority of the voters approve the water utility service application and all other application requirements are met may the City provide the service. . . .
>
> (B) Sustainable Water Protection is an Inviolable Right that Government Cannot Infringe [(Preemption Provision)].
>
> . . . . The People's Right to Water Protection vote provides a democratic safeguard, on top of the City's existing application process, to ensure that large new water users do not threaten the sustainability of the people's water supply. To prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and

rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights or mandates of this Article.

(C) Water Protection supersedes Corporate Interests.

As the People's Right to Water Protection is foundational to the people's health, safety, and welfare, and must be held inviolate, no government actor, including the courts, will recognize as valid any permit, license, privilege, charter, or other authorization, that would violate the rights or mandate of this Article, issued for any corporation, by any state, federal, or international entity. [Subordination of Judicial Review Provision]. In addition, corporations that violate, or seek to violate the rights and mandates of this Article shall not be deemed "persons" to the extent that such treatment would interfere with the rights or mandates enumerated by this Article, nor shall corporations possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by this Article [(Subordination of Corporate Rights Provision)]. . . .

(D) Enforcement.

The City or any resident of the City may enforce this section through an action brought in any court possessing jurisdiction over activities occurring within the City of Tacoma, including, but not limited to, seeking an injunction to stop prohibited practices. . . .

> [From the initiative amending Tacoma ordinance]
>
> (E) Severability and Construction.
>
> The provisions of this Ordinance shall be liberally construed to achieve the defined intent of the voters. The provisions of this Ordinance are severable, and the petitioners intend that all valid provisions of the initiative be placed on the ballot and enacted into law even if some provisions are found invalid.

Clerk's Papers (CP) at 28-31.

On June 6, 2016, the Port, the Economic Development Board for Tacoma-Pierce County, and the Tacoma-Pierce County Chamber filed a complaint in superior court for declaratory judgment and injunctive relief against STW, various sponsors of that organization, the City and the Pierce County Auditor. The City filed an answer to the complaint, which included cross-claims against STW and the additional parties named as defendants. The City then filed a motion for a preliminary and a permanent injunction to prevent STW's initiatives from appearing on the municipal ballot.

On July 1, the superior court granted the Port's motion for declaratory judgment and permanently enjoined the Pierce County Auditor from placing the initiatives on the 2016 ballot. The court determined that the Water Provision, Part A in the excerpt above, concerned an administrative matter beyond the scope of the local initiative power. The court further ruled that the Water Provision conflicted with state law and

determined also that the Preemption Provision, Part B above, was beyond the scope of the local initiative power because the provision attempted to subordinate all other law to the Water Provision. The court additionally determined that the Subordination of Corporate Rights Provision, part of Part C above, was beyond the scope of the local initiative power because it attempted to alter corporations' rights under existing law. Similarly, the court ruled that the Subordination of Judicial Review Provision, part of Part C above, was beyond the scope of the local initiative power because it conflicted with existing law. Finally, the court concluded that the remaining initiative provisions were not severable and that no portion of the initiatives could be placed on the ballot.

According to the declaration of Sherry Bockwinkel, STWs signature collection effort "stalled when people heard that [STW] was being sued for circulating the petition" and its "signature turn-ins" went down. CP at 585. The Bockwinkel declaration also states that "[m]any volunteer signature gatherers were now afraid that they would be named individually in a lawsuit" for their efforts. CP at 585.

On July 29, STW filed an appeal of the superior court's grant of a permanent injunction and declaratory judgment.[1] We affirm the superior court.

---

[1] STW's notice of appeal states that Sherry Bockwinkel, Donna Walters, and Jon and Jane Does 1-5, defendants in the case before the superior court, are not participating in this appeal.

ANALYSIS

I. STANDARD OF REVIEW

We review whether a proposed initiative is beyond the scope of the local initiative power de novo as a question of law. *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010). We review constitutional issues de novo. *Washington Citizens Action of Washington v. State*, 162 Wn.2d 142, 151, 171 P.3d 486 (2007).

II. AUTHORITY OF SUPERIOR COURT

STW asserts that the superior court lacked authority to conduct a pre-election review of its proposed local initiatives and that such review violated separation of powers principles. We disagree.

Generally, courts will refrain from considering the substantive validity of a proposed law to avoid interfering with electoral and legislative processes and to avoid rendering potentially advisory opinions. *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 745-46, 620 P.2d 82 (1980). However, our Supreme Court has identified an exception to this rule which authorizes courts to "review local initiatives and referendums to determine . . . whether 'the proposed law is beyond the scope of the initiative power.'" *Our Water-Our Choice!*, 170 Wn.2d at 7 (quoting *Seattle Bldg.*, 94 Wn.2d at 746). Our Supreme Court has explained that under the state constitution, municipal governments are not fully sovereign and derive their authority to utilize the initiative process from statute,

rather than the constitution. *Our Water-Our Choice!*, 170 Wn.2d at 8. Under RCW 35.22.200, a charter city such as Tacoma may "provide for direct legislation by the people through the initiative," but only "upon any matter within the scope of the powers, functions, or duties of the city." Under *Our Water-Our Choice!*, 170 Wn.2d at 7, a court may properly review whether a measure exceeds the scope of the initiative power.

STW further asserts that "[t]he Court should abide by the established justiciability rules and recognize that it has no authority to interfere with proposed legislation." Br. of Appellant at 30. Our Supreme Court has held that an issue presents a justiciable controversy when it presents (1) "'an actual, present and existing dispute, or the mature seeds of one,'" rather than a "'possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests,'" (3) which involves direct and substantial interests, "'rather than potential, theoretical, abstract or academic'" interests, "'and (4) a judicial determination of which will be final and conclusive.'" *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Industr. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973)). "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *To-Ro*, 144 Wn.2d at 411. STW does not offer any analysis or argument on why the present issue is not justiciable under these

standards, but rather appears to argue that this cause is not justiciable because it offends the separation of powers.

Spokane Entrepreneurial Center v. Spokane Moves to Amend Constitution, 185 Wn.2d 97, 100, 369 P.3d 140 (2016) and *Our Water-Our Choice!*, 170 Wn.2d at 7, each held that courts may entertain pre-election challenges to local initiatives based on the claim that the initiative is beyond the local initiative power. In addition, *Spokane Moves* recognized that "the local initiative power is limited to legislative matters that are within the authority of the city." *Spokane Moves*, 185 Wn.2d at 107. Consistently with this, *Spokane Moves* also recognized that municipalities may not enact legislation that conflicts with state or federal law. *Spokane Moves*, 185 Wn.2d at 108, 110. Thus, the inquiry into whether a measure conflicts with state law is part of determining whether it is beyond the local initiative power.

In *Spokane Moves*, the Supreme Court prefaced its analysis with a caution:

> We have expressed great concern about reviewing initiatives prior to enactment. This concern has been attributed to . . . "the constitutional preeminence of the right of initiative," *Coppernoll [v. Reed]*, 155 Wn.2d [290,] 297, 119 P.3d 318 [(2005)]. There are also general concerns that "the courts should not interfere in the electoral and legislative processes, and that the courts should not render advisory opinions." *Seattle Bldg. & Constr.*

> *Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980).

185 Wn.2d at 104. Similarly, *Our Water-Our Choice!* recognized that "[g]enerally, judicial pre[-]election review of initiatives and referendums is disfavored." 170 Wn.2d at 7.

These considerations lie at the heart of the inquiry into the separation of powers. Especially, the court's concern for the "'constitutional preeminence'" of the right of initiative, its avoidance of interference "'in the electoral and legislative processes,'" and its shunning of advisory opinions show that its analysis took into account and honored the boundaries between legislative, executive, and judicial authority. *Spokane Moves*, 185 Wn.2d at 104 (quoting *Coppernoll*, 155 Wn.2d at 297) (quoting *Seattle Bldg.*, 94 Wn.2d at 746). These cases thus implicitly hold that their analyses observe the proper separation of powers. With that, we hold that the superior court had authority to conduct a pre-election review of the proposed local initiatives, and we turn to the challenged aspects of the superior court decision.

III. Scope of Local Initiative Powers

STW argues that the superior court erred by determining that the proposed initiatives were beyond the scope of the local initiative power. We disagree.

As noted, "the local initiative power is limited to legislative matters that are within the authority of the

city." *Spokane Moves*, 185 Wn.2d at 107. The court has identified at least three limits on the local initiative power. *Spokane Moves*, 185 Wn.2d at 107. First, "'administrative matters, particularly local administrative matters, are not subject to initiative or referendum.'" *Spokane Moves*, 185 Wn.2d at 107 (quoting *Our Water-Our Choice!*, 170 Wn.2d at 8). Second, "a local initiative 'is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself.'" *Spokane Moves*, 185 Wn.2d at 108 (quoting *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006)). Third, municipalities may not enact legislation which conflicts with state or federal law. *Spokane Moves*, 185 Wn.2d at 108, 110.

A. Administrative vs. Legislative Matters

STW maintains that the superior court improperly determined that the Water Provision in its initiatives is administrative and, therefore, beyond the scope of the local initiative power. We disagree.

Generally, "'a local government action is administrative if it furthers (or hinders) a plan the local government . . . has . . . adopted.'" *Spokane Moves*, 185 Wn.2d at 107 (quoting *Our Water-Our Choice!*, 170 Wn.2d at 10). Our Supreme Court has also distinguished legislative from administrative matters by determining, respectively, "'whether the proposition is one to make new law or declare a new policy, or merely to carry out and execute law or policy already in

existence.'" *Spokane Moves*, 185 Wn.2d at 107-08 (quoting *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973)).

STW claims that the Water Provision contained in its initiatives creates a new policy and is therefore legislative. However, our Supreme Court has held that attempting to graft a voter approval requirement onto an existing regulatory system constitutes an administrative matter which is outside the scope of the local initiative power. In *Spokane Moves*, the Supreme Court considered whether a local initiative requiring "any proposed zoning changes involving large developments to be approved by voters in the neighborhood" was administrative. 185 Wn.2d at 108. The court held that the initiative provision was administrative, and beyond the scope of the local initiative power, because "the city of Spokane has already adopted processes for zoning and development" and the "provision would modify those processes for zoning and development decisions." *Spokane Moves*, 185 Wn.2d at 108.

In this case, chapter 12.10 of the Tacoma Municipal Code governs how the City processes applications for water service. STW's initiatives would require applicants for "water utility services" who are projected to use more than 1336 CCF of water to submit their application to a vote of the people of the City, in addition to complying with "*all other application requirements*." CP at 30 (emphasis added). Furthermore, the initiatives state, "The People's Right to Water Protection vote provides a democratic safeguard, *on top of the*

City's existing application process." CP at 28 (emphasis added).

As in *Spokane Moves*, STW's initiatives are administrative because they attempt to modify local permit processes already adopted by the City by adding a voter approval requirement to them. Therefore, we hold that the initiative's voter approval provision is beyond the scope of the local initiative power.

B. Conflict With RCW 43.20.260

Pre-election challenges to initiatives based on substantive invalidity are generally not allowed. *Coppernoll*, 155 Wn.2d at 297-98. However, the court does consider claims that the subject matter of a measure is not proper for direct legislation (ballot measures), usually in the context of the more limited powers of initiatives under city or county charters or enabling legislation. *Id.* at 299. More specifically, *Spokane Moves* held in its analysis of a pre-election challenge to a local initiative that "'[w]hile the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law.'" 185 Wn.2d at 108 (quoting *Seattle Bldg.*, 94 Wn.2d at 747).

RCW 43.20.260 states, in pertinent part:

> A municipal water supplier, as defined in RCW 90.03.015, has a duty to provide retail water service within its retail service area if: (1) Its service can be available in a timely and reasonable manner; (2) the municipal water

> supplier has sufficient water rights to provide the service; (3) the municipal water supplier has sufficient capacity to serve the water in a safe and reliable manner as determined by the department of health; and (4) it is consistent with the requirements of any comprehensive plans or development regulations.

In determining whether an ordinance conflicts with state law under the Washington Constitution, article I, section 11, "'the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.'" *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998) (quoting *City of Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960)). "'Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.'" *Weden*, 135 Wn.2d at 693 (quoting *Schampera*, 57 Wn.2d at 111).

RCW 43.20.260 places a duty on the City to provide retail water service if its requirements are met. The 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. Thus, the effect of the initiative would be to prohibit the City from carrying out a duty imposed by state law, a stark conflict under the test in *Weden*. Under *Coppernoll*, *supra*, and *Spokane Moves*, *supra*, this conflict supplies an additional basis for upholding the superior court's decision.

C. Severability

Having determined that the Water Provision is beyond the scope of the local initiative power, we must consider whether the remaining provisions are severable from the invalid provision. STW asserts that the superior court erred by not placing any remaining valid provisions of the initiative on the ballot. We disagree.

To determine whether an invalid portion of an initiative is severable, we consider "whether the [invalid] provisions are so connected to the remaining provisions that it cannot be reasonably believed that the legislative body would have passed the remainder of the act's provisions without the invalid portions." *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 411, 355 P.3d 1131 (2015). Stated another way, an invalid provision may be severed from the remaining provisions "unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes." *League of Women Voters*, 184 Wn.2d at 411-12.

In this case, the Water Provision of STW's initiatives represents the core of each measure. All of the remaining provisions are designed to either implement or protect the proposed right to require all applicants for water services with a projected daily usage of 1336 CCF of water or more to submit their applications to a vote of the people. If the Water Provision is invalid, then the other initiative provisions would be robbed of practical effect. For instance, without the Water

Provision there is no manner in which state law would preempt a provision of the initiatives, corporations would violate a provision of the initiatives, or a person would bring a cause of action under the provisions of the initiatives. Without the Water Provision, there is no triggering mechanism that would allow the remaining provisions to take effect. Therefore, we hold that the remaining initiative provisions are not severable, and the initiatives fail in their entirety.

IV. Free Speech

STW contends that the superior court violated its right to free speech under the First Amendment of the United States Constitution and article I, sections 4 and 5 of the Washington Constitution. STW argues that the violations lie in the superior court's determination that STW's initiatives exceeded the scope of the local initiative power and issuance of an injunction to prevent the initiatives from appearing on the ballot. We disagree.

The First Amendment to the United States Constitution mandates that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Article I, section 4 of the Washington Constitution states, "The right of petition and of the people peaceably to assemble for the common good shall never be abridged." Article I, section 5 states, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

A. The First Amendment

In *Meyer v. Grant*, the United States Supreme Court held 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, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988). STW is correct that barring the initiatives from the ballot would diminish this political speech generated through the process of gathering signatures.

We hold above, though, that STW's initiative is outside the scope of the local initiative's power. STW's position, 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.

This 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." STW has not cited to any authority for the proposition that one has a free speech right to have a local measure beyond the scope of the initiative power appear on a ballot. In the absence of authority, we "may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Under *Angle*, STW does not have a First Amendment right to place a local initiative on the ballot. STW has not presented any reasons why *Angle* is ill-considered or inconsistent with Washington case law. Therefore, its argument fails.

B. Article I, Section 5 of Washington Constitution[2]

STW also argues that pre-election review of a local initiative violates its right to free speech under article I, section 5 of the Washington Constitution. For support, STW cites to our Supreme Court's decision in *Collier v. City of Tacoma*, 121 Wn.2d 737, 854 P.2d 1046 (1993). *Collier* involved a challenge under the state and federal constitutions to city ordinances that restricted the posting of political signs in residential areas to a period beginning 60 days before the election and ending 7 days after it. *Collier* held that the ordinances were viewpoint-neutral but content-based in that they classified permissible speech in terms of subject matter. *Collier*, 121 Wn.2d at 752-53. The court deemed the ordinances to be time, place, and manner restrictions and held that such restrictions on speech that are viewpoint-neutral but subject-matter based are valid so long as they are narrowly tailored to serve a compelling state interest and leave open ample alternative channels of communication. *Collier*, 121 Wn.2d at 752-53. The court then concluded that the ordinances' durational requirements failed this test and therefore violated the First Amendment of the United

[2] Although STW refers to both article I, sections 4 and 5 of the Washington Constitution as part of its argument, it has not cited to any cases for an analysis of this issue under article I, section 4. We do not consider conclusory arguments unsupported by citation to authority or rational argument. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Therefore, we do not separately consider STW's claims under article I, section 4.

States Constitution and article I, section 5 of the Washington Constitution. *Id.* at 758-60.

For several reasons, the holdings and rationale of *Collier* do not serve STW's position. First, the challenged injunction before us does not classify speech on the basis of subject matter or content as did the measures in *Collier*. Instead, the injunction rests on the principles that a measure is beyond the local initiative power if it is administrative or in conflict with state law. 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. Thus, *Collier* does not show that the injunction at issue violates article I, section 5.

Second, if the inquiry into whether a measure is administrative or in conflict with state law were deemed to make it content-based, STW's position would still reduce to the claim that it has a constitutional right to place an initiative on the ballot, without regard to the scope of the initiative power under state law. As noted above, the Ninth Circuit held to the contrary with respect to the First Amendment in *Angle*. *Collier* did not decide whether placing a local initiative on the ballot constitutes political speech protected under article I, section 5, and STW cites to no other authority for its contention that pre-election review of a local initiative violates article I, section 5. For these

reasons also, we hold that the injunction at issue does not violate article I, section 5 under *Collier*.[3]

CONCLUSION

The superior court had authority to review whether the proposed initiatives exceeded the scope of the local initiative power, and its review did not offend the separation of powers. In exercising that authority, the superior court properly determined that the challenged provisions were beyond the scope of the local initiative power and that one of the provisions conflicted with state law. Finally, the injunction preventing the initiatives from appearing on the ballot did not violate STW's right to free speech.

We affirm the superior court.

/s/ Bjorgen, J.
Bjorgen, J.

We concur:

/s/ Worswick, J.
Worswick, P.J.

/s/ Melnick, J.
Melnick, J.

[3] With the holdings in this opinion, it is unnecessary to reach any other issues raised by the parties.

JUDGE Nevin
HEARING DATE: Friday, July 1, 2016
TIME: 10:00 a.m.

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

PORT OF TACOMA, a Washington State Municipal Corporation, ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY, a Washington State Nonprofit Corporation,

Plaintiffs,

vs.

SAVE TACOMA WATER, a Washington political committee, DONNA WALTERS, sponsor and Treasurer of SAVE TACOMA WATER, JON AND JANE DOES 1-5, (Individual sponsors and officers of SAVE TACOMA WATER), CITY OF TACOMA, a Washington State Municipal Corporation, and PIERCE COUNTY, a political subdivision by and through JULIE ANDERSON, IN HER CAPACITY AS PIERCE COUNTY AUDITOR

Defendants.

No. 16-2-08477-5

~~[PROPOSED]~~* ORDER GRANTING PLAINTIFFS' [and City of Tacoma] MOTION FOR DECLARATORY JUDGMENT & PERMANENT INJUNCTIVE RELIEF [& Dismissing STW's Motion to Dismiss]

(Filed Jul. 1, 2016)

* All modifications in Order are by Judge Nevin.

GOODSTEIN LAW GROUP PLLC
501 South G Street
Tacoma, WA 98405
253.779.4000

CITY OF TACOMA,

Third-Party Plaintiff,

vs.

SAVE TACOMA WATER, a Washington political committee, DONNA WALTERS, Co-Chair and Treasurer SAVE TACOMA WATER; SHERRY BOCK-WINKLE, Co-Chair and Campaign Manger of SAVE TACOMA WATER; JOHN AND JANE DOES 1-5, (Individual sponsors and officers of SAVE TACOMA WATER); Julie Anderson, in her official capacity as Pierce County Auditor

Third-Party Defendants.

THIS MATTER came before the Court upon the Plaintiffs' [& City's] Motion for Preliminary and Permanent Injunction and for Declaratory Judgment [& Motion to Dismiss] consideration on July 1, 2016. The Court has considered the arguments of Counsel and has reviewed the following pleadings:

1. CITY MOTION FOR PRELIMINARY INJUNCTION
2. DECLARATION OF KYMBERLY K EVANSON
3. DECLARATION OF PETER HUFFMAN
4. DECLARATION OF ROBERT MACK
5. DECLARATION OF TC BROADNAX
6. PORT & EDB MOTION FOR PRELIMINARY, PERMANENT AND DECLARATORY JUDGMENT
7. DECLARATION OF JOHN WOLFE
8. DECLARATION OF COUNSEL CAROLYN LAKE
9. DECLARATION OF SUSAN SUESS
10. PIERCE COUNTY'S ANSWER AND AFFIRMATIVE DEFENSES
11. CHAMBER MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION AND DECLARATORY JUDGMENT
12. DECLARATION OF TOM PIERSON
13. CITY RESPONSE TO MOTIONS FOR PRELIMINARY AND PERMANENT INJUNCTION AND DECLARATORY JUDGMENT
14. AFFIDAVIT/DECLARATION OF COUNSEL
15. STW RESPONSE TO PRELIMINARY INJUNCTION MOTION
16. DECLARATION OF LINDSEY SCHROMENWAWRIN

17. DECLARATION OF SHERRY BOCKWINKEL

18. CHAMBER REPLY IN SUPPORT OF PRELIMINARY, PERMANENT AND DECLARATORY JUDGMENT

19. PORT REPLY IN SUPPORT OF PRELIMINARY, PERMANENT AND DECLARATORY JUDGMENT

[20. STW'S MOTION TO DISMISS]

The Court finds as follows:

1. A justiciable controversy exists. There is an actual, present, and existing dispute between parties with genuine and opposing interests that are direct and substantial. Post-election events will not further sharpen the issue whether Tacoma Code Initiative 6 and Tacoma Charter Initiative 5 (the "STW Initiatives) are beyond the scope of the local initiative power.

2. Plaintiffs [and City] have standing. Plaintiffs [& City] fall within the zone of interests the STW Initiatives seek to regulate and have demonstrated sufficient injury in fact. Further, this case involves significant and continuing issues of public importance that merit judicial resolution.

3. The STW Initiatives exceed the local initiative power and are invalid.

    a. The requirement for a binding vote of Tacoma residents before providing water utility service to an applicant that intends to

use 1336 CCF (one million gallons) of water daily from the City of Tacoma ("Water Provision") is a land use and development provision and exceeds the local initiative power because it is administrative in nature and involves powers delegated under RCW Title 35 to the legislative bodies of municipalities. STW Initiatives' Water Provisions also is administrative because they seek to change or hinder Tacoma's pre-existing water utility management and operations.

b. The Water Provisions exceed the local initiative power because they conflict with state law, and are administrative in nature. The Water Provisions seek to interfere with water utility service requirements that are subject to Washington's state water rights and service laws, and the Growth Management Act. STW Initiatives' Water Provisions would add requirements to these pre-existing regulations, and would interfere with pre-existing regulations. The Water Provisions therefore conflict with state law and are outside the scope of the local initiative power. The Water Provisions are also administrative because they seek to change or hinder pre-existing water regulations. The Water Provisions are also outside the scope of the local initiative power because they attempt to impose rights on Tacoma residents regarding water usage outside the boundaries of Tacoma City limits, and they attempt to create new constitutional rights. The

[people of the] City of Tacoma lack~~s~~ jurisdiction to enact such legislation[, through the initiative.]

c. STW Initiatives' provisions which seek to invalidate any conflicting Washington and state agency laws and rules exceed the local initiative power because they conflict with state law and seek to elevate city code/charter above state law which is beyond the City of Tacoma's jurisdiction to enact.

d. The STW Initiatives' corporate rights provisions exceed the local initiative power because they attempt to change the rights of corporations under federal and state law. The provisions therefore conflict with federal and state law, and are outside the scope of the local initiative power. The local initiative power does not include the ability to limit U.S. Supreme Court precedent, including *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The local initiative power does not include the ability to override the "personhood" rights to corporations under federal and state law, including under the First and Fifth Amendments of the United States Constitution and Wash. State Const. art. XII, § 5. The STW Initiatives exceed the local initiative power because they attempted to strip corporations of their First and Fifth Amendment rights, which would conflict with U.S. Supreme Court precedent.

e. The STW Initiatives provisions that seek to limit a court's authority to interpret the law or to determine whether a "permit, license, privilege or charter" is valid are outside the scope of the local initiative power because they conflict with federal and state law and seek to elevate city code/charter above state law which is beyond the City of Tacoma's jurisdiction to enact.

4. The STW Initiatives are not severable. All substantive provisions of both Initiatives are invalid. Once the Initiatives' substantive provisions A-C are held invalid, the enforcement, severability, and effect sections are moot.

5. Plaintiffs [& City] have established clear, legal or equitable rights to prevent invalid Initiatives, which exceed the scope of local initiative power, from appearing on the official ballot for the November 2016 election or any ballot thereafter;

6. Plaintiffs [& City] established a well-grounded fear of immediate invasion of those Plaintiffs because the Pierce County Auditor, at the direction of the City, will place the STW's Tacoma Code Initiative 6 on the official ballot in September 2016 absent contrary direction from this Court; and

7. Plaintiffs [& City] have established that placing invalid initiatives on the ballot will result in actual or substantial injury to Plaintiffs.

Now, therefore, it is hereby ORDERED:

1. Plaintiffs' [& City] Motion for Declaratory Judgment is GRANTED.

2. The Court DECLARES that the STW Initiatives are invalid as outside the scope of the local initiative power.

3. The Court further DECLARES that neither STW Initiative shall appear on the November 2016 election or any ballot thereafter, and directs the Pierce County Auditor not to include them on that or any ballot.

4. Plaintiffs' [& City] Motions for Preliminary and Permanent Injunction is GRANTED.

5. The motion to consolidate the hearings on the motions for preliminary and permanent injunctive relief and the merits is GRANTED.

6. This Order shall serve as the Court's final Order and Judgement adjudicating the merits of this action.

7. The Pierce County Auditor is hereby enjoined from including the STW Initiatives on the ballot for the November 2016 election or any other election ballot.

[8. Court has subject matter jurisdiction & STW's Motion to Dismiss is denied.]

DATED this 1 day of ~~June~~ July, 2016.

/s/ Jack Nevin
Jack Nevin,
Superior Court Judge

Presented By:

GOODSTEIN LAW GROUP PLLC
By /s/ *Carolyn A. Lake*
By /s/ *Seth Goodstein*
Carolyn A. Lake, WSBA #13980
Seth Goodstein, WSBA #45091
Attorneys for Plaintiff Port of Tacoma

LEDGER SQUARE LAW, P.S.

By: /s/ *Jason M. Whalen*
Jason M. Whalen, WSBA #22195
Attorneys for Plaintiff EDB

GORDON THOMAS HONEYWELL LLP
By: /s/ *Warren E. Martin*
Warren E. Martin, WSBA # 17235
Shelly Andrew, WSBA # 41195
Attorneys for Plaintiff Chamber

[PACIFICA LAW GROUP
By: /s/ Kymberly K. Evanson
KYMBERLY K. EVANSON #39973
Counsel for City of Tacoma

MARK LINDQUIST, PROS. ATTY
By: /s/ David Prather #82012
DAVID PRATHER, DEPUTY

Approved as to form:

by: /s/ Lindsey Schromen-Wawrin
Lindsey Schromen-Wawrin 46352

Approved as to form:
F. Michael Misner STW]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PORT OF TACOMA, a Washington State Municipal Corporation; ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY, a Washington State Non-Profit Corporation; TACOMA-PIERCE COUNTY CHAMBER, a Washington State Non-Profit corporation,

Respondents,

v.

SAVE TACOMA WATER, a Washington political committee,

Appellant,

DONNA WALTERS, sponsor and Treasurer of SAVE TACOMA WATER; JON AND JANE DOES 1-5; (Individual sponsors and officers of SAVE TACOMA WATER); CITY OF TACOMA, a Washington State Municipal Corporation; and JULIE ANDERSON, in her capacity as PIERCE COUNTY AUDITOR,

Defendants.

No. 49263-6-II

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed Oct. 29, 2018)

Appellant has filed a motion for reconsideration of the opinion filed on July 25, 2018. After review, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Jjs.: Bjorgen, Worswick, Melnick

For the Court:

/s/ Bjorgen, J.
Bjorgen, J.

THE SUPREME COURT OF WASHINGTON

PORT OF TACOMA, et al., Respondents, v. SAVE TACOMA WATER, et al., Petitioners.	No. 96575-7 **ORDER** Court of Appeals No. 49263-6-II (Filed Mar. 6, 2019)

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered at its March 5, 2019, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 6th day of March, 2019.

For the Court

/s/ Fairhurst, CJ.
CHIEF JUSTICE

The Honorable Jack Nevin
Hearing: Friday, July 22, 2016, 9 am

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

PORT OF TACOMA, et al., Plaintiffs, v. SAVE TACOMA WATER, et al., Defendants.	No. 16-2-08477-5 **Motion to Dismiss for Lack of Jurisdiction over the Subject Matter** (Filed Jun. 29, 2016)

Defendants Save Tacoma Water, Donna Walters, and Sherry Bockwinkel, through counsel and pursuant to CR 12, move to dismiss because the Court lacks subject matter jurisdiction. The courts have no authority to consider the content of proposed legislation before it is enacted into law.

Procedural History

On June 6, 2016, Plaintiffs Port, Chamber, and EDB filed a complaint for declaratory and injunctive relief, asking this Court to assess two initiatives – which the people of Tacoma were still collecting signatures for – to determine whether the content of the initiatives would be valid law. Two days later, the City of Tacoma joined the Plaintiffs. Both the Plaintiffs and City have amended their complaints to remove requests for costs and fees.

Argument

This "pre-election challenge" cause of action is derived entirely from Court precedent.[1] It has no basis anywhere in any Constitution, Charter, statute, or ordinance; nowhere have the people or their elected representatives authorized the courts to police their lawmaking process. Instead, this power to peer into the content of proposed legislation is a power the Courts have given to themselves. It is an illegitimate usurpation of the legislative power of the people, and violates their fundamental political rights. Therefore, the Court should rule it has no authority to rule on this subject matter, and dismiss the case.

I. The Federal Constitution prohibits pre-enactment review of an initiative's content.

The protections guaranteed in the Fourteenth Amendment "governs any action of a state, whether through its legislature, *through its courts*, or through its executive or administrative officers." *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (emphasis added) (citations omitted). Here, the Court's orders are state actions that cannot violate the people's political rights. *See Shelley v. Kraemer*, 334 U.S. 1, 16-18 (1948).

---

[1] Last year the state Supreme Court stated 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).

The United States Supreme Court has held that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (footnote omitted). The *Meyer* Court rejected arguments that "the State has the authority to impose limitations on the scope of the state-created [*sic*[2]] 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 on that process is "well-nigh insurmountable." *Id.* at 424-25.

It is irrelevant that the people may have other means to express themselves. "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

---

[2] Here the *Meyer* Court was referring to the initiative as a state, rather than federal, lawmaking power, thus "state-created." But it needs to be clarified that the right to legislate by initiative is a reserved inherent political power of the people; it is not created by the state. *See* Const. Art. I, § 1 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."); *see also* Const. Art. II, § 1 ("The legislative authority of the state of Washington shall be vested in the legislature . . . , but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature. . . .").

[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). Clearly, an order that rules on the validity of proposed legislation and strikes that measure from the ballot will limit discussion of the proposed policy.

The courts can have a legitimate role in the initiative process, such as enforcing "nondiscriminatory, *content-neutral limitations* on the [people's] ability to initiate legislation," like the signature threshold for ballot placement. *Id.* at 297 (emphasis added). But here, the Plaintiffs and City make no claims that the initiatives have not properly qualified for the ballot. Rather, the Plaintiffs and City rely entirely on the *content* of the initiatives in asking this Court to infringe upon the people's political rights. The signature threshold is the mechanism the people have chosen for determining which proposed initiatives will appear on the ballot. But the Washington Courts have given themselves the power to dissect the content of the proposed initiative and veto the proposal. In other words, the courts are assuming the power to restrict "core political speech" precisely *because of* the proposed initiative's content.

There is no compelling interest that could justify this infringement on the people's First Amendment

rights.[3] The best argument the Plaintiffs and City can put forward is that the court is protecting the integrity of the initiative process by striking initiatives from the ballot that are "beyond the scope of the initiative power." This argument only works if the First Amendment only protects "valid" speech, or only protects proposed laws that seamlessly fit with current law. But the First Amendment guarantees far more than that: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind." *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 625, 957 P.2d 691 (1998) (quoting *Meyer*, 486 U.S. 419) (quotation omitted).

The First Amendment is about protecting the *debate*, and does not allow for sanitizing it down to "valid" proposals through a judicial validation process. *See*, *e.g.*, *id.* at 626 ("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)); *United States v. Schwimmer*, 279 U.S. 644, 654-655 (1929) (J. Holmes, dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who

[3] While the argument above is focused on *Meyer*, which itself focused on political speech, the First Amendment rights of assembly and petition are also implicated here. U.S. Const., 1st Amend. ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

agree with us but freedom for the thought that we hate."), *overruled by Girouard v. United States*, 328 U.S. 61, 63-64 (1946) ("The fallacies underlying [*Schwimmer's* majority opinion] were, we think, demonstrated in the dissents of Mr. Justice Holmes. . . .").

Even if the Plaintiffs and City do come up with a compelling interest, that interest must also be narrowly-tailored. Striking the initiative from the ballot is the most extreme remedy possible, as it abolishes the political significance of the people's constitutionally-protected debate. Further, judicial review of proposed legislation is inherently unnecessary. The same limitations that apply to the court interfering with lawmaking by representatives should apply to lawmaking by the people.

The Court has no authority to police the content of proposals that the people put forward through duly-qualified initiatives. Petitioners' and the City's claims must be dismissed.

II. The Washington Constitution prohibits pre-enactment review of an initiative's content.

Several provisions in the Washington Constitution's Declaration of Rights affirm that the courts have no place in reviewing the content of proposed legislation. Article 1, Section 1, affirms the principles in the Declaration of Independence[4] in stating that "All

[4] As required by the Washington Enabling Act, ch. 180, 25 Stat. 676 (1889) ("The [state] constitutions shall . . . not be

political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Like the federal Ninth Amendment, Section 30 reserves unenumerated rights "retained by the people." And in Section 32 the people reminded their government that "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."

The courts would never even consider such an action to censure the lawmaking process of the state legislature, or a local government council. Yet somehow, citizen initiatives have become second-class lawmaking, compared to the lawmaking of the people's representatives. The people, as principals, must have at least as much authority as their representatives. The courts' interference with the people's lawmaking process is just as illegitimate as the courts' interference with their agents' lawmaking process.

Paralleling the First Amendment's political rights protections, Washington Constitution, article I, section 4 provides that "The right of petition and of the people peaceably to assemble for the common good shall never be abridged." This section "appears to tend toward political, not judicial, rights." Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 19 (2002). Section 5 provides that "Every

---

repugnant to the Constitution of the United States and the principles of the Declaration of Independence.").

person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

Political expression can only be restricted if the strict scrutiny requirements are met. *Collier v. City of Tacoma*, 121 Wn.2d 737, 854 P.2d 1046 (1993). Putting an initiative on the ballot – even a potentially-flawed initiative[5] – is an important act of political expression. Even if the law fails judicial review in a post-enactment challenge, the people's vote sends an important message to elected officials.

Take as an example Tim Eyman's notorious 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 opinion, the legislature "paid[] homage to the 'will of the people'"[6] 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 – regardless of whether we like the outcome – that initiative served the central purpose of political expression: it influenced policy. That statute

---

[5] By challenging the legitimacy of the courts jurisdiction, Defendants do not concede that the proposed initiatives at issue in this case are "invalid" or "flawed."

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

would probably not be law today, as RCW 84.36.595, had the initiative been struck from the ballot.

The fact that there are other ways to influence policy, or express political views, does not justify the courts entertaining pre-election challenges based on the initiative's content. In striking down a Tacoma ordinance restricting political yard signs, the Washington Supreme Court noted that the ordinance was "particularly problematic because it inevitably favors certain groups of candidates over others. The incumbent, for example, has already acquired name familiarity and therefore benefits greatly from Tacoma's restriction on political signs. The underfunded challenger, on the other hand, who relies on the inexpensive yard sign to get his message before the public is at a disadvantage." *Collier*, 121 Wn.2d at 752, 854 P.2d 1046. This observation applies to political expression through the initiative process as well.

Here, for example, Save Tacoma Water gathered nearly 17,000 signatures in 100 days with all volunteers and a budget of less than $5000. (Bockwinkel Decl. ¶¶ 14-15.) With that minimal budget, they would have marginal political influence without the initiative process. Their political expression, and that of the people of Tacoma generally, continues because the initiatives will appear on the ballot. If the court strikes the initiative from the ballot, the court will have eliminated the purpose of that political debate, and necessarily infringed on the people's constitutionally-protected political expression. Sure, the people can still talk about something that is not on the ballot, but what

is the point – it would be like rallying for a political candidate who has dropped out of the race.

The Washington Constitution, like the United States Constitution, prohibits judicial content-based review of an initiative before it becomes law. The Court lacks authority to review these initiatives and must dismiss the Plaintiffs' and City's claims.

III. Foundational justiciability principles prohibit pre-enactment review of an initiative's content.

The Court should abide by the established justiciability rules and recognize that it has no authority to interfere with proposed legislation. "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 applies even for *local* decisions 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 was a

proposition to be voted on by the people of a water district on whether to dissolve the district).

Unfortunately, Washington courts have also entertained a line of cases that purport that the courts can do pre-election assessment of initiatives for "subject matter," even though they cannot be reviewed for their "substance." *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005). That "subject matter" versus "substance" distinction – which had justified the pre-election challenge due to its limited scope – has now imploded as the Washington Supreme Court appears to have decided that all possible legal issues are available in an action to strike an initiative from 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 constitutional review.[7]

"The foremost reason for restraint by the judiciary, particularly in controversies with significant political overtones, is the separation of powers inherent in our political structure." Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U.L. REV. 695, 697 (1999). "Justiciability constraints constitute the essence of judicial restraint. . . ." *Id.* at 707.

---

[7] Except that the Plaintiffs and City get to choose their hypothetical facts, rather than rely on an actual case or controversy.

Justiciability issues are particularly important when private interests ask the courts to interfere with the public legislative process. Justice Charles Johnson noted:

> [The] effort to enact a legislative proposal has consistently been recognized by this court as a political legislative action in which courts have not interfered, nor should they. Because of the multitude of possible outcomes, the essence of the political legislative process involves many competing political choices into which courts should not intrude to act as referee.

League of Educ. Voters v. State, 176 Wn.2d 808, 831, 295 P.3d 743 (2013) (C. Johnson, J., dissenting).[8]

Conclusion

The Court has no authority to review the content of a proposed law before it is enacted. Doing so violates the people's core political rights, and fails to uphold the foundational government principles of separation of power and judicial restraint. For these reasons, the

---

[8] The Court's political question doctrine is also at play in pre-election initiative challenges. *See id.* at 833-34 (citing, among other cases, *State ex rel. Donahue v. Coe*, 49 Wn.2d 410, 417, 302 P.2d 202 (1956) (determination of questions arising incidental to the submission of an initiative measure to the voters is a political and not a judicial question, except when there may be express statutory or written constitutional law making the question judicial)). As noted, the pre-election cause of action is not "express statutory or written constitutional law."

Court must dismiss the Plaintiffs' and City's claims due to lack of subject matter jurisdiction.

Respectfully submitted June 29, 2016.

/s/ Lindsey Schromen-Wawrin

Lindsey Schromen-Wawrin
Washington State Bar Number 46352
Community Environmental Legal Defense Fund
306 West Third Street
Port Angeles, WA 98362
phone: (360) 406-4321
fax: (360) 752-5767
email: lindsey@world.oberlin.edu

CERTIFICATE OF SERVICE

I certify that on this day I sent a copy of the foregoing document, the Declaration of Sherry Bockwinkel, Note for Motion Docket, and an accompanying proposed order, by email to: *Attorneys for Port of Tacoma:*

Carolyn A. Lake
Seth Goodstein
Goodstein Law Group PLLC
501 South G Street
Tacoma, WA 98405
Phone: (253) 779-4000
Fax: (253) 779-4411
clake@goodsteinlaw.com
sgoodstein@goodsteinlaw.com

Attorneys for Economic Development Board for Tacoma-Pierce County:

Jason M. Whalen
Ledger Square Law, P.S.
710 Market Street
Tacoma, WA 98402
Phone: (253) 327-1900
Fax: (253) 327-1700
jason@ledgersquarelaw.com
marsha@ledgersquarelaw.com

Attorneys for Tacoma-Pierce County Chamber of Commerce:

Shelly Andrew
Warren E. Martin
Valarie Zeeck
Gordon Thomas Honeywell
1201 Pacific Avenue, Suite 2100
Tacoma, WA 98402
Phone: (253) 620-6433
Fax: (253) 620-6565
sandrew@gth-law.com
wmartin@gth-law.com
vzeeck@gth-law.com
cscheall@gth-law.com

Attorney for Julie Anderson, Pierce County Auditor:

David H. Prather
Deputy Prosecuting Attorney
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402
Phone: (253) 798-6732
Fax: (253) 798-6713
dprathe@co.pierce.wa.us
dwillin@co.pierce.wa.us

Attorneys for City of Tacoma:

Paul J. Lawrence
Kymberly K. Evanson
Sarah S. Washburn
Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101
Phone: (206) 245-1700
Fax: (206) 245-1750
paul.lawrence@pacificalawgroup.com
kymberly.evanson@pacificalawgroup.com
sarah.washburn@pacificalawgroup.com
sydney.henderson@pacificalawgroup.com

/s/ Lindsey Schromen-Wawrin
Lindsey Schromen-Wawrin

Attorney for Save Tacoma Water, Donna Walters, and Sherry Bockwinkel

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

Port of Tacoma, Economic Development Board for Tacoma-Pierce County, Tacoma-Pierce County Chamber, City of Tacoma,

Respondents,

v.

Save Tacoma Water,

Appellant,

and

John and Jane Does 1-5 (Individual sponsors and officers of Save Tacoma Water), Donna Walters, Sherry Bockwinkel, City of Tacoma, Julie Anderson in her official capacity as Pierce County Auditor,

Defendants.

Case No. 49263-6-II

APPELLANT'S MOTION FOR RECONSIDERATION

(Filed Aug. 13, 2018)

By Attorneys for Appellant Save Tacoma Water:

Lindsey Schromen-Wawrin, WSBA No. 46352
Community Environmental Legal Defense Fund
306 West Third Street, Port Angeles, WA 98362
phone: (360) 406-4321, fax: (360) 752-5767
lindsey@ShearwaterLaw.com

Fred Michael Misner, WSBA No. 5742
3007 Judson Street, Gig Harbor, WA 98335

phone: (253) 858-5222, fax: (253) 858-5111
mike@misnerlaw.com

Stacy Monahan Tucker, WSBA No. 43449
Ropers Majeski Kohn & Bentley
800 Fifth Avenue, Suite 4100, Seattle, WA 98104
phone: (206) 674-3400
stucker@rmkb.com

Appellant Save Tacoma Water respectfully moves for reconsideration of the Court's Opinion of July 25, 2018.

The Opinion did not discuss argued issues pertinent to assignments of error, concerning the right of local community self-government, and separately, the application of statutory construction rules.

The Opinion determined, without explanation, that the trial court's judicial veto action was not a content-based infringement of core political speech. Finally, the Opinion misinterpreted *Angle* in a way that severely limits political rights protections for the people's initiative power. The Opinion should have applied strict scrutiny when analyzing the trial court's action.

Discussion

I. Right of local community self-government

Save Tacoma Water identified two connected issues pertaining to its first Assignment of Error that were not discussed in the Opinion. "Do the people of Tacoma possess an inviolable right of local community self-government, through which they have the political

power to enact laws to protect their rights, health, and safety?" and "Did the court violate the people's right of local community self-government when it prevent [sic] the people from voting on duly-qualified citizen initiatives?" (Appellant's Amended Opening Brief (hereinafter "Op. Br.") at 3.)

These issues were not discussed or decided by this Court, even though they were necessary for this Court to affirm the trial court. (*See* Op. Br. at 9 ("To affirm the trial court, this Court must find that (1) the people of Tacoma have no right of local community self-government. . . ."), and 10-30 (Appellant's argument on the right of local community self-government).)

II. Statutory construction rules

Save Tacoma Water also identified an issue pertaining to its second Assignment of Error: "Should the court follow established statutory construction rules when it evaluates the legality of laws proposed by initiative?" (Op. Br. at 3, *see also* Op. Br. at 40-43 (presenting relevant statutory construction rules).)

The Court's Opinion did not cite or apply any statutory construction rules.

Nor did the Court's Opinion follow statutory construction rules. For example, the Opinion disregarded the statutory construction rules that require courts to make all presumptions, assumptions, and inferences in favor of the validity of the law, and only strike the law with proof beyond a reasonable doubt, when the

Opinion concluded that the initiatives proposed administrative rather than legislative policies. (Op. at 9.) Also, the Opinion used a hypothetical situation to find conflict preemption: "The 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*." (Op. at 10 (emphasis added).)

The lack of standards here is not surprising. Most court opinions that veto initiatives from appearing on the ballot do so without any regard for statutory construction rules. This does not make any sense, since it should be harder for a court to veto proposed legislation while it is still in the legislative process than it would be to void the law through judicial review after it is enacted, as otherwise pre-election attacks on proposed laws seeking judicial vetoes would be a preferred remedy over post-enactment judicial review. But instead, court opinions that veto initiatives consistently fail to cite or apply statutory construction rules.

Thus, Save Tacoma Water merely asks for an answer about whether statutory construction rules apply, and if not, why not.

III. Political rights under both the Washington Constitution and the United States Constitution

Save Tacoma Water moves for reconsideration of the Opinion's analysis of political rights affected by the trial court's judicial veto, as the Opinion misapplies a sentence from *Angle* – and by so doing, severely limits

First Amendment protections for initiative lawmaking – and also because the Opinion concludes without explanation that the trial court's judicial veto was not content-based. The Opinion failed to apply strict scrutiny, as required by *Angle*, *Collier*, and *Meyer*, regardless of whether the trial court's judicial veto was content-based or content-neutral.

A. The specific sentence in *Angle* relied on by the Court is taken out of context and misinterpreted.

Angle v. Miller is a Ninth Circuit case concerning 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. 673 F.3d 1122 (9th Cir. 2012). *Angle* does not stand for the assertion that the Opinion uses it for, and therefore this Published Opinion risks confusing established First Amendment case law.

In their briefs, Respondents cited one sentence from *Angle*, and never explained the case:

The Port's Brief quoted *Angle*, on page 46, "[T]here is *no* First Amendment right to place an initiative on the ballot," (emphasis in Port's Brief) and then cited *Angle* with a parenthetical noting that *Angle* was "(citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988))."

The City's Brief, at 19-20, quoted the same sentence, but followed it up with a citation parenthetical

to another case that does get to the issue that the *Angle* court is actually discussing.

In this abused sentence, *Angle* is reiterating that the First Amendment does not create a right to place an initiative on the ballot. This is clear from the citation parenthetical in *Angle* itself (which was omitted from Respondents' Briefs): "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. In other words, the First Amendment does not mandate direct democracy rights (initiative and referendum).[1]

Immediately after this sentence and citation, the *Angle* court goes on to hold that "[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

[1] If it were otherwise, then the United States Constitution would require initiative procedures in every state. In *Meyer*, the Court emphasized that while the people of the state have the power to delegate their legislative authority (i.e., referendum and initiative) through their constitution to a representative legislature, the First Amendment precludes the state's power to limit discussion on political issues raised in initiative petitions. *Meyer*, 486 U.S. at 420, 424-25. This section of *Meyer* is also paraphrased with the same interpretation in *Angle*, 673 F.3d at 1133, n.5. It is the people, not the state, that decides who has legislative authority. *See* WASH. CONST. Art. II, § 1 (vesting legislative authority for the state in the legislature, "but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature. . . .").

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* did not end with "[t]here is no First Amendment right to place an initiative on the ballot." *Id.* But unfortunately, that is where this Court ended its analysis. (Op. at 13.) This analysis thus misstates the meaning of that sentence in *Angle*, and thereby reduces the protection of the First Amendment.

This Court should reconsider its First Amendment analysis, as it is based on a misinterpretation of the holding in *Angle*. Instead of dismissing the First Amendment claim, the *Angle* court analyzed whether the plaintiff initiative proponents 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. 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." *Angle*, 673 F.3d at 1134. Therefore, the court did not apply strict scrutiny analysis and instead used intermediate scrutiny analysis. *Id.* at 1134-35.

Here, in contrast, there is no question that the trial court judge's action "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. This is a "severe burden on core political speech" that triggers strict scrutiny. *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.").

Notably, the First Amendment test that the *Angle* court used – for a content-neutral procedural rule – was more robust than the analysis provided by the Opinion here. Even if the Court concludes that the trial court's judicial veto was not content-based, *Angle* still requires strict scrutiny analysis.

B. Content-based restrictions differentiate based on viewpoint or subject matter, which is what the trial court did here.

The Court's Opinion holds 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 14 ("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.

The United States Supreme 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, that 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. *Id.* 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. *Arkansas Writers' Project*, supra, at 231-232; *Carey v. Brown*, 447 U.S. 455, 464-469, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980).").

The Washington Supreme Court defines content-based and content-neutral similarly for the Washington Constitution. *See Collier v. City of Tacoma*, 121 Wn.2d 737, 746, 854 P.2d 1046 (1993) ("We recognize that the free speech clauses of the state and federal constitutions are different in wording and effect, but

that the result reached by previous Washington cases in general adopted much of the federal methodology for application to state constitutional cases. The federal cases cited here and in our prior decisions are used for the purpose of guidance and do not themselves compel the result the court reaches under our state constitution." (citation omitted)). Notably, when analyzing whether the law at issue in *Collier* was content-based, the Court observed that "[t]he trial court found that Tacoma Public Works Department personnel have to read the signs in order to determine whether they are prohibited at a particular time." *Id.* at 749.

That distinction between content-based and content-neutral restrictions is often foundational in First Amendment jurisprudence. The United States Supreme 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). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Here, the Court professes a content-neutral purpose: enjoining proposed laws that are ostensibly "beyond the local initiative power." (Op. at 14.) But that content-neutral purpose is not enough to make its action content-neutral, because what the trial court actually did was entirely content-based: the court looked at 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 (*Collier, 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.[2]

Appellants respectfully request the Court reconsider its determination that the trial court's action was content-neutral (*see* Op. at 14) and revise its analysis from there. The lack of case law authority on this issue should not cut against Appellant – it is the government that has the duty to justify its content-based prior restraint, namely, its judicial veto ruling.[3]

---

[2] The Opinion equates Save Tacoma Water's challenge of the constitutionality of a judicial veto order with an argument that initiative proponents "have a constitutional right to place an initiative on the ballot, whether or not authorized by state or local law." (Op. 13.) Thus, the Opinion ignores the basic fact that the trial court's judicial veto was a state action that placed a severe burden on core political speech, as if the ends (keeping an ostensibly *ultra vires* initiative off the ballot) justify the means (a judicial order that stops any meaningful political policy debate – core political speech). But political speech protections case law places severe restrictions on prior restraints on political expression, precisely because of the danger of letting the government say in advance what is legitimate political expression (see subsection C below). The issue is not whether the ballot is a public forum. The issue is whether a judge can legitimately enjoin a duly-qualified initiative from appearing on the ballot, and if the judge does so, and thus cuts off any further meaningful political discussion on the issue, is that a severe burden on core political speech?

[3] Instead, the Opinion put the burden on Save Tacoma Water. (See Op. at 14 ("STW cites to no other authority for its contention that pre-election review of a local initiative violates article I, section 5.").)

C. The First Amendment principles assembled in *Meyer* should guide the Court's analysis and prohibit allowing judicial veto actions.

The Court's Opinion dismissing Save Tacoma Water's political expression arguments relies heavily on the Court's assertion that it is legitimate for the court to prevent duly-qualified citizen initiatives from appearing on the ballot because they are ostensibly beyond "the scope of the initiative power." (*See* Op. at 14.)

But this reasoning goes against the purpose of protecting political expression as a right, which is to prevent the government from telling the people what they can meaningfully discuss. The *Meyer* Court quoted three earlier cases as reminders that it is not the government's job to protect the public from ideas:

"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.' *NAACP v. Button*, 371 U.S. 415, 445 (1963). '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)." *Meyer v. Grant*, 486 U.S. 414, 419-20 (1998). "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* at 421 (quoting *Roth v. United*

States, 354 U.S. 476 (1957)); *see also* WASH. CONST. Art. I, § 32 ("A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.").

By vetoing initiatives from appearing on the ballot because of the law proposed in those initiatives – after volunteer signature gatherers collected nearly 17,000 signatures on those initiatives – one trial court judge did exactly what is prohibited by the very purpose of the First Amendment: government telling the people what they can consider for their own public policy.

Yes, the *Meyer* Court held that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as core political speech." *Meyer*, 486 U.S. at 421-22. Here, Save Tacoma Water is arguing that 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 debate that precedes a vote of the people on a duly-qualified initiative. *See id.* 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.").

In its Opening Brief, Save Tacoma Water quoted some of the Respondents' representatives saying that they sought a judicial veto action because of the political expression that would result from the initiative appearing on the ballot. (Op. Br. at 8, *see also id.* at 9.)

Save Tacoma Water also presented an example from Washington where the vote on an initiative caused the state legislature to change its policy, even though the initiative was not legal. (Op. Br. at 38-39.)

Here, the trial court judge infringed on that debate by vetoing the initiatives, which killed the political debate on the policy and prevented meaningful political expression by initiative proponents and opponents. *See Meyer*, 486 U.S. at 422 n.5. This violated Save Tacoma Water's (and the people of Tacoma's) political rights under the Washington Constitution and United States Constitution, because the judge could instead review the new law after it is enacted following the vote (i.e., the judicial veto action is not a narrowly-tailored remedy) and keeping ostensibly "beyond the scope" initiatives off the ballot is not a compelling government purpose. *See id.* at 426 n.7 (citing *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.")).

Conclusion

The Court's Opinion omitted consideration of issues pertaining to assignments of error that should

have been necessary for affirming the trial court: right of local community self-government, and statutory construction review standards.

In addition, the Court misstated *Angle* with regard to the application of the First Amendment to initiatives, when instead *Angle* calls for strict scrutiny analysis, which the *Angle* court applied to a content-neutral law. As a Published Opinion, this application of *Angle* should be corrected.

Although strict scrutiny applies regardless (see *Angle*), the Opinion should also not consider a judicial veto action content-neutral when it relies entirely on the textual content of the specific initiative in question.

For these reasons, and in furtherance of a robust discussion prior to petitioning for Supreme Court review, Appellant Save Tacoma Water respectfully requests reconsideration of these issues.

Respectfully submitted on August 13, 2018,

/s/ Lindsey Schromen-Wawrin
Lindsey Schromen-Wawrin,
WSBA No. 46352 Community
Environmental Legal Defense Fund

/s/ Fred Michael Misner

Fred Michael Misner, WSBA No. 5742

/s/ Stacy Monahan Tucker

Stacy Monahan Tucker, WSBA No. 43449
Ropers Majeski Kohn & Bentley

Attorneys for Appellant Save Tacoma Water

Declaration of Service

I certify that on August 13, 2018, I filed this document through the Washington State Appellate Courts' Secure Portal for electronic filing, which emails a copy of all uploaded files to all active parties on the case, including:

Attorneys for Port of Tacoma:

Carolyn A. Lake
Seth Goodstein
Goodstein Law Group PLLC
501 South G Street
Tacoma, WA 98405
Phone: (253) 779-4000
Fax: (253) 779-4411
clake@goodsteinlaw.com
sgoodstein@goodsteinlaw.com

Attorney for Economic Development Board for Tacoma-Pierce County:

Jason M. Whalen
Ledger Square Law, P.S.
710 Market Street
Tacoma, WA 98402
Phone: (253) 327-1900
Fax: (253) 327-1700
jason@ledgersquarelaw.com

Attorneys for Tacoma-Pierce County Chamber of Commerce:

Shelly Andrew
Warren E. Martin
Valarie Zeeck
Gordon Thomas Honeywell

1201 Pacific Avenue, Suite 2100
Tacoma, WA 98402
Phone: (253) 620-6433
Fax: (253) 620-6565
sandrew@gth-law.com
wmartin@gth-law.com
vzeeck@gth-law.com

Attorney for Julie Anderson, Pierce County Auditor:

David H. Prather
Deputy Prosecuting Attorney
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402
Phone: (253) 798-6732
Fax: (253) 798-6713
dprathe@co.pierce.wa.us

Attorneys for City of Tacoma:

Paul J. Lawrence
Kymberly K. Evanson
Sarah S. Washburn
Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101
Phone: (206) 245-1700
Fax: (206) 245-1750
paul.lawrence@pacificalawgroup.com
kymberly.evanson@pacificalawgroup.com
sarah.washburn@pacificalawgroup.com

/s/ Lindsey Schromen-Wawrin
Lindsey Schromen-Wawrin

Of attorneys for Appellant Save Tacoma Water

Complete Text of Charter Amendment 5[1]

The People's Right to Water Protection Amendment

WHEREAS, the Residents of Tacoma do not want to return to our polluted past; and

WHEREAS, since 1980, Tacoma has spent an immense amount of money, time and effort cleaning up the Superfund Sites left behind by the Asarco copper smelter, Occidental Chemical, Kaiser Aluminum and others; and

WHEREAS, City residents use almost half of the water produced by City-owned Tacoma Public Utilities; and

WHEREAS, the City of Tacoma is projecting, and preparing for, an increase in population of 127,000 more residents by 2040; and

WHEREAS, a 2009 state survey of public utilities shows that the Pierce County Large Water Users Sector is 13.7% while in King County the Large Water Users Sector is only 1.9%; and

WHEREAS, the City of Tacoma is responsible to the city's residents and small businesses first and must use all caution when issuing water utility services to any potential water user that wants to use more than one million gallons of water per day; and

WHEREAS, the Tacoma Public Utility gets water from the Green River Watershed and the concerns for the environmental impacts of large water users are valid

---

[1] In Clerk's Papers at 28.

as more increasing demands for water for people and community development must take into account droughts that will become more frequent in the Pacific Northwest as the result of climate change; and

WHEREAS, the people want policies and contractual requirements to make industry secondary to the human needs of the citizens and households, schools, hospitals, and homes for the aged, for fresh potable water should take priority except in the case of emergency fire fighting needs or any other natural disaster that cannot be reasonably forecasted; and

WHEREAS, the sustained availability of affordable and potable water for the residents and businesses of Tacoma must be paramount over considerations such as potential tax revenues or investor profits; and

WHEREAS, industrial users that would require excessive amounts of water to operate will have potential long-term negative impacts on the local and regional environment and future community development in the City of Tacoma; and

WHEREAS, residents and businesses of Tacoma have been asked in the recent past and may be required in the future to conserve water; and

WHEREAS, large water users pay discounted rates while residents as ratepayers carry an extra financial burden for the conservation, maintenance, protection and development of potable water sources; and

WHEREAS, industries that use large amounts of water daily would place human, economic, environmental and homeland securities at risk; and

WHEREAS, the Citizens of Tacoma want to encourage clean and renewable energy industries operating in the City of Tacoma; and

WHEREAS, the Citizens of Tacoma find that a proposed methanol refinery does not meet the requirements of a clean, renewable and sustainable energy production facility; and

WHEREAS, the City of Tacoma Charter provides for Initiative and Referendum rights which provides the city's citizens the right to place this Charter amendment before the voters; and

WHEREAS, the people of the City of Tacoma possess an inherent and inalienable right to govern our own community as secured by the Declaration of Independence's affirmation of the right of people to alter or abolish their government if it renders self-government impossible, and this inherent right is reaffirmed in the Tacoma City Charter, the Washington State Constitution, and the United States Constituion [sic];

Therefore be it ordained by the voters in the City of Tacoma that:

(1) The people of Tacoma adopt the following amendments to the Tacoma City Charter, Article IV (Public Utilities):

Section 4.24 – The People's Right to Water Protection

(A) People's Vote on Large Water Use Applications.

The people of the City of Tacoma find that there is a compelling need to carefully consider the consequences of providing water utility service to an applicant that intends to use large amounts of fresh water. Before providing water utility service to any applicant for 1336 CCF (one million gallons), or more, of water daily from the City, the City shall place the applicant's request for water utility service before the voters on the next available General Election Ballot, in a manner substantially conforming to the rules for Section 2.22 of this Charter. The applicant shall pay for the costs of the vote of the people. Only if a majority of the voters approve the water utility service application and all other application requirements are met may the City provide the service. The vote by the people is binding, and not advisory. Any water users currently authorized to use 1336 CCF or more of water daily are grandfathered in, however, their water utility service is not transferable.

(B) Sustainable Water Protection is an Inviolable Right that Government Cannot Infringe.

The people of the City of Tacoma protect their right to water through their inherent and inalienable right of local community self-government, and in recognition that clean fresh water is essential to life, liberty, and happiness, and the City of Tacoma has a foundational

duty to maintain a sustainable provision of water for the people. The People's Right to Water Protection vote provides a democratic safeguard, on top of the City's existing application process, to ensure that large new water users do not threaten the sustainability of the people's water supply. To prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights or mandates of this Article.

(C) Water Protection supersedes Corporate Interests.

As the People's Right to Water Protection is foundational to the people's health, safety, and welfare, and must be held inviolate, no government actor, including the courts, will recognize as valid any permit, license, privilege, charter, or other authorization, that would violate the rights or mandate of this Article, issued for any corporation, by any state, federal, or international entity. In addition, corporations that violate, or seek to violate the rights and mandates of this Article shall not be deemed "persons" to the extent that such treatment would interfere with the rights or mandates enumerated by this Article, nor shall corporations possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by this Article. "Rights, powers, privileges, immunities, and duties" shall include the power to assert international, federal, or state

preemptive laws in an attempt to overturn this Article, and the power to assert that the people of the City of Tacoma lacked the authority to adopt this Article.

(D) Enforcement.

The City or any resident of the City may enforce this section through an action brought in any court possessing jurisdiction over activities occurring within the City of Tacoma, including, but not limited to, seeking an injunction to stop prohibited practices. In such an action, the City of Tacoma or the resident of the City of Tacoma shall be entitled to recover damages and all costs of litigation, including, without limitation, expert, and attorney's fees.

(2) In enacting this Charter Amendment through our Initiative Power, the people of Tacoma declare our intent that:

(A) The provisions of this Charter Amendment are severable, and the petitioners intend that all valid provisions of the initiative be placed on the ballot and enacted into law even if some provisions are found invalid.

(B) The provisions of this Charter Amendment be liberally construed to achieve the defined intent of the voters.

(C) We support each of the provisions of this section independently, and our support for this section would not be diminished if one or more of its provisions were to be held invalid, or if any of them were adopted by

the City Council and the others sent to the voters for approval.

(D) This section shall take effect 15 (fifteen) days after election certification. The City shall not accept any applications for water utility service for 1336 CCF or more between the election and effective date.

Complete Text of Tacoma Initiative 6[2]

The People's Right to Water Protection Ordinance

WHEREAS, the Residents of Tacoma do not want to return to our polluted past; and

WHEREAS, since 1980, Tacoma has spent an immense amount of money, time and effort cleaning up the Superfund Sites left behind by the Asarco copper smelter, Occidental Chemical, Kaiser Aluminum and others; and

WHEREAS, City residents use almost half of the water produced by City-owned Tacoma Public Utilities; and

WHEREAS, the City of Tacoma is projecting, and preparing for, an increase in population of 127,000 more residents by 2040; and

WHEREAS, a 2009 state survey of public utilities shows that the Pierce County Large Water Users

---

[2] In Clerk's Papers at 31.

Sector is 13.7% while in King County the Large Water Users Sector is only 1.9%; and

WHEREAS, the City of Tacoma is responsible to the city's residents and small businesses first and must use all caution when issuing water utility services to any potential water user that wants to use more than one million gallons of water per day; and

WHEREAS, the Tacoma Public Utility gets water from the Green River Watershed and the concerns for the environmental impacts of large water users are valid as more increasing demands for water for people and community development must take into account droughts that will become more frequent in the Pacific Northwest as the result of climate change; and

WHEREAS, the people want policies and contractual requirements to make industry secondary to the human needs of the citizens and households, schools, hospitals, and homes for the aged, for fresh potable water should take priority except in the case of emergency fire fighting needs or any other natural disaster that cannot be reasonably forecasted; and

WHEREAS, the sustained availability of affordable and potable water for the residents and businesses of Tacoma must be paramount over considerations such as potential tax revenues or investor profits; and

WHEREAS, industrial users that would require excessive amounts of water to operate will have potential long-term negative impacts on the local and regional

environment and future community development in the City of Tacoma; and

WHEREAS, residents and businesses of Tacoma have been asked in the recent past and may be required in the future to conserve water; and

WHEREAS, large water users pay discounted rates while residents as ratepayers carry an extra financial burden for the conservation, maintenance, protection and development of potable water sources; and

WHEREAS, industries that use large amounts of water daily would place human, economic, environmental and homeland securities at risk; and

WHEREAS, the Citizens of Tacoma want to encourage clean and renewable energy industries operating in the City of Tacoma; and

WHEREAS, the Citizens of Tacoma find that a proposed methanol refinery does not meet the requirements of a clean, renewable and sustainable energy production facility; and

WHEREAS, the City of Tacoma Charter provides for Initiative and Referendum rights which provides the city's citizens the right to place this ordinance before the voters; and

WHEREAS, the people of the City of Tacoma possess an inherent and inalienable right to govern our own community as secured by the Declaration of Independence's affirmation of the right of people to alter or abolish their government if it renders self-government

impossible, and this inherent right is reaffirmed in the Tacoma City Charter, the Washington State Constitution, and the United States Constituion [sic];

Therefore be it ordained by the voters in the City of Tacoma:

That a new Ordinance is adopted and a new section of Tacoma Municipal Code Title 12 is hereby adopted, which deals with issuing water utility service to any applicant for one million gallons, or more, of water daily from the City of Tacoma, and is to be known as "The People's Right to Water Protection Ordinance":

A. People's Vote on Large Water Use Applications. The people of the City of Tacoma find that there is a compelling need to carefully consider the consequences of providing water utility service to an applicant that intends to use large amounts of fresh water. Before providing water utility service to any applicant for 1336 CCF (one million gallons), or more, of water daily from the City, the City shall place the applicant's request for water utility service before the voters on the next available General Election Ballot. The applicant shall pay for the costs of the vote of the people. Only if a majority of the voters approve the water utility service application and all other application requirements are met may the City provide the service. The vote by the people is binding, and not advisory. Any water users currently authorized to use 1336 CCF or more of water daily are grandfathered in, however, their water utility service is not transferable.

B. Limitations on Government Infringement of the People's Inviolable Right of Sustainable Water Protection. The people of the City of Tacoma protect their right to water through their inherent and inalienable right of local community self-government, and in recognition that clean fresh water is essential to life, liberty, and happiness, and the City of Tacoma has a foundational duty to maintain a sustainable provision of water for the people. The People's Right to Water Protection vote provides a democratic safeguard, on top of the City's existing application process, to ensure that large new water users do not threaten the sustainability of the people's water supply. To prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate the rights or mandates of this Ordinance.

(C) Water Protection supersedes Corporate Interests. As the People's Right to Water Protection is foundational to the people's health, safety, and welfare, and must be held inviolate, no government actor, including the courts, will recognize as valid any permit, license, privilege, charter, or other authorization, that would violate the rights or mandate of this Ordinance, issued for any corporation, by any state, federal, or international entity. In addition, corporations that violate, or seek to violate the rights and mandates of this Ordinance shall not be deemed "persons" to the extent that such treatment would interfere with the rights or

mandates enumerated by this Ordinance, nor shall corporations possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by this Ordinance. "Rights, powers, privileges, immunities, and duties" shall include the power to assert international, federal, or state preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of the City of Tacoma lacked the authority to adopt this Ordinance.

D. Enforcement. The City or any resident of the City may enforce this Ordinance through an action brought in any court possessing jurisdiction over activities occurring within the City of Tacoma, including, but not limited to, seeking an injunction to stop prohibited practices. In such an action, the City of Tacoma or the resident of the City of Tacoma shall be entitled to recover damages and all costs of litigation, including, without limitation, expert, and attorney's fees.

E. Severability and Construction. The provisions of this Ordinance shall be liberally construed to achieve the defined intent of the voters. The provisions of this Ordinance are severable, and the petitioners intend that all valid provisions of the initiative be placed on the ballot and enacted into law even if some provisions are found invalid. We – the people of Tacoma – support each of the provisions of this Ordinance independently, and our support for this Ordinance would not be diminished if one or more of its provisions were to be held invalid, or if any of them were adopted by

the City Council and the others sent to the voters for approval.

F. Effect. This section shall take effect 15 (fifteen) days after either adoption or election certification. The City shall not accept any applications for water utility service for 1336 CCF or more between the adoption or election and the effective date of this Ordinance.