No. _____

In the

Supreme Court of the United States

RESPECT WASHINGTON,

Petitioner,

v.

GLOBAL NEIGHBORHOOD, *et al*,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals Division III of the State of Washington

PETITION FOR WRIT OF CERTIORARI

RICHARD M. STEPHENS
Counsel of Record
Stephens & Klinge LLP
601 108th Avenue N.E.
Suite1900
Bellevue, WA 98004
Telephone: (425) 453-6206
E-mail: stephens@sklegal.pro

Counsel for Petitioner Respect Washington

QUESTION PRESENTED

Whether the First Amendment protects citizens' interests in voting on an initiative that has met all time, place and manner requirements for an initiative to qualify for placement on the ballot.

LIST OF ALL PARTIES

The parties to this proceeding are Petitioner Respect Washington and the Respondents are Global Neighborhood; Refugee Connections of Spokane; Spokane Chinese Association; Asian Pacific Islander Coalition- Spokane; Spokane Chinese American Progressives; Spokane Area Chapter of the National Organization of Women; Vicky Dalton, the Spokane County Auditor; and the City of Spokane.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporations or any publicly held corporations that own 10% or more of the stock of any parties to this proceeding.

RELATED CASES

- *Global Neighborhood v. Respect Washington*, No. 172016211, Superior Court for Spokane County, Washington. Judgment entered on August 29, 2017.

- *Global Neighborhood v. Respect Washington*, No. 355284, Division III of the Washington Court of Appeals. Judgment entered on January 29, 2019.

- *Global Neighborhood v. Respect Washington*, No. 96903-5, Washington Supreme Court. Order denying petition for review entered on July 10, 2019.

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PETITION FOR WRIT OF CERTIORARI

Respect Washington respectfully petitions this Court for a Writ of Certiorari to review the decision of the Washington Court of Appeals, Division III.

OPINIONS BELOW

The opinion below was issued by a panel of the Washington Court of Appeals, Division III and is reported as *Global Neighborhood v. Respect Washington,* 434 P.3d 1024 (Wash. Ct. App.), *review denied*, 448 P.3d 69 (Wash. 2019). The decision is reprinted as Appendix (App.) A. The panel upheld a decision of the Superior Court for Spokane County, Washington, which is reprinted as App. B.

Petitioner sought review in the Washington Supreme Court, but that Court denied review. A copy of the order denying review is reprinted as App. C.

JURISDICTION

The Court of Appeals decision was issued on January 29, 2019. A petition for review was timely filed in the Washington Supreme Court, which was denied on July 10, 2019. App. C. Accordingly, this Court has jurisdiction of this matter under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

This case concerns the interpretation and application of the First Amendment to the United

States Constitution which provides:

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

This case also concerns Section 1 of the Fourteenth Amendment that makes the provisions of the First Amendment applicable to the states.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The City of Spokane, Washington (hereinafter referred to as "City") is situated in the eastern half of the state with a population just over 200,000. In 2014, the City Council enacted a local law—an ordinance that created the subsequently recodified Spokane Municipal Code (SMC) section 3.10.050, a copy of which is quoted at Appendix (App.) A-13. The

ordinance prohibited all city employees from inquiring about the immigration status of any person. *Id.*

The City Council also enacted SMC section 3.10.040 (quoted in App. A-12 through A-13) to add citizenship status to the list of factors the Spokane police are prohibited from considering when profiling suspects. In common parlance, the City Council was established Spokane as a "Sanctuary City."

This action by the City Council was the subject of substantial local controversy in Spokane. It is that controversy that forms the background of the present case.

A. In response to the City of Spokane's Sanctuary City ordinance, citizens of Spokane invoked the City Charter's initiative process.

Spokane citizens concerned about this controversial issue began gathering signatures from fellow voters to enable an initiative to be placed on the ballot that would reverse these recent changes. The Spokane City Charter specifically authorizes initiatives upon petition with sufficient voter signatures.[1] Using an existing organization concerned

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[1] The Spokane City Charter requires signatures from registered voters totaling at least 5% of the voters who voted in the last preceding general municipal election to secure placement of their question on the general election ballot, which typically has the highest voter turnout. Spokane City Charter, Section 82 B.

about these issues, Respect Washington, citizens in Spokane began a signature gathering drive. Ultimately, they submitted petitions to the Spokane City Clerk in July of 2015 with more than the 2586 signatures necessary to have the initiative placed on the ballot.

The proposed initiative would eliminate SMC 3.10.050 which prohibited city employees from inquiring about immigration status and would amend SMC 3.10.040 to eliminate citizenship status from the list of factors the Spokane police are prohibited from considering when profiling suspects. The initiative made no change to the existing, administrative Spokane Police Department policies.

In June of 2015, the City Council directed the City Attorney to issue an opinion concerning a claim that the petition was biased and, therefore, might provide grounds for disregarding the petition. From time of the petition's drafting in January of 2015, Respect Washington had asserted its First Amendment right to include supplemental political speech in the petitions. The City Attorney ultimately issued an opinion concluding that the Council that the circulation of initiative and referendum petitions is protected by the First Amendment and concluded that Respect Washington had complied with the law.

In December of 2015, the Spokane County Auditor certified that the initiative petition contained the requisite number of signatures to be placed on the next general municipal election ballot.[2]

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[2] Also that December, one of the original co-sponsors of

Subsequently, the City Council approved a Resolution to refer the initiative, called Proposition 1, to the voters.

After the certification of signatures, the City Council repealed SMC section 3.10.040 and section 3.10.050 which potentially would be amended by the initiative. App. A-15. However, at the same time, the City Council readopted those repealed provisions that were the targets of the initiative and placed them in a different title of the City Code. *See* A-15.[3]

Upon certification of the number of signatures, the City Council had the option of enacting the initiative without a vote of the people, but in February of 2016

Proposition 1 was encouraged to renounce her sponsorship (App. A-14), prompting the City Council President to direct the City Attorney to issue an opinion whether the Council could disregard Proposition 1 on that basis. Also, the City Attorney was requested to identify ramifications to the City should it disregard the citizens' petition. The City Attorney's subsequent opinion deemed the resignation of one original co-sponsor immaterial to the standing of all other petition signers.

[3] That paved the way for opponents to argue Proposition 1 was moot because the provisions targeted by the initiative were moved to a new code section, an argument later made and accepted by the Superior Court. App. B-3 ¶ 6. However, the Court of Appeals essentially rejected the mootness argument. App. A-29. Tellingly, a June 1, 2017 Spokane *Inlander* newspaper article quoted the City Council President's admission of collaboration with opponents of the initiative regarding this moving of the code sections to thwart the initiative.

the City Council voted to place this initiative on the November 2017 ballot

B. Opponents of the initiative obtained an injunction in the Spokane County Superior Court prohibiting placement of the initiative on the ballot.

Opponents of Proposition 1 (hereinafter all referred to as "Global Neighborhood") waited almost 15 months to file their complaint in the Spokane County Superior Court challenging the legality of the initiative and seeking an injunction to prohibit the placement of Proposition 1 on the November 2017 ballot. They filed their suit against Respect Washington, the City of Spokane and the Spokane County Auditor who is the election official for Spokane County. Global Neighborhood scheduled their hearing for a declaratory judgment for August 25, 2017, one week and one day before the September 5, 2017, deadline for submitting ballots to the printer. Among other arguments, Global Neighborhood argued that Proposition 1 was beyond the scope of the initiative power because it was administrative and not legislative in nature.

In the Superior Court action, Respect Washington defended Proposition 1 on the merits, but also contended that rights to freedom of speech required consideration of asserted illegality of the initiative after the election. The City and County Auditor took no position on Global Neighborhood's claims.

The Superior Court ultimately agrees with Global Neighborhood and concludes that Proposition 1 was administrative and not legislative in nature because of its subject matter, specifically because the initiative would change or hinder a pre-existing administrative policy and modify existing directives to City employees. App. B-3, ¶5.

The Superior Court also concludes that the initiative was invalid because it sought to repeal portions of the City code that had been repealed by the City Council even though those provisions were simply moved to another section of the City code. Ultimately, the Superior Court orders that "the initiative shall not appear on the November 7, 2017 ballot," but it makes no comment on Respect Washington's freedom of speech argument. App. B-3, ¶ 6.

Respect Washington appealed the decision of the Superior Court to Division III of the Washington Court of Appeals.

C. The Washington Court of Appeals concludes there are no First Amendment rights at stake.

Relying on numerous decisions of this Court, Respect Washington argued to the appellate court, that an injunction that prohibits people from voting on an initiative based on the subject matter of the initiative violates the First Amendment. Respect Washington contended that, while the state and City are free to limit the law-making power of initiatives to certain subject matters, the validity or invalidity of

the initiative should be decided after the voting public has had an opportunity to voice their support or opposition to the issue at hand by casting their votes.

The Court of Appeals concludes on this First Amendment issue that "the Supreme Court announced no rule that proponents of initiatives hold a First Amendment right to the advancement of the initiative to the ballot box." App. A-42 (citing *Coppernoll v. Reed*, 119 P.3d 318, 322 (Wash. 2005)). Furthermore, the Court of Appeals reiterated that "barring an initiative from the ballot does not violate the constitution when the initiative lies outside the scope of the local initiative's power." App. A-43.

Ultimately, the Court of Appeals concluded that the initiative was administrative and not legislative; therefore, the election on the Proposition 1 was properly enjoined. App. A-55.[4]

Petitioner filed a timely petition for review in the Washington Supreme Court which was denied without further comment on July 10, 2019. App. C. From the Washington Court of Appeals' decision and

[4] The Court of Appeals also noted that initiatives which violate federal or state law could be enjoined because compliance with some other legal mandate is "ministerial and administrative." App. A-61. It continued in *dicta* to suggest that Proposition 1 would allow unconstitutional actions by police in racial profiling. App. A-62. Nevertheless, it did not conclude that Proposition 1 *requires* unconstitutional conduct.

From the Washington Supreme Court's denial of review, Petitioner submits this Petition.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

This Court should grant the Petition because the Washington state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court regarding the First Amendment's protection of the initiative process.

Twenty four states and the Virgin Islands have an initiative process whereby citizens may petition to have a proposed change to statutes or ordinances placed on the ballot for voters' rejection or approval. *See* http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx. The related referendum process involves a voter-initiated proposal to veto recently enacted legislation. These common examples of direct democracy have rigorous signature requirements; however, they are often used in those circumstances involving heightened levels of public controversy over governmental policy or action.

Historically, people have submitted initiatives on a wide variety of subjects, a small sample of which include initiatives proposing an increase in the minimum wage,[5] a change in property tax laws,[6]

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[5] *See, e.g., Filo Foods, LLC v. City of SeaTac,* 357 P.3d 1040 (Wash. 2015).

environmental protection,[7] the legalization of marijuana use[8] and, as in the present case, repealing sanctuary city status. Like the town hall from an earlier time, the initiative process has been used to promote any political or ideological point of view.

Consequently, the opportunity for people to vote on a change or criticism of a controversial government policy is inherently political in nature. The more controversial the issue, the greater is the incentive of political opponents to thwart efforts to bring the issue to a vote.

> A lawsuit to strike an initiative or referendum from a ballot is one of the deadliest weapons in the arsenal of the measure's political opponents. With increasing frequency, opponents of ballot proposals are finding the weapon irresistible and are suing to stop elections.

John D. Gordon III and David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums,* 64 NOTRE DAME L. REV. 298, 298 (1989). Not only do judicial injunctions prior to the election ensure the proposed law is never enacted by the people, it also

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[6] *See, e.g.*, *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization,* 583 P.2d 1281 (Cal. 1978).

[7] *See, e.g., Advisory Opinion to the Attorney General – Limited Marine Net Fishing*, 620 So.2d 997 (Fla. 1993) (limits on marine fishing).

[8] *See, e.g.,* Colo. Const. art. XVIII, § 16(3), *referenced in People v. McKnight,* 446 P.3d 397, 407 (Colo.), *reh'g denied* (2019).

silences the people's views that would otherwise be expressed—and counted—at the polls.

This Court has long protected the initiative process, even from content neutral restrictions that might prevent matters from getting to the ballot. However, this Court has left open the question of whether opponents' use of judicial process to prevent a public vote based on the subject matter of the proposal violates the First Amendment.

Moreover, while the Washington court prohibited access to the ballot based on the content of the initiative, Washington courts use an extremely vague standard. The Court of Appeals concluded that elections may be prohibited on any initiative that "*hinders or furthers* a plan the local government previously adopted." App. A-55 (citing *City of Port Angeles v. Our Water-Our Choice!*, 239 P.3d 589, 594 (Wash. 2010) (emphasis added)).

The result is that Washington has created a rule for access to the ballot that focuses on the content of the message and governed by a subjective, unclear standard.

A. The decision below conflicts with this Court's decisions that the First Amendment protects the initiative process.

This Court long ago recognized the role of the First Amendment in protecting the opportunity for individuals to voice criticism of government laws, policies or actions. Given the conditions that led to the

American Revolution, this is no surprise. *See generally* Bernard Bailyn, Ideological Origins of the American Revolution 5 (1967).

Distilling the essential purposes of the Free Speech Clause, this Court concluded "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. State of Alabama*, 384 U.S. 214, 218 (1966).

This led to application of free speech principles to the initiative and referendum process and a recognition that these processes are "at the heart of the First Amendment's protection" because the speech occurring is about government law, policies or actions. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (a law criminalizing financial support for a referendum proposal to amend the state constitution violated the First Amendment). Initiatives, by their very nature, concern governmental affairs.

While there is no federal requirement that states provide an initiative process, when a state does permit citizen initiatives, it is "obligated to do so in a manner consistent with the Constitution." *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (invalidating a state law making it a crime to pay people to solicit signatures on initiative petitions). The message of this Court was that the initiative process, as a whole, is protected political speech under the First Amendment. *Id. at* 421.

At its core, "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The initiative process is about political and social change, regardless of the result of the election.

As to the manner in which political speech was burdened, this Court explained that the state law at issue in *Meyer* made "it less likely that [the initiative proponents] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Meyer,* 486 U.S. at 423. The speech to be protected is not just the speech of the petition signer attaching his or her signature, but also the speech of the voters inherent in the election.

Not only does allowing an initiative to be placed on the ballot encourage the free discussion of governmental affairs generally, but it also specifically allows people to express their views on the ballot and have their voice counted one way or the other on the particular governmental issue. The Washington Court's last-minute injunction prohibiting placement of an initiative on the ballot, despite compliance with all time, place and manner restrictions, conflicts with the previous decisions of this Court on an issue at the core of the First Amendment.

Notably, *Meyer* recognized an impermissible restriction on speech that had nothing to do with the subject matter of the initiative. *See also Buckley v. Am.*

Constitutional Law Found., 525 U.S. 182 (1999) (law requiring petition circulators to wear identification badges and report the identity of circulators violated the First Amendment). The restriction was not based on the content of the initiative, but it was subject to strict scrutiny as preventing freedom of expression. *Id.*

At issue here, however, the Washington Courts have prohibited an election on an initiative that met all time, place and manner restrictions precisely because of its content—the arbitrary distinction between administrative and legislative even though the initiative directly repeals legislation. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 2227 (2015) (citations omitted). The legislative versus administrative distinction is content based. Voters should be allowed to express their opposition to or approval of City policies at the ballot box even if those policies are deemed to be "administrative."

Not only does Washington use a content based criterion for determining whether a measure is placed on the ballot, that criterion—that the measure be legislative and not administrative in nature—is a highly malleable standard. The Washington Supreme Court has recognized that the distinction between administrative and legislative nature is a thin line. "Discerning whether a proposed initiative is administrative or legislative in nature can be difficult." *Our Water-Our Choice!*, 239 P.3d at 594 (citations omitted). Other courts have made similar observations.

See e.g., McAlister v. City of Fairway, 212 P.3d 184, 194 (Kan. 2009) ("[N]o single act of a governing body is ever likely to be solely legislative or solely administrative;" … "courts have struggled to separate" them); *Friends of Cong. Square Park v. City of Portland*, 91 A.3d 601, 605 (Me. 2014).

Washington's legislative/administrative standard is so that a state court can declare nearly any measure to be administrative and, therefore, subject to being excluded from the ballot. The Court of Appeals here wrestled with this confusing distinction. It posed eight questions the standard creates and recognized that existing cases only "partially answer" them. App. A-49 and A-50. Reinforcing the vagueness, the Court of Appeals concluded that elections may be prohibited on an initiative that "*hinders or furthers* a plan the local government previously adopted." App. A-55 (citing *Our Water-Our Choice!,* 239 P.3d 589, 594 (2010)(emphasis added).

Because every measure that changes policy is likely either to hinder or further some related city plan, Washington has created a vague standard that allows judges to prohibit a public vote using an unanchored standard—a situation long recognized to pose danger to the freedom of expression. *See, e.g., Forsyth County v. Nationalist Movement,* 505 U.S. 125, 130-31 (1992) (discretionary condition for access to public forum); *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968) (vague standard affecting First Amendment rights not cured by judicial review).

This uncertain, content based criterion makes the conflict between the present Washington court decision and this Court's decisions on the First Amendment in the initiative context even more egregious. It is a conflict that calls for this Court's resolution.

The overwhelming precedents of this Court indicate that, to provide a forum for public discussion on the ballot and deny access based solely on the content of the proposal, violates the First Amendment rights of initiative sponsors in making the issue a focus of discussion within the jurisdiction. This also results in the denial of the right of voters to vote either for or against a critique of current governmental policy or action.

B. The lower courts need guidance as to the First Amendment's role in considering injunctions against initiatives before an election.

Of the twenty-four states that make the initiative process available to their voters, it is common for the state courts to decide legal challenges to the legality of individual initiatives. There are three general types of challenges:

1. Failure to comply with procedural requirements such as the form of the initiative, the number of signatures, or timing restrictions;
2. Illegality of the measure if adopted; and
3. Subject matter exclusion from the initiative process based upon either common law or specific statutory on constitutional limits.

Challenges under the first category are about compliance with time, place and manner restrictions that raise few free speech issues and are generally considered appropriate for resolution prior to the election. *See, e.g., Gallivan v. Walker,* 54 P.3d 1069 (Utah 2002) (multi-county signature requirement).

Challenges in the second category, that the measure is unconstitutional or illegal if adopted, are often reserved for determination after the election if the measures passes at the polls. *See, e.g., Futurewise v. Reed,* 166 P.3d 708 (Wash. 2007); *Noh v. Cenarrusa,* 53 P.3d 1217 (Idaho 2002); *State v. Trust the People,* 113 P.3d 613 (Alaska 2005).

The wait and see approach is often based on ripeness concerns. *See Noh*, 53 P.3d at 1220; *Winkle v. City of Tucson*, 949 P.2d 502 (Ariz. 1997). But some states specifically defer determination of the legality of the measure until after the election because of the free speech aspects of the election itself. *See, e.g., Coppernoll,* 119 P.3d at 322; *Herbst Gaming, Inc. v. Heller,* 141 P.3d 1224, 1231 (Nev. 2006).

Other states, however, allow pre-election injunctions when the measure's substantive illegality is clear. *See, e.g, State ex rel. Montana Citizens for Pres. of Citizens' Rights v. Waltermire,* 729 P.2d 1283 (Mont. 1986); *Legislature v. Deukmejian,* 669 P.2d 17 (Cal. 1983) (initiative clearly violated state constitutional provision redistricting would occur by the legislature).

Challenges in the third category—that certain subjects are beyond the scope of initiative power—are often heard before the election and have become the commonplace tool of political opponents of measures headed toward the ballot. While restrictions on the subject matter of initiatives in some states are clear, Washington and other states have employed a prohibition on initiatives that are administrative instead of legislative in nature. App. A; *Friends of Cong. Square Park*, 91 A.3d 601; *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013).

The administrative versus legislative distinction as used by the Washington courts is far from clear and that makes it particularly vulnerable to abuse or arbitrary or politicized application. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas." *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). This vague approach invites plaintiffs who oppose specific initiatives to stifle public debate over a measure by litigating the measure off the ballot. Ultimately, the Washington court's rationale based on the distinction between legislative and administrative matters is too thin a thread to suspend the weighty value in freedom of speech.

However, states are masters of their own initiative processes because no federal law requires that they have any such process at all. Consequently, Washington is free to conclude that an initiative fails to enact a law because it addresses administrative matters and not legislative ones, assuming it uses a clear standard. But the First Amendment is implicated

at the point when the people speak—by casting their votes. Determining that an initiative is ineffective to enact a new statute or ordinance *after the election* fully protects both the right of states to establish subject matter limits on the initiative process and the right of citizens to express their views on matters of public controversy.

First Amendment rights are protected by a post-election determination whether the initiative is beyond the scope of the initiative power. That process is used regularly for other types of challenges to initiatives and it the only one which preserves the right to express one's views at the ballot box. Administrative matters may be as controversial and just as deserving of a public vote as any other government action.

This Petition should be granted to ensure that the right to vote is protected by the First Amendment, even if the proposed legislation never becomes law.

C. The lower courts need guidance in recognizing that the opportunity to vote on an initiative serves important agenda-setting First Amendment interests beyond simply adopting legislation.

Initiatives are more than just proposals to enact a new city ordinance or state law. As recognized in *Meyer*, they become the means by which people can focus public discussion on a particular governmental

issue. *Meyer,* 486 U.S. at 422. Inherent in the process is a

> dramatic power of an initiative that attains ballot status to shape the agenda of state and even national politics. This agenda-setting function comprises pressuring political actors, influencing candidate elections, fostering interest group and political party growth, and simply introducing an otherwise overlooked political position into the arena of public debate.

John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1464 (2007).

In a limited fashion, the Washington Supreme Court has recognized the free speech impacts of a vote on an initiative later determined to be invalid. In *Coppernoll,* the Washington Supreme Court observed that "after voter passage of [a specific initiative] …, it was ruled invalid by the trial court. A nearly identical measure was quickly passed by the legislature and signed by the governor before an appeal could be heard." *Coppernoll,* 119 P.3d at 322.

The Washington Supreme Court concluded, "[b]ecause ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential subsequent invalidation of the measure), *substantive preelection* review may also unduly infringe on free speech values."

Id. at 298 (emphasis added). While the Washington Supreme Court referred to "substantive preelection review" (based on asserted illegality of the initiative's provisions, which is not allowed in Washington), the reality is that any action that prohibits a vote creates the same infringement on free speech values, whether on the validity of the substance of the initiative or on the initiative's validity as a legislative as opposed to administrative measure.

If the people of Spokane resoundingly voted against Proposition 1, it would send a message. If they resoundingly voted in favor, it would send a different message, but a message nonetheless. The manner in which the people of Spokane express their views on a matter on the ballot is by voting, and the Washington Court decision ensures that particular opportunity for expression is halted solely based on the content of the initiative.

This expression is protected by the First Amendment regardless of whether the initiative accomplishes its law-making function. Even if the initiative were invalid, its validity can be determined after the people have spoken, which courts have done on numerous occasions. *See, e.g., Lee v. State,* 374 P.3d 157 (2016); *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762 (Wash. 2000), *opinion corrected*, 27 P.3d 608 (Wash. 2001). The Court of Appeals' decision in this case has silenced the people of Spokane in the public forum of the ballot box and in the form of a prior restraint without undergoing any First Amendment scrutiny.

> Plebiscites are a form of political speech near the very center of democratic values. Free speech values should lead to the conclusion that if a measure's proponents have properly qualified the measure for a plebiscite, they are entitled to have one, even if the measure will never be enforced.

Gordon III & Magleby, *supra*, at 312.

Respect Washington urges this Court to grant this Petition to protect this fundamental right. After all, "[t]here can be no more definite expression of opinion than by voting on a controversial public issue." *Miller v. Town of Hull,* 878 F.2d 523, 532 (1st Cir. 1989). This Court should grant this Petition to ensure this right receives more certain protection than state courts have provided.

II
This Court should grant this Petition to resolve the conflict between the decisions of First, Sixth and Eleventh Circuits and the decisions of the District of Columbia and Tenth Circuits on an important question of First Amendment law.

Despite the rigorous protection this Court has recognized for the process of gathering signatures on an initiative petition to ultimately allow the measure to qualify for the ballot, the Circuit Courts of Appeals are split as to whether the First Amendment provides any protection at all when content based restrictions on measures are employed to prevent measures from actually going to the ballot.

The First Circuit in *Wirzburger v. Galvin,* 412 F.3d 271 (1st Cir. 2005), reviewed a proposed initiative to amend the Massachusetts constitution to allow public financing of private religious-based education. The initiative was challenged in light of a specific prohibition on initiatives with that subject in the state constitution. *Id.* The First Circuit makes an important observation about initiatives and public debate:

> A state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative.

Id. at 276.

The First Circuit in *Wirzburger* expressly rejects the opposite analysis of the District of Columbia Circuit in *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. 2002)).

> We cannot agree with the D.C. Circuit's finding that subject matter exclusions from the initiative process "restrict[] no speech." … nor with its conclusion that this type of selective carve-out "implicates no First Amendment concerns."

Wirzburger, 412 F.3d 278 (quoting *Marijuana Policy Project*, 304 F.3d at 83, 85).

The First Circuit recognizes that subject matter exclusions from the initiative process raise First Amendment issues in contrast to the conclusion of the Washington Court of Appeals.[9]

Similar to the First Circuit, the Sixth Circuit in *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993), concludes that a limitation on the "initiative process violates the federal Constitution if it unduly restricts the First Amendment rights." *Id.* at 295. However, the restrictions in *Taxpayers United* were technical requirements for the submission of signatures—a classic time, place and manner restriction—and not a restriction based on the content or subject matter of the initiative. *Id.* It survives the First Amendment challenge. *Id.*

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[9] The First Circuit in *Wirzburger* ultimately concludes that, even though First Amendment rights were at stake, the prohibition on the use of the initiative process survived intermediate scrutiny. Rather than strict scrutiny, the court holds that intermediate scrutiny applied because the purpose of the restriction on the initiative process was not for the purpose of suppressing speech, although it had that effect. The prohibition of the particular initiative survives intermediate scrutiny because the state's interest in guarding against state-established religion was substantial and the restriction was no greater than necessary to protect that interest. *Wirzburger,* 412 F.3d at 279.

Additionally, the Eleventh Circuit in *Biddulph v. Morham*, 89 F.3d 1491 (11th Cir. 1996), generally recognizes the free speech aspects of initiatives when reviewing a lower court determination that a proposed initiative had a confusing title and multiple subjects. The Eleventh Circuit, however, concluded that these reasons for barring the initiative from the ballot were not content based and were permissible. *Id.* at 1500. In the present case, the Washington Court of Appeals found no First Amendment right to freedom from a content based restriction. App. A-42.

In sharp contrast to the First, Sixth and Eleventh Circuits is the decision of the District of Columbia Circuit in *Marijuana Policy Project,* 304 F.3d 82, references above. Proponents of an initiative to lessen the penalties for marijuana possession were stopped because Congress had prohibited the District from changing marijuana related laws. As indicated in the rejection by the Court in *Wirzburger*, the Court *in Marijuana Policy Project* finds no First Amendment right at stake when the vote on an initiative was barred, even based on subject matter. *Id.* at 87 ("limitation on the District of Columbia's legislative authority restricts no First Amendment right").

Similar to the District of Columbia Circuit, the also Tenth Circuit concludes there are no First Amendment rights at stake with a subject matter limitation on initiatives. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) involves a challenge to a Utah Constitutional provision which required initiatives that dealt with wildlife to pass with a supermajority vote. *Id.* at 1085. Wildlife advocates

challenged this provision as imposing a chilling effect on the exercise of First Amendment rights. *Id.*

The Tenth Circuit in *Walker* demonstrates the conflict among the federal circuits. "We disagree with *Wirzburger*'s premise that a state constitutional restriction on the permissible subject matter of citizen initiatives implicates the First Amendment *in any way*." *Id.* at 1102 (citing *Wirzburger,* 412 F.3d at 278-79) (emphasis added).

The ultimate result in *Walker*—the conclusion that a supermajority requirement does not violate the First Amendment—has a rationale that does no violence to the First Amendment. By allowing citizens to vote at the ballot box, Utah has fully protected the rights to speak through that method. A supermajority requirement only relates to whether the vote will enact the proposed law. The *Walker* Court notes that "[t]he First Amendment … does not ensure that all points of view are equally likely to prevail." *Id.* at 1101. But the right to vote—the expressive conduct—is allowed to go forward.

Nonetheless, the impact of the Tenth Circuit's decision has been noted. *Walker* "deepened a circuit split over the constitutionality of laws that put different restrictions on ballot initiatives depending on the initiatives' content or viewpoint." J. Michael Connolly, *Loading the Dice in Direct Democracy: the Constitutionality of Content—and Viewpoint—Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129, 130 (2008).

The split remains among the Circuits regarding whether the First Amendment provides any protection for content based restrictions on initiatives headed toward the ballot. These inconsistencies related to important interests in light of this Court's recognition that the initiative itself is by nature a criticism of current government affairs. The initiative process is one which allows a broad cross-section of a community, namely all voters, to express their views on the particular governmental issue at hand.

Getting a measure on the ballot requires considerable effort by the citizens. The voters in Washington are required to walk an uncertain legislative/administrative tightrope and risk having the issue of public controversy removed from the public agenda. The vague distinction between administrative and legislative characterization allows any measure to be blocked from the ballot. Such a system allows opponents of a measure to thwart the free speech rights of the citizenry by seeking a judicial veto in the process. The determination of whether a measure is within the scope of the initiative power should take place through careful consideration after the election—not through injunctions granted within days of the deadline for printing the ballots.

CONCLUSION

This Court's First Amendment jurisprudence protects the initiative process because it is the prerequisite to placing a controversial issue of government policy or action on the public agenda.

However, this Court has never resolved whether the First Amendment protects the voters' rights to vote on an initiative and the federal Circuit Court of Appeals are hopelessly in conflict.

By granting certiorari, the Court may resolve disagreements among the Circuits and make clear that the First Amendment protects the right of citizens to vote on controversial matters of public law and that ambiguous standards may not be used to withdraw controversial matters from the ballot box.

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Respectfully submitted,

RICHARD M. STEPHENS*
*COUNSEL OF RECORD

STEPHENS & KLINGE LLP
601 – 108th Avenue NE, Suite. 1900
Bellevue, WA 98004
Telephone: (425) 453-6206
Email: stephens@sklegal.pro

Counsel for Petitioner Respect Washington