No. 35528-4-III
(Spokane County Superior Court No. 17-02-01621-1)
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

GLOBAL NEIGHBORHOOD; REFUGEE CONNECTIONS OF SPOKANE; SPOKANE CHINESE ASSOCIATION; ASIAN PACIFIC ISLANDER COALITION - SPOKANE; SPOKANE CHINESE AMERICAN PROGRESSIVES; and the SPOKANE AREA CHAPTER OF THE NATIONAL ORGANIZATION OF WOMEN,

Respondents-Plaintiffs,

v.

RESPECT WASHINGTON;

Appellant-Defendant

VICKY DALTON, SPOKANE COUNTY AUDITOR, in her official capacity; and the CITY OF SPOKANE,

Defendants.

APPELLANT'S OPENING BRIEF

Richard M. Stephens
STEPHENS & KLINGE LLP
10900 NE 8th Street
Suite 1325
Bellevue, WA 98004
425-453-6206
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Municipal Codes:

Other Authorities:

INTRODUCTION

The fundamental question in this case is whether Spokane voters have a right to be heard on the issue of whether the City of Spokane will cooperate with federal immigration enforcement. Spokane voters gathered the requisite signatures for a ballot initiative on this question and the Spokane City Council directed that Proposition 1 be placed on the November 2017 ballot. Rather than see if the voters would even pass the measure, Respondents filed suit to enlist a court to fight its political battle.

Unfortunately, lawsuits have become a commonplace weapon of choice in this state's arena of political dialogue.

> A lawsuit to strike an initiative…from a ballot is one of the deadliest weapons in the arsenal of the measure's political opponents.

James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 298 (1989), a law review article cited by the Supreme Court in *Coppernoll v. Reed*, 155 Wn.2d 290, 300 (2005). The short timelines and great expense of qualifying an initiative has already made the process out of reach for most citizen-backed efforts. Citizen petitioners should not be burdened with the additional expense of hiring lawyers to defend themselves and their initiatives simply because opponents to the measure wish to avoid public input on the matter.

Nonetheless, the Superior Court below ordered that Proposition 1 be removed from the ballot, depriving the voters of their right to initiative. That Superior Court order is the subject of this appeal. Clerk's Papers (CP) 312.

ASSIGNMENT OF ERROR

Whether the Superior Court erred in entering the Order Granting Plaintiff-Respondents' Motion for Declaratory Relief and thereby prohibiting a municipal initiative from being placed on the November 2017 ballot.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the prohibition on the placement of a proposal on the ballot after compliance with all time, place, and manner regulations violates Appellant and the citizens of Spokane's right to free speech and right to petition government.

2. Whether respondents have shown the substantial injury required for issuance of an injunction.

3. Whether Proposition 1 is administrative and should be enjoined from being placed on the ballot on that basis.

4. Whether the recodification of the municipal code to be changed by an initiative renders the initiative moot and justifies removal from the ballot on that basis.

5. Whether the trial court erred in concluding that doctrine of laches did not bar the request for injunctive relief.

STATEMENT OF THE CASE

This case arises from the City of Spokane adopting two ordinances dealing with immigrations issues. On October 20, 2014, the City Council enacted Ordinance C-35164, creating the former Spokane Municipal Code ("SMC") section 3.40.040, titled "Biased-Free Policing." This provision prohibited the Spokane Police from relying a number of factors (including "citizenship status") for initiating law enforcement action. *Id.*

A week later, on October 27, 2014, the Spokane City Council enacted Ordinance C-35167. CP 181. This ordinance is titled "Immigrant Status Information" and created the former SMC 3.10.050. *Id.* Ordinance C-35167 prohibited city employees from inquiring about the immigration status of any person; prohibited police officers from inquiring about immigration status unless there was a reasonable suspicion that the person had been previously deported; and prohibited the police from detaining aliens because of immigration status. *Id.*

On November 26, 2014, Appellant, Respect Washington, submitted a proposed initiative with the Spokane city clerk. The proposed initiative would repeal Ordinance C-35167 and would amend Ordinance C-35164 to eliminate citizenship status from the list of factors the Spokane police are prohibited from considering in their investigations. CP 172-73.

Under the City Code, Proposition 1 was referred to the City Hearing Examiner to review the validity of the initiative. On January 20, 2015, the City Hearing

Examiner concluded that the initiative was valid for placement on the ballot, considering the procedural and substantive requirements of the law. CP 185.

On December 9, 2015, the Spokane County auditor certified that the requisite number of signatures had been submitted for Initiative No. 2015-1. On February 22, 2016, the Spokane City Council placed Initiative No. 2015-1 on the November 7, 2017 ballot where it became Proposition 1. Respondents waited until May 1, 2017 to file their complaint. CP 3.

On July 27, 2017—seventeen months after Spokane City Council voted to place it on the ballot—Respondents moved the Superior Court for a declaratory judgment that Proposition 1 should not be placed on the November 2017 ballot. CP 29. Ultimately, the Superior Court issued an injunction prohibiting the placement of Proposition 1 on the ballot. CP 314.

ARGUMENT

I. The Superior Court order violates the constitutional protection of free speech by depriving the citizens of Spokane of their right to participate in a public forum and express their views at the ballot box.

While, the Washington Constitution guarantees that "[t]he first power reserved by the people is the initiative," art. II, § 1, local initiatives are authorized by state law and, in this case, by municipal charter. Spokane Municipal Code 02.02. Regardless of the legal origin of the initiative power, as essentially the right to petition government and have a public vote on a proposed change to law, the initiative process at any level is an exercise of the right in art. I, § 4 of the Washington Constitution to petition government. The right to petition government

extends to all levels and departments of the government. *In re Marriage of Meredith*, 148 Wn. App. 887, 899 (2009) (citations omitted).

The initiative process also is part of the right to political speech under both the First Amendment to the United States Constitution and art. I, § 5 of the Washington Constitution. *Copperrnoll v. Reed*, 155 Wn.2d 290, 298 (2005). The ballot measure here constitutes an opportunity for all voters, whether in favor of or opposed to Proposition 1, to express their view on the question it poses.

While there is no federal constitutional right to an initiative process (in fact, many states do not have one), when it does exist, as here, the initiative process including the election itself is a public forum for free speech. *See City of Longview v. Wallin*, 174 Wn. App. 763, 791 (2013). Though the public forum doctrine first arose in the context of streets and parks, it has been extended to school publications (*Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995)), charitable contribution programs, (*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 473 U.S. 788 (1985)), and school mail systems (*Perry Educ. Ass'n, v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)). Like a state funded publication, the initiative process "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Rosenberger*, 515 U.S. at 830.

Where a public forum exists, the government cannot discriminate based on the content of the message without a compelling state interest. *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981). A "*content-based* restriction on *political speech* in a *public forum* [] must be subjected to the most exacting scrutiny." *Boos v. Barry*,

485 U.S. 312, 321 (1988) (emphasis in original). In fact, right of free speech under the State of Washington's constitution, art. 1 § 5, is much broader than its federal equivalent and the ability of the government to restrict speech in a public forum is much more limited. *Collier v. City of Tacoma*, 121 Wn.2d 737, 747–48 (1993).

Moreover, speech within the initiative and referendum process "is at the heart of the First Amendment's protection" because it is speech about governmental policies. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (regarding a referendum proposal submitted to Massachusetts voters to amend the state constitution). Initiatives, by their very nature, typically concern governmental affairs. As such, the initiative process, as a whole, is protected political speech under the First Amendment. *See Meyer v. Grant*, 486 U.S. 414, 421 (1988) ("the circulation of a petition involves ... core political speech").

As the Supreme Court observed in *Mills v. State of Alabama*, 384 U.S. 214, 218 (1966), "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." Not only does allowing an initiative to be placed on the ballot encourage the free discussion of governmental affairs, it allows the citizens to express their views in the election process.

This expression, whether in favor or in opposition, is protected by the First Amendment and has nothing to do with the legality of the initiative itself. Even if the initiative were invalid (which Appellant contends it is not), its validity can be determined after the people have spoken. The trial court's order in this case has

silenced the people of Spokane in the public forum of the ballot box without undergoing the exacting scrutiny required.

Two Washington decisions address free speech in the context of pre-election review of matters slated for the ballot. The first is the Supreme Court decision in *Copperrnoll*, 155 Wn.2d at 296–98, which recognized the free speech implications of an order removing a matter from the ballot:

> Because 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. While the Court referred to "substantive preelection review" (which is not allowed), the reality is that any action that prohibits the vote creates the same infringement on free speech values.

The other case is *City of Longview v. Wallin*, 174 Wn. App. 763 (2013). In *Wallin*, the City sued the initiative sponsors seeking a declaration that the initiative that sought to restrict the use of automated traffic safety cameras should not be placed on the ballot. *Id.* at 768. While the appeal was pending, the Supreme Court held initiatives concerning the use of automated traffic safety cameras are beyond the scope of local initiative power. *Id.* (citing *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 52 (2012)). Division II of the Court of Appeals agreed, but still recognized that the initiative process was protected by the First Amendment. *Wallin*, 174 Wn. App. at 791-92. *Copperrnoll* and *Wallin* stand for the proposition that ballot initiatives invoke free speech rights. Proposition 1 does not implicate any policy area that the Legislature has

specifically withheld from the voters. *Cf. City of Port Angeles v. Our Water-Our Choice!,* 170 Wn.2d 1, 13–14 (2010); *Wallin*, 174 Wn. App. at 768.

The Court observed in *Coppernoll* that "after voter passage of Initiative 695 …, 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." *Copperrnoll*, 155 Wn.2d at 298. Likewise, 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. Indeed, if the matter were placed on the ballot and few voted on it, it would send another message—a message of indifference. But the manner in which the people of Spokane express their views on a matter on the ballot is by voting, and the Superior Court decision ensures that particular opportunity for expression is unavailable.

Furthermore, the Superior Court's decision acts as a prior restraint on voter speech, that is even less tolerable under the First Amendment:

> Holding that the language of art. I, § 5 forbids prior restraints on publication, we have struck down prior restraints in most contexts, allowing only post publication sanctions to punish the abuse of free speech rights. *See, e.g., State v. Coe*, 101 Wn.2d 364, 374–75, 679 P.2d 353 (1984) (holding that the language of art. I, § 5 forbids prior restraints on the publication or broadcast of constitutionally protected speech that was lawfully obtained, true, and a matter of public record). The strict standard for evaluating prior restraints under the state constitution lies in the plain language of Const. art. I, § 5 which "seems to rule out prior restraints under *any* circumstances." [*Bering v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986) (quoting *State v. Coe*, 101 Wn.2d 364, 374 (1984))]

Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 117 (1997) (emphasis in original). As a prior restraint on lawful speech at the ballot box, the Superior

Court decision violates both art. I, § 5 of the Washington Constitution and the First Amendment.

Finally, the Superior Court's decision is based on the content of the proposal. There was no failure to obtain the requisite number of signatures, or any other failure to meet a time, place, or manner regulation. As a content-based restriction, the Superior Court's interference with First Amendment rights can only be justified by a compelling state interest. *Widmar,* 454 U.S. 263, 269–70. There is no compelling state interest that justifies prohibiting the citizens of Spokane from voting on Proposition 1.

The Superior Court order plainly conflicts with the free speech rights of Respect Washington, the citizens of Spokane who sought to place the matter on the ballot with their petition signatures, and every citizen of Spokane who was deprived of the opportunity to express his view at the ballot box, either for or against the measure.

II. The trial court erred in issuing injunctive relief without the requisite substantial injury.

Albeit in the absence of any constitutional analysis, the standard for establishing standing to challenge an initiative requires only harm if the measure passes. *Spokane Entrepreneurial Center v. Spokane Moves to Amend Constitution,* 185 Wn.2d 97, 106 (2016). However, the courts have not lessened the requirement that requests for injunctive relief be supported by more than allegations of harm sufficient to confer standing, but proof of substantial injuries in order to obtain the extraordinary relief of an injunction.

To enjoin a measure from being placed on the ballot, a party must establish:

> (a) a clear legal or equitable right, (b) a well-grounded fear of immediate invasion of that right, and (c) that the act complained of **will result in actual and substantial injury**. Failure to establish any one of these requirements results in a denial of the injunction. These criteria must also be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate.

Huff v. Wyman, 184 Wn.2d 643, 651 (2015) (emphasis added; internal citations and quotations omitted). "Failure to establish any one of these requirements results in a denial of the injunction." *Id.*

In *Huff*, the Supreme Court rejected an attempt to keep off of the ballot a tax-related initiative that the plaintiffs alleged exceeded the scope of the initiative power. *Id.* at 656. After the election, the Court held that the initiative was invalid. *Lee v. State,* 185 Wn.2d 608 (2016). The timing is significant. Even though the Court ultimately concluded that the initiative was invalid, it protected the citizens' right to express their views at the polls.

Here, the Superior Court only found nebulous, unripe, and speculative harms.

> All Plaintiffs will suffer organizational harm by being required to divert limited resources to address the impacts associated with Proposition 1, should it pass.

CP 313. It is not clear exactly what the court meant by "organizational harm," but the context seems to suggest it is harm to the organizations themselves as opposed to harm to the members of the organizations. The harm is described as the speculative diversion of resources **if the measure passes**.[1] Of course, that would

[1] Fortunately, the Court did not consider the cost of campaigning against the measure as a significant harm as argued by the organizations. Surely, choosing to participate in political dialogue cannot be sufficient injury to justify judicial intervention in the political process.

be true of every initiative ever proposed. If an initiative caused the law to be changed, someone would likely have to change their activities. The Superior Court's conclusion does not describe an immediate harm and it is so vague that it could not possibly constitute a substantial harm, as required for injunctive relief.

Furthermore, the Superior Court gave no consideration to the relative interest of the public in voting on Proposition 1. Respondents have not proven that a mere vote of the people is damaging, and they have timed the filing of this suit in such a way that it is impossible for their allegations of harm to be tested prior to the day of the election.

III. Proposition 1 is legislative in nature.

Although, without any consideration of free speech considerations, Washington courts have allowed pre-election review of initiatives and not required placement on the ballot when the initiative is administrative, instead of legislative. "In distinguishing between legislative and administrative actions of municipal legislative bodies, courts have frequently adopted two tests." *Durocher v. King Cty.*, 80 Wn.2d 139, 152 (1972). First, "[a]ctions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative." *Id.* (quoting 5 E. McQuillin, The Law of Municipal Corporations, § 16.55 (3d ed. 1969 rev. vol.) at page 213).

Second, "[t]he power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues

a plan already adopted by the legislative body itself, or some power superior to it." *Id.*; *accord Ruano v. Spellman*, 81 Wn.2d 820, 823 (1973). Here, a clearly legislative act, Spokane City Ordinance C-13564, put in place a policy of non-cooperation with federal enforcement of immigration law. It prohibited all Spokane City employees from inquiring into the immigration status of any individual; prohibited Spokane police officers from inquiring into the immigration status of any individual; and prohibited the Spokane police from detaining any individual because of immigration status.

Proposition 1 sought to reverse that city policy of noncooperation with federal authorities by "eliminating the prohibition of city employee use of immigration status information" and requiring that "[a]ny future regulations limiting the ability of any city employee from collecting immigration status information, communicating immigration status information and cooperating with federal law enforcement authorities would require a majority vote of the City Council and of the people at the next general election." CP 60.

Under both of the tests set forth by *Durocher*, Proposition 1 is clearly legislative in nature. If approved by the electorate, Proposition 1 will put in place a change in policy regarding cooperation with federal authorities in immigration enforcement. *See Durocher*, 80 Wn.2d at 153 (holding that the grant of a permit was administrative because temporary); *Ballasiotes v. Gardner,* 97 Wn.2d 191, 196–97 (1982) (holding that an ordinance adopting punch card ballots was a policy change that was legislative); *Citizens for Financially Responsible Gov't v. Spokane*, 99 Wn.2d 339, 347–48 (1983) (holding that a proposition calling for the

repeal of a business tax was permanent and therefore legislative). If enacted by the voters, Proposition 1 would put in place a change with no limit to the duration of that change. Thus, Proposition 1 is permanent, and accordingly is legislative.

In regard to the second test in *Durocher,* the explicit purpose of Proposition 1 is to reverse the City of Spokane policy put in place by ordinances C-35164 and C-35167, as it would "eliminat[e] the prohibition of city employee use of immigration status information." CP 60. Thus, as a policy change, under *Durocher*, it is legislative in nature. *See Citizens for Financially Responsible Gov't*, 99 Wn.2d at 347–48 (holding that a proposition calling for the repeal of a business tax represented a change in policy and was therefore legislative*); Leonard v. Bothell,* 87 Wn.2d 847, 850–51 (1976) (holding that rezoning a single property was an administrative action); *Heider v. Seattle,* 100 Wn.2d 874, 877 (1984) (holding that a proposition seeking to reverse a street name change was administrative in nature because it specified details on how to follow a pre-existing plan put in place by the legislative body).

Disregarding the settled law of *Durocher* and *Ruano*, the Superior Court found that Proposition 1 was administrative because it "would change or hinder a pre-existing administrative policy and modify existing directives applicable to the City of Spokane Police Department and City employees." CP 313. Under *Durocher* and *Ruano*, the court's findings actually describe Proposition 1 as being legislative in nature because the measure seeks change in policy, rather than specifying how an existing policy should be carried out. *See Ruano*, 81 Wn.2d at 823; *Durocher*, 81 Wn.2d at 823. Yet the Superior Court flipped the rules

adopted by the Supreme Court around and found that Proposition 1 is administrative because "it would change" policy. CP 313. This is a clear error of law.

It is also plainly inconsistent with the decision of the City Hearing Examiner who ruled on the propriety of Proposition 1.

> [T]he proposed initiative is legislative in nature because it seeks to establish a new policy in the city. At the end of 2014, the city council decided to amend the city code to preclude city employees, with limited exceptions, from inquiring about or ascertaining the immigration status of an individual. The proposed initiative would reverse this policy and affirmatively permit city employees to do so. The proposed initiative does not serve to dictate how a pre-existing scheme is carried out administratively. Rather, the proposed initiative makes a fundamental choice about what city employees are allowed to do in carrying out their duties. This is a policy question rather than a ministerial one.

CP 187 (Hearing Examiner decision). The Hearing Examiner was right.

To reach its conclusion that Proposition 1 is administrative, the Superior Court's opinion takes a statement of law from *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d at 10, out of context to expand the prohibition against ballot measures that change a policy that state law mandates be made by the local government into a general ban on initiatives changing any policy. CP 313. In *Our Water-Our Choice*!, the city of Port Angeles had voted to fluoridate the city's water supply. *Id.* at 5. The bar this initiative faced was that RCW 57.08.012 explicitly conferred on a specific entity—the board of commissioners of the water district—the power to decide whether to fluoridate water, and there was no provision for its decision to be challenged through initiative. *Id.* The Supreme

Court held that the legislature's grant of power to set policy governing water quality could not be "hindered" through initiative. *Id.* at 13–14.

Here, the Superior Court expanded the Supreme Court's prohibition on initiatives hindering those policies explicitly delegated to a municipality by the legislature to bar an initiative that seeks to replace a policy that is not explicitly delegated by the legislature. If the courts adopt this new interpretation—that a ballot measure that hinders any existing policy is outside the scope of initiatives—it would virtually wipe out the initiative process because the imposition of any new policy by the people could be considered to "hinder a pre-existing" policy put in place by elected officials.

An initiative is administrative only if it is carrying out policies—not if it is creating a new policy, as Proposition 1 proposes. The Superior Court clearly erred in concluding Proposition 1 was merely administrative.

IV. The City Council's rearrangement of the code sections to be amended by Proposition 1 does not render the initiative moot and mootness is not a ground for removing an initiative from the ballot.

The Superior Court found that Proposition 1 was invalid because during the initiative process the City Council recodified the Spokane Municipal Code sections to be amended by Proposition 1 and moved them to new places within the code. CP 313-14. This finding suffers from two defects. First, the question of whether the change in the municipal code invalidates Proposition 1 is not subject to pre-election judicial review. The only pre-election challenges to a referendum are to "noncompliance with procedural requirements" and "limited pre-election

review … where the subject matter of the measure was not proper for direct legislation." *Coppernoll*, 155 Wn.2d at 298, 299. Pre-election challenges to the substantive invalidity of a referendum specifically are "not allowed in this state because of the constitutional preeminence of the right of initiative." *Id.* at 297. The court below clearly erred by entertaining such a challenge. CP 313-14.

There is no authority for a trial court to enjoin an initiative based upon asserted mootness caused by a legislative body's re-codifying the statutes subject to the initiative. CP 314. This is a particularly troubling holding because it opens the door to allowing any legislative body to thwart the referendum process simply by re-codifying the relevant provisions or making minor changes to the relevant text, which is exactly what happened here. After the City Council knew Appellant had an initiative on this subject having been filed with the City in December of 2014 (CP 168), the City Council deliberately decided to move the sections being referred to in the initiative to a different section of the code so as to make the initiative amend or repeal sections of the code that no longer exist. CP 42 and 72 (passed on March 2, 2017).

The Supreme Court has warned about such manipulations. "We note, however, that deliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate will not be looked upon favorably by this court." *Citizens for Financially Responsible Gov't*, 99 Wn.2d at 351.

The Superior Court relied on *City of Yakima v. Huza*, 67 Wn.2d 351 (1965) to hold Proposition 1 was moot. Verbatim Report of Proceedings (VR) at 50.

However, *Huza* explicitly does not even address the potential validity of a proposition because of mootness. *Id.* at 360.

In *Huza*, the Respondent's proposition would have repealed two tax ordinances by reference to their numbers. *Id.* at 358. Prior to the election, the ordinances referenced in the proposition were superseded by a new ordinance with different terms. *Id.* There was no dispute that "no tax increase would be repealed" if the proposition had been enacted. *Id.* at 358. The issue of dispute in *Huza* was the Respondent's claim that if the proposition were adopted, taxpayers would be entitled to a refund of the amounts already collected. *Id.* The Supreme Court rejected that argument. "We are holding only that, where a tax ordinance has been previously validly enacted, it cannot be repealed retroactively, and the tax money heretofore collected validly cannot be refunded simply on the basis of the retroactive repeal." *Id.* at 359.

The Supreme Court noted in its opinion that its holding was limited to the unusual facts of the case.

> We are not holding that the city council could be enjoined from enacting this ordinance because of its potential invalidity. ... We are holding only that the city cannot be ordered to hold an election in this instance because it would be requiring the city to perform a useless act, and to expend public funds uselessly.

Id. at 360. The Supreme Court explicitly rejected the argument that *Huza* stands for the "proposition that once an ordinance is amended, the issue of a referendum pertaining to the original ordinance is moot." *Citizens for Financially Responsible Gov't,* 99 Wn.2d at 350. In contrast to the facts of *Huza,* Proposition 1 spells out the specific policies to be repealed within the text, and those policies remain, with nearly identical wording, in the current municipal code. Spokane Municipal Code

18.01.30(U) & 18.07.020. Proposition 1 does not fit the narrow fact pattern of *Huza* where the initiative could not have changed the law. *Huza*, 67 Wn.2d at 358.

The Superior Court treated *Huza* and *Citizens for Financially Responsible Gov't* as a menu of precedent that it could pick from rather than opinions that address different fact patterns. *See* VR at 50. The Superior Court stated that it was "more inclined to follow *Huza* than *Citizens for Financial Responsibility*" to find Proposition 1 invalid. *Id.* Yet *Huza* explicitly provides no support for the proposition that a voter initiative can be subjected to pre-election judicial review for validity. *Id.* at 360; *see also Coppernoll*, 155 Wn.2d at 298 & 299 (holding a pre-election challenge to the substantive invalidity of a referendum specifically "is not allowed in this state"). Furthermore, the Superior Court made the additional error of failing to recognize that Section 3 of Proposition 1 could not have been moot as a result of the recodification because it created a new section of the municipal code, unaffected by the recodification. *See Amalgamated Transit v. State,* 142 Wn.2d 183, 205 (2000). In addition, the Superior Court's holding that Proposition 1 is moot, VR at 49–50, is utterly inconsistent with its holding that Respondents will suffer injury from it. CP 313.

That Proposition 1 proposes to amend sections of the City code that have been relocated and given different code section numbers does not affect its meaning, for, if adopted by the electorate, it is to be construed according to normal "[r]ules of statutory construction [which] apply to initiatives." *Amalgamated Transit*, 142 Wn.2d at 205. When the citizenry legislates through initiative, "a court may determine the voters' intent by applying canons of statutory construction or by

'examining the statements in the voters pamphlet.'" *Pierce Cty. v. State*, 150 Wn.2d 422, 430 (2003) (quoting *Amalgamated Transit*, 142 Wn. 2d at 205–06). "Ascertaining what the people intended to accomplish by enacting initiative is, then, the main object of interpreting it." *State v. Felix*, 78 Wn.2d 771, 776 (1971); *see also* RCW 1.12.025(1) (specifying how conflicting legislative acts should be resolved). Furthermore, "statutes are to be construed to 'facilitate,' rather than frustrate, the right of initiative." *Coppernoll*, 155 Wn.2d at 297 n.4.

If Proposition 1 were adopted, the intent of the voters would be clear. Renumbering the code sections should not be a barrier to carrying out the will of the voters. In any event, that question should not have been the basis for refusing to allow people to vote on the measure. The question of intent should be answered only when and if the measure passes at the polls. The Superior Court clearly erred in enjoining the initiative on the basis of mootness.

V. The Superior Court erred in concluding that laches did not bar the requested injunctive relief; intent is not an element of laches.

The Superior Court rejected Respect Washington's laches defense, stating:

> [it] is without merit because Defendant failed to demonstrate that filing of the case was *intentionally delayed*, no evidence was provided that it was filed to avoid any subsequent appeals, and Respect Washington failed to provide evidence of actual quantifiable harm as a result of any delay.

CP 314 (emphasis added). Here, the Superior Court erred by creating an intent requirement for the doctrine of laches and ignoring the obvious harm to Respect Washington resulting from removing Proposition 1 from the ballot.

The motion under appeal was brought under the Uniform Declaratory Judgments Act (UDJA), RCW 7.24.010. "The UDJA does not have an explicit statute of limitations, but lawsuits under the UDJA must be brought within a reasonable time.'" *Auto. United Trades Org. v. State*, 175 Wn.2d 537, 541 (2012) (quoting *Brutsche v. City of Kent*, 78 Wn. App. 370, 376–77 (1995)). Reasonableness is determined by analogy to the time allowed for bringing a similar action as prescribed by statute, rule of court, or other provision. *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 159 (2013); *Brutsche v. Kent*, 78 Wn. App. 370, 376 (1995).

For an election-related challenge, the analogous statutes of limitations are quite short. For instance, a challenge to a ballot title must be commenced within five days. RCW 29A.72.080. A judicial challenge of a refusal to file an initiative must be filed in court within ten days. RCW 29A.72.180. A challenge to a ballot title for a City initiative is only ten days. RCW 29A.36.090.

Respondent's exhibits in the Superior Court show that it was widely known in the winter of 2016 that Proposition 1 would be on the 2017 ballot. CP 109-114. The resolution placing Proposition 1 on the ballot was adopted on February 22, 2016. Respondents waited over a year, until May 3, 2017, to file their complaint. CP 3. Respondents further delayed their motion for declaratory judgment until July 27, 2017. CP 29. This delay insured that it would be too late for Respect Washington to get a review of a decision prior to the November election. The Superior Court's decision was issued on August 29, 2017 (CP 313), just a week before the September 5, 2017 deadline for the ballots to be printed. CP 153-54.

Addressing Respondent's unreasonable delay, Appellants raised the affirmative defense of laches.

> Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay.

Auto. United Trades Org. v. State, 175 Wn.2d at 542. "Generally, laches depends upon the particular facts and circumstances of each case." *Lopp v. Peninsula Sch. Dist.*, 90 Wn.2d 754, 759 (1978). The Superior Court ignored the fact that dilatory conduct by a party is a bar under laches. *Peninsula Neighborhood Ass'n v. DOT,* 142 Wn.2d 328, 340 (2000).

Most puzzling is the Superior Court's finding that Respect Washington had shown no "actual quantifiable harm as a result of any delay." CP 314. Surely, the inability to get Proposition 1 on the November 2017 ballot and the inability to get appellate review in order to preserve the opportunity for people to vote at the November 2017 represents "damage to defendant." CP 158. The Superior Court's conclusion that a significant delay for Proposition 1's appearance on a ballot is not an injury is shocking. Interference with a right to vote is not without damage simply because an appellate court could reverse and allow votes to occur in the indefinite future.

Unless reversed, the Superior Court's decision opens the door to last-minute referenda and ballot challenges designed to avoid appellate review. Surely, a seventeen-month delay (February 22, 2016 to July 27, 2017) to press a claim, when it leaves only seven days for appellate review of a decision (*Cf.* CP 312 (August 29, 2017 date of order) *with* CP 154 (deadline for delivery of ballots to the printer of September 5, 2017)), is unreasonable.

CONCLUSION

For the reasons stated above, the Court should reverse the Superior Court's Opinion of August 29, 2017 and order the City of Spokane to hold a special election for Proposition 1.

Respectfully submitted this 12th day of February, 2018,

Richard M. Stephens WSBA #21776

STEPHENS & KLINGE LLP
Attorneys for Appellant
Respect Washington

DECLARATION OF SERVICE

I, Richard M. Stephens, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Stephens & Klinge LLP in Bellevue, Washington.

On February 12, 2018, I caused a true copy of the foregoing to be served on the following:

Rick Eichstaedt Center for Justice 35 West Main, Suite 300 Spokane, WA 99201	☐ Hand Delivery via Legal Messenger ☐ First Class U.S. Mail ☐ Federal Express Overnight ☒ E-Mail: ricke@cforjustice.org ☐ Other _____
Nathaniel Odle Assistant City Attorney Office of the City Attorney 808 W Spokane Falls Blvd Spokane, WA 99201	☐ Hand Delivery via Legal Messenger ☐ First Class U.S. Mail ☐ Federal Express Overnight ☒ E-Mail: nodle@spokanecity.org ☐ Other _____
Dan Catt Prosecuting Attorney's Office W 1115 Broadway Avenue Spokane, WA 99260	☐ Hand Delivery via Legal Messenger ☐ First Class U.S. Mail ☐ Federal Express Overnight ☒ E-Mail: Catt@spokanecounty.org ☐ Other _____

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 12th day of February, 2018, at Bellevue, Washington.

Richard M. Stephens