No. 86290-7

(King County Superior Court
No. 11-2-13620-5SEA)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE CITIZENS AGAINST THE TUNNEL; ELIZABETH A. CAMPBELL, in her capacity as Seattle Citizens Against The Tunnel's Campaign Manager and the principal initiative petitioner, Appellants, v. CITY OF SEATTLE, A Washington municipal corporation, Respondent, and Washington State Department of Transportation, Defendant-Respondent.	**REPLY IN SUPPORT OF EMERGENCY MOTIONS:** **FOR STAY OF TRIAL COURT DECISION** **AND** **FOR ACCELERATED REVIEW**

This reply is filed by Appellants, Seattle Citizens Against the Tunnel (SCAT) and Elizabeth Campbell, the sponsor of City of Seattle Initiative No. 101[1] to the City of Seattle's (City) Response and the Washington State Department of Transportation's (WSDOT) Answer.

[1] The first page of Appellants' Emergency Motion incorrectly refers to the initiative as Initiative No. 1, instead of Initiative 101.

I.

APPELLANTS' RESPONSE TO THE CITY

A. The Issues On Appeal Are Debatable.

The City argues in response to the request for stay that the issues on appeal are not debatable because of an asserted similarity between Initiative 101 and that in *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 620 P.2d 82 (1980). City Response, at 8. Although the general subject of the initiative at issue in *Seattle Bldg & Trades* related to a state highway project, that is where the similarity to Initiative 101 ends.

The Seattle initiative in *Seattle Bldg. & Trades* sought to prohibit the State from taking highway related actions regarding I-90, including the acquisition of property and the Court explained that title to the property vested in the State. 94 Wn.2d at 747. The Court noted that the City could not ban construction of I-90. *Id.* at 748. In contrast, Initiative 101 does not limit the State in any way, nor nullify administrative actions. It narrowly focuses on City policy and the people of Seattle have a right to legislate policy regarding the City even if they cannot stop the State.

B. The City Would Not Suffer More Harm From A Stay

The City claims that the harm it would endure if a stay is granted is "[t]he cost of conducting an unnecessary election, both in terms of money

and voter confusion." City Response, at 10. First, the City never provides a shred of evidence of the cost of conducting an election on Initiative 101, even after SCAT argued on summary judgment that the City failed to show any harm that would authorize relief under the Uniform Declaratory Judgments Act (UDJA).

Moreover, this is not a situation where, if Initiative 101 were placed on the ballot, it would be the only matter on the ballot and the sole basis for the entire cost of holding an election. Seattle voters will be voting in November on three City Council races, an education levy and other local matters. See http://www2.seattle.gov/ethics/votersguide.asp. The City fails to explain how including Initiative 101 in an already planned election will create any significant costs.

Second, the City forgets that more than 27,000 voters signed petitions to place Initiative 101 on the ballot this year. These voters want a voice regarding the City's role in the deep-bore tunnel before it is too late. Under the City's flawed reasoning, these tens of thousands of concerned citizens would not be harmed by waiting until next year to vote. The City fails to acknowledge that WSDOT is "poised to proceed" with construction as soon as the Federal Highway Administration (FHWA) makes the final decision approving the tunnel. WSDOT Answer, at 17.

The right to vote, to exercise free speech and to petition government outweighs the speculative harms alleged by the City.

To support these propositions of harm, the City relies on a California Court of Appeal decision, rather than evidence of cost of an election or Washington precedent that potential voter confusion is a harm that outweighs the right to vote, speak and petition government. City's Response, at 10-11 (quoting *City of Riverside v. Stansbury*, 155 Cal. App. 4th 1582, 1592-93, 66 Cal. Rptr. 3d 862 (2007)).

The City capitalizes on this one California Court of Appeal decision about the "cost of an election" and "creating community divisions concerning a measure which is **for any reason legally invalid**." 155 Cal. App. 4th at 1592 (emphasis added), *quoted in* City's Response, at 11.[2] The *Stansbury* court does not reveal the evidence upon which the statement of cost is based, and in the present case there is no such evidence. Moreover, the blanket statement that "creating community divisions" is a reason for prohibiting a public vote shows a much more hostile view to the right of the initiative than exists in Washington law.

[2] The quotation from *Stansbury* that a vote may be prohibited on a measure which "is for any reason legally invalid" represents a far different view than Washington jurisprudence. In Washington, only questions as to whether a matter is properly within the scope of the initiative power may be decided pre-election and allegations of constitutional defects in an initiative must be resolved after the election. *Coppernoll v. Reed*, 155 Wn.2d 290, 302, 119 P.3d 318 (2005).

This Court in *Maleng v. King County Corrections Guild*, 150 Wn.3d 325, 76 P.3d 727 (2003), rejected a similar argument.

> The respondent's final argument is that Initiative 18 contains some confusing and possibly conflicting language in the provisions regarding the initiative's implementation. Such issues are not within our narrow inquiry on whether a specific proposal is within the scope of the initiative power and will not be addressed here.

Id. at 336. While Appellants reject the notion that Initiative 101 is confusing, that is simply not a "harm" that justifies keeping a matter from the voters.[3]

Finally on this point, the City argues that Washington law allows pre-election review when the proposed initiative is beyond the scope of the initiative power. City Response, at 11 (quoting *City of Port Angeles v. Our Water-Our Choice*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010)). While this correctly states recent Washington law, it says nothing about the harm to the City if the stay is issued. While Appellants do not believe that pre-election review is **necessary,** their motion to accelerate review is intended to allow the City to have ultimate resolution of the issues prior to the November election.

[3] Similarly, then Court of Appeals Judge Gerry Alexander, explained in *Save Our State Park v. Hordyk*, 71 Wn.App. 84, 90-91, 856 P.2d 734 (1993), that the initiative process is not always neat and tidy, but it is part of our system of government and a process which is deserving of protection.

C. The Issue Here Is Pressing, Unlike In *Maleng*.

The City relies on *Maleng*, 150 Wn.3d 325 in arguing that Initiative 101can be delayed until after the November 2011 election. City Response, at 12. While *Maleng* is similar in that the Court granted accelerated review, the initiative in *Maleng* was a change to the size of the King County Council and was not tied to a particular pressing issue of public controversy. Initiative 101 is obviously connected with a current project of public controversy. Here, both WSDOT and the City claim they are ready to proceed with a tunnel. Any impact I-101 might have on that project, may become moot by the passage of time.

D. The City's Efforts To Obtain A Decision On The Merits Is A Red Herring.

Appellants do not dispute that the City made efforts to have a ruling on the merits prior to the election. Nevertheless, the City unleashes its tirade about Appellant Campbell's motion to dismiss, motion to strike and the scheduling conflicts of her former counsel. City Response, at 13-14. All of this is a red herring. The bottom line is that the Superior Court did issue a decision on the merits, not only prior to the election, but prior to the August 16, 2011 deadline for submission of measures to the County election officials.

Moreover, the City argues that by seeking a stay, Appellants seek to thwart pre-election review. There are two alternative problems with the argument. First, Appellants seek both a stay and accelerated review so that the Court can resolve the issues prior to the election. If the Court grants both motions, the City will have exactly what it claims it wants—a final decision prior to the November election. Second, that pre-election review is authorized does not mean that it is necessary. *See, e.g., City of Sequim v. Malkasian,* 157 Wn.2d 251, 253, 138 P.3d 943 (2006) (although pre-election review is authorized, review by the Supreme Court was after the election).

II.

APPELLANTS' RESPONSE TO WSDOT

A. WSDOT'S Complaining About Direct Review Is Contrary To RAP 8.3 And This Court's Scheduling Order.

WSDOT argues that Appellants did not argue for direct review in their emergency motions and that the motions "should be denied for that reason alone." WSDOT Answer, at 6. It cites no authority for that proposition, perhaps because the Rules of Appellate Procedure provide just the opposite.

RAP 8.3 provides that an "appellate court has authority to issue orders, **before or after acceptance of review**." RAP 8.3 (emphasis

added). This Court can issue an emergency order prior to deciding whether to accept direct review.

Moreover, WSDOT's argument ignores that this Court issued a scheduling order on July 25, 2011, which makes Appellants' Statement of Grounds for Direct Review due on August 6, 2011. Therefore, the Court will have the Statement of Grounds for Direct Review prior to considering the pending emergency motions on August 8, 2011.[4]

B. The Issues Presented In This Appeal Are Debatable.

WSDOT argues that "local initiative power, unlike state-wide initiatives, is subject to pre-election review." WSDOT Answer, at 8 (capitalization from heading removed). While local initiatives have been subject to pre-election review, it is simply not true that state-wide initiatives are not. *See, e.g., Philadelphia II v. Gregoire*, 128 Wn.2d 707, 911 P.2d 389 (1996).[5] Moreover, Appellants' Motions for Stay and for Accelerated Review would not frustrate WSDOT's interest in obtaining pre-election review.

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[4] The emergency nature of the motions exists regardless of whether the Court decides to retain direct review.

[5] WSDOT cites *Coppernoll,* 155 Wn.2d at 299, for the proposition that pre-election review is proper for local initiatives because the cases involve "more limited powers of initiative under city or county charters." WSDOT Answer, at 8. While the initiative power in some jurisdictions might be limited, the Seattle charter is broad. Article IV, Section 1. A. Additionally, this Court has held that even "local initiative and referendum provisions reserve a 'fundamental right of a governed people to exercise their inherent right and constitutional political power over governmental affairs.'" *1000 Friends of Washington v. McFarland,* 159 Wn.2d 165, 193, 149 P.3d 616 (2006) (quoting *Paget v. Logan*, 78 Wn.2d 343, 352, 474 P.2d 247 (1970)).

The only way that WSDOT can argue that Initiative 101 conflicts with a statutory delegation of authority to the City Council as a corporate entity is to misinterpret Initiative 101. RCW 47.12.040 authorizes the "governing body" of the City to directly "lease, sell, or convey" land to the state for use for roads or highways. This is not disputed. Initiative 101 does not prohibit the City from doing any of these activities, nor does it prohibit the state from condemning land for roads or highways.

In its effort to manufacture a conflict between Initiative 101 and RCW 47.12.040, WSDOT argues completely without authority that these terms include "use." In light of the presumption favoring the right of initiatives[6] and judicial reluctance to resolving issues that are premature or unripe, the Court should not assume that WSDOT's interpretation is correct and that the cited portion of Section 2 of the initiative conflicts with RCW 47.12.040.

Similarly, WSDOT's reliance on RCW 47.28.140 is similarly misplaced. WSDOT Answer, at 10. That statutes authorizes the "governing authorities" to enter into cooperative agreements with WSDOT regarding state highways. It then identifies such agreements related to the replacement of the Alaskan Way Viaduct. WSDOT Answer, at 11.

[6] *Maleng*, 150 Wn.2d at 334.

WSDOT then engages in a linguistic sleight of hand. "Appellants argue that I-101 does not eliminate the City's authority to contract with WSDOT. This is untrue." WSDOT Answer, at 11. First, Section 2 of Initiative 101 does prohibit the City from using **its** property for a tunnel. But it says nothing directly about what type of agreements it can have with the State for the State to use State property for a tunnel.

Second, WSDOT argues that Section 3 of Initiative 101, if approved at the polls, would repeal ordinances in conflict with the initiative. WSDOT Answer, at 12. It asserts that this section would "void all four agreements" it has with the City and that such would unconstitutionally impair its contracts with the City. *Id.* There are several reasons why WSDOT arguments should be rejected.

One, WSDOT's "impairment of contracts" claim is plainly unripe. One clear message from *Coppernoll v. Reed* is that whether the provisions of the measure are illegal or unconstitutional "is not allowed in this state because of the constitutional preeminence of the right of initiative." 155 Wn.2d at 297 (citations omitted). Yet, that is what was argued in *Coppernoll* by the challengers to the initiative, as does WSDOT here.

> Petitioners instead argue that these sections are unconstitutional and accordingly exceed the legislative power as a matter of law. However, this argument directly contradicts the narrow exception that we created in *Philadelphia II*. "[W]hile a court may decide whether the

> initiative is authorized by article II, section 1, of the state constitution, it may not rule on the constitutional validity of a proposed initiative" *Id*. at 717.

Coppernoll, 155 Wn.2d at 302.

> It is abundantly clear that here petitioners' claim as to the scope of the legislative power is a **pretext for a challenge to the possible constitutionality** of several sections of I-330. Because petitioners offer no theory under which I-330 exceeds the legislative power, other than this allegation of some sections unconstitutionality, petitioners' claims are not justiciable.

Id. at 305 (emphasis added).

Two, while Section 3 of Initiative 101 repeals ordinances in conflict with Section 2, WSDOT does not identify any such ordinances. Rather, it argues that the authority for the agreements is RCW 47.28.140. Certainly, Initiative 101 does not purport to repeal that statute.

Three, WSDOT's assertion that the "repeal of an ordinance, and not the subject matter of the ordinance (*i.e*., the four Agreements) is an absurd result if I-101, Section 3 is enacted" is unpersuasive. Appellants may wish that the agreements could be repealed, but that does not mean that the initiative purports to effect such a repeal. The initiative simply does not purport to repeal *agreements*.

Four, WSDOT's attempt to distinguish *City of Yakima v. Huza*, 67 Wn.2d 251, 407 P.2d 815 (1965), is unpersuasive. Just like taxes collected under a valid ordinance at the time are not rendered invalid

based on a repeal of the tax ordinance, agreements entered into under a valid ordinance at the time are not necessarily rendered invalid by the repeal of an authorizing ordinances. A person hired under one civil service statute is not automatically fired if the statute is repealed and replaced with another statute. Given the claim that the agreements are authorized by a state statute and not a City ordinance, there is no basis for concluding that a repeal of ordinances invalidates agreements based on a state statute.

Finally, WSDOT argues that Initiative 101 conflicts with all of Title 47, giving the State the authority to locate state highways. WSDOT Response, at 14-15. The fundamental problem with WSDOT's argument is that Initiative 101 does not purport to prohibit WSDOT from doing **anything.** Additionally, while the initiative in *Seattle Bldg & Trades* sought to "nullify past acts of the Mayor and City Council," Initiative 101 does not nullify acts other than ordinances conflicting with the initiative. The City and WSDOT have failed to come up with even one.

WSDOT's determined effort to characterize Initiative 101 as having a bigger bite than it likely does reveals it desperately does not want a recorded vote by the citizens of Seattle on a project extremely important to WSDOT. By making the initiative worse than it is, WSDOT plainly seeks to avoid public criticism—an interest not projected by this Court's

careful protection of the right of citizens to be heard in the initiative process. *Futurewise v. Reed*, 161 Wn.2d 407, 410-11, 166 P.3d 708 (2007).

C. Appellants' Motions Do Not Preclude Pre-election Review.

As addressed above, Appellants do not dispute that the validity of initiatives may be addressed prior to an election only if the question is whether the entire initiative is beyond the scope of the initiative power. Appellants' motion for stay and accelerated review preserve that option to the Court.

Finally, on this point, WSDOT argues that it "should not be required to wait for an invalid initiative to go through an election, then an appeal process. The need to replace the damaged Viaduct is now, and the WSDOT and City are poised to proceed." WSDOT Answer, at 16-17. The initiative does not require WSDOT to wait or do anything for that matter. Only if the initiative is approved by the voters will WSDOT need to even consider how to respond to it. If it chooses to wait, that is a decision of its own making.

D. Section 1 Is Not Meaningless Without The Remaining Sections.

WSDOT relies on two Court of Appeals decisions, *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 393, 93 P.3d 176 (2004) and *Priorities First v. City of Spokane*, 93 Wn. App. 406, 968 P.2d 431 (1998),

regarding the severability of initiative sections. It also relies on *Coppernoll*, 155 Wn.2d at 304-05, where the Court indicated that it would not "edit" the initiative by allowing some sections to go forward and not others.

On the severability question, *Coppernoll* is distinguishable in that it was a complicated twenty-three sectioned initiative involving changes to the tort damages in Washington. The Ballot Summary read as follows:

> This measure would change healthcare liability laws by: limiting recovery for noneconomic damages; limiting attorney fees; requiring advance notice of lawsuits; shortening time for filing cases; expanding evidence of payment from other sources and eliminating subrogation for those sources; authorizing mandatory arbitration without trial; authorizing periodic payments of future damages and terminating those payments under certain circumstances; eliminating liability for other persons or entities in some cases; and limiting damage recovery from multiple healthcare providers.

Id. at 293-94. In contrast, Initiative 101 is far simpler, convening a single and consistent message about replacement of the viaduct with a tunnel. Severability is not nearly as problematic here as it was in *Coppernoll*.

WSDOT also argues that Section 1 is not a statement of legislative policy statement because it urges the Council to take action and that in involved different legislative vehicle than the comprehensive plan in *Westside Hilltop Survival Comm. v. King County*, 96 Wn.2d 171, 179. 634 P.2d 862 (1981). That Section 1 makes a policy statement in a manner

different than the one in *Westside* does not mean that policy statements are not the expression of legislative power. Just as the City Council or Legislature declares policy, the voters are entitled to declare their view of the applicable policy as well.

E. WSDOT's Injury Is Not Existent, Let Alone Substantial And Its Bond Request Is Outrageous

WSDOT's claim about the burden of a public vote is based on the importance of replacing the Alaskan Way Viaduct. Despite WSDOT's protestations, it is far from clear that Initiative 101 would prohibit the replacement of the viaduct. It has absolutely no impact on decisions or actions made or to be made by WSDOT.

WSDOT's argument about costs foreshadows its briefing, if further briefing is allowed,[7] on the subject of a bond. Its claim of a cost of anywhere from $3 million to $54 million if the project is delayed assumes, if Initiative 101 is allowed to go to a vote, it passes at the polls, and that it is ultimately declared invalid, WSDOT would suffer delay of WSDOT's project. There is nothing to support the conclusion that initiative, if approved at the polls, would delay WSDOT. Of course, all of the proceeding must be met for WSDOT to suffer any prejudice. However, the lack of any evidence that the initiative would actually cause WSDOT

[7] Appellants do not agree that additional briefing is appropriate on bonding.

to delay its project is reason to defeat WSDOT's prejudice and bond argument entirely.

Instead, the assertion of multimillion dollar burdens is simply designed to encourage the Court to impose an impossible burden on Appellants to ensure that people are not allowed to express their views at the polls. The argument is also strained in light of WSDOT's recognition that environmental review of this project is not completed. WSDOT Answer, at 2.

WSDOT's claim asserts that allowing this case to move forward for even one week will cost millions of dollars ignores that WSDOT is prohibited by federal law from proceeding with final tunnel design or construction until the FHWA issues its record of decision. 40 CFR 1506.1(a)(2). The Ninth Circuit U.S. Court of Appeals has held that a premature " 'irreversible and irretrievable commitment of resources' " violates the National Environmental Policy Act. *Metcalf v. Daley*, 214 F.3d 1135, 1143(9th Cir. 2000) (quoting *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir.1988)). The final project decision, as Mr. Preedy acknowledges in his declaration supporting WSDOT's response, **has not yet been made.** Theoretically, the FHWA could reject the deep-bore tunnel in favor of an alternative such as a new elevated highway. Thus, it is disingenuous to argue that the project must zoom full-speed ahead

before this Court can conduct even an expedited review of the important legal questions in this case.

CONCLUSION

Appellants urge the Court to grant the pending motion to stay so that the possibility of a vote on this initiative is preserved until the Court can review the merits. Additional, accelerated review is appropriate to the extent that resolution of the merits is necessary prior to the election.

RESPECTFULLY submitted this 1st day of August, 2011.

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DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On August 1, 2011, I caused the foregoing document to be served upon the following persons or entities via the following means:

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

Executed this 1st day of August, 2011, at Bellevue, Washington.

s/ Linda Hall
Linda Hall