NO. 86290-7

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, Plaintiff-Respondent, v. SEATTLE CITIZENS AGAINST THE TUNNEL; ELIZABETH A. CAMPBELL, as principal initiative petitioner, Defendants-Appellants, and WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Defendant-Respondent.	STATEMENT OF GROUNDS FOR DIRECT REVIEW BY THE SUPREME COURT RAP 4.2

I. INTRODUCTION

Appellants seek direct review of the King County Superior Court's July 19, 2011 decision that the City of Seattle may not place Initiative 101 on the ballot. This appeal will determine the scope of the November 8, 2011 election in Seattle, affect citizens' rights to influence development of a multi-billion-dollar project to replace the

Alaskan Way Viaduct, and define the rights of voters and initiative sponsors throughout the state hereafter. Thus, this is a "case involving a fundamental and urgent issue of broad public import" warranting direct review under RAP 4.2(a)(4).

This case will determine for the first time whether a city may sue initiative sponsors without meeting requirements of a new statute, the Washington Act Limiting Strategic Lawsuits Against Public Participation, RCW 4.24.525. Adopted in 2010, the act makes it more difficult for governments to sue citizens based on "action involving public participation and petition," such as exercising petition rights. The trial court held that this suit was *not* based on public participation or petition, although it was filed against these citizens solely because they submitted initiative petitions to the City, and the statute's protections were not applied. Whether the statute was misapplied is an issue of first impression, and therefore has broad and urgent public importance.

This appeal also will clarify when a trial court may strip part of an initiative from the ballot in response to a pre-election challenge to an initiative's subject matter. This Court has yet to address that question, except in dicta in Coppernoll v. Reed, 155 Wn.2d 290 (2005).

Also of pressing public importance is the main underlying dispute: whether Seattle voters have authority to prohibit use of City-owned property for a state highway project. Resolving that issue will illuminate, for voters in all cities, how they may influence their own city's role in permitting a controversial state project. This case also presents the fundamental question of whether the threshold requirement of justiciability, when applied to a pre-election initiative challenge, includes showing some injury in fact from allowing people to vote.

The Seattle tunnel project itself is of major public importance due to its enormous impact on the environment, traffic, jobs, and government spending. Because this appeal could affect whether the viaduct replacement project moves forward as presently planned, or in some politically altered fashion, it has sufficient public importance for direct review by this Court.

The urgency of these issues cannot be questioned. The state is poised to proceed with the tunnel project as soon as the Federal Highway Administration approves it, possibly days from now. In sum, because this appeal presents urgent and fundamental issues of broad public importance, this Court should grant direct review.

II. NATURE OF THE CASE AND DECISION

Initiative 101 says in relevant part:

> Sec. 1. ….The Council is urged to make changes in the City's Comprehensive Plan to retain options for addressing the Alaskan Way Viaduct, including repair or replacement with an elevated structure. Additionally, the Alaskan Way Viaduct is an essential public facility both as a bypass highway and as an access facility to downtown and northwest Seattle neighborhoods. The site for this essential public facility should not be eliminated.
>
> Section 2. A new Section 15.55 of the Seattle Municipal Code is added to read as follows: The construction, operation or use of any City right-of-way or City-owned property wherever situated for a tunnel for vehicular traffic, or tunnel-related facility, to replace in whole or in part the Alaskan Way Viaduct is hereby prohibited.
>
> Section 3. All ordinances and/or parts of ordinances in conflict with the provisions of this measure are hereby repealed.
>
> Section 4. If any provision of this ordinance or its application to any person or circumstances is declared illegal, the remainder of the ordinance…shall not be affected thereby.

Respondent City of Seattle's Appendices To Its Response to Motion for Stay ("City Appendices"), Appendix A, Docket 12, Exhibit 2, p. 3.

When appellants submitted sufficient signatures to place Initiative 101 on the ballot, the City of Seattle filed a Complaint for Declaratory Judgment alleging that the measure is beyond the scope of the local initiative power. City Appendices, Appendix A, Docket 1.

Specifically, the City sought a declaration that the initiative may not be placed on the November ballot because only the City Council, and not the voters, can decide the subject matter of the initiative. Id., p. 6.

The suit named as defendants Seattle Citizens Against the Tunnel (SCAT), Elizabeth Campbell "in her capacity as Seattle Citizens Against the Tunnel's campaign manager and the principal initiative petitioner," and the Washington State Department of Transportation (WSDOT). Id. Although WSDOT was a "defendant," it filed an Answer agreeing with the City's request for declaratory judgment, and it asserted cross-claims against SCAT and Campbell requesting the same relief as the City. Appendix 1.

The City moved for summary judgment, arguing that Initiative 101 exceeds voters' authority because it conflicts with RCW 47.12.040. Appendix 2. RCW 47.12.040 says: "Whenever it is necessary to secure any lands for…state highway purposes, the title to which is…in any political or municipal subdivision of the state,…the board of directors or governing body of any such political or municipal subdivision are authorized to directly lease, sell, or convey by gift the land or any interest therein to the state of Washington…" Although Initiative 101 does not block the City Council's ability to "lease, sell, or

convey by gift" lands for state highway purposes, but only restricts the "use" of City-owned land which has *not* been sold or gifted to the state, the City argued that Initiative 101 unlawfully usurps the Council's authority under RCW 47.12.040. Appendix 2, p. 8.

The City also sought summary judgment based on RCW 47.28.140, which authorizes WSDOT and city "governing authorities" to "enter into cooperative agreements" to build or improve highways. Id., p. 10. Although Initiative 101 does not purport to repeal or prohibit city-state agreements, the City argued that the initiative nevertheless conflicts with RCW 47.28.140. Id.

Campbell filed a Special Motion to Strike the complaint and summary judgment motion under RCW 4.24.525, a new statute designed to protect citizens from having to defend costly suits based on public participation or petitioning the government.[1] Appendix 3. Under RCW 4.24.525, discovery and all prior motions are automatically stayed upon the filing of a special motion to strike. RCW 4.24.525(5)(c). Then, if the moving party proves by a preponderance

[1] RCW 4.24.525(2) defines "action involving public participation" broadly as including, but not limited to, submitting a document in a governmental proceeding or any "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." The statute provides a "right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion." RCW 4.24.525(5)(d). Direct review is consistent with the statutory right of expedited appeal.

of evidence that the lawsuit is "based on an action involving public participation and petition," the burden of proof shifts to the plaintiff to establish by "clear and convincing evidence" that it will probably prevail on its claims. RCW 4.24.525(4)(b). Thus, only if the plaintiff meets a heightened standard of proof may it proceed with claims based on citizens' public participation.

In this case, no heightened standard was imposed. Over Campbell's objection, the trial court granted the City's motion to hear both the special motion to strike *and* the City's summary judgment motion on the same day.[2] City Appendices, Appendix A, Docket 62. Thus, there was no stay of the summary judgment motion pending an initial determination as to whether the action was based on public participation. Id. There was no burden-shifting. Id. And Campbell and SCAT had to continue spending money defending the suit without any protection from RCW 4.24.525.

In response to the City's summary judgment motion, SCAT argued that Section 1 of Initiative 101 is merely a policy statement and therefore should be placed on the ballot even if other sections are not. Appendix 4, p. 2. SCAT also argued that there was no justiciable

[2] The Court scheduled both motions for hearing on the same day, although it was not the same day proposed by the City.

controversy because the City and WSDOT had not proven that allowing a public vote would cause "injury in fact" as necessary for standing. Id., p. 5. SCAT argued that Initiative 101 does not conflict with state law or exceed the authority of voters, and that whether it affects existing City-state agreements was not a ripe issue because the initiative had not been approved by voters. Id., pp. 7-14. Finally, SCAT argued that pre-election review would interfere with free-speech rights. Id., p. 16.

The trial court granted the City's summary judgment motion at the same time it denied Campbell's motion to strike. Notice of Appeal, Exhibit A (final order). Only then did the court find for the first time that "This lawsuit was not 'based on an action involving public participation and petition.'" Id., p. 3. In granting summary judgment, the trial court found that Initiative 101 exceeds the local initiative power "because it purports to exercise a power that the state legislature has directly delegated to cities' governing bodies." Id. The court also held that Section 1 of Initiative 101 is not severable because it is "inextricably intertwined" with other sections. Id. The court did not address appellants' justiciability arguments although, in Coppernoll v. Reed, 155 Wn.2d 290, 300 (2005), this Court said, "Justiciability is a

threshold inquiry and must be answered in the affirmative before a court may address a litigant's claim."

III. ISSUES PRESENTED FOR REVIEW

1. When the Legislature adopted RCW 4.24.525 to allow citizens to participate in matters of public concern without fear of reprisal, and when the statute protects any statement made in a public forum in connection with a public concern as well as any exercise of free-speech and petition rights, does the statute protect citizens who are sued to determine whether an initiative is within the scope of the initiative power?

2. When a citizen defending a lawsuit against public participation files a special motion to strike under RCW 4.24.525, and when the statute says that all motions and discovery "shall be stayed" upon such filing, does a trial court err by failing to stay the dispositive motion which is the subject of the motion to strike?

3. When RCW 4.24.525 requires that, once a citizen proves that a claim is based on public participation, the plaintiff must show "clear and convincing evidence" that it will probably prevail on the claim before the case may proceed, does a trial court err by granting summary judgment to the plaintiff without first determining if the claim is based on public participation?

4. When a statute protecting citizen petitioners from suits was enacted after this Court decided City of Sequim v. Malkasian, which held that a city may sue an initiative petitioner instead of the government official responsible for placing an initiative on the ballot, should Malkasian be revisited?

5. Because justiciability is a threshold requirement for all cases, does a trial court err by preventing an initiative vote without addressing whether the challenge was justiciable and, in particular, whether the plaintiff would suffer an injury in fact if people are allowed to vote?

6. Even if portions of an initiative were beyond the scope of the initiative power, does a trial court err in prohibiting a vote on the initiative's declaration of policy which is not challenged as being beyond the scope of the initiative power?

7. When RCW 47.12.040 authorizes city governing bodies to "lease, sell, or convey" city land to the state for highway purposes, and when an initiative seeks to prohibit "use" but not conveyance of city land for a state highway project, is a vote on the initiative permitted?

8. When RCW 47.28.140 authorizes state and city "governing authorities" to "enter into cooperative agreements" to build highways, and when an initiative does not prohibit city-state agreements, is a vote on the initiative permitted?

9. When the state argues that an initiative would unconstitutionally impair contracts by interfering with existing city-state agreements, and when the initiative has not yet passed, is the issue not ripe for review unless the initiative passes, as indicated by this Court in Coppernoll?

10. Are constitutional rights of free speech and petition violated when government prevents citizens from voting on a matter of public concern, and when the subject matter is within the authority of voters?

IV. GROUNDS FOR DIRECT REVIEW

RAP 4.2(a)(4) allows this Court to directly review a trial court decision when the case involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." Each of the issues above meets that test. In fact, the public-interest scale could hardly tip higher, as the rights of Seattle voters as well as citizen petitioners throughout the state are at stake.

This Court often grants direct review in cases involving ballot measures. See, e.g., 1000 Friends of Wash. v. McFarland, 159 Wn.2d 165, 171 (2007); Washington Citizens Action of Washington v. State, 162 Wn.2d 142, 151 (2007); Pierce County v. State, 159 Wn.2d 16, 26 (2006); Maleng v. King County Corrections Guild, 150 Wn.2d 325, 329 (2003); Citizens for Responsible Wildlife Management v. State, 149 Wn.2d 622, 626 (2003); Snohomish County v. Anderson, 123 Wn.2d 151, 155 (1994). And while not all of these cases were pre-election challenges to voter authority, they all present a common question: whether the will of the people may prevail. Few questions carry broader public import.

Anytime an initiative attracts enough voter signatures to qualify for the ballot, its public importance is plain. In this case, more than 27,000 voters signed petitions to place Initiative 101 on the November ballot, demonstrating broad concern about the City's handling of the tunnel. The urgency of the case is inherent in the looming election and the eagerness of the City and WSDOT to proceed with the project.

And while this statement does not directly address the merits of the issues, it shows they are far more weighty than alleged in City and WSDOT responses to the emergency motion for stay. For example, it

is not true that this Court has already established a rule regarding the severability of initiative sections. Rather, in Coppernoll, this Court simply mentioned in the final paragraph of its opinion – after resolving the case on other grounds - that a lawsuit challenging only three of 20 sections raises "obvious questions" about staying true to the intent of those who signed the initiative. 155 Wn.2d at 304-05.[3] To acknowledge difficult questions is not to declare a rule.

It is important to note, too, that Washington appellate courts have yet to construe RCW 4.24.525 since it was adopted in 2010. Whether the new law applies to suits based on initiative petitions is a fundamental and urgent question of broad public importance requiring prompt determination by this Court.

Moreover, RCW 4.24.525 was adopted after this Court issued sharply divided opinions in City of Sequim v. Malkasian, 157 Wn.2d 251 (2006), regarding the fairness of suing initiative sponsors. In Malkasian, this Court held that a city may sue individual citizens to defend initiatives even though such citizens are not elected or

[3] The Court in *Coppernoll* did not prohibit any part of the initiative from being placed on the ballot—another reason why a hypothetical as to what would happen if part should be barred is purely dicta.

appointed to represent the public interest, and even though there is no statute requiring reimbursement of their attorney fees if they successfully vindicate the public's right to vote. 157 Wn.2d at 270-71. In a part-concurring, part-dissenting opinion, Justice Chambers lamented that "permitting a city to choose its own representative to defend an initiative petition even if it is a sponsor, may allow '[t]he plaintiff [to] set up a straw man defendant whom it can easily knock over,' " but the alternative – suing the city clerk to defend an initiative opposed by the city - is not satisfactory either. Malkasian at 289. Justice Chambers wrote:

> Until the legislature creates an appropriate mechanism, the courts, in furtherance of equity and the proper functioning of the democratic process, have a duty to ensure that those willing and able to vigorously defend the initiative are the parties defending it before the court.

Id.

The "mechanism" that the Legislature came up with was RCW 4.24.525, which protects citizen initiative sponsors from having to "vigorously defend" suits unless the challenger *first* shows clear and convincing evidence that it will prevail. RCW 4.24.525 also changes the landscape regarding attorney fees. Under RCW 4.24.525(6)(a), any citizen who wins a special motion to strike is entitled to a $10,000

award, *plus* reasonable attorney fees for each motion on which the citizen prevailed.

As the Legislature declared in a statement of purpose for RCW 4.24.525, "It is in the public interest for citizens to participate in matters of public concern…without fear of reprisal through abuse of the judicial process." 2010 c 118(1)(d). The act was designed to strike a balance between the right to file suit and the rights of citizens to participate in matters of public concern. 2010 c 118(2)(a). The Legislature said it is "concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." 2010 c 118(a). This case places squarely before this Court how to carry out the Legislature's intent when a citizen is sued to defend an initiative, and must face two teams of tax-funded lawyers filing two sets of briefs with the goal of depriving all citizens of Seattle of an initiative vote.

In sum, this case is an important opportunity to clarify application of a new law designed to protect public participation, to define the bounds of voter authority regarding local conditions for state projects, and to address when courts may edit initiatives to preserve an

opportunity to vote. These are pressing and broadly important issues meriting direct review.

V. CONCLUSION

For the foregoing reasons, this Court should grant review.

Dated this 5th day of August, 2011.

Respectfully submitted,

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