NO. 91551-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SPOKANE ENTREPRENEURIAL CENTER, et al.,

Petitioners,

v.

SPOKANE MOVES TO AMEND THE CONSTITUTION, et al.,

Respondents.

MEMORANDUM OF AMICUS CURIAE ON BEHALF OF THE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF PETITIONERS

Andrea L. Bradford
WSBA #45748
Attorney for Amicus Curiae
Washington State Association of
Municipal Attorneys

Porter Foster Rorick llp
Attorneys at Law
800 Two Union Square
601 Union Street
Seattle, Washington 98101
Tel: (206) 622-0203
Fax: (206) 223-2003

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

The Washington State Association of Municipal Attorneys (WSAMA) joins in and fully supports the arguments raised in the Petitioners' Petition for Discretionary Review and the City of Spokane's Answer Supporting Discretionary Review.

WSAMA is made up of attorneys for cities and towns in the State of Washington. Washington has 280 cities and towns, ranging in population from Seattle at half a million citizens to Krupp, population 65. First class cities, code cities, and cities with the commission form of government have the authority to utilize initiatives or referenda. Over 50 cities have provided citizens the power of initiative and referendum, including Seattle, Spokane, Tacoma, Vancouver, and Bellevue, the five largest cities in the state.

WSAMA urges this Court to accept review of the decision of Division Three of the Court of Appeals. In its analysis of the Petitioners' standing to challenge the initiatives at issue, the court misstates the law governing local initiatives, and misapprehends the public importance of the local initiative process. Decisions regarding local initiatives and referenda affect both Washington cities and the roughly three million state residents

who reside in cities with the powers of initiative and referendum.[1] This Court should grant review of this case because the Court of Appeals' decision conflicts with Washington case law and presents issues of substantial public interest. RAP 13.4(b)(1), (2), (4).

II. RESTATEMENT OF THE CASE

WSAMA agrees with the Petitioners' Statement of the Case and the City of Spokane's Restatement of the Case in its Answer to Petition for Discretionary Review.

III. ARGUMENT

A. The Court of Appeals Analysis Fails to Distinguish Local from Statewide Initiatives

The Court of Appeals' decision draws on authority warning against substantive pre-election review of statewide initiatives to conclude that a "heightened showing of standing is in order for pre-trial election challenges and that the respondents have not satisfied that standard in this case." *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution,* No. 31887-7-III, slip op. at 6 (Wn. App. Jan. 29, 2015); Appendix to Petition for

[1] *See* Municipal Research and Services Center, *Initiative and Referendum Guide for Washington Cities and Charter Counties* at 20 (April 2015), http://mrsc.org/getmedia/18593ba0-fa89-4776-84dc-3dcab86b3449/initiativereferendumguide.pdf.aspx?ext=.pdf; U.S. CENSUS BUREAU, 2014 POPULATION ESTIMATES (2014), available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

Review (Appendix) at A-6. The decision fails to distinguish between local and statewide initiatives, and ignores case law stating challenges that the proposed initiative exceeds the scope of the initiative power do not raise justiciability concerns. In this respect, the court's decision conflicts with Washington state case law both of this Court and the Courts of Appeals, and touches on a matter of substantial public interest.

The briefing of the Petitioners and the City of Spokane thoroughly address the errors in the Court of Appeals' analysis of the standing issue. Of particular interest to WSAMA and the cities it represents is the court's failure to distinguish between local and state initiatives.

The Court of Appeals extensively quotes *Futurewise v. Reed*, 161 Wn.2d 407, 410-11, 166 P.3d 708 (2007), for the proposition that pre-election review of initiative measures is disfavored in part because the initiative right derives from the Washington State Constitution. Appendix at A-9. But the court fails to note that local initiatives are not protected by our state constitution. Article II, § 1 of the Washington Constitution protects only statewide initiatives. WASH. CONST. art. II, § 1(a) ("The legislative authority of the *state of Washington* shall be vested in the legislature . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls . . .") (emphasis added). Authority for

local initiative and referendum are provided by statute and local ordinance or charter.[2]

This distinction is not without a difference. Pre-election review to determine whether a local initiative exceeds the scope of the initiative power is *not* disfavored: case law expressly permits the type of challenge brought here. *E.g.*, *City of Sequim v. Malkasian*, 157 Wn.2d 251, 260, 138 P.3d 943 (2006) (calling it "well-settled" that it is proper to bring a pre-election challenge arguing that a proposed initiative exceeds scope of initiative power); *City of Port Angeles v. Our Water Our Choice!*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010) (courts may review local initiative to determine whether beyond scope of initiative power); *Seattle Bldg. & Const. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980) ("[C]ourts will take

---

[2] *See, e.g., City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7-8, 239 P.3d 589 (2010) (stating Article II, section 1 "does not apply to municipal governments"); *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 349, 662 P.2d 845 (1983) ("[T]he purpose of article 2 is to define the legislative, initiative and referendum powers of state government; there is no evidence of any intent by the framers of the constitution that it be applied to other levels of government."); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 230, 11 P.3d 762 (2000) (noting article II, section 1 "defines the legislative, initiative and referendum powers of *state* government") (emphasis in original); Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 76 (1973) ("In contrast to the situation at the state level, the state constitution contains nothing relating specifically to initiatives and referendums at the local level of government.").

By statute, the legislature grants first class cities like Spokane the power to adopt a charter providing for initiatives and referenda. RCW 35.22.200. Code cities may also enact legislation to provide for initiatives and referenda. RCW 35A.11.080; *Our Water, Our Choice!*, 170 Wn.2d at 8.

cognizance of certain objections to an initiative measure, and one of these is that the proposed law is beyond the scope of the initiative power."); *Ford v. Logan*, 79 Wn.2d 147, 151, 483 P.2d 1247 (1971) (rejecting contention that court could not rule pre-election on "threshold question" of whether subject matter exceeded scope of initiative power).[3]

Challenges alleging the subject matter of the initiative is beyond the initiative power occur almost exclusively in the context of local initiatives. *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005) (noting subject matter "challenges usually address the more limited powers of initiatives under city or county charters, or enabling legislation" and stating the Court has considered only one subject matter challenge to a statewide initiative).

In addition to its failure to note that local initiatives are not constitutionally protected, the Court of Appeals voices concerns about justiciablity that simply do not exist in a challenge that a proposed initiative exceeds the scope of the initiative power. "[T]he justiciability of any particular preelection claim is largely a function of the type of review sought." *Coppernoll*, 155 Wn.2d at 299. "Subject matter" pre-election

[3] A local initiative's subject matter may exceed the scope of the initiative power if it has been expressly delegated by the state to the local legislative body, or because it concerns "administrative" matters, as defined by case law. *See Malkasian*, 157 Wn.2d at 261; *Our Water Our Choice!*, 170 Wn.2d at 10.

challenges "do not raise concerns regarding justiciability because postelection events will not further sharpen the issue (*i.e.*, the subject of the proposed measure is either proper for direct legislation or it is not)." *Id.* (concluding Uniform Declaratory Judgment Act, Chapter 7.24 RCW, does not allow *substantive* challenge but may allow challenge that *subject matter* of the initiative exceeds the scope of the initiative power); *see also Malkasian*, 157 Wn.2d at 255; *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 432-33, 260 P.3d 245 (2011) (standing and justiciability requirements met in third party's challenge).[4]

Pre-election review in these circumstances spares municipalities the expense of an election and waste of public funds on an initiative that exceeds the scope of the initiative power. Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 80 (1973) ("[A] principal factor calling for an early review is the waste of public funds which would result from an election when the ordinance in question will be invalid even if approved."); *City of Yakima v. Huza*, 67 Wn.2d 351, 360, 407 P.2d

[4] "Subject matter" challenges stand in contrast to "substantive" challenges that an initiative would violate the federal or state constitution. Substantive pre-election challenges are prohibited, and raise the concerns expressed by the Court of Appeals regarding advisory opinions, ripeness, political questions, and justiciability. *Coppernoll*, 155 Wn.2d at 297–98, (stating Washington law does not allow challenges that an initiative is substantively invalid because it conflicts with a federal or state constitution); *Futurewise*, 161 Wn.2d at 410.

815 (1965) (holding "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.").

Here, the Petitioners' clearly brought a permissible subject matter challenge. CP 18 (complaint stating challenged initiatives exceed the scope of the local initiative power). Despite the fact that pre-election review is clearly warranted in this situation, the Court of Appeals expressed hesitance to intervene in the political process, render advisory opinions, and "derail an election." Appendix at A-18. To the extent the Court of Appeals' decision rests on the faulty premise that the state constitution protects local initiatives, and ignores case law stating subject matter challenges do not raise justiciability concerns, it conflicts with decisions of this Court and the Courts of Appeals. *Our Water Our Choice!*, 170 Wn.2d at 8; *Malkasian*, 157 Wn.2d at 255; *Am. Traffic Solutions*, 163 Wn. App. 427; *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 349, 662 P.2d 845 (1983); *Coppernoll*, 155 Wn.2d at 301. And to the extent the Court of Appeals' decision suggests pre-election subject matter challenges to local initiatives are disfavored, the decision increases barriers to judicial review of invalid local initiatives, a change in the law that would be detrimental to cities across the state.

B. The Court of Appeals Erroneously Concludes Only Issues of Statewide Importance Warrant Public Interest Standing

The second flaw in the Court of Appeals' reasoning that is of interest to WSAMA is the court's analysis of "public interest" or "public importance" standing. After concluding that Petitioners do not meet the ordinary standing requirements, the Court of Appeals held the Petitioners also do not meet the more lenient requirements for public interest standing. Appendix at A-16 ("We conclude this is not a case for granting public importance standing.").

Courts apply standing requirements more liberally in cases like this one that involve the public interest. *See Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969) ("Where a controversy is of serious public importance . . . questions of standing to maintain an action should be given less rigid and more liberal answer."). The Court of Appeals suggests that because this case involves a local rather than statewide initiative, public importance standing cannot apply. Appendix A at A-16 (stating there is no evidence "suggesting that this initiative presents questions of concern outside the Spokane area."). This is incorrect. The more lenient standard applies "when a controversy is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor,

industry, or agriculture." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004).

By its terms, the test does not require statewide impact, and the standard is liberally applied. Indeed, several Washington courts have held that various local initiatives are of sufficient public interest to justify relaxed standing requirements. *See Am. Traffic Solutions*, 163 Wn. App. at 433 (opponents of City of Bellingham initiative had standing because issues involved "continuing matters of public importance."); *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45 (2013) (concluding standing existed based on public importance of city initiative).

Further, the Court of Appeals ascribes significance to the fact that the City did not file the declaratory judgment action itself, stating this supports its conclusion regarding public importance standing. Appendix at A-16 n.19. This reasoning is faulty. There are a number of reasons a municipality may not choose to file a declaratory judgment action, including the costs of the lawsuit. Cities sometimes elect not to put an invalid initiative on the ballot and wait for the proponents to file a lawsuit. *See Priorities First v. City of Spokane*, 93 Wn. App. 406, 410, 968 P.2d 431 (1998) (reviewing validity of initiative in case where city filed counterclaim for declaratory judgment in suit brought by initiative proponents); *Good v. City of Shelton*,

No. 14-2-00555-9 (Mason Cnty. Super. Ct. Oct. 6. 2014) (same). Additionally, some cities have faced criticism for filing suit against initiative proponents. *See Malkasian*, 157 Wn.2d at 274 (Sanders, J. dissenting) (criticizing city's choice of defendant, stating initiative-proponent defendant "did not bring on this litigation but has been targeted, and pummeled . . . with all the taxpayer resources the city could bring to bear against this hapless private citizen.").

In short, no case law prohibits a local initiative from meeting the "public importance" standard, and a city's decision not to initiate litigation, which may rest in part on tactical or strategic considerations, should not be grounds to defeat Petitioners' challenge to the initiatives.

IV. CONCLUSION

WSAMA respectfully requests that this Court grant the Petition for Review. Cities faced with a proposed initiative that may be invalid because it exceeds the scope of the initiative power must regularly weigh costs and benefits of filing a declaratory judgment action. Whether courts will permit initiative opponents, rather than the municipalities themselves, to bring pre-election challenges is a relevant consideration in making that decision. On behalf of Petitioners, the City of Spokane, and the Washington cities for

which it speaks, WSAMA respectfully requests that this Court grant Petitioners' request for discretionary review.

RESPECTFULLY SUBMITTED this 8th day of June, 2015.

PORTER FOSTER RORICK LLP

By: Andrea L. Bradford, WSBA #45748
Attorneys for Washington State Association of Municipal Attorneys