Case No. 1035381

SUPREME COURT OF THE STATE OF WASHINGTON

TIM KOETJE, WHATCOM COUNTY, STACY HENTHORN, in her official capacity, and WHATCOM COUNTY COUNCIL,

Defendant-Appellants,
v.

PROTECT WHATCOM KIDS,

Plaintiff-Respondent.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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Defendant-Appellant Tim Koetje seeks direct review of the final Whatcom County Superior Court Order (Ex. A), filed on September 3, 2024, which granted Plaintiff Protect Whatcom Kids' ("Plaintiff-Respondents" or "PWK") Motion for Declaratory and Injunctive Relief.

I. NATURE OF THE CASE AND DECISION

Earlier this year, Defendant-Appellant Tim Koetje, joined by initiative proponents Washingtonians for a Sound Economy, collected over 9,000 signatures in support of I-2024-01, a local initiative in Whatcom County that would repeal Proposition 5. Proposition 5, which was passed in 2022, was a measure that lifted the limit on property taxes under Chapter 84.55, purportedly for the purpose of funding childcare, early learning programs, and increased support for vulnerable children. The effect of the repeal would be to reinstate the property tax limit. The initiative proponents cleared all ballot language with appropriate county officials on March 15, 2024 and subsequently filed sufficient petitions to qualify the measure for the November 2024 ballot. Under

state law, challenges to initiatives are required to be filed within 10 days of filing the ballot title. RCW 29A.36.090.

Despite this, the opponents of the initiative waited until August 15, 2024 to file a lawsuit, only a few days before the ballot was to be finalized by the county auditor. On September 3, 2024, the Superior Court of Whatcom County granted Plaintiff's request for declaratory and injunctive relief against Initiative 2024-01 ("Initiative"), finding that the Initiative exceeds the scope of the local initiative power and is invalid, and enjoining and prohibiting Whatcom County and its Auditor, Stacy Henthorn, from placing it on the November 2024 general election ballot (or subsequent election ballots), tabulating votes on the Initiative, and otherwise furthering an election on the Initiative. The trial court erred in ruling that the lawsuit was not time barred, but also strangely decided that taxes could be increased by initiative, but not repealed – something that no other court has held.

This order misreads the extent of the local initiative process and was, in any event, outside the Superior Court's

jurisdiction to file. The Superior Court's reasoning—that the Initiative, inter alia, is an "administrative" rather than "legislative" matter—is flawed, and Defendant-Appellants respectfully ask this Court for the opportunity to make its counterarguments to allow the voters of Whatcom County to have the opportunity to exercise their fundamental right to legislate by initiative.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the local initiative process extends to repealing Ordinance 2022-045.
2. Whether the Superior Court of Whatcom County stepped outside its jurisdiction in ruling on strategically untimely claims.

III. GROUNDS FOR DIRECT REVIEW

The Superior Court's decision in granting summary judgment to Respondents and Intervenors and dismissing the action is final and appealable, RAP 4.3(a), and direct review is warranted here because the trial court's decision raises "fundamental and urgent issue[s] of broad public import which require [] prompt and ultimate determination" by this Court, RAP 4.2(a)(4). If allowed to stand, the Superior

Court's order will serve to justify future such rulings that will, as Defendant-Appellant detailed in prior briefing, have the effect of undermining "a core and fundamental right of the people to legislate and exercise their sovereignty." *Amalgamated Transit Union Local 587 v. Stat*e, 142 Wash.2d 183, 11 P.3d 762, as amended, opinion corrected 27 P.3d 608 (2000) (an exercise of the initiative power is an exercise of the reserved power of the people to legislate). The right of initiative is a fundamental constitutional right. *Save Our State Park v. Hordyk,* 71 Wash.App. 84, 856 P.2d 734 (1993).

A. Direct Review is Appropriate Because This Matter Is a Fundamental and Urgent Issue of Broad Public Importance

The powers of initiative and referendum are "deeply ingrained in our state's history, and widely revered as a powerful check and balance on the other branches of government." *Futurewise v. Reed*, 161 Wn.2d 407, 409 (2007). Properly presented, initiatives bypass the County's legislative process and introduce legislation directly to the people. Referenda amend or "veto" all or part of duly enacted ordinances, checking and balancing legislative authority. *See*

Even, Jeffrey T., "Direct Democracy in Washington: A Discourse on the People's Powers of Initiative and Referendum," 32 Gonzaga Law Rev. 247, 249-50 (1996/97) (discussing the distinctions between initiatives and referenda). These powers are direct forms of democracy that remind us that "governments derive their just powers from the consent of the governed[.]" Const. Art, 1 § 1.

The trial court's decision endangers this fundamental right because it erroneously permitted a preelection challenge to an initiative that should have been statutorily time barred and further compounded the error by ruling that a repeal of a tax increase was outside the initiative power – even though the tax measure being repealed was itself created by initiative. The court's decision flies in the face of well-established caselaw disfavoring pre-election challenges. "Preelection review of initiative measures is highly disfavored. The fundamental reason is that the right of initiative is nearly as old as our constitution itself, deeply ingrained in our state's history, and widely revered as a powerful check and balance on the other branches of government. Given the preeminence

of the initiative right, preelection challenges to the substantive validity of initiatives are particularly disallowed." *Futurewise v. Reed,* 161 Wash. 2d 407, 410 (2007) (cleaned up). "Washington courts conduct preelection review of local initiatives for only two types of challenges. Courts review challenges claiming either that a ballot measure does not comply with procedural requirements or that a ballot measure exceeds the direct legislative power of the initiative." *State v. Econ. Dev. Bd. for Tacoma-Pierce Cnty.,* 9 Wash. App. 2d 1, 10, 441 P.3d 1269, 1275 (2019), as amended on reconsideration (July 25, 2019) (cleaned up).

But importantly:

> *If any lawsuit will remedy the flaw in the initiative's name, the lawsuit should be brought in advance of the election and* ***in time for the secretary of state or local government official to place a proper title on the ballot****. A challenge to a refusal to place an initiative on the ballot also should be brought* ***quickly in order to remedy any wrongful refusal to consign the measure to the ballot****. A challenge to a local initiative as exceeding the scope of a municipality's legislative power* ***may be brought after the initiative election.***

Burien Communities for Inclusion v. Respect Washington, 10 Wash. App. 2d 1013 (2019) (cleaned up, emphasis added).

This is especially true because "Courts may review the subject matter of local initiatives and referenda (either pre-or post-election) to determine whether the proposed law is beyond the scope of the initiative power." *Jewels Helping Hands v. Hansen*, 29 Wash. App. 2d 1, 7, 539 P.3d 68, 72 (2023), review granted, 549 P.3d 115 (Wash. 2024) (emphasis added). The specific arguments in this case demonstrate the public importance of the issues presented, all of which go the heart of the extent of the local initiative power and the legislature's limits on legal challenges to that right.

1. The Court Erred in Ruling that the Initiative Was Outside of Local Initiative Power

The Washington Supreme Court imposes a two-part test on whether an initiative is proper under the local initiative power. First, is it legislative or administrative? And second, is the subject that has been granted by the state legislature to the legislative authority of the county or has been granted to the corporate entity as a whole? *See generally, Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Const.,* 185 Wash. 2d 97, 107 (2016). This initiative readily satisfies both parts of the test.

First, an ordinance which imposes a permanent tax "is legislative in character." *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wash. 2d 339, 347 (1983). It is therefore properly subject to the initiative and referendum process. Just as enacting such a tax is legislative, so too is repealing it.

The trial court was unfortunately persuaded by PWK's argument that because RCW 84.55.050 requires an election to lift the levy lid, and the corresponding WAC 458-19-045 refers to the "governing authority," this power was therefore granted exclusively to the county council and not the county as a whole. This is false. First, PWK cited no case for the proposition that the WAC governs, rather than the statute. No court has ever so held. Whether the legislature delegated the power to the county as a whole or its governing body is the operative question, not what the administrative code's gloss on law says.

Second, RCW 84.55.050 does not limit the delegation to the legislative body. There is a section of that same Chapter which does so, and the contrast could not be

clearer: RCW 84.55.0101 states that "Upon a finding of substantial need, the legislative authority of a taxing district other than the state may provide for the use of a limit factor under this chapter of one hundred one percent or less." (emphasis added). The Legislature knew how to limit this kind of grant to only the county council when it so desired. In RCW 84.55.050, it did not.

2. The Trial Court Erred in Ignoring the Plain Language of RCW 29A.36.090, Which Provides a Ten-Day Statute of Limitations for Challenges to Local Initiatives

The governing statute requires the challenge to be filed within ten (10) court days of the date the title is finalized by the local government. This allows a court sufficient time for perceived or identified errors to be corrected. March 29, 2024 was the last day for PWK or its members to sue, not August 15, 2024. The trial court permitted PWK to bring its suit five (5) months late and lacked jurisdiction to hear the case.

This 10-day statute of limitations that bars Plaintiff's relief may seem shockingly short. It is actually long and slow under the circumstances of ballot title

litigation. While RCW 29A.36.060 sets the same deadline for challenges to the ballot title for constitutional amendments, RCW 29A.72.080, for statewide initiatives, creates an even shorter statute of limitations: only five (5) days from the finalization of the title. Those deadlines are valid for the same reason this court should enforce the 10-day deadline in this case.

The bottom line is that when the Whatcom County government officials approved the words and format of the petition forms on March 15, 2024, that constituted approval of the "ballot title" for purposes of starting the 10-day statute of limitations. Plaintiff filed late—and did so intentionally, for the purpose of bulldozing the Court into error—but its claim is time barred.

B. Direct Review is Appropriate Because This Case Requires Prompt and Ultimate Determination by This Court

This Court has not hesitated to grant direct review in cases involving constitutional challenges to initiatives, and specifically, to challenges to legislation impacting taxes. *See, e.g., Wash. Bankers Ass'n v. State*, 198 Wn.2d 418, 426-27,

495 P.3d 808 (2021) (directly reviewing challenge to business and occupation tax on financial institutions); *Garfield Cnty. Transp. Auth. v. State,* 196 Wn.2d 378, 385-86, 473 P.3d 1205 (2020) (directly reviewing challenge to initiative limiting and/or repealing various motor vehicle taxes and fees); *League of Educ. Voters v. State*, 176 Wn.2d 808, 812-15, 295 P.3d 743 (2013) (directly reviewing challenge to initiative requiring supermajority for tax increases and referendum for certain spending increases); *Wash. Citizens Action of Wash. v. State*, 162 Wn.2d 142, 151, 171 P. 3d 486 (2007) (directly reviewing of challenge to initiative limiting state and local property tax levy increases); *Pierce County. v. State,* 150 Wn.2d 422, 427-28, 78 P.3d 640 (2003) (directly reviewing challenge to initiative limiting license tab fees and repealing certain excise taxes and fees); *Power Inc. v. Huntley*, 39 Wn.2d at 194 (1951) (directly reviewing challenge to legislation that appropriated funds and created new substantive tax). *See also Walsh v. Hobbs*, Case No. #103174-2 (2024).

Here, speedy resolution is necessary, because even though it is too late to obtain relief from the court's error to get the measure on this year's general election ballot, the initiative could appear on the next election ballot in Whatcom. The voters of Whatcom County should not have to wait one day more than is necessary to exercise this fundamental right.

In contrast, PWK's members knew about Whatcom County Initiative 2024-01 for months, long before the deadline for finalizing the ballots. Yet PWK's members decided to raise its challenge just eight days before that deadline. To allow such cases to evade review in the face of such dilatory tactics would undermine the fundamental right of the people to legislative by initiative in our state.

IV. REQUEST FOR RELIEF

In light of this case's public import and need for speedy resolution, Appellant Koetje hereby requests that this Court grant direct review of the Superior Court's ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 2,112 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images, as calculated using Microsoft Word, the word processing software used to prepare this brief.

Submitted this 17th day of October, 2024.

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CERTIFICATE OF SERVICE

I certify that on October 17, 2024, I electronically filed the foregoing document with the Clerk of the Court of the Supreme Court of the State of Washington by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATE: October 17, 2024.

Submitted this 17th day of October, 2024.

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