No. 49333-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK; THURSTON COUNTY; and MARY HALL, Thurston County Auditor,

Appellants,

v.

CITY OF OLYMPIA, a Washington municipal corporation,

Respondent.

CITY OF OLYMPIA OPPOSITION TO APPELLANTS' MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL

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1. INTRODUCTION

There is no constitutional or statutory right of the public to vote on all city legislation. The local power of taxation, when authorized for a city, is clearly reserved to the city's governing/legislative body, and is not subject to direct legislation except as expressly authorized by the Legislature. The Legislature has not authorized direct legislation (initiative or referendum) for a city's imposition of an income tax.[1] Indeed, the Legislature has expressly forbidden cities from imposing a tax on net income. RCW 36.65.030 ("**A . . . city . . . shall not levy a tax on net income**.").

This appeal concerns two, straight-forward legal issues that are not debatable. In addition, Appellants have failed to demonstrate injury necessary for the requested injunction (which has already been denied twice). Accordingly, the City respectfully requests that this Court deny Appellants' request for extraordinary injunctive relief.

2. PROCEDURAL HISTORY

The procedural record in this case is set out in the City's Appendix of Trial Court Pleadings to be filed with this Court.

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[1] *City of Sequim v. Malkasian*, 157 Wn.2d 251, at 265 (2006) ("It is well-settled that in the context of statutory interpretation, a grant of power to a city's governing body ("legislative authority" or "legislative body") means exclusively the mayor and city council and not the electorate.").

3. ARGUMENT

RAP 8.1(b)(3) grants an appellate court discretionary authority "to stay enforcement of the trial court decision upon such terms as are just… In evaluating whether to stay enforcement of such a decision, the appellate court will (i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed."

This case involves two issues of law that are not subject to debate. Further, Appellants have failed to demonstrate injury necessary for the injunction that Commissioner Zinn and Judge Nevin both denied. In the unlikely event that the Legislature's direction is determined by the appellate courts to be different, a future election may be held.[2] Accordingly, this case does not warrant discretionary injunctive relief pursuant to RAP 8.1, and the City respectfully requests that this Court deny Appellants' Motion for Injunctive Relief Pending Appeal.[3]

[2] The tax would not be collected until 2018 in any event, and a tax can be levied in 2017 following an election on February 14, 2017.
[3] The City does not need an over length brief to address the clear issues in this case.

3.1 The Proposed Income Tax Initiative Clearly Extends Beyond Local Initiative Power.

The Legislature has already clearly answered the controlling questions in this case: (1) whether the power of local taxation is vested exclusively in local legislative bodies; and (2) whether the proposed Income Tax Initiative conflicts with a statute that prohibits local governments from taxing net income. The trial court had no difficulty applying the Legislature's direction.

After thoroughly reviewing the entire court file and considering argument of the parties, the trial court confirmed that the proposed Income Tax Initiative is invalid for two independent reasons: (1) because the power of local taxation is vested exclusively in local legislative bodies; and (2) because the proposed Income Tax conflicts with state law which prohibits local governments from taxing net income.

3.1.1 The power to impose local taxes is clearly vested exclusively in "local legislative bodies."

As a general rule, the initiative or referendum process allows the people to directly exercise power vested in a city as a corporate entity.[4] But the initiative or referendum process has limitations: it applies only to

[4] *See Guthrie v. City of Richland*, 80 Wn.2d 382, 384, 494 P.2d 990 (1972) ("It is concededly the general rule that where a statute vests a power in the city as a corporate entity, it may be exercised by the people through the initiative or referendum process.").

powers granted to the City as a whole; not to "powers granted by the legislature to the governing body of a city."[5]

In this case, the proposed Income Tax Initiative seeks to have the City levy an income tax to fund higher education for public high school graduates and GED recipients living in Olympia. Whether or not this is worthy public policy, under Washington law the power to levy taxes for local purposes is clearly, unambiguously, and exclusively vested in the City's legislative body (i.e., the City Council); it is not vested in the City as a whole. The Legislature said this at least three times: RCW 35A.11.020 ("Within constitutional limitations, **legislative bodies** of code cities shall have within their territorial limits **all powers of taxation for local purposes**…."); RCW 35A.11.030 ("eminent domain, borrowing, **taxation**, and the granting of franchises may be **exercised by the legislative bodies** of code cities") (emphasis added); and, RCW 35A.11.090 (taxation (§7) and appropriations (§4) are exempt from direct legislation). Because the proposed Income Tax Initiative involves powers that are clearly, unambiguously, and exclusively vested in the City's legislative body (and not to the City as a whole), the trial court properly

[5] *City of Longview v. Wallin*, 174 Wn.App. 763, 784, 301 P.3d 45 (Div. 2, 2013), quoting *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227 (2012); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006); *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 108, 369 P.3d 140 (2016) (Washington Supreme Court affirmed trial court ruling striking invalid initiative from the ballot).

concluded that the proposed Income Tax Initiative extends beyond the local initiative power, rendering it invalid.[6]

3.1.2 The proposed Income Tax Initiative clearly conflicts with state law.

As another limitation to the initiative or referendum process, it cannot be invoked if the initiative or referendum conflicts with state law.[7]

In this case, the proposed Income Tax Initiative seeks to have the City levy taxes "on household Income above $200,000 per year derived from financial transactions, personal activities, business, commerce, occupations, trades, professions and other lawful activities…" The proposed Income Tax Initiative defines "Income," as the "adjusted gross income as determined under the federal internal revenue code." The Internal Revenue Code defines "adjusted gross income" as "gross income minus [ ] deductions" (e.g., trade and business deductions, retirement savings, interest on students loans, and health savings accounts). This is a net amount of gross income.[8] Thus, the proposed Income Tax Initiative

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[6] *See Mukilteo Citizens For Simple Government*, 174 Wn.2d at 51 (2012) (initiatives that extend beyond the initiative power are invalid).

[7] *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 450, 495 P.2d 657 (1972) ("Initiative or referendum procedures can be invoked at the local level only if their exercise is not in conflict with state law."); *see also Spokane Entrepreneurial Center*,185 Wn.2d 97, 108-09, 369 P.3d 140 (2016).

[8] 26 U.S.C. § 62. *See also*, 5 U.S.C. § 381, which applies to state and local taxation of corporations and individuals. §383 states, "[f]or purposes of this chapter, the term "net income tax" means any tax imposed on, or measured by, net income." In *Atlantic Coast Line R. Co. v. Doughton*, 262 U.S. 413 (1923),

seeks to levy a tax on gross income netted by a number of deductions and adjustments, *i.e.*, a tax on net income.

Under state law, however, "[a] county, city, or city-county shall **not** levy a tax on net income." RCW 36.65.030. Because the proposed Income Tax Initiative seeks to levy a local tax on net income, the proposed Income Tax Initiative clearly and unambiguously conflicts with Washington state law. The trial court properly concluded that the proposed Income Tax Initiative extends beyond the local initiative power, rendering it invalid.

3.2 The Two, Straight-Forward Issues Presented In This Appeal Are Not Debatable.

Appellants continue to mischaracterize facts, misconstrue firmly-established Washington law, and assert a series of groundless accusations intended to deflect the Court's attention from the invalidity of the proposed Income Tax Initiative. In the following, the City dispels Appellants' continued hyperbole and political arguments.

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the Supreme Court referred to "net income" as follows (at footnote 6): "The term 'net income,' in law or in economics, has not a rigid meaning. Every Income Tax Act necessarily defines what is included in gross income; what deductions are to be made from the gross to ascertain net income; and what part, if any, of the net income, is exempt from taxation. These details are largely a matter of governmental policy."

3.2.1 Pre-election review was proper, appropriate, and justified.

As explained in the City's briefing, firmly-established Washington Supreme Court precedent confirms that pre-election challenges to local initiatives are both permissible and appropriate.[9] In this case, the City sought a judicial determination that the scope of the proposed Income Tax Initiative extends beyond the scope of local initiative power. Accordingly, the City's pre-election challenge to the proposed Income Tax Initiative was permissible and appropriate.

Appellants nevertheless continue to argue that this Court should refrain from ruling on the scope of the proposed Income Tax Initiative until after the election.[10] But Appellants' arguments do not comport with firmly-established precedent.

For example, Appellants argue that *Coppernoll v. Reed* bars pre-election challenges to local initiatives because they could "unduly infringe on free speech values." But Appellants' argument conflates: (a) pre-election challenges to **statewide** initiatives that conflict with federal law or constitutional provisions; with (b) pre-election challenges concerning the scope of **local** initiatives such as the proposed Income Tax Initiative.

[9] *See* Appendix 1 at p. 5:1-7; *see also Spokane Entrepreneurial*, 185 Wn.2d 97, 369 P.3d 140 (2016) ("courts will review local initiatives and referendums to determine, notably, whether the proposed law is beyond the scope of the initiative power.") (quotations and citations omitted).
[10] *See* Appellants' Motion at p. 16-19.

Whereas the former is prohibited under *Coppernoll* due to constitutional concerns, the latter is not.[11] In fact, the Washington Supreme Court recently reiterated that "the right to file a *local* initiative is not granted in the constitution." *Spokane Entrepreneurial Center*, 185 Wn.2d at 104.

As another example, Appellants argue that *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 53-54, 65 P.3d 1203 (2003), bars pre-election challenges to local initiatives when "there is insufficient time to fully litigate the case before the election." But, once again, Appellants' argument conflates: (a) the Court's decision to defer issuing temporary injunctive relief; with (b) the Court's ruling on the constitutional pre-election challenge. In *Reed*, the Washington Supreme Court initially deferred issuing a writ of mandamus because the Court did not have sufficient time to decide the constitutionality of Referendum 53 before the election. While the Court temporarily deferred issuing injunctive relief, the Court never deferred its ruling on the pre-election challenge (as Appellants ask the Court to do in this case).[12]

Finally, Appellants argue that *City of Seattle v. Yes for Seattle* bars pre-election challenges to local initiatives if the measure would not take

[11] *Coppernoll*, 155 Wn.2d at 297-98 (2005) (emphasis in original).
[12] In *Reed*, the Washington Supreme Court was asked to decide a complex legal issue: the constitutionality of EHB 2901. 149 Wn.2dat 52 (2003). The legal issues in this case, on the other hand, are simple and straight-forward. Appellants' lack of confidence in this Court's ability to decide a simple and straight-forward legal issue in advance of the November election is suspect.

effect immediately after the election.[13] But, once again, Appellants' argument conflates: (a) the Court's holding; with (b) the Court's explanation for why initiative proponent's argument even failed under *Reed*. In *Yes for Seattle*, the trial court ruled that the local initiative was invalid.[14] On appeal, the initiative proponent advanced the exact same argument that Appellants advance in this case (i.e., that the trial court's pre-election review of local initiatives was premature).[15] Notably, the Court of Appeals flatly rejected that argument.[16] The Court of Appeals then went on to explain how the initiative proponent's argument also failed under *Reed*, even though that was not the basis for the Court's holding.[17] Accordingly, Appellants' reliance on these cases to argue that this Court should defer pre-election review is misplaced. The cases actually confirm that the City's pre-election challenge of the proposed

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[13] *See* Appellants' Motion at p. 18-19.
[14] *Yes for Seattle*, 122 Wn.App. 382, 386, 93 P.3d 176 (2004).
[15] *Id.*
[16] *Id. at* 386, 93 P.3d 176 ("The idea that courts can review proposed initiatives to determine whether they are authorized by article II, section 1, of the state constitution is nearly as old as the amendment establishing the initiative power itself. Therefore, pre-election review was proper for the limited purpose of determining whether I-80 was within the initiative power.") (citations and quotations omitted).
[17] Without citing to any legal authority, Appellants also argue that courts should only conduct pre-election reviews if "final appellate decisions" can be reached prior to elections. But none of the cases cited by Appellants stand for that proposition. Considering how "final appellate decisions" can take years to obtain, Appellants' suggestion would effectively eliminate pre-election review entirely.

Income Tax Initiative was entirely proper and appropriate; and the trial court's ruling confirms that the City's pre-election challenge of the proposed Income Tax Initiative was justified.

3.2.2 The City timely sought pre-election judicial review just 10 days after County Auditor Certification.

Appellants continue, without basis, to accuse the City of improperly delaying pre-election judicial review of the proposed Income Tax Initiative for "10 weeks." But the undisputed facts confirm that the City expeditiously filed this action just **10 days** after the County Auditor certified the proposed Income Tax Initiative:

- July 6, 2016: Appellants filed the proposed Income Tax Initiative and the City forwarded the proposed Income Tax Initiative to the County Auditor;
- July 12, 2016 (six days later): the City Council authorized seeking a judicial declaration that the proposed Income Tax Initiative was invalid;
- July 13, 2016 (one day later): the County Auditor certified the proposed Income Tax Initiative;
- July 22, 2016 (nine days later): the City filed its Complaint; and
- July 29, 2016 (seven days later): the City filed its Motion for Declaratory Judgment and Injunctive Relief.

Appellants' accusations of delay are simply false. There was no delay. The City acted timely based on a filed initiative; and not on a hypothetical proposal that lacked a justiciable controversy.[18]

[18] Appellants' argument implies that the proposed Income Tax Initiative was filed in April. But that is patently false. As the evidence on record confirms, the City

3.2.3 The Trial Court did not err by ruling that the power of local taxation is vested exclusively in local legislative bodies.

The trial court properly ruled that the power to levy taxes for local purposes is clearly, unambiguously, and exclusively vested in the City's legislative body (i.e., the City Council). Appellants nevertheless continue to argue (incorrectly) that the power of local taxation is not vested exclusively in local legislative bodies because RCW 35A.82.020 grants the power to impose excise taxes to cities as a whole (as opposed to their legislative bodies), thereby legitimizing the proposed Income Tax Initiative. But Appellants' argument fails for at least two reasons: (1) because Appellants misconstrue the statutory framework for local taxation; and (2) because the proposed Income Tax Initiative does **not** seek to impose an excise tax on businesses (i.e., the only type of tax authorized by RCW 35A.82.020).

Under the statutory framework for local taxation, "municipal corporations are without any inherent power of taxation, being dependent upon legislative grant for their enjoyment of such power."[19] The state Legislature granted **local legislative bodies** the exclusive power to impose

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was only provided with a draft of the proposed initiative in April 2016, and that draft initiative was not even the version of the proposed Income Tax Initiative filed on June 6, 2016. Moreover, the City could not have sought declaratory relief in April because there was no actual justiciable controversy at that time.

[19] *City of Wenatchee v. Chelan County PUD No. 1*, 181 Wn. App. 326, 335, 325 P.3d 419 (Div. 3 2014).

local taxes under RCW 35A.11.020 ("Within constitutional limitations, **legislative bodies of code cities** shall have within their territorial limits all powers of taxation for local purposes"). Chapter 35A.82 RCW then authorizes specific local taxes that legislative bodies of code cities are empowered to enact (e.g., regulation excise taxes in RCW 35A.82.020). Under the statutory framework, the local taxes enumerated in Chapter 35A.82 RCW can be imposed **only** by local legislative bodies; and because local legislative bodies have the exclusive power to impose such taxes, they are **not** subject to local initiatives (e.g., the proposed Income Tax Initiative).[20]

Appellants' argument that the proposed Income Tax Initiative seeks to impose an excise tax authorized by RCW 35A.82.020 is similarly without merit. Specifically, Defendants argue that the proposed Income Tax Initiative seeks to impose an "excise" tax because it "taxes the privileges of disproportionate use and benefit from city services enjoyed by wealthy residents, such as proximity to city parks which enhance private property enjoyment and values, and higher value police and fire

[20] And even if RCW 35A.82.020 was somehow subject to local initiatives, the statute only involves imposing a business tax; it does not – and cannot – serve as a basis for taxing an individual's income. *See Cary v. Bellingham*, 41 Wn.2d 468 (1952) (business taxes cannot be imposed on an individuals' right to earn a living by working for wages).

protection services."[21] No matter how many different ways Appellants re-characterize the proposed tax, the proposed Income Tax Initiative does not seek to impose an "excise" tax – which is a business tax (and the only authorized type of tax) in Chapter 35A.82 RCW. Instead, the proposed Income Tax Initiative unambiguously seeks to tax individual's earned "household income."[22]

3.2.4 The trial court did not err by ruling that the proposed Income Tax Initiative conflicts with a statute expressly prohibiting local governments from taxing net income.

As explained above, the trial court also properly ruled that the proposed Income Tax Initiative conflicts with RCW 36.65.030, which prohibits local governments from levying a tax on net income. Appellants

[21] Appellants' Motion at p. 24-25.

[22] This Court need not and should not address the potential constitutional issues associated with an income tax in the State of Washington, including an income tax at the local level. There is a long history regarding income tax measures in the state. In 1933, for example, the Washington Supreme Court struck down an income tax initiative measure for violating the property tax uniformity provisions of our Constitution's Fourteenth Amendment. *See Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933); Washington Constitution Art. VII, Sec. 1. The Court held that income is property under the State Constitution and specifically rejected the argument that an income tax is an "excise tax." *See id*., 174 Wash at 376 ("It is asserted an income tax is an excise tax. That is not correct."). So here, OFO's attempt to characterize the tax in the proposed Income Tax Initiative as an excise tax is directly contrary to controlling Washington Supreme Court precedent. Three years later, the Court again considered an income tax that had been enacted by the Legislature in 1935. *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936). That income tax was also called an excise tax by the Legislature. But the Court again rejected the characterization of an income tax as an excise tax. Whether the tax was on "net income" or the "privilege of receiving net income," this further income tax effort still taxed property and was found unconstitutional. *Id*. at 218-19.

continue to argue that, under the plain language of the statute, it does not apply to the proposed Income Tax Initiative because the proposed Income Tax Initiative does not impose a tax on net income.[23] But that argument fails for at least two reasons.

Chapter 35A.82 RCW authorizes cities to levy various local business taxes.[24] Appellants' interpretation of "net income" in RCW 36.65.030 (i.e., as applying to business taxes only) would prohibit cities from levying such local business taxes (including those specifically authorized by Chapter 35A.82 RCW). Accordingly, Appellants' interpretation of "net income" must be rejected because it would render other local tax statutes meaningless.

Appellants' argument also fails because the plain meaning of "net income" is **not** restricted to business income under Washington law or other law.[25] As Defendants even concede, "net income" is used in Washington statutes as applying to an individual's income. *See, e.g.*, RCW 26.19.071 (calculating child support obligations based on an individual's "net income"). Accordingly, Appellants' contradictory argument fails

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[23] *See* Appellants' Motion at pp. 26-28.

[24] *See, e.g.*, RCW 35A.02.050 (authorizing local tax on certain business activities).

[25] For example, under federal law on state taxation of interstate commerce (15 U.S. Code Subchapter I, in particular Section 381) the term "net income tax" refers to state or local income taxes on corporations or individuals.

because it defies the plain meaning of "net income" as applied in other Washington statutes.

3.2.5 The trial court did not err by ruling that Chapter 91, Laws of 1984 and RCW 35.65.030 are constitutional.

As a last resort, Appellants argue that Chapter 91, Laws of 1984 (as codified by RCW 35.65.030) is unconstitutional because it violates the "single subject rule" and the "subject-in-title rule." Appellants' argument, however, misrepresents the title of Chapter 91, Laws of 1984.

The official Certification of Enrolled Enactment confirms that Chapter 91, Laws of 1984 is entitled "AN ACT relating to local government; and adding a new chapter to Title 36 RCW."[26] It is **not** entitled "City-County Municipal Corporations," as Appellants claim. Accordingly, the entire premise of Appellants' argument is fundamentally flawed and the trial court properly ruled that Chapter 91, Laws of 1984 is constitutional.

3.3 The City Will Be Injured If Forced To Place An Invalid Initiative On The Ballot, But Appellants Will Not Be Injured In The Absence Of A Stay.

Appellants continue to argue that an injunction should be imposed because: (1) the injunction would result in no injury to the City; and (2) Appellants' First Amendment rights would be "irreparably harmed" without an injunction. But as explained below, the former argument

[26] *See* Appendix 2.

defies firmly-established Washington precedent, and the latter argument is based on a fictitious First Amendment right to vote on invalid initiatives.

3.3.1. Firmly-established Washington law recognizes that the City will be harmed if forced to place the invalid Income Tax Initiative on the November ballot.

Appellants argue that the City will not suffer any injury if this Court forces the City to place the proposed Income Tax Initiative on the November ballot because the City has to put the severable portions of the proposed Income Tax Initiative on the November ballot anyway. But Appellants' argument fails for at least two separate reasons: (1) because the proposed Income Tax Initiative is not severable; and (2) because Appellants' argument defies firmly-established Washington law, including this Court's decision in *City of Longview v. Wallin*.[27]

With respect to the former, Appellants argue that the proposed Income Tax Initiative is severable because there are portions unrelated to the illegal income tax. But the entire proposed Income Tax Initiative **is** about the levying and appropriation of income tax:

- Section 1 sets forth the proposed ordinance enacting **the income tax**;
- Section 2 defines terms enacting **the income tax**;
- Section 3 assesses **the income tax**;
- Section 4 establishes a fund to deposit **the income tax**;

[27] *See City of Longview v. Wallin*, 174 Wn.App. 763, 301 P.3d 45 (Div. 1 2013).

- Section 5 sets for qualifications for appropriation of **the income tax**; and
- Section 6 concerns implementation and accountability for the levying and appropriation of **the income tax**.

Stated otherwise, severing the income tax components from the proposed Income Tax Initiative leaves nothing remaining. As the proposed Income Tax Initiative itself confirms, the mandatory funding is based entirely on the proposed income tax;[28] the solicitation and receipt of gifts, grants and bequests is **not** fundamental to the initiative and is entirely permissive.[29] *See also Leonard v. City of Spokane*, 127 Wn.2d 194, 202, 897 P.2d 358 (1995) (a provision that was "the heart and soul of the Act" is **not** severable); *see also League of Women Voters v. State*, 184 Wn.2d 393, 412, 355 P.3d 1131 (2015) (even with a severability provision, an act is invalid if the invalid provision is intertwined with the remainder act and fundamental to the act's efficacy).

Furthermore, firmly-established precedent confirms that Appellants' argument fails even if the proposed Income Tax Initiative is somehow severable (which it is not). In *City of Longview*, this Court affirmed the trial court's order enjoining invalid portions of the proposed city initiative from appearing on the ballot after finding that the financial

[28] Proposed Income Tax Initiative at Section 1 ("The People intend to raise such funds… by imposing a 1.5% tax on household income").
[29] Proposed Income Tax Initiative at Section 4 ("The City of Olympia and the committee **may** solicit and receive gifts, grants and bequests").

burden of placing an invalid initiative on the ballot was sufficient injury in fact to warrant injunctive relief.[30] Even though the trial court erroneously ruled that portions of the proposed city initiative were valid and severable, this Court still held that the city would be injured if it had to place invalid portions of the proposed city initiative on the ballot. This case is no different: the City would be injured if forced to place **any** invalid portion of the proposed Income Tax Initiative on the November ballot.

3.3.2 The First Amendment does not guaranty a right to vote on invalid initiatives.

Appellants also assert that their First Amendment rights will be "irreparably harmed" if this Court does not reverse the trial court's ruling and force the City to place the invalid proposed Income Tax Initiative on the November ballot. But Appellants' argument is a fallacy because the First Amendment does not guaranty a right to vote on invalid initiatives, and Appellants' misplaced reliance on selective quotes from inapposite cases (i.e., *Filo Foods v. City of Seatac*, *Farris v. Seabrook*, and *Small v. Avanti Health Systems*) does not create any such constitutional right.

In *Filo Foods, LLC v. City of Seatac*, the issue was whether RCW 35A.01.040 (which provided that "[s]ignatures, including the original, of any person who has signed a petition two or more times shall

[30] *City of Longview*, 173 Wn.App. at 782 ("We have recognized that requiring a city to place an invalid initiative on the ballot would result in an undue financial burden on local government.").

be stricken") unduly burdened First Amendment right to free speech. Because the statute invalidated all signatures (instead of allowing one signature to count), the Court held that the statute unduly burdened First Amendment rights.[31] But the Court did **not** rule that the First Amendment guarantees a right to vote on invalid initiatives.[32]

In *Farris v. Seabrooks*, 677 F.3d 858, 861 (9th Cir. 2012), the issue was whether RCW 42.17A.405(3) (which prohibited campaign contributions in excess of $800) unduly burdened First Amendment right to free speech. The Court ruled that it was likely that the statute unduly burdened First Amendment rights. But *Farris* did not involve an initiative or referendum, and the Court did **not** rule that the First Amendment guarantees a right to vote on invalid initiatives.

In *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180 (9th Cir. 2011), the issue was whether a successor employer had to recognize the California Nurses Association and its collective bargaining agreement. But *Small* is not a First Amendment case; it did not involve an initiative or referendum; nor did it involve a public election – it involved a proposed election to determine whether the labor union had majority support.

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[31] *Filo Foods*, 179 Wn.App. 401, 410, 319 P.3d 817 (2014).

[32] Article I, Section 19 of the State Constitution does not guarantee a right to vote on local issues that are controlled by statute. Similarly, the right to petition under Article I, Section 4 does not extend to a right to vote on local issues. *Grant County Fire Dst. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002) and 150 Wn.2d 791, 83 P.2d 419 (2004).

Appellants' reliance on these cases to advance an argument that would completely undermine all pre-election review is not only nonsensical, but patently misleading.

3.3.3 The Appellants will not be harmed in the absence of an injunction because the proposed Income Tax Initiative can be placed on any ballot to the extent the trial court's ruling is reversed on appeal.

Finally, Appellants argue that they will be "irreparably harmed" if the proposed Income Tax Initiative is not placed on the November ballot. But Appellants' argument fails: in the highly unlikely event that the trial court's ruling is overturned on appeal, the proposed Income Tax Initiative can be set for any election; it does not have to be placed on the November 2016 ballot.[33]

4. CONCLUSION

As confirmed by Commissioner Zinn and Judge Nevin, the two issues of law in this case are not subject to debate. The City respectfully requests that this Court deny Appellants' Motion for Injunctive Relief Pending Appeal accordingly.

[33] And, as noted above, Appellants' exclusive reliance on *Small v. Avanti Health Systems, LLC* to support this argument is misplaced. *Small* has no bearing on the issue because *Small* did not involve an initiative or even a public election; it involved a proposed election to determine whether the labor union had majority support.

DATED this 29th day of August, 2016.

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APPENDIX 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

CITY OF OLYMPIA, Plaintiff, vs. OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK, THURSTON COUNTY; and MARY HALL Thurston County Auditor, Defendants.	NO. 16-2-02998-34 COA NO. 49333-1-II

VERBATIM REPORT OF PROCEEDINGS
Ruling of the Court

BE IT REMEMBERED that on August 24, 2016, the above-entitled and numbered cause came on for motion hearing before the HONORABLE JACK NEVIN, visiting judge of Pierce County Superior Court, appearing at Thurston County Superior Court, Olympia, Washington.

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AUGUST 24, 2016

THE HONORABLE JACK NEVIN, PRESIDING

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(After hearing argument, the Court ruled as follows.)

THE COURT: I have spent a substantial amount of time on this matter in preparing for today's hearing. And counsel is right when they say that this is different than the prior initiative case that I heard and the answer is it is. And I think, moreover, every one of these cases has a commonality of processes and commonality of issues that present, yet one has to appreciate the differences. One always has to appreciate the differences.

I think that there is a notion that sometimes gets lost in these kinds of cases and that is that each side is committed through admittedly different avenues and different ways to the public good. I think counsel for the City has acknowledged that this is a good cause. This is a noble cause. This is, as they have correctly pointed out, however, not something in which we are deciding or not deciding how the State of Washington handles education, specifically community college education, but, rather, it is for the Court not the nobility of the

cause or perhaps what some people argue to be the shortcomings in funding of public education in the state of Washington, and specifically community college education, but instead, it is a question of whether the law allows this.

I am first going to state my decision in this matter, and then I am going to more specifically set forth not in great detail but in greater detail than just what my finding is.

The question posed first is whether the proposed tax initiative seeking to establish an income tax in the City is invalid because it extends beyond the scope of the local initiative power. I find that it does extend beyond that, and therefore it is invalid.

The second question is whether this Court should enter an order enjoining the proposed income tax initiative from appearing on the November ballot, and I am rendering that ruling.

Now, more specifically, I am relying upon the cases cited by all parties in their initial authorities. I am also including the Spokane County *Spokane Entrepreneurial* case, which I had on a computer here until apparently a few minutes ago, as well. I am looking at the income tax initiative that was an appendix to the Opportunity for Olympia's

political committee registration, the minutes from the City Council, City Resolution M-1847, City Resolution M-1846.

I find specifically that the City's pre-election challenge to the tax initiative is permissible and is appropriate given the nature of what is presented in this case. I further find that the City has standing to challenge the proposed tax initiative. I believe that declaratory relief and injunctive relief are proper because the proposed income tax initiative does extend beyond the local initiative power. I believe it involves powers that are granted to the City's governing body and not to the City as a whole. And I emphasize that because I feel as if that proposition lies in large part at the heart of the analysis. I believe that therefore it does conflict with the state law prohibiting income tax.

I just don't find that there is a constitutional issue here. I don't find that this is a matter of the constitutionality of income tax. I find that I am persuaded, to the extent that the City has responded to that issue -- I don't think this is a matter of constitutionality; perhaps I will stand to be corrected on that, but I simply do not.

I am not sure that I need to address the issue of

the statutory requirements for special elections. I am not rendering a finding on that, but I am issuing an order based upon what I have indicated prior, that I am going to issue an order declaring the proposed tax and the initiative in its entirety is invalid because it does extend beyond the scope of the local initiative power.

I am going to issue an injunction that bars Thurston County and the Thurston County Auditor from placing the proposed tax initiative from appearing on the state general election ballot in November of 2016.

Now, I am prepared to sign an order to that effect. If counsel wish instead to craft an order and extend it to me in my courtroom, they can do that.

MR. DiJULIO: Your Honor, I am handing to the Court what is a plain vanilla form of order for the Court's consideration. The proposed form of order lists the documents, including a document filed today, Declaration of Annaliese Harksen. The Court did not address the Freedom Foundation's motion and amicus brief, and we left that open for the Court's consideration of whether or not that is granted or denied.

THE COURT: I will -- I mean, I have read it in its totality. I did not include that here in my finding. I did allow for that to occur.

MR. DiJULIO: So that motion is to be granted?

THE COURT: Yes.

MR. DiJULIO: The order goes on to say, "Plaintiff's motion for declaratory judgment and injunctive relief is granted and defendant's petition for prevention of election error and motion for injunctive relief is denied. Accordingly, this Court declares that the proposed income tax initiative, in its entirety, is invalid, null, and void because it extends beyond the scope of the local initiative power and enjoins Thurston County and the Thurston County Auditor from placing the proposed income tax initiative on the state general election ballot in November 2016."

And I do believe it's in all parties' interest to have the Court enter an order as soon as practicable in light that there is further action in light of the timing.

THE COURT: I agree. I can look at your proposed order right now. I'm not going anywhere, so just bear with me. I am very sensitive to the notion that time is of the essence here, and I don't want

any party to be disadvantaged in any way because of some sort of a delay by the Court signing an order, so I intend to take care of this right now.

MS. TONRY: Your Honor, if I may? Petitioners object to the use of the phrase "income tax" in the proposed order. We believe that the given name for the initiative should be used or simply initiative. It's prejudicial to our positions here, and it hasn't been found today.

THE COURT: Mr. DiJulio?

MR. DiJULIO: If the Court wishes to -- we believe it's an accurate statement.

THE COURT: Well, I believe it's an income tax as well, to be honest, but I also don't want to be misleading in the record and misstating what it's titled. So I may believe that it's for all intents and purposes an income tax, but I certainly want to be fair to the responding party as to what it is titled, if you see the distinction that I'm trying to draw there.

MR. DiJULIO: I recognize it, Your Honor. The Court can certainly strike the phrase or the word "income" from both the order sections one and two, before the signature line and initial both as well as the other interlineations that you're initialing.

THE COURT: Okay. So would you say that again? I want to make sure I'm following here. Let's do that one more time so I can understand.

MR. DiJULIO: Ms. Tonry will correct me if I'm mistaken, but in terms of edits that the Court would initial, it would be the reference to the document, Declaration of Annaliese Harksen, item 13 on page two of the proposed order.

THE COURT: Well, I have read that and I read that as you were making your presentation, Mr. DiJulio, so it is part of what I have considered. I have initialed that.

MR. DiJULIO: And then below that with respect to the Freedom Foundation --

THE COURT: Granted.

MR. DiJULIO: I've stricken "denied" on that and initialed that.

THE COURT: Granted.

MR. DiJULIO: And on the third page of the proposed form of order, the Court will strike the word "income" in the first line of item, well, paragraph two and also in the second line of the second paragraph. I've initialed those as well.

MS. TONRY: Counsel, I need to correct something that is wrong. The official title of this

initiative is given in the Thurston County Auditor's certification - and it's a long title - but it's the Opportunity for Olympia Initiative, and that's the proper name that should be used, capitalizing income tax initiative just as an official name.

THE COURT: Opportunity for Olympia Initiative as opposed to tax initiative. I mean, the record speaks for itself. I have said what my take is on this.

Now, I will be honest with you. Going through the depth of all of this, as I did this past weekend, I have to be honest with you, I did spend a lot of time on this notion of the right of the Freedom Foundation wishing to file an amicus brief. I don't have any opposition to them doing that. I mean, I read their materials.

MR. DiJULIO: The City takes no position on that, Your Honor. There was an opposition filed by the initial sponsors I believe.

THE COURT: And forgive me from being a person from farther up north out in the country, but I must admit to you, I'm not particularly familiar with the Freedom Foundation, but I get a sense that you are. So what would you like to tell me your position is on that?

MS. TONRY: I'm not intimately familiar with the Freedom Foundation myself, Your Honor, but our opposition to their request to file an amicus brief in the trial court, which is unusual -- as I note, there is no process for it, but, moreover, the issues raised in that brief were completely irrelevant to the issues in this case as Your Honor has decided today. Those issues were not taken up. It's superfluous. We think it should not be allowed.

THE COURT: Well, what I did read -- yes. And there were some submissions from the Freedom Foundation; am I right?

MS. TONRY: There were.

THE COURT: You don't take a position?

MR. DiJULIO: The City takes no position.

THE COURT: You have persuaded me. I mean, I don't mean to be cavalier about this, but it seems to me that both parties have very, very precise and specific points they are trying to make. It seems to me that if we can efficiently - if you will pardon the expression - package this ruling, that will be better for any other entity that is reviewing it. It will be more efficient.

I think I have answered all the questions here. I have read this ruling. This order is consistent with

my ruling in this matter. I think that's it.

MS. TONRY: There is one more thing, Your Honor. I apologize to take our time this afternoon, but it's very important to my clients. I would like to make an oral motion pursuant to civil rules, if Your Honor would permit.

THE COURT: You are free to make your record. You can proceed.

MS. TONRY: Thank you.

Opportunity for Olympia and Ray Guerra respectfully move for limited injunctive relief pending appeal in this case. We specifically request only that the Court order the City to issue the ballot title that it has already prepared and that it has stipulated in the record to issuing today if the Court had ruled in our favor. This requested relief is necessary to preserve Opportunity for Olympia's rights on appeal, and it will also permit the Court of Appeals from having to hear an immediate motion for emergency relief this week.

The County Auditor, again, must have the final ballot title by September 14th, which leaves -- which is 14 court days from today, and there must be a 10 court day ballot title appeal period between the issuance of the ballot title and the finalization of

the ballot title through that appeal process. So thus, unless the City issues a ballot title in the next two days, it will be impossible to comply with the ballot title appeal statute and ensure that the measure can meet the printing deadline.

Again, this will irreparably injure Opportunity for Olympia, petitioners, First Amendment protected free speech rights if an appellate court should decide that the measure should be on the ballot.

If the Court would like, I have a copy of the stipulation from the City to hand up as well as a proposed order.

THE COURT: Okay. Mr. DiJulio?

MR. DiJULIO: Your Honor, I recall arguing a case once where the trial court had issued an injunction and then following hearing on the merits determined to lift the injunction. The question before the Court of Appeals on an emergency motion is should we now -- what is the standard? Well, a similar situation is presented here.

The Court Commissioner has already decided the issue once, albeit on a shortened consideration and a more limited record. This Court has now given full consideration to the matter and determined that the initiative is not lawful. Absent a likelihood of

prevailing on the merits, you cannot issue injunctive relief exercising the Court's equity jurisdiction.

Here, they cannot show a substantial likelihood of prevailing on the merits because the Court has already determined that you cannot. As a result, there is no appropriate method or measure at this time for injunctive relief.

THE COURT: I think that the Court of Appeals is in a position to hear this on an emergency basis. Whether they choose to do so or not obviously is up to the Court of Appeals.

I am going to deny your request and place this totally, to the extent we possibly can, in the hands of the Court of Appeals to decide in its entirety and on an emergency basis, should they decide to do so. Therefore, I respectfully deny the request.

I believe we will be in recess. Thank you all very much.

(Proceedings were concluded.)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I, Cheri L. Davidson, Official Court Reporter, in and for the State of Washington, residing at Olympia, do hereby certify:

That the annexed and foregoing Verbatim Report of Proceedings, Ruling of the Court, was reported by me and reduced to typewriting by computer-aided transcription;

That said transcript is a full, true, and correct transcript of the ruling announced by Judge Jack Nevin on the 24th day of August, 2016 at Thurston County Superior Court, Olympia, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND THIS _____ day of _____, 2016.

_____
Official Court Reporter

APPENDIX 2

EXHIBIT A

IN THE LEGISLATURE
of the
STATE OF WASHINGTON

CERTIFICATION OF ENROLLED ENACTMENT

SUBSTITUTE SENATE BILL NO. 4313

Chapter 91, Laws of 1984

48th Legislature
Regular Session

EFFECTIVE DATE: June 7, 1984

Passed the Senate February 7, 19 84

Yeas 43 *Nays* 5

Passed the House February 23, 19 84

Yeas 94 *Nays* 1

CERTIFICATE

I, Sidney R. Snyder, Secretary of the Senate of the State of Washington do hereby certify that the attached is enrolled Substitute Senate Bill No. 4313 *as passed by the Senate and the House of Representatives on the dates hereon set forth.*

Secretary of the Senate

SUBSTITUTE SENATE BILL NO. 4313

State of Washington 48th Legislature 1984 Regular Session

by Committee on Local Government (originally sponsored by Senators Thompson, Zimmerman, Hemstad and Moore)

Read first time January 19, 1984.

AN ACT Relating to local government; and adding a new chapter to Title 36 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. It is the intent of the legislature in enacting this chapter to provide for the implementation and clarification of Article XI, section 16 of the state Constitution, which authorizes the formation of combined city and county municipal corporations.

"City-county," as used in this chapter, means a combined city and county municipal corporation under Article XI, section 16 of the state Constitution.

NEW SECTION. Sec. 2. Recognizing the paramount duty of the state to provide for the common schools under Article IX, sections 1 and 2 of the state Constitution, school districts shall be retained as separate political subdivisions within the city-county.

NEW SECTION. Sec. 3. A county, city, or city-county shall not levy a tax on net income.

NEW SECTION. Sec. 4. The method of allocating state revenues shall not be modified for a period of one year from the date the initial officers of the city-county assume office. During the one-year period, state revenue shares shall be calculated as if the preexisting county, cities, and special purpose districts had continued as separate entities. However, distributions of the revenue to the consolidated entities shall be made to the city-county.

NEW SECTION. Sec. 5. If the city-county government includes a fire protection or law enforcement unit that was, prior to the

formation of the city-county, governed by a state statute providing for binding arbitration in collective bargaining, then the entire fire protection or law enforcement unit of the city-county shall be governed by that statute.

NEW SECTION. Sec. 6. The formation of a city-county shall not have the effect of reducing, restricting, or limiting retirement or disability benefits of any person employed by or retired from a municipal corporation, or who had a vested right in any state or local retirement system, prior to the formation of the city-county.

NEW SECTION. Sec. 7. Sections 1 through 6 of this act shall constitute a new chapter in Title 36 RCW.

Passed the Senate February 7, 1984.

John A. Cherberg
President of the Senate.

Passed the House February 23, 1984.

Wayne Ehlo
Speaker of the House.

Approved March 2, 1984

John Spellman
Governor of the State of Washington

FILED

MAR 2 1984

SECRETARY OF STATE
STATE OF WASHINGTON

10:32 am.

No. 49333-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

OPPORTUNITY FOR OLYMPIA, a Washington Political Committee; RAY GUERRA; DANIELLE WESTBROOK; THURSTON COUNTY; and MARY HALL, Thurston County Auditor,

Appellants,

v.

CITY OF OLYMPIA, a Washington municipal corporation,

Respondent.

CERTIFICATE OF SERVICE

OFFICE OF THE CITY ATTORNEY
Mark Barber, WSBA No. 8379
Olympia City Attorney,
Annaliese Harksen, WSBA No. 31132
Deputy City Attorney
and
P. Stephen DiJulio, WSBA No. 7139
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FOSTER PEPPER PLLC
1111 Third Avenue. Suite 3000
Seattle, Washington 98101-3292
Attorneys for Respondent City of Olympia

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty one years, I am not a party to this action, and I am competent to be a witness herein. The undersigned declares that on August 29, 2016, I caused the following documents to be served on parties of record in the manner indicated below:

1. City of Olympia Opposition to Appellants' Motion for Injunctive Relief Pending Appeal; and
2. Certificate of Service.

Counsel for: Opportunity For Olympia; Ray Guerra; and Danielle Westbrook

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☐ Via U.S. Mail
☐ Via Facsimile
☐ Via Messenger
☒ Via Email
☐ Via e-file / ECF

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

Executed at Olympia, Washington this 29th day of August, 2016.

Kari Pitharoulis