



October 6, 2016

SENT VIA EMAIL

William A. Lemp, III
(william.lemp@pdc.wa.gov)
Lead Political Finance Investigator
State of Washington
Public Disclosure Commission
P.O. Box 40908
Olympia, WA 98504-0908

Subject: PDC Case 8341 – City of Olympia Response to Complaint

Dear Mr. Lemp:

The information and exhibits submitted with this letter are in response to a Citizen Action Complaint (“Complaint”) by attorney, Knoll Lowney, on behalf of the Opportunity for Olympia (“OFO”) citizens’ initiative political campaign. It is my understanding Mr. Lowney submitted his Complaint to the Washington State Attorney General’s Office (“Attorney General”), which in turn provided his Complaint to the Washington State Public Disclosure Commission (“PDC”) on September 8, 2016.

In his Complaint, Mr. Lowney alleges violations of RCW Chapter 42.17A by all seven members of the Olympia City Council. Mr. Lowney alleges he has “indisputable evidence” showing “Olympia intentionally violated our campaign laws in using public moneys to oppose a qualified local initiative.”

As evidence, he attached a copy of the Complaint for Civil Penalties and for Injunctive Relief for Violation of RCW 42.17A filed by the Attorney General in Pierce County Superior Court on August 15, 2016 against the Port of Tacoma, Economic Development Board for Tacoma-Pierce County, Tacoma-Pierce County Chamber and various persons in their official capacities. This attachment is the extent of Mr. Lowney’s “indisputable evidence” provided to the Attorney General and the PDC. As City Attorney for Olympia, I have not received or been provided with any other documentary evidence in support of Mr. Lowney’s Complaint against the City of Olympia and the Olympia City Council.

Mr. Lowney states that “Olympia has violated RCW 42.17A merely by spending tens of thousands of dollars in public funds to attack the initiative. This is the identical violation for which the Attorney General sued the Port of Tacoma and others two weeks ago in *State of Washington v. Economic Development Board for Tacoma-Pierce County et al.*” Apparently, Mr. Lowney is unaware of PDC Interpretation No. 91-02 which concerns legal fees related to placing, or not placing, a proposition on the ballot, or he is attempting to mislead the media and voters about the City of Olympia’s official actions. (See, Exhibit A, PDC Interpretation No. 91-02.)

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Simply put, PDC Interpretation No. 91-02 states that “[e]xpenditures made by a government agency to defend its official actions related to whether or not a measure should be placed on a ballot or to the wording of a ballot title are **not reportable as campaign expenditures.**” This has been the position of the PDC since PDC Interpretation No. 91-02 was approved on June 25, 1991, *over 25 years ago*. As a licensed attorney, Mr. Lowney should have conducted his legal research before casting aspersions against the Olympia City Council and the City of Olympia.

The Discussion within PDC Interpretation No. 91-02 states, in part:

If a government agency takes an official action (e.g., to write a ballot title or to refuse to place a measure on a ballot) it must be assumed that the agency is acting in good faith. If the government action is challenged, the agency then has little or no discretion in whether to defend its action. Thus, while the agency’s act may serve the ultimate end of opposing a ballot proposal, since the agency lacks discretion in the situation, it has not made a campaign expenditure as envisioned by RCWA 42.17A.

In his Complaint, Mr. Lowney twice makes reference to OFO’s “qualified . . . initiative.” He further states that “[o]n September 2, 2016, the Court of Appeals Division II ruled that OFO Initiative should be placed on the ballot . . .” This statement without further explanation is grossly, albeit arguably intentionally misleading.

Mr. Lowney neglects to state that on July 22, 2016, the Olympia City Council sought a judicial determination in Thurston County Superior Court whether the OFO initiative was valid under state law. (See, Exhibit B, Complaint for Declaratory Judgment and Injunctive Relief.) On July 27, 2016, OFO answered and counter-claimed against the City of Olympia seeking a decree ordering an election under RCW 35.17.290, and to declare RCW 36.65.030 [prohibition on a city levying a tax on net income] unconstitutional, among other relief. (See, Exhibit C, Defendants-Petitioners’ Opportunity for Olympia’s and Ray Guerra’s Petition and Affidavit for Prevention of Election Error and Counterclaim.)

Both parties submitted motions and briefs to the court. (See, Exhibit D, City of Olympia’s Motion for Declaratory Judgment and Injunctive Relief; and City of Olympia Reply in Support of Declaratory Judgment and Injunctive Relief.) After a hearing on August 24, 2016, visiting Pierce County Superior Court Judge Jack Nevin, entered an order in Thurston County Superior Court (1) granting the City of Olympia’s Motion for Declaratory Judgment and Injunctive Relief; (2) denying OFO’s Petition for Prevention of Election Error and Motion for Injunctive Relief; (3) declaring the proposed OFO initiative, in its entirety, invalid, null, and void because it extends beyond the scope of the local initiative power; and (4) enjoining Thurston County and the Thurston County Auditor from placing the OFO initiative on the State general election ballot in November 2016. (See, Exhibit E, Order Granting Plaintiff’s Motion for Declaratory Judgment and Injunctive Relief and Denying Defendants’ Petition for Prevention of Election Error and Motion for Injunctive Relief.)

Judge Nevin, in his oral ruling, clarified his decision for the parties:

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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. (See, Exhibit F, Transcript of Ruling of the Court, August 24, 2016, Judge Jack Nevin, page 4.)

* * *

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 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 [RCW 36.65.030]. (See, Exhibit F, page 5.)

On August 24, 2016, after Judge Nevin's ruling, OFO filed a Notice of Appeal with Division II of the Court of Appeals. (See, Exhibit G, Notice of Appeal.) OFO then presented a Motion for Stay of Judge Nevin's decision to enjoin the placement of its initiative on the November ballot under RAP (Rules of Appellate Procedure) 8.3. The Division II Commissioner issued a written ruling on September 2, 2016, granting OFO's motion for a RAP 8.3 stay of the superior court's decision which enjoined the OFO initiative from appearing on the November 8, 2016 ballot.

The Commissioner stated in her ruling that "[a]lthough in some circumstances, courts will decline to reach the merits of an initiative until after an election, issues relating to the scope of local initiatives will be heard before an election." [Citing, *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1020 (2005)."] (See, Exhibit H, Ruling Granting Stay Pending Appeal, pp. 10-11.) The Commissioner noted that the *merits* of OFO's appeal would not be reached by the appellate court until after the election had passed. "Thus, although it does not appear that the superior court's decision was premature, that does not control the outcome of the present RAP 8.3 motion for a stay pending appeal, when, like *Reed*, this court will not have the opportunity to address the merits of the appeal before November 8, 2016." (See, Exhibit H, pp. 11-12.)

The Commissioner's ruling on September 2, 2016, never reached the merits of Judge Nevin's ruling that OFO's initiative was invalid and in conflict with State law. The Court of Appeals action *only stayed* Judge Nevin's decision enjoining OFO's initiative from the November ballot. The effect of the Commissioner's ruling is to permit the initiative to appear on the ballot. The nuanced and potentially misleading language used by Mr.

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Lowney in his Complaint is that the initiative received enough signatures for a Certificate of Sufficiency issued by the Thurston County Auditor. Mr. Lowney does not directly acknowledge that the OFO initiative has been held legally invalid and in conflict with State law, and that Judge Nevin's ruling has never been nullified or overruled.

Among his allegations, Mr. Lowney alleges that the Olympia City Council is politically motivated by an animus towards the OFO initiative. He does not acknowledge that the Olympia City Council and the City of Olympia properly sought a judicial determination whether the OFO initiative was lawful. Instead, Mr. Lowney argues that the Olympia City Council's "political animus" is "further shown by the City's coordination of its attack on the OFO initiative with the Freedom Foundation," citing as evidence numerous emails between the City of Olympia and the Freedom Foundation "showing this coordination."

Apparently, Mr. Lowney is unaware there is no exemption in the Public Records Act which would permit the City of Olympia to refuse to provide public records or public information to OFO's political opponents. The City, by State law, is required to provide public records lawfully requested by any person—including the Freedom Foundation—as well as OFO (which has made several Public Records Act requests of the City of Olympia through its campaign manager). Mr. Lowney's allegation of coordination between the City of Olympia, Olympia City Council, and the Freedom Foundation is false. (See, Exhibit I, emails between the City of Olympia, Olympia City Council and the Freedom Foundation concerning the OFO initiative.)

OFO's initiative involves imposing a City income tax upon households with adjusted gross incomes above \$200,000. OFO should not be surprised that its initiative is opposed by some citizens or groups for their own reasons. The Freedom Foundation filed a Motion for Leave to File *Amicus Curiae* Brief in Thurston County Superior Court. In his oral ruling, Judge Nevin addressed the issue and denied Freedom Foundation's request:

THE COURT: 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 [City's counsel]: 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 [OFO's counsel]: 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

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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.
(See, Exhibit F, pp. 10- 12.)

This exchange between the trial court and legal counsel for the City of Olympia and OFO establishes that the City took no position on the motion by Freedom Foundation to file an *amicus curiae* brief. This is hardly evidence to support Mr. Lowney's allegation that "the City's coordination of its attack on the OFO Initiative with the Freedom Foundation, which . . . spearheaded the political opposition to the OFO Initiative. There are numerous emails between Olympia and the Freedom Foundation showing this coordination."

Mr. Lowney did not attach to his Complaint a *single* email evidencing "coordination" between the City of Olympia and the Freedom Foundation. This failure is possibly because the emails referred to by Mr. Lowney do not evidence or support any coordination between the City of Olympia and the Freedom Foundation concerning the OFO initiative. (See, Exhibit I, emails between City of Olympia and Freedom Foundation.)

In his Complaint, Mr. Lowney also alleges that "[i]n oral argument before the Court of Appeals, the City's outside counsel *admitted* that the City Council brought its legal challenge to the OFO Initiative because it did not agree with the policies in the initiative." (Emphasis added by author.) This allegation is false and is based upon Mr. Lowney's unique and selective interpretation of remarks made in argument by the City's legal counsel, Stephen DiJulio. This allegation is not supported by the verbatim transcript of the oral arguments before Commissioner Aurora Bearse on September 1, 2016. (See, EXHIBIT J, Verbatim Record of Recorded Hearing, pp. 22; 25.)

The City submits that the verbatim transcript of the hearing before Commissioner Bearse should be examined, particularly in context of the questioning from the Commissioner, who inquired about post-election validation

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and a recent Tim Eyman initiative. (See, Exhibit J, p. 22.) Mr. DiJulio responded that the Commissioner was correct, referring to the recent Eyman state-wide initiative, but argued that “in the situation here, you have a judgment [that the OFO initiative is invalid],” arguing that the ruling of the trial court affirmed the City Council’s efforts to seek judicial review whether OFO’s initiative was lawful.

Unsurprisingly, Mr. Lowney fails to state in his Complaint that Mr. DiJulio’s response to another query from Commissioner Bearse directly addressed his allegation that the Olympia City Council brought its legal challenge to the OFO initiative because it [the City Council] did not agree with the policies in the initiative. Mr. DiJulio informed the Commissioner that “the City of Olympia is not antagonistic to the defendant’s general proposition for tax relief and tax remediation in our state. We understand - - the city council understands that. The city council supports the issue of better funding for education in this state. It says it in its resolutions.” (See, Exhibit J, p. 25.)

Also contrary to Mr. Lowney’s allegations, the City did not use public facilities for campaign purposes. The City denies violation of RCW 42.17A.555. The City did file a declaratory judgment action in Thurston County Superior Court on July 22, 2016, to request a judicial determination whether the OFO initiative was a lawful, valid exercise of the initiative power granted to Olympia’s citizens under State law, and if not, to obtain an injunction prohibiting the initiative measure from appearing on the November 2016 ballot.

The City’s legal action is consistent with well-established judicial precedent for municipalities where such public agencies have sought judicial review of the legal sufficiency of a proposed initiative. In numerous appellate decisions, such actions were not found to violate RCW 42.17A.555. Neither the City of Olympia nor the Olympia City Council took electioneering or campaign action to influence the vote on the ballot measure. The City’s action in pursuing a legal determination from the Thurston County Superior Court as to the initiative’s validity was not campaigning. Seeking judicial review is not use of public funds for campaign purposes. Filing a lawsuit to determine the legality of a local initiative is not advertising, communicating with voters, campaigning, lobbying or electioneering.

The City of Olympia is a noncharter code city organized under Title RCW 35A, the Optional Municipal Code. It is recognized that laws governing local or state initiatives differ. When the City of Olympia changed from a commission form of city government to become a municipality organized under Title 35A, the Olympia City Council elected to retain the powers of initiative and referendum for qualified electors of the city for purposes of RCW 35A.11.080.

RCW 35A.11.100 specifically provides, in part, that “. . . the powers of initiative and referendum in noncharter code cities [like Olympia] shall be exercised in the manner set forth for the commission form of government in RCW 35.17.240 through 35.17.360, as now or hereafter amended.” The Olympia Municipal Code (OMC) 1.16.010(A) specifically cites RCW 35A.11.080 regarding the retention of powers of initiative and referendum, and OMC 1.16.010(B) provides that powers of initiative and referendum shall be done in the manner for the commission form of government in RCW 35.17.240 through 35.17.360.

These statutory references are important because a local initiative for a municipality organized under the Optional Municipal Code (RCW Title 35A) is controlled by these laws. OFO has claimed that the City of Olympia had only two options upon the county auditor's issuance of a certificate of sufficiency: (1) pass the proposed initiative ordinance; or (2) immediately cause to be called a special election. What OFO has neglected to address is that an initiative under the commission form of government includes a third option, which is specifically addressed in RCW 35.17.290 where "the commission [city] refuses either to pass an initiative ordinance or order an election thereon, any taxpayer may commence an action in the superior court against the city and procure a decree ordering an election to be held in the city for the purpose of voting upon the proposed ordinance if the court finds the petition to be sufficient." This is commonly referred to as the "no action" provision.

It is this third option that was exercised by the Olympia City Council's legislative discretion on July 26, 2016. Why is this relevant?

A reading of the language in RCW 35.17.260 states that the "commission" (City of Olympia) has twenty (20) days *after the county auditor's certificate of sufficiency has been received by the "commission"* to either pass the ordinance or to call for a special election. The Thurston County Auditor's Certificate of Sufficiency was issued on July 13, 2016. In accord with the statutory language in RCW 35.17.260, the Olympia City Council had until August 2, 2016, to decide if it would pass the initiative's proposed ordinance. In this instance, the City Council moved to seek a judicial determination whether the initiative was lawful on July 12, 2016, the day before the County Auditor's issuance of the Certificate of Sufficiency, and twenty-one (21) days before the statutory deadline to make its legislative decision. A plain reading of RCW 35.17.260 does not contain *any* provision that shortens this twenty (20) day period for legislative review.

On July 22, 2016, eleven (11) days before the Olympia City Council was required by statute to decide whether it would pass the initiative ordinance, the City of Olympia filed its action in Thurston County Superior Court to seek a judicial determination about the legal validity of the OFO initiative. Five (5) days later, on July 27, 2016, OFO and Ray Guerra, a "taxpayer" and member of OFO, filed their lawsuit against the City of Olympia, requesting a judicial decree under RCW 35.17.290, alleging that OFO was "entitled to a decree ordering an election to be held in the City on November 8, 2016 for the purpose of voting upon the OFO Initiative measure. RCW 35.17.290." (See, Exhibit C, p. 6.) At the hearing in Thurston County Superior Court on August 24, 2016, Judge Nevin entered an order denying OFO's request for a decree ordering an election on OFO's initiative proposal. (See, Exhibit E, p. 2-3.)

It is the City of Olympia's position that any expenditures for legal fees to determine whether OFO's initiative was lawful were made prior to a ballot initiative campaign, and were in fact related to seeking a judicial determination if the OFO initiative was within the initiative power granted to citizens by the Legislature, and whether the initiative was in conflict with a statutory prohibition against levying a tax on net income. The City of Olympia submits that if a proposed local initiative is invalid and in conflict with State law, it can never become a

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legitimate ballot initiative campaign. The same is true if a proposed local initiative has not become a "ballot proposition" as defined by RCW 42.17A.005.

RCW 42.17A.005(4) defines the term "Ballot proposition." The statutory definition is in the disjunctive. The statutory definition states that "[b]allot proposition' means any 'measure' as defined by RCW 29A.04.091." RCW 29A.04.091 states "'Measure' includes any proposition or question submitted to the voters." Judge Nevin granted the City of Olympia's request for injunctive relief enjoining OFO's initiative from appearing on the November ballot. However, the definition in RCW 42.17A.005(4) also states in the disjunctive that this term means any "initiative . . . proposition proposed to be submitted to the voters of . . . any municipal corporation . . . from and after the time when the proposition has been *initially filed with the appropriate election officer of that constituency before its circulation for signatures.*"

In this instance, OFO never filed its proposed initiative petition with Olympia's City Clerk (the City's "appropriate election officer") before the OFO campaign commenced circulating its petition for signatures. OFO's actions in collecting signatures on its petition *before* filing its initiative petition with the Olympia City Clerk, do not come within the definition of a "ballot proposition" as defined by RCW 42.17A.005. (See, Exhibit K, Declaration of Jane Kirkemo.)

The procedure requiring an initiative petition to be filed with the City Clerk before circulation for signatures is similar to the requirement for state initiatives. RCW 29A.72.010 requires ". . . any legal voter of the state, either individually or on behalf of an organization, [who] desires to petition the legislature to enact a proposed measure, or submit a proposed initiative measure to the people . . . shall file with the secretary of state: (1) A legible copy of the measure proposed, or the act or part of such act on which a referendum is desired . . ." The City of Olympia submits that OFO's initiative petition never became a "ballot proposition" as defined in RCW 42.17A.005(4) when the Olympia City Council took action to seek a judicial determination whether OFO's initiative petition was lawful.

In response to your specific questions, please see the City of Olympia's answers:

1. Who did the City of Olympia pay for legal counsel and other services to challenge OFO's Initiative?

Answer: Foster Pepper, PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101

2. How much and when did the City of Olympia pay legal counsel and other services to challenge OFO's initiative?

Answer: \$30,149.50. This statement is being processed for payment. The City anticipates receipt of additional invoices for legal services.

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3. Please explain whether the City of Olympia plans to continue spending funds to appeal rulings concerning the City's challenge of OFO's Initiative?

Answer: Yes. The City of Olympia is the respondent in an appeal filed by OFO from the trial court's ruling finding the OFO initiative invalid as beyond the initiative power and in conflict with State law. The City of Olympia did not appeal Judge Nevin's ruling of August 24, 2016. OFO did appeal.

4. In oral argument before the Court of Appeals, did the City's outside counsel admit that the City Council brought its legal challenge to the OFO Initiative because it did not agree with the policies in the initiative?

Answer: No. (See, Exhibit J, pp. 22; 25.)

5. Did the City of Olympia coordinate its challenge to the OFO Initiative with the Freedom Foundation? Please submit copies of emails between the City of Olympia and the Freedom Foundation concerning the OFO Initiative.

Answer: No. (See, Exhibit I.)

After review of the information provided herein, together with the exhibits and documentary evidence provided by the City of Olympia, the City respectfully requests the Commission to find that there is no evidence to establish a material violation of any laws or regulation under the jurisdiction of the Commission and to dismiss the Complaint filed by Mr. Lowney and the OFO initiative campaign.

Very truly yours,



Mark Barber
City Attorney

Enclosures: Exhibits A through K

cc: Olympia City Council
Steven R. Hall, City Manager

Table of Exhibits
City of Olympia Response to Complaint
PDC Case No. 8341

Note: Clicking on exhibit reference will link to that exhibit

EXHIBIT A	PDC Interpretation No. 91-02
EXHIBIT B	Complaint for Declaratory Judgment and Injunctive Relief
EXHIBIT C	Defendants-Petitioners Opportunity for Olympia’s and Ray Guerra’s Petition and Affidavit for Prevention of Election Error and Counterclaim
EXHIBIT D	Plaintiff’s Motion for Declaratory Judgment and Injunctive Relief City of Olympia Reply in Support of Declaratory Judgment and Injunctive Relief
EXHIBIT E	Order Granting Plaintiff’s Motion for Declaratory Judgment and Injunctive Relief and Denying Defendants’ Petition for Prevention of Election Error and Motion for Injunctive Relief
EXHIBIT F	Verbatim Report of Proceedings – Ruling of the Court – Thurston County Superior Court No. 16-2-02998-34
EXHIBIT G	Notice of Appeal to the Washington State Court of Appeals, Division II
EXHIBIT H	Ruling Granting Stay Pending Appeal – Court of Appeals, Division II No. 49333-1-II
EXHIBIT I	Emails Between City of Olympia and Freedom Foundation
EXHIBIT J	Verbatim Record of Recorded Hearing Thursday, September 1, 2016 – Court of Appeals Division II No. 49333-1-II
EXHIBIT K	Declaration of Jane Kirkemo

EXHIBIT A

EXHIBIT A

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Legal Fees Related to Placing, or Not Placing, a Proposition on the Ballot

Statement #1

Expenditures made by a person or political committee to place a measure on a ballot, to influence the wording of a ballot title or to require that a government agency place a measure on the ballot are campaign expenditures reportable under RCW 42.17A.

Statement #2

Expenditures made by a government agency to defend its official actions related to whether or not a measure should be placed on a ballot or to the wording of a ballot title are not reportable as campaign expenditures.

Discussion:

The proponents of a proposed ballot measure are clearly acting to support or advance that measure when they take an action to require that it be placed before the voters. It is also in their interest to have the measure stated in terms most favorable to them. The proponents, therefore, have discretion in the action they take regarding the issue. They are also not closely bound by law in the range of actions they may take. The government agency, on the other hand, is closely regulated by law in its actions regarding measures that are presented to it. It first of all is expected to remain neutral in its approach to ballot proposals. The way in which a measure is processed is specified and the government is given little leeway in its actions. If a government agency takes an official action (e.g., to write a ballot title or to refuse to place a measure on a ballot) it must be assumed that the agency is acting in good faith. If the government action is challenged, the agency then has little or no discretion in whether to defend its action. Thus, while the agency's act may serve the ultimate end of opposing a ballot proposal, since the agency lacks discretion in the situation, it has not made a campaign expenditure as envisioned by RCWA 42.17A.

Cite as PDC Interpretation No. 91-02

Approved: June 25, 1991

Reference: RCW 42.17A.240

Source URL: <https://www.pdc.wa.gov/learn/index-of-interpretations-by-subject/legal-fees-related-placing-or-not-placing-proposition-ballot>

EXHIBIT B

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<input type="checkbox"/> EXPEDITE <input checked="" type="checkbox"/> No Hearing set <input type="checkbox"/> Hearing is set: Date: _____ Time: _____ Judge/Calendar: _____
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SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,

Plaintiff,

v.

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

Defendants.

No.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. INTRODUCTION

The local power of taxation, even when authorized for a city, is reserved to the city's governing/legislative body, and not subject to direct legislation except as specifically 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.

Plaintiff the City of Olympia ("City") brings this action for declaratory and injunctive relief under chapters 7.24 and 7.40 RCW. The City seeks a declaration that a proposed initiative to

¹ "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." *City of Sequim v. Malkasian*, 157 Wash.2d 251, at 265 (2006).

1 establish an income tax in the City is beyond the scope of the local initiative power. The City
2 also seeks an order enjoining the proposed income tax initiative from appearing on the ballot at a
3 City special election to be held in conjunction with the State general election on November 8,
4 2016.

6 **2. PARTIES**

7 **2.1** The City of Olympia is a non-charter code city organized and operating under the
8 laws of the State of Washington, including chapter 35A RCW.

9 **2.2** Defendant Thurston County is a political subdivision of the State of Washington.

10 **2.3** Defendant Mary Hall, named here only in her official capacity, is the Thurston
11 County Auditor.

12 **2.4** Defendant Opportunity for Olympia (“OFO”) is a Washington political
13 committee, and sponsor of a proposed City income tax initiative. Attached as Complaint
14 Appendix 1 is Public Disclosure Commission form C1, identifying OFO (“PDC Form”).

15 **2.5** Defendant Ray Guerra is a City and Thurston County resident, and a member and
16 representative of OFO. The PDC Form lists Ray Guerra as OFO’s Campaign Manager or Media
17 Contact.

18 **2.6** Defendant Danielle Westbrook is a City and Thurston County resident; the self-
19 described campaign manager for OFO; a member of OFO; and, the filer of the income tax
20 initiative petition with the City.

22 **3. JURISDICTION AND VENUE**

23 **3.1** This Court has subject matter jurisdiction over this action under chapter 7.24
24 RCW and chapter 7.40 RCW.

25 **3.2** Venue is proper in Thurston County, Washington, including under RCW
26 4.12.020.

1
2 **4. FACTUAL BACKGROUND**

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4 **4.1** On July 6, 2016, OFO through Danielle Westbrook filed an initiative petition with
5 the City. The initiative petition calls for the enactment of an ordinance, entitled:

6 AN ORDINANCE of the City of Olympia, Washington, imposing an excise tax
7 on household income above \$200,000 per year derived from financial transactions,
8 personal activities, business, commerce, occupations, trades, professions and other lawful
9 activities, the revenues therefrom to be dedicated to funding at least one year of free
10 community or technical college for each year's City of Olympia public high school
11 graduates and General Education Development Certificate ("GED") recipients, or an
12 equivalent amount of money for such public high school graduates and GED recipients
13 who choose to attend public universities and colleges in the State of Washington.

14 This initiative petition (the "Income Tax Initiative") would both levy an income tax in the city,
15 and appropriate funds collected by the City from income tax revenues. The Income Tax
16 Initiative is attached as Complaint Appendix 2.

17 **4.2** Consistent with law, the City forwarded the Income Tax Initiative to the County
18 Auditor. On July 13, 2016, the County Auditor advised the City that the Income Tax Initiative
19 "was signed by the requisite number of names of persons listed as registered voters within the
20 city and is hereby certified as sufficient pursuant to the Revised Code of Washington
21 35A.11.100." (The "County Auditor's Certification.") OFO seeks inclusion of the proposed
22 Income Tax Initiative on a ballot at a City special election to be held in conjunction with the
23 State general election on November 8, 2016 (the "November ballot").

24 **4.3** The Olympia City Council determined on July 12, 2016, in anticipation of the
25 County Auditor's Certification, to challenge the Income tax Initiative and directed the City
26 Manager to obtain a judicial determination regarding the validity of the Income Tax Initiative

1 and to prevent the Income Tax Initiative from appearing on the November ballot. The
2 unaniously-adopted motion states:

3 . . . that upon the Auditor's certification of sufficient valid signatures for Opportunity for
4 Olympia's initiative petition, the City Manager be authorized to take all reasonable steps
5 on behalf of the City of Olympia and this Council, to obtain a judicial determination
6 whether the initiative is a lawful, valid exercise of the initiative power granted to
7 Olympia's citizens under state law, and if not, to obtain an injunction prohibiting such
8 initiative measure from appearing on the November ballot. My motion includes
9 authorization for the City Manager to pursue any appeals as may be necessary before the
10 appellate courts of this state.

11 **4.4** The City seeks a declaration that proposed Income Tax Initiative is invalid
12 because it is beyond the scope of the initiative power.

13 **4.5** The City seeks injunctive relief to prevent inclusion of an invalid initiative, the
14 proposed Income Tax Initiative, on the November ballot.

15 **5. FIRST CAUSE OF ACTION - DECLARATORY RELIEF**

16 **5.1** The preceding paragraphs are incorporated by reference as if set forth fully
17 herein.

18 **5.2** Courts review before elections a local initiative or referendum to determine,
19 notably, whether "the proposed law is beyond the scope of the initiative power." *City of Port*
20 *Angeles v. Our Water – Our Choice*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010), citing *Seattle Bldg. &*
21 *Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82 (1980) (citing
22 *Leonard v. City of Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976)).

23 **5.3** A controversy exists between the City and Defendants OFO, Guerra and
24 Westbrook regarding whether the subject matter of proposed Income Tax Initiative is within the
25 scope of the initiative power granted to the City's citizens by State law.

26 **5.4** Pre-election review of a city initiative is permitted where, as here, there is a
dispute regarding whether the subject matter of the proposed initiative is beyond the scope of a
city's initiative power. And, the City faces the financial and administrative burden of placing an
unlawful initiative on a ballot.

1 **5.5** The City seeks a declaration the proposed Income Tax Initiative is invalid because
2 it is beyond the scope of the City’s local initiative power. Washington law specifically vests the
3 City Council, as the City’s local legislative body, with the power to enact ordinances governing
4 taxation as well as appropriations. The Income Tax Initiative would improperly interfere with
5 the exercise of a power delegated by state law exclusively to a local legislative body. *See, e.g.,*
6 RCW 35A.11.020, RCW 35A.11.030 and, 35A.11.090.

7 **5.6** The Income Tax Initiative proposes a local income tax. The City seeks a
8 declaration the proposed Income Tax Initiative is invalid because it violates RCW 36.65.030: “A
9 **county, city, or city-county shall not levy a tax on net income.**”

10 **5.7** Under RCW 29A.04.330(1), city general elections are “held throughout the state
11 of Washington on the first Tuesday following the first Monday in November in the **odd-**
12 **numbered years.**” The next City general election is November 2017. A special election may be
13 held in conjunction with a State general election. RCW 29A.04.175. But, under RCW
14 29A.04.330(2), only a city’s “governing body” can call a special election. The City Council is
15 the City’s governing body and has not yet called for an election on the Income Tax Initiative.

16 **6. SECOND CAUSE OF ACTION - INJUNCTIVE RELIEF**

17 **6.1** The preceding paragraphs are incorporated by reference as if set forth fully
18 herein.

19 **6.2** Because the proposed Income Tax Initiative is not a lawful exercise of the
20 initiative power, the Income Tax Initiative should be enjoined from appearing on the November
21 ballot.
22

23 **7. RELIEF REQUESTED**

24 WHEREFORE, the City seeks relief as follows:
25
26

APPENDIX 1

 <p>PUBLIC DISCLOSURE COMMISSION 711 CAPITOL WAY RM 206 PO BOX 40908 OLYMPIA WA 98504-0908 (360) 763-1111 Toll Free 1-877-401-2828</p>	<h2>Political Committee Registration</h2>	<h1>C1PC</h1> <p>(1/12)</p>	<p>MAR 29 2016</p>
Committee Name (Include sponsor in committee name. See next page for definition of "sponsor." Show entire official name. Do not use abbreviations or acronyms in this box.) Opportunity for Olympia		Acronym: OFO Telephone: (360) 742-0488	
Mailing Address PO Box 1254		Fax: ()	
City Olympia	County Thurston	Zip + 4 98507	E-mail: info@OpportunityForOlympia.com
NEW OR AMENDED REGISTRATION? <input checked="" type="checkbox"/> NEW. Complete entire form. <input type="checkbox"/> AMENDS previous report. Complete entire form.		COMMITTEE STATUS <input type="checkbox"/> Continuing (On-going; not established in anticipation of any particular campaign election.) <input checked="" type="checkbox"/> 2016 election year only. Date of general or special election: _____ (Year)	
1. What is the purpose or description of the committee? <input type="checkbox"/> Bona Fide Political Party Committee - official state or county central committee or legislative district committee. If you are not supporting the entire party ticket, attach a list of the names of the candidates you support.			
<input checked="" type="checkbox"/> Ballot Committee - Initiative, Bond, Levy, Recall, etc.. Name or description of ballot measure: Income tax for funding college tuition.			Ballot Number FOR AGAINST _____ <input checked="" type="checkbox"/> <input type="checkbox"/>
<input type="checkbox"/> Other Political Committee - PAC, caucus committee, political club, etc. If committee is related or affiliated with a business, association, union or similar entity, specify name:			
For single election-year only committees (not continuing committees): Is the committee supporting or opposing (a) one or more candidates? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, attach a list of each candidate's name, office sought and political party affiliation. (b) the entire ticket of a political party? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, identify the party:			
2. Related or affiliated committees. List name, address and relationship. <input type="checkbox"/> Continued on attached sheet.			
3. How much do you plan to spend during this entire election campaign, including the primary and general elections? Based on that estimate, choose one of the reporting options below. (If your committee status is continuing, estimate spending on a calendar year basis.) If no box is checked you are obligated to use Full Reporting. See instruction manuals for information about reports required and changing reporting options.			
<input type="checkbox"/> MINI REPORTING Mini Reporting is selected. No more than \$5,000 will be raised or spent and no more than \$500 in the aggregate will be accepted from any one contributor.		<input checked="" type="checkbox"/> FULL REPORTING Full Reporting is selected. The frequent, detailed campaign reports mandated by law will be filed as required.	
4. Campaign Manager's or Media Contact's Name and Address Ray Guerra PO Box 1254, Olympia, WA 98507		Telephone Number: (360) 742-0488	
5. Treasurer's Name and Address. Does treasurer perform only ministerial functions? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> . See WAC 390-05-243 and next page for details. List deputy treasurers on attached sheet. <input type="checkbox"/> Continued on attached sheet.		Daytime Telephone Number: (206) 218-3108	
Abbot Taylor 349 16th Ave E #302, Seattle, WA 98112			
6. Persons who perform only ministerial functions on behalf of this committee and on behalf of candidates or other political committees. List name, title, and address of these persons. See WAC 390-05-243 and next page for details. <input type="checkbox"/> Continued on attached sheet.			
Abbot Taylor 349 16th Ave E #302, Seattle, WA 98112		Treasurer	
7. Committee Officers and other persons who authorize expenditures or make decisions for committee. List name, title, and address. See next page for definition of "officer." <input type="checkbox"/> Continued on attached sheet.			
8. Campaign Bank or Depository KeyBank		Branch Capitol Hill	City Seattle
9. Campaign books must be open to the public by appointment between 8 a.m. and 8 p.m. during the eight days before the election, except Saturdays, Sundays, and legal holidays. In the space below, provide contact information for scheduling an appointment and the address where the inspection will take place. It is not acceptable to provide a post office box or an out-of-area address. Street Address, Room Number, City where campaign books will be available for inspection 350 15th Ave E, Seattle, WA 98112 In order to make an appointment, contact the campaign at (telephone, fax, e-mail): (360) 742-0488			
10. Eligibility to Give to Political Committees and State Office Candidates: A committee must receive \$10 or more each from ten Washington State registered voters before contributing to a Washington State political committee. Additionally, during the six months prior to making a contribution to a state office candidate your committee must have received contributions of \$10 or more each from at least ten Washington State registered voters. <input checked="" type="checkbox"/> A check here indicates your awareness of and pledge to comply with these provisions. Absence of a check mark means your committee does not qualify to give to Washington State political committees and/or state office candidates.		11. Signature and Certification. I certify that this statement is true, complete and correct to the best of my knowledge. Committee Treasurer's Signature Date  3/28/2016	

SEE INSTRUCTIONS ON NEXT PAGE

APPENDIX 2

Opportunity for Olympia Initiative Petition



Opportunity FOR OLYMPIA

This measure would establish a city fund dedicated to funding at least one year of free community or technical college for each year's City of Olympia public high school graduates and GED high school equivalency certificate recipients, or an equivalent amount of money for such public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington. 95% of all funds raised must be spent on tuition or related educational services, not administrative costs. The measure would be funded by establishing an excise tax of 1.5% on household income exceeding \$200,000 in the City of Olympia

INITIATIVE PETITION TO THE OLYMPIA CITY COUNCIL:

We, the undersigned registered voters within the City of Olympia, hereby petition the City Council to adopt the following proposed ordinance or submit it, unaltered, to a citywide vote pursuant to state law:

This measure would establish a fund dedicated to funding one year of free community college for each year's public high school graduates and those students receiving GED high school equivalency certificates who live in the City of Olympia, or an equivalent amount of money for those public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington. 95% of all funds raised must be spent on tuition, not administrative costs. The measure would be funded by establishing an excise tax of 1.5% on household income exceeding \$200,000.00 in the City of Olympia.

WARNING:

Every person who signs this petition with any other than his or her true name, or who knowingly signs more than one of these petitions, or signs a petition seeking an election when he or she is not a legal voter, or signs a petition when he or she is otherwise not qualified to sign, or who makes herein any false statement, shall be guilty of a misdemeanor.

Each signature shall be executed in ink or indelible pencil and shall be followed by the name and address of the signer and the date of signing.

	SIGNATURE <small>Please sign as registered to vote</small>	PRINT NAME HERE <small>For positive identification</small>	FULL MAILING ADDRESS <small>Street, City, State and Zip</small>	Date <small>MM/DD</small>
1				□□-□□-□□
2				□□-□□-□□
3				□□-□□-□□
4				□□-□□-□□
5				□□-□□-□□
6				□□-□□-□□
7				□□-□□-□□
8				□□-□□-□□
9				□□-□□-□□
10				□□-□□-□□
11				□□-□□-□□
12				□□-□□-□□
13				□□-□□-□□
14				□□-□□-□□
15				□□-□□-□□

The full text of the ordinance is on the back.
 Paid for By Opportunity for Olympia PO Box 1254, Olympia, WA 98507

Opportunity for Olympia Initiative Petition

TO THE OLYMPIA CITY COUNCIL:

We, the undersigned registered voters within the City of Olympia, hereby petition the City Council to adopt the following proposed ordinance or submit it, unaltered, to a citywide vote pursuant to state law:

This measure would establish a city fund dedicated to funding at least one year of free community or technical college for each year's City of Olympia public high school graduates and GED high school equivalency certificate recipients, or an equivalent amount of money for such public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington. 95% of all funds raised must be spent on tuition or related educational services, not administrative costs. The measure would be funded by establishing an excise tax of 1.5% on household income exceeding \$200,000 in the City of Olympia.

AN ORDINANCE of the City of Olympia, Washington, imposing an excise tax on household income above \$200,000 per year derived from financial transactions, personal activities, business, commerce, occupations, trades, professions and other lawful activities, the revenues therefrom to be dedicated to funding at least one year of free community or technical college for each year's City of Olympia public high school graduates and General Education Development Certificate ("GED") recipients, or an equivalent amount of money for such public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington.

WHEREAS the accelerating costs of higher education over the past decade have created significant obstacles for college participation and completion for public high school graduates and GED recipients living in the City of Olympia.

WHEREAS making higher education more affordable and accessible for public high school graduates and GED recipients will lead to opportunities for further education and jobs and to a higher quality of life for all citizens.

WHEREAS free first-year and second-year tuition will allow students to enroll in college, obtain degrees and certificates much sooner and start their professional lives with little or no student debt.

WHEREAS one year of community college tuition costs approximately \$3,846, which is more than 10% of household income for two out of five households in the City of Olympia.

WHEREAS the City of Olympia has a significant interest in making higher education more affordable and accessible for its public high school graduates and GED recipients.

WHEREAS the Legislature authorizes the City of Olympia to assess excises for revenue in regard to all places and kinds of activities, including personal activities, business, production, commerce, entertainment and exhibition, and upon all occupations, trades and professions and any other lawful activity, as those activities take advantage of and use current and future city services.

WHEREAS the City of Olympia has authority to assess excises on personal activities that correlate to greater or more intense utilization of city services.

WHEREAS wealthy residents take advantage of and use a greater proportion of certain city services than do less wealthy residents. These services include without limitation police protection from theft, city utilities, educational programs, neighborhood improvement projects, property protection and other municipal services.

WHEREAS local income taxes are levied by both counties and cities, in 4,983 jurisdictions across the United States.

WHEREAS the average cost of living within the City of Olympia for a married couple with two children is approximately \$60,000, according to the Workforce Development Council of Washington State.

WHEREAS less than 3% of households in the City of Olympia benefit from annual incomes in excess of \$200,000.

WHEREAS residents in Washington with incomes below \$21,000 pay 16.8% of their income in state and local taxes, and residents with income between \$40,000 and \$65,000 pay 10.1% of their income in state and local taxes, while residents with income between \$200,000 and \$500,000 pay only 4.6% of their income in state and local taxes, and residents with income in excess of \$500,000 pay only 2.4% of their income in state and local taxes.

WHEREAS the People in their legislative capacity find that in raising revenue it is appropriate to assess taxes on the disproportionate use by wealthy residents of certain municipal services by imposing a 1.5% tax on household income in excess of \$200,000 a year, and to dedicate those funds to make higher education affordable and accessible for Olympia public high school graduates and GED recipients.

NOW THEREFORE, BE IT ORDAINED BY THE CITY OF OLYMPIA as follows:

Section 1. Legislative Findings and Intent. The People of the City of Olympia adopt and confirm the above recitals. In exercising their direct legislative authority, the People intend to fund at least one year of free community or technical college in the State of Washington for each year's City of Olympia public high school graduates and GED recipients, or an equivalent amount of money for such graduates and GED recipients who choose to attend public universities or public colleges in the State of Washington. The People intend to raise such funds through the exercise of the City of Olympia's power under RCW 35A.82.020 by imposing a 1.5% tax on household income in excess of \$200,000 a year. 95% of all funds raised must be spent on grants and related educational services, not administrative costs.

Section 2. Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) The terms "community college" and "technical college" mean the public community colleges and public technical colleges in the State of Washington governed under chapter 28B.50 RCW.

(2) The terms "university" and "college" mean the public universities and public colleges in the State of Washington governed under chapter 28B.10 RCW.

(3) "Committee" means the Opportunity for Olympia Committee, which shall be comprised of the Mayor Pro Tem and four additional members appointed by the Mayor for three year terms. Members may serve successive terms.

(4) "Department" means the department or departments that the city manager directs to implement the provisions of this chapter.

(5) "Fund" means the Opportunity for Olympia Fund defined in this chapter.

(6) "Gift aid" means financial aid received from federal and state grant and scholarship programs that provide funds for educational purposes with no obligation of repayment. Student loans and work study programs are not included.

(7) "Income" means adjusted gross income as determined under the federal internal revenue code. A federal individual income tax return filed with the United States Internal Revenue Service ("IRS") creates a presumption of a taxpayer's income for purposes of this chapter.

(8) "Internal revenue code" means the United States internal revenue code of 1986, and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time, or from time to time, for the taxable year.

(9) "Qualified student" means an individual who:

(a) earned either a high school diploma from a public high school in the State of Washington or a GED as provided under RCW 28A.305.190; and

(b) (i) resided or was domiciled in the City of Olympia at least 50% of the year preceding the date on which he or she received a high school diploma or GED; or

(ii) had no regular, fixed residence but lived in the City of Olympia in a temporary shelter, institution or place not ordinarily used as a residence at least 50% of the year preceding the date on which he or she received a high school diploma or GED; and

(c) enrolled in a community college, technical college, university or college within two years of earning a high school diploma or GED.

(10) "Resident taxpayer" means an individual who:

(a) has resided in the City of Olympia for the entire tax year; or

(b) is domiciled in the City of Olympia unless the individual: (i) maintains no permanent place of abode in the City of Olympia; and

(ii) maintains a permanent place of abode elsewhere; and (iii) spends in the aggregate not more than one hundred and twenty days in the tax year in the City of Olympia; or

(c) is not domiciled in the City of Olympia, but maintains a permanent place of abode in the City of Olympia and spends in the aggregate more than one hundred eighty-three days of the tax year in the City of Olympia unless the individual establishes to the satisfaction of the department that the individual is in the City of Olympia only for temporary or transitory purposes; or

(d) claims the City of Olympia as the tax home for federal income tax purposes.

(11) "Tax" means the excise tax established by this chapter, unless the context requires a different meaning.

(12) "Taxpayer" means (i) an individual who is not married, who is a surviving spouse or who does not make a single return jointly with his or her spouse; or

(ii) a married couple filing jointly for federal income tax purposes.

Section 3. Assessment of Excise Tax.

(1) This act applies to income received on and after January 1, 2017.

(2) For each resident taxpayer, an annual levy is assessed on income exceeding \$200,000 per tax year at the rate of 1.5%.

(3) Each resident taxpayer who is subject to the tax assessed under this chapter shall make and file a return, and pay any tax owed, on or before April 15th of the year following the taxable year. The department may extend this deadline upon the request of the taxpayer for a period not to exceed one year.

(4) Within three months from the final determination of any federal tax liability affecting a taxpayer's liability for the tax assessed under this chapter, such taxpayer shall make and file an amended return based on such final determination of federal tax liability, and pay any additional tax shown due thereon or make claim for refund of any overpayment.

(5) All taxes assessed under the provisions of this chapter and remaining unpaid after they become due shall bear interest at the rate of 1% per month or fraction thereof. At the department's discretion, the department may abate the interest owed, in whole or in part, upon showing of good cause.

Section 4. Establishment of the Opportunity for Olympia Fund.

(1) A new City of Olympia fund called the "Opportunity for Olympia Fund" is hereby created to support grants for higher education to qualified students.

(2) All revenues from the excise tax assessed under this chapter must be deposited in the fund and used exclusively for the purposes set forth in this chapter.

(3) The City of Olympia and the committee may solicit and receive gifts, grants and bequests from other public and private entities, including commercial enterprises, to be deposited in the fund and used exclusively for the purposes set forth in this chapter.

(4) At least 95% of the total revenue received by the fund must be devoted to grants or other related educational services under section 3 of this chapter, not to administrative costs.

Section 5. Opportunity for Olympia Grant Program.

(1) A qualified student shall be eligible for a grant under this section each term that such student is enrolled in one or more courses that are either:

(a) offered at a community college or technical college for one or more credits that can be applied to (i) a one-year or two-year curriculum for students who plan to transfer to another post-secondary institution of education; (ii) an associate's degree; (iii) a program in career and technical education; (iv) Basic Education for Adults; (v) Integrated Basic Education Skills Training I-8es; (vi) the first two years of study for an Upper Division/Applied Bachelor's Degree provided through a community college; or (vii) such other programs as the department determines are appropriate; or

(b) offered for credit at a college or university.

(2) Except as provided in paragraphs (3) and (4) of this section, the amount of a grant shall be the actual cost of tuition and fees for courses satisfying the criteria in paragraph (1) of this section, including tuition and fees as defined in RCW 28B.15.020 and services and activities fees as defined in RCW 28B.15.041, less other gift aid received by the student that is and must be dedicated solely to such tuition and fees. The department, in administering this program, shall take all reasonable steps to minimize the impact of grants awarded under this subsection (2) on other gift aid.

(3) Except as provided in paragraph (4) of this section, the total amount of dollars in grants awarded to a particular student under this chapter shall not exceed the average cost of tuition and fees for one year at a community college, as determined by the department in consultation with the committee.

(4) The total amount of dollars in grants awarded in a tax year under this chapter shall not exceed the amount of dollars deposited in the fund the prior tax year. If funds are insufficient, the department, in consultation with the committee, may determine the priority by which grants are awarded. At the end of a tax year in which more than 10% of the revenues deposited in the fund during the prior tax year are not disbursed, the department, in consultation with the committee, may (i) dedicate the surplus, or any portion thereof, to fund grants for the average cost of up to two years of community college; and/or

(ii) implement or support programs or policies that improve the academic success or completion rates for students who receive or will be eligible for a grant under this chapter.

Section 6. Implementation and Accountability.

(1) The department shall have authority to adopt any rules, procedures, forms and policies, to execute contracts and agreements, to delegate its authority to the committee as the department deems appropriate and to coordinate with any other public entity, including but not limited to the Olympia School District, the Washington Student Achievement Council, the Washington State Department of Revenue, and the IRS, to implement the provisions of this chapter.

(2) The city manager, or his or her designee, shall prepare an annual audit of the moneys deposited in the fund, reporting on how the moneys have been spent and estimating the number of residents benefited. Annual disclosure of tax collection and spending under this chapter must be posted on a web site maintained by the City of Olympia and such disclosure must, at a minimum, include the information set forth in RCW 43.08.150, localized for the City of Olympia.

Section 7. Miscellaneous.

(1) The provisions of this chapter shall be interpreted and implemented in a manner consistent with the United States Constitution, the Washington Constitution and federal and state laws and regulations.

(2) If any section, subsection, paragraph, sentence, clause, or phrase of this ordinance is declared unconstitutional or invalid for any reason, such declaration shall not affect the validity of the remaining parts of this ordinance.

EXHIBIT C

EXPEDITE No hearing set Hearing is set Date: _____ Time: _____ Judge/Calendar: _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA,)	No. 16-2-02998-34
Plaintiff-Respondent,)	
vs.)	DEFENDANTS-PETITIONERS
OPPORTUNITY FOR OLYMPIA, et al.,)	OPPORTUNITY FOR OLYMPIA'S AND
Defendants.)	RAY GUERRA'S PETITION AND
)	AFFIDAVIT FOR PREVENTION OF
)	ELECTION ERROR AND
)	COUNTERCLAIM

Defendants and petitioners Opportunity for Olympia and Ray Guerra bring this petition for prevention of election error and counterclaims for declaratory and injunctive relief against Plaintiff City of Olympia (the "City"), and defendants Thurston County and Thurston County Auditor Mary Hall. This petition is supported by the affidavit of Ray Guerra.

I. INTRODUCTION

1. Opportunity for Olympia's proposed initiative petition to fund higher education for the City's students was endorsed by 4,719 registered City voters -- more than enough to qualify the measure for the ballot. The Thurston County Auditor certified the initiative as sufficient. Yet, the City has forced petitioners to file this action by refusing to perform its mandatory duty to either enact Opportunity for Olympia's initiative measure, or put it to a vote of the people on November 8, 2016.

1 8. Defendant Thurston County is a political subdivision of the State of Washington.

2 9. Defendant Mary Hall, named here only in her official capacity, is the Thurston
3 County Auditor.

4 **III. JURISDICTION AND VENUE**

5 10. This Court has personal jurisdiction over all necessary parties for purposes of this
6 petition and counterclaim.

7 11. This Court has subject matter jurisdiction over this counterclaim pursuant to chapters
8 7.24 RCW, 7.40 RCW, RCW 29A.68.011, and RCW 35.17.290.

9 12. Thurston County is a proper venue for this action.

10 **IV. STATEMENT OF THE CASE**

11 **The OFO Initiative Endorsed by Thousands of Olympians and Certified by the County**

12 13. The OFO Initiative would establish a fund for public high school graduates and GED
13 recipients in the City of Olympia dedicated to funding one year of free community college or an
14 equivalent amount of money for those who choose to attend public universities and colleges in the
15 State of Washington. The measure would be funded by establishing an excise tax of 1.5% on
16 household income exceeding \$200,000.00 in the City of Olympia.

17 14. Olympia is a "code city" that chose to retain the powers of initiative and referendum
18 for the qualified electors of the city for purposes of RCW 35A.11.080. OMC 1.16.010(A).

19 15. Under Olympia's code, the powers of initiative and referendum must be exercised in
20 the manner set forth for the commission form of government in RCW 35.17.240 through 35.17.360.
21 OMC 1.16.010(B).

22 16. RCW 35.17.260 provides for ordinances by initiative petition. RCW 35A.11.100
23 identifies the number of signatures required to advance such petitions.
24
25

1 17. On July 13, 2016, Defendant Hall, the Thurston County Auditor, issued a certificate
2 of sufficiency verifying that the OFO Initiative petition garnered signatures from more than enough
3 registered City voters to be sufficient under RCW 35A.11.100. This certificate is attached hereto as
4 Exhibit B.

5 18. RCW 35.17.260 mandates that if a petition to the people accompanying a proposed
6 ordinance carries the requisite number of signatures, the City Council “shall either”

- 7 (1) Pass the proposed ordinance without alteration within twenty days after the county
8 auditor's certificate of sufficiency has been received by the commission; or
9 (2) **Immediately** after the county auditor's certificate of sufficiency for the petition is
10 received, **cause to be called a special election to be held on the next election date, as**
11 **provided in RCW 29A.04.330**, provided that the resolution deadline for that election has not
passed, for submission of the proposed ordinance without alteration, to a vote of the people
unless a general election will occur within ninety days, in which event submission must be
made on the general election ballot.

12 RCW 35.17.260 (emphasis added).

13 19. The next election date RCW 29A.04.330 provides for a city council to call a special
14 election is November 8, 2016. *See* RCW 29A.04.330(2)(d) and (3).

15 **The City Council's Refusal to Advance the OFO Initiative to the Voters**

16 20. The City Council met on July 19, 2016, following receipt of the County Auditor's
17 certificate of sufficiency for the OFO Initiative, but failed to either pass the proposed measure or
18 cause a special election on the measure to be called.

19 21. On July 26, 2016, the City Council voted four to two to pass a resolution “deciding
20 against passing or enacting” the OFO Initiative, and deciding against ordering a special election on
21 the OFO Initiative (the “No Action Resolution”). The No Action Resolution is appended to this
22 petition as Exhibit A.
23
24
25

1 22. If the City “refuses either to pass an initiative ordinance or order an election thereon,”
2 any taxpayer may sue the city in this Court, and if the Court determines the petition is sufficient, may
3 obtain a “decree ordering an election to be held in the city for the purpose of voting upon the
4 proposed ordinance.” RCW 35.17.290.

5 23. The City Council, by and through the four council members who voted for the No
6 Action Resolution has willfully disregarded its mandatory, non-discretionary duty under RCW
7 35.17.260, and intentionally violated that statute.

8 **RCW 36.65.030**

9 24. The City contends that the OFO Initiative is “invalid because it violates RCW
10 36.65.030.”

11 25. Title 36 RCW concerns “Counties.”

12 26. Chapter 36.65 RCW, “Combined City and County Municipal Corporations” was
13 enacted in 1984. The explicit intent “of the legislature in enacting this chapter to provide for the
14 implementation and clarification of Article XI, section 16 of the state Constitution, which authorizes
15 the formation of combined city and county municipal corporations.” RCW 36.65.010. “City-
16 county,” as used in Chapter 36.65 RCW, “means a combined city and county municipal corporation
17 under Article XI, section 16 of the state Constitution.” *Id.*

18 27. RCW 36.65.030 – “Tax on net income prohibited” states that “A county, city, or city-
19 county shall not levy a tax on net income.”

20 28. Article II, section 19 of the state Constitution mandates “No bill shall embrace more
21 than one subject, and that shall be expressed in the title.”

22 29. The Senate Bill embodying Chapter 36.65 RCW, Substitute Senate Bill No. 4313, is
23 entitled “City-County Municipal Corporations ----- Clarification - An Act Relating to local
24
25

1 government; and adding a new chapter to Title 36 RCW.” Substitute Senate Bill No. 4313 is
2 appended hereto as Exhibit C.

3 30. Section 1 of Substitute Senate Bill No. 4313 states the Legislature’s intent in enacting
4 Chapter 36.65 RCW, i.e., to provide for the implementation and clarification of Article XI, section
5 16 of the state Constitution, which authorizes the formation of combined city and county municipal
6 corporations.

7 31. Sections 2, 4, 5, and 6 of Substitute Senate Bill No. 4313 concern school districts,
8 allocation of state revenue, fire protection and law enforcement collective bargaining, and municipal
9 employee benefits, respectively, all as they relate to the city-county form of local government.

10 32. Section 3 of Substitute Senate Bill No. 4313 states “A county, city, or city-county
11 shall not levy a tax on net income.”

12 33. The City of Olympia is not and has never been a city-county municipal corporation, or
13 part of a city-county municipal corporation.

14 34. The OFO Initiative would not levy a tax on net income.

15 **V. FIRST CAUSE OF ACTION –REQUEST FOR DECREE ORDERING ELECTION**

16 **(RCW 35.17.290)**

17 35. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

18 36. The City has violated its mandatory, non-discretionary duty to either enact the OFO
19 Initiative or order an election thereon to occur in conjunction with the November 8, 2016 general
20 election. RCW 35.17.260; *and see, e.g., Philadelphia II v. Gregoire*, 128 Wn.2d 707, 713-15 (1996).

21 37. Petitioners are entitled to a decree ordering an election to be held in the City on
22 November 8, 2016 for the purpose of voting upon the OFO Initiative measure. RCW 35.17.290.
23
24
25

1 **VI. SECOND CAUSE OF ACTION - PETITION FOR PREVENTION OF ELECTION**
2 **ERROR (RCW 29A.68.011)**

3 38. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

4 39. An error, omission, or other wrongful act has been performed or is about to be
5 performed by an election officer or in printing the ballots for the City's November 8, 2016 election,
6 with regard to the omission of the OFO Initiative from the ballots.

7 40. Petitioners are entitled to an order requiring Respondents to forthwith correct the
8 error, desist from the wrongful act, or perform the duty and to do as the court orders, specifically,
9 ordering an election on the OFO Initiative in conjunction with the November 8, 2016 general
10 election, and including the OFO Initiative when printing the ballots for that election. RCW
11 29A.68.011.

12 41. In the alternative or in addition, Petitioners are entitled to an order requiring
13 Respondents to show cause forthwith why the error should not be corrected, the wrongful act
14 desisted from, or the duty or order not performed. RCW 29A.68.011.
15

16 **VII. THIRD CAUSE OF ACTION – DECLARATORY JUDGMENT**

17 42. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

18 43. RCW 36.65.030 violates the "single-subject rule" of Article II, section 19 of the state
19 Constitution because a county's or city's authority to levy taxes is a separate subject, unrelated and
20 not germane to the implementation of a city-county form of government.

21 44. RCW 36.65.030 violates the "subject-in-title rule" of Article II, section 19 of the state
22 Constitution because a county's or city's authority to levy taxes is not encompassed within the title of
23 Substitute Senate Bill No. 4313.
24
25

1 45. A controversy exists between the OFO and the City as to whether RCW 36.65.030
2 applies to the OFO Initiative, and whether RCW 36.65.030 is unconstitutional and void.

3 46. The Attorney General is being served with a copy of this petition and counterclaim
4 and the City's complaint in accordance with RCW 7.24.110.

5 **VIII. REQUEST FOR RELIEF**

6 WHEREFORE, Opportunity for Olympia and Ray Guerra seek relief as follows:

7 A. A decree ordering an election to be held in the City of Olympia on November 8, 2016
8 for the purpose of voting upon the OFO Initiative measure;

9 B. An order requiring the OFO Initiative be included on the ballots for the November 8,
10 2016 City of Olympia election;

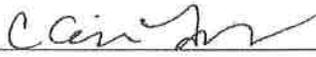
11 C. A declaration that RCW 36.65.030 is inapplicable and irrelevant to the OFO Initiative,
12 unconstitutional, and void;

13 D. Their reasonable attorneys' fees and costs;

14 E. Such other relief as the Court deems just.
15

16 DATED this 27th day of July, 2016.

17 SMITH & LOWNEY, PLLC

18
19 By: 
20 Knoll Lowney, WSBA # 23457
21 Claire Tonry, WSBA # 44497
22 Attorneys for Plaintiffs
23 2317 E. John St., Seattle WA 98122
24 Tel: (206) 860-2883 Fax: (206) 860-4187
25 knoll@igc.org, clairet@igc.org

CITY OF OLYMPIA, WASHINGTON

RESOLUTION NO. _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OLYMPIA, WASHINGTON, RELATING TO A PROPOSED INCOME TAX INITIATIVE; ENTERING RECITALS AND FINDINGS; DECIDING AGAINST PASSING OR ENACTING A PROPOSED INITIATIVE ORDINANCE TO ESTABLISH AN INCOME TAX ON SOME CITY RESIDENTS; AND, EXERCISING ITS LEGISLATIVE DISCRETION AGAINST ORDERING A SPECIAL ELECTION THEREON.

THE OLYMPIA CITY COUNCIL DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. RECITALS AND FINDINGS.

1.1 The City of Olympia is a noncharter code city organized under the Optional Municipal Code in Title 35A Revised Code of Washington.

1.2 RCW 35A.11.100 and Olympia Municipal Code Chapter 1.16 provide authority for Olympia's registered voters to sign a petition for initiative to directly initiate and enact legislation through the initiative process upon obtaining signatures of fifteen percent (15%) of the total number of persons registered to vote within the City of Olympia on the day of the last preceding city general election.

1.3 The powers of initiative and referendum in noncharter code cities such as the City of Olympia shall be exercised in the manner set forth for the commission form of government in RCW 35.17.240 through RCW 35.17.360.

1.4 The local organization known as Opportunity for Olympia (or "OFO") has submitted an initiative petition to the Olympia City Council to adopt an ordinance or submit it unaltered to a city-wide vote pursuant to state law to establish a fund dedicated to funding one year of free community college for each year's public high school graduates and those students receiving GED high school equivalency certificates who live in the City of Olympia, or an equivalent amount of money for those public high school graduates and GED recipients who choose to attend public universities and colleges in the State of Washington; and where ninety-five (95) percent of all funds raised must be spent on tuition, not administrative costs, and that such measure would be funded by establishing an income tax of 1.5% on household income exceeding \$200,000 in the City of Olympia (the "Income Tax Initiative").

1.5 The OFO Initiative Petition was filed with the City Clerk for the City of Olympia on July 6, 2016.

1.6 On July 7, 2016, the OFO Income Tax Initiative Petition was filed with the office of the Thurston County Auditor to determine pursuant to RCW 35A.01.040 and RCW 35A.11.100 whether the Income Tax Initiative Petition had obtained sufficient signatures of registered voters within the City of Olympia.

1.7 On July 13, 2016, the Thurston County Auditor issued a Certificate of Sufficiency finding that the number of registered voters in the City of Olympia for the 2015 General Election was 31,346; that the initiative's proponents had submitted 8,947 signatures on the initiative petition; that the Auditor's office examined 8,470 signatures; that the minimum number of verified registered voters' signatures for a sufficient initiative petition is 4,702; that 4,719 signatures of registered voters were verified; and 3,751 signatures were rejected. Based upon this examination, the Thurston County Auditor determined that the initiative petition was signed by the requisite number of persons listed as registered voters within the City of Olympia. As a result of this examination, the Thurston County Auditor issued a Certificate of Sufficiency pursuant to RCW 35A.11.100.

1.8 Under law, the City Council may:

1.8.1 Pass the OFO's proposed ordinance without alteration within twenty days after issuance of the Auditor's Certificate of Sufficiency has been received by the City Clerk;

1.8.2 Immediately following receipt of the Auditor's issuance of the Certificate of Sufficiency for the Petition, request that the Auditor place the Petition on the ballot on the next election date as provided in RCW 29A.04.330 (see RCW 35.17.260); or

1.8.3 Take no action to pass the OFO's proposed ordinance or to order an election thereon, leaving to any City taxpayer the option to commence an action against the City to obtain a decree ordering an election to be held in the city upon the proposed ordinance attached to the initiative petition (see RCW 35.17.290).

1.9 OFO's Income Tax Initiative proposes a local income tax which is contrary to state law, making the Income Tax Initiative invalid because it violates RCW 36.65.030, which provides that: "A county, city, or city-county shall not levy a tax on net income." And the Income Tax Initiative purports to tax "adjusted gross income," which is fundamentally a net income tax concept. Net income tax is not a term of art in the main body of the Internal Revenue Code. The term occurs in a few sections, and each time it is defined differently for the purposes of the specific section. Adjusted gross income, on the other hand, is expressly defined in the Internal Revenue Code as gross income minus certain enumerated deductions. A taxpayer's "taxable income" is then computed by applying certain additional deductions.

While the word "net" does not appear in the definition, there is language elsewhere in the Internal Revenue Code and Treasury Regulations that adjusted gross income is treated as a net concept. Further, similar to the Income Tax Initiative, adjusted gross income is used in the Internal Revenue Code as a benchmark for determining the appropriate income threshold for taxation in some cases. For example, the Patient Protection and Affordable Care Act imposes a "net investment income tax" on certain taxpayers that is pegged to adjusted gross income.

The City Council determines that a City tax on adjusted gross income is a type of net income tax because it is a tax on gross income netted by a number of deductions and adjustments.

1.10 The Olympia City Council has examined the specific mechanisms and content of OFO's Income Tax Initiative and proposed ordinance and has concluded it presents administrative flaws and questionable legal assertions which have not been resolved. The Olympia City Council, recognizing the flaws in OFO's Income Tax Initiative and proposed ordinance, attempted in good faith to find workable solutions to solve the administrative and legal problems posed in the initiative petition and ordinance. The City Council was unable to fully and fairly investigate, study, reflect, deliberate and secure public engagement and dialogue into the complex issues and administrative flaws and legal issues presented by OFO's Income Tax Initiative and ordinance.

1.11 Collaboration between the government of the City of Olympia, its elected officials, and the Olympia community regarding the local impacts of the current public education finance structure and the current state and local tax system depends upon reliable and relevant information. The City Council recognizes that any attempt to address the cost of higher education and public revenue options will require long-term, systemic change based upon adequate study, public engagement, dialogue and deliberation. The Olympia City Council further recognizes the far reaching and significant beneficial impact of improved access to post-secondary education and vocational training and supports efforts to reduce student loan debt and address a regressive state and local tax system which places a larger burden upon those least able to pay.

1.12 Washington case law and RCW 35A.11.020, RCW 35A.11.030, and RCW 35A.11.090, specifically vests the City Council, as the City's local legislative body, with the power to enact ordinances governing taxation as well as appropriations and OFO's Income Tax Initiative would improperly interfere with the exercise of a power delegated by state law exclusively to a local legislative body.

1.13 Under RCW 29A.04.330(1), city general elections are "held throughout the state of Washington on the first Tuesday following the first Monday in November in the odd-numbered years." The next City general election is November 2017. A special election may be held in conjunction with a State general election. RCW 29A.04.175. But, under RCW 29A.04.330(2), only a city's "governing body" can call a special election. The City Council is the City's "governing body" and it exercises its legislative discretion not to call for a special election on the Income Tax Initiative which it believes to be legally invalid and unconstitutional.

1.14 The Olympia City Council recognizes its duties and responsibilities as a legislative and governing body under state law, and that the initiative power is limited by statute, as well as by decisions of the Washington Supreme Court and other appellate courts of this state.

1.15 RCW 35.17.290 contemplates that any taxpayer and resident who feels aggrieved by the decision of the City Council to neither pass nor enact OFO's Income Tax Initiative or to order an election thereon, may commence an action in superior court against the City to procure a decree ordering an election be held in the city for the purpose of voting upon the proposed initiative ordinance, should the court find the petition to be sufficient and should the court also find that the initiative petition is within the initiative power granted to citizens for direct legislation.

SECTION 2. INITIATIVE REJECTED. The income tax ordinance proposed by Opportunity for Olympia's Income Tax Initiative Petition is hereby rejected.

SECTION 3. NO ELECTION ORDERED. As the elected legislative and governing body of the City of Olympia, this Council rejects ordering a special election upon OFO's Income Tax Initiative on the grounds that said initiative is beyond the lawful initiative power granted to citizens for direct legislation; that the initiative petition intrudes upon the exclusive statutory power granted to the legislative or governing bodies of code cities such as the City of Olympia; and that the proposed ordinance in Opportunity for Olympia's Initiative Petition is contrary to state law.

SECTION 4. CONTINUATION OF COUNCIL'S PRIOR DIRECTION. Consistent with the Council's unanimously-adopted motion on July 12, 2016, the City Manager is authorized to take all reasonable steps on behalf of the City of Olympia and this Council, to obtain a judicial determination whether the initiative is a lawful, valid exercise of the initiative power granted to Olympia's citizens under state law and, if not, to obtain an injunction prohibiting such initiative measure from appearing on a ballot. This authorization includes approval of any appeals as may be necessary before the appellate courts of this state.

PASSED BY THE OLYMPIA CITY COUNCIL this _____ day of July, 2016.

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:



CITY ATTORNEY



THURSTON COUNTY
WASHINGTON
SINCE 1852



24599

Mary Hall
AUDITOR

Certificate of Sufficiency
Petition No. 070716P

State of Washington)
County of Washington)

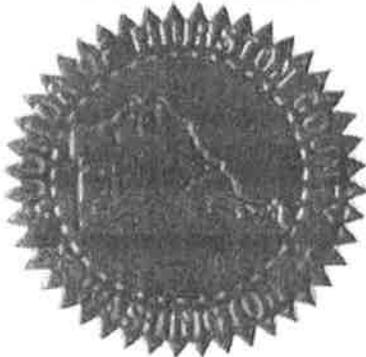
The Undersigned Certifies as Follows:

I am the Thurston County Auditor. The petition entitled "Opportunity for Olympia Initiative Petition: Initiative Petition to the Olympia City Council" was accepted and filed with this office on July 7, 2016.

Pursuant to the Revised Code of Washington 35A.11.100, the petition, to be sufficient, must be signed by fifteen percent of the number of names of persons listed as registered voters within the city, based on the total registered voters in the City of Olympia on the day of the last preceding city general election. I have caused the names of the signers on said petition to be compared against the list of registered voters in the Thurston County Auditor's Office. The results of the examination are as follows:

1. Number of registered voters in the City of Olympia for the 2015 General Election: 31,346
2. Number of signatures on the petition filed by the proponents: 8,947
3. Number of signatures examined: 8,470
4. Number of minimum verified signatures required for a sufficient petition: 4,702
5. Number of verified signatures: 4,719
6. Number of rejected signatures: 3,751

Based upon this examination, it has been determined that said petition was signed by the requisite number of names of persons listed as registered voters within the city and is hereby certified as sufficient pursuant to the Revised Code of Washington 35A.11.100.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the County of Thurston, Washington this 13th day of July, 2016.

MARY HALL
Thurston County Auditor

Elections
2000 Lakeridge Dr SW, Bldg 1, Rm 118
Olympia, WA 98502
Phone: (360) 786-5408
Fax: (360) 786-5223

Ballot Processing Center
2905 29th Avenue SW, Ste E & F
Tumwater, WA 98512
Phone: (360) 786-5408
Fax: (360) 705-3518

Financial Services
929 Lakeridge Dr SW, Rm 226
Olympia, WA 98502
Phone: (360) 786-5402
Fax: (360) 357-2481

Licensing and Recording
2000 Lakeridge Dr SW, Bldg 1, Rm 106
Olympia, WA 98502
Licensing Phone: (360) 786-5406
Recording Phone: (360) 786-5405
Fax: (360) 786-5223

government and its existing public institutions, and shall take effect immediately.

Passed the Senate February 6, 1984.

Passed the House February 22, 1984.

Approved by the Governor March 2, 1984.

Filed in Office of Secretary of State March 2, 1984.

CHAPTER 91

[Substitute Senate Bill No. 4313]

CITY-COUNTY MUNICIPAL CORPORATIONS—CLARIFICATION

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.

Passed the House February 23, 1984.

Approved by the Governor March 2, 1984.

Filed in Office of Secretary of State March 2, 1984.

CHAPTER 92

[Substitute House Bill No. 69]

MARTIN LUTHER KING, JR.—SCHOOL HOLIDAY

AN ACT Relating to holidays; and amending section 13, chapter 283, Laws of 1969 ex. sess. as last amended by section 2, chapter 24, Laws of 1975-'76 2nd ex. sess. and RCW 28A.02.061.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 13, chapter 283, Laws of 1969 ex. sess. as last amended by section 2, chapter 24, Laws of 1975-'76 2nd ex. sess. and RCW 28A.02.061 are each amended to read as follows:

The following are school holidays, and school shall not be taught on these days: Saturday; Sunday; the first day of January, commonly called New Year's Day; the third Monday of January, being celebrated as the anniversary of the birth of Martin Luther King, Jr.; the third Monday in February, being the anniversary of the birth of George Washington; the last Monday in May, commonly known as Memorial Day; the fourth day of July, being the anniversary of the Declaration of Independence; the first Monday in September, to be known as Labor Day; the eleventh day of November, to be known as Veterans' Day, the fourth Thursday in November, commonly known as Thanksgiving Day; the day immediately following Thanksgiving Day; the twenty-fifth day of December, commonly called Christmas Day: PROVIDED, That no reduction from the teacher's time or salary shall be made by reason of the fact that a school day happens to be one of the days referred to in this section as a day on which school shall not be taught.

Passed the House February 6, 1984.

Passed the Senate February 23, 1984.

Approved by the Governor March 2, 1984.

Filed in Office of Secretary of State March 2, 1984.

EXHIBIT D

EXHIBIT D

EXPEDITE
 No Hearing set
 Hearing is set:
 Date: August 17, 2016 (Special Set)
 Time: 3:30 p.m.
 Judge/Calendar: Anne Hirsch/Civil

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,

Plaintiff,

v.

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

PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

CITY OF OLYMPIA
 City Attorney's Office
 P.O. Box 1967/601 - 4th Ave. E.
 Olympia, Washington 98507-1967
 Telephone: (360) 753-8338

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1 **1. INTRODUCTION & REQUESTED RELIEF**

2 There is no constitutional right to direct legislation (initiative and referendum) in
3 Washington cities and counties.¹ Such authority exists only as authorized by the Legislature.
4 And the Legislature has reserved specific powers – particularly the taxing power – to a city’s
5 legislative body: the city council. RCW 35A.11.030.

6 The proposed Income Tax Initiative seeks to have the City of Olympia levy income taxes
7 and appropriate funds collected by the City from income tax revenues. But the proposed Income
8 Tax Initiative is invalid for two independent reasons: because the proposed Income Tax Initiative
9 involves powers specifically granted to the City’s legislative body (which are not subject to
10 direct legislation); and because the proposed Income Tax Initiative conflicts with a statute that
11 expressly prohibits local taxes on net income (RCW 36.65.030).

12 The City respectfully requests that this Court: (1) issue an order declaring that the
13 proposed Income Tax Initiative, in its entirety, is invalid because it extends beyond the scope of
14 the local initiative power; and (2) issue an injunction that bars Thurston County and the Thurston
15 County Auditor from placing the proposed Income Tax Initiative on the State general election
16 ballot on November 8, 2016.

17 **2. STATEMENT OF FACTS**

18 The following facts are undisputed.

19 **2.1. The City Of Olympia.**

20 The City of Olympia (“City”) is a non-charter code city that operates under Title 35A
21 RCW.² The City adopted code city initiative and referendum power as permitted under
22
23

24 ¹ Amendment 7 to the Washington Constitution, authorizing direct legislation on State measures, does not
25 apply to municipal governments. *Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1 , 239 P.3d 589
26 (2010). For example, there is no authority in law for Thurston County’s (or 31 other Washington
 counties’) exercise of initiative and referendum. Only a charter county has that option.

² *Olympia Municipal Code at Section 1.08.010* (“There is adopted for the city of Olympia, Washington,
 the classification of noncharter code city, pursuant to the provisions of RCW 35A.02.030.”).

1 RCW 35A.11.080 through 35A.11.100.³ Under RCW 35A.11.100, the powers of initiative and
2 referendum must be exercised under RCW 35.17.240 through 35.17.360.

3 **2.2. The Income Tax Initiative Sponsored By OFO.**

4 On July 6, 2016, Opportunity for Olympia (“OFO”) filed a petition with the City seeking
5 to levy an income tax and appropriate funds collected by the City from income tax revenues (the
6 “Income Tax Initiative”).⁴ The ordinance proposed by the Income Tax Initiative is entitled:

7 AN ORDINANCE of the City of Olympia, Washington, imposing an excise tax
8 on household income above \$200,000 per year derived from financial
9 transactions, personal activities, business, commerce, occupations, trades,
10 professions and other lawful activities, the revenues therefrom to be dedicated to
11 funding at least one year of free community or technical college for each year’s
12 City of Olympia public high school graduates and General Education
Development Certificate (“GED”) recipients, or an equivalent amount of money
for such public high school graduates and GED recipients who choose to attend
public universities and colleges in the State of Washington.⁵

13 OFO, a Washington political committee, sponsored the proposed Income Tax Initiative.⁶

14 **2.3. The County Auditor’s Certification.**

15 As required by Washington law, the City forwarded the proposed Income Tax Initiative
16 to the County Auditor.⁷ On July 13, 2016, the County Auditor advised that the proposed Income
17 Tax Initiative “was signed by the requisite number of names of persons listed as registered voters
18 within the city and is hereby certified as sufficient pursuant to the Revised Code of Washington
19 35A.11.100.”⁸

20 OFO seeks to have the proposed Income Tax Initiative placed on a ballot at a City special
21 election to be held in conjunction with the State general election on November 8, 2016 (the

22 ³ *Olympia Municipal Code Section 1.16.010(B)* (“The powers of initiative and referendum shall, when
23 exercised, be done so in the manner set forth for the commission form of government in RCW 31.17.240
through 35.17.360.”).

24 ⁴ Clerk’s Document Declaration at Ex. 1 (Income Tax Initiative).

25 ⁵ *Id.*

26 ⁶ *Id.*

⁷ Clerk’s Document Declaration at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016), Section 1.6.

⁸ Defendants-Petitioners Opportunity For Olympia’s And Ray Guerra’s Petition And Affidavit For
Prevention Of Election Error And Counterclaim at Ex. B (County Assessor’s Certification).

1 “November ballot”).⁹ The City’s legislative body (i.e., the City Council) has not called for a
2 special election on the proposed Income Tax Initiative.¹⁰

3 **2.4. The City Seeks Declaratory Relief To Bar The Proposed Income Tax**
4 **Initiative.**

5 On July 12, 2016, the Olympia City Council authorized legal action against the proposed
6 Income Tax Initiative.¹¹ The City proceeded with this suit to obtain a judicial declaration
7 concerning the validity of the proposed Income Tax Initiative and an injunction preventing the
8 proposed Income Tax Initiative from appearing on the November ballot if the proposed Income
9 Tax Initiative is deemed invalid.¹² The unanimously-adopted motion states:

10 . . . that upon the Auditor’s certification of sufficient valid signatures for
11 Opportunity for Olympia’s initiative petition, the City Manager be authorized to
12 take all reasonable steps on behalf of the City of Olympia and this Council, to
13 obtain a judicial determination whether the initiative is a lawful, valid exercise of
14 the initiative power granted to Olympia’s citizens under state law, and if not, to
15 obtain an injunction prohibiting such initiative measure from appearing on the
16 November ballot. My motion includes authorization for the City Manager to
17 pursue any appeals as may be necessary before the appellate courts of this state.¹³

18 On July 26, 2016, the City Council adopted Resolution No. M-1847, entitled:

19 **A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OLYMPIA,**
20 **WASHINGTON, RELATING TO A PROPOSED INCOME TAX INITIATIVE;**
21 **ENTERING RECITALS AND FINDINGS; DECIDING AGAINST PASSING OR**
22 **ENACTING A PROPOSED INITIATIVE ORDINANCE TO ESTABLISH AN INCOME**
23 **TAX ON SOME CITY RESIDENTS; AND, EXERCISING ITS LEGISLATIVE**
24 **DISCRETION AGAINST ORDERING A SPECIAL ELECTION THEREON.¹⁴**

25 The Resolution rejected the Income Tax Initiative; rejected its referral to the ballot; and,
26 reaffirmed the authority and direction for this suit to invalidate the Income Tax Initiative and to
prevent the Initiative from appearing on the November ballot.¹⁵

23 ⁹ Clerk’s Document Declaration at Ex. 1 (Income Tax Initiative).

24 ¹⁰ *Id.* at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016), Section 3.

25 ¹¹ *Id.* at Ex. 3 (Minutes of the City Council meeting of July 12, 2016).

26 ¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016).

¹⁵ *Id.*

1 **3. QUESTIONS PRESENTED**

2 *QUESTION:* Whether the proposed Income Tax Initiative seeking to establish an income
3 tax in the City is invalid because it extends beyond the scope of the local initiative power?

4 *ANSWER:* YES.

5 *QUESTION:* Whether this Court should enter an order enjoining the proposed Income
6 Tax Initiative from appearing on the November ballot?

7 *ANSWER:* YES.

8 **4. EVIDENCE RELIED UPON**

9 The City relies on the following to support this motion for declaratory judgment and
10 injunctive relief: (1) the Document Declaration of Jane Kirkemo, City Clerk (“Clerk’s
11 Document Declaration”); and (2) the files on record in this matter. The Clerk’s Document
12 Declaration verifies the following:

13 4.1 The Income Tax Initiative (also at Appendix 2 to the Complaint);

14 4.2 Opportunity for Olympia’s Political Committee Registration – PDC form C1pc
15 (also at Appendix 1 to the Complaint);

16 4.3 Minutes of the City Council meeting of July 12, 2016 (containing record of City
17 Council motion authorizing this suit);

18 4.4 City Resolution No. M-1847 (July 26, 2016) (rejecting Income Tax Initiative);
19 and

20 4.5 City Resolution No. M-1846 (July 12, 2016) (calling for further study on taxes
21 and on access to higher education and funding).

22 **5. AUTHORITY**

23 The questions presented in this motion are purely issues of law.
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25
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1 **5.1. The City’s Pre-Election Challenge To The Proposed Income Tax Initiative Is**
2 **Both Permissible And Appropriate.**

3 In contrast to state-wide measures, “[i]t is well established [] that a preelection challenge
4 to the *scope* of the initiative power is both permissible and appropriate” at the local level.¹⁶ In
5 this case, the City seeks a judicial determination that the scope of the proposed Income Tax
6 Initiative extends beyond the local initiative power. Accordingly, the City’s pre-election
7 challenge to the proposed Income Tax Initiative is both permissible and appropriate.

8 **5.2. The City Has Standing To Challenge The Proposed Income Tax Initiative.**

9 Washington law recognizes that forcing cities to place invalid initiatives on the ballot
10 results in undue financial and administrative burdens. As a result, a city has standing to
11 challenge such initiatives.¹⁷ In this case, the financial and administrative burden of placing the
12 proposed Income Tax Initiative on the November ballot is sufficient injury in fact to confer
13 standing on the City. Furthermore, income tax-related initiatives have significant public
14 importance warranting judicial resolution.

15 **5.3. Declaratory Relief And Injunctive Relief Are Proper Because The Proposed**
16 **Income Tax Initiative Extends Beyond The Local Initiative Power.**

17 As a general rule, the initiative or referendum process allows the people to directly
18 exercise power vested in a city as a corporate entity.¹⁸ But the initiative or referendum process

19 ¹⁶ *American Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn.App. 427, 432, 260 P.3d 45 (Div. 1
20 2011) (emphasis in original); see also *City of Longview v. Wallin*, 174 Wn.App. 763, 778, 301 P.3d 45
21 (Div. 2 2013) (the city’s challenge to the initiative was ripe for review even though the county auditor had
22 yet to determine whether the initiative had enough signatures to be placed on the ballot); *Futurewise v.*
23 *Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007) (“We will therefore consider only two types of
24 challenges to an initiative prior to an election: that the initiative does not meet the procedural
25 requirements for placement on the ballot... and that the subject matter of the initiative is beyond the
26 people’s initiative power.”) (citation omitted).

¹⁷ *City of Longview v. Wallin*, 174 Wn.App. 763, 782-83, 301 P.3d 45 (Div. 2 2013) (“We hold that the
financial and administrative burden of placing a potentially unlawful initiative on the ballot was a
sufficient injury in fact to confer standing on the city. Moreover, even if Longview did not have clear
standing, we would address its claims because they involve significant and continuing matters of public
importance that merit judicial resolution.”) (quotations and citations omitted).

¹⁸ 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.”).

1 has limitations. For example, the initiative or referendum process applies only to powers granted
2 to the City as a whole; not to “powers granted by the legislature to the governing body of a
3 city.”¹⁹ As another example, the initiative or referendum process cannot be invoked if it
4 conflicts with state law.²⁰ In this case, both limitations independently invalidate the proposed
5 Income Tax Initiative.

6 **5.3.1. The proposed Income Tax Initiative is invalid because it involves**
7 **powers granted to the City’s governing body and not to the City as a**
8 **whole.**

9 As set forth above, the authority for direct legislation only applies to powers granted to
10 the City itself; it does *not* apply to “powers granted by the legislature to the governing body of a
11 city.”²¹ In *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 272 P.3d
12 227 (2012), for example, the Washington Supreme Court considered whether a proposed
13 initiative attempting to restrict a city’s use of red light cameras extended beyond the local
14 initiative power.²² Recognizing the legislature granted the exclusive power to legislate the use of
15 automated traffic safety cameras to local legislative bodies (as opposed to cities as a whole), the
16 Washington Supreme Court held that the proposed initiative was invalid because it extended
17 beyond the local initiative power.²³

18 In this case, the proposed Income Tax Initiative seeks to have the City levy an income tax
19 to fund higher education for public high school graduates and GED recipients living in
20 Olympia.²⁴ Whether or not this is worthy public policy, under Washington law the power to levy

21 ¹⁹ *City of Longview v. Wallin*, 174 Wn.App. 763, 784, 301 P.3d 45 (Div. 2, 2013), quoting *Mukilteo*
22 *Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227 (2012); *City of*
23 *Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006).

24 ²⁰ *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 450, 495 P.2d 657 (1972) (“Initiative
25 or referendum procedures can be invoked at the local level only if their exercise is not in conflict with
26 state law.”).

²¹ *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).

²² *Mukilteo Citizens For Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 51-52, 272 P.3d 227
(2012).

²³ *Id.*

²⁴ Clerk’s Document Declaration at Ex. 1 (Income Tax Initiative).

1 taxes for local purposes is exclusively vested in the City’s legislative body (i.e., the City
2 Council); it is not vested in the City as a whole. *See* RCW 35A.11.020 (“Within constitutional
3 limitations, **legislative bodies** of code cities shall have within their territorial limits **all powers of**
4 **taxation for local purposes...**”); *and* RCW 35A.11.030 (“eminent domain, borrowing,
5 **taxation**, and the granting of franchises may be **exercised by the legislative bodies** of code
6 cities”) (emphasis added). Because the proposed Income Tax Initiative involves powers
7 specifically granted to the City’s legislative body (and not to the City as a whole), the proposed
8 Income Tax Initiative extends beyond the local initiative power, rendering it invalid, null, and
9 void.²⁵

10 The policy background for the Legislature’s delegation of difficult issues to legislative
11 bodies is demonstrated by the process faced by the City with the proposed Income Tax Initiative.
12 As the City Council found, the issues in this State with a regressive tax structure and ongoing
13 issues in funding access to higher education are not easily addressed by a political fix. The City
14 Council in part stated in its Resolution No. M- 1846:

15 **WHEREAS**, the City Council recognizes that any attempt to address the cost of higher
16 education and secure public revenue options will require long-term, systemic change
based upon adequate study, public engagement, dialogue and deliberation; and

17 **WHEREAS**, the Olympia City Council recognizes the far reaching and significant
18 beneficial impact of improved access to post-secondary education and vocational training
19 and supports efforts to reduce student loan debt and address a regressive state and local
tax system which places a larger burden upon those least able to pay;

20 The City Council then provided for a thoughtful legislative, not political, process to “research,
21 investigate, and study local residents’ access to higher, post-secondary and vocational education,
22 and the local impact of the state’s regressive tax policies, while actively engaging Olympia’s
23 citizens in meaningful and constructive dialogue regarding the consequences of existing and
24

25 _____
26 ²⁵ *See Mukilteo Citizens For Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227
(2012) (initiatives that extend beyond the initiative power are invalid).

1 proposed policies.²⁶ It is that legislative process for difficult issues, such as taxation and
2 appropriations that the Legislature reserved to legislative bodies, not the political process of
3 direct legislation.

4 The Legislature's clear authorization to the City Council only, as the city's governing
5 body, is confirmed in RCW 35A.11.090. There, the law ordinarily requires 30 days before an
6 ordinance takes effect in order to allow the people's direct exercise of referendum authority. But
7 that authority for direct legislation is not permitted for "ordinances appropriating money; . . . and
8 ordinances authorizing or repealing the levy of taxes; which excepted ordinances shall go into
9 effect as provided by the general law or by applicable sections of Title 35A RCW." RCW
10 35A.11.090 (4) and (7). As a result, appropriation or tax ordinances are effective 5 days after
11 publication and not subject to referendum. RCW 35A.13.190. Here, the proposed Income Tax
12 Initiative is not only a proposed tax measure, but also an appropriation measure that specifically
13 directs the management of funds collected from the tax (college tuition). Both the authority of
14 taxation and appropriation are outside of the people's limited authority to exercise direct
15 legislation. The proposed Income Tax Initiative is not an authorized subject for direct
16 legislation.

17 When the Legislature has determined that a vote is appropriate for local tax legislation, it
18 has specifically so stated. For example, in RCW 35.21.706 the Legislature requires an election
19 on a city council proposal to increase a utility business and operations tax, above the base-six
20 percent a city is authorized to levy against public utilities (e.g., gas and electric companies). No
21 such authority for an election exists with respect to an income tax or with any appropriation. The
22 proposed Income Tax Initiative is not within the limited authority for direct legislation
23 authorized by the Legislature for the City – it is beyond the scope of the local initiative power.

24
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²⁶ Clerk's Document Declaration at Ex. 5 (Resolution No. M-1846).

1 **5.3.2. The proposed Income Tax Initiative is invalid because it conflicts with**
2 **state law prohibiting income tax.**

3 As set forth above, “[i]nitiative and referendum procedures can be invoked at the local
4 level *only* if their exercise is not in conflict with state law.”²⁷ In *1000 Friends of Washington v.*
5 *McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2006), for example, the Washington Supreme Court
6 considered whether county ordinances enacted to implement Washington’s Growth Management
7 Act were subject to veto by local initiative or referendum.²⁸ Recognizing how “[i]t would violate
8 the constitutional blueprint to allow a subdivision of the State to frustrate the mandates of the
9 people of the State as a whole,” our Supreme Court held that the proposed local referendum was
10 invalid because it conflicted with Washington’s Growth Management Act:

11 Initiatives or referenda that attempt to graft limits onto a grant of power by the
12 people of the State, or to modify obligations imposed on local legislative or
13 executive authority by the people of the State, are invalid as in conflict with state
14 law.²⁹

15 In this case, the proposed Income Tax Initiative seeks to have the City levy taxes “on
16 household Income above \$200,000 per year derived from financial transactions, personal
17 activities, business, commerce, occupations, trades, professions and other lawful activities...”³⁰
18 The proposed Income Tax Initiative defines “Income,” as the “adjusted gross income as
19 determined under the federal internal revenue code.”³¹ The Internal Revenue Code defines
20 “adjusted gross income” as “gross income minus [] deductions” set forth in 26 U.S.C. § 62 (e.g.,
21 trade and business deductions, retirement savings, interest on students loans, and health savings
22 accounts). This is a net amount of gross income.³² Thus, the proposed Income Tax Initiative
23 seeks to levy a tax on gross income netted by a number of deductions and adjustments; that is, a

24 ²⁷ *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 450, 495 P.2d 657 (1972) (emphasis
25 added).

26 ²⁸ *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 168, 149 P.3d 616 (2006).

²⁹ *Id.*

³⁰ Clerk’s Document Declaration at Ex. 1 (Income Tax Initiative).

³¹ *Id.*

³² 26 U.S.C. § 62.

1 net income tax. The City Council as the legislative authority that would be charged with
2 enforcement of the proposed Income Tax Initiative, if enacted, has appropriately determined that
3 the proposed Income Tax Initiative would create a net income tax:

4 And the Income Tax Initiative purports to tax “adjusted gross income,” which is
5 fundamentally a net income tax concept. Net income tax is not a term of art in the
6 main body of the Internal Revenue Code. The term occurs in a few sections, and
7 each time it is defined differently for the purposes of the specific section. Adjusted gross income, on the other hand, is expressly defined in the Internal
8 Revenue Code as gross income minus certain enumerated deductions. A taxpayer’s “taxable income” is then computed by applying certain additional
9 deductions.

10 While the word “net” does not appear in the definition, there is language
11 elsewhere in the Internal Revenue Code and Treasury Regulations that adjusted
12 gross income is treated as a net concept. Further, similar to the Income Tax
13 Initiative, adjusted gross income is used in the Internal Revenue Code as a
14 benchmark for determining the appropriate income threshold for taxation in some
15 cases. For example, the Patient Protection and Affordable Care Act imposes a
16 “net investment income tax” on certain taxpayers that is pegged to adjusted gross
17 income.

18 The City Council determines that a City tax on adjusted gross income is a type of
19 net income tax because it is a tax on gross income netted by a number of
20 deductions and adjustments.³³

21 Under state law, however, “[a] county, city, or city-county shall **not** levy a tax on net
22 income.” RCW 36.65.030. Because the proposed Income Tax Initiative seeks to levy a local tax
23 on net income, the proposed Income Tax Initiative conflicts with Washington state law; and
24 because the proposed Income Tax Initiative conflicts with Washington state law, the proposed
25 Income Tax Initiative extends beyond the local initiative power, rendering it invalid, null, and
26 void.

27 **5.3.3. Court need not address constitutionality of a local income tax.**

28 This Court need not and should not address the potential constitutional issues associated
29 with an income tax in the State of Washington, including an income tax at the local level. There

30 ³³ Clerk’s Document Declaration at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016), Section 1.9.

1 is a long history regarding income tax measures in the state. In 1933, for example, the
2 Washington Supreme Court struck down an income tax initiative measure for violating the
3 property tax uniformity provisions of our Constitution's Fourteenth Amendment.³⁴ The Court
4 held that income is property under the State Constitution³⁵ and specifically rejected the argument
5 that an income tax is an "excise tax."³⁶ So here, OFO's attempt to characterize the tax in the
6 proposed Income Tax Initiative as an excise tax is directly contrary to controlling Washington
7 Supreme Court precedent.

8 Three years later, the Court again considered an income tax that had been enacted by the
9 Legislature in 1935.³⁷ That income tax was also called an excise tax by the Legislature. But the
10 Court again rejected the characterization of an income tax as an excise tax.³⁸ Whether the tax
11 was on "net income" or the "privilege of receiving net income," this further income tax effort
12 still taxed property and was found unconstitutional.³⁹ Here, these cases are cited only to dispel
13 the notion that the proposed Income Tax Initiative is for an excise tax that is not a tax on net
14 income. Because the authority to levy a tax rests with the City Council, and not with direct
15 legislation, and because an existing statute expressly bans cities from enacting net income taxes,
16 the Court should invalidate the proposed Income Tax Initiative without consideration of
17 constitutional issues.

18 **5.4. Injunctive Relief Is Also Proper Because The Statutory Requirements For** 19 **Special Elections Have Not Been Satisfied.**

20 In order to call for a special election, a city's governing body must first provide a
21 resolution to the county auditor calling for a special election. *See* RCW 29A.04.330(2) ("The

22 ³⁴ *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933); Washington Constitution Art. VII, Sec. 1.

23 ³⁵ *Id.*, 174 Wash at 376 ("It has been definitely decided in this state that an income tax is a property tax
which should set the question at rest here.").

24 ³⁶ *Id.* ("It is asserted an income tax is an excise tax. That is not correct.").

25 ³⁷ *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936).

26 ³⁸ *Id.*, 185 Wash. at 217 ("But the Legislature cannot change the real nature and purposes of an act by
giving it a title or declaring its nature and purpose to be otherwise, any more than a man can transform his
character by changing his attire or assuming a different name.").

³⁹ *Id.*, 185 Wash. at 218-9.

1 county auditor, as ex officio supervisor of elections, upon request in the form of a resolution of
2 the governing body of a city, town, or district, presented to the auditor prior to the proposed
3 election date, shall call a special election in such city, town, or district...”). In this case, the
4 City’s legislative body, the City Council, has not provided a resolution to the County Auditor
5 calling for a special election on the proposed Income Tax Initiative.⁴⁰ To the contrary, the City
6 Council passed Resolution No. M-1847 reaffirming the authority of the City Manager to obtain a
7 judicial declaration confirming that the proposed Income Tax Initiative extends beyond the local
8 initiative power.⁴¹ Because the City Council has not provided the County Auditor with a
9 resolution calling for a special election on the proposed Income Tax Initiative, the statutory
10 requirements for special elections have not been satisfied and the proposed Income Tax Initiative
11 cannot appear on the November ballot. This Court accordingly should enter an order enjoining
12 the proposed Income Tax Initiative from appearing on the November ballot.⁴²

13 **6. CONCLUSION**

14 The City respectfully requests that this Court: (1) issue an order declaring that the
15 proposed Income Tax Initiative, in its entirety, is invalid, null, and void because it extends
16 beyond the scope of the local initiative power; and (2) issue an injunction that bars Thurston
17 County and the Thurston County Auditor from placing the proposed Income Tax Initiative from
18 appearing on the State general election ballot in November 2016. A proposed form of order to
19 that effect is attached for the Court’s consideration.
20
21

22 ⁴⁰ Clerk’s Document Declaration at Ex. 4 (City Resolution No. M-1847, dated July 26, 2016), Section 3.

23 ⁴¹ *Id.*, Section 4.

24 ⁴²For a special election to be held in conjunction with the State general election on November 8, 2016,
25 Washington law requires that a resolution calling for the special election be presented to the county
26 auditor no later than August 2, 2016 (the day of the primary as specified by RCW 29A.04.311). See
RCW 29A.04.030(3). In the absence of a resolution calling for a special election on the proposed Income
Tax Initiative prior to August 2, 2016, therefore, the proposed Income Tax Initiative **cannot** appear on the
November ballot. The Court should enter an order enjoining the Proposed Income Tax Initiative from
appearing on the November ballot for this reason as well.

1 DATED this 29th day of July, 2016.

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1
2
3 EXPEDITE
4 No Hearing set
5 Hearing is set:
6 Date: August 24, 2016
7 Time: 3:00 p.m.
8 Judge/Calendar: The Hon. Jack Nevin/Civil

9
10 SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

11 CITY OF OLYMPIA, a Washington municipal
12 corporation,

13 Plaintiff,

Case No. 16-2-02998-34

14 v.

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

CITY OF OLYMPIA
REPLY IN SUPPORT OF
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

20 Defendants.

21
22
23
24
25
26
REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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6	RCW 35A.82.020.....	6, 7
7	RCW 35A.83.....	9
8	RCW 36.65.030	3, 8, 9

OTHER AUTHORITIES

10	<i>Initiative and Referendum Guide for Washington Cities and Charter Counties</i>	
11	(Municipal Research and Services Center of Washington, 2015), available at	
12	www.mrsc.org/publications/publications.aspx	6

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1 **1. INTRODUCTION**

2 The City of Olympia asks this Court to apply well-established law on the limits of direct
3 legislation, and the Legislature’s clear prohibition against city net income taxes. Defendants’
4 opposition mischaracterizes facts, misconstrues firmly-established Washington law, and asserts a
5 series of false accusations intended to deflect this Court’s attention away from the fact that the
6 proposed Income Tax Initiative is beyond the authority for direct legislation and invalid, null,
7 and void. The Defendants’ hyperbole and political arguments in opposition are without merit,
8 and the City’s Motion for Declaratory Judgment and Injunctive Relief should be granted.

9 **2. THE CITY’S PRE-ELECTION CHALLENGE TO THE PROPOSED INCOME
10 TAX INITIATIVE IS PERMISSIBLE AND APPROPRIATE.¹**

11 Established Washington Supreme Court precedent confirms that pre-election challenges
12 to local initiatives are permissible and appropriate.² There are no constitutional issues present in
13 this matter.³ The power of local direct legislation (initiative and referendum) is controlled by the
14 Legislature. Here, the City seeks a judicial determination that the scope of the proposed Income
15 Tax Initiative extends beyond the scope of that local initiative power. Accordingly, the City’s
16 pre-election challenge to the proposed Income Tax Initiative is permissible and appropriate.
17 Defendants’ arguments that this Court should refrain from ruling on the scope of the proposed
18 Income Tax Initiative must be rejected.⁴ The very cases cited by Defendants support the City.

19 *Coppernoll v. Reed* specifically recognizes the right to pre-election challenges concerning
20 the scope of local initiatives, such as the proposed Income Tax Initiative.⁵ Defendants’ reliance
21 on *Coppernoll* is misplaced.

22
23 ¹ The City explains this and other issues in greater detail in the City’s Opening Brief.

24 ² See City’s Opening Brief at p. 5:1-7.

25 ³ *Spokane Entrepreneurial Ctr. v. Spokane Moves*, 185 Wn.2d 97, 104, 369 P.3d 140 (2016) (“[T]he right
26 to file a local initiative is not granted in the constitution. Instead, state statutes governing the
establishment of cities allow the cities to establish a local initiative process.” (Emphasis by the Court)).

⁴ See Defendants’ Opposition at pp. 9-11. In fact, Defendants argue that substantive pre-election review
is “never” appropriate. But that argument defies firmly-established precedent.

⁵ *Coppernoll v. Reed*, 155 Wn.2d 290, 297-98, 119 P.3d 318 (2005).

1 *Washington State Labor Council v. Reed* does not bar pre-election challenges to local
2 initiatives.⁶ In *Reed*, the Washington Supreme Court initially declined to issue a pre-election writ
3 of mandamus prohibiting certification of Referendum 53 on a **state referendum** because the
4 Court did not have sufficient time to decide whether Referendum 53 was constitutional prior to
5 the election, and instead issued a writ of mandamus prohibiting the secretary of state from
6 certifying the votes on Referendum 53 pending a ruling on the constitutionality of Referendum
7 53.⁷ While the Court temporarily deferred issuing injunctive relief, the Court **never** deferred its
8 ruling on the pre-election challenge (as Defendants ask this Court to do in this case).
9 Defendants' reliance on *Reed* is misplaced.⁸

10 *City of Seattle v. Yes for Seattle* further supports the timing of this action. In *Yes for*
11 *Seattle*, the trial court ruled that the local initiative was invalid.⁹ On appeal, the initiative
12 proponent advanced the exact argument that Defendants here advance (i.e., that the trial court's
13 pre-election review of local initiatives is premature).¹⁰ The Court of Appeals flatly rejected that
14 argument:

15 Generally, courts will not review initiatives before they are adopted by voters
16 because courts do not want to interfere with the political process of issue advisory
17 opinions. But an established exception to the general rule is that a court will
18 review an initiative to determine if it is within the scope of the initiative power. . .
19 Therefore, pre-election review was proper for the limited purpose of determining
20 whether I-80 was within the initiative power.¹¹

21
22 ⁶ See Defendants' Opposition at p. 10:4-9.

23 ⁷ *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 53-54, 65 P.3d 1203 (2003).

24 ⁸ In *Reed*, the Washington Supreme Court was asked to decide a complex legal issue: the constitutionality
25 of EHB 2901. The legal issue in this case, on the other hand, is simple and straight-forward. The reason
26 for Defendants' lack of confidence in this Court's ability to decide a simple and straight-forward legal
issue in advance of the November election remains a mystery.

⁹ *City of Seattle v. Yes for Seattle*, 122 Wn.App. 382, 386, 93 P.3d 176 (2004).

¹⁰ *Id.*

¹¹ *Id.* (citations and quotations omitted).

1 *Yes for Seattle* confirms that the City's pre-election challenge of the proposed Income Tax
2 Initiative is proper.¹² And our Supreme Court, most recently on February 4, 2016, reaffirmed the
3 long line of authority recognizing the propriety of preelection challenges to local direct
4 legislation. *Spokane Entrepreneurial Ctr. v. Spokane Moves*, 185 Wn.2d 97, 369 P.3d 140
5 (2016).¹³ This action is properly before this Court for action prior to the 2016 general election.

6 **3. THE CITY IS ENTITLED TO INJUNCTIVE RELIEF BECAUSE THE**
7 **PROPOSED INCOME TAX INITIATIVE CLEARLY EXTENDS BEYOND**
8 **LOCAL INITIATIVE POWER.**

9 The proposed Income Tax extends beyond the scope of local initiative power.¹⁴ None of
10 Defendants' three arguments has merit. This Court should not defer ruling on the validity on the
11 proposed Income Tax Initiative or refrain from issuing injunctive relief

12 **3.1 The City's Right to Bring Preelection Challenges to Unlawful Initiatives.**

13 The proposed Income Tax Initiative involves powers expressly granted to the City's
14 legislative body alone; and, the proposed Income Tax Initiative conflicts with RCW 36.65.030
15 which unambiguously prohibits city taxes on net income. Contrary to Defendants' first
16 argument,¹⁵ the City **does** have a clear legal or equitable right to prevent the proposed Income
17 Tax Initiative from appearing on the ballot.¹⁶

18
19
20 ¹² The Court of Appeals went on to explain how the initiative proponent's argument also failed under
21 *Reed*, even though that was not the basis for the Court's holding. Without citing to any legal authority,
22 Defendants also argue that courts should only conduct pre-election reviews if "final appellate decisions"
23 can be reached prior to elections. But none of the cases cited by Defendants stand for that proposition.
24 Considering how "final appellate decisions" can take years to obtain, Defendants' suggestion would
25 effectively eliminate pre-election review entirely.

26 ¹³ And, reconsideration was denied on April 1, 2016. 2016 Wash. LEXIS 465 (Wash., Apr. 1, 2016)

¹⁴ See City's Opening Brief.

¹⁵ Defendant's Opposition at pp. 11-14.

¹⁶ *Spokane Entrepreneurial Ctr. v. Spokane Moves* ("courts will review local initiatives and referendums
to determine, notably, whether 'the proposed law is beyond the scope of the initiative power.'") citing
City of Port Angeles v. Our Water-Our Choice!, 170 Wn.2d 1, 7, 239 P.3d 589 (2010) (quoting *Seattle*
Bldg. & Constr. Trades Council, 94 Wn.2d 740, 746, 620 P.2d 82 (1980)).

1 **3.2 The City’s Standing to Bring a Preelection Challenge to Unlawful Initiatives.**

2 Defendants’ second argument neglects to mention *City of Longview v. Wallin* (and
3 similar cases).¹⁷ The reason is that *City of Longview* completely undermines Defendants’
4 argument. There the Court affirmed the trial court’s order enjoining invalid portions of the
5 proposed city initiative from appearing on the ballot after finding that the financial burden of
6 placing an invalid initiative on the ballot was sufficient injury in fact to warrant injunctive relief.
7 Accordingly, Defendants’ second argument is without merit.¹⁸

8 **3.3 The City’s Timely Action on The Unlawful Proposed Income Tax Initiative.**

9 The City of Olympia expeditiously filed this action within 10 days of the County
10 Auditor’s Certification of the proposed Income Tax Initiative.¹⁹ Here is the chronology:

- 11 • July 6, 2016: Defendants filed the proposed Income Tax Initiative and
12 the City forwarded the proposed Income Tax Initiative to the County
 Auditor;
- 13 • July 12, 2016 (six days later): the City Council authorized seeking a
14 judicial declaration that the proposed Income Tax Initiative was invalid;
- 15 • July 13, 2016 (one day later): the County Auditor certified the proposed
16 Income Tax Initiative;
- 17 • July 22, 2016 (nine days later): the City filed its Complaint; and
- 18 • July 29, 2016 (seven days later): the City filed its Motion for Declaratory
19 Judgment and Injunctive Relief.²⁰

20 ¹⁷ See *City of Longview v. Wallin*, 174 Wn.App. 763, 301 P.3d 45 (Div. 1 2013). *And, see, Spokane*
21 *Entrepreneurial Ctr. v. Spokane Moves* (Court declines to adopt heightened standing requirements for this
22 type of action).

23 ¹⁸ See Defendants’ Opposition at pp. 13:11 – 14:4.

24 ¹⁹ Defendants’ argument implies that the proposed Income Tax Initiative was filed in April. But that is
25 patently false. As the evidence on record confirms, the City was only provided with a draft of the
26 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.

²⁰ See City’s Opening Brief at pp. 2-3. Similarly unwarranted is Defendants’ accusation that the City
somehow “forced” Defendants’ former counsel from representing Defendants in this matter. The City did
not create the Rules of Professional Conduct, and the City is not responsible for Defendants’ failure to
confirm that Defendants’ former counsel conducted a conflicts check.

1 Defendants argument that the City has unclean hands is unfounded.²¹ Defendants absurdly
2 accuse the City of “flouting the rule of law to gain a political advantage” by delaying this legal
3 proceeding for **100 days**.²² The uncontested facts speak for themselves. There was no delay.
4 The City acted timely based on a filed initiative, not on a hypothetical proposal.

5 **4. THE CITY HAS SATISFIED ITS BURDEN TO SHOW THAT THE ENTIRE**
6 **PROPOSED INCOME INITIATIVE IS INVALID.**

7 Defendants ask this Court to parse the Initiative and sever provisions unrelated to the
8 illegal income tax. But the entire proposed Income Tax Initiative is about the levying and
9 appropriation of the proposed income tax:

- 10 • Section 1 sets forth the proposed ordinance enacting **the income tax**;
- 11 • Section 2 defines terms enacting **the income tax**;
- 12 • Section 3 assesses **the income tax**;
- 13 • Section 4 establishes a fund to deposit **the income tax**;
- 14 • Section 5 sets for qualifications for appropriation of **the income tax**; and
- 15 • Section 6 concerns implementation and accountability for the levying and
16 appropriation of **the income tax**.

17 Stated otherwise, severing the income tax components from the proposed Income Tax Initiative
18 leaves nothing left (as confirmed by Defendants’ failure to specify whatever “remainder” would
19 remain). Accordingly, the Defendants’ argument fails.

20 Further, the appropriation portion (for college tuition) of the proposed Income Tax
21 Initiative is invalid for two separate reasons. First, without a source of funds, there is no fund and
22 no source for an appropriation. And, most significantly, the power of appropriation, just as the
23 power of taxation, is not subject to direct legislation. That power is vested by the Legislature in a
24 city’s local legislative body alone. *See* RCW 35A.11.090 (4) and (7); RCW 35A.13.190.

25 _____
26 ²¹ *See* Defendants’ Opposition at p. 14:5-24.

²² *See id.*

1 **5. THE POWER OF LOCAL TAXATION IS VESTED EXCLUSIVELY IN LOCAL**
2 **LEGISLATIVE BODIES.**

3 The local initiative power is available only to cities “corporate” powers; it does not apply
4 to powers granted local legislative bodies.²³ RCW 35A.11.020 unambiguously establishes that
5 the power of local taxation for code cities is vested exclusively in local legislative bodies:
6 “Within constitutional limitations, **legislative bodies** of code cities **shall have** within their
7 territorial limits **all powers of taxation for local purposes....**” Accordingly, it follows that
8 initiative power cannot apply to local taxation and that the proposed Income Tax Initiative
9 (which seeks to impose a local income tax) extends beyond the scope of local initiative power.²⁴

10 Defendants argue that the power of local taxation is not vested exclusively in local
11 legislative bodies because RCW 35A.82.020 grants the power to impose excise taxes to cities as
12 a whole (as opposed to their legislative bodies), thereby legitimizing the proposed Income Tax
13 Initiative.²⁵ But Defendants’ argument fails for at least two reasons: (1) Defendants misconstrue
14 the statutory framework for local taxation; and (2) the proposed Income Tax Initiative does **not**
15 seek to impose an excise tax on businesses, the type of tax authorized by RCW 35A.82.020.

16 **5.1 The Power To Impose Excise Taxes Is Not Granted To Cities As A Whole.**

17 “[M]unicipal corporations are without any inherent power of taxation, being dependent
18 upon legislative grant for their enjoyment of such power.”²⁶ The state Legislature granted local
19 legislative bodies the exclusive power to impose local taxes under RCW 35A.11.020 (“Within
20 constitutional limitations, **legislative bodies of code cities** shall have within their territorial
21 limits all powers of taxation for local purposes”). Chapter 35A.82 RCW authorizes the local
22 taxes that legislative bodies are empowered to enact (e.g., state shared excise taxes in RCW
23 35A.82.010; regulation excise taxes in RCW 35A.82.020; and taxes on certain business activities

24 ²³ Attached to this brief at Appendix I is a list showing corporate powers subject to direct legislation, at
25 *Initiative and Referendum Guide for Washington Cities and Charter Counties* (Municipal Research and
26 Services Center of Washington, 2015), available at www.mrsc.org/publications/publications.aspx .

²⁴ See City’s Opening Brief at pp. 6 -8.

²⁵ See Defendants’ Opposition at pp. 16-21.

²⁶ *City of Wenatchee v. Chelan County PUD No. 1*, 181 Wn. App. 326, 335, 325 P.3d 419 (Div. 3 2014).

1 in RCW 35A.02.050). Under this statutory framework, therefore, the local taxes enumerated in
2 Chapter 35A.82 RCW can be imposed **only** by local legislative bodies. Because local legislative
3 bodies have the exclusive power to impose such taxes, they are **not** subject to local initiatives
4 (such as the proposed Income Tax Initiative). Defendants' argument to the contrary fails.²⁷

5 **5.2 The Proposed Income Tax Initiative Does Not Seek To Impose a Business**
6 **Excise Tax.**

7 Defendants argue that the proposed Income Tax Initiative seeks to impose an "excise" tax
8 because it "taxes the privileges of disproportionate use and benefit from city services enjoyed by
9 wealthy residents, such as proximity to city parks which enhance private property enjoyment and
10 values, and higher value police and fire protection services."²⁸ No matter how many different
11 ways Defendants re-characterize the proposed tax, the proposed Income Tax Initiative does not
12 seek to impose an "excise" tax on business, the only type of tax authorized in Chapter 35A.82
13 RCW. Instead, the proposed Income Tax Initiative unambiguously seeks to tax individual's
14 earned "household income."

15 An "excise" tax is tax imposed for the "particular use or enjoyment of property or the
16 shifting from one to another of any power or privilege incidental to the ownership or enjoyment
17 of property."²⁹ As one example, OMC 3.36.010 imposes an excise tax for "occupying or using
18 publicly owned real and personal property within the city." As another example, the Estate and
19 Transfer Tax Act imposes an excise tax for the transfer of property from a decedent's estate.³⁰
20 The proposed Income Tax Initiative's tax on "household income" is **not** an "excise" tax because
21 the proposed tax would **not** be imposed for the use, ownership, or enjoyment of property;
22 instead, the proposed tax would be based exclusively on an individual's earned "household

23 ²⁷ And even if RCW 35A.82.020 was somehow subject to local initiatives, the statute only involves
24 imposing a business tax; it does not – and cannot – serve as a basis for taxing an individual's income. *See*
25 *Cary v. Bellingham*, 41 Wn.2d 468 (1952) (business taxes cannot be imposed on an individuals' right to
26 earn a living by working for wages).

²⁸ *See* Defendants' Opposition at p. 20:3-6.

²⁹ *In re Estate of Hambleton*, 181 Wn.2d 802, 811, 335 P.3d 398 (2014).

³⁰ *See id.*

1 income” **without** regard to whether that individual uses, owns, or enjoys any property within the
2 City limits. Accordingly, even if an excise tax is not within the exclusive control of a city
3 legislative body, this Court should reject Defendants’ attempt to bring the proposed Income Tax
4 Initiative within the scope of the local initiative power by simply re-characterizing the tax as an
5 “excise” tax (which it is not).

6 **6. CHAPTER 91, LAWS OF 1984 IS NOT UNCONSTITUTIONAL.**

7 Because the proposed Income Tax Initiative clearly conflicts with RCW 36.65.030,
8 Defendants claim RCW 36.65.030’s enabling legislation violates the “single-subject rule” and
9 the “subject-in-title rule.”³¹ Chapter 91, Laws of 1984 (a portion of which is codified at RCW
10 36.65.030) is **not** unconstitutional.³²

11 **6.1 Chapter 91, Laws of 1984 Does Not Violate The “Single-Subject Rule.”**

12 Chapter 91, Laws of 1984 is entitled “AN ACT relating to local government; and adding
13 a new chapter to Title 36 RCW.” The title is a general title (as opposed to a restrictive title), and
14 the “rational unity” requirement is satisfied because the substantive provisions of Chapter 91,
15 Laws of 1984 are all directly related to the general subject set forth in the title (i.e., “local
16 governments”).³³ Accordingly, there can be no reasonable suggestion of logrolling legislation by
17 attaching it to other legislation.

18 Defendants mistakenly argue that Chapter 91, Laws of 1984 violates the “single-subject
19 rule” because “prohibiting cities and counties from levying a tax on net income is a different
20 subject than the primary subject of establishing the city-county form of municipal
21 government.”³⁴ But, again, Defendants mischaracterize the title of Chapter 91, Laws of 1984.

22
23 ³¹ See Defendants’ Opposition at pp. 21-23.

24 ³² This Court recognizes that the Defendants bear the burden of proof beyond a reasonable doubt that a
25 statute is unconstitutional. *Sch. Districts’ All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d
26 599, 605, 244 P.3d 1 (2010) (“In Washington, it is well established that statutes are presumed
constitutional and that a statute’s challenger has a heavy burden to overcome that presumption; the
challenger must prove that the statute is unconstitutional beyond a reasonable doubt.”)

³³ See City’s Opposition at pp. 6-9.

³⁴ Defendants’ Opposition at p. 22:3-4.

1 Chapter 91, Laws of 1984 is “AN ACT relating to local government;” not an act relating to city-
2 county government, and the prohibition of net income taxes by cities, counties, and city-counties
3 is directly related to “local government.”

4 **6.2 Chapter 91, Laws of 1984 Does Not Violate The “Subject-In-Title Rule.”**

5 The title of Chapter 91, Laws of 1984 (i.e., “AN ACT relating to local government”)
6 gives notice that would lead to an inquiry into the body of the act (which consists of substantive
7 provisions that are directly related to “local government”).³⁵ Chapter 91, Laws of 1984 does not
8 violate the “subject-in-title rule.” Defendants again misrepresent the title of Chapter 91, Laws of
9 1984 claiming the title relates only to city-county governments. But the Act’s title clearly gives
10 notice that the act contain provisions concerning “local governments” (e.g., cities, counties, and
11 city-counties alike). Defendants’ “subject-in-title rule” argument is wrong.

12 **7. THE PROPOSED INCOME TAX INITIATIVE WOULD TAX NET INCOME.**

13 As a final resort, Defendants argue that the proposed Income Tax Initiative does not
14 conflict with RCW 36.65.030 because the proposed Income Tax Initiative would not levy a tax
15 on net income.³⁶ More specifically, Defendants argue that “net income” necessarily refers to a
16 type of business tax, and not a tax on an individual’s income.³⁷ But Defendants’ argument is
17 without merit for at least two reasons.

18 Chapter 35A.82 RCW authorizes cities to levy various local business taxes.³⁸
19 Defendants’ interpretation of “net income” in RCW 36.65.030 (i.e., as applying to business taxes
20 only) would prohibit cities from levying such local business taxes (including those specifically
21 authorized by Chapter 35A.83 RCW). Accordingly, Defendants’ interpretation of “net income”
22 must be rejected because it would render other local tax statutes meaningless.

23
24 ³⁵ See City’s Opposition at p. 9, citing to *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183,
207, 11 P.3d 762 (2000); see also *Filo Foods v. City of Sea-Tac*, 183 Wn.2d 770, 357 P.3d 1040 (2015)
25 (The language of the title “is sufficiently broad to place voters on notice of its contents.”).

26 ³⁶ Defendants’ Opposition at pp. 23:8 – 24:9.

³⁷ *Id.*

³⁸ See, e.g., RCW 35A.02.050 (authorizing local tax on certain business activities).

1 Defendants' argument also fails because the plain meaning of "net income" is not
2 restricted to business income under Washington law or other law.³⁹ As Defendants even
3 concede, "net income" is used in Washington statutes as applying to an individual's income. *See,*
4 *e.g.*, RCW 26.19.071 (calculating child support obligations based on an individual's "net
5 income"). Accordingly, Defendants' argument fails because it defies the plain meaning of "net
6 income" as applied in other Washington statutes.

7 **8. CONCLUSION**

8 The Olympia City Council is not blind to this State's issues regarding both taxation and
9 education funding:

10 The City Council recognizes that any attempt to address the cost of higher
11 education and public revenue options will require long-term, systemic change
12 based upon adequate study, public engagement, dialogue and deliberation. The
13 Olympia City Council further recognizes the far reaching and significant
14 beneficial impact of improved access to post-secondary education and vocational
15 training and supports efforts to reduce student loan debt and address a regressive
16 state and local tax system which places a larger burden upon those least able to
17 pay.⁴⁰

18 But the Council also recognized that the proposed Income tax Initiative is unlawful. As a result,
19 it asks this Court to enjoin the proposed Income Tax Initiative.⁴¹

20 The City respectfully requests that this Court: (1) issue an order denying Defendant-
21 Petitioners' Petition For Prevention Of Election Error And Motion For Injunctive Relief;
22 (2) issue an order declaring that the proposed Income Tax Initiative, in its entirety, is invalid,
23 null, and void because it extends beyond the scope of the local initiative power and conflicts with
24 state law; and (3) issue an injunction that bars Thurston County and the Thurston County Auditor
25 from placing the proposed Income Tax Initiative from appearing on the State general election
26 ballot in November 2016.

³⁹ 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.

⁴⁰ Clerk's Document Declaration at Ex. 4 (Resolution No. M-1847 at 1.11, July 26, 2016).

1 DATED this 22nd day of August, 2016.

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Appendix I

Examples of specific statutory grants of power to municipal corporations

These topics may be subject to initiative and referendum powers if the other statutory and judicial limitations on the powers are satisfied.

Statutory Grants	RCW
Petition for Reduction of City Limits	35.16.010
Power to Provide Auxiliary Water System for Fire Protection	35.21.030
Power to Create Equipment Fund	35.21.088
Power to Establish, Construct and Maintain Dikes and Levees	35.21.090
Power to Accept Donations of Property	35.21.100
Authorization to Construct, Acquire and Maintain Ferries	35.21.110
Power to Establish Solid Waste Handling System	35.21.120
Power to Establish Sewers, Drainage and Water Supplies	35.21.210
Power to Regulate Sidewalks	35.21.220
Authority to Require Removal of Debris/Plants	35.21.310
Authority to Establish Lake Management Districts	35.21.403
Authority to Establish Youth Agencies	35.21.630
Authority to Assist Development of Low Income Housing	35.21.685
Authority to Own/Operate Professional Sports Franchise	35.21.695
Authority to Acquire/Construct Multi-Purpose Community Center	35.59.030
Authority to Participate in World Fairs and Expositions	35.60.030
Authority to Construct Sidewalks, Gutters, Curbs, etc.	35.68.010
Authority to Erect/Maintain Draw Bridges	
Authority to Regulate and License Bicycles	35.75.010
Authority to Provide Off-Street Parking Facilities	35.86.010
Authority to Acquire and Operate Municipal Utilities Generally	35.92.010
Authority to Require Conversion to Underground Utilities	35.96.030
Authority to Establish Heating Systems	35.97.020
Power to Adopt Code City Status	35A.02.010
Power to Adopt Charter Code City Status	35A.07.010
Authority for Library, Museum and Historical Activities	35A.27.010
Authority for Joint Acquisition of Land for Schools	35A.28.010
Authority for Joint Facilities and Agreements Intergovernmental Relations Civic Center, Jails, Armories	35A.35.010

Statutory Grants

	RCW
Authority for Emergency Services Participation	35A.38.010
Authority for Granting of Property for Highways and Streets	35A.47.010
Authority for Local Regulatory Option on Sale of Liquor	Ch.35A.66
Authority to Acquire Recreational Facilities	Ch.35A.67
Authority to Acquire Cemeteries/Morgues	Ch.35A.68
Authority to Regulate Food and Drugs	Ch.35A.69
Authority to Regulate Health and Safety	Ch.35A.70
Authority to Provide for the General Welfare	Ch.35A.74
Power to Acquire, Use and Manage Property and Materials	Ch.35A.79
Authority to Provide Public Utilities	Ch.35A.80
Authority to Regulate Harbors and Navigation	Ch.35A.88

EXHIBIT E

4

EXHIBIT E

16-2-02998-34
OR
Order
548112



FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2016 AUG 24 PM 4:25

Linda Myhre Enlew
Thurston County Clerk

EXPEDITE
 No Hearing set
 Hearing is set:
 Date: August 24, 2016
 Time: 3:00 p.m.
 Judge/Calendar: Honorable Jack Nevin/Civil

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

CITY OF OLYMPIA, a Washington municipal corporation,

Plaintiff,

v.

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

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF

THIS MATTER came on specially pursuant to: (a) Plaintiff's Motion For Declaratory Judgment And Injunctive Relief; and (b) Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim. The Court reviewed and considered the records and files herein, including:

1. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief;
2. Document Declaration Of Jane Kirkemo, City Clerk (with attached exhibits);
3. Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim (with attached exhibits);
4. Affidavit Of Ray Guerra;
5. Defendants-Petitioners' Brief In Support Of Petition For Prevention Of Election Error And Motion For Injunctive Relief;

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 1

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
Olympia, Washington 98507-1967
Telephone: (360) 753-8338

6. Declaration Of Claire Tonry (with attached exhibits);
7. City Of Olympia's Answer To Petition And Affidavit For Prevention Of Election Error And Counterclaim;
8. Plaintiff's Opposition To Defendants/Petitioners' Petition For Prevention Of Election Error And Motion For Injunctive Relief;
9. Second Declaration Of Claire Tonry (with attached exhibits);
10. Defendant Thurston County And Thurston County Auditor's Motion For Accelerated Review And Response To Opportunity For Olympia's Petition For Prevention Of Election Errors;
11. Plaintiff's Reply In Support Of Plaintiff's Motion For Declaratory Judgment And Injunctive Relief; and
12. Opportunity For Olympia's And Ray Guerra's Reply To Plaintiff's Opposition Brief.
13. **DOCUMENT DECLARATION OF ANNALIESE HARKSEN. ?**

In addition, the Court reviewed:

1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief;
2. [Proposed] Freedom Foundation's Amicus Curiae Brief; and
3. Opportunity For Olympia's Opposition To Freedom Foundation's Motion For Leave To File Amicus Curiae Brief.

Having considered the pleadings and submissions in this case, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief is ~~(GRANTED) (DENIED)~~.
2. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief is **GRANTED**; and
3. Defendants' Petition For Prevention Of Election Error And Motion For Injunctive Relief is **DENIED**.

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 2

CITY OF OLYMPIA
 City Attorney's Office
 P.O. Box 1967/601 - 4th Ave. E.
 Olympia, Washington 98507-1967
 Telephone: (360) 753-8338

opportunity for Olympia

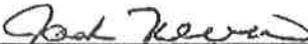
1 Accordingly, this Court:

qk

2 1. Declares that the proposed ~~Income~~-Tax Initiative, in its entirety, is invalid, null,
3 and void because it extends beyond the scope of the local initiative power; and

4 2. Enjoins Thurston County and the Thurston County Auditor from placing the
5 proposed ~~Income~~-Tax Initiative on the State general election ballot in November 2016.

6 DATED: August *24*, 2016.

7
8 
9 The Honorable Jack Nevin
Superior Court Judge (Visiting)

10 Presented by:

11 OFFICE OF THE CITY ATTORNEY
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13 Olympia City Attorney,
14 Annaliese Harksen, WSBA No. 31132
15 Deputy City Attorney,
16 Email: mbarber@ci.olympia.wa.us
17 Email: aharksen@ci.olympia.wa.us
18 and

19 
20 P. Stephen DiJulio, WSBA No. 7139
21 Jason R. Donovan, WSBA No. 40994
22 FOSTER PEPPER PLLC
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25 Attorneys for Plaintiff City of Olympia

26 ///

///

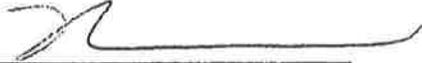
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ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 3

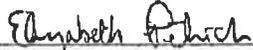
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1 Copy Received:

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13 Ray Guerra; and Danielle Westbrook

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21 Attorneys for Defendants Thurston County; and
22 Mary Hall, Thurston County Auditor

23
24
25
26
ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 4

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EXHIBIT F

EXHIBIT F

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

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

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.

Cheri L. Davidson
Official Court Reporter
Thurston County Superior Court
Olympia, Washington 98502
(360)786-5570
davidsco@co.thurston.wa.us

A P P E A R A N C E S

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5 Foster Pepper PLLC
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7 Seattle, WA 98101-3292

8 MARK E. BARBER
9 ANNALIESE HARKSEN
10 Attorneys at Law
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14 For the Defendants: KNOLL LOWNEY
15 (OFO/Guerra/
16 Westbrook) CLAIRE TONRY
17 Attorneys at Law
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21 For the Defendant: ELIZABETH PETRICH
22 (County) Chief Civil DPA
23 Thurston County Prosecutor's Office
24 Civil Division
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Olympia, WA 98502

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AUGUST 24, 2016

THE HONORABLE JACK NEVIN, PRESIDING

* * * * *

(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

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

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

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

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

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

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

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

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

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

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

8 I am going to issue an injunction that bars
9 Thurston County and the Thurston County Auditor from
10 placing the proposed tax initiative from appearing on
11 the state general election ballot in November of
12 2016.

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

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

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

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

5 THE COURT: Yes.

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

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

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

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

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

10 THE COURT: Mr. DiJulio?

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

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

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

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

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

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

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

15 THE COURT: Granted.

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

18 THE COURT: Granted.

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

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

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

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

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

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

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

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

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

13 MS. TONRY: There were.

14 THE COURT: You don't take a position?

15 MR. DiJULIO: The City takes no position.

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

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

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

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

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

9 MS. TONRY: Thank you.

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

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

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

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

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

13 THE COURT: Okay. Mr. DiJulio?

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

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

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

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

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

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

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

19 (Proceedings were concluded.)
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EXHIBIT G

EXPEDITE
 No hearing set
 Hearing is set
 Date: _____
 Time: _____
 Judge: _____

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

CITY OF OLYMPIA, A Washington
municipal corporation,

No. 16-2-02998-34

Plaintiff,

**NOTICE OF APPEAL TO THE
WASHINGTON STATE COURT
OF APPEALS, DIVISION II**

v.

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

Defendants.

Defendants Opportunity for Olympia, Ray Guerra, and Danielle Westbrook seek review
by the Washington State Court of Appeals, Division II, of the attached Order, entered on August
24, 2016, in the above captioned matter.

Plaintiff, City of Olympia, is represented by:

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Annaliese Harksen, WSBA No. 31132
Office of the City Attorney
P.O. Box 1967/601 - 4th Ave. E.

No. 16-2-02998-34
NOTICE OF APPEAL - 1

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11 Defendant, Mary Hall, Thurston County Auditor, is represented by:

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14 Olympia, WA 98502
15 Telephone: (360) 786-5540
16 Email: petrice@co.thurston.wa.us

17 RESPECTFULLY SUBMITTED this August 24, 2016

18 SMITH & LOWNEY, PLLC

19 By 

20 Knoll Lowney, WSBA # 23457
21 Claire Tonry, WSBA # 44497
22 Attorneys for Defendants Opportunity
23 for Olympia, Ray Guerra, and Danielle
24 Westbrook
25 2317 E. John St., Seattle WA 98122
26 Tel: (206) 860-2883
27 E-mail: knoll@igc.org,
28 clairet@igc.org

29 No. 16-2-02998-34
NOTICE OF APPEAL - 2

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1
2
3 EXPEDITE

4 No Hearing set

5 Hearing is set:

6 Date: August 24, 2016

Time: 3:00 p.m.

Judge/Calendar: Honorable Jack Nevin/Civil

7 SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

8 CITY OF OLYMPIA, a Washington municipal
9 corporation,

10 Plaintiff,

11 v.

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

17 Defendants.

No. 16-2-02998-34

ORDER GRANTING PLAINTIFF'S
MOTION FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF
AND DENYING DEFENDANTS'
PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR
INJUNCTIVE RELIEF

18 THIS MATTER came on specially pursuant to: (a) Plaintiff's Motion For Declaratory
19 Judgment And Injunctive Relief; and (b) Defendant-Petitioners Opportunity For Olympia's And
20 Ray Guerra's Petition And Affidavit For Prevention Of Election Error And Counterclaim. The
21 Court reviewed and considered the records and files herein, including:

- 22 1. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief;
- 23 2. Document Declaration Of Jane Kirkemo, City Clerk (with attached exhibits);
- 24 3. Defendant-Petitioners Opportunity For Olympia's And Ray Guerra's Petition And
25 Affidavit For Prevention Of Election Error And Counterclaim (with attached exhibits);
- 26 4. Affidavit Of Ray Guerra;
5. Defendants-Petitioners' Brief In Support Of Petition For Prevention Of Election
Error And Motion For Injunctive Relief;

ORDER GRANTING PLAINTIFF'S MOTION FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND
DENYING DEFENDANTS' PETITION FOR PREVENTION OF
ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 1

CITY OF OLYMPIA
City Attorney's Office
P.O. Box 1967/601 - 4th Ave. E.
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Telephone: (360) 753-8338

6. Declaration Of Claire Tonry (with attached exhibits);
7. City Of Olympia's Answer To Petition And Affidavit For Prevention Of Election Error And Counterclaim;
8. Plaintiff's Opposition To Defendants/Petitioners' Petition For Prevention Of Election Error And Motion For Injunctive Relief;
9. Second Declaration Of Claire Tonry (with attached exhibits);
10. Defendant Thurston County And Thurston County Auditor's Motion For Accelerated Review And Response To Opportunity For Olympia's Petition For Prevention Of Election Errors;
11. Plaintiff's Reply In Support Of Plaintiff's Motion For Declaratory Judgment And Injunctive Relief; and
12. Opportunity For Olympia's And Ray Guerra's Reply To Plaintiff's Opposition Brief.
13. **DOCUMENT DECLARATION OF ANNALIESE HARKSEN. 9/2**

In addition, the Court reviewed:

1. Freedom Foundation's Motion For Leave To File Amicus Curiae Brief;
2. [Proposed] Freedom Foundation's Amicus Curiae Brief; and
3. Opportunity For Olympia's Opposition To Freedom Foundation's Motion For Leave To File Amicus Curiae Brief.

Having considered the pleadings and submissions in this case, it is hereby ORDERED, ADJUDGED and DECREED that:

1. ~~Freedom Foundation's Motion For Leave To File Amicus Curiae Brief is (GRANTED) (DENIED).~~
2. Plaintiff's Motion For Declaratory Judgment And Injunctive Relief is **GRANTED**; and
3. Defendants' Petition For Prevention Of Election Error And Motion For Injunctive Relief is **DENIED**.

ORDER GRANTING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AND DENYING DEFENDANTS' PETITION FOR PREVENTION OF ELECTION ERROR AND MOTION FOR INJUNCTIVE RELIEF - 2

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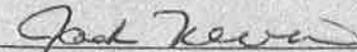
opportunity for Olympia

1 Accordingly, this Court:

2 1. Declares that the proposed ~~Income~~ Tax Initiative, in its entirety, is invalid, null,
3 and void because it extends beyond the scope of the local initiative power; and

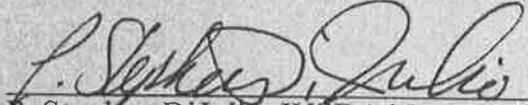
4 2. Enjoins Thurston County and the Thurston County Auditor from placing the
5 proposed ~~Income~~ Tax Initiative on the State general election ballot in November 2016.

6 DATED: August 24, 2016.

7
8 
9 The Honorable Jack Nevin
Superior Court Judge (Visiting)

10 Presented by:

11 OFFICE OF THE CITY ATTORNEY
12 Mark Barber, WSBA No. 8379
13 Olympia City Attorney,
14 Annaliese Harksen, WSBA No. 31132
15 Deputy City Attorney,
16 Email: mbarber@ci.olympia.wa.us
17 Email: aharksen@ci.olympia.wa.us
18 and

19 
20 P. Stephen DiJulio, WSBA No. 7139
21 Jason R. Donovan, WSBA No. 40994
22 FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
23 Seattle, Washington 98101-3292
24 Phone: (206) 447-4400 / Fax: (206) 447-9700
25 Email: steve.dijulio@foster.com
26 Email: j.donovan@foster.com
Attorneys for Plaintiff City of Olympia

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DECLARATION OF SERVICE

I, Jessie Sherwood, declare under penalty of perjury of the laws of the State of Washington, that I am a citizen of the United States and a resident of the State of Washington, that I am over the age of eighteen, that I am not a party to this lawsuit, and that on August 24, 2016 I caused the foregoing Notice of Appeal to The Washington State Court Of Appeals, Division II to be filed with the Clerk of the Thurston County Superior Court, and a true and correct copy of the same to be sent to the following in the manner indicated:

Mark E. Barber, WSBA No. 8379 Annaliese Harksen, WSBA No. 31132 Office of the City Attorney P.O. Box 1967/601 - 4th Ave. E. Olympia, Washington 98507-1967 Telephone: (360) 753-8338 Email: mbarber@ci.olympia.wa.us aharksen@ci.olympia.wa.us	<input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail (postage prepaid) <input checked="" type="checkbox"/> E-mail
P. Stephen DiJulio, WSBA No. 7139 Foster Pepper, PLLC 1111 Third Avenue, Suite 3000 Seattle, Washington 98101-3292 Telephone: (206) 447-4400 Email: steve.dijulio@foster.com	<input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail (postage prepaid) <input checked="" type="checkbox"/> E-mail
Elizabeth Petrich, WSBA No. 18713 2000 Lakeridge Dr. SW, Bldg. 5 Olympia, WA 98502 Telephone: (360) 786-5540 Email: petrice@co.thurston.wa.us	<input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail (postage prepaid) <input checked="" type="checkbox"/> E-mail

DATED this 24th of August 2016 in Seattle, Washington.



EXHIBIT H

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF OLYMPIA, a Washington
municipal corporation,

Respondent,

v.

OPPORTUNITY FOR OLYMPIA, a
Washington Political Committee; RAY
GUERRA; DANIELLE WESTBROOK,

Petitioners,

THURSTON COUNTY; and MARY
HALL, Thurston County Auditor,

Respondents.

No. 49333-1-II

RULING GRANTING STAY
PENDING APPEAL

FILED
COURT OF APPEALS
DIVISION II
2016 AUG 33 PM 12: 22
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

Petitioners, Opportunity for Olympia, Ray Guerra, and Danielle Westbrook (collectively, OFO), move for a stay of the superior court's decision to enjoin the

placement of their initiative (the OFO initiative) on the November ballot.¹ RAP 8.3. Respondent, the City of Olympia (the City), opposes the motion.² The motion is granted.

BACKGROUND

The OFO initiative would establish a fund to pay for one year of community college (or the equivalent, for other in-state public colleges or universities) for public high school graduates and general equivalency diploma (GED) recipients in the City of Olympia. Mot. for Stay and Injunctive Relief, App. B, Ex. 1. According to OFO:

The measure would be funded by gifts, grants, and bequests, and by establishing an excise tax on household adjusted gross income ("AGI") exceeding \$200,000.00 in the City of Olympia.^[3] The initiative contains a severability clause and provides a mechanism for scaling back the grants if the income is insufficient.

Mot. for Stay and Injunctive Relief at 5 (citations omitted).

OFO worked to obtain enough signatures to place the OFO initiative on the November 8, 2016 ballot⁴ and, on July 13, 2016, the Thurston County Auditor issued a certificate of sufficiency for the OFO initiative. RCW 35A.11.100; Mot. for Stay and Injunctive Relief, App. D, Ex. 1. The City Council then met and failed to either pass the

¹ OFO's motion to file an overlength stay motion is granted.

² Thurston County and Thurston County Auditor Mary Hall filed an answer to the stay motion. They request accelerated review of this matter because the "Thurston County Auditor needs to receive the final decision in this appeal by **September 12, 2016.**" Thurston County Response to Stay Motion at 1.

³ Referred to herein as the "taxation provision."

⁴ The Motion for Stay and Injunctive Relief, App. D (Declaration of Mary Hall), sets out the relevant dates.

proposed measure or call a special election. Mot. for Stay and Injunctive Relief, App. B, Ex. 2.

On July 22, 2016, the City filed a complaint seeking a declaration that the OFO initiative is invalid and to enjoin placement of the OFO initiative on the November ballot. Mot. for Stay and Injunctive Relief at 6. The Thurston County Auditor is required to have a final ballot title for the OFO initiative by September 14, 2016, to meet ballot printing deadlines. RCW 29A.36.071; RCW 29A.36.090; Mot. for Stay and Injunctive Relief at 7.

On August 24, 2016, the superior court held a hearing. It concluded the taxation provision extended beyond the scope of local initiative power. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 4 (Report of Proceedings (RP) Aug. 24, 2016 at 4). Specifically, it ruled, "[the initiative] involves powers that are granted to the City's governing body and not to the City as a whole" and "it does conflict with the state law prohibiting income tax." City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 5 (RP Aug. 24, 2016 at 5). It enjoined the initiative from appearing on the November 2016 ballot. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 4-6 (RP Aug. 24, 2016 at 4-6). OFO moved for the trial court to "order the City to issue the ballot title that it has already prepared" due to the September 14 deadline. City's Resp. to Mot. for Stay and Injunctive Relief, App. 1 at 12 (RP Aug. 24, 2016 at 12). The trial court denied the motion.

ANALYSIS

RAP 8.3 provides:

Except when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of review or in an original action under Title 16 of these rules, to insure effective and equitable review, including authority to grant injunctive or other relief to a party. The appellate court will ordinarily condition the order on furnishing a bond or other security. A

party seeking the relief provided by this rule should use the motion procedure provided in Title 17.

RAP 8.3 permits this court to “stay an injunction if the movant can demonstrate that debatable issues are presented on appeal and that the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation.” *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986) (citing *Purser v. Rahm*, 104 Wn.2d 159, 702 P.2d 1196 (1985), *cert. dismissed sub nom. Department of Soc. and Health Servs. v. Purser*, 478 U.S. 1029 (1986)). As a practical matter,

courts apply a sliding scale such that the greater the inequity, the less important the inquiry into the merits of the appeal. Indeed if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit.

Boeing, 43 Wn. App. at 291.

Debatable Issues on Appeal

Severability

Before addressing whether it is debatable that the OFO initiative’s taxation provision is valid, OFO argues that the additional funding sources are clearly valid. Mot. for Stay and Injunctive Relief at 9. It notes that the City challenged only the taxation provision and never argued that this provision is not severable from the remainder of the initiative. Mot. for Stay and Injunctive Relief at 10. It adds that the superior court did not engage in a severability analysis despite that OFO raised it. Mot. for Stay and Injunctive Relief at 10.

The City responds that the taxation provision is not severable because it is central to the OFO initiative. City’s Resp. to Mot. for Stay and Injunctive Relief at 7 (citing

Leonard v. City of Spokane, 127 Wn.2d 194, 202, 897 P.2d 358 (1995), for the proposition that a provision that is the “heart and soul” of a law is not severable). It adds that *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45 (2013), supports that the City would be harmed if forced to place invalid portions of a potentially severable initiative on a ballot.⁵

A law’s provisions are not severable if

the constitutional and unconstitutional provisions are so connected . . . that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.

Leonard, 127 Wn.2d at 201 (quoting *Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982) (quoting *State ex rel. King Cy. v. State Tax Comm’n*, 174 Wash. 336, 339-40, 24 P.2d 1094 (1933))). Severability clauses in (passed) initiatives, however, are generally “conclusive as to the circumstances asserted.” *League of Educ. Voters v. State*, 176 Wn.2d 808, 827, 295 P.3d 743 (2013) (quoting *McGowan v. State*, 148 Wn.2d 278, 296, 60 P.3d 67 (2002) (quoting *State v. Anderson*, 81 Wn.2d 234, 239, 501 P.2d 184 (1972))).

In *Leonard*, our Supreme Court concluded that the funding source for law intended to encourage cities to constrict public improvements unlawfully diverted tax dollars from common schools to public improvements. 127 Wn.2d at 199. It does not appear, however, that the act contained additional lawful funding sources. Thus, the *Leonard* court concluded, “As the Act’s funding mechanism, it represents the heart and soul of the

⁵ In *Wallin*, the proposed initiative was eventually invalidated in its entirety. 174 Wn. App. 782-83.

Act. This being so, the Act would be virtually worthless without it." 127 Wn.2d at 201-02; see also *League of Women Voters v. State*, 184 Wn.2d 393, 411-12, 355 P.3d 1131 (2015) ("Without a valid funding source the charter schools envisioned in I-1240 are not viable.").

Here, although the City argues that serving the taxation provision "leaves nothing remaining," the OFO initiative includes additional funding sources and permits college grants to be scaled back if income is insufficient. City's Resp. to Mot. for Stay and Injunctive Relief at 17. Thus, the severability issue is debatable.

Legislative Body

With respect to the other potential issues presented on appeal, OFO next argues that the legislature has not precluded local tax initiatives despite that RCW 35A.11.020 and .030⁶ grant taxation powers to the "legislative body" of each code city.⁷ Mot. for Stay

⁶ RCW 35A.11.030 provides, in relevant part:

Powers of eminent domain, borrowing, taxation, and the granting of franchises may be exercised by the legislative bodies of code cities in the manner provided in this title or by the general law of the state where not inconsistent with this title; and the duties to be performed and the procedure to be followed by such cities in regard to the keeping of accounts and records, official bonds, health and safety and other matters not specifically provided for in this title, shall be governed by the general law.

⁷ At oral argument, the City added that even a severed initiative (removing the taxation provision) infringes on the City's appropriations power, which is also vested in a legislative body. RCW 35A.11.090. RCW 35A.11.090 provides, in relevant part:

Ordinances of noncharter code cities the qualified electors of which have elected to exercise the powers of initiative and referendum shall not go into effect before thirty days from the time of final passage and are subject to referendum during the interim except:

-
(4) Ordinances appropriating money;
.....

and Injunctive Relief at 19. It primarily argues that these laws do not demonstrate a clear legislative intent to preempt the initiative rights of the people. Mot. for Stay and Injunctive Relief at 20. See also RCW 35A.11.080 (granting code cities the right of initiative); *1000 Friends v. McFarland*, 159 Wn.2d 165, 177, 149 P.3d 616 (2006). The City responds by relying on the language of RCW 35A.11.020 and .030. City's Resp. to Mot. for Stay and Injunctive Relief at 4.

Decisions support that "initiative or referendum rights do not exist where the legislature has delegated power to a city or county legislative authority." *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 575, 103 P.3d 203 (2004) (citing cases). In *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976), for example, the court found that RCW 35A.11.020 vested the city council the power to adopt and modify a zoning code. It concluded, "[t]his grant of power precludes a referendum election" pursuant to RCW 35A.11.080. 87 Wn.2d at 853. See also City's Resp. to Mot. for Stay and Injunctive Relief at 4 n.5 (citing *Wallin*, 174 Wn. App. at 784; *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227 (2012); and *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006)).

As identified by OFO, these cases relied upon by the City address initiatives that sought to limit a city's exercise of authority granted to it by the legislature. Mot. for Stay and Injunctive Relief at 20 n.6. In *Mukilteo Citizens*, for example, the initiative sought to

(7) Ordinances authorizing or repealing the levy of taxes; which excepted ordinances shall go into effect as provided by the general law or by applicable sections of Title 35A RCW as now or hereafter amended. Although the City cites RCW 35A.11.090 in its response to the stay motion, it presented no argument that a severed initiative violates this law. City's Resp. to Mot. for Stay and Injunctive Relief at 4. This argument will not be addressed further herein.

limit the legislative body's power to enact red light cameras by requiring a two-thirds vote of the electorate. 174 Wn.2d at 51-52. See also *Malkasian*, 157 Wn.2d at 255 ("The proposed initiative would impose additional requirements on revenue bonds" by "requir[ing] the city council of Sequim to obtain ratification by the voters before issuing citywide revenue bonds."); *Wallin*, 174 Wn. App. at 785-86 (prohibiting traffic safety cameras unless two-thirds of the council and voters approved and placing other limits on camera use). OFO attempts to distinguish these cases by arguing that "[t]he OFO [i]nitiative seeks to enact substantive legislation by *exercising* the power that the citizens and the City Council both hold in common." Mot. for Stay and Injunctive Relief at 20 n.6 (emphasis theirs).

Although the City is correct that "[a]n initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself," *Wallin*, 174 Wn.2d at 51, this court also recognizes that *1000 Friends* sets out that simply because a statute purports to give powers to a legislative authority or body, it does not automatically mean that the legislature intended to exclude "the people acting in a legislative capacity" from exercising the same powers. *1000 Friends*, 159 Wn.2d at 177-78. Accordingly, although the City prevailed on this issue in the superior court—and may be successful here on the merits of this issue—it qualifies as debatable. *Shamley v. City of Olympia*, 47 Wn.2d 124, 127, 286 P.2d 702 (1955).

Income/Excise Tax

The superior court also concluded that the OFO initiative conflicts with state law prohibiting the establishment of a net income tax by a city. City's Resp. to Mot. for Stay

and Injunctive Relief, App. 1 at 4 (RP Aug. 24, 2016 at 5). RCW 36.65.030 provides, "A county, city, or city-county shall not levy a tax on net income."

OFO contends, however, that the taxation provision is a permitted excise tax and not a prohibited net income tax. Mot. for Stay and Injunctive Relief at 23-25. According to OFO:

The OFO Initiative 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 protection services, by assessing a tax on the portion of AGI [adjusted gross income] in excess of \$200,000. Tony Decl., Ex. Ex. 1.8.

Mot. for Stay and Injunctive Relief at 24-25.

Chapter 35A.82 RCW addresses excise taxes. It, however, does not define them. According to *Estate of Hambleton*, 181 Wn.2d 802, 811, 335 P.3d 398 (2014), which involved a challenge to an amendment of the Estate and Transfer Act:

A tax is an "excise" or "transfer" tax if the government is taxing "a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property." *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945).

In addition, *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004), which addressed an assessment to fund ambulance services, states:

Our cases establish that an assessment is a valid excise tax if (1) the obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise tax, and (2) the element of absolute and unavoidable demand is lacking. *Covell*, 127 Wn.2d [874,] 889, 905 P.2d 324 [(1995)]; *High Tide Seafoods v. State*, 106 Wn.2d 695, 699, 725 P.2d 411 (1986); *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965).

These cases support that the taxation provision does not resemble a conventional excise tax. The payment of an excise tax “must be based on a voluntary act.”⁸ *Covell*, 127 Wn.2d at 889 (discussing *Emerson College v. Boston*, 391 Mass. 415, 462 N.E.2d 1098 (1984)); see also *Arborwood*, 151 Wn.2d at 367. Here, the taxation provision is not premised upon any voluntary action of the person taxed. All citizens of Olympia use fire services, police services, other city services, and city parks.

However, because of the unique structure of the OFO initiative's taxation provision, which echoes the *Estate of Hambleton* language and imposes a “tax[on] the privileges of disproportionate use and benefit from city services enjoyed by wealthy residents,” this court cannot say that OFO's argument is devoid of merit.⁹ Mot. for Stay and Injunctive Relief at 24-25; *Boeing*, 43 Wn. App. at 291.

Equities

Timing of Action

The parties argue as to whether our courts should decide this matter before the election, or after. Although in some circumstances, courts will decline to reach the merits of an initiative until after an election, issues relating to the scope of local initiatives will be

⁸ In addition, *Covell*, in its analysis of whether a residential street utility charge was an excise tax, relied on *Emerson College*. *Emerson College* addressed whether a fire protection service charge was an excise tax. *Covell* noted that *Emerson College* rejected an argument that “the charge qualified as an excise on the ‘privilege’ of receiving an extra level of fire protection.” *Covell*, 127 Wn.2d at 890 (citing *Emerson College*, 391 Mass. 415, 427-28, 462 N.E. 2d 1098 (1984)). The taxation provision here appears also to tax the “privilege” of receiving more or better city services.

⁹ Because the issue whether the tax is an excise tax, as opposed to an income or a net income tax, is debatable, this court will not reach this issue whether the taxation provision qualifies as a net income tax that is prohibited by RCW 36.65.030 in this ruling.

heard before an election.¹⁰ *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 386, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1020 (2005).

Nevertheless, as pointed out by OFO, the merits of this appeal will not be reached by this court until after the election has passed. This situation resembles the circumstances in *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 52-53, 65 P.3d 1203 (2003). In *Reed*, the petitioners sought a declaration that a referendum was unconstitutional and they sought to bar the secretary of state from certifying a ballot containing the referendum. 149 Wn.2d at 53. The *Reed* court declined to bar the secretary of state from adding the measure to the ballot because there was “insufficient time to engage in the deliberations that a case of this magnitude demands’ and because an immediate decision was not required by the dates of implementation of those sections of EHB 2901 included in Referendum 53.”¹¹ 149 Wn.2d at 53. The election was held. The matter returned to the courts and the secretary of state was prevented from certifying the election results until the *Reed* court ruled on the merits of the appeal. 149 Wn.2d at 53.

Thus, although it does not appear that the superior court’s decision was premature, that does not control the outcome of the present RAP 8.3 motion for a stay pending

¹⁰ *Yes For Seattle*, relied upon by the City, addressed whether pre-election review was the scope of an initiative was premature and decided it was not. In that case, however, although an appeal was filed from the superior court’s August decision to strike an initiative from a September ballot, it does not appear that any RAP 8.3 stay was requested or issued. The Court of Appeals decided the merits of the appeal the following June. 122 Wn. App. at 386-87.

¹¹ OFO also emphasizes that the taxation provision allows for “18 months for post-election review before any tax payments are due.” Mot. for Stay and Injunctive Relief at 18-19.

appeal, when, like *Reed*, this court will not have the opportunity to address the merits of the appeal before November 8, 2016.

Balancing Harms

Given that OFO presents at least one debatable issue, this court must analyze whether a "stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation." *Boeing*, 43 Wn. App. at 291.

Here, the concrete cost to the City will be the printing of a supplemental voters' pamphlet.¹² The deadline for adding the initiative to the original pamphlet was August 2. Mot. for Stay and Injunctive Relief, App. D (Declaration of Mary Hall) (OFO, however, notes that the City knew of the ballot measure's language and possible legal challenges before this deadline and should have performed its ministerial duty to advance the ballot measure while any legal challenge was pending, which would have gotten the OFO initiative into the original pamphlet. Mot. for Stay and Injunctive Relief at 12). The asserted harms to OFO are (1) missing a high voter turnout presidential election and (2) impairment of the First Amendment rights of the signatories to the OFO petition, who expressed their views that the OFO initiative should be put to a vote this November. Mot. for Stay and Injunctive Relief at 13-15.

The City and OFO disagree as to the harm caused to OFO by not having the initiative included on the November 2016 ballot. The City stipulates OFO will not have to re-collect signatures if they succeed on appeal and, therefore, can present the initiative

¹² At oral argument, the City also referenced a charge it is billed a percentage of the costs of holding an election and that this charge is calculated based on the number of issues on the ballot.

in a future special election. OFO responds that it planned for this initiative to appeal on the November ballot and obtained signatures for this purpose because of the high voter turnout in this specific election. This court agrees with OFO that it has an interest in having the initiative appear on the ballot that it sought and gained approval for and is now working to get passed, and that it would be harmed by deferring any election on its initiative. See Mot. for Stay and Injunctive Relief at 13 n.2. See generally *Small v. Avanti Health Sys. LLC*, 661 F.3d 1180, 1195 (9th Cir. 2011) (remedy of holding a new union election was insufficient to prevent harm).

Because this court has concluded that at least the severability issue is debatable and that a balancing of the equities favors OFO, this court determines to stay at least the portion of the superior court's decision that enjoined the *entire* initiative from appearing on the November 8, 2016 ballot.

The remaining issue is the harms to the parties if the taxation provision is included on the ballot. Although the court views the severability issue as more debatable than the remaining issues, it cannot conclude that the others are devoid of merit. Moreover, given that the City now will incur its additional costs regardless whether the taxation provision is included, this court concludes that a balancing of the equities favors having the full measure appear on the ballot regardless whether the additional issues meet the RAP 8.3 debatability requirement.

Supersedeas Bond or Other Security

RAP 8.3 provides, "The appellate court will ordinarily condition the order on furnishing a bond or other security." Neither OFO nor the City discussed the issuance of a bond. The primary financial harm to the City is the need to print a supplemental voters'

pamphlet. Mot. for Stay and Injunctive Relief, App. D, at 4 (Declaration of Mary Hall). This court sets the supersedeas amount at 50 percent of the reasonable cost to the City to print this pamphlet. The City has until 5:00 p.m. on September 6, 2016, to provide the printing cost information to OFO. Supersedeas must be posted with the Thurston County Superior Court Clerk no later than 5:00 p.m. on September 9, 2016. RAP 8.1(d).

Accordingly, it is hereby

ORDERED that OFO's motion for a RAP 8.3 stay of the superior court's decision, which enjoined the OFO initiative from appearing on the November 8, 2016 ballot, is granted. It is further

ORDERED that OFO must comply with the supersedeas portion of this ruling by 5:00 p.m. on September 9, 2016. It is further

ORDERED that any motion to modify this ruling is due by 5:00 p.m. on Tuesday, September 6, any answer is due by 5:00 p.m. on Wednesday, September 7, and any reply is due by noon on Thursday, September 8, 2016.

DATED this 2nd day of September, 2016.



Aurora R. Bearse
Court Commissioner

cc: Eric Lowney
Claire E. Tonry
P. Stephen DiJulio
Mark E. Barber
Annaliese Harksen
Elizabeth Petrich
Hon. Jack Nevin

EXHIBIT I

Kari Pitharoulis

From: Matthew Hayward <MHayward@myfreedomfoundation.com>
Sent: Friday, July 01, 2016 3:38 PM
To: Cheryl Selby
Subject: Meeting

Dear Mayor Selby,

Several members of the Freedom Foundation are also residents of the city of Olympia and we were hoping you would be willing to have a meeting with one of us to discuss the current proposals for a local income tax.

The Freedom Foundation was recently involved in several lawsuits involving local initiatives. We argued that after citizens gathered the required number of valid signatures, the initiatives should be allowed on the ballot. In three separate cases, the city refused to put the measures on the ballot, and in all three cases the city won the right to keep them off the ballot.

This is just one or a couple of issues we are interested in discussing.

Please let me know when you are available, we can be flexible.

Happy 4th of July

Matthew Hayward

Washington Coordinator | *Freedom In Action*

MHayward@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

Kari Pitharoulis

From: James Phillip Turpin <jamesphillipturpin@gmail.com>
Sent: Monday, July 11, 2016 4:46 PM
To: Jami Lund; CityCouncil
Subject: Re: Tuesday Olympia Council meeting - input needed

I discussed this issue of a city income tax to fund higher education at length with one of the petitioners. The petitioners were misleading people to believe that this money would go towards local community colleges, while it would actually go to large universities around the state with bloated administrative fees. I believe in market economies and that colleges should compete by providing better affordable services, not by plundering tax payers.

On Mon, Jul 11, 2016 at 4:05 PM, Jami Lund <JLund@myfreedomfoundation.com> wrote:

Hello James Turpin

Perhaps you have heard that the City of Olympia has been targeted by the union-backed “Economic Opportunity Institute” of Seattle for an experiment to impose a city income tax.

On Friday the activists turned in the signatures to get a city income tax initiative on the November ballot if allowed by the council.

Freedom Foundation has fought on behalf taxpayers for twenty five years, and this scheme is no exception. Not surprisingly, government unions play a key role in this plan to plunder some Olympia citizens to fund public higher education institutions.

Freedom Foundation policy fellow, Amber Gunn, penned an opinion editorial expressing concerns in the Olympian newspaper. The Freedom Foundation is working to educate people about the injustice of unconstitutional selective income harvesting.

But Olympia residents need to make their voice heard, and now is the time. Before this Tuesday, July 12th city council meeting, please contact all city council members regarding this unconstitutional income tax initiative.

Reach them all at once at: citycouncil@ci.olympia.wa.us

Will you send a note to the city council expressing your thoughts about forcing a minority of citizens in Olympia to fund the public college tuition of others?

I am also looking for several to join me at the hearing. Please reply if you would consider lending support on Tuesday evening at 7:00. You can bet that the other side is going to be there.

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com

[360.956.3482](tel:360.956.3482) | PO Box 552 Olympia, WA 98507

myFreedomFoundation.com

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Kari Pitharoulis

From: William Grous <wrgrous@comcast.net>
Sent: Tuesday, July 12, 2016 3:41 PM
To: CityCouncil
Cc: Jami Lund
Subject: Initiative to tax high wage earners

Dear City Council.

The initiative to tax Olympia's highest wage earners to provide free college to others is both illegal and immoral.

Some 40 years ago, my parents put me through college, contributing what they could, while the rest of the tuition/board

was paid by student loans I contracted.. It took me 10 years to pay off the loans.

Government provides schooling K-12 to all Americans. But college is not a right. Those who seek it must be willing to pay for the cost

themselves, as they are the only ones who benefit from it.

If you think this initiative through, there are a host of unintended consequences I don't believe you (or the petitioners) have thoroughly thought out.

Please dismiss this initiative.

Sincerely,

William Grous

5027 Foxhall Drive

Kari Pitharoulis

From: Jami Lund <JLund@myfreedomfoundation.com>
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

Hello Mr. Barber,

I just called, but you were in a meeting. As happens on occasion, the news account of the city decision is not clear to me:

“the council authorized the city manager to seek a judicial decision in Thurston County Superior Court to determine whether the initiative is lawful.”

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Is there a simple answer to what the city can do to get a ruling on the legality of the initiative you could email, or should I call at a time convenient for you?

Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

Kari Pitharoulis

From: Mark Barber
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund
Subject: RE: Confusing news account
Attachments: 2016-07-22 Complaint for Declaratory Judgment and Injunctive Relief.pdf

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



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myFreedomFoundation.com

Kari Pitharoulis

From: Jami Lund <JLund@myfreedomfoundation.com>
Sent: Tuesday, July 26, 2016 7:43 AM
To: Mark Barber
Subject: RE: Confusing news account

Thank you.

Jami Lund
(360) 956-3482
Senior Policy Analyst
Freedom Foundation

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

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Kari Pitharoulis

From: Jami Lund <JLund@myfreedomfoundation.com>
Sent: Tuesday, August 09, 2016 9:46 AM
To: Mark Barber
Subject: RE: Confusing news account

Mr. Barber,

Thank you for the copy of the complaint to bar the placement of the Opportunity for Olympia initiative on the ballot.

May I see the briefing schedule for this case or the date of any court hearings?

Jami Lund

(360) 956-3482
Senior Policy Analyst
Freedom Foundation

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Kari Pitharoulis

From: Mark Barber
Sent: Tuesday, August 09, 2016 3:11 PM
To: Jami Lund
Cc: Kari Pitharoulis
Subject: RE: Confusing news account
Attachments: 2016-07-29 City of Olympia's Motion for Declaratory Judgment and Injunctive Relief.pdf; 2016-08-01 OFO Opening Brief on Petition and Counterclaim.pdf

Mr. Lund,

See copies of attached documents. The trial court's hearing is scheduled for Wednesday, August 17, at 3:30 pm before Judge Anne Hirsch.

Mark Barber, City Attorney
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PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
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Kari Pitharoulis

From: Mark Barber
Sent: Wednesday, August 10, 2016 2:34 PM
To: Greg Overstreet
Subject: RE: Confusing news account

Greg,

I neglected to inform you that the court advised the parties this morning that the court had a conflict with the scheduled hearing on August 17 at 3:30 pm. The parties responded and advised the judicial assistant that Thursday, August 25 at 3:30 pm was acceptable. We have not received confirmation of the new date/time from the judicial assistant.

As an explanation, I added the service information related to the Attorney General because Opportunity for Olympia is alleging that RCW 36.65.030 is unconstitutional and the defendants have so advised the AG's Office.

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Kari Pitharoulis

From: Kirsten Nelsen <KNelsen@myfreedomfoundation.com>
Sent: Wednesday, August 10, 2016 3:12 PM
To: steve.dijulio@foster.com; j.donovan@foster.com; Mark Barber; Annaliese Harksen; knoll@igc.org; clairet@igc.org; petrice@co.thurston.wa.us
Cc: Greg Overstreet; Kirsten Nelsen
Subject: Case No. 16-2-02998-34: Freedom Foundation's Motion for Leave to File Amicus Curiae Brief, Motion to Shorten Time, Declaration of Greg Overstreet, Proposed Order for Leave to File Amicus Brief and Motion to Shorten Time, Notices of Issue, & Ltr. to Court
Attachments: FF MOT for Leave to File Amicus Curiae Brief and Prop. Amicus Brief.pdf; FF MOT to Shorten Time (Laptop-3's conflicted copy 2016-08-10).pdf; Declaration of Greg Overstreet.pdf; Prop. ORD Granting Leave file Amicus (Laptop-3's conflicted copy 2016-08-10).pdf; Prop. ORD MOT Shorten Time.pdf; FF NOI Leave File Amicus Brief.pdf; FF NOI MOT Shorten Time.pdf; Ltr to Court.pdf

Good afternoon,

Please find attached for filing today in Case No. 16-2-02998-34 Freedom Foundation's Motion for Leave to File Amicus Curiae Brief, Motion to Shorten Time, Declaration of Greg Overstreet, Proposed Order for Leave to File Amicus Brief and Motion to Shorten Time, Notices of Issue, and Letter to Court.

Notify me immediately if you are unable to open the attachments.

Best,

Kirsten Nelsen

Paralegal | Freedom Foundation

KNelsen@FreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
FreedomFoundation.com

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Kari Pitharoulis

From: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Sent: Wednesday, August 10, 2016 3:40 PM
To: Mark Barber
Subject: RE: Confusing news account

Thanks, Mark. I appreciate it.

From: Mark Barber [mailto:mbarber@ci.olympia.wa.us]
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Mark Barber, City Attorney
City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



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Thanks.

Greg

From: Mark Barber [<mailto:mbarber@ci.olympia.wa.us>]
Sent: Monday, July 25, 2016 5:11 PM
To: Jami Lund <JLund@myfreedomfoundation.com>
Subject: RE: Confusing news account

Mr. Lund,

In response to your query, please see attached.

Mark Barber, City Attorney

City of Olympia
PO Box 1967
Olympia, WA 98507-1967
Direct Line: (360) 753-8223
Email: mbarber@ci.olympia.wa.us



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From: Jami Lund [<mailto:JLund@myfreedomfoundation.com>]
Sent: Thursday, July 14, 2016 9:53 AM
To: Mark Barber
Subject: Confusing news account

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Jami Lund

Senior Policy Analyst | Freedom Foundation

JLund@myFreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation.com

Kari Pitharoulis

From: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Sent: Wednesday, August 10, 2016 4:26 PM
To: Mark Barber
Subject: RE: Confusing news account

OK. Thanks. I still will not ask for oral argument on either our motion to file the brief or argument on the contents of the brief.

Good luck to the City on this. You guys are right on the law.

From: Mark Barber [mailto:mbarber@ci.olympia.wa.us]
Sent: Wednesday, August 10, 2016 4:20 PM
To: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Subject: RE: Confusing news account

Greg,

The parties have received confirmation that this matter has been reassigned to Judge Mary Sue Wilson, who will conduct the hearing on August 25 at 3:30 pm.

Mark Barber, City Attorney
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PO Box 1967
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clairet@igc.org
Telephone: 206-860-2883

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Elizabeth Petrich, WSBA #18713
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Legal Department

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Kari Pitharoulis

From: Susan Banner <susan.banner@foster.com>
Sent: Thursday, August 11, 2016 2:08 PM
To: knoll@igc.org; claret@igc.org; petrice@co.thurston.wa.us;
'goverstreet@myfreedomfoundation.com'
Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Kari Pitharoulis
Subject: City of Olympia v. Opportunity For Olympia, et al., Thurston County Case No. 16-2-02998-34
Attachments: OLYMPIA Re-Notice of Issue.pdf; Thurston County eFile Status Confirmation of Re-Note.pdf

Counsel – Attached are the following documents in the above-referenced matter:

1. **Civil Re-Notice of Issue for August 25, 2016 at 3:30 p.m. before Judge Mary-Sue Wilson (special setting); and**
2. **Thurston County Clerk's eFile Confirmation.**

No hard copy to follow.

Susan Banner
LEGAL ASSISTANT TO P. STEPHEN DIJULIO,
RICHARD L. SETTLE, LEE R. MARCHISIO, and
THOMAS FARROW

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000
Seattle, WA 98101

susan.banner@foster.com

Tel: 206-447-7891

Fax: 206-447-9700

foster.com

Kari Pitharoulis

From: Kirsten Nelsen <KNelsen@myfreedomfoundation.com>
Sent: Thursday, August 11, 2016 3:50 PM
To: steve.dijulio@foster.com; j.donovan@foster.com; knoll@igc.org; claret@igc.org; Mark Barber; Annaliese Harksen; petrice@co.thurston.wa.us
Cc: Greg Overstreet; Kirsten Nelsen
Subject: Case No. 16-2-02998-34: Freedom Foundation's Notice of Hearing Stricken
Attachments: NOT Hearing Stricken MOT Shorten Time.pdf

Good afternoon,

Please find attached for filing today in Case No. 16-2-02998-34, Freedom Foundation's Notice of Hearing Stricken.

Notify me immediately if you are unable to open the attachment.

Best,

Kirsten Nelsen

Paralegal | Freedom Foundation

KNelsen@FreedomFoundation.com
360.956.3482 | PO Box 552 Olympia, WA 98507
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Kari Pitharoulis

From: Kirsten Nelsen <KNelsen@myfreedomfoundation.com>
Sent: Friday, August 12, 2016 10:20 AM
To: steve.dijulio@foster.com; j.donovan@foster.com; knoll@igc.org; claret@igc.org; Mark Barber; Annaliese Harksen; petrice@co.thurston.wa.us
Cc: Greg Overstreet; Kirsten Nelsen
Subject: Case No. 16-2-02998-34: Freedom Foundation's Re-Notice of Issue for Motion Granting Leave to File Amicus Curiae Brief
Attachments: FF Re-NOI Leave File Amicus Brief.pdf

Good morning,

Please find attached for filing today in Case No. 16-2-02998-34 Freedom Foundation's Re-Notice of Issue for Motion Granting Leave to File Amicus Curiae Brief.

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Kirsten Nelsen

Paralegal | Freedom Foundation

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Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Kari Pitharoulis
Subject: City of Olympia v. Opportunity for Olympia, et al., Thurston County Case No. 16-2-02998-34
Attachments: Olympia Briefing Schedule Status Report.pdf; Olympia Certificate of Service.pdf; Thurston County eFiling Confirmation.pdf

Counsel – Attached are the following documents in the above-referenced matter:

1. **Briefing Schedule Status Report;**
2. **Certificate of Service; and**
3. **Thurston County Clerk's eFile Confirmation.**

No hard copy to follow.

Susan Banner
LEGAL ASSISTANT TO P. STEPHEN DiJULIO,
RICHARD L. SETTLE, LEE R. MARCHISIO, and
THOMAS FARROW

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Kari Pitharoulis

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Sent: Tuesday, August 16, 2016 11:24 AM
To: knoll@igc.org; claret@igc.org; petrice@co.thurston.wa.us;
'goverstreet@myfreedomfoundation.com'
Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Kari Pitharoulis
Subject: City of Olympia v. Opportunity for Olympia, et al., Thurston County Case No. 16-2-02998-34
Attachments: Olympia v OFO - Notice of Stipulation.pdf; Olympia v OFO - Certificate of Service 8-16-16.PDF; TCSC Clerks eFile Confirmation 8-16-16.pdf

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1. **Notice of Stipulation;**
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3. **Thurston County Clerk's eFile Confirmation.**

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Susan Banner
LEGAL ASSISTANT TO P. STEPHEN DIJULIO,
RICHARD L. SETTLE, and LEE R. MARCHISIO

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From: Susan Banner <susan.banner@foster.com>
Sent: Monday, August 22, 2016 3:54 PM
To: knoll@igc.org; claret@igc.org; petrice@co.thurston.wa.us;
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Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Kari Pitharoulis
Subject: City of Olympia v. Opportunity for Olympia, et al., Thurston County Cause No. 16-2-02998-34
Attachments: Olympia Reply Brief.pdf; Olympia v OFO Certificate of Service.pdf; TCSC eFile Confirmation .pdf

Counsel – Attached are the following in the above-referenced matter:

- 1. Reply in Support of Plaintiff's Motion for Declaratory Judgment and Injunctive Relief;**
- 2. Certificate of Service; and**
- 3. Thurston County Clerk's eFile Confirmation.**

No hard copy to follow.

Susan Banner
LEGAL ASSISTANT TO P. STEPHEN DiJULIO,
RICHARD L. SETTLE, and LEE R. MARCHISIO

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000
Seattle, WA 98101

susan.banner@foster.com

Tel: 206-447-7891

Fax: 206-447-9700

foster.com

Kari Pitharoulis

From: Kari Pitharoulis
Sent: Wednesday, August 24, 2016 11:44 AM
To: knoll@igc.org; claret@igc.org; petrice@co.thurston.wa.us; 'goverstreet@myfreedomfoundation.com'
Cc: Stephen DiJulio; Jay Donovan; Mark Barber; Annaliese Harksen; Susan Bannier (susan.bannier@foster.com)
Subject: City of Olympia v. Opportunity for Olympia, et al., Thurston County Case No. 16-2-02998-34
Attachments: City v. OFO - Declaration of Annaliese Harksen 08-24-16.pdf; City v. OFO - Certificate of Service 08-24-16.pdf; City v OFO - TCSC Clerks eFile Confirmation 08-24-16.pdf

Counsel – Attached are the following in the above-referenced matter:

1. Document Declaration of Annaliese Harksen;
2. Certificate of Service; and
3. Thurston County Clerk's eFile Confirmations.

No hard copies to follow.

Kari Pitharoulis

Paralegal II

Direct Phone: 360.753.8037 | FAX: 360.570.3791

Please note: This email may be subject to public disclosure.



Kari Pitharoulis

From: Stephen DiJulio <steve.dijulio@foster.com>
Sent: Thursday, August 25, 2016 9:52 AM
To: 'coa2filings@courts.wa.gov'
Cc: clairet@igc.org; knoll lowney (knoll@igc.org); Petrice@co.thurston.wa.us; Greg Overstreet; Mark Barber; Annaliese Harksen; Jay Donovan
Subject: City of Olympia v. Opportunity for Olympia/Thurston County, Thurston County Cause No. 16-2-02998-34

Mr. Ponzoha,

Together with the Office of City Attorney, we represent the City of Olympia in the above-referenced matter. An appeal was filed yesterday from the judgment of Judge Nevin (sitting as visiting judge) that a proposed City initiative was unlawful and that it not appear on the November ballot. The initiative sponsors reportedly will seek emergency relief from the Court of Appeals. The City opposes any such request; and, respectfully requests an opportunity to respond to any such request. Thank you for the Court's attention to these proceedings.

P. Stephen DiJulio

P. Stephen (Steve) DiJulio
ATTORNEY

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000
Seattle, WA 98101

steve.dijulio@foster.com

Tel: 206-447-8971

Fax: 206-749-1927

foster.com

Kari Pitharoulis

From: Jay Donovan <j.donovan@foster.com>
Sent: Thursday, September 08, 2016 3:02 PM
To: 'Tonya Moore'
Cc: claret@igc.org; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Kari Pitharoulis; Jessie Sherwood; 'Elizabeth Petrich'; knoll lowney; Susan Banner
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.
Attachments: Letter to Thurston County Superior Court 9.8.16.pdf

Dear Ms. Moore:

Attached is the City of Olympia's response to the correspondence from counsel below. Please do not hesitate to contact me should you have any questions.

Sincerely,
Jay Donovan

Jason R. Donovan
Partner
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101-3299
Phone: 206.447.7269
Fax: 206.749.1944
j.donovan@foster.com
www.foster.com

From: Elizabeth Petrich [<mailto:Petrice@co.thurston.wa.us>]
Sent: Thursday, September 08, 2016 1:02 PM
To: knoll lowney; Susan Banner
Cc: claret@igc.org; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Jay Donovan; Mark Barber (mbarber@ci.olympia.wa.us); aharksen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us); Jessie Sherwood
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From: seattleknoll@gmail.com [<mailto:seattleknoll@gmail.com>] **On Behalf Of** knoll lowney
Sent: Thursday, September 8, 2016 12:29 PM
To: Susan Banner <susan.banner@foster.com>
Cc: claret@igc.org; Elizabeth Petrich <Petrice@co.thurston.wa.us>; goverstreet@myfreedomfoundation.com; Stephen DiJulio <steve.dijulio@foster.com>; Jay Donovan <j.donovan@foster.com>; Mark Barber (mbarber@ci.olympia.wa.us) <mbarber@ci.olympia.wa.us>; aharksen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us)

<kpitharo@ci.olympia.wa.us>; Jessie Sherwood <jessie.c.sherwood@gmail.com>

Subject: OFO Initiative Ballot Title Appeal

Good morning,

Attached is a petition for ballot title appeal, which is being filed today in Thurston County Superior Court.

I have spoken with Ms. Petrich and we agreed that a suitable briefing schedule, given the urgency of this matter, is as follows:

Opening brief for any party seeking amendment to the ballot title: Close of business Friday.

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Reply briefs: Close of business Tuesday.

Hearing: Wednesday.

If the hearing is scheduled for Wednesday morning, then the replies would be due by Tuesday noon.

Please let me and Claire know if you have any objection to this briefing schedule.

Knoll Lowney
Smith & Lowney PLLC
2317 E. John St.
Seattle WA 98112
(206) 860-2976
fax (206) 860-4187
knoll@igc.org

****Note: the content of this message may be confidential and/or subject to attorney client privilege.****

Kari Pitharoulis

From: Kari Pitharoulis
Sent: Friday, September 09, 2016 8:17 AM
To: Tonya Moore; Claire Tonry; Jay Donovan
Cc: Knoll Lowney; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Carolina Mejia Barahona; Jessie Sherwood; Elizabeth Petrich; Carolina Mejia Barahona; knoll lowney; Susan Banner
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Good morning Tonya – The City would appreciate that information as well. Thank you.

Kari Pitharoulis
Paralegal II
Direct Phone: 360.753.8037 | FAX: 360.570.3791

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From: Tonya Moore [mailto:mooret@co.thurston.wa.us]
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Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Can someone provide me with the case number for the ballot title appeal?

Tonya S. Moore
360.754.4405

From: Tonya Moore
Sent: Thursday, September 08, 2016 4:42 PM
To: 'Claire Tonry' <clairet@igc.org>; 'Jay Donovan' <j.donovan@foster.com>
Cc: Knoll Lowney <knoll@igc.org>; 'goverstreet@myfreedomfoundation.com' <goverstreet@myfreedomfoundation.com>; 'Stephen DiJulio' <steve.dijulio@foster.com>; 'Mark Barber' <mbarber@ci.olympia.wa.us> <mbarber@ci.olympia.wa.us>; 'aharksen@ci.olympia.wa.us' <aharksen@ci.olympia.wa.us>; 'Kari Pitharoulis (kpitharo@ci.olympia.wa.us)' <kpitharo@ci.olympia.wa.us>; Carolina Mejia Barahona <mejiabc@co.thurston.wa.us>; 'Jessie Sherwood' <jessie.c.sherwood@gmail.com>; Elizabeth Petrich <Petrice@co.thurston.wa.us>; Carolina Mejia Barahona <mejiabc@co.thurston.wa.us>; 'knoll lowney' <knoll@igc.org>; 'Susan Banner' <susan.banner@foster.com>
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Yes, Judge Hirsch will still be hearing this matter.

Tonya S. Moore
360.754.4405

From: clairetonry@gmail.com [<mailto:clairetonry@gmail.com>] **On Behalf Of** Claire Tonry
Sent: Thursday, September 08, 2016 4:39 PM
To: Tonya Moore <mooret@co.thurston.wa.us>
Cc: Knoll Lowney <knoll@igc.org>
Subject: Re: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Thank you, Ms. Moore.
We just received a notice of assignment to the Hon. Judge Murphy. Will the hearing still be before the Hon. Judge Hirsch?
Thank you for clarifying.

On Thu, Sep 8, 2016 at 3:26 PM, Tonya Moore <mooret@co.thurston.wa.us> wrote:

Counsel,

Thank you for your input. As these matters are heard on an expedited manner, the ballot title appeal hearing will be heard on Wednesday, September 14th at 9:00 a.m. before Judge Hirsch.

Should another ballot title challenge petition be filed, that matter will also be scheduled on an expedited manner.

Tonya S. Moore

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Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Dear Ms. Moore:

Attached is the City of Olympia's response to the correspondence from counsel below. Please do not hesitate to contact me should you have any questions.

Sincerely,

Jay Donovan

Jason R. Donovan

Partner

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000

Seattle, WA 98101-3299

Phone: [206.447.7269](tel:206.447.7269)

Fax: [206.749.1944](tel:206.749.1944)

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Cc: clairret@igc.org; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Jay Donovan; Mark Barber (mbarber@ci.olympia.wa.us); aharsen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us); Jessie Sherwood

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From: seattleknoll@gmail.com [<mailto:seattleknoll@gmail.com>] **On Behalf Of** knoll lowney

Sent: Thursday, September 8, 2016 12:29 PM

To: Susan Banner <susan.bannier@foster.com>

Cc: clairret@igc.org; Elizabeth Petrich <Petrice@co.thurston.wa.us>; goverstreet@myfreedomfoundation.com; Stephen

DiJulio <steve.dijulio@foster.com>; Jay Donovan <j.donovan@foster.com>; Mark Barber (mbarber@ci.olympia.wa.us)
<mbarber@ci.olympia.wa.us>; aharksen@ci.olympia.wa.us; Kari Pitharoulis (kpitharo@ci.olympia.wa.us)
<kpitharo@ci.olympia.wa.us>; Jessie Sherwood <jessie.c.sherwood@gmail.com>

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I have spoken with Ms. Petrich and we agreed that a suitable briefing schedule, given the urgency of this matter, is as follows:

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If the hearing is scheduled for Wednesday morning, then the replies would be due by Tuesday noon.

Please let me and Claire know if you have any objection to this briefing schedule.

Knoll Lowney
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2317 E. John St.
Seattle WA 98112
[\(206\) 860-2976](tel:(206)860-2976)
fax [\(206\) 860-4187](tel:(206)860-4187)

knoll@igc.org

****Note: the content of this message may be confidential and/or subject to attorney client privilege.****

--
Claire E. Tonry, Esq.

Smith & Lowney PLLC
2317 E. John St.
Seattle, WA 98112
Email: clairet@igc.org
Main: (206) 860-2883
Direct: (206) 860-1394
Fax: (206) 860-4187

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Kari Pitharoulis

From: Microsoft Outlook on behalf of Greg Overstreet
<GOverstreet@myfreedomfoundation.com>
Sent: Friday, September 09, 2016 8:17 AM
To: Kari Pitharoulis
Subject: Automatic reply: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.
Attachments: Automatic reply: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Sender: GOverstreet@myfreedomfoundation.com

Subject: Automatic reply: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Message-Id: <92ca98e18ea54f07b83115959f6de4bf@MWHPR12MB1824.namprd12.prod.outlook.com>

Recipient: kpitharo@ci.olympia.wa.us

Kari Pitharoulis

From: Greg Overstreet <GOverstreet@myfreedomfoundation.com>
Sent: Friday, September 09, 2016 8:17 AM
To: Kari Pitharoulis
Subject: Automatic reply: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

I will be out of the office September 8 and 9. If you have any immediate questions or concerns, please contact my paralegal, Kirsten Nelsen, at knelsen@myfreedomfoundation.com or call one of my associates at 360-956-3482. Thank you.

Kari Pitharoulis

From: Kari Pitharoulis
Sent: Friday, September 09, 2016 9:24 AM
To: Jessie Sherwood
Cc: Tonya Moore; Claire Tonry; Jay Donovan; Knoll Lowney; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Carolina Mejia Barahona; Elizabeth Petrich; Susan Bannier
Subject: RE: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Thank you, Jessie.

Kari Pitharoulis
Paralegal II
Direct Phone: 360.753.8037 | FAX: 360.570.3791

Please note: This email may be subject to public disclosure.



From: Jessie Sherwood [mailto:jessie.c.sherwood@gmail.com]
Sent: Friday, September 09, 2016 9:23 AM
To: Kari Pitharoulis
Cc: Tonya Moore; Claire Tonry; Jay Donovan; Knoll Lowney; goverstreet@myfreedomfoundation.com; Stephen DiJulio; Mark Barber; Annaliese Harksen; Carolina Mejia Barahona; Elizabeth Petrich; Susan Bannier
Subject: Re: OFO Initiative Ballot Title Appeal - court hearing available 9:00 a.m. Wednesday September 14th.

Good morning. I telephoned the Clerk's office this morning; the case number is 16-2-03575-34.

Yours very truly,
Jessie Sherwood

On Fri, Sep 9, 2016 at 8:17 AM, Kari Pitharoulis <kpitharo@ci.olympia.wa.us> wrote:

Good morning Tonya – The City would appreciate that information as well. Thank you.

Kari Pitharoulis

Paralegal II

Direct Phone: [360.753.8037](tel:360.753.8037) | FAX: [360.570.3791](tel:360.570.3791)

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Legal Department

From: Tonya Moore [mailto:mooret@co.thurston.wa.us]

Sent: Friday, September 09, 2016 8:12 AM

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360.754.4405

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<goverstreet@myfreedomfoundation.com>; 'Stephen DiJulio' <steve.dijulio@foster.com>; 'Mark Barber

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<aharksen@ci.olympia.wa.us>; 'Kari Pitharoulis (kpitharo@ci.olympia.wa.us)' <kpitharo@ci.olympia.wa.us>; Carolina

Mejia Barahona <mejiabc@co.thurston.wa.us>; 'Jessie Sherwood' <jessie.c.sherwood@gmail.com>; Elizabeth Petrich

<Petrice@co.thurston.wa.us>; Carolina Mejia Barahona <mejiabc@co.thurston.wa.us>; 'knoll lowney' <knoll@igc.org>;

'Susan Bannier' <susan.bannier@foster.com>

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Jason R. Donovan

Partner

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Seattle WA 98112

(206) 860-2976
fax (206) 860-4187

knoll@igc.org

****Note: the content of this message may be confidential and/or subject to attorney client privilege.****

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Claire E. Tonry, Esq.

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Seattle, WA 98112
Email: clairet@igc.org
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Direct: (206) 860-1394
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--

Jessie Sherwood
Legal Assistant/Office Manager
Smith & Lowney, PLLC
2317 E. John
Seattle, WA 98112
E-mail: jessie.c.sherwood@gmail.com
Tel.: (206) 860-1570

Kari Pitharoulis

From: Marci Brandt <marci.brandt@foster.com>
Sent: Monday, September 12, 2016 4:30 PM
To: 'knoll@igc.org'; 'clairret@igc.org'; 'TCAuditor@co.thurston.wa.us';
'Petrice@co.thurston.wa.us'; 'goverstreet@myfreedomfoundation.com'; Steve Hall; Mark Barber; Annaliese Harksen
Cc: Stephen DiJulio; Jay Donovan
Subject: In Re: Ballot Title Appeal of Opportunity for Olympia Initiative - Thurston County Superior Court No. 16-2-03575-34
Attachments: City of Olympia's Opposition to Petition to Appeal.pdf; [Proposed] Order.pdf

Attached are the following:

- City of Olympia's Opposition to Petition to Appeal Ballot Title Opportunity for Olympia Initiative; and
- [Proposed] Order Denying Opportunity of Olympia's Petition to Appeal Ballot Title Dated 9/9/16.

Hard copies will follow via U.S. Mail.

Marci Brandt

Legal Assistant

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000

Seattle, WA 98101

marci.brandt@foster.com

Tel: 206-447-8955

Fax: 206-447-9700

foster.com

Kari Pitharoulis

From: Marci Brandt <marci.brandt@foster.com>
Sent: Tuesday, September 13, 2016 2:29 PM
To: 'knoll@igc.org'; 'clairret@igc.org'; 'TCAuditor@co.thurston.wa.us';
'Petrice@co.thurston.wa.us'; 'goverstreet@myfreedomfoundation.com'; Steve Hall; Mark Barber; Annaliese Harksen
Cc: Stephen DiJulio; Jay Donovan
Subject: RE: In Re: Ballot Title Appeal of Opportunity for Olympia Initiative - Thurston County Superior Court No. 16-2-03575-34
Attachments: Declaration of Jason R. Donovan.pdf

Attached is the Declaration of Jason R. Donovan in this matter.

Hard copies will follow via U.S. Mail.

Marci Brandt

Legal Assistant

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000
Seattle, WA 98101

marci.brandt@foster.com

Tel: 206-447-8955

Fax: 206-447-9700

foster.com

EXHIBIT J

EXHIBIT J

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THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

CITY OF OLYMPIA, a Washington)
municipal corporation,)
Respondent,)
vs.)
OPPORTUNITY FOR OLYMPIA, a)
Washington Political)
Committee, RAY GUERRA,)
DANIELLE WESTBROOK, THURSTON)
COUNTY, and MARY HALL,)
Thurston County Auditor,)
Appellants.)

NO. 49333-1-II

VERBATIM RECORD OF RECORDED HEARING
Thursday, September 1, 2016

APPEARANCES:

FOR THE RESPONDENT CITY OF OLYMPIA:

MR. P. STEPHEN DiJULIO
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THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

CITY OF OLYMPIA, a Washington)
municipal corporation,)
Respondent,)
vs.)
OPPORTUNITY FOR OLYMPIA, a)
Washington Political)
Committee, RAY GUERRA,)
DANIELLE WESTBROOK, THURSTON)
COUNTY, and MARY HALL,)
Thurston County Auditor,)
Appellants.)

NO. 49333-1-II

VERBATIM RECORD OF RECORDED HEARING
Thursday, September 1, 2016

APPEARANCES:

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APPEARANCES (Continued):

FOR THE APPELLANTS OFO, RAY GUERRA & DANEILLE WESTBROOK:

MS. CLAIRE TONRY
MR. KNOLL LOWNEY
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2317 E. John Street
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FOR THE APPELLANT MARY HALL:

MS. ELIZABETH PETRICH
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ATTORNEY
2000 Lakeridge Drive SW
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1 COMMISSIONER BEARSE: Opportunity for Olympia
2 versus City of Olympia, 49333-1. And I understand -- I'm
3 going to hear appearances of counsel in a minute, and I do
4 understand we have some people on the phone here as well.
5 So why don't I hear who is here and confirm that our
6 telephonic participants can hear us as well.

7 So telephonic participants, if you could just
8 announce who you are.

9 MS. PETRICH: Good morning, Commissioner. My
10 name is Elizabeth Petrich. I'm the attorney representing
11 the Thurston County Auditor.

12 MS. HALL: Mary Hall, Thurston County Auditor.

13 MS. PETRICH: I am Elizabeth Petrich, and I am
14 representing the Thurston County Auditor.

15 COMMISSIONER BEARSE: Understood.

16 And then counsel who are here in person, we'll
17 start --

18 MS. TONRY: Good morning, Your Honor. Claire
19 Tonry with Smith & Lowney on behalf of Appellants
20 Opportunity for Olympia, Ray Guerra and Danielle Westbrook.

21 COMMISSIONER BEARSE: Thank you.

22 MR. DIJULIO: Good morning, Commissioner. Steve
23 DiJulio with Foster Pepper appearing on behalf of the City
24 of Olympia, together with Mark Barber, City Attorney, and
25 Annaliese Harksen, Assistant City Attorney.

1 COMMISSIONER BEARSE: Thank you.

2 I hear a little bit of background noise coming from
3 our telephone. Unless you need to speak for some reason,
4 could you make sure that you are on mute or there's no
5 other sounds?

6 As I said when I came in, we are here on a motion for
7 a stay pending appeal.

8 For the moving parties, are we going to have a single
9 person arguing for the full ten minutes, or are you
10 reserving rebuttal time?

11 MS. TONRY: We will be taking seven minutes and
12 (inaudible) it together, presuming there's (inaudible).

13 COMMISSIONER BEARSE: Thank you. And the
14 responding parties?

15 MR. DiJULIO: I'll be appearing on behalf of the
16 City. Thank you.

17 COMMISSIONER BEARSE: Are you going to be
18 splitting any time with Thurston County?

19 MR. DIJULIO: We have not decided what Thurston
20 County will do. Thurston County typically does not speak
21 at these hearings, but I'll leave it to Ms. Petrich to
22 advise and advise as much time as she may need.

23 COMMISSIONER BEARSE: Ms. Petrich, are you
24 planning on having any argument time here?

25 MS. PETRICH: No, I'm not planning on arguing.

1 I'm only here to answer any questions that the Court may
2 have.

3 COMMISSIONER BEARSE: Thank you very much.
4 So we will hear from the moving party.

5 MS. TONRY: Thank you. And may it please the
6 Court -- again, I'm Claire Tonry here on behalf of
7 appellants Opportunity for Olympia, Ray Guerra, and
8 Danielle Westbrook.

9 And we're here today to request emergency injunctive
10 relief pending appeal so that there may be a vote on the
11 Opportunity for Olympia citywide initiative measure this
12 November.

13 Now, the criteria for an junction pending appeal asks
14 whether the movant will lose the fruits of a successive
15 appeal without the relief and, if so, whether the appeal
16 presents debatable questions such that it is not totally
17 devoid of merit.

18 And I submit that if ever there were a case deserving
19 of injunctive -- injunction performing appeal, this is it.
20 There's no dispute that more than enough registered voters
21 signed Opportunity for Olympia's petition to advance the
22 measure to this November's ballot. Indeed more than 4,719
23 registered voters exercised their First Amendment right in
24 signing that petition and express their view that it ought
25 to be put to a vote at the very next election.

1 There's also no question that absent an order from
2 this Court staying that injunction from the trial court and
3 ordering an election on the Opportunity for Olympia measure
4 this November, petitioners will lose the fruits of a
5 successful appeal, thereby irreparably harming, not only
6 their First Amendment rights, but those of thousands of
7 other Olympia voters.

8 And as Thurston County stated in its brief, the
9 County needs to have the final ballot by September 12th to
10 meet ballot printing deadlines.

11 COMMISSIONER BEARSE: Is it the 12th or the
12 14th?

13 MS. TONRY: We were originally informed that it
14 was the 14th, and I believe that that's the deadline for
15 finalizing the ballot to print. And the County has more
16 recently requested it to be finalized by the 12th.

17 COMMISSIONER BEARSE: Okay.

18 MS. TONRY: So obviously, in either event,
19 there's no time to resolve the merits of this appeal before
20 the critical deadline for printing ballots.

21 And this, I have to note, is entirely a problem of
22 the City's own making, because they waited ten weeks to
23 bring their claims, and in the interim they failed to carry
24 out their ministerial duties that they are clearly required
25 to carry out to advance the measure to the ballot, and

1 holding the election this November is sinful --

2 COMMISSIONER BEARSE: In terms of your harms, I
3 mean, are you -- when you sign a petition, are you
4 guaranteed the right to have your initiative voted on, or
5 not guaranteed, you're expressing your view to have your
6 initiative voted on at an election or at a certain
7 election?

8 MS. TONRY: It's at the election that the
9 initiative is qualified for, your Honor. And I want to
10 point out that the Court in Filo Foods versus City of
11 SeaTac stated that the First Amendment protects statutorily
12 created initiative rights -- that's a quote -- in code
13 cities. And those initiative rights that are statutorily
14 created mandate that the city council forward it to the
15 next election, which is this November's general election.

16 COMMISSIONER BEARSE: In you're not given the
17 right to have it in this election, would it potentially be
18 able to be held at a later election, heard in a later
19 election?

20 MS. TONRY: That relief, your Honor, would
21 not --

22 COMMISSIONER BEARSE: Would you have to go back
23 to square one to collect signatures again?

24 MS. TONRY: I think that that's -- it's
25 debatable, but the point that I really want to emphasize

1 here is that that November election is essential to
2 preserving the fruits of a successful appeal, because a
3 later election as you're suggesting with a different
4 electorate is simply no substitute. This November's
5 general election is a presidential election. A general
6 election with voter turnout is the highest, and the subject
7 of the Opportunity for Olympia initiative education funding
8 is a headline political issue right now.

9 As the Ninth Circuit recognized in Southwest Voter
10 Registration versus Shelley, quote, investments of time,
11 money, and the exercise of citizenship rights, end quote,
12 in reliance on an election date, end quote, the political
13 and social environment of the time cannot be returned if an
14 appellate court finds that an election is improperly
15 enjoined.

16 And so in this situation where appellants and
17 thousands of voters will suffer irreparable harm without
18 the request for relief and the fruits of a successful
19 appeal will certainly be lost, the Supreme Court instructs
20 that, quote, relief should be granted unless the appeal is
21 totally devoid of merit.

22 And even when the threatened harm is not so great as
23 it is here, the merits of the controversy are considered
24 only so far as to ascertain that the questions presented
25 are debatable, and that's Shamley versus City of Olympia.

1 Opportunity for Olympia usually meets this standard
2 because this appeal has merits, and I want to address three
3 of those merits.

4 COMMISSIONER BEARSE: Go ahead.

5 MS. TONRY: So, first, the trial court erred by
6 invalidating the entire measure when the City only
7 challenged the tax element, and the Court never conducted
8 any severability analysis.

9 COMMISSIONER BEARSE: And you brought up the
10 severability issue in the Superior Court? I don't have the
11 benefit of a full record here, so --

12 MS. TONRY: We did, your Honor. We pointed out
13 that no severability analysis argument was made, yet -- no
14 argument was made and the Court never took up the issue or
15 analyzed the severability, which the Court of Appeals in
16 Priorities, excuse me, in the Supreme Court in League of
17 Education Voters versus State tells us that that's an
18 analysis that must be conducted before --

19 COMMISSIONER BEARSE: And if that analysis is
20 conducted, do you think it's debatable as the severability?

21 MS. TONRY: I think it's at least debatable, but
22 I think that there's -- the City really has no meritorious
23 argument at all, that the issue --

24 COMMISSIONER BEARSE: Do you think the City
25 waived the severability issue?

1 MS. TONRY: We do think that the City waived the
2 severability issue --

3 COMMISSIONER BEARSE: Go ahead.

4 MS. TONRY: -- by failing to reach it. But in
5 any event, the measure contains a severability clause, and
6 the Court again in League of Education Voters tells us
7 severability is presumed in that event. And, in addition,
8 the initiative has a funding mechanism aside from the tax
9 element that was challenged, and it has a provision for
10 distributing grants for education, even if there are not
11 funds to distribute grants to every --

12 COMMISSIONER BEARSE: In the severability cases
13 I looked at, it appeared that the funding position was the,
14 I'm sorry, the funding provision was the only provision for
15 funding an initiative, which then supported the reasoning
16 of those courts that it was the heart and soul of the
17 initiative and thus unseverable. So you're saying because
18 there are other funding mechanisms, it's not the case here?

19 MS. TONRY: That's right. There are explicit
20 funding mechanisms.

21 COMMISSIONER BEARSE: I am going to stop you for
22 one minute, because I do want to hear this full argument,
23 and I think ten minutes is going to be insufficient. I'm
24 going to add five minutes here --

25 MS. TONRY: Thank you, your Honor.

1 COMMISSIONER BEARSE: -- and five minutes to the
2 responding party if they desire to use it.

3 Go ahead.

4 MS. TONRY: Okay, thank you.

5 And it's section 4, subsection 3, that provides
6 specific mechanisms for receiving private gifts, grants,
7 and bequests. So there is sufficient independent funding
8 mechanism, in addition to heart and soul of the measure
9 being grants for education, which are fully preserved and
10 have never be challenged. Neither of these provisions
11 have.

12 COMMISSIONER BEARSE: Okay. Move on.

13 MS. TONRY: And so I do want to make the
14 additional point that regardless of the fate of the
15 initiative's tax element, the City is obligated to put the
16 remainder of the measure on the November ballot, and so the
17 City will incur the same costs to run the entire measure.
18 And that's just yet another reason why the request for
19 relief pending appeal is justified.

20 So the second merit issue I want to address is that
21 the trial court erred in holding that the city council has
22 exclusive power over local taxation to the exclusion of
23 citizens through initiative petitions. The City's entire
24 argument on this point is based on two specific statutes
25 that contain the phrase "legislative bodies." But in 1000

1 Friends versus McFarland, the Supreme Court squarely
2 rejected that argument and said that the phrase
3 "legislative bodies" is not dispositive. It directed us
4 then to the analysis we were supposed to conduct, is to
5 examine the entire statutory scheme and determine whether
6 there's a clear legislative intent to preclude the
7 different initiatives.

8 So if we look to the statutory scheme, we find that
9 the Legislature's explicit intent stated in RCW 35A.01.010,
10 which states that any specific enumeration of municipal
11 powers in this chapter, quote, shall not be construed in
12 any way to limit these broad powers. So that's to read to
13 specific statutory grants with power to the legislative
14 body, as the City does -- reading that to implicitly
15 preclude local tax initiatives is directly contrary to the
16 Legislature's explicit directions as to how to interpret
17 these statutes.

18 COMMISSIONER BEARSE: Did 1000 Friends
19 specifically address these statutes, 020 and 030, or was it
20 concerned with another statutory provision?

21 MS. TONRY: I believe it was concerned with
22 another statutory provision, your Honor.

23 COMMISSIONER BEARSE: Okay.

24 MS. TONRY: But specifically stated that the
25 Legislature normally is not paying attention to the citizen

1 initiative power versus -- versus not, using the term
2 legislative body.

3 COMMISSIONER BEARSE: I did find one case
4 involving 020 and 080 -- I didn't see it cited in the
5 briefs -- that predated 1000 Friends, however, which is
6 Citizens for Responsible Wildlife Management, which talked
7 about a zoning code alteration, and it said because 020
8 vested the city council with this power, it precluded a
9 referendum.

10 MS. TONRY: And that's an important point, your
11 Honor. Precluding a referendum is something that the City
12 has argued supports this argument but, in fact, it's just
13 the opposite.

14 COMMISSIONER BEARSE: Okay.

15 MS. TONRY: Where the Legislature has, as in the
16 case of tax ordinances, has precluded citizens only from
17 exercising the power of referendum, it's silent in terms of
18 the initiative power.

19 COMMISSIONER BEARSE: Okay.

20 MS. TONRY: And that shows that the Legislature
21 knows how to explicitly preclude its citizens from direct
22 legislation and have not done that here.

23 In addition, because the grants of power to the
24 legislative body in RCW 35A.11.020, those grants are
25 extremely broad. They literally include enacting, quote,

1 ordinances of all kind, so reading that to preclude citizen
2 initiatives would effectively nullify the entire initiative
3 power.

4 COMMISSIONER BEARSE: It would wipe out the 080
5 subsection?

6 MS. TONRY: There would be nothing left, and
7 that cannot be the Legislature's intent when it granted
8 powers to code cities the right of initiative.

9 So the third point I want to address is that the
10 court erred by applying RCW 36.65.030, which is the statute
11 that purports to prohibit local taxes on, quote, net
12 income. The statute's application of validity are issues
13 of first impression, which in and of itself, indicate that
14 there are debatable issues here, and, as such, relief
15 should be granted pending appeal.

16 COMMISSIONER BEARSE: You strongly believe this
17 is an excise tax?

18 MS. TONRY: We do, your Honor. And that's
19 supported by the City's own draft ordinances just a few
20 months ago, the scholarship of the City's legal advisor,
21 United States Supreme Court.

22 COMMISSIONER BEARSE: And I'm just -- I'm really
23 trying to educate myself on the taxation issue in
24 particular, and it seems to me that excise taxes are
25 premised on the doing of what's quoted as a voluntary act;

1 for example, somebody who wants to run a retail business in
2 a city or somebody who wants to get a particular license
3 for something. And I'm wondering what the acts are here.

4 MS. TONRY: Well, to quote the Supreme Court,
5 the taxes and excise -- if the government is taxing a
6 particular use or enjoyment of property for the shifting
7 from one to another of any power or privilege incidental to
8 the ownership or enjoyment of property. And here this tax
9 is based on the benefits that are disproportionately
10 received by residents with household incomes above
11 \$200,000, including, for example, city services providing
12 for parks for which they receive a disproportionate
13 benefit, police and other emergency-like services.

14 COMMISSIONER BEARSE: But these police and other
15 emergency-like services, they are offered to everybody in
16 Olympia, correct?

17 MS. TONRY: They are, and they provide a
18 disproportionate value, as do the parks in close proximity
19 to these households.

20 COMMISSIONER BEARSE: And we're out of time. We
21 can talk about the excise tax if we need a little more on
22 rebuttal. Thank you.

23 MR. DIJULIO: May it please the Court and
24 Counsel.

25 The King Dome, the I-90 floating bridge, water system

1 fluoridation, traffic safety cameras, zoning, municipal
2 bonds, growth management and taxation, what do all those
3 important public issues have in common? They're not
4 subject to local direct legislation. But appellants seek
5 to elevate this case in this motion to a level that is
6 unsupported by fact or law. Saying it is so does not make
7 it so, but that is the whole foundation for this motion.

8 The appellant political committee says there are
9 debatable issues, but the city council, Thurston County's
10 special election commissioner and Court found no debatable
11 issues, and there are none, because the Legislature
12 answered these questions directly. The Court doesn't need
13 to look to 020. 030 itself precludes the application of
14 the direct legislation when it specifically delegates such
15 political powers to the legislative bodies such as eminent
16 domain and taxation.

17 COMMISSIONER BEARSE: And you think that 030's
18 language is sufficient to sort of overcome the 1000
19 Friends' statements about how particular you need to be
20 when you're trying to circumvent initiative power?

21 MR. DIJULIO: It's not only 1000 Friends, but
22 all the cases that come after 1000 Friends, your Honor.
23 And, of course, under 36.65.030, the Legislature has simply
24 and unequivocally prohibited a city from levying a tax on
25 net income.

1 Before addressing the counsel's argument, it should
2 not go unnoticed that the United States Supreme Court
3 yesterday denied North Carolina's request to stay pending
4 appeal the Fourth Circuit's ruling that invalidated that
5 state's voter registration laws.

6 First, let's address the issue of who is really
7 damaged in this case by this motion. Counsel
8 misrepresented the petition that was circulated. There's
9 no reference in the petition to a November 2016 election.
10 The petition is attached to the City's complaint and it's
11 attached to the opposition and petition of the political
12 committee.

13 The election can be held just as easily in February
14 2017 as it can in November 2016.

15 COMMISSIONER BEARSE: Can you answer my question
16 about whether re-acquisition of signatures would be
17 required?

18 MS. TONRY: MR. DIJULIO: There's no requirement
19 for that. If the Court issues wishes a stipulation, the
20 City is prepared to so stipulate, and we will right now.

21 There's no foundation, evidentiary or in law, that
22 the assertions for the November general election either is
23 a right or a necessity. This case has been pending for six
24 weeks. There is no declaration, expert or otherwise, that
25 an election in early 2017 is any different than late 2016.

1 They say all these political things are going on, but where
2 is there an evidentiary record in support of that? The
3 City can just as easily point out, and the Commissioner may
4 take notice, that a lower voter turnout at a special
5 election in February would be better for a proposition, as
6 there is a greater likelihood that committed voters will
7 vote and there will be a greater opportunity to secure the
8 necessary percentage. That is why school district bonds in
9 this state are typically held at the February or April
10 special election, because you have the committed voters
11 turning out. And, of course, all ballots are by mail in
12 this state, and so there is no issue of voter turnout or
13 accessibility to polls.

14 So, again, there is not a single fact in this effort
15 that supports a claim that a November 2016 election is any
16 different than an election in February 2017, and this
17 matter can be resolved by then.

18 Second, the fruits of this case are preserved for
19 appeal, notwithstanding the trial court's invalidation of
20 the initiative. In Philadelphia II versus Gregoire, a very
21 similar situation: The Thurston County Superior Court
22 invalidated an initiative, kept it off the ballot. The
23 Supreme Court nevertheless reviewed the matter on the
24 merits. There, the so-called Philadelphia II initiative
25 sought to establish the United States direct "direct

1 democracy" by means of federal nationwide initiative
2 process to complement the Congressional system and to call
3 what was known as a world meeting to discuss global issues.

4 Again, the Supreme Court, although arguably moot with
5 respect to a specific election, nevertheless went forward
6 and considered the merits and ruled it invalid, just as has
7 happened here.

8 And, third, and, of course, while they cannot show a
9 likelihood of prevailing, or as the City asserts, even
10 debatable issue, even a debatable issue is not enough to
11 gain extraordinary relief.

12 As -- by the way, the Court has the record before it.
13 The City filed an appendix of these proceedings in this
14 matter.

15 COMMISSIONER BEARSE: Are you -- I just want to
16 make sure I have all the documents.

17 MR. DIJULIO: Yeah, I recognize --

18 COMMISSIONER BEARSE: You filed an appendix with
19 your response?

20 MR. DIJULIO: We did.

21 COMMISSIONER BEARSE: Is that what you're
22 referring to, or is there another appendix?

23 MR. DIJULIO: No, that's the appendix we're
24 referring to.

25 COMMISSIONER BEARSE: Okay, just making sure.

1 MR. DIJULIO: And while there may be a document
2 or so that is not -- that is in the trial court record that
3 is not before the Court, you have the transcript from the
4 judge's ruling and you have all of the pleadings we believe
5 that are relevant to this consideration. Again, we filed
6 both the City's and the Defendant's pleadings.

7 COMMISSIONER BEARSE: You started out talking
8 about the lack of the harm to OFO. I'm supposed to look at
9 -- I'm supposed to balance equities here. Is there any
10 harm to the City?

11 MR. DIJULIO: Thank you, your Honor.

12 In the court's exercise of its discretion in applying
13 the sliding scale of RAP 8.1, what party really loses by
14 granting the defendant's motion? It's not appellants.
15 They preserve the right to appeal, they preserve the right
16 to a ruling on the merits, and reserve the right to an
17 election if it prevails. It is the City that loses; the
18 City loses the fruits of this matter, because the judgment
19 in the City's favor entered by the trial court becomes
20 void, and the City is compelled to hold a useless election
21 and incur the attendant costs and administrative burdens.
22 The City has no recovery for that. You have to --

23 COMMISSIONER BEARSE: I understand you will
24 incur the cost, for example, of printing a supplemental
25 voter's pamphlet, but what are the additional real-world

1 costs?

2 MR. DIJULIO: The City has to pay for the
3 election. The City has to pay --

4 COMMISSIONER BEARSE: Well, we're talking about
5 an election that's going ahead, correct?

6 MR. DIJULIO: Yeah.

7 COMMISSIONER BEARSE: I mean, this is not a
8 special election.

9 MR. DIJULIO: No. The city has an obligation
10 under law, your Honor, to pay a percentage of the cost of
11 the election based upon the number of measures on the
12 ballot, and it is admitted by the City that the cost for
13 its participation in a general election is less than the
14 cost of the participation in a special election, but,
15 nevertheless, there's a direct cost for the City, and those
16 -- the Spokane case, the Longview case, all recognize that
17 it is such a cost that is a damage to the City and
18 certainly gives rise to the standing that allows them to
19 challenge a matter preelection to avoid that very cost.
20 And that's what we're talking about. And there's no
21 recovery. The electorate, loses again in such a
22 circumstance by having a ballot measure that is invalid
23 placed before it.

24 The efforts of the initiative sponsors here are
25 similar to those of Tim Eyman who puts these initiatives

1 before the people without consideration of their validity.
2 And they get on the ballot and the people vote on them,
3 thinking that they have a right that they're not entitled
4 to, and it puts the courts in a position of again
5 invalidating a measure --

6 COMMISSIONER BEARSE: But, you know, they do a
7 post-election validation. Isn't that what just happened
8 with this most recent one?

9 MR. DIJULIO: That's correct, your Honor, but in
10 the situation here, you have a judgment. We understand
11 politically that decisions are made and some will not --
12 well, some will send matters to the ballot, in any event.
13 The city council of the City of Olympia made a conscious
14 decision, after studied efforts -- again, those studied
15 efforts are part of the record; the resolutions of the
16 council are before you -- to consider this matter and to
17 say this doesn't work, we're not putting it before the
18 electorate, and a judgment of the trial court affirmed
19 that. That is what is here before the Court.

20 And to suggest that we're going to have an election
21 on a matter that is going to be invalid is a disservice to
22 the public and a waste of public resources. The City
23 concludes then where it began. There is no constitutional
24 right to a city initiative or referendum. The right
25 exists, if at all, by statute.

1 Appellant asked the commissioner to put a measure on
2 the November ballot, simply because they say it should be
3 on that ballot. There's no right constitutionally and no
4 debatable issues, and there is no statutory right to have
5 an election in November 2016. This Court should not
6 exercise its discretion in the face of thorough and studied
7 consideration by the Olympia city council and the legal
8 determinations by the trial court below.

9 The City asks this court to not order an election,
10 that it will be a useless act and an election that condones
11 bad policy by allowing invalid matters onto the ballot and
12 wastes public resources. The motion should be denied.

13 One further --

14 COMMISSIONER BEARSE: Going to --

15 MR. DIJULIO: I'm sorry, your Honor. One
16 further comment. The issue of severability --

17 COMMISSIONER BEARSE: You can read my mind.

18 MR. DIJULIO: Thank you.

19 -- was before the trial court. I refer the Court to
20 the briefing, and I'll specifically refer to page 5 of the
21 City's reply brief to the defendant's motion, which is
22 index No. 13 in the City's submission and subsection 4
23 specifically addresses the issue of severability. The City
24 says: Defendants ask the Court to parse the initiative and
25 sever provisions unrelated to the illegal income tax, but

1 the entire proposed income tax initiative is about the
2 levying and appropriation of the proposed income tax. And
3 the Court can review that briefing, if it wishes further,
4 but clearly that issue was before the trial court.

5 COMMISSIONER BEARSE: And what did the trial
6 court do with it? I didn't -- I mean, I read the ruling.

7 MR. DIJULIO: The trial court did not address it
8 and -- the Court didn't need to address a number of issues
9 in that regard, as it said. I don't need to address it,
10 the Court said, and we believe the court act was correct in
11 doing so.

12 The trial court, having reviewed the record, is not
13 obligated to review and rule on every element of the matter
14 before it. Here it ruled the initiative was invalid and --

15 COMMISSIONER BEARSE: And you don't think the
16 severability issue is debatable?

17 MR. DIJULIO: The issue, your Honor, is: Can
18 direct election, here in initiative, direct the
19 appropriation of college -- or of city funds to support
20 college education? The statute, 030, specifically
21 prohibits, and 090, specifically addresses appropriation.
22 And here they're saying we're going to appropriate city
23 funds, however they come in to the City, for use for
24 college education. That is not within the power of direct
25 legislation. And so we're going to have a vote on a single

1 measure? That is, that the City receives grants or gifts
2 and uses that money first to support college education? Is
3 that what we're going to have a vote on, to essentially
4 tell the City how it's going to appropriate its fund? We
5 don't believe that's a debatable issue, your Honor.

6 COMMISSIONER BEARSE: And your views on the
7 excise tax? As I explained, I am coming up to speed on
8 arcane taxation issues very quickly.

9 MR. DIJULIO: The Court's question is addressed
10 in our briefing and, we believe, answered, and we agree
11 with the Court that an excise tax is on the privilege of
12 doing business, and if you look at the excise tax cases in
13 this state's history -- the City of Olympia is not
14 antagonistic to the defendant's general proposition for tax
15 relief and tax remediation in our state. We understand --
16 the city council understands that. The city council
17 supports the issue of better funding for education in this
18 state. It says it in its resolutions.

19 The difficulty is, and we don't want to address this,
20 but in our brief we note it, the Legislature specifically
21 called an income tax an excise tax, and the Supreme Court
22 invalidated it and said this isn't an excise tax, it's an
23 income --

24 COMMISSIONER BEARSE: That's the old -- I can't
25 remember the case -- from 1930's, correct?

1 MR. DIJULIO: Correct.

2 COMMISSIONER BEARSE: Okay.

3 MR. DIJULIO: So here we have a situation where
4 we have a claim of an excise tax on adjusted gross income.
5 That's not an income tax filed for -- ?

6 COMMISSIONER BEARSE: So you believe this is
7 best characterized as an income tax, and even though it's
8 an AGI tax, you believe it resembles enough a net income
9 tax to fall within the prohibition of 36 -- I'm not going
10 to recite the whole quote, but you understand what I'm
11 talking about?

12 MR. DIJULIO: And that was specifically found by
13 the city council in its resolution, your Honor.

14 COMMISSIONER BEARSE: Thank you.

15 MR. DIJULIO: Thank you.

16 COMMISSIONER BEARSE: And is it three minutes of
17 rebuttal time?

18 UNIDENTIFIED SPEAKER: She went over briefly by
19 about a minute.

20 COMMISSIONER BEARSE: Okay, two minutes of
21 rebuttal time, but I'll be a little casual with the red
22 light.

23 MS. PETRICH: Thank you, your Honor.

24 I want to first address the equities here, because I
25 think they're plain and they're completely misstated by the

1 City. The City stands to lose nothing if the injunctive
2 relief is granted pending appeal, but Opportunity for
3 Olympia stands to lose their First Amendment rights.

4 COMMISSIONER BEARSE: Do you think any of the
5 State's actual outlay, let's say, the cost of printing a
6 supplemental voter's pamphlet can be adequately protected
7 by filing a supersedeas bond?

8 MS. PETRICH: If those costs were impact --
9 something that the City only needed to incur because of the
10 appeal --

11 COMMISSIONER BEARSE: Well, the Hall declaration
12 seems to say that they need to print another pamphlet,
13 correct?

14 MS. TONRY: That's right, and that is the case
15 regardless because, again, the lack of a severability
16 argument, and the City has just claimed that all it says
17 below is that the entire measure is invalid, but that's not
18 a severability analysis, and it was not conducted as it
19 needs to be, but --

20 COMMISSIONER BEARSE: Well, and then they argue
21 that it infringes the appropriation power given by statute
22 to a legislative body, if I'm not misstating what the City
23 just argued.

24 MS. TONRY: The City has made that argument, but
25 it's completely unsupported, because this is not an

1 appropriation. An appropriation is a compulsory payment.
2 Accepting gifts and bequests is, by definition, not an
3 appropriation, so that argument has no merit.

4 But I want to go back to the fact that we stand to
5 lose everything that we have -- that my clients have
6 designed this initiative for, designed it to for this
7 election, designed it for the high-voter turnout election,
8 and we've put evidence into the record on page 13 of our
9 motion that, in fact, as I'm sure, that the Court can take
10 judicial notice of, that general elections in a
11 presidential year have much higher voter turnout. And the
12 campaign is underway. The staff are here; the voters are
13 here today.

14 As the Ninth Circuit clearly held, those investments
15 of time and money, and primarily the exercise of their
16 citizenship rights, based on the political and social
17 environment of the time, cannot be returned. That is, by
18 definition, irreparable harm.

19 And going back, your Honor, to the severability
20 issue, I want to again point up to the initiative, which
21 provides section 5, subsection 4, that if funds are
22 insufficient, the Department, in consultation with the
23 committee, may determine the priority by which grants are
24 awarded, so there's a provision for grants appeal.

25 COMMISSIONER BEARSE: And I understand the

1 function and the way the initiative functions, and we are
2 out of time, so if you want to have just ten seconds to
3 wrap up.

4 MS. TONRY: In conclusion, your Honor, voters
5 have everything to lose here, and the City stands to lose
6 nothing by running an initiative -- running an initiative
7 that was undisputably qualified.

8 COMMISSIONER BEARSE: Thank you. I am going to
9 take this matter under consideration. I do understand that
10 we're coming up against some very strict deadlines here. I
11 will issue a written decision as quickly as I can, and,
12 obviously, all parties will be notified.

13 Thurston County, are you still with us?

14 MS. PETRICH: Yes, I am. Yes, we are, your
15 Honor.

16 COMMISSIONER BEARSE: Do you have any questions
17 before we conclude this hearing?

18 MS. PETRICH: No, I don't.

19 COMMISSIONER BEARSE: Thank you. I do want to,
20 before you hang up, Thurston County, switch to a more
21 administrative portion of this hearing, in that I do
22 understand we have a September 12th or September 14th
23 deadline we are coming up against, and in that I likely --
24 think that likely, regardless of my commissioner's ruling,
25 that any party will want to bring this up on a motion to

1 modify to a panel of judges, and I do appreciate both
2 parties working hard to meet the deadline, the emergency
3 filing deadlines, to get this stay before me so quickly,
4 and I just want to notify the parties that in the event --
5 well, regardless of my ruling -- I am going to likely set
6 out a motion-to-modify scheduling in my ruling. If anybody
7 objects to that or has concerns about that, now would be a
8 good time to air them.

9 MR. DIJULIO: No objection from the City.

10 COMMISSIONER BEARSE: Certainly I'm not
11 encouraging people to file a motion to modify, but, again,
12 I'm conscious of deadlines that were set out in the Hall
13 declaration, and I think everybody deserves their day in
14 court, and we're going to do our best to give it to the
15 both of you.

16 With that, we will be adjourned.

17 (Hearing adjourned)

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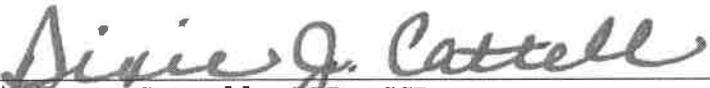
I, DIXIE J. CATTELL, the undersigned Registered Professional Reporter and Washington Certified Court Reporter, do hereby certify:

That the foregoing VERBATIM RECORD OF RECORDED HEARING was taken by me via a recording and completed on the 3rd day of October, 2016, and thereafter transcribed by me by means of computer-aided transcription; that the transcript is a full, true and complete transcript of the proceedings, to the best of my ability;

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IN WITNESS HEREOF, I have hereunto set my hand this 3rd day of OCTOBER, 2016.



Dixie J. Cattell, RPR, CCR
NCRA Registered Professional Reporter
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EXHIBIT K

EXHIBIT K

**BEFORE THE PUBLIC DISCLOSURE COMMISSION
STATE OF WASHINGTON**

In RE: 45-Day Citizen Action Complaint Filed by
Knoll Lowney on Behalf of the Opportunity for
Olympia Initiative Campaign,

Complainant.

PDC Case No. 8341

DECLARATION OF JANE KIRKEMO

I, JANE KIRKEMO, declare as follows:

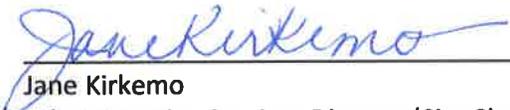
1. I am over the age of 18 years. I have personal knowledge of the facts contained in this Declaration and if called upon to testify, I could and would testify competently as to the truth of the facts stated herein.

2. I am the Administrative Services Director for the City of Olympia, Washington. As part of my responsibilities as Administrative Services Director, I am the City Clerk. As City Clerk, I also serve as the City of Olympia's election officer.

3. The Opportunity for Olympia (OFO) initiative campaign did not file their proposed initiative petition with me before it commenced circulating its initiative petition for signatures as defined in RCW 42.17A.005(4).

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Signed at Olympia, Washington, this 6th day of October 2016.


Jane Kirkemo
Administrative Services Director/City Clerk