No. _________

In the

Supreme Court of the United States

RESPECT WASHINGTON,
Petitioner,
v.

BURIEN COMMUNITIES FOR INCLUSION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Washington Court of Appeals Division I

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Twenty four states allow citizens to propose state or local legislation through the initiative and referendum process—a remnant reminder of that consent from which just powers derive. Over 30 years ago this Court expressly recognized that the initiative process rests at the heart of the First Amendment's protection because it involves communication about governmental policies and constitutes core political speech. Nonetheless, after an initiative has met all time, place and manner restrictions, a routine practice has developed for political opponents to seek an injunction prohibiting people from expressing their views at the ballot box and courts have repeatedly issued such injunctions expressly based on the subject matter of the initiatives.

Question:

Whether the First Amendment protects the right of citizens to vote on an initiative that meets all time, place and manner requirements for the initiative to qualify for placement on the ballot.

LIST OF ALL PARTIES

The parties to this proceeding are Petitioner Respect Washington and the Respondents are Burien Communities for Inclusion; King County Elections; Julie Wise, King County Director of Elections and the City of Burien.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporations or any publicly held corporations that own 10% or more of the stock of any parties to this proceeding.

RELATED CASES

- *Burien Communities for Inclusion v. Respect Washington*, No. 17-2-23799-0-KNT, Superior Court for King County, Washington. Order entered on September 14, 2017.

- *Burien Communities for Inclusion v. Respect Washington*, No. 77500-6-1, Division I of the Washington Court of Appeals. Judgment entered on September 9, 2019.

- *Burien Communities for Inclusion v. Respect Washington*, No. 97755-1, Washington Supreme Court. Order denying petition for review entered on January 8, 2020.

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PETITION FOR WRIT OF CERTIORARI

Respect Washington respectfully petitions this Court for a Writ of Certiorari to review the decision of the Washington Court of Appeals, Division I.

OPINIONS BELOW

The opinion below was issued by a panel of the Washington Court of Appeals, Division I and is reprinted as Appendix (App.) A. The Court of Appeals' Commissioner issued a decision allowing Petitioner's appeal to proceed, reprinted as App. B. The panel upheld a decision of the Superior Court for King County, Washington, which is reprinted as App. C.

Petitioner sought review in the Washington Supreme Court, but that Court denied review. A copy of the order is reprinted as App. D.

JURISDICTION

The Court of Appeals decision was issued on September 9, 2019. A petition for review was timely filed in the Washington Supreme Court, which was denied on January 8, 2019. App. D. Accordingly, this Court has jurisdiction of this matter under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

This case concerns the interpretation and application of the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This case also concerns Section 1 of the Fourteenth Amendment that makes the provisions of the First Amendment applicable to the states.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The City of Burien in the State of Washington is a city of approximately 53,000 people in the greater Seattle area. But it is far from the sleepy suburb from times past. The people of Burien are now on the front lines of gang related violence and other criminal activity. In January of 2017, the Burien City Council enacted an ordinance to send a political message opposing federal immigration policy by prohibiting city personnel from participating in federal immigration enforcement. App. A at 2a. In common parlance, Burien was establishing itself as a "Sanctuary City." As in other communities, Burien's Sanctuary City status was a subject of substantial local controversy.

In response to the City Council's enactment of the Sanctuary City ordinance, an informal group of citizens in Burien opposed to the Sanctuary City ordinance began gathering signatures on an initiative to repeal the recent enactment. Using an existing organization, Respect Washington, they submitted signed petitions to the City to propose an initiative which was later identified as Measure 1. Just two weeks later, the King County Department of Elections notified the Burien City Clerk that Measure 1 had received sufficient voter signatures to be placed on the November 2017 ballot. At that point, the Burien City Council had the option of enacting the proposal or placing it on the ballot.

Because the City Council took no action regarding Measure 1, Respect Washington officer, Craig Keller,

filed a complaint and application for writ of mandate to compel the Burien City Council to comply with state law and either enact Measure 1 or place it on the November 2017 ballot. App. G at 62a. On August 7, 2017, the Burien City Council voted to place Measure 1 on the ballot. App. B at 34a.

Over a month later, on Friday, September 8, 2017, Burien Citizens for Inclusion (BCI), a group formed to oppose Measure 1, sued Respect Washington, the City, the King County Elections Department and the Director of Elections seeking an injunction prohibiting placement of the initiative on the ballot. App. A at 3a. The complaint alleged that Measure 1 exceeded the scope of the initiative power and that the form of the petition was invalid. App. A at 3a.

The King County Election Department's deadline to send the final November 2017 ballot to the printer was Thursday, September 14th. App. A at 4a. BCI filed its motion for a temporary restraining order on Monday, September 11th, prior to Respect Washington being served with the complaint. App. A at 3a-4a. A Superior Court Commissioner granted that motion on September 11th and ordered a hearing for a preliminary injunction to be held two days later on Sept. 13, 2017. BCI filed its motion for a preliminary injunction on September 12, 2017.

Accompanying BCI's motion for a preliminary injunction were declarations of individuals claiming injury from the mere placement of the initiative on the ballot. *See, e.g.,* App. A at 19a (referencing "the polarizing debate over [Measure 1] has raised fears in

the immigrant and refugee community"). BCI argued that having polarizing debate and fear were sufficient injuries to enable it to ask the Court to strike the initiative from the ballot.

On the very morning of the deadline for sending ballots to the printer, September 14, 2017, the Superior Court issued an order granting Respondents a preliminary injunction prohibiting Measure 1 from being placed on the November 2017 ballot. App. at 41a.

Because the issuance of a preliminary injunction was not an appealable order, Respect Washington's only recourse to obtain appellate review was to file a Notice and Motion for Discretionary Review in the Washington Court of Appeals. Washington Rules of Appellate Procedure, Rule 5.2. Petitioner successfully persuaded the Court of Appeals to treat the Motion for Discretionary Review as an appeal because the granting of a preliminary injunction blocking Measure 1 from appearing on the ballot on the very day ballots were scheduled to be printed essentially decided the entire case and gave BCI all the relief it sought in its complaint. App. B.

The Court of Appeals ultimately issued the Decision attached as Appendix A, affirming the trial court decision.[1]

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[1]The Court of Appeals did not reach the question as to whether the petitions used to obtain signatures on petitions were invalid because they contained campaign rhetoric. App. A at 31a, n.10.

Relying on numerous decisions of this Court, Respect Washington argued to the appellate court, that an injunction that prohibits people from voting on an initiative based on the subject matter of the initiative violates the First Amendment. *See* App. G at 52a-54a. While the state legislature is free to circumscribe the law-making power of initiatives and exclude certain subject matters, any decision as to whether the initiative is within the proper scope of the initiative power can and should be made after people have had the opportunity to voice their support, opposition or indifference to the issue at the ballot box.

The Court of Appeals concludes on this First Amendment issue:

> The preliminary injunction was based on the initiative exceeding the scope of the local initiative power, not the substance of the policy stance taken. It does not violate the free speech rights of the City's voters.

App. A at 15a.

Petitioner filed a timely petition for review in the Washington Supreme Court which was denied without further comment on January 8, 2020. App. D at 44a.

From the Washington Court of Appeals, Division II's decision, Petitioner submits this Petition.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

This Court should grant the Petition because the Washington state court has decided an important question of federal law in a way that conflicts with relevant First Amendment decisions of this Court.

Twenty four states and the Virgin Islands have an initiative process whereby citizens may petition to have a proposed statute or ordinance placed on the ballot for voters' rejection or approval. *See* http://www.ncsl.org/research/elections-and-campaigns /chart-of-the-initiative-states.aspx. The related referendum process involves a voter-initiated proposal to veto recently enacted legislation. These common examples of direct democracy have rigorous signature requirements; nonetheless, heightened levels of public controversy over governmental policy or action are typically the catalyst necessary to meet those requirements.

Historically, people have submitted initiatives on a wide variety of subjects, indicating the subject matter of initiatives fall indiscriminately on the political or ideological map. A small sampling of initiative subjects includes: increasing the minimum wage,[2] a changing property tax laws,[3] limiting marine

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[2] *See, e.g., Filo Foods, LLC v. City of SeaTac,* 357 P.3d 1040 (Wash. 2015).

[3] *Amador Valley Joint Union High Sch. Dist. v. State*

fishing,[4] legalizing marijuana use,[5] changing wildlife policy,[6] creating open government rules,[7] and, as in the present case, repealing sanctuary city status. Like the earlier town hall, the initiative process is expected to be open to any political or ideological point of view.

Consequently, the opportunity for people to vote on a change or criticism of controversial government policy is inherently political in nature. The more controversial the issue, the greater the incentive of political opponents to thwart efforts to bring the issue to a vote.

> A lawsuit to strike an initiative or referendum from a ballot is one of the deadliest weapons in the arsenal of the measure's political opponents. With increasing frequency, opponents of ballot proposals are finding the weapon irresistible and are suing to stop elections.

John D. Gordon III and David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums,* 64 NOTRE DAME L. REV. 298 (1989). Judicial injunctions prior to the election silence the people's views that

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Bd. of Equalization, 583 P.2d 1281 (Cal. 1978) (addressing tax initiative).

[4] *Advisory Opinion to the Attorney General – Limited Marine Net Fishing*, 620 So.2d 997 (Fla. 1993).

[5] *People v. McKnight,* 446 P.3d 397, 407 (Colo. 2019).

[6] *Kafka v. Montana Dept. of Fish, Wildlife and Parks,* 201 P.3d 8 (Mont. 2008).

[7] *Fritz v. Gorton,* 517 P.2d 911 (Wash. 1974).

would otherwise be expressed—and counted—at the polls.

While this Court has long protected the initiative process, even from content-neutral restrictions that might prevent matters from getting to the ballot, like a prohibition on using paid circulators of petitions,[8] this Court has not addressed whether the First Amendment extends to further steps in the process, specifically whether it protects the right to vote when opponents use judicial processes to prohibit the election based on the subject matter of the proposal.

Washington, like other states, has created a rule for access to the ballot that focuses on the content of the message and is governed by a subjective, unclear standard. The importance of protecting expression of views about government policy call for this Court's granting of this Petition.

A. The decision below conflicts with this Court's decisions that the First Amendment protects the initiative process.

This Court long ago recognized the role of the First Amendment in protecting the opportunity for individuals to voice criticism of government policies or actions. Given the conditions that led to the American revolution, this is no surprise. Bernard Bailyn, Ideological Origins of the American Revolution 5 (1967).

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[8] *Meyer v. Grant*, 486 U.S. 414 (1988).

Distilling the essential purposes of the Free Speech Clause, this Court concludes "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. State of Alabama*, 384 U.S. 214, 218 (1966).

This led to application of free speech principles to the initiative and referendum process and a recognition that these processes are "at the heart of the First Amendment's protection" because the speech occurring is about governmental policies. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (law criminalizing financial support for a referendum proposal violated the First Amendment). Initiatives by their very nature concern governmental affairs.

While there is no federal requirement that states provide an initiative process, a state that chooses to permit citizen initiatives is "obligated to do so in a manner consistent with the Constitution." *Meyer,* 486 U.S. at 420. The initiative process, as a whole, is protected political speech under the First Amendment. *Id. at* 421.

It is self-evident that "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The initiative process is about political and social change, regardless of the result of the election and regardless of any actual law-making function of the vote itself.

As to the manner in which political speech was burdened in *Meyer*, this Court explains that the challenged state law (prohibiting paid signature gatherers) made "it less likely that [the initiative proponents] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Meyer,* 486 U.S. at 422. Therefore, the speech at issue in initiatives reaches further than just the petition signer attaching his or her signature to a petition.

Not only does allowing an initiative to be placed on the ballot encourage the free discussion of governmental affairs generally, but it also specifically allows people to express their views on the ballot and have their voice counted one way or the other on the particular governmental issue. The Washington Court's last-minute injunction—issued on the day of ballot printing—prohibiting a vote despite compliance with all time, place and manner restrictions conflicts with the foundational decisions of this Court on an issue at the core of the First Amendment.

Notably, *Meyer* recognized that a state law was an impermissible restriction on speech even though it had nothing to do with the subject matter of the initiative. *See also Buckley v. American Constitutional Law Foundation,* 525 U.S. 192 (1999) (law requiring petition circulators to wear identification badges and report the identify of circulators, regardless of initiative content was subject to strict scrutiny as implicating freedom of expression).

At issue here, however, the Washington Court has prohibited an election on an initiative that met all time, place and manner restrictions precisely because of its content—that the matter to be voted upon was administrative and not legislative in nature. App. A at 14a.[9] While the phrasing of the administrative/ legislative standard appears on its face to be viewpoint neutral, it is clearly content-based. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 2227, (2015). "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive." *Id.* at 2228.

Here, the initiative was removed from the ballot because the topic was deemed to be an administrative topic—not because of noncompliance with signature requirements or filing or timing rules. App. A at 15a.

Injunctions prohibiting a vote are also clearly prior restraints on the voter's speech, which calls for a rigorous level of scrutiny. *See Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992). Because of the state court's manifest conflict with this Court's First Amendment jurisprudence, this Court should grant this Petition.

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[9] A different division of the Washington Court of Appeals reached a similar decision regarding a similar initiative. *Global Neighborhood v. Respect Washington,* 434 P.3d 1024 (Wash. Ct. App.), *cert. denied.* __ U.S. ___, 140 S. Ct. 638 (2019).

B. The Washington court uses an impermissibly vague standard for determining whether people can vote on a proposal steeped in civic controversy.

The apparent viewpoint neutrality of the administrative versus legislative distinction provides little comfort to initiative proponents because Washington, like others, uses an ambiguous criterion for determining whether a measure is placed on the ballot—whether the measure is legislative and not administrative in nature. Underlying this criterion is the law in Washington that a government entity can enact an ordinance, but that ordinance may be viewed as administrative and not legislative in nature. *See, e.g., Heider v. City of Seattle*, 675 P.2d 597 (Wash. 1984) (city ordinance renaming street was administrative and not legislative).

The Washington Supreme Court has recognized that the distinction between administrative and legislative nature is a thin line. "Discerning whether a proposed initiative is administrative or legislative in nature can be difficult." *City of Port Angeles v. Our Water-Our Choice!*, 239 P.3d 589, 594 (Wash. 2010) (citations omitted). Other courts have made similar observations. *See, e.g., McAlister v. City of Fairway*, 212 P.3d 184, 194 (Kan. 2009) ("[N]o single act of a governing body is ever likely to be solely legislative or solely administrative;" … "courts have struggled to separate" them), *cited in Friends of Congress Square Park v. City of Portland*, 91 A.3d 601, 605 (Me. 2014).

Washington's legislative/administrative standard is so vague that a state court can declare nearly any measure to be administrative and, therefore, subject to being excluded from the ballot. Reinforcing the vagueness of the standard, the Court of Appeals concluded that elections may be prohibited because an initiative is administrative if it "*furthers (or hinders)* a plan the local government previously adopted." App. A at 25a (citing *Our Water-Our Choice!,* 239 P.3d at 594 (emphasis added).

Because every measure that changes policy is likely to hinder or further some related city plan, Washington has created a vague standard that allows judges to prohibit a public vote using an unanchored standard—a situation long recognized to pose danger to the freedom of expression. *See, e.g., Forsyth County,* 505 U.S. at 130-31 (discretionary condition for access to public forum); *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968) (vague standard affecting First Amendment rights not cured by judicial review).

The overwhelming precedents of this Court indicate that to provide a forum for public discussion on the ballot and deny access based solely on the content of the proposal violates the First Amendment rights of initiative sponsors in making the issue a focus of discussion within the jurisdiction. This also results in the denial of the right of voters to vote either for or against a critique of current governmental policy or action and this is true regardless of whether the critique is about legislative actions. There is no reason that purely administrative policies of the City should be immune from public criticism even if they are

protected from being repealed through a vote of the people.

Nevertheless, this uncertain, content-based criterion makes the conflict between the Washington court decision and this Court's decisions on the First Amendment in the initiative context even more egregious. It is a conflict that calls for this Court's resolution.

C. Injunctions against initiatives before an election implicate the First Amendment right of voters to express their views through the election.

Of the twenty-four states which make the initiative process available to their voters, it is common for the state courts to decide legal challenges to the legality of individual initiatives. There are three general types of challenges:

1. Failure to comply with procedural requirements such as the form of the initiative, the number of signatures, or timing restrictions;
2. Illegality of the measure if adopted; and
3. Subject matter exclusion from the initiative process based upon either common law or specific statutory on constitutional limits.

Challenges under the first category generally create no free speech injuries because they are akin to time, place and manner restrictions; they are generally considered appropriate for resolution prior to the election. *See, e.g., Utah Safe to Learn-Safe To Worship Coalition, Inc. v. State*, 94 P.3d 217 (Utah 2004);

Gallivan v. Walker, 54 P.3d 1069 (Utah 2002) (multi-county signature requirement).

However, challenges in the second category, that the measure is unconstitutional or illegal if adopted, are often reserved for determination after the election and only if the measures passes. *See Lee v. State,* 374 P.3d 157 (Wash. 2016); *Noh v. Cenarrusa,* 53 P.3d 1217 (Idaho 2002). Other states, however, allow pre-election injunctions when the measure's substantive illegality is clear. *See, e.g, State ex rel. Montana Citizens for Preservation of Citizens' Rights v. Waltermire,* 729 P.2d 1283 (Mont. 1986); *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989 (Alaska 2004) (initiative was an illegal appropriation); *Legislature v. Deukmejian,* 669 P.2d 17 (Cal. 1983) (initiative clearly violated state constitutional provision redistricting would occur by the legislature).

The wait and see approach is often based on ripeness concerns. *See Noh*, 53 P.3d at 1220; *Winkle v. City of Tucson*, 949 P.2d 502 (Ariz. 1997). But some states specifically defer determination of the legality of the measure until after the election because of the free speech aspects of the election itself. *See, e.g., Coppernoll v. Reed,* 119 P.3d 318 (Wash. 2005) and *Herbst Gaming, Inc. v. Heller,* 141 P.3d 1224, 1231 (Nev. 2006).

Challenges in the third category—that certain subjects are beyond the scope of initiative power—are often heard before the election and have become the commonplace tool of political opponents of the measures at hand. Gordon and Magleby, *supra* at

298. While the subject matter restrictions in some states are clear, Washington and other states have employed a test for prohibiting the vote on an initiative which is far from clear—enjoining initiatives that are administrative instead of legislative in nature. App. A at 22a, *et seq.*; *Friends of Congress Square Park*, 91 A.3d 601; *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013).

As addressed above, the administrative versus legislative distinction used by the Washington courts is far from clear and that makes it particularly vulnerable to abuse or arbitrary or politicized application. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). This vague approach invites plaintiffs who oppose specific initiatives to stifle public debate over a measure by litigating the measure off the ballot which is exactly what was intended with this particular lawsuit because of the asserted fear of polarizing debate.

States are masters of their own initiative processes because no federal law requires that they have any such process at all. Consequently, Washington is free to conclude that an initiative fails to enact a law because it addresses administrative matters and not legislative ones. Determining that an initiative is ineffective to enact a new statute or ordinance *after the election* fully protects both the right of states to establish subject matter limits on the initiative process and the right of citizens to express their views on matters of public controversy.

But the fact that state law determines that a positive vote of the voters will not enact the proposal provides no basis for concluding that voters in the relevant jurisdiction should not be allowed to vote. For even administrative matters may be a subject of local civic controversy and the vote on an initiative—whether in favor, or opposed—is expression regarding controversial government action.

Here, the administrative versus legislative distinction is so vague that resolution of that issue should be undertaken after the election. That process is used regularly for other types of challenges to initiatives and is the only one which preserves the right to express one's views at the ballot box. *See, e.g., Lee v. State,* 374 P.3d 157. This Petition should be granted to ensure that the right to vote is protected by the First Amendment, even if the proposed legislation never becomes law.

D. The opportunity to vote on an initiative serves important First Amendment interests beyond adopting legislation.

Initiatives are more than just proposals to enact a new city ordinance or state law. As recognized in *Meyer*, they have become the means by which people can focus public discussion on a particular governmental issue. *Meyer,* 486 U.S. at 422.

> [The dramatic power of an initiative that attains ballot status to shape the agenda of state and even national politics.

> This agenda-setting function comprises pressuring political actors, influencing candidate elections, fostering interest group and political party growth, and simply introducing an otherwise overlooked political position into the arena of public debate.

John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1464 (2007) (break added).

Initiatives serve free speech purposes even if the initiative is later determined to be invalid and this is precisely why suits to keep initiatives off the ballot are a commonplace campaign tactic. In *Coppernoll,* the Washington Supreme Court observed that "after voter passage of [a specific initiative] …, it was ruled invalid by the trial court. A nearly identical measure was quickly passed by the legislature and signed by the governor before an appeal could be heard." *Coppernoll,* 119 P.3d at 322. The Court recognized that "ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential subsequent invalidation of the measure)." *Id.* at 298 (emphasis added).

The Washington Supreme Court concluded that only "substantive" judicial review before the election is inappropriate despite the fact that any action that prohibits a vote creates the same infringement on free speech values, whether on the validity of the substance

of the initiative or on the initiative's validity as a legislative, as opposed to an administrative measure.

If the people of Burien resoundingly voted in favor of Measure 1, it would have sent a message. If they had resoundingly voted against, it would have sent a different message, but a message nonetheless. The manner in which the people of Burien express their views on a matter on the ballot is by voting, and this Washington Court decision ensures that particular opportunity for expression is halted solely based on the content of the initiative.

This expression, whether in favor or in opposition, is protected by the First Amendment and has nothing to do with the legality of the initiative itself. Even if the initiative were invalid, its validity can be determined after the people have spoken, which courts have done on numerous occasions. *See Lee,* 374 P.3d 157; *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762 (Wash. 2000), *as amended* (2000), o*pinion corrected*, 27 P.3d 608 (2001). The Court of Appeals' decision in this case has silenced the people of Burien in the public forum of the ballot box and in the form of a prior restraint without undergoing any First Amendment scrutiny.

This Court has explained that a "bedrock principle" of First Amendment law is that "the government may not prohibit the expression of an idea simply because society finds the ideal itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989). Some would find a public vote on a criticism of the City of Burien's Sanctuary City status objectionable as

evidenced by the underlying complaint. But the distinction between legislative and administrative matters is too thin a thread to suspend the right to vote from the voters' reach.

Petitioner urges this Court to grant this Petition to protect this fundamental right to be free of content-based restrictions on public expression regarding a matter of public controversy. After all, "[t]here can be no more definite expression of opinion than by voting on a controversial public issue." *Miller v. Town of Hull,* 878 F.2d 523, 532 (1st Cir. 1989). This Court should grant this Petition to consider whether this right needs more certain protection.

II.

This Court should grant this Petition to resolve the conflict between the decisions of the First and Sixth Circuits and the decisions of the District of Columbia and Tenth Circuits on an important question of First Amendment law.

Despite the rigorous protection this Court has recognized for the process of gathering signatures on an initiative petition to ultimately allow the measure to qualify for the ballot, the Circuit Courts of Appeals are split as to whether the First Amendment provides any protection at all when content-based restrictions on measures are employed to prevent the measure from actually going to the ballot.

The First Circuit in *Wirzburger v. Galvin,* 412 F.3d 271 (1st Cir. 2005), reviewed a proposed initiative to amend the Massachusetts constitution to allow public

financing of private religious-based education in light of a specific prohibition on initiatives with that subject in the state constitution. The First Circuit made an important observation about initiatives and public debate:

> A state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative.

Id. at 276.

Furthermore, the First Circuit in *Wirzburger* expressly rejected the opposite analysis of the District of Columbia Circuit in *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002).

> We cannot agree with the D.C. Circuit's finding that subject matter exclusions from the initiative process "restrict[ ] no speech." … nor with its conclusion that this type of selective carve-out "implicates no First Amendment concerns."

Wirzburger, 412 F.3d 278 (quoting *Marijuana Policy Project*, 304 F.3d at 83, 85).[10] The First Circuit

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[10] The First Circuit in *Wirzburger* ultimately concludes that, even though First Amendment rights were at stake, the prohibition on the use of the initiative process survived intermediate scrutiny. Rather than strict scrutiny, the court held that

recognizes that subject matter exclusions from the initiative process raise First Amendment issues.

Similar to the First Circuit, the Sixth Circuit in *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993), concludes that a limitation on the "initiative process violates the federal Constitution if it unduly restricts the First Amendment rights." *Id.* at 295. However, the restriction in *Taxpayers United* was a time, place and manner restriction—technical requirements for the submission of signatures—and not a restriction based on the content or subject matter of the initiative. *Id.* Naturally, it survived the First Amendment challenge. *Id.*

Finally, the Eleventh Circuit in *Biddulph v. Morham*, 89 F.3d 1491 (11th Cir. 1996), generally recognizes the free speech aspects of initiatives when reviewing a lower court determination that a proposed initiative had a confusing title and multiple subjects. However, the Eleventh Circuit concludes that these reasons for barring the initiative from the ballot were not content-based and were permissible. *Id.* at 1500. In

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intermediate scrutiny applied because the purpose of the restriction on the initiative process was not for the purpose of suppressing speech, even though it had that effect. The prohibition of the particular initiative survived intermediate scrutiny because the state's interest in protecting the freedom from state-established religion was substantial and the restriction was no greater than necessary to protect that interest. *Wirzburger,* 412 F.3d at 279.

the present case, the Court of Appeals finds no First Amendment right to freedom from a content-based restriction. App. A at 14a-15a.

In sharp contrast to the First, Sixth and Eleventh Circuits is the District of Columbia Circuit in *Marijuana Policy Project,* 304 F.3d 82, referenced above. Proponents of an initiative to lessen the penalties for marijuana possession were stopped because Congress had prohibited the District from changing marijuana related laws. As indicated in the rejection by the Court in *Wirzburger*, the Court *in Marijuana Policy Project* finds no First Amendment right at stake when the vote on an initiative was barred, even when the bar is based on subject matter. *Id.* at 87 ("limitation on the District of Columbia's legislative authority restricts no First Amendment right").

Similar to the District of Columbia Circuit, the Tenth Circuit concludes there are no First Amendment rights at stake with a subject matter limitation on initiatives. *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) involves a challenge to a Utah Constitutional provision which required initiatives that dealt with wildlife to pass with a supermajority. *Id.* at 1085. Wildlife advocates challenged this provision as imposing a chilling effect on the exercise of First Amendment rights. *Id.*

The Tenth Circuit in *Walker* demonstrates the conflict among the federal circuits. "We disagree with *Wirzburger*'s premise that a state constitutional restriction on the permissible subject matter of citizen

initiatives implicates the First Amendment *in any way*." *Id.* at 1102 (citing *Wirzburger,* 412 F.3d at 278-79) (emphasis added).

The ultimate result in *Walker*—the conclusion that a supermajority requirement does not violate the First Amendment—has a rationale that does no violence to the First Amendment. By allowing citizens to vote at the ballot box, Utah has fully protected the rights to speak through that method. A supermajority requirement only relates to whether the vote will enact the proposed law. The *Walker* Court noted that "[t]he First Amendment … does not ensure that all points of view are equally likely to prevail." *Id.* at 1101. But the right to vote—the expressive conduct—was allowed to go forward.

Nonetheless, the impact of the Tenth Circuit's decision has been noted. *Walker* "deepened a circuit split over the constitutionality of laws that put different restrictions on ballot initiatives depending on the initiatives' content or viewpoint." J. Michael Connolly, *Loading the Dice in Direct Democracy: The Constitutionality of Content—and Viewpoint—Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129, 130 (2008).

Therefore, there remains a split among the Circuits regarding whether the First Amendment provides any protection for content-based restrictions on initiatives' access to the ballot. This split remains despite the reality that all initiatives are by nature criticisms of current government affairs and present opportunities for a broad cross-section of a community, namely all

voters, to express their views on particular governmental issues.

Getting a measure on the ballot requires considerable effort by the citizens. The voters in Washington are required to walk an uncertain legislative/administrative tightrope and risk having the issue of public controversy removed from the public agenda. The vague distinction between administrative and legislative characterization allows any measure to be blocked from the ballot. Such a system allows opponents of a measure to thwart the free speech rights of the citizenry by seeking a judicial veto in the process. The determination of whether a measure is within the scope of the initiative power should take place through careful consideration after the election—not through injunctions demanded within hours of the ballot printing deadline.

CONCLUSION

This Court's First Amendment jurisprudence protects the initiative process because it is the prerequisite to placing a controversial issue of government policy or action on the public agenda. However, this Court has never resolved whether the First Amendment protects the voters' rights to vote on an initiative and the federal Circuit Court of Appeals are hopelessly in conflict on whether free speech is implicate at all.

Petitioner urges the Court to grant this Petition to resolve the conflict and to protect this community-wide

platform for voicing approval or disapproval of government policies. In light of the free speech values at stake, injunctions to prohibit a vote should not be based on content, nor on the easily malleable distinction between administrative and legislative matters.

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Respectfully submitted,

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