No. 82225-5

SANDERS, J. (dissenting)—The Washington Constitution provides: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed . . . ." Const. art. I, § 1. The power of initiative, the first power reserved by the people of Washington, remains a powerful symbol of the importance this State places on the ability of the people to check the other branches of government. *Coppernoll v. Reed*, 155 Wn.2d 290, 296-97, 119 P.3d 318 (2005) (citing Const. art. II, § 1(a)). It must be vigilantly protected. *Id*. at 297. Because the majority today diminishes our state's forthright commitment to this core democratic principle, I dissent.

It has been a long-standing rule that courts refrain from inquiring into the validity of a preelection initiative. *Id*. (citing *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 745, 620 P.2d 82 (1980)). Our preelection review is only appropriate under narrowly prescribed exceptions. *Id*. One exception is when the initiative exceeds the scope of initiative power. *Id.* at 301. An initiative is beyond the scope of initiative power when it is (1)

administrative, not legislative, in character; and (2) the initiative would enact a law beyond the jurisdiction's power to enact. *See Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718-19, 911 P.2d 389 (1996).

An initiative is legislative in character when it makes new law or declares a new policy. *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 748 (citing 5 Eugene McQuillin, *The Law of Municipal Corporations* § 16.55 (3d rev. ed. 1969)). Conversely, administrative initiatives merely carry out laws or policies already in existence and are not within the scope of initiative power. *See id*. The majority asserts the initiatives here[1] are administrative because the city of Port Angeles (the City) implemented its water fluoridation program pursuant to an existing regulatory system established by the Washington State Legislature and the Department of Health. Majority at 13. This view oversimplifies the analysis. Although the Department of Health does regulate water fluoridation levels, class A municipal water suppliers like Port Angeles are not *required* to fluoridate. *See* WAC 246-290-460(2). The decision to fluoridate did not carry out a state mandate or preexisting policy. *See Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 748 "'[An initiative] is administrative in its nature if it merely pursues a plan already adopted

[1] Entitled the "Medical Independence Act," sponsored by petitioner Our Water-Our Choice (Clerk's Papers (CP) at 220-21), and the "Water Additives Safety Act," sponsored by petitioner Protect Our Waters (CP at 222-23).

by the legislative body itself, or some power superior to it.'" (quoting 5 McQuillin, *supra*, § 16.55, at 214)). Instead, it introduced a new policy to fluoridate the City's water. The preexisting regulations merely dictate safe levels of fluoride; they do not determine whether fluoride should be added in the first place. This threshold question falls within the legislative domain.

The majority claims the initiatives do not constitute new policies or plans because they seek to prohibit or limit the amount of fluoride or contaminant levels in drinking water—which the majority believes is already regulated by the Department of Health. *See* majority at 7-8; *see also* WAC 246-290-460. Furthermore, the majority contends the initiatives seek to administer details of the City's water system, which has existed since 1924.

The majority views the issue through too wide a lens. The initiatives here seek to create new law in Port Angeles. Although the water system has existed since 1924, the provisions of the Port Angeles Municipal Code that regulate water services carry *no* mention of chemical additive regulation, including optional[2] additives such as fluoride. *See* Port Angeles Municipal Code chs. 13.24-13.48.[3]

[2] I use the term "optional" to mean chemicals added for purposes other than ensuring safe drinking water.

[3] For example, the chapters cited regulate "Water Service Connection Charges" (ch. 13.32); "Water Service Turnons and Turnoffs" (ch. 13.36); "Water Rates" (ch. 13.44), etc. Nothing in these chapters regulates potability, chemical contaminants, or fluoride.

Accordingly these initiatives would not merely administer details of the City's water system.

While the Department of Health regulations do regulate fluoridation and a variety of chemical additives, the initiatives here would substantially expand the scope of regulated chemicals. This substantial expansion constitutes new law, which is legislative in character. *See* WAC 246-290-310 (listing maximum contaminant levels of chemicals for water samples). We have addressed an analogous issue before. *See Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 662 P.2d 845 (1983) (*Citizens*). In *Citizens*, we found an ordinance that expanded a licensing tax from utility companies to all businesses generally to be legislative in character. Like the licensing tax, the initiatives here seek to expand categories that would be regulated. The initiatives seek to regulate *all* public sources of water supply, not just the City's municipal water supply. There is no current ordinance regulating the purity of all public water systems in the City. *See* Appellant's Opening Br. at 24.

Furthermore, the Department of Health regulations address the health and safety of drinking water. *See* WAC 246-290-001(2)(b).[4] The proposed initiatives do not seek to ensure the safety of drinking water, but rather to prohibit or limit

[4] "The rules of this chapter are specifically designed to ensure: . . . (b) Provision of safe and high quality drinking water in a reliable manner and in a quantity suitable for intended use."

additives for reasons unrelated to the water quality itself.[5] Specifically the initiatives would ban certain optional additives, such as fluoride, which has been shown to prevent dental disease.[6] These new objectives address a wholly different matter than the preexisting WAC regulations. The current state regulations ensure that the water is safe to drink. These initiatives, in turn, aim to prevent the addition of optional additives, which have nothing to do with water drinkability. They do not attempt to interfere with the current systems set in place by the City and the Department of Health. Accordingly the initiatives are legislative, not administrative, in nature.

Because the majority holds the initiatives are administrative in nature and thus determinative of the case, it does not reach the second issue of whether the initiative would enact a law within the jurisdiction's power to enact. Because I would hold the initiatives are legislative, however, I address the issue briefly.

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[5] The Water Additives Safety Act states:

> This ordinance does not regulate chemicals added to water to make water safe or potable.
>
> . . . .
>
> This ordinance requires that any substances which are added with the intention of treating *people*, not the *water*, must meet existing health-based standards . . . .

CP at 222-23 (emphasis added).

[6] Respondents have conceded that the decision to fluoridate was spurred by local health care professionals who thought fluoridation would produce a measurable benefit for a significant portion of the population. *See* Br. of Resp'ts at 7.

The Court of Appeals noted that an initiative is generally beyond the scope of initiative power if the initiative involves powers granted by the legislature to the governing body of the city, rather than to the City itself. *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 881, 188 P.3d 533 (2008). However, it held that RCW 35A.11.020 granted exclusive authority to the city council to operate and regulate a municipal water system and, therefore, in its opinion "[t]his delegation placed the operation of a municipal water system beyond the initiative power." *Id.* at 880-81.

This interpretation is erroneous; the statute is a general grant of authority but, as is clear from the text, the exercise of that power is clearly *permissive*.[7] Under the Court of Appeals' interpretation, *any* issues included after the language "by way of illustration," including utilities, are naturally precluded from initiative powers. This interpretation is not supported by the text of the statute. Only when the legislature *clearly* delegates power to a local legislative body alone, as opposed to the city as a whole, will initiatives that attempt to modify that power be invalid. *See 1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 173-74, 149 P.3d 616 (2006). RCW 35A.11.020 uses the word "may" in describing the power exercised by a city

[7] RCW 35A.11.020 states: "The legislative body of each code city shall have all powers possible . . . . By way of *illustration* and not in limitation, such powers *may* be exercised . . . , including operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns." (Emphasis added.)

council over utilities; there is no clear delegation of power solely to the city council. A proper reading of RCW 35A.11.020 would be that the legislative body or some other law-making body may exercise power over its utilities.

The majority does not reach the issue of whether the legislature delegated to the city's legislative body the decision to fluoridate. *See* majority at 14 n.7. However, it is essential to the analysis. "Not only must the proposed initiative be legislative in nature, but it must be within the authority of the jurisdiction passing the measure." *Philadelphia II*, 128 Wn.2d at 719.

The Court of Appeals opinion below broadly suggests citizen initiatives cannot touch city council decisions when the legislature has granted power to a local legislative body instead of the city as a whole. *Our Water-Our Choice*, 145 Wn. App. at 880-81 (citing *1000 Friends*, 159 Wn.2d at 173-74; *Whatcom County v. Brisbane,* 125 Wn.2d 345, 350, 884 P.2d 1326 (1994); *Lince v. City of Bremerton,* 25 Wn. App. 309, 312-13, 607 P.2d 329 (1980)). But *1000 Friends* and its brethren demand this result only if the legislature did not also contemplate the use of local referenda within the same statutory chapter. For example, the statutory scheme in *1000 Friends* did not expressly allow for initiative and referendum.[8] But here the legislature's intent to authorize citizen legislation, as expressed in RCW

[8] *1000 Friends* concerned the Growth Management Act, chapter 36.70A RCW.

35A.11.080, is clear. RCW 35A.11.080 provides: "The qualified electors or legislative body of a noncharter code city may provide for the exercise in their city of the powers of initiative and referendum . . . ." Port Angeles, in turn, accepted the legislature's invitation to provide to its citizens the powers of initiative and referendum. *See* Port Angeles Ordinance 3252 (2006), *available at* http://65.243.149.132/Weblink/DocView.aspx?id=16649 (last visited Sept. 17, 2010). Statutory delegation of authority to the Port Angeles City Council cannot preempt citizens' initiative rights when the same chapter also expressly authorizes those rights.

This is borne out in our case law. The Court of Appeals applied the first part of the holding in *1000 Friends* (i.e., that delegation of control to the city council superseded citizen initiative) while, at the same time, improperly overlooked the implicit second part of the holding (i.e., that citizens can modify by initiative when the legislature contemplated the use of local initiatives and referenda). In *1000 Friends* we stated that "we considered the absence of any mention of referenda in the extensive and detailed [statutory scheme], and concluded that absence was strong evidence of a legislative desire to vest the power and responsibility in the local legislative authority." *1000 Friends*, 159 Wn.2d at 176 (citing *Brisbane,* 125 Wn.2d at 351-52). But as noted above, the statute here *does* contemplate the

initiative and referendum power. After granting permissive power to local legislative bodies in RCW 35A.11.020, the legislature then specifically considered and approved the use of citizen legislation in a subsequent section of the same chapter. *See* RCW 35A.11.080. This situation is the opposite of that discussed in *1000 Friends*. Here we have an explicit grant of referendum and initiative power. This distinction compels us to find the fluoridation decision subject to initiative. The initiatives here fell within the authority of the City's legislative body.

Washington State respects the people's right to govern their own affairs. Without a robust right of initiative, the citizens of Port Angeles are without recourse in determining what types of additives the City pumps into or withholds from their drinking water. The initiatives propose new policy regarding chemical additives in the water; these matters have not been satisfactorily addressed by either the Department of Health or the Port Angeles Municipal Code. These legislative initiatives, which would greatly expand the range of substances and parties regulated, are not beyond the scope of initiative power. Accordingly, they are not subject to preelection review. We must allow them to proceed to the ballot.

Because the right of initiative must be preserved here, I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice Mary E. Fairhurst

Justice Gerry L. Alexander

Justice James M. Johnson