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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

WASHINGTON ISRAEL BUSINESS COUNCIL, ISRAEL EMERGENCY ALLIANCE (dba STANDWITHUS); AND ROBERT JACOBS,)	CAUSE NO. 08-2-14327-9 Sea
Plaintiffs,)	SEATTLE DIVEST FROM WAR AND OCCUPATION’S RESPONSE TO MOTION TO CHALLENGE BALLOT TITLE
v.)	
THE CITY OF SEATTLE; THE KING COUNTY DIRECTOR OF RECORDS AND ELECTIONS, AND THE DIVEST FROM WAR CAMPAIGN, SPONSOR OF INITIATIVE 97,)	
Defendants.)	

COMES NOW Seattle Divest from War and Occupation, defendant herein, by and through its attorney, Neil M. Fox, and provides this response to Plaintiffs’ “Motion to Challenge Ballot Title of Initiative 97 on an Expedited Basis.”

1. RELIEF REQUESTED

Seattle Divest from War and Occupation requests that this Court deny Plaintiffs’ motion.

2. STATEMENT OF FACTS

Following the historic precedent of Seattle’s divestment from companies doing business in apartheid South Africa (Seattle Resolution No. 27220, adopted December 17, 1984), Seattle Divest from War and Occupation has proposed, as an initiative to the

1 Seattle City Council, Initiative No. 97. If adopted, this initiative would divest Seattle
2 Employees' Retirement System funds from corporations that fund war and occupation
3 in the Middle East.

4 After Seattle Divest from War and Occupation submitted the proposed initiative
5 to the Seattle City Clerk, the Seattle City Attorney's Office drafted the ballot title. The
6 City Clerk's office then approved the final petition form on April 1, 2008, and sent e-
7 mail notice to the campaign sponsors. The Treasurer of Seattle Divest from War and
8 Occupation received by mail the written notice of the approval on April 6, 2008. The
9 City Clerk's Office informed Seattle Divest from War and Occupation that it had 180
10 days to collect 17,968 valid signatures, with the 180 days starting to run on April 1,
11 2008. Ex. 1. Seattle Divest from War and Occupation started collecting signatures,
12 and to date, close to 1800 voters of the City of Seattle have exercised their democratic
13 rights and have signed the initiative petitions. Ex. 1.

14 The City Clerk's Office sent notice of the initiative to the King County
15 Superintendent of Elections,¹ by letter dated April 11, 2008. For reasons that are
16 unknown, the letter was not officially "received" until April 16, 2008. Ex. 1.

17 On April 28, 2008, three opponents of the Initiative – the Washington Israel
18 Business Council, the Israel Emergency Alliance and Robert Jacobs – filed a lawsuit
19 challenging various aspects of Initiative 97. The portion of the suit that challenges the
20 ballot title, pursuant to RCW 29A.36.090, comes on for hearing on May 15, 2008, the
21 other issues raised in the lawsuit having been reserved.

22 Because of the urgency of the situation, Seattle Divest from War and
23 Occupation wants to continue collecting signatures and wants all possible clouds (real
24 or imagined) over the ballot title removed at the earliest possible time. Accordingly,
25 Seattle Divest from War and Occupation will also reserve its challenges to various
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28 ¹ Pursuant to RCW 29A.04.025, the King County Division of Records and Elections performs the functions
of the County Auditor in non-charter counties.

1 other aspects of Plaintiffs’ lawsuit, including issues of standing² and ripeness, and asks
2 this Court to affirm the ballot title drafted by the Seattle City Attorney.

3 **3. STATEMENT OF ISSUES**

4 a. What is the proper standard of review for an appeal of an initiative’s
5 ballot title written by the City Attorney?

6 b. Is the ballot title drafted by the City Attorney a “true and impartial
7 statement of the purpose” of Initiative 97, does it contain the essential features of the
8 measure, does the title intentionally contain an argument and does the title create
9 prejudice for or against the measure?

10 c. Is the proposed replacement ballot title misleading itself?

11 d. Are there 75 words in the “concise description?”

12 e. If there are 79 words, rather than 75 words, should this invalidate the
13 petition and disqualify the signatures of nearly 1800 voters who signed the petition
14 after it was approved by the City Clerk?

15 **4. EVIDENCE RELIED UPON**

16 The filings and pleadings contained in the court file, and:

17 a. Exhibit 1 – Certification of Dave Jette and attachments

18 **5. ARGUMENT AND AUTHORITY**

19 a. *Summary*

20 Seattle Divest from War and Occupation did not draft the ballot title at issue
21 here. Rather, the Seattle City Attorney drafted the title, and the City Clerk approved
22 the petition form for Initiative 97 on April 1, 2008, giving the proponents of the
23 initiative 180 days from then to collect 17,968 signatures. Conscious of the deadline,
24 Seattle Divest from War and Occupation immediately began collecting signatures and
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26 ² It is not clear, for instance, how the Israel Emergency Alliance, a California non-profit corporation, should
27 have any standing to challenge a Seattle initiative. Similarly, the Washington Israel Business Council would
28 seemingly not constitute a “person” and thus would not have standing under RCW 29A.36.090 to challenge the ballot
title. Nonetheless, it appears that if Mr. Jacobs can prove he is a registered voter in the City of Seattle, he would have
standing.

1 so far has collected around 1800 signatures. The opponents of the initiative, however,
2 wish to derail the process, and cast doubt onto the validity of the signatures collected
3 already by raising this challenge to the ballot title.

4 The opponents of the initiative quibble with minor points of the ballot title, and
5 essentially wish this Court to interfere in the political process by substituting its
6 judgment for that of the City Attorney. Notably, while the opponents of the initiative
7 make hypertechnical arguments regarding language, which is filtered through the lens
8 of their own political agenda, the opponents’ brief is noticeably void of significant
9 legal argument, particularly as to the role of this Court. In this regard, this Court’s role
10 is limited to an appellate capacity and does not have the political role to rewrite the
11 initiative’s ballot title in a de novo manner. Ultimately, the Court must balance the
12 opponents of the initiative’s own political agenda against the political rights of the
13 1800 people who have already signed the initiative. Because the ballot title written by
14 the City Attorney is not misleading, is impartial, and fully complies with the law, the
15 Court should reject the current challenge made by opponents of the initiative.

16 **b. *The Court Has a Limited Role of Review***

17 “One of the foremost rights of Washington State citizens is the power to
18 propose and enact laws through the initiative process.” Maleng v. King County
19 Corrections Guild, 150 Wn.2d 325, 330, 76 P.3d 727 (2005). On the local level, as on
20 the state level, Seattle voters have reserved the right to “propose for themselves any
21 ordinance dealing with any matter within the realm of local affairs or municipal
22 business.” Seattle City Charter, Article IV, § 1(A).

23 Under the Seattle City Charter and the Seattle Municipal Code,³ proposed
24 initiative petitions must be approved by the Seattle City Clerk. Seattle City Charter,
25 Article IV, § 1(B); SMC 2.08.010. The proponents do not get to write their own ballot
26 titles. Rather, this task is specifically assigned to the Seattle City Attorney. SMC

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³ Copies of pertinent provisions of the City Charter and Code are appended to this brief.

1 2.08.020. Once a final initiative petition (with the City Attorney-drafted ballot title) is
2 approved by the City Clerk, the proponents of an initiative have only a limited amount
3 of time (180 days) to collect a certain number of signatures (10% of the total number
4 of votes cast for the office of Mayor at the last preceding municipal election). Seattle
5 City Charter, Article IV, § 1(B). If the required signatures are collected, the initiative
6 does not immediately go on the ballot. Rather, Seattle’s initiative process provides for
7 an initiative to the City Council, which “may enact, or reject, any initiative bill or
8 measure.” Seattle City Charter, Article IV, § 1(C). If the City Council approves the
9 initiative, it becomes law. If it rejects the initiative, it is only then that the matter gets
10 put to the voters, possibly alongside an alternative proposal passed by the City Council.
11 Seattle City Charter, Article IV, § 1(D).

12 Recognizing the importance of the ballot title in this process, there is a limited
13 right of review to superior court. RCW 29A.36.090. This statute, however, does not
14 give the Court the function of de novo review of the City Attorney’s performance. The
15 statute makes it clear that the right of judicial review is limited to that of an appellate
16 capacity – the statute itself labels the review an “appeal.” The City Attorney’s Office
17 is charged by ordinance with the job of writing a proper ballot title, and thus the Court,
18 in an appellate role, should defer to the City Attorney’s general expertise and
19 experience. See generally Arima v. Dep’t of Employment Security, 29 Wn. App. 344,
20 348-49, 628 P.2d 500 (1981) (recognizing judicial deference to administrative
21 expertise and following “clearly erroneous” standard).

22 A deferential appellate role for this Court is important because of the
23 recognition that the proponents of the initiative did not write the ballot title, but then
24 relied upon the ballot title given to them by the City of Seattle to go out and begin the
25 process of petitioning in order to meet the 180 day limit for collecting 17,968
26 signatures. Here, it is not just Seattle Divest from War and Occupation, and its direct
27 supporters, who are impacted. Rather, every single voter who has signed the petitions
28 since the beginning of April would be impacted by a decision to rewrite the City

1 Attorney’s ballot title. In this regard, the Court should recognize the inherent political
2 nature of the petitioning process itself. Each voter who signed the petitions has
3 committed a political act which is nearly on the same level as voting.⁴ Therefore, the
4 Court should be very careful about substituting its judgment for the City Attorney’s
5 judgment when it comes to ballot title issues, given the fact that about 1800 voters of
6 the City of Seattle have already signed the initiative petitions. Rewriting the ballot
7 title at this point would effectively disenfranchise those voters who already signed and
8 interfere with the ability of the proponents of the initiative to meet the 180 day
9 deadline, and interfere with even a slim hope of getting the measure on the ballot in
10 time for the November 2008 elections.

11 **c. *The Ballot Title is Proper***

12 “To be constitutionally adequate, the title need not be an index to the contents,
13 nor must it provide details of the measure. [citation omitted] It satisfies the
14 constitutional requirement if it gives notice that would lead to an inquiry into the body
15 of the act, or indicate to an inquiring mind the scope and purpose of the law.” Pierce
16 County v. State of Washington, 150 Wn.2d 422, 436, 78 P.3d 640 (2003) (internal
17 quotations omitted).⁵ The mandate is met if the ballot title is impartial, is not

19 ⁴ A voter’s signature on an initiative petition is little different than a vote in an election in terms of the
20 participatory and democratic nature of the act. See Coppernoll v. Reed, 155 Wn.2d 290, 298, 119 P.3d 318 (2005)
21 (“Because ballot measures are often used to express popular will and to send a message to elected representatives
22 (regardless of potential subsequent invalidation of the measure), substantive preelection review may also unduly
23 infringe on free speech values.”); Edwards v. Hutchinson, 179 Wash. 580, 35 P.2d 90 (1934) (fact that signatures
were collected by paid workers does not invalidate the signatures of the voters); State ex rel. Mohr v. Seattle, 59
Wash. 68, 109 Pac. 309 (1910) (recognizing the right of voters who signed petitions to withdraw their signatures).

24 ⁵ To be sure, the ballot title is important as it is safe to assume that “not all voters will read the text of the
25 initiative.” In re Ballot Title for Initiative 333, 88 Wn.2d 192, 198, 558 P.2d 248 (1977). However, in the instant
26 case, the initiative process leads to the submission of an ordinance to the City Council, and does not go onto the ballot
27 for a vote without first being filtered through the legislative process. Fears that a misleading ballot title could result
28 in the voters being “hoodwinked” into passing the wrong laws should be rejected. See Edwards v. Hutchinson, 178
Wash. at 585 (“Ever since popular elections were instituted, in every one held, some one, perhaps many voters, have
been deceived, and so long as the political field remains free and open, as it should and must if we are to have free
popular government, there is no way to prevent prejudices being appealed to; and voters to a greater or less degree
will always be deceived. Manifestly, the courts cannot undertake to set aside elections or to interfere with the action
of electors upon the theory that someone has been deceived. Attempts to deceive can only be met by publicity and

1 argumentative, and does not, in and of itself, create prejudice for or against a measure.
2 SMC 2.08.020. The ballot title drafted by the City Attorney in this case satisfies these
3 concerns.

4 The opponents of the initiative propose other language, which undoubtedly
5 would be better for their own political agenda. However, their objections really
6 amount to mere quibbles with wording.

7 For instance, obviously to keep the word count down, and to make the language
8 less argumentative, the City Attorney substituted the phrase “in territory taken by Israel
9 in the 1967 Arab-Israeli war” for the words “the occupied and besieged territories of
10 West Bank, Gaza Strip, East Jerusalem, and Golan Heights.” The opponents of the
11 initiative object to this language on two grounds.

12 First, the opponents of the initiative object to the use of the term “1967 Arab-
13 Israeli War,” suggesting the mere mention of the war would somehow create prejudice.
14 It is not clear, though, what is being argued here. Are the opponents of the initiative
15 really suggesting that Israel did not seize East Jerusalem, the West Bank, the Gaza
16 Strip or the Golan Heights in the war in 1967? Did Israel gain those lands in any way
17 other than armed conflict? Are we to have an evidentiary hearing on the subject? The
18 opponents of the initiative have their own agenda, which includes clearly minimizing
19 the fact that Israel seized territory by force in a war. However, the political agenda that
20 the opponents wish to advance should be argued in another forum.

21 Second, the opponents of the initiative complain because the City Attorney’s
22 ballot title mentions territories seized in the 1967 war, but the proposed ordinance does
23 not mention the Sinai Peninsula. Again, it is not clear what it is the opponents of the
24 initiative are arguing here. While it is correct that Israel seized the Sinai in the 1967
25 war, the Sinai was returned to Egypt after the Camp David Accords. The ordinance
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28 a campaign of education. The courts are powerless, or, if not powerless, an attempt to exercise power would result
in confusion worse confounded. These views, we think, are supported by the great weight of authority.”).

1 proposed by Init. 97 only prohibits investment in corporations that provide direct
2 material support for Israeli government activities in the territories that are still
3 “occupied and besieged” or corporations with a business presence in Israeli settlements
4 in those same occupied territories. Such territories only encompass the Gaza Strip, the
5 West Bank, East Jerusalem and the Golan Heights, because there are no current Israeli
6 government activities or Israeli settlements in the Sinai Peninsula. This wording is not
7 misleading or confusing.

8 The other substantive complaint the opponents have with the ballot title is that it
9 should include reference to the “specific foreign policy reasons” for the initiative,
10 citing to some of the “whereas” clauses of the proposed initiative. This is not so much
11 as an objection to the wording of the ballot title as it is a suggestion for a different
12 wording. However, the opponents cite no case or legal principle that requires a ballot
13 title to include reference to the perceived motivations of the sponsors.

14 In fact, Init. 97 does not set any type of “foreign policy.” It is quite common for
15 state and local governments to set policies for prudent investment and to divest from
16 corporations that invest in war zones and areas of the world characterized by human
17 rights abuses. Seattle’s own prior Resolution No. 27220, governing divestment from
18 corporations that supported apartheid, is but one example. On the other hand, the
19 ballot title proposed by the opponents of the initiative is misleading in that it labels the
20 initiative as being a “foreign policy” initiative, when in fact it is not.

21 More importantly, a preamble of an initiative which contains “policy fluff” for
22 the meat of the initiative does not have to be reflected in the ballot title. In Pierce
23 County v. State of Washington, supra, the Supreme Court held that the inclusion of
24 policy statements in a bill or initiative do not constitute additional subjects and do not
25 have to be referenced in the ballot title:

26 The distinction between a proposed measure's legal substance and
27 its policy fluff was tersely drawn in an early opinion of this court: "A law
28 is a rule of action. An argument is not. . . . [A] preface or preamble
stating the motives and inducement to the making of [the law] . . . is
without force in a legislative sense It is no part of the law." State ex

1 rel. Berry v. Superior Court for Thurston County, 92 Wash. 16, 30-32,
2 159 P. 92 (1916). Just as the common inclusion of dicta in judicial
3 opinions does not compromise the legal effect of a decision, [footnote
4 omitted] policy expressions in a bill or initiative are "no part of the law."

5 Pierce County, 150 Wn.2d at 434-35. Similarly, in the instant case, the statements of
6 policy in the "Whereas" sections of Init. 97 are not the substance of the proposed
7 ordinance and do not have to be reflected in the title. The fact that the proponents of
8 Initiative 97 have a different view of foreign policy and international law than the
9 opponents is not pertinent. The ballot title needs to reflect the substance of the
10 proposed ordinance, not the "policy fluff."

11 Finally, the ballot title proposed by Plaintiffs is itself misleading in a fairly
12 significant manner. Their proposed text states in part:

13 It would . . . prohibit such investment in corporations that support
14 Israeli government activities or do business in Israeli settlements

15 Plaintiff's Proposed Order Granting Motion to Challenge Ballot Title of Initiative 97.

16 This proposed wording makes it sound like the proposed ordinance would ban
17 investment in corporations that support the Israeli Government, as opposed to
18 prohibiting investments in "corporations that provide direct material support for
19 activities of the Israeli government within the occupied and besieged territories of
20 West Bank, Gaza Strip, East Jerusalem, and Golan Heights," which is how the
21 ordinance is written. The Plaintiffs' proposed wording is misleading and could easily
22 lead some people who support Israel, but not the Occupation, to decline to sign the
23 initiative. The Plaintiffs' proposed wording not only is misleading, but clearly
24 advances their own political agenda, which is to scare people away from signing the
25 petition.

26 Ultimately, given the appellate standard of review, given the fact that the
27 Plaintiffs' own proposed substitution is misleading, and given the fact that the
28 proponents have already begun collecting hundreds of signatures, the opponents of the
initiative have not identified how the ballot title is so misleading that the political

1 rights of those who signed the initiative should be violated by having their signatures
2 invalidated.

3 **d. *The Ballot Title Has the Proper Number of Words***

4 In their complaint, the Plaintiffs claimed that the ballot title contained 101
5 words, rather than the 75 words required by SMC 2.080.020 and RCW 29A.36.071.
6 The Plaintiffs now argue that there are 79 words. There are two responses to this
7 argument.

8 First, it should be noted that the word limitations in statutes such as these are
9 directory only rather than mandatory. Office of the Attorney General, 1957-1958 Op.
10 Att. Gen. Wash. No. 61 (May 9, 1957) (“In our opinion, however, a statement in
11 excess of seventy-five words does not, ipso facto, destroy the validity of school bonds
12 issued pursuant to authority secured from the electors at the election. The statute does
13 not expressly so provide, and in such cases, the provisions of the statute are generally
14 deemed directory rather than mandatory. . . . In the absence of evidence indicating
15 that the length of the statement in excess of seventy-five words prevented the electors
16 from intelligently exercising their franchise, we believe such a statement would not
17 invalidate bonds issued pursuant to authority secured at the election.”). See also
18 Municipality of Metropolitan Seattle v. City of Seattle, 57 Wn.2d 446, 451, 357 P.2d
19 863 (1960)(“We have held that minor irregularities in the wording of a ballot title will
20 not invalidate the election, if the electorate was not misled thereby.”).

21 In light of the facts that the City Attorney drafted the ballot title, and so many
22 people have already signed the petitions, the Court should not invalidate those petitions
23 simply because of the alleged existence of four extra words.

24 More importantly, the Plaintiffs are counting too many words. A ballot title for
25 a local measure “must conform with the requirements and be displayed substantially as
26 provided under RCW 29A.72.050, except that the concise description must not exceed
27 seventy-five words.” RCW 29A.36.071. RCW 29A.72.050 provides in part:

1 The ballot title for an initiative to the people, an initiative to the
2 legislature, a referendum bill, or a referendum measure consists of: (a) A
3 statement of the subject of the measure; (b) a concise description of the
4 measure; and (c) a question in the form prescribed in this section for the
5 ballot measure in question. The statement of the subject of a measure
6 must be sufficiently broad to reflect the subject of the measure,
7 sufficiently precise to give notice of the measure's subject matter, and not
8 exceed ten words. The concise description must contain no more than
9 thirty words, be a true and impartial description of the measure's essential
10 contents, clearly identify the proposition to be voted on, and not, to the
11 extent reasonably possible, create prejudice either for or against the
12 measure.

13 (2) For an initiative to the people, or for an initiative to the
14 legislature for which the legislature has not proposed an alternative, the
15 ballot title must be displayed on the ballot substantially as follows:

16 "Initiative Measure No. . . . concerns (statement of
17 subject). This measure would (concise description). Should
18 this measure be enacted into law?
19 Yes
20 No "

21 (3) For an initiative to the legislature for which the legislature has
22 proposed an alternative, the ballot title must be displayed on the ballot
23 substantially as follows:

24 "Initiative Measure Nos. . . . and . . .B concern (statement
25 of subject).
26 Initiative Measure No. . . . would (concise description).
27 As an alternative, the legislature has proposed Initiative
28 Measure No. . . .B, which would (concise description).
29 1. Should either of these measures be enacted into law?
30 Yes
31 No
32 2. Regardless of whether you voted yes or no above, if one
33 of these measures is enacted, which one should it be?
34 Measure No.
35 or
36 Measure No. "

37 The operative number of words relates not to the “ballot title” but to the
38 “concise description.” The concise description, though, as illustrated in the statute
itself excludes such preliminary words as “if enacted” and “the measure would.” See
e.g. Pierce County v. State of Washington, 150 Wn.2d at 436-37 (not including the
words “this measure would” in 30-word limit for state initiative concise description).

1 Thus, with regard to the concise description of Initiative 97, the 75 words begin
2 with the words “prohibits the City of Seattle from investing” and continues until the
3 words “U.N. authorization.” The concise description is exactly 75 words.

4 **e. *The Court Should Be Aware of the Delays in Review***

5 RCW 29A.36.090 provides a strict 10-day limit for filing an appeal of a ballot
6 title. The time starts running from the date that the initiative is filed with the County
7 Auditor. The reason for such a strict time line is the importance of resolving ballot
8 title challenges quickly, before significant numbers of voters sign petitions that could
9 be invalidated. See *Kreidler v. Eikenberry*, 111 Wn.2d 828, 766 P.2d 438 (1989)
10 (timeliness of challenges to ballot title critical).

11 The City Clerk approved the petitions on April 1, 2008. There is no explanation
12 as to why it took another 16 days before the County Department of Records and
13 Elections received the initiative. None of this delay is attributable to the proponents of
14 the initiative, nor to the hundreds of voters who have signed the petitions.

15 The will of those voters who signed the petitions should not be thwarted
16 because the City Clerk did not relay the initiative promptly or because there was a
17 stack of unopened mail in the County Elections Department. Those voters, along with
18 the proponents of the initiative, have their own due process rights and First
19 Amendment rights at stake.

20 Accordingly, if the Court changes the ballot title at all, the Court should also
21 enter an order allowing any petitions to be used that have been circulated and signed
22 prior to June 30, 2008, on the petition forms approved by the City Clerk’s office. The
23 reason to extend the time until June 30, 2008, is to allow sufficient time for Seattle
24 Divest from War and Occupation to contact all of its supporters and to recall the old
25 petitions and substitute them with new ones.

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6. CONCLUSION

For the foregoing reasons, the Court should deny the appeal and affirm the ballot title as written by the Seattle City Attorney.

DATED this ___ day of May 2008.

Respectfully submitted,

NEIL M. FOX
WSBA NO. 15277
Attorney for Seattle Divest from War and Occupation