No. 77966-0

(Thurston County Superior Court No. 05-2-01205-3)

SUPREME COURT OF THE STATE OF WASHINGTON

SAN JUAN COUNTY, a political subdivision of the State of Washington, CITY OF KENT, a political subdivision of the State of Washington, CITY OF AUBURN, a political subdivision of the State of Washington, CITY OF SEATTLE, a political subdivision of the State of Washington, *ex rel.* the STATE OF WASHINGTON

Appellees,

v.

NO NEW GAS TAX, a Washington Political Action Committee, and JEFFREY DAVIS, an individual and Treasurer of NO NEW GAS TAX,

Appellants.

OPENING BRIEF OF APPELLANTS NO NEW GAS TAX AND JEFFREY DAVIS

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INTRODUCTION

This case concerns a governmental assault on Washington's longstanding traditions of free press and open political debate on matters of public importance. Its resolution will determine whether political partisans will be able to use campaign finance laws to intimidate and harass their opponents. It will also determine whether campaigns and the media in this state will be forced to sanitize their speech and curtail their association to avoid the sanction of governmental monitors.

The question in this case is whether on-air commentary by radio talk show hosts concerning a ballot initiative must be treated as campaign contributions and subjected to disclosure and regulation. No court at any level – in Washington or elsewhere – has ever taken this unprecedented step, and yet the trial court did so in this case without so much as an evidentiary hearing and without allowing the defendants-Appellants the benefit of virtually any discovery. The government's lawsuit, and the trial court's decision in its favor, are a frontal challenge to free speech, free association, and the free press. They are blatantly unconstitutional under the Washington and United States Constitutions and they violated Washington campaign statutes and regulations. This Court should hold that the government's actions here violated defendant-Appellants' constitutional rights and vacate the trial court's decision.

ASSIGNMENTS OF ERROR

1. Did the trial court err when it dismissed Appellants' counterclaims pursuant to CR 12(b)(6) when evidence outside Appellants' pleading was material to its decision and the trial court did not provide Appellants an opportunity to test and rebut this evidence?

The trial court erred when it dismissed this case under CR 12(b)(6) based on materials outside Appellants' pleadings, did not permit Appellants to test or rebut such evidence, and ignored evidence Appellants did produce. Clerk's Papers (CP) at 1495-96, 1519-21.

2. Did the government's action here violate free speech, free association, and free press rights?

The trial court erred when it found that classification of editorial comment as a campaign contribution does not violate constitutional guarantees of free speech, free association, and the free press. CP 1499-1500, 1523-24.

3. Were the government's actions here inconsistent with Washington campaign finance statutes and regulations?

The trial court erred when it found that the commentary at issue here was not exempt from regulation as campaign contributions under Washington statutes and regulations. CP 1495-96, 1519-22.

4. Did the government's actions here violate due process?

The trial court erred when it held that the government's actions here did not violate due process when the government used a private party

with personal financial and political interests to prosecute the case. CP 1500, 1524.

5. Did the government here violate the "Faithful Execution" clause of the Washington Constitution?

The trial court erred when it dismissed Appellants' counterclaim under article III, section 5 of the Washington Constitution. CP 1500.

6. Did the trial court err when it refused to strike a letter containing inadmissible hearsay submitted after the court heard arguments on the government's CR 12(b)(6) motion?

The trial court erred when it refused to strike the October 25, 2005, letter from Vicki Rippie submitted by the government after argument on its CR 12(b)(6) motion. RP (11/2/05) 8-9.

STATEMENT OF THE CASE

In cases raising First Amendment issues, an appellate court has an obligation to make an independent examination of the whole record to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L.Ed.2d 502 (1984).

A. The Plaintiffs Sue NNGT

In 2005, the Legislature, in a controversial move, increased the state's gasoline tax. CP 374. The increase sparked a public debate among media commentators as soon as it was passed. In Seattle, radio talk show

hosts John Carlson and Kirby Wilbur of 570 KVI AM were immediate and outspoken critics of the tax. On the other side, practically every Washington newspaper supported the tax increase. Opponents soon organized an initiative campaign to repeal the increase and formed a political committee, NONEWGASTAX.COM ("NNGT"), to promote it.[1] The initiative was designated Initiative 912 ("I-912"). CP 374. A coalition of business, labor, legal, and environmental organizations soon responded by forming Keep Washington Rolling ("KWR") to defeat I-912. CP 437. The law firm of Foster, Pepper & Schefelman, PLLC, ("Foster"), also joined as a member of KWR. CP 437.

KWR evidently believed it needed something more to defeat I-912 than just good arguments and a lot of money. To that end, in June 2005, KWR contacted Foster seeking to file a lawsuit against NNGT under Washington's Fair Campaign Practices Act (FCPA) for failing to disclose certain alleged contributions, including Carlson and Wilbur's on-air discussions about the initiative. CP 1207-08. Foster then solicited San Juan County and the cities of Seattle, Auburn and Kent (the "Municipalities") – all of which stood to gain millions (if not billions) of dollars in State tax revenue if the initiative failed and the new tax

[1] NNGT later changed its name to Yes912.com. To be consistent with the record in this case, this brief refers to the committee and its treasurer as NNGT.

prevailed – to act as plaintiffs in the suit. CP 1207-08; 1233-39. Foster agreed to represent the Municipalities free of charge. CP 1206.

On June 22, 2005, two weeks before the July 8, 2005, deadline to qualify I-912 for the November 2005 ballot, Foster and the Municipalities filed their action against NNGT. CP 23. They did so "by and through" Foster, who purported to act "on behalf of the State of Washington." CP 23, 32. The Municipalities continued to coordinate with KWR after filing suit. KWR issued the press release announcing the suit and identified San Juan County Prosecuting Attorney Randall Gaylord as its point of contact. CP 1271-72. In the release, he explained that the desire for more tax revenue motivated San Juan's participation in the suit: "As a county, we have a lot at stake. We depend on a healthy transportation network, and the transportation package is a fair way to pay for it." CP 1271.

Foster also wanted to stop I-912. Foster was a member of KWR and donated $2,500 to KWR two days after the suit was filed. CP 1274. Foster was also bond counsel for the State and would receive the legal work for the State's bonds guaranteed by new tax revenues. CP 1276-86. With no tax, there would be no bond issuance and fewer fees for Foster.

B. The Complaint

The Municipalities' Complaint (the "Complaint") against NNGT contained two allegations. First, the Municipalities alleged that NNGT

failed to report certain identifying information for persons contributing to NNGT over the Internet. CP 27. However, NNGT had already discovered this problem before the Municipalities filed suit and was diligently locating and reporting missing donor information when it was sued. That issue is not on appeal.

Second, and more importantly, the Municipalities alleged that Wilbur and Carlson's on-air discussions constituted "in-kind contributions" to NNGT under the FCPA. The Municipalities claimed that NNGT's failure to report such "contributions" to the Public Disclosure Commission ("PDC") violated the FCPA's reporting requirements. CP 28. The Complaint sought to enjoin NNGT, preliminarily and permanently, from "depositing, using, or expending contributions," and from accepting any additional "in-kind contributions" from Fisher Communications, Inc. ("Fisher"), the owner of KVI, until NNGT treated Wilbur and Carlson's commentary as "contributions." It requested penalties, treble damages, attorney fees, and costs. CP 30-31.

The Municipalities also moved for a preliminary injunction along with their Complaint. CP 46. The Municipalities claimed that Wilbur and Carlson "actively promoted and supported" the initiative by discussing it and asking listeners to support it. CP 28, 34, 38, 42. However, the hosts' support for the initiative should have come as a surprise to no one. They

had long opposed increased taxation and government spending. Moreover, they had opposed the gas tax before it was even passed. Nevertheless, based on innocuous self-aggrandizing (hearsay) statements by Wilbur and Carlson in which the talk show hosts described the campaign using the word "we," the Municipalities alleged that Wilbur and Carlson were "officers or agents" of the campaign and their discussions constituted "political advertising" for it. CP 344-46. The Complaint did not limit its claims to prior to May 31. CP 30-32.

In opposition, NNGT argued that treating media discussions of political issues as contributions subject to campaign finance reporting would constitute an unconstitutional restraint on free speech. CP 324-25.

C. The Preliminary Injunction Hearing

On July 1, 2005, the trial court heard argument on the PI Motion. RP (7/1/05) 1. There, Prosecutor Gaylord "explain[ed] why we are seeking full disclosure" by again talking about how defeating I-912 would bring more tax money to his county:

> Third, the citizens in San Juan County understand public transportation. Virtually every resident in San Juan County uses public transportation, the Washington State ferries. They are smart people. They understand that the network of transportation throughout the state depends upon a solid infrastructure.

RP (7/1/05) 4, 5.

The trial court held no evidentiary hearing and made no factual findings to support the Municipalities' claim that Wilbur and Carlson were "officers or agents" of the campaign. Nevertheless, the court granted the preliminary injunction, holding that "Fisher Communications/KVI's donation of free air time to [NNGT] is an in-kind contribution … that must be disclosed." CP 388. The court stated that "requiring disclosure of in-kind contributions for media time allocated to campaigning for a political campaign will not restrict that campaign but merely require[s it] to be disclosed to the general public much the same as any other valuable contribution." RP (7/1/05) 35. However, the court overlooked, and counsel for the Municipalities' neglected to mention, that under RCW 42.17.105(8) "it is a violation of [the FCPA] for any person to make . . . contributions reportable under RCW 42.17.090 in the aggregate exceeding . . . five thousand dollars for any . . . campaign subject to the provisions of this chapter within twenty-one days of a general election." (To the contrary, counsel expressly denied any limits existed. RP (7/1/05) 35.) The Court ordered NNGT to disclose the "free air time provided by Fisher Communications." CP 388.

Counsel for NNGT then requested (and the court declined) some indication of the scope of the order granting the preliminary injunction ("PI Order"):

> MR. GOSS: . . . I'm not sure what you're asking us to do, and here is my problem, Your Honor. How are we to decide what is political advertising and what's not?
>
> THE COURT: You know, I think that you have the same problem that any other candidate or campaign has in trying to understand how to make full reporting, and I'm not going to treat you any differently. I recognize that that doesn't answer your question, but there are many questions that come up in the area of political reporting, and this is just one of them.
>
> MR. GOSS: I think I understand what you're saying, Your Honor. It's just that I don't want to get dragged back in here saying that we didn't make a good faith estimate. It's just like there's no standard here.
>
> THE COURT: And I'm not going to make a standard this morning on this calendar, on this record. I'm just going to leave it as it is, and I'm prepared to adopt that finding.

RP (7/1/05) 37.

D. NNGT's Counterclaim and Interlocutory Appeal

NNGT promptly complied by estimating and reporting the "contributions" by Fisher. (Both the Municipalities and the trial court conceded that NNGT complied with this order. *See* CP 1636; CP 443; RP (10/24/05) 4.) Because the trial court refused to identify the standards to apply, NNGT monitored the media for discussions of I-912, estimated a value, and reported these discussions to the PDC. CP 452-53.

On August 1, 2005, NNGT filed a Notice for Discretionary Review to the Court of Appeals regarding the PI Order. On August 9, 2005,

NNGT filed an answer and, pursuant to 42 U.S.C. § 1983, among other causes, filed counterclaims, alleging that the Municipalities' actions violated NNGT's free speech, free association, and due process rights. CP 413-41. On August 25, 2005, the Municipalities filed a Motion to Dismiss Counterclaims ("Motion to Dismiss") and a Motion for Award of Attorneys' Fees. CP 443-58; 459-64. In these pleadings, the Municipalities abandoned their request for a permanent injunction and requested that the court dismiss their own claims. CP 464.

Although termed a CR 12(b)(6) motion, the Motion to Dismiss relied heavily on materials outside NNGT's counterclaims. NNGT moved, pursuant to CR 56(f), for a continuance to conduct discovery. CP 521-30. On September 9, 2005, the trial court granted NNGT's motion, noting the court's "willingness to make sure that both parties are fully prepared at the time the dispositive motion is heard." RP (9/9/05) 23.

E. Discovery Disputes Between the Parties

NNGT never received the discovery to which the trial court had held it was entitled. Although the court ordered the Municipalities to respond to NNGT's interrogatories and requests for production no later than October 3, *see* RP (9/23/05) 53, the Municipalities ignored the order and on that date produced non-responsive answers and no documents. CP 792. They later produced a small amount of materials, including some an

hour before NNGT's response to the Municipalities' Motion to Dismiss was due. CP 1428-29. NNGT moved to compel, arguing that the Municipalities' failure to comply with the court's order compromised its ability to fully respond to the Motion to Dismiss. CP 1429.[2] At the hearing, contrary to its earlier "willingness to make sure that both parties are fully prepared at the time the dispositive motion is heard," RP (9/9/05) 23, the trial court held that it would defer consideration of NNGT's motion to compel until after argument on the Municipalities' Motion to Dismiss. RP (10/17/05) 35. NNGT was thus left without the material the trial court earlier had agreed was necessary to allow it to respond to the Motion to Dismiss.

F. The Municipalities' Actions Against Fisher

During this time, the Municipalities also sought to compel production of certain subpoenaed materials from Fisher. CP 880-86. Fisher moved to quash and argued that production would infringe on its

[2] The Municipalities also moved to compel discovery from NNGT. NNGT, however, had previously moved for a protective order. CP 558. NNGT argued, among other things, that production of campaign documents directly to Foster – a member of NNGT's political opposition, KWR – prior to the election would violate NNGT's free speech rights. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 786 P.2d 781 (1990); CP 768-71. NNGT reiterated these objections to production in its responses to the Municipalities' discovery requests. CP 912-24. Because many of NNGT's objections arose from concerns with turning over campaign communications directly to its political opposition prior to the election, both NNGT and the trial court suggested postponing the case until after the general election. RP (9/23/05) 9, 12; CP 1170. The trial court also offered to appoint a special master. RP (9/23/05) 15. NNGT also offered to stipulate to facts. CP 1169. The Municipalities rejected all these suggestions and instead insisted on a protective order that still required NNGT to produce material directly to its political opposition. CP 768-71.

First Amendment rights. CP 960. It also argued that the application of the trial court's PI Order would lead to a prohibition, or at least a substantial chilling effect, on its speech because of the operation of the $5,000 limitation in RCW 42.17.105(8). CP 960-61. Specifically, Fisher argued that "[i]f Plaintiffs' interpretation of 'contributions' stands, Fisher is going to feel very apprehensive about permitting its broadcasters to discuss I-912 as of October 18 (three weeks before the general election on November 8) and may in fact need to direct them to avoid the issue." CP 960-61. Fisher submitted the declaration of Robert Dunlop, Vice President of Fisher, CP 1034, which stated the following:

- Neither Carlson nor Wilbur controlled any management or business decisions of Fisher and Fisher was not owned or controlled by any political party or political committee;
- Wilbur and Carlson's views expressed on the show were not the views of Fisher and the station did not put any filter on their topics;
- Fisher does not charge, and has never charged, any person or entity for the value of any content time associated with Wilbur or Carlson's talkshows;
- The station charges for political advertising and that advertising runs in the commercial-designated segments of any of its radio programs;
- Fisher provided a forum for both proponents and opponents of I-912;
- The PI Order "has created a risk that any on-air discussion about I-912 by Mr. Carlson or Mr. Wilbur during the

> content portions of their talkshows in the three weeks preceding the November 2005 General Election may be deemed an in-kind contribution of more than $5,000 that Fisher Seattle Radio is prohibited from making under 42.17.105(8). We would have no way to assess when or whether a '[$]5,000' threshold would be crossed. Therefore, I will have to direct Mr. Carlson and Mr. Wilbur to not discuss I-912 during the content portions on their programs to avoid this risk because Fisher Seattle Radio does not wish to face a possible prosecution for violation of the Fair Campaign Practices Act . . . ."

CP 1035-37. The Municipalities did not produce evidence disputing these statements. The trial court quashed the subpoena, concluding that it could not produce relevant material. RP (10/17/05) 21.

G. Proceedings at the Court of Appeals

While this was going on, NNGT requested that the Court of Appeals expedite argument on its Motion for Discretionary Review and stay enforcement of the PI Order until the court's review was complete. *See* Mot. to Shorten Time and Stay Enforcement of Order at 2 (Sep. 29, 2005). NNGT sought the stay because, beginning October 18 and running through the November 8 election, the $5,000 per-person limit on in-kind contributions to initiative campaigns applied. *Id.* at 4-5. Pursuant to RAP 8.1(b)(3), NNGT argued that the constitutionality of the PI Order was "debatable" and NNGT would suffer irreparable harm from its continued enforcement given the $5,000 limit. *Id.* at 10-12. The Municipalities

opposed NNGT's request and argued, contrary to prior representations, that NNGT had an "ongoing responsibility" under the PI Order. *See* Opp'n to Mot. to Shorten Time and Stay Enforcement of Order at 11 (Oct. 7, 2005).

A Court of Appeals Commissioner denied these requests. The Commissioner found that "the trial court's authority to issue its [preliminary injunction] Order . . . [was] debatable." Ruling Den. Mots. to Shorten Time and Stay Enforcement of Order at 3 (Oct. 7. 2005). He found, however, that NNGT "is not harmed by the lack of a stay" because the order did not apply "to any actions occurring after May 31, 2005" and the Municipalities "have represented that they have not and will not seek application of the [FCPA] . . . for conduct after" that date. *Id.* at 3.

On October 20, 2005, NNGT moved to modify this ruling based on the Commissioner's misapplication of the law and an October 19 telephone conversation between PDC staff member Anthony Perkins and NNGT Treasurer Jeffrey Davis. NNGT submitted a declaration from Davis testifying that he had received a call from Perkins to review the in-kind contributions that NNGT had been reporting. *See* Emergency Mot. to Modify Ruling Den. Stay, Ex. B at 2 (Oct. 20, 2005). In this conversation, Perkins explained that the PDC viewed the PI Order as applying throughout the life of the I-912 campaign and expressed concern that,

given the level of in-kind contributions NNGT had been reporting, many of the media outlets making such contributions would likely exceed the $5,000 limit. *Id.*, Ex. B at 2, 3. If that occurred, Perkins added, the PDC could not guarantee NNGT immunity from prosecution, fines, or sanctions. *Id.*, Ex. B at 2. Davis testified that NNGT had "no effective way to know immediately when coverage of the campaign by Fisher . . . or other media outlets" occurred or "when the $5,000 limit might have been reached." *Id.*, Ex. B at 3.

The next day, October 21, the Court of Appeals denied a stay, but expedited hearing of NNGT's Motion for Discretionary Review for October 25. *See* Order on Emergency Mot. to Modify at 1 (Oct. 21, 2005).

H. Argument on the Motion to Dismiss

The trial court heard the Municipalities' Motion to Dismiss on October 24. Before the hearing, counsel for the Municipalities informed NNGT that he had spoken with the PDC, which, in turn, would soon be issuing a statement regarding the case. CP 1510. NNGT was previously unaware of any contact between the PDC and Municipalities. CP 1510.

After NNGT's responsive argument, counsel for the Municipalities, noticing members of the media in the audience, began his reply by turning his back to the bench and addressing the "the audience"

and "the media": *e.g.*, "I know your Honor is familiar with the facts, but I believe there are some folks in the audience who may not be, so if you will indulge me . . . ."; "Your Honor, I think I have made my point. Just so the members of the media understand . . . ." RP (10/24/05) 35, 36. The court then permitted counsel to introduce numerous extraneous materials. For example, counsel argued its CR 12(b)(6) motion should be granted because "a friend of mine [who] is a publisher of a newspaper" thought NNGT should report the commentary as contributions. RP (10/24/05) 37. Counsel also presented an approximately two-by-three-foot poster containing hearsay transcripts of broadcasts. RP (10/24/05) 35; CP 1480 (reproduction of poster).

Because NNGT's counterclaims did not contain any references to counsel's friend or radio transcripts, such materials could not be considered in resolving the Motion to Dismiss and NNGT objected. The court replied:

> THE COURT: You know, I am going to allow a wide range of arguments for counsel on this. I understand what the rule is, what the standard is, and I will be applying the standard.

RP (10/24/05) 35-36. The Court later incorporated the material from the poster board into its Final Order. CP 1520. The court denied NNGT's request to address these factual matters. RP (10/24/05) 42.

I. The PDC's Letter

The day after the hearing on the Motion to Dismiss and the day before the day the court had set to issue its written decision, the PDC issued a letter to counsel for all parties purporting to refute Davis's account of the October 19 call from Perkins. CP 1484-85. The letter accused Davis of making "attributions to a PDC staff member that significantly differ from the recollections of that staff member." CP 1485. However, the letter was not authored by, and did not contain a statement from, Perkins himself. Rather, it was authored by the PDC's Executive Director, Ms. Vicki Rippie, who issued it a week after the conversation between Perkins and Davis occurred. The letter barred Davis from all future telephone contact with the PDC. CP 1485. The Municipalities immediately submitted the letter to the trial court in support of their "request to refer [their] remaining claims to [the] Public Disclosure Commission" — a "request" they had made once in their Motion for Fees. CP 1481, 463. NNGT moved to strike. CP 1502-07.

J. The Court's Written Decision

The following day, October 26, the trial court issued its written decision granting the Motion to Dismiss NNGT's counterclaims. Notwithstanding the fact that it was resolving a CR 12(b)(6) motion, the decision made new factual findings and relied on certain earlier "findings"

the court had "expressly or impliedly made" in granting the PI Motion. CP 1495 (emphasis added). These included findings "that Kirby Wilbur and John Carlson were principals in the campaign", "that they had intentionally promoted the campaign by advertising it in their regular radio show time slots," and "that the on-air advertising was in addition to and different from any editorializing, comment, or discussion by the hosts on their shows." CP 1495. The court concluded that the hosts' discussions were political advertising and thus contributions. CP 1495-96. The court acknowledged that NNGT had alleged "problems" that "could have resulted" from the PI Order, but dismissed them as "theoretical" and "speculation." CP 1497. According to the court, the PI Order created "no inability on the part of the campaign, its sponsors, or its contributors to effectively advocate." CP 1499.[3] Even if it had, the court concluded, "a minor limitation on their freedom of speech and association during that time period, by the requirement in the preliminary injunction for disclosure of on-air in-kind contributions, is permitted." CP 1499.

The court also dismissed the remaining claims in the Municipalities' enforcement action because the Municipalities had agreed to end their prosecution of NNGT so long as NNGT was not permitted to

[3] The court's decision disposed of NNGT's remaining counterclaims, including the due process violations stemming from Foster's participation. The court found that "[NNGT] ha[s] presented no authority that [the Municipalities] do not have the right to retain private counsel or that those counsel should be restricted in their speech." CP 1500.

vindicate its constitutional rights: "[The Municipalities] have indicated their intention to dismiss this case upon this court's granting of their motion to dismiss [NNGT's] counterclaims." CP 1500. With all claims dismissed, the Court of Appeals struck its hearing on the Motion for Discretionary Review because NNGT now had an appeal of right.

K. NNGT's Motion to Strike and Entry of Judgment

On November 2, 2005, the trial court conducted a hearing to enter a final order. It also considered NNGT's motion to strike the PDC letter regarding the October 19 telephone conversation between Davis and Perkins. In that motion, NNGT argued that the letter was inadmissible, multi-layered hearsay: an out-of-court statement by Rippie, purporting to recount her conversation with Perkins, regarding his conversation with Davis. CP 1505. NNGT also argued that the letter was immaterial because the Municipalities had submitted it the day after argument on a CR 12(b)(6) motion. CP 1506. NNGT noted that Davis's declaration was submitted under penalty of perjury and that no evidence of comparable reliability had been produced to challenge it. CP 1505-06. The court denied the Motion to Strike "essentially based on its timing [and] without further analysis." RP (11/2/05) 9.

The court then turned to the entry of a final order, largely adopting a proposed order presented by the Municipalities. RP (11/2/05) 9. Over

NNGT's repeated objections, *e.g.*, RP (11/2/05) 9-10, 11-12, 13, 17, 23, the court again made numerous factual findings — for example, that "Carlson and Wilbur . . . had formed" NNGT, CP 1520. The trial court made one major change to the proposed order, which it raised *sua sponte*: the court altered the order to hold that the contributions had come from Carlson and Wilbur, not Fisher, as the Municipalities alleged and the court had earlier found. CP 1520; RP (11/2/05) 24. The court no longer believed that Fisher made any contributions:

> I think it is true that in the [preliminary injunction] order that I issued I referred to Fisher Communication[s] as making contributions, but after all the discovery hearings that we had and the additional materials that came in, my ruling is essentially limited to Carlson and Wilbur, and I don't want to make a finding by implication or otherwise that it was directed at Fisher Communications.

RP (11/22/05) 24.

Thus, in the last minutes of the case, the court adopted a theory of the case that the Municipalities had never advanced, that contradicted the PI Order, and that made legal determinations regarding two people who had never been parties. And the court did this, on a CR 12(b)(6) motion, based on "the additional materials that came in." RP (11/22/05) 24. Despite arguing for four months that Fisher had made the contributions, the Municipalities, also in the last minutes, agreed to this change. Asked by the court, "How about if we just change it . . . and strike, 'from Fisher

Communications,'" counsel replied, "We would agree to that, your Honor." RP (11/2/05) 25.

SUMMARY OF ARGUMENT

This case presents the issue of whether partisans in an intense and important political debate will be able to use the campaign finance laws to harass their opponents and intimidate the media. Whether it was their intention or not – and there is ample evidence to suggest that it was – the Municipalities, acting in concert with KWR, were able to use the campaign finance laws to raise considerable uncertainty about the continued legality of Wilbur and Carlson's discussions of the campaign. As Fisher made clear, the classification of the hosts' discussions as campaign contributions threatened its unfettered exercise of editorial discretion and raised the possibility that both Fisher and NNGT would be violating the law if Wilbur and Carlson continued to discuss the case.

The Municipalities were able to accomplish this by convincing the trial court to ignore several key statutory, administrative, and constitutional hurdles that are supposed to, but in this case did not, prevent the campaign finance laws from being used as a weapon by political partisans. First, the court ignored the fact that WAC 390-05-290 exempts "commentary" from the definition of "political advertising" subject to regulation. Second, there was no evidence that Wilbur and Carlson were

"officers or agents" of the campaign; rather, there was unrefuted testimony from Fisher conclusively demonstrating that Washington's "press exemption" applied to Carlson and Wilbur's commentary in support of their campaign. Third, and most significantly, requiring disclosure of Wilbur and Carlson's commentary was blatantly unconstitutional.

Such "disclosure" was unconstitutional in large part because the Municipalities could never articulate (i) what made these hosts "officers or agents" and, even if they were, how this status stripped them of the protections for the press in both the Constitution and Washington law; (ii) how the campaign was supposed to identify and compile the portions of their shows that constituted "contributions" as opposed to commentary; and (iii) the dollar value to be assigned to the minutes devoted to "political advertising." Indeed, the Municipalities' standards were so cryptic that neither the trial court nor their own attorneys could consistently say who made the "contributions" at issue.

The Municipalities' prosecution also created a substantial chilling effect by creating the possibility that both NNGT and Fisher would violate the law if Fisher permitted Wilbur and Carlson to discuss I-912 in the three weeks prior to the general election. The Municipalities claimed that RCW 42.17.105(8)'s three-week restriction on aggregate contributions greater than $5,000 did not apply because they only sought disclosure for

the time period prior to May 31, 2005. This self-serving promise is meaningless for First Amendment purposes – when the government makes speech illegal, it cannot cure the constitutional defect by making a promise (not binding on others) not to prosecute.

ARGUMENT

A. CR 12(b)(6) Standard and the Trial Court's Deviation from It

1. Standard for Dismissal Under CR 12(b)(6)

A dismissal for failure to state a claim is appropriate only if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Bravo v. The Dolsen Companies,* 125 Wn.2d 745, 750, 888 P.2d 147 (1995). Such motions should be granted sparingly and with care in order to make certain that the plaintiff is not improperly denied a right to have his claim adjudicated on the merits. *Fondren v. Klickitat County,* 79 Wn. App. 850, 854, 905 P.2d 928 (1995). For purposes of deciding the motion, all of the factual allegations in the complaint will be accepted as true. *Dennis v. Heggen*, 35 Wn. App. 432, 434, 667 P.2d 131 (1983). The court will consider hypothetical facts and any hypothetical situation conceivably raised by the complaint to defeat a CR 12(b)(6) motion. *Bravo,* 125 Wn.2d at 750. When an area of the law involved is

developing, courts are reluctant to dismiss an action on the pleadings alone. *Id.* at 751.

2. The Trial Court Incorrectly Applied this Standard

In this case, the trial court turned the standard for a CR 12(b)(6) motion on its head. It accepted unproven assertions as established truths, while finding NNGT's allegations, many of which it had already demonstrated, false. The trial court based its decision on "implied[] . . . findings," CP 1495, while ignoring unrebutted testimony from Davis and Dunlop, an especially prejudicial error when the court was obligated to consider even hypothetical facts to support NNGT's claims. Indeed, it is difficult to catalog the extraneous material provided to and considered by the trial court. Everything from tape recordings, newspaper articles, declarations, an approximately 2' by 3' posterboard containing hearsay statements, to a discussion of opposing counsel's "friend [who] is a publisher of a newspaper" and arguments directed to the audience, were submitted to the trial court over NNGT's objections. NNGT did not have the opportunity to test such evidence or to fully build its own evidence.

"[I]f the court can say that no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief, the motion remains one under CR 12(b)(6)." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 121, 744 P.2d 1032 (1987). However, "[i]f

factual evidence in addition to the pleadings was considered and was material to the disposition of the motion for judgment on the pleadings, then the consideration of those matters would convert the motion for judgment on the pleadings into a motion for summary judgment." *Loger v. Wash. Timber Prods., Inc.*, 8 Wn. App. 921, 924, 509 P.2d 1009 (1973). Here, the extraneous material considered by the trial court was determinative. *See* CP 1519-21 (findings of fact listing radio broadcasts, facts found in the PI Order, a press release, a web site, and an e-mail, none of which were alleged by NNGT); CP 1495 (discussing "express[] or implied[]" findings, none of which were alleged by NNGT). "When the affidavits of the party opposing a summary judgment motion show reasons why the party cannot present facts justifying its opposition, the trial court has a duty to give that party a reasonable opportunity to complete the record before ruling on the case." *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 902-03, 973 P.2d 1103 (1999) (emphasis added).

The trial court's decision rested entirely on factual findings that were not alleged by NNGT and NNGT was entitled to have its claims adjudicated on the merits. It was entitled to an opportunity to test the Municipalities' evidence and to produce evidence in support of its claims.

B. The Municipalities' Actions Violate Constitutional Guarantees of Free Speech, Free Association, and the Free Press

Throughout this case, the Municipalities argued that because courts had upheld disclosure laws against facial challenges in *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S. Ct. 619, 157 L.Ed.2d 491 (2003), *Buckley v. Valeo*, 424 U.S. 1, 14-15, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), and *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1976), they had *carte blanche* to use the campaign finance laws as they wished. None of these cases addressed – or even suggest – that the government may use campaign finance laws to regulate the on-air commentary of members of the media, however. To the contrary, application of constitutional principles recognized in United States and Washington Supreme Court precedent establishes that the Municipalities, by bringing and pursuing this case, violated constitutional guarantees of free speech, free association, and the free press guarantees by: (i) creating substantial uncertainty regarding the legality of the hosts' discussion of the campaign in the three weeks prior to the general election, (ii) chilling speech and expressive association by conditioning whether the hosts' discussions of the campaign were reportable contributions on some impermissible, but unclear, level of interaction between the campaign and the hosts, and (iii) creating standards so indefinite that persons of common intelligence could not comprehend them, causing the campaign and the hosts to guess as to

what behavior and speech left them subject to regulation and potential penalties.

1. The United States and Washington Constitutions Guarantee Freedom of Speech, Association and Press

Free speech protections are at their zenith in the context of a political campaign. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966). The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy – the political campaign. *Brown v. Hartlage*, 456 U.S. 45, 53, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982). Thus, the constitutional protection afforded political speech has its fullest application in political campaigns. *Collier v. Tacoma*, 121 Wn.2d 737, 746, 854 P.2d 1046 (1993).

But the ability to speak effectively depends on the ability to associate. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). Governmental action that has the effect of

curtailing freedom to associate is thus subject to the closest scrutiny. *Buckley*, 424 U.S. at 25.

Related to the principle that an informed electorate can better exercise its political rights, the United States Constitution specifically selected the press – in all its forms – to play an important role in the discussion of public affairs. *Mills*, 384 U.S. at 219.

> Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

Id. These protections do not cease when the press advocates because free trade in ideas means the opportunity to persuade to action, not merely to describe facts. *NAACP v. Button*, 371 U.S. 415, 437, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

2. The Municipalities Have Violated These Rights

Because of the importance of these rights, courts require that governmental action that infringes on them be drawn narrowly.

a. The Municipalities' Action Burdens the Exercise of These Rights

The Municipalities claim that this case is about disclosure, not free speech. Answer to Statement of Grounds for Direct Review at 15. However, the Municipalities' classification of on-air commentary as a contribution leads to an actual prohibition on speech in the three weeks prior to the general election, regardless of whether the Municipalities brought a prosecution or not. RCW 42.17.105(8). The trial court's PI Order stood as a legal determination by a court of competent jurisdiction that certain media commentary in support of the initiative was an "in-kind" contribution. The ban on contributions prior to the general election is the law and responsible citizens would be hard-pressed to ignore it. The Municipalities' declaration that they would not prosecute violations of RCW 42.17.105(8) actually compounds the constitutional problem – it gives the Municipalities discretion to determine whom to enforce these laws against and whom to leave alone. The Municipalities' position is also particularly cynical given their claim that Wilbur and Carlson's on-air commentary amounted to "secret" contributions – if they were truly making such unlawful contributions, one would think that enforcement would be all the more imperative in the final three weeks of the campaign.

That these agencies choose not to prosecute under this section does not make violating the law any less illegal. The decision of the Municipalities and the PDC not to prosecute is not binding on other

prosecuting agencies. RCW 42.17.400. These promises are not even binding on themselves – both the Municipalities and the PDC still could bring a claim against NNGT, Wilbur or Carlson because the statute of limitations under the FCPA does not run for five years. RCW 42.17.410. Regardless, the evidence demonstrated that the Municipalities' actions created substantial uncertainty regarding the hosts' ability to continue to discuss I-912 during this time period. *See* CP 1036.

Even if one accepts the Municipalities' self-created limitations, their actions still burdened the free association rights of Carlson, Wilbur and NNGT. The Municipalities' argument rested on classifying Wilbur and Carlson as "officers," "agents," or, in the court's words, "principals" of the campaign. *See, e.g.*, CP 344, 345, 453, 1495. Presumably, this was based on these hosts' association with the campaign, and if they disassociated themselves from the campaign, they would have been absolved from being "in-kind contributors." *See* Chris McGann, *Ruling on Anti-Gas Tax Radio Talk Upheld,* Seattle Post-Intelligencer, October 27, 2005, at B-5 (quoting counsel for the Municipalities: "'The reason why they are required to declare is that during that period of time Kirby Wilbur and John Carlson were running the campaign, and they now say they are not involved in the campaign. I don't know if that's true or not, but if it is true there would not be a reporting requirement.'"). However,

the media, and the people with whom it associates, do not lose their constitutional rights during a campaign. *See* Christopher R. Edgar, *The Right to Freedom of Expressive Association and the Press,* 55 Stan. L. Rev. 191, 198 (2002) ("Press entities are expressive groups, and thus they deserve the same right of expressive association that the courts have conferred on other organizations.").

b. Government Actions Burdening Speech and Association are Subject to Strict Scrutiny

Because the Municipalities' actions burden fundamental rights, an exacting level of scrutiny applies: "If the challenged law burdens First Amendment rights, it can survive constitutional scrutiny only if the state shows that it advances a compelling state interest and is narrowly tailored to serve that interest." *Rickert v. Wash. Pub. Disclosure Comm'n,*129 Wn. App. 450, 459, 119 P.3d 379 (2005). "Few laws survive such scrutiny . . . ." *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1255 (11th Cir. 2004). Because the Municipalities seek to treat only statements regarding I-912 as reportable contributions, their actions are content-based. *See Burson v. Freeman*, 504 U.S. 191, 197, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992). "Content-based regulations are presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

c. There Was No Compelling Interest Here

The governmental interest identified by the Municipalities (revealing the source of "campaign contributions fueling the Initiative 912 signature gathering campaign," CP 444) was not only inapplicable here, its application was laughable. To uncover "secret money," the Municipalities sued to require the reporting of the identities of initiative supporters who regularly identified themselves and their employer and broadcast that information to every person in Western Washington with an AM radio. Their identity could scarcely have been less secret. "To constitute a compelling interest, the purpose must be a fundamental one and the legislation must bear a reasonable relation to the achievement of the purpose." *Collier*, 121 Wn.2d at 754. It is not a "fundamental purpose" of government to vindicate the public's right to know something that was patently obvious to begin with.

d. The Municipalities' Actions Were Not Narrowly Tailored Because They Are Contrary to Washington Law

The Municipalities' actions were not narrowly tailored because they ignored Washington statutes and regulations specifically exempting from regulation the kind of commentary at issue here.

The Municipalities' claims rest on a series of assumptions arising from an erroneous reading of "political advertising" under Washington law. The Municipalities argued that (i) Wilbur and Carlson were officers

or agents of the campaign; (ii) free air time for the broadcast of political advertising prepared by a campaign or its authorized agents is a contribution; and (iii) because Fisher broadcasted political advertising by Wilbur and Carlson without charge to NNGT, it made contributions to the campaign that were reportable under the FCPA. *See* CP 453. Their theory was flawed because the airtime at issue was not "political advertising" under Washington law and commentary is exempt under the "press exemption" in the FCPA.

First, WAC 390-05-290 defines "Political advertising" thus:

> Political advertising <u>does not include</u> . . . editorial comment or replies thereto . . . <u>on a radio or television broadcast where payment for the . . . broadcast time is not normally required</u>.

(Emphasis added.) Fisher demonstrated that the airtime in which Wilbur and Carlson made their "contributions" was not airtime for which Fisher normally requires payment. CP 1035-36. The purported contributions listed by the Municipalities were, in fact, "editorial comment" occurring during the normal course of Wilbur and Carlson's shows. CP 1035-36. The Municipalities' claims were thus not "narrowly tailored."

Second, the Municipalities misinterpreted the "press exemption" in RCW 42.17.020(15)(b)(iv), which states that a "Contribution" under the

FCPA does not include "[a] news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by the person whose business is that news medium, and that is not controlled by a candidate or a political committee." The press exemption applies in a case like this, as the sole tribunal ever to examine the issue concluded.

In *In re Dornan*, MUR 4689, Federal Election Commission (Feb. 14, 2000) (reproduced at CP 1307), the FEC rejected the theory urged by the Municipalities here. *In re Dornan* concerned several talk radio shows guest hosted by former Congressman Dornan while he was a congressional candidate. The FEC's General Counsel argued that the purpose of the broadcasts was to promote Dornan's election to Congress and that the stations which permitted him to guest host without restrictions on the content of his show had made prohibited corporate contributions. *In re Dornan* at 1. Although Dornan spent significant time attacking his anticipated opponent, the FEC found that Dornan's appearances did not constitute prohibited corporate contributions because these broadcasts fell under the "press exemption" to contribution limitations contained in 2 U.S.C. §431(9)(B)(i), *see In re Dornan* at 2-3, which exists to preserve "the unfettered right of the newspapers, TV networks, and other media to

cover and comment on political campaigns," H.R. REP. NO. 93-1239, at 4 (1974) (emphasis added).

The FEC first examined whether the press entity was owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question. *In re Dornan* at 2. The FEC found no indication that the radio stations at issue were owned or controlled by a political party or candidate. *Id.* Similarly, Fisher here testified that it was not owned or controlled by a political party or candidate. CP 1035.

The FEC next examined whether the corporations in question "were acting in their capacity as members of the media in presenting the programs in question." *In re Dornan* at 2. The FEC found that the shows in question featured commentary on political topics, interviews with political figures, and interactions with callers, and that there was no indication that the format of the shows was any different from those times when its regular host was present. *Id.* Finally, the FEC noted that there was no evidence that Dornan was invited to host in order to promote his candidacy; rather, he was employed for business, not political, reasons. *Id.* at 3. Similarly, Fisher testified here that the commentary purportedly constituting "in-kind contributions" occurred during shows that involved

"commentary, editorial debate and discussion on current issues of interest to the general public." CP 1035.

In re Dornan determines the outcome of this case, and Washington's "press exemption" therefore applies. *See* RCW 42.17.020(15)(b)(iv). The statements by Wilbur and Carlson are the same kind of commentary on political topics and interaction with callers discussed in *In re Dornan* and fall squarely within the exemption for "commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public."

e. The Municipalities' Actions Were Not Narrowly Tailored Because They Were Based on Vague Standards

The Municipalities' actions cannot survive strict scrutiny because they were unconstitutionally vague.

i. Vague Standards are Unconstitutional

Governmental actions are void for vagueness if the standard to be applied is "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 629, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). Therefore, the government must articulate standards with "a reasonable degree of clarity" to reduce the risk of

arbitrary enforcement and allow individuals to conform their behavior to the requirements of the law. *Roberts,* 468 U.S. at 629. Every American is entitled to be informed as to what the government commands or forbids. *Cramp v. Bd. of Pub. Instruction of Orange County,* 368 U.S. 278, 287, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961). "Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula." *Id.* (quotation marks omitted). When applied to free speech, "[t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). When a governmental action touches protected expression, courts "will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression." *Button,* 371 U.S. at 432.

ii. The Standards Employed Here Were Unconstitutionally Vague

Far from being drawn with narrow specificity, the Municipalities' standards here were so vague that even they could not consistently apply them: neither the Municipalities nor the court were able to consistently identify who was making the contributions NNGT was supposed to report.

The PI Order found that Fisher made the contributions, and the Municipalities agreed that NNGT substantially complied with the order by reporting the contributions from Fisher. However, the Final Order found that Wilbur and Carlson made the contributions, and the Municipalities agreed with this too. To confuse the matter even more, the Final Order incorporated the PI Order. This is not so much vague as incomprehensible.

The Municipalities' inability to say who was providing these in-kind contributions, its inability to specify what constituted "political advertising," and its conclusions regarding the role the hosts played in the campaign based on the use of a pronoun, suggest that the standards for determining when the media makes an in-kind contribution, when speech crosses the line from commentary to "political advertising," and how to identify who makes a contribution, were so cryptic that persons of common intelligence could not consistently apply them. Indeed, the fact that the trial court changed its mind – during the hearing on entry of judgment – as to who provided these contributions, and the fact that the Municipalities agreed with this radical departure from their theory of the case, demonstrates that the "standards" were, in a word, nonexistent.

Even if one were to discern who made the contributions at issue, this does little to provide the necessary level of specificity. The

Municipalities never articulated any standards for how the campaign is to determine (i) when a media figure is a "principal," "officer," or "agent" of the campaign, (ii) when such a figure's commentary crosses the line from "editorial commentary" to "political advertising," and (iii) the dollar value of such commentary. Because neither the trial court nor the Municipalities could tell NNGT how to apply the "standards" imposed, NNGT was forced to guess what was reportable and the value to assign these "in-kind contributions." That they appear to have guessed correctly, at least in the Municipalities' eyes, does not make the standards any less mysterious.

iii. The Lack of Standards Resulted in Bad Faith, Harassing Prosecution

While the vagueness inquiry addresses compliance, "the more important aspect of the vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (internal quotations and citation omitted). Government standards must be "sufficient[ly] definite[]" so as to "not encourage arbitrary and discriminatory enforcement." *Id.* at 357. Murky standards "furnish[] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 360 (internal quotation marks

and citations omitted). In determining whether prosecution is commenced in bad faith or to harass, courts look to whether the prosecution "was . . . in retaliation for the defendant's exercise of constitutional rights." *Phelps v. Hamilton,* 59 F.3d 1058, 1065 (10th Cir. 1995). The inquiry is whether there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive animus towards the defendant because he exercised his specific legal right. *U.S. v. P.H.E., Inc.*, 965 F.2d 848, 858 (10th Cir. 1992).

"[E]xperience teaches us that prosecutors too are human." *Baggett v. Bullitt,* 377 U.S. 360, 373, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964). The record is clear that the Municipalities sued NNGT to interfere with its efforts to pass I-912. It coordinated the case with KWR, hired a member of KWR to prosecute it, issued press releases with KWR, and announced the case as derived from their desire for tax revenue. The Municipalities' abandonment of their theory of the case at the last minute in order to obtain a judgment confirms that they sought only to harass NNGT — not faithfully enforce the FCPA. Good faith prosecution does not play "whack-a-mole" with the law – when a defendant knocks down one theory, a new one does not just pop up, especially as judgment is being entered. Here, there was no other motivation except to interfere with NNGT's exercise of its rights.

f. The Municipalities' Actions Were Not Narrowly Tailored and Created a Chilling Effect

As noted above, vague governmental standards create an "obvious chilling effect on free speech." *Reno,* 521 U.S. at 845. "Threats of coerced silence chill uninhibited political debate and undermine the very purpose of the First Amendment." *State ex rel. Public Disclosure Comm'n v. 119 Vote No! Committee*, 135 Wn.2d 618, 626, 957 P.2d 691 (1998).

Read logically, RCW 42.17.105(8) required Fisher to stop discussing I-912 in the three weeks prior to the general election. The trial court, the Municipalities, and the PDC all sought to avoid this outcome by finding that no one intended to prosecute anyone for failure to disclose anything after May 31, 2005. In that regard, the trial court found that NNGT "raised many theoretical problems that could have resulted from a case such as this," but held that its decision was limited in application. CP 1497. However, these are anything but "theoretical problems." As the United States Supreme Court has recognized, these problems create standards so vague and broad that parties will censor themselves in or to avoid coming under governmental scrutiny in the future. In short, they are precisely what the First Amendment guards against. *See Laird v. Tatum,* 408 U.S. 1, 11, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of

governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.").

Noticeably missing from the trial court's decision, the Municipalities' pleadings, or Rippie's letter is any consideration of why on-air discussions by Wilbur and Carlson before May 31, 2005 constituted "in-kind contributions," while discussions occurring after did not. Did Wilbur and Carlson cease to be "officers and agents" of the campaign on May 31? If so, why? The Municipalities produced no evidence that any relationship between Wilbur and Carlson and the campaign changed or that there was no need for NNGT to report such "in-kind contributions" in the future. As noted above, the Municipalities' repeated statements of their fidelity to disclosure ring particularly hollow, given that disclosure would seem to be more imperative three weeks before the general election, when people begin actually paying attention to campaigns.

The Municipalities' attempt to slough off the free speech concerns of both Fisher and NNGT – by arguing that they never intended to prosecute for contributions after May 31 – was insufficient to remove the chilling effect of their actions. Such beneficent gestures do not solve the constitutional problems raised when the government makes speech illegal. The Supreme Court "has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar" in

finding that government action chills First Amendment activity. *Button,* 371 U.S. at 432 (emphasis added). The Court has found that "[i]t makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." *Id.* at 435.

The Municipalities created a situation where NNGT and Fisher were uncertain whether the exercise of core First Amendment rights would violate the law. When both parties pointed this out, the Municipalities replied by saying, in effect, "we won't curtail your rights as much as we could." This promise was meaningless under the First Amendment.

3. The Municipalities' Actions Violated the Independent Protections of the Washington Constitution

They Municipalities also violated independent protections of the Washington Constitution. In deciding whether the state constitution provides broader rights than the federal, this Court examines the state guarantees in light of the criteria outlined in *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986). *State v. Foster,* 135 Wn.2d 441, 454, 957 P.2d 712 (1998). This Court has already determined that the state constitution provides broader protections than the federal; the issue is whether such protections apply in this specific context. *Ino Ino, Inc. v. City of Bellevue,* 132 Wn.2d 103, 115, 937 P.2d 154 (1997).

The language of article I, section 5. "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Wash. Const. art. I, § 5. This Court has held that the broad language of article I, section 5 justifies a more protective standard when evaluating restrictions on political speech. *Collier,* 121 Wn.2d at 747-48.

Differences in text. This Court has found that the differences between the federal and state provisions justify an independent interpretation for political speech. *Ino Ino,* 132 Wn.2d at 118.

State constitutional and common law history. The Constitutional Convention adopted the most protective speech provision proposed. *Id.* at 120. This suggests that the Framers wished to provide independent protections for political speech. *See Collier,* 121 Wn.2d at 748.

Preexisting state law. This factor looks to state cases and statutes from the time of the constitution's ratification. *Ino Ino,* 132 Wn.2d at 120. NNGT has searched for, but has been unable to find, any statutes or cases from the late 19th century holding that advocacy by the press lessened the press's constitutional protections. There were no disclosure laws in 1889 and the Framers would not have viewed the partisanship of the media as a basis for its regulation because nearly all media in 1889 was partisan.

When the Framers wrote article I, section 5, the news media was controlled by partisan organizations. "During this period, there was no

distinction between news coverage and editorial opinion. Commentary was interspersed throughout news stories of the day because partisan advocacy was the clear goal." Darrell M. West, *The Rise and Fall of the Media Establishment* 11 (2001). The Framers would have assumed the media to be partisan given their role as "purposeful actors in the political process, linking parties, voters, and the government together, and pursuing specific political goals." Jeffrey L. Pasley, *"The Tyranny of Printers": Newspaper Politics in the Early American Republic* 3 (2001). Washington newspapers were often created for the purpose of pushing an agenda, political party, or cause, including the passage of the 1889 constitution. *See Washington State Constitutional Convention 1889, Contemporary Newspaper Articles* (1999) (excerpts attached in Appendix to this brief); Wilfred J. Airey, *A History of the Constitution and Government of Washington Territory* 36, 438 (1945) (unpublished Ph.D. dissertation, University of Washington) (on file with University of Washington Library). Statements of partisanship did not appear on the editorial page – this was how newspapers in 1889 reported the <u>news</u>. They urged politicians, legislators, and the people to take political action, as Wilbur and Carlson do today. The Framers would have found the use of government power to coerce objectivity incomprehensible and the lack of any statutes or cases confirms that article I, section 5 does not permit it.

Structural differences. This "supports an independent state constitutional analysis in every case." *Foster*, 135 Wn.2d at 458.

Particular state or local concern. As noted above, the Washington Constitution is particularly protective of political speech and Washington law exempts campaigns from reporting the kinds of commentary at issue.

Putting these pieces together, it is clear that article I, section 5 provides independent protections for political speech and the independence of the press. Because the United States Constitution mandates that the Municipalities' action be subject to "strict scrutiny," the only greater protection available would be for this Court to find the governmental actions at issue here are *per se* unconstitutional and not subject to any balancing test. NNGT urges this Court to adopt such an approach and vacate the trial court's decision as *per se* unconstitutional.

C. The Municipalities' Prosecution of NNGT Violated Constitutional Guarantees of Due Process

By hiring a member of KWR personally interested in the outcome of the case, the Municipalities inserted into a government prosecution a private party with no incentive to observe NNGT's constitutional rights. While prosecutors need not be neutral and detached, a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision

and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980). Thus, courts have found that "serious due process implications arise when the investigator and prosecutor have a personal financial interest in the outcome of the proceedings." *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339, 1349 (Okla. 1996); *see also Cantrell v. Commonwealth*, 329 S.E.2d 22, 26-27 (Va. 1985). This is because a prosecutor's obligation is to see that justice is done, and part of that consideration is an obligation to make sure that a defendant's rights are scrupulously preserved. *Bhd. of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969).

The Municipalities "injected a personal interest, financial or otherwise" by hiring Foster. It was a member of, and contributor to, KWR, and stood to gain substantial legal fees if I-912 failed. In addition to its political and financial interests in defeating I-912, Foster also undertook this case without charging the Municipalities, thus making this prosecution a contingency fee suit in which the firm would not receive any compensation unless it succeeded in achieving attorneys' fees for successfully prosecuting its claim. *See* RCW 42.17.400(5). And by abandoning its theory of the case in the final minutes to achieve victory, Foster demonstrated that victory was all it cared about.

D. The Trial Court Erred in Dismissing NNGT's Faithful Execution Clause Claim

In its counterclaims, NNGT alleged that the Municipalities' action violated article III, section 5 of the Washington Constitution, which requires the Executive to "see that the laws are faithfully executed." CP 429. The trial court's decision disposed of the claim in two sentences, with no citation to legal authority. CP 1500. Its Final Order added a citation to *Fritz*, but no explanation of its applicability. CP 1524.

Fritz has no bearing on this claim because it concerned a facial challenge to the FCPA's private enforcement provision on "due process" — not faithful execution — grounds. *Fritz*, 83 Wn.2d at 311. Although the opinion speaks about the "constitutionality" of "qui tam" provisions, it does not address the Executive's authority to "see that the laws are faithfully executed." Wash. Const. art. III, § 5. On the other hand, the Supreme Court has raised the possibility that such provisions violate the federal "faithful execution" command. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). In fact, at least three current Justices have expressed reservations about such provisions. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 197, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (Kennedy, J., concurring); *id.* at 209-10

(Scalia, J., dissenting, with Thomas, J., joining). When an area of the law involved is developing, courts should not dismiss an action on the pleadings, *see Bravo,* 125 Wn.2d at 751, and the trial court erred in dismissing this claim.

CONCLUSION

This Court should decline the Municipalities' invitation to be the first appellate court in the nation to permit campaign finance laws to be used to monitor editorial commentary and require that such commentary be treated as a contribution. This Court should also decline the Municipalities' invitation to provide partisan prosecutors with a tool to harass political opponents. NNGT respectfully requests that this Court (i) hold that the preliminary injunction was wrongfully issued, violated NNGT's constitutional rights, and was void *ab initio*; (ii) vacate the trial court's judgment; (iii) hold that the Municipalities' enforcement action violated NNGT's constitutional rights; and (iv) remand for a determination of the extent of such violations.

RESPECTFULLY submitted this 19th day of January 2006.

INSTITUTE FOR JUSTICE
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APPENDIX

Including:

Relevant Statutes and Rules

Excerpts from *Washington State Constitutional Convention 1889, Contemporary Newspaper Articles* (William S. Hein & Co., Inc. 1999)

RCW 42.17.020(15)(b)

(b) "Contribution" does not include:

. . .

(iv) A news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political committee . . . .

RCW 42.17.105(8)

It is a violation of this chapter for any person to make, or for any candidate or political committee to accept from any one person, contributions reportable under RCW 42.17.090 in the aggregate exceeding fifty thousand dollars for any campaign for statewide office or exceeding five thousand dollars for any other campaign subject to the provisions of this chapter within twenty-one days of a general election. This subsection does not apply to contributions made by, or accepted from, a bona fide political party as defined in this chapter, excluding the county central committee or legislative district committee.

RCW 42.17.410

Any action brought under the provisions of this chapter must be commenced within five years after the date when the violation occurred.

WAC 390-05-290

Political advertising does not include letters to the editor, news or feature articles, editorial comment or replies thereto in a regularly published newspaper, periodical, or on a radio or television broadcast where payment for the printed space or broadcast time is not normally required.

WASHINGTON STATE
CONSTITUTIONAL CONVENTION
1889

CONTEMPORARY NEWSPAPER ARTICLES

COMPILED 1998

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To be used with:

THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, WITH ANALYTICAL INDEX

William S. Hein & Co., Inc.
Buffalo, New York
1999

was a bilk, and so gauzy a one that even the hotels required him to pay in advance. On arriving at St. Paul he wrote up a dirty thing at this city which was published by a paper styled the "St. Paul Journal of Commerce." Last week in accordance with the usual style and animus of the thing who runs "it," the Centralia News republished the article. How naturally hogs wallow in the same mire.

Republicans in the Constitutional Convention now in session at Olympia should bear in mind that they are in the majority, and in a measure will be held responsible for the Constitution. They should also remember that it has been through the words and doctrines of and laws made by Republicans that these United States have been brought to their present power and high standing in the Nations of the world and the hearts of the happiest people on earth. Remembering that they should not be afraid to insist that the spirit of Republicanism should pervade the new document.

Missouri has passed a law prohibiting the playing of any kind of games of chance or gambling in saloons or drinking places. This is one of the most sensible laws for lessening the drinking habit, and will do away with one of the most objectionable features of saloons. Washington Territory prohibitionists would do a good work for temperance if they would devise and ask the legislature to pass just such a law.

In a class of nine graduates from

UNCLAIMED LETTERS.

List of letters remaining u
claimed in the postoffice at Cheha
on July 1st 1889.

Brown, J W	Brown, J C
Black, Abraham	Comacher, Pet
Clark, Susie	Compton W P
Dungan, Wm M	Dolph, Wm
Dunston, E	Dickman, Chas
Emley, S C Mrs	Erickson, J E
Franklin, J B	Gosnell Wesley
Harlan, J G	Hagelberry A
Horner, Peter J	Johnson Ed
Johnson, Mrs H L	Kaufman Mrs (
Leach, Chas E	Lakim, Leroy
Loiss, Ernest	McGuire, Jas
Park, J S	Petterson, Axel
Redahleur, R	Suarken, Fred
Stocking, W C	Shahom Shaia
Steele, Geo B	Shire, Tomas
Shelly, Dick	Wright, Mr & M
Wilson, Miss M	Web, D A
	Sherd Mrs

Persons calling for any of t
above letters please say advertise
W. H. Mossman P. M.

NOTICE.

Parties who have taken tile fro
my pile during the year of 18
will please call and render a sta
ement and settle.

J. H. Loxo,

Chehalis, June 21, 1889.

THE CHEHALIS BEE.

CHEHALIS, W. T., AUGUST 2, 1889.

MORE TALK THAN WORK.

The constitutional convention at Olympia seems to be doing a great deal of talking for the actual work performed, and occasionally displays the common weaknesses of humanity. The report of the committee on preamble and bill of rights created a heated discussion by omitting direct reference to God, and several members showed how foolish they could be about their hobbies. Just as though it could make any difference to God or the people whether the constituton affirmed our thankfulness and religious belief or not. "God-in-the-Constitution" will neither confirm believers, convert infidels, nor give us increased favor with the Almighty. Still there was nothing in the proposed amendment that could have offended the most ardent unbeliever and the dissenters might have left themselves in a more creditable light by keeping still.

After settling the preamble to the satisfaction of those who would acknowledge God therein the next bone of contention was the military committee's report. Opponents of the report were afraid that the state would be in danger of a "military despotism" or "military aristocracy" and defeated it. Some of them got mad and said harsh things which were afterwards apologized for, and things went on smoothly.

It really looks as if the convention was endeavoring to leave as little work as possible for the legislature and will offer a long and cumbersome constitution. In this they are making a great mistake. All such matters as the governing and maintainence of the militia should be left to the legislature which should even be given power to decide if the state wants such a superfluity. A clause was adopted making it compulsory on the legislature to maintain a home for honorably discharged and disabled Union soldiers. Of all things this should have been left to the legislature.

In the language of the day, THE BEE asks the delegates to "come off the roof." They are not in the place for political work, and should get down to making a constitution for the people.

Chehalis Bee, August 2, 1889, p. 2, col. 1

We can cheerfully sanction the proposition to abolish fees and emoluments of public officers other than fixed salaries. We believe the system of fees entails much unnecessary expense and is incentive of much that is questionable in the conduct of officials. Every official in the state of Washington, from governor down to justice of the peace, should receive a fixed salary and, as the laborer is worthy of his hire, we believe the salaries should be reasonably liberal. Men love honor and fame as well perhaps as good living. Some men there are who have even a higher appreciation of distinction. At the same time these men in all probability have others dependent upon them to whom they owe more than a mere living and an honorable name. It is the duty of every man of family to give, if possible, to those dependent upon him every possible advantage in the way of refined education and travel. The higher the position he himself obtains the greater obligation he owes to his family for they, too, should be fitted to continue so far as possible in the same sphere and amid similar surroundings. This cannot be possible, where the salary is niggardly, unless the incumbent of a position consists to an unworthy use of his power. Men with the capacity to fill such positions acceptably are endowed with a capacity that will insure success in private life. They therefore would not be justified in accepting a public office where the salary does not equal or exceed the income they derive from the pursuit of their profession or occupation. Nor should they be expected to do so. Neither is it a wise public policy to insist on their doing so. The salaries of public officers of Great Britain are perhaps the most liberal of any country; and the result is found in the marked absence of scandals that have disgraced the official life of the United States for the last twenty-odd years. The salary list proposed for this state, if it should be adopted by the Constitutional Convention, would although apparently large, prove less expensive and far more satisfactory than the old system of small salaries and large and numerous fees. It will insure the competition of competent men for the positions of trust and their exemption from temptation.

Chehalis Nugget, July 19, 1889, p. 2, col. 2

CONSTITUTIONAL CONVENTION.

Notes From Our Special Correspondent.

OLYMPIA, July 6, 1889.

I regret to find that my endeavors to furnish the readers of the ARGUS with information regarding the constitutional convention, up to this time, has been made futile by the poor ability on the part of the officials at Olympia. A letter which I mailed on the 5th of July you inform me has not yet reached the ARGUS. President Harrison's attention should be directed to the fact that there are a number of Democratic postmasters still in office, not only this, but should be informed of their inefficiency. Delegate Allen is unmindful of his duties if he does not at once begin the weeding out of the Democratic postmasters, if they are not inefficient they are, at least inattentive.

The second day's proceedings were marked by an act, which was most unwise and unprecedented. A gentleman by the name of Waltman presented a certificate signed by the senior auditor of his district; armed with this document he presented himself for admission as a delegate. The official returns in the office of the territorial secretary proved conclusively that a person by the name of Travis had a majority of ten votes. Because Travis was not present, and Waltman was, the latter is seated. This action is the most unheard of flagrant disregard of the peoples' wishes that ever came to our notice. Secretary White cannot issue a certificate to Waltman, and neither can he issue a warrant to him for his pay. Should the convention act in all matters, as they have in this, God pity the constitution that they will frame.

Chief Justice Hanford had the distinguished honor of swearing in the solons of the convention. The entire people may have the pleasure of swearing them out before the convention adjourns.

The lack of enthusiasm displayed by the convention on the election of Hoyt, was so marked that it was a subject of general comment. Hoyt is not the presiding officer one would expect, judging from the laudatory notices that have appeared in the papers of this territory. He is given too much to explaining his rulings. There is no snap about him, and he lacks the ability to expedite business.

This early in the convention's proceedings has it been demonstrated who will be the working members. Upon the Democratic side Griffiths stands out prominently, and though Warner is looked upon as the leader of that side, yet he will be shadowed by his colleague from Spokane. Turner, beyond doubt, is the recognized leader of the Republican forces. No abler man could have been selected. He is eminent as a lawyer, and as a politician has no superior in the territory. In his leadership he will be ably seconded by Minor.

The delegates from Jefferson county will not be second in ability to any delegation in the convention. Weir has already been recognized as one of the leading members of the convention by his election as temporary secretary, and his appointment as a member of the committee on rules. Jones will be one of the workers of the convention, and though he may not be often heard addressing the convention, will do good and effective work in the committee room. The affairs of this section could not be intrusted to a more capable or more worthy person than to Geo. H. Jones. The genial Dr. Willison will, in his quiet way, accomplish much good.

Some of the members have already been nicknamed. Griffiths, of Spokane, is known as "running at the mouth," on account of his loquaciousness. Buchanan, of Adams, is "early worker," because he desires the convention to begin its labors early in the morning. Jones is known as "one of the trio," because he was one of three delegates who failed to answer to their names on the first day. Dunbar is known as "Siney De A."

LEDDY.

Puget Sound Weekly Argus, July 11, 1889, p. 4, col. 3

The enabling act for Washington provides that in case the people refuse to adopt the constitution as framed by the convention that body shall re-convene and re consider their action. This is a fortunate provision because it will embolden many to vote their sentiments unhampered by fear that the state movement will fail. The constitution should cover all the grounds, as the people wish, rather than be adopted as a dernier resort. Let the convention do its best and then do it over again if not satisfactory, and let the voters explicitly show by their votes what their wishes are. After the convention adjourns its work will be thoroughly canvassed by the papers, and by orators on the stump. The people will take interest enough to be well informed, and Washington should, under these circumstances, have as good a constitution as human ability can frame.

Puget Sound Weekly Argus, July 18, 1889, p. 2, col. 2

The Weekly Argus.

CONSTITUTIONAL CONVENTION.

OLYMPIA, July 10, 1889.

The weather to-day has been extremely warm and in consequence the delegates have not been over anxious to labor. There may be many places warmer than Olympia but I have not been able to find them. A newspaper that has not the fear of the Lord, says, that Olympia is at the head of navigation; I would amend and say that it is at the head of a funeral.

Many of the delegates have long faces on them since Hoyt announced the committees. There are a number of important committees, but the major portion are of little importance. Of course all desired to be put on the committees that are to deal with vital questions. According to our judgment, the committees were made up without much consideration as to ability. One of the most important committees is that of State, School and Granted Lands. An examination of the merits of the members leads me to but one conclusion, and that, that with but one or two exceptions, the committee is a very weak one indeed. This committee will have to deal with the tide-land question and should have been composed of the brightest minds in the convention. I regret that Jefferson county is not represented on this committee. Port Townsend is deeply interested in the proper solution of this vexed question. When the committee was first formed, Pierce county had no representative, but made known her dissatisfaction and at once Hoyt decided to request the convention to increase the membership, which was done. The delegation from the fifteenth district should also have recognizition upon this committee, for she is the third city on the sound and her interests in this regard are as important, relatively speaking, as those of Seattle and Tacoma. The committee seems to have been made up for the benefit of Seattle.

The committee which will have to form an article relating to woman's suffrage is composed of men who are strongly antagonistic to the question. The prevailing opinion is that the convention will present a separate clause governing this question. Such must be their action if they hope to see the constitution adopted by the people, for all concede that if the constitution should embody within it a clause governing woman's suffrage and prohibition that it would be defeated.

The woman's suffragists opened fire upon the convention to-day, when a proposition was received from Yelm, Thurston county. The cold water regiment also came to the front, and petitions were received from Watcom and Pierce counties asking for prohibition. President Hoyt was non-plussed as to the proper committee to which to refer these petitions. Some suggested that the petitions should go to the committee on water and water rights.

The resolution introduced by Kinnear upon the question of trusts, yesterday was referred back from the committee with a suggestion that it be adopted. There was, however, a majority and a minority report. The minority report was adopted. As some of your readers may not have seen the original resolution, I append a copy of the preamble:

WHEREAS, The formation of trusts and combinations for the purpose of fixing the price and regulating the production of the various articles of commerce is one of the existing and growing evils of the day, preventing fair and honest competition in the various industries in which our people are engaged and certain to retard the new state in its onward march to commercial greatness; be it therefore

RESOLVED, That a proposition has been presented to the convention to embody in the constitution a clause against the ownership of lands by aliens. Also against counties subsidizing railroads and other corporations. Upon the latter proposition I have not had an opportunity of conversing with all the members of the delegation; Dr. Willison, however, is opposed to it.

Very little was accomplished to-day. Early in the session the convention got into a snarl about one of its rules. Under the present rules members have to present their suggestions to the convention and they have to be read twice before they are referred to committees. To-day a large number of suggestions

Puget Sound Weekly Argus, July 18, 1889, p. 3, cols. 1-3

were offered and some so long that the convention awoke to the fact, that if the rule was continued in force, the time of the convention would be consumed in having read suggestions. At last as a means of getting out of the tangle, the convention adjourned.

A new rule will be made, so that hereafter all suggestions will be referred to the proper committees without being read. A number of the delegates are opposed to this method, as they claim that they cannot make any record; for this new rule precludes the possibility of their suggestions being known in the committee room. The record-makers will endeavor to defeat the adoption of the new rule.

Delegate Weir is on two committees—Executive Department and Pardoning Power; Harbors, Tidewater and Navigable Streams. Of the first named committee he is chairman. Delegate Jones is appointed upon three committees—Judicial Department; Homestead and Property Exemptions; Engraving and Enrolled Bills. The first committee is an important one. Beyond doubt there should be a resident judge at Port Townsend for the counties of Clallam, San Juan and Jefferson. Being a member of the judicial committee, Mr Jones can secure for us a judge for the counties named. Mr. Jones feels confident that he can accomplish this matter. By having a judge who will sit during the greater part of the year, the litigants can have their suits determined without much unnecessary delay. Dr. Willison is on the committees of Apportionment County, city and Township Organization; Public Health and State Medicine. Of the latter committee he is chairman.

The following card was sent to the desks of the members of the constitutional convention. The majority of them were thrown into the waste basket.

TO THE HONORABLE MEMBERS OF THE CONVENTION.

Please indicate your preference regarding Prohibition by writing "yes" or "no" opposite one of the following questions and sign your name and oblige

Yours Truly,
E. B. SUTTON.
Gen'l Ag't State Temperance Alliance.

Are you in favor of having Prohibition placed on the constitution?

If not, are you in favor of submitting it as a separate clause to be voted on by the people?

Sign name here:

OLYMPIA, July 11, 1889.

The convention is gradually systematizing its work, so that it can better transact the business that it has in hand. One cannot help remarking the lack of a well defined place for the conducting of the business of the convention. No one seems to have thought of presenting any means for the proper organization of the body. The convention elected officers without a formal resolution as to the number or the names of the same. This want of a well settled policy is, and will continue to retard the progress of the convention. The convention puts me in mind of a man in a dark cellar hunting after, he does not know what.

The convention may succeed in evolving a constitution out of this chaos, but the character of the same, I would not care to be the judge of. A majority of the members are men of small calibre and as fit to frame a constitution for the great state of Washington as a lot of crows.

The antagonists of woman's suffrage are now beginning to train their guns upon the convention and fired their first shot to-day. A remonstrance against woman's suffrage was introduced to-day by Delegate Henry, of Thurston county. I am informed that this is but the beginning of the remonstrances.

A petition was presented asking the convention to consider an article governing the traffic of liquor. With this petition was also an affidavit stating that a petition signed by 85,000 persons residents of Washington and which it was intended should be presented to the convention, had been destroyed in the Seattle fire. Members of the Prohibition party are continually arriving and will soon begin to work upon the members, but in this as upon the woman's suffrage questions, their efforts will be of no avail.

The committee upon elections and elective rights, to whom will be referred the question of woman's suffrage have decided to appoint an evening for the purpose of hearing arguments upon that subject. One of the committe remarked to your correspondent, that that was all the good it would do them.

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One of the most important committees is that of "appointment and representation." To this committee is assigned the duty of determining the number of persons that shall constitute the legislative assembly of Wasington. There is a diversity of opinion as to what should be the number, but nearly all are in favor of giving a representative to each county. The apportionment committee reported in favor of seventy members for the house and thirty-five for the Senate. This report lead to a heated debate. Henry, of Thurston, opposed the making of a constitution by "piece-meal." He said let the committee report an article for the constitution and not encumber the time of the convention by suggestions. The committee further suggested that the house should have never less than sixy-four nor more than one hundred members and that the senate shall consist of half the members mentioned. Turner, of Spokane, favored making the senate to be composed of not less than thirty-three and not more than fifty members; the house to consist of not less than one hundred nor more than one hundred and fifty. Nearly every member of the convention had a number to suggest. The committee of the whole rose without determining the matter.

Many important propositions were presented, among them one for the appointing of land commissioners and railroad commissioners. There are measures that deserve the undivided attention of the convention. The proposition for railroad commissioners also empowers the legislature to regulate the rate of mileage which railroads shall charge to passengers. This should commend itself to all well-thinking people. No doubt the mileage charged in Washington is exhorbitant. For example: The distance from Olympia to Tenino is fifteen miles and the railroad has the audacity to charge $1—nearly seven cents a mile.

The land commissioners are to be three in number; the railroad the same. For their services the latter will receive a salary of $2,500. The following are the more prominent propositions presented to the convention: The legislature shall have the power to enact a mechanics' lein law and also a law to protect persons employed in mines and factories; no money shall be paid from the state treasurer for the benefit of any sectarian institution; land commissioners for each county; the state to have the right of eminent domain over all tide lands.

The question of permitting counties to bond their credit for railroad improvements, will lead to a fervid discussion when it comes up before the convention. Delegate Jones and Willison are opposed to jeopardizing the credit of the counties, by allowing them to give bonds to railroads or other corporations. With delegate Weir I have not had any conversation upon this matter. Walla Walla county will have a strong lobby here in favor of counties bonding themselves for railroad improvements.

OLYMPIA, July 12, '89.

Many are considering the date at which the convention will conclude its labors. Some are of the opinion that at the present rate of proceeding it will be six weeks before the president's gavel adjourns the convention sine die. The convention is destined to be in session much longer than was first anticipated. Much of the delay is occasioned by members who desire to be heard upon every trivial proposition that is presented to the convention.

All the delegates have a political scheme and in consequence are endeavoring to appear upon the record. One would imagine that every delegate was expecting to receive the nomination for governor, senator, representative, judge or some state office, from the way in which he poses. Doubtless the delegates believe in the concentrated essence of all the wisdom in the state [illegible]

A gentleman prominent in the politics of this state, remarked to your correspondent, that this convention would be the funeral of many of its members. In all our experience we have never witnessed so much demagoguery as is displayed in this convention. Many of the delegates are members, not because they desire to advance their political aspirations; and have as much patriotism for the state of Washington as an Irishman has for the English flag.

Propositions favoring woman's suffrage and prohibition continue to be

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presented. Members in order to shirk the responsibility, preface their presentation by "we are requested." This phrase is getting to be a "chestnut" and causes a rippie of laughter to pervade the chamber. To day a proposition signed by 494 men and 414 women was presented to the convention and referred to the committee on elections and elective rights, where I hope it will sleep the sleep that knows no waking.

Mr. Jones, of Jefferson county, presented a proposition against the legislature granting divorce. If our readers will consider the question, they will see that this is a wise provision and should be included in the constitution. Some of the legislatures of the south have the power to grant divorces and also the parliaments of Canada.

Matters of this kind, if left to the legislature, would cause the interested parties to lobby the case through. The real facts would, not be examined into, and the divorce would be granted on account of the influence brought to bear upon the members. Divorce cases are purely personal and the general rights of the public should not be interfered with, or the time of the legislature taken up with such matters.

Mr. Griffiths, of Spokane, made a bid for the workingman's vote, by introducing a proposition that eight hours shall constitute a day's labor. How the convention is going to deal with this question is beyond my ken. The only way out of the dilemma is to squelch it in the committee. This is a fair sample of demagoguery.

Mr. Eshelman, of Klickitat, has introduced a proposition for separate articles for woman's suffrage and prohibition. If the convention is wise they will adopt the suggestion of a separate clause for there matters in the constitution. A proposition has been presented giving women the right to vote, upon attaining the age of twenty-one, in all school matters, and to hold office relating to the same.

Mr. Weir has introduced for the consideration of the convention a proposition relating to shore lands and has given notice of his intention to discuss the same at the proper time. According to Mr. Weir's proposition the state of Washington owns all shore or tide lands by virtue of its sovereignty. That power to sell, lease, manage and control ~~these lands shall be vested in the board~~ of state land commissioners, under such legislative restrictions as to values, terms, etc., as may be hereafter enacted. The right of the public to free use of highways across such shore lands at the termination of streets, alleys and public roads shall never be obstructed. Any person occupying shore land with permanent improvements in actual use and the necessity for commerce and trade, the land having been occupied prior to Jan. 1, 1889, shall have the right to purchase the shore land so used, or so much thereof as may be necessary for the purposes of such improvements, at a valuation to be fixed by the board of land commissioners, without regard to the improvements thereon. In all sales of shore lands, other than lands occupied by permanent improvements, the owner of abutting land extending to the government meander line shall be prior right, limited by law, to purchase such shore land, as may be directly in front of the abutting land so owned.

The judiciary committee expect to report in full on Monday. They have about decided to report in favor of three judges of the supreme court at a salary of five thousand dollars. As I stated in a former letter, the committee will favor superior judges, and they will number about eighteen. The counties of Jefferson, Clallam and San Juan will be one district for judicial purposes. The salary of the superior judge will be thirty-five hundred dollars, except in the counties of Spokane, King and Pierce, where it will be four thousand.

The convention has determined to meet hereafter at 9 a. m. LEDDY.

Puget Sound Weekly Argus, July 18, 1889, p. 3, cols. 1-3

NO RAILROAD COMMISSION.

The constitutional convention has decided against incorporating a railroad commission section in the constitution, by a vote so decided as to render hopes for a future reconsideration decidedly slim. Whether the majority of the convention were moved to this action by desires for the public weal or by more questionable motives is a dubitable matter. One prominent member of the convention charged, or at least insinuated, that railroad lobbyists had something to do with it. Coming from him the statement should carry some weight.

But, suppose,—let it be taken for granted that the lobbyists had no influence whatever in Olympia, the action of the convention requires some explanation. Most of the delegates expressed themselves in favor of a railroad commission. They agreed that it had been a good thing and had been very useful in many states. What they objected to was the kind of commission the corporation committee wanted to form, and the powers proposed to give it. In order to meet their desires the section was cast aside and another substituted in its place, simply establishing a railroad commission and leaving to the legislature the settlement of its powers. The opposition then changed front. It was not merely the section as proposed by the corporation committee to which they objected, but to any provision in the constitution for a commission. It was true, they argued, a commission would be a good thing, but let the legislature attend to it. They voted as they argued, and the question of a commission was left to the legislature.

Seattle Times, August 7, 1889, p. 4, cols. 1-2

WOMEN SUFFRAGE

The Final Move of the Hon. Edward Eldridge.

Masculine Women and Feminine Men Weeping for a Lost Cause.

A Substitute for Section Two of the Tide Land Article Adopted.

Special to THE TIMES.

OLYMPIA, Aug. 15.—[Special.]—The convention met at 9 o'clock. There was no prayer.

Prosser (by request) presented a petition from "a tax-paying woman," Zerelda McCoy, praying that women be exempt from taxation until they are given the right to vote.

Joy (by request) presented a petition from Marion & Buckley, Pierce county, signed by ninety-three voters, praying for equal suffrage.

Three petitions were received by the clerk from Port Ludlow, praying for laws directing the sale of school lands, tide flats and shore lands, and that the owner or owners of land lying above and abutting upon such lands shall have prior right to purchase.

Two petitions from Port Gamble to the same effect were also read.

The article on harbors was read for the third time, and finally adopted by a vote of 49 to 21.

P. C. Sullivan then moved to reconsider the vote by which the article on elections and elective rights was defeated, and the motion was carried by a vote of 50 to 15.

A motion of J. Z. Moore to put the main question was lost.

Crowley, in order to open the article to amendment, moved that the vote by which it was passed to third reading be reconsidered. Carried by a vote of 59 to 11.

Crowley then moved to substitute the following for the section providing for the submission of a separate article on woman's suffrage.

"The following article shall be submitted separately to the electors of the territory at the time of the election held for the adoption of the constitution.

Separate article: All persons male and female of the age of twenty-one years or over, possessing the following qualifications shall be entitled to vote at all elections. The ballots of those voting in favor of the article shall read "for woman suffrage," the ballots of those voting against the article shall read "against woman suffrage." If at said election the number of ballots cast in favor of the adoption of said article exceed those cast against its adoption, then said separate article shall become a part of the constitution and shall be submitted for and take the place of the following sentence in the article on elections and elective rights:

"All male persons of the age of twenty-one years or over, possessing the following qualifications shall be entitled to vote at all elections:

This was carried by a viva voce vote.

Eldridge offered the following amendment to the substitute to be added as a priviso:

"In the event of rejection of separate article on woman's suffrage, the legislature may at any future general election submit the question to the qualified electors and if a majority of all the votes cast on that question shall be in favor of woman's suffrage it shall then take effect and become a law; lost.

Shoudy offered the following provision to section 1:

"But after the year 1895, the following additional qualification to the above shall be required:

"No person shall be allowed to vote at any election or hold any office who cannot read and write in the English language;" lost.

The article was then finally agreed upon. The president called Dyer to the chair and the consideration of the article on state school and granted lands was continued.

Seattle Times, August 15, 1889, p. 1, col. 6

Seattle Times, August 15, 1889, p. 1, col. 6

After a long debate as to the rights of riparian owners, the following substitute for section 2 was adopted:

The state of Washington, by virtue of its inherent sovereignty, is the owner of the shores of all navigable waters in the state up to and including the line of ordinary high tide in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water in all rivers and lakes, and no act of the territory of Washington or its officers or agents, and no act of any individual or corporation in pursuance of the claim of private rights shall be permitted to prejudice the state in the assertion and maintenance of such ownership.

The convention then took a recess for two hours.

STILL ANOTHER PLOT.

The Disgruntled Faction at Olympia Receives Another Black Eye.

Adjournment Taken Until Tuesday Afternoon.

Inwardness of the Scheme to Take the Appointment of Committees From Judge Hoyt.

Special From a Staff Correspondent:

OLYMPIA, July 6.—The same combination which attempted to knife Judge Hoyt yesterday asserted its influence today when the committee on rules and order reported the list of standing committees. A glance at the proceedings, if you read between the lines, will show clearly that there was an organized attempt to take the appointment of the committees out of the hands of Judge Hoyt.

The conspirators had nothing to lose and everything to gain. They wanted to be taken care of in the distribution of favors on prominent committees, and the plot to defeat Judge Hoyt for chairman was of too recent origin to be forgotten. But in this they did Judge Hoyt an injustice, I think. "He will play no favorites," as the gamblers say, and the best men will be placed on the committees where they will do the most good. Judge Turner, who led the eastern forces against Hoyt, will no doubt be made chairman of the judiciary committee. Judge Turner is a man of great ability and learning. He was Judge Hoyt's associate on the bench.

GREAT QUESTIONS FEW UNDERSTAND.

The Pierce county delegation will be prominently represented on the committees on tide and school lands, and Mr. Stiles will probably be one of the members of the judiciary committee, and also of the former, too. He and Mr. Sullivan will take a leading part in the discussion of the tide and school land question. These matters will occupy more time than anything else, and will certainly extend the time of the session for six weeks. While nearly all the delegates are interested in the tide and school land controversy, few are prepared to say how they will vote. In fact, very few understand the matter, and before they cast their vote one way or the other they want to understand the subject fully.

The convention will get down to business on Tuesday afternoon, to which time it adjourned, when the committees will be announced. Chief Clerk John J. Booge, of Spokane Falls, has arrived and will be sworn in when the convention convenes. He is a small, sharp featured man, of middle age, with a slight sprinkling of gray in his dark hair. It is openly hinted that he will be a railroad lobbyist. He was here in the interests of the railroads last session of the legislature, but his friends say that that is no evidence that he will be a lobbyist this time. His course will be watched with interest.

GENEROUS DELEGATES.

Force of habit had a humorous illustration this morning when the Rev. J. R. Thompson, chaplain of the convention, was introduced. He was president of the list territorial council, and when he mounted the platform to pray, he said: "Gentlemen, I am deeply grateful to you for electing me president of this convention." There was a general laugh, but the preacher was equal to the occasion, and said: "You see, I am so used to presiding that its natural for me to say what I did. If I am not exactly president of this convention, I preside over your spiritual affairs."

The delegates subscribed $300 to sufferers by the Ellensburgh fire in very few minutes. Banker Fairweather, of Sprague, stood in the center of the hall, and in the voice of an auctioneer called out: "Who'll give more? Who'll be the next man to come to the front?" The hat was passed around twice, and whenever a man said that he would give more if he had the money, Mr. Fairweather replied: "Don't let that trouble you. I'll lend you the money. How much do you want."

It just happened that Mr. Fairweather didn't have anything smaller than $10 bills. He acted as banker in a good cause.

Most of the delegates have left the city, some to go home on a visit to their families over Sunday, and others to vote, as in many places in the territory municipal elections are held on Monday.

W. A. GRAMER.

A SHORT SESSION.

The Convention Adjourned Till Tuesday Afternoon at 2 O'clock.

Special from a Staff Correspondent.

OLYMPIA, July 6.—The proceedings were opened with prayer for the first time, this morning, Rev. J. R. Thompson, the chaplain, officiating. He also obtained permission to arrange with the different pastors in this city to hold religious services for the convention.

H. Clothier, of Sterling, who arrived last night, presented his credentials and was seated.

Resolutions were adopted thanking J. Z. Moore, who was temporary chairman, Allen Weir, temporary secretary, and Governor Moore, Territorial Secretary White and Chief Justice Hanford, for their services to the convention.

Mr. Weir moved to elect a journal clerk and a doorkeeper. By amendment a page was included in the motion. The matter was referred to the committee to report rules. As the convention deferred the election of another page till today this matter was proceeded with, resulting in the choice of Master John F. Carrere, son of a newspaper man from Spokane Falls. An effort to elect Louis

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THE TIDE LANDS.

One of the most interesting, and certainly, one of the most important subjects for equitable adjustment and disposition, is the matter of the thousands of acres of tide lands within the boundary of the territory. So long as the territorial statutes exist no great embarrassment could ensue but when statehood comes along, the act of admissions, ipso facto, vests the title to these valuable lands in the new state subject to sale, lease or other disposal as may be provided by the fundamental law or by legislative enactment. How far the constitutional convention may seek to go in the way of legislative disposition is up to this time entirely problematical.

So much has been written and talked upon the subject, that the legal status of this class of lands is pretty generally understood by the people of the territory. The general government holds the title as trustee for the future state, without power of disposal, either by the land department or by legislative enactment.

Embracing nearly all of Puget Sound, the Pacific ocean on the western boundary and the Columbia river in its tortuous course, these lands exist in quantities unparalleled in any other state or territory. While many of them are of comparatively small value those portions within and contiguous to the commercial points in the territory are and will always be the most valuable of any others. Indeed, it is quite impossible to estimate their great value, either for purposes of commerce or revenue. Some confusion has arisen in the minds of many by confounding any supposed right of the adjoining land owner, with the rights of those who own lands upon navigable rivers or streams, and are designated and known in the law as riparian owners. The owners of property abutting upon a tide that ebbs and flows are known as littoral or shore owners. These last named persons can by no possible means known to the law acquire any legal rights in the soil between high and low water mark, except a grant from the state—not even by a federal grant. While such is unquestionably the law it cannot and will not be denied but that persons or corporations that have in good faith and for commercial or business purposes expended money and made valuable improvements upon this class of property, should be protected, and that in case of sale, lease or other disposition of the lands, preference should be given to such person or corporation, and at prices lower than to strangers or speculators, who have made no investment or improvement. The former should be favored and protected by law—the latter are entitled to but little consideration.

The revenue derivable from either sale or lease of these lands adjusted and collected upon any equitable basis would undoubtedly pay every dollar of the expenses of the state government, besides aiding largely in maintaining its eleemosynary and reformatory institutions.

Whatever power shall be delegated by convention to the legislature should be the surrounded with such limitations and conditions as shall not jeopardize the rights and revenues of the state, and at the same time do no wrong to littoral owners who have, in good faith, made valuable improvements.

Permission might be given to to the legislature, and perhaps make it its duty to create a commission of competent persons to sell or lease, or adjust any equities existing between the state and the littoral owners. In any event a subject of such magnitude requires deliberate consideration, and as it has been so much discussed its disposition will be vigilantly watched.

TACOMA MORNING GLOBE, JULY 18, P. 4, COL. 1,

VANCOUVER INDEPENDENT, AUGUST 28, 1889, P. 2, COL. 1

One of the notable men of the constitutioal convention was Judge George Turner of Spokane Falls. Of him a correspondent truly says:

The purely intelligent man of the convention who developed more ability as a debater, thinker and worker than any of his colleagues was Judge George Turner, of Spokane Falls, who had almost a national reputation from his republican leadership in Alabama before the late Presidet Arthur appointed him to the supreme bench in the Territory. He was born thirty-nine years ago in Missouri near the Iowa boundary, and when a boy, was a telegraph operator. His parents, over eighty years, are still living in Rolla, Mo. He has been in the territory six years and was on the supreme bench nearly four years. Judge Turner was chairman of the judical committee and brought in the first article for the consideration of the convention on that subject which was adopted. His capacity for work is simply enormous and his industry was exhibited in the body by his constant attendance, his unflagging interest on all subjects and the fact that he never missed a roll call, nor went back to Spokane Falls for a few days, after the calamity there which swept away his law library, books and private papers. He has made the best record of any man in the convention, and has been named in connection with the United States senatorship and as one of the supreme judges.

The Seattle *Post Intelligencer* comments as follows on the convention and the constitution.

The mistakes of the convention, we believe, lie chiefly in its failure to define the policy of the state in the matter of its vast tide land property, in its provision practically confiscating the landed property of aliens and in its failure to establish a practical plan for the control of railroads. The first of these failures, relating to the tide lands, will, we fear, result in hindrance of enterprise in many ways and in great loss to the state. The second, relative to alien land-ownership, will be corrected by the courts. The third, relative to railroads, will be a fruitful source of business damage and political corruption. These matters are, in our judgement, to be seriously regretted, but they appear only as blemishes when compared with the general excellence of the constitution. It is, in the main, broad, liberal and capable of natural and harmonious development as conditions change. It is free from any of the novelties and quackeries which social and political "reformers" have endeavored to impress upon it. It will, if accepted as it should be, and unquestionably will be, involve us in no experiments. It is entirely free, this much must be said for the Republican majority, from partisan bias. It provides a liberal state government, including a judical system of exceptional excellence. Much more might be said in its commendation, but it is before the public and must stand upon its merits. We hope it will be read by every citizen of the territory and carefully considered in all its relations before the day of election.

By provision of congress this constitution will be submitted to the people of the territory on October 1 for their acceptance as the basic law of the state to be, or for rejection. If accepted by the people it will be submitted to the president, and if approved by him he will proclaim Washington a state.

VANCOUVER INDEPENDENT, AUGUST 28, 1889, P. 2, COL. 2

The Constitution to be submitted to the people at the coming election has provided for the popular vote, namely: Woman Suffrage, Prohibition and the Permanent Location of the Seat of Government. The location of the Capital is one of vital importance to the people of the State. It appears that there will be three leading candidates, Olympia, North Yakima and Ellensburgh. Olympia has had the seat of government for a good many years and is somewhat isolated and remote from the lines of transportation present and prospective, and this to a considerable extent is true of Ellensburgh. North Yakima is centrally located and is as accessible as any town in the Territory, and it has the prospects of railroad connections which renders it extremely desirable as the seat of government. The Vancouver, Klickitat and Yakima Railroad, when completed will give Vancouver direct connection with North Yakima, and no section of the Territory is so pre-eminently intersted in the building of that road as Clarke County. We may anticipate a lively campaign for Capital honors and we fully believe that the interest of the river counties lies with North Yakima.

It is pretty well settled that neither probibition nor woman's suffrge can by any possibility become a part of the constitution to be submitted to voto in October. Since this has developed, the suffragists and prohibitionists, who are pretty much one and the same crowd, object to having them submitted to vote as separate articles. The people want them submitted however, and will have them so submitted. These questions should be settled at once, so that future legislatures can have some peace. If these questions not definitely settled now, they will come up every year as a disturbing element in all the political parties. They will be in every caucus, every convention and every legislature. Submit them to the popular vote in October along with the constitution and they will be settled for this generation at least.

VANCOUVER INDEPENDENT, JULY 24, 1889, P. 2, COL. 3

CONSTITUTIONS.

The constitution of a state is meant to be its fundamental law, and it ought to be nothing more, nothing less. It should establish an organic structure of the government, and lay down the broad fundamental rules or principles which are to control its administration, and define and restrict the domain of legislation. It should embody such safeguards as the experience of ages has proved to be necessary to protect the rights of the citizen from the invasion of the legislative or judicial power. What is essentially fundamental and, therefore, structurally permanent falls within the province of a state constitution. It should embrace only the ultimate generalizations of political experience—the principles that have stood the test of time, or which have been evolved from the errors of past experiences. There is plenty of room for the needed reforms within these lines. But there will be plenty of attempts to load down the constitutions with provisions that are purely legislative in their character, and which should be remanded to the legislature. And generally these attempts will be made on the very questions which are the least capable of being settled by any constitutional provision—questions of controversy on which parties are fiercely arrayed against each other. It is always dangerous to put themes which are the subjects of wide popular controversy into the fundamental law. The best model of a state constitution is the constitution of the United States. Its grandeur lies in its simplicity. It has stood almost unaltered for a hundred years because its authors understood the difference between the essential, the fundamental and the permanent and what is accidental, temporary and liable to change with the changing phases of public opinion.—[Pioneer Press.

WALLA WALLA WEEKLY STATESMAN, JULY 22, 1889, P. 2, COL. 1

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A CORRECT MOVE.

Seattle Press: Montana has inserted a provision in its constitution which does away with the old fogyism of the past in regard to holding witnesses in criminal cases. This new provision deals with them as though they were honest, respectable citizens, instead of treating them like murderers or felons. It is a great wrong to a man who has chanced to see a murder committed, to lock him up in prison with murderers and other prisoners because he is in a strange place or is unable to give bonds for his appearance in court as a witness in criminal prosecution. A man who is charged with having committed a criminal offense has a right to be confronted in open court by the witnesses for the prosecution, yet it is often a great hardship for the witness to have to give bonds for his appearance or be imprisoned. The provision in the Montana constitution proposes to do away with this by allowing a deposition of the witness to be taken in the presence of the prisoner and his counsel. This is an important provision, and can work no injustice to the witness or the accused. The old law has long been an injustice to witnesses, and Montana ought to be congratulated for having set it aside by a more liberal and reasonable provision.

WALLA WALLA WEEKLY STATESMAN, AUGUST 12, 1889, P. 2, COL. 1

YAKIMA HERALD, JULY 18, 1889, P. 2, COL. 1,

A PLEA FOR THE CAPITAL.

Spokane Falls *Review*, July 13t—The *Review* is in receipt of an elegantly-printed well-written pamphlet entitled: "The Capital of Washington—Reasons for Its Location at Yakima." This pamphlet is written in a spirit of fairness and makes a strong showing in favor of the claim it espouses. It contains a map displaying Yakima's central location and showing also the remarkable topographical fact that all of the passes through the mountains, by which Eastern and Western Washington are connected, converge at this point, thus making the place of necessity a railroad center if these passes are ever used for that class of thoroughfares, and they undoubtedly will be. It is perhaps not generally known that a line drawn by a scale rule from the Idaho line on the east to the Pacific on the west shows North Yakima to be the exact center to a mile. In other words, it is thus shown that from Yakima to the Idaho line the distance is just 164 miles and that from Yakima to the ocean the distance is precisely the same. But after all, the matter of a few miles is but a trifling matter and Yakima must base its claim for capital honors on more substantial grounds than this. The fact that it occupies a commanding point with reference to the great mountain gateways, making it thus accessible from all points, is a much stronger ground than exactness of distance between east and west. In this particular Yakima has a decided advantage.

The pamphlet just issued by the Yakima people is made up largely of extracts from the press of the territory. It is a noticeable feature of these extracts that they fairly represent the press of the territory, and that from the *Argus* of Port Townsend and the *Ledger* of Tacoma on the west side, the Vancouver papers on the south, the Spangle *Record* and other papers on the east and the Colville *Miner* on the north, the unanimous voice is for Yakima. These extracts present the views of their various sections and make a truly strong showing for the central city of the plains, where rolls the Yakima, and where the Yakima & Vancouver or Southern Pacific will cross the Northern Pacific on its way to Spokane Falls, and where the Union Pacific extension from Umatilla to Tacoma will intersect the latter, and where other prospective lines will converge if they ever choose to avail themselves of the Natches pass, the Cowlits pass, the Stampede and the Snoqualmie. This is a subject worthy of consideration at this time, especially when presented in courteous and genial phraseology, and in succinct and logical argument as in this neat pamphlet.

BUILD WISELY AND LIBERALLY.

The members of the constitutional convention are showing considerable fogyism in their discussions of restrictions on municipal and county indebtedness. There is some talk of granting special privileges to Walla Walla and Seattle, but that is ill-advised. The same emergencies may arise at any time and any place. The people are certainly the best judges of an indebtedness which should be incurred, and an indebtedness is especially necessary in a new and progressive country. The present population should not bear all of the burdens of improvements in which future generations will be largely the gainers. The effort to restrict is mainly due to our contiguity to Oregon and the fact that a number of the members of the convention are former Oregonians and still retain family ties and business relations throughout that state. Oregon, however, should not direct nor should we be guided by her in the building of our constitution, for a state that has builded as poorly as she has is not a suitable one to pattern after. Her laws are fossilized, the pay of her judges is so small that none but young attorneys, or old and retired ones can afford to accept the office, and as a consequence her law reports are less quoted as authority than those of most any other state. The O. R. & N. company and Portland will of course endeavor by all means in their power to have the indebtedness of our cities and counties restricted in order to prevent the building of railroads into the territory which they have looked upon as their own and which they have mulched without restraint. We have grown too great, however, to weight state or section at the dictation of town or railroad corporation and the delegates of the convention should rise superior to such influences. The people are looking for a liberal and progressive constitution and if their representatives do not provide it for them the makeshift will not be accepted at the polls.

Grateful for Our Liberties.

"We, the people of Washington, grateful to the Supreme Being for our liberties, ordain this constitution." This is the way it is agreed the big constitution shall start out. It will be observed that it doesn't undertake to commit the people to an assertion that they are grateful to the Supreme Being for the constitution. It is our "liberty" we are to be made to declare ourselves thankful for—the liberty of voting down this constitution if they get it so big we can't swallow it. In this clause, at least, the phraseology of the document is judicious and guarded. There is no blasphemy in the expression so long as no attempt is made to make the people who vote for it say they are grateful to the Supreme Being for the constitution itself. But since we are to be made "grateful to the Supreme Being for our liberties," and since we are to look to this constitution to guarantee us in our liberties, this may be a sly way of getting us to look upon this constitution as a Supreme Being. It is quite an elastic expression. But if the convention could be induced to prune down as liberally as it has in this case, all other expressions in the huge document that is being formulated and leave out all attempted legislation, the people would be grateful also to those delegates who are preparing it.—*Spokane Review.*

YAKIMA HERALD, AUGUST 8, 1889, P. 1, COL 7,

YAKIMA HERALD, AUGUST 29, 1889, P. 2, COL. 1,

LOCATION OF THE CAPITAL.

Spokane Falls *Review:* The constitutional convention has provided that the location of the state capital shall be submitted to the voters this fall. It is generally believed on the east side of the mountain range that the capital should be brought over to the central part of the territory. The present location is exceedingly unfair and inconvenient to those residing east of the mountains and is not especially convenient to many of the people on the west side. Olympia was a good place for the capital in the old days when the principal settlements were along Puget Sound and the Columbia river, but times have changed and conditions have done the same. All portions of Eastern and Western and Central Washington have become settled communities and in fairness to the people of all quarters it is now quite generally conceded that the seat of government of the new state should be located at some point in Central Washington.

In an interview published in the *Review* of to-day, Mr. W. J. Milroy, a citizen of Yakima, presents the advantages of that place over its competitors, and gives what must be conceded to be strong reasons why the people of all eastern Washington should unite their votes in its favor. These reasons are based mainly upon the peculiar topography of the country, which makes Yakima the point most easily reached from the northern, southern and eastern parts of the state, and equally as accessible as any other place from the west side. The argument is that people coming to central Washington from Vancouver and all of the southern counties must come to Yakima by way of the Vancouver & Yakima railroad, as there is only one pass through the mountains in that direction; and that if the Southern Pacific or any other line is ever built from Portland to Spokane Falls, as now seems probable, this road would make a direct route to Yakima from all the northern and northeastern counties. The Northern Pacific, passing through, affords direct connection from Walla Walla, Columbia and Whitman, and should any road be built through the Natcheez pass to Gray's Harbor or Puget Sound, it must enter the pass by the Natcheez river, the mouth of which is within a mile of Yakima.

The fact that Yakima is beautifully laid out, with a great profusion of shade trees and streams of water running down each street; that it is in the center of a valley that is easily approached from all directions, and is blessed with a good climate, combine in making it certainly the best point in the territory for the seat of state government. Ellensburgh and Pasco are competitors, but while Pasco is too far to the southeast, Ellensburgh is too far up in the mountains and too inaccessible, as well as too notoriously windy and cold. These are advantages and disadvantages that will bear investigation and should certainly be frankly considered in this connection. The vote of Eastern Washington should be considered, as far as possible, upon the best point, for we certainly want the capital of the state made easier of access than the territorial capital is to this section. It is now a journey more than equal to a trip to Portland to go from Eastern Washington to Olympia. Considering that the supreme court, the legislature, and other state affairs will call our citizens and their representatives often to the seat of government, it becomes a matter of much importance to have the capital placed at this more convenient point.

DECLARATION OF SERVICE

I, Charity Osborn, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On January 19, 2006, I personally served a true copy of the foregoing OPENING BRIEF OF APPELLANTS, upon the following:

P. Stephen DiJulio
Michael K. Vaska
David S. Snyder
Ramsey Ramerman
Foster Pepper & Shefelman PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101

I also caused to be served a true copy of the same document upon:

□ ABC/Legal Messenger:

David C. Lundsgaard
Graham & Dunn PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 19th day of January 2005 at Seattle, Washington.

_____/s/_____
Charity Osborn