

No. 82225-5

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE, and PROTECT OUR WATERS,
Petitioners,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,
Respondent.

AMICUS CURIAE MEMORANDUM
IN SUPPORT OF PETITION FOR REVIEW

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- 2 RAP 13.4(b)(4)

A. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Fluoride Class Action is an association that opposes using public water systems to medicate people. The work of Fluoride Class Action may be viewed by going to the following web sites:

<http://fluorideclassaction.wordpress.com> and

<http://dealmortgage.net/fluoride-class-action/fluoride-class-action.htm>.

B. ISSUES ADDRESSED

This Amicus Curiae Memorandum addresses Issues 1 and 2 presented in the Petition for Review.

C. BRIEF STATEMENT OF THE CASE

In the published opinion that is the subject of the Petition for Review in the instant case, Division II of the Court of Appeals considered, in pre-election review, two local initiatives that sought to make it unlawful in defined circumstances for people to put drugs into public water systems serving the City of Port Angeles. The initiative petitions are in the Appendix to the Petition for Review at pages A-16 to A-19. The said published opinion ruled that the initiatives were invalid, finding them 1) administrative in nature, and 2) exceeding the local initiative power because the city council, and not the corporate city, is delegated to operate the city water system and because the initiatives attempt to limit that power. Appendix to the Petition for Review at A-1 to A-14.

In the Petition for Review, Petitioners Our Water - Our Choice and Protect Our Waters ("Committees") request that this Court reverse the

decision of the Court of Appeals and issue a decree to place the initiatives on the ballot.

D. ARGUMENT IN SUPPORT OF REVIEW

Fluoride Class Action supports this Court in accepting the instant case for review because it involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

It is of substantial public interest for this Court to decide for this State if a Legislative grant of power to a city council or other local legislative body to operate a waterworks limits the power solely to this local legislative body to determine whether or not to fluoridate or add other drugs to its municipal water system. In the instant case, Division II of the Court of Appeals ruled that with such a Legislative grant, this power to determine whether or not to add drugs to a municipal water system is solely within the authority of the local legislative body and therefore beyond the local initiative power. Appendix to the Petition for Review at A-10 to A-11.

While this is a case of first impression in this State, it has been addressed by the Ohio Supreme Court in Canton v. Whitman, 44 Ohio St.2d 62, 337 N.E.2d 766 (1975) where the Court determined that despite a constitutional grant of power to cities to own and operate public utilities, a police power regulation involving fluoridation would not unreasonably limit or otherwise interfere with the operation of a municipal utility. Canton at 67-68. Appendix hereto at pages A-1 to A-7.

Similarly, this issue was addressed by the Iowa Supreme Court in

Wilson v. City of Council Bluffs, 253 Iowa 162, 100 N.W.2d 569 (1961) where the Court ruled that despite a statute authorizing a city to operate waterworks, such a statute could not be construed in any way authorizing fluoridation. Wilson at 100 N.W.2d at 570-71. Appendix hereto at pages A-8 to A-12.

This Court can take judicial notice that the public has expressed great interest in the adding of drugs to municipal water supplies and a great number of initiatives and referendums on fluoridation have been passed in this nation either opposing or supporting fluoridation when local legislative bodies have constitutional or statutory authority to operate waterworks. It is an issue of substantial public interest as to whether in this state, a statutory grant of power to a city council to operate a waterworks, gives the city council the sole authority to decide whether or not drugs including fluoride can be added to all public water supplies serving the city. This question will be resolved by this Court when it addresses Issue No. 1 in the Petition for Review.

A second issue of substantial public interest is the issue of whether initiatives opposing fluoridation and other drugs being added to local public water supplies are legislative or administrative. If they are administrative rather than legislative, the public initiative and referendum processes will no longer be allowed. This will disenfranchise the public from being able to vote to fluoridate or being able to vote to prevent fluoridation or other drugs from being put in their public water supplies. If the reasoning of the Court of Appeals Division II prevails, citizens will

lose initiative and referendum rights to vote on fluoridation and on whether other drugs can be put in their drinking water. There is a great deal of controversy regarding putting drugs in drinking water and so this issue is of substantial public interest.

The Court of Appeals District II ruled that because the State has comprehensive regulations regarding water additives, regulations that put more strict controls on these additives are in pursuit of a plan of some power superior and are therefore administrative. Appendix to Petition for Review at A-8. The comprehensive water regulations of the State only regulate one drug and that is fluoride. Id. at A-49 to A-62. The fluoride regulation, WAC 246-290-460, does not mandate or prevent fluoridation but rather leaves the decision to fluoridate to the local jurisdiction. Appendix hereto at page A-18. The state's comprehensive water regulations do not regulate the putting of other drugs in public water supplies.

While this is a matter of first impression for this State, other states have ruled that a local decision to add or not to add drugs to municipal water supplies is inherently a legislative decision made under the police power. Hughes v. City of Lincoln, 232 Cal.Rptr.2d 741, 746-47, 43 Cal.Rptr. 306 (Cal.App.Dist. 3 1965). (“Intrinsically therefore, as well as in its police power origin, the decision to fluoridate is legislative rather than administrative.”) Appendix hereto at pages A-13 to A-17. Because the Court of Appeals Division II decision will generally prevent future citizen votes on whether or not to fluoridate, or whether other drugs can be

put in local public water supplies, its ruling that initiatives presenting such issues are administrative is of substantial public interest. This question will be resolved by this Court when it addresses Issue No. 2 in the Petition for Review.

There is a third issue of substantial public interest that is raised by the Court of Appeals Division II decision. It is the issue of whether a corporate city has authority under the police power or under RCW 35A.70.070(6) and Chapter 35.88 RCW to adopt stricter local water purity standards for all public water systems serving the inhabitants of the City. Issue No. 1 in the Petition for Review. The Court of Appeals Division II decision ruled that these authorities were not available because of the exclusive authority granted to the City Council under RCW 35A.11.020 to operate waterworks. Appendix to Petition for Review at A-11 to A-12. But as discussed above, the authority to operate waterworks should be seen as the authority to have a business to supply water and should not trump the corporate city's police power and authority under RCW 35A.70.070(6) and Chapter 35.88 RCW to protect the safety and health of its citizens. Supra, this Memorandum at 2-3.

City voters have a substantial public interest it being able to use the corporate city's police power and authority under RCW 35A.70.070(6) and Chapter 35.88 RCW to adopt water pollution regulations more strict than the State's regulations. These statutes give the corporate city the authority to enact the initiatives. If the corporate city's action violates Chapter 70.142 RCW as found by the Court of Appeals Division II, then

that should be considered an issue of substantive invalidity that is inappropriate for pre-election review. See Petition for Review at 12-13. It is of substantial public interest for this Court to clarify that substantive invalidity challenges are inappropriate for pre-election review of local initiatives, as they are for statewide initiatives. Id.

The Court of Appeals Division II erred in finding conflict with Chapter 70.142 RCW. RCW 70.142.010 authorizes the State Board of Health to set maximum contaminant standards and states that State and local standards can be more strict than federal standards. The Court of Appeals Division II interpreted RCW 70.142.010 and 70.142.040 to find that more strict local standards could only be established by local health departments of County's with population over 125,000. Appendix to Petition for Review at A-7.

However, no provision in Chapter 70.142 RCW prevents corporate cities from using their police power and authority under RCW 35A.70.070(6) and Chapter 35.88 RCW to adopt water pollution regulations more strict than the State's regulations. To accept the Court of Appeals interpretation that Chapter 35.88 RCW may not be applied would require a repeal by implication which is disfavored. Our Lady of Lourdes v. Franklin Cy., 120 Wn.2d 439, 450, 842 P.2d 956 (1993).

There is a fourth issue of substantial public interest that is raised by the Court of Appeals Division II decision. There is a statute that has already determined that fluoridation is a legislative policy issue. I refer to RCW 57.08.012. It reads as follows:

Fluoridation of water authorized.

A water district by a majority vote of its board of commissioners may **fluoridate** the water supply system of the water district. The commissioners may cause the proposition of fluoridation of the water supply to be submitted to the electors of the water district at any general election or special election to be called for the purpose of voting on the proposition. The proposition must be approved by a majority of the electors voting on the proposition to become effective.

According to this statute, the issue of whether or not water will be fluoridated is a policy issue that is suitable to being submitted to a vote of the electorate. This means that the decision whether to fluoridate or not is a legislative policy issue of substance and not just procedural or administrative.

The addition of other chemicals such as chlorine or lime or soda ash are administrative matters and not subject to a public vote, and this is because such chemicals merely kill bacteria, clean the water, and adjust the pH. Fluoride is a chemical too, but there the similarity ends. Fluoride is not added to water to kill bacteria, clean the water, or change its pH. It is added to do something to those who drink the water. It is added as medicine and drug.

The Respondents' quibble over administrative vs. legislative is irrelevant. RCW 57.08.012 is determinative.

E. FLUORIDATION POLICY CONSIDERATIONS LINKED TO THE LEGISLATIVE VS. ADMINISTRATIVE ISSUE

We know much more about the health problems associated with fluoridation than we did back when the legislature passed RCW 57.08.012. However, even then there was controversy about whether fluoridation was safe and appropriate. The Legislature acknowledged this by making the issue one which could be put to a public vote. Fluoridation was a policy issue at the time RCW 57.08.012 was passed, and it remains a policy issue today. The fact that it was a policy issue from the very beginning means that it was and remains a legislative and not an administrative matter.

Fluoride Class Action takes the position that within the next few years, class action law firms will file suit against water districts and local governments for actual harm caused by water fluoridation. Half of all fluoride ingested remains in the body and accumulates in bones and other organs.

Fluoride hardens and protects teeth only if applied topically, as in toothpaste or mouthwash. When taken internally, it only affects teeth for the short time that the water is in contact with the teeth in the mouth, but it makes bones harder, less flexible, and more brittle. The fluoride changes the very chemistry of bone, creating a new compound.

When fluoride is ingested, it gradually causes a host of problems, all of which are made clear in a report done by the National Research Council, an arm of the prestigious National Academies of Science, which report was commissioned by the Environmental Protection Agency. See <http://www.nationalacademies.org/morenews/20060322.html> or do a

Google search for “National Research Council report fluoridation.”

That conservative NRC study confirmed the new science on fluoride, facts not known when our waters were first fluoridated half a century ago.

The NRC study and others conclude that fluoride in drinking water contributes to dental fluorosis, bone cancer, arthritis, bone fractures, thyroid reduction, diabetes, obesity, kidney damage, reproductive problems, lower IQ and retardation.

Fluoride is in everything made with fluoridated water. It is in all the food cooked with tap water. It is in reconstituted orange juice, bread, cake, beer, and even bottled water. Those who drink a lot of tap water ingest more fluoride, and this includes those who do hard physical labor and athletes.

The first plaintiffs who will be likely to sue will be populations particularly vulnerable to fluoridation chemicals, including young children. The American Dental Association cautions parents against giving fluoridated water to infants in reconstituted formula and reconstituted juice.

Fluoride lowers thyroid function, so those with thyroid problems likely will be among the first to sue as well as those with kidney problems. Those receiving kidney dialysis must avoid fluoridated water and likely will be among the first to sue. Those who perform hard physical labor and athletes likely will be among the first to sue.

There was opposition to fluoridation at the time RCW 57.08.012

was passed, and safety issues were raised then. Whether fluoridation should be considered safe is a policy issue. It is because it is a policy issue that the Legislature left the question ultimately to the voters of each water district. This confirms that this issue is legislative and not merely administrative.

F. CONCLUSION

Fluoride Class Action opposes using public water systems to medicate people. There is strong public support for this position in the State of Washington. This Court should accept review of the decision of the Court of Appeals Division II because this decision, if allowed to stand, would prevent people in cities from being able to directly vote on whether or not fluoride and other drugs could be put in their local public water systems. Because this issue is of great public interest in this State, this Court should give the citizens the benefit of its review.

Dated this 24th day of November, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 24th day of November, 2008, I caused a true and correct copy of this certificate and the Amicus Curiae Memorandum in Support of Petition for Review and Motion to File Amicus Curiae Memorandum to be served on the following by email, fax, and first class mail:

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Dated this 24th day of November, 2008, at Lynnwood, Washington.

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APPENDIX INDEX

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A-13	<u>Hughes v. City of Lincoln</u> , 232 Cal.Rptr..2d 741, 43 Cal.Rptr. 306 (Cal.App.Dist. 3 1965)
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