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IN THE SUPREME COURT
STATE OF FLORIDA

In re: Advisory Opinion to the Attorney General -- Limited Political Terms in Certain Elective Offices.	)	Case No. 78,647

Reply Brief of Respondents
Let The People Decide -- Americans For Ballot Freedom;
R. Ed Blackburn; J. Hyatt Brown; Doyle E. Conner;
Louis De La Parte; Patricia A. Dore; Raymond Ehrlich;
Richard W. Ervin; Richard A. Pettigrew; T. Terrell Sessums;
Parker D. Thomson; and Ralph Turlington

In Opposition to the Proposed Amendment

Original Proceeding
pursuant to Article V, Section 3(b)(10),
Florida Constitution

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Introduction

Briefs in support of the proposed amendment were filed by its proponents, Citizens for Limited Political Terms, by Term Limits Legal Institute ("Term Institute"), and by Richard N. Friedman. Let The People Decide--Americans for Ballot Freedom[1] and several distinguished Floridians filed an initial brief to oppose the proposed constitutional amendment, as did United States Representative Lawrence J. Smith and the National Conference of State Legislatures and the Southern Legislative Conference of the Council of State Governments. This reply brief is filed in response to the one subject, ballot summary and federal constitutional conflict arguments which are made by supporters of the proposed amendment in their initial briefs. Arguments on first amendment issues are again left to other parties.

Argument

1. The proposed amendment violates the one-subject requirement of article XI, section 3 of the Florida Constitution.

Supporters of the proposed amendment contend that it satisfies the one-subject requirement of article XI, section 3 of the Florida Constitution, based on two elemental contentions. First, they say that the effect and purpose of the amendment can be summed up in the phrase "limited political terms in certain elective offices," a statement (they say) which obviously represents only one subject. In support of this contention, they argue that the Court "has held that the restriction 'should be viewed broadly rather than narrowly,'" quoting *Floridians Against Casino Takeover,* 363 So.2d 337, 340 (Fla. 1978).[2] Reliance on this statement in *Floridians* is somewhat surprising, inasmuch as the Court receded from that portion of the *Floridians* decision in *Fine v. Firestone*, 448 So.2d 984 (Fla. 1984). In *Fine*, the Court specifically rejected the "broad" view of "one subject," which had been expressed in *Floridians*, and held that the one-subject requirement of article XI,

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1/ The members of the Board of Advisers to Let the People Decide -- Americans for Ballot Freedom are listed in the Appendix to this brief.

2/ Proponents' initial brief at p. 9.

section 3 must be viewed narrowly.[3] *See also Evans v. Firestone,* 457 So.2d 1351 (Fla. 1984). Indeed, the Court even directed that the narrow view of initiative proposals would require "strict compliance." *Fine*, 448 So.2d at 989.

The simplistic catch phrase "limited political terms" does not define a single subject within the meaning of article XI, section 3, and it cannot save this proposal. The same argument was put forward and failed to save the "Citizens' Choice on Government Revenue" proposal in *Fine*, and the "Citizen's Rights in Civil Actions" proposal in *Evans*. In both instances, the Court had no trouble rejecting proposed amendments which affected various functions and various branches of government, even though the proponents were able to express diverse governmental functions in a single, pithy phrase. The test for the one-subject requirement is not the craftsmanship of a wordsmith, but the affect that the proposal will have on governmental functions embodied in the constitution.

As a second point, the proponents assert that they have placed the proposed change in one discrete section of the Florida Constitution, leaving other provisions of the Florida Constitution unaffected. Once again, this is an overly simple and formalistic argument, similar to those the Court rejected in *Fine* and *Evans*. If the amendment affects more than one constitutional function, it fails to satisfy the one-subject requirement. In their initial brief, Americans demonstrated that the proposed amendment is so broad that it substantially affects three subjects -- not just in separate articles of the Florida Constitution, but also in two different constitutions. Americans' analysis of the one-subject requirement in their initial brief, relying on *Fine* and *Evans*, is neither met nor overcome by the proponents and their supporters. There is no need to repeat Americans' analysis here.

3/ Concurring separately in *Fine,* Justice Shaw rejected a broad view of initiative petitions as "largely nullify[ing] the one subject limitation." 448 So.2d at 997.

2. **The substance of the proposed amendment is not set forth in clear, neutral and unambiguous language.**

In cursory fashion, proponents of the initiative petition contend that the title and summary provide all of the information required to adequately inform voters of what they are being asked to vote upon. They argue that it is enough to inform voters that they are being asked to limit terms of certain offices, that those limitations will be achieved by prohibiting incumbents from seeking re-election after eight years in office, and that the proposal embraces enumerated offices. These statements, however, do not satisfy controlling law.

Florida law requires that when an initiative petition changes existing provisions of the constitution, as opposed to merely adding a new provision, the voters must be informed as to the present status of the constitution, so that they may assess and weigh the significance of the proposed change.[4] *See Wadhams v. Board of County Comm'rs*, 567 So.2d 414, 416-17 (Fla. 1990); *Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982); *see also Kobrin v. Leahy*, 528 So.2d 392 (Fla. 3d DCA), *review denied*, 523 So.2d 577 (Fla. 1988). The proposed limited term amendment changes current organic law. It does not merely add a completely new concept, such as the one in *In re: Advisory Opinion to the Attorney General: English -- The Official Language of Florida*, 520 So.2d 11 (Fla. 1988). The absence of any reference to the current non-limitations on the terms of various officeholders affected by this proposal is a material fact, essential to an understanding of the effect of this amendment.

Likewise, there is no mention in the summary of the possibility of severance. As argued in the initial brief of Americans, this is a very consequential omission, without which the proposal could be completely misleading both to petition-signers and to voters.

In their initial brief, Americans also noted that the proposal lacks neutrality in its thoroughly biased preamble. It is probable that the preamble will not appear on the ballot, so that the evil of a misleading "substance" on the ballot will not come to

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4/ *See* Americans' initial brief at pp. 18-19.

fruition.[5] While this demagoguery will not be seen in voting booths, the spectre of a different evil in the initiative process is self-evident from the petition's biased use of innuendo and conjecture.

3. The proposed amendment is preempted by the supremacy clause of article VI of the United States Constitution because it contravenes the qualifications for federal officeholders established in article I, sections 2 and 3 of the United States Constitution.

(a) The facial conflict is ripe for review.

The proponents and the Term Institute contend in their initial briefs that the Court should decline the Attorney General's invitation to consider at this time whether the proposed amendment affects or conflicts with the qualifications for federal office as expressed in the United States Constitution.[6] Essentially, three justifications for avoidance are presented.

First, proponents argue that the proposal is not subject to attack in the advisory process, because conceivably it may be valid in some respects or under some circumstances.[7] That contention begs the question. In order for the Court to determine whether there may be some valid application of the federal portion of the proposed amendment at some time or under some circumstances, it would necessarily have to examine the proposal facially under the standards set forth in *Gray v. Winthrop*, 115 Fla. 721, 156 So.270 (1934), and *Gray v. Moss*, 115 Fla. 701, 156 So. 262 (1934). *See also Pope v. Gray,* 104 So.2d 841 (Fla. 1958). To perform

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5/ Section 101.161(1) of the Florida Statutes (Supp. 1990) requires that the "substance" of an initiative proposal appear on the ballot in clear and unambiguous language.

6/ In lieu of filing a reply, which would mirror the ripeness argument here, counsel for co-respondents, the National Conference of State Legislatures and the Southern Legislative Conference of the Council of State Governments, have asked Americans to inform the Court that this ripeness argument applies with equal force to the first and fourteenth amendment claim raised in their initial brief.

7/ *See* proponents' initial brief at p. 19.

that task is to engage in the very analysis the proponents seek to avoid. Consequently, there is no easy avoidance of the issue which the proponents' petition presents.

The next argument is that this question is too complex for the Court to resolve in an expedited proceeding. This argument also is meritless. The issue of federal-state conflict is not in the least complex, as the proponents and the Term Institute contend. The one constitutional issue posed involves a facial conflict between the United States Constitution and the Florida Constitution. No facts clutter the record, as might be the case with an "as applied" challenge. There are no statutes that need reconciliation or analysis, as might be the case in complex legislation. There is no multi-party complexity; only two interests are present to assert polar opposite views as to whether the state constitution conflicts with the federal constitution.

The issue before the Court concerns a simple and routine (albeit extremely important) analysis of case law and policy, to decide whether federal law preempts or conflicts with Florida law. That form of analysis is undertaken all the time, as standard Court fare. *See State ex rel. Davis v. Adams,* 238 So.2d 415 (Fla. 1970) (on rehearing), application for stay granted, *Davis v. Adams*, 400 U.S. 1203 (1970); *see also, e.g., United States v. Carter*, 121 So.2d 433 (Fla. 1960).

Nor does the procedural posture of this case or its expedited nature present any difficulty whatsoever to the Court's consideration of the state-federal conflict, despite an assertion that the parties have no time to analyze the issues thoroughly for the Court. The proponents have known all along that this petition would be scrutinized in the procedure they have now invoked under article XI, section 3, and article IV, section 10 of the Florida Constitution. They elected to include federal offices in their initiative petition. They have had unlimited time to research and develop any arguments that could be mustered as to the federal-state constitutional conflict. Indeed, the proponents obviously drafted the initiative petition knowing full well of the looming federal conflict even before they obtained the first signature on their petition. That initial awareness is reflected in the petition itself, where the

caveat "to the extent permitted by the Constitution of the United States" was carefully inserted.

Certainly, the Term Institute has no valid claim that time or circumstances limited its ability to present and fully argue the issue of federal constitutional conflict. The Term Institute is a self-professed national organization interested in limiting the terms of federal officeholders. Obviously, it has had the time, the opportunity and the resources to contemplate, to prepare for and to argue the federal constitutional implications of its mission.[8]

In contrast to the cries of the proponents, respondents have had no difficulty in briefing and arguing the federal constitutional conflict. The initial brief of Americans devoted five pages to that subject, and the brief filed on behalf of United States Representative Lawrence J. Smith devoted ten pages to the issue. These briefs call for a response, and unless the proponents simply decline to respond,[9] the issue will be joined in the traditional manner that all such issues come before the Court -- in briefs and oral argument.

Finally, proponents assert that the initiative process does not contemplate a decision on the issue now put before the Court. The proponents and the Term Institute argue that section 16.061(1) of the Florida Statutes (1989) does not allow the Attorney General or the Court to address legal issues beyond those raised in the ballot title and summary. The proponents' constrictive reading of the law is mistaken.

Section 16.061(1) directs the Attorney General to seek an advisory opinion from the Court regarding the compliance of an initiative proposal with article XI,

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8/ Despite protesting that there has not been enough time to brief the merits of the federal issue, the Term Institute nonetheless has managed to devote five pages of its initial brief to the merits of the federal conflict claim.

9/ A failure of the proponents to respond on the merits will speak volumes to the Court about the proponents' position. Among other things, their plea for deferral can be seen as a ploy for procedural leverage in a post-adoption challenge (should the proposal pass), when issues of standing, justiciability and incumbents' self-interest can be raised to cloud the legal landscape.

section 3 of the Florida Constitution. That provision of the constitution opens by stating:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people . . . .

Since 1791, however, the people of any one state have not had any reserve power to amend the federal constitution by themselves. Amendment 10 to the United States Constitution, ratified 200 years ago, states:

> The powers not delegated to the United States by the Constitution . . . are reserved . . . to the people.

In other words, while powers not enumerated in the federal constitution are indeed reserved to the people, by like token those powers which <u>are</u> enumerated there are <u>not</u> reserved to the people. This has been the essence of every citizen's compact with our federal government for two centennials. In this situation, since the qualifications of federal officeholding <u>are</u> enumerated in the federal constitution, there is nothing in reserve to be exercised unilaterally by Floridians.[10]

Further, as Americans pointed out in their initial brief, the process by which the Attorney General has petitioned for an advisory opinion with respect to the proposed amendment is a highly appropriate process for consideration of the federal constitutional conflict. The Court has never flinched from a pre-election determination of constitutionality when the issue is ripe, and where the issue is appropriately briefed and argued. A case is "ripe" if all preliminary matters have been disposed of, and nothing remains for the Court but to render an appropriate judgment.

> A case is ripe for decision by an appellate court if the legal issues involved are clear enough and well enough evolved and presented so that a clear decision can come out of the case.

Black's Law Dictionary 1192 (5th ed. 1979). *See also State v. Newman*, 405 So.2d 971 (Fla. 1981), where the Court held that the constitutionality of a criminal statute

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<u>10/</u> *See* Americans' initial brief at pp. 24-28.

was ripe for review even though the defendant charged with violating that statute had not yet been convicted.

Ripeness, like mootness, is a discretionary doctrine whereby a court having proper jurisdiction can choose to resolve a legal question or not. This contrasts with matters of issue preclusion, whereby a judicial tribunal is legally prohibited from resolving a matter. The federal constitutional conflict here is purely a ripeness question, as the proponents and Term Institute acknowledge.[11]

Recognizing that the issue is one of discretion, the proponents next ask the Court not to exercise that discretion because the issue presented is a legal issue rather than a factual one. They point to section 16.061 as a limitation on the Court's authority to decide. It is not, of course. This legislative enactment came into being in order to add to the Court's authority, not detract from it. At best the statute enlarges the Court's normal responsibilities by adding the authority to resolve factual disputes as well as legal disputes in this particular context, should there be any.[12]

Equally important and historically recognized is the fact that public policy supports a resolution of a facial constitutional problem before the matter appears on the ballot and the voters are forced to choose. Decisions of this Court such as *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270 (1934), *Gray v. Moss*, 115 Fla. 701, 156 So. 262 (1934), and *Pope v. Gray*, 104 So.2d 841 (Fla. 1958), wisely declare that a facial constitutional attack such as the one presented here is justiciable and should be resolved before the election takes place. Indeed, under the interpretation suggested by the proponents, the Court would be precluded from reviewing a proposed amendment reinstituting slavery, which certainly would be facially unconstitutional. As the Court said in *Winthrop* and *Moss,* a timely ruling at this juncture could avoid

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11/ *See* proponents' initial brief at p. 19 and Term Institutes' initial brief at p. 5.

12/ The Supreme Court rarely (if ever) resolves questions of fact. Query what facts could be before the Court for resolution if, as the proponents argue, only the one-subject limitation and ballot substance are available for consideration.

the expense of submitting to the public a proposal that could not be held operative under any conditions or circumstances.

In a discretionary context such as this, policy is the key. As argued in Americans' initial brief, resolution of the federal constitutional issue now will foster judicial economy by resolving a dispute that will inevitably appear before the courts again. Americans note that nowhere in the briefs of the proponents or their supporters is there any counter-argument to this salutary policy.

Predictably, the Term Institute would have the Court follow the results in *Legislature of the State of California v. Eu,* slip op. No. S019660 (Cal. Oct. 10, 1991), and *League of Women Voters v. Munroe,* slip op. No. 58438-9 (Wash. Aug. 30, 1991). The California decision already has been distinguished on numerous grounds.[13] The Washington decision, being of a summary nature, is even less persuasive. That decision merely says that the issues were complex, and that under the accelerated procedure in <u>that</u> state, the court would have to decide the case without time for adequate briefing, argument and deliberation. Patently, that situation is far different from the one in Florida. The Washington constitution has no pre-vote, advisory process such as Florida's. Uniquely, Florida has precisely the appropriate pre-vote process in its constitution and its laws. No argument can be made that the parties here have not had ample notice, time or opportunity to inform the Court on the federal conflict posed by the proposed amendment.

(b) <u>The proposed amendment alters the qualifications established for members of Congress in article I, sections 2 and 3 of the United States Constitution, thereby violating the supremacy clause of article VI of the United States Constitution</u>.

Proponents of the limited term initiative do not dispute that article I of the United States Constitution establishes the exclusive qualifications for service in Congress. U.S. Const. art. I, §§ 2, 3 ("Qualifications Clauses"); *see also Powell v. McCormack,* 395 U.S. 486, 532 (1969). Predictably, they strive to save the initiative

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<u>13/</u> *See* Americans' initial brief at p. 17 n. 21.

by claiming that the Qualifications Clauses have no bearing on this appeal. In particular, they argue that term limits are not "qualifications" for service in Congress, but rather are "time, place and manner" regulations that Florida may impose under article I, section 4 of the United States Constitution.[14] This assertion, however, is directly at odds with the definition of time, place and manner regulations established by the case law.

State regulation of congressional elections is authorized for a distinctly limited purpose: to guarantee that congressional elections are conducted in a "fair and honest" manner. *Storer v. Brown*, 415 U.S. 724, 730 (1974). The Court there held that states may impose time, place and manner restrictions to assure that "some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* The scope of this procedural authority encompasses

> not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932).

To this end, for example, a state may tabulate votes and conduct recounts. *Thorsness v. Daschle*, 279 N.W. 2d 166 (S.D. 1979). A state may require potential candidates to gather a reasonable number of signatures before appearing on the ballot. *Storer*, 415 U.S. at 734; *Jenness v. Fortson*, 403 U.S. 431 (1971); *Williams v. Tucker*, 382 F. Supp. 381 (M.D. Pa. 1974). A state may impose reasonable ballot access restrictions for new political parties. *Hudler v. Austin*, 419 F. Supp. 1002 (E.D. Mich. 1976), *aff'd*, 430 U.S. 924 (1977). A state may even charge a modest filing fee, provided the fee does not create a barrier to economically disadvantaged candidates. *Bullock v. Carter*, 405 U.S. 134 (1972). The common thread of these

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14/ *See* the Term Institute's initial brief at pp. 8-12.

provisions is that they impose procedural restrictions. *See Storer*, 415 U.S. at 731; *Smiley*, 285 U.S. at 366.

The analysis to be made here requires that candidate restrictions must be viewed "in a realistic light." *Bullock*, 405 U.S. at 143. In such a light, term limits stand in stark contrast to procedural provisions. A regulation which absolutely bars a candidate from appearing on the ballot cannot credibly be characterized as a procedural limitation on how one runs for office -- a time, place or manner restriction. Rather, it can only realistically be viewed as a prescription for who can run for federal office -- a limitation that falls squarely within the province of the Qualifications Clauses. The authorities are clear that term limits would in fact constitute an improper additional qualification on service in Congress.

States have frequently attempted to expand the classes of individuals who are barred from service in Congress. Here in Florida, this Court upheld a statute which provided that no state officeholder could qualify for election to another office unless he first resigned his state position. *State ex rel. Davis v. Adams*, 238 So.2d 415, 417 (Fla. 1970) (on rehearing), petition for stay granted, 400 U.S. 1203 (1970). However, a three judge panel of the federal district court invalidated the provision as it applied to candidates for federal office. *Stack v. Adams*, 315 F. Supp. 1295, 1297-99 (N.D. Fla. 1970). The court observed that

> The Act, in essence, provides that a state public office holder who has not resigned his state office in accordance with the Act cannot be a candidate for or be elected to Congress -- it is a flat disqualification.

Id. at 1298.[15]

The parallel between the *Adams* case and this case is striking. In *Adams*, the invalidated statute blocked a candidate from running for Congress because he held

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15/ Justice Black confirmed the federal District Court's analysis by granting a stay of the Florida Supreme Court's decision in *Davis*, which conflicted with *Stack*. He ruled that the Florida statute would likely be held unconstitutional because it imposed a qualification to run for Congress, thereby exceeding Florida's "constitutional powers." *Davis v. Adams*, 400 U. S. 1203, 1204 (1970) (Black, J.).

state office. Here, the limited term initiative would block a candidate from running for Congress because he held federal office -- an even more dubious proposition. But the *Adams* case is not unusual.

Time and again, state and federal courts have rejected state provisions that would bar persons from serving in Congress. *See, e.g., Dillon v. Fiorina*, 340 F. Supp. 729 (D.N.M. 1972) (candidate required to have been registered in a political party for a least one year prior to filing date for candidacy); *Exon v. Tiemann*, 279 F. Supp. 609, 613 (D. Neb. 1968) (congressional candidate required to reside in district he seeks to represent); *State ex rel. Chavez v. Evans,* 446 P.2d 445 (N.M. 1968) (same); *Hellman v. Collier*, 141 A.2d 908 (Md. 1958) (same); *Lowe v. Fowler*, 240 S.E.2d 70 (Ga. 1977) (City Council President could not hold or qualify for any other elective public office); *Danielson v. Fitzsimmons,* 44 N.W.2d 484 (Minn. 1950) (convicted felon cannot hold federal office); *Buckingham v. State ex rel. Killoran*, 35 A.2d 903 (Del. 1944) (state judge ineligible for federal office until six months after expiration of term); *Stockton v. McFarland*, 106 P.2d 328 (Ariz. 1940) (state judge ineligible for any other public office during term).

The Term Institute cites two "resign to run" cases for the proposition that regulations limiting ballot access for congressional candidates may be sustained. *See* Term Institute's initial brief at p. 11, citing *Joyner v. Mofford,* 706 F.2d 1523, 1528 (9th Cir. 1983), and *Signorelli v. Evans*, 637 F.2d 853, 858 (2d Cir. 1980). Those cases turned on a threshold determination that the provisions in question regulated state office, not qualifications for service in Congress.

In *Signorelli,* the court upheld a statute requiring New York state judges to resign their judicial office prior to seeking election to any other public office, reasoning that the purpose of the statute was to regulate <u>state</u> offices in an area of traditional state authority, and that the burden on federal office seekers was merely incidental. 637 F.2d at 859. In *Joyner*, the court upheld a provision of the Arizona Constitution which forbade certain state officials from remaining in office if they sought an elected federal position before the final year of their term, observing expressly that the provision did not prevent a state officeholder from running for

federal office, but merely regulated the conduct of state officials. 706 F.2d at 1531. In fact, the court pointedly noted in *Joyner* that "state provisions which bar a potential candidate from running for federal office . . . impose[] additional qualifications on candidates and therefore violate[] the qualifications Clause." Id. at 1528.[16]

In sum, the limited term initiative imposes impermissible additional qualifications on service in Congress. Consequently, it must be declared unconstitutional.

4. Provisions of the proposed amendment are not severable.

None of the parties responding in support of the initiative proposal have argued the severability issue. Therefore, Americans will rely on the argument made in their initial brief.

Respectfully submitted,

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16/ Statutes that bar state officials from seeking federal office uniformly have been denied effect. This Court expressly observed as much. *See State ex rel. Davis v. Adams*, 238 So.2d 415, 417-18 (Fla. 1970) (citing cases); *see also Stack v. Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970); *State ex rel. Santini v. Swackhamer*, 521 P.2d 568 (Nev. 1974); *State ex rel. Handley v. Superior Court of Marion County*, 151 N.E.2d 508 (Ind. 1958); *State ex rel. Johnson v. Crane*, 1979 P.2d 864 (Wyo. 1948); *Riley v. Cordell*, 194 P.2d 857 (Okla. 1948); *State ex rel. Wettengel v. Zimerman*, 24 N.W.2d 504 (Wis. 1946); *Stockton v. McFarland*, 106 P.2d 328 (Ariz. 1940); *State ex rel. Chandler v. Howell*, 174 P. 569 (Wash. 1918).

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