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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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TIM EYMAN,

Appellant,

v.

ROBERT FERGUSON, in his capacity as  
Attorney General of the State of Washington,

Respondent.

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**BRIEF OF RESPONDENT, ATTORNEY GENERAL FERGUSON**

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## I. INTRODUCTION

The people have already spoken on Advisory Vote No. 17. Sixty two percent of voters said that Engrossed House Bill 2163 should be repealed. As a result, this Court should dismiss this case as moot. It should also decline to invoke the exception to the mootness doctrine because the issues Mr. Eyman raises—what is a revenue source and what amounts to a tax increase for purposes of advisory votes—are better decided in the context of particular legislative action, rather than in the abstract as an advisory opinion. Because each piece of tax legislation is unique, this particular configuration will not likely arise again. Thus, even if this Court were to rule on the merits of the Attorney General’s Office’s advisory vote designation for EHB 2163, it is not likely that this Court’s decision would fully resolve any future challenge to the designation of a different piece of legislation.

Even if this Court were to proceed to the merits, the trial court appropriately dismissed this case because the ballot language had already been finally established when Mr. Eyman filed his complaint. The ballot language for Advisory Vote No. 17 became final on August 3, 2017, and by statute it was not subject to appeal. By the time Mr. Eyman filed his complaint, he was not able to obtain the remedy he sought: a change to the

2017 general election ballots. While there were procedural avenues for Mr. Eyman to pursue an accelerated case, he chose not to use them.

Finally, even if this Court were inclined to address the substance of Mr. Eyman's challenge to the Attorney General's Office's designation of Advisory Vote No. 17, the designation was correct and this Court can affirm the trial court for any reason that the record supports under RAP 2.5. Here, the Attorney General's Office appropriately treated EHB 2163 as a single tax increase of the state excise tax under RCW Title 82. Moreover, the Attorney General's Office correctly designated EHB 2163 as a tax increase only where it resulted in an overall increase of the tax *due*. Legislative action that may lead to better tax collection or enforcement does not trigger designation of an advisory vote.

Adopting the arguments Mr. Eyman made below would mean that legislators would not receive feedback from voters on the exact tax legislation legislators have voted on, as the people intended. Adopting Mr. Eyman's reasoning could also absurdly multiply the number of advisory votes, which have no legal effect but appear with other statewide measures high on the ballot. Thus, even if this Court reaches the merits, it should affirm.

## II. STATEMENT OF THE CASE

### A. Initiative 960 Created Advisory Votes

The voters adopted Initiative 960 in 2007. Laws of 2008, 60th Leg., Reg. Sess., ch. 1. Among other things, the initiative requires that if legislative action “raising taxes” is not subject to public vote, an advisory vote must be placed on the next general election ballot. RCW 43.135.041(1)(a).

The purpose section of Initiative 960 emphasized voter feedback to legislators:

The people find that, if they are not allowed to vote on a tax increase, good public policy demands that at least the legislature should be aware of the voters’ view of individual tax increases. An advisory vote of the people at least gives the legislature the views of the voters and gives voters information about the bill increasing taxes and provides the voters with legislators’ names and contact information and how they voted on the bill.

Initiative 960, § 1.<sup>1</sup> The “Argument For” in the statewide Voters’ Guide in 2007 also indicates that an advisory vote would “provide[] voter feedback” to legislators about how they had voted on tax legislation. Voters’ Guide, 2007 General Election, I-960.<sup>2</sup> Thus, the people intended advisory votes to

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<sup>1</sup> Available at <https://www.sos.wa.gov/elections/initiatives/text/i960.pdf>.

<sup>2</sup> Available at <https://weiapplets.sos.wa.gov/MyVoteOLVR/onlinevotersguide/Measures?language=en&electionId=2&countyCode=xx&ismyVote=False&electionTitle=2007%20General%20Election%20#ososTop>.

communicate to legislators whether their votes on particular tax legislation were consistent with the will of the people.

By August 1 of each year, the Attorney General's Office must send written notice to the Secretary of State of any "tax increase" that is subject to an advisory vote. RCW 43.135.041(2). For purposes of advisory votes, "raising taxes" means "any action or combination of actions by the state legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund." RCW 43.135.034. The statute also provides that if "legislative action raising taxes . . . involves more than one revenue source, each tax being increased shall be subject to a separate measure for an advisory vote of the people under the requirements of this chapter." RCW 43.135.041. The statute equates "raising taxes" with the term "tax increase." RCW 43.135.041(2), (4).

Within five business days of the Attorney General's Office's designation, the Secretary of State must assign advisory vote numbers to the designated tax increases. RCW 43.135.041(2). Within five business days after receiving the advisory vote numbers, the Attorney General must formulate a short description "*not subject to appeal*, of each tax increase and shall transmit a certified copy of such short description meeting the

requirements of this section to the secretary of state.” RCW 29A.72.283 (emphasis added).

Short statutory timelines are necessary in order to ensure that the federal and state requirements for mailing of ballots are met. For instance, under federal law, ballots must be transmitted to military and overseas voters “not later than 45 days before the election.” 52 U.S.C. § 20302. More than 60,000 military and overseas voters currently receive Washington ballots. Substantial time is required for ballot formatting, proofing, printing, and mailing. *See* Letter from Rebecca Glasgow to the Washington Supreme Court Clerk and Deputy Clerk at 2-3, Aug. 29, 2017. As a result, Washington’s statutes set strict timelines for establishing final ballot language. *See generally* RCW 29A.72.080, .283, RCW 29A.40.070. Conscious of these looming statutory deadlines for getting ballots and Voters’ Pamphlets printed, the Secretary of State’s typical practice has been to assign advisory vote numbers on the same day the office receives the designation, despite the longer period allowed by the advisory vote statute.

The short description must be formulated substantially as follows:

The legislature imposed, without a vote of the people, (identification of tax and description of increase), costing (most up-to-date ten-year cost projection, expressed in dollars and rounded to the nearest million) in its first ten years, for government spending. This tax increase should be:  
Repealed . . . . [ ] Maintained . . . . [ ]

RCW 29A.72.283. The entire short description cannot exceed 33 words. *Id.* Because there are multiple levels of internal review, the Attorney General's Office takes the full five business days to draft the advisory vote short descriptions for the ballot.

Certain information also must be provided to voters in the statewide Voters' Pamphlet and the online voters' guide. RCW 29A.32.031, .070. The short description must appear, along with a ten-year cost projection and a year-by-year breakdown, telling voters how much tax revenue the legislation should generate each year over ten years. RCW 29A.32.070(11). Finally, the Voters' Pamphlet must provide the name and contact information for each legislator, as well as "how they voted on the increase upon final passage . . . ." RCW 29A.32.070(11).

**B. The Attorney General's Office's Practice in Designating Advisory Votes**

As a result of I-960, advisory votes have appeared on the ballot every year since 2012. CP at 99, ¶ 2.

In determining whether legislation qualifies for an advisory vote, the Attorney General's Office looks to the language of the definition of "raises taxes," as well as the overall context of the statutory scheme, including I-960's purpose. CP at 99, ¶ 3. Revenue neutral tax shifts or legislation that results in an overall decrease in tax revenue are not designated for advisory

votes because they are not ultimately a “tax increase.” CP at 99-100, ¶ 3. The Attorney General’s Office designates an advisory vote when the Legislature imposes a new tax, expands application of an existing tax, or narrows or eliminates tax exemptions. CP at 100, ¶ 4. Where a tax is already due, but the Legislature takes some action that makes collection or enforcement easier or more likely, the Attorney General’s Office does not treat that as a “tax increase” for purposes of designating advisory votes because it does not increase the amount of tax due. CP at 100, ¶ 4.

The advisory vote statutes do not define “revenue source,” so the Attorney General’s Office has exercised the authority granted to it in RCW 43.135.041 to designate advisory votes, applying a reasonable interpretation of that statutory language. Specifically, the Attorney General’s Office has treated each separate title in the tax code as a separate revenue source: excise tax under RCW Title 82, estate tax under RCW Title 83, and property tax under RCW Title 84. CP at 100, ¶ 5. This provides both the people and the legislators with meaningful feedback by making advisory votes correlate with the bills that the legislators voted on.<sup>3</sup>

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<sup>3</sup> The Legislature has not imposed or increased multiple taxes under multiple tax titles (e.g., excise tax and property tax) in the same legislation since advisory votes began. Should that occur, the Attorney General would likely designate separate advisory votes because the tax titles reflect different revenue sources under the overall Washington tax scheme. CP at 100.

Three times before, a single piece of legislation has imposed or increased more than one subtype of excise tax, and in each instance, the Attorney General's Office treated these types of excise tax under RCW Title 82 as a single revenue source in order to facilitate the initiative's purpose and avoid absurd results. CP at 100, ¶ 6. At the same time, the ten-year cost projection in the Voters' Pamphlet informed the voters of each type of excise tax that was being increased or imposed. CP at 100, ¶ 6.

In 2014, Advisory Vote No. 8 was designated as a single advisory vote, with four subtypes of excise tax reflected in the cost projection: business and occupation (B&O) tax, litter tax, public utility tax, and retail sales tax. CP at 103. In 2015, Advisory Vote No. 10 was designated as a single advisory vote, with two types of excise tax reflected in the cost projection: oil spill administration tax and oil spill response tax. CP at 104. Also in 2015, Advisory Vote No. 13 was designated as a single advisory vote, with two types of excise tax reflected in the cost projection: B&O tax and retail sales tax. CP at 105. In each of these instances, the people provided feedback to the Legislature by voting on the exact same thing that the Legislature had approved.

**C. Advisory Vote No. 17**

On July 27, 2017, the Attorney General's Office designated Engrossed H. B. 2163, 65th Leg., 3d Spec. Sess. (Wash. 2017), *enacted as*

Laws of 2017, 3d Spec. Sess., ch. 28, for advisory vote. CP at 107. The legislation increased excise tax paid to the State by eliminating the retail sales and use tax exemption for food and food ingredients as it applied to bottled water. EHB 2163, §§ 101, 102. The legislation also increased excise tax to the State by narrowing a use tax exemption so that it no longer applies to refinery fuel consumed or used in Washington. EHB 2163, § 107. Finally, the legislation increased excise tax revenue by expanding B&O tax nexus, so that the B&O tax now applies to more business activity than it did before. EHB 2163, § 301. These are the only portions of the legislation that increased the amount of tax due.

EHB 2163 also imposed a new collection or reporting obligation on remote sellers (for example, internet sellers), referrers, and marketplace facilitators. EHB 2163, § 201. But this portion of EHB 2163 simply improves collection on excise tax already due from consumers. Nothing relieves sellers or consumers of their already-existing responsibility to collect and pay retail sales tax or the equivalent use tax under RCW 82.08 and RCW 82.12. EHB 2163, § 208.

Because EHB 2163 increased excise tax due under RCW Title 82, but not property tax under RCW Title 84 or estate tax under RCW Title 83, on July 27, 2017, the Attorney General's Office designated EHB 2163 for a single advisory vote consistent with its practice in prior years. CP at 107.

Mr. Eyman does not dispute that when he disagreed, he was told on July 27, 2017 that the Attorney General's Office's designation would not change. Consistent with its typical practice, on the same day, the Secretary of State's Office provided advisory vote numbers for each of the three designated advisory votes. *See* CP at 92. At that point, Mr. Eyman could have sought an injunction before the unappealable ballot language was established, but he failed to do so. On August 3, 2017, the Attorney General's Office filed with the Secretary of State the short description for Advisory Vote No. 17 to be printed on the general election ballot. CP at 108.

**D. Procedural History**

Mr. Eyman filed a petition for declaratory judgment challenging the Attorney General's Office's designation of Advisory Vote No. 17 as a single advisory vote on August 4, 2017, one day after the Attorney General's Office had filed the advisory vote ballot language for Advisory Vote No. 17. CP at 4, 108. The Thurston County Superior Court denied Mr. Eyman's petition. CP at 134; VRP at 38-41. Specifically, the Superior Court concluded that Mr. Eyman brought his action too late because the statutes provide that once the ballot language is established, it cannot be appealed. *See* VRP at 39-40; RCW 29A.72.283 (advisory vote ballot language "not subject to appeal"). The Superior Court did not reach the merits of Mr. Eyman's petition. VRP at 39-40.

Mr. Eyman then sought direct review at the Washington Supreme Court. The Supreme Court transferred the appeal to this Court.

In the meantime, on Election Day 2017, the people voted on Advisory Vote No. 17. By more than 62 percent, the people called for repeal of EHB 2163. <http://results.vote.wa.gov/results/20171107/Advisory-Votes-Advisory-Vote-No-17-Engrossed-House-Bill-2163.html>.

### **III. ARGUMENT**

This Court should dismiss this case as moot. Because each piece of tax legislation involves a unique combination of elements, the exception to the mootness doctrine does not apply. But even if this court were to reach the merits, the trial court correctly dismissed Mr. Eyman’s challenge because it was brought too late to effect a change in the ballot. Moreover, the Attorney General’s Office correctly designated Advisory Vote No. 17 as a single vote.

#### **A. This Case Is Now Moot and the Exception to the Mootness Doctrine Does Not Apply**

##### **1. This case is moot and should be dismissed**

The people have already had their say about EHB 2163. Mr. Eyman thus cannot effectuate any change for the advisory vote designation of EHB 2163, and the matter is moot.

“It is a general rule that, where only moot questions or abstract propositions, or where the substantial questions involved in the trial court

no longer exist, the appeal . . . should be dismissed.” *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). With regard to a pre-election challenge, the Washington Supreme Court has explained that an issue is moot if it is “purely academic” and not moot if “a court can provide any effective relief.” *City of Sequim v. Malkasian*, 157 Wn.2d 251, 258-59, 138 P.3d 943 (2006) (internal quotations marks omitted) (citations omitted). For example, in *City of Sequim*, the issue was a pre-election challenge to a local initiative that the city claimed was beyond the local initiative power. *Id.* at 258. The election occurred, the initiative passed, and the Washington Supreme Court concluded that it was proper to proceed to the merits on the post-election appeal because if the court concluded that the subject matter of the initiative was outside the scope of the relevant initiative power, the Court could invalidate the initiative. *Id.* The Washington Supreme Court then invalidated the initiative. *Id.* at 273.

In contrast, the Washington Supreme Court has regularly dismissed election-related appeals as moot where the election has already occurred, there is no longer an effective remedy, and the case depends on particular facts. *E.g.*, *Pedersen v. Maleng*, 101 Wn.2d 288, 289-90, 677 P.2d 767 (1984) (challenge to timeliness of recall petition was moot after recall election had occurred, mayor was recalled, and new mayor had been elected); *see also West v. Reed*, 170 Wn.2d 680, 681-82, 246 P.3d 548

(2010) (challenge to referendum certification was moot because voters had approved the referendum and no effective relief could be granted); *State ex. rel. Jones v. Byers*, 24 Wn.2d 730, 733-34, 167 P.2d 464 (1946) (challenge to a vote to reconfigure various school districts based on alleged untimeliness of a required comprehensive plan was moot after the election approving the new districts); *see generally State ex rel. Chapman v. Superior Court of Benton County*, 15 Wn.2d 637, 643 131 P.2d 958 (1942) (listing additional mootness cases).

The specific issues and requests for relief raised in this action are now moot under the line of election-related cases. Mr. Eyman's request for declaratory judgment was specific to EHB 2163. He sought declaratory judgment: (1) that EHB 2163 "enacts three discrete tax increases," (2) that EHB 2163 "derives tax revenue from three discrete revenue sources," and (3) "that the Attorney General's decision to seek one advisory vote for the tax increases imposed by EHB 2163 is therefore unlawful." CP at 8-9. Nothing in Mr. Eyman's prayer for declaratory relief extends beyond this specific legislation. The voters have already spoken regarding EHB 2163, calling for the Legislature to repeal its tax increase, but because the vote was advisory, there is no practical or legal effect. The absence of any effect distinguishes this case from *City of Sequim* where the local initiative would have become effective absent a court ruling invalidating it. *City of Sequim*,

157 Wn.2d at 261. In contrast, here a declaration of invalidity of the advisory vote designation for EHB 2163 would be fruitless because the vote already occurred and legislators already know how the people voted.<sup>4</sup> Because this Court cannot now provide, any effective remedy regarding Advisory Vote No. 17 or EHB 2163, the matter should be dismissed as moot.

**2. This Court should decline to enter an advisory opinion addressing future advisory vote designations on legislation yet to be adopted**

The exception to the general mootness rule for matters “of continuing and substantial public interest” does not apply here. *See Sorenson*, 80 Wn.2d at 558. This Court, in its discretion, may decide an appeal that has otherwise become moot when “[1] the public or private nature of the question presented, [2] the desirability of an authoritative determination for the future guidance of public officers, and [3] the likelihood of future recurrence of the question” warrant review. *Id.* This Court may also consider “[4] the level of genuine adverseness and the quality of advocacy of the issues,” and “[5] the likelihood that the issue will

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<sup>4</sup> In *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 54, 272 P.3d 227 (2012) (Johnson, J. dissenting), the dissent argued that the advisory nature of the public vote weighed in favor of mootness. The majority disagreed that the local measure was merely advisory. *Id.* at 49 (concluding the measure was an initiative, not merely advisory). Here, there is no dispute that the statewide advisory votes have no substantive effect.

escape review . . .” due to the short-lived nature of the case. *Waterman v. Cary*, \_\_\_ Wn.2d \_\_\_, 885 P.2d 827, 832 (1994); *Hart v. Dep’t of Soc. & Health Servs.*, 111 Wn.2d 445, 448-49, 759 P.2d 1206 (1988) (cataloging cases in which the mootness exception was invoked) (internal quotation marks omitted). The *Hart* Court emphasized that an appellate court must faithfully apply all of the *Sorenson* criteria in order to ensure the “actual benefit to the public interest in reviewing a moot case outweighs the harm from an essentially advisory opinion.” *Hart*, 111 Wn. at 450.

The content of the ballot and issues of statutory interpretation are often matters of substantial public interest, and thus the first criterion weighs in favor of applying the exception.

Mr. Eyman’s arguments are specific to EHB 2163, however. The second and third criteria, the desirability of future authoritative guidance for public officials and the likelihood of recurrence, weigh against reaching the merits despite mootness. This Court’s application of the advisory vote statutes to EHB 2163 will not necessarily resolve future issues about different, newly adopted laws, and thus will not be authoritative in other circumstances. This is especially so given the myriad forms that tax legislation can ultimately take. *Compare* CP at 16-66 (EHB 2163) *with* CP at 103-05 (describing other legislation subject to advisory vote including the elimination of excise tax preferences and expansion of the excise tax in

various ways). Here, Mr. Eyman has asserted that the Legislature's narrowing and elimination of certain sales and use tax exemptions related to bottled water and self-produced fuel, and the imposition of a tax reporting or collection obligation for remote sellers (without increasing the amount of tax due) should result in three separate advisory votes. CP at 7-8. Resolving the merits of Mr. Eyman's petition would not likely provide authoritative guidance for future advisory vote designations, nor are his precise complaints likely to arise again. *Cf Mukilteo Citizens for Simple Gov't.*, 174 Wn.2d at 52 n.6 (subject matter challenge to a local initiative was a justiciable controversy post-election because effective relief, including invalidation of the adopted initiative, could be granted, and the issue was recurring in other localities). Indeed, there have been 18 advisory votes since 2012 and this is the first legal challenge to an advisory vote designation. It could be several years before similar issues arise again.

To the extent that Mr. Eyman requests a broad statement from this Court about how the advisory vote statutes should be applied in future circumstances, the appellate courts have recognized good reasons for avoiding such advisory opinions. *See also Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994) (declaratory judgment action must involve a concrete, ripe, and not moot disagreement to avoid "prohibited . . . advisory opinions.") (citation omitted); *see also To-Ro Trade Shows v. Collins*, 144

Wn.2d 403, 416, 27 P.3d 1149 (2001) (discretion to render advisory opinion exercised rarely and only where public interest is overwhelming).

Finally, this Court is in the best position to judge the fourth criterion, the quality of the arguments presented, and the fifth criterion does not support the mootness exception here. Mr. Eyman can properly get his arguments before the courts should he object to the Attorney General's Office's designation of some future legislative tax package. Mr. Eyman requested immediate notice of the Attorney General's designation of legislation subject to advisory vote and the Attorney General's Office responded promptly to all of his requests for information on the same day he made them. *See* Mot. Direct Review at 9. Thus, Mr. Eyman can obtain notice of an advisory vote designation in time to properly seek injunctive relief from the courts. Mot. Direct Review at 9; *cf Philadelphia II v. Gregoire*, 128 Wn.2d 707, 712, 911 P.2d 389 (1996). He can take appropriate legal action in the week after the designation occurs but before the short description is filed, he just failed to do so here. Nothing prevents Mr. Eyman from following the appropriate procedure for seeking an injunction in a future case.

In sum, this Court should dismiss this appeal as moot and it should not invoke the mootness exception. Tax increase legislation is varied and each bill involves a unique application of the advisory vote statutes to the

facts. Thus, under the Washington Supreme Court’s criteria, the mootness exception should not apply.

**B. The Trial Court Properly Concluded That Mr. Eyman’s Action Was Untimely**

The Superior Court correctly held that Mr. Eyman’s challenge to the Attorney General’s Office’s designation of EHB 2163 for a single advisory vote was untimely. The Attorney General’s Office designated the 2017 advisory votes on July 27, 2017. CP at 107. Mr. Eyman admits he received prompt notice of these designations and objected on the same day. Mot. Direct Review at 9. On the same day, the Attorney General’s Office declined to change the designation and the Secretary of State’s Office provided advisory vote numbers for each advisory vote, consistent with its regular practice. The Attorney General’s Office then filed the advisory vote short descriptions five business days later on August 3, 2017, in order to meet the statutory deadline. CP at 108. Under RCW 29A.72.283, once submitted to the Secretary of State, the advisory vote short descriptions for the ballot are not subject to appeal. As a result, the ballot language could not be changed after it was finally established on August 3, 2017. *Contrast with* RCW 29A.72.080 (permitting an appeal of an initiative ballot title to superior court, but providing that decision “shall be final”). Mr. Eyman did not file and serve this lawsuit until August 4, 2017. CP at 4.

Despite the short statutory timeline, Mr. Eyman had options. He could have sought to enjoin the filing of the advisory vote short descriptions any time between July 27 and August 3, 2017, but he failed to do so despite prompt notice of the July 27, 2017 designation.<sup>5</sup> He also could have sought a writ of mandamus. *E.g., Eyman v. McGehee*, 173 Wn. App. 684, 294 P.3d 847 (2013). There were procedural avenues for Mr. Eyman to pursue a challenge to the advisory vote designation before the short descriptions were complete and filed, but he failed to exercise those options. The superior court was correct to conclude that his challenge was untimely once the advisory vote ballot language was filed and was not subject to appeal.

Finally, a five-day window to challenge ballot and Voters' Pamphlet content is not unusual. *See, e.g.,* RCW 29A.32.040 (five-day appeal period for explanatory statements); RCW 29A.72.080 (ballot titles—same). Any decision that departs from the Legislature's strict statutory timelines could interfere with election officials' ability to meet the federal and state deadlines for getting ballots to military and overseas voters. 52 U.S.C. § 20302; RCW 29A.40.070. This Court should affirm the trial court's

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<sup>5</sup> While Mr. Eyman seems to assert that the Secretary of State could have issued advisory vote numbers that contradicted the Attorney General's Office's designation, the advisory vote statutes do not authorize the Secretary of State to depart from the Attorney General's Office's designation when assigning advisory vote numbers. RCW 43.135.041(2). The Secretary of State is performing a ministerial duty when assigning advisory vote numbers and the statute does not authorize her to exercise any discretion. *See* RCW 43.135.041(2).

conclusion that after the ballot language was finally decided, the 2017 advisory votes could not be challenged.

**C. The Attorney General Properly Designated a Single Advisory Vote for EHB 2163**

Even if this Court were to consider the merits, Mr. Eyman’s petition still fails as a matter of law because Mr. Eyman cannot demonstrate that the Attorney General’s Office’s designation was statutorily deficient. While the Superior Court did not reach the merits, this Court can affirm on any ground so long as the record is sufficiently developed. *See* RAP 2.5(a).

The Attorney General’s Office’s interpretation of the advisory vote statutes should be reviewed under an error of law standard. *See St. Francis Extended Health Care v. Dep’t of Soc. & Health Servs.*, 115 Wn.2d 690, 695, 801 P.2d 212 (1990). Even so, where there is more than one way to interpret the statutory scheme, the Court should defer to the Attorney General’s Office’s application of the statutory language. *Cf. Seattle Area Plumbers v. Wash. State Apprenticeship & Training Council*, 131 Wn. App. 862, 871, 129 P.3d 838 (2006) (court will defer to government’s interpretation if statute is ambiguous or government is charged with statute’s administration and enforcement).

The Attorney General’s Office has reasonably applied the advisory vote statutory language, which provides if “legislative action raising taxes

. . . involves *more than one revenue source*, each tax being increased shall be subject to a separate measure for an advisory vote of the people under the requirements of this chapter.” RCW 43.135.041 (emphasis added). The Attorney General’s Office interprets the statute to mean revenue sources as the Legislature has divided them under the revenue code: excise tax under RCW Title 82, estate tax under RCW Title 83, and property tax under RCW Title 84. Mr. Eyman has asserted that this reading would give no meaning to, “each tax being increased shall be subject to a separate advisory vote,” but that is not the case. “Should a piece of legislation raise both excise tax and property tax, for example, then two advisory votes would be designated.” CP at 100, ¶ 6.

While it is possible to read RCW 43.135.041 to require a separate advisory vote for every subtype of tax within those titles, this reading is less consistent with the purpose of I-960. Read as a whole, the purpose of the advisory vote provisions was to give the voters a chance to express the people’s opinion as to whether the tax increase legislation should have been adopted. *See* I-960, § 1 (“An advisory vote . . . gives the voters information about *the bill* increasing taxes and provides the voters with legislators’ names and contact information and how they voted *on the bill*.”) (emphases added). The initiative requires voters be notified of how each legislator

voted on the tax legislation as a whole upon final passage. I-960, § 1; RCW 29A.32.070(11).

Tax packages, like EHB 2163, are often the result of long and delicate negotiations and they frequently strike a careful balance through compromise, adopting some elements that each caucus does not like. The best way to provide meaningful feedback to legislators who voted on the tax bill in question is for the people to vote on the same tax package presented to the legislators for approval or rejection whenever possible. The advisory vote statute seems to recognize this when it requires reporting in the Voters' Pamphlet of how legislators voted on final passage. RCW 29A.32.070(11). It would be absurd to require multiple listings that repeatedly reflect a legislator's single vote on the same bill. More importantly, under the Attorney General's Office's designation method, the people consider the same question that the legislators considered in almost all cases, and the legislators will know from the results of the advisory vote whether the people approve of the tax compromise the Legislature has struck overall. While Mr. Eyman argues that the people's feedback through advisory votes should be more like the Governor's line item veto power, that argument is not consistent with how I-960 was explained to voters. The Attorney General's Office's application of the advisory vote statutes is consistent with how I-960 was explained to voters in 2007 as an opportunity

to require “voter feedback” to legislators about how they had voted on tax legislation. Voters’ Guide, 2007 General Election, I-960.

Mr. Eyman also relies on a floor ruling that then Lieutenant Governor Brad Owen made in 2009 when acting as President of the Senate regarding the application of I-960. Eyman’s Opening Br. at 24; S. Journal, 61st Leg., Reg. Sess., at 574, 579 (2009). But that floor ruling addressed the question of whether a two-thirds vote was required for passage of a bill, applying a provision in I-960 that the Washington Supreme Court has since struck down, not an advisory vote designation. S. Journal, 61st Leg., Reg. Sess., at 574, 579 (2009); *League of Educ. Voters v. State*, 176 Wn.2d 808, 826, 295 P.3d 743 (2013). As a result, the issues that the President addressed, including whether the bill at issue imposed a fee or a tax, did not implicate an advisory vote designation, nor did he interpret the meaning of “revenue source” for purposes of an advisory vote. S. Journal, 61st Leg., Reg. Sess., at 574, 579 (2009); RCW 43.135.041. The former Lieutenant Governor’s determination that legislation amounted to a tax increase for purposes of a two-thirds vote requirement on the entire bill does not support Mr. Eyman’s argument that multiple advisory votes are required for a single bill.

The Attorney General’s Office’s reasonable reading of “revenue source” draws a principled line and avoids absurd results. If an increase in

each subtype of excise tax or property tax triggered a separate advisory vote, this would multiply the number of advisory votes without providing meaningful feedback to the legislators who voted on the bill because it would not align with the choices the legislators faced. In 2015, there were four advisory votes on the ballot, and designating one for each subtype of excise tax would have increased that number to six, including two separate advisory votes on the oil spill administration tax and the oil spill response tax. CP at 104. In 2014, the number of advisory votes would have increased from two to five where four advisory votes would have been about parts of the same legislation. CP at 103. Nothing in I-960 or its history suggests that the voters wanted advisory votes to extend the ballot to such a large degree, and common sense suggests otherwise.

In contrast, Mr. Eyman does not offer a principled basis for determining what amounts to a separate “revenue source.” In his petition, Mr. Eyman claimed that there should be three advisory votes for various parts of EHB 2163: increased sales and use tax revenue from bottled water, increased use tax revenue from self-produced fuels, and increased revenue from internet sales as a result of the new reporting requirement. CP at 14-15. This multiplication of advisory votes does not make any sense.

Mr. Eyman was incorrect to argue below that a reporting or collection obligation must be a “tax increase” even though it does not

increase the amount of tax due. Reading RCW 43.135.041 in its entirety, advisory votes must be designated only for tax increases. *See* RCW 43.135.041(2), (3), and (4) (using the terms “tax increase” and “bill increasing taxes”). Under RCW Title 82, one type of excise tax, the retail sales tax, is imposed on retail sales of goods and specified services to consumers occurring in Washington. RCW 82.08.020. The state retail sales tax is imposed on the buyer, but the seller has an obligation to collect the tax, hold it in trust, and remit it to the state. RCW 82.08.050. A companion excise tax, the use tax, is imposed on any person using an item in Washington as a consumer, where retail sales tax has not previously been paid. RCW 82.12.020; *Activate, Inc. v. Dep’t of Revenue*, 150 Wn. App. 807, 814, 209 P.3d 524 (2009) (“Use tax is a companion tax imposed when a seller does not collect a retail sales tax.”). Where the retail sales tax or use tax is already due, legislation that improves collection is not a “tax increase” under RCW 43.135.041.

Mr. Eyman sought a separate advisory vote on a portion of EHB 2163 that imposes a collection or reporting obligation on remote sellers, referrers, and marketplace facilitators depending on their preference. CP at 8, 14. But this part of EHB 2163 does not impose a new tax—the use tax is already due on all items used in Washington that were purchased through remote internet sales. EHB 2163, § 201 (expressing

legislative intent to allow remote sellers and marketplace facilitators to choose between collecting the retail sales/use tax or reporting remote sales so that use tax can more easily be collected). Part two of EHB 2163 does not impose a new tax, it simply creates a reporting or collection obligation. EHB 2163, §§ 201-205. Thus, this portion of the bill was not subject to advisory vote at all.

Mr. Eyman also sought separate advisory votes for elimination or narrowing of sales and use tax exemptions. But there is no principled basis to require two separate advisory votes for sales and use tax increases, one regarding bottled water and the other regarding extracted fuels. It strains logic to treat use tax on one thing (bottled water) as a separate revenue source than use tax on a different thing (extracted fuel). Under Mr. Eyman's rationale, even the retail sales and use tax increases on bottled water should have two separate advisory votes, but that would be absurd. The excise tax on retail sales and excise tax on use are inextricably linked because use tax is due only where retail sales tax has not been paid. RCW 82.12.020. As a result, there should not be two separate advisory votes for increased revenue for use tax (on bottled water and on extracted fuel), nor should there be two separate advisory votes on retail sales and use tax, which are both inextricably linked and mutually exclusive. It makes much more sense to

avoid these complications by treating the entire excise tax scheme under RCW Title 82 as a single revenue source for purposes of advisory votes.

Finally, Mr. Eyman suggested below that voters were not told who would pay the increased tax and on what items or services the voters would pay more tax after EHB 2163 took effect. CP at 80-81. But the statute governing advisory vote descriptions does not require such information. Instead, the statute requires identification of the tax and a description of the increase. RCW 29A.72.283. Mr. Eyman should not be allowed to challenge the Attorney General's Office's designation based on what he believes the law ought to be.

In sum, even if this Court ultimately considers the merits, the Attorney General's Office has adopted a reasonable construction and application of the advisory vote statutes. The Attorney General's Office's application of the advisory vote statutes is the only one that is consistent with the purpose to provide direct feedback to the Legislature because the advisory vote designations correlate with what the legislators voted on.

#### **IV. CONCLUSION**

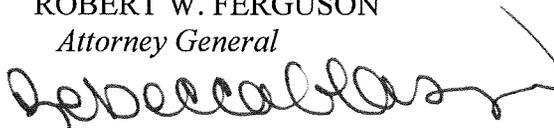
The superior court was correct to conclude Mr. Eyman's petition for declaratory judgment was improper. This Court should dismiss this case as moot. Yet if the Court proceeds to the merits, it should affirm the superior court's dismissal of Mr. Eyman's petition because it was too late. It was

filed after the ballot language for advisory votes had already become final. Moreover, the Attorney General's Office's designation of a single advisory vote for EHB 2163 was consistent with the law.

RESPECTFULLY SUBMITTED this 22nd day of December, 2017.

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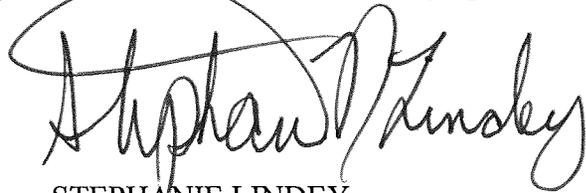
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I certify, under penalty of perjury under the laws of the state of Washington, that on this date I served a true and correct copy of the foregoing document via electronic mail, upon the following:

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DATED this 22nd day of December 2017, at Olympia,  
Washington.

A handwritten signature in black ink, appearing to read 'Stephanie Lindey', written in a cursive style. The signature is positioned above the printed name and title.

STEPHANIE LINDEY  
*Legal Assistant*

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