

NO. 80430-3

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SUPREME COURT OF THE STATE OF WASHINGTON

FUTUREWISE and SERVICE EMPLOYEES INTERNATIONAL
UNION HEALTHCARE 775NW,

Appellants,

v.

SAM REED, Secretary of State of the State of Washington,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Two years ago this Court reiterated Washington's "longstanding rule of our jurisprudence that we refrain from inquiring into the validity of a proposed law, including an initiative or referendum, before it has been enacted." *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005). Appellants commenced this action seeking to preclude an election on Initiative 960, a proposed measure certified to appear on the November 2007 general election ballot. In doing so, Appellants ask this Court to entertain the very type of claim that this Court has recently and unanimously held it would not entertain. This Court should instead affirm the judgment of the trial court dismissing this action.

II. ISSUES PRESENTED

Given the general rule that Washington courts do not consider pre-election challenges to proposed initiatives, does Initiative Measure 960 exceed the scope of the initiative power of the people under article II, section 1(a) of the Washington Constitution so as to bring this measure within a narrow exception to that rule?

III. STATEMENT OF THE CASE

Appellants commenced this action in the King County Superior Court, seeking an order excluding proposed Initiative 960 (I-960) from the November 2007 statewide general election ballot. The sole Defendant

named in the action is Secretary of State Sam Reed, the election official responsible for certifying proposed measures to the ballot and overseeing the administration of the election. CP at 1-82. The initiative sponsors are not parties to this action, although they did submit an amicus brief below. CP at 127-38.

In very brief summary, I-960 concerns increases in state taxes and fees. It includes provisions requiring various cost projections and other information concerning such legislation, including legislative voting records. I-960, §§ 2-4. It also addresses requirements that the legislature enact certain legislation by a two-thirds vote, rather than a simple majority, and that some legislation be referred to the voters either for their approval or rejection or simply for an advisory vote. I-960, §§ 5-13. It also requires legislative authorization for increases in certain administrative fees. I-960, § 14. Some of these provisions propose new statutory sections, while others amend existing statutes.

The parties briefed the matter on an accelerated basis, as cross-motions for judgment on the pleadings. CP at 87-103; CP at 104-26. Following oral argument, the trial court granted Secretary Reed's cross-motion and dismissed the action, concluding that Appellants had raised the same type of inappropriate pre-election challenge to the constitutionality

of an initiative that this Court rejected in *Coppernoll*. RT 7:2-8:6 (July 13, 2007). This appeal followed.

Shortly after the trial court ruled, the Secretary of State completed the review of the petitions supporting I-960 and concluded that they bore sufficient valid signatures to qualify for the ballot.¹ The Secretary of State anticipates that county auditors will begin printing general election ballots as early as September 11, 2007. By statute, the results of the August primary will be certified no later than that day. RCW 29A.60.240. County auditors are required to mail ballots to all overseas and military service voters at least thirty days before any primary or election. RCW 29A.40.070(2). In 2007, this translates to an October 7 mailing deadline. Before ballots can be mailed, of course, time is required for design, printing, checking for accuracy, and preparation for mailing, all of which begins promptly after certification of the primary results.

IV. SUMMARY OF ARGUMENT

Washington courts have long recognized a general rule against considering challenges to the constitutionality of proposed ballot measures unless and until the voters enact them at the polls. *Coppernoll*, 155 Wn.2d

¹ The Secretary of State's announcement that I-960 qualified to the general election ballot can be found online at the Secretary's web site: http://www.secstate.wa.gov/office/osos_news.aspx?i=yhVmLPrDX76o2ZuW5dGZgQ%3d%3d (last visited Aug. 13, 2007).

at 297. Several sound purposes support this rule, including the importance of permitting voters to express their views on public policy points rather than denying them that voice, and of avoiding advisory opinions on mere proposals that might never become law. *Id.* at 298. Justiciability concerns regarding arguments about a mere *proposed* law also underlie this rule, and have particular force when the only named defendant in the action is the Secretary of State—a neutral election official whose duty is to fairly conduct the election according to law and not to defend the constitutionality of a proposed measure. *Id.* at 300-01.

The *Coppernoll* opinion notes a limited exception to this prohibition against pre-election challenges: the principle that a measure can be excluded from the ballot if it is not a proper exercise of the initiative power. As applied to statewide measures, this exception is limited to measures that are categorically beyond the legislative power of the state, such as attempts to amend the federal or state constitutions or to enact or amend federal law. *Id.* at 303. Appellants' challenge in this case is clearly predicated upon arguments that provisions of I-960 are unconstitutional. In this regard, Appellants' arguments closely parallel those offered and rejected in *Coppernoll*.

V. ARGUMENT

A. Standard Of Review

This Court reviews grants of summary judgment *de novo*. *Madison v. State*, No. 78598-8, 2007 WL 2128346 at *3 (Wash. July 26, 2007). Although initially presented on cross-motions for judgment on the pleadings, the trial court treated the motions below as motions for summary judgment because matters outside the pleadings were presented. CR 12(c).

B. Pre-Election Challenges To Proposed Initiatives Are Generally Premature And, With Rare Exceptions, Are Not Considered

1. Washington's Rule Against Pre-Election Challenges Is Well-Established

The voters, like any other legislative body, are entitled to exercise their choices on pending legislation without judicial interference in the legislative process. Washington courts “refrain from inquiring into the validity of a proposed law, including an initiative or referendum, before it has been enacted.” *Coppernoll*, 155 Wn.2d at 297; *see also Philadelphia II v. Gregoire*, 128 Wn.2d 707, 716, 911 P.2d 389 (1996) (“Generally, courts are reluctant to rule on the validity of an initiative before its adoption by the people . . .”). This Court first announced the rule against pre-election constitutional challenges less than four years after the

constitution was first amended to create the initiative process² (*State ex. rel. Griffiths v. Superior Ct.*, 92 Wash. 44, 47, 159 P. 101 (1916)), and has reiterated this rule clearly and decisively on numerous occasions, in cases both recent and time-honored. *Coppernoll*, 155 Wn.2d at 297-98; *see also Seattle Bldg. & Constr. Trades Coun. v. City of Seattle*, 94 Wn.2d 740, 745, 620 P.2d 82 (1980); *State ex rel. O'Connell v. Kramer*, 73 Wn.2d 85, 87, 436 P.2d 786 (1968).

This general rule against pre-election challenges is rooted in the constitutional preeminence of the right of initiative. *Coppernoll*, 155 Wn.2d at 297. Voters exercise a constitutional right in proposing an initiative. Initiative opponents have every right to oppose a measure, but they have no constitutional right to prevent its presentation to the voters. *Schrempp v. Munro*, 116 Wn.2d 929, 932, 809 P.2d 1381 (1991). This is consistent with this Court's maxim that, "the judiciary should exercise restraint in interfering with the elective process which is reserved to the people in the state constitution." *Dumas v. Gagner*, 137 Wn.2d 268, 283, 971 P.2d 17 (1999) (quoting *McCormick v. Okanogan Cy.*, 90 Wn.2d 71, 75, 578 P.2d 1303 (1978)) (internal quotation marks omitted); *see also Wash. State Labor Coun. v. Reed*, 149 Wn.2d 48, 54, 65 P.3d 1203 (2003)

² The initiative and referendum powers were added to the state constitution through the enactment of Amendment 7, approved by the voters in 1912. Wash. Const. amend. 7.

(the court is “generally reluctant to interfere in the electoral process or to give advisory opinions”); *Wash. State Repub. Party v. King Cy.*, 153 Wn.2d 220, 226, 103 P.3d 725 (2004) (Chambers, J., concurring) (“there is little to commend judicial intervention into the electoral process before the process is complete”).

The courts properly accord substantial respect and deference to the voters as they engage in their constitutionally-protected legislative role. “Because ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential subsequent invalidation of the measure), substantive preelection review may also unduly infringe on free speech values.” *Coppernoll*, 155 Wn.2d at 298. The Court’s reluctance stems additionally “from our desire not to interfere in the electoral process or give advisory opinions.” *Philadelphia II*, 128 Wn.2d at 716.

Appellants suggest that, despite this longstanding rule, pre-election challenges “serve[] the interest of the People” because the invalidation of a measure after the voters enact it “would likely cause some voters to feel that their voice was ignored or overruled”. Appellants’ Br. at 9. In other words, Appellants suggest that voters are better off being told that they cannot vote on a proposal at all than to subject the resulting legislation to constitutional review after enactment.

This Court has previously addressed this concern in a two-fold manner. As already noted, the electoral process can be used to “express popular will and to send a message to elected representatives”. *Coppernoll*, 155 Wn.2d at 298. Additionally, decades ago this Court rejected the argument that judicial economy supports a premature review of constitutional challenges, reasoning:

Should the constitutionality of the proposed initiative be later challenged, and should it then be determined to be unconstitutional, unquestionably there would be those who would criticize the court for not having made that decision at this time, before signatures were secured and an election held. We wish to forestall such criticism, if that be possible, by making it clear that we cannot pass on the constitutionality of proposed legislation, whether by bills introduced in the House or Senate, or measures proposed as initiatives, until the legislative process is complete and the bill or measure has been enacted into law. Then, and then only, can the constitutional issue now urged upon us be properly considered.

O’Connell, 73 Wn.2d at 87.

2. There Is No Justiciable Dispute Between The Appellants And The Secretary Of State As To The Constitutionality Of I-960

The rule against pre-election challenges to an initiative’s constitutionality is also based upon the requirements of a justiciable controversy. The validity of a proposed law is not subject to challenge before the election because a mere proposed law creates no justiciable

controversy. *O'Connell*, 73 Wn.2d at 87. "If petitioners' claim is for substantive review of [the initiative], it is clear that the standard [for] justiciability requirements are not met—there is no actual, present, or existing dispute." *Coppernoll*, 155 Wn.2d at 300. This is true for several reasons. The voters might reject the initiative, as in fact occurred with regard to the initiative at issue in *Coppernoll*.³ Even if the initiative is enacted, there is no guarantee that the present Appellants will suffer any direct harm. *Id.* at 300-01.

The absence of a justiciable controversy is particularly apparent where, as here, the sole named Respondent is the official charged with the neutral task of administering the election. In order for a claim to be justiciable, it must include, among other elements, an actual present dispute between truly adverse parties. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994) (quoting *Nollette v. Christianson*, 115 Wn.2d 594, 599, 800 P.2d 359 (1990)). The interests of Appellants and Secretary Reed are only truly adverse to the extent that Appellants contend that I-960 is not properly within the scope of the initiative power. Secretary Reed has an interest in properly conducting the election, but not in either the policy merits of the proposed measure or its substantive

³ Election results for initiatives on the ballot in 2005 are posted to the Secretary of State's Web site at: <http://vote.wa.gov/Elections/Results/Measures.aspx?e=816913c8-43d7-4b77-be19-3d794615271e> (last visited Aug. 13, 2007).

constitutionality. The Secretary has no duty to enforce or defend the merits of a proposed measure, but only to administer the election according to law. *See generally* RCW 29A.72. There is, accordingly, no case or controversy between the present parties as to the measure's constitutionality. *See City of Sequim v. Malkasian*, 157 Wn.2d 251, 289, 138 P.3d 943 (2006) (Chambers, J., concurring in part/dissenting in part).⁴

This Court has adhered for decades to the rule that review of a measure's constitutionality should await its enactment by the voters. "Ultimate questions as to the validity of the proposed initiative measure are not before us and should not come before us unless and until the people have enacted the measure into law, for the Supreme Court does not render advisory opinions." *O'Connell*, 73 Wn.2d at 86-87. Appellants offer no sound reason to depart from this established rule.

⁴ In addition, in order for a challenge to the constitutionality of a law (much less merely a proposed law) to proceed, the plaintiff must have standing to pursue the claim. "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Walker*, 124 Wn.2d at 419. *Walker* involved a challenge to the constitutionality of Initiative 601, brought after that measure was enacted. *Id.* at 405. As in that case, the Appellants here have failed to allege concrete harm to them, much less concrete harm caused by the mere act of proposing the initiative. *See id.* at 419.

C. Appellants' Challenge To I-960 Is Not Within The Narrow Exception For Pre-Election Challenges To Proposed Initiatives

1. Pre-Election Challenges May Proceed Only Under Two Narrowly-Proscribed Circumstances; Neither Of Which Arise In This Case

The longstanding rule prohibiting pre-election challenges to proposed initiatives has two narrow exceptions. *Coppernoll*, 155 Wn.2d at 297. The two exceptions are (1) challenges based on alleged failures to satisfy procedural requirements for qualifying the measure to the ballot, and (2) challenges based on the contention that the measure exceeds the scope of the initiative power. *Id.* at 298-99. In this case, Appellants raise no challenge to the procedural requirements for qualifying I-960 to the ballot.⁵ Appellants' claim can therefore proceed only if it falls into the second category, for challenges based on the scope of the initiative power. *Id.* at 299.

The task of determining whether Appellants' challenge is properly brought before the election, therefore, depends upon distinguishing between an argument that a proposed measure is beyond the scope of the initiative process from an argument that the measure would, if enacted, be inconsistent with the constitution and, therefore, wholly or partially

⁵ Such challenges are of limited availability in any event. *Schrempp*, 116 Wn.2d at 935-36 (upholding from constitutional challenge a statute that restricts challenges to the Secretary of State's decision regarding the acceptance and filing of initiative petitions to challenges brought by initiative proponents).

unenforceable. *Id.* at 297. Only if it constitutes a challenge based on the proper scope of the initiative process may it proceed before the election. *Id.* at 299.

Appellants' own recitation of their contentions reveals that their challenge falls into the prohibited category of claims of unconstitutionality rather than the permitted category of claims of exceeding the scope of the initiative power. Appellants contend that I-960 suffers from two constitutional defects. First, they contend that, by requiring automatic referendums on various bills enacted by the legislature, the initiative would violate article II, section 1(b) of the constitution. Appellants' Br. at 23. Second, Appellants contend that by requiring a two-thirds vote for the legislature to enact certain bills, I-960 would violate article II, section 22 of the constitution, relating to the passage of bills. Appellants' Br. at 30-31. In other words, Appellants argue that if I-960 were enacted, some of its provisions would not be enforceable because they would be inconsistent with certain language in the constitution. This is precisely the type of argument that courts will entertain *after* a bill or measure is enacted, but not before. *Coppernoll*, 155 Wn.2d at 297.

Appellants' arguments, like those of their predecessors in *Coppernoll*, are predicated upon a linguistic twist: they contend that the initiative process does not extend to proposing unconstitutional laws, and

that therefore I-960 exceeds the scope of the initiative power based on the argument that it would be unconstitutional if enacted. Appellants' Br. at 8. Of course, if such verbal gymnastics sufficed to state a claim for pre-election review, nothing would be left of the rule against pre-election challenges to the constitutionality of proposed initiatives. See *Interlake Sporting Ass'n, Inc. v. Wash. State Boundary Review Bd.*, 158 Wn.2d 545, 561, 146 P.3d 904 (2006) (decrying a construction under which the exception would swallow the rule). If enacting an unconstitutional provision is "beyond the scope of the initiative power," any constitutional challenge to the substance of a measure could simply be expressed as a contention that the measure is beyond the scope of the initiative power. Accepting this formulation of the argument "would eliminate our rule against preelection review and open the floodgates to preelection challenges of nearly any proposed initiative." *Coppernoll*, 155 Wn.2d at 304.

Although this Court in *Coppernoll* clearly articulated only two exceptions to the rule against pre-election challenges, Appellants erroneously proffer a third exception where "post-election review would not provide an adequate remedy." Appellants' Br. at 12. Post-election review is clearly available, of course, both in the form of substantive

constitutional challenges and requests for preliminary injunction, which any party with standing could seek.

Nevertheless, Appellants derive this third exception from the decision in *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004). In that case, the court of appeals cited the fact that the initiative at issue in that case would take effect promptly after the election as an additional reason why pre-election review, “limited to whether the initiative was beyond the initiative power, was appropriate.” *Id.* at 387. Appellants similarly argue I-960 will take effect promptly after the election, but the same could be said of every initiative. Wash. Const. art. II, § 1(d) (initiatives and referendums take effect on the thirtieth day after the election at which they are approved). Moreover, the court of appeals in *City of Seattle* explicitly limited the question it would review to the issue of “whether the initiative was beyond the initiative power”. *Id.* at 387. The case, therefore, clearly states an additional rationale for applying the recognized exception to the rule against pre-election challenges and does not purport to establish a third exception to that rule. *Id.* Even if it did, this Court’s later-issued decision in *Coppernoll* would contradict and overrule that conclusion. *Coppernoll*, 155 Wn.2d at 297-99 (recognizing only two exceptions to the rule against pre-election challenges). Finally, even if haste could form the basis of a third exception, an action

challenging the constitutionality of a proposed initiative in which the only named defendant is the neutral election administrator would fail to present a justiciable case or controversy, for the reasons articulated previously. *See infra* section B(2).

2. A Challenge That An Initiative “Exceeds The Scope Of The Initiative Power” Is Limited To Challenges Based On The Extent And Nature Of Legislative Authority

Challenges based on whether the initiative exceeds the scope of the initiative power properly inquire into the nature and extent of the legislative authority the measure would exercise, not into whether it would conflict with the constitution. As this Court observed in *Coppernoll*, all but one of the cases in which appellate courts have entertained challenges to a proposed ballot measure before the election, based on the argument that it is not proper for direct legislation, have arisen with regard to local governments. *Coppernoll*, 155 Wn.2d at 299 (citing *Maleng v. King Cy. Corr. Guild*, 150 Wn.2d 325, 76 P.3d 727 (2003)); *Seattle Bldg. & Constr. Trades Coun.*, 94 Wn.2d 740; *Ruano v. Spellman*, 81 Wn.2d 820, 505 P.2d 447 (1973); *Ford v. Logan*, 79 Wn.2d 147, 483 P.2d 1247 (1971). This observation highlights the nature of the inquiry in which the court engages when the challenge is properly one to the scope of the initiative process. The inquiry is not into whether the measure conflicts with the constitution,

but rather into whether it is the kind of measure the voters are empowered to enact.

This is true, for example, of this Court's most recent pre-election challenge decision, *City of Sequim v. Malkasian*. In that case, the Court explained that at the local level, "[a]n initiative is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself." *City of Sequim*, 157 Wn.2d at 261. In other words, the inquiry is into the authority of the voters to enact the measure, not its constitutionality. See also *Leonard v. City of Bothell*, 87 Wn.2d 847, 853, 557 P.2d 1306 (1976) (grant of power by the legislature to the legislative body of a local government precludes a referendum election); *Whatcom Cy. v. Brisbane*, 125 Wn.2d 345, 350, 884 P.2d 1326 (1994) ("a statutory grant of [legislative] power to a legislative authority does not generally permit delegation to the voters through an initiative or referendum"); *Snohomish Cy. v. Anderson*, 123 Wn.2d 151, 156, 868 P.2d 116 (1994) (same); *City of Seattle*, 122 Wn. App. at 385 (same).

This inquiry involves not only the distinction between the authority of a legislative body and that of the voters, as in the local government cases cited above, but also the question of whether the measure falls within the authority of the jurisdiction passing the measure. In one case,

this Court upheld an injunction against holding an election on a local initiative because it “relate[d] to matters upon which the City had no authority to legislate”. *Seattle Bldg. & Constr. Trades Coun.*, 94 Wn.2d at 749. Specifically, the initiative addressed the construction of an interstate highway bridge across Lake Washington (*id.* at 741-42), a facility under the jurisdiction of the state rather than the city (*id.* at 747). The initiative at issue attempted to achieve something not within the city’s authority and, therefore, was not within the scope of the local initiative power. *Id.* at 748.

The same was true of the only statewide initiative that a Washington appellate court has found to exceed the scope of the initiative power.⁶ In *Philadelphia II*, this Court explained the inquiry into whether an initiative exceeds the scope of the initiative power as an examination of whether the measure would “enact a law that is within the state’s power to enact.” *Philadelphia II*, 128 Wn.2d at 719. The initiative at issue in that case proposed to establish a federal initiative process. *Id.* As such, it was

⁶ Appellants mention an additional case in which the Thurston County Superior Court concluded that a statewide initiative exceeded the scope of the initiative power. Appellants’ Br. at 11 n.12 (citing *Goldstein v. Gregoire*, Thurston Cy. Superior Ct. No. 03-2-00221-3). Since the case did not result in an appellate decision a discussion of it casts little light on the present case. It bears mention, however, that Appellants err in stating that the Secretary of State brought that case. Appellants’ Br. at 11. The Secretary of State did not bring that action.

not within the scope of the initiative power because “it is simply not within Washington’s power to enact a federal law.” *Id.* at 720.

These cases demonstrate that, as to statewide measures, an initiative exceeds the scope of the initiative power if it “purport[s] to effectuate a federal law; amend the U.S. or Washington Constitution; or create any other type of law outside the state’s legislative power.” *Coppernoll*, 155 Wn.2d at 303. This conclusion is made clear by the fact that the analysis in each of this Court’s prior cases has been into the nature and extent of the lawmaking power being invoked, not whether the resulting legislation would or would not conflict with the constitution.⁷

Appellants essentially contend that I-960 *does* propose to amend the state constitution. Appellants’ Br. at 15-18. They ignore, however, the distinction between a measure exceeding the scope of the initiative

⁷ Appellants rely upon several out-of-state cases for the proposition that initiatives that propose federal constitutional amendments can be stricken from the ballot. These cases not only fail to support Appellants’ case, but actually illustrate the Secretary’s point above. See Appellants’ Br. at 19-20. In each of these cases, the courts excluded proposed initiatives from the ballot, or found them invalid after the election, precisely because they proposed legislation beyond the power of the voters to enact, such as federal constitutional amendments. See *In re Initiative Petition 364*, 930 P.2d 186 (Okla. 1996) (striking from the ballot a state initiative requiring the legislature to petition for a federal constitutional amendment); *Barker v. Hazeltine*, 3 F. Supp. 2d 1088 (D.S.D. 1998) (rejecting initiative directed toward changing federal law by identifying candidates who opposed term limits); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999) (post-election challenge to state constitutional amendment directing state’s elected officials to seek federal term limits); *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826 (1984) (striking from the ballot a proposed state initiative requiring the legislature to petition for a federal constitutional amendment); *AFL-CIO v. Eu*, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984) (same); *State ex rel. Askew v. Meier*, 231 N.W.2d 821 (N.D. 1975) (same).

power, on the one hand, and a measure conflicting with the constitution, on the other.

As Appellants note, in Washington the state constitution cannot be amended by initiative. *Gerberding v. Munro*, 134 Wn.2d 188, 210, 949 P.2d 1366 (1998). This does not mean that every statute that this Court finds unconstitutional was, in reality, an effort to amend the constitution. There is a striking difference between asking whether a proposed statute is unconstitutional and whether the voters (or the legislature) exceeded their authority by attempting to amend the constitution. It is in the nature of our constitutional system that from time to time a court concludes that a statute is unconstitutional, but that conclusion does not call into question the power of the legislative body to consider it in the first place. To conclude otherwise would not only ignore the realities of the legislative process, but would also suggest that courts can, or should, actively police the bills pending before the legislature. “We do not substantively review the legislature’s bills before enactment, and will not do so with the people’s right of direct legislation.” *Coppernoll*, 155 Wn.2d at 304.⁸

⁸ Appellants rely upon the principle that this Court looks to the purpose of legislation, rather than merely to its form, in determining whether it exceeds the scope of the initiative power as authority for the notion that an unconstitutional proposal is equivalent to one that exceeds the scope of the initiative process. Appellants’ Br. at 17. Appellants misconstrue this Court’s reliance upon *Philadelphia II* in the cited passage from the *Coppernoll* decision. The Court merely made the point that, although the initiative at issue in *Philadelphia II* was cast in the form of an amendment to state statute,

Appellants alternatively argue that I-960 exceeds the scope of the initiative process because the constitution “operates as a constitutionally based subject matter restriction on [certain] laws”. Appellants’ Br. at 34. Appellants argue that the inclusion within the state constitution of provisions governing the referendum power (Const. art. II, § 1(b)) and the enactment of bills in the legislature (Const. art. II, § 22) essentially withdraws those subjects from the scope of the state’s legislative authority. Appellants’ Br. at 34-36. This version of their argument that I-960 attempts to amend the constitution begs the question before the Court in a striking way. Appellants assert that in order to change the law related to referendums or passage of the bills in the legislature, a constitutional amendment would be necessary and, accordingly, any bills or initiative measures on these subjects are beyond the scope of the initiative power. Appellants’ Br. at 8.

In order to conclude, however, that a constitutional amendment is necessary, one must first conclude that I-960 would violate the constitution. Otherwise, the provisions of I-960 would simply be statutes enacted within the boundaries set forth in the constitution. The propositions that (1) the initiative is unconstitutional and (2) that a

in substance it proposed a change to federal law. *Coppernoll*, 155 Wn.2d at 302 (citing *Philadelphia II*, 128 Wn.2d at 719). This is not the same as concluding that the enactment of an arguably unconstitutional statute is actually an effort to amend the state constitution.

constitutional amendment is necessary to effectuate its proposal thus collapse into a single argument. Appellants cannot escape the fact that their argument is simply that the initiative is unconstitutional.

Appellants place great emphasis upon an Alaska decision in support of their argument. *Alaskans for Efficient Gov't, Inc. v. Alaska*, 153 P.3d 296 (Alaska 2007). That decision was, however, based on Alaska law that differs substantially from Washington law. To state the matter differently, if its analysis is considered in light of established Washington law (which is, of course, not the task of an Alaska court), that analysis is clearly wrong.

The Alaska case concerned a pre-election challenge to an Alaska initiative that proposed, among other things, to require that any bill to enact or increase taxes receive either a 75% majority in the state legislature or approval by the voters. *Id.* at 297. The Alaska court began its analysis by reciting a “general rule . . . that a court should not determine the constitutionality of an initiative unless and until it is enacted.” *Id.* at 298. The similarity between Washington and Alaska law begins and ends at the recitation of that general rule. The Alaska court recognized exceptions to that rule where either “the initiative is challenged on the basis that it does not comply with the state constitutional and statutory provisions regulating initiatives . . . [or] where the initiative is

clearly unconstitutional”. *Id.* These exceptions are different from those recognized in Washington. *Coppernoll*, 155 Wn.2d at 297. The Alaska court excluded the initiative from the ballot on the authority of the first exception, relating to initiatives that do not comply with state constitutional and statutory provisions regulating initiatives, rather than the second exception for clearly unconstitutional proposals. *Alaskans for Efficient Gov’t*, 153 P.3d at 302. This analysis has no parallel in Washington law, and if the standards enunciated in *Coppernoll* and earlier cases were applied to it the outcome would be different. *Coppernoll*, 155 Wn.2d at 304 (“Under petitioners’ theory, any proposed legislation that could be potentially unconstitutional would operate as an amendment to the constitution, which is beyond the legislative power . . .”).⁹

The constitution directly contradicts Appellants’ contention that the initiative and referendum processes are themselves beyond the scope of the legislative process. Wash. Const. art. II, § 1(d) (“This section is self-executing, but legislation may be enacted especially to facilitate its operation . . .”). The legislature has enacted statutes governing the process, none of which can seriously be called into question as exceeding the scope of legislative power. *See generally* RCW 29A.72.

⁹ Additionally, the reasoning of the Alaska case is unpersuasive, especially when compared to the careful analysis of the *Coppernoll* decision.

3. The Challenge To Initiative 960 Fails For The Same Reasons Stated In *Coppernoll*

The conclusion that Appellants' challenge constitutes an improper pre-election challenge to the constitutionality of I-960, and not a challenge that it exceeds the scope of the initiative power, can be further illustrated by noting the striking parallels between the arguments rejected in *Coppernoll* and those offered by Appellants in this case. Those arguments fall into two categories: (1) the contention that a prior decision of this Court already establishes that a proposed initiative would be unconstitutional and that, therefore, the initiative amounts to an effort to amend the state constitution and (2) the contention that the initiative would violate one or more cited sections of the constitution as authority for the proposition that it exceeds the scope of the initiative power.

a. Prior Decisions Of This Court Do Not Address Whether I-960 Is Beyond The Scope Of The People's Legislative Power

In *Coppernoll*, the initiative at issue included proposed limitations on noneconomic damages and contingency fees, which the initiative's opponents argued had already been found unconstitutional in prior decisions of this Court. *Coppernoll*, 155 Wn.2d at 302-03 (summarizing the opponents' reliance upon *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989) and *Moody v. United States*, 112

Wn.2d 690, 773 P.2d 67 (1989)). Similarly, in this case the Appellants emphasize their argument that this Court has already concluded that statutes requiring an automatic referendum as a condition for the legislature enacting certain bills is unconstitutional. Appellants' Br. at 21-24 (relying heavily upon *Amalgamated Transit Union Local 587 v. State* (ATU), 142 Wn.2d 183, 11 P.3d 762 (2000)).

This Court in *Coppernoll* rejected the proposition that a plaintiff can use prior case law to "prove" that a proposed initiative would be unconstitutional if enacted and, therefore, beyond the scope of the initiative power. "Petitioners' reliance on this precedent applying other sections of our state's constitution to other laws is misguided." *Coppernoll*, 155 Wn.2d at 303. As this Court explained, "[w]e carefully distinguish between review of initiatives for general constitutionality and review for being beyond the legislative power of article II, section 1 of the Washington Constitution." *Id.*

In this regard, Appellants' argument is essentially that a measure exceeds the scope of the initiative power if a prior decision of this Court supports an argument that it is unconstitutional. Not only does such a formulation confuse the distinction between legislative power and constitutionality, but it would lead to the conclusion that the scope of the people's legislative authority depends on the subjects the courts have

previously addressed. “The fact that this court addressed a subject in a prior case does not prevent the people or the legislature from enacting measures to test the bounds or continued applicability of a prior judicial decision.” *Id.*

Moreover, the *ATU* decision is not the magical talisman that Appellants imagine it to be. Even aside from distinctions that might be drawn between the text of I-960 and that of I-695, the subject of *ATU*,¹⁰ *ATU* was not a pre-election challenge. *ATU*, 142 Wn.2d at 195 (noting that the *ATU* lawsuit was filed after the initiative was enacted). This Court did not have before it in *ATU* the question of whether I-695 should be excluded from the ballot as a measure that exceeds the scope of the initiative power. It merely engaged in a post-election review of its constitutionality. *Id.* at 232. Appellants take out of context the statement that I-695 “was adopted in an improper way” (*id.*)—authority for the proposition that should not have been permitted to proceed to the ballot. In context, the statement appears in the course of an argument explaining that I-695 was unconstitutional as conflicting with article II, section 1(b).
Id.

¹⁰ For example, I-695 included a provision that required voter approval in order for certain legislation to take effect. *ATU*, 142 Wn.2d at 231. I-960 proposes, in part, a procedure under which certain *nonbinding* advisory votes would take place. I-960, §§ 6-13.

Nor does it matter that this challenge is partly based on article II, section 1, the portion of the constitution reserving and defining the power of the initiative. *Id.* The question of whether a proposed initiative is unconstitutional as conflicting with article II, section 1 is analytically indistinguishable from an argument that a proposed initiative conflicts with any other section of the constitution. Accordingly, Appellants' reliance upon *ATU* fails to state a claim that I-960 exceeds the scope of the initiative power.

b. The Appellants' "Supermajority" Challenge Is An Argument That I-960 Would Be Unconstitutional If Enacted, Not An Argument That I-960 Exceeds The Scope Of The Legislative Power

In *Coppernoll*, the initiative's opponents also argued that if enacted the initiative would violate various other sections of the constitution. In addition to arguing that constitutional issues were already resolved by prior decisions of this Court, which they contended were directly on point, they argued that other provisions of the initiative conflicted with other constitutional provisions. *Coppernoll*, 155 Wn.2d at 303 (noting allegation that a provision restricting attorney fees violated separation of powers principles). Similarly, Appellants in this case contend that by requiring a supermajority vote for the legislature to enact certain bills,

I-960 conflicts with article II, section 22 of the state constitution, relating to the enactment of bills in the legislature. Appellants' Br. at 30-33.

The *Coppernoll* Court had no trouble recognizing such an argument as a substantive constitutional challenge to the initiative, rather than as an argument that it exceeded the scope of the initiative process. *Coppernoll*, 155 Wn.2d at 303. Likewise, Appellants' arguments in this case are transparent assertions of substantive unconstitutionality. Such a challenge is categorically prohibited before the election. *Id.* at 297.

4. Some Of The Statutory Language Upon Which Appellants Base Their Challenge To I-960 Is Already In Statute; I-960 Does Not Propose To Enact It

Appellants' pre-election challenge suffers from yet another defect. Their challenge is based on arguments that I-960 would be unconstitutional if enacted because of two particular features of the initiative, but those features are already contained in current law. Appellants challenge the constitutionality of both the requirement that certain legislation be approved by a two-thirds vote of the legislature in order to take effect and the requirement that certain legislation be approved by the voters in order to take effect. Appellants' Br. at 8. Both requirements appear in Section 5 of I-960—but in both cases as *statements of current law, not as new amendments proposed by this initiative.*

As currently enacted, state law already includes the two-thirds vote requirement. RCW 43.135.035(1) (two-thirds vote requirement). I-960 proposes to change the language describing the class of bills subjected to the two-thirds vote requirement, but the potential effect of that change is subject to debate. I-960, § 5(1). The intent section explains that the purpose of this change is to clarify that the two-thirds vote requirement applies without regard to whether revenue is deposited into the general fund or into another fund. I-960, § 1. I-960 proposes to delete from RCW 43.135.035(1) the phrase “raises state revenue or requires revenue-neutral tax shifts” and replace it with the term “raises taxes,” a term that it defines to mean actions that raise revenue for deposit in any treasury fund. I-960, §§ 5(1), 5(6).¹¹

The two-thirds vote requirement for legislative actions that would result in expenditures in excess of the state expenditure limit is also currently stated in RCW 43.135.035(2). I-960 proposes no change to that language, although it does acknowledge constitutional language that permits the legislature to refer bills to the voters. I-960, § 5(1). I-960 additionally includes a requirement that certain bills not referred to the

¹¹ The initiative would also, however, delete the current reference to “revenue-neutral tax shifts”. I-960, § 5(1). In this sense at least, the initiative could be read as somewhat narrowing the scope of the supermajority requirement. The extent to which I-960 would affect the supermajority requirement is a question for another day.

voters be the subject of an advisory vote (I-960, §§ 6-13), but it does not propose to amend the scope of the current popular vote requirement (I-960, § 5).¹²

The fact that the two-thirds vote and voter approval requirements are already in statute is significant to this case because excluding I-960 from the ballot would have no effect on whether those provisions remain in statute. Appellants seek to exclude I-960 from the ballot and to prevent the people from voting upon it because they allege that, if enacted, the measure would cause them harm. Appellants' Br. at 12-14. That harm is alleged to arise from the two-thirds vote requirement and the voter approval requirement. Appellants' Br. at 12-14. Yet, even if this Court granted them the relief they seek and excluded I-960 from the ballot, those very provisions would remain part of Washington's statutory law. They are already contained within RCW 43.135.035.¹³

¹² As discussed previously, Appellants also challenge the constitutionality of the provisions related to advisory votes, but Appellants clearly raise their challenge to those provisions as arguments that they would be unconstitutional if enacted.

¹³ Questions about the meaning or construction of I-960, like questions regarding its constitutionality, are not properly before the Court in this case. This case is limited to a determination of whether the measure is proper for direct legislation. *Coppernoll*, 155 Wn.2d at 297. Nevertheless, Appellants' brief includes numerous assertions regarding the meaning of I-960, which are not necessarily correct. In addition to those mentioned already, two merit brief discussion.

First, Appellants assert that "I-960 removes flexibility from the process for setting the state expenditure limit". Appellants' Br. at 4. Appellants cite I-960, § 5(5) as the provision to which they refer in this regard. The meaning of this section, however, may be less straightforward than Appellants suggest because of an intervening statutory amendment that took effect July 1, 2007. The intent section of the initiative explains that

5. Severability Analysis Is Irrelevant

Finally, Appellants engage in a severability analysis of the various provisions of I-960, reflecting the fact that their constitutional challenge to the proposed measure does not embrace all of its provisions. Appellants' Br. at 41-45. Appellants seek to exclude the measure in its entirety from the ballot, even though they do not argue that every provision within it exceeds the scope of the initiative power. This analysis is irrelevant because, as described throughout the preceding pages, their claims fail to fall within the exception to the rule against pre-election challenges.

Even if that were not the case, pre-election challenges that only address selected sections of a measure are "particularly troublesome." *Coppernoll*, 155 Wn.2d at 304. As this Court has explained, the courts

the amendment proposed for RCW 43.135.035(5) is designed to eliminate the possibility that transfers of funds among treasury accounts might have the effect of increasing the state expenditure limit, referring specifically to a series of appropriations and fund transfers that are at issue in a case currently pending before this Court (*Washington State Farm Bureau Federation v. Gregoire*, No. 78637-2). I-960, § 1. However, the legislature already amended RCW 43.135.035(5) so as to eliminate adjustments to the expenditure limit based solely on the transfer of funds, limiting adjustments to transfer of programs and revenue streams. Laws of 2005, ch. 72, § 5. That amendment took effect July 1, 2007. Laws of 2005, ch. 72, § 7(2). The meaning of the amendment proposed for the same statutory paragraph in I-960, § 5(5) may, therefore, be subject to debate.

Second, Appellants allege that "the initiative proponents duped the Attorney General's Office into writing a misleading and false ballot title." Appellants' Br. at 27. The drafting of the ballot title is not properly before this Court since jurisdiction over appeals regarding the initiative titles is vested exclusively in the Thurston County Superior Court, and then within a limited time period. RCW 29A.72.080. More importantly, Appellants base this argument upon the view that I-960 would continue to require that bills raising taxes receive a two-thirds vote in the legislature even if they are referred to the voters for approval. Appellants' Br. at 27. This is not what Section 5(1) of the initiative says, and the question is not properly before the Court in any event.

cannot and will not edit an initiative. *Coppernoll*, 155 Wn.2d at 304-05. “Doing so would raise obvious questions whether the newly-edited initiative remains true to the intent of those who signed the proposed initiative to qualify it for certification to the [ballot].” *Id.* at 305.

The court of appeals has previously suggested that if some portions of an initiative exceed the initiative power and others do not, the valid portions must proceed to the ballot. *City of Seattle*, 122 Wn. App. at 393; *Priorities First v. City of Spokane*, 93 Wn. App. 406, 413, 968 P.2d 431 (1998). Such a severability analysis is untenable, given that courts cannot edit proposed initiatives. *Coppernoll*, 155 Wn.2d at 305.

To the contrary, if the Court is confronted with a proper pre-election challenge to a measure that exceeds the scope of the initiative power, the inquiry properly addresses “[t]he fundamental and overriding purpose” of the initiative, taken as a whole. *Philadelphia II*, 128 Wn.2d at 719. Under such an analysis, the inclusion in an initiative of provisions “incidental to the primary goal of the initiative” may not save it, if the initiative as a whole “is suffused with a purpose that” exceeds the scope of the initiative power. *Id.*

The converse would logically also be true: the inclusion of a troublesome, but incidental, provision would not doom a measure that is fundamentally within the scope of the process. *See id.* The question

before the Court in a pre-election challenge is whether the initiative as a whole may proceed to the ballot, not whether the court may edit its provisions. *Coppernoll*, 155 Wn.2d at 304-05. This differs from a severability analysis that might occur in a constitutional challenge after the election because before the election the inquiry is merely into the voters' right to vote upon a proposed law.

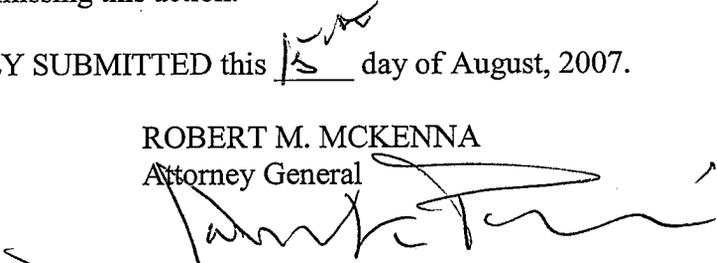
Because the Appellants cannot show that I-960's overriding purpose is beyond the scope of the initiative power, and because Appellants' constitutional arguments are not ripe for consideration by the courts, there is no reason to engage in a severability analysis here.

VI. CONCLUSION

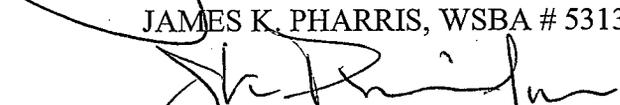
For the reasons stated above, the Court should affirm the decision of the superior court dismissing this action.

RESPECTFULLY SUBMITTED this 15 day of August, 2007.

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