

No. 92075-3

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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SHERRIL HUFF, an individual taxpayer and King County Director of Elections; MARY HALL, an individual taxpayer and Thurston County Auditor; DAVID FROCKT, an individual taxpayer and Washington State Senator; REUVEN CARLYLE, an individual taxpayer and Washington State representative; EDEN MACK, an individual taxpayer; TONY LEE, an individual taxpayer; ANGELA BARTELS, an individual taxpayer; GERALD REILLY, an individual taxpayer; and PAUL BELL, an individual taxpayer,

Appellants,

v.

KIM WYMAN, in her official capacity as Secretary of State for the State of Washington; TIM EYMAN; LEO J. FAGAN; and M.J. FAGAN;

Respondents.

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**APPELLANTS' STATEMENT OF GROUNDS FOR DIRECT  
REVIEW**

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## I. INTRODUCTION

The issue in this case is whether Initiative Measure No. 1366 (“I-1366” or the “Initiative”) should appear on the November 2015 general election ballot. The trial court properly concluded that the “fundamental and overriding purpose” of I-1366, as evidenced by its text, its title and its advertising, is to invoke the process to amend the state Constitution to require a two-thirds legislative supermajority or a public vote for approval of any measure that “raises taxes” and that this subject matter is beyond the scope of the initiative power under Article II of the Washington Constitution. Well-established Washington precedent provides that an initiative whose subject matter is beyond the scope of the initiative power should be kept off the ballot.

The trial court, however, refused to enjoin placing I-1366 on the ballot. The trial court reasoned, contrary to all Washington and United States Supreme Court precedent, that there was an open question of law whether the First Amendment precludes pre-election scope challenges to an initiative. The trial court relied on a statement in *Coppernoll v. Reed*, 155 Wn.2d 290, 298, 119 P.3d 318, 322 (2005) that suggested pre-election “substantive” review of an initiative “may also unduly infringe on free speech values.” The trial court seriously mis-applied that statement. First, the statement was specifically limited to “substantive” pre-election review,

not “scope” pre-election review. *Coppernoll* approved “scope” pre-election review, a result that cannot be squared with the trial court’s conclusion that *Coppernoll* raises the question whether free speech values preclude “scope” pre-election review. Second, the statement in *Coppernoll* was dicta unsupported by any analysis or citation to authority. In fact, the Washington Supreme Court, the United States Supreme Court and other federal courts have held unequivocally that the initiative process is not subject to such free speech scrutiny.

Accordingly, the trial court’s decision is inconsistent with decisions of the Washington Supreme Court. Moreover, this is a “case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” Finally, the case seeks an injunction against the Secretary of State. Direct review is appropriate under RAP 4.2(a)(3), (4) and (5).

The State has already filed for expedited review given the important nature of the case and the need for a final decision by September 4, 2015. As noted in the motion, Appellants consented to and agree with the motion. The Court has set a schedule so that briefing will be concluded timely by August 31, 2015.

## II. NATURE OF THE CASE AND DECISION

Appellants are a group of taxpayers and elected officials who brought this action against Respondent Washington Secretary of State Kim Wyman and I-1366's sponsors Tim Eyman, Leo J. Fagan, and M.J. Fagan to enjoin placement of the Initiative on the general election ballot. Appellants sought a preliminary and permanent injunction in the King County Superior Court on July 30, 2015, one day after Respondent Wyman certified that I-1366 had received sufficient signatures to be placed on the ballot.

In their motion, Appellants claimed that I-1366 exceeds the scope of the initiative power under Article II of the Washington Constitution because it improperly invokes the constitutional amendment process set forth under Article XXIII. Whereas Article XXIII requires that constitutional amendments be proposed in either house of the legislature and passed by 2/3 of each house, I-1366 circumvents these requirements by proposing a constitutional amendment by initiative and forcing a public vote under threat of a massive tax cut.

The trial court heard argument on Appellants' motion on August 14, 2015 and issued a written order the same day. *See* Order on Plaintiffs' Motion for Permanent Injunction, dated August 14, 2015 ("Order"). The court found that Appellants had standing to bring this action on multiple

grounds, including as taxpayers, as county elections officials and as legislators, and that the case was justiciable. Order at 3. The court further found standing on the basis that the case presented issues of public importance. *Id.* at 4.

The court then ruled that the “fundamental, stated and overriding purpose of I-1366 is to amend the Constitution.” Order at 5. Agreeing with Appellants, the court detailed three independent ways in which I-1366 violates Article XXIII of the Washington Constitution. First, “I-1366 proposes the constitutional amendment, rather than coming from the Senate or the House” without any opportunity for legislators to change the text of the amendment. *Id.* “Second, I-1366 directs the legislature to submit the proposed amendment to a public vote without the requirement that it be passed by 2/3 of each independent house, thereby amending the constitution and the constitutional process.” *Id.* Third, the court found that the Initiative improperly invokes the constitutional amendment process by using a threat of a large sales tax reduction to force the legislature to “propose” the amendment, notwithstanding the fact that some legislators would be forced to do so against their will and without an ability to make changes in the amendment. *Id.* Thus, the court concluded, I-1366 “appears to violate the constitutional amendment process in multiple ways and appears to exceed the scope of the initiative power.”

Order at 6.

The court then acknowledged this Court’s precedent sanctioning limited pre-election challenges in instances where the scope of a proposed initiative exceeds the Article II power. *Id.* The court went on, however, to deny the requested injunction, ruling that “[a]lthough I-1366 appears to exceed the scope of the initiative power, our Supreme Court has not clearly and squarely ruled on whether the First Amendment to the United States Constitution and/or Article I Section 5 of the Washington Constitution provide additional protections against pre-election challenges even in circumstances where the initiative may itself be invalid.” *Id.* at 8. Notably, the trial court did not discuss how the First Amendment and/or Article I, section 5 are violated by the narrow pre-election challenge articulated by Appellants. Neither did the court distinguish between substantive pre-election review—which this Court has suggested in dicta may infringe on free speech rights—and the more limited form of pre-election review at issue here. This expedited appeal followed.

## **II. ISSUES PRESENTED FOR DIRECT REVIEW**

A. Where the fundamental and overriding purpose of I-1366 is to amend the Constitution, where I-1366 exceeds the scope of the initiative power, and where Appellants will suffer actual and substantial injuries from the placement of I-1366 on the ballot, did the trial court err in refusing to enjoin placement of I-1366 on the ballot for the November 2015 general election?

B. Where I-1366 exceeds the scope of the Article II power, does the First Amendment to the United States Constitution or Article I, Section 5 of the Washington State Constitution require placement of an invalid initiative on the ballot?

## **III. GROUNDS FOR DIRECT REVIEW**

Direct review is warranted under RAP 4.2(a)(3), (4) and (5) because the trial court's decision is inconsistent with this Court's precedent, the case presents "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination" and this is "[a]n action against a state officer in the nature of... injunction..." RAP 4.2(a)(3), (4), (5).

**A. The Trial Court’s Decision is Inconsistent with Supreme Court Precedent.**

In Washington, it is well established that a pre-election challenge to the scope of the initiative power is both permissible and appropriate. In other words, this Court will consider a pre-election challenge that the subject matter of an initiative is beyond the people’s initiative power. *See Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708, 710 (2007); *Coppernoll*, 155 Wn.2d at 299; *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82, 86 (1980) (same, collecting cases). This Court has specifically rejected arguments that it should revisit this authority to reject all pre-election challenges to initiatives. *See Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718, 911 P.2d 389, 394 (1996) (“Petitioners urge us to overrule *Ford v. Logan* and subsequent case law to hold that no pre-election review is proper. . . . However, the rationale of the *Ford* court in distinguishing review of the constitutional validity of a proposed measure and whether the measure is authorized by our state constitution is sound and finds support among commentators and other jurisdictions.”). Moreover, this Court has permitted pre-election review on this limited basis despite recognizing that the initiative process entails important free speech values. *Coppernoll*, 155 Wn.2d at 298-99.

As the trial court ruled here, I-1366 represents an invalid attempt to invoke the constitutional amendment process by initiative. Under Article II, a valid initiative “must be legislative in nature and enact a law that is within the state’s power to enact.” *Philadelphia II*, 128 Wn.2d at 719. In applying this test, courts consider the “fundamental and overriding purpose” of the initiative and do not focus on effects that are merely “incidental to the primary goal of the initiative.” *Id.*; *see also Coppernoll*, 155 Wn.2d at 302; *Futurewise*, 161 Wn.2d at 411. The “fundamental and overriding purpose” of I-1366, as evidenced by its text, its title and its promotional materials, is to force the legislature to submit for public vote a constitutional amendment that requires a two-thirds legislative supermajority or a public vote for approval of any measure that “raises taxes.” As the trial court properly ruled, however, the power to invoke the constitutional amendment process may not be accomplished by initiative. *Ford*, 79 Wn.2d at 156 (“Amendment of our constitution is not a legislative act and thus is not within the initiative power reserved to the voters.”). Rather, the amendment power stems from Article XXIII of the Constitution. Based on well-established Supreme Court precedent, having found I-1366 exceeds the scope of the initiative power, the trial court should have enjoined its placement on the ballot.

Despite finding I-1366 beyond the scope of the initiative power, the trial court nonetheless denied the injunction on the grounds that the law pertaining to pre-election challenges is not “clear”. Order at 7-8. Specifically, the court ruled that it is unclear whether the First Amendment to the United States Constitution and/or Article I, Section 5 of the Washington Constitution provide additional protections against pre-election challenges even in circumstances where the initiative may itself be invalid. *Id.*

This was error. This Court has previously ruled that the free speech considerations raised by Respondents and the trial court “may apply” to **substantive** pre-election review, but not to challenges properly limited to the **scope** of an initiative, as here. *Coppernoll*, 155 Wn. 2d at 299 (pre-election challenge to scope is “expressly held to be separate and distinct from a challenge to the measure’s substantive validity.”). Whereas substantive pre-election review may implicate free speech concerns, a pre-election challenge to scope does not. As this Court noted in *Coppernoll*, “the subject of the proposed measure is either proper for direct legislation or it is not.” *Id.* The trial court’s determination that free speech concerns preclude a scope pre-election challenge is inconsistent with Washington Supreme Court precedent.

**B. Whether I-1366 Appears on the Ballot is an Issue of Public Importance Warranting Direct Review.**

As the trial court ruled, the issues presented in this case are of substantial public importance and Appellants will suffer actual and substantial injury, financial, administrative, constitutional or otherwise, from placement of I-1366 on the ballot. Order at 3. Respondent Wyman likewise agrees that this case warrants expedited direct review from this Court because of its public importance. *See* Motion for Accelerated Review at 3.

The issues of public importance raised by this case are manifest. If the Initiative is placed on the ballot for the November 2015 general election, public funds will be expended in holding a vote on an invalid and void measure. Moreover, advancing invalid measures for public vote will compromise the integrity of the initiative process itself. *See Ford*, 79 Wn.2d at 153-54 (in precluding placement of initiative on ballot on grounds it exceeded scope of initiative power, this Court noted, “The people in their legislative capacity are not, however, superior to the written and fixed Constitution....A fundamental limit on the initiative power inheres in its nature as a legislative function reserved to the people.”). This effort to end-run the limits on the scope of the initiative power should not be

sanctioned by this Court. In sum, the issues of broad public import raised by this case necessitate this Court's direct and expedited review.

**C. Direct Review is Also Appropriate Because this Case Seeks an Injunction Against a Public Officer.**

Direct review is also appropriate under RAP 4.2(a)(5) because this is an action against a state officer in the nature of an injunction. Here, Appellants sued Kim Wyman in her official capacity as Secretary of State for the State of Washington and seek an injunction to prevent Ms. Wyman from placing I-1366 on the ballot. This Court should accept direct review.

**IV. CONCLUSION**

Because the trial court's decision is inconsistent with well-established Washington Supreme Court authority, the case concerns fundamental and urgent issues of broad public import, and it involves an action against a state officer in the nature of an injunction, direct review by this Court is warranted. The superior court erroneously denied Appellants' motion for injunction, despite ruling that I-1366 exceeds the scope of the initiative power by attempting to amend the Constitution. Under these rare circumstances, the trial court should have enjoined placement of I-1366 on the ballot. Without this Court's intervention, Appellants will suffer actual and substantial injury in the form of an

invalid and void election and therefore respectfully request that this Court grant direct and expedited review.

RESPECTFULLY SUBMITTED this 18th day of August, 2015.

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 18th day of August, 2015 I caused to be served a true copy of the foregoing document upon counsel listed below:

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