

NO. 92708-1

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SUPREME COURT OF THE STATE OF WASHINGTON

TONY LEE, an individual taxpayer; ANGELA BARTELS, an individual taxpayer; DAVID FROCKT, an individual taxpayer and Washington State Senator; REUVEN CARLYLE, an individual taxpayer and Washington State Representative; EDEN MACK, an individual taxpayer; PAUL BELL, an individual taxpayer; and THE LEAGUE OF WOMEN VOTERS OF WASHINGTON,

Respondents,

v.

STATE OF WASHINGTON,

Appellant,

and TIM EYMAN; LEO F. FAGAN; and M.J. FAGAN,

Appellants.

**APPELLANT STATE OF WASHINGTON'S
CORRECTED OPENING BRIEF**

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I. INTRODUCTION

A majority of Washington State voters approved Initiative 1366 in the last general election. The people enacted Initiative 1366 in accordance with the constitution and as a valid exercise of their article II power. The Initiative is nothing more than a state statute that reflects the current public policy of the State until the Legislature determines otherwise.

The superior court struck down Initiative 1366 as improperly proposing a constitutional amendment in violation of article XXIII of the Washington Constitution, for abridging the plenary powers of the 2016 Legislature, and for containing two subjects in violation of article II, section 19 of the Washington Constitution. The superior court was wrong.

By its plain text, Initiative 1366 does not propose a constitutional amendment to the people and it does not alter or relieve the Legislature of its duty to comply with the constitutional amendment requirements set forth in article XXIII. In order for a constitutional amendment to be proposed to the people, a member of the Legislature must propose a resolution, it must proceed through legislative committees, and it must be adopted by two-thirds vote of both houses. Initiative 1366 does not eliminate any of these procedural safeguards. Nor does Initiative 1366 deprive the Legislature of any option it would otherwise have to address any initiative that the people adopt.

Moreover, Initiative 1366 contains a single subject in accordance with article II, section 19 because it sets forth only one operative legislative act. It amends the state sales tax rate, an act that is plainly within the people's legislative power, and merely makes that act contingent on a constitutional amendment that may or may not be taken up by the Legislature.

The people of Washington have a fundamental right to have their voices heard and respected. Their right to pass laws through initiatives should not be abridged by the policy preferences of others. That some may disagree with the policy choices reflected in the Initiative does not change the fact that Initiative 1366 is a valid exercise of the people's initiative power.

II. ASSIGNMENTS OF ERROR

The superior court erred in entering its January 21, 2016, Findings of Fact and Conclusions of Law and Order striking down Initiative 1366 as unconstitutional under article II, section 19 and article XXIII of the Washington Constitution. Clerk's Papers¹ (CP) at 419-26.

1. While the State does not dispute that this case warrants review, the superior court erred in finding that the plaintiffs had more than

¹ The State is filing this corrected opening brief to amend the Clerk's Papers citations. Due to the expedited filing deadlines in this matter, the State's opening brief was filed before the superior court clerk issued the Index to Clerk's Papers.

generalized taxpayer standing based, in part, on the substantial public interest in this case and the need for various public officials to have immediate resolution of these issues. CP at 420 (FF 1-3).

2. The superior court erred in finding that “it is beyond dispute” that the impetus behind Initiative 1366’s enactment was the adoption of a constitutional amendment requiring two-thirds vote of the Legislature for any tax increase. CP at 421 (FF 5).

3. The superior court erred in finding that Initiative 1366 undercuts the constitutional amendment process. CP at 421-22 (FF 6).

4. The superior court erred in finding that the prospect of a budget cut in April renders the Legislature’s deliberative process an impossibility. CP at 421-22 (FF 6).

5. The superior court erred in finding that Initiative 1366 proposed the terms of a constitutional amendment and that the Legislature would be powerless to consider a different constitutional amendment. CP at 422 (FF 7).

6. The superior court erred in finding that Initiative 1366 compels a constitutional amendment that must be proposed within 60 days. CP at 422 (FF 8).

7. The superior court erred in finding that Initiative 1366 contains two operative pieces of legislation. CP at 422-23 (FF 9).

8. The superior court erred in finding that it was impossible to determine how many people voted for Initiative 1366 because of the desire for a constitutional amendment and how many voted for it because of tax relief. CP at 423 (FF 10).

9. The superior court erred in concluding that plaintiffs had standing based only on a stated threat to their personal and associational interests. CP at 424 (CL 3).

10. The superior court erred in concluding that Initiative 1366 exceeds the scope of the people's initiative power. CP at 424 (CL 5).

11. The superior court erred in concluding that Initiative 1366 violates article XXIII of the Washington Constitution by proposing the terms of a constitutional amendment and compelling its enactment. CP at 425 (CL 6).

12. The superior court erred in concluding that Initiative 1366 abridges the plenary powers of the 2016 Legislature. CP at 425 (CL 7).

13. The superior court erred in concluding that Initiative 1366 violates article II, section 19 of the Washington Constitution for combining two separate actions of law that lack rational unity. CP at 425 (CL 8).

14. The superior court erred in concluding that Initiative 1366's provisions are not severable and striking it down in its entirety. CP at 425 (CL 9).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the superior court err in finding that Initiative 1366 proposes a constitutional amendment in contravention of article XXIII, when the Initiative only proposes that the Legislature take up consideration of a constitutional amendment, but does not require the Legislature to do so? Assignments of Error 2-6, 10-12.

2. Did the superior court err in finding that Initiative 1366 abridges the plenary powers of the 2016 Legislature when Initiative 1366 amends the state sales tax, but makes that legislative act contingent to the Legislature proposing a constitutional amendment? Assignments of Error 4-6, 12.

3. Did the superior court err in finding that Initiative 1366 embraces three subjects in contravention of article II, section 19 when the Initiative's sole legislative act is to amend the state sales tax rate? Assignments of Error 7-8, 13.

4. Did the superior court err in voiding Initiative 1366 in its entirety when, even if a section were held unconstitutional, the Initiative is presumptively severable? Assignment of Error 14.

5. Did the superior court err in finding that the plaintiffs had more than generalized taxpayer standing when none of the plaintiffs asserted individualized, actual legal injury? Assignments of Error 1, 9.

IV. STATEMENT OF THE CASE

A majority of Washington State voters approved Initiative 1366 in the November 3, 2015, general election. CP at 147. The Initiative's ballot title appeared on the voters' ballots as follows:

Statement of Subject: Initiative Measure No. 1366 concerns state taxes and fees.

Concise Description: This measure would decrease the sales tax rate unless the legislature refers to voters a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes, and legislative approval for fee increases.

Should this measure be enacted into law? Yes [] No []

CP at 36.

Section 1 of Initiative 1366 explains the Initiative's purpose and intended effect: "[T]he state needs to exercise fiscal restraint by either reducing tax burdens or limiting tax increases to only those considered necessary by more than a bare majority of legislators. . . . The people want to ensure that tax and fee increases are consistently a last resort."

CP at 23-28 (cited hereafter as Initiative 1366).

Section 2 reduces the state retail sales tax rate from 6.5 percent to 5.5 percent. Initiative 1366, § 2(1).

Section 3 states that the sales tax rate reduction takes effect on April 15, 2016, unless a contingency first occurs. Initiative 1366, § 3(1). If the Legislature, prior to April 15, 2016, refers a constitutional amendment that accomplishes specific purposes for a vote, then the tax cut in section 2 expires on April 14, 2016. Initiative 1366, § 3(2). The proposed amendment must require “two-thirds legislative approval or voter approval to raise taxes . . . and majority legislative approval for fee increases.” Initiative 1366, § 3(2). The terms “raises taxes” and “majority legislative approval for fee increases” are specifically defined. Initiative 1366, §§ 3(2), 6.

Section 6 defines “raises taxes,” consistent with current law, as “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.” Initiative 1366, § 6. Section 8 is a severability clause that provides that if any provision of the act is held invalid, the remainder of the act is not affected. Initiative 1366, § 8.²

² Sections 4 and 5 update statutory references. Section 7 requires liberal construction to effectuate the intent, policies, and purpose of the act. Section 9 titles the act the “Taxpayer Protection Act.” Initiative 1366, § 9.

Thus, in enacting Initiative 1366, the people of the state of Washington voted to reduce the state retail sales tax to 5.5 percent and defined certain terms related to taxes and fees. Initiative 1366 does not order or require the Legislature (or individual members of the Legislature) to take any specific action, but the Legislature has several options for responding to Initiative 1366. *See generally* Initiative 1366. An individual legislator may choose to take up the referenced constitutional amendment in Initiative 1366, but he or she must still comply with the usual process of proposing a constitutional amendment. *See* Const. art. XXIII. Alternatively, the Legislature could amend Initiative 1366 by a two-thirds vote of all members elected to each house. Const. art. II, § 1(c). The Legislature could take alternative action to counter the tax effects of Initiative 1366, or it could take no action other than to reduce appropriations to account for an anticipated reduction in state revenue.

Shortly after the people enacted Initiative 1366, Plaintiffs filed the action below seeking to invalidate the Initiative.³ CP at 1-21. After considering all of the parties' briefs on summary judgment and hearing oral argument, the superior court issued an order finding that the Initiative

³ Some of the plaintiffs previously sought to enjoin Initiative 1366 from reaching the voters' ballots. This Court held that they failed to meet their burden of making a clear showing that the subject matter of the initiative was not within the people's power, and as such had failed to demonstrate a clear legal right for injunctive relief. *Huff v. Wyman*, __ Wn.2d __, 361 P.3d 727 (2015).

was unconstitutional under article XXIII and article II, section 19 of the Washington Constitution. CP at 419-26. The superior court struck down the Initiative in its entirety. *Id.*

V. ARGUMENT

A. Plaintiffs Carry a Heavy Burden in This Constitutional Challenge to Initiative 1366

1. Review is de novo

When reviewing a grant of summary judgment, this Court engages in the same inquiry as the trial court. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 206, 11 P.3d 762 (2001). “[A]ll questions of law are reviewed de novo,” while all competent “facts and reasonable inferences are considered in a light most favorable to the nonmoving party.” *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005).

2. Initiative 1366 is presumptively constitutional

The scope of the people’s initiative power is at stake. When the people approve an initiative measure, they exercise the same sovereign power as the Legislature does when it enacts a state statute, and the people are subject to the same limitations. *Wash. Ass’n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 654, 278 P.3d 632 (2012). Accordingly, courts interpret and enforce initiatives just as they interpret

and enforce laws passed by the Legislature. *Brown v. State*, 155 Wn.2d 254, 267, 119 P.3d 341 (2005).

“A statute enacted through the initiative process is, as are other statutes, presumed to be constitutional.” *Amalgamated Transit Union*, 142 Wn.2d at 205. A party challenging the constitutionality of an initiative bears the “heavy burden” of establishing its unconstitutionality “beyond a reasonable doubt.” *Id.* In other words, there must be “no reasonable doubt that the statute violates the constitution.” *Id.* And courts are obligated to construe statutes and initiatives in a way that preserves their constitutionality whenever possible. *See ZDI Gaming, Inc. v. State*, 173 Wn.2d 608, 619, 268 P.3d 929 (2012).

Standard rules of statutory construction apply to initiatives. *Amalgamated Transit Union*, 142 Wn.2d at 205. In determining the meaning of a statute enacted through the initiative process, the court ascertains the collective intent of the voters who, acting in their legislative capacity, enacted the measure. *Id.* “Where the voters’ intent is clearly expressed in the statute, the court is not required to look further.” *Id.* Thus, the statements of a few voters or an initiative’s sponsor cannot govern its meaning. *Cf. Futurewise v. Reed*, 161 Wn.2d 407, 166 P.3d 708 (2007) (relying on the text of the initiative in question, not statements from

sponsors or voters); *Coppernoll*, 155 Wn.2d 290 (same); *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718-19, 911 P.2d 389 (1996) (same).

Finally, “it is not the prerogative nor the function of the judiciary to substitute what they may deem to be their better judgment for that of the electorate in enacting initiatives . . . unless the errors in judgment *clearly* contravene state or federal constitutional provisions.” *Amalgamated Transit Union*, 142 Wn.2d at 206 (emphasis added) (quoting *Fritz v Gordon*, 83 Wn.2d 275, 287, 517 P.2d 911 (1974)). Any reasonable doubts are resolved in favor of an initiative’s constitutionality. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 632, 71 P.3d 644 (2003).

B. Initiative 1366 Is a Valid Exercise of the People’s Initiative Power Because the Initiative Enacts Valid Contingent Legislation and Does Not Amend the Constitution

Washington voters enacted Initiative 1366 as a valid exercise of their article II initiative power. An initiative is within the scope of the people’s initiative power if (1) it is legislative in nature, and (2) it is within the state’s power to enact. *Coppernoll*, 155 Wn.2d at 302; *Philadelphia II*, 128 Wn.2d at 718-19. In contrast, an initiative is outside the scope of the initiative power if it attempts to act outside of the state’s jurisdiction by amending or enacting a federal law, or if it attempts to act outside of the legislative power by amending the state or federal constitutions. *See*

Coppernoll, 155 Wn.2d at 303. Contrary to the trial court’s conclusion, Initiative 1366 is legislative in nature and does not amend the Washington Constitution. It therefore does not violate article XXIII. Nor does Initiative 1366 improperly infringe upon the Legislature’s article II powers.

1. Initiative 1366 is within the scope of the people’s initiative power

Article II, section 1 of the Washington Constitution reserves to the people “the power to propose bills, laws, and to enact or reject the same at the polls.” “[T]he right of initiative is nearly as old as our constitution itself, deeply ingrained in our state’s history” *Coppernoll*, 155 Wn.2d at 296. This Court has maintained only narrow bases for concluding that an initiative falls outside of this broad power reserved to the people. Everyone agrees that the people’s initiative power does not include amending the state constitution. *See Ford v. Logan*, 79 Wn.2d 147, 155, 483 P.2d 1247 (1971). But in *Ford*, at page 156, the plurality articulated the restriction on the people’s power narrowly: “the initiative power set forth in Const. art. 2 does not include the power to *directly amend or repeal* the constitution *itself*.” (Emphases added.) *See also Philadelphia II*, 128 Wn.2d at 717-18 (favoring the *Ford* Court’s reasoning). This Court has also emphasized that it must consider the actual text of the initiative, not its possible downstream effects, to determine whether it amends the

constitution. *Futurewise*, 161 Wn.2d at 412 (concluding “I-960 does not purport to amend the constitution, whatever its practical ‘effect’ may be”).

Initiative 1366 does not amend the state constitution. Rather, Initiative 1366 amends state statutes and is therefore within the plain language of the article II initiative power “to propose bills, laws, and to enact or reject the same at the polls.” Const. art. II, § 1. The state sales tax rate reduction in section 2 is plainly legislative in nature and within the general legislative authority of the people to enact. *Amalgamated Transit Union*, 142 Wn.2d at 200 (“[T]here is no serious dispute that in general an initiative can repeal, impose, or amend a specific tax.”). And, conditioning the operative effect of that sales tax reduction on a future event (as Initiative 1366 does in section 3) is also a plainly legislative act sanctioned by the constitution and our courts. *See, e.g., Brower v. State*, 137 Wn.2d 44, 55-56, 969 P.2d 42 (1998) (Legislature could both refer a measure to the people and condition the effectiveness of a legislative act upon the happening of a future event outside of the Legislature’s control); *State v. Storey*, 51 Wash. 630, 632, 99 P. 878 (1909) (“The mere fact that the act does not take effect until the contingency arises does not indicate a delegation of legislative power, even where the contingency depends upon the action of certain persons.”).

Plaintiffs nevertheless assert that the contingency set forth in Initiative 1366 is somehow different from previously approved contingent statutes. CP at 75-76. Specifically, Plaintiffs assert that, unlike the legislation in *Brower* and *Storey*, Initiative 1366 is not based on a “full and complete” legislative enactment that will take effect only upon the happening of a future event. CP at 76. But Plaintiffs are wrong, as Initiative 1366 clearly involves a complete legislative act—the reduction in the sales tax rate—conditioned on the operation of a specified event.

The people, in Initiative 1366, made a legislative judgment that the sales tax rate should be reduced to a specific amount. Initiative 1366, § 2. The people also made a legislative judgment that that tax reduction would be “expedient only in certain circumstances,” namely the absence of the Legislature proposing a constitutional amendment. *See Brower*, 137 Wn.2d at 54; Initiative 1366, § 3. Accordingly, under the plain language of the Initiative, a reduction in the sales tax rate is the only act that Initiative 1366 accomplishes. However, the people also determined that, if the Legislature refers a constitutional amendment to the ballot before April 15, 2016, then the sales tax reduction would not be expedient and the state sales tax rate should remain at 6.5 percent. That Plaintiffs do not like the people’s legislative judgment does not change the fact that the people validly exercised their legislative powers to enact a law, and its

effectiveness was conditioned on a future event in the hands of others. *Cf. State v. Superior Court In & For Thurston County*, 92 Wash. 16, 25, 159 P. 92 (1916) (“Any law or proposed law may be, and often is, unfair to some Legislative bodies, whether delegated, or principals in mass, are not to be stopped from exercising the supreme function of making laws by such considerations.”).

For this reason, Initiative 1366 is unlike the initiative struck down in *Amalgamated Transit Union*. There, the people’s initiative conditioned the effectiveness of certain state laws passed by the legislature on ultimate voter approval. *Amalgamated Transit Union*, 142 Wn.2d at 241. Accordingly, the measure improperly delegated what would otherwise be legislative power to the people. *Id.* Here, the people are conditioning their own legislative enactment. That is, the people rendered the judgment that the sales tax rate reduction would be expedient only upon specified circumstances. *See Brower*, 137 Wn.2d at 49. As this Court previously recognized, “[t]he power to make this judgment is not transferred merely because the circumstances may arise at the discretion of others.” *Id.* (quoting *Diversified Inv. P’ship v. Dep’t of Soc. & Health Servs.*, 113 Wn.2d 19, 28, 775 P.2d 947 (1989)).

Put another way, by adopting Initiative 1366, the people have not done anything that the Legislature itself could not do by a majority vote. A

majority of the Legislature could certainly adopt a reduction in the sales tax rate, *Amalgamated Transit Union*, 142 Wn.2d at 200, and there is no legal reason why it could not also condition the sales tax reduction on the failure of two-thirds of each house to propose a constitutional amendment by a certain date.⁴ If the Legislature can perform an act through ordinary legislation, so can the people.

Plaintiffs also rely on language from *Philadelphia II*, which struck from the ballot an initiative whose “fundamental and overriding purpose” was to amend federal law. CP at 72. While the plain language of Initiative 1366 does not accomplish a constitutional amendment, Plaintiffs argue that a “fundamental and overriding purpose” of the initiative was to accomplish this effect. *Id.*⁵

In *Philadelphia II*, the initiative would have established direct democracy at the federal level through a “federal, nationwide initiative process” “and ultimately to call a world meeting.” *Philadelphia II*, 128 Wn.2d at 710. While the Washington procedures for adopting initiatives would also have been affected, the Court found that such changes were

⁴ In this situation, a subsequent legislature could re-establish the pre-existing sales tax rate by a majority vote if it so desired. The Washington Constitution also provides a mechanism for subsequent legislatures to amend an adopted initiative, albeit by a two-thirds vote. Const. art. II, § 1.

⁵ While Plaintiffs rely on the sponsors’ promotional materials to assert that the sponsors’ primary purpose was to achieve a constitutional amendment, CP at 60, the cases that Plaintiffs rely on have not rested on sponsors’ promotional materials. See *Futurewise*, 161 Wn.2d 407; *Coppernoll*, 155 Wn.2d 290; *Philadelphia II*, 128 Wn.2d 707. Instead, these cases focused on the language of the initiatives at issue.

“incidental to the primary goal of the initiative.” *Philadelphia II*, 128 Wn.2d at 719. The entire initiative was “suffused with a purpose that is national or global in scope.” *Id.* Significantly, if the initiative did not eventually become enacted as federal law, it would be deleted from the Washington statutes. *Id.*

Initiative 1366 is fundamentally different from the initiative at issue in *Philadelphia II*. Plaintiffs ignore the actual text of Initiative 1366 to assert that its “fundamental and overriding purpose” is to amend the state constitution. CP at 72. Under its plain language, Initiative 1366 would cut the state sales tax rate unless a contingency occurs: a legislative choice to propose a constitutional amendment to the people. Initiative 1366, §§ 2, 3; CP at 36. Plaintiffs never suggest, nor could they, that cutting the state sales tax rate is not legislative in nature or that it is somehow outside the general legislative authority of the people. Initiative 1366 proposes a change in state statute and is therefore within the plain language of the article II initiative power “to propose bills, laws, and to enact and reject the same.”

Initiative 1366 is also different from the initiative in *Philadelphia II* because the reduction in the sales tax rate in Initiative 1366 is not merely “incidental,” it is central to the Initiative and it will be the Initiative’s only effect if the contingency of a proposed constitutional

amendment never occurs. *See* Initiative 1366. The concept of a constitutional amendment is not so central that the entire Initiative will be wiped from the books if the amendment does not occur. *Cf. Philadelphia II*, 128 Wn.2d at 719. As a result, this Court cannot conclude that the constitutional amendment is, beyond a reasonable doubt, the fundamental overriding purpose of Initiative 1366. *See Amalgamated Transit Union*, 142 Wn.2d at 205.

Indeed, this Court has already recognized that a constitutional amendment was not *clearly* the fundamental and overriding purpose of Initiative 1366. *Huff*, 361 P.3d at 733 n.7. Footnote seven of the *Huff* opinion explains that as a result, the Court declined to “definitively decide,” pre-election, whether Initiative 1366 was beyond the scope of the initiative power. *Id.* But now that this question is before the Court for definitive resolution, the burden on the plaintiffs is at least as high as it was in *Huff*. Plaintiffs must show that the Initiative is unconstitutionally beyond the scope of the people’s power beyond a reasonable doubt. *Amalgamated Transit Union*, 142 Wn.2d at 205. If the Initiative was not “clearly” beyond the scope of the initiative power a few months ago, it could not be so now beyond a reasonable doubt.

In sum, Initiative 1366 accomplishes a legislative act if a contingency is met. The Initiative is legislative in nature and within the

state's power to enact. Significantly, it does not exceed what the Legislature itself could do by a majority vote. Thus, this Court should conclude that Plaintiffs have not met their heavy burden to show it is unconstitutional beyond a reasonable doubt.

2. Initiative 1366 does not conflict with article XXIII because it does not amend the state constitution or alter the requirements for doing so

Plaintiffs have also asserted that Initiative 1366 improperly undercuts the constitutional amendment process set forth in article XXIII by proposing a constitutional amendment through initiative. *See* CP at 67-70. They assume an improper reading of Initiative 1366 when the Initiative can—and should—be read in a manner that does not cause a constitutional conflict with article XXIII. *See ZDI Gaming, Inc.*, 173 Wn.2d at 619.

The Initiative does not bypass or undercut the constitutional amendment process set forth in article XXIII, and no constitutional amendment will be adopted without the fulfillment of each requirement set forth in article XXIII. Nothing in the text of the Initiative purports to change or alter the requirements for enacting a constitutional amendment. Initiative 1366 does not propose the precise language or actual text of a constitutional amendment. *See generally* Initiative 1366, *specifically* § 3. The Initiative does not alter the requirement that the actual text of the

proposed amendment originate in either the House or the Senate. Initiative 1366. And the Initiative does not direct the Legislature to submit an amendment to the people without a vote of the Legislature or without two-thirds approval by the members of each legislative house. *Id.*⁶ Under Initiative 1366, article XXIII's procedural safeguards are still firmly in place. *See Ford*, 79 Wn.2d at 155-56; *see also e.g.*, 2016 Senate Joint Resolution 8211. Only after these safeguards have been met would a constitutional amendment be presented to the people for a vote.

Nothing in the state constitution suggests that the people violate article XXIII when they express a policy desire for a constitutional amendment. Nor does the constitution suggest that an idea for a constitutional amendment can only begin with a source inside the Legislature. *See Const. art. XXIII, § 1*. It would be absurd to conclude that the original idea or motivation for a constitutional amendment can only arise from the Legislature itself, and nowhere else. Here, no constitutional amendment could be adopted without a legislative sponsor proposing a resolution.

⁶ Plaintiffs also argued below that the "proposed" constitutional amendment violates article XXIII for allegedly containing multiple subjects. CP at 70-72. Since Initiative 1366 does not in fact propose a constitutional amendment, this argument is meritless. Nonetheless, should a member of the Legislature decide to take up the referenced constitutional amendment, this Court should not presume that it would be unconstitutional. For example, nothing in Initiative 1366 precludes the Legislature from forwarding two separate constitutional amendments to the people. This Court should not render an advisory opinion about a not-yet-adopted amendment.

The trial court laments the speed with which the Initiative would impose the sales tax reduction absent the referral of a constitutional amendment to the people. CP at 422. This reasoning implies that if the Legislature does not have the time it desires to craft a legislative solution to a problem or a perceived problem, then the timing somehow unconstitutionally interferes with article XXIII or the Legislature's article II powers. The fact that legislators might have to make a decision more quickly than they otherwise would does not rise to a constitutional violation. Otherwise, any time limitations placed on the Legislature, directly or indirectly, could run afoul of article II.

The Legislature might fulfill all of the requirements in article XXIII to propose a constitutional amendment to the people, or it might not. Initiative 1366 does not relieve the Legislature of any of the procedural obligations placed upon it by article XXIII to accomplish a constitutional amendment. In sum, Initiative 1366 does not violate article XXIII beyond a reasonable doubt.

3. Initiative 1366 does not bind the Legislature any more than the Washington Constitution already provides, nor does Initiative 1366 require the Legislature to act

Plaintiffs argue that Initiative 1366 abridges the plenary lawmaking powers of the 2016 Legislature by compelling the Legislature to choose between two outcomes that Plaintiffs see as undesirable. CP at

74-75. But Initiative 1366 does not restrict the Legislature's plenary power any more than any other initiative adopted by the people. The Washington Constitution already strikes a balance between the people's initiative power and the Legislature's plenary power by providing that the Legislature can override or amend an initiative within the first two years after its adoption, but only through a two-thirds vote. Const. art. II, § 1(c). The Legislature can amend or repeal an initiative by a majority vote after that. *See id.*; *see also Wash. State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 290-91 and n.6., 174 P.3d 1142 (2007).

While the trial court relied on *Farm Bureau* to conclude that the Initiative improperly ties the Legislature's hands, CP at 425, nothing about the Initiative infringes upon the broad legislative powers described in that decision. The *Farm Bureau* Court held that a majority vote of the Legislature could amend a statute that had been adopted by initiative, where the amendment occurred more than two years after the initiative was adopted. *See Farm Bureau*, 162 Wn.2d at 289-307. The *Farm Bureau* Court also acknowledged that the Legislature could amend or repeal an initiative by a two-thirds vote within two years of the initiative's enactment. *Id.* at 290-91 and n.6. Here, nothing in Initiative 1366 prevents the Legislature from exercising these article II powers, or any of the article

II powers described in *Farm Bureau*. The Legislature's hands are not tied as Plaintiffs and the trial court suggest.

The Legislature has multiple options for responding to Initiative 1366. The Legislature might choose to propose a constitutional amendment through a two-thirds vote of both houses, or it might not. The Legislature might choose to override or amend Initiative 1366 with a two-thirds vote, or not. The Legislature might choose to increase another tax or adopt a new tax in order to make up the shortfall created by the sales tax reduction. The Legislature might reduce appropriations to absorb the reduction in revenue that would result from reducing the sales tax rate.

Similarly, individual legislators still have a choice of whether to propose the suggested constitutional amendment to their respective houses, or not. Individual legislators still have a choice to vote for any proposed constitutional amendment, or not.⁷ Individual legislators will still have a choice of voting to override or amend Initiative 1366 through a two-thirds vote, or not. Const. art. II, § 1(c). Individual legislators will

⁷ Plaintiffs Senator Frockt and Representative Caryle assert that Initiative 1366 forces them to vote in a specific manner. CP at 83, 130-35 (Frock Decl.), 124-29 (Carlyle Decl.). But Initiative 1366 does not force any specific vote on these individual legislators. Further, even if Initiative 1366 did not contain the conditional provision and only contained the sales tax rate reduction, these individual legislators would be in the same position: faced with the consequences of an adopted initiative they do not agree with and the legislative choices of what to do with an initiative that they believed "contrary to their constituents' interests."

have the choice whether to vote for a new or increased alternative tax, or not.

The trial court emphasized its conclusion that the Legislature must adopt a constitutional amendment with specific content in order to avoid the sales tax reduction adopted by the people in the Initiative. CP at 422. The trial court speculated that the Legislature could not, for example, propose to the people a constitutional amendment that called for a sixty percent supermajority vote of the Legislature to impose a tax increase. CP at 422. Yet this reasoning fails to recognize that a two-thirds vote of each house is necessary both to propose a constitutional amendment to the people and to amend an initiative within two years of its adoption. If the Legislature wanted to amend the Initiative's condition to reduce the supermajority to sixty percent as the trial court suggests in its hypothetical, it could do so with a two-thirds vote. Const. art. II, § 1(c).

Nothing in Initiative 1366 forces or restricts these legislative choices and other possible avenues for addressing the Initiative. Initiative 1366 does not unconstitutionally restrict the plenary power of the Legislature contemplated by the constitution, and the Legislature has several options for addressing the consequences of the new law.

C. Initiative 1366 Satisfies Article II, Section 19 Because It Contains Only One Subject With Rationally Related Provisions

Article II, section 19 of the Washington Constitution provides that “[n]o bill shall embrace more than one subject, and that shall be expressed in the title.” The constitutional provision applies to initiatives and is to be construed liberally in favor of the legislation. *Amalgamated Transit Union*, 142 Wn.2d at 206. Accordingly, with respect to initiatives, the provision is satisfied if: (1) the initiative embraces only one general subject and (2) that subject is expressed in the initiative’s ballot title. *See Citizens for Responsible Wildlife Mgmt.*, 149 Wn.2d at 632.

The superior court concluded that Initiative 1366 violates article II, section 19 by combining two separate actions that lack rational unity: a one-time sales tax reduction (Initiative 1366, § 2) and the act of proposing a constitutional amendment relating to future tax increases and user fees (referenced in Initiative 1366, § 3).⁸ CP at 425. But the superior court’s conclusions misapply article II, section 19 and misread Initiative 1366’s text.

⁸ Plaintiffs do not argue that Initiative 1366’s remaining provisions found in sections 4-6 create article II, section 19 single-subject problems. *See* CP at 62-67. Nor could they; those provisions make statutory updates related to the Initiative’s definition of “raises taxes,” which are clearly incidental and germane to the Initiative’s overall subject. *See* Initiative 1366, §§ 4-6.

“Washington law has consistently viewed the term ‘subject’ in article II, section 19 as referring to laws, measures with legal effect.” *Pierce County v. State*, 150 Wn.2d 422, 434, 78 P.3d 640 (2003). “[T]he legislature must be the judge of the scope which they will give to the word subject,” so long as the title embraces only one general subject, “all matters which are naturally and reasonably connected with it, and all measures which will, or may, facilitate the accomplishment of the purpose so stated, are properly included in the act and are germane to its title.” *Wash. Toll Bridge Auth. v. State*, 49 Wn.2d 520, 523, 304 P.2d 676 (1956); see also *Amalgamated Transit Union*, 142 Wn.2d at 207; *Pierce County*, 150 Wn.2d at 431.

Policy expressions found in an initiative do not contribute additional subjects within the meaning of article II, section 19. *Pierce County*, 150 Wn.2d at 433. Rather, the constitutional prohibition against multiple subjects “plainly applies to the passage of two or more ‘unrelated laws’—not to the passage of one law that contains policy expressions indisputably devoid of legal effect.” *Pierce County*, 150 Wn.2d at 434 (quoting *Amalgamated Transit Union*, 150 Wn.2d at 212). In drawing this distinction, this Court emphasized “[a] law is a rule of action. An argument is not.” *Id.* The Court then considered the “operative and relevant” provisions of the measure, not its policy statements. *Id.* at 435.

Accordingly, portions of an initiative that do not have any operative effect as separate laws cannot create a second subject problem under article II, section 19. *Pierce County*, 150 Wn.2d at 434

Initiative 1366's single legislative "subject" for purposes of article II, section 19 concerns taxes. CP at 23-28; *see also* CP at 36. Section 2 of the measure reduces the retail sales tax rate. Initiative 1366, § 2. Section 3 sets the effective date for the sales tax reduction, Initiative 1366, § 3(1), but makes the enactment contingent on certain subsequent actions of the Legislature, specifically referring constitutional amendments to the people for a vote. Initiative 1366, § 3(2). But the references to constitutional amendments in section 3 have no force of law other than to provide the set of facts upon which the sales tax rate reduction in the Initiative takes effect. Initiative 1366, § 3.

The superior court suggested that section 3 provides the "mechanism" for bringing about a constitutional amendment, and therefore constitutes a separate "subject" for purposes of article II, section 19 analysis. *See* CP at 423. But, contrary to the superior court's findings, section 3 is not a separate piece of legislation and does not propose a constitutional amendment. *See* Initiative 1366, § 3. As shown above, the Initiative does not enact any constitutional amendments. It does not "invoke" the constitutional amendment process, nor does it require the

Legislature to start the amendment process or to take any action at all. *See generally* Initiative 1366. Rather, the Initiative’s references to constitutional amendments reflect the people’s desire for certain policy that is “indisputably devoid of any legal effect” other than stating the conditions that trigger the effective date for the people’s own legislative action. *See Pierce County*, 150 Wn.2d at 434; *cf. State v. Storey*, 51 Wash. 630, 632, 99 P. 878 (1909) (“While the legislative body cannot delegate the power to legislate, the Legislature may delegate the power to determine some facts or state of facts upon which the statute makes or intends to make its own action depend.” (Internal quotation marks omitted.)).

In fact, this Court has specifically rejected a viewpoint that “combining a mandatory subject with an unrelated nonmandatory one” (internal quotation marks omitted) violates article II, section 19, finding instead that the constitutional provision prevents “two measures with legal effect.” *See Pierce County*, 150 Wn.2d at 434 (providing as example a measure that combined an appropriations bill with a corporate income tax bill). Here, the Initiative’s only mandatory legislative action is to reduce the sales tax rate as set forth in section 2. Section 3 does not enact a separate law, nor require the Legislature to enact one. It simply sets the operative effective date for the people’s own legislative act that reflects a

non-mandatory expression of the people's policy preferences. And setting an effective date for the people's legislative act is certainly rationally related to the accomplishment of the purpose of the act.⁹ *Cf. Wash. Toll Bridge Auth.*, 49 Wn.2d at 523. The constitutional amendment references in Initiative 1366 do not constitute a separate "subject" for purposes of article II, section 19.

Second, article II, section 19's constitutional prohibition against passing *separate laws* serves to prevent "logrolling," the forced adoption of unpopular legislation by attaching it to other legislation. *See Amalgamated Transit Union*, 142 Wn.2d at 207; *Pierce County*, 150 Wn.2d at 429-30. Plaintiffs assert, and the superior court agreed, that Initiative 1366 serves as classic logrolling by attaching an unfavorable policy (the sales tax reduction, according to the plaintiffs' viewpoint) with a favorable one (a constitutional amendment). *See* CP at 179, 425.¹⁰ But, Initiative 1366 did not logroll. The people in enacting Initiative 1366

⁹ For these same reasons, it is irrelevant that the referenced constitutional amendment may raise topics other than those related to Initiative 1366's general subject of taxes. *See* CP at 65-66. Nonetheless, the State does not concede that the subject matter of the referenced constitutional amendments (limiting state imposed taxes and fees) is not rationally related to the Initiative's reduction of the state sales tax rate. This Court has previously upheld laws that combine taxes and fees so long as unity is found in the general purpose of the act. *See Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 278 P.3d 632 (2012); *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 377 P.2d 466 (1962).

¹⁰ While the sales tax rate reduction may be viewed as negative from the Plaintiffs' viewpoint, there is simply no empirical evidence that the voters thought so. There are in fact many reasons why voters may favor a lower state sales tax rate, including for some a desire to pay less taxes and for others a belief that such taxes are regressive and harmful to some citizens.

passed one law that reduces the retail sales tax, but also made that legislative act contingent on the Legislature taking separate action that is neither demanded nor required by Initiative 1366. Regardless of whether *some* voters *desired* the contingency to occur, *all* voters affirming Initiative 1366 *voted for* the measure’s sales tax reduction. Therefore, the overriding purpose of Initiative 1366 was not a constitutional amendment, nor was it to attach unpopular legislation “to some other thoroughbred” as the superior court held. It was to reduce the people’s taxes.

Unlike the legislation struck down in *Washington Toll Bridge Authority*, 49 Wn.2d 520, and *Amalgamated Transit Union*, 142 Wn.2d 183, cited by the superior court, Initiative 1366 accomplishes one legislative act—the reduction in the state sales tax rate—not two or more legislative acts. *See* CP at 425. In both cases, this Court found that the relevant acts enacted multiple *laws* not related in purpose.¹¹ For instance, in *Washington Toll Bridge Authority*, the relevant legislation resulted in two separate legislative acts—the creation of a state toll road system and the construction of a specific toll road. *Wash. Toll Bridge Auth.*, 49 Wn.2d

¹¹ Both Plaintiffs and the superior court appear to turn this analysis around. They focus on the Initiative’s “purpose” as the talismanic test for whether the legislation violates article II, section 19. However, in all cases, the Court’s analysis centers on “what is in the measure itself, i.e., whether the measure contains unrelated *laws*.” *Amalgamated Transit Union*, 142 Wn.2d at 212 (emphasis added). The purposes, motives, or inducements behind the act are not relevant to the constitutional inquiry. *Pierce County*, 150 Wn.2d at 434.

at 523. Because these acts resulted in two separate legislative actions, the Court held the act violated article II, section 19. *Wash. Toll Bridge Auth.*, 49 Wn.2d at 524-25. Likewise, the initiative in *Amalgamated Transit Union* fell under article II, section 19 because it (1) imposed one law setting the amount of vehicle license fees; (2) imposed a second law repealing existing vehicle taxes; and (3) imposed a third law requiring voter approval for all future state and local tax increases. *Amalgamated Transit Union*, 142 Wn.2d at 191. But, as shown, Initiative 1366 is different. Initiative 1366 does not combine a one-time legislative action with a continuing one. It asked the people to vote on one legislative act—the reduction of the state sales tax rate. That the people also made their legislative act contingent on the accomplishment of another act in the hands of the Legislature does not change the analysis.

Initiative 1366 contains one single subject in accordance with article II, section 19. Plaintiffs failed to meet their burden of showing otherwise beyond a reasonable doubt.

D. Initiative 1366 Should Be Upheld in Its Entirety, but if the Court Finds Any Provision Unconstitutional, the Remaining Provisions Should Be Severed

An act or statute is not unconstitutional in its entirety unless invalid provisions are unseverable and it cannot reasonably be believed that the legislative body would have passed one without the other, or

unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes. *McGowan v. State*, 148 Wn.2d 278, 294, 60 P.3d 67 (2002). Even if this Court disagrees with the State regarding the legal effect and constitutionality of the Initiative’s conditional provision, Initiative 1366’s remaining provisions remain valid, enforceable legislative acts.¹² Accordingly, Initiative 1366 should not be struck down in its entirety.

First, courts have found that severability clauses provide “the necessary assurance that the Legislature would have enacted the appropriate sections of the legislation despite the unconstitutional sections.” *Gerberding v. Munro*, 134 Wn.2d 188, 197, 949 P.2d 1366 (1998) (applying the test to Initiative 573). Here, Initiative 1366 contains a severability clause (Initiative 1366, § 8) therefore the first part of the severability test is met. Initiative 1366, § 8; *see also McGowan*, 148 Wn.2d at 295.

Second, contrary to the superior court’s conclusion, Initiative 1366’s provisions are not so intertwined that striking the conditional section 3 renders the tax rate reduction in section 2 meaningless. Section 2 of the Initiative operates independently of the remaining provisions—if its

¹² The State does not dispute that severability is not applicable if the Court finds that the Initiative contains two subjects in violation of article II, section 19. *See City of Burien v. Kiga*, 144 Wn.2d 819, 828, 31 P.3d 659 (2001).

effective date in section 3 is stricken, the sales tax reduction in section 2 would still remain. Further, a “legislative declaration of the basis and necessity for enactment is deemed conclusive as to the circumstances asserted unless it can be said that the declaration is obviously false on its face.” *McGowan*, 148 Wn.2d at 296 (internal quotations marks omitted).

Here, section 1 declares the basis and need for the legislation:

[T]he state needs to exercise fiscal restraint by either reducing tax burdens or limiting tax increases to only those considered necessary by more than a bare majority of legislators. . . . This measure provides a reduction in the burden of state taxes by reducing the sales tax . . . unless the legislature refers to the ballot for a vote a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes and majority legislative approval for fee increases.

Initiative 1366, § 1 (emphases added). If the contingency in section 3 comes to pass because the suggested constitutional amendment cannot be proposed, it would not change the fact that the voters approved the operative provision of the Initiative—the reduction in the state sales tax rate. The reason for a failure to propose a constitutional amendment is immaterial under the plain language of Initiative 1366. In light of this intent statement, it cannot be shown “beyond a reasonable doubt” that voters would not have enacted the sales tax reduction without the related contingency in section 3. The provisions of Initiative 1366 are severable.

E. This Challenge Merits Judicial Resolution Despite Issues of Standing

The State does not challenge Plaintiffs' ability to bring this action as taxpayers, especially in light of the issues of substantial public interest presented in this case, and public officials' need for immediate resolution. *See Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997) ("The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum for citizens to contest the legality of official acts of their government."); *see also Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 242 n.5, 242 P.3d 891 (2010) (courts may decide a question of public interest that has been adequately briefed and argued if doing so would benefit the public and government officers). Thus, the Court need not address the Plaintiffs' other claimed bases for standing.

In the event the Court does consider alternative bases for standing, the State disputes Plaintiffs' individualized claims of harm and the legislators' separate claims of official standing.

None of the plaintiffs has suffered an individualized harm from Initiative 1366.¹³ Plaintiffs assert that Initiative 1366's sales tax reduction

¹³ The League of Women Voters asserts representative standing on behalf of its members. CP at 81. The State does not challenge that the League stands in place of its individual members, but does challenge their claims of harm for the same reasons as the individual Plaintiffs.

(or the suggested constitutional amendment) will have “direct and substantial detrimental impacts” on their interests in funding education, social services, and state programs and infrastructure. CP at 80-81. But a mere interest in government funding mechanisms is insufficient to establish individualized harm; rather the individual plaintiffs must show that their rights are directly affected or that they are being denied some benefit by implementation of I-1366. *Federal Way Sch. Dist. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009); *see also Walker v. Munro*, 124 Wn.2d 402, 420-21, 879 P.2d 920 (1994). Here, nothing in Initiative 1366 directly affects the Plaintiffs, other than that they generally disagree with the Initiative and its resulting, potential sales tax reduction or hypothetical constitutional amendment. Plaintiffs cannot yet know the concrete effects of Initiative 1366, especially in light of the Legislature’s multiple options for addressing its consequences.

The Plaintiff legislators also lack standing in their official capacities. Relying on *League of Education Voters v. State*, 176 Wn.2d 808, 817-18, 295 P.3d 743 (2013), the Plaintiff legislators assert that they have standing because Initiative 1366 prevents them from independently initiating the constitutional amendment process and allegedly forces certain legislative action. CP at 83-84. In *League of Education Voters*, a specific bill failed to pass notwithstanding having received a simple

majority of votes, including the votes of the plaintiff legislators, due to the supermajority requirement in Initiative 1053. *League of Educ. Voters*, 176 Wn.2d at 817. This Court found that the legislators' interest in maintaining the effectiveness of their votes gave them sufficient standing to challenge the legality of Initiative 1053. *Id.* But there, the legislators had taken actual votes that had been nullified by Initiative 1053's supermajority vote requirement. Here, none of the Plaintiff legislators' votes will be in any way dictated or nullified by Initiative 1366. Nothing in Initiative 1366 requires the Plaintiff legislators to propose a constitutional amendment or to vote for or against any constitutional amendment should one be proposed. Thus, none of the Plaintiff legislators are harmed by Initiative 1366, and their claim of individual legislator standing should fail.

In sum, this Court should decline to expand the concept of legislator standing beyond that articulated in *League of Education Voters*, and if necessary, the Court should conclude that Plaintiffs have not shown adequate individualized harm to establish more than generalized taxpayer standing. Notwithstanding these issues, the State believes that this matter is properly before this Court for determination.

VI. CONCLUSION

Initiative 1366 is a valid exercise of the people's legislative power that is in accordance with all of the constitutional requirements. The

Initiative amends the state sales tax rate, an act that is plainly within the people's power, and merely makes it contingent on constitutional amendments that may or may not be taken up by the Legislature. Initiative 1366 does not amend the state constitution nor alter the constitutional amendment requirements. This Court should hold that Initiative 1366 meets all the constitutional requirements for a valid legislative act and is within the scope of the people's initiative power.

RESPECTFULLY SUBMITTED this 5th day of February 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via email, a true and correct copy of the Statement of Grounds and Motion for Expedited Review, upon the following:

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DATED this 5th day of February 2016, at Olympia, Washington.

STEPHANIE N. LINDEY
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Initiative amends the state sales tax rate, an act that is plainly within the people's power, and merely makes it contingent on constitutional amendments that may or may not be taken up by the Legislature. Initiative 1366 does not amend the state constitution nor alter the constitutional amendment requirements. This Court should hold that Initiative 1366 meets all the constitutional requirements for a valid legislative act and is within the scope of the people's initiative power.

RESPECTFULLY SUBMITTED this 18th day of February 2016.

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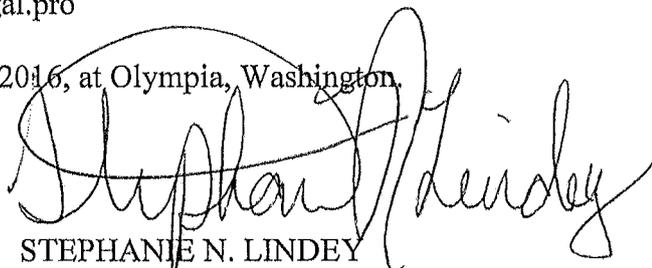
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Subject: RE: Lee v. State; 92708-1; Letter and Corrected Opening Brief

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Please find the actual brief attached to this email. I apologize for the error.

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Subject: Lee v. State; 92708-1; Letter and Corrected Opening Brief

Dear Clerk,

Attached in case number 92708-1, please find the following document:

1. Letter to Susan Carlson re: Filing of Corrected Opening Brief; and
2. State's Corrected Opening Brief.

<< File: Ltr_to_Clerk_re_Corrected_Opening_Brief_02182016.pdf >> << File: Corrected_Opening_Brief.pdf >>

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