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King County Superior Court No. 15-2-28277-8 SEA

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; GERALD REILLY, an individual taxpayer; PAUL BELL, an individual taxpayer, and THE LEAGUE OF WOMEN VOTERS OF WASHINGTON,
Respondents,

v.

The STATE OF WASHINGTON,

Appellant, and

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

Appellants.

**REPLY BRIEF OF APPELLANTS,
THE INITIATIVE SPONSORS**

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 ORIGINAL

TABLE OF CONTENTS

INTRODUCTION.....	1
A. Constitutionality Does not Hinge on Tim Eyman’s Actions.....	1
B. Because the Trial Court Granted a Motion for Summary Judgment, its Findings are Irrelevant.....	1
C. The Historical Role of the Initiative Includes Breaking Up Gridlock.....	2
ARGUMENT.....	4
I. THIS CASE IS NOT JUSTICIABLE NOW BECAUSE THE DISPUTE IS ABSTRACT UNTIL THE LEGISLATURE RESPONDS TO THE APRIL 15, 2016 EFFECTIVE DATE.....	4
II. RESPONDENTS HAVE FAILED TO PROVE THEY HAVE STANDING.....	6
A. Respondents do not have Standing as Taxpayers.....	6
B. Respondents’ Claim of Injury to Confer Standing as Individuals is Subject to Disputed Evidence.....	8
C. Respondent Legislators do not Have Standing.....	9
D. Taxpayer Standing to Inject the Court in On-going Legislative Processes is Inappropriate.....	10
III. I-1366 IS CONSTITUTIONAL	
A. Respondents Ignore that the Court Should Interpret Legislation in Ways to Avoid Unconstitutionality.....	10
B. I-1366 Does not Violate The Single Subject Rule: The Sales Tax Reduction and Potential Opportunity to Vote on a Constitutional Amendment regarding Taxes are Germane to Fiscal Restraint	11
C. I-1366 Does not Violate Article XXIII Regarding the	

Process for Amending the Constitution; The Initiative Does Not Circumvent Any Step in the Process	16
D. I-1366 Does not Violate any Limitation that only Legislators can “Propose” Constitutional Amendments.....	19
E. I-1366 Does not Bind Future Legislatures and Thereby Violate Article II Because the Legislature Retains Options to Respond to the Initiative.....	22
IV. THE PROVISIONS OF I-1366 ARE SEVERABLE.....	23
CONCLUSION.....	25
Declaration of Service	
Appendix 1	
Appendix 2	

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Transit Union v. State</i> , 142 Wn.2d 183, (2000)	1, 4, 12, 23
<i>Am. Legion Post #149 v. Washington State Dep't of Health</i> , 164 Wn.2d 570 (2008)	9
<i>Am. Legion Post No. 32 v. City of Walla Walla</i> , 116 Wn.2d 1 (1991)	8
<i>Brower v. State</i> , 137 Wn.2d 44 (1998)	13, 14
<i>Brown v. Derry</i> , 10 Wn. App. 459 (1974)	4
<i>Brown v. Owen</i> , 165 Wn.2d 706 (2009)	1
<i>City of Burien v. Kiga</i> , 144 Wn.2d 819 (2001)	4, 12
<i>City of Tacoma v. O'Brien</i> , 85 Wn.2d 266 (1975)	7
<i>Fed. Way Sch. Dist. No. 210 v. State</i> , 167 Wn.2d 514 (2009)	7
<i>Ford v. Logan</i> , 79 Wn.2d 147 (1971)	19
<i>Fritz v. Gorton</i> , 83 Wn.2d 275 (1974)	10
<i>Futurewise v. Reed</i> , 161 Wn.2d 407 (2007)	1, 18
<i>Greater Harbor 2000 v. City of Seattle</i> , 132 Wn.2d 267 (1997)	7
<i>Huff v. Wyman</i> , 184 Wn.2d 643 (2015)	passim
<i>League of Educ. Voters v. State</i> , 176 Wn.2d 808 (2013)	6, 8
<i>League of Women Voters v. State</i> , 184 Wn.2d 393 (2015)	24

<i>Leonard v. City of Spokane</i> , 127 Wn.2d 194 (1995)	24
<i>Maleng v. King County Corrections Guild</i> , 150 Wn.2d 325 (2003).....	19
<i>McCleary v. State</i> , 173 Wn.2d 477 (2012)	3
<i>Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1</i> , 149 Wn.2d 660 (2003)	9, 11
<i>Philadelphia II v. Gregoire</i> , 128 Wn.2d 707 (1996)	18
<i>Pierce County v State</i> , 150 Wn.2d 422 (2003)	1
<i>Reiger v. City of Seattle</i> , 157 Wn.2d 651 (1961)	4
<i>Save Our State Park v. Hordyk</i> , 71 Wn. App. 84 (1993)	2
<i>SentinelC3, Inc. v. Hunt</i> , 181 Wn.2d 127 (2014)	4
<i>Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution</i> , No 91551-2, 2016 WL 455957 (Wash. Feb. 4, 2016)	5
<i>State ex rel. Boyles v. Whatcom Cty. Superior Court</i> , 103 Wn.2d 610 (1985)	7
<i>State v. Howell</i> , 107 Wash. 167 (1919)	2
<i>State v. Meath</i> , 84 Wash. 302 (1915)	2
<i>Superior Asphalt & Concrete Co. Inc. v. Washington Dep't of Labor & Indus.</i> , 121 Wn. App. 601 (2004)	6
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403 (2001)	6
<i>Walker v. Munro</i> , 124 Wn.2d 402 (1994)	5
<i>Washington Ass'n for Substance Abuse & Violence Prevention v. State</i> , 174 Wn.2d 642 (2012)	15
<i>Washington Toll Bridge Auth. v. State</i> , 49 Wn.2d 520 (1956)	12

Legislative Bills

HB 347521
SJR 821517

INTRODUCTION

In their brief to this Court, Respondents reveal three fundamental differences between the approaches of the parties.

A. Constitutionality Does not Hinge on Tim Eyman's Actions

By endless references to what Tim Eyman did during the campaign or what Tim Eyman said in his deposition, it is apparent that Respondents are playing into the urban myth that this Court hates Tim Eyman.¹ Despite Respondents' seemingly endless references to Tim Eyman, Sponsors believe the Court's review of I-1366 should not be any different than if someone else sponsored the initiative or campaigned for its passage in a different manner. Ultimately, it is the text of the initiative that the Court is reviewing—not campaign rhetoric. Sponsors believe the Court will decide the case based on the law as applied to what the voters enacted and not based on selected campaign slogans.

B. Because the Trial Court Granted a Motion for Summary Judgment, its Findings are Irrelevant

When their argument is thin, Respondents rely on the findings of the trial court. They completely ignore that review is *de novo* because this is an appeal of the grant of a summary judgment motion. They ignore that

¹ While one of the first initiatives Tim Eyman was involved with was struck down by the Court in *Amalgamated Transit Union v. State*, 142 Wn.2d 183, (2000), it is false to suggest that this Court strikes down all Eyman-related initiatives. See *Pierce County v State*, 150 Wn.2d 422 (2003); *Futurewise v. Reed*, 161 Wn.2d 407 (2007); *Brown v. Owen*, 165 Wn.2d 706 (2009); *Huff v. Wyman*, 184 Wn.2d 643 (2015). As one should expect, the Court has reviewed initiatives on their merits and not on who sponsored the measure.

findings are irrelevant in the grant of a summary judgment order and there was disputed evidence. *See* CP 372-79 (Ericksen Decl.).

C. The Historical Role of the Initiative Includes Breaking Up Gridlock

Respondents ignores the reason the initiative power was added to the state constitution, namely to step in when the legislature fails to act. As aptly explained by Justice Alexander:

In 1912, the citizens of this State amended our constitution to give the people the right to initiate laws. ... They passed the amendment “because they had become impressed with a profound conviction that the legislature had ceased to be responsive to the popular will.”

Save Our State Park v. Hordyk, 71 Wn. App. 84, 89-90 (1993) (quoting *State v. Howell*, 107 Wash. 167, 172 (1919)).

In *Hordyk*, Justice Alexander invoked a fundamental, first principle of Washington’s governmental system:

The people have a right to adopt any system of government they see fit to adopt. In its workings, it may not meet their expectations; it may be unwieldy and cumbersome; it may tend to inconvenience and prodigality; it may be the expression of a passion or sentiment rather than of sound reason; but it is the people's government and, until changed by them, must be observed by the legislature and protected by the courts.

Hordyk, 71 Wn. App. at 90 (quoting *State v. Meath*, 84 Wash. 302, 320 (1915)). The initiative is “the first of all the sovereign rights of the citizen—the right to speak ultimately and finally in matters of political concern.” *Howell*, 107 Wash. at 171.

It is this first, sovereign right to speak, even in a manner which is inconvenient or unwieldy, which Respondents seek to muzzle. Moreover, the voters usurped no power of the legislature when enacting I-1366, but rather gave it an option. For this, Respondents seek to render voters' vote meaningless. Because there is no allegation that reducing the sales tax is illegal, the Court should reject Respondents' convoluted arguments that giving the legislature a choice is unconstitutional.

As recognized in *Howell* and *Hordyk*, the initiative process is available when the legislature is nonresponsive. The legislature has failed to address serious fiscal issues, such as its reliance on a particularly regressive tax—the sales tax. It has failed to deal with this Court's decision in *McCleary v. State*, 173 Wn.2d 477 (2012). It has failed to fully fund lower class size Initiative 1351.

Rather than shield the legislature from the voters' expressed wishes, which may spur transformation of the way the legislature handles fiscal issues, the trial court should not have interfered with the process and instead allowed the legislature to respond to the initiative. Any supposed constitutional issues should have been decided after the legislature decided which path or paths to take in response to the people's vote.

ARGUMENT

I.

THIS CASE IS NOT JUSTICIABLE NOW BECAUSE THE DISPUTE IS ABSTRACT UNTIL THE LEGISLATURE RESPONDS TO THE APRIL 15, 2016 EFFECTIVE DATE

Respondents argue that this case is justiciable because justiciability is “consistent with numerous decisions of this Court evaluating the validity of voter-approved initiatives.” Answering Brief of Respondents (ABR) at 45 (citing *Amalgamated Transit Union v. State (ATU)*, 142 Wn.2d 183, 202-03 (2000); *City of Burien v. Kiga*, 144 Wn.2d 819, 824-28 (2001)).² Sponsors are not arguing a lack of justiciability because I-1366 is an initiative. Justiciability is lacking because the effect of this initiative, unlike that in *ATU* or *Kiga*, is completely unknown until the legislature acts.

While Respondents claim they are not challenging legislative acts (ABR at 46), the impact of the initiative is completely unknown until the legislature responds. In this respect, the present case is much like that in

² By footnote, Respondents complain that Appellants did not assign error to the trial court’s findings on standing or justiciability and did not identify them as appropriate for direct review. ABR at 39 n. 16. First, when reviewing a summary judgment order, the duty to assign error extends to the order itself. *Relger v. City of Seattle*, 157 Wn.2d 651 (1961); *Brown v. Derry*, 10 Wn. App. 459 (1974). While the trial court issued findings, Appellants have been quite clear that any findings are improper for a summary judgment decision. See Opening Brief of Appellants at 20 and cases cited therein.

Second, the identification of issues appropriate for direct review does not require that every issue be so identified. A party who has an appeal does not forfeit issues simply because some may be argued as appropriate for direct review and some not. Nor does the Court typically bifurcate an appeal and send some issues to the Court of Appeals. As the case here, there are issues appropriate for direct review and therefore all issues should be resolved by the Court in this proceeding. The only way in which an appellant waives issues on appeal is to fail to brief them. See, e.g., *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127 (2014) n.4. (2014). That is certainly not the case here.

Walker v. Munro, 124 Wn.2d 402 (1994), where this Court found the case non-justiciable because the effect of the initiative was unknown until the legislature acted. The same is true here.

Respondents argue that the sales tax reduction is not a speculative injury because of its amount, as if that makes it any less speculative. ABR at 47. The sales tax “injury” is purely speculative because the legislature could refer one constitutional amendment, refer several, suspend or delay the sales tax reduction or repeal it entirely with a two-thirds vote.

If the legislature decides not to refer a constitutional amendment to the voters and responds to the sales tax reduction with an increase in other taxes and/or an adjustment in spending, Respondents’ claim that the initiative violates the process for amending the constitution fails if that process is never initiated.

Respondents also argue that challenges to initiatives must be justiciable immediately because the “harm” of a two-subject initiative occurs at voting. But, the legislature should be allowed to decide how to respond which may in fact make the entire case moot. That is why, in the context of I-1366’s effective date contingent on legislative action, the Court should have waited for that legislative action to occur.

Respondents rely on the recent decision in *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, No 91551-2, 2016 WL

455957 (Wash. Feb. 4, 2016). This decision is consistent with the jurisprudence in this state that a court may review an initiative before its enactment only if challenged on the basis of being beyond the scope of the initiative power. It does not stand for the proposition that a substantive review of an initiative, the effect of which lies in the hands of the legislature, should occur before the legislature acts. *Walker* remains good law.

Until the legislature decides what to do about I-1366, Respondents' challenge is "potential, theoretical, abstract or academic." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001). A challenge to a law that has never been acted upon is not justiciable. *Sup. Superior Asphalt & Concrete Co. Inc. v. Wash. Dep't of Labor & Indus.*, 121 Wn. App. 601, 606 (2004).

Finally, the public importance of I-1366 does not make the case justiciable at this time any more than it did in *Walker* or *League of Educ. Voters v. State*, 176 Wn.2d 808, 819-20 (2013). Sponsors agree that I-1366 is important. But public importance does not require the Court to decide constitutional issues now.

II. RESPONDENTS HAVE FAILED TO PROVE THEY HAVE STANDING

A. Respondents do not have Standing as Taxpayers

In response to this Court's reaffirmation in *Huff*, 184 Wn. 2d at 653 that taxpayer standing is appropriate to challenge only illegal actions by

public officials that are nondiscretionary, Respondents claim that they are not challenging any legislative action at all, just the existence of the initiative. ABR at 40. But taxpayer standing does not lie to challenge the existence of laws, but rather actions and the only actions related to I-1366 are now purely discretionary.

In order to maintain an action, the taxpayer must show ... a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers.” The taxpayer must show that **the action complained of** interferes with the taxpayer's legal rights or privileges. If not, the taxpayer has no standing to challenge the action.

Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 281-82 (1997) (emphasis added; footnotes omitted); *State ex rel. Boyles v. Whatcom Cty. Superior Court*, 103 Wn.2d 610, 614 (1985) *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 529 (2009) (“The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state's citizens contest the legality of official acts of their government”); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269 (1975) (“standing to challenge the act of a public official”); *Federal Way School Dist. No. 210 v. State*, 167 Wn. 2d 514, 529 (2009) (“doubtful there is taxpayer standing to protest lower taxes or limits on taxation”).

Without showing that the action complained of interferes with such legal rights or privileges, there is no standing to challenge the action.

Am. Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 8 (1991).

Respondents provide no response to Sponsors' argument that judicial intervention in on-going legislative processes is inappropriate, other than a brief reference to Justice Johnson's dissent in *League of Education Voters*, 176 Wn.2d at 808, cited in ABR at 48. The trial court should not have interfered with the legislative process, but let the legislature respond. If the legislature decided not to propose a constitutional amendment, none of the concerns about forcing legislator's votes would have materialized.

B. Respondents' Claim of Injury to Confer Standing as Individuals is Subject to Disputed Evidence

Respondents claimed a wide variety of injuries if the sales tax were reduced or citizens were allowed to vote on a constitutional amendment. However, the assumption that there would be less state money available to finance their desires is a disputed assumption. See CP 372-79 (Ericksen Declaration). If the legislature is faced with the consequence of the voter's choice, there are a variety of forms of tax reform possible, including replacing the highly regressive sales tax with more progressive ones.

Respondents argue that, "if the legislature adopts new taxes to make up for the lost revenue, that will harm Respondents' interest in fully funding education, health and human services, and other state programs and infrastructure." ABR at 42. The argument makes no sense. If new taxes offset the reduction in the regressive sales tax, how are Respondents injured? Perhaps, they intend to argue that if the legislature "makes up for

lost revenue,” that isn’t good enough. Under their view, the Court should make sure the legislature funds everything Respondents want. Standing does not exist to invoke the courts to demand anything one desires.³

C. Respondent Legislators do not Have Standing

The legislators claim harm because the “amendment usurps their constitutional authority under Article XXIII to propose constitutional amendments.” ABR at 42. These legislators remain free to propose constitutional amendment they support or none at all, just as all legislators do. I-1366 does not create a constitutional amendment or even guarantee the referral, or passage, of any constitutional amendment.

They also assert an inherent right not to vote for a constitutional amendment without a sales tax reduction as a possibility. While the argument suits their purposes, it views the initiative in a light to promote a finding of unconstitutionality, which this Court, and every other, has long rejected. *See Parents Involved in Community Schools v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 671 (2003).

Here, the voters adopted a sales tax reduction and expressly gave the

³ Finally, Respondents argue that the League of Women Voters has an interest in promoting representative democracy which would be harmed by a supermajority requirement. ABR at 42. As this Court has explained, associational standing requires proof, not just assertions, about the mission of the association. *Am. Legion Post #149 v. Washington State Dep’t of Health*, 164 Wn.2d 570, 596 (2008).

Even if this were a proven mission of the association, the interest in opposing supermajority requirements remains unripe. The legislature, the only entity with the power to refer a constitutional amendment to the people, has not decided to do so.

legislature an option to retain the sales tax upon referring a constitutional amendment to the voters. **Of course, the legislature already had that authority.** Giving the legislature this option does not force these legislators to vote one way or another. If legislators prefer the sales tax reduction, they need do nothing. If the legislators prefer a constitutional amendment, they can vote yes or no on one. The Court should not put itself in the position of protecting legislators from taking “tough” votes. Making choices by casting votes is inherent in the legislative process.

D. Taxpayer Standing to Inject the Court in On-going Legislative Processes is Inappropriate

This Court in *Fritz v. Gorton*, 83 Wn.2d 275, 283 (1974) recognized that the Court should not interfere with legislative processes. To this fundamental principle, Respondents offer no response other than to state that they are challenging the initiative and not anything the legislature has done. It is clear that the initiative highlights to the legislature one of many options it has. The trial court’s grant of Respondent’s summary judgment motion interfered with the legislature’s decision on how to respond by prematurely ruling no response is necessary.

III.

I-1366 IS CONSTITUTIONAL

A. Respondents Ignore that the Court Should Interpret Legislation in Ways to Avoid Unconstitutionality.

Additionally, in reviewing whether an initiative is unconstitutional,

the Court must interpret the measure in any way possible that would save its constitutionality. *Parents Involved*, 149 Wn. 2d at 671.

B. I-1366 Does not Violate The Single Subject Rule: The Sales Tax Reduction and Potential Opportunity to Vote on a Constitutional Amendment regarding Taxes are Germane to Fiscal Restraint

Respondents apparently do not dispute that the ballot title is broad and that it expresses a general subject which could be viewed as “fiscal restraint.” But their argument that all provisions are not germane to fiscal restraint fails. ABR at 10. They attempt to have the Court strike down the voters’ enactment by describing the initiative in terms of its objective or purpose and not upon what the initiative says. This should be rejected.

First, Respondents claim the initiative has a one-time objective and a continuing objective, arguing that must mean there is more than one subject. ABR at 11. This focus diverts attention from this Court’s requirement that the single subject analysis depends upon whether provisions are germane to each other, not whether they have “one-time” or “continuing” aspects. Respondents treat this as a separate test because they do not deal with germaneness until their second point. ABR at 13. It is not a separate test.

Their argument is based on three cases: *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520 (1956); *ATU*, 142 Wn. 2d at 193, and *Kiga*, 144 Wn.2d at 824-28. The Court in *Washington Toll Bridge* held that the statute had two unrelated subjects because it created a toll authority and

authorized the construction of a specific road. 49 Wn.2d at 523-24. It described the specific road construction as being “subject to accomplishment and *is not continuing in character.*” *Id.* at 524 (italics in original). Creating the toll road authority was continuing in character.

Respondents argue that the sales tax reduction is not continuing in character as would be a constitutional amendment. ABR at 19. The problem with the argument is two-fold. First, it is apparent from the 1956 decision in *Washington Toll Bridge* that the Court was not looking at the permanency of the change. After all, the construction of a road is relatively permanent, even more than the reduction of the sales tax, which can be changed by the legislature at any time. By using the phrase “subject to accomplishment,” the Court was distinguishing between legislative acts and essentially administrative ones. *Washington Toll Bridge* is really about joining legislative with site specific decisions.⁴ Here, that is not the case.

ATU is also distinguishable. The Court found the initiative invalid on numerous grounds, including the single subject requirement. The Court concluded that the initiative had two subjects, setting “license tab fees at \$30 and to provide a continuing method of approving all future tax increases.” 142 Wn. 2d at 217. Here, I-1366 contains two mutually exclusive possibilities. The sales tax is lowered, but it does not create or

⁴ Similarly, the Court in *Kiga* described the initiative in *Washington Toll Bridge* as involving a “one-time event that was narrow in scope.” 144 Wn.2d at 826.

otherwise affect future tax increases. The legislature has the option to refer a constitutional amendment to the ballot, that may or may not be approved, but the initiative itself does not mandate that result.

Kiga is also distinguishable. The initiative nullified and provided refunds of a wide variety of taxes and monetary charges and created a new systematic change to property tax assessments. It relied on *Brower v. State*, 137 Wn.2d 44 (1998), which held that addressing long term and short term funds were germane provisions. Hence, the problem in *Kiga* was not the one time or permanent change, but like *ATU*, it was refunds of an indefinite number of taxes combined with a change on property tax assessments.

Nevertheless, even if Respondents' analysis were proper, it fails in this case. Essentially, Respondents argue that the sales tax reduction is a one-time reduction and a constitutional amendment is continuing in nature. The sales tax reduction is as a "one-time" as the legislature chooses. The lowering of the sale tax to 5.5% could be negated immediately or it could become the new normal for decades to come.

The more fundamental error in Respondents' argument, however, is that the constitutional amendment is continuing in nature. I-1366 does not create a constitutional amendment.⁵ No constitutional amendment will

⁵ Respondents accuse the Sponsors of ignoring their "previous arguments and admissions that the purpose of the initiative is to "prod" the legislature into advancing the amendment." ABR at 13. As Appellant Eyman stated repeatedly in his deposition, it is the voters' approval of the initiative itself which may spur the legislature to act. More

occur unless two-thirds of both houses refer one to the voters and the voters approve it. It is the referral to the people that triggers the effective date and is as one-time as the sales tax reduction is. There is no mixing of one-time with permanent or “systematic” aspects so as to contain multiple subjects.

Respondents’ second point is that the sales tax reduction is not germane to a two-thirds vote for tax increases. ABR at 13. Their argument is that a reduction in taxes is in no way germane to a potential future limitation on taxes. *Id.* More importantly, they argue that limiting and reducing taxes are not germane to the general subject of fiscal restraint. It is obvious that to reduce taxes or to limit the imposition of higher taxes or fees both require the exercise of fiscal restraint. *See* CP 23 (intent of I-1366).

They also suggest that the provisions are not germane because one deals with the sales tax and the other deals with any kind of tax. The argument presupposes that an initiative cannot have both general and specific provisions. They clearly can.

Third, Respondents continue to argue that there are two subjects because I-1366 includes something lawful (the sales tax reduction) and something they claim is unlawful (a potential referral of a constitutional amendment). ABR at 14. They ignore that this illegal and legal argument

importantly, however, to the extent the sales tax reduction motivates the legislature to refer a constitutional amendment to the voters, that does not mean that the initiative itself requires that result. It does not.

has never been a basis for determining whether an initiative or bill contains more than one subject. If it were, then all legislation that had an unlawful provision would violate the single subject requirement and courts would never have to deal with severability issues for any legislation whatsoever. That creative, new argument, if adopted, would be a new weapon for any opponent of any future bill or initiative—any illegality in the act automatically creates a single subject violation. This newly minted argument should be rejected; it would frustrate all legislative processes.

Fourth, Respondents assert there are two subjects because I-1366 involves the power of the voters under Article II in enacting the initiative and the legislature's power under Article XXIII. The constitution addresses numerous issues throughout its entirety. An initiative is not invalid simply because it addresses a subject addressed in another constitutional provision.

As addressed in Sponsors Opening Brief, to resolve the single subject question, the Court should rely on its very recent case, *Washington Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642 (2012). Respondents make only a passing reference to the case in a footnote. ABR at 21 n.10.

Various asserted separate subjects were alleged, such as liquor fees, liquor privatization and changing wine regulation. If Respondents' argument about permanent joined with one-time changes were applicable,

the liquor initiative would not have survived. It required a relatively permanent change in the sale of all state-owned liquor stores and changed taxes and fees related to liquor. The latter are arguably as one-time as the sale tax reduction in I-1366.

More to the point, however, the liquor initiative privatized liquor sales and increased fees on liquor sales. Presumably, some voters wanted privatized liquor sales with the belief that liquor would be available at lower cost and did not want the higher taxes or fees on liquor. Others may have wanted higher taxes and fees on liquor, but opposed privatization of liquor sales or were ambivalent about it. There is no way to know. This Court correctly concluded that these provisions were germane to the subject.

The same result should occur here. A sales tax reduction is germane to fiscal restraint as is the option given to the legislature to retain the tax upon referring to the voters a constitutional amendment regarding taxes.

C. I-1366 Does not Violate Article XXIII Regarding the Process for Amending the Constitution; The Initiative Does Not Circumvent Any Step in the Process

Respondents argue that this Court in *Huff* found that amending the constitution was an improper purpose of I-1366. ABR at 21 (citing *Huff*, 184 Wn. 2d at 654). To the contrary, this Court stated that the initiative could be viewed as conditional legislation and when viewed in that light the “purpose of I-1366 is ... **not the amendment** of the constitution. *Huff*, 184

Wn. 2d at 653 (emphasis added).

No one contests the fact that the legislature has plenary power over whether to refer constitutional amendments to the voters. But that does not mean the voters cannot express their wishes for an opportunity to vote on one. Nor does it mean the voters cannot encourage the legislature to do so. The referral of a constitutional amendment still remains completely in the hands of the legislature, as well as the text of any constitutional amendment.

Being considered in the legislature at the time of the drafting of this brief is SJR 8215, a proposed constitutional amendment that would require a 60% vote of the legislature for tax increases, attached hereto as Appendix 1. The legislature could decide to refer this amendment and with the same number of votes, amend I-1366 to negate the sales tax reduction.

Sponsors believe that focusing on the “fundamental purpose” of an initiative is the wrong approach because it leads to what has happened here—a focus on what Respondents claim Tim Eyman wants rather than on what voters actually adopted. Similarly, in regard to the review of the liquor privatization initiative, the Court did not, and should not have, viewed the initiative in terms of what its sponsors’ overriding purpose may have been—to make money for new wholesale retailers.

The “overriding purpose” phrase that Respondents seek to capitalize upon comes from the Court’s decision in *Philadelphia II v. Gregoire*, 128

Wn.2d 707, 719 (1996). While the Court used that phrase to describe the initiative generally, there was no indication that the Court was intending that a characterization of “the overriding purpose” was going to be a test of constitutionality. To make the “overriding purpose” **the test** invites the manipulation Respondents engage in here, namely, characterizing the voter’s intent, not based on what the initiative actually says, but by what Respondents claim is the motivation of one of its co-sponsors. Constitutionality should not depend upon motives or even what policies initiative promoters choose to emphasize in a campaign.

Instead of lifting the “overriding purpose” from *Philadelphia II* and making it a test, the Court should recognize what the problem was with the proposed initiative in *Philadelphia II*. It was purporting to make a change in **federal law** which was not within the state’s power to enact. *Id.* at 719. The “overriding purpose” language was just a short cut way of describing the fact that all of its provisions were useless to enact state law.

More recently, however, this Court explained that the constitutionality of an initiative requires the review of the text and not **“whatever its practical ‘effect’ may be.”** *Futurewise*, 161 Wn. 2d at 412 (emphasis added). Respondents’ focus on the *purpose* of I-1366 should be

rejected. Instead, the focus should be on what the initiative **actually enacts**, which is a reduction in the sales tax.⁶

D. I-1366 Does not Violate any Limitation that only Legislators can “Propose” Constitutional Amendments

Amazingly, Respondents continue to argue that this Court ruled in *Huff* that I-1366 had an improper purpose of amending the constitution. ABR at 21. This Court did not so rule.

Respondents argue that the constitutional amendment process is “manifestly distinct” from the enactment of bills. ABR at 22 (citing *Ford v. Logan*, 79 Wn.2d 147, 155 (1971)). Respondents ignore that *Ford* has been severely limited to its facts, if not overruled, by this Court’s decision in *Maleng v. King County Corrections Guild*, 150 Wn.2d 325 (2003).

Nevertheless, the distinctions in the process are not negated by I-1366. Namely, constitutional amendments need a two-thirds legislative vote and a majority vote of the people. Bills need a majority legislative vote and the Governor’s signature or the override of a veto.

But I-1366 does not conflict with any step of the constitutional amendment process. The only argument offered and the one accepted by the trial court is that the voters cannot “propose” a constitutional

⁶ Respondents also argue that I-1366 cannot constitute “conditional legislation” without even recognizing that this Court in *Huff*, 184 Wn. 2d at 653 ruled that such was a permissible reading of the initiative. ABR at 19.

amendment. ABR at 23 (citing CP at 424). The voters did not “propose” a constitutional amendment in terms of legislative processes. There would be no hearings or votes on a constitutional amendment by virtue of the I-1366 passage alone. It would take a proposal by a legislator. *See* CP 372-79 (Ericksen Decl.) And true to the constitutional process, in this year’s legislative session, constitutional amendments with varying degrees of conformity to the constitutional amendment requested by the voters all began with a proposal by one or more legislators.

Because the initiative requires no deviation from the process for referring constitutional amendments, the only conceivable way in which the initiative “proposes” an amendment is in informing the legislature of the voter’s desires—that they want a reduction in the sales tax or the option of voting on a constitutional amendment. It is ludicrous to conclude that the idea for a constitutional amendment cannot come from anyone other than a legislator with no input from constituents, lobbyists, the governor or voters.

In response to the State, Respondents argue that the legislature does not have time to consider a constitutional amendment because the legislature was scheduled for a short session this year. No precedent exists for the notion that constitutional amendments may not be considered by the legislature during short sessions. The legislature should be allowed to decide whether to propose one or more constitutional amendments.

While the passage of I-1366 does place pressure on the legislature to consider constitutional amendments, the legislature retains plenary power to respond in many different ways—suspending or amending the sales tax cut; alleviating the burden of the sales tax reduction by either adjusting spending and/or increasing or creating less regressive taxes; referring a constitutional amendment as addressed in I-1366 or referring one different, even alternative, proposed constitutional amendments, such as one establishing an income tax.⁷ Legislators, nor the legislature as a whole (which is not a party to this case), have no constitutional right to be free from “pressure.”

In regard to the argument that I-1366 violates the single subject rule because a proposed constitutional amendment would deal with both taxes and fees, Sponsors argued that there is no single subject rule for constitutional amendments. Respondents argue that Article XXIII requires separate votes on separate amendments. ABR at 21 n.10. If this is

⁷ Respondents argue that the legislature cannot change the text of the proposed constitutional amendment. ABR at 26-27. But that is not true; it can with a two-thirds vote, which is exactly the same vote threshold for referring a constitutional amendment. Therefore, there will be no referral of any constitutional amendment without a two-thirds vote and that same two-thirds vote can suspend, amend or repeal I-1366 in any way the legislature chooses. In fact, a bill was introduced that amended section 3 of I-1366 to allow the referral of any constitutional amendment to cause the sales tax reduction’s effective date to expire. *See* HB 3475, attached hereto as Appendix 2.

Additionally, if the legislature refers a constitutional amendment with the text of I-1366 and adds other language, such as creating a new tax, whether that is in conflict with the initiative is simply not ripe. In any event, the Court should not assume that the legislature has lost its ability to refer constitutional amendments with whatever text it ultimately chooses.

analogous to the single subject rule and Respondents argument that fees must be separate from taxes were correct, several constitutional amendments are unconstitutional for dealing with taxes and fees.⁸

E. I-1366 Does not Bind Future Legislatures and Thereby Violate Article II Because the Legislature Retains Options to Respond to the Initiative

I-1366 is not invalid because it binds future legislatures. It obviously does not. Instead, it appears that Respondents are arguing that legislators have the right to vote no on any proposed bill or constitutional amendment. ABR at 28. They still do.

This argument is simply the rehashed claim that the legislature should not feel any pressure from the passage of initiatives. Under Respondents' theory, Initiative 1351 dealing with school class sizes could have been declared illegal because the legislature would feel pressure to fund the changes in class size. Simply stated, the legislature is not as helpless as the Respondents argue.⁹

Respondents' argument that I-1366 could not be viewed as conditional legislation keeps changing. *Huff*, 184 Wn. 2d 643. At the trial

⁸ See Article 8, Section 4 (Moneys dispersed only be appropriation, regardless of whether moneys are obtained by taxes or fees); Amendment 18 (highway fees and excise taxes); Amendment 43 (Funds for support of common schools come from a variety of sources, including sales, taxes, donations, and fees); Amendment 55 limiting taxes on property by both the state and all other taxing districts; Amendment 60 which refers to state debt and defines "general state revenues" as "all state money received in the treasury," subject to limited exceptions.

⁹ Here again, Respondents rely on purported findings by the trial court, wholly inappropriate in an appeal from a summary judgment decision.

court, they argued that the legislature could not enact conditional legislation that was conditional on other legislative action, but that the condition must come from an outside source. However, as addressed in Opening Brief of the Sponsors, the legislature has conditioned changes to the sale tax upon the enactment of other bills, contrary to Respondents' original argument.

Now, Respondents argue that conditional legislation would violate the principle of delegation of legislative authority. ABR at 30. Of course, delegation of legislative authority is inherent in any conditional legislation.

In an effort to save this argument, Respondents argue that the Court in *ATU* ruled that the legislature could not “transfer the determination of expediency’ to another body that had not enacted the measure.” ABR at 32. (quoting *ATU*, 142 Wn.2d at 241). This is a misreading of *ATU* because the **constitution expressly allows the legislature** to transfer the determination of expediency to the voters by the referendum provision in Article II, Section (1)(b) (referendum may be ordered by the legislature). *ATU* was concerned with an initiative would make **all** future tax increases subject to voter-approval without compliance with referendum procedures. Clearly, specific legislation can be conditional upon some other legislative act.

V. **THE PROVISIONS OF I-1366 ARE SEVERABLE**

Sponsors agree that the severability is not at issue if the Court finds that I-1366 violates Article II, Section 19. However, severability clearly is

at issue if the Court concludes that I-1366's reference to a potential constitutional amendment is somehow improper.

Respondents falsely state that "Sponsors argue for a different standard, but cannot cite a single case that has applied a different severability test." ABR at 35 (citing *League of Women Voters v. State*, 184 Wn.2d 393, 411-12 (2015)). This is not a different standard and essentially the same test as the cases cited by Sponsors.

They go on to reference the requirement for grammatical, functional and volitional elements, as did the Sponsors. ABR at 36. Therefore, they rely on the trial court's statement that there is no way to know whether the sales tax would have been adopted by itself. ABR at 36 (quoting CP 425). That is true with any law with a question of severability.

The cases on which Respondents rely as examples of entire initiatives that were stricken and no severability found support the conclusion that severability should occur here—*Leonard v. City of Spokane*, 127 Wn.2d 194 (1995) and *League of Women Voters*, 184 Wn.2d at 412, cited in ABR at 38. Both cases involved initiatives where the entire funding scheme for a sizable new program was held to be unconstitutional. It was logical to conclude that the voters did not want significant new programs instituted with the method of paying for them having been removed.

In contrast, the voters chose a sales tax reduction; they were

repeatedly told in the voters' pamphlet, in the ballot title and in the campaign that the initiative would produce either a chance to vote on a constitutional amendment or a sales tax reduction. There is no basis to deprive the voters of what they clearly enacted based on lack of severability. The sales tax reduction is not "useless" and should be severed and retained if the Court were to find the option of proposing a constitutional amendment under Section 3 unconstitutional.

CONCLUSION

Sponsors urge this Court to resist substituting the Respondents' policy preferences for those chosen by the people and allow the legislature to consider its response to the initiative before the April 15, 2016 effective date. These issues are all policy decisions within the purview of the legislative branches, both the legislature and the voters.

Sponsors urge the Court to reverse the trial court and allow the legislature to decide on its own whether the reduction in the sales tax is preferable to any constitutional amendment the legislature may choose.

RESPECTFULLY SUBMITTED this 26th day of February, 2016.

STEPHENS & KLINGE LLP

By /s/ Richard M. Stephens
Richard M. Stephens, WSBA 21776
Attorney for Appellants Tim Eyman,
Leo Fagan and M. J. Fagan

DECLARATION OF SERVICE

I, Jill E. Stephens, declare as follows:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action and am competent to be a witness herein.

On February 26, 2016, I caused a true copy of the foregoing to be served on the following person via electronic mail, pursuant to consent of counsel:

PACIFIC LAW GROUP LLP
Paul J. Lawrence
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OFFICE OF THE WASHINGTON
STATE ATTORNEY GENERAL
Rebecca R. Glasgow
Callie A. Castillo
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 26th day of February, 2016, at Bellevue, Washington.

/s/Jill E. Stephens
Jill E. Stephens
Paralegal

Appendix 1

SENATE JOINT RESOLUTION 8215

State of Washington 64th Legislature 2016 Regular Session

By Senators Braun, Benton, Rivers, Angel, Becker, Roach, Schoesler, Bailey, Brown, Miloscia, Warnick, Honeyford, Dammeier, Fain, O'Ban, Sheldon, Parlette, and Hewitt

Read first time 02/18/16. Referred to Committee on Ways & Means.

1 BE IT RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE
2 STATE OF WASHINGTON, IN LEGISLATIVE SESSION ASSEMBLED:

3 THAT, At the next general election to be held in this state the
4 secretary of state shall submit to the qualified voters of the state
5 for their approval and ratification, or rejection, an amendment to
6 Article II of the Constitution of the state of Washington by adding a
7 new section to read as follows:

8 Article II, section . . . (1) Any action or combination of
9 actions by the legislature that raises taxes may be taken only if it
10 is referred to the voters for their approval or rejection.

11 (2) For the purposes of this section, "raises taxes" means any
12 action or combination of actions by the legislature that increases
13 state tax revenue deposited in any fund, budget, or account,
14 regardless of whether the revenues are deposited into the general
15 fund.

16 (3) Subsection (1) of this section does not apply to:

17 (a) An action of the legislature that receives the approval of at
18 least a three-fifths vote of both the senate and house of
19 representatives;

20 (b) An action of the legislature following a declaration by the
21 governor of a state of emergency resulting from a catastrophic event
22 that necessitates government action to protect life or public safety,

1 via separate legislation setting forth the nature of the emergency
2 and raising taxes, for a period not to exceed twelve months and for
3 the limited purpose as contained in the declaration; and

4 (c) An action of the legislature modifying or terminating a tax
5 preference that has been examined by a commission established by law
6 to review tax preferences, and the commission has not recommended
7 continuation of the preference.

8 BE IT FURTHER RESOLVED, That the secretary of state shall cause
9 notice of this constitutional amendment to be published at least four
10 times during the four weeks next preceding the election in every
11 legal newspaper in the state.

--- END ---

Appendix 2

BILL REQUEST - CODE REVISER'S OFFICE

BILL REQ. #: H-3475.1/16

ATTY/TYPIST: JA:eab

BRIEF DESCRIPTION: Removing the requirement for majority legislative approval of fee increases from the contingency provisions of the sales tax rate decrease created by Initiative Measure No. 1366.

1 AN ACT Relating to removing the requirement for majority
2 legislative approval of fee increases from the contingency provisions
3 of the sales tax rate decrease created by Initiative Measure No.
4 1366; and amending 2016 c 1 s 3 (uncodified).

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** 2016 c 1 s 3 (Initiative Measure No. 1366) (uncodified)
7 is amended to read as follows:

8 (1) Section 2 of this act takes effect April 15, 2016, unless the
9 contingency in subsection (2) of this section occurs.

10 (2) If the legislature, prior to April 15, 2016, refers to the
11 ballot for a vote a constitutional amendment requiring two-thirds
12 legislative approval or voter approval to raise taxes as defined by
13 voter-approved Initiatives 960, 1053, and 1185 and section 6 of this
14 act (~~(and majority legislative approval for fee increases as required~~
15 ~~by voter-approved Initiatives 960, 1053, and 1185 and codified in RCW~~
16 ~~43.135.055 and further defined by subsection (a) of this section)),~~
17 section 2 of this act expires on April 14, 2016.

18 (~~((a) "Majority legislative approval for fee increases" means~~
19 ~~only the legislature may set a fee increase's amount and must list it~~
20 ~~in a bill so it can be subject to the ten-year cost projection and~~
21 ~~other accountability procedures required by RCW 43.135.031.)) (3) For~~

1 the purposes of this section, "raise taxes" has the same meaning as
2 "raises taxes" in RCW 43.135.033.

--- END ---

OFFICE RECEPTIONIST, CLERK

To: Jill Stephens
Cc: Paul.Lawrence@pacificalawgroup.com; Kymberly.evanson@pacificalawgroup.com; Sarah.Washburn@pacificalawgroup.com; CallieC@ATG.WA.GOV; Glasgow, Rebecca (ATG) (RebeccaG@ATG.WA.GOV)
Subject: RE: Lee v. State: Reply Brief of Appellants, The Initiative Sponsors, # 92708-1

Received on 02-26-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Subject: Lee v. State: Reply Brief of Appellants, The Initiative Sponsors, # 92708-1

Dear Clerk,

Attached is Reply Brief of Appellants, The Initiative Sponsors in #9708-1

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