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IN THE 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; TIM EYMAN; LEO J. FAGAN;
and M.J. FAGAN,

Petitioners.

ANSWERING BRIEF OF RESPONDENTS

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I. INTRODUCTION

Thwarted by this Court's decision striking down a prior initiative that imposed a 2/3rds vote requirement to increase taxes and that held such a requirement could only be adopted by a constitutional amendment, Mr. Eyman, Mr. L.J. Fagan and Mr. M.J. Fagan (the "Sponsors") drafted Initiative 1366 ("I-1366" or "the Initiative"). I-1366 presented an ultimatum to the Legislature: submit a constitutional amendment imposing a two-thirds supermajority requirement for tax and fee increases by April 15, 2016, or face an immediate \$1.4 billion per year hole in the state budget. At a time when the State is significantly financially challenged and the legislature is in contempt of this Court for failing to fund basic education, the Initiative sought to hijack the short 2016 legislative session and force an immediate choice between an untenable tax cut and a proposed constitutional amendment that had already failed several times in the legislature. But in seeking an end-run around this Court's prior ruling, the Sponsors created a mechanism — I-1366 — that is rife with constitutional problems.

In response, a coalition of education and social service advocates, two legislators, and the League of Women Voters of Washington ("Respondents") filed this action seeking to invalidate the Initiative and prevent I-1366's intended derailment of constitutional legislative function. The trial court saw the Initiative for what it is: an unconstitutional abuse of the initiative power that unlawfully combines multiple disparate subjects

into a single measure, improperly invokes the constitutional amendment process, and abridges the plenary law-making power of the legislature. The trial court ruled I-1366 invalid on each of these grounds. This Court should affirm.

II. ISSUES ON APPEAL

1. Did the Superior Court correctly rule that I-1366 violates Article II, section 19 of the constitution because it contains multiple subjects, including a one-time reduction in the sales tax rate and the proposal of a constitutional amendment requiring supermajority approval for tax increases and legislative majority approval for setting and increasing fees?

2. Did the Superior Court correctly rule that I-1366 violates Article II and Article XXIII of the constitution by invoking the process for amending the Constitution, including proposing the terms of a constitutional amendment, where doing so is outside the scope of the people's initiative power under Article II and reserved to the legislature under Article XXIII?

3. Did the Superior Court correctly rule that I-1366 abridges the plenary power of the legislature in that one legislative body forces a subsequent legislative body to choose between accepting the sales tax cut or advancing the proposed constitutional amendment for a public vote?

4. Did the Superior Court correctly rule that I-1366 is not severable because it violates Article II, section 19 of the constitution and because it is impossible to know whether the voters would have passed the tax cut

without the proposed amendment?

III. STATEMENT OF THE CASE

A. The History and Purpose of Initiative I-1366

The Sponsors have long led efforts in Washington to impose legislative supermajority and voter approval requirements on legislation that “raises taxes.” Since 1993, four separate initiatives have imposed similar requirements to those set forth in I-1366. The Sponsors are responsible for three: I-960, I-1053, and I-1185 (“the two-thirds initiatives”) each of which contained (1) a Supermajority Requirement mandating that any legislation containing a tax increase be passed by a two-thirds majority vote of the legislature, and (2) a Referendum Requirement necessitating voter approval for any tax bill increasing spending beyond the state spending limit. *See League of Educ. Voters v. State*, 176 Wn.2d 808, 813-14, 295 P.3d 743, 746 (2013) (describing history of the two-thirds initiatives).

In 2013, in response to a challenge brought by a group of education advocates, taxpayers, and legislators, this Court ruled that the Supermajority Requirement contained in the two-thirds initiatives and codified in former RCW 43.135.034 was unconstitutional:

The Supermajority Requirement unconstitutionally amends the constitution by imposing a two-thirds vote requirement for tax legislation. More importantly, the Supermajority Requirement substantially alters our system of government, thus enabling a tyranny of the minority. The framers were aware of the extraordinary nature of a supermajority

requirement as evidenced by their decision to use it only under special circumstances. The passage of ordinary legislation is not one of those circumstances. If the people and the legislature wish to adopt such a requirement, they must do so through constitutional amendment.

Id. at 826 (emphasis added).

In 2015, in response to this ruling, Mr. Eyman and his partners tried to secure their desired constitutional amendment via I-1366.¹ I-1366 was filed on January 5, 2015 and appeared on the ballot for the November 3, 2015 general election. The official ballot title for I-1366 stated:

Initiative Measure No. 1366 concerns state taxes and fees.

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.

See CP 36.

Mr. Eyman chose to label the I-1366 petition sheets with the heading “Text of 2/3 Constitutional Amendment Initiative 1366” in large font across the top. CP 93. The petition sheet also solicited donations payable to “2/3 Constitutional Amendment” and stated that the effect of I-1366 was to “bring back” the supermajority requirement previously enacted in Mr. Eyman’s prior initiatives. CP 92, 93 (“Voters OK’d this policy in 2012, politicians took it away, this initiative brings it right back again.”).²

¹ In 2014, Mr. Eyman filed two similar initiatives (I-1325 and I-1328) but failed to secure sufficient signatures.

² I-1185 passed with 65% of the vote, what Mr. Eyman termed the biggest statewide victory he’s ever had. CP 275.

In his deposition, Mr. Eyman conceded that he printed the same slogan, “Tougher to Raise Taxes”, across the top of the I-1366 petitions that he had used on his previous supermajority initiatives to capitalize on the success of his prior efforts. CP 233-34 (Eyman Dep. 41:2-42:4). In his communications to supporters and the media, Mr. Eyman never publicized the anticipated sales tax cut as a subject or goal of I-1366, rather he promoted only the constitutional amendment. *See* CP 95 (describing goal as “[p]ermanent protection from higher taxes with a constitutional amendment requiring a 2/3 vote of the Legislature for any tax increase”); CP 98 (“Best of all, once we get our 2/3-for-taxes constitutional amendment passed, politicians can’t change it....Adding a 2/3-for-taxes amendment to our state Constitution keeps Governor Inslee and the tax-hiking Democrats on a short leash.”). Mr. Eyman admitted that he intended the tax cut in I-1366 to “prod” the legislature into putting the proposed constitutional amendment on the ballot. CP 226-29, 236-37 (Eyman Dep. 34:2-37:9; 44:13-45:6).

B. The Terms of I-1366

The content of the required constitutional amendment is expressly prescribed by the Initiative. Specifically, I-1366 requires an amendment that mandates a two-thirds legislative majority or voter approval for any measure that “raises taxes”, which is defined 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.” *See* CP 28 (I-1366 § 6). The amendment must also require “Majority legislative approval for fee increases”, which means “only the legislature may set a fee increase’s amount and must list it in a bill so it can be subject to the ten-year cost projection and other accountability procedures required by RCW 43.135.031.” *See* CP 25 (I-1366 § 3(2)(a)).

These essential terms of the I-1366 constitutional amendment are not subject to drafting, deliberation, or amendment in either house of the legislature, nor approved as a result of such a process by two-thirds of both houses. CP 126-29 (¶¶ 6, 8, 11); CP 131-33 (¶¶ 4, 8). This is contrary to the usual process whereby a constitutional amendment is debated, refined, edited and amended through the House and Senate committee processes. CP 127-28, 129 (¶¶ 8, 11).

If the legislature does not refer the required supermajority amendment to voters for consideration at the November 2016 general election by April 15, 2016, the sales tax will automatically be reduced by one percent. *See* CP 23, 25 (I-1366 §§ 1-3). Sales tax revenue for the state General Fund would decrease roughly \$1.4 billion per year or \$8 billion over the next six fiscal years. CP 101-04 (OFM Fiscal Impact Statement on I-1366). The General Fund is used for all government purposes such as education; social, health, and environmental services; and other essential government activities. CP 102. Thus, I-1366 would have forced Washington lawmakers either to vote to amend the State

Constitution to require a two-thirds vote for any tax increase or face \$8 billion in cuts to K-12 schools, higher education, public safety, healthcare, and other essential services over six years. CP 101-04.

The Initiative was approved by a slim majority of Washington State voters, 51.52% to 48.48%, in an election with record low turnout.

C. The Post-Election Challenge

A coalition of taxpayers, education and social service advocates, two state legislators and the nonpartisan advocacy group the League of Women Voters of Washington filed this declaratory judgment action on November 23, 2015 in King County Superior Court, asking the Court to invalidate I-1366 on multiple grounds. Specifically, Respondents alleged that I-1366 was unconstitutional because it contained multiple subjects, abridged the plenary power of the legislature and attempted to amend the constitution via an initiative.

Despite overwhelming evidence to the contrary, the State of Washington and the Initiative Sponsors argued in the trial court (as they do here) that the constitutional amendment proposed in I-1366 was merely “precatory language devoid of legal impact” or simply the expression of a “desired policy.” CP 161-63, 168, 357-58. As such, they claimed that the Initiative contained only one “operative” subject — a sales tax reduction — and therefore did not violate the prohibition on multiple subjects in Article II, section 19. CP 161-64, 353-54, 368. They likewise argued that the Initiative did not “propose” a constitutional amendment because the

legislature was free to alter its terms, or propose a competing amendment. CP 167-68, 342-43, 347-48, 350, 361-62. Finally, Appellants claimed that I-1366 did not exceed the scope of the initiative power or abridge the plenary power of the legislature because the proposed constitutional amendment was permitted “conditional legislation.” CP 166-67, 364-65.

The trial court rejected each of these claims. The court first found that “[i]t really is beyond dispute that the impetus behind I-1366 was to further the goal of adoption of a constitutional amendment requiring a two-thirds vote of the legislature for any tax increase.” CP 421 (FF 5). The court went on to find that “[t]he fact that the initiative contains quite specific requirements for the content of the constitutional amendment it is proposing...confirms that the initiative serves to deprive legislators, individually and collectively, of their rights and duties.” CP 422 (FF 7). Similarly, the court observed that forcing the legislature to choose between the tax cut and the amendment within the 60-day short session undercut the safeguards provided by Article XXIII, including the “deliberative nature of a legislative assembly” and the “tempering element of time.” CP 422 (FF 8). Finally, the court found that the Initiative contained two operative provisions that lacked rational unity and that it was impossible “to determine how many people voted for this initiative because they desired adoption of the constitutional amendment at its heart and how many voted for it because they desired the short-term relief of the immediate reduction in the sales tax.” CP 423 (FF 10).

Based on these findings, the court first concluded that the Respondents have standing and this case is justiciable, as the State conceded. The court then determined that I-1366 violates both Article II and Article XXIII. CP 424-25 (CL 5-6). Characterizing the tax cut as a “pressure-wielding mechanism” that “derail[s]” the intended “calm deliberation and independent weighing” of a constitutional amendment by the legislature, the court concluded that the Initiative exceeds the scope of the Article II power and usurps the role of the legislature by “*proposing* precise terms for a constitutional amendment while applying compulsion to quickly move it forward.” CP 424-25 (CL 5-6) (emphasis in original). The court further concluded that the Initiative violated Article II, section 19 by containing “two separate actions of law that lack rational unity” and therefore the sales tax cut was not severable from the “unconstitutional section 3”. CP 425 (CL 8-9). As a result, the court struck down the Initiative in its entirety. This appeal followed.

IV. ARGUMENT

- A. **Initiative 1366 Violates Article II Because it Contains Multiple Subjects.**
 - 1. **I-1366 Contains Multiple Subjects Because There Is No Rational Unity Between the Tax Cut and the Proposed Constitutional Amendment.**

Article II, section 19 of the Washington constitution provides, “No bill shall embrace more than one subject, and that shall be expressed in the

title.”³ The purpose of the single subject rule is to “prevent logrolling or pushing legislation through by attaching it to other legislation.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207, 11 P.2d 762 (2000) (“*ATU*”); *see also City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659, 662 (2001). In *Kiga*, the Court noted that “logrolling of unrelated measures [in an initiative] violates the fundamental principle embedded in article II, section 19. . . .” Such logrolling “necessarily require[s] the voters who supported one subject of the initiative to vote for an unrelated subject they might or might not have supported.” *Id.* at 827-28; *see also ATU*, 142 Wn.2d at 212 (in deciding whether a measure contains multiple subjects in violation of Article II, section 19, “the constitutional inquiry is founded on the question whether a measure is drafted in such a way that those voting on it may be required to vote for something of which the voter disapproves in order to obtain approval of an unrelated law.”) There must be “rational unity” between and among the provisions of the measure. *ATU*, 142 Wn.2d at 209-10, 217.

Appellants claim that all provisions of I-1366 fall under the general subject of “fiscal restraint”. But the tax cut and the proposed constitutional amendment are separate subjects that lack the required rational unity for multiple reasons.

³ Article II, section 19 applies to initiatives. *Wash. Fed'n of State Emps. v. State*, 127 Wn.2d 544, 551-54, 901 P.2d 1028, 1032-33 (1995).

First, I-1366 includes both a one-time objective and continuing objectives, which this Court has held constitutes multiple subjects. For example, in *Wash. Toll Bridge Authority v. State*, 49 Wn.2d 520, 304 P.2d 676 (1956), new legislation was passed that (1) provided procedures for establishing and financing toll roads and (2) provided specifically for a toll road between Tacoma and Everett. *Id.* at 521. The Court concluded that these purposes were not germane to each other and, thus, the legislation violated Article II, section 19. *Id.* at 524-25. The Court noted that the act's first purpose granted the power to build toll roads in general and was "continuing in effect, applicable to every toll road project henceforth to be authorized and constructed" and did not "refer to the problems of a certain project." *Id.* at 524 (emphasis omitted). In contrast, the act's second purpose was to provide for the construction of a specific toll road—a purpose that was "subject to accomplishment, and...not continuing in character," and thus not germane to the purpose of creating an authority for the establishment of toll roads generally. *Id.* (emphasis omitted). And because both the title and the body of the act contained these two unrelated subjects in violation of Article II, section 19, the Court held the entire act was unconstitutional. *Id.* at 524-25.

The Court in *ATU* reached a similar conclusion where voters passed an initiative that (1) required voter approval for any state-imposed tax increase, (2) set license tab fees at \$30 per year for motor vehicles, and (3) repealed existing vehicle taxes. *ATU*, 142 Wn.2d at 193. The Court

noted the initiative had two purposes: to set license tab fees specifically at \$30 and to provide a continuing method of approving all future tax increases. *Id.* at 216-17. Citing *Wash. Toll Bridge Authority*, the Court concluded no rational unity existed between these subjects. *Id.* Further, because both the title and the body of the initiative contained these unrelated purposes, the entire initiative was invalid under Article II, section 19. *Id.* at 217.

Finally, in *Kiga*, the Court found unconstitutional multiple subjects in an initiative that proposed “systemic changes to future property tax assessments” and the “refunding of [one year’s] tax increases”. *Kiga*, 144 Wn.2d at 828. The Court noted: “The nullification and onetime refund of various 1999 tax increases and monetary charges is unnecessary and entirely unrelated to permanent, systemic changes in property tax assessments.” *Id.* at 827. The Court found significant that the tax refunds extended to a large variety of taxes while the systematic change only related to one kind of tax. The Court concluded that “[b]ecause the subjects . . . are unrelated, voters did not have an opportunity to cast a vote that clearly demonstrated their support for either or both subjects.” *Id.* at 828.

Here, 1366 sets a new sales tax rate which is no different than setting license tab fees at \$30 or setting a toll for a specific road or refunding tax increases. Amendment of the state constitution, by contrast, does not pertain to any specific tax, is continuing in effect, and will apply

to all future legislative action that “raises taxes” or increases fees.⁴

Indeed, pairing a one-time legislative act of just about any sort with a constitutional amendment that by its nature is of continuing significance and operation violates Article II, section 19.⁵

Second, implicit in the Court’s ruling is the correct conclusion that the subjects within I-1366 are not germane to each other. Though the Sponsors argue both subjects are germane to “fiscal restraint”, they offer no explanation beyond the Initiative’s statement of intent as to why. Sp. Br. at 29. Mr. Eyman’s pronouncement does not make it so. Specifically, a single sales tax reduction is not germane to a constitutional amendment limiting all future legislation that “raises taxes”. The former involves a reduction in taxes. The latter results in no reduction in taxes; rather it seeks to limit tax increases. Nor is a single sales tax reduction germane to a constitutional amendment limiting future increases in state fees. The subject of reducing taxes is distinct from the subject of limiting future tax or fee increases. *See Kiga*, 144 Wn.2d at 827 (“The nullification and

⁴ To distinguish this authority, the Sponsors argue that the proposed constitutional amendment does not “arise from the initiative itself” and therefore is not a separate subject of a “continuing nature.” Sp. Br. at 28. This claim ignores the Sponsors’ previous arguments and admissions that the purpose of the substantial tax cut is to “prod” the Legislature into advancing the amendment, as well as the Attorney General’s ballot title and concise statement. As detailed below, it is disingenuous to now pretend that the constitutional amendment is not a component of the Initiative at all.

⁵ The Sponsors further claim that affirming this aspect of the trial court’s ruling would “seriously hamper legislative prerogatives” by prohibiting legislation that touches on subjects addressed in multiple Articles of the constitution. Sp. Br. at 31. But this argument wholly misses the point that this Court has correctly held that where an initiative combines a one-time action with a permanent “systematic change” as reflected in the proposed constitutional amendment, the initiative violates the two-subject rule.

onetime refund of various 1999 tax increases and monetary charges is unnecessary and entirely unrelated to permanent, systemic changes in property tax assessments.”). Moreover, like in *Kiga*, I-1366 suffers because on the one hand it proposes a sales tax reduction and on the other proposes to limit the ability of the legislature to raise any kind of tax. I-1366 is a classic example of pairing an end that will attract certain votes (making it harder to raise taxes) with another end that will attract potentially different votes (an immediate reduction in taxes) in order to reach what turned out to be a slim majority of the total votes.⁶

Third, I-1366 contains two subjects in that it contains one potentially lawful legislative act (the reduction in sales tax) and one unconstitutional act (the use of the initiative power to invoke the amendment process under the state Constitution). As this Court noted in the pre-election challenge to I-1366: “If the initiative called only for a reduction in the sales tax, there would be no preelection issues. If it called only for a two-thirds constitutional amendment, it would clearly be outside the scope of the people’s initiative power. This court has never decided a case in which an initiative offered contingent alternatives and, if so, whether one invalid purpose would prevent it from being on the ballot.” *Huff v. Wyman*, 184 Wn.2d 643, 654, 361 P.3d 727, 733 (2015). In making this observation, this Court implicitly recognized that I-1366 had

⁶ The trial court aptly compared the Initiative to making a child eat broccoli in order to get dessert.

one valid purpose and one invalid purpose. *Id.* These two separate purposes reflect two separate subjects.

In sum, because the title and the body of I-1366 include multiple unrelated subjects, the Initiative is unconstitutional and invalid under Article II, section 19. The trial court should be affirmed.

2. The Proposed Constitutional Amendment is Not Mere “Policy” and Constitutes a Prohibited Second Subject.

Relying on *Pierce County v. State*, 150 Wn.2d 422, 78 P.3d 640 (2003), Appellants’ principal response is that I-1366 does not contain two subjects because the proposed constitutional amendment is not an “operative” provision of the measure and is instead merely a “policy expression”. St. Br. at 26-28. The trial court properly rejected this argument.

In *Pierce County*, Section 1 of the initiative at issue stated that “politicians should keep their promises” but the initiative provided no statute or mechanism for bringing about such a result. *Id.* at 435. In drawing the line between “legal substance” and “policy fluff”, this Court held, “A law is a rule of action. An argument is not... [A] preface or preamble stating the motives and inducement to the making of [the law] ... is without force in a legislative sense.... It is no part of the law.” *Id.* at 434 (citations omitted).

Here, Section 3 of the Initiative, which proposes the constitutional amendment, plainly embodies a “rule of action”, not a mere “argument” or

“policy expression.”⁷ Moreover, unlike the political “fluff” declared inoperative in *Pierce County*, the text of I-1366, the ballot title, the Voters’ Pamphlet, and the fiscal analysis by OFM all treat the proposed amendment provision as operative.

Section 3 of I-1366 makes clear that the constitutional amendment proposal has an operative effect. Section 3 sets forth the effective date of the putative sales tax cut. Whether the tax cut goes into effect depends on whether the legislature refers to the ballot a constitutional amendment containing specified provisions by April 15, 2016. *See* CP 422 (FF 7). Therefore, the Initiative by its terms treats Section 3(2)’s referral of the amendment (or not) as an inherent operational fact that triggers the sales tax reduction (or not). Section 3(2) cannot be ignored without destroying the Initiative’s effective date language. The legislature must choose to submit the proposed constitutional amendment or face the \$8 billion tax penalty. Far from being an abstract expression of policy directed at politicians’ honesty, voters would have understood that the 2016 legislature was required to either submit the proposed amendment in this session or allow the sales tax reduction to go into effect. Section 2 and Section 3 thus present two very real operative choices to the legislature, with different outcomes and consequences. The “pure policy expressions” rejected in *Pierce County* had no such consequences.

⁷ By contrast, the policy of I-1366 is listed in Section 1 in the “Intent” section. *See* CP 23.

The ballot title makes equally clear that the 2/3rds constitutional amendment is a subject of the Initiative that has an operative effect. First, the statement of subject states that I-1366 “concerns state taxes and fees.” CP 36. The only place where “fees” are at play is as part of the proposed 2/3rds constitutional amendment. Thus, the ballot title’s statement of subject treats the 2/3rds constitutional amendment as an operative subject. RCW 29A.72.050 (“The statement of the subject of a measure must be sufficiently broad to reflect the subject of the measure. . . .”). The concise description spends most of its limited 30 words describing the terms of the 2/3rds constitutional amendment and its operational effect. Thus, the concise description treats the 2/3rds constitutional amendment as an essential operative part of the initiative to be voted on. RCW 29A.72.050 (“The concise description must . . . be a true and impartial description of the measure’s essential contents, [and] clearly identify the proposition to be voted on . . .”). Indeed, it is disingenuous for the Attorney General to write a ballot title prominently highlighting the 2/3rds constitutional amendment, and now argue it is no more than policy fluff with no operative effect that the Court should disregard.⁸

In addition to containing the ballot title, the Voters’ Pamphlet also contains the OFM analysis of I-1366. The OFM fiscal analysis identifies “two possible and mutually exclusive scenarios”—one where the

⁸ Contained in the Appendix at pgs. 7-8 is the complete text of the Attorney General’s ballot title, as well as a redacted version to demonstrate how the ballot title would appear without reference to the 2/3rds constitutional amendment.

legislature does not refer the 2/3rds amendment, in which case there is a state sales tax revenue loss of \$8 billion over six years, and one where the legislature does refer an amendment, in which case there would be an increase in state expenditures of \$101,000. CP 101-04. By contrast, there is no indication in the text of the Initiative or the ballot title or the Voters' Pamphlet to suggest the 2/3rds constitutional amendment provision is merely an expression of policy.

There is no chance that any voters believed the proposed amendment had "no effect." See *Wash. Citizens Action of Wash v. State*, 162 Wn.2d 142, 154, 171 P.3d 486, 492 (2007) (voter understanding controls for purposes of two-subject inquiry). As the trial court observed, it is impossible to know which purpose the voters intended to support, and there is "[n]o doubt" that there was an "undeterminable number" of voters who desired the one objective and not the other. CP 423 (FF 10).

Furthermore, if this Court accepts Appellants' premise that the true purpose of I-1366 is to lower the sales tax, then it becomes apparent this is a classic case of attaching an unfavorable policy (sales tax reduction) to a favorable one (imposing a 2/3rds requirement for tax increases). The prior two supermajority initiatives passed with 64 and 65 percent of the vote. See CP 274-75. As Mr. Eyman testified, the supermajority requirement is a very popular policy, having garnered many millions of votes in various elections. *Id*; see also CP 214 (Eyman Dep. 22:7-13). Yet, I-1366 passed

with less than 52% of the vote.⁹ This suggests that a sales tax reduction initiative alone could not have passed without being attached to the 2/3rds constitutional amendment provision. If, as Appellants claim, only the sales tax reduction is relevant, that conclusion supports the trial court's finding of log-rolling.

In its brief to this Court, the State makes the circular claim that even if some voters *desired* the constitutional amendment, they all nonetheless voted for the tax cut, and therefore, the argument goes, there is no logrolling. St. Br. at 30. This makes no sense and has no support in the record. Rather than undercutting the finding of logrolling, this argument concedes that voters had to vote for one outcome in the hopes of getting another—the very definition of logrolling.

Appellants also attempt to avoid the two subject problem by claiming that I-1366 is merely “conditional legislation.” While, as detailed below, this characterization is contrary to law, implicit in Appellants’ claim is the notion that the condition at issue (referring the amendment or not) is a valid operative act. If the provision proposing the constitutional amendment were merely inoperative “political fluff”, it could not form an alleged “condition” that triggers the sales tax reduction. *See* St. Br. at 14 (arguing I-1366 is a “complete legislative act...conditioned on the operation of a specified event”).

⁹ <http://results.vote.wa.gov/results/20151103/State-Measures-Initiative-Measure-No-1366-concerns-state-taxes-and-fees.html>

Finally, that Section 3(2)'s referral of a constitutional amendment is unconstitutional does not solve the two-subject problem. The fact that a provision is unconstitutional does not render it "non-operative" for purposes of the two subject analysis. *See ATU*, 142 Wn.2d at 217, 244 (I-695 violated two-subject prohibition although Court also found one of its subjects – the referral of tax increases to a vote – unconstitutional). Whether a "subject" is operative or not depends on how the initiative was intended to operate assuming its constitutionality.

While the Sponsors claim that the two-subject problem can be remedied by severing the invalid provisions, Sp. Br. at 28, 48-49, this Court has already ruled (and the State concedes) that where an initiative contains two subjects, one of which is invalid, the entire initiative must be struck down. *See Kiga*, 144 Wn.2d at 825 ("When an initiative embodies two unrelated subjects, it is impossible for the court to assess whether either subject would have received majority support if voted on separately. Consequently, the entire initiative must be voided."). *See also infra*, pp. 35-39.

In sum, the proposal of a "2/3 constitutional amendment" was not only the centerpiece of the Initiative's text, its ballot title and the Initiative campaign, it is the only voted mechanism by which the legislature can avoid the sales tax reduction. Section 3 is an operative provision, not germane to Section 2, and constitutes an additional impermissible second

subject.¹⁰ Because it is impossible to know whether the voters intended to advance the amendment or the tax cut, the Initiative violates Article II, section 19 and must be invalidated. *See Kiga*, 144 Wn.2d at 825.

B. Initiative 1366 Violates Article II Because it Exceeds the Scope of the Initiative Power.

The trial court correctly ruled that I-1366 exceeds the scope of the people's Article II initiative power because it unlawfully proposes a constitutional amendment, it abridges the plenary power of the legislature and it does not constitute valid "contingent legislation." The trial court's order should be affirmed on each of these grounds.

1. I-1366 Unlawfully Proposes a Constitutional Amendment in Violation of Article II and Article XXIII.

As this Court previously acknowledged, amending the Constitution is an "invalid purpose" of I-1366. *See Huff*, 184 Wn.2d at 654. This is because the constitutional amendment process falls under Article XXIII of

¹⁰ As the trial court recognized, the Initiative in fact contains three subjects that are not germane to each other. The single tax cut is not germane to a permanent limit on raising taxes via the amendment, nor to the amendment's withdrawal of existing legislative delegation to state agencies for fee increases. *See Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn. 2d 642, 659, 278 P.3d 632, 642 (2012) (Article II, section 19 does not permit combining "a specific impact of a law with a general measure for the future."). Further, the Sponsors are wrong that an amendment may contain multiple disparate subjects. Article XXIII provides that "if more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such amendments separately." This Court has held that this language "prohibits the adoption of dual subject amendments." *Farris v. Munro*, 99 Wn.2d 326, 331, 662 P.2d 821, 824 (1983). In order to constitute multiple amendments within the meaning of Article XXIII, "the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other." *Id.* (quoting *Gottstein v. Lister*, 88 Wash. 462, 470, 153 P. 595, 599 (1915)).

the state Constitution, whereas the people’s initiative power stems from Article II. *See* Wash. Const. art. II, § 1 (“The legislative authority of the state of Washington shall be vested in the legislature... but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature....”); *see also* *Northwest Animal Rights Network v. State*, 158 Wn. App. 237, 245, 242 P.3d 891, 895 (2010) (describing legislative power under Article II, section 1).

The people exercise their Article II powers through the proposal of bills and laws by initiative, which are enacted upon receiving a simple majority vote. By contrast, the Article XXIII process is “manifestly distinct” from the enactment of ordinary bills or laws under Article II, section 1, and “is of a higher order than the mere enactment of laws within the framework of [the Constitution].” *Ford v. Logan*, 79 Wn.2d 147, 155, 483 P.2d 1247, 1252 (1971). Unlike ordinary bills or laws which can be proposed by the people under Article II, Article XXIII requires first that an amendment be proposed in “either branch” of the legislature. *See* Wash. Const. art. XXIII, § 1. In other words, either the state house or the state senate has the “exclusive authority” to initiate the constitutional amendment process including the opportunity to debate, amend and perfect the text of a constitutional amendment. *See Maleng v. King Cnty. Corr. Guild*, 150 Wn.2d 325, 333 n.5, 76 P.3d 727, 730 (2003) (Article XXIII gives the legislature the “exclusive authority to amend the

constitution”); *see also* CP 127-28 (§ 8) (describing usual debate and deliberation process for constitutional amendments and role of committees in editing and refining them). Then, before the amendment is submitted to the public for a vote, each house of the legislature must pass the proposed amendment by a two-thirds majority. *See* Wash. Const. art. XXIII, § 1. Only then can the proposed amendment be submitted to the public for a vote. *Id.*; *see also Ford*, 79 Wn.2d at 155-56.

Consistent with this authority, the trial court correctly ruled that I-1366 is an invalid attempt to invoke the Article XXIII process, a process constitutionally reserved for the legislature:

It is solely in the province of the legislative branch of our representative government to “propose” an amendment to the state constitution. The intended process – one that is constitutionally mandated – is one that facilitates a calm deliberation and independent weighing of alternatives before a proposed amendment is submitted for public review. That process is derailed by the pressure-wielding mechanism in this initiative which exceeds the scope of the initiative power.

CP 424 (CL 5). The trial court’s opinion echoes this Court’s articulation of the Article XXIII safeguards that prohibit amending the constitution by initiative, including “the deliberative nature of a legislative assembly, the public scrutiny and debate made possible during the legislative process, the requirement of a two-thirds vote in each independent house of a bicameral body, and the tempering element of time.” *Ford*, 79 Wn.2d at

156.¹¹ These safeguards protect against “hasty or emotional action”, are “of fundamental importance” and should not “be lightly cast aside in an understandable zeal for the right of the people to act directly on matters of common legislation.” *Id.* at 155-56. This Court has further emphasized that “to permit direct action by a majority to change a basic form of government would enable any given majority to remove all protections contained within constitutional frameworks.” *Id.* at 155. Consistent with these principles, this Court has definitively and repeatedly held that “[a]mendment of our constitution is not a legislative act and thus is not within the initiative power reserved to the voters.” *Id.* at 156; *see also ATU*, 142 Wn.2d at 204 (“The initiative process cannot be used to amend the constitution.”); *Brown v. State*, 155 Wn.2d 254, 268, 119 P.3d 341, 348 (2005) (same); *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718-19, 911 P.2d 389, 394-95 (1996), *cert. denied*, 519 U.S. 862, 117 S. Ct. 167, 136 L. Ed. 2d 109 (1996) (same); *Gerberding v. Munro*, 134 Wn.2d 188, 210 n. 11, 949 P.2d 1366, 1377 (1998) (same).

Ignoring this authority, the State argues that the fundamental purpose of I-1366 is not to amend the constitution, but is instead to lower the sales tax rate, contingent upon a “legislative choice to propose a constitutional amendment to the people.” St. Br. at 17. According to the

¹¹ The Sponsors argue that *Ford* stands only for the proposition that amendment of the state constitution is not a legislative act because “it involves two separate legislative acts – a vote by both houses and a vote by the people.” Sp. Br. at 37. Nothing in the *Ford* decision supports this theory. To the contrary, the *Ford* court’s discussion of the “Article XXIII safeguards” undercuts Sponsors’ claim that an Article XXIII amendment is simply multiple Article II votes.

State, “the fact that legislators might have to make a decision more quickly than they otherwise would does not rise to a constitutional violation.” St. Br. at 21. The State equates the “amendment or tax cut” ultimatum to any time “the Legislature does not have the time it desires to craft a legislative solution to a problem or a perceived problem . . .” *Id.* In making this claim, the State ignores the well-settled distinction between an Article II legislative act, which sometimes will have to be made in response to exigent circumstances, and the fundamentally different act of amending the constitution under Article XXIII. Article XXIII intentionally imposes no artificial time limits on the constitutional amendment process, for the reasons articulated by this Court in *Ford*. Amending the constitution is—and should be—more difficult to achieve and more deliberate than enacting other bills and laws to address everyday “problems or perceived problems” as the State blithely suggests. Moreover, unlike the State’s analogy, the legislature here has not simply “run out of time” to attend to the business of a normal short session. Rather, I-1366 intentionally created the “pressure-wielding” tax cut as a mechanism to “prod” the Legislature into advancing the amendment. CP 424 (CL 5); CP 226-29, 236-37 (Eyman Dep. 34:2-37:9; 44:13-45:6). As such, the trial court correctly found that the purpose of I-1366 was to invoke the constitutional amendment process and therefore struck it down. *See Philadelphia II*, 128 Wn. 2d at 718 (where the “fundamental and overriding purpose” of an initiative is to amend the constitution, it must be invalidated).

Both Appellants claim that I-1366 is not an unlawful “proposal” under Article XXIII because the Initiative “does not propose the precise language or actual text of a constitutional amendment.” St. Br. at 19; Sp. Br. at 37. As the trial court recognized, however, this is not true. The initiative *does* provide the text of the constitutional amendment in that Section 6 expressly defines “raises taxes” and requires a 2/3rds legislative vote to do so, and Section 3(2)(a) defines “majority legislative approval for fee increases” in a way that is broader than a common understanding and represents a significant change in the legislative process for passing revenue related bills. *See* CP 293-99, 309-13, 315-17 (Carlyle Dep. 18:8-19:16; 20:17-24:17; 35:10-39:13; 45:8-47:11) (broad definition of “raise taxes” would substantially change legislative process for correcting errors or adjusting revenue bills); Wash. Att’y Gen. Op. 2014 NO.4 (2014) (requiring new legislative authorization for raising fees is substantial change from current interpretation of fee approval requirement). As the court observed, “The legislature would not be free to consider, say, a 60% supermajority requirement, a different scope for what would be deemed to ‘raise taxes’ or a different approach to this wholly new method for calculating user fees.” CP 422 (FF 7). That additional provisions could be added to the required amendment provisions does not resolve the problem created by I-1366.

Appellants cite no authority for their claim that the legislature could change the text of the proposed constitutional amendment and still fulfill the mandate of the Initiative in order to prevent the sales tax

reduction. Rather, it is well-established that initiatives cannot be changed at all within two years of their enactment absent a two-thirds vote. Wash. Const. art. II, § 1(c). Nor does it make sense to argue an unconstitutional initiative can be saved simply because of the possibility the legislature might amend it to address the constitutional problem. Because I-1366 expressly defines these operative terms, the trial court correctly found that “The initiative has effectively *proposed* the terms of the constitutional amendment rather than leaving that process to the legislature.” CP 422 (FF 7). This exceeds the scope of the people’s initiative power. *See Maleng*, 150 Wn.2d at 333 n.5 (the legislature has the “exclusive authority” to amend the constitution). The trial court should be affirmed.

2. I-1366 Unconstitutionally Abridges the Plenary Power of the Legislature.

The trial court also correctly ruled that I-1366 is unconstitutional and beyond the scope of the people’s Article II power because it abridges the plenary law-making power of the 2016 legislature. CP 425 (CL 7). It is well-established that no bill, whether enacted by the legislature or by initiative, may bind a future legislature or otherwise limit its power to act.¹² *Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn. 2d 284, 290, 301-02, 174 P.3d 1142, 1145, 1150-51 (2007). A previously passed initiative can no more bind a current legislature than a previously enacted

¹² An exception to this rule is that the legislature only may amend a law enacted by initiative by a two-thirds vote during the two-year period after its passage. Const. art. II, § 1(c).

statute. *Id.* at 291. This is because “[i]mplicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power.” *Id.* at 301. Rather, there is “a general rule that one legislature cannot abridge the power of a succeeding legislature. . . .” *Id.* (quoting *Gruen v. State Tax Comm’n*, 35 Wn.2d 1, 54, 211 P.2d 651, 681 (1949), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963)).

Each duly elected legislature is thus fully vested with this plenary legislative power, and the 2016 legislature is no exception. *Wash. State Farm Bureau Fed’n*, 162 Wn. 2d at 301. “A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions.” *Id.* (quoting *State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 203-04, 191 P.2d 241, 246 (1948) (quoting *Ex parte McCarthy*, 29 Cal. 395, 403 (1866))). That function includes the right to vote “no” on proposed legislation or constitutional amendments. But here, the powers and privileges of the 2016 legislature are abridged by I-1366 because the Initiative forces the 2016 legislature to submit a supermajority amendment to the voters or face a penalty in the form of an unsupportable tax cut. The legislature does not have the option to vote no on both proposals. As the trial court found, “Even if the 2016 legislature were not facing a daunting and immediate challenge to solve the school funding

crisis, the prospect of a severe budget cut to take effect in April (said to amount to \$1.4 billion in the first year) would greatly impede the intended deliberative process [of amending the constitution]; in the operative reality, it renders it an impossibility.” CP 421-22 (FF 6).

Appellants detail numerous hypothetical options for dealing with I-1366, *see* St. Br. at 23-24, but miss the point that as a result of the forced choice between two prescribed options, the Legislature is not free to engage in an “unobstructed exercise” of its plenary law-making power; rather it is forced to choose between two undesirable options. *See Wash. State Farm Bureau Fed’n*, 162 Wn. 2d at 301. Especially given that a similar 2/3rds constitutional amendment has been proposed in the legislature numerous times in the past few years (including in the 2016 session), but has never received the necessary two-thirds majority, requiring the legislature to submit the amendment to the people or impose the tax cut thwarts the legislature’s procedures and power to adopt (or not to adopt) legislation as well as its demonstrated will on this particular topic. *See* CP 127 (¶ 7); CP 134 (¶ 9); *see also* Senate Joint Resolution 8211 (failed to pass the Senate on February 12, 2016). Indeed, neither the tax cut nor the amendment may have even simple majority support in both houses. *See* CP 125, 128 (¶¶ 2, 9); CP 131, 134-35 (¶¶ 2, 10) (I-1366 would force the legislator Respondents to choose between two options that their constituents do not support).

“Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception.” *Wash. State Farm Bureau Fed’n*, 162 Wn.2d at 301 (quoting *State v. Fair*, 35 Wash. 127, 132-33, 76 P. 731, 733 (1904)). I-1366 presents an unwarranted restriction on the legislature’s plenary power, and thus violates Article II, section 1. *See id.* at 302 (“The people cannot, by initiative, prevent future legislatures from exercising their law-making power.”). The trial court properly ruled that I-1366 is invalid on this ground as well.

3. I-1366 is Not Valid “Contingent Legislation”.

The State argues that I-1366 is not beyond the scope of the people’s initiative power because it is valid “conditional legislation” akin to that upheld in *Brower v. State*, 137 Wn.2d 44, 55-56, 969 P.2d 42,49-50 (1998) and *State v. Storey*, 51 Wash. 630, 632, 99 P. 878, 878-79 (1909). But I-1366’s condition bears no resemblance to the conditions upheld in those cases. I-1366 is not valid contingent legislation.

“The legislative authority of the State is vested in the Legislature, art. II, § 1, and it is unconstitutional for the Legislature to abdicate or transfer its legislative function to others. . . .” *Brower*, 137 Wn.2d at 54. Where, however, the legislature enacts a law that is complete in itself and requires no further legislative action, it may condition whether that legislation goes into effect based on a future event that would render the legislation expedient and necessary. For example, in *Brower*, a vote on

the stadium funding proposal was contingent on a private person agreeing with the state to pay the costs of the election. The legislation was complete, was not dependent on a subsequent legislative determination, and would only be expedient and necessary on the payment of the election costs. Likewise, the *Storey* court upheld legislation prohibiting livestock running at large in any county where three-fourths of the land was fenced that required the county commissioners to determine whether three-fourths of the county was fenced when ten or more freeholders applied for enforcement of the act. Again, there was only a single legislative determination, and whether the law was necessary and expedient depended on a set of subsequent facts, not a second legislative decision. In both *Brower* and *Storey*, the legislation at issue enacted a complete policy that would go into effect upon the happening of a specified future non-legislative event. In contrast, I-1366 is neither a complete legislative act, nor an act conditioned on a future non-legislative event. Neither *Brower* nor *Storey* supports the constitutionality of I-1366.

This Court in *ATU* addressed a similar situation. There, the Court held that (1) the legislature cannot delegate its authority and (2) although conditional legislation may be passed by the legislature, the legislature lacks authority to condition measures on a vote of the people because such an action “transfer[s] the determination of expediency of the measure to the voters, thus constituting an unlawful delegation of legislative power....” 142 Wn.2d at 241. This Court should hold that the same is

true here, namely, that the people cannot condition an initiative on action or inaction by the legislature. As in *ATU*, delegation would “transfer the determination of expediency” to another legislative body that had not enacted the measure.

The State argues without citation to authority that the Legislature could adopt a reduction in the sales tax rate and condition it on the failure of the people to adopt a constitutional amendment. But that scenario runs afoul of *ATU*, where this Court rejected the power of the legislature to pass legislation conditioned on a future vote of the people.

State v. Dougall, 89 Wn.2d 118, 122-23, 570 P.2d 135, 137-38 (1977) is also on point. There, the court held: “While the legislature may enact statutes which adopt existing federal rules, regulations, or statutes, legislation which attempts to adopt or acquiesce in future federal rules, regulations, or statutes is an unconstitutional delegation of legislative power and thus void.” *Id.* at 122-23. One legislative body (here the people acting through the initiative power) lacks the power to condition a legislative decision (here a sales tax reduction) on the policy decision of another legislative body (here the 2016 legislature’s determination about a 2/3rds constitutional amendment). See *Diversified Inv. P’ship v. Dep’t of Soc. & Health Servs.*, 113 Wn. 2d 19, 28, 775 P.2d 947, 952 (1989) (In *Dougall*, the “State Legislature’s only judgment as to that statute was that it would defer to the judgment of the federal government. Such a transfer of the legislative power to render judgment is unconstitutional.”).

Moreover, the provision establishing the “condition” (i.e., the proposed amendment) is beyond the scope of the people’s initiative power. The people (acting in their legislative capacity) have told the 2016 legislature that during this session, they must submit a constitutional amendment to the voters, or be penalized with an unsupportable tax cut. As detailed above, the people cannot invoke the constitutional amendment process. Where one purpose of an initiative is invalid on its face, calling the other purpose “conditional legislation” does not save the measure. *See Mukilteo Citizens for Simple Gov’t v. City of Mukilteo*, 174 Wn.2d 41, 51, 272 P.3d 227, 232 (2012) (“the initiative on its face would enact legislation that is beyond the scope of the initiative power, and calling it conditional legislation does not alter that fact.”).

Appellants cite no cases in which the “contingency” is a legislative choice between options dictated by another body, particularly where the option is really a gun to the head of another body to force a choice between two potentially undesired options. If the people are permitted to pass initiatives forcing a vote of the legislature between two prescribed options, their Article II powers would exceed those of the legislature itself, which cannot be the case. *Wash. State Farm Bureau Fed’n*, 162 Wn.2d at 290-91.¹³ Put another way, if the legislature cannot condition its

¹³ “What is true of statutes enacted by the legislature is likewise true of initiatives, for when the people pass an initiative, they exercise legislative power that is coextensive with that of the legislature. A law passed by initiative is no less a law than one enacted by the legislature. Nor is it more. A previously passed initiative can no more bind a

legislation on a future vote of the people as in *ATU* or a future enactment by the federal government as in *Dougall*, then the people may not condition their legislation on a future vote of the state legislature.¹⁴

Finally, if the Court upholds I-1366 as a form of “conditional legislation”, there will be no end to the hostage-taking style initiatives and the erosion of the integrity of the initiative process. Any manner of invalid threat could be attached to a valid legislative act under the guise of “conditional” legislation. The safeguards meant to protect the law-making process from improper logrolling or illegal constraints on the legislature’s plenary power will be destroyed, along with decades of this Court’s precedent restricting the initiative power to the confines of Article II. The Court should reject Appellants’ desired hijacking of the legislative process and affirm the trial court.

C. The Invalid Provisions of Initiative 1366 Are Not Severable.

As noted above, this court has unequivocally held that where an initiative violates Article II, section 19’s prohibition of multiple subjects, the entire initiative should be struck down. *See Kiga*, 144 Wn.2d at 825, 828; *ATU*, 142 Wn.2d at 217. Severability is not an option. As this Court noted in *Kiga*: “Because we cannot know if either subject of I-722 would

current legislature than a previously enacted statute.” *Wash. State Farm Bur. Fed’n*, 162 Wn.2d at 290-91.

¹⁴ For this reason, I-1366 is different from the “effective date” contingency identified in the Code Reviser’s notes to the 1975 sales tax. Sp. Br. at 47. In setting the effective date contingent upon the passage of a different statute, the legislature did not shift a prescribed legislative choice to another decision making body. The sales tax was going into effect no matter what; only when was at issue.

have garnered popular support standing alone, we must declare the entire initiative void.” 144 Wn.2d at 828. The trial court correctly so held. And the State agrees this result is mandated in the case of a two subject violation. St. Br. at 32 n.12. Only the Sponsors disagree, but they cite no cases to support their position. Because I-1366 violates the two subject prohibition in its entirety, the entire initiative is void.

Appellants argue that if this Court strikes down the proposed constitutional amendment in Section 3 for other reasons, the provision is severable from the tax cut in Section 2. St. Br. at 31-33; Sp. Br. at 47-49. The trial court properly rejected this claim.

The test for severability is “whether the unconstitutional provisions are so connected to the remaining provisions that it cannot be reasonably believed that the legislative body would have passed the remainder of the act’s provisions without the invalid portions, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes.” *League of Women Voters of Wash. v. State*, 184 Wn.2d 393, 411-12, 355 P.3d 1131, 1140-41 (2015). The State and Sponsors argue for a different standard, but cannot cite a single case that has applied a different severability test. Without citation to authority, the State claims that Respondents must show “beyond a reasonable doubt” that voters would not have enacted the sales tax reduction without the proposed constitutional amendment. St. Br. at 33. But while the Court cites that standard for the general burden any person challenging a statute

must meet, it has never applied that standard to severability once a part of a statute has been found to be unconstitutional. For example, in *League of Women Voters*, the Court imposed the burden on the plaintiffs to show the initiative was unconstitutional beyond a reasonable doubt, but it applied the standard severability test. *League of Women Voters of Wash.*, 184 Wn.2d at 411-13.

Similarly, the Sponsors incorrectly claim the standard is whether I-1366's severability clause is "obviously false on its face." Sp. Br. at 48. The Sponsors appear to rely on *McGowan v. State*, 148 Wn.2d 278, 296, 60 P.3d 67, 76 (2002). But *McGowan* applied the severability test set forth above. Indeed, the Court there observed that to be severable, "[t]he invalid provision must be grammatically, functionally, and volitionally severable." *McGowan*, 148 Wn.2d at 295 (footnote omitted).

Here, the trial court ruled that the tax cut in Section 2 is not severable from the constitutional amendment in Section 3, as "[i]t cannot be determined that the sales tax reduction would have been enacted were it not for its being used as a device to further the overriding purpose of a constitutional amendment..." CP 425 (CL 9). As such, the court concluded that "section 2 cannot stand on its own...severed from the unconstitutional section 3" and the court properly struck down the Initiative in its entirety. *Id.*

The trial court's ruling was correct. The structure of I-1366 inexorably intertwines the unconstitutional amendment process and the tax

cut; the tax cut is only triggered by legislature's failure to act on the unconstitutional amendment process. Given that (1) I-1366 will result in different outcomes based on the legislature's decision and (2) voters may have been motivated by any one of those outcomes, it is impossible to know whether "the balance of the legislation would have...been adopted had the [voters] foreseen the invalidity of [Section 3(2)]." *State v. Abrams*, 163 Wn.2d 277, 288, 178 P.3d 1021, 1026 (2008). As detailed above, in addition to the multiple purposes in the plain language of the title and the text, the Initiative was advertised solely on the basis of its proposed "2/3 Constitutional Amendment", without a single written publication from the Sponsors that even mentioned the tax cut. CP 226-29, 236-37 (Eyman Dep. 34:2-37:9; 44:13-45:6).

The State's reliance on *McGowan* is misplaced. In *McGowan*, the Court analyzed whether the legislature's declaration of basis and necessity in section 1 of I-732 indicated that voters would have enacted I-732 without its unconstitutional provision and so found. 148 Wn.2d at 296. Here, Section 1 of I-1366's declared basis and need for the legislation does not support severability:

[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....

CP 23. Unlike the declaration of basis and necessity in *McGowan*, I-1366's declaration contains multiple subjects—reducing current tax burdens and limiting future tax increases—and thus sheds no light on

whether voters would have approved Section 2 without Section 3(2). The declaration rather begs the question whether voters supported I-1366 because of the tax decrease or benefits of the proposed constitutional amendment or both.

This Court has repeatedly invalidated entire initiatives where an invalid purpose was not severable from a valid one. For example, in *Leonard v. City of Spokane*, 127 Wn.2d 194, 897 P.2d 358 (1995), the Court determined that a statutory funding scheme that unconstitutionally diverted tax dollars from common schools to public improvements was not severable from the remainder of the statute, noting that the “funding mechanism...represents the heart and soul of the Act.” *Leonard*, 127 Wn.2d at 201-02. Likewise, in *League of Women Voters*, this Court held that the Charter School Act’s diversion of restricted basic education funds and common school construction funds to charter schools was unconstitutional, and further held that the invalid provisions of the Act were so “intertwined” and “fundamental” to the Act’s efficacy that they were not severable. *League of Women Voters of Wash.*, 184 Wn.2d at 412 (“Without a valid funding source the charter schools envisioned in I-1240 are not viable....Nor can it be believed that voters would have approved the Charter School Act without its funding mechanism.”). As a result, the entire act was invalidated. *Id.* at 412-13.

As in *League of Women Voters* and *Leonard*, I-1366's invalid provisions are not severable from any arguably valid provision.¹⁵ Section 3(2) is pervasive and reflects the Initiative's clear overall purpose is to amend the constitution. Thus, like the unconstitutional provision at issue in *Leonard*, Section 3(2) is the "heart and soul" of I-1366. Even if Section 2's reduction in the state sales tax, standing alone, could be a valid purpose, the valid and invalid portions of I-1366 are so interconnected that the valid portion would be useless to accomplish the purpose of I-1366. See *Priorities First v. City of Spokane*, 93 Wn. App. 406, 413, 968 P.2d 431, 434 (1998). The Initiative is not severable.

D. Respondents Have Standing.

The State agrees with the trial court that Respondents have taxpayer standing and that this case presents a justiciable controversy. The State objects to other asserted bases for standing. The Sponsors, by contrast, dispute both standing and justiciability on all grounds.¹⁶ The trial court properly ruled that Respondents have standing as taxpayers, as

¹⁵ Respondents do not concede that any provision of I-1366 is valid. Specifically, while a standalone sales tax cut could be passed by an initiative, the tax cut proposed here does not stand alone. Rather, it was coerced by the threat of the proposed constitutional amendment. Moreover, as explained above, apart from its substantive invalidity, I-1366 is also unconstitutional because it contains multiple subjects and exceeds the scope of the initiative power. Finally, the legislature's acquiescence in a large tax cut while in contempt for underfunding public education is likely invalid.

¹⁶ Despite this, the Sponsors did not assign error to the trial court's findings and conclusions on standing and justiciability, nor did the Sponsors identify standing or justiciability as an issue for direct review in this Court.

individuals who assert “threats to their personal and associational interests” from I-1366 and as legislators and should be affirmed.

1. Respondents Have Standing as Taxpayers.

As the State rightly concedes, Respondents have standing to bring this action as taxpayers. As this Court held in *State ex rel. Boyles v. Whatcom Cty. Sup. Court*, 103 Wn.2d 610, 614--15, 694 P.2d 27 (1985):

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. We have acknowledged that the value of taxpayer suits generally outweighs any infringement on governmental processes.... Only when such recognition would encourage “unwarranted harassment” of public officials have we implied that standing would be denied. (internal citations omitted).

Sponsors nonetheless dispute taxpayer standing because they argue the unconstitutional government act at issue is allegedly discretionary. But the Sponsors point only to discretion in the 2016 legislature’s response to I-1366. Respondents are not challenging the potential actions of the 2016 legislature; they are challenging the constitutionality of an adopted official act – I-1366. There is no claim of harassment here. And Respondents properly requested that the Attorney General take action, but the request was denied. Where, as here, the constitutionality of a statute is at issue, taxpayer standing is routinely and freely given.

For the same reason, the Sponsors’ argument that this lawsuit will interfere with the ongoing legislative process fails. I-1366 has been enacted by the people as law; it is only the constitutionality of I-1366 that

is at issue. Moreover, Respondents are not making policy arguments to the Court. I-1366 is unconstitutional because it contains two subjects and because it contains matter that is beyond the scope of the Article II legislative power. Respondents are not arguing this Court should strike down the Initiative because a sales tax cut is bad policy.

2. Respondents Have Standing as Individuals.

In addition to taxpayer standing, Respondents also have standing in their individual capacities. Respondents would suffer injury-in-fact from the implementation of I-1366, as the Initiative (whether via the significant sales tax cut or a supermajority amendment) will have direct and substantial detrimental impacts on Respondents' interests. Specifically, if the sales tax is reduced, the Initiative will inevitably result in drastic cuts to the state budget and impact Respondents' interests in education, social services and state programs and infrastructure. CP 136-38, 139-40 (¶¶ 2-7, 9-11); CP 115-17, 118 (¶¶ 2-7, 9); CP 53-55 (¶¶ 3-6, 8, 10); CP 143-45 (¶¶ 3-8); CP 121-23 (¶¶ 3-7, 9); CP 49-50 (¶¶ 2, 5). Moreover, the resulting cuts in services will directly affect taxpayers by, for example, cutting access to state parks, reducing public transportation, reducing available health care, and underfunding public education. *See, e.g.*, CP 131-32, 134-35 (¶¶ 3, 5, 10); CP 125, 128-29 (¶¶ 3, 9-10); CP 140 (¶¶ 11-12); CP 143-45 (¶¶ 4-8); CP 122-23 (¶ 9).

Alternatively, if the legislature adopts new taxes to make up for the lost revenue, that will harm Respondents' interests in funding fully

education, health and human services, and other state programs and infrastructure. Similar results are likely if a constitutional amendment is passed that severely limits the opportunity to raise new revenue or even close tax loopholes. CP 138-40 (§§ 8-12); CP 117-18 (§§ 8-9); CP 54-55 (§§ 7-8); CP 146-46 (§ 9); CP 122-23 (§§ 8-9); CP 50 (§ 5).

Moreover, the League's interests in promoting representative democracy are especially harmed by the implementation of a supermajority requirement.¹⁷ CP 50 (§§ 3-4). Finally, even if a supermajority amendment is proposed and voted down, all Respondents are harmed by the expenditure of public funds on an illegal amendment process and election. *See e.g.*, CP 50 (§ 5) ("Even if the voters ultimately do not approve such an amendment, the expenditure of tax dollars and the diversion of the legislature's time and effort on an unconstitutional amendment process and illegal election will harm the League and its taxpayer members."); CP 55 (§ 9).

3. The Legislator Respondents Have Standing.

Respondents Frockt and Carlyle also have standing to challenge I-1366 in their capacities as legislators. As the trial court recognized,

¹⁷ The League has asserted representative standing to bring claims on behalf of its individual members. *Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 866-68, 576 P.2d 401, 403-04 (1978) (non-profit organization had standing to assert claims on members' behalf). The League has standing on behalf of its members who individually have standing to challenge the constitutionality of I-1366. The interests the League seeks to protect are germane to its purposes, namely to encourage informed and active participation of citizens in government, influence public policy through education and advocacy, advocate for full funding of basic education in Washington, and work to defend the state's representative system of democracy.

Respondents Frockt and Carlyle are harmed because the amendment usurps their constitutional authority under Article XXIII to propose constitutional amendments. CP 125, 126-28 (§§ 2, 6, 8); CP 131-32, 133-34 (§§ 2, 4, 8-9). Inherent in this power is the right to vote against a properly proposed constitutional amendment, without the threat of a massive tax cut. But under I-1366, the legislator Respondents are not free to vote against the proposed amendment; rather, they are forced to choose between two undesirable options, neither of which are in the best interests of their constituents. CP 125, 128 (§§ 2, 9); CP 131, 134 (§§ 2, 10). This forced choice essentially removes or dilutes the power of their votes, which is sufficient to confer standing on legislative Respondents. See, e.g., *League of Educ. Voters*, 176 Wn. 2d at 817-18 (legislators “have a plain, direct and adequate interest in maintaining the effectiveness of their votes”); *Coleman v. Miller*, 307 U.S. 433, 437-39, 59 S. Ct. 972, 83 L. Ed. 1385 (1939) (state senators had standing to challenge procedure by which lieutenant governor could break deadlock which “virtually held for naught” the senators’ votes); *Silver v. Pataki*, 755 N.E.2d 842, 847-48, 96 N.Y.2d 532, 730 N.Y.S.2d 482 (N.Y. Ct. App. 2001).¹⁸

¹⁸ See also *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1167-69 (D.C. Cir. 1983) (finding standing for Republican House members to challenge Democrats’ allocation of committee seats to the parties on grounds that Republicans’ power and influence was diluted as a result); *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (recognizing standing of congressional representatives and individual voters to assert dilution of voting power as result of voting rights granted to congressional delegates).

In *League of Education Voters*, this Court recognized that legislators “have a plain, direct and adequate interest in maintaining the effectiveness of their votes.” *League of Educ. Voters*, 176 Wn.2d at 817. The Court found legislator standing to challenge the prior statutory supermajority requirement on the grounds that it prevented passage of legislation that the legislator plaintiffs supported, and would have been able to enact by a simple majority, but for the supermajority requirement. *Id.* at 817-18. Here, the forced choice created by I-1366 has the same diluting effect.

The Sponsors’ reliance on *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) is misplaced. Sp. Br. at 17. There, the legislator plaintiffs did not detail the specific harms caused by Initiative 601, which had not yet gone into effect. *Id.* at 419. Here, by contrast, the looming sales tax requires Respondents Frockt and Carlyle to treat the constitutional amendment proposed by the Initiative differently from any other constitutional amendment that would be proposed by the legislature under Article XXIII. See CP 127-28, 129 (¶¶ 8, 11). Contrary to Appellants’ claims, this detrimental impact is sufficient to secure standing.

E. This Case Is Justiciable.

Again, the State agrees that this case is justiciable. Sponsors dispute justiciability. The trial court correctly rejected Sponsors’ claim.

1. The Constitutionality of I-1366 is an Actual, Present and Existing Dispute.

It is undisputed that this Court has jurisdiction over constitutional challenges to statutes, including statutes passed by initiative. RCW 2.04.010. The only limitations on the Court's jurisdiction are those imposed by the Court itself through its case law.

The constitutionality of I-1366 is an actual, present and existing dispute that can only be resolved by judicial determination. The parties have genuine and opposing interests in the outcome of this action, and those interests are direct and substantial. *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 489-90, 585 P.2d 71, 80 (1978). This case is ripe, as the legislature is currently in a short 60-day session, and but for the trial court's order, would be constrained by I-1366, while simultaneously trying to reach consensus on how to come into compliance with this Court's contempt order in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), and fully fund basic education. CP 128-29 (§ 10); CP 134-35 (§ 10). Thus, the trial court's finding of justiciability here is consistent with numerous decisions of this Court evaluating the validity of voter-approved initiatives. *See e.g., ATU*, 142 Wn.2d at 202-03; *Kiga*, 144 Wn.2d at 824-28.

The Sponsors dispute justiciability first relying on *Walker* and *League of Education Voters*. The Sponsors argue that this case is not justiciable because the legislature has not yet taken action under the

Initiative. But again it is not the actions of the 2016 legislature that are at issue. Moreover, neither *Walker* nor *League of Education Voters*, involved the type of constitutional challenges brought here that are routinely heard by this Court post-election but pre-effective date, including challenges based on Article II, section 19. *See e.g., Kiga*, 144 Wn.2d at 824-28 (addressing single subject challenge before effective date), *Pierce County*, 150 Wn.2d at 429-36 (complaint filed after election but prior to initiative taking effect), *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 357 P.3d 1040 (2015) (same), *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 70 P.3d 920 (2003), *abrogated on other grounds in Filo Foods* (addressing single subject challenge); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 71 P.3d 644 (2003) (addressing single subject challenge). Indeed, no case cited by the Sponsors concerned a two-subject challenge under Article II, section 19.

Moreover, *Walker* was not a declaratory judgment action originating in the Superior Court, but was instead a mandamus action filed in this Court. A key component of the Court's justiciability analysis depended upon the lack of original jurisdiction in this Court under the Uniform Declaratory Judgment Act. 124 Wn.2d at 418. Further, unlike *Walker*, where the majority of the initiative in question would not take effect for many months, and *League of Education Voters* where no plaintiff claimed harm from the Referendum Requirement, here, I-1366

imposes an immediate requirement to either propose a constitutional amendment for a public vote or be penalized with the drastic tax cut. As Respondents demonstrated in the trial court, a \$1.4 billion penalty for failing to advance a constitutional amendment within a 60-day short session is hardly a “speculative” injury.

Finally, under the Sponsors’ argument, no one could challenge an initiative on the grounds asserted here: that it exceeds the scope of the initiative power, contains multiple subjects, attempts to amend the constitution, and improperly binds the legislature. The constitution imposes these restrictions on initiatives, and a cognizable injury to the interests protected by these restrictions occurs by the act of voting on the invalid initiative. Put another way; if, for example, a two-subject challenge is not justiciable until after the legislature implements the improper initiative in a way that causes an additional cognizable harm to a potential plaintiff, then the protection against logrolling guaranteed by Article II, section 19 would never be vindicated. This Court recently recognized this principle in *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, No. 91551-2, 2016 WL 455957, at *4 (Wash. Feb. 4, 2016). There, the Court observed that a cognizable injury can be caused by an initiative that exceeds the scope of the initiative power, and a challenge can be brought prior to its enactment. *Id.* (“If we were to require that a petitioner show that an injury had already occurred,

no challenger could ever meet this requirement for an initiative that had not yet been enacted.”).

For this reason, the concerns identified in Justice Charles Johnson’s dissent in *League of Education Voters* are not present here. Sp. Br. at 16. Respondents do not ask the Court to insert itself into “political legislative action” related to the ultimate choice the legislature might make in response to I-1366. *Id.* (citing 176 Wn.2d at 831). Rather, it is Respondents’ position that forcing the choice at all is unconstitutional, regardless of the outcome. In other words, no matter what the legislature might choose in response to I-1366, the choice will have been made as a result of an initiative that contains multiple subjects and exceeds the scope of Article II. As this Court has repeatedly held, such initiatives present justiciable disputes and fall squarely within this Court’s appellate jurisdiction over declaratory judgment actions. *See* RCW 2.04.010.

2. This Case Presents Justiciable Issues of Substantial Public Importance.

As the State argues, this case should also be heard because of the significance of the issues at stake. Washington courts take a liberal approach to standing and justiciability when a controversy “is of serious public importance and immediately affects substantial segments of the population” and when its outcome “will have a direct bearing on the commerce, finance, labor, industry or agriculture generally.” *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 96,

459 P.2d 633, 635 (1969); *see also City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641, 645 (1985) (“Where a controversy is of serious public importance the requirements for standing are applied more liberally.”). The constitutionality of I-1366 is an issue of state-wide public importance, the outcome of which will have far-reaching impacts on all Washington citizens. The public’s interest in ensuring adequate funding for basic state services, including the provision of public education, is significant. *See Seattle Sch. Dist*, 90 Wn.2d at 490 (issue of adequate school funding is one of “great public interest”); *Kitsap Cnty. v. Smith*, 143 Wn. App. 893, 908-09, 180 P.3d 834, 842-43 (2008) (exercising jurisdiction to hear case involving privacy of public employees conversations due to its public importance).¹⁹ And more broadly, the public has a substantial interest in ensuring that its government observes the requirements of the constitution. The Court should recognize the significant public importance of the constitutional questions raised here and adjudicate the merits of Respondents’ declaratory judgment claim. *See State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012, 1014

¹⁹ Courts have found a variety of cases present issues of substantial public importance. *See, e.g., Huntamer*, 40 Wn.2d at 770 (challenge to statute requiring candidates for public office to attest they are not subversive is issue of substantial public importance); *State ex rel. O’Connell v. Dubuque*, 68 Wn.2d 553, 559, 413 P.2d 972, 976 (1966) (finding “[q]uestions of salary, tenure, and eligibility to stand for public office” were issues of public importance); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 433, 260 P.3d 245, 248 (2011) (challenge to red light camera initiative would be considered “even if the question of [plaintiff’s] standing were debatable” because the case presented issues of substantial public importance); *Yovos v. Grant*, 87 Wn.2d 697, 701, 555 P.2d 1343, 1346 (1976) (question regarding legality of fingerprinting juveniles absent advance consent from juvenile court issue of significant public importance).

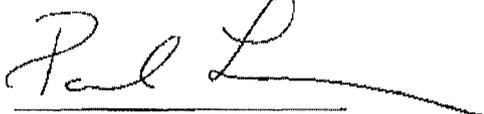
(1972) (overlooking enrolled bill doctrine to decide case) (internal citations omitted); *Clallam Cnty. Deputy Sheriff's Guild v. Bd. of Clallam Cnty. Comm'rs*, 92 Wn.2d 844, 849, 601 P.2d 943, 945 (1979) (declaratory judgment proper to decide constitutional questions when judicial opinion would benefit public and other branches of government).

V. CONCLUSION

I-1366 is a perversion of the initiative process. If its only purpose is to lower the sales tax, as Appellants maintain, then an initiative only lowering the sales tax should have been submitted. By combining the sales tax reduction with the popular 2/3rds to raise taxes policy, I-1366 violates multiple provisions of the constitution including the prohibition against multiple subject legislation, Article II section 19, limitations on legislative power under Article II and Article XXIII. As the Sponsors conceded, the sales tax reduction was just a means to prod the legislature to propose a constitutional amendment, a matter not within the legislative power. I-1366 is unconstitutional, and the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of February, 2016.

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APPENDIX

2/3 CONSTITUTIONAL AMENDMENT

COMPLETE TEXT

AN ACT Relating to taxes and fees imposed by state government; amending RCW 82.08.020, 43.135.031, and 43.135.041; adding new sections to chapter 43.135 RCW; creating new sections; and providing a contingent expiration date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

INTENT

NEW SECTION. **Sec. 1.** Over the past twenty years, the taxpayers have been required to pay increasing taxes and fees to the state, hampering economic growth and limiting opportunities for the citizens of Washington.

The people declare and establish that the 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.

Since 1993, the voters have repeatedly passed initiatives requiring two-thirds legislative approval or voter approval to raise taxes and majority legislative approval for fee increases. However, the people have not been allowed to vote on a constitutional amendment requiring these protections even though the people have approved them on numerous occasions.

This measure provides a reduction in the burden of state taxes by reducing the sales tax, enabling the citizens to keep more of their own money to pay for increases in other state taxes and fees due to the lack of a constitutional amendment protecting them, 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. The people want to ensure that tax and fee increases are consistently a last resort.

REDUCE THE SALES TAX UNLESS...

Sec. 2. RCW 82.08.020 (Tax imposed--Retail sales--Retail car rental) and 2014 c 140 s 12 are each amended to read as follows:

(1) There is levied and collected a tax equal to (~~six~~) five and five-tenths percent of the selling price on each retail sale in this state of:

(a) Tangible personal property, unless the sale is specifically excluded from the RCW 82.04.050 definition of retail sale;

(b) Digital goods, digital codes, and digital automated services, if the sale is included within the RCW 82.04.050 definition of retail sale;

(c) Services, other than digital automated services, included within the RCW 82.04.050 definition of retail sale;

(d) Extended warranties to consumers; and

(e) Anything else, the sale of which is included within the RCW 82.04.050 definition of retail sale.

(2) There is levied and collected an additional tax on each retail car rental, regardless of whether the vehicle is licensed in this state, equal to five and nine-tenths percent of the selling price. The revenue collected under this subsection must be deposited in the multimodal transportation account created in RCW 47.66.070.

(3) Beginning July 1, 2003, there is levied and collected an additional tax of three-tenths of one percent of the selling price on each retail sale of a motor vehicle in this state, other than retail car rentals taxed under subsection (2) of this section. The revenue collected under this subsection must be deposited in the multimodal transportation account created in RCW 47.66.070.

(4) For purposes of subsection (3) of this section, "motor vehicle" has the meaning provided in RCW 46.04.320, but does not include:

(a) Farm tractors or farm vehicles as defined in RCW 46.04.180 and 46.04.181, unless the farm tractor or farm vehicle is for use in the production of marijuana;

(b) Off-road vehicles as defined in RCW 46.04.365;

(c) Nonhighway vehicles as defined in RCW 46.09.310; and

(d) Snowmobiles as defined in RCW 46.04.546.

(5) Beginning on December 8, 2005, 0.16 percent of the taxes collected under subsection (1) of this section must be dedicated to funding comprehensive performance audits required under RCW 43.09.470. The revenue identified in this subsection must be deposited in the performance audits

of government account created in RCW 43.09.475.

(6) The taxes imposed under this chapter apply to successive retail sales of the same property.

(7) The rates provided in this section apply to taxes imposed under chapter 82.12 RCW as provided in RCW 82.12.020.

...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

NEW SECTION. **Sec. 3.** (1) Section 2 of this act takes effect April 15, 2016, unless the contingency in subsection (2) of this section occurs.

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

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

STATUTORY REFERENCE UPDATES

Sec. 4. RCW 43.135.031 (Bills raising taxes or fees – Cost analysis – Press release – Notice of hearings – Updated analyses) and 2013 c 1 s 5 are each amended to read as follows:

(1) For any bill introduced in either the house of representatives or the senate that raises taxes as defined by (~~RCW 43.135.034~~) section 6 of this act or increases fees, the office of financial management must expeditiously determine its cost to the taxpayers in its first ten years of imposition, must promptly and without delay report the results of its analysis by public press release via e-mail to each member of the house of representatives, each member of the senate, the news media, and the public, and must post and maintain these releases on its web site. Any ten-year cost projection must include a year-by-year breakdown. For any bill

containing more than one revenue source, a ten-year cost projection for each revenue source will be included along with the bill's total ten-year cost projection. The press release shall include the names of the legislators, and their contact information, who are sponsors and cosponsors of the bill so they can provide information to, and answer questions from, the public.

(2) Any time any legislative committee schedules a public hearing on a bill that raises taxes as defined by (~~RCW 43.135.034~~) section 6 of this act or increases fees, the office of financial management must promptly and without delay report the results of its most up-to-date analysis of the bill required by subsection (1) of this section and the date, time, and location of the hearing by public press release via e-mail to each member of the house of representatives, each member of the senate, the news media, and the public, and must post and maintain these releases on its web site. The press release required by this subsection must include all the information required by subsection (1) of this section and the names of the legislators, and their contact information, who are members of the legislative committee conducting the hearing so they can provide information to, and answer questions from, the public.

(3) Each time a bill that raises taxes as defined by (~~RCW 43.135.034~~) section 6 of this act or increases fees is approved by any legislative committee or by at least a simple majority in either the house of representatives or the senate, the office of financial management must expeditiously reexamine and redetermine its ten-year cost projection due to amendment or other changes during the legislative process, must promptly and without delay report the results of its most up-to-date analysis by public press release via e-mail to each member of the house of representatives, each member of the senate, the news media, and the public, and must post and maintain these releases on its web site. Any ten-year cost projection must include a year-by-year breakdown. For any bill containing more than one revenue source, a ten-year cost projection for each revenue source will be included along with the bill's total ten-year cost projection. The press release shall include the names of the legislators, and their contact information, and how they voted on the bill so they can provide information to, and answer questions from, the public.

(4) For the purposes of this section, "names of legislators, and their contact information" includes each legislator's position (senator or representative), first name, last name, party affiliation (for example,

Democrat or Republican), city or town they live in, office phone number, and office e-mail address.

(5) For the purposes of this section, "news media" means any member of the press or media organization, including newspapers, radio, and television, that signs up with the office of financial management to receive the public press releases by e-mail.

(6) For the purposes of this section, "the public" means any person, group, or organization that signs up with the office of financial management to receive the public press releases by e-mail.

Sec. 5. RCW 43.135.041 (Tax legislation – Advisory vote – Duties of the attorney general and secretary of state – Exemption) and 2013 c 1 s 6 are each amended to read as follows:

(1)(a) After July 1, 2011, if legislative action raising taxes as defined by (~~RCW 43.135.034~~) section 6 of this act is blocked from a public vote or is not referred to the people by a referendum petition found to be sufficient under RCW 29A.72.250, a measure for an advisory vote of the people is required and shall be placed on the next general election ballot under this chapter.

(b) If legislative action raising taxes enacted after July 1, 2011, involves more than one revenue source, each tax being increased shall be subject to a separate measure for an advisory vote of the people under the requirements of this chapter.

(2) No later than the first of August, the attorney general will send written notice to the secretary of state of any tax increase that is subject to an advisory vote of the people, under the provisions and exceptions provided by this chapter. Within five days of receiving such written notice from the attorney general, the secretary of state will assign a serial number for a measure for an advisory vote of the people and transmit one copy of the measure bearing its serial number to the attorney general as required by RCW 29A.72.040, for any tax increase identified by the attorney general as needing an advisory vote of the people for that year's general election ballot. Saturdays, Sundays, and legal holidays are not counted in calculating the time limits in this subsection.

(3) For the purposes of this section, "blocked from a public vote" includes adding an emergency clause to a bill increasing taxes, bonding or contractually obligating taxes, or otherwise preventing a referendum on a bill increasing taxes.

(4) If legislative action raising taxes is referred to the people by the legislature or is included in an initiative to the people found to be sufficient under RCW 29A.72.250, then the tax increase is exempt from an advisory vote of the people under this chapter.

NEW SECTION. **Sec. 6.** A new section is added to chapter 43.135 RCW and reads as follows:

For the purposes of this chapter, "raises taxes" means any action or combination of actions by the state legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.

CONSTRUCTION CLAUSE

NEW SECTION. **Sec. 7.** The provisions of this act are to be liberally construed to effectuate the intent, policies, and purposes of this act.

SEVERABILITY CLAUSE

NEW SECTION. **Sec. 8.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

TITLE OF THE ACT

NEW SECTION. **Sec. 9.** This act is known and may be cited as the "Taxpayer Protection Act."

-- END --

Ballot Title

Statement of Subject: Initiative Measure No. 1366 concerns 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

Ballot Measure Summary

This measure would decrease the state retail sales tax rate on April 15, 2016, from 6.5 percent to 5.5 percent. The sales tax rate would not be decreased if, by April 15, 2016, two-thirds of both legislative houses refer to the ballot a vote on a constitutional amendment that requires two-thirds legislative approval or voter approval to raise taxes, and majority legislative approval to set the amount of a fee increase.

Ballot Title

Statement of Subject: Initiative Measure No. 1366 concerns taxes [REDACTED]

Concise Description: This measure would decrease the sales tax rate [REDACTED]
[REDACTED]

Should this measure be enacted into law? Yes No

Ballot Measure Summary

This measure would decrease the state retail sales tax rate on April 15, 2016, from 6.5 percent to 5.5 percent. [REDACTED]
[REDACTED]

OFFICE RECEPTIONIST, CLERK

To: Katie Dillon
Cc: stephens@sklegal.pro; jills@sklegal.pro; RebeccaG@atg.wa.gov; CallieC@atg.wa.gov; Stephanie11@atg.wa.gov; Paul Lawrence; Kymberly Evanson; Sarah Washburn; Dawn Taylor; Sydney Henderson
Subject: RE: Lee v. State and Tim Eyman: Supreme Court Cause No. 92708-1 - Answering Brief of Respondents

Rec'd 2/19/16

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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Cc: stephens@sklegal.pro; jills@sklegal.pro; RebeccaG@atg.wa.gov; CallieC@atg.wa.gov; Stephanie11@atg.wa.gov; Paul Lawrence <Paul.Lawrence@pacificallawgroup.com>; Kymberly Evanson <Kymberly.Evanson@pacificallawgroup.com>; Sarah Washburn <Sarah.Washburn@pacificallawgroup.com>; Dawn Taylor <Dawn.Taylor@pacificallawgroup.com>; Sydney Henderson <Sydney.Henderson@pacificallawgroup.com>
Subject: Lee v. State and Tim Eyman: Supreme Court Cause No. 92708-1 - Answering Brief of Respondents

On behalf of Paul Lawrence (WSBA #13557), Kymberly Evanson (#39973), and Sarah Washburn (#44418), attached for filing please find the following documents:

1. Answering Brief of Respondents;
2. Appendix
3. Proof of Service

Please note that our reception, address suite number and zip code have changed.

Katie Dillon
Paralegal



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