

NO. 78844-8

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2007 JAN -5 P 1:19

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK *bjh*

THE STATE OF WASHINGTON, and
WILLIAM RICE, Director of the State Department of Revenue,

Appellants,

v.

WASHINGTON CITIZENS ACTION OF WASHINGTON, a
Washington Non-Profit Corporation; WELFARE RIGHTS
ORGANIZATION COALITION, a Washington Non-Profit Corporation;
1000 FRIENDS OF WASHINGTON, a Washington Non-Profit
Organization; and WHITMAN COUNTY,

Respondents.

REPLY BRIEF OF APPELLANTS

ROB MCKENNA
Attorney General

JAMES K. PHARRIS
Deputy Solicitor General
WSBA #5313
PO Box 40100
Olympia, WA 98504-0100
(360) 664-3027

CAMERON G. COMFORT
Sr. Assistant Attorney General
WSBA #15188
PO Box 40123
Olympia, WA 98504-0100
(360) 664-9429

TIMOTHY D. FORD
Deputy Solicitor General
WSBA #29254
PO Box 40100
Olympia, WA 98504-0100
(360) 586-0756

TABLE OF CONTENTS

I. ARGUMENT1

A. Initiative 747 Was Enacted In Compliance With Article II, Section 37 Of The State Constitution.....1

1. Initiative Measure 747 Satisfies Case Law Concerning Compliance With Article II, Section 372

2. Respondents Fail To Show A Basis For Expanding The Requirements of Article II, Section 37.....5

a. No Cases Bar Lawmakers From Amending Properly Adopted Statutes By Invoking The *Void Ab Initio* Doctrine7

b. Article II, Section 37 Should Be Construed With Article II, Section 1(a) To Require An Initiative Measure To Set Forth The Laws Existing At The Time Of Filing10

3. The Petition Process Is Not Deliberative And Does Not Allow Amendments.....11

4. Respondents’ Reliance On *Hebard v. Bybee* Is Misplaced Because It Construes Statutory Law In The Context Of A Pre-Election Writ Challenging The Form Of A Petition.....15

B. The Ballot Title For Initiative 747 Reflects The Contents Of The Measure As Required By Article II, Section 19.....17

1. The Constitution Does Not Prohibit A Statewide Vote On An Increase In The State School Levy17

2. Initiative 747 Did Not Purport To Require A Referendum On Statewide Property Tax Increases.....19

3.	Initiative 747 Does Not “Permanently” Cap Increases In The State Property Tax Levy; The Limits Set Forth In The Measure Are Always Subject To Amendment Or Repeal.....	20
II.	CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Transit Union Local 587 v. State (ATU),</i> 142 Wn.2d 183, 11 P.3d 762 (2000).....	passim
<i>City of Burien v. Kiga,</i> 144 Wn.2d 819, 31 P.3d 659 (2001).....	9
<i>Cook v. Bd. of Directors of School Dist. 80,</i> 266 Ill. 164, 107 N.E. 327 (1914).....	9
<i>Hebard v. Bybee,</i> 65 Cal. App. 4th 1331, 77 Cal. Rptr.2d 352 (1998).....	15, 16, 17
<i>Naccarato v. Sullivan,</i> 46 Wn.2d 67, 278 P.2d 641 (1955).....	4
<i>Schrempp v. Munro,</i> 116 Wn.2d 929, 809 P.2d 1381 (1991).....	16
<i>State ex rel. Berry v. Superior Court,</i> 92 Wash. 16, 159 P. 92 (1916)	14, 15
<i>The Boeing Company v. State,</i> 74 Wn.2d 82, 442 P.2d 970 (1968).....	8, 9
<i>Washington State Grange v. Locke,</i> 153 Wn.2d 475, 105 P.3d 9 (2005).....	13

Statutes

Laws of 2001, ch. 1	1
RCW 29.79.160	16
RCW 84.55.005	1, 4, 6, 7
RCW 84.55.0101	passim

Constitutional Provisions

Wash. Const. art. II, § 1(a)..... 10, 11

Wash. Const. art. II, § 19 17, 20, 21

Wash. Const. art. II, § 37 passim

I. ARGUMENT

A. Initiative 747 Was Enacted In Compliance With Article II, Section 37 Of The State Constitution

Initiative 747 amends RCW 84.55.005 and RCW 84.55.0101 by referring to the act that had recently amended the two statutes, Laws of 2001, ch. 1, also known as Initiative Measure 722. Respondents claim that the proposal and adoption of I-747 amending RCW 84.55.005 and RCW 84.55.0101 violates article II, section 37. However, rather than focus on the judicial tests for analyzing whether an act violates article II, section 37, Respondents repeatedly argue that I-747 was inaccurate or deceptive. *E.g.*, Br. Resp. at 8-9. They show only that if I-747 is viewed through the lens of the judicial challenge to I-722, then the effect of I-747 was to reduce the “limit factor” from 106% to 101%, and not from “102% to 101%. Of course, that is no surprise, as the Voter’s Pamphlet identified and fully explained that litigation was pending challenging I-722, including that it would change the “limit factor” from 106% to 101%. *See* Br. App. at 16; CP at 163-166.¹

¹ Section 1 of I-747 similarly informed voters of the measure’s effect:

This measure would limit property tax increases to 1% per year unless approved by the voters. . . . Throughout Washington every year, taxing authorities regularly increase property taxes to the maximum limit factor of 106%, while also receiving additional property tax revenue from new construction, improvements, increases in the value of state-assessed property, excess levies approved by the voters, and tax revenues generated from real estate excise taxes when property is sold. . . . The Washington Constitution limits property taxes

1. Initiative Measure 747 Satisfies Case Law Concerning Compliance With Article II, Section 37

Respondents' brief presents the issue as to whether article II, section 37 is satisfied when an initiative sets forth a properly-adopted prior version of a statute, but intervening judicial challenges prevent that version from taking effect. As explained in the State's opening brief (Br. App. at 4-11), this issue should be decided based on the tests for compliance with article II, section 37. First, the Court should decide whether "the scope of the rights or duties created or affected by the legislation action can be determined without referring to any other statute or enactment[.]" *Amalgamated Transit Union Local 587 v. State (ATU)*, 142 Wn.2d 183, 246, 11 P.3d 762 (2000). And second, whether a "straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment[.]" *ATU*, 142 Wn.2d at 246. As explained below, Respondents do not show that I-747 is somehow an incomplete statute or fails the first test. More importantly, Respondents also do not show that the scope of any rights or duties under any existing statute would be rendered erroneous by the enactment of I-747.

to 1% per year; this measure would match this principle by limiting property tax increases to 1% per year.
Br. App., Appendix A, CP at 207.

In its opening brief, the state noted that I-747 satisfies the first test of whether I-747 is a complete act. Br. App. at 5. Initiative 747 revises existing statutes, however, so the question of whether it is a complete act “exempt from the requirements of article II, section 37” is not that helpful. *See ATU*, 142 Wn.2d at 246 (an act is exempt from article II, section 37 if it is “complete in itself, independent of prior acts, and stand[s] alone as the law on the particular subject of which it treats.”) The state does not contend that I-747 is exempt from requirements of article II, section 37, only that it does not violate any of its requirements.

Several opinions refer to the first test of “completeness” without analysis. In *ATU*, however, this Court clarified the first test, explaining that stand-alone legislation complies with article II, section 37 when the new act is complete and “the scope of the rights or duties created or affected by the legislation action can be determined without referring to any other statute or enactment[.]” *ATU*, 142 Wn.2d at 246. Although stated as the first of two tests for compliance with article II, section 37, logically the two tests are alternatives for examining the same question of whether an enactment fails to set forth a law being amended. The so-called “first test” is another way of asking whether an enactment

stands alone so that no other statutory language need be set forth at full length.²

Initiative 747 amends RCW 84.55.005 and RCW 84.55.0101 and thereby triggers the obligation to set forth these two statutes at full length. The first test therefore has little relevance to answering whether I-747 violates article II, section 37. Not surprisingly, Respondents do not focus on the first test.

To the extent the first test applies to I-747, the measure is a complete enactment. More importantly, Respondents identify no laws other than RCW 84.55.005 and RCW 84.55.0101 that they contend the sponsors of I-747 should have set forth at full length. They only claim that because of the intervening judicial challenge finding I-722 unconstitutional, article II, section 37 should be interpreted to require

² In *Naccarato v. Sullivan*, 46 Wn.2d 67, 75, 278 P.2d 641 (1955), the Court explored this concept of complete acts, summarizing its applicability:

This court has adopted the rule that Art. II, § 37, of the state constitution is not violated in the following instances: (1) complete acts which repeal prior acts or sections thereof on the same subject; (2) complete acts which adopt by reference provisions of prior acts; (3) complete acts which supplement prior acts or sections thereof without repealing them; (4) complete acts which incidentally or impliedly amend prior acts.

Initiative 747, however, revises prior statutes and therefore the more relevant inquiry is whether the amendment using a prior law that has been the subject of intervening litigation somehow violates article II, section 37. To answer that question, the scrutiny must examine the second question – whether existing laws are rendered erroneous. See part A.2, below.

I-747 to have set forth at full length the versions of the statutes that existed before the voters passed I-722.

But the relevant inquiry for compliance with article II, section 37 is whether Respondents showed that a “straightforward determination of the scope of rights or duties under the existing statutes be rendered erroneous by the new enactment[.]” *ATU*, 142 Wn.2d at 246. While Respondents criticize the wisdom of I-747 and claim that voters might have been misled about its effects, they identify no rights or duties under the existing statutes that somehow are rendered erroneous by the adoption of I-747. In other words, Respondents identify no other statutes that should have been set forth at length under article II, section 37.

Based on a straightforward application of the case law concerning the tests for compliance with article II, section 37, Respondents have shown no violation of the constitutional obligation to set forth the statutes that I-747 was amending.

2. Respondents Fail To Show A Basis For Expanding The Requirements of Article II, Section 37

Because Respondents cannot show that any other statute should have been set forth by the sponsors of I-747, they ask the Court to expand the requirements of article II, section 37 to effectively prevent the amending of statutes that are the subject of pending or intervening

litigation. Respondents offer no particular rule of law to further their argument, except to claim that once the Thurston County Superior Court entered the preliminary injunction against I-722, neither RCW 84.55.005 nor RCW 84.55.0101 could be the subject of an amendment, at least until the issue of the constitutionality of I-722 was finally resolved. *See* Br. Resp. at 26. Alternatively, Respondents seem to contend that as a result of a superior court judgment or final Supreme Court ruling, the statutes as amended by I-722 ceased to exist for purposes of subsequent law making. Their approach is not based on the specific language of article II, section 37, but instead reflects the notion that the Constitution should be interpreted to implement broad general principles, without reference to the specific language used.

Respondents' approach to the constitution would put in place undue hurdles to the initiative process and to legislative action. For example, if the legislature were attempting to cure a statute by amendment to resolve a legal dispute, the legislature, like the voters here, would be engaging in an uncertain venture. A simple amendment of the most recently enacted bill would, under Respondents' view, be subject to post-hoc judicial review for whether it accurately reflected the state of the law.

Respondents' theory of *void ab initio* is not an appropriate device to support this encroachment on the lawmaking power. Nor is their claim

that a voter (or legislator, if a legislative bill) will not know the effect of an enactment if the law set forth is “inaccurate”. The language of article II, section 37 simply does not suggest that one of its purposes is to resolve and describe the effect of legal challenges before a previously adopted law can be the subject of an amendment. Article II, section 37 serves the voter (or legislator) by setting forth the law to be amended, allowing the lawmaker to see what law is being amended – no more, no less. Calling for an “accurate” reflection of a complex legal analysis of how pending litigation may affect the law being amended goes far beyond the plain language of article II, section 37.³

a. No Cases Bar Lawmakers From Amending Properly Adopted Statutes By Invoking The *Void Ab Initio* Doctrine

Initiative 747 proposed amending a law that existed when the sponsors of I-747 filed the petition with the Secretary of State, seeking to amend sections of revised code recently amended by I-722. As noted above, all Respondents can show is that a preliminary injunction enjoined the enforcement of I-722 prior to the filing of I-747, and that subsequently

³ Instead of drafting I-747 to amend RCW 84.55.005 and 84.55.0101, the measure’s sponsors could have instead repealed the two statutes and drafted new sections imposing a “limit factor” of 101%. Had the sponsors chosen that option, article II, section 37 would not have required the sponsors to have set forth in the initiative the text of either statute being repealed. See *ATU*, 142 Wn.2d at 254 (“statutes must be set forth in full only when they are revised or amended, but not when they are fully repealed.”). But the voters here had as much information about the effect of I-747 – *e.g.*, it would reduce the “limit factor” to 101% -- as they would have had the sponsors repealed the two statutes and drafted new sections including a new 101% “limit factor.”

the court found I-722 unconstitutional and entered a judgment permanently enjoining it. Respondents, however, would have this Court conclude I-722 never existed and, more importantly, that I-722 could not be the law that would be set forth in full length for purposes of article II, section 37. This is error, and would wrongly extend the injunction and declarations regarding the enforceability of I-722 to render the statutes as amended by I-722 into non-existence, thereby unduly hamstringing the lawmaking powers of the voters and legislature.

Respondents' theory depends on the notion that a preliminary injunction not only renders a law non-operative, but also renders it non-existent for purposes of future legislative acts.⁴ The source for this position appears to be the trial court's order concluding that I-722 must be *void ab initio*: "Once a law has been found to be invalid, it becomes as inoperative as if it had never been passed." *The Boeing Company v. State*, 74 Wn.2d 82, 88, 442 P.2d 970 (1968). Notably, this theory of "retroactive" invalidity does not support the notion that the preliminary injunction itself prevented a subsequent law (I-747) from setting forth for amendment the enjoined statutes. Judge Roberts's statement was issued long after the constitutionality of I-722 had been adjudicated in *City of*

⁴ Of course, as a logical matter, in accord with CR 65 courts may preliminarily enjoin existing laws from operation. However, a court would have no reason to enter or maintain an injunction as to a non-existent law.

Burien v. Kiga, 144 Wn.2d 819, 828, 31 P.3d 659 (2001). And the Court in *Kiga* held only that I-722 was unconstitutional, not that the statutes as amended by I-722 never existed. Indeed, the Court's opinion never mentions the *void ab initio* doctrine.

Moreover, even assuming arguendo that I-722 was *void ab initio*, and therefore never operative, would not answer the question of whether I-747 complies with article II, section 37. The answer to that question does not depend on whether the amended law is operative or inoperative. The Court in *Boeing* construed the *void ab initio* doctrine as only rendering a challenged law "as inoperative" which "prevents an amendatory law from taking effect". *Boeing*, 74 Wn.2d at 88-89. The application of the *void ab initio* doctrine in *Boeing* only ensured that the "previously existing valid statute continues" as the effective or operative law. *Id.* at 89. The *void ab initio* doctrine was not further construed to mean that the unconstitutional amendatory law never existed at all.⁵ That conclusion would require the

⁵ Respondents cite *Cook v. Bd. of Directors of School Dist. 80*, 266 Ill. 164, 107 N.E. 327 (1914), as authority for the proposition that statutes held unconstitutional *are considered non-existent*. Br. Resp. at 22. *Cook*, however, is factually distinguishable. The amendatory act challenged in *Cook* set forth an act that had been held unconstitutional several years before. In contrast, at the time it was filed with the Secretary of State, I-747 set forth recently-amended laws, presumed constitutional, that were subject to a constitutional challenge but as to which no judgment had been entered as to its constitutionality. In addition, we have not found a single court that has cited *Cook* as authority for the proposition that unconstitutional statutes must be considered non-existent in the 90 plus years since it was filed.

Court to act as if the voters had never voted to enact I-722. But clearly they did.

The proper analysis under article II, section 37 simply requires a court to answer the question of whether an initiative or legislative act sets forth the law being amended. The fact that an initiative or legislative act sets forth a law held inoperative by the courts is of no consequence for the purposes of article II, section 37.

The State has not found any cases in which the *void ab initio* doctrine has been applied in the context urged by Respondents, to attack an initiative measure or legislation under article II, section 37. The trial court erred by applying the doctrine here.

b. Article II, Section 37 Should Be Construed With Article II, Section 1(a) To Require An Initiative Measure To Set Forth The Laws Existing At The Time Of Filing

Rather than misapplying the *void ab initio* doctrine, this Court should interpret article II, section 37 in conjunction with the article II, section 1(a) and the power of the people to enact laws. Article II, § 1(a) mandates: “The first power reserved by the people is the initiative. Every such petition shall include the *full text of the measure* so proposed.” (Emphasis added.) This echoes article II, § 37: “. . . the act revised or the section amended *shall be set forth at full length.*” (Emphasis added.)

Both constitutional provisions mandate that laws proposed or amended to be set forth in full.

The mandate of article II, section 1(a), however, specifically relates to the *petition* filed by the sponsors of I-747. The petition must include the full text of the proposed measure. When read in conjunction with article II, section 37, the petition must include the full text of the statutes being amended as they exist when the petition is filed. An initiative proponent can not comply with these dual provisions by filing a petition that sets forth laws that might come into effect at a later date as a result of pending litigation.

3. The Petition Process Is Not Deliberative And Does Not Allow Amendments

Respondents suggest four options that the sponsors of I-747 could have utilized to comply with article II, section 37. All the suggested options are impractical and would infringe on the constitutional right to initiative. Having shown no violation of the case law addressing article II, section 37, the Court need not address Respondents' suggestions for alternative approaches for complying with article, II, section 37. But if it does address the suggestions, it should conclude that each one is without merit.

Respondents' first suggestion is that the sponsors wait until resolution of the I-722 litigation before filing an initiative petition. Br. Resp. at 26. This makes no sense because lawmakers – whether through an initiative or legislative enactment – are entitled to rely on the presumptive constitutionality of existing laws. Moreover, if sponsors of initiatives were required to wait for the resolution of litigation, then opponents would be able to thwart the initiative process simply by filing a lawsuit concerning the law to be amended when an initiative is filed.

This has serious repercussions to the constitutional initiative process. The financial support and signatures gathered for one initiative petition may not be used for another petition on the same subject. Practically, delay to an initiative campaign caused by litigation interferes with the prospects of passage and support. Even frivolous litigation might delay an initiative for an additional year or more. Whatever marginal “accuracy” would result from this delay is no reason to create a bar to a fundamental constitutional power to enact laws by initiative.

Respondents' second suggestion is similar -- that the sponsors withdraw and resubmit a new initiative on the same subject. Respondents characterize this option as an amendment by the proponent. Br. Resp. at 27. This suggestion is without merit because an updated initiative measure is not an amendment. A new initiative cannot use signatures

already gathered, or financial support obtained for previous versions of the initiative. The essence of this suggestion is therefore no different than the first suggestion for the sponsors to wait, and has the same effect of barring the express constitutional right to adopt laws by initiative.

Respondents' third suggestion is that the sponsors draft ballot measures with alternative provisions to amend certain laws or amend other laws. Here, the hypothetical initiative would have depended on the result of I-722 litigation. Br. Resp. at 27-28. For an example, Respondents cite to ESB 6453 which contained two parts relating to the adoption of a primary election system. Part 1 of ESB 6453 provided for the Louisiana top two primary election system. Part 2 of ESB 6453 provided for the alternative Montana primary election system "should a court strike down the top two primary system." *Washington State Grange v. Locke*, 153 Wn.2d 475, 483, 105 P.3d 9 (2005).

Respondents place undue emphasis on the lack of criticism at such alternative legislative provisions by this Court in *Washington Grange*. This Court in *Washington Grange* did not criticize such alternative legislative provision for a simple reason: part one of the legislation was vetoed by the Governor. *Id.*, at 484. If the purpose of article II, section 37 is to reduce confusion by setting forth the full text of the laws to be amended, then confusion would be multiplied by setting forth not only the

existing laws amended, but also setting forth several pre-existing versions of the laws on the same subject. Indeed, the very arguments that Respondents raise concerning accuracy would inevitably be used to attack an initiative with alternative provisions of the laws to be amended. Again, the better bright line is to follow the plain language of article II, section 37 and allow the initiative to set forth the laws that exist, regardless of pending or intervening judicial challenges to the effect or legality of those existing laws.

Respondents' fourth suggestion is that the sponsors should petition a court to use its equitable powers to modify an initiative. Br. Resp. at 28. Respondents cite *State ex rel. Berry v. Superior Court*, 92 Wash. 16, 159 P. 92 (1916) as authority for the proposition that courts may modify an initiative. *Berry* is not on point. The plaintiffs in *Berry* sought to enjoin the Secretary of State and the Joint Legislative Committee from preparing, printing, and circulating petitions for proposed Initiative Measure No. 22. The objectionable section of I-22 was its preamble which was not merely a declaration of purpose but also wholly argumentative. The *Berry* court found the arguments' "proper place is in the publicity pamphlet to be issued by the secretary of state under the 'facilitating' law, and paid for pro rata by the proponents." *Id.*, at 32. In neither *Berry* nor any other case have our courts suggested that the text of a pending initiative may be

modified by a court. This would present serious constitutional issues, in that the text of a proposed measure as appearing on the petitions (and, presumably, relied on by voters signing those petitions) would not be the same text appearing on the ballot.

Plaintiffs in *Berry* prevailed in enjoining the petition because the preamble of I-22 was not part of the law and therefore “proponents have no constitutional right to propose it as a law . . .”. *Id.*, at 32. The *Berry* court merely enjoined I-22 and suggested that the proponents may submit the proposed act with the expunged preamble. *Berry* does not support that courts may edit or modify proposed initiative measures as Respondents in this case suggest.

4. Respondents’ Reliance On *Hebard v. Bybee* Is Misplaced Because It Construes Statutory Law In The Context Of A Pre-Election Writ Challenging The Form Of A Petition

Respondents cite *Hebard v. Bybee*, 65 Cal. App. 4th 1331, 77 Cal. Rptr.2d 352 (1998), for authority that construing article II, section 37 to invalidate I-747 on hyper-technical grounds would not “unduly frustrate the exercise of the powers of initiative”. Br. Resp. at 29. *Hebard* is not persuasive. *Hebard* involved a pre-election challenge to the form of a petition. The California law examined in *Hebard* required the form of petitions to provide that “Each section of the referendum petition shall

contain (1) the identifying number or title, and (2) the text of the ordinance or the portion of the ordinance that is the subject of the referendum.” *Hebard*, at 1338. The remedy sought in *Hebard* was to invalidate the signatures on the allegedly defective petitions.

This Court dealt with a pre-election challenge in *Schrempp v. Munro*, 116 Wn.2d 929, 809 P.2d 1381 (1991). In *Schrempp*, plaintiffs challenged the form of the signature gathering petitions of Initiative 120, in part because the text of the measure on the back of the petition did not have a legislative title, and also because the petition erroneously stated that it was an initiative to the people instead of an initiative to the legislature. The Court noted that Washington law “provides that the Secretary of State *may* refuse to file a petition if it is not in the form required by the statute. RCW 29.79.150.” *Schrempp*, 116 Wn.2d at 937 (emphasis in original). It further held that the Secretary’s “decision is a discretionary administrative act.” *Id.* The Court concluded that judicial review of the Secretary’s administrative decision is only statutorily authorized where the Secretary refuses to accept petitions. *Id.* at 934 (citing former RCW 29.79.160). Initiative 120, despite its alleged errors, was allowed to proceed, and the voters enacted into law.

Unlike the plaintiffs in *Hebard*, Respondents would not have prevailed in a pre-election writ against the Secretary of State had they

sought to challenge the form of the I-747 petition. Moreover, *Hebard* does not provide any constitutional analysis or rulings that would assist this court, but is limited in its scope to statutory interpretation. Accordingly, Respondents' reliance on *Hebard* is misplaced.

B. The Ballot Title For Initiative 747 Reflects The Contents Of The Measure As Required By Article II, Section 19

Respondents argue that I-747's ballot title was "false and materially misleading about the scope of the proposed measure." Br. Resp. at 32. Respondents either misunderstand or intentionally misstate the effect of I-747 in order to make their arguments. They rely on two inaccurate propositions: (1) that the Constitution prohibits a statewide vote to exceed the 1% limit factor, and (2) that I-747 "imposes a *permanent cap* of 1% on increases in the state school levy." Br. Resp. at 33 (*italics in the original*).

1. The Constitution Does Not Prohibit A Statewide Vote On An Increase In The State School Levy

On this point, Respondents misunderstand the Constitution, the case law, and the effect of I-747. They contend that the ballot title for I-747 "falsely reassured voters that the 1% limit would apply to the state property tax levy '*unless* an increase greater than this limit is approved by the voters at an election.'" Br. Resp. at 35 (*italics in the original*). Respondents overlook the fact that the statement in quotes is not false but

absolutely true. After the enactment of I-747, there is indeed a limit of 1% on increases in the state property tax levy (just as the same limit factor applies to local government property tax increases). This increase could indeed be exceeded with approval of the voters at an election according to the terms of I-747.

Respondents quote RCW 84.55.0101 which authorizes the legislative authorities of *local* taxing districts to seek voter approval for tax increases greater than the limit factor. They are correct that this statute does not expressly include the state. But that merely reflects an obvious distinction between the state and local governments. If the legislature did not authorize local governments to request voter approval for tax increases, they would lack statutory authority to do so.

The legislature does not need to authorize *itself* to call for a vote on increases in the state property tax levy by adding a reference in RCW 84.55.0101. If the legislature chose to refer a tax increase to the voters, it would simply exercise its referendum power under article II, section 1, of the Constitution. It would not need RCW 84.55.0101 or any other source of statutory authority. Initiative 747 does not purport either to extend or to restrict this pre-existing power concerning statewide levies.

It was appropriate to include reference in the ballot title to voter approval for tax increases greater than 1%, because permitting voter-

approved higher levies was an essential feature of I-747. As to local governments, the initiative retained the pre-existing statutory authority while changing the “threshold” requirement to 1% from the 2% limit set the year before in I-722 and the 6% limit established in prior law. As to state government, there was no need to change the law in order to allow statewide votes, and I-747 did not purport to make any change.

2. Initiative 747 Did Not Purport To Require A Referendum On Statewide Property Tax Increases

Respondents next suggest that I-747 purports to require a statewide referendum on all property tax increases and is therefore unconstitutional under *ATU*, 142 Wn.2d 183, 11 P.3d 762 (2000). This suggestion is not well taken.

Initiative 695, the measure under examination in *ATU*, attempted to establish, through the exercise of the initiative power, a requirement for voter approval of all future state and local tax increases, and this attempt was ruled ineffective as an attempted expansion or modification of the referendum power as set forth in the Constitution. By contrast, I-747 does not require voter approval of any category of legislation, and does not purport to expand or modify any constitutional power. Initiative 747 simply changes the statutory limitation on property tax increases to 1% per year, retaining previous statutory language permitting greater increases

with voter approval. Nothing in the text of I-747 supports the notion that it subjects increases in the state property tax levy that exceed the limit factor to an unconstitutional vote of the people. The measure merely recognizes the legislature's pre-existing authority to refer a tax increase to the people at the legislature's discretion.⁶

3. Initiative 747 Does Not “Permanently” Cap Increases In The State Property Tax Levy; The Limits Set Forth In The Measure Are Always Subject To Amendment Or Repeal

Respondents inaccurately characterize I-747 as imposing a “permanent cap” on the state property tax at 1%, which they describe as “below the rate of inflation.”⁷ Initiative 747, however, is no more “permanent” than the previously-enacted 2% and 6% limitations on increases in property tax levies. If an annual limit of 1% on the growth of property tax levies leaves state and/or local governments with insufficient funds to provide essential services, or with insufficient funds to provide the services the voters desire, the voters or the legislature may amend I-747 to change the limit factor or to repeal it. Indeed, the voters could

⁶ Moreover, the role of article II, section 19 is to reflect the subject of a bill in the title. Article II, section 19 does not address other substantive concerns regarding whether the bill's requirement of a vote is unconstitutional. Those concerns are best examined independent of an article II, section 19 analysis.

⁷ Whether the cap is above or below the rate of inflation is of no significance to the analysis in this case. The constitutional authority of the legislature to set a cap on levy increases does not relate in any way to the rate of inflation. By the same token, the Court should ignore Respondents' arguments that the limitations on levy increases will have dire effects on local government services. These are policy arguments which should be directed to the legislature and to the voters, not the courts.

also circulate and enact an initiative modifying the limit factor either up or down, just as they enacted I-747 itself. Thus, there is nothing “permanent” about the limits enacted in the measure.

Respondents have also invited the courts to invalidate I-747 based on “bad motives” of the sponsors as expressed in the petitions circulated for signatures to qualify I-747 for the ballot. Br. Resp. at 46-47. The courts have wisely avoided relying on extrinsic evidence about sponsors’ motives when evaluating the constitutionality of legislation, and there is no reason to address that thorny subject in this case. The constitutionality of the ballot title for I-747 should depend on whether the language of the title accurately reflects the language of the measure, not what the motives of sponsors or supporters might have been.

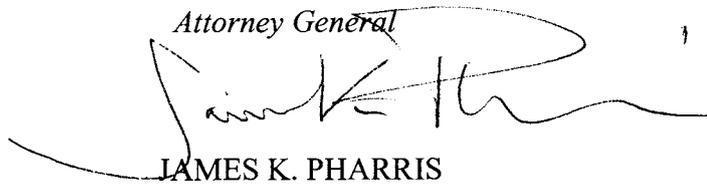
The ballot title for I-747 accurately summarizes what the measure contained. Voters were not misled or misinformed about the scope of the measure, and, as is always true, could read the text of the measure, read the statements in the voters’ pamphlet, or listen to the public debate to learn precisely what it would do. The title to I-747 meets the “subject in title” requirements of article II, section 19 of the Constitution.

II. CONCLUSION

For the reasons expressed in the Appellants' Brief and in this Reply Brief, the superior court order should be reversed and the Respondents' constitutional challenges to I-747 should be dismissed.

RESPECTFULLY SUBMITTED this 5th day of January, 2007.

ROB MCKENNA
Attorney General



JAMES K. PHARRIS
Deputy Solicitor General
WSBA# 5313

TIMOTHY D. FORD
Deputy Solicitor General
WSBA# 29254
PO Box 40100
Olympia, WA 98504-0100
(360) 664-3027

CAMERON G. COMFORT
Sr. Assistant Attorney General
WSBA #15188
PO Box 40123
Olympia, WA 98504-0123
(360) 664-9429