No. 78844-8

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,
v.
WASHINGTON CITIZENS ACTION, a Washington Non-Profit Corporation; WELFARE RIGHTS ORGANIZING COALITION, a Washington Non-Profit Corporation; 1000 FRIENDS OF WASHINGTON, a Washington Non-Profit Corporation; and WHITMAN COUNTY,

Respondents.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

I. STATEMENT OF ISSUES.....2

A. Did the Superior Court correctly find that Initiative Measure 747 (I-747) violated Article II, Section 37 of the State Constitution because the text of I-747 substantially misled voters about the existing law to be amended and the change in law being proposed?.....2

B. Alternatively, does I-747 violate Article II, Section 19 of the State Constitution because its ballot title falsely assured voters that the new 1% limitation imposed on the State School Levy could be exceeded through a vote of the people, when in fact no provision for a statewide vote exists and any such provision would be unconstitutional?..2

II. STATEMENT OF THE CASE.....2

A. Procedural History.....2

B. Background on Initiative 747.....4

III. SUMMARY OF ARGUMENT.....8

IV. ARGUMENT.....11

A. I-747 violated Article II, Section 37 by misleading voters about the existing limit factors to be amended (106%) and the proposed reduction in such limit factors (5%).....11

1. Article II, Section 37 required voters to be informed of (1) the existing limit factor proposed to be amended, and (2) how the law would be changed.....12

2. By misstating the existing limit factor and how it would be amended, I-747 made the proposal ambiguous and the election an unreliable measure of voter intent.....15

a. The constitutional infirmity cannot be remedied by the fact that *some* voters may have understood the error.....16

b. The error was material to voters.....17

3. The purpose of Article II, Section 37 is to protect and inform the lawmakers, which can only be accomplished by judging compliance on the date of the election.....18

4. Permanent Offense's purported reliance on I-722 cannot overcome I-747's Constitutional defect....19

a. The interest of initiative sponsors is subordinate to the Constitution's protection of voters and the legislative process.....20

b. To consider I-722 valid would undermine the policies of Art. II, § 37.....21

c. The initiative drafters did not reasonably rely upon the constitutionality of I-722....24

d. I-747 was not "fixed" as of the date of filing.....26

5. Requiring accuracy in an initiative promotes the initiative process and the public interest.....29

B. I-747 violated Article II, Section 19 because it's ballot title was false and materially misleading about the scope of the proposed measure.....32

1. Article II, Section 19 prohibits ballot titles that are false or inaccurate, or that fail to inform voters about the scope of the measure.....33

2. I-747's ballot title was unconstitutionally false and inaccurate in promising that the new 1% limitation could be overcome by a vote of the people.....35

a. There exists no provision allowing voters to approve increases to the state property tax levy.....36

b. Any statute purporting to adopt a state tax limitation that can be overcome by voter approval would be unconstitutional under *ATU*.....37

3. The ballot title's inaccuracy concealed I-747's most significant fiscal impact: permanently capping the state property tax at below the rate of inflation....42

4. Voters have the right to rely upon explicit and unambiguous statements in a ballot title without conducting an inquiry into their accuracy.....43

5. Extrinsic evidence proves that the right to vote on future property tax increases was not merely a detail, but was the central promise of I-747.....46

V. CONCLUSION.....48

TABLE OF AUTHORITIES

Cases

Amalgamated Transit Union ("ATU") v. Washington,
142 Wn.2d 183, 198, 216; 11 P.3d. 762, 776, 786 (2000).....passim

Berry v. Superior Court,
92 Wash. 16, 26-27, 159 P. 92 (1916).....20, 21, 28

Boeing v. State,
74 Wn.2d 82, 88, 442 P.2d 970 (1968).....21

Brower v. State,
137 Wn.2d 44, 56, 969 P.2d 42 (1998).....39

Burien v. Kiga,
144 Wn.2d 819, 827, 31 P.3d 659, 664 (2001).....5, 6, 15, 19, 28

Citizens Against Tolls ["CAT"] v. Murphy,
151 Wn.2d 226, 249, 88 P.3rd 375 (2004).....45

City of Helena v. Omholt,
155 Mont. 212, 219-220, 468 P.2d 764 (1970).....35

Cook v. School Dist. 80,
266 Ill. 164, 107 N.E. 327 (1914).....22

Coppernoll v. Reed,
155 Wn.2d 290, 297, 119 P.3d 318 (2005).....19

Flanders v. Morris,
88 Wn.2d 183, 189, 558 P.2d 769 (1977).....14

Fray v. Spokane County,
85 Wn.App. 150, 931 P.2d 918 (1997).....44, 45

Heberd v. Bybee,
65 Cal.App.4th 1331, 77 Cal. Rptr.2d 352 (1998) 29

Harbor v. Deukmejian,
43 Cal.3rd 1078, 1096, 742 P.2d 1290 (1987).....34

In re recall of West,
156 Wn.2d 244, 126 P.3d 798 (2006).....28

Larson v. Seattle Popular Monorail Authority,
156 Wn.2d 752, 759, 131 P.3d 892 (2006).....38

Lemon v. Kurtzman,
411 U.S. 192, 93 S. Ct. 1463, 36 L.Ed. 151 (1973).....22, 23

Ortblad v. State,
85 Wn.2d 109, 111, 530 P.2d 635 (1975).....2

Pierce County v. State,
150 Wn.2d 422, 78 P.3rd 640 (2003).....43, 44, 45

Spokane Grain & Fuel Co. v. Lyttaker,
59 Wn. 76, 82, 109 P. 316 (1910).....13, 14

State v. Thorne,
129 Wn.2d 736, 753, 921 P.2d 514 (1996).....13

VA v. US Natl. Bank,
191 Ore. 203, 229 P.2d 276 (1951).....35

Wash. Ass'n of Neighborhood Stores v. State,
149 Wn.2d 359, 373, 70 P.3d 920 (2003).....13

Washington Education Ass'n v. State,
97 Wn.2d 899, 903, 652 P.2d 1347 (1982).....14

Washington Education Association v. Washington,
93 Wn.2d 37, 41, 604 P.2d 950 (1980).....12, 14

Washington Farm Bureau Federation v. Gregoire,
Wa. Sup. Ct. No. 78637-2.....39, 40, 41, 42

Wash. Fed'n of State Employees v. State,

127 Wash.2d at 544, 553-54, 901 P.2d 1028 (1995).....16, 33

Washington Grange v. Locke,
153 Wn.2d 475, 483, 105 P.3d 9, 11 (2005).....28, 31

Statutes

I.M. No. 747, 57th Leg, Reg. Sess. 1 (Wash 2002).....46

I.M. No. 747, 57th Leg. Reg. Sess. 1, §§ 2, 3 (Wash 2002).....4

RCW 29A.....21

RCW 29A.72.050.....44

RCW 29A.72.060.....47

RCW 29A.72.090.....47

RCW 84.52.065.....42

RCW 84.55.....8, 36, 37, 40

RCW 84.55.005.....4, 14, 19

RCW 84.55.005(2).....4

RCW 84.55.005(2)(a).....5

RCW 84.55.010.....4, 46

RCW 84.55.0101.....4, 14, 36

RCW 84.55.050.....18, 36, 37, 42, 46

RCW 84.55.050(1).....37

RCW 84.55.050(4).....18

RCW 85.55.005.....43

RCW 85.55.010.....43

Constitutional Provisions

Wa. Const. Art. II, § 1(b).....38

Wa. Const. Art. II, § 19.....passim

Wa. Const. art. II, § 37 .....passim

I. STATEMENT OF ISSUES

A. Did the Superior Court correctly find that Initiative Measure 747 (I-747) violated Article II, Section 37 of the State Constitution because the text of I-747 substantially misled voters about the existing law to be amended and the change in law being proposed?

B. Alternatively, does I-747 violate Article II, Section 19 of the State Constitution because its ballot title falsely assured voters that the new 1% limitation imposed on the State School Levy could be exceeded through a vote of the people, when in fact no provision for a statewide vote exists and any such provision would be unconstitutional?

II. STATEMENT OF THE CASE

A. Procedural History

The State of Washington and the Director of the State Department of Revenue (collectively the "State") seek to overturn an order issued by King County Superior Court declaring Initiative Measure 747 ("I-747") unconstitutional.[1] The challenge to I-747 was brought by Washington Community Action Network (formerly Washington Citizen Action), the

[1] The trial court's order on cross-motions for judgment on the pleadings was issued June 13, 2006. It is attached as Appendix B to the Brief of Appellants. Because both parties agreed that there existed no factual issues that would preclude a judgment on the pleadings, the trial court properly considered extrinsic evidence to better understand the CR(12) motion without converting it to a motion for summary judgment. *Ortblad v. State*, 85 Wn.2d 109, 111, 530 P.2d 635 (1975).

Welfare Rights Organizing Coalition, Futurewise,[2] and Whitman County (collectively "WCA").

The trial court's order held that I-747 violated art. II, § 37 of the Washington State Constitution, which requires amendatory legislation to set forth the sections being amended at full length. CP 206-208.[3] WCA requests that the Court affirm the trial court, or in the alternative, to hold that I-747 violates the subject-in-title requirement of art. II, § 19.

Initiative 747's statement of existing law and its assigned ballot title were each *factually inaccurate* and *materially misleading* and each thereby misrepresented the measure as being much more moderate than its actual legal impact. Due to a drafting error that the initiative proponents refused to cure, the text of I-747 understated *five fold* its actual reduction of property tax limits. Meanwhile, I-747's ballot title *falsely promised* that the new limits could be overcome by a vote of the people, concealing that in fact the new limits would *permanently cap* increases to the State School Levy, the state property tax devoted to supporting our public schools. I-747 thus violated art. II, §§ 19 and 37 of the State Constitution, which are

[2] Since the filing of this case, 1000 Friends of Washington has changed its name to Futurewise.

[3] Having found I-747 unconstitutional under § 37, the Superior Court chose not to address WCA's other argument: that I-747 violated the subject-in title requirement of Article II, Section 19 of the State Constitution. CP at 200-08.

designed to protect the integrity of the lawmaking process by preventing precisely this type of voter deception.

B. Background on Initiative 747

Proposed by Tim Eyman and his organization Permanent Offense (collectively "Permanent Offense"), I-747 was approved by Washington voters on November 6, 2001 and codified at RCW 84.55.005 and 84.55.0101.[4]

I-747 amended Referendum 47 ("R-47"), enacted by voters in 1997, which had set limits on the amount a taxing district could raise property tax levies in any given year. It did this by applying a "limit factor," as defined by RCW 84.55.005(2), to a complex formula set forth in RCW 84.55.010. Under R-47, all taxing districts --including the State-- were allowed to increase their levy by the rate of inflation. RCW 84.55.005(2).[5] Certain districts other than the State could use a higher "limit factor" up to 106% in certain circumstances.[6]

Section 2 of I-747 purported to amend R-47 (RCW 84.55.005) by lowering the highest "limit factor" available to taxing districts from 102%

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[4] I.M. No. 747, 57th Leg. Reg. Sess. 1, §§ 2, 3 (Wash 2002).

[5] Numerous intricacies of the property tax system are not encompassed by the general descriptions used by both Appellants and Respondents in this case, including the complex formulas used to establish levy amounts. Such details are not material to the arguments at issue in this case.

to 101%. Anyone reading the measure saw a proposal for a modest one percentage point reduction. In reality, the maximum limit factor was at all times 106%. The legal effect of I-747 was to reduce this limit factor by five percentage points to 101%.

The error in the text of I-747 (showing the existing limit factor as 102% when it was actually 106%) can be explained – but not excused -- by the history of Permanent Offense's previous initiatives. The chronology begins in 1999, when Permanent Offense ran Initiative Measure 695 ("I-695"), the "30 dollar car tab" initiative. I-695 was challenged immediately after passage. Both the trial court and the Supreme Court declared the measure unconstitutional in part because it violated the "single subject" rule of art. II, § 19 of the State Constitution. *Amalgamated Transit Union ("ATU") v. Washington,* 142 Wn.2d 183, 198, 216; 11 P.3d. 762, 776, 786 (2000).

Despite I-695's fate, the next year Permanent Offense proposed I-722, which made the *same error*[7] of including two separate subjects in a single initiative. *Burien v. Kiga,* 144 Wn.2d 819, 827, 31 P.3d 659, 664

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[6] *See* RCW 84.55.005(2)(a) (districts with a population under 10,000); 84.55.0101(districts adopting a legislative finding of substantial need).

[7] This was the risk of running a "permanent offense" of annual initiatives. Permanent Offense chose not to reflect on the lessons of one initiative before moving onto the next, and as a result, I-722 suffered from the same constitutional error as I-695. *Kiga,* 144 Wn.2d at 826-27.

(2001). One of I-722's multiple subjects was to reduce the R-47 limit factors from 106% to 102%.[8]

After the November 2000 election, I-722 was promptly challenged in Thurston County Superior Court, and on November 30, 2000, that court entered a preliminary injunction against enforcement or implementation of I-722. *Kiga,* 44 Wn.2d at 823. Never lifted, this injunction became permanent when the Superior Court granted summary judgment declaring I-722 to be unconstitutional on February 23, 2001. *Id.* On September 20, 2001, the Supreme Court affirmed the trial court's decision to permanently enjoin I-722, reasoning, "Because we cannot know if either subject of I-722 would have garnered popular support standing alone, we must declare the entire initiative void." *Kiga,* 44 Wn.2d at 828.

When Permanent Offense drafted I-747 as if I-722 were existing law, *it acted directly contrary to the trial court's preliminary injunction against implementation of I-722.* Permanent Offense never sought interlocutory appeal to challenge the trial court's preliminary or permanent injunctions. *Kiga,* 44 Wn.2d at 824. Nor did it participate in appealing the trial court's decision. *Id.*

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[8] I-722 also required refunds of various 1999 tax increases and monetary charges. *Kiga,* 144 Wn.2d at 823.

Even after the Supreme Court affirmed the trial court's judgment invalidating I-722, Permanent Offense took no steps to remedy the error in the text of I-747. It allowed the voters to be presented with a measure to reduce the limit factor from 102% to 101%, even though the 102% limit factor was never law.

Permanent Offense had plenty of time and numerous opportunities to remedy the error in its initiative, thereby ensuring that its measure did not mislead voters and could survive constitutional scrutiny. Instead, it allowed, if not intended, for the voters to be misled into believing that I-747 was much more moderate than it actually was.

Also deceptive to the voters was the fact that the ballot title of I-747 stated:

> Initiative 747 concerns limiting property tax increases. This measure would require state and local governments to limit property tax levy increases to 1% per year, *unless an increase greater than this limit is approved by the voters at an election.*

I-747 Ballot Title, CP 113 (emphasis added). The title's assurances, which had the effect of minimizing the importance of the limit factor change, were in fact false. This Court's *ATU* decision had already held that such voter approval mechanisms are unconstitutional. Thus, the voters were misled both as to the magnitude and legal significance of the proposed

reduction to the R-47 limit factors. Either misrepresentation, standing alone, should be held to invalidate the measure.

III. SUMMARY OF ARGUMENT

The factually inaccurate and materially misleading text and ballot title of I-747 cannot withstand scrutiny under art. II, §§ 19 and 37. These provisions were enacted to protect lawmakers and the legislative process from confusion, fraud and ignorance. Article II, § 37, requiring amendatory acts to fully set forth the sections being amended, insures that lawmakers know the existing state of the law and how it is affected by a proposed amendment. Section 19 requires an initiative's subject to be expressed in its ballot title, so voters, as lawmakers, may rely upon the title when casting their ballots.

The sole legal impact of I-747 was to amend the "limit factors" in RCW Chapter 84.55 from 106% to 101%, thereby reducing the cap on annual property tax levy increases. The spirit and the letter of § 37 required I-747 to "fully set forth" the existing limit factors being amended (106%) and the proposed limit factors (101%). Instead, due to a drafting error, I-747's statement of existing law was inaccurate, showing the existing limit factors as 102% and a proposed reduction of one percent.

There is no question that this error was *material* and *deceptive* to voters, and therefore directly implicated art. II, § 37. Far from being a technicality, as the State suggests, the error went to the essence of I-747 and understated its impact *five-fold.*

By all accounts, I-747 has led to significant revenue shortfalls and service cutbacks for taxing districts across the State, and these impacts grow more significant with every year. It also has contributed to the State's failure to meet its commitment to fund public education. The magnitude of these impacts can be traced directly to I-747's five percentage point reduction in the R-47 limit factors. A measure imposing only a one percentage point reduction, as I-747 purported to propose, would have caused only a fraction of these impacts.

The State's excuses for Permanent Offense's error, relating to Initiative 722, are constitutionally irrelevant and factually inaccurate. Based upon its defeat in *ATU* and the trial court's preliminary and permanent injunctions against the implementation of I-722, Permanent Offense could not have reasonably relied upon the constitutionality of I-722. Moreover, the State's arguments, if accepted, would fundamentally undermine the purposes of § 37 by elevating the interests of initiative sponsors above the protection of the voters and the legislative process.

Section 37's policies would also become meaningless if, as the State argues, the required statement of existing law could be materially false and misleading as long as it cited the correct sections.

In addition, the ballot title was false and dramatically misrepresented the scope and content of I-747 in violation of the § 19's subject-in-title requirement. The title explicitly promised voters that the newly proposed 1% limit could be overcome by a vote of the people. Thus, voters were promised that passage of I-747 would enact a "right to vote on property tax increases," not a permanent cap on any levy. In fact, I-747 had the legal effect of *permanently capping* increases to the State School Levy -- the largest property tax levy in the state -- at 1% annually, well below the rate of inflation. The promised voter "relief valve" does not and could not exist since it would run afoul of the referendum provision of the State Constitution.

This misrepresentation was certainly material and deceptive. As represented by the ballot title, I-747 would allow the State School Levy to maintain its current value provided voters approved inflation-based increases. Without the right for a statewide vote, however, the State School Levy is guaranteed to lose value on an annual basis and at an

escalating rate[9] as long as inflation remains at historic levels.[10] Moreover, every piece of evidence confirms that voters approved I-747 *because* they wanted a right to vote on property tax increases, and had no intent to permanently cap any levy increases.

Each of these defects deceived voters into believing that I-747 was much more moderate than it actually was. There is no reason to believe that this extreme measure would have garnered majority support without this misrepresentation. Voters were hoodwinked into passing I-747 in violation of our State Constitution.

IV. ARGUMENT

A. I-747 VIOLATED ARTICLE II, SECTION 37 BY MISLEADING VOTERS ABOUT THE EXISTING LIMIT FACTORS TO BE AMENDED (106%) AND THE PROPOSED REDUCTION IN SUCH LIMIT FACTORS (5%)

I-747 is a simple initiative because it operated solely by lowering the previous R-47 "limit factors" from 106% to 101%. CP 207-08. Despite this singular amendatory purpose, I-747 never informed voters of

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[9] The impact of I-747 to State and local taxing district began small but grows more significant with each passing year. Whereas I-747 was projected to reduce state and local taxing district revenue by a mere $74 million in 2002, its first year in effect, its impact is estimated to grow to over $550 million in fiscal year 2007, and to keep growing thereafter. CP 115. Thus, Constitutional scrutiny of I-747 grows more important with each passing year.

[10] Any inflation over 1% erodes the real value of the levies, requiring cuts to government services or alternative sources of revenues. Inflation has averaged 3% during the last 20 years. *See* http://wastats.leg.wa.gov/profile.asp?pid=2, http://www.mrsc.org/subjects/finance/cpiw.aspx ; CP 70.

the existing 106% limit factors. *Id.* Instead, it materially misrepresented the existing limit factors and concealed the magnitude of the proposed reduction.

I-747 falsely showed the existing law as being the 102% limit factors that would have been enacted by Initiative 722, had it ever taken effect. *Id.* Thus, the text of I-747 erroneously showed the proposed amendment to existing law as "((~~102~~)) 101," when it should have shown the changes as "((~~106~~)) 101."

While WCA had the burden to prove I-747 unconstitutional beyond a reasonable doubt, this standard is met because "*argument and research* show that there is no reasonable doubt that the statute violates the constitution." *ATU,* 142 Wn.2d at 205 (emphasis added).

1. Article II, Section 37 required voters to be informed of (1) the existing limit factor proposed to be amended, and (2) how the law would be changed

Article II, § 37 of the state constitution states: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the Section amended shall be set forth at full length."

Section 37 requires the amended sections to be "*fully set forth.*" *Washington Education Association v. Washington,* 93 Wn.2d 37, 41, 604 P.2d 950 (1980) (emphasis added). Given that I-747 was simply an

amendment of the limit factors, it was the existing limit factors above all else that needed to be "fully set forth."

Observing that § 37 applies to initiatives as well as statutes, the Supreme Court held that the purpose of § 37 "is to disclose the effect of the new legislation and its impact on existing laws." *State v. Thorne*, 129 Wn.2d 736, 753, 921 P.2d 514 (1996) (citations omitted); *see also Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wn. 76, 82, 109 P. 316 (1910) (purpose of § 37 is to "protect the members of the Legislature and the public against fraud and deception"). A violation may occur where the act "tend[s] to mislead or deceive." *ATU,* 142 Wn.2d at 251.

The State's argument that art. II, § 37 only guarantees the voters' ability to see the *new* limit factor ignores the second primary purpose of this constitutional provision:

> The *dual purpose* of art. II, Sect. 37 is to disclose the effect of the new legislation *and to show its impact on existing laws. ... Citizens or legislators must not be required to search out amended statutes to know the law on the subject treated in a new statute. Under article II, section 37, a new statute must explicitly show how it relates to statutes it amends.*

Wash. Ass'n of Neighborhood Stores v. State, 149 Wn.2d 359, 373, 70 P.3d 920 (2003) (emphasis added; citations omitted); a*ccord ATU,* 142 Wn.2d at 246 ("*The second purpose of the constitutional provision is the necessity of insuring that the legislators are aware of the nature and*

content of the law which is being amended and the effect of the amendment upon it."); *Flanders v. Morris*, 88 Wn.2d 183, 189, 558 P.2d 769 (1977) (same).[11] Such cases also confirm that § 37's utility was not limited to "territorial days," as the State suggests.

Because the State concedes that I-747 was required to set forth RCW 84.55.0101 and 84.55.005, there is no reason to apply the two-part test of *Washington Education Ass'n v. State,* 97 Wn.2d 899, 903, 652 P.2d 1347 (1982). In *ATU,* the Court explicitly recognized that this two-prong test is used to determine "*if art. II, § 37's requirement had to be followed.*" *ATU,* 142 Wn.2d at 251 (emphasis added).[12]

Where § 37 applies, the Court must go further to determine whether the amended section was "fully set forth" such that the voters understood both the existing law and the proposed changes. *See Washington Education Ass'n.,* 93 Wn.2d at 41.

Art. II, § 37 is to be given reasonable construction. *ATU,* 142 Wn.2d at 245. Thus, the Court must reject the State's argument that as long as the correct statutory section is cited in the legislation, the

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[11] *See also Spokane Grain,* 59 Wash. at 79 (art. II, § 37 "is *both prohibitory and mandatory*. By its terms it inhibits the revision or amendment of any act by mere reference to its title, *and requires that the act revised or sections amended shall be inserted at length.*")(emphasis added).

[12] *Accord ATU,* 142 Wn.2d at 253 (calling it a "test for *when a new enactment must comply* with art. II, § 37.")(emphasis added)

Constitution does not require it to be set forth correctly. Section 37 would certainly not protect lawmakers from "fraud and deception" if the mandatory recitation of existing law could be *materially inaccurate* and *deceptive,* as in this case.

2. By misstating the existing limit factor and how it would be amended, I-747 made the proposal ambiguous and the election an unreliable measure of voter intent

The ultimate harm from I-747's erroneous statement of existing law is that it created an ambiguity in the vote that undermined the integrity of the election. Almost certainly, the "yes vote" on I-747 was comprised of some voters who believed they were agreeing to a five percentage point change in the limit factor and other voters who believed they were enacting a much more moderate one percent reduction in the limit factor.[13]

Like the "two subject" violation that defeated I-722, the ambiguity and deception in I-747 makes it impossible to know whether either proposal "would have garnered popular support standing alone." *Kiga,* 144 Wn.2d at 828. This is the ultimate prejudice to the initiative process.

[13] Reading I-747, a voter saw a relatively moderate proposal for a one percent reduction in the limit factor. While few voters probably understood the intricacies of our tax system, most would consider a proposal for a one percent change to be a moderate proposal.

a. The constitutional infirmity cannot be remedied by the fact that *some* voters may have understood the error

The State argues that "voters in 2001 were not misled as to the expected impact of enacting I-747" because they knew that the existing limit factor was 106%. But at most the State can argue that *some voters* knew these facts.

The Supreme Court has noted that many voters *do no research whatsoever* before casting their votes. *ATU,* 142 Wn.2d at 217; *Wash. Fed'n of State Employees v. State*, 127 Wash.2d at 544, 553-54, 901 P.2d 1028 (1995). Many voters do not even read the voters pamphlet so "notice of the contents of an initiative provided by the voters pamphlet may not serve the notice purpose in Const. art. 2, § 19." *Wash. Fed'n.,* 127 Wn.2d at 554. The State can hardly argue that all voters researched the existing limit factor before casting their ballots.

Moreover, depending upon which part of the voters pamphlet was read, different voters were led to different conclusions about I-747. Voters reading pages 15 of the voters' pamphlet were shown the change in limit factor as "one hundred ((~~two~~)) <u>one</u>". CP 166. The voters' pamphlet explained that "*In the text any language in double parentheses with a line through it is existing state law and will be taken out of the law if this*

measure is approved by voters." CP 162 (emphasis added). Of the voters reading those pages, nobody can say how many also read the Attorney General's analysis on pages 4-5 explaining that I-722 had been declared unconstitutional. CP 163-64.

Section 37 entitles lawmakers to adequate information within the text of the initiative itself. The fact that *some* voters – but not all – may have learned of the error in the legislation through alternative means cannot cure this constitutional defect.

b. The error was material to voters

I-747's failure to correctly state the existing limit factor and how it would be changed does not merely violate a "hypertechnical standard," as Appellants argue. Under the State's theory of the case, Permanent Offense promoted I-747 for the sole purpose of reducing the limit factor one additional percentage point, proving that each percentage point change must be significant. Thus, the discrepancy between a five percent change and a one percent change must be held to be material.

The magnitude of the change in limit factors is material to voters because it significantly affects taxing district revenues and their ability to provide government services.[14] For example, the State Department of

[14] "Currently, 12.5 percent of the state general fund is derived from property taxes. For cities, the relative share is 20 percent and for counties it is 32 percent. Special districts

Revenue estimated that in calendar year 2007, I-747 would result in a 21% loss of revenue for Hospital Districts and 16% loss for Fire Districts.[15] CP 116-117. A one percent reduction in the limit factor would have only a fraction of these impacts.[16]

3. The purpose of Article II, Section 37 is to protect and inform the lawmakers, which can only be accomplished by judging compliance on the date of the election

The State argues that I-747 satisfies art. II, § 37 because *at the time it was drafted*, Permanent Offense could not be expected to "correctly guess" that I-722 would be declared void. The State's argument is legally and factually flawed.

This Court's opinions on § 37, cited above, leave no question that the constitutional mandates and policies of § 37 protect the legislative

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are typically more dependent on property taxes. In some cases, such as library districts and fire districts, the only revenue source for the district is property tax." CP 117.

[15] While a local taxing districts may obtain additional revenue through placing a property tax measure on the ballot, in what is known as a "lid lift," pursuant to RCW 84.55.050(4), such increases cannot permanently recapture the losses of levy value due to inflation. RCW 84.55.050. Moreover, "[t]he administrative costs of the election and difficulty in mounting an effective campaign will work against routine appeals for increases in the levy lid." *CP 90.*

[16] These impacts grow more significant with each passing year as property tax levies are eroded by inflation. Moody's Investment Service described I-747 as creating "*a growing structural imbalance* between the costs and revenues of local governments." *Moody's I-747 Report,* CP 118-121 (emphasis added). Snohomish County's Finance Department similarly concluded, "The long-term impacts of this initiative on the tax rates and funding for government entities is substantial because of the *cumulative compounding impacts of any change in rates. ... For the General Fund, this relative reduction in future revenue would mean fundamental reductions in many programs with large impacts on criminal justice expenditures... Similar issues exist for other governmental entities including libraries, hospitals, fire districts, cities and towns, and the State for its school funding.* CP 128-130.

process, including citizens acting in their legislative capacity. This protection would become meaningless if the Court applied § 37 at some preliminary drafting stage controlled by the proponent, as the State suggests.

The only existing law that matters to the § 37 analysis is the law in effect when voters were presented with I-747. As the voters went to the polls in 2001, the Supreme Court had affirmed the trial court's ruling that I-722 was unconstitutional and it was beyond question that I-747 did not state the existing limit factors being amended (106%) or how it proposed to amend them.[17]

4. Permanent Offense's purported reliance on I-722 cannot overcome I-747's Constitutional defect

The Court should reject the State's many arguments attempting to resurrect I-722 for the purpose of § 37 analysis. The mere passage of I-722 is irrelevant to the constitutionality of I-722 and did not in this circumstance allow reliance upon it. This Court has a "longstanding rule" of jurisprudence "to refrain from inquiring into the validity of a proposed law, including an initiative or referendum, before it has been enacted." *Coppernoll v. Reed*, 155 Wn.2d 290, 297, 119 P.3d 318 (2005). The Court

[17] *See Kiga,* 144 Wn.2d 819. The Revised Code of Washington contains the following Reviser's note for RCW 84.55.005 and 84.55.0101: "2002 c 1 (Initiative measure No.

has reserved the right (and responsibility) of assessing the Constitutionality of a measure *after* it has been enacted. Here, I-722 was promptly enjoined after being enacted and this injunction was never lifted. There was never a basis for reliance upon that unconstitutional law.

a. The interest of initiative sponsors is subordinate to the Constitution's protection of voters and the legislative process

The State contends that initiative proponents' best efforts at drafting somehow immunize I-747 from § 37 scrutiny.[18] But any interest of initiative sponsors is subordinate to the Constitution's protection of voters and the legislative process. Indeed, the Supreme Court has held that an initiative sponsor "is not, under this system of direct legislation, a legislator. He is merely given a license or privilege to propose and file a proposed measure. This is a preliminary step in the process of legislating. ... *His act in initiating a measure is but a voluntary one, and is permitted and defined, limited and circumscribed, by the Constitution* and the laws passed in obedience to and compliance with the Constitution." *Berry v. Superior Court,* 92 Wash. 16, 26-27, 159 P. 92 (1916) (emphasis added).

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747) amended the 2001 c 2 (Initiative Measure No. 722) version, which was found unconstitutional in its entirety."

[18] They argue that I-747 complied with art. II, § 37 because I-747 properly set forth the most recent language which was being amended, insofar as that could be determined when I-747 was drafted and circulated. Appellants' Brief at 3.

Moreover, proposing an initiative is not a "protected legislative act" and "[t]here is no sanctity conferred upon the proposal of an intended law to be initiated and voted upon by the people." *Id.* In the trial court, the State acknowledged that the drafting dilemmas faced by Permanent Offense stem from RCW Chapter 29A. CP 6. Such dilemma, should they exist, should be taken up with the Legislature,[19] and do not rise to a constitutional magnitude.

b. To consider I-722 valid would undermine the policies of Art. II, § 37

The State argues that the reliance interests of Permanent Offense and petition signers should cause this Court to consider I-722 to be valid in evaluating § 37 compliance. This argument is wholly without merit.

In conducting its mandatory analysis under § 37, the trial court was required to determine whether the existing law was "fully set forth." The 102% limit factor shown in I-747 simply was not the existing law, and in so holding the trial court did not need to rely upon *Boeing v. State,* 74 Wn.2d 82, 88, 442 P.2d 970 (1968),[20] which the State seeks to distinguish.

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[19] The Legislature could adopt a process, judicial or otherwise, for amending an initiative after it has been filed. *See Berry,* 92 Wash. At 35 (initiative may be amended before its placement on ballot).

[20] The trial court cited *Boeing* for the proposition that "an invalid statute is a nullity" and that "[i]t is as inoperative as if it had never been passed." *Accord* 16 Am.Jur.2d 2D *Constitutional Law Sec. 203* (1998) ("An unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed.").

Nevertheless, in the only case on point we have identified, the Court held that in applying the constitutional requirement that amended sections be fully set forth, statutes previously held unconstitutional *are considered nonexistent.* *Cook v. School Dist. 80,* 266 Ill. 164, 107 N.E. 327 (1914). The State has pointed to no cases where an unconstitutional law was considered valid in a later constitutional analysis, since such an artifice would turn the constitutional analysis into a farce.

In analogizing the question as one of "retroactive invalidity," the State seeks to have a mandatory constitutional analysis succumb to a discretionary equitable doctrine.[21] Whether or not there is a "set rule of absolute retroactive invalidity," there *are* set rules for applying our State Constitution. Section 37's fundamental policies of protecting voters and the legislative process cannot be overcome by a reliance claim of private individuals.

The facts of *Lemon v. Kurtzman,* 411 U.S. 192, 93 S. Ct. 1463, 36 L.Ed. 151 (1973), relied upon by the State, merely demonstrate the inapplicability of this doctrine here. In *Lemon* the act at issue had been in effect for three years before it was declared to be unconstitutional. The appellants explicitly abandoned their request for injunctive relief against

the act's implementation and, after they lost their case, they did not seek interlocatory relief pending appeal which would have mitigated any unreasonable reliance upon the decision. *Lemon,* 411 U.S. at 196. Applying equitable principals, the Court held that the State needed to pay for the services that were provided to it in reasonable reliance on the validity of the statute, and which the State accepted without objection.

Here, unlike in *Lemon*, I-722 was *immediately* enjoined before it ever took effect and this injunction was *never* lifted. This is the purpose of the trial court's preliminary injunction – to make sure that neither the State nor Permanent Offense relied upon the constitutionality of I-722. CP 80-87. Moreover, after the Superior Court issued its summary judgment order, neither the State nor Permanent Offense sought interlocatory relief pending appeal. Therefore, there was no justifiable reliance and, indeed, there was no period of validity to be expunged through *retroactive* invalidity.

Ultimately, the Court need not decide whether and how the retroactive invalidity doctrine applies in this context because the State cannot point to any reasonable reliance on the part of Permanent Offense or those who signed the petition.

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[21] *See Lemon v. Kurtzman,* 411 U.S. 192, 197-199, 93 S. Ct. 1463, 36 L.Ed. 151 (1973)(problem of retroactive invalidity involves "the appropriate scope of federal

c. The initiative drafters did not reasonably rely upon the constitutionality of I-722

The facts of this case cannot support the contention that Permanent Offense reasonably relied upon the constitutionality of I-722. To the contrary, the facts show that the proponents of I-747 acted recklessly and disregarded the interests of the voters and the lawmaking process.

On November 30, 2001, Judge Pomeroy entered an Order Granting Preliminary Injunction which enjoined the parties from "implementing or enforcing Initiative 722." CP 80-87. Permanent Offense was a party to the lawsuit and was explicitly made subject to the injunction.[22] *Id.* This was the purpose of the preliminary injunction – to prevent the State, or Permanent Offense, from relying upon the constitutionality of I-722. Yet, about five weeks *later*, Permanent Offense submitted I-747 to the Secretary of State.[23] It was drafted as if I-722 had been codified and was effective. In so doing, the sponsors of I-747 violated the spirit if not the letter of the preliminary injunction order. *See American Heritage Dictionary (*defining "implement" as "to put into practical effect; carry out").

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equitable remedies.").

[22] James Johnson, now Justice on the Supreme Court, represented Permanent Offense in the proceeding and signed the preliminary injunction order on behalf of Permanent Offense. CP 84.

[23] Appellants' Brief at 8.

There is no question that Permanent Offense and signers of I-747 understood that I-722 might be unconstitutional. The *ATU* case, which Permanent Offense had just lost, left little doubt on this subject. The I-747 petition itself admitted the risk that I-722 was unconstitutional and therefore put signers of I-747 on notice of the potential constitutional violation:

> Last November, I-722 passed overwhelmingly but instead of following the will of the people, politicians instead used taxpayer dollars to sue the taxpayers. Politicians still don't get it. We will defend I-722 in the courts but we also need to defend I-722 in the political arena with this new initiative. *If the courts OK I-722, then "Spirit of 695" I-747 reinforces I-722. If the courts strike down I-722, then "Spirit of 695" I-747 replaces I-722 with an even more stringent property tax limitation.* Politicians must learn that ignoring the taxpayers is not an option anymore.

I-747 Petition, CP 88.[24] (emphasis added). Indeed, Permanent Offense claimed that I-747 cut the limit factor even more than I-722 to penalize local officials for mounting the court challenge to I-722. *See* CP 91.

On February 23, 2001, Judge Pomeroy entered summary judgment stating that "Initiative 722 is hereby declared unconstitutional, null, and void in its entirety" and permanently enjoining its implementation and enforcement. *Summary Judgment Order,* CP 93-111. Certainly at this point I-722 had no presumption of constitutionality and Permanent

Offense knew that I-747 ran afoul of art. II, § 37. This was only shortly after I-747 received its ballot title, CP 112, and before the summer signature gathering season.

It is clear from the Court's many cases that the reliance of petition signers cannot cure a constitutional defect; such reliance is present in *every* initiative. Moreover, here the petition informed the signers of the potential constitutional defect. It may be that WCA's arguments are actually protective of these signers. The petition for I-747 arguably suffered from the same defect as the initiative itself, since it asked for a vote on a one percent reduction in the limit factors. It is not clear that these voters would have wanted their signatures used to qualify a more extreme measure.

d. I-747 was not "fixed" as of the date of filing

Even when I-747's defect was clear, Permanent Offense took no action to correct it. Permanent Offense's proposal was not "fixed," as the State claims, as Permanent Offense had many options to remedy its error.

Perhaps the most prudent course of action would have been for Permanent Offense to wait until the legal status of I-722 had been resolved before again attempting to amend the R-47 limit factor. Indeed, it is hard

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[24] WCA is not certain that both sides of the petition were included in the record, although both sides were submitted with WCA's Reply Brief below. A two-side copy is included

to imagine any proponent seeking to amend the same law in two consecutive years were it not for the likely invalidity of the first attempt.

Alternatively, Permanent Offense could have withdrawn and resubmitted a new initiative showing the 106% limit factor as existing law and indicating that a 5% reduction was being proposed. Contrary to the State's contention that no amendment is possible, Initiative proponents are *freely allowed to amend* their proposals by submitting multiple initiatives on the same subject. WCA proved this to the trial court, showing as an example that in 2006 Permanent Offense submitted 21 proposed initiatives on three subjects, even though it actively attempted to qualify only the final version on each subject. CP 220 *et seq.*[25] The final versions were all filed with the Secretary of State in March or later, indicating that Permanent Offense had plenty of time to resubmit a corrected version of I-747 after the Superior Court had ruled I-722 to be unconstitutional. *Id.* Arguably, the Superior Court's injunction required this.

The State is also wrong that the resubmitted initiative proposal could not have addressed the uncertainty of the pending I-722 lawsuit. Indeed, the State Legislature adopted just such a piece of legislation when

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in the Appendix and is designated CP 88 and CP 88a.

[25] These documents are included in WCA's Supplemental Designation of Clerks Papers and have not been given office CP numbers. CP 220 is the next sequential number available.

it adopted a new state primary system. As this Court noted, "ESB 6453 contained two parts. Part 1 (section 1-57) provided for the Louisiana top two primary. Part 2 (sections 102-193) provided for the alternative Montana primary should a court strike down the top two primary system." *Washington Grange v. Locke,* 153 Wn.2d 475, 483, 105 P.3d 9, 11 (2005). In *Washington Grange,* this Court leveled no criticism at such legislation.

Finally, the Courts at any time could have provided relief to Permanent Offense, and probably on an emergency schedule, had the sponsor chosen to ask. *See In re recall of West,* 156 Wn.2d 244, 126 P.3d 798 (2006) (Supreme Court held special session and entered brief order affirming Superior Court's order on same day to allow recall petition drive to commence). At the very least, Permanent Offense could have asked a court to use its equitable powers to modify the initiative after the Supreme Court declared I-722 to be invalid. *See Berry,* 92 Wash. at 35 (allowing sponsors to modify initiative before its placement on the ballot). By this point, Permanent Offense was savvy at using the court system, having previously obtained counsel in its I-747 campaign and in *Kiga.* Indeed, it might have asked for relief from this Court as part of the *Kiga* case.

5. Requiring accuracy in an initiative promotes the initiative process and the public interest.

Rather than "unduly frustrate[ing] the exercise of the powers of the initiative," § 37 *protects* the integrity of the process by guaranteeing that legislators and citizens know the law they are voting upon.

The California Court of Appeals made this point in *Heberd v. Bybee*, 65 Cal.App.4th 1331, 77 Cal. Rptr.2d 352 (1998). That case involved a referendum drive in which, due to an error of the proponents, a portion of the petitions omitted *four words* in the title of the ordinance being challenged. The Court held that the petitions containing the misstatement neither technically nor substantially complied with the requirements of the California Elections Code. The statute required that the petition contain the identifying *number or title* of the ordinance being challenged, *and the text* of such ordinance.

The proponents pointed out that the petition did not even need to state the title, since it stated the ordinance number, and that it also included the entire ordinance text. Yet, the court held:

> *Although appellants were free to include the number and text of the Ordinance (with no title), this does not mean they were free to include an inaccurate title.* A voter faced with a petition challenging an ordinance identified only by a number is forced to rely upon the text of the measure for a written account of its contents. Here, in contrast, a voter might rely on the inaccurate title printed on the petition.

> *By choosing to include both the number and title of the Ordinance, appellants had a duty to provide them both correctly* to the voters who would rely on the accuracy of the materials presented. *A contrary holding, allowing an inaccurate ordinance title whenever the ordinance number is present, would promote precisely the uncertainty and confusion the statutory requirements are designed to prevent.*

Hebard, 65 Cal.App.4th at 1338-39 (emphasis added). The Court noted that the omission of four words created potential ambiguity and confusion and therefore did not substantially comply with laws designed to reduce such confusion. *Hebard,* 65 Cal.App.4th at 1341. The same is true in this case.

Nor did the presence of the complete ordinance text on the petition cure the error, since "[a]lthough a reader *could* have send the reference (in the incomplete title) to open space, believed there was an ambiguity, and examined the text to resolve the question, it is the responsibility of the petition proponent to present a petition that conforms to the requirements of the Elections Code." *Hebard,* 65 Cal.App.4th at 1342 (emphasis in original). "[V]oters should not be required to resolve material ambiguities or to correct inaccuracies in a referendum petition." *Id.*

Finally, the conclusions of the California Court of Appeals are equally sound when applied to the constitutional provisions at issue in this case:

> Appellants argue that doubts should be resolved in favor of the referendum. Although we recognize the importance of the referendum, we cannot ignore the clear statutes enacted to protect and preserve its exercise. ... *[A]lthough these statutes should be liberally construed to permit the exercise by the electors of this most important privilege, the statutes designed to protect the electors from confusing or misleading information should be enforced so as to guarantee the integrity of the process.*

Hebard, 65 Cal.App.4th at 1343-44 (emphasis added).

The State is also wrong in arguing that the Superior Court's ruling, if affirmed, would cause harm to the Legislative process.[26] Section 37 also protects that lawmaking process. Most importantly, because the Courts give § 37 reasonable construction, *ATU, 142 Wn.2d at 245,* § 37 will not be mechanically applied where its policies are not advanced.

Permanent Offense committed the exact type of fraud that art. II, § 37 was meant to protect against. The centerpiece of existing property tax law since 1971 was the ability of most taxing districts to increase property taxes up to 106% annually. Unaffected by I-722, the limit factors remained 106% throughout the I-747 signature gathering drive and – most critically –at the time of the I-747 vote. I-747's failure to properly set

[26] For example, § 37 would not require that anytime a law is declared unconstitutional, it has a domino effect and invalidates all later acts that referenced it. As long as the lawmaker has full and correct information when acting on the measure, the policies of § 37 are not violated. Similarly, as long as legislation complies with § 37 when the bill passes, there is no Constitutional violation. As discussed, in those rare situations where there is a dilemma, such as when there is a pending lawsuit, the legislature knows how to address it with contingent legislation like that addressed in *Washington Grange v. Locke, 153 Wn.2d at 475.*

forth the law being amended undermined the integrity of the election because it is impossible to know whether a majority of voters would have consented to impacts that were five times greater than the initiative disclosed. I-747 must therefore be held unconstitutional.

B. I-747 VIOLATED ARTICLE II, SECTION 19 BECAUSE ITS BALLOT TITLE WAS FALSE AND MATERIALLY MISLEADING ABOUT THE SCOPE OF THE PROPOSED MEASURE

Article II, § 19 of the Washington State Constitution provides that "no bill shall embrace more than one subject, and that shall be expressed in the title." This Court should find that I-747 violated the subject-in-title requirement because its ballot title was (1) false and misleading; and/or (2) misrepresented the scope of the measure.

Fully half of I-747's ballot title was devoted to explaining that the new limit factor being proposed could be overcome by a vote of the people. CP 112. This promise supported the Campaign's theme that I-747 would merely create a "right to vote on property tax," and all of the evidence suggests that this was the goal of the voters.

This "right to vote" made I-747's 101% limit factors appear much more moderate. This was one of Permanent Offense's main arguments in the 2001 voters pamphlet. Its argument for I-747 stated "1% ought to be enough for any taxing district (*and if it's not, I-747 allows voter approval*

for higher increases)." CP 163-164 (emphasis added). In their rebuttal, they stated "(and remember, voters can OK higher increases)." *Id.*

In truth, however, the Constitution prohibits a statewide vote to exceed the 1% limit factor. Instead, I-747 imposed a *permanent cap* on the State School Levy of 1%, well below the rate of inflation, thereby creating a "*growing structural imbalance*" in the State's largest source of school funding. *See* CP 120. I-747 is unconstitutional because § 19 does not permit the voters to be misled by ballot titles that are false or that misrepresent the scope of the proposed measure.

1. Article II, Section 19 prohibits ballot titles that are false or inaccurate, or that fail to inform voters about the scope of the measure

Courts have recognized the particular importance of the subject-in-title rule in he context of initiatives because voters frequently cast their votes based only on the ballot title and fail to read the text of the measure or the explanatory statement. *See ATU,* 142 Wn.2d at 217; *Wash. Fed'n*, 127 Wash.2d at 553-54.

Washington Courts have held that one of the purposes for the subject-in-title rule is to provide notice to legislators or the public of the contents of a measure. *ATU,* 142 Wn.2d at 217. To comply, the title of an

act must "give notice which would lead to an inquiry into the body of the act or indicate the scope and purpose of the law to an inquiring mind." *Id.*

In *ATU,* the Supreme Court held that I-695 violated the subject-in-title requirement because the ballot title stated that voter approval would be required for "taxes," giving no indication that the measure itself required voter approval for many other types of charges as well. The Court held "Nothing about this ballot title gives any notice [that] would indicate to the voters that the content of the initiative would include voter approval for charges other than taxes or suggest inquiry into the act be made to learn the broad meaning of tax." *ATU,* 142 Wn.2d at 224. From this discrepancy, the Court held "*It follows* that the trial court's holding that I-695 violates the subject-in-title rule of art. II, § 19 must be affirmed." *ATU,* 142 Wn.2d at 226 (emphasis added).

The "subject-in-title" requirement, common to virtually every state constitution, also prohibits inaccurate ballot titles. Sutherland on Statutory Construction, (2d Ed.) volume 1, section 123, page 28, ("A title so general as practically to conceal the subject of the statute, or a *false or delusive*[27] *title, will be treated as not constitutionally framed.*") (emphasis added). *See also Harbor v. Deukmejian,* 43 Cal.3rd 1078, 1096, 742 P.2d 1290 (1987) (*"constitutional provision, by preventing *misleading or inaccurate*

titles, serves the important purpose of ensuring that legislators and the public have reasonable notice of the scope and content of proposed statutes") (emphasis added); *City of Helena v. Omholt,* 155 Mont. 212, 219-220, 468 P.2d 764 (1970) (holding bill with false title violates Constitution, which "prevent[s] both legislators and the public from being misled by *false or deceptive bill titles*"); *VA v. US Natl. Bank,* 191 Ore. 203, 229 P.2d 276 (1951).

2. I-747's ballot title was unconstitutionally false and inaccurate in promising that the new 1% limitation could be overcome by a vote of the people

I-747 should be held unconstitutional because its title was false and misrepresented the scope of the measure. The ballot title 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." I-747 Ballot Title (emphasis added).[28]

The ballot title misrepresented that the new limit factors could be exceeded by a statewide vote, without giving any indication that I-747 measure would permanently cap the State's largest property tax levy. This

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[27] "likely to delude; constituting a delusion" Merriam Websters Collegiate Dict. 10th Ed.
[28] The ballot title must be interpreted by its common meaning. *ATU,* 142 Wn.2d at 226. The conjunctive "unless" clearly indicated an exception to the 1% limit. The word "unless" is a conjunction meaning "except on the condition that; under any other circumstance than." Merriam-Webster Collegiate Dictionary, 10th Ed.

misled the pubic as to the scope of the measure, much like the I-695 ballot title, which was held unconstitutional in *ATU*. Viewed another way, the title misrepresented the scope of the measure by promising a major exception to the new rule, when in fact that exception did not exist. The title thus "fail[ed] to inform of the scope of the measure," misleading voters in direct violation of art. II, § 19. *ATU, 142* Wn.2d. at 217-18.

a. There exists no legislative intent to allow voters to approve increases to the state property tax

This Court need not engage in a lengthy statutory analysis to determine if RCW Chapter 84.55 allows a statewide "levy lid lift" vote, since such a statutory provision would be unconstitutional under its *ATU* decision. However, a brief analysis suggests no legislative intent to allow future statewide votes on property tax increases.

Nothing in RCW Chapter 84.55 suggests the possibility of a statewide "levy lid lift" vote to overcome the R-47 limit factors. To the contrary, RCW 84.55.0101 states: "the legislative authority of a taxing district *other than the state* may provide for a limit factor *under this chapter* of one hundred one percent or less *unless an increase greater than this limit is approved by the voters at an election as provided in RCW 84.55.050.*" RCW 84.55.0101 (emphasis added). By using the term

"under this chapter," this statute recognizes that *Chapter 84.55* does not allow the State is bypass the 1% limit through a statewide vote.

RCW 84.55 recites the Legislature's intent that state property tax relief would be in an "amount [] to be *determined by the legislature* on a yearly basis based on the level of general fund tax revenues." 1995 2nd sp.s. c 13 § 1 (emphasis added). Consistent with this intent, RCW 84.55.050, uses language suggesting of local "levy lid lift" propositions, never once using the words "state," "statewide vote" or "referendum."[29] If the legislature sought to subject future statewide tax increase to a statewide vote for the first time, arguably circumventing the referendum process, it would have made explicit reference to this major policy shift.

b. Any statute purporting to adopt a state tax limitation that can be overcome by voter approval would be unconstitutional under *ATU*

The *ATU* decision is clear that even if they wanted to, neither the legislature nor the people could adopt a measure that subjects statewide

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[29] "Subject to any otherwise applicable statutory dollar rate limitations, regular *property taxes may be levied by or for a taxing district in an amount exceeding the limitations provided by this chapter if such levy is authorized by a proposition* approved by a majority of the voters of the taxing district voting on the *proposition* at a general election held within the district or at a special election within the taxing district called by the district for the purpose of submitting such *proposition* to the voters."
RCW 84.55.050(1) (emphasis added).

tax increases to a vote of the people.[30] In *ATU*, this Court invalidated a provision of I-695 which would have required voter approval of future state tax increases. The Court held that such a provision violates the referendum provisions of the State Constitution. *ATU,* 142 Wn.2d at 241. The Court confirmed that both the people and the legislature may send a measure to the ballot, *but only through the referendum process set forth in article II, section 1(b). Id.* at 240-41

In *Larson v. Seattle Popular Monorail Authority,* 156 Wn.2d 752, 131 P.3d 892 (2006), the Court explained the holding of *ATU,* saying "The people can petition for referendum of legislation that the legislature has passed" or "[a]lternatively the legislature may refer a measure to the people", but a "statutory requirement for voter approval of future tax legislation passed by the legislature" is "not allowed under the state constitution." *Larson,* 156 Wn.2d at 759.

The Constitution does grant the people the power to approve or disapprove legislation, but "the right must be exercised in conformity with the constitutionally mandated procedures" of art. II, § 1(b). *ATU,* 142

[30] The Court in *ATU* made it clear that it was considering whether "the Legislature could ... condition *state* tax measures on a vote of the people." *ATU,* 142 Wn.2d at 239 (emphasis in original).

Wn.2d at 238.[31] This means that the referendum proponents must satisfy the "four percent voter signature requirement *each time* the people petition for a referendum on a piece of legislation the legislature has passed." *ATU,* 142 Wn.2d at 242. The Legislature can also "refer a measure to the people for a statewide vote ... through the referendum process set forth in article II, section 1." *Id.* But the constitution requires that the legislature maintain the "*discretionary* authority to refer measures it passes to the people." *ATU,* 142 Wn.2d at 232. n. 13 (citing *Brower v. State,* 137 Wn.2d 44, 56, 969 P.2d 42 (1998)) (emphasis added). The referendum power accordingly works only on a "particular measure" and cannot be used to "condition[] *all* future *state* measures of a certain class on voter approval." *ATU,* 142 Wn.2d at 242.

In *ATU*, this Court held that I-695 was unconstitutional because it "effectively authorized mandatory referendum elections on all future tax legislation passed by the Legislature." This mandatory referendum election was required even "where the Legislature has not referred the legislation". *ATU,* 142 Wn.2d at 232, 244. I-695 thus created a "presumptive veto" by establishing a mandatory referendum "without

[31] Some of the discussion in this subsection is attributed to the *Amicus Brief* submitted by Hugh Spitzer of Foster Pepper LLC on behalf of the Washington Education Association *et al* in *Washington Farm Bureau Federation v. Gregoire,* Wa. Sup. Ct. No. 78637-2.

regard to whether a particular piece of legislation would engender enough interest or opposition" to force a referendum under those constitutional requirements. *ATU,* 142 Wn.2d at 231-32.

If RCW Chapter 84.55 or I-747 subjected future state property tax increases to voter approval, as the State now argues, it would be just as unconstitutional as I-695's voter approval provision. It would "effectively authorize[] mandatory referendum elections on all future tax legislation passed by the legislature" that increased the state property tax above the limit factor. *ATU,* 142 Wn.2d at 232. This amounts to "conditioning *all* future *state* legislation of a certain class on voter approval" which cannot be done "absent a constitutional amendment." *ATU,* 142 Wn.2d at 242.

Moreover, by reducing the limit factor (expanding the scope of legislation requiring a statewide vote), I-747 would be using the initiative process to expand the people's referendum right. This is impermissible under the State Constitution, since it effectively allows the voters to call referenda without collecting signatures of 4% of the voters, as required by the Constitution. *ATU,* 142 Wn.2d at 232.

Only months ago, the State filed a brief making the same argument as WCA now makes. In *Washington State Farm Bureau Federation*

That *Amicus Brief* contains a more detailed analysis of the origins of the referendum provisions of the State Constitution.

("Farm Bureau Federation") v. Gregoire, Wa. Sup. Ct. No. 78637-2, the State acknowledged that *ATU* prohibits legislation subjecting future state tax increase to voter approval. *Farm Bureau Federation,* State's Opening Brief, at 41-43. In that case, the State argued for the unconstitutionality of the voter approval provision of Initiative 601, noting that "Although the voter approval requirement of [I-601] operates on a narrower class of revenue bills (those requiring revenues in excess of the state expenditure limits), this difference does not appear to be a significant one under the rationale of the Court in *ATU.*" *Id.* at p. 43.

Indeed, the Court in *ATU* clearly distinguished between situations where the legislature had placed a voter-approval requirement on a "particular measure" and "conditioning *all* future *state* measures of a certain class on voter approval." *ATU,* 142 Wn.2d at 242 (underscore emphasis added). The former is permissible, and the latter is not. This is because, if such were permissible, the voters or legislature could enact a series of measures in a piecemeal fashion to completely erode the legislature's constitutional role. *Id.*

In its *Farm Bureau Foundation* brief, the State acknowledged that it had previously "vigorously but unsuccessfully defended" the voter approval provision of I-695 in *ATU,* and that the State sees no justification

for the Court to overrule this prior decision. *Farm Bureau Foundation,* State's Opening Brief at 43-44.

It is impossible to reconcile the State's legal position in *Farm Bureau Foundation* with the position it takes on page 23 of its brief in this case. The legislature simply could not correct the error in I-747's ballot title by "amending a current statute such as RCW 84.55.050, or by enacting new laws authorizing an increase in the state property tax, with ...a public vote," as the State argues. State's Opening Brief, at 23.

Under *ATU,* neither the legislature nor the people could adopt a "levy lid lift" mechanism for the State School Levy.[32] By falsely promising such a "relief valve," I-747's ballot title was false and misleading as to the measure's scope.

3. The ballot title's inaccuracy concealed I-747's most significant fiscal impact: permanently capping the state property tax at below the rate of inflation

The State School Levy is dedicated to supporting our system of common schools. RCW 84.52.065. Prior to the enactment of I-747, growth of this levy was already limited to the rate of inflation.[33] As promised by the ballot title, I-747 would have allowed the State School

[32] Even if *ATU* left open a question about whether 88.84.050 could be applied to a statewide levy (which it does not), I-747's ballot title would not be justified in making an explicit statement that the voters could increase the State School Levy by more than 1%. Such assurances would be false.

Levy to maintain its long term value with the consent of the voters. Without the ability of a statewide "levy lid lift" vote, the Department of Revenue concluded that I-747 erodes the State School Levy with every passing year, at an escalating rate: The State Department of Finance noted that "[i]n 2007, the state school levy would be reduced by about $148 million or eight percent of what it would have grown. This is a result of the growth in the state school levy being reduced from inflation to one percent." CP 116. The false ballot title concealed that there would be any permanent loss of revenue for the primary source of education funding in the State.

4. Voters have the right to rely upon explicit and unambiguous statements in a ballot title without conducting an inquiry into their accuracy

By explicitly representing that the 1% limit could be overcome by voter approval, the I-747 ballot title "did not lead to an inquiry into the body of the Act" and is therefore distinguishable from ballot titles like that in *Pierce County v. State,* 150 Wn.2d 422, 78 P.3rd 640 (2003). Here, like in *ATU,* "nothing about this title ... suggest inquiry into the act be made." *ATU,* 142 Wn.2d at 224.

Exactly half of the ballot title's "concise description" is devoted to stating this exception. Voters have the right to rely upon an explicit

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[33] Former RCW 85.55.005, 010. .

statement in the ballot title on an essential element of the initiative. *See* RCW 29A.72.050 (concise description must be "*true* and impartial description of the measure's essential contents") (emphasis added); *Hebard,* 65 Cal.App.4th at 1338-39 (voters have right to rely upon statements made to them in ballot title).

In *Pierce County*, the challenger claimed that the ballot title for Initiative 776 should have stated that the measure would not repeal the $3.50 license tab application fee charged by agents. But by stating that "certain" taxes and fees would be repealed, the ballot title already gave notice that one needed to review the entire initiative for such details. *Pierce County,* 150 Wn.2d at 427.

If the title of I-747 had said that "certain" taxing districts could overcome the 1% limit with a vote, then the title – like that in *Pierce County*-- would lead the voter to conduct further inquiry. But instead, I-747's title explicitly misrepresented the legal significance of the proposed reduction in limit factors.

Where an act's title explicitly understates its scope, art. II, § 19 is violated. This was the case in *Fray v. Spokane County*, 85 Wn.App. 150, 931 P.2d 918 (1997), challenging a 1992 statute that purported to eliminate certain police officers' right to sue their employer. The Court

held that the title "AN ACT Relating to *making technical corrections* to chapter 35, Laws of 1991 ..." violated art. II, § 19 because the title "suggests ... that the changes are technical corrections .... It does not give fair notice that ...Plan II members no longer have the right to sue their employers..." *Fray,* 85 Wn.App. at 159. Likewise, I-747's ballot title promised a voter approval override and in so doing failed to give fair notice of any permanent cap.

It is no defense that I-747 did not change the law forbidding a statewide vote. Even if the I-747 ballot title could have remained silent on unchanged law,[34] it was not allowed to *falsely state* that existing law provided a major exception to the proposed 1% limit and thereby deceive the voters about the scope of the measure. *Hebard,* 65 Cal.App.4th at 1338-39 (even if petition's recitation of ordinance title was voluntary, it could not be inaccurate).

In any event, unlike in *Pierce County,* an inquiry into the body of I-747 would not have revealed the unavailability of a statewide vote. In fact, I-747 doesn't even contain enough information for a voter to determine how limit factors or lid lift levies work, since it included neither

[34] *Citizens Against Tolls ["CAT"] v. Murphy,* 151 Wn.2d 226, 249, 88 P.3rd 375 (2004)

RCW 84.55.010[35] nor 84.55.050.[36] Ultimately, a voter would need to study the State Constitution and *ATU* to understand that that there could be no statewide "levy lid lift" vote.

5. Extrinsic evidence proves that the right to vote on future property tax increases was not merely a detail, but was the central promise of I-747

Extrinsic evidence supports the likelihood that voters were tricked into voting for a permanent cap on increases to the state property tax levy, when they really just wanted the right to approve increases. *See ATU,* 142 Wn.2d at 224-225 (Court can look to extrinsic evidence such as the voters' pamphlet to confirm the voters' intent.)

The first context in which voters learned of I-747 was through the petition. In a banner headline crossing the length of the petition – four times – the Petition screams I-747's campaign theme: "**THE RIGHT TO VOTE ON PROPERTY TAXES INITIATIVE.**" CP 88, 88a.

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[35] "Except as provided in this chapter, *the levy for a taxing district in any year shall be set so that the regular property taxes payable in the following year shall not exceed the limit factor* multiplied by the amount of regular property taxes lawfully levied for such district in the highest of the three most recent years ..." RCW 84.55.010 (emphasis added)

[36] Once Permanent Offense omitted critical portions of the Act being amended, it was left free to deliberately mislead the voters in the non-operative sections of I-747. For example, Section 1 of I-747 stated that "The Washington state Constitution [Sic] limits property taxes to 1% per year; this measure matches this principal by limiting property tax increases to 1% per year." I.M. No. 747, 57th Leg, Reg. Sess. 1 (Wash 2002). In fact, there is no resemblance between the 1% limit in the Constitution and that adopted by I-747. The Constitution states that aggregate property taxes may not exceed 1% *of fair property value*, which has nothing to do with R-47 limit factors, which limit annual levy increase growth.

In addition to the false ballot title, the petition recites the official Ballot Measure Summary[37] which set forth the new limit factors, including those of the State and assured that "*Taxing districts could levy higher than the limit factor with voter approval.*" *Id.*

The Petition claimed that voters should support I-747 because "...I-747 requires politicians to limit property tax increases to 1% per year unless a higher increase is approved by the voters. This forces politicians to spend existing tax revenues more effectively and to ask the taxpayers permission if they want to raise them more." *Id.* (emphasis added).

The entire campaign was on this "right to vote" theme. For example, when Permanent Offense introduced its initiative on its website, it stated, "The Right to Vote on Property Tax Initiative I-747 ... has a simple subject: *requires politicians to get your permission before increasing your property taxes.*" CP 158 (emphasis added). This claim was echoed in the argument section of the voters pamphlet, quoted above. CP 163-164.

I-747's Explanatory Statement, prepared by the Attorney General and appearing in the voters pamphlet, also falsely assured the voters that every taxing district, including the State, would have a safety valve to overcome the 1% limit factor by a simple majority vote:

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[37] RCW 29A.72.060, 090 requires the summary to be printed on the petition.

> *The measure would change all of the limitation factors on property tax levies to "101%." For taxing districts with populations less than 10,000*, the new limitation factor would be ... *For the state,* the new limitation factor would be the lower of 101% of the previous year's inflation rate. *For other taxing districts*, the limitation factor would be ...
>
> *A taxing district could levy higher amounts with approval of the voters at a general election held in the district or at a special election called for that purpose.* ...

Voters Pamphlet, p. 14, CP 163-164 (emphasis added).

Given the significant financial impact of I-747 to state school spending over the long term, the inability to have a vote to keep up with inflation is not a minor detail. The voters were sold a "Right to Vote on Property Tax Increases." This was echoed by the petition drive, the campaign, the voters' pamphlet and the officially-prepared summaries and descriptions. But the Constitution does not allow this falsehood to be perpetuated in the ballot title and thereby deceive the voters.

V. CONCLUSION

Both the error in the text of I-747 and the false representation in its ballot title violated the Constitution's safeguards for voters and the legislative process. Each of these defects was *material* and *deceptive*. The Court should affirm the trial court's ruling that I-747 is unconstitutional.

Dated this 20th day of November, 2006

SMITH & LOWNEY PLLC

By _____
Knoll Lowney, WSBA # 23457

PUBLIC INTEREST LAW GROUP, PLLC

By _____
Gwynne L. Skinner, WSBA #23490
Nancy S. Chupp, WSBA #33740
Attorney for Respondents

No. 778844-8

SUPREME COURT OF THE STATE OF WASHINGTON

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.	)	DECLARATION OF SERVICE

06 NOV 21 PM 3:25
BY C. J. TERRITT
CLERK

I, Lonnie Lopez, declare that on November 20, 2006, I served the Respondents' Reply Brief electronically and by first class mail to all other parties to this action.

Dated this 20th of November, 2006.

Lonnie Lopez

Lonnie Lopez
Smith & Lowney, PLLC

Appendix A

Christine O. Gregoire
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

January 18, 2001

The Honorable Ralph Munro
ATTN: Jean Womer
Initiative Coordinator
PO Box 40220
Olympia, WA 98504-0220

Re: Initiative No. 747

Dear Mr. Munro:

Pursuant to RCW 29.79.040, we supply herewith the ballot title and ballot measure summary for Initiative No. 747 to the People (an act relating to limiting property tax increases).

BALLOT TITLE

Statement of the Subject: Initiative Measure No. 747 concerns limiting property tax increases.

Concise Description: This measure would require state and local governments to limit property tax levy increases to 1% per year, unless an increase greater than this limit is approved by the voters at an election.

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

BALLOT MEASURE SUMMARY

This measure would establish new "limit factors" for taxing districts in setting their property tax levies each year. For each local government taxing district, the limit factor would be a 1% increase over the highest of the district's three previous annual property tax levies. For the state, the limit factor would be the lower of 1% or the rate of inflation. Taxing districts could levy higher than the limit factor with voter approval.

Very truly yours,

JAMES K. PHARRIS
Senior Assistant Attorney General
(360) 664-3027

cc: Narda Pierce, Solicitor General

EXHIBIT E

Appendix B

Why should I suppo t "Spirit of 695" I-747 The Right to Vote on Property Taxes Initiative

YES 747

Property taxes are simply skyrocketing – "Spirit of 695" I-747 solves the problem once and for all!

Property taxes are the 800-pound gorilla when it comes to excessive taxation in our state. Property taxes are increasing so rapidly that working class families and senior citizens are being taxed out of their homes and making it nearly impossible for first-time homebuyers to afford a home. Gary Locke and the Legislature have failed to address this persistent problem and they will ignore it again this year. "Spirit of 695" I-747 requires politicians to limit property tax increases to 1% per year unless a higher increase is approved by the voters. This forces politicians to spend existing tax revenues more effectively and to ask the taxpayers permission if they want to raise them more.

With their taxpayer-funded lawsuits, politicians are robbing taxpayers of property tax relief by blocking Initiative 722

Last November, I-722 passed overwhelmingly but instead of followi the will of the people, politicians instead used taxpayer dollars to sue t taxpayers. Politicians still don't get it! We will defend I-722 in the courts l we also need to defend I-722 in the political arena with this new initiative the courts OK I-722, then "Spirit of 695" I-747 *reinforces I-722*. If the cou strike down I-722, then "Spirit of 695" I-747 *replaces I-722* with an ev more stringent property tax limitation. Politicians must learn that ignori the taxpayers is not an option anymore.

"Spirit of 695" I-747 is sponsored by Permanent Offense, a grassro taxpayer organization which also sponsored voter approved I-695 and I-7:

747 • 747 • 747 • 747 • 747 • 747 • 747 • 747 • 747

Complete text of "Spirit of 695" I-747 The Right to Vote on Property Taxes Initiative

YES 747

AN ACT Relating to limiting property tax increases by amending RCW 84.55.005 and 84.55.0101; and adding new sections.

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

POLICIES AND PURPOSES

NEW SECTION. **Sec. 1.** This measure would limit property tax increases to 1% per year unless approved by the voters. Politicians have repeatedly failed to limit skyrocketing property taxes either by reducing property taxes or by limiting property tax increases in any meaningful way. 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. Property taxes are increasing so rapidly that working class families and senior citizens are being taxed out of their homes and making it nearly impossible for first-time home buyers to afford a home. The Washington state Constitution limits property taxes to 1% per year; this measure matches this principle by limiting property tax increases to 1% per year.

LIMITING PROPERTY TAX INCREASES TO 1% PER YEAR UNLESS APPROVED BY THE VOTERS

Sec. 2. RCW 84.55.005 and 2001 c 2 s 5 (Initiative Measure No. 722) are each amended to read as follows:

As used in this chapter:

(1) "Inflation" means the percentage change in the implicit price deflator for personal consumption expenditures for the United States as published for the most recent twelve-month period by the bureau of economic analysis of the federal department of commerce in September of the year before the taxes are payable:

(2) "Limit factor" means:

(a) For taxing districts with a population of less than ten thousand in the calendar year prior to the assessment year, one hundred ((~~two~~)) one percent;

(b) For taxing districts for which a limit factor is authorized under RCW 84.55.0101, the lessor of the limit factor under that section or one hundred ((~~two~~)) one percent;

(c) For all other districts, the lesser of one hundred ((~~two~~)) one percent or one hundred percent plus inflation; and

(3) "Regular property taxes" has the meaning given in RCW 84.04.140.

Sec. 3. RCW 84.55.0101 and 1997 c 3 s 204 are each amended to read as follow:

Upon a finding of substantial need, the legislative authority of a taxing district other than the state may provide for the use of a limit factor under this chapter one hundred ~~two~~ one percent or less unless an increase greater than this limit i approved by the voters at an election as provided in RCW 84.55.050. In distric with legislative authorities of four members or less, two-thirds of the members must approve an ordinance or resolution under this section. In districts with m than four members, a majority plus one vote must approve an ordinance or resolution under this section. The new limit factor shall be effective for taxes collected in the following year only.

CONSTRUCTION CLAUSE

NEW SECTION. **Sec. 4.** The provisions of this act are to be liberally construe to effectuate the policies and purposes of this act.

SEVERABILITY CLAUSE

NEW SECTION. **Sec. 5.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the applicati of the provision to other persons or circumstances is not affected.

LEGISLATIVE INTENT

NEW SECTION. **Sec. 6.** The people have clearly expressed their desire to limi taxes through the overwhelming passage of numerous initiatives and referendums. However, politicians throughout the state of Washington continu to ignore the mandate of these measures.

Politicians are reminded:

(1) All political power is vested in the people, as stated in Article I, section 1 o the Washington state Constitution.

(2) The first power reserved by the people is the initiative, as stated in Article I section 1 of the Washington state Constitution.

(3) Politicians are an employee of the people, not their boss.

(4) Any property tax increase which violates the clear intent of this measure undermines the trust of the people in their government and will increase the likelihood of future tax limitation measures.

—— END ——

747 • 747 • 747 • 747 • 747 • 747 • 747 • 747 • 747

Help the "Spirit of 695" I-747 The Right to Vote on Property Taxes Initiative qualify for the ballot

YES 747

Please get as many signatures as you can and mail this petition back to us as soon as possible. Fold it, put it in an envelope, and mail it, along with your most generous donation to:

"Spirit of 695" I-747, PO Box 1641, Mukilteo, WA 98275

The government only gives us until July 6th, 2001 to gather 198,000 valid signatures. Time is short — ACT NOW.

Paid for by 'Spirit of 695' I-747 • PO Box 1641 • Mukilteo • WA • 98275 • Tel: 425-493-8707 • FAX: 425-493-1027

Web: permanent-offense.org • email: info@permanent-offense.org • Requires 197,734 valid signatures • Get your petitions in to us by: June 29th, 20

Petitions submitted to the Secretary of State's Office in Olympia: July 6th, 2001 • Statewide vote on: November 6th, 2001

To get more petitions, call us @ 425-493-8707, OR PREFERABLY, to save you time and to save our can paign time and resources, this 11"x17" petition may be photocopied in black & white in its entirety (bot front & back must be photocopied and petition size cannot be reduced — final size must remain 11"x17"

EXHIBIT B

YES 747

"Spirit of 695" I-747

The Right to Vote on Property Taxes Initiative

Ballot Title

Statement of the Subject:
Initiative Measure No. 747 concerns limiting property tax increases.

Concise Description: This measure would require state and local governments to limit property tax levy increases to 1% per year, unless an increase greater than this limit is approved by the voters at an election.

Should this measure be enacted into law? Yes ☐ No ☐

Ballot Measure Summary

This measure would establish new "limit factors" for taxing districts in setting their property tax levies each year. For each local government taxing district, the limit factor would be a 1% increase over the highest of the district's three previous annual property tax levies. For the state, the limit factor would be the lower of 1% or the rate of inflation. Taxing districts could levy higher than the limit factor with voter approval.

WARNING:

Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both.

Initiative petition for submission to the People

To the Honorable Sam Reed,
Secretary of State of the State of Washington

We, the undersigned citizens and legal voters of the State of Washington, respectfully direct that the proposed measure known as Initiative Measure No. 747, and entitled, "Statement of the Subject: Initiative Measure No. 747 concerns limiting property tax increases. Concise Description: This measure would require state and local governments to limit property tax levy increases to 1% per year, unless an increase greater than this limit is approved by the voters at an election. Should this measure be enacted into law? Yes ☐ No ☐" a full, true and correct copy of which is printed on the reverse side of this petition, be submitted to the legal voters of the State of Washington for their approval or rejection at the general election to be held on the 6th day of November, 2001; and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

Washington State voters please sign below. Statewide Initiative to the People.

DO NOT CUT PETITION ***DO NOT CUT PETITION*** ***DO NOT CUT PETITION***

Petitioner's Signature Please sign as registered to vote	Print Name Here For positive identification	Home Address Where Registered to Vote Street number or rural route & box number	City or Town	Zip	County	Phone *(optional)*
0. *Bob P. Drewel*	Bob P. Drewel	722 Father Knows Best Blvd.	Everett	98203	Snohomish	360-555-1212
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

DO NOT CUT PETITION ***DO NOT CUT PETITION*** ***DO NOT CUT PETITION***

Please get as many signatures as you can and mail this petition back to us as soon as possible. Fold it, put it in an envelope, and mail it, along with your most generous donation to:

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To get more petitions, call us @ 425-493-8707, OR PREFERABLY, to save you time and to save our campaign time and resources, this 11"x17" petition may be photocopied in black & white in its entirety (both front & back must be photocopied and petition size cannot be reduced — final size must remain 11"x17").