

Case No.: 81857-6

SUPREME COURT OF THE STATE OF WASHINGTON

Community Care Coalition of Washington, et al.

v.

Sam Reed, Secretary of State

AMICUS BRIEF OF THE
INITIATIVE AND REFERENDUM INSTITUTE

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TABLE OF CONTENTS

I.	Introduction	1
II.	Summary	2
	A. The Washington Constitution is unique in that it reserves to the people the right to direct and indirect initiative.	2
	B. Honoring the will of “the people” who signed the petitions honors the distinction between direct and indirect initiatives.	4
III.	Conclusion	6

TABLE OF AUTHORITIES

Case law

<u>Washington Citizens Action v. State,</u> 171 P.3d 486, 171 P.3d 486 (2007)	4
--	----------

Constitutional provisions

Wash. Const. art. II, § 1	1, 3
Utah Const. art. VI, § 1	1, 3

Statutes

Ch. 29A.72 RCW.....	1
RCW 29A.72.030	6

Rules

RAP 2.2; 2.3 & 4.2 5

Other Authorities

**M. Dane Waters, Initiative and Referendum Almanac
Carolina Academic Press (2003) 4**

The Federalist Papers (London: Penguin, 1987) 4

APPENDICES:

**A-1: I&R Fact Sheet No. 1 [Initiative & Referendum
Institute] “What is Initiative and Referendum?”**

**A-2: I &R Fact Sheet No. 2 [Initiative & Referendum
Institute] “The History of Initiative and Referendum in
the United States”**

**A-3: M. Dane Waters, Initiative and Referendum Almanac
Carolina Academic Press (2003) at 13-15
[Fred Silva, “The Indirect Initiative Process”]**

**A-4: “I-1029: What it said vs. what they said it said,” Tacoma
News Tribune Editorial (July 17, 2008).**

I. Introduction:

The Washington Constitution is unique in allowing both direct and indirect initiatives.¹ Only one other state has both types of initiatives.² The conditions and procedures by which citizens initiatives may be placed directly on the ballot or indirectly sent to the legislature are governed by specific statutes.³ These statutes establish bright-line rules for uniform exercise of the initiative power.

Allowing initiative sponsors to arbitrarily override the law and the will of “the people” who actually signed the petitions by rewriting an indirect initiative petition as a direct initiative petition after the fact is contrary to fundamental constitutional principles. It blurs the distinction between direct and indirect initiatives by trivializing the uniform operation of the laws governing their proper use. It ignores the

¹ Wash. Const. art. II, § 1

² Utah Const. art. VI, § 1

³ See Ch. 29A.72

express will of the citizens who signed the petitions with the understanding that:

this petition and proposed measure known as Initiative Measure No. 1029 ... be transmitted to the legislature of the State of Washington at the next ensuing regular session, and we respectfully petition the legislature to enact said proposed measure into law.⁴

II. Summary:

A. The Washington Constitution is unique in that it reserves to the people the right to direct and indirect initiative.

Although 24 states have some form of initiative, only two (Washington and Utah) have both direct (to the people) and indirect (to the legislature).⁵ Likewise, the governments of both Washington and Utah were founded pursuant to the

⁴ See Exhibit J to Petition for Writ of Mandamus [Emphasis added].

⁵ See A-1: I&R Fact Sheet No. 1 "What is Initiative and Referendum?"; A-2: I&R Fact Sheet No. 2 "The History of Initiative and Referendum in the United States" Available on line at: <http://www.iandrinstute.org/Quick%20Fact-Handouts.htm>

people's organic authority to govern themselves.⁶ The

Washington State Constitution unequivocally provides:

*All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.*⁷

Although both types of initiative are subject to judicial review,

Initiatives to the people and initiatives to the Legislature are very different animals. The latter are presented to lawmakers when they get together in January, just as the I-1029 petitions proposed. Lawmakers study these measures and do one of three things: adopt them as written, reject them and let them proceed to the ballot by themselves,

⁶ "For in reason, all government without the consent of the governed is the very definition of slavery." -Jonathan Swift, satirist (1667-1745)

⁷Wash. Const. Art. I, § 1 Political Power [Emphasis added];

Utah Const. art. I, § 2 provides:

"All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require."

[Emphasis added].

or put alternative measures on the ballot alongside them.⁸

Indirect initiatives provide for legislative review whereas direct initiatives do not. In fact, five states⁹ allow only indirect initiatives. One criticism on initiatives is that the language of an initiative measure cannot be amended once it is filed by the proponents.¹⁰ However, an indirect initiative provides the opportunity for the legislature to address any perceived problems by and through public hearings, rejecting the measure or proposing alternatives.

It's easy to imagine someone signing an initiative to the Legislature when he or she would have rejected the same measure as an initiative to the people. Initiatives to the Legislature get vetted. They get hearings, and lawmakers hear arguments

⁸A-4: "I-1029: What it said vs. what they said it said," Tacoma News Tribune Editorial (July 17, 2008).

⁹Five states allow only in-direct initiatives to propose statutes: Maine, Massachusetts, Michigan, Nevada and Ohio. See A-1: I&R Fact Sheet No. 1 "What is Initiative and Referendum?" [Table: 1:1 States with Direct (DA) and In-direct (IDA) Initiative Amendments; Direct (DS) and In-direct (IDS) Initiative Statutes and Popular (RP) Referendum].

¹⁰Washington Citizens Action v. State, 171 P.3d 486, 171 P.3d 486 (2007)

pro and con. If they spot a serious major flaw, they can propose a fix with a ballot alternative.¹¹

Arguably, some citizens may choose to sign a petition to the legislature rather than one directly to the people believing the additional legislative gate keeping function safeguards “against the effects of occasional ill humors in the society.”¹²

B. Honoring the will of “the people” who signed the petitions honors the distinction between direct and indirect initiatives.

The Initiative 1029 Petition states:

We, the undersigned citizens and legal voters of the State of Washington, respectfully direct that this petition and proposed measure known as Initiative Measure No. 1029 ... be transmitted to the legislature of the State of Washington at the next ensuing regular session, and we respectfully petition the legislature to enact said proposed measure into law....¹³

¹¹A-4: “I-1029: What it said vs. what they said it said,” Tacoma News Tribune Editorial (July 17, 2008).

¹² Alexander Hamilton, “The Federalist Number 78,” in James Madison, Alexander Hamilton, and John Jay, The Federalist Papers (London: Penguin, 1987, p. 441) [referring to judicial review]

¹³ See Exhibit J to Petition for Writ of Mandamus [Emphasis added].

Despite this express directive, the proponents argue that they “drive the process”¹⁴ - *not the people who actually signed the petition!* They argue that, although the “verbiage suggesting that Initiative 1029 was an initiative to the Legislature,”¹⁵ that express language should be ignored. They argue that *their intent* should trump the will and dignity of “the people” – the citizens who actually signed the petitions.¹⁶ However, the sponsors filed the initiative on March 12, 2008 – the earliest date allowed by law to file an indirect initiative “to the legislature.”¹⁷

¹⁴ Brief on Interveners and Motion to Dismiss at 4

¹⁵ Brief on Interveners and Motion to Dismiss at 1

¹⁶ See A-4: “I-1029: What it said vs. what they said it said,” Tacoma News Tribune Editorial (July 17, 2008). [*“The argument: Offering I-1029 directly to the electorate honors the intent of the citizens who signed it, because they assumed it was what the SEIU said it was, not what the actual petitions said it was. Honoring the intent of citizens is, of course, a good thing. But that argument assumes that all of the roughly 300,000 citizens who signed it failed to read what they were signing. Why not assume that at least some did read it – perhaps enough of them that the initiative otherwise wouldn’t have qualified?”* (Emphasis added)]

¹⁷ RCW 29A.72.030; See Attachment B to Motion for Accelerated Review.

The sponsors and the Secretary of State apparently assume that “the people” who signed the petitions were: ignorant of the law; ignorant of what they signed; and, ignorant to whom they were petitioning. To allow the proponents to arbitrarily change petitions after the fact from an indirect initiative to a direct initiative places political expediency above the law and, more importantly, ignores the express will of “the people.”

III. Conclusion:

The Secretary of State should respect the dignity of “the people” by honoring their expressed will rather than the sponsor’s alleged intent. “The people” signed an initiative with the express directive that it “be transmitted to the legislature of the State of Washington at the next ensuing regular session, and we respectfully petition the legislature to enact said proposed measure into law....”¹⁸ “The people” knowingly signed these petitions understanding that the initiative would

¹⁸ See Exhibit J to Petition for Writ of Mandamus [Emphasis added].

be subject to legislative review. Just as the language of an initiative cannot be amended once it is filed, neither should the language of the petition be amended after the fact for political expediency. The Secretary of State should honor, not overrule, the intent of “the people” who signed the petitions and not permit sponsors to change language after the fact.

Dated: August 25, 2008



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I & R FACTSHEET

WHAT IS INITIATIVE AND REFERENDUM?

"[The Initiative is] the means by which voters can correct legislative sins of omission and the popular referendum as the means of correcting legislative sins of commission."

David B. Magleby, Author of *Direct Legislation Voting on Ballot Propositions in the United States* (1984)

Important Facts

- There are two types of Initiative – Direct and In-direct.
- There are two types of Referendum – Popular and Legislative.
- 27 states have some form of Initiative or Popular Referendum.
- 24 states have a form of Initiative.
- 24 states have Popular Referendum.
- 49 states have Legislative Referendum.
- Hundreds of cities and counties have some form of Initiative and Popular Referendum.

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The Initiative & Referendum Institute is a 501(c)(3) non-profit tax-exempt educational organization dedicated to protecting and educating the people on the Initiative and Referendum process.

In many states, citizens have the ability to adopt laws or to amend the state constitution. This is commonly referred to as the *Initiative process*. In many of the same states, as well as others, the citizens have the ability to reject laws or amendments proposed by the state legislature. This process is commonly referred to as the *Referendum process*. The Initiative process is used much more frequently than the Referendum process and is considered by many the more important and powerful of the two processes.

There is no national Initiative process in the United States, but 24 states (see page two for complete list) have some form of Initiative – either *Direct* or *In-direct*.

Direct Initiative is when constitutional amendments or statutes proposed by the people are directly placed on the election ballot and then submitted to the people for their approval or rejection (the state legislature has no role in this process). *In-direct Initiative* is when statutes or amendments proposed by the people through a petition must first be submitted to the state legislature during a regular legislative session. If the legislature

fails to approve the statute or amendment or it amends the proposal in a manner that is not acceptable to the proponents of the proposal, the proponents may proceed to collect the additional signatures, if required, to have the original proposal submitted to the voters. Some states allow their legislature to submit an alternative proposal on the same subject as the initiated proposal for the people to choose between.

There is no national Referendum process in the United States, but 49 states (see page two for complete list) have some form of Referendum – either *Popular* or *Legislative*.

Popular Referendum is when the people have the power to refer, through a petition, specific legislation that was enacted by their legislature for the people to either accept or reject. *Legislative Referendum* is when the state legislature, an elected official, state appointed constitutional revision commission or other government agency or department submits propositions (constitutional amendments, statutes, bond issues, etc.) to the people for their approval or rejection. This is either constitutionally required, as in proposing constitutional amendments, or



Thomas Jefferson was a strong advocate of the Legislative Referendum process and first proposed its use in the 1775 Virginia state constitution.

because the legislature, government official or agency voluntarily chooses to submit the proposal to the people. Every state but Delaware requires that constitutional amendments proposed by the legislature be submitted to the citizenry via Legislative Referendum for approval or rejection.

In addition to the states listed on page two, citizens in hundreds of cities and counties have adopted Initiative and Popular Referendum including; Washington, DC; New York City, New York; Los Angeles, California and Houston, Texas to name a few.

-the end-

Table 1.1
States with Direct (DA)ⁱ and In-direct (IDA)ⁱⁱ Initiative Amendments; Direct (DS)ⁱⁱⁱ and In-direct (IDS)^{iv} Initiative Statutes and Popular (PR)^v Referendum^{vi}

States where some form of Initiative or Popular Referendum is available	Date process was adopted	Type of process available		Type of Initiative process available		Type of Initiative process used to propose Constitutional Amendments		Type of Initiative process used to propose Statutes (Laws)	
		Initiative	Popular Referendum	Constitutional Amendment	Statute	Direct (DA)	In-direct (IDA)	Direct (DS)	In-direct (IDS)
Alaska	1959	X	X	O	X	O	O	X	O
Arizona	1912	X	X	X	X	X	O	X	O
Arkansas	1909	X	X	X	X	X	O	X	O
California ⁱⁱ	1911/66	X	X	X	X	X	O	X	O
Colorado	1912	X	X	X	X	X	O	X	O
Florida	1972	X	O	X	O	X	O	O	O
Idaho	1912	X	X	X	X	X	O	X	O
Illinois ^{viii}	1970	X	X	X	O	X	O	O	O
Kentucky	1910	O	X	O	O	O	O	O	O
Maine	1908	X	X	O	X	O	O	O	X
Maryland	1915	O	X	O	O	O	O	O	O
Massachusetts	1918	X	X	X	X	O	X	O	X
Michigan	1908	X	X	X	X	X	O	O	X
Mississippi	1992	X	O	X	O	X	X	O	O
Missouri	1906	X	X	X	X	X	O	X	O
Montana ^x	1904/72	X	X	X	X	X	O	X	O
Nebraska	1912	X	X	X	X	X	O	X	O
Nevada	1904	X	X	X	X	X	O	O	X
New Mexico	1910	O	X	O	O	O	O	O	O
North Dakota ^{xi}	1914	X	X	X	X	X	O	X	O
Ohio	1912	X	X	X	X	X	O	O	X
Oklahoma	1907	X	X	X	X	X	O	X	O
Oregon	1902	X	X	X	X	X	O	X	O
South Dakota ^{xi}	1898/72/88	X	X	X	X	X	O	X	O
Utah	1900/17	X	X	O	X	O	O	X	X
Washington	1912	X	X	O	X	O	O	X	X
Wyoming	1968	X	X	O	X	O	O	X	O
Totals	27 states	24 states	24 states	18 states	21 states	16 states	2 states	16 states	7 states

Legend
 O = process *not* currently allowed by the state constitution.
 X = process currently allowed by the state constitution.

ⁱ Direct Initiative amendment (DA) is when constitutional amendments proposed by the people are directly placed on the ballot and then submitted to the people for their approval or rejection.
ⁱⁱ In-direct Initiative amendment (IDA) is when constitutional amendments proposed by the people must first be submitted to the state legislature during a regular session.
ⁱⁱⁱ Direct Initiative statute (DS) is when statutes (laws) proposed by the people are directly placed on the ballot and then submitted to the people for their approval or rejection.
^{iv} In-direct Initiative statute (IDS) is when statutes (laws) proposed by the people must first be submitted to the state legislature during a regular session.
^v Popular Referendum (PR) is the power to refer to the ballot, through a petition, specific legislation that was enacted by the legislature for their approval or rejection.
^{vi} This list does not include the states with Legislative Referendum (LR). Legislative Referendum is when a state legislature places an amendment or statute on the ballot for voter approval or rejection. Every state but Delaware requires state constitutional amendments to be placed on the ballot for voter approval or rejection.
^{vii} In 1966 California repealed indirect Initiative for statutes.
^{viii} In Illinois, the subject matter of a proposed constitutional amendment is severely limited to legislative matters. Consequently, Initiatives seldom appear on the ballot.
^{ix} In 1972 Montana adopted a provision that allows for directly initiated constitutional amendments.
^x In North Dakota prior to 1918, constitutional amendments could be initiated only indirectly.
^{xi} In 1972 South Dakota adopted a provision that allows for directly initiated constitutional amendments. In 1988 South Dakota repealed In-direct Initiative for Statutes.

I & R FACTSHEET

Important Facts

- First state to hold a statewide Legislative Referendum to adopt its constitution – Massachusetts in 1778.
- First state to adopt statewide Initiative and Popular Referendum – South Dakota in 1898.
- First state to place a statewide Initiative on the ballot – Oregon in 1904.
- First state to allow cities to use Initiative and Popular Referendum – Nebraska in 1897.
- First state to provide for Initiative and Popular Referendum in its original constitution – Oklahoma in 1907.
- Last state to adopt statewide Initiative – Mississippi in 1992.
- Total number of states with some form of Initiative or Popular Referendum – 27.
- Total number of states that adopted statewide Initiative or Popular Referendum between 1898 and 1958 – 23.
- Total number of states that have adopted statewide Initiative or Popular Referendum since 1958 – 4.

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The Initiative & Referendum Institute is a 501(c)(3) non-profit tax-exempt educational organization dedicated to educating the people on the Initiative and Referendum process.

THE HISTORY OF INITIATIVE AND REFERENDUM IN THE UNITED STATES

Initiative and Referendum has existed in some form in this country since the 1600's when the citizens of New England placed ordinances and other issues on the agenda for discussion and then a vote utilizing town meetings. Thomas Jefferson first proposed Legislative Referendum for the 1775 Virginia State constitution. The first state to hold a statewide Legislative Referendum for its citizens to ratify its constitution was Massachusetts in 1778. New Hampshire followed in 1792.

Jefferson was a strong and vocal advocate of the Referendum process, which in his view recognized the people to be the sovereign. Whereas the King of England spoke of his power to govern being derived from God, Jefferson knew that those chosen to represent the citizenry as envisioned in a republican form of government were only empowered by the people.

Madison, as did Jefferson, knew too well the possibility that in a republic, those chosen to rule can and would on occasion become consumed with their power and take actions not consistent with the Constitution – actions that represented their self-interest and not

the interest of the people. For this reason, a series of checks-and-balances were placed in our Constitution in order to right the errors caused when elected representatives chose to rule unconstitutionally or in their own self-interest. Not only did the Founding Fathers create these checks-and-balances by one branch of government over the next, they created a provision in Article V of the Constitution that allowed the people the right to make change and restore our Constitution absent of action by the Government. Unfortunately this process still relied on some form of action by those in power and therefore has become unusable by the citizenry.

State constitutions mirror the Federal Constitution. They created a republican government on a smaller scale to mirror that of the nation as a whole. In these constitutions a series of checks-and-balances were created to take into account the possible abuse of power by elected representatives and to protect the people from an out of control government - when and if that were to happen. But what the people began to realize in the late 1800's was that no matter what checks-and-balances existed, the people

had no direct ability to reign in an out of touch government or government paralyzed by inaction.

Then came the Populist Party of the 1890's. Their members had become outraged that moneyed special interest groups controlled government, and that the people had no ability to break this control. They soon began to propose a comprehensive platform of political reforms. They advocated women's suffrage, secret ballots, direct election of U.S. Senators, primary elections and Initiative and Referendum. Difficult as it would be to envision modern political systems without these reforms, they were considered quite extreme changes in the 1890's.

(Continued on page 2)

"As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority...whenever it may be necessary to enlarge, diminish, or new-model the powers of government."

James Madison, Federalist Paper No. 49

THE HISTORY OF INITIATIVE AND REFERENDUM - CONTINUED

(Continued from page 1)

Perhaps the most revolutionary Populist reform was Initiative (the people's ability to place legislation or constitutional amendments



"I believe in the Initiative and Referendum, which should be used not to destroy representative government, but to correct it whenever it becomes misrepresentative." Teddy Roosevelt

ments, by petition, on the ballot for voter approval) and Popular Referendum (the people's ability to refer newly enacted law, by petition, from the legislature to the ballot for final approval). These forms of Initiative and Referendum, as well as the already established Legislative Referendum (all but three states that entered the union after 1830 established Legislative Referendum and required the voters to approve their proposed constitutions. Congress itself required that voters approve state constitutions proposed after 1857), acknowledged that the authority to legislate and govern was delegated by the people and reaffirmed that the people were the only true sovereign – as Jefferson had envisioned. They rightfully believed that government without the consent of the governed was tyranny and because authority, but not responsibility, can be delegated, a mechanism to un-delegate, when appropriate, was a proper check on the process of legislating. They believed that Initiative and Referendum was another check-and-balance on the power of government, but one that the people could use.

In 1897, Nebraska became the first

state to allow cities to place Initiative and Referendum in their charters. One year later, the Populists adapted methods from the 1848 Swiss Constitution and successfully amended them into the South Dakota Constitution. On November 5, 1898, South Dakota became the first state to adopt statewide Initiative and Popular Referendum. Oregon followed in 1902 when Oregon voters approved Initiative and Popular Referendum by an 11-to-1 margin. Other states soon followed. In 1906 Montana voters approved an Initiative and Popular Referendum amendment proposed by the state legislature. Oklahoma became the first state to provide for the Initiative and Popular Referendum in its original constitution in 1907. Maine and Michigan passed Initiative and Popular Referendum amendments in 1908.

In 1911 California placed Initiative and Popular Referendum in their constitution. Other states were to follow – but even with popular support in many states, the elected class refused the will of the people and did not enact this popular reform. In Texas, for example,

"I most strongly urge, that the first step in our design to preserve and perpetuate popular government shall be the adoption of the Initiative, Referendum, and Recall."

**Hiram Johnson,
in his inaugural speech as
Governor of California in 1911**

the people actually had the opportunity to vote for Initiative and Popular Referendum in 1914, but voted it down because the amendment proposed by the legislature would have required that signatures be gathered from 20% of the registered voters in the state – a number twice as large as what was required in any other state. The proponents for Initiative and Popular Referendum felt it was more important to get a useable process than one that would have maintained the status quo and provided no

benefit to the citizenry. However, the legislature used this defeat as an excuse to claim that Initiative and Popular Referendum was not wanted by the people and therefore effectively killed the movement in Texas.

Eventually, between 1898 and 1918, 24 states adopted Initiative or Popular Referendum – mostly in the West. The expansion of Initiative and Popular Referendum in the West fit more with the Westerners belief of populism – that the people should rule the elected and not allow the elected to rule the people. Unfortunately in the East and South this was not the case. Those that were in power were opposed to the expansion of Initiative and Popular Referendum because they were concerned that blacks and immigrants would use the process to enact reforms that were not consistent with the biased beliefs of the elite ruling class.

In 1959, when Alaska became a state, the citizens had adopted the power of Initiative and Popular Referendum. Then in 1972, Floridians adopted statewide Initiative as did Mississippians in 1992 – the newest and last state to get this valuable tool.

The credit for the establishment of Initiative and Popular Referendum in this country belongs with the Progressives. They worked steadily to dismantle the political machines and bosses that controlled American politics by pushing reforms eliminating the influence the special interest had on political parties and the government. Their goal, as is today's proponents of the Initiative and Popular Referendum, is to ensure that elected officials remain accountable to the electorate.

- the end -

For more information on the initiative and referendum process please visit the Institute's award winning website at www.iandrinstitute.org.

Initiative and Referendum Almanac

M. Dane Waters

The Indirect Initiative Process

By Fred Silva⁹

The indirect initiative is a process by which voters can submit a measure to their state legislature for consideration. In general, the legislature has a set period of time to adopt or reject the proposal. If it is adopted by the legislature, the measure becomes law (albeit one subject to referendum). If the measure is rejected or the legislature fails to act within a set period of time, the measure is generally placed on the ballot at the next general election. Currently, the constitutions and provisions of ten states provide for an indirect initiative process: Alaska, Maine, Massachusetts, Michigan, Mississippi, Nevada, Ohio, Utah, Washington, and Wyoming.

This two-step process would in theory seem to lead to a large number of initiatives being proposed since initiative sponsors would only have to collect half of the number of signatures normally required to get their issued addressed by their lawmakers, but in reality that hasn't occurred. This is due to the fact that very rarely do state legislatures actually adopt the initiatives that are placed before them through the indirect process. California and South Dakota, which had both the direct and indirect initiative process, repealed the indirect initiative in 1966 and 1988, respectively, for lack of use. The Utah Legislature has never adopted an initiative measure and the Massachusetts legislature, according to the Secretary of State's Office, hasn't adopted an initiative measure in the last decade. The Maine legislature has only adopted two laws placed before them since adopting the indirect initiative process in 1908.¹⁰

Alaska¹¹

Alaska uses a form of the indirect initiative called the legislature's option, and only statutes are eligible. Here, after collecting the proper amount of signatures (10% of those who voted in the preceding election), the petitioners must submit their request prior to the beginning of the legislative session. The legislature is not required to consider the measure, however, and if it does not, the measure goes on the next ballot. If the legislature adopts the measure or a measure that is substantially similar, the initiative does not go on the ballot. Other than Wyoming, Alaska is the only state in which the legislature may vary indirect initiative statutory proposals without creating the possibility of a vote on the amended measure.

Maine¹²

After Massachusetts, Maine is the second largest user of the indirect initiative—but only statutes are allowed. The required number of signatures is 10% of the total votes cast for governor in the last election. The legislature has the entire session in which to act and may decide to place an alternative proposal or recommendation on the ballot. If it chooses to do this, it must construct the ballot so that voters can choose between competing versions (one or more) or reject both. The Legislature can also reject the initiative, in which case it is placed on the ballot. Following enactment, the Legislature can both repeal and amend initiatives.

Massachusetts¹³

Massachusetts is by far the largest user of the indirect initiative. Both constitutional amendments and statutes may be proposed, and signatures that total only 3% of the entire vote cast for Governor are required. The Massachusetts procedure for constitutional amendments is the most indirect of any American initiative procedure, as the proponents have no right to submit their proposal to a vote of the people unless the legislature places the measure on the ballot. The process involves a two-step procedure. In the first step the sponsor must obtain a fairly low number of signatures (3%) to have the legislature consider the proposal. Initiative amendments are acted upon by a joint session of the House and Senate; the Legislature can only amend the initiative by a ? majority vote in a joint session of both houses. If the legislature fails to adopt the proposal, the sponsors must seek additional signatures to get on the ballot. An initiative amendment to the Constitution will not appear on the ballot if, when it comes to a vote in either joint session, less than 25% of the legislators vote in favor of it or if no vote is taken before the legislative term ends. Following enactment, the Legislature can both repeal and amend initiatives. In practice, the indirect initiative process is rarely used for constitutional amendments.

Michigan¹⁴

Only statutes may be proposed in Michigan's indirect initiative process, and the number of signatures required to qualify is at least 8% of the total votes cast for Governor in the last general election. Once submitted, the legislature has 40 days to act on a petition and may also place an alternative on the ballot. It can approve or reject an initiative, but it can-

9. Fred Silva is a Senior Advisor of Governmental Relations at the Public Policy Institute of California

10. This paragraph was written by M. Dane Waters and is based on research conducted by the Initiative & Referendum Institute. The state by state overviews were written by Fred Silva.

11. Alaska Constitution Article XI; Dubois, Philip L. and Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons*. New York: Agathon Press, 1998.

12. Maine Constitution Article IV; *ibid*.

13. Massachusetts Constitution amendment article XLVIII, Initiative part 5 (statutes), part 4 (cons. Amendment); *ibid*.

14. Michigan Constitution Article II; *ibid*.

not amend one. However, it can submit an alternative to an initiative to the ballot. If rejected, the measure can be placed on the next ballot. Following enactment, the Legislature can both repeal and amend initiatives.

Mississippi¹⁵

Mississippi is the only state in which the indirect initiative process is used for constitutional amendments only. To qualify an amendment for consideration, the number of collected signatures must equal 12% of all votes cast for governor in the last election. These initiatives always appear on the ballot, whether the legislature adopts, rejects, or proposes alternatives to them. If it is amended, both the amended version and the original one are submitted to the ballot. The Legislature is empowered to both repeal and amend these initiatives following enactment. This procedure was adopted in Mississippi in 1992, but has been used only very rarely.

Nevada¹⁶

Nevada requires that 10% of the total number of voters in the last general election sign a petition in order for it to be considered by the Legislature. After submission, the Legislature has 40 days to act on a petition and may also place an alternative on the ballot. If the measure is rejected by the Legislature or if no action is taken in 40 days, the measure is placed on the ballot. The Legislature can only repeal or amend an approved initiative three years after enactment. Nevada used an indirect procedure for initiative constitutional amendments until 1962. Since then, Nevada has required that initiative constitutional amendments be approved at two separate elections but has allowed the amendments to go directly on the ballot. Because of the two separate elections requirements, the legislature still has an opportunity to deal with any matter proposed before a final ballot. As a result, some see this as really being an "indirect" procedure.

Ohio¹⁷

Ohio is one of two states (along with Massachusetts) that have a two-step procedure in the indirect initiative process. In the first step the sponsor must obtain a fairly low number of signatures (3% of the total vote cast for governor in the last election) to have the legislature consider the proposal. Only statutes are permitted. If the legislature fails to adopt the proposal (or does not act on it), the sponsors must seek additional signatures to get on the ballot. The Legislature may amend the proposed measure.

Utah¹⁸

Utah (along with Washington) is one of only two states that allow the initiative sponsor to choose whether they wish to use the direct process or indirect initiative process. In Utah, there is an incentive to use the indirect initiative, since indirect initiatives can go before the legislature with signatures equal to 5% of the last vote, while the direct initiative requires twice that number. If the legislature rejects the indirect initiative, its advantages are lost, however, because sponsors must come up with signatures equal to another 5% of the vote. Only statutes can be proposed and signatures that total at least 5% of all votes cast for governor in the last election are required. The proposed law can only be enacted or rejected without change or amendment by the Legislature. Following enactment, the Legislature can both amend and repeal initiatives.

Washington State¹⁹

Washington (along with Utah) is one of the two states that allow voters to choose between the indirect and direct initiative. The number of signatures required for each type of initiative is the same (8% of the votes cast for governor in the last election); thus, the sponsor chooses the type that seems most advantageous. In practice voters overwhelmingly choose the direct variant. Only statutes can be considered in the indirect process. Following submission to the legislature, the Legislature can approve an amended version of the proposed legislation, in which case both the amended version and the original proposal must be placed on the next state general election ballot. If the Legislature adopts the measure without amending it, it automatically becomes law. After enactment, the Legislature can repeal or amend an initiative by a 2/3 vote of each house during the first two years of enactment, and a majority vote thereafter.

Wyoming²⁰

Wyoming, like Alaska, uses the "legislature's option" form of indirect initiative. Initiative sponsors must collect their signatures (15% of those voting in the last election) prior to the beginning of the next legislative session. Only statutes can be proposed using the indirect process. The legislature is not required to consider the measure, however. If it chooses

15. Mississippi Constitution Section 273; *ibid.*

16. Nevada Constitution Article XIX; *ibid.*

17. Ohio Constitution Article II; *ibid.*

18. Utah Code Ann. Sections 2-A-7-201, -208 (Supp. 1994); *ibid.*

19. Washington Constitution Article II; *ibid.*

20. Wyoming Constitution Article III, Section 52; *ibid.*

not to consider the measure, it is placed on the next ballot. If the legislature adopts the measure or a measure that is substantially similar, the initiative does not go on the ballot. As mentioned above, Wyoming and Alaska are the only states in which the legislature may vary indirect initiative statutory proposals without creating the possibility of a vote on the amended measure. After a measure is enacted, the legislature can amend it, and repeal it after two years.

Pre-Circulation Filing Requirements and Review

Prior to circulating a petition, the proposed initiative and a request to circulate must be submitted to the designated public officer such as the Lieutenant Governor, Attorney General or Secretary of State for approval. Nine states require the proposed initiative to be submitted with a certain number of signatures—ranging from five in Montana to 100 in Alaska. Five states require a deposit that is refunded when the completed petition has been filed—Alaska (\$100), Mississippi (\$500), Ohio (\$25), Washington State (\$5), and Wyoming (\$500).

Depending on the state, the petition may be reviewed for form, language and/or constitutionality. Ten states require the Secretary of State's office or the Attorney General to review initiatives for proper form only. Twelve states require some form of pre-circulation/certification review regarding language, content or constitutionality. However, in all but four of these states, the results of the review are advisory only. In Arkansas, the Attorney General has authority to reject a proposal if it utilizes misleading terminology. In Utah, the Attorney General can reject an initiative if it is patently unconstitutional, nonsensical, or if the proposed law could not become law if passed. In Oregon, the Attorney General can stop an initiative from circulating if he believes it violates the single amendment provision for initiatives and in Florida, the State Supreme Court—during its mandatory review—can stop an initiative if it is unconstitutional or violates the state's very strict single subject requirement for initiatives.

Pre-Circulation State Review of Initiative Petitions

State	Assistance Provided
Alaska	Lieutenant Governor reviews for form and legal restrictions on content.
Arizona	Secretary of State reviews for form only.
Arkansas	Attorney General may reject confusing title and summary and instruct petitioners to redesign proposal.
California	Optional assistance from Legislative Council.
Colorado	Mandatory content review by Legislative Council.
Florida	Supreme Court reviews for constitutionality and compliance to single subject after petitioners gather 10% of the signature requirements.
Idaho	Mandatory review of content by Attorney General.
Illinois	None
Maine	Secretary of State reviews for form only.
Massachusetts	Mandatory review of subject by Attorney General
Michigan	Optional public hearing on draft before the Board of State Canvassers.
Mississippi	The state makes advisory recommendations regarding the initiative language. The sponsor may accept or reject any of these recommendations.
Missouri	Attorney General reviews form only.
Montana	Mandatory review of content by Legislative Council. The sponsor may accept or reject any of these recommendations.
Nebraska	The state makes advisory recommendations regarding the initiative language. The sponsor may accept or reject any of these recommendations.
Nevada	Secretary of State reviews for form only.
North Dakota	Secretary of State reviews for form only.
Ohio	Petitioners may revise draft after the indirect initiative legislative hearing.
Oklahoma	Secretary of State reviews for form only.
Oregon	Mandatory review for single subject. The Attorney General can stop an initiative from circulating if he believes it violates the single amendment provision for initiatives.
South Dakota	Legislative Research Council reviews for style and form and makes advisory recommendations regarding the initiative language.
Utah	Attorney General reviews for constitutionality and will reject the measure if it is patently unconstitutional, nonsensical; or if the proposed law could not become a law if passed.
Washington	Mandatory review by Code Reviser. The sponsor may accept or reject any recommendations.
Wyoming	Secretary of State reviews for form only.

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Section: Opinion

< [Back to Regular Story Page](#)

I-1029: What it said vs. what they said it said

THE NEWS TRIBUNE

Are Washingtonians smart? Or are they dumb?

Some might have doubts about their collective intelligence, but the state constitution presumes they are smart enough to enact laws through the initiative process.

Secretary of State Sam Reed apparently has a few doubts of his own.

He's just accepted Initiative 1029, which mandates more training for home-care workers, as an initiative to the people. That's what its sponsor, the powerful Service Employees International Union, wants: A place on the November ballot.

The problem is that the petitions didn't identify I-1029 as a direct-to-ballot initiative. They identified it as an initiative to the Legislature. It's there in black and white, right in the middle of the sheets, in the concise description: The measure is to be "transmitted to the Legislature of the State of Washington at its next ensuing regular session ..."

Initiatives to the people and initiatives to the Legislature are very different animals. The latter are presented to lawmakers when they get together in January, just as the I-1029 petitions proposed. Lawmakers study these measures and do one of three things: adopt them as written, reject them and let them proceed to the ballot by themselves, or put alternative measures on the ballot alongside them.

The SEIU says the "transmitted to the Legislature" part was an accident. That's quite an accident, given the legal advice this union can buy. Nevertheless, Reed has decided the mistake was a mere glitch that shouldn't keep the initiative off the ballot.

The argument: Offering I-1029 directly to the electorate honors the intent of the citizens who signed it, because they assumed it was what the SEIU said it was, not what the actual petitions said it was.

Honoring the intent of citizens is, of course, a good thing. But that argument assumes that all of the roughly 300,000 citizens who signed it failed to read what they were signing. Why not assume that at least some did read it – perhaps enough of them that the initiative otherwise wouldn't have qualified?

It's easy to imagine someone signing an initiative to the Legislature when he or she would have rejected the same measure as an initiative to the people. Initiatives to the Legislature get vetted. They get hearings, and lawmakers hear arguments pro and con. If they spot a serious major flaw, they can propose a fix with a ballot alternative.

As secretary of state, Reed may have the legal discretion to do what he did – though that's likely to be challenged in court. The bigger issue is how much credit to give the voters who lent their signatures to it. Supporters of I-1029 are essentially saying that virtually all 300,000 missed the critical "to the Legislature" language and ought to be given an initiative to the people instead.

But that's giving their inattention the benefit of the doubt. If their carelessness were given the benefit of the doubt, I-1029 would be headed for the 2009 Legislature, not the 2008 ballot.

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