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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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SHERRIL HUFF, an individual taxpayer and King County Director of Elections; MARY HALL, an individual taxpayer and Thurston County Auditor; DAVID FROCKT, an individual taxpayer and Washington State Senator; REUVEN CARLYLE, an individual taxpayer and Washington State representative; EDEN MACK, an individual taxpayer; TONY LEE, an individual taxpayer; ANGELA BARTELS, an individual taxpayer; GERALD REILLY, an individual taxpayer; and PAUL BELL, an individual taxpayer,

Appellants,

v.

KIM WYMAN, in her official capacity as Secretary of State for the State of Washington; TIM EYMAN, LEO J. FAGAN and M.J. FAGAN,

Respondents.

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

Respondent Kim Wyman (“the State”) and Appellants agree that Washington law is clear on several foundational issues in this case: 1) Appellants have standing; 2) pre-election review of Initiative 1366 (“I-1366” or “the Initiative”) is warranted; 3) the State Constitution may not be amended by initiative; and 4) there is no First Amendment or Article I, Section 5 free speech right to place an invalid initiative on the ballot. (The Initiative Sponsors, by contrast, take positions on each of these issues that are contrary to well-established Washington law and decisions of this Court.) Thus, the State and Appellants agree that the trial court erred in holding that the law governing pre-election challenges is not sufficiently “clear” to support an injunction because free speech considerations might “provide additional protections against pre-election challenges even in circumstances where the initiative may itself be invalid.” Order at 8 (CL 12). As both Appellants and the State argue, the court’s order in this regard is contrary to numerous decisions of this Court that hold a pre-election challenge based on an initiative’s scope, as contrasted with a substantive challenge, does not implicate free speech rights. The trial court should be reversed on that point.

The trial court otherwise correctly held that the subject matter of I-1366 is beyond the scope of the initiative power under Article II of the

Washington Constitution. The “fundamental and overriding purpose” of I-1366 is to invoke the state constitutional amendment process under Article XXIII of the Washington Constitution, a subject that is not within the people’s initiative power. The State and Initiative Sponsors disagree. While neither the State nor Initiative Sponsors dispute that this Court has used the “fundamental and overriding purpose” test to determine the true subject of an initiative that has both a proper subject and an improper subject, both argue that invoking the amendment process is not the real purpose of I-1366. But the text of I-1366 (and its real threat aimed at the legislature to invoke the amendment process), the text of the I-1366 petition, and the Initiative Sponsors’ materials make clear I-1366’s purpose. Moreover, both the State and Initiative Sponsors mischaracterize the applicable law. Indeed, the crux of the Initiative Sponsors’ arguments is to preclude pre-election review of an initiative on any grounds, a position that has been rejected by this Court multiple times.

Accordingly, the trial court’s order should be reversed on this issue and an injunction barring placement of I-1366 on the ballot should issue.<sup>1</sup>

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<sup>1</sup> The State has requested that the Court decide the case no later than September 4, 2015, the date the Secretary of State has determined is necessary to allow timely preparation of ballots for overseas mailing by the statutory deadline.

## II. ARGUMENT

### A. All Appellants have standing and the case is justiciable.

1. *Appellants have standing as taxpayers, legislators and elections officials and because this case presents a significant issue of public importance.*

The State agrees that Appellants have standing under Washington law as taxpayers. *See* State Br. at 5. While the Initiative Sponsors dispute taxpayer standing, they mischaracterize the only case they cite in order to claim that Appellants must show the Secretary of State's action is "clearly illegal." Sponsors Br. at 13 (citing *Friends of North Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wn. App. 105, 336 P.3d 632 (2014)). The court of appeals in *Friends* did not use the term "clearly illegal" to describe standing requirements. Rather, the court explained, "Viewed as a whole, Washington cases recognize a plaintiff's standing to challenge the legality of governmental action based solely upon the plaintiff's status as a taxpayer and his or her prior demand on the attorney general." *Friends*, 184 Wn. App. 105, 336 P.3d at 640. In *Friends*, far from requiring proof of "clearly illegal" activity, the court recognized taxpayer standing where the plaintiffs had merely pleaded taxpayer status, made the required demand of the Attorney General and alleged in their Complaint that the City of Spokane violated a restrictive covenant.

*Friends* is consistent with this Court's long-standing precedent recognizing a taxpayer's right to challenge official government acts. *See e.g., State ex rel. Lemon v. Langlie*, 45 Wn. 2d 82, 88, 273 P.2d 464, 468 (1954) (surveying 10 cases and holding that "where the attorney general refused to act to protect the public interest" a taxpayer could do so); *see also State ex rel. Boyles v. Whatcom Cnty. Sup. Ct.*, 103 Wn.2d 610, 614, 694 P.2d 27, 30 (1985) ("The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state's citizens contest the legality of official acts of their government."); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114, 115 (1975) ("It is well settled that taxpayers, in order to obtain standing to challenge the act of a public official, need allege no direct, special or pecuniary interest in the outcome of their action, there being only a condition precedent to such standing that the Attorney General first decline a request to institute the action.").

Here, as in *Langlie*, Appellants allege taxpayer status, a proper demand on the Attorney General, and a challenge to the constitutionality of an official government action, namely the legality of Respondent Wyman's placement of I-1366 on the ballot. Appellants likewise allege that public funds derived from taxation will be spent on the election—and this is true whether the State or individual counties foot the bill. *See* CP 5,

9-12, 21-24. As such, Appellants have established taxpayer standing. *Cf. Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718, 911 P.2d 389, 394 (1996) (pre-election challenges allow “a court to prevent public expense on measures that are not authorized by the constitution.”).<sup>2</sup>

Under the Sponsors’ view, no citizen has standing to bring a pre-election challenge to the scope of an initiative. Rather, the Sponsors suggest that only a municipality or the Secretary of State herself could invoke pre-election review. This is not the law. In addition to the obvious problem of placing the sole authority for pre-election challenges in the hands of partisan officials, this Court has for decades upheld the right of ordinary taxpayers to bring the type of challenge presented here. *See, e.g., Reiter v. Wallgren*, 28 Wn. 2d 872, 876, 184 P.2d 571, 573 (1947).

The State also agrees Appellants have standing because this case raises an issue of public importance. This Court has repeatedly held that “even traditional standing to bring a lawsuit is not an absolute bar to a

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<sup>2</sup> Initiative Sponsors contend that Appellants have submitted no “evidence” outside of the complaint to support standing. *See* Sponsors Br. at 6. They cite a single case where this Court affirmed summary judgment dismissal of a plaintiff’s claim for failure to provide evidence supporting the allegations in the plaintiff’s complaint. *Coughlin v. Christoffersen*, 72 Wn.2d 1039, 1039-40, 431 P.2d 997, 998 (1967). It is well established that in the summary judgment context, evidentiary facts are required to establish a material issue of fact precluding summary judgment. *See, e.g., Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517, 518-19 (1988). Initiative Sponsors cite no authority applying the same standard to the standing inquiry, and the court of appeals’ decision in *Friends* refutes Sponsor’s argument. *See Friends*, 184 Wn. App. 105, 336 P.3d at 640 (taxpayer’s complaint must allege both a taxpayer’s cause of action and facts supporting taxpayer status).

court's review where an important issue is at stake." *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903, 904 (2005); *see also Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419, 424 (2004) (holding that when an issue "is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture," the Court will "take a 'less rigid and more liberal' approach to standing." (quoting *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 96, 459 P.2d 633, 635 (1969))).

Finally, though the Initiative Sponsors and the State dispute that Appellants Huff, Hall, Frockt, and Carlyle have standing in their capacity as elections officers and state legislators, their arguments are unfounded. Regardless of who ultimately pays for the election, the county elections officers have a professional interest stronger than that of ordinary citizens in maintaining proper elections and preventing invalid initiatives from appearing on the ballot. They further have an interest in maintaining proper pre-election review procedures—which, as discussed below, Initiative Sponsors wish to do away with all together. The legislators also have standing because, as the trial court found, the Initiative invokes the constitutional amendment process pursuant to Article XXIII, thus usurping the legislators' unique right independently and deliberately to do so. In

sum, standing is well-established on multiple grounds and the trial court's order on standing should be affirmed.

*2. This case is justiciable.*

The State also agrees with Appellants that this case is justiciable. State Br. at 7. In response, the Initiative Sponsors merely argue for an end to all pre-election review. Sponsors Br. at 3-4. The cases cited by the Sponsors do not concern challenges to the scope of an initiative, and they ignore this Court's repeated precedent upholding the practice in the limited circumstances present here. *See, e.g., Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708, 710 (2007) (court will consider pre-election challenge "that the subject matter of the initiative is beyond the people's initiative power"); *Philadelphia II*, 128 Wn.2d at 717 (same); *see also Coppernoll v. Reed*, 155 Wn.2d 290, 299-301, 119 P.3d 318, 323 (2005) (distinguishing between substantive and scope-based pre-election review and concluding that only the latter is justiciable prior to the election).

Further, Initiative Sponsors mischaracterize the direct and substantial harms that will result absent an injunction. Specifically, Appellant taxpayers and elections officials will suffer from the use of taxpayer funds and other public resources to conduct an invalid election and the legislators will additionally suffer from the usurpation of their

unique Article XXIII power. Contrary to the Sponsors' claims, Appellants have not asserted harm resulting from any future reduction in the sales tax, from a legislative proposal for a supermajority constitutional amendment, or from the several other constitutional deficiencies in the Initiative.<sup>3</sup>

Rather, in this limited pre-election challenge, Appellants have properly alleged only harms that will result from placement of I-1366 on the ballot.

**B. Free speech rights are not implicated by limited scope-based pre-election review.**

Appellants and the State agree that the trial court committed an error of law in holding that the First Amendment to the United States Constitution or Article I, Section 5 of the Washington Constitution might preclude all pre-election review. Specifically, the trial court erroneously ruled that free speech considerations might create a right to require placement of an initiative on the ballot regardless of whether its scope exceeds the initiative power under Article II. But no such right exists under Washington State or federal law.

As noted, this Court has repeatedly upheld the propriety of pre-election review based on an initiative's scope. *Futurewise*, 161 Wn.2d at 411; *Coppernoll*, 155 Wn.2d at 299-301; *Maleng v. King Cnty. Corr. Guild*, 150 Wn.2d 325, 330-31, 76 P.3d 727, 729 (2003); *Philadelphia II*, 128 Wn.2d at 717; *Ford v. Logan*, 79 Wn.2d 147, 151-52, 483 P.2d 1247,

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<sup>3</sup> Appellants reserve the right to raise these challenges in a later proceeding if necessary.

1249-50 (1971); *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 746, 620 P.2d 82, 86 (1980) (collecting cases). Moreover, this Court in *Philadelphia II* expressly rejected an attempt to revisit this authority in order to preclude all pre-election challenges to initiatives. See *Philadelphia II*, 128 Wn.2d at 718.

Despite this authority, the Initiative Sponsors argue that the First Amendment forbids all pre-election review. Sponsors cite no authority supporting their would-be ban on all pre-election review, but instead rely solely on this Court's dicta in *Coppernoll* to support their claim. This argument fails. First, this Court in *Coppernoll* expressly approved pre-election scope review at the same time it was recognizing that free speech concerns "may" come into play if pre-election substantive review were allowed. *Coppernoll*, 155 Wn.2d at 298-99. Second, the dicta in *Coppernoll* was not supported by any analysis or case citation and was merely expressed as a possibility. Stretching that dicta to include pre-election scope review is not warranted and contrary to later decisions of this Court. See, e.g., *Futurewise*, 161 Wn.2d at 411 (acknowledging courts will engage in pre-election review of initiative's scope).

Though the Initiative Sponsors also attempt to discredit *City of Longview v. Wallin*, 174 Wn. App. 763, 789-92, 301 P.3d 45, 59-60 (2013), *review denied*, 178 Wn.2d 1020, 312 P.3d 650 (2013)—where the

court of appeals rejected an identical free speech argument—they cite no authority undermining *Wallin*'s holding. There, the court accurately observed this Court's well-established distinction between substantive and scope-based pre-election review, holding "The First Amendment concern articulated by the *Coppernoll* court specifically referred to a *substantive* preelection challenge to a statute, not a challenge to whether the statute exceeded the scope of initiative power." *Wallin*, 174 Wn. App. at 791 (emphasis in original). While the court agreed that the "initiative process can involve protected political speech", and that the circulation of a petition can constitute protected "core political speech", the court distinguished between the petition and signature-gathering process and the initiative's placement on the ballot. *Id.* With respect to the latter, the court correctly held that the First Amendment did not guarantee the sponsor the right to place an invalid initiative on the ballot. Indeed, despite Sponsors' rhetoric, they do not dispute that no Washington court has ever concluded that the First Amendment or Article I, Section 5 require all initiatives to be placed on the ballot regardless of their scope.

The federal cases cited by the Sponsors are not on point. *See* Sponsors Br. at 35 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (school mail systems), *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473

U.S. 788, 105 S. Ct. 3439, 87 L.Ed.2d 567 (1985) (charitable contribution programs), and *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (university-funded student publications)). As a threshold matter, those cases each involved allegations of regulatory restrictions on speech, not Constitutional limitations on legislative power.

While the Initiative Sponsors claim the initiative process is a “limited public forum for political speech”, the authority they cite does not support their analogy. The defining characteristic of traditional and limited public fora, such as streets, parks, public school facilities, and student newspapers, is that they are “devoted to assembly and debate” or “opened for use by the public as a place for expressive activity.” *Perry Educ. Ass’n*, 460 U.S. at 45. Although places designated for the expression of views about legislation—the grounds of the U.S. Capitol, for example, *Lederman v. United States*, 291 F.3d 36, 41-44 (D.C. Cir. 2002)—share these characteristics, the legislative act itself, i.e., the voting that occurs inside the Capitol, does not. *Cf. Nevada Comm’n on Ethics v. Carrigan*, 131 S.Ct. 2343, 2351, 180 L.Ed.2d 150 (2011) (“This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message....In like manner, a

legislator has no right to use official powers for expressive purposes.”).<sup>4</sup> The same is true for the ballot initiative process: That process stimulates First Amendment-protected debate and discussion, but no case holds that the act of voting in a ballot initiative—a legislative act—is itself a public forum. *Cf. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362-63, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (“We are unpersuaded...by the party’s contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.”); *Burdick v. Takushi*, 504 U.S. 428, 438, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992) (“[T]he function of the election process is...not to provide a means of giving vent to short-range political goals, pique, or personal quarrel[s]....Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.”) (internal citations and quotations omitted); *Marlin v. Dist. of Columbia Bd. of Elections and Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001) (holding polling

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<sup>4</sup> In rejecting a legislator’s claim to a speech-based right to vote, the Nevada court analogized in dicta to the legislators in *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997) who lacked standing to challenge the Line Item Veto Act. Unlike the generalized “vote dilution” harm alleged by the legislators in *Raines*, the injury claimed by the Appellant legislators here is harm to their unique power under Article XXIII of the Washington Constitution to propose and approve constitutional amendments.

booths were not public forum because “[t]he only expressive activity involved is each voter’s communication of his own elective choice and this has long been carried out privately—by secret ballot in a restricted space.”).

Indeed, the Supreme Court has made a clear distinction between state restrictions on “interactive communication concerning political change,” see *Meyer v. Grant*, 486 U.S. 414, 422, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), and restrictions that “protect the integrity and reliability of the initiative process.” *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). Only the former implicates protected “core political speech”. *Id.* at 190. In contrast, states have “considerable leeway” regarding the latter. *Id.* at 191; see also *Timmons*, 520 U.S. at 358 (“[I]t is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”); *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (“We have recognized that, ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.’”) (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974)); *Burdick*, 504 U.S. at 441 (“[T]he right to

vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.”).

In sum, and as the State agrees, the Initiative Sponsors erroneously conflate substantive pre-election review—which is not at issue in this case—with the limited scope-based pre-election review sought by Appellants. As such, their challenge based on free speech rights fails.<sup>5</sup> And contrary to the trial court’s order, the law on pre-election challenges is clear: neither the First Amendment nor Article I, Section 5 prohibits pre-election review of the scope of an initiative, and neither constitutional provision requires placement of an invalid initiative on the ballot. *See Coppernoll*, 155 Wn. 2d at 299 (pre-election challenge to scope is “expressly held to be separate and distinct from a challenge to the measure’s substantive validity.”); *see also Stone v. City of Prescott*, 173 F.3d 1172, 1175-76 (9th Cir. 1999) (finding that the First Amendment is not implicated when the plaintiffs challenge the scope of the referendum right rather than challenging regulations on the exercise of that right).

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<sup>5</sup> The State correctly observes the fallacy in Appellants’ free speech claim, arguing that it would “lead to electoral chaos and absurdity, as any conceivable measure would have to go before the voters regardless of the extent of the initiative’s procedural defect or unlawful scope of subject matter.” State Br. at 9. This criticism applies equally to the arguments raised in the Brief of Amicus Curiae Pam Roach. Senator Roach cites no authority for her claims that the free speech rights of voters require the Secretary of State to place any initiative on the ballot, so long as it garners adequate signatures. Like the Sponsors, Senator Roach ignores entirely decades of this Court’s precedent upholding limited pre-election review.

**C. I-1366 exceeds the scope of the Article II initiative power.**

Appellants have carefully crafted this litigation to focus only on whether the subject matter of I-1366 is within the initiative power. *See Futurewise*, 161 Wn.2d at 410-11. Appellants do not argue that if enacted, I-1366 would be unconstitutional, although that is certainly true.<sup>6</sup>

The subject of I-1366 is not appropriate for direct legislation by the people, because as the trial court found, the fundamental and overriding purpose is to invoke the Article XXIII constitutional amendment process. As such, I-1366 exceeds the scope of Article II and should not be placed on the ballot.

1. *I-1366 does not purport to change the Constitution; it purports to invoke the Article XXIII power to move a specified constitutional amendment through the legislature to a vote.*

The State erroneously tries to recharacterize Appellants' argument. The argument here, unlike *Futurewise* or *Coppernoll*, is not that I-1366 if enacted would amend the constitution. For example, the claim in *Futurewise* was that the enactment of the initiative at issue would amend the referendum process under the state constitution. 161 Wn.2d at 411. I-1366, however, does not purport to change the process for amending the constitution either in general or for a particular subset of legislative acts. Rather, I-1366 seeks to force the legislature to exercise its power under

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<sup>6</sup> I-1366 has, among other issues, an obvious two subject, log-rolling problem. That would be properly addressed in a post-election challenge.

Article XXIII to adopt a specified amendment to the constitution. As this Court has held, the legislature's exercise of power under Article XXIII is not subject to the people's initiative power. *Ford*, 79 Wn.2d at 155-56.

*2. The fundamental and overriding purpose of I-1366 is to invoke the Article XXIII constitutional amendment power.*

Both the Sponsors and the State attempt to cast I-1366 as a "choice" or a "suggestion" to the Legislature, rather than an ultimatum to force the legislature to exercise its power to move a constitutional amendment to a vote of the people. In arguing that the Initiative amounts to "encouragement", the State implicitly concedes that forcing the Legislature to invoke its Article XXIII amendment powers would be outside the scope of the Article II power. *See* State Br. at 15.

The plain language of the Initiative refutes the Respondents' claim that I-1366 presents the legislature with a mere idea or choice. The Initiative "proposes" a specific amendment, laying out in detail what must be on the ballot to the people: "a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes". *See* CP 14-16 (I-1366 §§ 1, 3); *see also* CP 44 (petition signature page indicating same). "Raises taxes" is specifically defined in I-1366. *See* CP 19 (I-1366 § 6). This specific directive to the legislature is more than a mere idea or suggestion. As the trial court properly recognized, there is no meaningful

choice where the alternative is a reduction in sales tax resulting in a \$1.4 billion dollar annual shortfall in the state budget. *See* [www.ofm.wa.gov/ballot/2015/I-1366\\_Fiscal\\_Impact\\_Statement.pdf](http://www.ofm.wa.gov/ballot/2015/I-1366_Fiscal_Impact_Statement.pdf).

Materials generated by the Sponsors themselves also refute the Respondents' claim that the Initiative's purpose is not to invoke the legislature's power to amend the Constitution, but rather to give the legislature the "option" to do so. The initiative petition plainly states at the top "2/3-For-Taxes Constitutional Amendment". CP 44. Sponsors' press release announcing certification of signatures stated: "The 2/3-for-Taxes Constitutional Amendment Initiative, on the Ballot". *See* [www.voterswantmorechoices.com](http://www.voterswantmorechoices.com). Other promotional materials similarly describe I-1366. Initiative Sponsors cite no authority for their argument that neither the title of the initiative petition nor the sponsors' own statements should be disregarded as evidence of the initiative's purpose in a pre-election review. Regardless, the Attorney General's official title also makes clear that I-1366's purpose is to propose a constitutional amendment. *See* CP 77 (I-1366 would decrease the state sales tax rate unless the legislature "refers to voters a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes"). The "fundamental and overriding purpose" of I-1366 is to invoke the

constitutional amendment process and to propose a constitutional amendment.<sup>7</sup>

I-1366's proposed tax cut does not bring it within the scope of Article II. Indeed, this Court has recognized that initiatives might contain both valid and invalid components, but that hitching a legislative act to a non-legislative act cannot save an initiative. *See Philadelphia II*, 128 Wn.2d at 719. As described in *Philadelphia II*, the proper analysis where an initiative contains both a valid legislative act and an invalid one is to determine the "fundamental and overriding" purpose of the initiative. *Id.* Otherwise, there would be no limitation on the strategy of placing a valid legislative act in an initiative as a means to accomplish an invalid purpose. And despite Respondents' suggestions to the contrary, there is no precedent for using the initiative process as a polling device to show support for a constitutional amendment. State Br. at 15 ("nothing in the state constitution suggests that the people cannot express through an initiative their desire for a constitutional amendment.")

The Initiative Sponsors' arguments similarly reflect a misunderstanding of Washington law and the Initiative's scope. Initiative Sponsors contend that pre-election challenges are rare and that a statewide

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<sup>7</sup> Despite challenging Appellants' view of the "fundamental and overriding purpose" of I-1366, neither the State nor Initiative Sponsors perform any detailed analysis of the Initiative's purpose.

initiative has only once been found to exceed the Article II scope (i.e., *Philadelphia II*).<sup>8</sup> They also erroneously contend that pre-election challenges differ depending on whether an initiative is statewide or local. They cite no authority for this contention. The relative rarity of pre-election review does not support denying such review altogether. And with respect to both state and local initiatives, the focus of the court always is on whether the subject of the proposed initiative is outside of or within the scope of people's initiative power. In each instance where an initiative has been kept off the ballot, whether state or local, it has been because the subject matter is beyond the scope of the initiative power. *See, e.g., Philadelphia II*, 128 Wn.2d at 719 (enacting federal law beyond state legislative and initiative power); *Leonard v. City of Bothell*, 87 Wn.2d 847, 853, 557 P.2d 1306, 1310 (1976) (legislative power delegated directly to legislative authority of city outside the scope of initiative and

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<sup>8</sup> Initiative Sponsors first attempt to distinguish *Philadelphia II* on the grounds that it did not involve an initiative for which any signatures had been gathered and had not been certified for the ballot. But in *Ford*, this Court affirmed the trial court in precluding an initiative from being placed on the ballot, even after the requisite signatures were obtained and all procedural steps for placing the initiative on the ballot were taken. *Ford*, 79 Wn.2d at 151-53, 155-57; *see also, e.g., Wallin*, 174 Wn. App. at 777, 786-87 (court of appeals affirmed decision striking invalid portions of initiative from the ballot even after signatures had been gathered and a petition submitted to the county auditor). Initiative Sponsors also attempt to distinguish *Philadelphia II* on grounds it involved an initiative that "sought to change federal law, something neither the Legislature nor the people has the authority to do." Sponsors Br. at 18. But I-1366, like the initiative at issue in *Philadelphia II*, attempts to accomplish an act that exceeds the Article II power. Nothing in *Philadelphia II* or any other decision of this Court limits its reach to initiatives that propose changes to federal law.

referendum power); *Ruano v. Spellman*, 81 Wn.2d 820, 823-24, 505 P.2d 447, 449 (1973) (matters that are administrative rather than legislative in character are outside scope of initiative power); *Ford*, 79 Wn.2d at 155-57 (repeal of a municipal charter is outside scope of initiative power); *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 746 (subject matter preempted by state law outside scope of initiative power).

Initiative Sponsors also claim that because the legislature has full authority to lower the sales tax and also has full authority to refer a constitutional amendment to the ballot, I-1366 is a proper exercise of the initiative power. This argument is irrelevant to the issues presented here. While the legislature has authority to invoke the constitutional amendment process under Article XXIII, the people under Article II do not.

Initiative Sponsors' argument that "The legislative power of the voters is co-extensive with the legislative power of the Legislature", Sponsors Br. at 19, is not on point. While this statement is true insofar as it pertains to legislative powers under Article II, the legislature has additional, separate, and exclusive power to amend the Constitution under Article XXIII. That the State legislature's power (and the people's initiative power) under Article II is broad is of no particular importance here because the issue remains whether the subject matter of the Initiative

falls within the Article II legislative power. I-1366's subject matter does not.

3. *The Constitution may not be amended by initiative.*

The State and Appellants agree that the Constitution cannot be amended by initiative. The constitutional amendment process and power reside not in Article II, but in Article XXIII as detailed in *Ford*, 79 Wn.2d at 155-56. As this Court has repeatedly held, the initiative power does not extend to Article XXIII. See *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762, 780 (2000); *Brown v. State*, 155 Wn.2d 254, 268, 119 P.3d 341, 348 (2005); *Philadelphia II*, 128 Wn.2d at 718; *Gerberding v. Munro*, 134 Wn.2d 188, 210 n. 11, 949 P.2d 1366 (1998). Because I-1366 attempts to use Article II to invoke the Article XXIII process, it is beyond the scope of the initiative power.

Rather than acknowledge this well-established authority, Initiative Sponsors distort *Ford* and later decisions of this Court in urging constitutional amendment by initiative is permitted. Relying heavily on *Maleng*, Initiative Sponsors suggest that *Ford's* holding is limited to repealing an organic act in its entirety and does not apply to amending the Constitution. This is incorrect. *Maleng* addressed amendment of a city charter, not the state Constitution, and held that voter-initiated charter amendments are within the people's legislative authority contemplated

under specific constitutional provisions governing municipalities.

*Maleng*, 150 Wn.2d at 332-33 (citing WASH. CONST. art. XI, §§ 4, 10).

Because the city charter at issue did not limit that authority, amendment of the charter by initiative was permissible. *Id.* at 333-35.

In contrast, the people’s initiative power is limited to Article II legislative acts and does not extend to Article XXIII acts of the legislature invoking the constitutional amendment process. *Maleng* does not apply to state constitutional amendment; in fact this Court in *Maleng* reaffirmed *Ford*’s holding, noting that Article XXIII gives the legislature the “exclusive authority to amend the constitution”. *Maleng*, 150 Wn.2d at 333 n.5.

Initiative Sponsors also mischaracterize *Ford*’s holding, claiming this Court “considered amendment not to be a legislative act because it involves two separate legislative acts—a vote by both houses and a vote by the people.” Sponsors Br. at 27. To the contrary, this Court in *Ford* properly recognized that constitutional amendment is not a “legislative act” because it is governed by a separate constitutional provision—Article XXIII. *See Ford*, 79 Wn.2d at 155 (“The [constitutional amendment] process is manifestly distinct from that involved in the enactment of ordinary bills or laws.”).

Finally, Initiative Sponsors erroneously claim that I-1366, if approved, would allow the “tempering element of time” deemed so important in *Ford*, claiming that the legislature would go through “its normal legislative process on a proposed amendment and a public vote could not occur until November 2016.” Sponsors Br. at 27 n. 7. The Initiative’s requirement that the legislature refer to the ballot a specific two-thirds for taxes constitutional amendment prior to April 15, 2016 obliterates the customary deliberative process. Constitutional amendments are often proposed, rejected, revised, re-proposed, and debated, sometimes over many years, before they either achieve the required support in the legislature or fail for lack of such support.<sup>9</sup> I-1366’s specific timeline removes the safeguard of a deliberate process by the legislature.

### III. CONCLUSION

I-1366’s “fundamental and overriding purpose” is a subject beyond the scope of the initiative power. That a pre-election challenge to I-1366 is proper and that the appropriate remedy is an injunction keeping I-1366 off the ballot is well-established by decisions of this Court and the Washington Court of Appeals. No decisions are to the contrary.

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<sup>9</sup> For example, members of the legislature have attempted to adopt a two-thirds amendment proposal over the last two legislative sessions. In the 2013-14 session, the proposal failed to obtain the requisite votes in the Senate. SJR 8213 ([app.leg.wa.gov/billinfo/summary.aspx?year=2013&bill=8213](http://app.leg.wa.gov/billinfo/summary.aspx?year=2013&bill=8213)). In the 2014-2015 session, similar proposals failed to advance out of committee. SJR 8200 ([app.leg.wa.gov/billinfo/summary.aspx?year=2015&bill=8200](http://app.leg.wa.gov/billinfo/summary.aspx?year=2015&bill=8200)); HJR 4206 ([app.leg.wa.gov/billinfo/summary.aspx?year=2015&bill=4206](http://app.leg.wa.gov/billinfo/summary.aspx?year=2015&bill=4206)).

Neither the First Amendment to the United States Constitution nor Article I, Section 5 of the Washington Constitution provide any basis for permitting I-1366—which exceeds the scope of the Article II initiative power and is thus invalid and void—to appear on the ballot. Free speech concerns do not bar pre-election scope review of an initiative. Accordingly, this Court should hold as a matter of law that I-1366 exceeds the scope of the Article II initiative power and should issue an order enjoining the Secretary of State from placing it on the ballot for the November 2015 general election.

RESPECTFULLY SUBMITTED this 31st day of August, 2015.

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SUPREME COURT OF THE STATE OF WASHINGTON

SHERRIL HUFF, an individual taxpayer and King County Director of Elections; MARY HALL, an individual taxpayer and Thurston County Auditor; DAVID FROCKT, an individual taxpayer and Washington State Senator, REUVEN CARLYLE, an individual taxpayer and Washington State representative; EDEN MACK, an individual taxpayer; TONY LEE, an individual taxpayer; ANGELA BARTELS, an individual taxpayer; GERALD REILLY, an individual taxpayer; and PAUL BELL, an individual taxpayer,

Appellants,

v.

KIM WYMAN, in her official capacity as Secretary of State for the State of Washington; TIM EYMAN, LEO J. FAGAN and M.J. FAGAN,

Respondents.

**PROOF OF SERVICE**

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 31st day of August, 2015, I

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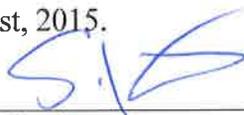
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