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NO. 92075-3

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; GERALD REILLY, an individual taxpayer; and PAUL BELL, an individual taxpayer,

Petitioners,

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.

**SECRETARY OF STATE'S ANSWER TO STATEMENT OF
GROUNDS FOR DIRECT REVIEW**

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I. INTRODUCTION

This matter involves a fundamental and urgent issue of broad public import that requires immediate and ultimate determination by this Court. Plaintiffs seek to enjoin Initiative 1366's placement on the 2015 general election ballot. The superior court correctly denied Plaintiffs' request having determined that they had not established that they were entitled to legal or equitable injunctive relief. While the superior court's ultimate conclusion denying the injunction was correct, its analysis was flawed. This Court should hold that Initiative 1366 should remain on the ballot for a decision by the voters because it does not fall within the extremely narrow circumstances that justify pre-election removal of an initiative measure. The Court should reject the trial court's incorrect conclusion that the scope of the initiative is not within the people's broad legislative power.

Accordingly, the Secretary of State respectfully requests that this Court grant direct, accelerated review and immediately issue an order rejecting Plaintiffs' injunctive request and allowing Initiative 1366 to remain on the ballot. The Secretary of State and county election officials need to receive a final decision in this appeal by September 4, 2015 in order to print and mail ballots and voters' pamphlets to military and overseas voters by the statutory deadline of 45 days before the election date. More importantly, the people of the State of Washington should have an opportunity to exercise their fundamental constitutional right to enact or reject Initiative 1366 in the upcoming election.

II. NATURE OF CASE AND DECISION BELOW

Initiative 1366 concerns state taxes and fees. Section 1 of the initiative explains its purpose and intended effect: “[T]he state needs to exercise fiscal restraint by either reducing tax burdens or limiting tax increases to only those considered necessary by more than a bare majority of legislators. . . . This measure provides a reduction in the burden of state taxes by reducing the sales tax . . . unless the legislature refers to the ballot for a vote a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes and majority legislative approval for fee increases. The people want to ensure that tax and fee increases are consistently a last resort.” I-1366, § 1.

Section 2 would cut the state retail sales tax from 6.5 percent to 5.5 percent. I-1366, § 2(1).

Section 3 would make the tax cut take effect on April 15, 2016, unless the legislature first refers to the ballot for a vote an amendment to the state constitution that includes certain provisions. I-1366, § 3. The proposed amendment must require “two-thirds legislative approval or voter approval to raise taxes . . . and majority legislative approval for fee increases.” I-1366, § 3(2). The terms “raises taxes” and “majority legislative approval for fee increases” are specifically defined. I-1366, §§ 3(2), 6. Section 6 defines “raises taxes” as “any action or combination of actions by the state legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are

deposited into the general fund.” If the legislature does refer the constitutional amendment to the ballot for a vote before April 15, 2016, then Section 2 of the Act, which reduces the tax rate, would expire.¹ I-1366, § 3(1).

Thus, if the legislature refers the constitutional amendment to the ballot before April 15, 2016, then the state retail sales tax rate would stay at 6.5 percent. If the legislature does not refer the constitutional amendment before that time, the state retail sales tax rate would be reduced to 5.5 percent.

Shortly after the Secretary of State verified that I-1366 had received sufficient valid signatures from registered voters to place it on the ballot for the 2015 general election, Plaintiffs filed the action below seeking to enjoin the Secretary from actually placing the initiative on the ballot. After considering all parties’ briefs and hearing oral argument, the superior court denied Plaintiffs’ motion for permanent injunction. While the superior court determined that “I-1366 appears to exceed the scope of the initiative power,” it ultimately concluded that questions surrounding the First Amendment prevented Plaintiffs from establishing that they had a clear legal or equitable right to enjoin I-1366’s placement on the ballot. Order at 8. Plaintiffs immediately sought direct review by this Court.

¹ Sections 4 and 5 update statutory references. Section 7 requires liberal construction to effectuate the intent, policies, and purpose of the act. Section 8 is a severability clause, and section 9 entitles the act the “Taxpayer Protection Act.”

III. ISSUE PRESENTED FOR REVIEW

Where I-1366 would amend the state sales tax rate, an act that is plainly legislative in nature, and only proposes to the legislature a constitutional amendment that may or may not be acted upon, does I-1366 fall outside the scope of the people's initiative power?

IV. ANSWER TO GROUNDS FOR DIRECT REVIEW

The Secretary of State agrees with Plaintiffs that direct and immediate review by this Court is warranted under RAP 4.2(a). The people's constitutional right of initiative is well-established and well-protected. Insuring that the people can exercise this right in the upcoming election is a matter of fundamental and urgent public importance that requires this Court's immediate attention.

A. **Pre-Election Challenges Must Remain Limited And Narrow To Protect The People's Right of Initiative.**

For over one hundred years, the people's right of initiative has been protected through the Washington Constitution and this Court's jurisprudence. Article II, section 1 of the Washington Constitution reserves to the people "the power to propose bills, laws, and to enact or reject the same at the polls." Recognizing the preeminence of this power, this Court has "vigilantly protected" the people's right of initiative by liberally construing the constitutional provision and narrowly limiting the scope of pre-election challenges. *Coppernoll v. Reed*, 155 Wn.2d 290, 297-98, 119 P.3d 318 (2005). "If an initiative otherwise meets procedural requirements, is legislative in nature, and its fundamental and overriding

purpose is within the State's broad power to enact, it is not subject to pre-election review." *Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007) (internal quotation marks omitted). Further, this Court has explained that it must be "clear" that an initiative is outside of the legislative power to warrant removing it from the ballot. *Coppernoll*, 155 Wn.2d at 305. And, this Court has found only one statewide initiative to be outside the scope of legislative power in the entire history of Washington's initiative process. *Futurewise*, 161 Wn.2d at 411 n.2 (discussing *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718-19, 911 P.2d 389 (1996), which involved an initiative proposing to amend federal law by creating a federal initiative process and calling for a world meeting).

In the matter below, the superior court reached the right result in determining that I-1366 should remain on the ballot, yet much of the superior court's rationale and its findings and conclusions were incorrect as matter of law and of fact.² The superior court below did not restrain itself to the narrow inquiry of whether I-1366 was within the State's legislative power under article II, section 1. Rather, the superior court summarily assumed that the measure was *not* after (1) engaging in an inappropriate inquiry of whether I-1366 violated article XXIII, the

² The Secretary of State takes specific exception to Findings of Fact Nos. 12, 14-15, 17, and 18. Order at 2. While designated as findings of fact, they are in essence conclusions of law that should be reviewed *de novo*. See *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002). Moreover, the Secretary takes exception to all or part of Conclusions of Law Nos. 3-9, 12, and 13. Order at 7-8. However, because the Secretary is not asking for a change in the final result reached by the trial court, she does not intend to cross-appeal and merely reserves her right to argue any grounds in support of affirmance. See *State v. Sims*, 171 Wn.2d 436, 442-43, 256 P.3d 285 (2011).

constitutional provision setting forth requirements for constitutional amendments and (2) making assumptions not found in the actual text of the initiative. Neither comports with the limited and narrow scope set forth by this Court for reviewing an initiative prior to an election. This Court should accept review to reiterate that only a narrow and limited means exists for removing an initiative from the ballot prior to an election, substantive pre-election review of an initiative is not allowed, and I-1366 is within the broad scope of the people's initiative power.

B. I-1366 Does Not Exceed the Scope of the People's Initiative Power Because, If Adopted, It Would Not Amend the Washington Constitution

While the Secretary of State takes no position on the merits of I-1366 or its ultimate validity, if enacted, she does have an interest in preserving the people's right to have their say on matters that are within the people's initiative power. Closely guarding the people's initiative power avoids unnecessary judicial interference with the electoral process. *Coppernoll*, 155 Wn.2d at 298; *see also Dumas v. Gagner*, 137 Wn.2d 268, 283-84, 971 P.2d 17 (1999) ("the judiciary should exercise restraint in interfering with the elective process which is reserved to the people in the state constitution" (internal quotation marks omitted)). It also preserves the people's fundamental right to direct democracy through initiative, and the people's right to express their views through an initiative vote. *Id.* Here, the people's fundamental right warrants this Court's careful scrutiny of a request, like Plaintiffs', to strike an initiative

from the ballot. This is especially true when the request is based on an incorrect premise that the measure purports to amend the state constitution.

Contrary to the superior court's uncritical acceptance of Plaintiffs' assertions, I-1366 does not improperly invoke the constitutional amendment process. The initiative does not "bypass" the constitutional amendment process set forth in article XXIII as the superior court found. *See* Order at 5, ¶ 6. Nothing in the text of the initiative purports to change or alter the requirements for obtaining a constitutional amendment. The initiative does not propose the precise language or actual text of the constitutional amendment. The initiative does not alter the requirement that the actual text of the proposed amendment originate in either the House or the Senate. And the initiative does not direct the legislature to submit the amendment to the people without a vote of the legislature or without two-thirds approval by the members of each legislative house. *See generally* I-1366 and *specifically* I-1366, § 3. Each of these was an erroneous assumption made by the superior court not found in the actual text of the measure itself.

Further, the superior court erred in concluding that the scope of the initiative appeared to be outside the people's power. *See* Order at 5-6. As an initial matter, no one disputes that the people's initiative power does not include amending the state constitution. *See Ford v. Logan*, 79 Wn.2d 147, 155, 483 P.2d 1247 (1971). But I-1366 does not amend the state constitution. Rather, I-1366 proposes a change in state statute and is

therefore within the plain language of the article II initiative power “to propose bills, laws, and to enact and reject the same at the polls.” If passed, I-1366 would cut the state sales tax rate unless a contingency occurs: a legislative choice to propose a constitutional amendment. I-1366, §§ 2, 3. Cutting the state sales tax rate is plainly legislative in nature and within the general legislative authority of the people. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 200, 11 P.3d762 (2000) (“[T]here is no serious dispute that in general an initiative can repeal, impose, or amend a specific tax.”).

Nothing in the state constitution suggests that the people cannot express through an initiative their desire for a constitutional amendment. Nor does the constitution suggest that an idea or suggestion for a constitutional amendment can only begin with a source inside the legislature. *See* Const. art. XXIII, § 1. The superior court’s implied conclusion that the original idea or motivation for a constitutional amendment can only come from the legislature itself, and not from the people, is absurd. If that were the case, then no individual legislator could ever take up a constituent’s proposal for an amendment.

If I-1366 passes, the legislature might choose to propose the constitutional amendment through a two-thirds vote of both houses, or it might not. Encouraging the legislature to initiate the constitutional amendment process is not the same as forcing the legislature to do so as the superior court found. *See* Order at 5, ¶ 7. Individual legislators will still have a choice of whether to propose the suggested constitutional

amendment to their respective house, or not. Individual legislators will also have a choice of overriding I-1366 through a two-thirds vote, or not. Nothing in I-1366 forces or restricts these legislative choices and other possible avenues for addressing the initiative.

This Court should accept review, affirm the superior court's ultimate conclusion that I-1366 should remain on the ballot, and correct these errors. Because I-1366 does not purport to amend the constitution or alter its requirements, it is not outside of the people's initiative power. Sufficient voter signatures have qualified the initiative to the ballot and the people have a right to express their views through a vote to approve or reject the measure.

V. CONCLUSION

The Secretary of State respectfully requests that this Court grant direct review and issue an immediate order allowing I-1366 to remain on the ballot. The voters' fundamental right to vote on an initiative should not be abridged unless the initiative is clearly outside the scope of the people's power. Even though the superior court allowed the initiative to remain on the ballot, the superior court erred in concluding that I-1366 fell outside the people's initiative power. I-1366 does not amend the state constitution or alter the constitutional amendment requirements. Instead, it would amend the state sales tax rate, an act that is plainly within the people's

power, and merely proposes to the legislature a constitutional amendment that may or may not be taken up by that body.

RESPECTFULLY SUBMITTED this 21st day of August 2015

A handwritten signature in black ink that reads "Callie A. Castillo". The signature is written in a cursive, flowing style.

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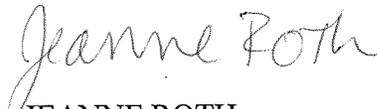
CERTIFICATE OF SERVICE

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