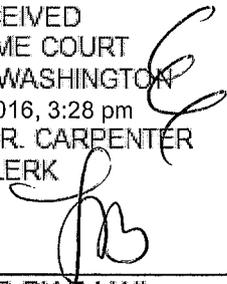


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SUPREME COURT
OF THE STATE OF WASHINGTON

TONY LEE, an individual taxpayer; ANGELA BARTELS, an individual taxpayer; DAVID FROCKT, an individual taxpayer and Washington State Senator, REUVEN CARLYLE, an individual taxpayer and Washington State representative; EDEN MACK, an individual taxpayer; GERALD REILLY, an individual taxpayer; PAUL BELL, an individual taxpayer, and THE LEAGUE OF WOMEN VOTERS OF WASHINGTON,

Respondents,

v.

The STATE OF WASHINGTON,

Appellant, and

TIM EYMAN, LEO J. FAGAN and M.J. FAGAN,

Appellants.

**ANSWER TO AMICUS BRIEF OF ASSOCIATION OF
WASHINGTON SCHOOL PRINCIPALS OF APPELLANTS, THE
INITIATIVE SPONSORS**

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 ORIGINAL

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INTRODUCTION

The amicus brief by the Association of Washington School Principals (AWSP) primarily focuses on one argument—that increased taxes are needed for schools and, therefore, an initiative which reduces taxes is a bad idea, despite the decision of the people at the polls.

Voters were repeatedly told that I-1366 was about fiscal restraint and would reduce the sales tax unless the legislature referred a constitutional amendment to the ballot requiring a greater level of consensus among legislators in order to raise taxes. Nonetheless, AWSP is asking the Court to nullify the people's vote because it argues that taxes need to be increased. But a judicial rejection of I-1366 will do it no favors in achieving its goal to increase taxes. In the future, the legislature may decide that taxes need to be increased. However, the ruling that AWSP seeks, that the people are entitled to no relief, not even a reduction in the sales tax that every person pays, will only inflame the electorate.

A fundamental understanding of governance includes a recognition that the legislature must operate with the consent of the governed. AWSP's goal of higher taxes will not be achieved if voters are told they get nothing in response to their participation in the legislative process.

After a vigorous and extended public debate over I-1366, the voters approved the measure sending a clear message that the voters want state

government to exercise additional fiscal restraint. A judicial rejection of that public sentiment will not help AWSP achieve its goals. In fact, it will poison the well even more.

If the voters' ballot box decision is disrespected, it will result in taxpayers being even more opposed to tax increases, making compliance with obligations under *McCleary v. State*, 173 Wn.2d 477 (2012), even harder to achieve. Tax increases will be doomed politically if taxpayers have no protection. If the people are ignored, the likelihood of raising taxes becomes even more faint. The political give and take between the people and the legislature needs to operate without interference by the Court. The ruling AWSP seeks makes future tax increases a political impossibility.

ARGUMENT

Like the Respondents, AWSP cites the trial court's findings to support the arguments in its brief, even though trial court "findings" are irrelevant when the Court is reviewing the granting of summary judgment, as it is in this case. *Oltman v. Holland America Line USA, Inc.*, 163 Wn. 2d 236, 249 n.10 (2008). As to the arguments AWSP asserts, they provide no basis for the Court to step in and rescue the legislature from having to make hard decisions.

I.

THERE IS NO RIGHT OF THE LEGISLATURE TO BE FREE FROM PRESSURE; AWSP'S ARGUMENTS ARE PRIMARILY LOBBYING EFFORTS

A. AWSP's Arguments are More Appropriate as Lobbying Efforts

The essence of AWSP's first point is that the sales tax reduction puts "undue pressure on the legislature." Amicus Brief of AWSP, at 3. In so doing, it recites the dollar impact and the fact that this year is a short legislative session. It also recites various news articles and appeals to "common knowledge in Olympia." Amicus Brief of AWSP, at 6. Needless to say, this type of rhetorical argument is not the stuff upon which judicial decisions should be made.

Additionally, AWSP bases its argument heavily upon how the legislature **currently** utilizes taxes and allocates revenues to spending. This is not relevant because the legislature remains free to adjust how it allocates spending and taxation and whether to change funding from one source to another. Even if AWSP's claims as to how funding has been allocated in the past (when there is no legal requirement to allocate funds in that way) does not mean that the legislature would not make any changes in response to I-1366.

Nothing in the initiative prevents the legislature from increasing any other taxes with a simple majority vote. The only tax that could not be

increased is the highly regressive sales tax if it chose not to refer a constitutional amendment to the voters. However, with a two-thirds vote, it could retain or increase that tax if it chose not to refer a constitutional amendment. AWSP's argument that state-funded education needs billions of additional dollars is not grounds to conclude that the voters cannot reduce a particular tax.

The AWSP's argument is really that it is illegal for the voters to reduce any tax in any way. For instance, it asserts that "reducing tax revenue is a step backwards." Amicus Brief of AWSP, at 10. That, of course, is a political argument to make to the legislature or to the voters, not to the court.

Significantly, the Respondents never argued that it is illegal for an initiative to reduce a tax and for good reasons. Plainly, the voters possess the legislative power to reduce taxes as this Court has repeated stated. *See Huff v. Wyman*, 184 Wn.2d 643 (2015); *Amalgamated Transit Union v. State*, 142 Wn.2d 183 (2001).

Similarly, AWSP argues that a higher vote threshold for tax increases would "force the legislature to solve the problems with one hand tied behind its back." Amicus Brief of AWSP at 11. Again, that is a political argument to make to the legislature and the voters. AWSP thinks a higher vote threshold is a bad policy, even though it was one that was in

place for twenty years beginning with the passage of Initiative 601.

Nevertheless, the constitution does not prohibit voters from expressing that they want an opportunity to vote on a constitutional amendment that would create a higher vote threshold for raising taxes.

Ultimately, the question as to whether people will be able to vote on such a change is completely in the legislature's hands. The decision on whether a higher vote threshold should be created will be first made by the legislature and potentially by the voters. The "one hand tied behind its back" argument should be made to the legislature or the voters during a campaign—not at the Temple of Justice.

B. There is no Legal Right of the Legislature to be Free from Pressure

AWSP argues that the sales tax reduction puts pressure on the legislature to submit a constitutional amendment to the voters and that pressure constitutes "legislative coercion." Amicus Brief of AWSP, at 12. There is no legal doctrine that protects the legislature from pressure by enactments by the voters any more than the legislature has a right to be free from pressure from the rulings of the judiciary, powerful lobbying groups, or newspaper editorials.

As highlighted in Sponsors' Opening Brief, the 2015 legislature shifted transit money to roads if the governor imposed a lower carbon fuel standard. Initiative 872 made the top two primary contingent on a court

ruling. The 1975 legislature made a change to the sales tax contingent upon passage of other legislation. Contingent legislation like I-1366 is common in Olympia.

The whole reason for having the initiative power is to spur the legislature to act when it is being unresponsive to popular will. *State ex rel. Mullen v. Howell*, 107 Wash. 167, 172 (1919). In this case, how the legislature responds to the initiative's passage is its choice. I-1366 simply reduces a highly regressive tax and expressly highlights the legislature's option to continue to tax lower income communities at a greater level if it chooses to refer a constitutional amendment. **This is an option the legislature has regardless of I-1366.** The Court's role is not to shield the legislature from having to make hard choices.

C. Tim Eyman's Statements Are Irrelevant.

Although the Respondents have only hinted at this tactic, AWSP is quite clear that this case should be all about Tim Eyman, rather than what the voters enacted. AWSP argues that Tim Eyman has been involved in other initiatives that didn't qualify for the ballot where he said he wants the opportunity to vote on a constitutional amendment creating a higher vote threshold for tax increases. Amicus Brief of AWSP, at 13. What Tim Eyman wants is irrelevant. The Court's role relates to the legality of what the **voters** adopted. The Court should not analyze what the voters enacted

any differently than if its sponsors were anyone else or if its sponsors wanted the reduction of a regressive sales tax more than a vote on a constitutional amendment.

Furthermore, ASWP complain that the Initiative Sponsors “dismiss the possibility” of a referral of a constitutional amendment even though AWSP asserts that is what the Initiative Sponsors really want. *Id.* But referral of a constitutional amendment is still just a possibility because it is an unmistakable reality that the effect of I-1366 remains completely the legislature’s decision. Even the form of one or more constitutional amendments remains in the legislature’s hands.

Finally, in regard to its arguments about the ballot title, AWSP emphasizes that I-1366 is an “either-or” scenario.

Neither option vests until the legislature makes its choice; until then, each outcome has as much legal consequence as the other.

Amicus Brief of AWSP, at 15. I-1366 does not result in a sales tax reduction **and** the referral of a constitutional amendment—only one of the two, depending on the legislature’s choice. AWSP is right and for that reason, this case is not justiciable.

The sales tax reduction that AWSP opposes is not illegal on any grounds. Only giving the legislature the option of referring a constitutional amendment is substantively challenged. The trial court should not have

decided the constitutional questions because neither option has vested; no one knows whether the legislature will choose to refer a constitutional amendment prior to April 15, 2016. It should be allowed to decide whether to do so without judicial intervention.

D. AWSP's Argument Results in Undue Restriction of Legislative Processes

The impact of I-1366 may very well be revenue neutral, depending upon the legislature's response, either by implementing the option in Section 3 of I-1366 or some other option based on its inherent powers. Currently slated for the November 2016 ballot is Initiative 732 which has been certified as having sufficient signatures. *See* http://sos.wa.gov/assets/elections/initiatives/FinalText_779.pdf.

I-732 proposes the same reduction in the sales tax as I-1366. But instead of allowing the legislature to decide how to respond to the reduction, I-732 creates a new carbon tax. *Id.*

If AWSP's and Respondent's argument prevails that the voters cannot reduce a tax and highlight a legislative option to make the I-1366 revenue neutral without violating the single subject rule, then such a ruling would certainly render I-732 unconstitutional as well. It proposes reducing a tax and dictates how revenues would be recouped. Clearly, AWSP seeks judicial interference with normal legislative processes which should not be

constrained by new arguments or hyper-technical interpretations of existing precedent.

AWSP's desire for more public funding should not be used to create new rules that limit the legislative powers of the electorate or the legislature.

CONCLUSION

AWSP is essentially calling for the Court to create a new right of the legislature to be free from pressure from citizen initiatives. Such a result has no precedent to support it and runs counter to the entire historical purpose of the initiative process. AWSP's desire for more money should be left to its lobbying efforts in the legislative processes and be given no place in this Court.

RESPECTFULLY SUBMITTED this 10th day of March, 2016.

STEPHENS & KLINGE LLP

By /s/ Richard M. Stephens
Richard M. Stephens, WSBA 21776
Attorney for Appellants Tim Eyman,
Leo Fagan and M. J. Fagan

DECLARATION OF SERVICE

I, Richard M. Stephens, declare as follows:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action and am competent to be a witness herein.

On March 10, 2016, I caused a true copy of the foregoing to be served on the following person via electronic mail, pursuant to consent of counsel:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 10th day of March, 2016, at Bellevue, Washington.

/s/ Richard M. Stephens
Richard M. Stephens

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Please see the attached for filing in this matter.

Thank you.

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