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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; PAUL BELL, an individual taxpayer; and THE LEAGUE OF WOMEN VOTERS OF WASHINGTON,

Respondents,

v.

STATE OF WASHINGTON,

Appellant,

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

Appellants.

APPELLANT STATE OF WASHINGTON'S REPLY BRIEF

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I. INTRODUCTION

A majority of Washington State voters approved Initiative 1366 in the last general election. Plaintiffs seek to override the people's legislative will in favor of their own policy preferences. But Plaintiffs' disagreement with the Initiative's policy purposes does not convert what is otherwise a valid enactment of the people into one that is not.

Plaintiffs base all of their arguments on the fundamentally incorrect premise that Initiative 1366 proposes a constitutional amendment or forces the Legislature to propose one. Under its plain text, Initiative 1366 does neither. Instead, the Initiative amends the state sales tax rate, an act that is plainly within the people's legislative power, and merely makes that act contingent on a constitutional amendment that may or may not be taken up by the Legislature. The Legislature is under no obligation to adopt or even consider a constitutional amendment. If the Legislature believes that the sales tax rate reduction imposed by Initiative 1366 is problematic, it may, by a simple majority vote, replace the lost revenue by closing tax exemptions, increasing a different tax, or finding new revenue sources.

Plaintiffs have not met their heavy burden to show that Initiative 1366 is unconstitutional beyond a reasonable doubt. The court should uphold the people's enactment.

II. ARGUMENT

A. Initiative 1366 Is a Valid Exercise of the People's Article II Legislative Power

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." Const. art. II, § 1. This provision reserves to the people the same right to legislate as that granted to the Legislature: what the Legislature can enact through the passage of a statute so can the people. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000). Here, the people exercised their sovereign right when they enacted Initiative 1366 in order to reduce the sales tax rate, an act that is plainly within their legislative powers. That the people also set forth in the legislation a contingency that depends on an action outside of the people's control does not convert what is a valid article II legislative action into one that is not.

1. Initiative 1366 does not invade the article XXIII constitutional amendment process

Plaintiffs contend that Initiative 1366 is not a valid legislative act because it proposes a constitutional amendment. Resp. Br. at 21. But, to reach their conclusion, Plaintiffs ignore what the text of the Initiative *actually does* and focus instead on what the *effect* of the Initiative *may* one day be. *See* Resp. Br. at 21-27. This is counter to how this Court has previously analyzed whether an initiative improperly amends the

constitution or invokes the constitutional amendment process. This Court has focused on the text of the initiative, not its downstream effects. *See, e.g., Futurewise v. Reed*, 161 Wn.2d 407, 412, 166 P.3d 708 (2007); *Gerberding v. Munro*, 134 Wn.2d 188, 211, 949 P.2d 1366 (1998).

Article XXIII explains how the state constitution may be amended:

Any amendment or amendments to this Constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments . . . be submitted to the qualified electors of the state for their approval, at the next general election.

Const. art. XXIII, § 1. Thus, to propose a constitutional amendment requires one or more individual legislators to submit an amendment to their respective house for consideration. And, to give effect to an amendment, “two-thirds of each house of the legislature must agree to submit the proposed amendment. Then it must be approved and ratified by the majority of electors in their capacity as the ultimate sovereign.” *Ford v. Logan*, 79 Wn.2d 147, 155, 483 P.2d 1247 (1971).

Plaintiffs suggest that Initiative 1366 permits the people to circumvent this process by invoking the amendment process themselves. Resp. Br. at 22-23. It does not. While Initiative 1366 may have the *effect* of prodding the Legislature into taking up a constitutional amendment, this is not the same as actually invoking the constitutional process under article XXIII.

First, Initiative 1366 does not *propose* a constitutional amendment within the meaning of article XXIII, as Plaintiffs wrongly suggest. Resp. Br. at 21, 26-27. While Initiative 1366 provides specifications for a constitutional amendment that would impact the effective date of the Initiative, nothing in the Initiative requires the Legislature to actually take up the amendment. *See generally* I-1366. Specifying terms that may or may not be taken up by Legislature is not the same as *proposing* a constitutional amendment within the meaning of article XXIII. Otherwise, any time a constituent or interest groups submits a suggested constitutional amendment to a legislator, they would be improperly invoking the constitutional amendment process. That is not the law. Only an individual legislator can accomplish the act of referring a constitutional amendment to his or her respective house, and nothing in Initiative 1366 requires any legislator to do so.

Further, Initiative 1366 does not allow the people or the Legislature to bypass any of article XXIII's requirements. Initiative 1366 does not order or require the Legislature (or individual members of the Legislature) to take any specific action. *See generally* I-1366. But if an individual legislator chooses to take up the referenced constitutional amendment in Initiative 1366, he or she must still comply with the constitutional process for proposing a constitutional amendment. The amendment or amendments must be proposed in either house of the Legislature by one or more legislators; considered by both houses through the normal legislative course; agreed to by two-thirds of the members of

each of the two houses; and then submitted to the qualified voters at the next general election.

Initiative 1366 also does not interfere with the deliberative process contemplated by article XXIII. Plaintiffs suggest that Initiative 1366 forces the Legislature to take up a constitutional amendment without “deliberation and independent weighing of alternatives.” Resp. Br. at 23-24. But, any time the Legislature takes up a specific proposal—be it ordinary legislation or a constitutional amendment—the Legislature must complete the deliberative process within its legislative session, otherwise the proposal cannot take effect. And, in every legislative session, external pressures, constituent demands, mandates, and deadlines weigh on the Legislature to accomplish specific acts. Initiative 1366 is no different. Initiative 1366 sets an effective deadline for its sales tax reduction to take effect and specifies a mechanism for the Legislature to avoid that legislative action. That the Legislature must decide whether to take up and approve the constitutional amendment specified within Initiative 1366 by a certain deadline does not alter or impede the normal process.

2. Initiative 1366 does not abridge the Legislature’s plenary powers

When the people enacted Initiative 1366, they exercised the same sovereign legislative power as the Legislature does when it enacts other laws. *Amalgamated Transit Union*, 142 Wn.2d at 204. As this Court has recognized, “the right of initiative is nearly as old as our constitution itself, deeply ingrained in our state’s history, and widely revered as a powerful

check and balance on the other branches of government.” *Futurewise*, 161 Wn.2d at 410. Accordingly, Initiative 1366 is entitled to the same deference as if it were enacted by the Legislature. *See Amalgamated Transit Union*, 142 Wn.2d at 204.

Despite these fundamental principles, Plaintiffs treat the people’s legislative power as if it is inferior to that of the Legislature’s, suggesting that the Legislature should not accept the people’s will in enacting Initiative 1366. Resp. Br. at 28-29. In fact, Plaintiffs go so far as to suggest that the Legislature has a constitutional right to “vote no” on the people’s enactment of a tax cut. *Id.* at 28. But, the state constitution already establishes the balance of power between the people and the Legislature in this regard. Const. art. II, § 1. The Legislature can override or amend Initiative 1366 through a two-thirds vote. Const. art. II, § 1(c). While the Washington Constitution establishes that the Legislature cannot vote down the people’s tax rate reduction with a simple majority, there is nothing—other than political will—that impedes their ability to do so by a two-thirds vote.

Plaintiffs also argue that Initiative 1366 abridges the plenary law-making powers of the 2016 Legislature by forcing it to submit a two-thirds supermajority amendment to the voters. Resp. Br. at 28. Plaintiffs base this argument on a flawed reading of Initiative 1366 that reads requirements into the text that do not exist. The Legislature might choose to propose a constitutional amendment, or it might not. Encouraging the Legislature to initiate the constitutional amendment process is not the

same as forcing the Legislature to do so. Individual legislators still have a choice to make. They could propose the suggested constitutional amendment, vote for any proposed constitutional amendment,¹ or override or amend Initiative 1366 through a two-thirds vote. The Legislature could also do nothing under Initiative 1366 at all and, instead by simple majority vote, reduce appropriations or replace any lost revenue through other revenue sources. Nothing in Initiative 1366 forces or restricts this range of legislative choices. Plaintiffs' assertions in these regards are simply false.

3. Initiative 1366 enacts valid contingent legislation

Plaintiffs concede that if the Legislature were to enact “a law that is complete in itself and requires no further legislative action,” the Legislature may validly “condition whether that legislation goes into effect based on a future event that would render the legislation expedient and necessary.” Resp. Br. at 30. Yet, Plaintiffs inexplicably contend that Initiative 1366, which was enacted by the people and adopted a complete legislative act, is not “valid contingent legislation.” Plaintiffs are wrong.

Contrary to Plaintiffs' unsupported claim, Initiative 1366 is a complete legislative act. *See* Resp. Br. at 31. When the people enacted Initiative 1366, they passed a law that reduces the sales tax rate by a

¹ Senate Joint Resolution 8211, 65th Leg. (2016), which proposed a constitutional amendment similar to that suggested by Initiative 1366, exemplifies this very thing. The Senate voted 26-23 in favor of passing the amendment, but because the constitutional measure required a two-thirds majority, the measure failed. *See* <http://app.leg.wa.gov/billinfo/summary.aspx?year=2015&bill=8211> (last viewed Feb. 26, 2016). The Senate's consideration of the resolution also belies any suggestion by Plaintiffs that the “deliberative process” on such an amendment is an “impossibility.” Resp. Br. at 29.

specific amount. I-1366 § 2. The people also determined that the tax rate reduction should go into effect only in the absence of the Legislature proposing a constitutional amendment to the people for a vote by a specific date. I-1366 § 3. If however the Legislature does not take such action before the specified time, the sales tax reduction will automatically go into effect with no further legislative action by the people or the Legislature. I-1366 §§ 2, 3.

When the people enacted Initiative 1366, they made a legislative judgment that the sales tax reduction should occur only in the absence of a certain circumstance. While Plaintiffs' claim that the people's legislative judgment here is different from the legislative judgments made in *Brower v. State*, 137 Wn.2d 44, 969 P.2d 42 (1998), and *State v. Storey*, 51 Wash. 630, 99 P. 878 (1909), because the people's enactment involves a negative condition, that argument relies on semantics. Resp. Br. at 30-31. Enacting legislation that will go into effect only upon the occurrence of some set of future facts is not legally different from enacting legislation that will go into effect only upon the non-occurrence of some set of future facts. In either instance, the substance of the legislative act is full and complete at the time the measure is enacted. The relevant legislative body has "rendered the judgment" as to both the statute itself and the "expediency of conditioning the operation of the statute," and there is nothing left to be done except to see if the conditioning event occurs or not. See *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 28, 775 P.2d 947 (1989).

For this same reason, Plaintiffs' argument that the people improperly delegated a legislative decision to the Legislature is misplaced. Resp. Br. at 31-34. Plaintiffs point to *Amalgamated Transit Union*, 142 Wn.2d at 241, and *State v. Dougall*, 89 Wn.2d 118, 570 P.2d 135 (1977), for the proposition that the people cannot pass legislation conditioned on a vote of the Legislature. See Resp. Br. at 31-32. But those cases are inapposite, as the legislation at issue in those cases improperly transferred the Legislature's power to give effect to its own laws into the hands of others. See *Amalgamated Transit Union*, 142 Wn.2d at 241-243; *Dougall*, 89 Wn.2d at 120-23. In other words, the body ultimately giving effect to the law was not the same legislative body that had initially enacted the law. *Id.* But here, the people did not condition the effectiveness of the sales tax reduction in Initiative 1366 on an ultimate vote to approve or reject the Initiative or a sales tax reduction.

Instead, the people enacted Initiative 1366 and conditioned the effective date of that measure on the occurrence of a specified event within the Legislature's control. This is no different from *Brower*, where the Legislature conditioned the effectiveness of its referendum on an event outside of its control. *Brower*, 137 Wn.2d at 49. Here, like in *Brower*, the people's legislative judgment was complete at the time of the Initiative's passage. The Legislature can take absolutely no action in response to Initiative 1366 and nothing in the people's enactment would change. Plaintiffs are simply wrong to suggest otherwise.

B. Initiative 1366 Contains Only One Legislative Subject Within the Meaning of Article II, Section 19

In enacting Initiative 1366, the people passed one law that reduces the retail sales tax and made that act contingent on whether the Legislature takes an action that is neither imposed nor required by the Initiative. Initiative 1366 does not propose any constitutional amendments, nor does it require the Legislature to start the amendment process or take any action at all. Accordingly, Initiative 1366 contains only a single subject within the meaning of article II, section 19. State's Br. at 25-31.

Plaintiffs nevertheless put forth various arguments that Initiative 1366 contains multiple subjects in violation of the constitution's single-subject requirement. Resp. Br. at 9-20. But Plaintiffs build all of their arguments on the fundamentally wrong premise that the Initiative enacts not only a law that reduces the state sales tax rate, but also proposes a constitutional amendment. *Id.* All of Plaintiffs' arguments fail because the Initiative does no such thing and, even if a constitutional amendment were considered a "subject," it is rationally related to the Initiative's sales tax reduction. Plaintiffs cannot carry their burden of establishing that Initiative 1366 violates article II, section 19 "beyond a reasonable doubt." *Amalgamated Transit Union*, 142 Wn.2d at 205.

1. All of Initiative 1366's provisions are rationally related and germane to the measure's general subject

Article II, section 19 is to be liberally construed in favor of Initiative 1366. *See Amalgamated Transit Union*, 142 Wn.2d at 206. The single-subject provision does not "contemplate a metaphysical singleness

of idea or thing, but rather that there must be some rational unity between the matters embraced in the act, the unity being found in the general purpose of the act and the practical problems of efficient administration.” *Id.* at 209 (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 33, 377 P.2d 466 (1962)). So long as the matters within the body of the initiative are germane to the general title and germane to one another, rational unity will be found. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 638, 71 P.3d 644 (2003). Thus, “regardless of what is in the voters pamphlet or the history of the initiative,” the relevant focus for purposes of article II, section 19 is “on what is in the measure itself, i.e., whether the measure contains unrelated laws.” *Amalgamated Transit Union*, 142 Wn.2d at 212 (emphasis added).

As the State has already shown, all of Initiative 1366’s provisions are rationally related within one general subject. Initiative 1366’s single legislative “subject” for purposes of article II, section 19 concerns taxes. CP at 23-28, 36. Section 2 of the measure reduces the retail sales tax rate. I-1366, § 2. Section 3 sets the effective date for the sales tax reduction (I-1366, § 3(1)), but makes the enactment contingent on subsequent action of the Legislature, specifically referring a constitutional amendment to the people for a vote. I-1366, § 3(2). But the references to constitutional amendments in section 3 have no force of law other than to provide the set of facts upon which the sales tax rate reduction in the Initiative takes effect. I-1366, § 3. Accordingly, all of the provisions within Initiative 1366 facilitate the accomplishment of its purpose and are properly

included within the general subject of the Act. *See Wash. Toll Bridge Auth. v. State*, 49 Wn.2d 520, 523, 304 P.2d 676 (1956).

Plaintiffs nevertheless contend that Initiative 1366 violates article II, section 19 by improperly combining a one-time objective (setting a new tax rate) and a continuing objective (a constitutional amendment). *See Resp. Br.* at 11-13. In making this argument, Plaintiffs treat Initiative 1366 as if the measure accomplishes both a reduction in the state sales tax rate and a constitutional amendment. It does not. Initiative 1366 accomplishes only one legislative act—a reduction in the state sales tax rate. *State’s Br.* at 29-31. Accordingly, Initiative 1366 is unlike the laws cited by Plaintiffs that were struck down for containing multiple, unrelated legislative actions. *See State’s Br.* at 30-31.

Plaintiffs also contend that Initiative 1366’s “subjects” are not germane to each other. *Resp. Br.* at 13-14. In making their argument, Plaintiffs misconstrue the Initiative’s text by supposing that the measure actually proposes both a sales tax reduction and a constitutional amendment. *See Resp. Br.* at 14. But, even if the constitutional amendment reference was relevant to the analysis, Plaintiffs have not shown that its subject matter is unrelated to Initiative 1366’s overall general subject. The subject of limiting state imposed taxes and fees is certainly related to the subject of reduced taxes, and both are germane to Initiative 1366’s overall general subject of taxes. *See State’s Br.* at 28-29.²

² Even the concept of addressing taxes and fees together are germane to the Initiative’s overall subject. *C.f. Wash. Ass’n for Substance Abuse & Violence Prevention*

Plaintiffs' final two-subject contention is that Initiative 1366 contains one valid purpose (reducing the sales tax) and one invalid purpose (invoking the amendment process). Resp. Br. at 14-15. For the reasons explained above, the contingency provision is not improper. Plaintiffs also go too far in their assertion that this Court "implicitly recognized" that Initiative 1366 violates the constitution. Resp. Br. at 14-15. This Court did no such thing. *See generally Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727 (2015). To view *Huff* otherwise would contradict this Court's plain holding that the plaintiffs there had not met their burden in the prior action of showing a *clear* constitutional violation. *Huff*, 184 Wn.2d 643.

2. Initiative 1366's references to a constitutional amendment do not constitute a second subject

Plaintiffs misunderstand the State's argument when they accuse the State of treating Initiative 1366's reference to a constitutional amendment as no more than "policy fluff." Resp. Br. at 15-19. The State has never suggested that the Initiative's references to a constitutional amendment should be ignored as meaningless. In fact, the State does not dispute that the reference to a constitutional amendment is significant to Initiative 1366; it just does not have the effect that Plaintiffs ascribe to it.

Plaintiffs doggedly insist that section 3 of the Initiative proposes a constitutional amendment, and therefore embodies a separate "rule of

v. State, 174 Wn.2d 642, 278 P.3d 632 (2012); *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 377 P.2d 466 (1962).

action” for purposes of article II, section 19. Resp. Br. at 15. But, as the State has already proven, section 3 does not have any separate force of law beyond providing a set of facts upon which the sales tax reduction in the Initiative would not take effect. While section 3 is certainly operative in that it states the condition and effective date for section 2, it does not separately propose or enact a constitutional amendment. Accordingly, the provision cannot create a second subject under article II, section 19. *See* State’s Br. at 26-29.

When a majority of voters endorsed Initiative 1366, they knew that they were passing one law that reduces the retail sales tax rate, but were also making that legislative act contingent on the Legislature choosing not to take separate action in the form of proposing a constitutional amendment. Nothing in the text of the Initiative, its ballot title, or even the Voters’ Pamphlet suggested to the people that by enacting the measure they were forcing the Legislature to propose a constitutional amendment or were proposing an amendment themselves. *See* I-1366; CP at 36-37.

Plaintiffs’ arguments presume that the people only voted for Initiative 1366 because of the *possibility* of a constitutional amendment requiring two-thirds legislative approval for tax increases and fees. But Plaintiffs provide no empirical evidence that that was the reason Initiative 1366 passed, and it is their burden to show unconstitutionality beyond a reasonable doubt. *See* Resp. Br. at 18-19. More importantly, Plaintiffs’ arguments do not give the voters of Washington enough credit. While Plaintiffs point to the history of past initiatives and statements by sponsors

to make their arguments as to the voters' intent (Resp. Br. at 18-19), none of those are relevant. Only "what is in the measure" itself matters, for that is what was before the voters at the time they cast their ballot. See *Amalgamated Transit Union*, 142 Wn.2d at 212. Here, Initiative 1366 asked the people to vote on only one legislative act—a reduction to the state sales tax rate—no more and no less.

In sum, Initiative 1366 contains a single subject in accordance with article II, section 19. Plaintiffs failed to meet their burden of showing otherwise beyond a reasonable doubt.

C. Initiative 1366's Provisions Can Be Severed

The Court need not reach this argument because Initiative 1366 is constitutional in its entirety. But if the Court disagrees, Plaintiffs have failed to establish that Initiative 1366's provisions cannot be severed.³

The State has already shown that all of Plaintiffs' arguments rely on a fundamental misreading of Initiative 1366. While Plaintiffs contend that section 3(2) is the "heart and soul" of Initiative 1366, they make this argument based on the unsupported assumption that the Initiative's overall purpose is to amend the constitution. Resp. Br. at 39. And Plaintiffs base their claim that the voters would not have enacted the sales tax reduction in section 2 without the conditional provision only on their own unsupported beliefs about the validity of the measure. Resp. Br. at 36-37.

³ Plaintiffs accuse the State of applying the wrong test for severability as found in *McGowan v. State*, 148 Wn.2d 278, 294, 60 P.3d 67 (2002). Resp. Br. at 35-36. But the State fails to see how the test cited in *McGowan* is any different from that cited in *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 411-12, 355 P.3d 1131 (2015), which Plaintiffs rely on. Both recite identical propositions and authority.

Again, they fail to give voters proper credit for understanding what the Initiative would accomplish.

Initiative 1366's provisions are not so intertwined as to be unseverable. Section 2 operates independently of the Initiative's remaining provisions. If the contingency in section 3 never comes to pass, the voter's purpose for enacting Initiative 1366 still remains—to reduce the state sales tax rate.

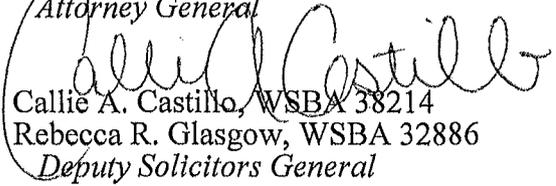
III. CONCLUSION

Initiative 1366 is a valid exercise of the people's legislative power that is in accordance with all constitutional requirements. The Initiative amends the state sales tax rate, an act that is plainly within the people's power, and merely makes the reduction contingent on a constitutional amendment that may or may not be taken up by the Legislature.

Plaintiffs have not met their burden to prove Initiative 1366 is unconstitutional beyond a reasonable doubt. Accordingly, the State of Washington asks this Court to reject Plaintiffs' challenge and uphold the people's legislative act as constitutional.

RESPECTFULLY SUBMITTED this 26th day of February 2016.

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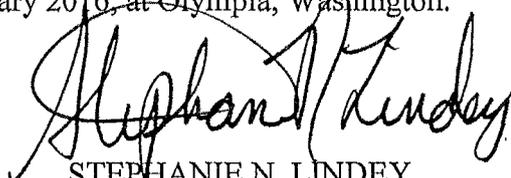
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I certify, under penalty of perjury under the laws of the state of Washington, that I served, via email, a true and correct copy of the Appellant State of Washington's Reply Brief, upon the following:

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Dear Clerk,

Attached in case number 92708-1, please find the following document:

1. Appellant State of Washington's Reply Brief.

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