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SUPREME COURT OF THE STATE OF WASHINGTON

TIM EYMAN,

Respondent/Cross-Appellant,

and

MICHAEL J. PADDEN,

Intervenor-Respondent/Cross-Appellant,

v.

KIM WYMAN, in her capacity as Secretary of State,

Defendant,

WASHINGTON STATE LEGISLATURE,

Appellant/Cross-Respondent,

and

DE-ESCALATE WASHINGTON; and
CYRUS HABIB, Lieutenant Governor of the State of Washington,

Intervenor-Appellants/Cross-Respondents.

**OPENING BRIEF OF
THE WASHINGTON STATE LEGISLATURE**

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I. INTRODUCTION

The Legislature chose one of three constitutionally specified options when it enacted Initiative to the Legislature 940 (I-940). Laws of 2018, ch. 11.¹ The Legislature also properly exercised its plenary legislative authority by enacting a separate measure that conditionally amends the law enacted through I-940, only if and when I-940 becomes operative law. Engrossed Substitute House Bill 3003 (ESHB 3003), *enacted as* Laws of 2018, ch. 10.² In taking these actions, the Legislature violated neither the letter nor the spirit of the Washington Constitution, and this Court should not undo these appropriate exercises of the authority of a coordinate branch of government.

This Court has long recognized the Legislature's plenary authority to act unless the constitution restricts its powers, as well as the importance of the people's initiative power. Here, these authorities intersect, and the Court must strive to give effect to both. In doing so, the Court should look to its prior decisions for guidance. It may borrow a legal test employed in cases protecting the Governor's veto power and the voters' referendum power. This would provide a framework to inquire whether the Legislature's enactment of I-940 and ESHB 3003 constituted an attempt to

¹ I-940 appears in the record at CP 132-40.

² ESHB 3003 appears in the record at CP 141-50.

circumvent the initiative power. They did not. In enacting I-940 and ESHB 3003, the Legislature sought to further I-940's purposes, not to undermine them. Because the Legislature's actions here were not an attempt at circumventing or defeating the people's initiative power, invalidation is unnecessary and unwarranted. This approach effectively balances important powers by affording appropriate deference to the Legislature's authority to enact legislation, while also providing for meaningful judicial review of future legislative actions that may infringe on authority vested in others.

I-940 is a valid enactment. It received sufficient voter signatures to be certified to the Legislature, and the Legislature chose one of three constitutionally specified options by adopting the initiative without changing or amending it. Because it is facially valid, the enrolled bill doctrine forbids further inquiry into the Legislature's processes used to enact it. ESHB 3003 is likewise a valid enactment. It passed both houses and was signed by the Governor. There is no express Constitutional provision forbidding its enactment, and thus it was a proper exercise of the Legislature's plenary power. Finally, this Court can give effect to both I-940 and ESHB 3003 because neither constitutes a legislative attempt to usurp the voter's initiative power.

II. ASSIGNMENT OF ERROR

The Thurston County Superior Court erred in entering its order of April 20, 2018, granting summary judgment (in part) in favor of Mr. Eyman and Senator Padden, and denying summary judgment to the Legislature and De-Escalate. In particular, the court erred in concluding that the Legislature did not validly enact I-940 and ESHB 3003, and in ordering that I-940 appear on the November 2018 general election ballot. CP 255-58.

III. ISSUES

1. Did the Legislature validly enact I-940 into law such that it takes effect on June 7, 2018, without being placed onto the ballot?

2. Was ESHB 3003 a valid exercise of the Legislature's law-making power?

IV. STATEMENT OF THE CASE

A. Legal Background Regarding Initiatives to the Legislature

This case involves two processes by which laws are enacted in Washington. ESHB 3003, like most laws, was enacted by the Legislature pursuant to its plenary legislative authority. I-940 followed a less common route as a law enacted via voter initiative submitted to the Legislature. Const. art. II, § 1(a). Both the plenary authority of the Legislature and the reserved power of initiative are bedrock constitutional principles. But while the Legislature's law-making process is generally well-known, the voter

initiative process—and in particular the process of submitting a voter initiative to the Legislature—is less familiar. Thus, we provide a brief overview.

An initiative to the Legislature begins as a proposed new law drafted by voters and circulated by petition for signature. The initiative needs signatures from at least eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure. Const. art. II, § 1(a).³ If an initiative to the legislature receives sufficient signatures, the Secretary of State certifies it to the Legislature for its consideration, not directly to the ballot. *Id.*

At this point, the Legislature has three options, described in the state Constitution:

Such initiative measures . . . shall be either [1] *enacted* or rejected *without change or amendment by the legislature* before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. [2] *If it is rejected* or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. [3] *The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such*

³ Initiatives to the people differ principally in the consequences of securing sufficient signatures. If an initiative to the people receives enough signatures, it is placed onto the ballot at the next general election. Const. art. II, § 1(a).

event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election.

Const. art. II, § 1(a) (emphases and enumeration added).

Thus, the Legislature has exclusive discretion to (1) enact the initiative into law, (2) reject (including by failing to act on) the proposal, or (3) propose an alternative. *Id.* If the Legislature enacts the initiative, it becomes law and takes effect 90 days after the end of the legislative session. Const. art. II, § 1(c). The voters' right of referendum applies to initiatives so enacted—i.e., voters may file a petition with the Secretary of State within the 90-day window to place the enacted initiative onto the ballot. *Id.*; Const. art. II, § 1(d).

If the Legislature rejects or fails to act on the initiative, then the Secretary of State places it onto the next general election ballot for the voters' consideration. Const. art. II, § 1(a). If the Legislature proposes an alternative, then both the original initiative and the alternative are placed before the voters using a constitutionally specified two-question format that differs from other ballot measures:

When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully

counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

Id. By statute, the original measure and the alternative appear on the ballot together, designated by the same number but with the alternative designated by the letter “B.” RCW 29A.72.270. To illustrate, when Initiative 97 appeared on the 1988 Washington ballot with an alternative, the voters were presented with two questions: (1) whether they wanted to enact either one of the alternatives or reject both (they voted to enact one of the proposals); and (2) whether they preferred the original Initiative 97 or the alternative Initiative 97B (they chose the original Initiative 97).⁴

⁴ Initiative 97 was the last time a Washington ballot contained an initiative to the Legislature and an alternative. The Secretary of State’s historical list of all initiatives to the legislature describes the history of Initiative 97:

INITIATIVE TO THE LEGISLATURE NO. 97

(Shall a hazardous waste cleanup program, partially funded by a 7/10 of 1% tax on hazardous substances, be enacted?) Filed on August 13, 1987 by Christine Platt of Olympia. 215,505 signatures were submitted and were found sufficient. The measure was certified to the Legislature on February 8, 1988. The Legislature passed Alternative Measure No. 97B. As required by the state constitution both measures were submitted to the voters at the November 8, 1988 general election. The votes cast on the original measure and the alternative proposal were as follows: For Either: 1,307,638 Against Both: 224,286 Prefer No. 97: 860,835 Prefer No. 97B: 676,469 The act is now identified as Chapter 2, Laws of 1989.

Initiatives to the Legislature, online at: https://www.sos.wa.gov/elections/initiatives/statistics_initleg.aspx.

The argument below also refers to referendums, an additional type of ballot measure. A referendum allows voters to review a statute already enacted by the Legislature. Const. art. II, § 1(b). It can be exercised in two ways. First, as described above, voters can file petitions with the Secretary of State within 90 days after the adjournment of a legislative session to place onto the ballot any bill or initiative that the Legislature enacted during that session. *Id.*; Const. art. II, § 1(d). Second, the Legislature may itself place a measure directly onto the ballot for the voters' consideration. Const. art. II, § 1(b).

B. Facts and Procedure in This Case

The Legislature enacted I-940 and ESHB 3003 on March 8, 2018, the last day of the Legislature's regular session. CP 132-50. I-940's genesis is with the voters; sponsor Leslie Cushman, on behalf of Intervenor-Defendant De-Escalate Washington, proposed I-940 by filing the measure with the Secretary of State as a voter initiative to the Legislature. After enough voters signed petitions in support of I-940, the Secretary of State certified the measure to the Legislature for its consideration. CP 34. Legislative committees in both houses held hearings on I-940, and recommended its passage. Thereafter, both legislative chambers enacted I-940 into law in its original unamended form. CP 132. I-940 takes effect

90 days after the adjournment of the legislative session, on June 7, 2018. *Id.*; Const. art. II, § 1(c).

ESHB 3003’s origin is in the Legislature; it is not part of I-940 nor is it structured as a stand-alone piece of legislation. Instead, it is an enactment by the Legislature, pursuant to its plenary legislative authority, conditionally amending sections 5 through 9 of I-940 and adding three new sections to the RCW. CP 141-50. These amendments and additions do not interfere with the policy advanced by I-940; to the contrary, ESHB 3003 furthers the policies of I-940. *Compare* Laws of 2018, ch. 11 (I-940) *with* Laws of 2018, ch. 10 (ESHB 3003).

ESHB 3003 passed with a majority vote in both chambers of the Legislature, and the Governor signed the bill. Although the Legislature approved ESHB 3003 immediately prior to I-940, the bill takes effect on June 8, 2018—one day after the effective date of I-940—and the Legislature conditioned the bill on I-940 taking effect as operative law. ESHB 3003 provides that it would become law only if I-940 “is passed by a vote of the legislature during the 2018 regular legislative session and a referendum on the initiative . . . is not certified by the secretary of state.” Laws of 2018, ch. 10, § 10. In other words, ESHB 3003 is a separate legislative enactment that amends I-940 only if and after I-940 takes effect.

Following enactment of I-940 and ESHB 3003, Plaintiff-Respondent Tim Eyman brought this action, naming both Secretary of State Kim Wyman and the Legislature as defendants. Mr. Eyman challenged the validity of the Legislature's two enactments and requested the court order the Secretary of State to place both I-940 and I-940 as amended by ESHB 3003 onto the 2018 general election ballot as alternative measures. CP 3-16. Senator Padden intervened in support of Mr. Eyman's position. *See* CP 97-98. The sponsoring organization for I-940 intervened to defend the Legislature's action in passing both measures. *See* CP 151-70.

The superior court granted summary judgment, ruling that the Legislature in fact rejected I-940. CP 251-54; RP 45:2-62:24. It ordered the Secretary of State to place I-940 onto the November general election ballot. RP 62:10-12. It did not order that ESHB 3003 appear on the ballot as an alternative measure, reasoning that legislative history showed that the Legislature rejected amendments that would have made ESHB 3003 an alternative to I-940. RP 62:13-24. The Legislature immediately appealed and sought direct review in this Court. CP 250-54. Mr. Eyman, Senator Padden, and De-Escalate also appealed or cross-appealed. Lieutenant Governor Cyrus Habib moved to intervene.

V. SUMMARY OF ARGUMENT

The legislative process includes a number of circumstances in which powers that are constitutionally vested in different actors converge. In this case the Legislature's plenary authority to legislate overlaps with the right of voters to propose an initiative to the legislature. In other circumstances, the Legislature's authority to pass laws intersects with the Governor's veto authority. And when the Legislature passes a bill containing an emergency clause, that clause affects the people's right of referendum.

This Court has developed a test to preserve the competing legislative roles in the latter two contexts, and this test can be applied here to protect both the Legislature's authority to legislate and the voters' initiative right. In particular, this Court has evaluated whether the Legislature's use of subsections in a bill amounts to an obvious attempt to circumvent the Governor's veto power. In emergency clause cases, this Court similarly asks whether the legislative declaration of an emergency is obviously false or a palpable attempt at dissimulation. This Court should resolve this case by asking the same question: whether the Legislature's action constituted a palpable attempt at dissimulation sufficient to impair the initiative process.

On the facts of this case, the Legislature's action did not impair the initiative process. Rather, the Legislature enacted the voters' initiative unchanged, and amended it by a separate act. That separate act did not

contradict or thwart the initiative process, but rather reflected a good faith refinement of the original measure's policy. This Court should therefore give effect to both I-940 and ESHB 3003 as enacted by the Legislature.

The trial court's decision should be reversed for an additional reason. The trial court based its ruling on the order in which the Legislature voted upon I-940 and ESHB 3003. The enrolled bill doctrine precludes that inquiry. This Court has long held that the judiciary may not look behind the four corners of an enacted bill to inquire into the procedure by which it was adopted. The four corners of I-940, as enacted by the Legislature, reveal that a majority of both houses enacted the initiative. The trial court erred in looking behind the four corners to consider whether the Legislature really intended to enact the initiative based upon the order of the events. The trial court's order placing I-940 onto the general election ballot, when the Legislature in fact enacted the initiative, should be reversed.

Finally, Mr. Eyman and Senator Padden are incorrect in construing ESHB 3003 as an alternative to I-940. The Legislature structured ESHB 3003 as a series of amendments, and not as a stand-alone measure that could constitute an alternative to I-940. In order to invent an alternative, they ask this Court to create a wholly new legislative proposal consisting of I-940 as amended by ESHB 3003. The Legislature passed no such proposal,

and it would violate article II, section 1 and the doctrine of separation of powers for a court to craft an alternative that the Legislature never passed.

For these reasons, this Court should reverse the decision of the trial court and declare both I-940 and ESHB 3003 valid as enacted.

VI. ARGUMENT

A. Standard of Review

This Court engages in the same inquiry as the trial court when reviewing a grant of summary judgment. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). The appellate court “review[s] summary judgment motions and issues of constitutional interpretation de novo.” *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007). The Legislature’s enactment of a statute is presumed to be constitutional, and the burden of proving the invalidity of an enacted statute rests with the party challenging that enactment—in this case with Mr. Eyman and Senator Padden. *Id.*

B. The People’s Right to Initiative and the Legislature’s Plenary Authority Under the State Constitution Must Each be Construed to Respect the Other

This case arises where the law-making powers of the Legislature and of the people converge. “The legislature’s power to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions.” *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004). This

Court should adopt an analytic approach similar to the one this Court uses when other combinations of legislative power come together—such as the Legislature’s plenary power to legislate vis-à-vis the Governor’s veto authority or the voters’ right to referendum. *See Washington State Legislature v. Lowry*, 131 Wn.2d 309, 320, 931 P.2d 885 (1997) (deferring to the Legislature’s authority to structure a bill while also protecting the Governor’s veto authority); *see also Wash. State Farm Bureau Fed’n v. Reed*, 154 Wn.2d 668, 675, 115 P.3d 301 (2005) (reviewing an emergency clause to determine whether a legislative bill was subject to referendum). This approach respects both means of legislating as set forth in the constitution, and in this case dictates the conclusion that the Legislature validly enacted both I-940 and ESHB 3003.

Analysis properly begins by recognizing that the constitution vests legislative authority in two places. “It is a fundamental principle of our system of government that the legislature has plenary power to enact laws, except as limited by our state and federal constitutions.” *Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007). But at the same time, the reserved power of initiative is “deeply ingrained in our state’s history, and widely revered as a powerful check and balance on the other branches of government.” *Coppernoll*, 155 Wn.2d at 296-97.

To respect the law-making power of both the Legislature and of the voters, we begin with the text and nature of the Washington Constitution. “As this Court has explained, ‘the state constitution is a limitation upon the power of the legislature rather than a grant thereof.’” *Cedar County Committee v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998) (quoting *Moses Lake Sch. Dist. 161 v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 555, 503 P.2d 86 (1972), *appeal dismissed for want of a substantial federal question*, 412 U.S. 934 (1973)). That is, “[i]nsofar as legislative power is not limited by the constitution *it is unrestrained.*” *Id.* (emphasis added).

With regard to initiatives submitted to the voters, the constitution provides the Legislature with specific options, including enactment “without change or amendment.” Const. art. II, § 1(a). If the Legislature enacts the initiative in its original form as proposed by the voters, its authority to amend it by separate act is unrestrained by any constitutional text. The Constitution’s limitation on the amendment of initiatives requires that any amendment to an initiative *approved by the voters* receive a two-thirds legislative majority. *See* Const. art. II, § 1(c) (restricting legislative authority only if the initiative was “approved by a majority of the electors voting thereon”). But the constitution sets forth no restriction on the amendment of an initiative to the legislature that the Legislature adopts. If the framers of article II, section 1 had intended to preclude the Legislature’s

action, they could have so provided. It is well-settled that when the constitution does not expressly prohibit the Legislature's action, the action is valid unless limited by the constitution itself. *See Cedar County Comm.*, 134 Wn.2d at 386. Whether it is so limited in a particular instance requires analysis that respects the prerogatives of both the Legislature and the voters. The statement that the Legislature can enact an initiative to the legislature "without change or amendment" is, of course, such a limitation. Const. art. II, § 1(a). Whether that limitation constrains a particular action when the Legislature acts through separate legislation requires a more nuanced analysis of legislative authority.

In other contexts in which the roles of different legislative actors converge, this Court has not adopted an absolute rule upholding one right over the other in all cases. Rather, this Court employs an analytic approach to discern actions by the Legislature that are intended to, and in fact do, frustrate other constitutionally protected powers, such as the people's right to referendum or the Governor's authority to veto. The same approach should apply to this context. Doing so would effectively harmonize potentially competing constitutional powers by affording the appropriate deference to the Legislature's authority to enact necessary and helpful legislation while also preserving checks on that power.

The Legislature’s authority converges with that of the Governor when the Governor partially vetoes a bill. The Governor has the constitutional authority to veto a bill in whole or in part. Const. art. III, § 12. But when the Governor partially vetoes a bill, he or she is limited to vetoing whole sections or items of appropriations, and cannot veto just a part of a section. *Id.* This raises the danger that the Legislature could frustrate the Governor’s constitutional veto authority by combining disparate concepts into a single section to force the Governor to either sign or veto the whole section. This Court recognizes in this context that determining the structure of a legislative bill is a matter for the Legislature, not for the courts or the Governor. *Washington State Legislature v. State*, 139 Wn.2d 129, 140, 985 P.2d 353 (1999). Thus, the Legislature’s determination to structure a bill in a particular way is usually conclusive “‘unless it is obviously designed to circumvent the Governor’s veto power and is a “palpable attempt at dissimulation.”’” *Id.* (quoting *Lowry*, 131 Wn.2d at 320-21 (citation omitted)). Where the court “‘discern[s] legislative drafting that so alters the natural sequences and divisions of a bill to circumvent the Governor’s veto power, [it] reserve[s] the right to strike down such maneuvers.’” *Id.* However, the Court will interfere “[o]nly rarely, and reluctantly” “to ensure that neither the Legislature nor the Governor will so conduct its affairs . . . [such] that the coordinate branch of government is substantially deprived of

the fair opportunity to exercise its constitutional prerogatives as to legislation.” *Lowry*, 131 Wn.2d at 321.

This “palpable attempt at dissimulation” test—or “*Lowry* test”—originated in cases involving legislative emergency clauses that declare a bill to be beyond the people’s power of referendum. *Id.* at 320. The constitution generally reserves to the voters the power to pursue a referendum on any bill passed by the Legislature. Const. art. II, § 1(b). But the constitution specifies an exception to this power for “such laws as may be necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government and its existing public institutions.”⁵ *Id.* Here, as in the gubernatorial veto cases, when two legislative powers meet “the legislative declaration of the facts constituting the emergency is conclusive, unless, giving effect to every presumption in its favor, the court can say that such legislative declaration, on its face, is obviously false and a palpable attempt at dissimulation.” *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 257, 23 P.2d 1 (1933) (citing *State v. Meath*, 84 Wash. 302, 147 P. 11, 15 (1915)).

Experience has shown that the *Lowry* test provides real and meaningful protections for competing sources of legislative power. It begins

⁵ This Court has observed that the word “or” was inadvertently omitted from article II, section 1(b). *Farm Bureau Fed’n v. Reed*, 154 Wn.2d at 673 n.3.

with judicial deference to the Legislature, as befits the judicial role under a system of divided government. *See Madison*, 161 Wn.2d at 92 (courts presume the constitutionality of statutes). But it provides the means for meaningful judicial review to overrule legislative action that infringes on the authority vested in others by the constitutional text. *See, e.g., Washington State Legislature*, 139 Wn.2d at 140-41 (rejecting a legislative division of a bill into sections that would frustrate the veto power); *Humiston v. Meyers*, 61 Wn.2d 772, 780, 380 P.2d 735 (1963) (invalidating an emergency clause in a bill legalizing certain forms of gambling because the desire to legalize them was in no way an emergency).

Here, the Court should not invalidate the Legislature's exercise of its plenary authority unless necessary for the preservation of the people's initiative power. *See Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d at 290 (Legislature's authority is plenary except where constitutionally limited). The *Lowry* test protects *both* the Legislature and the voters.

Mr. Eyman and Senator Padden did not offer the trial court an analysis comparable to the *Lowry* test that could effectively distinguish legislative measures that are compatible with a pending initiative to the legislature from those that are not. They cite *Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 557-58, 512 P.2d 1094 (1973) to argue that the Legislature can never legislate on the same subject as a pending initiative to the legislature.

But it is easy to imagine circumstances in which legislation on the same subject as a pending initiative would not conflict with it. For example, a bill might address the same topic as a pending initiative to the legislature but in different ways, such that a court would have no difficulty harmonizing the two enactments. *See Am. Legion Post 149 v. Dep't of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008) (“‘Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.’” (citation omitted)). Or a legislative bill might amend a section in common with a proposed initiative, but by changing different language that is entirely compatible with the initiative. *See* RCW 1.12.025 (describing what becomes law if the Legislature amends the same statute more than once in the same session).

Further, as discussed above, this Court has not adopted such an absolute rule in other contexts involving intersecting legislative powers. A more sensitive test is therefore necessary to preclude the mere pendency of an initiative from blocking any and all legislative action on the subject of that initiative. The *Lowry* test serves that purpose and avoids hamstringing the legislative process unnecessarily.

Hoppe is not to the contrary. That case involved an initiative to the legislature that the Legislature allowed to proceed to the ballot, and a conflicting statute enacted before the election. *Hoppe*, 82 Wn.2d at 550-51.

Given the direct conflict between the measures, this Court gave effect to the initiative and invalidated the single section of the legislative act that conflicted with it. *Id.* at 557-58. The Court did not have occasion on those facts to consider whether both measures could be given effect because they were in direct conflict. In addition, *Hoppe* arose after the election and so on those facts no question arose as to whether the legislative act should appear on the ballot as an alternative measure. *Id.* at 550-51.

Hoppe also arose before this Court decided *Lowry* and applied the “palpable attempt at dissimulation” test to the analogous context of a gubernatorial veto.⁶ *Lowry*, 131 Wn.2d at 320. The approach adopted in *Lowry* improved the analysis beyond anything the *Hoppe* court had occasion to consider.

The Court in the present case faces the task of ensuring that neither the Legislature nor the voters are “substantially deprived of the fair opportunity to exercise its constitutional prerogatives as to legislation.” *Lowry*, 131 Wn.2d at 321. This can be done by inquiring, to paraphrase

⁶ Something similar is true of a formal Opinion of the Attorney General issued decades ago. Op. Att’y Gen. 5 (1971). That opinion concluded that if the Legislature enacts an initiative to the legislature it must await the expiration of any possibility of referendum against the measure before amending it. The opinion recognized that legislative authority to amend an initiative is not unlimited, but failed to envision that circumstances could arise in which the Legislature’s action is compatible with the initiative process. *Id.* at 12-13. Like *Hoppe*, the opinion was written before *Lowry* offered a more nuanced analysis to protect the roles of differing parties to the legislative process.

Lowry, whether the Legislature’s enactment of I-940 and ESHB 3003 constituted an obvious attempt to circumvent the initiative power. *See id.*

C. The Legislature’s Enactments of I-940 and ESHB 3003 Should Not Be Invalidated Unless Their Structure and Contents Demonstrate a Palpable Attempt at Dissimulation

Application of the *Lowry* test to the Legislature’s 2018 actions reveals that the enactment of both I-940 and ESHB 3003 can be given effect without meaningfully infringing upon the voters’ right of initiative. This is so because ESHB 3003 advances the original objectives of I-940 by seeking to decrease the use of deadly force by law enforcement officers, as well as to address causes of the use of such force. *See generally* Laws of 2018, ch. 10. ESHB 3003 did not depart from the policy and substantive provisions of I-940 so as to infringe upon the voters’ initiative powers.

In the language of *Lowry*, the Legislature’s actions did not “substantially deprive[] [the electorate of] the fair opportunity to exercise its constitutional prerogatives as to legislation.” *Lowry*, 131 Wn.2d at 320. The Legislature’s enactment of I-940 and ESHB 3003 in no way constituted an obvious attempt to circumvent the initiative power. *See id.*

Judicial review under the *Lowry* test entails “no inquiry as to the facts, but must consider the question from what appears upon the face of the act, aided by its judicial knowledge.” *City of Tacoma v. Luvene*, 118 Wn.2d 826, 851, 827 P.2d 1374 (1992) (quoting *Martin*, 173 Wash. at 257).

That is, the Court does not look behind the four corners of the legislative act, but it can take judicial notice of facts in the record that shed light on the question of whether the legislative enactment was “a mere ruse” to deprive the voters of their legislative power. *Farm Bureau Fed’n v. Reed*, 154 Wn.2d at 677.

The face of ESHB 3003 reveals that the Legislature enacted it to advance the policies of I-940 without contradicting the policy of the original I-940. A legislative achievement that unifies the interested parties in this way does not infringe on the initiative power that was used to propose I-940 in the first place—constituting the catalyst for legislative action that achieved its objectives.

Judicial invalidation of either or both measure would do more to frustrate the initiative power than to protect it. Not only did the combination of these two pieces of legislation achieve the original policy objective of the initiative, but it did so without needlessly contorting the legislative process. If the Legislature had simply enacted I-940 at its 2018 regular session, there is no doubt the Legislature could amend it afterward. This is because the requirement that an act amending an initiative receive a two-thirds legislative supermajority applies only if the *voters* enact the initiative; it has no application if the legislature passes it. Const. art. II, § 1(c). If the Legislature had returned in special session after the deadline for referendum

on I-940 expired or at its next regular session and passed ESHB 3003 at that time, there would be no question under any theory advanced in this case that the amendment would be valid. *See* Op. Att’y Gen. 5, at 12-13 (concluding that the Legislature could amend an initiative to the legislature in this way).

The argument that the Legislature could not do so in the same session would lead to the absurd result that what it clearly can do at one time it cannot do at another. This is particularly true on the facts of this case, in which the Legislature delayed the effective date of ESHB 3003 until after the opportunity for referendum on I-940 expires. But more than that, the Legislature provided that ESHB 3003 would not take effect *at all* in the event of a referendum on I-940. Laws of 2018, ch. 10, § 10; CP 149. And, as a legislative bill that does not contain an emergency clause, ESHB 3003 is also subject to voter referendum. Const. art. II, § 1(c).

The trial court erred in answering this objection by relying on the timing of the legislative votes on I-940 and ESHB 3003. As noted, a proper application of the *Lowry* test is based upon a review of the four corners of the legislative enactment. *Luvne*, 118 Wn.2d at 851. The four corners of ESHB 3003 reveal an act that refines I-940, not that contradicts it. CP 141-50. As more fully developed in the following section, Washington’s well-established enrolled bill doctrine also precludes examining the manner in which I-940 was enacted to invalidate that measure.

D. The Enrolled Bill Doctrine Precludes Courts From Inquiring Into the Procedure Used in the Enactment of Legislation

The trial court's decision invalidating the Legislature's enactment of I-940 and ESHB 3003 rested upon an examination of the procedure that the Legislature used to enact both measures. As explained in its oral ruling, the trial court emphasized that the Legislature did not validly enact I-940 because it voted on the initiative only after the enactment of ESHB 3003 and the Governor's signature of that bill. RP 59:25-60:8. The court reasoned that the Legislature did not enact I-940 without change or amendment because when it voted on I-940, ESHB 3003 had already been enacted. *Id.* This reasoning violates Washington's longstanding enrolled bill doctrine, and thus cannot stand. CP 127 (discussing the enrolled bill doctrine); RP 19:1-13 (same).

This Court explained, only four years after statehood, that an "enrolled bill on file, when fair upon its face, must be accepted without question by the courts, as having been regularly enacted by the legislature." *State v. Jones*, 6 Wash. 452, 477, 34 P. 201 (1893); accord *Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 897 n.1, 529 P.2d 1072 (1975). Washington courts continue to follow this established rule to this day. *Brown v. Owen*, 165 Wn.2d 706, 723-24, 206 P.3d 310 (2009).

The trial court erred in looking behind the four corners of I-940 to conclude that it was improperly enacted because the Legislature voted on ESHB 3003 first. That fact appears nowhere within the four corners of the legislation. Washington courts are compelled to conclude that the Legislature validly enacted I-940 because majorities of both houses voted in favor of the initiative. Laws of 2018, ch. 11 (certificate of enrollment for I-940). This is how the Legislature passes bills, by majority vote of the members elected to each house. Const. art. II, § 22. “Under a commonsense understanding, any bill receiving a simple majority vote will become law.” *League of Educ. Voters v. State*, 176 Wn.2d 808, 821, 295 P.3d 743 (2013).

Records of legislative proceedings cannot be used to impeach the enrolled bill, because to do so would deny both state officers and the public alike the ability to know what the law is. *Jones*, 6 Wash. at 466.

The constitutional principle upon which this doctrine is based is that the three branches of state government are co-equal in dignity and that none of them is entitled to look behind the properly certified record of another to determine whether that branch has followed the procedures prescribed by the constitution, but rather each is responsible and answerable only to the people for its proper performance of the function for which it is constituted.

Citizens Council Against Crime, 84 Wn.2d at 897 n.1. “An additional reason of public policy which supports the doctrine is that it is necessary in order

that the people may rely upon the statutes as setting forth the laws which have been enacted by the legislature.” *Id.*

Nor may the Court, as the trial court did, inquire as to whether the Legislature hypothetically would have enacted I-940 if the vote on that measure had been taken before the vote on ESHB 3003. *See State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 33, 377 P.2d 466 (1962) (holding that the enrolled bill doctrine precluded inquiring into whether the title of a bill misled legislators); *see also Brower v. State*, 137 Wn.2d 44, 71, 969 P.2d 42 (1998) (same). The enrolled bill doctrine categorically precludes “what if” questions, like asking whether the Legislature would have acted differently if it had voted on bills in a different order. The simple facts that constitutional majorities in both houses voted for I-940 and the enrolled bill is now on file with the Secretary of State preclude judicial questioning of the procedure used to enact it. *See Morrow v. Henneford*, 182 Wash. 625, 634, 47 P.2d 1016 (1935) (enrolled bill doctrine barred judicial inquiry into whether the Legislature passed a bill after the expiration of the days allotted for its session); *State v. State Bd. of Equalization*, 140 Wash. 433, 443, 249 P. 996, 1000 (1926) (courts do not examine the antecedent history connected with its passage except where necessary to construe a bill in accordance with legislative intent).

For the same reasons, the trial court erred in concluding that the constitution compelled the Legislature to vote on I-940 before voting on ESHB 3003. RP 58:2-22. The lower court relied on the provision that an initiative to the legislature “shall take precedence over all other measures” to conclude that the Legislature must vote on an initiative to the legislature first. Const. art. II, § 1(a). The constitution doesn’t micromanage the Legislature’s floor calendar, and for good reason. Inviting scrutiny outside that body of the sequence in which the House or Senate decide to vote on bills would conflict with the constitution’s choice to vest control over internal proceedings in the two legislative bodies. Const. art. II, § 9 (vesting in the House and Senate the authority to determine their own procedures). The constitution does not state that the Legislature must vote on an initiative to the legislature before voting on any other bill, but even if it did say that, the enrolled bill doctrine would preclude a judicial remedy just as it precludes judicial examination of whether other procedural requirements are followed. *See Power, Inc. v. Huntley*, 39 Wn.2d 191, 204, 235 P.2d 173 (1951) (procedural requirements “are binding only upon the legislative conscience,” precluding judicial enforcement); *Roehl v. Pub. Util. Dist. 1 of Chelan County*, 43 Wn.2d 214, 219, 261 P.2d 92 (1953) (enrolled bill doctrine precluded judicial consideration of whether an amendment to a bill changed its scope and object contrary to article II, section 38 of the

constitution). Such an inquiry would quintessentially transgress the deference that this Court affords the Legislature as a coequal branch of government. *Brown*, 165 Wn.2d at 720.

In any event, the resolution governing the consideration of bills in both bodies gives precedence to initiatives to the legislature by exempting them from procedural deadlines. Senate Concurrent Resolution 8407 (2018).⁷ Consideration of an ordinary legislative bill ends—i.e., the bill “dies”—if it does not continue to advance according to the “cutoff dates” set by resolution. Those deadlines do not apply to initiatives to the legislature. *Id.* The Legislature gives precedence to initiatives to the legislature by treating them as priority bills that can be considered despite deadlines that would end consideration of most other bills.

The trial court therefore erred in ordering that I-940 proceed to the November 2018 general election ballot on the basis that the Legislature voted on I-940 only after enactment of ESHB 3003. The enrolled bill doctrine precludes the analysis upon which that conclusion depends.

⁷ Senate Concurrent Resolution 8407 is available online at: <http://lawfilesex.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/8407.PL.pdf>.

E. The Legislature Did Not Enact ESHB 3003 as an Alternative to I-940

The superior court did not order the Secretary of State to place ESHB 3003 on the general election ballot as an alternative to I-940, and neither should this Court. CP 253; RP 62:13-24. On its face, ESHB 3003 is not a complete, stand-alone alternative to I-940, and to so find would require this Court to invade the province of the Legislature to fill in the gaps.

The structure, form, and words of ESHB 3003 demonstrate that the Legislature did not propose an alternative to I-940. The Legislature is well aware of how to draft an alternative measure—as a complete and independent act that can be enacted in place of the original initiative. *See Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d at 300-01 (it is fundamentally the prerogative of the Legislature to craft bills and laws). For example, the Legislature's proposed alternative to Initiative 97 in 1988 was self-contained, and effective without any addition or reference. Laws of 1988, ch. 112. It further included a provision specifically instructing that it be placed onto the ballot as an alternative:

Sections 1 through 64 of this 1988 act shall constitute an alternative to Initiative 97, which has been proposed to the legislature. The secretary of state is directed to place sections 1 through 64 of this 1988 act on the ballot in conjunction with Initiative 97, pursuant to Article II, section 1(a) of the state Constitution.

Laws of 1988, ch. 112, § 66.

By contrast, nothing about ESHB 3003 indicates that it is an alternative to I-940. Instead, the Legislature structured ESHB 3003 as a set of amendments to a separately enacted statute, I-940. For example, section 1 of ESHB 3003 amends section 5 of the initiative: “RCW 43.101.--- and 2018 c . . . s 5 (Initiative Measure No. 940) are amended to read as follows” ESHB 3003, § 1. The following several sections similarly amend some, but not all, provisions of the initiative. *Id.* §§ 2-4. ESHB 3003 then adds three new section to the RCW. *Id.* §§ 5-7. The Act closes by explicitly stating its relationship to I-940, notably not as an “alternative” but as a conditional enactment:

This act takes effect June 8, 2018, only if chapter . . . (Initiative Measure No. 940), Laws of 2018, is passed by a vote of the legislature during the 2018 regular legislative session and a referendum on the initiative under Article II, section 1 of the state Constitution is not certified by the secretary of state. If the initiative is not approved during the 2018 regular legislative session, or if a referendum on the initiative is certified by the secretary of state, this act is void in its entirety.

Id. § 10. In other words, ESHB 3003 consists of isolated amendments and additions that take effect only if I-940 is enacted by the Legislature. As drafted, ESHB 3003 is not a self-contained alternative, but a refinement of policy set by I-940. *See Lowry*, 131 Wn.2d at 320 (courts defer to the Legislature to determine the structure of a bill).

Mr. Eyman recognizes as much by asking not that the Court place ESHB 3003 onto the ballot as an alternative, but that the Court create a new proposal consisting of “the text of I-940 as amended by [ESHB 3003].” CP 15. But Washington courts have long recognized that “[t]he right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of government.” *State ex rel. Gunning v. Odell*, 58 Wn.2d 275, 278, 362 P.2d 254 (1961), *modified* 60 Wn.2d 895, 371 P.2d 632 (1962). “Our system of government allows each branch to exercise some control over the others in the form of checks and balances, but the power to interfere is a limited one” and courts “will not interfere where doing so will ‘threaten the independence or integrity or invade the prerogatives of another branch.’” *Brown*, 165 Wn.2d at 720 (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

Drafting legislation to judicially create an alternative measure here would profoundly invade the prerogatives of the Legislature. It would require the Court to essentially draft new legislation by stitching together ESHB 3003 and I-940, and declaring that amalgam to have passed the Legislature as an alternative. But just as courts decline “to determine whether a failed bill should have passed,” so must courts abstain from

determining whether a non-existent bill should have passed. *Brown*, 165 Wn.2d at 724-25.⁸

Similarly, mandamus is unavailable as a remedy here. Mandamus is only available to compel a state officer to undertake a mandatory duty. *Id.* “Directing the performance of a discretionary duty would ‘usurp the authority of coordinate branches of government.’” *Id.* at 725 (quoting *Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994)). Whether to propose an alternative to an initiative submitted to the Legislature is a decision vested entirely in the discretion of the Legislature. Const. art. II,

⁸ The Court need look no further than ESHB 3003 on its face to determine that it is not a standalone alternative to I-940, and consistent with the enrolled bill doctrine it should not do so. *See Brown*, 165 Wn.2d at 723–24. But the history of ESHB 3003 confirms that both the House and the Senate considered, but rejected, amendments to ESHB 3003 that would have recast the bill as an alternative measure to I-940. The House considered but rejected an amendment that would have made the bill into a complete alternative version of I-940. Amendment 1422 by Representative Rodne (*available at* <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Amendments/House/3003-S%20AMH%20RODN%20H5178.1.pdf>). That amendment would have added a section providing:

This act constitutes an alternative to Initiative Measure No. 940. The secretary of state shall place this act on the ballot in conjunction with Initiative Measure No. 940, pursuant to Article II, section 1(a) of the state Constitution.

House Amendment 1422, § 16. The Senate also considered but rejected an amendment that would have similarly transformed ESHB 3003 into an alternative version of I-940, containing the same text declaring it an alternative to I-940. Senate Amendment 956, § 16 (by Senator Padden; *available at* <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Amendments/Senate/3003-S.E%20AMS%20PADD%20S6202.1.pdf>). The Legislature has expressly declined to make ESHB 3003 into an alternative measure, and this Court may not do so judicially even if the enrolled bill doctrine permitted the inquiry. *See Brown*, 165 Wn.2d at 720.

§ 1(a). It is for the Legislature, not this Court, to determine whether to place an alternative measure onto the ballot along with I-940.

In sum, ESHB 3003 is not an alternative that could stand on its own as a substitute for I-940; it is an exercise of the Legislature’s plenary authority to amend the content in I-940 to further advance the initiative’s policy and purpose. The Court should defer to the Legislature’s enactment unless it appears to be a palpable attempt to frustrate the initiative process. As discussed above, ESHB 3003 is not. Thus, ESHB 3003 survives the *Lowry* test and should be upheld as a valid enactment.

VII. CONCLUSION

For these reasons, this Court should reverse the decision of the superior court and hold that the Legislature acted within its legislative authority when it enacted both I-940 and ESHB 3003. This Court should declare both of those measures to have been enacted validly, and reverse the

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order directing the Secretary of State to place I-940 onto the November 2018 general election ballot.

RESPECTFULLY SUBMITTED this 11th day of May 2018.

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