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No. 95749-5

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

TIM EYMAN,
Plaintiff, Respondent,
and
MICHAEL J. PADDEN,
Plaintiff-Intervenor, Respondent

v.

**KIM WYMAN, in her capacity as Secretary of State; and THE
WASHINGTON STATE LEGISLATURE,**
Defendants, Appellants

and

DE-ESCALATE WASHINGTON
Defendant-Intervenor, Appellant

and

CYRUS HABIB, in his capacity as Lieutenant Governor,
Defendant-Intervenor, Appellant

**REPLY BRIEF OF CYRUS HABIB, in his official capacity as
Lieutenant Governor**

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REPLY BRIEF OF LIEUTENANT GOVERNOR CYRUS HABIB

I. INTRODUCTION

Once a legislative enactment has been properly certified, the judicial branch lacks authority to look past that certification to ascertain whether the legislature’s proceedings complied with certain constitutional provisions. That is the enrolled bill rule. For 125 years, this Court has adhered to that rule without exception because it embodies one of the most important structural constitutional principles for our system of government: that the three branches of government are co-equal. While there are checks and balances, no branch is “superior to the others.” *State v. Jones*, 6 Wash. 452, 464, 34 P. 201 (1893). Accordingly, the enrolled bill rule is a critical component of the separation of powers doctrine. The judiciary can no more look past the legislature’s certifications to second guess that branch’s proceedings than the legislature can look past a judicial order to second guess whether the judiciary complied with its prerogatives. *Id.*

Respondents Tim Eyman and Senator Michael Padden (collectively, “Eyman”), ask this Court to ignore this century of precedent. Indeed, in seeking to nullify the legislature’s enactment of ESHB 3003 and I-940, Eyman expressly asks this Court to examine the proceedings leading up the legislature’s certification of those bills. *See, e.g.*, Resp. Br.

at 22-25. But his arguments only underscore the importance of adhering to this Court's precedent and reversing the decision below.

First, Eyman does not provide any substantive defense of the trial court's reasoning. The trial court's focus on what legislators were "thinking" when they cast their ballot, the sequencing of bills, and hypothetical political dynamics (i.e., whether I-940 *would have passed* if ESHB 3003 had not been passed first), directly contravenes the enrolled bill rule. That is reason enough to reverse.

Second, Eyman expressly disavows any argument that the legislature "acted unconstitutionally" when it passed both ESHB 3003 and I-940. Resp. Br. at 4. In other words, Eyman agrees that the legislature's actions were constitutional and identifies no constitutional infirmity with the content of either bill. Eyman cites no support (because there is none) for the notion that the judiciary can nullify enactments that all parties agree are otherwise proper and constitutional.

Third, Eyman's only real objection is about the sequencing of the two enactments: that ESHB 3003 could not be passed before I-940. But even if that argument has merit, it is not a reason to strike down I-940 or nullify the legislature's separate decision to enact the initiative. There is no such thing as constitutional contamination. In effect, Eyman's

argument asks this Court to consider ESHB 3003 and I-940 as one enactment, in two parts.

Fourth, Eyman’s proposed remedy is unworkable and highlights the underlying flaws with his argument. He asks the Court to send to the ballot both I-940 and an alternative he calls “I-940B,” which, according to him, is “I-940 as amended by ESHB 3003.” Resp. Br. at 3. On the one hand, if Eyman is asking the Court to send ESHB 3003 to the ballot, that would be misleading to voters and impractical; ESHB 3003 is not a true alternative to I-940 but rather a series of amendments. On the other hand, if Eyman is asking the Court to send some permutation of I-940 and ESHB 3003, that would require the judiciary to rewrite legislation, something this Court is unable to do.

Taken together, Eyman’s arguments provide no basis to ignore the enrolled bill rule, and his proposed remedy is unworkable and impractical. The Lieutenant Governor respectfully requests that the Court reverse.

II. ARGUMENT

A. Eyman’s Argument Cannot Be Reconciled with the Enrolled Bill Rule.

The enrolled bill rule forbids an inquiry into the legislative procedures preceding the enactment of a statute that is “properly signed and fair upon its face.” *Washington State Grange v. Locke*, 153 Wn.2d 475, 499-500, 105 P.3d 9, 22 (2005) (citing *Schwarz v. State*, 85 Wn.2d

171, 175, 531 P.2d 1280 (1975)). This Court has adhered to the enrolled bill rule “without deviation” for 125 years. *Roehl v. Pub. Util. Dist. No. 1 of Chelan County*, 43 Wn.2d 214, 220, 261 P.2d 92, 94 (1953).

The trial court’s decision to nullify the legislature’s enactment of I-940 and order that the initiative be sent to the general election ballot violates the enrolled bill rule, and by extension the separation of powers doctrine, in at least four ways: (i) the trial court focused on what legislators were “thinking” when they voted for I-940 (RP 60; Resp. Br. at 23-24 (citing this reasoning as “correct[]”)); (ii) the trial court pointed to the legislature’s sequencing decisions—i.e., passing ESHB 3003 before passing I-940—which necessarily turns on an inquiry into the legislative procedures preceding the enactment of a statute which is properly signed and fair upon its face (RP 58; Resp. Br. at 2, 11); (iii) the court expressly considered the *political* dynamics leading up to I-940’s passage, openly hypothesizing whether the initiative would have passed if ESHB 3003 had not already been enacted (RP 26, 58); and (iv) the trial court made clear its ruling was based on its view that the judiciary can and should police the legislative branch’s adherence to constitutional formalities unique to the legislative process (RP 60). Taken together, the trial court’s reasoning directly contravenes over a century of precedent applying the enrolled bill rule. *See State v. Jones*, 6 Wash. 452, 468, 34 P. 201 (1893); *Citizens*

Council Against Crime v. Bjork, 84 Wn.2d 891, 897 n.1, 529 P.2d 1072, 1076 (1975); *Washington State Grange v. Locke*, 153 Wn.2d 475, 499–500, 105 P.3d 9, 22 (2005).

Eyman insists that the enrolled bill does not apply to this case, but the arguments in his brief only underscore why the rule is dispositive to the outcome of this case. First, Eyman suggests that he is not challenging “any ruling or parliamentary decision that led to the votes on either ESHB 3003 or I-940” and that “[n]o party contests the vote counts, or alleges that the Legislature, in either house, violated any internal rule regarding how to vote on either.” Resp. Br. at 19. Eyman’s attempt to recast his challenge fails and is beside the point. It fails because, in effect, Eyman *is* challenging the legislature’s independent determination that both laws passed the legislature. Eyman is asking the judiciary to look behind the Lieutenant Governor’s certification that I-940 had passed the Senate, and the Speaker’s certification that it had passed the House, to nullify the enactments, and instead send the choice to the voters.

Eyman’s attempt to recast his argument is also beside the point because what matters is what the trial court ordered, and how that order affects the legislature. As the Commissioner explained in her order granting the Lieutenant Governor’s motion to intervene in this matter: “[T]he superior court’s order effectively overruled [the Lieutenant

Governor's] determination that I-940 mustered enough votes to pass the Senate. This touches on the issue of whether I-940 was validly enacted notwithstanding the validity of ESHB 3003. . . . [which] directly affects the validity of the lieutenant governor's certification of I-940's passage in the Senate." No. 95749-5, Ruling Granting Emergency Motion to Intervene, at 4-5. The underlying purpose of the enrolled bill rule is to protect these interests from interference by another branch of government.

Second, Eyman expressly concedes that the legislature properly enacted ESHB 3003 and I-940 as standalone and separate enactments. In fact, Eyman emphasizes he is not arguing "that the Legislature acted unconstitutionally with respect to acts it took that led to this case." Resp. Br. at 4. He even suggests that "the only parties who contend, either directly or by implication, that the Legislature acted unconstitutionally, are the Defendant-Intervenors." *Id.* at 5; *see also id.* at 24 n.13 ("Here, no party contends that I-940 received less than a majority vote nor that it needed a supermajority vote to constitute adoption. There is no dispute whatsoever about the vote counts.").¹

¹ To be clear, the Lieutenant Governor is not arguing that the legislature acted unconstitutionally in enacting either ESHB 3003 or I-940. The Lieutenant Governor is simply arguing that any constitutional infirmity with ESHB 3003 cannot be cross-applied to I-940.

In other words, Eyman disavows any notion that the legislature “acted unconstitutionally” when it passed both ESHB 3003 and I-940. That concession is dispositive because it means that all parties agree the legislature constitutionally enacted both ESHB 3003 and I-940. The only question, therefore, is whether each enactment can survive constitutional scrutiny as a standalone bill. That’s where the enrolled bill rule comes into play. No party has challenged the substantive constitutionality of either enactment, and the enrolled bill rule forbids the judiciary from considering the legislative procedures preceding an otherwise proper bill. There is no support for the notion that a court can override a legislative enactment that all parties agree is constitutional and was properly enacted.

Third, Eyman’s only real objection boils down to timing, and only applies to ESHB 3003, not I-940: he does not believe the legislature could have passed ESHB 3003 before enacting I-940. *See* Resp. Br. at 2, 6, 11-12, 24-25. In effect, Eyman argues that ESHB 3003 was an improper and untimely amendment to I-940. And, in fact, the trial court agreed with this timing argument, and determined that ESHB 3003 was unconstitutional because it was enacted *before* I-940. RP 61. But even if ESHB 3003 is invalid, that does not render the legislature’s separate and standalone enactment of I-940 unconstitutional.

This Court has never held that the constitutional flaws with one bill can somehow contaminate the constitutionality of another separately-enacted bill. ESHB 3003 and I-940 had their own readings in the legislature, distinct roll calls, different vote tallies, and separate certifications of passage by the presiding officers of each legislative chamber. It would be completely unprecedented for this Court to create a new non-severability doctrine that somehow links two separate bills together as “one enactment, in two parts.”

Notably, Eyman urges the Court to “construe actions of the co-equal legislative branch in the light most consistent with the Constitution.” Resp. Br. at 3. The only way to do that would be to consider each enactment separately. If ESHB 3003 was an untimely and constitutional amendment, then that’s a reason to strike down ESHB 3003. But construing the legislature’s actions “in the light most consistent with the Constitution” means treating I-940 as a standalone and separate enactment. As Eyman himself acknowledges, no party has made any substantive objection to the constitutionality of I-940, or the process used to enact the initiative.

And finally, in an effort to avoid the enrolled bill rule, Eyman argues that he is simply asking the Court to conduct an ordinary judicial review of both enactments. Eyman is mistaken, and the cases he cites do

not support his position. At the outset, the enrolled bill rule does not prevent the judiciary from conducting judicial review of legislative enactments. Eyman’s suggestion that Defendants are somehow framing the enrolled bill rule as some exception to judicial review is a strawman. The key is *how* that review is conducted. Here, Eyman wants the Court to expand the scope of judicial review to reach procedural and political considerations that preceded the passage of an otherwise proper and substantively constitutional enactment. The enrolled bill rule simply says that the judiciary cannot scrutinize an enactment by second guessing the procedures the legislature employed preceding the enactment. *See Jones*, 6 Wash. at 477 (“the 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”).

None of the cases Eyman cites changes this analysis. For instance, he cites to *Weyerhaeuser Co. v. King County*, 91 Wn.2d 721, 730, 592 P.2d 1108, 1114 (1979), for the notion that a court can review a previously-enacted law to determine the constitutionality of another. But the question in *Weyerhaeuser* was simply whether a bill amending an existing law complied with the substantive constitutional requirement that amendments “must set forth the revised or amended section in full.” *Id.* (citing Const., art. II, section 37). The same question was at issue in

Washington Citizens Action of Washington v. State, 162 Wn.2d 142, 151-52, 171 P.3d 486, 491 (2007), another case Eyman cites. In both cases the Court was conducting a straightforward exercise in judicial review: whether the text and content of a challenged law complied with a substantive constitutional requirement.

Neither case implicated the enrolled bill rule because the procedures *preceding* the enactment of the challenged laws were not issue; the *content* of the statutes were at issue. Moreover, these cases are unavailing because Eyman has not identified any substantive flaw with either ESHB 3003 or I-940; on the contrary, he has expressly asserted that there are no substantive flaws with these enactments. *See* Resp. Br. at 4-5.

In sum, despite acknowledging that both ESHB 3003 and I-940 are constitutional and were properly enacted, Eyman insists that this Court nullify the legislature's enactments and send I-940 (and some alternative) to the general election ballot. Eyman's argument, and the trial court's order, cannot be reconciled with the enrolled bill rule or the separation of powers doctrine. Accordingly, this Court should vacate the trial court's mandamus order.

B. Eyman's Proposed Remedy Is Unworkable.

Eyman's proposed remedy illustrates the substantive flaws with his argument. He asks the Court to send both I-940 and what he calls "I-

940B” to the ballot. Resp. Br. at 3. According to Eyman, I-940B would be “I-940 as amended by ESHB 3003.” *Id.* It is not at all clear what that means.

On the one hand, if Eyman is asking the Court to simply send ESHB 3003 to the ballot, that would make no sense. Everyone agrees that ESHB 3003 is not a standalone alternative to I-940. It purported to amend I-940. It is the legislative equivalent of an incomplete sentence.

Masquerading ESHB 3003 as an alternative proposal to I-940 on the general ballot would be impractical and misleading, and would not vindicate any of the constitutional interests underlying article II, § 1(a).

On the other hand, if the I-940B alternative that Eyman envisions is some permutation of I-940 and ESHB 3003, then he would be asking this Court to draft a new piece of legislation altogether. Eyman’s argument would rest on the notion that this Court can step into the shoes of the legislative branch to draft its own version of I-940 and order the Secretary of State to put a judicially-crafted bill on the general election ballot. But Courts don’t write laws. *State v. Preston*, 151 Wash. 175, 178, 275 P. 81, 82 (1929) (“[T]he court will not rewrite legislation simply because it may possibly deem it unwise. Matters of expediency and wisdom are solely for the Legislature.”); *Newman v. Schlarb*, 184 Wash. 147, 151, 50 P.2d 36, 38 (1935) (The judiciary is not “clothe[d] . . . with

power to rewrite legislation This court is bound by the constitution and legislation as it finds it upon the books, and new legislation is the only method by which those who vote for these measures, either directly or through their legislators, can find relief.”); *State v. Groom*, 133 Wn.2d 679, 689, 947 P.2d 240, 246 (1997) (“[I]t is imperative that we not rewrite statutes to express what we think the law should be. We simply have no such authority.”); *see also Graham Thrift Group, Inc. v. Pierce County*, 75 Wn. App. 263, 267, 877 P.2d 228, 230 (1994) (“We cannot rewrite or modify the language of the statute under the guise of statutory interpretation or construction.”).

The ambiguity in Eyman’s request—whether he’s asking an impractical alternative, or for this Court to act as a super legislature—highlights the underlying analytical flaws with his argument, and illustrates why this Court should reject Eyman’s challenge to the legislature’s actions and his unworkable proposal.

III. CONCLUSION

The Lieutenant Governor respectfully requests that the Court reverse the decision below, at the very least with respect to the constitutional validity of the legislature's enactment of I-940.

DATED: May 25, 2018

Respectfully submitted,

/s/ David A. Perez

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CERTIFICATE OF SERVICE

I, David A. Perez, attorney for Lt. Governor Cyrus Habib, certify that on May 25, 2018, I caused to be served upon all counsel of record, via electronic and U.S. mail, a true and correct copy of this motion to intervene.

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

Signed at Seattle, Washington, this 25th day of May, 2018.

/s/ David A. Perez

David A. Perez

PERKINS COIE LLP

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