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**SUPREME COURT OF THE STATE OF WASHINGTON**

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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.

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**REPLY BRIEF OF  
THE WASHINGTON STATE LEGISLATURE**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

All parties agree that the constitution affords the Legislature the option of enacting an initiative to the legislature “without change or amendment.” Const. art. II, § 1(a). All parties also agree that the constitution vests both the Legislature and the voters with authority to exercise the same legislative authority. *Id.* The novel questions presented by this appeal are whether the Legislature enacted Initiative 940 (I-940) without change or amendment, as well as whether Engrossed Substitute House Bill 3003 (ESHB 3003) was enacted within the Legislature’s plenary legislative authority or impermissibly overlapped with the voters’ legislative authority. Viewed in appropriate context, the Legislature acted within its authority in enacting both I-940 and ESHB 3003.

Three misconceptions lie at the heart of the arguments offered by Respondents Tim Eyman and Senator Michael Padden (collectively “Mr. Eyman”). First, Mr. Eyman fails to give full effect to constitutional language by arguing that the Legislature is flatly prohibited from enacting any legislation on the same subject as a pending initiative to the legislature. Rather, the constitution treats legislation as an alternative to an initiative only if it is on the same subject as the initiative *and conflicts with it*. Const. art. II, § 1(a) (providing procedures for “[w]hen conflicting measures are submitted to the people”). ESHB 3003 does not conflict with the policy and

objectives of I-940 because it merely reflects refinement of the original initiative, not a conflicting policy that attempts to supersede it.

Second, his arguments are premised on an untenable understanding of the constitutional role of state actors—including the role of the Secretary of State and this Court. Mr. Eyman assumes that the Secretary of State can make constitutional judgments about the validity of legislative actions, and argues from that premise that adopting the *Lowry* test would place too much of a burden on the Secretary. But making such judgments about the constitutional validity of legislative enactments is an exclusively judicial function. The Secretary's role does not include ignoring the face of the legislative enactments to determine herself that I-940 and a nonexistent variant of ESHB 3003 were in fact alternatives.

Third, the enrolled bill doctrine squarely precludes judicial inquiry into the *process* by which the Legislature acted. The enrolled bill doctrine does not, as Mr. Eyman suggests, preclude the courts from inquiring into the constitutionality of a statute in a substantive sense. Mr. Eyman's reliance on cases involving challenges to the substantive constitutionality of a law suggest no reason that the enrolled bill doctrine doesn't apply to his arguments based on the legislative process, including the order in which the Legislature voted on I-940 and ESHB 3003.

Mr. Eyman also brings a cross-appeal, alleging that the trial court erred with regard to the remedy if the Court concludes that the Legislature acted outside its authority in enacting I-940 and ESHB 3003. This Court need not reach the cross-appeal because the Legislature properly enacted both I-940 and ESHB 3003. Both can be given effect as enacted. Mr. Eyman's proposal to place an alternative measure onto the ballot is not available, however, because the Legislature did not propose an alternative. The task of formulating an alternative measure falls solely within the purview of the Legislature, and the separation of powers precludes this Court from either creating a measure that the Legislature did not propose or ordering the Secretary of State to do so.

## **II. ARGUMENT**

### **A. Standard of Review**

Mr. Eyman incorrectly denies that he maintains the burden of proof on this challenge to the validity of the Legislature's enactment of I-940 and ESHB 3003. Statutes passed by the Legislature are presumed to be constitutional in the form that the Legislature enacts them. *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007). The Legislature enacted I-940 by constitutional majority vote in each house. Laws of 2018, ch. 11; *see also* Const. art. II, § 22. Mr. Eyman asks this Court to look behind the face of that act in order to conclude that the Legislature actually *rejected* the

measure. Similarly, the Legislature enacted ESHB 3003 into law by majority vote of each house. Laws of 2018, ch. 10. Mr. Eyman contends that what the Legislature actually did was to propose an alternative to I-940 with text that differs from the text of ESHB 3003 and which the Legislature never proposed as an alternative. Mr. Eyman bears the burden of proving these contentions because each is an argument that the Legislature did not validly enact the laws at issue as reflected in the text of the measures the Legislature voted on.

**B. The *Lowry* Test is Practical and Workable**

Mr. Eyman argues that this Court should apply a bright line test to reject the Legislature's enactment of I-940 and ESHB 3003. He argues that any time the Legislature enacts a bill on the same subject as a pending initiative to the Legislature, that bill must instead constitute an alternative to the initiative. And he argues that, at least when the Legislature votes on the initiative after voting on the other act, the combined acts must constitute the rejection of the initiative even if the Legislature in fact enacted the initiative. Mr. Eyman argues that as applied here, this bright line test results in the conclusion that the Legislature rejected I-940 and proposed an alternative consisting of text that the Legislature never enacted that Mr. Eyman calls (but the Legislature never did) "I-940B." Resp's'/Cross-Appellants' Br. (Eyman Br.) at 24-27.

Mr. Eyman’s argument is not supported by the text of article II, section 1(a) of the constitution. Nor does it account for the breadth of the Legislature’s authority. His proposed test must ultimately depend on a case-specific analysis, as any test would. His argument against application of the *Lowry* test also misconceives the role of this Court and of the Secretary of State, and assumes incorrectly and without any basis that the test will always result in insulating the Legislature’s actions.

**1. The Constitution Does Not Preclude All Legislative Action on the Same Subject as a Pending Initiative to the Legislature**

Mr. Eyman argues that the constitutional text deprives the Legislature of the authority to enact any bill on the “same subject” as a pending initiative to the legislature. Eyman Br. at 27. The governing constitutional language does not support Mr. Eyman’s argument:

The legislature may reject any measure so proposed by initiative petition and propose a different one *dealing with the same subject*, and in such 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. 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.

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

Mr. Eyman ignores the second italicized phrase in the quoted text. “[T]he constitution, like statutes, should be construed so that no portion is

rendered superfluous.” *Farris v. Munro*, 99 Wn.2d 326, 333, 662 P.2d 821 (1983). The constitution does not treat all bills on the same subject as an initiative to the legislature as an alternative measure; rather, the constitution makes clear that the only bills that must appear on the ballot as an alternative are “conflicting measures.” Const. art. II, § 1(a).

The question of what constitutes a “subject” in legislation for constitutional purposes is not always straightforward. A single subject might contain “several incidental subjects or subdivisions.” *Washington Ass’n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 656, 278 P.3d 632 (2012) (WASAVP). A “subject” is not synonymous with vernacular terms like “topic” or “issue.” This Court has resorted to metaphysical language to describe what a “subject” is: “[f]or purposes of legislation, ‘subjects’ are not absolute existences to be discovered by some sort of *a priori* reasoning, but are the result of classification for convenience of treatment and for greater effectiveness in attaining the general purpose of the particular legislative act.” *Id.* (alteration in original) (internal quotation marks omitted) (quoting *State ex rel. Washington Toll Bridge Auth. v. Yelle*, 61 Wn.2d 28, 33, 377 P.2d 466 (1962)).

An overly broad construction of the phrase “same subject” in article II, section 1(a) would effectively hamstring legislative authority to address a topic. An initiative petition requires the signatures of voters

numbering eight percent of the votes cast for governor. Const. art. II, § 1(a). If Mr. Eyman was right, the signatures of that number of registered voters could annually deprive the Legislature of authority to act on a topic. This Court has previously cautioned against construing the initiative power to deprive the Legislature of its authority. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 242, 11 P.3d 762, 27 P.3d 608 (2000). This Court found that a requirement that a legislative enactment raising taxes also receive voter approval “would mean that the voters could pass several initiatives, each requiring every measure of a certain class passed by the Legislature to be submitted to the voters for approval.” *Id.* Construing article II, section 1(a) to broadly preclude any legislation on the “same subject” as a pending initiative to the legislature would allow eight percent of the voters to similarly deal a death of a thousand cuts to legislative authority by repeatedly proposing initiatives on a particular topic year by year. The constitution is drafted more narrowly to preclude this result by specifying that only “conflicting measures” be treated as alternatives. Const. art. II, § 1(a).<sup>1</sup>

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<sup>1</sup> The constitutional provision on referendums was also drafted to avoid allowing a small percentage of voters to restrain the legislative process by filing referendum petitions that tie the hands of the Legislature on key matters. *Farris*, 99 Wn.2d at 336. This Court noted that the referendum process does not apply to laws necessary for the support of state government, in an effort to avoid “the error that Oregon had made” in allowing referendums on budget bills. *Id.* (quoting *State ex rel. Blakeslee v. Clausen*, 85 Wash. 260, 267, 148 P. 28 (1915)). A construction of the same constitutional section so as to broadly

Many combinations of bills on the same subject do not conflict. In such instances, courts harmonize the statutes to give effect to both, rather than invalidating one or the other. *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.” (alteration in original) (internal quotation marks omitted)). In this context, the Court should ask whether the amendatory act “substantially deprived [the voters] of the fair opportunity to exercise [their] constitutional prerogatives as to legislation.” *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 321, 931 P.2d 885 (1997). It did not.

I-940 and ESHB 3003 do not conflict. Both advance the same policy objective. *See* Memorandum of Amici Curiae Washington Association of Sheriffs and Police Chiefs, Washington Council of Police and Sheriffs, and the Fraternal Order of Police (WASPC Amicus Br.) at 8-17 (section-by-section description of ESHB 3003). The difference is that ESHB 3003 reflects further discussion that refines the legislation in a way that is fully consistent with the original objectives of the initiative. And contrary to Mr. Eyman’s argument, the original objectives of the initiative are relevant

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restrict legislative authority when an initiative to the legislature is pending would be incongruous alongside drafting designed to avoid that result in a related context.

to this Court’s analysis. The “fundamental and overriding purpose” of an initiative is part and parcel of this Court’s consideration of the scope of the initiative power. *See Huff v. Wyman*, 184 Wn.2d 643, 652, 361 P.3d 727 (2015) (considering the fundamental purpose of a proposed initiative to determine whether it falls within the scope of the initiative process). The Legislature’s enactment of I-940 and of ESHB 3003 did not constitute an attempt to circumvent the initiative power, and by applying the *Lowry* test this Court can give effect to both. *See id.*

**2. The *Lowry* Test Gives Effect to Both the Authority of the Legislature and of the Voters**

The Washington Constitution presents at least three situations in which more than one entity plays a role in enacting legislation. This Court has previously resolved disputes as to the authority of these different actors using the *Lowry* test in the first two of those situations. The third scenario is the one presented by this case, and the Court should apply the test here as well.

The first, and most common, interaction is when the Legislature passes a bill by majority vote in each house, and then presents that bill to the Governor for signature or veto. Const. art. II, § 22; Const. art. III, § 12. Both the Legislature and the Governor are vested with legislative authority in this situation, the Legislature by passing the bill and the Governor by

signing or vetoing it. When those two powers intersect, this Court resolves any dispute using the *Lowry* test. *Lowry*, 131 Wn.2d at 320.

The second scenario involves the people's right to referendum, which intersects with the Legislature's authority to enact laws. The constitution reserves to the voters the power to refer most bills that the Legislature passes to the ballot for acceptance or rejection. Const. art. II, § 1(b). This Court also employs the *Lowry* test to evaluate the validity of the Legislature's declaration of an emergency, which exempts legislation from referendum. *Washington State Farm Bureau Fed'n v. Reed*, 154 Wn.2d 668, 675, 115 P.3d 301 (2005).

This case presents the third situation. The constitution reserves to the voters the right to propose legislation by initiative, including by submitting an initiative to the legislature. The Legislature has the option of enacting the initiative, in which case the measure becomes law without going onto the ballot. Const. art. II, § 1(a). The constitution does not limit legislative authority to amend an enacted initiative to the legislature by separate act. *See* Const. art. II, § 1(c) (requiring a two-thirds vote for amendment only if the initiative is approved by the voters).

The *Lowry* test provides a practical and workable analytic method for protecting the authority of both the Legislature and the voters. Its application here parallels its application in the two situations in which this

Court has already applied it. Like gubernatorial vetoes or legislative declarations of emergency, the *Lowry* test gives effect to the authority of both the Legislature and the voters.

Mr. Eyman criticizes the test in this application based on a misunderstanding of the role of the courts and of the executive branch. He envisions a system in which, once the Court decides this case, no future case will necessitate judicial review. Eyman Br. at 34-37. Mr. Eyman assumes that in the future the Secretary of State will simply examine the face of any bill passed by the Legislature, consider this Court's ruling on the facts of this case, and potentially declare on her own that a legislative bill conflicts with an initiative. Eyman Br. at 34-37. This is not the system that the constitution establishes and this is not the role of the Secretary of State.

The Legislature did not pass any measure in this case requiring the Secretary of State to place anything onto the ballot. It enacted I-940 without change or amendment, an action that on its face does not instruct the Secretary of State to place the measure onto the ballot. Laws of 2018, ch. 11; Const. art. II, § 1(a). It passed ESHB 3003 without any instruction to place it onto the ballot either.<sup>2</sup> Laws of 2018, ch. 10. Mr. Eyman argues that, even in the absence of any legislative or constitutional directive, the Secretary of

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<sup>2</sup> The Legislature knows how to propose an alternative measure for the ballot. *See, e.g.*, Laws of 1988, ch. 112, § 66.

State was somehow supposed to place both I-940 and ESHB 3003 onto the ballot.<sup>3</sup> Not so, and any decision by the Secretary of State to do so would have required her to make a legal judgment as to the validity of the Legislature's actions—a determination the Secretary is not empowered to make.

The Secretary of State properly has no role drawing legal conclusions as to whether I-940 or ESHB 3003 should appear on the ballot lacking any legislative directive to do so. State law assigns the Secretary only ministerial duties of a largely mechanical nature with regard to placing measures onto the ballot. *State ex rel. O'Connell v. Kramer*, 73 Wn.2d 85, 88, 436 P.2d 786 (1968). This is because any decision by the Secretary of State to place either I-940 or ESHB 3003 onto the ballot would require her to make a legal judgment as to the validity of the Legislature's enactment of those measures directly into law, without sending them to the ballot. The Secretary of State cannot do that, because doing so would involve making a legal judgment that would fall within the exclusive province of the judiciary. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 714, 911 P.2d 389

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<sup>3</sup> Mr. Eyman alludes mysteriously to the notion that Secretary Wyman "received conflicting advice as to whether the inclusion of I-940 or 'I-940B' [his term] on the November ballot was either required or forbidden." Mr. Eyman fails to cite the record for his claim that conflicting advice was given, and the record does not reflect any such fact. Nor does Mr. Eyman explain who is alleged to have given this advice. The point is irrelevant, in any event, because the validity or effect of legislative acts is not for the Secretary to determine, as described in text.

(1996). Just as the Attorney General “does not have discretion to refuse to prepare a ballot title due to [an] initiative being beyond the scope of Washington’s legislative power,” neither does the Secretary have discretion to *sua sponte* place (or refuse to place) legislation onto the ballot based upon a belief that a legislative act exceeded the scope of the Legislature’s powers. *Id.* at 713. This is because determining “the construction of the meaning and scope of a constitutional provision is exclusively a judicial function.” *Philadelphia II*, 128 Wn.2d at 714.

Thus, contrary to Mr. Eyman’s arguments, the application of the *Lowry* test would not impose any additional duties on the Secretary of State because the courts—not the Secretary—apply the test.<sup>4</sup> Indeed, that the Secretary has taken no position on the merits of this case highlights the ministerial role she plays with respect to placing initiatives onto the ballot. The Secretary acts ministerially, absent a statute conferring some discretionary authority on her.<sup>5</sup> *Philadelphia II*, 128 Wn.2d at 713-14.

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<sup>4</sup> In distinction from the lack of authority for an executive branch officer to make a constitutional judgment, this Court recognizes the unique authority of the legislative branch to determine its own internal parliamentary matters. *Brown v. Owen*, 165 Wn.2d 706, 720, 206 P.3d 310 (2009).

<sup>5</sup> The Legislature sometimes vests discretion in an executive branch officer to determine a fact that would require judicial action in the absence of that authority. For example, state law directs the Secretary of State or a county auditor to determine whether a candidate for elected office meets a residency requirement. RCW 29A.24.075(3). There is no comparable statute regarding alternative measures. Such a decision remains subject to judicial review, of course. *See, e.g., Dumas v. Gagner*, 137 Wn.2d 268, 286-87, 971 P.2d

The bright line test that Mr. Eyman advocates also misunderstands the role of the Secretary, is subject to his own criticisms of the *Lowry* test, and ultimately depends on a case-specific judicial analysis. Mr. Eyman argues that a better rule would be for the Secretary to treat any bill on “the same subject” as an initiative to the legislature as an alternative measure. Eyman Br. at 26-27. But the determination of whether two pieces of legislation address the same subject is no less a judicial determination than the legal question of whether two pieces of legislation conflict in a way that circumvents or impairs the initiative right. *Cf. Philadelphia II*, 128 Wn.2d at 714-15 (“we hold that courts . . . should determine whether a proposed initiative exceeds the power reserved to the people”). Further, as Mr. Eyman points out, the Legislature may not believe that it has enacted legislation on “the same subject,” or could even include a statement of findings to that effect. *See* Eyman Br. at 34-35. And whether a bill and an initiative cover “the same subject matter” could invite dispute. *See, e.g., WASAVP*, 174 Wn.2d at 656. In other words, not only would Mr. Eyman’s supposedly bright line rule improperly require the Secretary to make a quintessentially judicial determination, it ultimately also requires a case-specific review of the particular legislation at issue. This is so because even under

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17 (1999) (reviewing the decision of a county auditor to place a candidate onto the ballot in light of a dispute over residence).

Mr. Eyman’s test the Secretary (or actually the courts) would have to determine whether there is sufficient overlap between the subjects of an initiative and a piece of legislation. For such a case-specific inquiry, courts have already developed the *Lowry* test.

In sum, Mr. Eyman’s critiques of the *Lowry* test fail because he misunderstands the ministerial role the Secretary of State has when placing measures onto the ballot, and assumes incorrectly that *Lowry* will always result in upholding the Legislature’s actions. This simply is not so, as demonstrated by prior cases applying the *Lowry* test. *See* Legislature’s Opening Br. at 17-18, and cases cited therein. Instead, in the rare cases in which legislative powers intersect, courts can apply—and have applied—the *Lowry* test to make case-specific determinations that properly balance competing constitutional powers. Further, Mr. Eyman’s proposed bright line rule does not provide a bright line at all, and fails to give effect to consider the constitutional language treating only “conflicting measures” as alternatives. Const. art. II, § 1(a). Therefore. It is not a proper substitute for the *Lowry* test. This Court should apply the *Lowry* test to determine whether the Legislature acted within its authority in enacting I-940 and ESHB 3003.

**C. The Enrolled Bill Doctrine Precludes Judicial Review of the Process by Which the Legislature Enacts a Bill**

The enrolled bill doctrine instructs that a court “will not go behind an enrolled enactment to determine the method, the procedure, the means or the manner by which it was passed in the houses of the legislature.” *State ex rel. Bugge v. Martin*, 38 Wn.2d 834, 840-41, 232 P.2d 833 (1951). The court cannot look behind the face of the bill to consider the way in which the Legislature enacted I-940 and ESHB 3003.

Mr. Eyman asks the Court to do just that in two respects. Mr. Eyman’s argument depends critically upon the order in which the Legislature procedurally voted on I-940 and ESHB 3003. That fact is not apparent on the face of either bill, and therefore runs squarely athwart the enrolled bill doctrine. CP at 132-50 (text of both measures). The enrolled bill doctrine applies all the same even when the parties agree on the underlying facts. *See Power, Inc. v. Huntley*, 39 Wn.2d 191, 204, 235 P.2d 173 (1951) (the doctrine may apply even when everyone in the state knows what occurred). The enrolled bill doctrine applies in the same way whether or not the parties dispute the process the Legislature used.

Additionally, Mr. Eyman’s argument—like the trial court’s ruling—turns on rank speculation about what the Legislature would have done under a hypothetical set of facts. Mr. Eyman and the trial court both assume that

if the Legislature had voted on I-940 before voting on ESHB 3003 the outcome of the vote may have been different. This argument is entirely unrooted from the two bills themselves. The enrolled bill doctrine squarely prohibits such speculation into what the Legislature might have done. *See Brower v. State*, 137 Wn.2d 44, 71, 969 P.2d 42 (1988) (the enrolled bill doctrine precluded an inquiry into whether the Legislature was confused by the bill title).

Mr. Eyman argues that this rule cannot “blind the Court to reality.” Eyman Br. at 15. But rhetorical flourishes aside, the enrolled bill doctrine derives from the respect that each branch of government must accord to the actions of the others consistent with separation of powers. The enrolled bill doctrine embodies judicial respect for the legislative branch with regard to its own procedures. *Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 897 n.1, 529 P.2d 1072 (1975). Its holding that the Court will not look behind the face of a bill is unmistakable. *Id.* This Court has previously acknowledged that constitutional limitations on internal legislative process “are binding only upon the legislative conscience, and that the courts must perpetually remain in ignorance of what everybody else in the state knows.” *Power, Inc.*, 39 Wn.2d at 204.

Mr. Eyman attempts to distinguish this Court’s seminal case on the enrolled bill doctrine, noting that there “the Court refused to examine the

journals of either chamber of the Legislature.” Eyman Br. at 21 (discussing *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 P. 201 (1893)). He contrasts that case with the present one because “[n]o party to this case asks the Court to review the journal of a house of the Legislature, or in any other way examine its internal workings.” Eyman Br. at 21. This is so only because the parties already examined legislative records and agreed to what they establish without putting them into the record. Particularly when the records at issue are in the possession of one of the parties to the case—the Legislature—it would have been remarkable, and perhaps disingenuous, not to look. The enrolled bill doctrine, however, does not protect the internal legislative process only against arguments based on untrue or unexamined allegations. As *Jones* itself recognizes, it is the inquiry into internal legislative processes itself that the enrolled bill doctrine precludes. *Jones*, 6 Wash. at 453-54. Being forthright with the tribunal does not alter the application of the enrolled bill doctrine, born as it is of mutual respect between the branches to reflect the separation of powers. *Citizens Council*, 84 Wn.2d at 897 n.1.

When Mr. Eyman isn’t engaged in minimizing the enrolled bill doctrine, he takes a turn at overstating it so as to present a straw man that threatens judicial review itself. He contends that if the Court cannot look behind the enrolled bill to review the procedure used to enact it, neither can

the Court evaluate compliance with the constitution's single subject rule or the rule against amending a statute without setting it forth in full. Eyman Br. at 15-16 (citing Const. art. II, §§ 19, 37). But the subject and title of a bill are apparent from the face of the bill itself, as is any attempt to amend a statute without setting it forth in full. Thus, without violating the enrolled bill doctrine, courts can properly hear these and other constitutional challenges by considering the face of the bill. The Court need only examine legislative history if necessary to construe the meaning of an ambiguous statute. *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 443, 249 P. 996 (1926) (courts do not examine the antecedent history connected with its passage except where necessary to construe a bill in accordance with legislative intent). But a court may not look behind a bill to evaluate procedural compliance.

Nothing on the face of the acts reveals the order in which the Legislature voted on I-940 and ESHB 3003, a matter of procedure. Even less do the bill texts establish what the Legislature might have done if the votes had been in the reverse order.

**D. Separation of Powers Precludes The Remedy of Placing a Measure that the Legislature Never Proposed onto the Ballot as an Alternative Measure**

Mr. Eyman's proposal to place an alternative measure onto the ballot is not available because the Legislature did not propose an alternative.

The task of formulating an alternative measure falls solely within the purview of the Legislature, and the separation of powers precludes this Court from either creating a measure that the Legislature did not propose or ordering the Secretary of State to do so.

The constitution assigns the discretion to propose an alternative exclusively to the Legislature. “The legislature may reject any measure so proposed by initiative petition and propose a different one.” Const. art. II, § 1(a). An alternative is something that the Legislature “proposes,” not something that a judicial or executive body compiles from disparate sources.

It is fundamentally the prerogative of the Legislature to craft bills and laws. *Washington State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 300-01, 174 P.3d 1142 (2007); *see also Lowry*, 131 Wn.2d at 320 (courts defer to the Legislature to determine the structure of a bill). The Legislature structured ESHB 3003 as a set of amendments to an enacted statute, I-940. WASPC Amicus Br. at 8-17. ESHB 3003 does not include sections 1-4 of I-940, amends sections 5-9 of I-940, and adds three new sections to the RCW not contained in I-940. WASPC Amicus Br. at 8-17; *see also Laws of 2018, ch. 10*. If enacted alone as an alternative to I-940, ESHB 3003 would omit the first four sections of I-940, although the bill itself plainly presumes their enactment. The face of I-940 and ESHB 3003

therefore demonstrate that the Legislature did not propose an alternative to I-940.

Mr. Eyman argues that the Secretary of State should therefore create what the Legislature never proposed. As discussed, this is not something the Secretary has the authority to do consistent with her ministerial role in determining what measures to certify to the ballot. *See supra* pp. 11-13. What Mr. Eyman really asks is for this Court to create a new legislative proposal in the guise of ordering Secretary Wyman to do so. Mr. Eyman envisions taking some components of such a measure from I-940 (those sections unamended by ESHB 3003), and others from ESHB 3003 (those sections amending sections 5-9 of I-940 and enacting new statutory sections), but presumably omitting one section of ESHB 3003 (section 10, providing for ESHB 3003 to take effect only on the occurrence of a specified contingency). The Court may no more do this than could the Secretary. Courts “will not interfere [in the legislative process] where doing so will “threaten[] the independence or integrity or invade[] the prerogatives of another [branch].”” *Brown*, 165 Wn.2d at 720-21 (alterations in original) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). Proposing an alternative to an initiative is exclusively a prerogative of the Legislature. Const. art. II, § 1(a).

The remedy Mr. Eyman seeks lies beyond the power of this Court to grant. This Court should accordingly reject the cross appeal.

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

RESPECTFULLY SUBMITTED this 25th day of May 2018.

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DATED this 25th day of May 2018, at Olympia, Washington.

*s/ Kristin D. Jensen*  
KRISTIN D. JENSEN  
*Confidential Secretary*

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