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No. 95749-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TIM EYMAN,

Respondent/Cross-Appellant

and

MICHAEL J. PADDEN,

Intervenor-Respondent/Cross-Appellant

vs.

KIM WYMAN, in her capacity as Secretary of State,

Defendant,

WASHINGTON STATE LEGISLATURE,

Appellant/Cross-Respondent

and

DE-ESCALATE WASHINGTON and CYRUS HABIB,

Intervenors-Appellants/Cross-Respondents

BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

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TABLE OF CONTENTS

I. Introduction..... 1

II. Assignment Of Error On Cross-Appeal 3

III. Issues..... 4

IV. Statement Of The Case And Standard Of Review 4

 A. Standard of Review 4

 B. The Structure and Purpose of Article II § 1 7

 C. Facts Of This Case 10

V. Summary Of Argument..... 12

VI. The Court Correctly Held That The Legislature Rejected I-940
And Correctly Ordered It To Appear On The Ballot..... 13

 A. The Ruling Below Correctly Applied This Court’s Precedents on
 Judicial Review 14

 1. Judicial Review of Legislative Acts Requires Comparison of
 Later Acts to Earlier Acts 15

 2. The Enrolled Bill Doctrine Provides the Defendants No Support
 18

 B. The Trial Court Correctly Concluded That I-940 Was Not Adopted
 Without Change Or Amendment 22

 C. The Trial Court Correctly Concluded That Adopting An Initiative
 After Amendment Constitutes Rejection 24

VII. The Court Erred In Excluding I-940B 25

 A. The Legislature Admits It Voted In Favor Of A Different Measure
 Dealing With The Same Subject..... 27

B.	Proposing A Different Measure Requires Neither Belief Nor Intent By The Legislature.....	28
C.	The Provisions of Art. II § 1 Apply Even When the Legislature Inadvertently Deals With the Same Subject As An Initiative.....	30
1.	The Potential for Conflict between an Initiative and a Legislative Alternative Requires the Secretary of State to Place Both Measures on the Ballot.....	30
2.	The Duties of the Secretary of State Do Not Involve Legislating	33
D.	The Legislature’s Proposed Exception to the Constitutional Procedure Is Unworkable In Practice As This Case Demonstrates	34
VIII.	Conclusion	37

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn. 2d 183 11 P.3d 762 (2000), as amended (Nov. 27, 2000), opinion corrected, 27 P.3d 608 (2001)....	23
<i>Andrews v. Munro</i> , 102 Wn. 2d 761, 689 P.2d 399 (1984)	6, 10
<i>Brown v. Owen</i> , 165 Wn. 2d 706, 206 P.3d 310 (2008)	19
<i>Citizens Council Against Crime v. Bjork</i> , 84 Wn. 2d 891, 529 P.2d 1072 (1975) .	22
<i>Citizens for Responsible Wildlife Mgmt. v. State</i> , 149 Wn. 2d 622, 71 P.3d 644 (2003)	16, 17
<i>Flanders v. Morris</i> , 88 Wn. 2d 183, 558 P.2d 769 (1977).....	16, 17
<i>Schwarz v. State</i> , 85 Wn. 2d 171, 531 P.2d 1280 (1975).....	28
<i>State v. Jones</i> , 6 Wash. 452, 34 P. 201 (1893).....	21
<i>State v. State Bd. of Equalization</i> , 140 Wash. 433, 249 P. 996 (1926).....	20
<i>Washington Citizens Action of Washington v. State</i> , 162 Wn. 2d 142, 171 P.3d 486 (2007)	16
<i>Washington State Dept. of Revenue v. Hoppe</i> , 82 Wn. 2d 549, 512 P.2d 1094 (1973)	31, 32
<i>Washington State Legislature v. Lowry</i> , 131 Wn. 2d 309, 931 P.2d 885 (1997)	5, 34, 35
<i>Weyerhaeuser Co. v. King Cty.</i> , 91 Wn. 2d 721, 592 P.2d 1108 (1979)	16

Statutes

RCW 29A.72.270.....	29
---------------------	----

Constitutional Provisions

Art. II § 1.....	13
Wash. Const. Art. II § 1	4, 7, 24, 30
Wash. Const. Art. II § 1(a).....	passim
Wash. Const. Art. II § 19	16, 17
Wash. Const. Art. II § 22	24
Wash. Const. Art. II § 32	20
Wash. Const. Art. II § 37	16
Wash. Const. Art. II § 9	18

I. INTRODUCTION

All parties to this case agree on every relevant fact. I-940 secured sufficient signatures to properly be certified as an initiative to the Legislature prior to the 2018 regular legislative session. ESHB 3003 deals with the same subject as I-940, and it amends I-940. ESHB 3003 secured majority votes in both chambers of the Legislature, and it secured those votes (and the legislative act of a gubernatorial signature) prior to the Legislature casting votes on I-940. I-940 also secured majority votes in both chambers of the Legislature, and those votes occurred later in time than the votes (and gubernatorial signature) on ESHB 3003.

Those agreed facts compel one, and only one, constitutionally permissible conclusion with respect to the duties of the Secretary of State. Both I-940 and the “different [measure] dealing with the same subject”¹ that the Legislature proposed must appear on the November ballot for a vote of the people. I-940 must appear on the ballot because the Legislature did not enact it “without change or amendment.” *Id.* I-940B (I-940 as amended by ESHB 3003) must appear on the ballot because by majority vote in both chambers, the Legislature “propose[d] a different [measure] dealing with the same subject,” *id.*, and therefore “both measures shall be submitted by

¹ WASH. CONST. Art II § 1(a).

the secretary of state to the people for approval or rejection at the next ensuing regular general election.” *Id.*

The Court below correctly concluded that the Legislature amended I-940 before purporting to adopt it. It reached this quite unremarkable conclusion, not by making impermissible judgments about non-justiciable parliamentary rulings by the Lieutenant Governor, but simply by applying this Court’s long-standing jurisprudence on judicial review of legislative action to the agreed facts and the Constitution’s mandate. To adopt an initiative, the Legislature must do so without change or amendment. But prior to voting on I-940, the Legislature first amended it by the act of both chambers voting in favor of ESHB 3003. When, later in time, it purported to adopt I-940, it did not do so without change or amendment, because earlier in time it had amended I-940. Nothing in that analysis implicates the enrolled bill doctrine, or calls into question any parliamentary ruling by the president of the Senate.

The ruling below erred, however, by failing to credit the actions taken by the Legislature with respect to ESHB 3003, which all parties at one time or another have agreed were valid legislative acts. Because the constitution imposes no specific requirements on *how* the Legislature proposes a different measure to an initiative—it simply addresses the *fact* of legislative action that poses a potential conflict with the subject of the initiative—the

ruling below erred when it rejected the request to include I-940B on the November ballot. The trial court gave decisive weight to one Senate vote against one possible text of such a “different measure,” an edited version of the text proposed by Senator Padden. Ignoring the enrolled bill doctrine with respect to I-940B, the trial court failed to focus on the only constitutional question: did the Legislature, by first enacting ESHB 3003 (the amendments to I-940) and then enacting I-940, propose a different measure dealing with the same subject. To subject these legislative acts to a higher standard, as urged to an extent by De-Escalate Washington and the Lieutenant Governor, would reject the long-standing principle that requires the judicial branch to construe actions of the co-equal legislative branch in the light most consistent with the Constitution.

The Legislature rejected I-940, because it did not follow the one path by which it can avoid giving the people the opportunity to vote on it—by adopting it without change or amendment. However, it did propose a different measure dealing with the same subject. Because the constitutional duty of the Secretary of State is clear, this Court should affirm the issuance of mandamus to include I-940B along with I-940 on the November ballot.

II. ASSIGNMENT OF ERROR ON CROSS-APPEAL

The trial court erred in declining to order the Secretary of State to include I-940B (I-940 as amended by ESHB 3003) on the November ballot.

III. ISSUES

1. Did the Legislature enact I-940 without change or amendment?
2. Did the enactment of ESHB 3003, followed by the enactment of I-940, propose a “different [measure] dealing with the same subject?”

IV. STATEMENT OF THE CASE AND STANDARD OF REVIEW

A. Standard of Review

The Legislature incorrectly claims that Plaintiff and Plaintiff Intervenor have challenged the constitutionality of ESHB 3003 and I-940.² Neither Plaintiff nor Plaintiff-Intervenor, nor the Legislature, consider that the Legislature acted unconstitutionally with respect to acts it took that led to this case. The relief sought by Plaintiff and Plaintiff-Intervenor is a writ of mandamus to compel the Secretary of State to follow Article II § 1(a) of the Washington State Constitution, requiring her to place both I-940 and I-940B (the amended version of I-940) on the November ballot. This conclusion follows directly from the agreed facts as to the contents of the two texts, the agreed sequence of legislative action, and the structure and purpose of Art.

² “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.” Brief of the Legislature at 12.

II § 1(a). By contrast, the Legislature insists that those two acts now require the Office of the Code Reviser to incorporate the edited text of I-940, as amended by ESHB 3003, into the Revised Code of Washington.

Defendant Intervenors De-Escalate Washington and Lieutenant Governor Habib argue provisionally that I-940 as amended by ESHB 3003 has become the law, but in the event that the passage of ESHB 3003 is found to have prevented I-940 from being considered “adopted,” then (perhaps) the Legislature acted unconstitutionally in its votes on ESHB 3003. Consequently, they argue, the acts that resulted in ESHB 3003 should be disregarded as if they never happened; and I-940 should become law without a vote of the people. Thus, the only parties who contend, either directly or by implication, that the Legislature acted unconstitutionally, are the Defendant-Intervenors. They bear the heavy burden of showing constitutional infirmity.³

³ The Legislature also faults Plaintiff and Plaintiff Intervenor for failing to propose something similar to the *Lowry* test advanced by the Legislature. Brief of the Legislature, at 18: “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.” But neither the Plaintiff nor Plaintiff Intervenor have the burden of proposing such a test. The *Lowry* test is discussed *infra* § VII-D, which demonstrates that not only would the substitution of such a test for the procedure outlined in Art. II, § 1 unfairly place the burden on the initiative sponsors to defend their right to legislate independently of the legislature, but it would be hopelessly unworkable. The specificity of the procedure prescribed in Art. II, § 1 anticipates that the distinction between “compatible” and “incompatible” amendments to an initiative would be impossible for the Secretary of State (or the Code Reviser) to make.

Plaintiff and Plaintiff Intervenor agree that, because the court below ruled as a matter of law on undisputed facts, the review by this court is *de novo*. The Plaintiff and Plaintiff Intervenor appeal only the trial court's rejection of the request to instruct the Secretary of State to include I-940B (the amended form of I-940) on the ballot alongside I-940. Since this Court has previously held that Article II, § 1 is to be "liberally construed," *Andrews v. Munro*, 102 Wn. 2d 761, 767, 689 P.2d 399, 402 (1984), the burden on Plaintiff and Plaintiff Intervenor is to show that placing I-940B on the ballot would facilitate the constitutional right of the people to legislate. The trial court explicitly stated that it was possible to interpret I-940B as an alternative to I-940:

Now, the plaintiffs have asked that I find that what the legislature did in ESHB 3003 was really an alternate proposal that would also go to the ballot. Potentially, it could be, I think, interpreted that way because, again, I don't think we need to go with labels. However, I am compelled by the fact that, in fact, that was offered as an amendment to the legislation when it was before the legislature, and the legislature said, no, this is not an alternative to I-940. Therefore I do not find that it would be an alternative to I-940, and it shall not be placed on the ballot.

RP 62:13-25. Since the review by this Court is *de novo*, this Court should re-examine whether I-940B is a "different [measure] dealing with the same subject," and therefore is subject to the constitutional mandate that it be placed on the ballot alongside I-940.

B. The Structure and Purpose of Article II § 1

In order to determine whether the Secretary of State is constitutionally required to place both I-940 and I-940B on the November ballot, the structure and purpose of Article II § 1 must be understood.

The two houses of the Washington State Legislature have primary responsibility for translating the will of the people into law. Wash. Const. Art. II § 1. However, that same section of the state Constitution was amended in 1912 to provide that “the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, **independent of the Legislature . . .**” *Id.* (emphasis added). In order to insure that the exercise of legislative power by these two sources of legislative authority are harmonized, Art. II § 1 prescribes a very specific set of procedures that each must follow. Otherwise, the uncoordinated pursuit by two different legislative bodies could result in conflict and confusion.

The initiative process⁴ begins when a Washington voter composes an initiative text, revises it in coordination with the Office of the Code Reviser, and files that final text with the Secretary of State. After that moment, the initiative text cannot be altered, and the initiative proponent circulates the

⁴ Although there are similarities between an initiative to the people and an initiative to the Legislature, only the latter is at issue in this case. Thus all references to the initiative process refer to the constitutional process prescribed for an initiative to the Legislature.

text to seek sufficient signatures of support for the initiative to be certified by the Secretary of State. Initiative sponsors do not enjoy the luxury available to the Legislature to consider proposed legislation and then, after debate and discussion, modify or amend it to make it more attractive to a wider range of voters. Instead, once an initiative has been composed and circulated for signature, any weaknesses or objections to the content of the initiative are irremediable.

On the other hand, the constraints placed upon initiative sponsors are matched by the constraint placed on the Legislature once the initiative has been certified to it: as all parties have recognized, the Legislature must choose among the three options specified in Article II § 1(a).⁵ The otherwise “plenary authority” of the Legislature is circumscribed with respect to the subject of the initiative, corresponding to the only three possible reactions with which the Legislature may greet the initiative: it may agree with the initiative in its entirety; it may reject it in its entirety; or it may find some features attractive while wishing to delete some and add others. The three Constitutional options correspond to those reactions: if the Legislature agrees with the initiative, it may adopt the initiative without change or amendment, and it thereby becomes law. The exact text of the

⁵ See Brief of the Legislature, at 4; Brief of Cyrus Habib, at 10; Brief of De-Escalate Washington, at 9.

initiative, which the drafter could not change once she began seeking signatures, becomes the positive law of the state. If the Legislature rejects the initiative, it is placed on the ballot for the people to approve or reject. Again, the text remains unchanged, because neither the initiative sponsor nor the Legislature has the authority to do so after it was filed with the Secretary of State and signatures solicited. Finally, if the Legislature agrees with some but not all of the initiative, it may propose a “different [measure] dealing with the same subject,” in which case the unchanged initiative text and the Legislature’s proposed measure appear on the ballot. What the Legislature may not do is simply legislate on the same subject and ignore the initiative, or amend the initiative and adopt it as amended. Art. II § 1(a) insures that when the people exercise their right to legislate, their right and the right of the Legislature to legislate do not conflict. In addition, those who obtain enough signatures to certify an initiative to the Legislature will be assured that the Legislature will not interfere with their right to legislate independently of the Legislature: either the initiative will become law (as a result of adoption by the Legislature), or the people will have the opportunity to vote on it when it appears on the ballot either alone (because it was rejected by the Legislature) or alongside the Legislature’s alternative (because they have proposed a “different [measure] dealing with the same subject”).

Although the Legislature claims to agree with the description of Art. II § 1(a) as recognizing only three options for the Legislature in response to an initiative, in fact they have proposed a fourth alternative: the passage of an amendment to an initiative, followed by the “adoption” of the initiative.⁶ According to the Legislature, the exact text of the initiative need not become law, nor need it appear on the ballot for a vote of the people. If adopted, this novel theory would only serve to undermine and eliminate Art. II § 1(a), which “is to be construed liberally so that the legislative rights of the people may be rendered effective.” *Andrews v. Munro*, 102 Wn. 2d 761, 689 P.2d 399 (1984).

C. Facts Of This Case

On May 23, 2017, Leslie Cushman filed with the Secretary of State the final text of an initiative to the legislature. That same day, the Secretary of State assigned it serial number I-940.⁸ CP 6:9; 61:15. On June 9, 2017, Thurston County Superior Court entered a stipulated order regarding the ballot title for I-940. 6:15; 61:24. Between June 10, 2017 and December 31, 2017, as certified by the Secretary of State, 359,895

⁶ The Legislature recognizes the sweeping nature of this proposed interpretation of Art. II, § 1. They therefore propose that this option could only be pursued if the amendments to the initiative are “compatible” with the original initiative. Brief of the Legislature, at 18. As a later section of this brief demonstrates, such a proposal not only is in direct conflict with the procedure prescribed by the Constitution, but in practice it would prove hopelessly unworkable.

⁸ The first citation to the Clerk’s Papers is to the allegation in the First Amended Complaint; the second citation is to the admission contained in the Answer.

registered voters of the State of Washington signed the I-940 initiative. CP 6:22; 62:7-13. This exceeded the minimum number required for certification to the legislature. CP 6:24; 62:14-15.

On March 8, 2018, the last day of the regular session of the Washington Legislature, a majority of members of the House of Representatives voted in favor of I-940: 55 in favor and 43 against. CP 7:20-25; 63:9-14. Later that same day, a majority of the members of the Washington State Senate also voted in favor of I-940: 25-24. CP 9:17-19; 64:19-24. According to the votes of both chambers, I-940 becomes effective on June 7, 2018. CP 9:23; 65:5-6.

Prior to voting on I-940, the legislature took action on a bill, ESHB 3003. CP 13:7-16; 68:10-20. Section 1 of ESHB 3003 states that it amends I-940. CP 10:26-11:1; 66:9-10; Section 10 of ESHB 3003, the final section, states that:

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.

CP 55:27-35.

Both chambers of the legislature voted in favor of ESHB 3003, and the Governor signed it, before either chamber voted on I-940. CP 13:7-

16; 68:10-20. In the House, 73 Representatives voted in favor of ESHB 3003; 25 voted against. CP 11:6-11; 66:15-20. In the Senate, however, 25 Senators voted in favor and 24 voted against. CP 12:3-8; 67:13-18. The Governor signed ESHB 3003 after both votes, and before either chamber voted on I-940. CP 13:7-16; 68:10-20. Thus, according to the text of Section 10, the various amendments to I-940 take effect on June 8, 2018, one day after I-940 takes effect.

V. SUMMARY OF ARGUMENT

This appeal requires the determination of two questions:

(1) Did the Legislature reject I-940 by failing to adopt it “without change or amendment,” and thereby trigger the constitutional duty of the Secretary of State to submit I-940 to the voters in November?

(2) Did the Legislature, after a duly certified initiative was submitted to it, propose “a different [measure] dealing with the same subject,” thereby triggering the mandate to the Secretary of State to submit that different measure to the voters on the November ballot alongside I-940?

As the undisputed facts of this case demonstrate, the Legislature first voted in favor of ESHB 3003, an amendment to I-940, and only then did it vote in favor of I-940. The Legislature now claims that it adopted I-940, thereby eliminating the need to place it on the ballot, but then it exercised its plenary authority to amend I-940, with the result that I-940 as amended

by ESHB 3003 will become the law of the state. The procedure specified in Art. II § 1(a) cannot so easily be evaded. The undisputed facts of this case permit only one conclusion in answer to the questions stated: (1) the Legislature rejected I-940 when it did not adopt I-940 without change or amendment, and therefore it must appear on the ballot for the voters to approve or reject; and (2) the Legislature did propose a different measure dealing with the same subject (I-940B), and therefore the Secretary of State must place it alongside I-940 on the November ballot.

VI. THE COURT CORRECTLY HELD THAT THE LEGISLATURE REJECTED I-940 AND CORRECTLY ORDERED IT TO APPEAR ON THE BALLOT

No party to this dispute questions the plain Constitutional mandate: If an initiative secures sufficient signatures to be certified to the Legislature, then “[s]uch initiative measures . . . shall be either enacted or rejected *without change or amendment* by the Legislature before the end of such regular session.” Art. II § 1(a) (emphasis added). The Legislature agrees. *See, e.g.*, Legislature’s Statement Of Grounds For Direct Review, at 6 (quoting Constitution), at 10 (arguing for right to amend initiatives “so long as the Legislature enacts the initiative itself ‘without change or amendment’”), at 13 (arguing for policy-based analysis of whether adoption was “without change or amendment”).

The parties also all agree that ESHB 3003 amends I-940. Indeed, the Legislature frankly acknowledges that by voting in favor of ESHB 3003, it amended I-940. *See, e.g.*, Legislature’s Statement of Grounds for Direct Review at 1 (characterizing the nature of “the amendments the Legislature adopted in ESHB 3003”), and *id.* at 2 (arguing that “[t]he amendments, however, did not change the general policy advanced by the original initiative”).

Nor is there any disagreement among the parties that the Legislature’s act in adopting amendments to I-940 took place, and was a completed legislative act, prior to votes on I-940. Both chambers voted in favor of ESHB 3003, and the governor signed it, all prior in time to any vote on I-940. *See, e.g., id.* at 3 (“The Legislature approved, and the Governor signed, ESHB 3003 just before the Legislature enacted I-940”).

A. The Ruling Below Correctly Applied This Court’s Precedents on Judicial Review

In light of the foregoing agreed facts, the court below reached the correct and inescapable conclusion: the Legislature did not choose to adopt the initiative “without change or amendment.” To avoid that conclusion, the Legislature asks this Court to disregard the normal modes of judicial analysis of legislative action and instead stand the “enrolled bill doctrine” on its head. The Legislature argues that because the text which was the

subject of the favorable I-940 vote in each chamber did not have, on its face, strikethroughs and underlines, but instead had the text of the initiative as filed with the Secretary of State, I-940 was therefore adopted without change or amendment. The Legislature defends its demand that the Court ignore its prior adoption of amendments in ESHB 3003, claiming that the enrolled bill doctrine prevents this Court from paying any attention to the facts the Legislature has freely admitted: prior to that vote, it had already approved a slate of amendments to I-940. The Legislature is wrong. The enrolled bill doctrine does not serve to blind the Court to reality, and this Court's judicial inquiry into the legislative context of legislative action is not only normal, but constitutionally mandated.

1. Judicial Review of Legislative Acts Requires Comparison of Later Acts to Earlier Acts

The ruling below correctly compared I-940 to ESHB 3003 – the later act to the earlier act – to determine whether the later act purporting to adopt an initiative did so “without change or amendment” as required by the constitution. This simple comparison of one legislative text to another constitutes the basic act of judicial review. Washington courts routinely compare a later act to an earlier one, or to the constitution. Indeed, the courts even examine the content of bills to determine whether they comply with the constitution. This form of judicial review fulfills the judicial role to

police compliance with, *e.g.*, Wash. Const. Art. II §§ 19 or 37. Such questions are regularly addressed by the courts, and are no different than the question raised here: did the Legislature’s action in first adopting amendments to an initiative and then the initiative itself constitute a choice to adopt an initiative without change or amendment?

The Court has compared one enactment to a previous enactment to determine if the later amends the earlier, and if so, whether it “set[s] forth at full length” the amended earlier statute as required by Wash. Const. Art. II § 37. *See, e.g., Weyerhaeuser Co. v. King Cty.*, 91 Wn. 2d 721, 730, 592 P.2d 1108, 1114 (1979) (reviewing two acts to determine that the later “substantially alter[ed] the scope and effect of the [earlier] without changing the language of the statute to reflect that alteration” and was unconstitutional); *Flanders v. Morris*, 88 Wn. 2d 183, 189, 558 P.2d 769, 774 (1977) (reviewing new and prior enactment to find that added restriction amended existing law without change reflected in statute). The Court treats initiatives no differently. *See, e.g., Washington Citizens Action of Washington v. State*, 162 Wn. 2d 142, 154, 171 P.3d 486, 492 (2007) (reviewing text of initiative to determine whether it “accurately set forth the law that the initiative sought to amend”); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn. 2d 622, 645, 71 P.3d 644, 656 (2003) (comparing an initiative to existing statutes to identify whether “the scope of the rights

created or affected by [the initiative] can be ascertained without referring to any other statute or enactment”).

Similarly, the courts are well equipped to compare the various contents of a single enactment to ensure that “[n]o bill shall embrace more than one subject, and that shall be expressed in the title.” Wash. Const. Art. II § 19. *Citizens for Responsible Wildlife Mgmt.* at 639 (comparing initiative title to contents to determine if “if it gives notice to voters which would lead to an inquiry into the body of the act or indicates the scope and purpose of the law to an inquiring mind”); *Flanders v. Morris*, 88 Wn. 2d 183, 188, 558 P.2d 769, 773 (1977) (reviewing an appropriations bill to determine if the title would “apprise the public of an uncodified change in the substantive law”).

Judicial review of the Legislature’s compliance with the constitution always requires the reviewing court to read the contents of the purported enactment and compare it to earlier enactments, or its own contents, then apply that comparison to the constitutional requirements for passing bills or initiatives. That, and no more, is what the court below did. It reviewed I-940. It reviewed ESHB 3003. It noted the parties’ agreement that the two deal with the same subject.⁹ It noted the parties’ agreement that legislative

⁹ See FAC ¶ 118, Legislature’s Answer ¶ 118 (CP 13:21, 69:1-3).

actions on ESHB 3003 were completed prior to action on I-940. It reviewed ESHB 3003 to determine whether (as described in the text of the bill and agreement of the parties) it actually did amend I-940. In short, the court below engaged in permissible, normal, judicial review of legislative action.

2. The Enrolled Bill Doctrine Provides the Defendants No Support

This Court’s enrolled bill doctrine only precludes review of non-justiciable, procedural decisions of the Legislature. “Each house may determine the rules of its own proceedings,” Wash. Const. Art. II § 9, and the courts do not referee those rules. However, any possible question regarding the application of that doctrine to this case became moot upon the filing of the First Amended Complaint (“FAC”) and Answers of the Legislature and Secretary of State. Each legislative act was alleged and admitted – the readings of the two texts at issue, the dates of votes, the vote counts, the signatures of presiding officers and governor.¹⁰ Plaintiff and Plaintiff-Intervenor raise no question of any internal procedure of the Legislature. Rather, they contend that the final outcome of the undisputed internal procedures places a constitutional duty on the Secretary of State to

¹⁰ Compare, FAC ¶¶ 48-52 with Legislature’s Answer ¶¶ 48-52 (CP 7:18-8:1; 63:7-16), FAC ¶¶ 65-70 with Legislature’s Answer ¶¶ 65-70 (CP 9:16-21, 64:17-65:2); FAC ¶¶ 88-91 with Legislature’s Answer ¶¶ 88-91 (CP 11:4-11, 66:13-20); FAC ¶¶ 100-108 with Legislature’s Answer ¶¶ 100-108 (CP 12:1-17, 67:11-68:2). The Lieutenant Governor does not, apparently, dispute the allegations or the Answers admitting them.

take certain acts. Such a review is a regular feature of this Court's jurisprudence.

Thus, in *Brown v. Owen*, 165 Wn. 2d 706, 206 P.3d 310 (2008), the court refused to entertain a challenge to the Senate president's ruling on whether enacting a certain bill required a simple majority or a 2/3 supermajority vote. In that case, the president of the Senate ruled that the bill required a supermajority. No Senator objected. The bill did not receive the called-for supermajority, and the president ruled that it had not passed. Had a Senator objected to the parliamentary ruling, a simple majority of senators could have overruled the president's parliamentary decision, after which a simple majority vote in favor of the bill would have required the president to forward it. One senator sued, seeking a mandamus order from the courts against the president to order him to forward the bill as though it had passed. The court refused. "A ruling by this court overturning the president of the senate's ruling on a point of order would undermine the constitutional authority of the senate to govern its own proceedings and the lieutenant governor's duty to preside over those proceedings." *Brown*, 165 Wn. 2d at 719. Here, however, no party challenges any ruling or parliamentary decision that led to the votes on either ESHB 3003 or I-940. No party contests the vote counts, or alleges that the Legislature, in either house, violated any internal rule regarding how to vote on either.

State v. State Bd. of Equalization, 140 Wash. 433, 249 P. 996 (1926) is equally irrelevant to any question actually raised by this case. There, an act passed both chambers, was signed by presiding officers, and was vetoed by the governor. Both chambers overrode the veto, but neither presiding officer re-signed the bill. The Court rejected a challenge that claimed a constitutional requirement for a second iteration of the constitutionally required signatures.¹¹ Here, no party questions whether ESHB 3003 or I-940 was “signed by the presiding officer of each of the two houses in open session, and under such rules as the Legislature shall prescribe.” Wash. Const. Art. II § 32. *See* FAC ¶ 52, CP 7:26-8:1 (“On March 8, 2018, the Speaker of the Washington State House of Representatives”); FAC ¶ 70, CP 9:21 (“On March 8, 2018, the President of the Washington State Senate signed I-940”); FAC ¶ 105, CP 12:11-12 (“On March 8, 2018, the President of the Washington State Senate signed Engrossed Substitute House Bill 3003”); FAC ¶ 106, CP 12:13-14 (“On March 8, 2018, the Speaker of the

¹¹ Notably, the Court did acknowledge it would entertain such a challenge if the signatures did not appear on the bill in the first instance, because that was an unwaivable constitutional requirement, the omission of which would appear on the face of the bill. “There is no question that, if the Constitution had provided, upon a repassage of a vetoed bill, that the designated officers should sign it, the absence of such signature on the enrolled bill in the Secretary of State’s office would render that bill invalid . . .” *State v. State Bd. of Equalization*, 140 Wash. at 446.

Washington State House of Representatives signed Engrossed Substitute House Bill 3003”).¹²

Similarly, in *State v. Jones*, 6 Wash. 452, 34 P. 201 (1893), the Court refused to examine the journals of either chamber of the Legislature, in a challenge to the enactment of a piece of legislation. Because “the enrolled bill on file in the office of the secretary of state is in all respects regular upon its face, and bears the signatures of the presiding officers of the respective houses of the Legislature in due form, and has been regularly approved by the governor, and deposited in said office, as required by the provisions of the constitution in that regard,” the Court would not probe the internal procedure by which that had been accomplished. *State v. Jones*, 6 Wash. at 453–54. No 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. Instead, all parties agreed on all relevant facts regarding the votes on both ESHB 3003 and I-940. Those allegations, resulting in agreed facts among the parties as to every aspect of legislative procedure leading to this dispute, removed from consideration in this case any application of the enrolled bill doctrine.

¹² The Legislature admitted each of these facts. See Legislature’s Answer, at ¶¶ 52, 70, 105, 106 (CP 63:15, 65:1, 67:21).

The Court has also cited the enrolled bill doctrine as a reason not to rewrite the Constitution to add a clause on the legislative procedure for voting to override vetoes. In *Citizens Council Against Crime v. Bjork*, 84 Wn. 2d 891, 529 P.2d 1072 (1975), one chamber overrode six item vetoes, then the other overrode only five. The plaintiff claimed that the earlier House override of six vetoed items “formed a new bill,” that the subsequent Senate vote to override only five “thereby amended the bill,” and therefore triggered the requirement “that an amended bill must be returned to the house of its origin for approval.” *Id.* at 898. The Court rejected the novel theory. “The trouble with this theory is that it finds no expression in the words used by the people in framing the constitution.” *Id.* Here, plaintiffs do not allege that any additional voting was required, nor ask the Court to add or subtract any words from the Constitution regarding the Legislature’s responsibilities with respect to treatment of initiatives.

B. The Trial Court Correctly Concluded That I-940 Was Not Adopted Without Change Or Amendment

The ruling below correctly determined that the Legislature did not adopt I-940 without change or amendment. The court evaluated the text of ESHB 3003 to determine that the changes it made to I-940 were sufficiently significant to constitute “amendment” under this Court’s precedents. *See, e.g., Amalgamated Transit Union Local 587 v. State*, 142 Wn. 2d 183, 246,

11 P.3d 762, 800–01 (2000), as amended (Nov. 27, 2000), opinion corrected, 27 P.3d 608 (2001) (determining whether “the new enactment [is] such a complete act that the scope of the rights or duties created or affected by the legislation action can be determined without referring to any other statute or enactment”). The trial court below observed:

The changes or amendments from ESHB 3003 are significant. It’s related to training and use of force, Washington State Criminal Justice Training Commission, use of deadly force by law enforcement officers as well.

RP 46:24-47:3. The ruling also correctly disregarded the substantive policy questions the Legislature asked it to evaluate, when it argues that there is constitutional significance to motivation behind the amendments.

I am not looking at whether or not ESHB 3003 improves I-940 and the results -- and that those improvements might result in clear standards for law enforcement and increased protections for the public. Those are incredibly important things. . . that’s not my inquiry today. My inquiry is a legal inquiry only.

RP 53:16-22. At the conclusion of the court’s review of the contents of the two legislative texts, the ruling correctly concluded:

Did the Legislature enact I-940 without amendment or change? Did what the Legislature actually engage in, what they did, change I-940 in scope and effect? Clearly, ESHB 3003 changed I-940 in scope and effect. It states -- although it doesn’t matter what it says, and that’s part of the caselaw that was cited, but it states, “This amends I-940,” and then it goes on to provide significant amendments to I-940, substantive changes. Multiple sections were amended, and it also added three new sections.

RP 56:22-57:7. Later she continued:

The Legislature did not enact I-940 without first amending it or changing it. ESHB 3003 amended I-940. It was passed first and

signed by the governor before I-940 was voted upon, and so when the Legislature voted to enact I-940, they knew it was already amended.

RP 60:3-8.

The Legislature asks this Court to reach a contrary conclusion by standing the enrolled bill doctrine on its head, eliminating judicial review of legislative action in nearly any form. Despite the agreement by all parties as to the procedures employed to vote on the two texts, the Legislature asks this Court to ignore the duly adopted ESHB 3003 when looking at I-940. To do so would be an abdication of this Court's obligation to ensure legislative acts comport with the constitution, and allow the Legislature to write Art. II § 1's reservation of the right of the people to legislate out of the constitution entirely.

C. The Trial Court Correctly Concluded That Adopting An Initiative After Amendment Constitutes Rejection

The constitution does not prescribe a specific method for rejection—only for adoption: The Legislature can adopt an initiative only if it does so “without change or amendment.”¹³ However, the constitution treats all other responses as a rejection. Certainly, the Legislature can reject an initiative by inaction, or by voting against it in one or both chambers. Or it can reject

¹³ And presumably only by dual-chamber majority vote in accordance with Wash. Const. Art. II § 22. 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.

by proposing an alternative. But, as the decision below correctly concluded, the Legislature's failure to follow the sole prescribed method for adoption necessarily constitutes rejection and requires the initiative to appear on the ballot. In other words, if the initiative is not adopted in accordance with the constitutional command—adoption “without change or amendment”—it has been rejected. If rejected, it must appear on the ballot at the next ensuing regular general election. The ruling below correctly reached this conclusion:

But certainly, today, I cannot find that the Legislature enacted I-940, because they didn't. They enacted I-940 with amendments, which was not one of the things that is permissible under the constitution. Therefore, the Legislature rejected I-940, and it shall -- I will direct that the Secretary of State place I-940 on the ballot in the general election for 2018.

RP 62:5-12. There is simply no constitutional alternative, as the ruling correctly discerned. I-940 cannot be directly incorporated into Revised Code of Washington as positive law, because the Legislature amended the initiative before purporting to adopt it. It did not adopt I-940 without change or amendment. But I-940 cannot be excluded from the ballot, because a vote of the people is the only alternative to adoption “without change or amendment.” Wash. Const. Art. II § 1(a).

VII. THE COURT ERRED IN EXCLUDING I-940B

The relief requested by Plaintiff and Plaintiff Intervenor is an order directing the Secretary of State to place both I-940 and I-940B (the amended version of I-940 adopted by the Legislature) on the ballot. The decision in

this case will not only provide the Secretary of State with guidance as to what to do with I-940 and I-940B, but will instruct any future Secretary of State who is faced with a similar issue. Consequently, the rule adopted by this Court should be one that can be applied without the need for judicial intervention.¹⁴

As the previous section of this brief demonstrates, the question of whether an initiative should be placed on the ballot is relatively simple: was it adopted “without change or amendment”? If so, it becomes law and does not require a vote of approval or rejection by the people. Otherwise, the people must be given an opportunity to approve it at the ballot box and thereby make it law. Because I-940 was not adopted without change or amendment, the Secretary of State’s duty is clear: she must place it on the ballot for approval or rejection by the people.

As to whether I-940B should be placed on the ballot, the Constitution’s language is equally clear: the Secretary of State is directed to place it on the ballot if the Legislature has proposed (1) a different measure (2) “dealing with the same subject.” Art. II § 1(a) (“The Legislature may reject any measure so proposed by initiative petition and propose a different one

¹⁴ Although the mandamus requested in this case is directed at the Secretary of State, the Court’s rule will also answer the question of whether a law passed by the Legislature “dealing with the same subject” as an initiative will not become law until after the voters have approved it.

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”).

A. The Legislature Admits It Voted In Favor Of A Different Measure Dealing With The Same Subject

FAC ¶ 118 alleged: “Engrossed Substitute House Bill 3003 deals with the same subject as I-940.” CP 13:21. The Legislature answered with an admission: “Paragraph 118 of the First Amended Complaint sets forth a conclusion of law to which no response is required by way of factual pleading. Defendant admits the legal conclusion set forth in Paragraph 118 of the First Amended Complaint.” CP 69:1-3. In addition to this formal admission, the Legislature bases much of its argument on the claim that I-940B “did not contradict or thwart the initiative process, but rather reflected a good faith refinement of the original measure’s policy.” Brief of the Legislature, at 10-11. In light of these statements, it is difficult to understand why the Legislature would now argue against placing I-940B on the ballot alongside I-940. If, as the trial court held (and the previous sections of this brief demonstrate), I-940 should be placed on the ballot, then there is no constitutional provision that requires, or even suggests, that the Legislature’s preferred policy choice should be excluded from the ballot. The legislation passed by the Legislature clearly qualifies as a

“different [measure] dealing with the same subject,” and thus meets the constitutional threshold for the Secretary of State to place both I-940 and I-940B on the ballot.

B. Proposing A Different Measure Requires Neither Belief Nor Intent By The Legislature

Despite the Legislature’s admission that it passed a measure dealing with the same subject, it would be a mistake to make the Legislature’s belief or expressed desire the touchstone for whether to place the Legislature’s measure on the ballot alongside the initiative. In fact, it is the enrolled bill doctrine trumpeted so loudly by the defendants that prevents the judiciary from speculating about what the Legislature may have desired or opposed. Instead, the Secretary of State is directed by the constitution to take certain actions based upon what the Legislature actually does: “[T]he enrolled bill doctrine precludes inquiring into the legislative procedures preceding the enactment of a statute which is properly signed and fair upon its face.” *Schwarz v. State*, 85 Wn. 2d 171, 175, 531 P.2d 1280, 1282 (1975).

And here is the source of the trial court’s error in rejecting the request to put I-940B on the November ballot: The trial court stated she felt “compelled” to deny the requested relief because of a legislature procedure that preceding the enactment of ESHB 3003—an amendment that would have frankly acknowledged that ESHB 3003 was an alternative proposal.

She stated “I am compelled by the fact that, in fact, that was offered as an amendment to the legislation when it was before the legislature, and the legislature said, no, specifically, this is not an alternative to I-940.” RP 62:18-22. The enrolled bill doctrine required her to disregard questions of internal legislative procedure and apply the clear language of Art. II § 1(a), which contains no formal requirement at all regarding how the Legislature proposes¹⁵ a different measure. It certainly has no requirement that the Legislature express an expectation, or desire, or belief that the Legislature itself considers it an alternative measure. In fact, the Constitution never uses the word “alternative.”¹⁶ Instead, legislation must be placed on the ballot for voter approval or rejection whenever the Legislature proposes “a different [measure] dealing with the same subject” as an initiative.

¹⁵ The word “propose” might easily be misunderstood to imply that the Legislature must desire or at least understand that when it votes to approve legislation that deals with the same subject as an initiative, it is proposing an alternative. The reason the Constitution uses the word “propose” instead of the word “enact” (which is the way that most statutes become law) is that, unlike ordinary legislation that becomes law once a majority of both houses approve it and the Governor signs it, a legislative measure dealing with the same subject as an initiative does not become law unless and until it is approved by the voters. Thus the use of a tentative word—“propose”—rather than “enact.” However, as this section of the brief demonstrates, the same constitutional duties arise when the Legislature acts inadvertently as when it knows or intends to propose an alternative.

¹⁶ RCW 29A.72.270, which prescribes how the “different measure” should be presented on the ballot, does use the word “alternative,” but the word is not found in Art. II § 1.

C. The Provisions of Art. II § 1 Apply Even When the Legislature Inadvertently Deals With the Same Subject As An Initiative

1. The Potential for Conflict between an Initiative and a Legislative Alternative Requires the Secretary of State to Place Both Measures on the Ballot

In addition to preserving the right of the people to legislate, the procedure specified in Art. II § 1 is necessary to avoid the potential confusion and conflict that would arise when both the people and the Legislature exercise their legislative powers concerning the same subject. If an initiative is proposed, and the Legislature adopts legislation dealing with the same subject (even inadvertently), which of the two legislative acts will take priority? The constitution provides a solution: put both the initiative and the Legislature’s “different [measure] dealing with the same subject” on the ballot together so that the voters may choose whether to adopt either measure and if so, which measure they prefer.

This provision is operative even if (or perhaps especially if) the Legislature is unaware that it has enacted a different measure dealing with the same subject as an initiative. In its opening brief, the Legislature claims that it has the sole power to determine whether it has proposed a different measure that should be placed on the ballot.¹⁷ But the Secretary of State

¹⁷ “It is for the Legislature, not this Court, to determine whether to place an alternative measure onto the ballot along with I-940.” Brief of the Legislature, at 33. Presumably the exclusion of this Court from the decision to place an alternative measure on the ballot also excludes the Secretary of State.

must fulfill her constitutional duty without the ability to inquire of the Legislature what it believed or intended,¹⁸ Instead, her decision must be based on a determination of whether the two different sources of legislation—the people acting through the initiative process and the Legislature acting in its constitutional role—have addressed the same subject. If that is the case, then a failure to follow the constitutional process of placing both measures on the ballot will result in chaos and confusion.

The Legislature’s proposed rule—that the Secretary of State can only place an alternative on the ballot when the Legislature explicitly requests that she do so—should be rejected. It not only ignores the role that the constitution assigns to another coordinate branch of government; it not only creates the potential for conflicting laws to be passed by different legislative bodies; but in the case of inadvertent conflict it would deprive the people of the opportunity to choose the policy that may be preferable to what the original initiative proposes.

The prospect of inadvertent collision between competing legislators is not a merely theoretical possibility; it actually happened in *Washington State Dept. of Revenue v. Hoppe*, 82 Wn. 2d 549, 512 P.2d 1094 (1973). In

¹⁸ Because the enrolled bill doctrine applies to the Secretary of State’s examination of legislative acts, and as a practical matter there is no mechanism to inquire of the Legislature how they wished to treat a particular piece of legislation, the Secretary of State must apply the Constitutional procedure whenever the Legislature enacts a “different [measure] dealing with the same subject.”

that case the voters had approved an initiative that limited the rate of taxation that could be levied, and the Legislature subsequently adopted legislation that addressed the same subject. Because of the conflict, the trial court ruled that both the initiative and the legislation that conflicted with it were invalid. *Hoppe*, 82 Wn. 2d at 551. On appeal, the Washington Supreme Court reversed the trial court, noting that the Legislature should not be able to render the initiative process a “futile exercise.” *Id.* at 557. But because of the conflict, it was forced to excise the provisions of the legislation that conflicted with the initiative.¹⁹

In this case, by contrast, the Secretary of State has both the opportunity and the duty to prevent the legislative power of the people from colliding with the legislative authority of the Legislature: she can invite the people to choose whether to change the law, and which change in the law they prefer. Following the constitutional procedure protects the interests of all of the parties involved while avoiding conflict or confusion over the governing law.

¹⁹ *Hoppe*, unlike this case, concerned an initiative and legislation which had both been enacted before the apparent conflict between the texts arose. It nonetheless illustrates how a Legislature may pass legislation without realizing that it was in conflict with an initiative. As this Court noted, “[i]t is apparent to us that the Legislature was not endeavoring to subvert the initiative power of the people. Obviously it acted under a misconception of the effect of the initiative on taxes collectible in 1973.” *Hoppe*, 82 Wn. 2d at 558.

2. The Duties of the Secretary of State Do Not Involve Legislating

An additional objection raised by the Legislature in their opening brief is the claim that the relief requested in this case would involve the judiciary in “drafting legislation” and would invade the prerogatives of the Legislature.²⁰ But no such request is being made. The relief requested in this case is directed at the Secretary of State, who has raised no objection on the basis of being ill-equipped or unable to translate the “different [measure] dealing with the same subject” into the format suitable for presentation to the voters on the November ballot. As the previous section indicates, it may be necessary to do so when the Legislature has inadvertently legislated on a subject that is addressed by a pending initiative. The Secretary of State does not legislate when she prepares an initiative and a proposed alternative for presentation to the voters; and if she has not objected to the issuance of a writ of mandamus in this case to do so with respect to I-940 and I-940B, then it does not fall to the Legislature to make an objection on her behalf.

Moreover, it is particularly unbecoming of the Legislature to object on this basis when it spends most of its brief claiming that the enactment of ESHB 3003 and I-940 became law without further action on anyone’s part.

²⁰ “Drafting legislation to judicially create an alternative measure here would profoundly invade the prerogatives of the Legislature.” Brief of the Legislature at 31.

The legislation that it claims should go straight to the Code Reviser for inclusion in the Revised Code of Washington is the same legislation that constitutes I-940B. Plaintiff and Plaintiff Intervenor only ask that this legislation be submitted to the voters for approval or rejection.

D. The Legislature’s Proposed Exception to the Constitutional Procedure Is Unworkable In Practice As This Case Demonstrates

The Legislature acknowledges that, placed in the wrong hands, an unlimited power to adopt an initiative in modified form could be used to subvert the initiative process. To answer this objection, the Legislature proposes what it calls the *Lowry* test²¹ to distinguish those cases where the constitutional procedure should be followed from other cases (including the case at bar) where the constitutional procedure is unnecessary and undesirable. Even if the constitutional procedure specified in Art. II § 1(a) were optional rather than mandatory, the *Lowry* test proposed by the Legislature is hopelessly unworkable.

The Legislature asks this Court to adopt a test that would be imposed on a future Secretary of State, who would be required to apply this test in the short window between the end of a legislative session and the date for printing ballots. She would be required to evaluate whether the enactment of a modified form of an initiative was “compatible” with the original

²¹ Brief of the Legislature, at 17-21, citing *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 931 P.2d 885 (1997).

initiative, or whether it represented “an obvious attempt to circumvent the initiative power.” Brief of the Legislature at 21. It is to be expected that a future Legislature considering an initiative would undoubtedly believe that the modified version it adopted “advances the original objectives of [the initiative] . . . and did not depart from the policy and substantive provisions of [the initiative] . . .” Brief of the Legislature, at 21 (applying the *Lowry* test to I-940). It may even pointedly insert such a set of findings in the legislative text by which it amends the initiative.

A future Secretary of State attempting to apply the *Lowry* test would be worse off than the Secretary of State in this case. The lawsuit in this case was triggered when she received conflicting advice as to whether the inclusion of I-940 or I-940B on the November ballot was either required or forbidden. But at least in this case the facts are all agreed and the parties agreed to a highly compressed time frame to brief and resolve the issues. By contrast, if a similar case arose in the future, how would the Secretary of State determine whether the amended version was “compatible” with the original language of the initiative? Or that there had been “an obvious attempt to circumvent the initiative power”? Would it not invite complex factual disputes that the Secretary of State lacks the resources to resolve?

The constitution recognizes that initiative sponsors and the Legislature are likely to have divergent views as to the best public policy to address the

subject of the initiative. The arduous and expensive path of composing an initiative and obtaining the requisite number of signatures will typically be chosen only after the initiative sponsor has first attempted to convince legislators to adopt the policy proposal but has despaired of succeeding on that path. The compensating benefit is the assurance from Art. II § 1(a) that if the initiative is duly certified, the initiative sponsor is guaranteed of the opportunity to legislate independently of the Legislature. Consequently, when the Legislature considers an initiative, and decides that it can “improve” the initiative by certain amendments, the Constitution requires that their “improved” version be submitted to the voters alongside the original initiative. But of course the Legislature would prefer otherwise. It would prefer to have its policy preferences adopted at once, without the need to have the voters approve. And, as in this case, no Legislature will admit that it has engaged in “an attempt to circumvent the initiative power” (Brief of the Legislature at 1-2); instead, it is likely to believe—quite sincerely—that it has “advanced the original objectives of [the initiative].” *Id.* at 21.

But the provisions of Art. II § 1(a) that protect the right of the people to legislate would become a “futile exercise” if the right to have their initiative submitted to a vote of the people were made subject to a determination by the Secretary of State that the Legislature, in passing a modified version of

the initiative, was engaged in “an obvious attempt to circumvent the initiative power.” Nor would it be any comfort to the initiative sponsor that a court could review the Secretary of State’s failure to make such a finding.

The *Lowry* test proposed by the Legislature should be rejected as a clear violation of Art. II § 1(a). If Art. II § 1 is to be “liberally construed” in order to protect the right of the people to legislate, it cannot be subjected to the additional hurdles proposed by the Legislature.

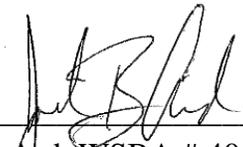
VIII. CONCLUSION

In order to preserve the right of the people to legislate independently of the Legislature, this Court should affirm the trial court’s decision to require I-940 to appear on the November ballot, and reverse the trial court’s decision to include I-940B. A writ of mandamus to the Secretary of State should issue accordingly.

RESPECTFULLY SUBMITTED this 18th day of May 2018.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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