No. 95749-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIM EYMAN and MICHAEL J. PADDEN,

Respondents/Cross Appellants,

v.

KIM WYMAN, in her capacity as Secretary of State,

Defendant,

THE WASHINGTON STATE LEGISLATURE and DE-ESCALATE WASHINGTON,

Appellants/Cross Respondents,

CYRUS HABIB, in his capacity as Lieutenant Governor,

Intervenor.

APPELLANT DE-ESCALATE WASHINGTON'S EMERGENCY MOTION FOR RECONSIDERATION

I. IDENTITY OF MOVING PARTY AND STATEMENT OF RELIEF SOUGHT

Appellant De-Escalate Washington requests emergency reconsideration of this Court's August 28, 2018, split decision terminating review. RAP 12.4(a); RAP 17.4(b). The opinions diverged into three different substantive results as to what measures, if any, should appear on this November's ballot. Four Justices would have held that Initiative 940

("I-940") is law and nothing should appear on the ballot. Four Justices would have held that I-940 and Engrossed Substitute House Bill ("ESHB 3003") should appear on the ballot together as alternatives. Finally, one Justice would have held that I-940 should appear on the ballot by itself. For reasons not explained, the Court seems to have adopted the view of that single Justice as the ruling of the Court as a whole. Adopting a substantive result that only one of nine Justices reaches is contrary to any notion of how a plurality decision should be interpreted. Moreover, the reasoning in support of the determination to send only I-940 to the ballot represents an unwarranted intrusion by the judiciary into the legislature's province, intruding on well-established separation of powers principles and creating the potential for inappropriate litigation second-guessing legislative acts.

De-Escalate respectfully requests that the Court reconsider its decision and hold that I-940 validly was enacted and nothing should appear on the ballot or, in the alternative, hold that both I-940 and ESHB 3003 should appear on the ballot as alternatives.

II. STATEMENT OF GROUNDS FOR RELIEF SOUGHT

A. This Court's ruling on the merits.

Earlier today, this Court issued a split opinion with no single opinion gaining more than four votes. In Justice Gordon McCloud's lead

opinion, four Justices would have upheld the legislature's enactment of I-940, ruled ESHB 3003 validly was passed, but substantively unconstitutional, and sent nothing to the ballot. In Justices Fairhurst's and Stephen's dissents, four Justices would have held that ESHB 3003 validly was passed, but by enacting ESHB 3003 the legislature rejected I-940 and proposed an alternative, resulting in both I-940 and ESHB 3003 appearing on the ballot together as alternatives. Finally, Justice Madsen's sole concurrence/dissent concluded that the legislature amended I-940 by enacting ESHB 3003 (which validly was passed) and, therefore, I-940 should appear on the ballot. But Justice Madsen further reasoned that ESHB 3003 by its own terms becomes void if I-940 is placed on the ballot and therefore should not go to the voters. Thus, Justice Madsen concluded that I-940 should appear on the ballot by itself. Without explanation, the Court appears to have determined that Justice Madsen's sole opinion controls although contrary to the results urged by eight other justices.

B. Justice McCloud's opinion presents the proper approach to legislative acts.

De-Escalate recognizes that what the legislature did here was unorthodox. All nine members of the Court agree, for differing reasons, that the legislature should not have done what it did in the way it enacted both I-940 and ESHB 3003. None of the opinions would implement the

legislature's preferred result of both I-940 and ESHB 3003 becoming law. For that reason, regardless of the result (holding I-940 adopted, placing both I-940 and ESHB 3003 on the ballot as alternatives, or placing only I-940 on the ballot), this Court's holding will preclude and deter the legislature from repeating its action in the future.

The holding of the Court should be reconsidered because of the impact on future cases where the Court is asked to interpret the intent of the legislature. The opinion of Justice McCloud best reflects the long-established and limited role the Court has taken to interpreting acts of the legislature, especially as reflected in the enrolled bill doctrine. As a majority of the Court recognizes, the premise of the enrolled bill doctrine is that the Court looks only within the four corners of the enacted law to determine its validity. Doing so with I-940 necessitates the conclusion that the legislature validly enacted I-940 by majority votes. As both Justice McCloud and Justice Yu note, deviating from that doctrine gives rise to the potential for inappropriate future litigation asking the Court to "interpret" otherwise clear legislation. And it invites intrusion by the judiciary into the legislative sphere in violation of the separation of powers doctrine. In this case, the dissents took that invitation by looking beyond the actual enactment of I-940 and determining legislative intent based on a holistic examination of legislative actions throughout the

legislative session. This Court never has set forth such a broad approach in applying the constitution to legislation. In short, one cannot conclude that I-940 was enacted without looking beyond the text of I-940 as adopted by the legislature. And one cannot conclude ESHB 3003 is an alternative to I-940 without looking beyond the text of ESHB 3003. With all due respect to Justice Stephens, using the intent of article II, section 1 as a guise for interpreting the legislature's actions here violates the enrolled bill doctrine and the separation of powers. As Justice Yu forcefully notes, the treatment of I-940 and ESHB 3003 encourages the courts "to invade the exclusive province of the legislature . . . to corrupt the finality and deference this court usually affords to the laws bearing the certified seal of Washington."

This Court has taken the legislature to task. But it should reconsider and hold that I-940 as duly enacted by the legislature is the law of Washington.

C. In the alternative, I-940 and ESHB 3003 both should appear on the ballot as alternatives.

Alternatively, Justice Madsen's holding should not control the outcome of the case. Justice Madsen's holding does not reflect a majority or even a plurality of the Court. Because the substantive result Justice Madsen posits is hers and hers alone it cannot be considered the narrowest ground supporting a conclusion of the court.

This case is somewhat unique in that the Court split 4 – 4 – 1 asserting three different substantive results. This is not a traditional case where five Justices agree on a substantive result but disagree on the reasoning.[1] Five Justices do not agree that only I-940 should go to the ballot. Indeed, eight of the nine Justices would have reversed the trial court's ruling ordering that exact result.

Determining the proper result is a three-step analysis. First, admittedly five Justices believe that the legislature intended to reject I-940 in enacting ESHB 3003 (which, as argued above, should be reconsidered). Second, five Justices believe that ESHB 3003 was a constitutional enactment. Third, four of those five believe that ESHB 3003 should be treated as an alternative to I-940. In other words, a majority of the Justices asserting that ESHB 3003 was constitutionally adopted voted to send both I-940 and ESHB 3003 to the ballot. That holding better reflects the split of opinions in the case. Adopting the holding of one Justice to achieve a result that none of the other Justices support has no precedence and makes no sense.[2]

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[1] That is the traditional basis for applying the narrowest grounds principle. "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998); *see also Southcenter Joint Venture v. Nat'l Democratic Policy Cmte.*, 113 Wn.2d 413, 427-28, 780 P.2d 1282 (1989).

[2] It also is not a result that any of the parties in this case requested at any time. Appellants and Respondents alike have argued that putting I-940 on the ballot by itself is error.

Moreover, Justice Madsen's statement that ESHB 3003 is void by its own terms "if I-940 is placed on the ballot" is, with all due respect, incorrect. Slip Op. Concurrence/Dissent (Madsen, J.) at 3. The plain language of ESHB 3003 states no such thing. Rather, it states that ESHB 3003 is void if: (1) I-940 "is **not approved** during the 2018 regular legislative session" or (2) "if a **referendum** on the initiative is certified by the secretary of state…." *Id.* (quoting CP at 55) (emphasis added). The plain language of ESHB 3003 does not say it is void if there is *any* vote by the people on I-940—only if there is a certified referendum. Justice Madsen is in the majority in that she "agree[s] that 'the legislature validly passed both I-940 and ESHB 3003.'" *See* Slip Op. Concurrence/Dissent (Madsen, J.) at 2 (quoting Dissent (Stephens, J.) at 14). And no referendum on I-940 was filed or certified. Neither of the circumstances that trigger voiding ESHB 3003 is present. Accordingly, it is not void by its own terms and Justice Madsen's rationale should not control.

III. BASIS FOR EMERGENCY CONSIDERATION

Emergency consideration of this Motion under RAP 17.4(b) is warranted due to the Secretary of State's August 31, 2018, deadline for knowing what measures should appear on the ballot. The undersigned attorney declares that De-Escalate provided notice it would be filing this Motion to all other parties via email earlier this afternoon.

IV. CONCLUSION

This Court should reconsider its opinion that I-940 should go to the ballot by itself. This result is only supported by one of the nine members of the Court. Moreover, the rationale of the Justices holding that the legislature's adoption of I-940 should be interpreted through the intent of the constitution rather than the four corners of the legislature's actions is the exact intrusion on separation of powers that the enrolled bill doctrine prevents. This Court should hold that I-940 is law and nothing goes to the ballot. In the alternative, this Court should hold that both I-940 and ESHB 3003 should go to the ballot together as alternatives.

RESPECTFULLY SUBMITTED this 28th day of August, 2018.

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CERTIFICATE OF SERVICE

I, declare under penalty of perjury under the laws of the State of Washington, that on August 28, 2018, I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send e-mail notification of such filing to all registered parties.

DATED this 28th day of August, 2018.

Tricia O'Konek
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PACIFICA LAW GROUP

August 28, 2018 - 4:56 PM

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Comments:

Appellant De-Escalate Washington's Emergency Motion for Reconsideration

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