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,

Intervenor-Appellant/Cross-Respondent

RESPONDENTS' AND CROSS-APPELLANTS' ANSWER TO MOTION FOR RECONSIDERATION

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I. INTRODUCTION

The Motion for Reconsideration filed by De-Escalate Washington, which intervened in the trial court, does not meet the high standards for that extraordinary relief. It mis-states the vote counts of the opinions as to the questions presented to this Court by characterizing the Order as implementing the views of a single Justice. The state legislature, the party most affected by the decision, has not sought reconsideration, while De-Escalate for the first time in its extraordinary Motion asks this Court to implement a position it never actively opposed in earlier proceedings – that both I-940 and I-940B should appear on the November ballot.

II. ANSWER TO MOTION FOR RECONSIDERATION

A. The Standards for Reconsideration Are Not Met

RAP 12.4, which permits the filing of a Motion for Reconsideration of Decision Terminating Review, specifies the procedure and the timing of such a motion, but says little concerning the grounds for granting such a motion. RAP 12.4(c) states "Content. The motion should state with particularity the points of law or fact which the moving party contends the

court has overlooked or misapprehended, together with a brief argument on the points raised."

1. Appellant Fails to Identify any "Overlooked" or "Misapprehended" Points of Fact or Law

The only argument raised by Appellant De-Escalate Washington suggesting that the Court "overlooked" or "misapprehended" a point of fact or law is the assertion that the court's decision will have an adverse "impact on future cases where the Court is asked to interpret the intent of the legislature." (Motion for Reconsideration, at 4.) This argument fails to identify any mistakes made by the Court in reaching its decision. Moreover, a concern about the wisdom of the Court's decision affects no interest of De-Escalate Washington. The only party to this case with standing to assert an interest in protecting the intent of the legislature is the Legislature. And the Legislature has accepted the Court's ruling. Nor has the Court asked for a response from the Legislature. As Appellant correctly notes, all nine Justices rejected the Legislature's claim that it could first amend an initiative and then "adopt" it in order to make the amended version become law.

While it is asserted by Appellant that the Court's remedy—issuing a writ of mandamus to place I-940 on the ballot—"is only supported by one of the nine members of the Court," in fact five members of the Court held

that I-940 was amended by the legislature, and thus the result requested by Appellant (to treat I-940 as though it had become law) was rejected by five members of the Court, as more fully detailed below.

2. It Would Be Fundamentally Unfair to Respondents to Amend the Court's Decision Without Adequate Opportunity for Response

The ordinary result of granting a Motion for Reconsideration is to permit the case to be reargued, or to correct a mistake in the opinion without fundamentally changing the result. Ordinarily there is no time pressure to conclude the case before an adequate opportunity has been presented to the parties to help the Court arrive at clarity as to whether a mistake had been made in the opinion and if so, how it should be corrected. This case of course offers no such opportunity.

Even though RAP 12.4(g)(1) permits the Court, following a Motion for Reconsideration, to modify the decision without new argument, Respondents would strenuously object to any fundamental change to the decision adverse to Respondents in light of the severe time constraints that deprive them of a meaningful opportunity to respond to the Appellant's claim of error.

Both at the trial level and on appeal the parties have had reasonable opportunity to present arguments and rebut arguments made by opposing parties. The Court's opinion, which it issued on August 28, 2018, reflected

a sharp division of opinion among the members of the Court. Nonetheless, it thoroughly addressed all of the arguments presented by the parties. Appellant has failed to point to any error committed by the Court that would qualify as an "overlooked" or "misapprehended" feature of the case.

B. The Order Reflects the Vote Count On Both Questions

The Motion calls into question the Court's ultimate Order: that the Secretary of State put I-940 on the ballot but not I-940B (I-940 as amended by ESHB 3003). It argues that the Order reflects the views of only one justice. This is incorrect, and mischaracterizes the correct approach the Court took to formulating an Order to the Secretary that accurately reflected the vote counts on the two questions presented to the court. Because the Justices characterized those questions in different ways, Respondents offer for purposes of this brief discussion a neutral recasting consistent with the fact that the Order ultimately must direct the Secretary either to act or not to act: First, must the Secretary print I-940 on the November ballot? Second, must the Secretary print I-940B on the November ballot?

The Court – in all opinions – correctly approached the questions in this sequence. Every party in every legal theory presented to the Court agreed that the answer to the second question hinged on the answer to the first. For the Legislature, ESHB 3003, aka I-940B, could not become law unless I-940 became law. For Respondents, the only reason I-940B would appear

on the November ballot is as the Legislature's "different [measure] dealing with the same subject," Cost. Art. II § 1(a), and as the alternative to I-940. If I-940 does not appear on the ballot, then I-940B does not. And, for De-Escalate, while they argued that I-940 could have become law in the legislative session without ESHB 3003 also becoming law, they, too, recognized that ESHB 3003 could not become law without I-940.

As every member of this Court recognized, if I-940 must appear on the ballot, I-940B could not be law, but might appear on the ballot, although opinions divided on whether it should. The entire Court recognized that if I-940 had become law, I-940B would ***not*** appear on the ballot.

Review of the opinions plainly shows that a majority of this Court agreed on the instructions to be given to the Secretary as to I-940: five justices held that it must appear on the November ballot.

	What To Do With I-940?
Justice Fairhurst	Place on the ballot
Justice Stephens	Place on the ballot
Justice Johnson	Place on the ballot
Justice Owens	Place on the ballot
Justice Madsen	Place on the ballot
Justice Gordon McCloud	Not on the ballot: became law
Justice Wiggins	Not on the ballot: became law

Justice Gonzales	Not on the ballot: became law
Justice Yu	Not on the ballot: became law

Thus, the Order correctly reflects that a majority of this Court concluded that I-940 must appear on the November ballot.

A majority of the Court also concluded that I-940B (I-940 as amended by ESHB 3003) must ***not*** appear on the November ballot, albeit for two different reasons. Four Justices concluded that I-940 became law. As noted above, that conclusion necessarily precludes the possibility that I-940B would appear on the ballot.[1] One justice concluded that I-940B should not appear on the ballot because "ESHB 3003, by its express terms, voids itself if I-940 is placed on the ballot." Madsen, J., concurring/ dissenting. Only four justices agreed that the Court should order the Secretary to place I-940B on the November ballot.

	What To Do With I-940B?
Justice Gordon McCloud	Not on the ballot: unconstitutional enactment
Justice Wiggins	Not on the ballot: unconstitutional enactment

[1] Those same four agreed that ESHB 3003 violated Art. II § 1(a) and did not become law, but for purposes of crafting an order, none of the four would have ordered the Secretary to print it on the ballot.

Justice Gonzales	Not on the ballot: unconstitutional enactment
Justice Yu	Not on the ballot: unconstitutional enactment
Justice Madsen	Not on the ballot: voided itself
Justice Fairhurst	Place on the ballot
Justice Stephens	Place on the ballot
Justice Johnson	Place on the ballot
Justice Owens	Place on the ballot

Thus, contrary to the argument presented in the Motion for Reconsideration, a majority of the Court concurred on the mandamus to be issued to the Secretary: Five justices agreed that I-940 should appear on the November ballot. Five justices agreed that I-940B or ESHB 3003 should not. The five justices who concurred on the result of the second question did so for different reasons, but their divergent reasons do not change their agreement concerning the mandate—the action (or in this case, inaction)—that should be issued to the Secretary.

C. The Majority Correctly Concluded That I-940 Was Not Adopted Without Change Or Amendment And Is Therefore Rejected

The Motion for Reconsideration also argues that the Court's majority should have adopted the minority position as to I-940, for reasons argued

thoroughly in the briefs below and plainly given extensive consideration by every member of this Court. Appellant's dissatisfaction is not a proper basis for reconsideration, and Respondents will not reiterate in detail the reasons the majority is correct. In sum, the enrolled bill doctrine does not prevent any member of the Court from looking at I-940 and ESHB 3003, reading the four corners of each bill as enrolled, and concluding that, as it says on its face, ESHB 3003 amends I-940. The face of the bill also shows that it passed "before the end of such regular session" in which I-940 was "adopted." The Court does not implicate the enrolled bill doctrine in concluding that I-940 was not "enacted . . . without change or amendment by the legislature before the end of such regular session." Art. II § 1(a). The Constitution compels this Court and the Secretary of State to characterize that action as rejection, such that I-940 must appear on the November ballot.

D. De-Escalate Washington Has Offered To Stipulate To Respondents' Proposed Remedy

Although it would be fundamentally unfair to Respondents to change the Court's decision in a way adverse to Respondents, Appellant has requested that "[i]n the alternative, this Court should hold that both I-940 and ESHB 3003 should go to the ballot together as alternatives." (Motion for Reconsideration, at 8.) This is precisely the remedy that Respondents requested. Four members of the Court agreed that Respondents were

entitled to this remedy. As Respondents argued, by voting in favor of ESHB 3003 the legislature "propose[d] a different measure dealing with the same subject," such that "both measure shall be submitted by the secretary of state to the people" in November. *See* Art. II § 1(a). Respondents argued that under these circumstances, akin to *Washington State Dept. of Revenue v. Hoppe*, 82 Wn. 2d 549, 512 P.2d 1094 (1973), the legislature's characterization or lack of characterization of the measure as falling within or without the constitutional definition cannot be dispositive. As Respondents argued from the outset, the constitutional mandate—and thus this Court's mandate to the Secretary—should be to give constitutionally dispositive weight to what the legislature did, not what it says it meant to do, and order both measures to appear on November's ballot.[2] Respondents would readily agree to having the Court require both I-940 and I-940B to be placed on the ballot.

III. CONCLUSION

The Motion for Reconsideration does not identify any "overlooked" or "misapprehended" point of fact or law that justifies changing the Court's

[2] Respondents acknowledge that the question of the constitutional import of the contingency clause of ESSB 3003, considered dispositive by Justice Madsen, was not addressed by any party. Respondents cannot give adequate responsive consideration to that analysis on the necessarily compressed schedule for this Answer, but suggest that the legislature cannot exclude an act from the constitutional definition by attempting to render it "self-voiding." To do so would do violence to the people's decision to withdraw the initiative power from the legislature in the manner outlined in the constitution.

conclusion regarding the resolution of this case. Nonetheless, based on the Appellant's offer to stipulate to the inclusion of I-940B on the November ballot, Respondents would agree to reconsideration on that basis and that basis alone.

RESPECTFULLY SUBMITTED this 29th day of August 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:

On the date below, 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.

Signed on August 29, 2018 at Spokane, Washington.

_____

Melanie A. Evans

ALBRECHT LAW PLLC

August 29, 2018 - 4:35 PM

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