HONORABLE DEAN S. LUM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

SHERRIL HUFF, an individual taxpayer and King County Director of Elections; MARY HALL, an individual taxpayer and Thurston County Auditor; DAVID FROCKT, an individual taxpayer and Washington State Senator, REUVEN CARLYLE, an individual taxpayer and Washington State representative; EDEN MACK, an individual taxpayer; TONY LEE, an individual taxpayer; ANGELA BARTELS, an individual taxpayer; GERALD REILLY, an individual taxpayer; and PAUL BELL, an individual taxpayer, Plaintiffs, v. KIM WYMAN, in her official capacity as Secretary of State for the State of Washington; TIM EYMAN, LEO J. FAGAN and M.J. FAGAN, Defendants.	No. 15-2-18335-4 SEA NOTICE OF APPEAL TO THE WASHINGTON SUPREME COURT

Plaintiffs Sherril Huff, Mary Hall, David Frockt, Reuven Carlyle, Eden Mack, Tony Lee, Angela Bartels, Gerald Reilly, and Paul Bell ("Plaintiffs"), pursuant to RAP 4.2(b), seek by this notice direct review by the Washington Supreme Court of the Superior Court's Order on Plaintiffs' Motion for Permanent Injunction, dated August 14, 2015, denying Plaintiffs' Motion

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for Preliminary and Permanent Injunction. A copy of the order from which appeal is made is attached to this notice.

DATED this 14th day of August, 2015.

PACIFICA LAW GROUP LLP

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 14th day of August, 2015 I caused to be served a true copy of the foregoing document upon:

Rebecca R. Glasgow Callie A. Castillo Peter B. Gonick Washington State Attorney General's Office 1125 Washington Street SE P.O. Box 40100 Olympia, WA 98504-0100 RebeccaG@atg.wa.gov CallieC@atg.wa.gov PeterG@atg.wa.gov Attorneys for Defendant Washington Secretary of State	☐ via facsimile ☐ via overnight courier ☒ via first-class U.S. mail ☒ via email ☐ via electronic court filing ☐ via hand delivery
Richard M. Stephens Stephens & Klinge LLP 10900 NE 8th Street, Suite 1325 Bellevue, WA 98004-4405 stephens@sklegal.pro Attorney for Defendants Tim Eyman, Leo J. Fagan and M.J. Fagan	☐ via facsimile ☐ via overnight courier ☒ via first-class U.S. mail ☒ via email ☐ via electronic court filing ☐ via hand delivery

DATED this 14th day of August, 2015.

S.H

Sydney Henderson

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SHERRIL HUFF, an individual taxpayer and King County Director of Elections; MARY HALL, an individual taxpayer and Thurston County Auditor; DAVID FROCKT, an individual taxpayer and Washington State Senator, REUVEN CARLYLE, an individual taxpayer and Washington State representative; EDEN MACK, an individual taxpayer; TONY LEE, an individual taxpayer; ANGELA BARTELS, an individual taxpayer; GERALD REILLY, an individual taxpayer; and PAUL BELL, an individual taxpayer. Plaintiffs, v. KIM WYMAN, in her official capacity as Secretary of State for the State of Washington; TIM EYMAN, LEO J. FAGAN and M.J. FAGAN, Defendants.	No. 15-2-18335-4 SEA ORDER ON PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION

THIS MATTER came before the Court on Plaintiffs' Motion for Preliminary and Permanent Injunction ("Motion"). The Court has considered the pleadings, briefs and declarations, including the Motion and all supporting declarations, Defendants' Oppositions to the Motion and all supporting declarations, Plaintiffs' Reply in support of the Motion, and the

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other pleadings and papers filed in this action. Based on the foregoing, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

A. Parties.

1. Plaintiffs challenge the placement of Initiative 1366 ("I-1366" or the "Initiative") on the ballot for the November 2015 general election.

2. Plaintiff Sherril Huff is the Director of Elections for King County. She resides in King County, Washington, and is a taxpayer in the state of Washington.

3. Plaintiff Mary Hall is the Auditor for Thurston County. She resides in Thurston County, Washington, and is a taxpayer in the state of Washington.

4. Plaintiff David Frockt is a Washington State resident who lives in Seattle, Washington. He is a taxpayer in Washington State and also a Washington State Senator for the 46th Legislative District.

5. Plaintiff Reuven Carlyle is Washington State resident who lives in Seattle, Washington. He is a taxpayer in Washington State and also a Washington State Representative for the 36th Legislative District.

6. Plaintiffs Tony Lee and Angela Bartels reside in Seattle, Washington and are taxpayers in Washington State.

7. Plaintiff Eden Mack resides in Seattle, Washington and is a taxpayer in Washington State.

8. Plaintiff Paul Bell resides in Sammamish, Washington, and is a taxpayer in Washington State.

9. Plaintiff Gerald Reilly resides in Olympia, Washington and is a taxpayer in

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Washington State.

10. Defendant Kim Wyman is Secretary of State for the State of Washington.

11. Defendants Tim Eyman, Leo J. Fagan and M.J. Fagan are I-1366's sponsors.

B. Standing.

12. Plaintiffs have standing to bring this action on multiple independent grounds, and at a minimum, this case may proceed forward based on taxpayer standing and public importance. Plaintiffs are taxpayers and elected officials and will suffer actual and substantial injury, financial, administrative, constitutional, or otherwise, from the placement of I-1366 on ballot for the November 2015 general election.

13. The issues presented here are of significant public importance.

14. Additionally, with respect to Plaintiff Huff and Plaintiff Hall, the financial and administrative burden of placing a potentially unlawful initiative on the ballot is sufficient injury to confer standing. *City of Longview v. Wallin*, 174 Wn. App. 763, 783, 301 P.3d 45 (2013).

15. Plaintiffs Frockt and Carlyle have standing because the initiative would hamper and harm their ability independently and in a deliberate fashion determine whether to invoke the constitutional amendment process under Article XXXIII of the Washington Constitution.

C. I-1366.

16. I-1366 was filed on January 5, 2015 by Defendants Tim Eyman, Leo J. Fagan and M.J. Fagan. On July 29, 2015, Defendant Wyman certified that I-1366 had received a sufficient number of signatures to be placed on the ballot for the November 2015 general election.

17. The stated purpose of I-1366 is to amend the Washington Constitution to require a two-thirds supermajority vote in the legislature or a popular vote to approve any measure that "raises taxes".

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18. I-1366 utilizes the threat of a one percent reduction in sales tax to force the state legislature to invoke the constitutional amendment process. The sales tax reduction will take effect April 15, 2016 unless the legislature, prior to that date, "refers to the ballot for a vote a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes".

19. Under I-1366, a measure that "raises taxes" means "any action or combination of actions by the state legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund."

20. The Attorney General's official ballot title for I-1366 states in its concise description that "This measure would decrease the sales tax rate unless the legislature refers to voters a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes").

21. The heading of I-1366 is labeled "2/3 Constitutional Amendment" and its sponsors have advertised the initiative as an effort to amend the Constitution.

22. I-1366 was not proposed in either house of the legislature, nor approved by two-thirds of both houses.

MEMORANDUM OPINION

Whether I-1366 is a good idea or a bad idea is not the question before the Court, and this Court takes no position on the merits of this initiative. The Court limits itself to the legal questions here, much of which involve process. The process is of paramount importance, however, since it is spelled out in the Constitution, and involves the process to amend the Constitution.

The Attorney General concedes, and the Court finds that the issues presented are of public importance, and therefore the standing issues are moot. Moreover, at a minimum, plaintiffs have taxpayer standing. Although sponsors' counsel disagrees, the Attorney General also concedes that this case is justiciable and that the Court should decide this matter prior to the election.

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We first must decide whether Initiative 1366 is outside the scope of the initiative power reserved to the citizens of King County under article II, section 1 and article XI, section 4 of the Washington State Constitution. One of the foremost rights of Washington State citizens is the power to propose and enact laws through the initiative process. Wash. Const. art. II, § 1(a). "The passage of an initiative measure as a law is the exercise of the same power of sovereignty as that exercised by the Legislature in the passage of a statute." *Love v. King County*, 181 Wash. 462, 469, 44 P.2d 175 (1935).

As a general rule, courts are reluctant to rule on the validity of an initiative before its adoption. This reluctance stems from our desire not to interfere in the electoral process or give advisory opinions. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 911 P.2d 389, *cert. denied*, 519 U.S. 862, 117 S.Ct. 167, 136 L.Ed.2d 109 (1996); *Maleng v. King County Corrections Guild*, 150 Wn.2d 325, 76 P.3d 727, 729 (2003).

However, it "is well established that a pre-election challenge to the **scope** of the initiative power is both permissible and appropriate." *Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007). *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wash. App. 427, 432, 260 P.3d 245 (2011). Importantly, the Attorney General agrees that the question presented here is within the narrow category of questions that can be answered pre-election and is therefore justiciable. Although the Attorney General's Office is defending the initiative, it agrees that this case is properly before the court. This challenge is different than other potential substantive challenges which must be resolved post-election, such as the "two subject" prohibition.

All parties agree that the Washington Constitution may only be amended by the process in Article XXIII, not by the legislative or initiative power in Article II. They agree, and the Washington State Supreme Court has held four times, that the Constitution may not be amended by initiative. They disagree that I-1366 amends the constitution. In deciding this question, we must determine the initiative's fundamental and overriding purpose.

The Court finds that the fundamental, stated and overriding purpose of I-1366 is to amend the Constitution. Sponsors do not contest that the referenced I-1366 "promotional material" for the "2/3- For Taxes Constitutional Amendment Initiative" was drafted not by some unnamed supporters, but by themselves. The "promotional material" are not mere advertisements, but either fundraising letters from some of the defendants, or the actual page attached to the I-1366 signature gathering document. The initiative's text explicitly links the proposed constitutional amendment (with specific constitutional amendment language submitted with the initiative) to a reduction in the sales tax from 6.5% to 5.5%.Legislators would have no authority to propose changes to the constitutional amendment. The initiative's sponsors have decided that already.

I-1366 appears to violate Article XXIII Constitutional process in at least three ways. First, the initiative proposes the constitutional amendment, rather than coming from the Senate or the House. The constitutional amendment's text comes directly from the initiative with no possible changes by any legislator. The constitutional amendment process effectively bypasses representatives elected by the people. Second, I-1366 directs the legislature to submit the proposed amendment to a public vote without the requirement that it be passed by 2/3 of each independent house, thereby amending the constitution and the constitutional process.

Third, the initiative uses the threat of a large reduction in the sales tax (and large reduction in services to Washingtonians) to force legislators to engage in the physical act of "proposing" the constitutional amendment for the ballot, notwithstanding that some will forced to do so against their will and without any changes to the amendment. The purpose of the initiative is not to legislate, but to invoke the constitutional amendment process. Sponsors characterize the legislator's proposal as a "choice", but there is no choice here.

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Thus, I-1366 appears to violate the Constitutional Amendment process in multiple ways and appears to exceed the scope of the initiative power. However, that is not the end of the inquiry. In order to obtain preliminary injunction, plaintiffs must establish (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the act complained of will result in actual and substantial injury. Rabon v. City of Seattle, 135 Wn.2d 278, 284, 957 P.2d 621 (1998). Whether this proposed injunction triggers First Amendment protections is not that clear, as our Supreme Court has neither squarely addressed the issue nor harmonized its reasoning in the Futurewise, Coppernoll, Philladelphia II and Maleng cases. Moreover, previous pre-election cases involving local initiatives are of limited precedential value on this issue, since the state initiative process is part of the state constitution itself.

Although our Supreme Court has allowed pre-election review of initiatives in limited and rare circumstances, it has never squarely decided whether the First Amendment to the US Constitution and/or Article I, Section 5 of the Washington Constitution are violated by pre-election restrictions on initiatives. Although it is questionable whether the "public forum" doctrine fully applies in this case, the Coppernoll court recognized that First Amendment concerns may be triggered by judicial involvement in initiatives prior to the election, **even if the initiative is later struck down:**

> Because ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential subsequent invalidation of the measure), substantive pre-election review may also unduly infringe on free speech values...For example, after voter passage of Initiative 695 requiring $30 vehicle license tabs, it was ruled invalid by the trial court. A nearly identical measure was quickly passed by the legislature and signed by the governor before the appeal could be heard.

Coppernoll v. Reed, 155 Wn.2d 290, 298 (2005).

Thus, language in Coppernoll and other cases indicate that the election has importance separate and apart from whether the measure is valid or even implemented. Plaintiffs cite *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006) and other federal cases, but those cases merely stand for the proposition that sponsors have no First Amendment right to the result of an election, or to implement their initiative. Those cases do not speak to the issue presented here.

Our Supreme Court has invalidated these sponsor's prior initiatives on multiple occasions...but only after the election had occurred. Here, although the ultimate decision is obviously the Supreme Court's, there is a substantial possibility that I-1366 will be found to be invalid for exceeding the scope of the initiative process, and that voters will be voting on a measure which will never go in to effect. Plaintiffs have alluded to additional Constitutional and other substantive challenges to I-1366 which would make it susceptible to post-election invalidation, including most prominently an alleged violation of the two subject rule. Nevertheless, the Coppernoll, Philadelphia II and Maleng cases require that the preliminary injunction be denied because it is not clear that it would not violate the First Amendment or Article I, Section 5.

Of course, on appeal, the Supreme Court could squarely decide the First Amendment issue prior to the election, but this trial court is not in a position to say that the law on this issue is clear and settled.

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CONCLUSIONS OF LAW

1. Issues of law are dispositive of Plaintiffs' Motion. Consolidation of Plaintiffs' request for preliminary and permanent injunctive relief is therefore appropriate under CR 65(a)(2).

2. The Court has jurisdiction over Defendants and over the subject matter of this action, this case is justiciable, at a minimum plaintiffs have taxpayer standing and this lawsuit involves issues of significant public importance.

3. The power to invoke the constitutional amendment process is not part of the Article II legislative power.

4. Article XXIII provides a specific procedure through which the Constitution can be amended. Article XXIII requires first that an amendment is proposed in "either house" of the Legislature. Before the amendment is submitted to the public for a vote, each house of the Legislature must pass the proposed amendment by a two-thirds majority. Only then can the proposed amendment be submitted to the public for a vote.

5. The Constitution may not be amended by initiative.

6. The process of amending the Constitution cannot be invoked by initiative.

7. Constitutional amendments may not be proposed by initiative, rather amendments must be proposed in either branch of the legislature.

8. The fundamental and overriding purpose of I-1366, as evidenced by its text, its title, the material appended to the signature page and the sponsor's promotional material is to invoke the process to amend the Constitution to require a two-thirds legislative supermajority or a public vote for approval of any measure that "raises taxes."

9. For the reasons identified in the above Memorandum Opinion, I-1366 appears to

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exceed the scope of the initiative power. The legislative power reserved to the people under Article II, sec. 1 does not include the ability to propose constitutional amendments by initiative or amend the Constitution by initiative.

10. To obtain injunctive relief, Plaintiff's must establish (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the act complained of will result in actual and substantial injury. *Rabon v. City of Seattle,* 135 Wn.2d 278, 284, 957 P.2d 621 (1998).

11. For the reasons, identified in the above Memorandum Opinion (which is incorporated into these Findings of Fact and Conclusions of Law by reference) plaintiffs have not established that they have a "clear" legal or equitable right to injunctive relief.

12. Although I-1366 appears to exceed the scope of the initiative power , our Supreme Court has not clearly and squarely ruled on whether the First Amendment to the United States Constitution and/or Article I Section 5 of the Washington State Constitution provide additional protections against pre-election challenges even in circumstances where the initiative may itself be invalid. The Supreme Court may clarify this issue prior to the election, but this trial court cannot.

13. The Court cannot say at this time whether Plaintiffs' actual and substantial injuries outweigh Defendants' First Amendment rights under the United States Constitution or their rights under Article I, Section 5 of the Washington State Constitution.

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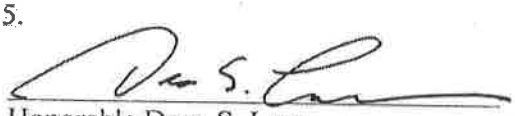
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and Memorandum Opinion, the Court hereby DENIES Plaintiffs' Motion for Preliminary Injunction.

DATED this 14th day of August, 2015.



Honorable Dean S. Lum
King County Superior Court Judge

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