

1 EXPEDITE

2 Hearing is Set:

3 Date: August 24, 2012

4 Time: 9:00 am

5 Judge: Dixon

6
7 **STATE OF WASHINGTON**
8 **THURSTON COUNTY SUPERIOR COURT**

9
10 TIM D. EYMAN,

11 Plaintiff,

12 v.

13 MARTY BROWN, in his official capacity as
14 Director of the Office of Financial Management;
15 SAM REED, in his official capacity as Secretary
of State of the State of Washington,

16 Defendants.

NO. 12-2-01682-5

DEFENDANTS' RESPONSE
OPPOSING ISSUANCE
OF WRITS

17 **I. INTRODUCTION**

18 Plaintiff seeks two extraordinary writs from this court based solely upon his
19 disagreement with an assumption underlying the fiscal impact statement for Initiative 1185.
20 Plaintiff seeks a writ of mandamus to compel the Director of the Office of Financial
21 Management (OFM) to prepare a new fiscal impact statement for I-1185 that would employ
22 assumptions reflecting the Plaintiff's preferred construction of the initiative. Petition for Writ
23 of Mandate and Writ of Prohibition (Petition), at 5-7. Plaintiff also seeks a writ of prohibition
24 directed to the Secretary of State, prohibiting the Secretary from including the fiscal impact
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1 statement that has been prepared by OFM for Initiative 1185 in the voters' pamphlet for the
2 election to be held on November 6, 2012. Pet., at 7-8.

3 Plaintiff is not entitled to either writ. His motion should be denied because it does not
4 satisfy fundamental criteria for mandamus or prohibition. The content of the fiscal impact
5 statement and decisions about the assumptions necessary to prepare the statement are matters
6 firmly committed to OFM's discretion.

7 II. STATEMENT OF THE CASE

8 A. Statutory and Constitutional Background

9 Under RCW 29A.72.025, "[t]he office of financial management, in consultation with
10 the secretary of state, the attorney general, and any other appropriate state or local agency,
11 shall prepare a fiscal impact statement for each of the following state ballot measures: (1) An
12 initiative to the people that is certified to the ballot[.]" Initiative 1185 is a state measure that
13 has been certified to the ballot. Davis Decl., ¶ 3.

14 RCW 29A.72.025 addresses how and when OFM is to prepare fiscal impact statements
15 and the content of such statements, and directs that such statements must be included in the
16 voters' pamphlet. The statute provides:

17
18 Fiscal impact statements must be written in clear and concise language, avoid
19 legal and technical terms when possible, and be filed with the secretary of state
20 no later than the tenth day of August. Fiscal impact statements may include
easily understood graphics.

21 A fiscal impact statement must describe any *projected* increase or decrease in
22 revenues, costs, expenditures, or indebtedness that the state or local
23 governments will experience if the ballot measure were approved by state
24 voters. Where appropriate, a fiscal impact statement *may include* both
25 *estimated* dollar amounts and a description placing the *estimated* dollar amounts
26 into context. *A fiscal impact statement must include* both a summary of not to
exceed one hundred words and a more detailed statement that includes *the*
assumptions that were made to develop the fiscal impacts.

1 Fiscal impact statements must be available online from the secretary of state's
2 web site and included in the state voters' pamphlet. Additional information
may be posted on the web site of the office of financial management.

3 (Emphases added.)

4 Washington's voters' pamphlet derives from article II, section 1(e) of the Washington
5 Constitution, which requires the legislature to provide methods for publicizing all laws or parts
6 of laws referred to the people. "The secretary of state shall send one copy of the publication to
7 each individual place of residence in the state and shall make such additional distribution as he
8 shall determine necessary to reasonably assure that each voter will have an opportunity to
9 study the measures prior to election." Const. art. II, § 1(e). RCW 29A.32.070(5), in turn,
10 requires that the voters' pamphlet must provide "[t]he fiscal impact statement prepared under
11 RCW 29A.72.025[]" for each statewide issue on the ballot except for advisory votes.

12 Additional state and federal laws address the content and distribution of ballots and
13 related voter information materials. Under Section 203 of the Voting Rights Act,
14 42 U.S.C. § 1973aa-1a(c), when a specified threshold of the population of a jurisdiction has
15 limited proficiency in English, the covered State or political subdivision is required to provide
16 "any . . . materials or information relating to the electoral process" "in the language of the
17 applicable minority group as well as in the English language[.]" Pursuant to this requirement,
18 Washington publishes and distributes the voters' pamphlet in Chinese and Vietnamese for
19 King County, and in Spanish for Adams, Franklin, and Yakima counties. Davis Decl., ¶ 6.

20 County auditors must mail ballots to all other voters at least 18 days before the election.
21 RCW 29A.40.070(1). Again, to ensure that voters may inform themselves with respect to
22 matters on the ballot at the time they may begin voting, the schedule for publishing and
23 distributing the voters' pamphlet is designed to ensure that the pamphlet arrives within a day or
24 two of the ballot. Davis Decl., ¶ 11.

1 **B. Factual Background**

2 In keeping with RCW 29A.72.025, the OFM consulted with the Attorney General's
3 Office and other state agencies to prepare the fiscal impact statement for Initiative 1185, and
4 filed it with the Secretary of State on August 10, 2012. Murray Decl., ¶¶ 5, 6(d). Also
5 consistent with RCW 29A.72.025, the fiscal impact statement for Initiative 1185 and additional
6 information supporting the underlying assumptions has been posted on OFM's website since
7 August 10, 2012. Murray Decl., ¶ 6(e).

8 As RCW 29A.72.025 further provides, the fiscal impact statement for I-1185 is
9 predicated on OFM's assumptions concerning the measure and fiscal impacts to the state, and
10 both general and specific assumptions are identified in the fiscal impact statement. Murray
11 Decl., ¶¶ 7, 9. Based upon these assumptions, the statement estimates the fiscal impact of the
12 measure on activities of state government for the remainder of the current biennium and next
13 two ensuing biennium, if approved by the voters, as RCW 29A.72.025 directs.

14 Washington will hold its general election on November 6, 2012. Davis Decl., ¶ 3. As
15 one would expect, many critical administrative tasks must be timely accomplished in advance
16 of the election for the election to go forward in the manner required by law. In Washington,
17 this includes proofing; formatting; translating into Spanish, Chinese, and Vietnamese;
18 accessible format production, printing; and distributing the voters' pamphlet. Davis Decl., ¶ 6.
19 For the voters' pamphlet to be timely distributed to voters, the Secretary of State must receive
20 the final text of materials for inclusion in the pamphlet by August 29, 2012. Davis Decl., ¶ 14.
21 Even that date leaves little time to proof each of the 26 editions, translate, format and print the
22 pamphlet so that it may be timely distributed. *Id.*

23 **C. Procedural Background**

24 Plaintiff filed this action on August 15, 2012. The Attorney General's Office received
25 the initial pleadings on the same day. Plaintiff failed to provide the minimum 10 day notice
26 required by RCW 7.16.190 to respond to an application for a writ of mandamus or prohibition.

1 Because it is critical to the integrity of the election process that this case be resolved promptly,
2 Defendants do not separately seek dismissal based upon this defect.

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4 **III. ARGUMENT**

5 **A. Plaintiff's Action Does Not Satisfy the Most Basic Criteria for a Writ of Mandamus**

6 Plaintiff's motion for writ of mandamus should be denied because he cannot satisfy the
7 basic criteria for the writ. Mandamus is an extraordinary writ and should be granted only in a
8 clear case. *See Walker v. Munro*, 124 Wn.2d 402, 407-411, 879 P.2d 920 (1994). To obtain
9 the writ, Plaintiff must prove three elements:

- 10 (1) The party subject to the writ is under a clear duty to act, RCW 7.16.160;
11 (2) The applicant has no plain, speedy, and adequate remedy in the ordinary
12 course of law, RCW 7.16.170¹;
13 (3) The applicant is beneficially interested, RCW 7.16.170.

14 *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003).

15 This case primarily involves the first element – whether OFM has a clear duty to
16 replace its assumption about the effect of I-1185 on certain fees that have been authorized by
17 the Legislature, but will not be adopted before the initiative's effective date with an alternative
18 assumption that is preferred by the Plaintiff. Plaintiff seeks a writ directing OFM to adopt the
19 alternative assumption and to prepare a new fiscal impact statement based on that assumption.
20 As explained in the remainder of this section, the court should not issue the writ because the
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¹ Defendants agree with Plaintiff that no statute provides a cause of action to challenge a fiscal impact
24 statement or a particular assumption underlying a fiscal impact statement. Pet., ¶ 12. The statutes pertaining to
25 ballot measures allow two causes of action. The first is for any person "dissatisfied with the proposed ballot title
26 or summary for a state initiative or referendum" to petition the court to amend "the ballot title or summary[.]"
RCW 29A.72.080. The second is for challenges to the explanatory statement. RCW 29A.32.040(3). Plaintiff
does not challenge the ballot title, summary, or explanatory statement for I-1185.

1 content of the fiscal impact statement and the underlying assumptions are firmly committed to
2 the discretion of OFM.

3 It is a fundamental rule that a writ of mandamus does not lie to compel the manner in
4 which an official exercises discretion. *Mower v. King Cnty.*, 130 Wn. App. 707, 719, 125 P.3d
5 148 (2005) (“[M]andamus can direct an officer or body to exercise a mandatory discretionary
6 duty, but not the manner of exercising that discretion.”)

7
8 Mandamus lies to compel discretionary acts of public officials when they have
9 totally failed to exercise their discretion to act, and therefore it can be said they
10 have acted in an arbitrary and capricious manner. Once officials have exercised
11 their discretion, mandamus does not lie to force them to act in a *particular*
12 *manner*.

13 (Emphasis in original.)

14 *Aripa v. Dep’t of Soc. & Health Servs.*, 91 Wn.2d 135, 140-41, 588 P.2d 185, 188-89 (1978),
15 *overruled on other grounds*, *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999).

16 Only purely ministerial acts may be compelled by mandamus, and preparing a fiscal
17 impact statement or deciding whether to make a particular assumption is not a purely
18 ministerial act. *Burg v. City of Seattle*, 32 Wn. App. 286, 291, 647 P.2d 517, 520 (1982)
19 (“Mandamus as authorized by RCW 7.16.160 will issue only in relation to the performance of
20 a ministerial duty and not for a duty or power which requires the exercise of discretion”);
21 *Hern v. Looney*, 90 Wn. App. 519, 528, 959 P.2d 1116 (1998) (mandamus is aimed at
22 requiring officers to perform purely ministerial acts). A ministerial act is one “where the law
23 prescribes and defines the duty to be performed with such precision and certainty as to leave
24 *nothing* to the exercise of discretion or judgment [.]” *SEIU Healthcare 775NW v. Gregoire*,
25 168 Wn.2d 593, 599, 229 P.3d 774 (2010) (emphasis added) (holding that the Governor’s
26 decision about whether to include particular spending items the budget was “clearly not a
ministerial act”).

1 Deciding upon the content of a fiscal impact statement for a ballot measure is an act
2 imbued with discretion and as such, it is not purely ministerial and not subject to mandamus.
3 The very statute requiring such statements, RCW 29A.72.025, demonstrates as much. The
4 statute defines fiscal impact as “any projected increase or decrease in revenues, costs,
5 expenditures, or indebtedness that the state or local governments will experience if the ballot
6 measure were approved by state voters.”

7 In making that *projection*, OFM must hold *consultations*; it must prepare *estimates*; and
8 it *may* make *assumptions*² regarding the effect of the measure or other relevant circumstances.
9 In each of these respects, the statute evidences that OFM’s obligation involves the exercise of
10 considered judgment and discretion. RCW 29A.72.025.

11 Moreover, the fact that discretion inheres in OFM’s responsibility under
12 RCW 29A.72.025 to prepare a fiscal impact statement, only makes sense when one considers
13 the context in which OFM acts. OFM is required to prepare a fiscal impact statement with
14 respect to a *proposed* law—a measure that has not been enacted, let alone applied or construed
15 by any court. The scope and operation of the measure cannot be known with certainty; hence
16 the requirement that OFM make assumptions with respect to those matters. Moreover, as often
17 is the case with proposed legislation, and as is the case with I-1185, ballot measures may
18 contain ambiguities.³ Where that is the case, OFM is required to exercise its judgment
19 concerning the measure’s scope in order to estimate its fiscal consequences. Murray Decl., ¶ 7.
20 It is for this very reason that the statute allows OFM to make assumptions as to the scope and
21 application of the measure—and to include them in the fiscal impact statement.

24 ² If OFM elects to make assumptions, those assumptions must be described in the fiscal impact
25 statement.

26 ³ Plaintiff concedes as much when he argues (incorrectly) that the fiscal impact statement may influence
future judicial interpretation of the Initiative. Mot., p. 9.

1 Plaintiff argues that one particular assumption that OFM decided to include in the fiscal
2 impact statement is subjective, “inaccurate,” “erroneous,” or “defective” and that it may
3 influence future judicial construction of I-1185. Plaintiff fundamentally misapprehends the
4 nature of assumptions and the purpose of a fiscal impact statement. A fiscal impact statement
5 is an estimate of the fiscal consequences of a proposed ballot measure if enacted into law,
6 based on assumptions concerning its operation and activities of state government. By
7 definition, assumptions are premises that may or may not hold true. An assumption is “[a]
8 statement accepted or supposed true without proof or demonstration.” *American Heritage*
9 *Dictionary* 80 (new college ed. 1982). Voters can judge OFM’s assumptions for themselves
10 and determine whether they agree with them; and certainly, proponents and opponents of the
11 measure may take issue with OFM’s assumptions and estimates in the public debate that
12 surrounds a ballot measure election. But the assumptions may not be challenged in an action
13 in mandamus.

14 Because OFM’s responsibility under RCW 29A.72.025 to determine the content of the
15 fiscal impact statement requires the exercise of discretion, Plaintiff’s action for a writ of
16 mandamus must fail. The writ is not available to force OFM to make any particular
17 assumption and Plaintiff’s petition and motion should be denied. For the same reason,
18 Plaintiff’s argument taking issue with one particular OFM assumption is irrelevant. The
19 decision about whether it is necessary to assume something about the effect of the measure for
20 the purpose of making the estimate represents the exercise of OFM’s discretion. The decision
21 about the substance of necessary assumption also involves the exercise of discretion.

22 Accordingly, Plaintiff’s disagreement with OFM’s assumption regarding I-1185’s
23 effect on certain agencies’ authority to impose specific fees is discussed here only to point out
24 that it demonstrates the discretion involved in arriving at assumptions concerning the scope
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1 and operation of an initiative for purposes of preparing a fiscal impact statement.⁴ Essentially,
2 Plaintiff argues that OFM must replace its assumption—regarding the effect of I-1185 on
3 certain authorized fees that will not be adopted before the initiative’s effective date, which the
4 agency settled upon after extensive consultation and analysis—with Plaintiff’s subjective
5 beliefs about how a court would interpret the initiative if it is enacted.⁵ He contends that
6 I-1185 contains the same “substantive policy” as a previous initiative (I-1053) and therefore
7 that OFM must make precisely the same assumptions for each initiative’s fiscal impact
8 statement. Mot., p. 6.

9 But, circumstances have changed since I-1053 became law. In particular, there have
10 been two informal opinions issued by the Attorney General’s Office.⁶ Those informal opinions
11 viewed the effect of I-1053 upon certain fees in a way that differs from the assumption that
12 OFM made in the I-1053 fiscal impact statement. Mot., pp. 4-6. Under any reasonable
13 construction of RCW 29A.72.025, OFM has discretion to consider these informal legal
14 opinions issued subsequently to the enactment of I-1053 (and any other new information it
15 deems pertinent) in determining appropriate assumptions for the I-1185 fiscal impact
16 statement. Plaintiff’s resort to a selective version of the “legislative history” and tools of
17 statutory construction to support his contention that I-1185 contains “the same substantive
18 policy” as I-1053 further demonstrates the discretion and judgment involved in deciding upon
19 appropriate assumptions regarding the effect of a proposed initiative. Eyman Affidavit, pp. 2-
20 6.

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23 ⁴ See Murray Decl., ¶¶ 5, 9.

24 ⁵ Although Plaintiff is a proponent of the Initiative, recent history demonstrates that courts sometimes
25 disagree with proponents regarding an initiative’s legal effect. *E.g.*, *Pierce Cnty. v. State*, 159 Wn.2d 16, 148 3d
26 1002(2006) (holding I-776 unconstitutional); *City of Burien v. Kiga*, 144 Wn.2d 819, 31 P.3d 659(2001) (holding
I-722 unconstitutional); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 183 (2000)
(holding I-695 unconstitutional).

⁶ Murray Decl., ¶ 9.

1 Regardless of how a court ultimately may interpret I-1185 if the voters enact it and if its
2 meaning is litigated, the determinative point for this action is that mandamus is not a
3 mechanism to second-guess the exercise of discretion on the part of an officer or agency or to
4 direct the manner in which discretion is to be exercised. *Vangor v. Munro*, 115 Wn.2d 536,
5 543, 798 P.2d 1151 (1990). The short and busy period between certification of measures to the
6 ballot and the conducting of the election is not the appropriate time to resolve questions of
7 interpretation in the measures on the ballot. Yet that is what Plaintiff seeks here. Plaintiff's
8 request for a writ of mandamus should be denied.

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10 **B. Plaintiff's Request for a Writ of Prohibition to the Secretary of State Fails With
11 His Request for Mandamus to OFM and Additionally Fails to Satisfy the Basic
12 Requirements for the Writ**

13 Plaintiff also seeks a writ of prohibition to the Secretary of State to preclude the
14 Secretary from placing the fiscal impact statement for I-1185 in the voters' pamphlet, and to
15 require him to wait for a new statement from OFM, to include in the voters' pamphlet.
16 Plaintiff's requested writ of prohibition thus is predicated on the court issuing a writ of
17 mandamus to the Director of OFM. Because Plaintiff's request for a writ of mandamus to the
18 Director of OFM fails, so too does Plaintiff's request for a writ of prohibition to the Secretary
19 of State.

20 To the extent Plaintiff also intends to suggest that there are independent grounds for a
21 writ of prohibition to the Secretary, his claim finds no support in the law. A writ of prohibition
22 may be issued only if the person to whom the writ is directed is acting in excess of jurisdiction.
23 RCW 7.16.290. A writ of prohibition is a drastic remedy that is proper only when it is clear
24 and inarguable that the person to whom the writ is directed entirely lacks jurisdiction.
25 *In re King Cnty. Hearing Exam'r*, 135 Wn. App. 312, 318, 144 P.3d 345(2006). It hardly may
26 be contended that the Secretary lacks the legal authority to include the fiscal impact statement
for I-1185 in the voters' pamphlet. The Secretary has clear authority and indeed, the

1 obligation, to include the fiscal impact statement that OFM prepared under RCW 29A.72.025
2 in the voters' pamphlet. RCW 29A.32.070(5). Plaintiff's contention that disagreement with
3 assumptions in the statement somehow ousts the Secretary from this authority is unsound.
4 Wholly apart from the fact that Plaintiff cannot demonstrate that assumptions in the fiscal
5 impact statement are "erroneous", jurisdiction does not come and go based on whether an error
6 is committed in the Secretary's exercise of his authority; prohibition is not available for error
7 correction. *State ex rel. N. Y. Cas. Co. v. Superior Ct. for King Cnty.*, 31 Wn.2d 834, 839,
8 199 P.2d 581(1948). Plaintiff's request for a writ of prohibition to the Secretary should be
9 denied.

10 IV. CONCLUSION

11 For the reasons set forth above, Defendants respectfully request that Plaintiff's Motion
12 to Issue Writs be denied and this action be dismissed with prejudice.

13 DATED this 17 day of August, 2012.

14
15 ROBERT M. MCKENNA
16 Attorney General

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DECLARATION OF SERVICE

I certify that I caused to be served a copy of Defendants' Response Opposing Issuance of Writs, Declaration of Tami Davis, and Declaration of Julie Murray on all parties or their counsel of record on the date below as follows:

ELECTRONIC TRANSMITTAL TO:

E-MAIL: tim_eyman@comcast.net

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of August, 2012, at Olympia, WA.



KEELEY TAFOYA
Legal Assistant