

Honorable Dean S. Lum
Hearing Set
Friday August 14, 2015 at 10:00am

**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

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

SECRETARY OF STATE'S
RESPONSE TO MOTION FOR
PERMANENT INJUNCTION

1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 Secretary of State Kim Wyman requests that this Court deny the plaintiffs’ motion for
3 injunction and allow Initiative 1366 to appear on the general election ballot, permitting the
4 voters to exercise their fundamental constitutional right to enact or reject the initiative.

5 Article II, section 1 of the Washington Constitution reserves to the people “the power
6 to propose bills, laws, and to enact or reject the same at the polls.” “[T]he right of initiative is
7 nearly as old as our constitution itself, deeply ingrained in our state’s history . . .” *Coppernoll*
8 *v. Reed*, 155 Wn.2d 290, 296-97, 119 P.3d 318 (2005).

9 As the chief election officer of the state, the Secretary of State has an interest in
10 ensuring that elections are conducted properly. She takes no position on I-1366 as a matter of
11 policy. Nor does the Secretary take a position on whether I-1366, if enacted, would be valid.
12 But the Secretary of State does have an interest in defending the people’s right to vote on a
13 measure where sufficient voter signatures have qualified it for the ballot.

14 Although certain initiative measures can be enjoined from appearing on the ballot, the
15 Washington Supreme Court has emphasized that those circumstances are limited and
16 extremely rare. The present case does not present those limited and rare circumstances: the
17 measure does not amend or purport to amend the state constitution, and is thus within the
18 legislative power of the people under article II, section 1. Unless “*it is clear* that an initiative
19 exceeds the scope of the broad legislative power under article II, section 1,” the people should
20 have the opportunity to cast their votes. *Coppernoll*, 155 Wn.2d. at 305 (emphasis added). In
21 order to protect voters’ fundamental rights, this Court should not go out of its way to read I-
22 1366 as an improper amendment to the Washington Constitution. Instead, this Court should
23 allow the voters to vote because I-1366 does not “directly amend or repeal the constitution
24 itself.” *See Ford v. Logan*, 79 Wn.2d 147, 156, 483 P.2d 1247 (1971).

1 **II. STATEMENT OF FACTS**

2 339,236 people signed a petition to place I-1366 on the ballot. The Secretary of State
3 has certified that the initiative had sufficient signatures of registered voters to qualify for the
4 ballot. Augino Decl. ¶ 10.

5 The Attorney General provided the following ballot title and summary for I-1366:

6 Statement of Subject: Initiative Measure No. 1366 concerns state taxes and fees.

7 Concise Description: This measure would decrease the sales tax rate unless the
8 legislature refers to voters a constitutional amendment requiring two-thirds
9 legislative approval or voter approval to raise taxes, and legislative approval for
fee increases.

10 Section 1 of I-1366 explains its purpose and intended effect: “[T]he state needs to
11 exercise fiscal restraint by either reducing tax burdens or limiting tax increases to only those
12 considered necessary by more than a bare majority of legislators. . . . This measure provides a
13 reduction in the burden of state taxes by reducing the sales tax . . . unless the legislature refers
14 to the ballot a constitutional amendment requiring two-thirds legislative approval or voter
15 approval to raise taxes and majority legislative approval for fee increases.” I-1366, § 1.

16 Section 2 would cut the state retail sales tax from 6.5 percent to 5.5 percent. I-1366,
17 § 2(1).

18 Section 3 would make the tax cut take effect on April 15, 2016, unless the legislature
19 first refers to the ballot a specific amendment to the state constitution. I-1366, § 3. The
20 proposed amendment must require “two-thirds legislative approval or voter approval to raise
21 taxes . . . and majority legislative approval for fee increases.” I-1366, § 3(2). The terms “raises
22 taxes” and “majority legislative approval for fee increases” are specifically defined. I-1366, §§
23 3(2), 6. Section 6 defines “raises taxes” as “any action or combination of actions by the state
24 legislature that increases state tax revenue deposited in any fund, budget, or account, regardless
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1 of whether the revenues are deposited into the general fund.”¹

2 Thus, if the legislature refers to the ballot the proposed constitutional amendment
3 before April 15, 2016, then the state retail sales tax rate would stay at 6.5 percent. If the
4 legislature does not refer the constitutional amendment before that time, the state retail sales
5 tax rate would be reduced to 5.5 percent.

6 Challengers filed this action seeking an injunction to prevent I-1366 from appearing on
7 the ballot. Secretary Wyman asks that this Court to deny the request for injunction and permit
8 the voters to cast their votes to approve or reject I-1366.

9 The parties brief this matter on an accelerated basis in order to ensure that election
10 officials receive the final decision in this case, including all appeals, by September 4, 2015. A
11 decision by this date will allow election officials to print and mail ballots and voters’
12 pamphlets to military and overseas voters by the statutory deadline of forty-five days before
13 election day. Augino Decl., ¶¶ 3-4.

14 **III. STATEMENT OF ISSUES**

- 15 1. Pre-election challenges are allowed in rare and limited circumstances, but can
16 include a challenge that an initiative exceeds the people’s initiative power. Do
17 the challengers raise an issue that is the proper subject of pre-election review
18 where they allege I-1366 would improperly amend the Washington
19 Constitution?
20 2. Where I-1366 would amend the state sales tax rate, an act that is plainly
21 legislative in nature, and a constitutional amendment is solely a contingency
22 that may or may not occur, does I-1366 fall outside the scope of the people’s
23 initiative power?

24 **IV. EVIDENCE RELIED UPON**

25 The Secretary of State relies on the Declaration of Lori Augino, Director of Elections,
26 submitted with the Secretary’s response, and the pleadings and records filed in this case.

¹ Sections 4 and 5 update statutory references. Section 7 requires liberal construction to effectuate the intent, policies, and purpose of the act. Section 8 is a severability clause, and section 9 entitles the act the “Taxpayer Protection Act.”

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V. AUTHORITY

A. Pre-Election Challenges Should Rarely Be Entertained, But The Present Challenge Presents an Issue That Should Be Decided Now: Whether I-1366 Would Amend the State Constitution

Pre-election review is severely restricted to avoid advisory opinions and interference with the elective process. *Futurewise v. Reed*, 161 Wn.2d 407, 410, 166 P.3d 708 (2007). Only two types of challenges are justiciable pre-election: (1) that the initiative does not meet procedural requirements for placement on the ballot (a claim not made here), and (2) that the subject matter of the initiative is outside the scope of people’s initiative power. *Id.* at 411; *see also Coppernoll*, 155 Wn.2d at 298-99. In *Coppernoll* and *Futurewise*, the Court refused to consider pre-election challenges, concluding that the challengers were really arguing that the initiatives in those cases would be unconstitutional if enacted, rather than beyond the people’s initiative power. *Futurewise*, 161 Wn.2d at 412; *Coppernoll*, 155 Wn.2d at 303-04. Here, the challengers argue that I-1366 would improperly amend the state constitution and is thus outside of the scope of the people’s initiative power. Compl., ¶¶ 37, 42. The question presented here is within the narrow category of questions that can be answered pre-election, and this case is properly before this court at this time.² *See Futurewise*, 161 Wn.2d at 411; *Coppernoll*, 155 Wn.2d at 298-99.

² The Secretary of State disputes that the legislator plaintiffs have standing because nothing in I-1366 restricts the legislators’ ability to propose or to vote for or against any constitutional amendment, and thus they would not be harmed by a popular vote on I-1366. *Cf. League of Educ. Voters v. State*, 176 Wn.2d 808, 817-18, 295 P.3d 743(2013) (legislators were harmed and had standing in that case because votes that the legislators had already taken were completely nullified).

The plaintiff county election officials claim standing in their official capacities based on injury to their county coffers if I-1366 proceeds to the ballot, but no county will pay for the cost of elections on statewide measures in 2015. The State fully reimburses counties for the expenses of elections on statewide ballot measures in odd numbered years, including prorated overhead expenses. RCW 29A.04.420(1). The case cited to support the election officials’ standing, in contrast, involved a local election whose costs would be paid by local government. *See City of Longview v. Wallin*, 174 Wn. App. 763, 782-83, 301 P.3d 45 (2013).

Even so, the Secretary acknowledges that this case presents a sufficiently important question that it constitutes “significant and continuing matters of public importance that merits judicial resolution.” *Farris v. Munro*, 99 Wn.2d 326, 329-30, 662 P.2d 821 (1983); *American Traffic Sols., Inc. v. City of Bellingham*, 163 Wn. App. 427, 433, 260 P.3d 245 (2011); *see also, Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718, 911 P.2d 389 (1996) (pre-election review of whether an initiative is within the people’s power “allows a court to prevent public

1 **B. I-1366 Does Not Exceed the Scope of the People’s Initiative Power Because, If**
2 **Adopted, It Would Not Amend the Washington Constitution**

3 An initiative is within the scope of the people’s initiative power if (1) it is legislative in
4 nature, and (2) it is within the state’s power to enact. *Coppernoll*, 155 Wn.2d at 302;
5 *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 718-19, 911 P.2d 389 (1996). In contrast,
6 initiatives are outside the scope of the initiative power if they attempt to act outside of the
7 state’s jurisdiction by amending or enacting a federal law, or if they attempt to act outside of
8 the legislative power by amending the state or federal constitutions. *See Coppernoll*, 155
9 Wn.2d at 303.

10 I-1366, if adopted, is legislative in nature and would not amend the Washington
11 Constitution. Thus I-1366 is within the legislative power and it should remain on the ballot.

12 The Washington Supreme Court has recognized that striking a qualifying initiative
13 from the ballot is an extraordinary act that is reserved for the most extreme circumstances. It
14 has found only one statewide initiative to be outside the scope of legislative power in the entire
15 history of Washington’s initiative process. *Futurewise*, 161 Wn.2d at 411 n.2 (discussing
16 *Philadelphia II*, which involved an initiative proposing to amend federal law by creating a
17 federal initiative process and calling for a world meeting).³ Historically, Washington courts
18 have closely guarded the voters’ right to exercise their choice without judicial interference.
19 Courts have avoided unnecessary interference with the electoral process, the exercise of the
20 people’s fundamental right to direct democracy through initiative, and the people’s right to

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22 expense on measures that are not authorized by the constitution while still protecting the initiative power from
23 review . . . for possible constitutional infirmities”).

24 ³ While challengers refer to several cases about the scope of initiative power at the local level, the local
25 initiative power is more limited than the state initiative power. *See* Pls.’ Mot. at 5. Local initiatives are outside of
26 the people’s power where they attempt to accomplish an administrative function or exercise some power the
legislature has limited exclusively to the local governing body, rather than the city or county itself. *See, e.g.,*
American Traffic Sols., 163 Wn. App. at 433-34 (holding only the local legislative body could adopt an ordinance
relating to automated traffic safety cameras); *see also, Seattle Bldg. & Const. Trades Council v. City of Seattle*, 94
Wn.2d 740, 746, 620 P.2d 82 (1980).

1 express their views through an initiative vote. *Coppernoll*, 155 Wn.2d at 298 (“ballot measures
2 are often used to express popular will and to send a message to elected representatives
3 (regardless of potential subsequent invalidation of the measure)” and thus removing an
4 initiative from the ballot “may infringe on free speech values”); *Philadelphia II*, 128 Wn.2d at
5 716; *see also Dumas v. Gagner*, 137 Wn.2d 268, 283-84, 971 P.2d 17 (1999) (“the judiciary
6 should exercise restraint in interfering with the elective process which is reserved to the people
7 in the state constitution” (internal quotation marks omitted)).

8 This emphasis on the people’s fundamental right warrants careful restriction of the
9 circumstances when an initiative will be stricken from the ballot. While the challengers ask this
10 court to speculate that I-1366 will eventually result in a constitutional amendment if adopted,
11 the Washington Supreme Court has explained that it must be “*clear*” that an initiative is
12 outside of the legislative power to warrant removing it from the ballot. *See Coppernoll*, 155
13 Wn.2d at 305 (emphasis added). Similarly, in *Ford*, 79 Wn.2d at 156, the plurality articulated
14 the restriction narrowly: “the initiative power set forth in Const. art. 2 does not include the
15 power to *directly amend or repeal* the constitution *itself*.” (Emphasis added.) *See also*
16 *Philadelphia II*, 128 Wn.2d at 717-18 (favoring the *Ford* Court’s reasoning and noting it
17 strikes a sensible balance).

18 The Washington Supreme Court has also emphasized that the court must look to the
19 actual text of the initiative, not its possible downstream effects, to determine whether it should
20 be stricken from the ballot. *Futurewise*, 161 Wn.2d at 412 (“I-960 does not purport to amend
21 the constitution, whatever its practical ‘effect’ may be.”). Here, the text of the initiative
22 contains no language purporting to directly amend the state constitution itself or the
23 constitution or laws of the United States, and constitutional amendment is by no means a
24 certain result.

25 Instead, I-1366 would cut the state sales tax rate unless a contingency occurs: a
26 legislative choice to propose a constitutional amendment. I-1366, §§ 2, 3; Augino Decl., Ex. 2

1 (Ballot Title). Challengers do not suggest, nor could they, that cutting the state sales tax rate is
2 not legislative in nature or that it is outside the general legislative authority of the people.
3 *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 200, 11 P.3d762 (2000)
4 (“There is no serious dispute that in general an initiative can repeal, impose, or amend a tax.”).
5 I-1366 proposes a change in state statute and is therefore within the plain language of the
6 article II initiative power “to propose bills, laws, and to enact and reject the same at the polls.”

7 If I-1366 passes, the legislature might choose to propose a constitutional amendment
8 through a two-thirds vote of both houses, or it might not. Encouraging the legislature to initiate
9 the constitutional amendment process is not the same as amending the constitution. And an
10 idea or suggestion for a constitutional amendment can certainly begin with sources outside of
11 the legislature. It would be absurd to conclude that the requirement that constitutional
12 amendments “be proposed in either branch of the legislature” means that the original idea or
13 motivation can only come from the legislature itself. *See* Const. art. XXIII, § 1.

14 Challengers assert that the fundamental and overriding purpose of I-1366 is
15 constitutional amendment, and thus, this Court can strike it from the ballot. They rely on
16 sponsors’ promotional materials, but neither *Futurewise*, nor *Coppernoll*, nor *Philadelphia II*
17 referred to sponsors’ promotional materials; instead they focused on the language of the
18 initiatives at issue. *See Futurewise*, 161 Wn.2d 407; *Coppernoll*, 155 Wn.2d 290; *Philadelphia*
19 *II*, 128 Wn.2d 707.

20 Challengers also rely on *Philadelphia II*, which struck from the ballot an initiative
21 whose “fundamental and overriding purpose” was to amend federal law. Pls.’ Mot. at 8. But
22 unlike this case, the initiative in *Philadelphia II* almost exclusively attempted to enact federal
23 and international law, which was beyond Washington’s legislative power. In *Philadelphia II*,
24 the initiative would have established direct democracy at the federal level through a “federal,
25 nationwide initiative process” “and ultimately call a world meeting.” *Philadelphia II*, 128
26 Wn.2d at 710. The sponsors believed that if 51 percent of voters nationwide chose to adopt the

1 initiative in their states, then the initiative would automatically become federal law. *Id.* While
2 the Washington procedures for adopting initiatives would have been affected, the Court found
3 that such changes were “incidental to the primary goal of the initiative.” *Id.* at 719. The entire
4 initiative was “suffused with a purpose that is national or global in scope.” *Id.* Significantly, if
5 the initiative did not eventually become enacted as federal law, it would be deleted from the
6 Washington statutes. *Id.*

7 Here, the reduction in the sales tax rate in I-1366 is not merely incidental; it is central to
8 the initiative and it will be the initiative’s only effect if the contingency of a proposed
9 constitutional amendment never occurs. And unlike in *Philadelphia II*, the concept of a
10 constitutional amendment is not so central that the entire initiative will be wiped from the
11 books if the amendment does not occur. As a result, constitutional amendment is not the
12 “overriding purpose” of I-1366. This Court should decline to conclude that I-1366’s cut in the
13 sales tax rate is merely incidental.

14 Finally, challengers suggest that I-1366 would allow legislators to submit a
15 constitutional amendment to the people with a simple majority vote, rather than a two-thirds
16 vote as required in article XXIII, section 1. *See* Pls.’ Mot. at 9 ll. 1-2. First, even if accurate,
17 the challengers do not show that such an enactment would be beyond the people’s initiative
18 power, as opposed to substantively unconstitutional. *Futurewise*, 161 Wn.2d at 414 (holding
19 the question of whether an initiative will ultimately violate a constitutional limitation is a
20 constitutional inquiry that courts will not engage in before the voters have had their say).
21 Second, nothing in I-1366 changes the constitutional amendment process in any way or
22 suggests that the legislature would somehow be relieved of the requirements in article XXIII,
23 section 1. Any constitutional amendment would still have to be adopted by a two-thirds vote in
24 both houses in order to be referred to the ballot. Const. art. XXIII, § 1. Significantly, I-1366
25 would not result in omission of any required steps for amending the constitution. While the
26 Washington Supreme Court emphasized the importance of article XXIII’s safeguards in *Ford*,

1 none would be cast aside as a result of this initiative. *See Ford*, 79 Wn.2d at 155-56. The
2 challengers assume a reading that conflicts with article XXIII, but courts are obligated to
3 construe statutes and initiatives in a way that preserves their constitutionality whenever
4 possible. *See ZDI Gaming, Inc. v. State*, 173 Wn.2d 608, 619, 268 P.3d 929 (2012). And this
5 Court cannot assume the legislature will engage in some future unconstitutional act.

6 In sum, this Court should not depart from prior courts' narrow reading of what
7 constitutes an improper constitutional amendment. Because I-1366 does not purport to amend
8 the constitution, it is not outside of the people's initiative power. Sufficient voter signatures
9 have qualified the initiative to the ballot and the people have a right to express their views
10 through a vote to approve or reject the measure.

11 **C. In Any Event, County and State Elections Officials Must Have a Final Mandate in**
12 **this Case, Including All Appeals, By September 4, 2015**

13 By statute, ballots to military and overseas voters must be mailed by September 19,
14 2015. *See RCW 29A.40.070(2)*. In order to print and mail ballots and voters' pamphlets to
15 military and overseas voters by this date, the Secretary of State and county auditors need to
16 receive the final decision in this case, including resolution of all appeals, by September 4,
17 2015. Augino Decl. at ¶¶ 3-4. Accordingly, the Secretary of State respectfully requests this
18 court issue an order as quickly as reasonably possible.

19 **VI. CONCLUSION**

20 The Secretary of State respectfully requests that this Court deny the plaintiffs' motion
21 for injunction. While the Secretary does not support or oppose I-1366 as a matter of policy, nor
22 does she take a position about its ultimate legitimacy, she does have an interest in defending
23 the voters' right to have their say.

24 The voters' fundamental right to vote on an initiative should not be abridged unless the
25 initiative is clearly outside the scope of the people's power. Here, the initiative would amend
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1 the state sales tax rate, an act that is plainly legislative in nature, and a constitutional
2 amendment is solely a contingency that may or may not occur. If constitutional amendment
3 does occur, it must be according to the process required in article XXIII. I-1366 is not outside
4 of the scope of the people's initiative power.

5 RESPECTFULLY SUBMITTED this 11th day of August 2015.

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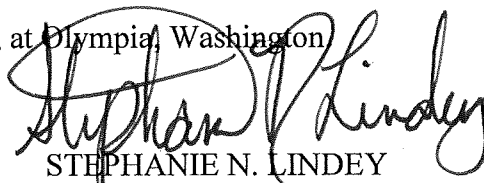
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail per agreement between the parties, a true and correct copy of the foregoing document, upon the following:

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DATED this 11th day of August 2015, at Olympia, Washington


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