

Honorable William Downing
Hearing Set
Tuesday January 19, 2015 at 9:00 a.m.

**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

TONY LEE, an individual taxpayer;
ANGELA BARTELS, an individual
taxpayer; DAVID FROCKT, an
individual taxpayer and Washington
State Senator; REUVEN CARYLYE,
an individual taxpayer and Washington
State Representative; EDEN MACK, an
individual taxpayer; GERALD
REILLY, an individual taxpayer; PAUL
BELL, an individual taxpayer; and THE
LEAGUE OF WOMEN VOTERS OF
WASHINGTON,

Plaintiffs,

v.

STATE OF WASHINGTON; TIM
EYMAN; LEO J. FAGAN; and M.J.
FAGAN,

Defendants.

NO. 15-2-28277-SEA

STATE OF WASHINGTON'S
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT ON
DECLARATORY RELIEF

I. INTRODUCTION AND RELIEF REQUESTED

A majority of Washington State voters approved Initiative 1366 in the last general election. Now, through this challenge, Plaintiffs seek to impose their own policy beliefs in an attempt to override the people's legislative will. But Plaintiffs' disagreement with the

1 Initiative's policy purposes does not convert what is otherwise a valid enactment of the people
2 into one that is not.

3 Initiative 1366 is a valid exercise of the people's legislative power that complies with
4 all of the constitutional requirements for an initiative. The Initiative contains a single subject in
5 accordance with article II, section 19 of the Washington Constitution because it sets forth only
6 one operative legislative act. It amends the state sales tax rate, an act that is plainly within the
7 people's legislative power, and merely makes that act contingent on a constitutional
8 amendment that may or may not be taken up by the Legislature. Initiative 1366 does not amend
9 the state constitution and it does not alter or relieve the Legislature from complying with the
10 constitutional amendment requirements set forth in article XXIII of the Washington
11 Constitution. Accordingly, Plaintiffs have not met their heavy burden to show that Initiative
12 1366 is unconstitutional beyond a reasonable doubt. The State of Washington respectfully
13 requests that this Court deny Plaintiffs' motion for summary judgment and, under *Impecoven v.*
14 *Department of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992), grant summary judgment to the
15 State and dismiss the complaint.

16 II. STATEMENT OF FACTS

17 A. Initiative 1366

18 A majority of Washington State voters approved Initiative 1366 (I-1366 or the
19 Initiative) in the November 3, 2015, general election. The Initiative's ballot title appeared on
20 the voters' ballots as follows:

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

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

26 Should this measure be enacted into law? Yes [] No []

Compl., Ex. D (I-1366 Ballot Title).

1 Section 1 of I-1366 explains the Initiative’s purpose and intended effect: “[T]he state
2 needs to exercise fiscal restraint by either reducing tax burdens or limiting tax increases to only
3 those considered necessary by more than a bare majority of legislators. . . . This measure
4 provides a reduction in the burden of state taxes by reducing the sales tax . . . unless the
5 Legislature refers to the ballot for a vote a constitutional amendment requiring two-thirds
6 legislative approval or voter approval to raise taxes and majority legislative approval for fee
7 increases. The people want to ensure that tax and fee increases are consistently a last resort.”
8 Compl., Ex. A (cited hereafter as I-1366).

9 Section 2 reduces the state retail sales tax rate from 6.5 percent to 5.5 percent. I-1366
10 § 2(1).

11 Section 3 states that the sales tax rate reduction takes effect on April 15, 2016, unless a
12 contingency first occurs. I-1366 § 3(1). The contingency provides that if the Legislature, prior
13 to April 15, 2016, refers a constitutional amendment that accomplishes specific purposes for a
14 vote, then the tax cut in section 2 expires on April 14, 2016. I-1366 § 3(2). The proposed
15 amendment must require “two-thirds legislative approval or voter approval to raise taxes . . .
16 and majority legislative approval for fee increases.” I-1366 § 3(2). The terms “raises taxes” and
17 “majority legislative approval for fee increases” are specifically defined. I-1366 §§ 3(2), 6.

18 Sections 4 and 5 update statutory references. Section 6 defines “raises taxes” as “any
19 action or combination of actions by the state Legislature that increases state tax revenue
20 deposited in any fund, budget, or account, regardless of whether the revenues are deposited
21 into the general fund.” I-1366 § 6.

22 Section 7 requires liberal construction to effectuate the intent, policies, and purpose of
23 the act. Section 8 is a severability clause that provides that if any provision of the act is held
24 invalid, the remainder of the act is not affected. I-1366 § 8. Section 9 titles the act the
25 “Taxpayer Protection Act.” I-1366 § 9.

1 Thus, in enacting I-1366, the people of the state of Washington voted to reduce the
2 state retail sales tax to 5.5 percent and defined certain terms related to taxes and fees.
3 Accordingly, under the plain language of the Initiative, a reduction in the sales tax rate is the
4 *only* act that I-1366 accomplishes.¹ However, the people also determined that, if the
5 Legislature refers a constitutional amendment to the ballot before April 15, 2016, then the sales
6 tax reduction would not go into effect and the state sales tax rate would remain at 6.5 percent.

7 I-1366 does not order or require the Legislature (or individual members of the
8 Legislature) to take any specific action. *See generally* I-1366. If an individual legislator
9 chooses to take up the referenced constitutional amendment in I-1366, he or she must still
10 comply with the usual process of proposing a constitutional amendment. *See* Const. art. XXIII.
11 The amendment or amendments must be proposed in either house of the Legislature by one or
12 more legislators; considered by both houses through the normal legislative course; agreed to by
13 two-thirds of the members of each of the two houses; and then submitted to the qualified voters
14 at the next general election. Const. art. XXIII.

15 Alternatively, the Legislature could amend I-1366 by a two-thirds vote of all members.
16 Const. art. II, § 1(c). Or the Legislature could take alternative action to counter the tax effects
17 of I-1366 or it could take no action on I-1366 at all. Nothing in I-1366 demands or alters these
18 legislative options. *See generally* I-1366.

19 **B. Procedural History**

20 Plaintiffs and others previously sought to enjoin I-1366 from reaching the voters'
21 ballots. *Huff v. Wyman*, __ Wn.2d __, 361 P.3d 727 (2015).² While the superior court made
22 findings regarding the unconstitutionality of I-1366, it ultimately held that the plaintiffs in that
23 case had not met their burden of showing a “clear legal or equitable right” to an injunction.

24 ¹ While the Initiative also defined “raises taxes,” it simply reiterates the preexisting statutory definition of
25 this term. *See* RCW 43.135.034(b).

26 ²Secretary of State Kim Wyman was the named defendant on behalf of the State of Washington in that
matter.

1 *Huff*, 361 P.3d at 729. The Secretary of State agreed with the superior court’s result, but
2 contested the lower court’s findings and conclusions regarding the constitutionality of I-1366
3 given that matter was before the court pre-election and I-1366 had not yet been approved by
4 the voters. The challengers sought direct review by the State Supreme Court, which was
5 granted on an accelerated basis. *Id.* Ultimately, the Court held that “appellants did not make a
6 clear showing that the subject matter of the initiative is not within the broad scope of the
7 people’s power of direct legislation and, as such, failed to demonstrate a clear legal right for
8 injunctive relief.” *Huff*, 361 P.3d at 729-30. The Court did *not* address the constitutionality of
9 I-1366, finding that doing so would be “inappropriate” under the pre-election posture of the
10 case. *Id.* at 733 n.7.³

11 Plaintiffs filed this action seeking again to declare I-1366 unconstitutional and void.
12 The State of Washington opposes the action because I-1366 meets all the constitutional
13 requirements for a valid legislative act and is within the scope of the people’s initiative power.
14 The parties agreed to set this matter on an accelerated basis so that the Legislature would know
15 the status of I-1366 during the upcoming legislative session and could plan accordingly.

16 III. STATEMENT OF ISSUES

- 17 1. **Does Initiative 1366 embrace one subject for purposes of article II, section**
18 **19 of the Washington Constitution when the Initiative’s sole legislative act**
is to amend the state sales tax rate?
- 19 2. **Where Initiative 1366 amends the state sales tax rate, but makes that**
20 **legislative act contingent to the Legislature proposing a constitutional**
21 **amendment, does Initiative 1366 fall within the scope of the people’s**
initiative power?
- 22 3. **Did the people of Washington abridge the Legislature’s law-making powers**
23 **when they only proposed, via Initiative 1366, that the Legislature take up**
consideration of a constitutional amendment, but do not require the
Legislature to act on the amendment?

24 ³ Plaintiffs go too far in their repeated assertions that the Supreme Court “implicitly recognized” that the
25 Initiative violates the constitution. *See, e.g.*, Pls.’ Mot. Summ. J. at 9, 16 n.3, 19. The Court did no such thing. *See*
26 *generally Huff*, 361 P.3d 727. To view the opinion otherwise would contradict the Court’s plain holding that
appellants had not met their burden of showing a *clear* constitutional violation. *Id.*

1 **IV. EVIDENCE RELIED UPON**

2 The State of Washington relies on all of the pleadings and papers filed in this action.

3 **V. ARGUMENT**

4 **A. Plaintiffs Cannot Carry Their Heavy Burden In This Constitutional Challenge To an Initiative**

5 **1. Summary judgment standard for declaratory relief**

6 Summary judgment may be granted only if the moving party shows that “there is no
7 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
8 matter of law.” *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012); CR 56(c).
9 When considering summary judgment, the court must construe the facts and draw all factual
10 inferences in a light most favorable to the nonmoving party. *Kofmehl v. Baseline Lake, LLC*,
11 177 Wn.2d 584, 594, 305 P.3d 230 (2013). Further, the court should disregard conclusions or
12 opinions of law in supporting affidavits, as well as conclusions that merely reiterate the
13 allegations in the complaint. *Orion Corp. v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369
14 (1985); *Atherton Condo. Apt.-Owners Ass’n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506,
15 533, 799 P.2d 250 (1990). In denying a motion for summary judgment, the court may instead
16 grant summary judgment for the nonmoving party when the record becomes clear that the
17 nonmoving party is so entitled. *Impecoven*, 120 Wn.2d at 365. Here, there are no genuine
18 issues of material fact that prevent this Court from concluding that Plaintiffs have failed to
19 meet their burden and, thus, dismiss the case.

20 **2. Standard of review for constitutional challenges to initiatives**

21 Plaintiffs challenge the constitutionality of I-1366. Because initiatives are an exercise
22 of legislative authority, courts interpret and enforce initiatives just as they interpret and enforce
23 laws passed by the Legislature. *Brown v. State*, 155 Wn.2d 254, 267, 119 P.3d 341 (2005). “A
24 statute enacted through the initiative process is, as are other statutes, presumed to be
25 constitutional.” *Amalgamated Transit Union v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000).
26

1 A party challenging the constitutionality of an initiative bears the “heavy burden” of
2 establishing its unconstitutionality “beyond a reasonable doubt.” *Amalgamated Transit Union*,
3 142 Wn.2d at 183. In other words, there must be “no reasonable doubt that the statute violates
4 the constitution.” *Id.* And courts are obligated to construe statutes and initiatives in a way that
5 preserves their constitutionality whenever possible. *See ZDI Gaming, Inc. v. State*, 173 Wn.2d
6 608, 619, 268 P.3d 929 (2012).

7 Standard rules of statutory construction apply to initiatives. *Amalgamated Transit*
8 *Union*, 142 Wn.2d at 205. In determining the meaning of a statute enacted through the
9 initiative process, the court ascertains the collective intent of the voters who, acting in their
10 legislative capacity, enacted the measure. *Id.* Thus, the statements of a few voters, handpicked
11 by a challenger or a supporter of an initiative cannot govern its meaning.

12 Initiatives should be read in light of all of the statute’s various provisions. *Am. Legion*
13 *Post 149 v. Dep’t of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008). “Where the language
14 of the initiative is clear and unambiguous, a court may not look beyond the text of the measure;
15 however, if the initiative is susceptible to more than one reasonable interpretation, a court may
16 determine the voters’ intent by applying canons of statutory construction or by examining the
17 statements in the voters’ pamphlet.” *Pierce County v. State*, 150 Wn.2d 422, 430, 78 P.3d 640
18 (2003) (internal quotations mark omitted) (citing *Amalgamated Transit Union*, 142 Wn.2d at
19 205-06).

20 Finally, “it is not the prerogative nor the function of the judiciary to substitute what
21 they may deem to be their better judgment for that of the electorate in enacting initiatives. . .
22 unless the errors in judgment *clearly* contravene state or federal constitutional provisions.”
23 *Amalgamated Transit Union*, 142 Wn.2d at 206 (emphasis added) (quoting *Fritz v Gordon*, 83
24 Wn.2d 275, 287, 517 P.2d 911 (1974)). Any reasonable doubts are resolved in favor of an
25 initiative’s constitutionality. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622,
26 632, 71 P.3d 644 (2003).

1 Here, Plaintiffs have not carried their burden of establishing that I-1366 is
2 unconstitutional “beyond a reasonable doubt.” Plaintiffs build their arguments on a flawed
3 reading of the Initiative’s text and a false assumption that I-1366 cannot be construed in a
4 constitutional manner. By its plain language, I-1366’s sole legislative action is to amend the
5 sales tax rate unless a contingency first occurs. Simply because that contingency is premised
6 on the Legislature proposing a constitutional amendment to the people for a vote does not
7 convert what is a plainly, legitimate legislative act into one that is not. Moreover, nothing in
8 I-1366 interferes with or alters the Legislature’s constitutional amendment powers or plenary
9 legislative powers. The Legislature remains free to take up a constitutional amendment or not.
10 It remains free to override or amend I-1366 by a two-thirds vote, or not. Const. art. II, § 1(c).
11 Simply because Plaintiffs disagree with the policy choice that the voters made—to reduce the
12 state sales tax rate unless a contingency occurs—that does not make I-1366 unconstitutional or
13 an illegitimate exercise of the people’s initiative power. Plaintiffs’ challenge to I-1366 fails.

14 **B. I-1366 Satisfies the Constitutional Requirements for Valid Legislative Action**
15 **Because It Contains Only One Subject in Accordance with Article II, Section 19**

16 Article II, section 19 provides that “[n]o bill shall embrace more than one subject, and
17 that shall be expressed in the title.” Const. art. II, § 19. The constitutional provision applies to
18 initiatives, and is to be construed liberally in favor of the legislation. *Amalgamated Transit*
19 *Union*, 142 Wn.2d at 206. Accordingly, with respect to initiatives, the provision is satisfied if:
20 (1) the initiative embraces only one general subject and (2) that subject is expressed in the
21 initiative’s ballot title. *See Citizens for Responsible Wildlife Mgmt.*, 149 Wn.2d at 650.

22 “Washington law has consistently viewed the term ‘subject’ in article II, section 19 as
23 referring to laws, measures with legal effect.” *Pierce County*, 150 Wn.2d at 434. Policy
24 expressions found in an initiative do not contribute additional subjects within the meaning of
25 article II, section 19. *Id.* at 433. Rather, the constitutional prohibition against multiple subjects
26 “plainly applies to the passage of two or more ‘unrelated laws’—not to the passage of one law

1 that contains policy expressions indisputably devoid of legal effect.” *Pierce County*, 150
2 Wn.2d at 434 (quoting *Amalgamated Transit Union*, 150 Wn.2d at 212). In drawing this
3 distinction, the Washington Supreme Court emphasized “[a] law is a rule of action. An
4 argument is not.” *Id.* at 434. The Court then considered the “operative and relevant” provisions
5 of the measure, not its policy statements. *Id.* Accordingly, portions of an initiative that do not
6 have any operative effect cannot create a second subject problem under article II, section 19.
7 *Id.* Further, there is no violation of article II, section 19 if an initiative’s general subject
8 contains several incidental subjects or subdivisions that are rationally related to each other. *See*
9 *Amalgamated Transit Union*, 142 Wn.2d at 207; *Pierce County*, 150 Wn.2d at 431.

10 Plaintiffs put forth various arguments in support of their contention that I-1366 contains
11 multiple subjects in violation of article II, section 19’s single-subject requirement. Pls.’ Mot.
12 Summ. J. at 5-8.⁴ Their overarching theme asserts that I-1366 contains three improper
13 “purposes”: a one-time sales tax reduction (I-1366 § 2) and two constitutional amendments that
14 contain ongoing objectives related to taxes and fees (referenced in I-1366
15 § 3), which Plaintiffs contend bear no rational relationship to each other.⁵ But Plaintiffs’
16 arguments misapply the proper article II, section 19 analysis and fundamentally misconstrue
17 I-1366’s text.

18 First, it is irrelevant under article II, section 19 whether I-1366 contains multiple,
19 unrelated *purposes*; instead the proper inquiry is whether I-1366 contains multiple, unrelated
20 *laws*, meaning the operative provisions accomplishing some action. *Pierce County*, 150 Wn.2d
21 at 434. And, examining I-1366’s “operative and relevant sections” that have the force of law
22

23 ⁴ Plaintiffs do not argue that I-1366’s subject is not expressed in its ballot title, which it clearly is. *See*
24 Pls.’ Mot. Summ. J. at 5-8; Compl., Ex. D (I-1366 Ballot Title).

25 ⁵ Plaintiffs do not argue that I-1366’s remaining provisions found in sections 4-6 create article II, section
26 19 single-subject problems. *See* Pls.’ Mot. Summ. J. at 5-8. Nor could they; those provisions make statutory
updates related to the Initiative’s definition of “raises taxes,” which are clearly incidental and germane to the
Initiative’s overall subject of taxes. *See* I-1366 §§ 4-6.

1 demonstrate that the Initiative contains a single general subject and only incidental, related
2 subsections. *See id.*

3 Initiative 1366’s single legislative “subject” for purposes of article II, section 19
4 concerns taxes. I-1366; *see also* Compl., Ex. D (I-1366 Ballot Title). Section 2 of the measure
5 reduces the retail sales tax rate. I-1366 § 2. Section 3 sets the effective date for the sales tax
6 reduction, I-1366 § 3(1), but makes the enactment contingent on certain subsequent actions of
7 the Legislature, specifically referring constitutional amendments to the people for a vote.
8 I-1366 § 3(2). But the references to constitutional amendments in section 3 have no force of
9 law other than to provide a set of determinate facts upon which the sales tax rate reduction in
10 the Initiative takes effect. I-1366 § 3. As discussed further in the next section, the Initiative did
11 not enact any constitutional amendments. It did not “invoke” the constitutional amendment
12 process, nor did it require the Legislature to start the amendment process. *See generally* I-1366.
13 Rather, I-1366’s reference to constitutional amendments reflects a policy expression of the
14 people that is “indisputably devoid of any legal effect” other than setting the conditions that
15 will trigger the effective date for the people’s own legislative action. *See Pierce County*, 150
16 Wn.2d at 434; *c.f. State v. Storey*, 51 Wash. 630, 632, 99 P. 878 (1909) (“While the legislative
17 body cannot delegate the power to legislate, the Legislature may delegate the power to
18 determine some facts or state of facts upon which the statute makes or intends to make its own
19 action depend.”). Accordingly, the amendment references in I-1366 do not constitute a separate
20 “subject” for purposes of article II, section 19.⁶

21 Second, article II, section 19’s constitutional prohibition against passing *separate laws*
22 serves to prevent “logrolling,” the forced adoption of unpopular legislation by attaching it to
23 other legislation. *See Amalgamated Transit Union*, 142 Wn.2d at 207, *Pierce County*, 150

24 ⁶ For these same reasons, it is irrelevant that referenced constitutional amendments may raise topics other
25 than those related to I-1366’s general subject of taxes. *See* Pls.’ Mot. Summ. J. at 8-9. Nonetheless, the State does
26 not concede that the subject matter of the referenced constitutional amendments (limiting state imposed taxes and
fees) is not rationally related to the Initiative’s reduction of the state sales tax rate.

1 Wn.2d at 429-30. But, contrary to Plaintiffs’ arguments, I-1366 did not logroll. *See* Pls.’ Mot.
2 Summ. J. at 8. The people in enacting I-1366 passed one law that reduces the retail sales tax
3 but also made that legislative act contingent to the Legislature taking separate action that is
4 neither demanded nor required by I-1366. Unlike the legislation struck down in *Washington*
5 *Toll Bridge Authority v. State*, 49 Wn.2d 520, 304 P.3d 676 (1956), and *Amalgamated Transit*
6 *Union*, 142 Wn.2d 183, I-1366 accomplishes one legislative act—the reduction in the state
7 sales tax rate—not two or more legislative acts. *See* Pls.’ Mot. Summ. J. at 6-7.

8 In both cases, the State Supreme Court found that the relevant acts enacted multiple
9 laws not related in purpose.⁷ For instance, in *Washington Toll Bridge Authority*, the relevant
10 legislation resulted in two separate legislative acts—the creation of a state toll road system and
11 the construction of a specific toll road. *Wash. Toll Bridge Auth.*, 49 Wn.2d at 523. Because
12 these acts resulted in two separate legislative actions, the Court held the act violated article II,
13 section 19. *Id.* at 524-25. Likewise, the initiative in *Amalgamated Transit Union* fell under
14 article II, section 19 because it (1) imposed one law setting the amount of vehicle license fees;
15 (2) imposed a second law repealing existing vehicle taxes; and (3) imposed a third law
16 requiring voter approval for all future state and local tax increases. *Amalgamated Transit*
17 *Union*, 142 Wn.2d at 191. But, as shown, I-1366 is different. I-1366 does not combine a one-
18 time legislative action with a continuing one. It asked the people to vote on one legislative
19 act—the reduction of the state sales tax rate. That the people also made their legislative act
20 contingent to the accomplishment of another act in the hands of the Legislature does not
21 change the analysis.

22 I-1366 contains one single subject in accordance with article II, § 19. Plaintiffs failed to
23

24 ⁷ Throughout their motion, Plaintiffs turn this analysis around. They focus on the Initiative’s “purpose”
25 as the talismanic test for whether the legislation violates article II, section 19. However, in all cases, the Court’s
26 analysis centers on “what is in the measure itself, i.e., whether the measure contains unrelated laws.”
Amalgamated Transit Union, 142 Wn.2d at 213 (emphasis added). The purposes, motives, or inducements behind
the act are not relevant to the constitutional inquiry. *Pierce County*, 150 Wn.2d at 434.

1 meet their burden of showing otherwise beyond a reasonable doubt.

2 **C. I-1366 Falls Within the Scope of The People’s Article II Powers Because It Enacts**
3 **Contingent Legislation and Does Not Amend the Washington Constitution**

4 The people of the state of Washington enacted I-1366 as a valid exercise of their
5 article II initiative power. An initiative is within the scope of the people’s initiative power if
6 (1) it is legislative in nature, and (2) it is within the state’s power to enact. *Coppernoll v Reed*,
7 155 Wn.2d 290, 302, 119 P.3d 318 (2005); *Philadelphia II v. Gregoire*, 128 Wn.2d 707,
8 718-19, 911 P.2d 389 (1996). In contrast, initiatives are outside the scope of the initiative
9 power if they attempt to act outside of the state’s jurisdiction by amending or enacting a federal
10 law, or if they attempt to act outside of the legislative power by amending the state or federal
11 constitutions. *See Coppernoll*, 155 Wn.2d at 303. By its plain terms, I-1366 is legislative in
12 nature and does not amend the Washington Constitution. Thus, I-1366 is within the people’s
13 article II initiative powers.

14 **1. I-1366 is a Valid Exercise of the People’s Legislative Power**

15 Plaintiffs ignore the actual text of the Initiative to assert that the “fundamental and
16 overriding purpose” of I-1366 is to amend the state constitution. Pls.’ Mot. Summ. J. at 15.
17 Instead, they rely on sponsors’ promotional materials, Pls.’ Mot. Summ. J .at 2-3, but neither
18 *Futurewise v. Reed*, 161 Wn.2d 407, 166 P.3d 708 (2007), nor *Coppernoll*, nor *Philadelphia II*
19 relied on by plaintiffs referred to sponsors’ promotional materials; instead they focused on the
20 language of the initiatives at issue. *See Futurewise*, 161 Wn.2d 407; *Coppernoll*, 155 Wn.2d
21 290; *Philadelphia II*, 128 Wn.2d 707.

22 As an initial matter, no one disputes that the people’s initiative power does not include
23 amending the state constitution. *See Ford v. Logan*, 79 Wn.2d 147, 155, 483 P.2d 1247 (1971).
24 But I-1366 does not amend the state constitution. Rather, I-1366 amends state statutes and is
25 therefore within the plain language of the article II initiative power “to propose bills, laws, and
26 to enact and reject the same at the polls.” Const. art. II, § 1. Here, the reduction in the sales tax

1 rate in I-1366 is not merely incidental; it is central to the Initiative and it will be the Initiative's
2 only effect if the contingency of a proposed constitutional amendment never occurs. *See*
3 I-1366. The concept of a constitutional amendment is not so central that the entire Initiative
4 will be wiped from the books if the amendment does not occur. As a result, the constitutional
5 amendment is not the clear, fundamental overriding purpose of I-1366. *Coppernoll*, 155 Wn.2d
6 at 305 (it must be “*clear* that an initiative exceeds the scope of the broad legislative power
7 under article II, section 1”) (emphasis added). This Court should decline to conclude that I-
8 1366's cut in the sales tax rate is merely incidental.

9 Further, the state sales tax rate reduction (as I-1366 does in section 2) is plainly
10 legislative in nature and within the general legislative authority of the people to enact.
11 *Amalgamated Transit Union*, 142 Wn.2d at 200 (“[T]here is no serious dispute that in general
12 an initiative can repeal, impose, or amend a specific tax.”). And, conditioning the operative
13 effect of that sales tax reduction on a future event (as I-1366 does in section 3) is also a plainly
14 legislative act sanctioned by the constitution and our courts. *See, e.g., Brower v. State*, 137
15 Wn.2d 44, 55-56, 969 P.2d 42 (1998) (Legislature could both refer a measure to the people and
16 to condition the effectiveness of a legislative act upon the happening of a future event); *Storey*,
17 51 Wash. at 632 (“The mere fact that the act does not take effect until the contingency arises
18 does not indicate a delegation of legislative power, even where the contingency depends upon
19 the action of certain persons.”).

20 Plaintiffs nevertheless assert that the contingency set forth in I-1366 is somehow
21 different from previously approved contingent statutes. Pls.' Mot. Summ. J. at 18-19.
22 Specifically, Plaintiffs assert that—unlike the legislation in *Brower* and *Storey*—I-1366 is not
23 based on a “full and complete” legislative enactment that will take effect only upon the
24 happening of a future event. Pls.' Mot. Summ. J. at 19. But Plaintiffs are wrong as I-1366
25 clearly involves a complete legislative act conditioned on the operation of a specified event.
26 *See supra* pp 7-8. The people in I-1366 made a legislative judgment that the sales tax rate

1 should be reduced to a specific amount. I-1366 § 2. The people also made a legislative
2 judgment that that tax reduction would be “expedient only in certain circumstances” namely
3 the absence of the Legislature proposing a constitutional amendment. I-1366 § 3.⁸ That
4 Plaintiffs or others do not like those circumstances does not change the fact that the people
5 validly exercised their legislative powers to enact a law, and its effectiveness was conditioned
6 on a future event in the hands of others. *C.f. State v. Superior Court In & For Thurston County*,
7 92 Wash. 16, 25, 159 P. 92 (1916) (“Any law or proposed law may be, and often is, unfair to
8 some. . . . Legislative bodies, whether delegated, or principals in mass, are not to be stopped
9 from exercising the supreme function of making laws by such considerations.”).

10 **2. I-1366 does not Amend the Constitution or Alter the Constitutional**
11 **Amendment Requirements of Article XXIII**

12 Plaintiffs also assert that I-1366 improperly “invokes” the constitutional amendment
13 process set forth in article XXIII by proposing a constitutional amendment. *See* Pls.’ Mot.
14 Summ. J. at 10-13. Plaintiffs are wrong. They assume a reading of I-1366 that causes a
15 violation of article XXIII, when the Initiative can—and should—be read in a manner that does
16 not cause such constitutional conflict. *See ZDI Gaming, Inc.*, 173 Wn.2d at 619. The Initiative
17 does not bypass the constitutional amendment process set forth in article XXIII by proposing a
18 constitutional amendment. Nothing in the text of the Initiative purports to change or alter the
19 requirements for obtaining a constitutional amendment. I-1366 does not propose the precise
20 language or actual text of a constitutional amendment. The Initiative does not alter the
21 requirement that the actual text of the proposed amendment originate in either the House or the
22 Senate. And the Initiative does not direct the Legislature to submit an amendment to the people
23 without a vote of the Legislature or without two-thirds approval by the members of each

24 ⁸ For this same reason, I-1366 is unlike the initiative struck down in *Amalgamated Transit Union*. There,
25 the initiative conditioned certain state laws passed by the Legislature on ultimate voter approval. Accordingly, the
26 measure improperly delegated what would otherwise be legislative power to the people. *Amalgamated Transit Union*, 142 Wn.2d at 241. Here, the people are conditioning their own legislative enactment.

1 legislative house. *See generally* I-1366, *specifically* I-1366 § 3. Each of these is an erroneous
2 assertion made by Plaintiffs that are not supported by the actual text of the measure itself.⁹
3 Under I-1366, article XXIII’s procedural safeguards are still in effect. *See Ford*, 79 Wn.2d at
4 155-56 (“Under Article 23, these safeguards consist of the deliberative nature of a legislative
5 assembly, the public scrutiny and debate made possible during the legislative process, the
6 requirement of a two-thirds vote in each independent house of a bicameral body, and the
7 tempering element of time.”).

8 I-1366 reduces the state sales tax rate unless a contingency occurs: a legislative choice
9 to propose a constitutional amendment. I-1366 §§ 2, 3. Nothing in the state constitution
10 suggests that the people cannot express through an initiative their policy desire for a
11 constitutional amendment. Nor does the constitution suggest that an idea or suggestion for a
12 constitutional amendment can only begin with a source inside the Legislature. *See Const.*
13 *art. XXIII, § 1.* Plaintiffs’ conclusion that the original idea or motivation for a constitutional
14 amendment can only come from the Legislature itself, and not from the people, is absurd. If
15 that were the case, then no individual legislator could ever take up a constituent’s proposal for
16 an amendment. Now that I-1366 has passed, the Legislature might choose to propose a
17 constitutional amendment through a two-thirds vote of both houses, or it might not.
18 Encouraging the Legislature to initiate the constitutional amendment process is not the same as
19 amending the constitution.

20 **3. I-1366 Does Not Bind the Legislature or Require the Legislature to Act**

21 Plaintiffs argue that I-1366 abridges the plenary law-making powers of the 2016
22 Legislature. Pls.’ Mot. Summ. J. at 17-18. Like all of their previous arguments, Plaintiffs base

23 ⁹ Plaintiffs also argue that the “proposed” constitutional amendment violates article XXIII for allegedly
24 containing multiple subjects. Pls.’ Mot. Summ. J. at 13-15. Since I-1366 does not in fact propose a constitutional
25 amendment, this argument is meritless. Nonetheless, should a member of the Legislature decide to take up the
26 referenced constitutional amendment, this Court should not presume what the Legislature would do. For example,
nothing in I-1366 precludes the Legislature from forwarding two, separate constitutional amendments to the
people.

1 this argument on a flawed reading of I-1366 that imposes requirements onto the text that do not
2 exist. Now that I-1366 has passed, the Legislature might choose to propose a constitutional
3 amendment through a two-thirds vote of both houses, or it might not. Encouraging the
4 Legislature to initiate the constitutional amendment process is not the same as forcing the
5 Legislature to do so. Individual legislators still have a choice of whether to propose the
6 suggested constitutional amendment to their respective house, or not. Individual legislators still
7 have a choice to vote for any proposed constitutional amendment, or not.¹⁰ Individual
8 legislators will still have a choice of overriding or amending I-1366 through a two-thirds vote,
9 or not. Const. art. II, § 1(c). Nothing in I-1366 forces or restricts these legislative choices and
10 other possible avenues for addressing the Initiative. Plaintiffs' assertions in these regards are
11 simply false.

12 **D. I-1366 Is Presumptively Severable**

13 An act or statute is not unconstitutional in its entirety unless invalid provisions are
14 unseverable and it cannot reasonably be believed that the legislative body would have passed
15 one without the other, or unless elimination of the invalid part would rend the remaining part
16 useless to accomplish the legislative purposes. *McGowan v. State*, 148 Wn.2d 278, 294, 60
17 P.3d 67 (2002). Even if this court disagrees with the State regarding the legal effect and
18 constitutionality of the Initiative's conditional provision, I-1366's remaining provisions remain
19 valid, enforceable legislative acts. Accordingly, I-1366 should not be struck down in its
20 entirety.

21 First, our courts have found that severability clauses provide "the necessary assurance
22 that the Legislature would have enacted the appropriate sections of the legislation despite the

23 ¹⁰ Plaintiffs Senator Frockt and Representative Carlyle, assert that I-1366 forces them to vote in a specific
24 manner. Pls.' Mot. Summ. J. at 18; Frockt Decl.; Carlyle Decl. But I-1366 does not force any specific vote on
25 these individual legislators. Further, even if I-1366 did not contain the conditional provision and only contained
26 the sales tax rate reduction, these individual legislators would be in the same position: faced with the
consequences of an adopted initiative they do not agree with and the legislative choices of what to do with an
initiative that they believed "contrary to their constituents' interests."

1 unconstitutional sections.” *Gerberding v. Munro*, 134 Wn.2d 188, 197, 949 P.2d 1366 (1998)
2 (applying the test to Initiative 573). Here, I-1366 contains a severability clause, I-1366 § 8,
3 therefore the first part of the severability test is met. *Id.*; *see also McGowan*, 148 Wn.2d at 295.
4 Second, contrary to Plaintiffs’ assertions, I-1366’s provisions are not so intertwined that
5 striking the conditional section 3 renders the tax rate reduction in section 2 meaningless.
6 Section 2 of the Initiative operates independently of the remaining provisions—if its effective
7 date in section 3 is stricken, then the general effective date for initiatives applies. *See* Const.
8 art. II, § 1(d) (“[Initiatives] shall be in operation on and after the thirtieth day after the election
9 at which it is approved.”). Further, our courts have said that “a legislative declaration of the
10 basis and necessity for enactment is deemed conclusive as to the circumstances asserted unless
11 it can be said that the declaration is obviously false on its face.” *McGowan*, 148 Wn.2d at 296
12 (internal quotations marks omitted). Here section 1 declares the basis and need for the
13 legislation:

14 [T]he state needs to exercise fiscal restraint by either reducing tax burdens or
15 limiting tax increases to only those considered necessary by more than a bare
16 majority of legislators. . . . This measure provides a reduction in the burden of
17 state taxes by reducing the sales tax . . . unless the legislature refers to the ballot
18 for a vote a constitutional amendment requiring two-thirds legislative approval
19 or voter approval to raise taxes and majority legislative approval for fee
20 increases.

18 I-1366 § 1 (emphases added). If the contingency in section 3 comes to pass because a court
19 rules that the suggested constitutional amendment cannot be proposed, that would not change
20 the fact that the voters approved the operative provision of the Initiative—the reduction in the
21 state sales tax rate. The reason for a failure to propose a constitutional amendment is
22 immaterial under the plain language of I-1366. In light of this intent statement, Plaintiffs
23 cannot show “beyond a reasonable doubt” that voters would not have enacted the sales tax
24 reduction without the related contingency in section 3. The provisions of I-1366 are severable.
25
26

1 **E. This Challenge Merits Judicial Resolution Despite Issues of Standing**

2 The State disputes that Plaintiffs have established all of the types of standing that they
3 assert. Plaintiffs assert that they have standing to bring this action as individuals, as taxpayers,
4 and as legislators. Pls.’ Mot. Summ. J. at 23-27. The State does not challenge their ability to
5 bring the action as taxpayers. *See State ex rel. Boyles v. Whatcom County Superior Court*, 103
6 Wn.2d 610, 614, 694 P.2d 27 (1985) (recognizing litigant standing to challenge governmental
7 acts on the basis of status as a taxpayer). Thus, the Court need not address the Plaintiffs’ other
8 claimed bases for standing. In the event the Court does consider these bases, the State does
9 dispute the individual claims and the legislators’ separate claims of official standing.

10 All of the plaintiffs lack individual standing because none of them suffer legal injury
11 from I-1366’s passage.¹¹ Plaintiffs assert that I-1366’s sales tax reduction (or the suggested
12 constitutional amendment) will have “direct and substantial detrimental impacts” on their
13 interests in funding education, social services, and state programs and infrastructure. Pls.’ Mot.
14 Summ. J. at 23-24. But a mere interest in government funding mechanisms is insufficient to
15 establish standing; rather the individual Plaintiffs must show that their rights are directly
16 affected or that they are being denied some benefit by implementation of I-1366. *Federal Way*
17 *Sch. Dist. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009); *see also Walker v. Munro*,
18 124 Wn.2d 402, 420-21, 879 P.2d 920 (1994). Here, nothing in I-1366 directly affects the
19 Plaintiffs, other than that they generally disagree with Initiative’s passage and its resulting,
20 potential sales tax reduction or hypothetical constitutional amendment. Plaintiffs cannot know
21 the effects of I-1366 because the Initiative has yet to go into practical effect. The Legislature
22 may override or amend I-1366, or it might not. The Legislature may take some yet unknown
23 budgeting action that counters the Initiative’s effect, or take no action at all. Accordingly,

24 _____
25 ¹¹ The League of Women Voters asserts representative standing on behalf of its members. Pls.’ Mot.
26 Summ. J. at 24 n.6. The State does not challenge that the League stands in place of its individual members, but
does challenge their claims of harm for the same reasons as the individual Plaintiffs.

1 I-1366 may reduce the state sales tax rate, or it might not. Merely because Plaintiffs disagree
2 that I-1366 presents these hypothetical situations does not establish that they have been
3 individually harmed by the Initiative or provide them with individual standing.

4 The plaintiff legislators also lack standing in their official capacities. Relying on
5 *League of Education Voters v. State*, 176 Wn.2d 808, 817-18, 295 P.3d 743(2013), the plaintiff
6 legislators assert that they have standing because I-1366 prevents them from independently
7 initiating the constitutional amendment process and allegedly forces certain legislative action.
8 Pls.' Mot. Summ. J. at 26-27. In *League of Education Voters*, a specific bill failed to pass
9 notwithstanding having received a simple majority of votes, including those made by the
10 plaintiff legislators, due to the requirements of Initiative 1053. *League of Educ. Voters*, 176
11 Wn.2d at 817. The State Supreme Court found that the legislators' interest in maintaining the
12 effectiveness of their votes gave them sufficient standing to challenge the legality of the
13 supermajority initiative. *Id.* But this case is unlike *League of Education Voters* because the
14 legislators in that case had taken actual votes that had been nullified by I-1053's supermajority
15 vote requirement. Here, none of the plaintiff legislators' votes will be in any way impacted by
16 I-1366. And as explained above, the Initiative does not nullify any future legislative votes:
17 nothing in I-1366 requires the plaintiff legislators to propose a constitutional amendment or to
18 vote for or against any constitutional amendment should one be proposed. Thus, none of the
19 plaintiff legislators are harmed by I-1366, and their claim of individual legislator standing
20 should fail.

21 Notwithstanding these issues of standing, the State believes that this matter is properly
22 before this Court for determination. The State does not contest that Plaintiffs have taxpayer
23 standing. Further, ensuring that the Legislature knows the status of I-1366 during the upcoming
24 legislative session is a matter of significant and continuing public importance that necessitates
25 judicial resolution of this matter. *See Nw. Animal Rights Network v. State*, 158 Wn. App. 237,
26

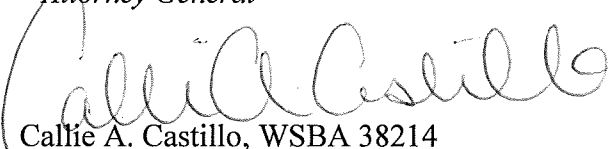
1 242 n.5, 242 P.3d 891 (2010) (courts may decide a question of public interest that has been
2 adequately briefed and argued if doing so would benefit the public and government officers).

3 **VI. CONCLUSION**

4 I-1366 is a valid exercise of the people's legislative power that is in accordance with all
5 of the constitutional requirements. The Initiative amends the state sales tax rate, an act that is
6 plainly within the people's power, and merely makes it contingent on constitutional
7 amendments that may or may not be taken up by the Legislature. I-1366 does not amend the
8 state constitution nor alter the constitutional amendment requirements. Plaintiffs have not met
9 their burden to prove I-1366 is unconstitutional beyond a reasonable doubt. Accordingly, the
10 State of Washington respectfully requests that this Court deny Plaintiffs' motion for summary
11 judgment and dismiss their challenge to I-1366.

12 RESPECTFULLY SUBMITTED this 8th day of January 2016.

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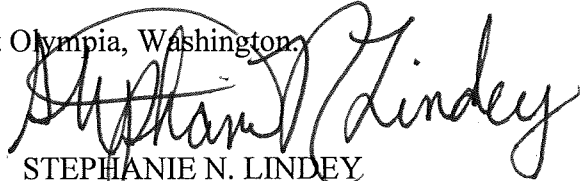
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via email, a true and correct copy of the foregoing document, upon the following:

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