



In the Matter of:

**A Challenge to the Ballot Title and Summary
of Initiative No. 1929**

No. 22-2-00796-34

❖ I-1929 Ballot Title Virtual Binder

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1 X EXPEDITE
2 No hearing set
3 X Hearing is set
4 Hearing Date: April 20, 2022 (trial setting date)
5 Hearing Time: N/A
6 Judge/Calendar: Hon. Indu Thomas
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8
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10 SUPERIOR COURT OF THE STATE OF WASHINGTON
11 THURSTON COUNTY

11 In the Matter of:)
12 A CHALLENGE TO THE BALLOT TITLE) No. 22-2-00796-34
13 AND SUMMARY OF INITIATIVE NO. 1929)
14) PETITIONERS' OPENING
15) BRIEF IN SUPPORT OF APPEAL
16) OF BALLOT TITLE AND
17) SUMMARY FOR INITIATIVE
18) NO. 1929
19)
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25 **I. INTRODUCTION AND RELIEF REQUESTED**

26 Petitioners J. Vander Stoep and Repeal the Capital Gains Income Tax appeal the ballot
27 title and ballot measure summary issued by the Attorney General's Office ("AGO") for Initiative
28 Measure No. 1929.¹ As drafted, the AGO's proposed ballot title exceeds the thirty-word limit in
29 RCW 29A.72.050(1), and the Court will have to make some changes so that it complies. In an
30 attempt to comply with the thirty-word limit, the ballot title improperly hyphenates capital gains,
31 counts "sale/exchange" as one word, and employs a convoluted structure, the result of which is a
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33 ¹ "Under RCW 29A.72.080, a person may challenge the ballot title of an initiative in Thurston
34 County Superior Court within five days of its filing with the Secretary of State. The superior
35 court then examines the ballot title, measure, and objections 'and shall, within five days, render
36 its decision....' RCW 29A.72.080." *Wash. Ass'n for Substance Abuse & Violence Prevention v.*
37 *State*, 174 Wn.2d 642, 661, 278 P.2d 632 (2012).

1 81 (1933). In 1936, the Washington Supreme Court again invalidated a graduated income tax
2 that the Legislature had described as a tax on “the privilege of receiving income.” *Jensen v.*
3 *Henneford*, 185 Wn. 209 (1936). Between 1934 and 2010, Washington voters have rejected ten
4 proposals to impose a personal or corporate income tax and in 2021 voted to repeal the tax at
5 issue here in an advisory vote. See Jason Mercier, *History of income tax votes in Washington*,
6 WASHINGTON POLICY CENTER (Oct. 17, 2016),
7 <https://washingtonpolicy.org/publications/detail/history-of-income-tax-votes-in-washington>.

8 In 2021, Governor Inslee signed into law ESSB 5096, Declaration of Harry Korrell at ¶ 2,
9 Ex. 1, codified at RCW 82.87.010 *et seq.* (“RCW 82.87”). RCW 82.87.040 imposes a seven
10 percent tax on “Washington capital gains” earned by individuals over the course of a year. RCW
11 82.87.020(13) defines “Washington capital gains” as “an individual’s adjusted capital gain, as
12 modified in RCW 82.87.060, for each return filed under this chapter.” RCW 82.87.020(1)
13 defines “adjusted capital gain” in reference to the federal income tax: “federal net long-term
14 capital gain” subject to a number of defined additions and deductions. RCW 82.87.020(7)
15 defines “long-term capital gain” as “gain from the sale or exchange of a long-term capital asset.”
16 RCW 82.87.020(6) defines “long-term capital asset” as “a capital asset that is held for more than
17 one year.” And RCW 82.87.020(2) defines “capital asset” by reference to the internal review
18 code: “the same meaning as provided by Title 26 U.S.C. Sec. 1221 of the internal revenue code
19 and also includes any other property if the sale or exchange of the property results in a gain that
20 is treated as a long-term capital gain under Title 26 U.S.C. Sec. 1231 or any other provision of
21 the internal revenue code.”

22 As “Washington capital gains” are the starting point in determining an individual’s tax
23 liability, one must first identify an individual’s federal net long-term capital gain reportable for
24 federal income tax purposes. RCW 82.87.020(3). From there, an individual may include a loss
25 carryforward so long as it is attributable to Washington and not carried back for federal income
26 tax purposes. RCW 82.87.040(3). Next, he or she can deduct long-term capital gains from the
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1 capital gains tax, including gains from certain real estate transactions, retirement plans, and
2 business transactions (such as commercial fishing privileges). RCW 82.87.050.

3 From this initial set of calculations, the tax authorizes individuals to make certain
4 deductions: (1) a \$250,000 standard deduction per individual (or combined in the case of spouses
5 or domestic partners); (2) amounts the state is prohibited from taxing under the U.S. or
6 Washington Constitution; (3) adjusted capital gain derived from the sale or transfer of a
7 taxpayer's interest in a qualified family-owned small business; and (4) \$100,000 charitable
8 contributions on top of the \$250,000 standard deduction. RCW 82.87.060. Finally, the taxpayer
9 may credit taxes paid to other taxing jurisdictions on capital gains derived from capital assets in
10 that other taxing jurisdiction to the extent those capital gains are included in the calculation of
11 Washington capital gains. RCW 82.87.100.

12 Taxpayers must file their capital gains tax return on or before the deadline to file federal
13 income tax returns. RCW 82.87.110(1)(a). A taxpayer who obtains a time extension for filing
14 their federal income tax returns is entitled to the same time extension for their capital gains tax
15 filing so long as they provide Washington with their extension confirmation number or other
16 satisfactory evidence. RCW 82.87.110(5). A taxpayer who owes money under the capital gains
17 tax is required to file a copy of his or her federal income tax return as well as all schedules and
18 supporting documentation. RCW 82.87.110(2).

19 **B. Douglas County Superior Court Declares the Capital Gains Tax an**
20 **Unconstitutional Income Tax.**

21 In 2021, plaintiffs challenged in Douglas County Superior Court the capital gains tax
22 imposed by ESSB 5096. Korrell Decl. ¶ 3-4, Ex. 2 & 3. The plaintiffs alleged the tax violates
23 (1) the Commerce Clause of the United States Constitution; (2) the uniformity and one-percent
24 limit requirements set forth in Article VII, Sections 1 & 2 of the Washington Constitution; and
25 (3) the Privileges and Immunities Clause of Article I, Section 12 of the Washington Constitution.
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1 *Id.* The claim pertaining to Article VII, Sections 1 & 2 of the Washington Constitution is
2 relevant to this ballot title appeal.

3 On March 1, 2022, Douglas County Superior Court held that the RCW 82.87 capital
4 gains tax is properly characterized as an income tax and that, as an income tax, it is an
5 unconstitutional property tax. Korrell Decl. ¶ 5, Ex. 4 at 26. The Court listed a number of
6 “incidents” of the tax that showed “the hallmarks of an income tax rather than an excise tax.” *Id.*
7 at 23-26. These included the tax’s reliance on federal IRS income tax returns; IRS’s
8 characterization of the tax as an income tax; the annual levy of the tax, not at the time of each
9 transaction; the tax’s application to net capital gain rather than gross value; consideration of
10 various deductions and exclusions; and its imposition on individuals only rather than also on
11 corporations. *Id.* at 23-25. On March 22, 2022, the Court issued its order rejecting the State’s
12 contention that the tax was an “excise tax,” declaring the capital gains tax unconstitutional and
13 invalid and, therefore, void and inoperable as a matter of law. *Id.* at 11.

14 On March 25, 2022, the State of Washington filed a notice of appeal with the Washington
15 Supreme Court seeking direct review of the Douglas County Superior Court’s order. *Id.*

16 **C. I-1929 and the AGO’s Proposed Ballot Title and Ballot Measure Summary.**

17 On March 21, 2022, J. Vander Stoep filed Initiative Measure 1929. Korrell Decl. ¶ 6, Ex.
18 5. I-1929 is not an amendatory measure; it is a straightforward repealer of RCW 82.87. If
19 enacted, I-1929 would apply retroactively to January 1, 2022, as well as prospectively. *Id.*

20 On April 6, 2022, the AGO submitted to the Secretary of State the following ballot title
21 and ballot measure summary:

22 **BALLOT TITLE**

23 Statement of Subject: Initiative Measure No. 1929 concerns taxes.

24 Concise Description: This measure would repeal a 7% excise tax on annual
25 capital-gains above \$250,000 by individuals from the sale/exchange of stocks and
certain other capital assets (the tax exempts real estate and retirement accounts).

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

BALLOT MEASURE SUMMARY

1 This measure would repeal an excise tax imposed on the sale or exchange of
2 certain long-term capital assets by individuals who have annual capital gains of
3 over \$250,000. The tax applies to the sale or exchange of stocks, bonds, and
4 certain other long-term capital assets, but exempts real estate, retirement accounts,
and certain other assets. This repeal would operate retroactively to January 1,
2022, as well as prospectively.

5 Korrell Decl. ¶ 7, Ex. 6. The AGO's proposed ballot title and ballot measure summary ignore
6 the Douglas County Superior Court's declaratory judgment ruling and state that I-1929 would
7 repeal an "excise tax." *Id.* The summary also wrongly states the tax would apply to transactions
8 ("the sale or exchange") rather than income. However, a person could engage in dozens of sales
9 or exchanges of assets and pay no tax; the tax only applies if the net income from those sales is
10 above \$250,000. The AGO's proposal is thus misleading and creates prejudice against I-1929.
11 The Court should reject it and revise it as explained in detail below.

III. ARGUMENT

A. The AGO's Proposed Concise Description Exceeds the 30-Word Limit.

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14 The Court must revise the AGO's proposed concise description because it exceeds the
15 30-word limit and is confusing. RCW 29A.72.050(1) sets forth the standard for the concise
16 description:

17 The concise description must contain no more than thirty words, be a true and
18 impartial description of the measure's essential contents, clearly identify the
19 proposition to be voted on, and not, to the extent reasonably possible, create
prejudice either for or against the measure.

20 *Id.* The AGO's proposed concise description contains thirty-two words. In an attempt to
21 conform to the word limit, the concise description hyphenates "capital gains" and places a slash
22 between the words "sale" and "exchange." *Id.* The concise description is only thirty words if
23 "capital-gains" and "sale/exchange" are each counted as one word. But "capital-gains" and
24 "sale/exchange" are each two words. A word limit means nothing if it can be circumvented by
25 improper punctuation.

1 Capital gains are two words, not one, and are never combined by a hyphen. The
2 dictionary does not hyphenate “capital gains.” *Capital gain*, MERRIAM-WEBSTER.COM
3 DICTIONARY, <https://merriam-webster.com/dictionary/capital%20gain> (last visited Apr. 13,
4 2022). Neither federal law nor federal authorities hyphenate capital gain. *See, e.g.*, 26 U.S.C.
5 § 1222 (“The term ‘long-term capital gain’ means gain from the sale or exchange of a capital
6 asset held for more than 1 year, if and to the extent such gain is taken into account in computing
7 gross income.”); I.R.S. Topic No. 409 Capital Gains and Losses (Feb 3, 2022). And “capital-
8 gains” is not a term of art in Washington State. *See, e.g.*, RCW 82.87.020 (“‘Adjusted capital
9 gain’ means federal net long-term capital gain.”); Korrell Decl. ¶ 8, Ex. 7 at 1 (“A capital gains
10 tax (CGT) is a tax on the profit realized . . .”). Even the AGO’s proposed ballot measure
11 summary spells out capital gains. As capital gains are two words, the proposed concise
12 description violates the thirty-word limit, and the Court must revise it to comply.

13 In addition, the proposed concise description fails the thirty-word limit because
14 “sale/exchange” are two words, not one. The tax at issue purports to impose a tax “on the sale or
15 exchange of long-term capital assets.” RCW 82.87.040. The proposed concise description
16 replaces the words “sale or exchange” with “sale/exchange.” Joining the words “sale” and
17 “exchange” with a slash does not combine them into one word, the slash just replaces “or.” As
18 “sale” and “exchange” are two words, the proposed concise description violates the thirty-word
19 limit and should be redrafted to comply with statutory requirements.

20 Further, the proposed concise description’s shortcuts and structure create a confusing
21 description of the essential contents of the measure. There are at least two issues with how the
22 proposed description describes the tax: “this measure would repeal a 7% excise tax on annual
23 capital-gains above \$250,000 by individuals from the sale/exchange of stocks . . .” First, it
24 seems as if there is a verb, like “earned,” that should precede “by individuals.” Capital asset
25 appreciation is not “by individuals”; individuals earn profit from capital asset appreciation. A
26 natural reading of the text is that the tax is imposed “by individuals,” rather than the State, which
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1 is clearly wrong. Second, replacing “or” with a slash is confusing. The slash punctuation mark
2 has various meanings, including that two words are in conflict (such as love/hate). Using a slash
3 in the description of the content of the measure could cause confusion and, thus, prejudice the
4 measure. There is no reason the ballot title, which is all that most voters will read, should
5 present the essential contents of the ballot measure in such an imprecise and confusing manner.

6 **B. The Court Should Revise the AGO’s Proposed Concise Description and**
7 **Ballot Title Summary to Remove References to an Excise Tax.**

8 In general, ballot titles must be clear and should not confuse voters. *Municipality of*
9 *Metro. Seattle v. City of Seattle*, 57 Wn.2d 446, 357 P.2d 863 (1960). This rule “has particular
10 importance in the context of initiatives since voters will often make their decision based on the
11 title of the act alone, without ever reading the body of it.” *Citizens for Responsible Wildlife*
12 *Mgmt.*, 149 Wn.2d 622, 639, 71 P.3d 644 (2003); *see also Wash. Assoc. for Substance Abuse &*
13 *Violence Prevention v. State*, 174 Wn.2d 642, 667, 278 P.3d 632 (2012) (“when laws are passed,
14 people should know what is in them, especially those voting on the laws.”) (Wiggins, J.,
15 dissenting).

16 As a predicate matter, labeling RCW 82.87 an excise tax is neither true nor impartial and
17 will confuse voters. On March 1, 2022, Douglas County Superior Court held that RCW 82.87 is
18 an income tax and not an excise tax. Following that ruling, on March 22, 2022, the Court issued
19 an order declaring RCW 82.87 “unconstitutional and invalid and, therefore, [] void and
20 inoperable as a matter of law.” Korrell Decl. ¶ 5, Ex. 4 at 11. As of the date of this ballot title
21 appeal, that order is still in effect but has been appealed. And while the appellate process has not
22 run its course, there is no guarantee that (1) the process will be completed by the time of the vote
23 on this measure or (2) the Douglas County Superior Court order will be reversed. A ballot title
24 that describes the law as the State hopes it to be, not as the law is currently characterized, is not
25 accurate and is drafted to the benefit of the measure’s opponents. The Court should not adopt a
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1 title that picks a side in the ongoing fight over the proper characterization, much less the side that
2 has been rejected by the only court to have ruled on the issue.

3 Labeling RCW 82.87 an excise tax will also confuse the average informed voter, who
4 will know from personal experience that a capital gains tax is an income tax. Every year voters
5 are asked to declare capital gains or loss when they file their federal *income* tax returns. Korrell
6 Decl. ¶ 9, Ex. 8. These federal capital gains are the same capital gains that are the starting point
7 for RCW 82.87's calculation. Moreover, RCW 82.87 bears many of the hallmarks of a typical
8 income tax. As the Douglas County Superior Court highlighted in its summary judgment ruling,
9 the tax "relies upon federal IRS income tax returns," "is levied annually," is levied on "net
10 capital gain," not individual sales or exchanges, and "is based on an aggregative calculation of an
11 individual's capital gains over the course of a year from all sources, taking into consideration
12 various deductions and exclusions[.]" Korrell Decl. ¶ 5, Ex. 4 at 23-24.

13 In addition to being false and confusing, labeling RCW 82.87 an excise tax in the ballot
14 title and ballot measure summary is inappropriate given the risks and uncertainty of ongoing
15 litigation. By the time of the vote, an appellate court could have issued a final judgment
16 affirming or reversing the Douglas County Superior Court's ruling. Picking sides when drafting
17 the ballot title and summary creates the possibility that voters will be presented with a title and
18 summary that are untrue and misleading. This can easily be avoided by using Petitioners'
19 proposed title and summary, which simply refers to the tax as a tax on capital gains income.

20 In *Washington Citizens Action of Washington v. State*, 162 Wn.2d 142, 171 P.3d 486
21 (2007), the Court dealt with a similar issue in a post-election constitutional challenge to I-747,
22 and its reasoning is instructive here. I-747's text purported to amend the ability of taxing
23 districts to increase property taxes from a limit of two percent to one percent. However, four
24 months before the signature submission deadline, Thurston County Superior Court issued a
25 permanent injunction holding the two percent limit unconstitutional and reinstating the former
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1 six percent limit. The Washington Supreme Court issued a final judgment affirming the trial
2 court in September 2001. *City of Burien v. Kiga*, 144 Wn.2d 819, 828, 31 P.3d 659 (2001).

3 Challengers to I-747 argued that the measure misled voters (because it said it reduced the
4 increase limit from two percent to one percent instead of from six percent to one percent) and
5 was not justified in presuming I-722 (which set the two percent limit) was constitutional given
6 the Superior Court’s injunction. *Wash. Citizens Action of Wash.*, 162 Wn.2d at 157. The
7 Supreme Court held that the text of the initiative “misled voters about the substantive impact of
8 the initiative on existing law” in violation of Article II, Section 37 of the Washington
9 Constitution. *Id.* at 156. And while the Court declined to address whether the measure also
10 violated Article II, Section 19, *id.* at 163, the Court acknowledged that Article II, Section 19 and
11 Article II, Section 37 shared a “common purpose” of “ensur[ing] that those voting on legislation
12 are not deceived or misled[.]” *Id.* at 154.

13 Here, a Superior Court has held that RCW 82.87 is not an excise tax. If that ruling is not
14 overturned by the time of the vote, a ballot title stating RCW 82.87 is an excise tax would be
15 untrue and would mislead voters. The ballot title should reflect the law as it is at the time of the
16 vote, to avoid misleading voters. *Id.* Implicit in the *Wash. Citizens* decision is that an initiative
17 should not have a title that conveys an inaccurate characterization of the law being amended or
18 repealed, especially if that characterization has been rejected in the course of ongoing litigation.

19 Unlike in *Wash. Citizens*, in this case there is middle ground that allows drafting a title
20 and summary that are accurate and do not pick sides in the ongoing litigation. The parties to the
21 Douglas County Superior Court litigation disputed the nature of RCW 82.87: excise tax versus
22 income tax. But there is no dispute that the tax applies to capital gains income above \$250,000,
23 as Petitioners’ proposal states. The State argued that a valid excise tax under controlling
24 Washington precedent can be applied to “income.” In their brief opposing summary judgment,
25 the State wrote “[m]any types of transactions generate income But that does not mean that
26 a tax on these transactions is an income tax.” Korrell Decl. ¶ 10, Ex. 9 at 16. The State went
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1 further in its Reply Brief in support of its own motion for summary judgment, arguing “The tax
2 is tied to the amount of profit earned from the voluntary sale of long-term capital assets, RCW
3 82.87.040(1)” Korrell Decl. ¶ 11, Ex. 10 at 2. Thus, simply describing RCW 82.87 as a tax
4 on capital gains income will remain accurate whether it is ultimately held to be an “income tax”
5 or an “excise tax” by an appellate court.

6 Describing RCW 82.87 as an excise tax is also unfair to I-1929’s proponents for one
7 additional but critical reason specific to the ongoing litigation. There is potential that the legal
8 debate will shift from whether RCW 82.87 is an excise tax or income tax to whether an income
9 tax is a property tax. If an income tax is not a property tax, then RCW 82.87 could be a
10 constitutional non-uniform income tax. Senator Pedersen recently stated that the importance of
11 the capital gains tax was “less about the dollars that it’s raising and more about the fact that the
12 opponents are attacking it as an income tax, and that gives us a clean shot to go back to the
13 Supreme Court and go back to the root of this entire problem[.]” Korrell Decl. ¶ 12, Ex. 11. The
14 State’s briefing foreshadowed this line of argument. *See* Korrell Decl. ¶ 10, Ex. 9 at 15-16
15 (describing *Culliton*, 174 Wash. 363 and *Jensen*, 185 Wash. 209 as “fractured decisions.”). If
16 this Court approves the AGO’s proposed ballot title and summary (calling the tax at issue an
17 “excise tax”) and the Supreme Court deems RCW 82.87 a constitutional “income tax” before the
18 November election, the proponents of I-1929 will be left with a fatally defective ballot title and
19 measure summary. Petitioners’ proposal avoids this problem.

20 **C. The AGO’s Proposed Concise Description and Ballot Measure Summary**
21 **Cherry-Pick Exemptions, Rendering the Proposal Misleading.**

22 The proposed concise description and ballot measure summary will create prejudice
23 against the initiative for the additional reason that they cherry-pick two exemptions to the benefit
24 of the initiative’s opponents: real estate and retirement accounts. There is no requirement that a
25 ballot title contain an index of the measure’s contents or that the title give details contained in the
26 bill. *Garfield Cty. Transp. Auth. v. State*, 196 Wn.2d 378, 398, 473 P.3d 1205 (2020). In the
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1 case of RCW 82.87, it would be impossible for I-1929's title or measure summary to index all of
2 the measure's content or even just all the exemptions. Computation of RCW 82.87's tax is
3 complicated, requires analysis into what counts as "Washington capital gains," and involves a
4 number of credits, deductions, and exemptions. I-1929's ballot title and ballot measure summary
5 can put voters on notice to inquire about these details by broadly stating that the tax is subject to
6 credits, deductions, and exemptions. An interested voter would have the information necessary
7 to read the text of the measure and RCW 82.87 to learn the details. But highlighting just two
8 exemptions, both of which benefit opponents of the measure, is not impartial and causes
9 prejudice to the proponents of the I-1929.

10 This prejudice is heightened by the misleading manner in which the two exemptions are
11 described. A ballot title or measure summary may not describe a measure's contents in a partial
12 or misleading manner. RCW 29A.72.050; *Garfield Cty. Transp. Auth.*, 196 Wn.2d at 398. In
13 particular, the AGO's proposed concise description is misleading in two ways. First, it gives
14 voters the impression that "real estate and retirement accounts" are the sole exemptions in RCW
15 82.87 but does not state that other assets are exempted, deducted, or credited.

16 Second, the ballot title does not provide any qualifications in describing the real estate
17 and retirement account exemptions. This is inaccurate. RCW 82.87.050(3) only exempts certain
18 retirement accounts, such as retirement savings accounts under 26 U.S.C. § 401(k), deferred
19 compensation plans under 26 U.S.C. § 457(b), individual retirement accounts or individual
20 retirement annuities described in .S.C. § 408, and Roth individual retirement accounts described
21 in 26 U.S.C. § 408A. The average informed lay voter would likely read the unqualified language
22 as describing an exemption for any accounts an individual plans to save for retirement. This will
23 create bias against the initiative measure because it makes it seem as if the tax's reach is less than
24 it is. While RCW 82.87.050(1) and (2) broadly exempt real estate, there remain exceptions to
25 certain transactions in RCW 82.87.050(2)(b)(ii)-(iii). Again, an unqualified description of the
26 exemption misleads voters and is inaccurate. These issues can be easily remedied.

1 **D. The Court Should Revise the Ballot Title and Ballot Measure Summary.**

2 For the reasons set out above, the Court should revise the ballot title and ballot measure
3 summary so that they comply with the word limit, avoid picking sides in the “excise tax versus
4 income tax” debate, and provide an impartial description of the measure to voters. The Court
5 should, therefore, revise the ballot title and ballot measure summary to state the following:

6 **BALLOT TITLE**

7 Statement of Subject: Initiative Measure No. 1929 concerns taxes.

8 Concise Description: This measure would repeal a 7% tax on individuals with
9 annual capital gains income above \$250,000, subject to certain credits,
deductions, and exemptions. [20 words]

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

11 **BALLOT MEASURE SUMMARY**

12 This measure would repeal a 7% tax on annual capital gains income above
13 \$250,000. The tax is levied only on natural persons, not on corporations, and is
14 based upon an individual’s annual federal income tax filing. The tax contains a
15 number of credits and deductions, and it exempts capital gains from defined real
estate transactions, qualified retirement accounts, and certain other assets. This
repeal would operate retroactively to January 1, 2022, as well as prospectively.
[72 words]

16 Petitioners’ proposed concise description and ballot measure summary fit within the
17 statutory word limit. They accurately describe the tax, avoid picking sides in the “income tax
18 versus excise tax” debate, and avoid selecting exemptions in a way that creates prejudice against
19 the measure. Petitioners’ concise description and ballot measure summary are less likely to
20 mislead voters at the time of the vote than the AGO’s proposed concise description and ballot
21 measure summary.

22 **IV. CONCLUSION**

23 As described above, the AGO’s proposed concise description exceeds the thirty-word
24 limit, and both the proposed concise description and ballot measure summary are untrue,
25 misleading, and prejudicial towards I-1929. One court has already held that RCW 82.87 is not
26 an excise tax, and I-1929’s concise description and ballot measure summary should not state that
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1 it is. Ongoing litigation poses a real risk that any concise description or ballot measure summary
2 that picks sides in the “excise tax versus income tax” debate will end up misleading voters at the
3 time of the vote. The title of I-1929 should steer a middle ground and merely state the
4 undeniable subject of the tax: capital gains income above \$250,000. Petitioners respectfully
5 request that this Court grant their Petition and adopt their proposed ballot title and ballot title
6 summary for I-1929 as set forth in Petitioners’ proposed order.

7 Respectfully submitted this 18th day of April, 2022.

8
9 Davis Wright Tremaine LLP
 Attorneys for Petitioners

10
11 By: *s/Harry J.F. Korrell*

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1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, certify under the penalty of perjury under the laws of the state of
3 Washington that I am now and at all times herein mentioned a citizen of the United States, a
4 resident of the State of Washington, over the age of eighteen years, not a party to or interested in
5 the above-entitled action, and competent to be a witness herein.

6 On this date I caused to be served in the manner noted below a copy of the document
7 entitled *Petitioners' Opening Brief in Support of Appeal of Ballot Title and Summary for*
8 *Initiative 1929* on the following:

9 Via E-mail on April 18, 2022
10 Steve Hobbs, Secretary of State
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DATED this 18th day of April, 2022.

24 s/Lesley Smith
25 Lesley Smith
26 Legal Assistant
27

PETITIONER NO TAX CUT FOR THE SUPER RICH'S OPENING BRIEF

1 Hearing Date: _____

2 Hearing Time: _____

3 Judge/Calendar:

4 Indu Thomas / Civil

5
6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR THE COUNTY OF THURSTON

8
9 In Re:

10 BALLOT TITLE AND SUMMARY FOR
11 INITIATIVE NO. 1929

12 On behalf of No Tax Cut for the Super
13 Rich, a Washington political committee

No. 22-2-00796-34

PETITIONER NO TAX CUT FOR
THE SUPER RICH'S OPENING
BRIEF

14 **I. INTRODUCTION AND RELIEF REQUESTED**

15 With limited words, a ballot title and summary must provide voters with an accurate,
16 informative, and impartial description of the essential contents of a ballot measure. The ballot title
17 and summary returned by the Attorney General for Initiative Measure No. I-1929 (“I-1929”) is a
18 good start, accurately and neutrally conveying to voters what a capital gains excise tax is, who the
19 tax applies to, and the types of assets exempt from the tax. But the Attorney General’s proposal
20 can be improved in several ways. Most significantly, the statement of subject and concise
21 description should be revised to more accurately and informatively convey the scope and actual
22 impact of the measure—namely, that repealing the capital gains tax would eliminate approximately
23 \$500 million per year in K-12 education and early-learning funding. The omission of this
24 significant consequence of repeal deprives voters of critical information to understand the scope
25 of the measure, its true impact, and the Legislature’s purpose in enacting the tax. In addition, other
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1 revisions to the ballot title and summary are warranted to improve accuracy, readability, and to
2 better inform voters about the scope and function of the initiative.

3 In contrast to the Attorney General’s imperfect but neutral ballot title and description, the
4 alternative from Sponsor J. Vander Stoep and Petitioner Repeal the Capital Gains Income Tax
5 (collectively, “Sponsor”) deprives voters of critical information and context necessary to
6 understand the measure’s essential contents, including what a capital gain is, what types of assets
7 are exempt, and that the tax is an excise tax. The alternative also is prejudicial in including the
8 term “income,” which is not how the Legislature described the capital gains tax or intended it to
9 function, but rather is part of the Sponsor’s political argument. The Sponsor’s alternative concise
10 description is especially ill-advised because it uses only 20 of the 30 available words. There is no
11 reason the concise description should fail to specify the major assets exempt from the tax or
12 clarify what a capital gain is when more words remain available.
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14

15 The Court should correct the shortcomings in the Attorney General’s proposal by
16 adopting the revisions proposed by Petitioner No Tax Cut for the Super Rich (“Petitioner”) and
17 decline the Sponsor’s alternative, which would leave voters without an understanding of
18 essential aspects of the measure.

19 **II. FACTUAL BACKGROUND**

20 **A. The Capital Gains Excise Tax**

21 On April 25, 2021, the Legislature passed Engrossed Substitute Senate Bill 5096 (“ESSB
22 5096”), which was signed into law by Washington Governor Jay Inslee on May 4, 2021. The
23 primary purpose of ESSB 5096 is to increase funding for K-12 education and early learning and
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1 child care programs. ESSB 5096 §§ 1-3.¹ As the Legislature specifically found in enacting this
2 law:

3 [I]t is the paramount duty of the state to amply provide every child in the state
4 with an education, creating the opportunity for the child to succeed in school and
5 thrive in life. The legislature further finds that high quality early learning and
6 child care is critical to a child’s success in school and life, as it supports the
7 development of the child’s social-emotional, physical, cognitive, and language
8 skills from this act to the education legacy trust account and the common school
9 construction account.

10 *Id.* § 1.²

11 In considering how to fund these education programs and services, the Legislature was
12 mindful that Washington’s tax system is “the most regressive in the nation.” *Id.* In fact,
13 “[m]iddle-income families in Washington pay two to four times more in taxes, as a percentage of
14 household income, as compared to top earners in the state.” *Id.*

15 Accordingly, the Legislature crafted a tax to apply to Washington’s top earners—namely,
16 a 7% excise tax on annual profits above \$250,000 per individual from the sale or exchange of
17 stocks, bonds, and certain other long-term capital assets. *Id.* §§ 1, 5-7. It is significant that the
18 Legislature identified and intended to adopt an excise tax. *Id.* § 5. To further assist in rebalancing
19 the state’s tax code, the Legislature exempted several significant assets from the tax, including
20 real estate, retirement accounts, and small businesses. *Id.* §§ 1, 6-9.

21 **B. I-1929**

22 I-1929 seeks to repeal the capital gains excise tax in its entirety. The Sponsor filed the
23 initiative with the Secretary of State on March 21, 2022. On April 6, 2022, the Attorney General
24 returned the following ballot title and summary for I-1929.

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¹ A copy of ESSB 5096 was included as Exhibit A to Petitioner’s Petition.

27 ² “It is the paramount duty of the state to make ample provision for the education of all children residing within its
borders[.]” Const. art. IX, § 1.

1 **Ballot Title**

2 Statement of Subject: Initiative Measure No. 1929 concerns taxes.

3 Concise Description: This measure would repeal a 7% excise tax on annual capital-
4 gains above \$250,000 by individuals from the sale/exchange of stocks and certain
5 other capital assets (the tax exempts real estate and retirement accounts).

6 Should this bill be ___ Approved ___ Rejected

7 **Ballot Measure Summary**

8 This measure would repeal an excise tax imposed on the sale or exchange of certain
9 long-term capital assets by individuals who have annual capital gains of over
10 \$250,000. The tax applies to the sale or exchange of stocks, bonds, and certain other
11 long-term capital assets, but exempts real estate, retirement accounts, and certain
other assets. This repeal would operate retroactively to January 1, 2022, as well as
prospectively.

12 Pet., Ex. C.

13 Petitioner timely filed this ballot title challenge on April 13, 2022. *See generally*
14 Pet. The Sponsor also filed a challenge on April 11, 2022 (“Sponsor’s Pet.”).³

15 **III. ARGUMENT AND AUTHORITY**

16 **A. The Ballot Title and Summary Must Accurately, Informatively, and**
17 **Impartially Describe the Essential Contents of the Measure**

18 For any initiative measure, the “ballot title”—which appears on each voter’s ballot and on
19 petitions to qualify the measure for the ballot, RCW 29A.72.050, .120—consists of two
20 components. First, a “statement of the subject” of the measure, not to exceed ten words, that is
21 “sufficiently broad to reflect the subject of the measure [and] sufficiently precise to give notice
22 of the measure’s subject matter.” RCW 29A.72.050(1). Second, a “concise description” of the
23 measure, not to exceed 30 words, that is a “a true and impartial description of the measure’s
24 essential contents” and “not, to the extent reasonably possible, . . . prejudic[ial] either for or
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27 ³ A third petition (Cause No. 22-2-00738-34), filed by Tim Eyman, was withdrawn.

1 against the measure.” *Id.*⁴ Ballot titles are important tools to voters: “often voters will not reach
2 the text of a measure or the explanatory statement, but may instead cast their votes based upon
3 the ballot title” alone. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 217, 11
4 P.3d 762 (2000). Thus, a ballot title must “give[] notice which would lead to an inquiry into the
5 body of the act or indicate[] the scope and purpose of the law.” *Id.*; *Municipality of Metro.*
6 *Seattle v. City of Seattle*, 57 Wn.2d 446, 451, 357 P.2d 863 (1960) (“A ballot title must apprise a
7 voter of the proposal being considered.”).

9 In addition, a “summary of the measure,” not to exceed 75 words, must be included along
10 with the ballot title on all petitions for signature. RCW 29A.72.060.⁵ The summary does not
11 appear on voters’ ballots. *Id.*

12 It is the Attorney General’s responsibility to craft each ballot measure’s title and
13 summary, subject to review and final resolution in this Court. *See* RCW 29A.72.060, 080. This
14 Court has the responsibility to conduct a de novo review of the ballot title in light of the
15 proposed measure and the Petitioner’s objections. RCW 29A.72.080. This Court’s task is to
16 determine what formulation would convey most accurately, completely, and impartially the
17 “subject matter” and “essential contents” of the measure. RCW 29A.72.050.

19 Finally, because this initiative is a simple repeal of a legislative enactment, as opposed to
20 affirmatively enacting new legislation, deference should be given to the Legislature’s description
21 of the tax as an excise tax. It is not the place of this Court to substitute its characterization of
22 legislation in a ballot title challenge.

24 _____
25 ⁴ For the statement of subject, the words, “The legislature passed . . . Bill. No. . . . concerning,” do not count toward
26 the 10-word limit. RCW 29A.72.050(5). For the concise description, the words, “This bill would,” do not count
27 toward the 30-word limit. *Id.*

⁵ In contrast to the ballot title statute cited above, the ballot summary statute does not explicitly exclude any words
from the word count. Accordingly, it generally is accepted that the words “This bill would” *do* count towards the 75-
word limit in the summary.

1 **B. The Attorney General’s Ballot Title and Summary Should Be Amended**

2 The Petitioner proposes six revisions to the Attorney General’s title and summary, which
3 will make them more accurate and informative to voters. First, the statement of subject should be
4 amended to specify that I-1929 concerns not just “taxes,” but would repeal a capital gains excise
5 tax that funds education. Second, the concise description should more accurately and
6 informatively convey the scope and true impact of the measure—namely, that repealing the tax
7 would eliminate approximately \$500 million per year in K-12 education and early-learning
8 program funding. Third, the concise description should be amended to identify the small
9 business asset exemption from the tax, and thereby identify all major asset exemptions. Fourth,
10 instead of stating “annual capital-gains,” which may be confusing to the average voter, the
11 concise description should state “annual profit,” which is a more accurate and plain language
12 description of what is actually being taxed. Fifth, some additional minor revisions are warranted
13 to improve readability and fit the statutory word limit. Sixth, the ballot summary should be
14 amended to reflect the above changes to the concise description and the asset exemptions, among
15 other revisions for consistency and clarity.
16
17

18 **1. The statement of subject should more precisely state that I-1929 repeals a capital**
19 **gains excise tax that funds education**

20 The Attorney General’s proposed statement of subject is not “sufficiently precise to give
21 notice of the measure’s subject matter.” RCW 29A.72.050(1). As explained above, the purpose
22 of ESSB 5096 is to fund education with revenue from an excise tax on capital gains. ESSB 5096
23 §§ 1-3. While the Attorney General’s simple description of the law as concerning “taxes” is not
24 inaccurate, it is not nearly as precise as it can or should be. By stating generally that the subject
25 of I-1929 is “taxes,” the statement fails to convey to voters that the measure does not seek merely
26 to add to the contours of Washington’s existing tax regime, but instead seeks to substantially
27

1 alter the existing tax regime in Washington by repealing an entire category of tax. The term
2 “repeal” should be included in the statement of subject.

3 Next, using the generic term “taxes” does not accurately express the Legislature’s
4 purpose in adopting an “excise tax.” The repeal does not involve a property tax, or a sales tax, or
5 a B&O tax, or a tax on wages. While the courts can assess the Legislature’s characterization of a
6 tax in litigation about the constitutionality of the tax, a ballot title challenge is not the proper
7 forum to do so. Here, the Legislature specifically intended and termed this an “excise tax.” In
8 this forum, the Court should defer to the Legislature.

9
10 Finally, even if an average voter was aware that this measure would repeal a tax, the
11 average voter may be led to believe that revenue from the tax is directed to the state’s general
12 fund and in turn may be used for any government purpose. That would be prejudicial and an
13 incorrect understanding. As explained above, revenue from the tax is dedicated exclusively to
14 fund education and fulfill the state’s “paramount duty . . . to amply provide every child in the
15 state with an education.” ESSB 5096 § 1. As proposed, the statement of subject fails to put the
16 average voter on notice that the measure would eliminate a significant source of revenue for
17 education funding.

18
19 To remedy the overbreadth of the Attorney General’s formulation and more precisely
20 convey the core effect of the law, the statement of subject should be revised to identify that the
21 initiative repeals a capital gains excise tax that funds education. This revision is also more
22 consistent with the level of detail that the Attorney General has used to describe the subjects of
23 past ballot measures. *See, e.g.*, I-1704 (“Initiative Measure No. 1704 concerns funding forest
24 health and wildfire prevention and preparedness.”); I-1568 (“Initiative Measure No. 1568
25 concerns withholding state funds from municipalities for obstructing federal immigration
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1 efforts.”); I-1437 (“Initiative Measure No. 1437 concerns establishing a cap and trade system for
2 greenhouse gas emissions.”); I-1356 (“Initiative Measure No. 1356 concerns funding for cancer
3 research, prevention, and care.”).⁶

4 This level of detail also better comports with the ballot title statute, which allows up to
5 ten words to convey the subject of a measure. RCW 29A.72.050(1). The Court can and should
6 use more than one word out of 10 allotted to provide a “sufficiently precise” description of I-
7 1929.
8

9 A more precise statement of subject would read as follows:

10 Statement of Subject: Initiative Measure 1929 concerns ~~taxes~~ repealing a capital gains
11 excise tax that funds education.

12 **2. The concise description should be revised**

13 In addition to the statement of subject, the concise description can be improved in several
14 ways to more accurately and informatively convey the essential contents of I-1929.

15 First, the Attorney General’s proposed concise description suffers from the same error of
16 omission as the statement of subject: it fails to indicate that the measure would eliminate a
17 significant source of funding for education programs and services, and thus deprives voters of
18 information and context necessary to understand the measure’s scope and function. As noted
19 above, repealing the capital gains excise tax will eliminate approximately \$500 million per year in
20 K-12 education and early learning and child care funding. Yet the proposed concise description
21 makes no mention of education or the consequences of the repeal. The omission of this significant
22 impact deprives voters of information necessary to understand the true impact of the measure, its
23 scope, and the Legislature’s purpose in enacting the tax: to fund education. RCW 29A.72.050(1)
24
25

26
27 ⁶ The ballot titles for current and past ballot measures can be found on the Secretary of State’s website. *See*
<https://www.sos.wa.gov/elections/initiatives/> (last visited April 15, 2022).

1 (concise description must describes “the measure’s essential contents” and “clearly identify the
2 proposition to be voted on”).

3 Identifying this impact in the concise description is especially warranted because many (if
4 not most) voters will not review the full bill text. *See Washington Fed’n of State Employees v.*
5 *State*, 127 Wn.2d 544, 554, 901 P.2d 1028 (1995) (“We can safely assume that not all voters will
6 read the text of the initiative or the explanatory statement. Some voters may cast their votes based
7 on the ballot title as it appears on their ballots.”) (cleaned up). Thus, the ballot title *itself* must
8 convey the practical significance of a repeal of the capital gains excise tax, not just the technical
9 consequences of the measure on the tax collection process. Here, voters should be informed that
10 I-1929 would eliminate a significant dedicated funding source for K-12 education and early
11 learning and child care programs. Moreover, as noted above this addition will avoid any confusion
12 that the excise tax revenue would otherwise go to the general fund. The public’s potential concern
13 about the scope of government spending is substantially ameliorated where, as here, the
14 Legislature specifies how new revenue will be spent.

17 To comply with the ballot title statute, the concise description should be revised to state that
18 the tax is “dedicated to fund education.” With this revision—which adds only four words to the
19 concise description—the ballot title will more clearly and informatively convey to voters the scope
20 and actual impact of the measure, or least put inquiring voters on notice that they should investigate
21 the funding consequences further. *See Amalgamated Transit Union Local 587*, 142 Wn.2d at 217.

23 Second, although the Attorney General’s concise description properly identifies that
24 retirement accounts and real property are exempt from the tax, it should be revised and improved
25 to convey that small business are also exempt. In crafting ESSB 5096, the Legislature specifically
26 called out the three most significant asset classes exempt from the tax: “The legislature further
27

1 intends to exempt certain assets from the tax including, but not limited to, qualified family-owned
2 small businesses, all residential and other real property, and retirement accounts.” ESSB 5096 § 1.
3 It is inappropriate and unnecessary for the Attorney General to omit any of the three exemptions
4 that the Legislature explicitly identified and that are, as a practical matter, the most significant
5 asset exemptions in the law. Adding “small businesses” to the existing list will improve the
6 informative value of the concise description with only two additional words and would not require
7 material changes to any other portion of the concise description.
8

9 Third, the Attorney General’s concise description somewhat confusingly states that the tax
10 applies to “annual capital-gains.” While not inaccurate, a reasonably informed voter may not
11 understand what a “capital-gain” is, even with the additional context provided in the concise
12 description. *See Garfield Cnty. Transp. Auth. v. State*, 196 Wn.2d 378, 398, 473 P.3d 1205 (2020)
13 (ballot title should “read as the average informed voter would read it”). Under ESSB 5096, the
14 gain that the tax applies to is the profit made on the annual sale or exchange of the enumerated
15 capital assets—i.e. the difference between the sale price and the purchase price of the asset. That
16 difference is the profit to the seller. Thus, the concise description should be revised to more clearly
17 state that the tax applies to “annual profit,” which is a more plain and understandable term, free of
18 technical tax jargon, and true as a factual matter.
19

20 Fourth, the phrase “stocks and certain other capital assets” should be revised to “capital
21 assets (e.g., stocks/bonds),” which uses one fewer word and informs voters of an additional type
22 of asset that qualifies as a capital asset for purposes of the tax. This minor revision will improve
23 readability and keep the concise description within the 30-word limit.
24

25 In sum, the concise description should be revised to read as follows:
26
27

1 Concise Description: This measure would repeal a 7% excise tax on annual ~~capital gains~~
2 individual profits above \$250,000 ~~by individuals~~ from the sale/exchange of ~~stocks and~~
3 ~~certain other~~ capital assets (e.g., stocks/bonds) dedicated to fund education, ~~(the tax~~
~~exempts real estate~~ exempting property, and retirement accounts, and small businesses.

4 **3. The summary should be revised for the same reasons, and to eliminate**
5 **redundancy**

6 The ballot summary should be revised to correct the same deficiencies in the ballot title
7 discussed above. In addition, the summary as drafted is redundant, and to improve clarity, should
8 be revised to omit that redundancy. The Attorney General’s summary states that the initiative
9 would repeal an “excise tax imposed on the sale or exchange of certain long-term capital assets,”
10 and then again states “[t]he tax applies to the sale or exchange of stocks, bonds, and certain other
11 long-term capital assets.” The summary does not need to define the tax twice. Instead, the
12 redundancy should be removed and the summary should instead inform voters that repeal of the
13 tax would eliminate \$500 million per year in K-12 education and early learning program funding.
14 With these revisions, the summary will be clear, informative, and consistent with the ballot title as
15 revised by Petitioner.
16

17 In sum, the ballot measure summary should be revised to read as follows:

18 Ballot Measure Summary: This measure would repeal a 7% excise tax ~~imposed on~~
19 ~~the sale or exchange of stocks, bonds, and certain other~~ long-term capital assets by
20 ~~individuals with who have annual capital gains profit~~ over \$250,000. The tax
21 ~~applies to the sale or exchange of stocks, bonds, and certain other long term capital~~
22 ~~assets-exempts real estate, retirement accounts, small businesses, and certain other~~
23 ~~assets. The tax generates approximately \$500 million a year that is dedicated to~~
24 fund K-12 education and early learning programs. This repeal would operate
25 retroactively to January 1, 2022, as well as prospectively.

26 **IV. RESPONSE TO SPONSOR’S PETITION**

27 In contrast to the Attorney General’s imperfect but neutral and largely informative ballot
title, the Sponsor’s alternative fails to satisfy the basic requirements of the ballot title statute and
deprives voters of critical information and context necessary to understand the scope and

1 function of the measure, including what a capital gain is, what types of assets are exempt, and
2 that the tax is an excise tax. Removal of this information from the ballot title and adding the term
3 “income” would prejudice the electorate in favor of the measure, and would be especially
4 inappropriate given that the Sponsor’s alternative concise description is only 20 words—10
5 fewer than allotted by the ballot title statute. The Court should reject these suggestions and, like
6 the Attorney General, use all 30 words to convey the essential contents of I-1929.

8 **A. The Sponsor’s Concerns About Word Count and Clarity are Without Merit**

9 The Sponsor first argues that the Attorney General’s concise description exceeds the 30-
10 word limit because words connected with hyphens and slashes do not count as one word.
11 Sponsor Pet. ¶ 21. But words connected by hyphens and slashes are considered one word by
12 Washington courts in determining compliance with word limits in briefs based on the word count
13 function in Microsoft Word.⁷ There is no reason a different rule should apply to ballot titles. In
14 fact, ballot titles and summaries regularly employ hyphens and slashes to ensure that important
15 information about a measure is provided to voters within the prescribed word limit. *See, e.g.*, I-
16 1912 (“This measure would prohibit government limitations on law-abiding citizens’ right to
17 purchase/own firearms/ammunition for personal protection absent a uniform federal standard,
18 limit government confiscation, and prohibit a governmental registry of such
19 firearms/ammunition.”).⁸

24 ⁷ *See, e.g.*, Washington Courts, Washington State Appellate Filings Word Counts, <https://bit.ly/3uB67QX> (last
25 visited April 13, 2022).

26 ⁸ Even if the argument did have merit, the Sponsor’s concern can easily be addressed with minimal revisions. For
27 example:

Concise Description: This measure would repeal a 7% excise tax on annual individual profits
above \$250,000 from selling or exchanging capital assets (e.g., stocks) dedicated to fund
education, exempting property, retirement accounts, and small businesses.

1 Nor is there any risk that these commonly used and understood grammatical conventions
2 or other phrasing in the concise description will cause confusion for voters. No average voter
3 would believe, for example, that the ballot title’s reference to “sale/exchange” refers to the sale
4 or exchange of human beings and not capital gains. Sponsor Pet. ¶ 22. An average voter also
5 would not conclude that the capital gains excise tax “is imposed by individuals rather than by the
6 state”—which would make no sense.⁹ *Id.*

8 The Attorney General’s syntax complies with the ballot title statute’s word requirement
9 and clearly describes the essential contents of I-1929. The Sponsor’s criticisms are unavailing,
10 and in any case they could be easily remedied without the drastic and prejudicial changes the
11 Sponsor proposes.

12 **B. The Attorney General Correctly Describes the Tax as an Excise Tax**

13 The Sponsor next belabors through a misplaced argument that the ballot title improperly
14 labels the tax as an “excise” tax. Sponsor Pet. ¶¶ 23-24. But a ballot title appeal is not the forum
15 to litigate the Legislature’s classification of a tax or its legality. The Legislature enacted an
16 “*excise tax* on the sale or exchange of certain capital assets.” ESSB 5096 § 5 (emphasis added);
17 *see also id.* § 11. That is the language used in the law that I-1929 seeks to repeal, and it is the
18 language that should be used in the ballot title and summary as well.

19 The Sponsor references an ongoing lawsuit where classification of the tax is being
20 litigated, Sponsor Pet. ¶ 24, but provides no authority to support either the proposition that (1) a
21 ballot title challenge is the proper forum to address the issue or (2) that another superior court’s
22 ruling—which is currently on appeal—warrants disregarding the Legislature’s intentional
23 decision to classify the capital gains tax as an excise tax for purposes of crafting a ballot title.
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⁹ This concern also can be easily remedied, such as by replacing “by” with “per.”

1 That the trial court decision will be on appeal when the measure appears on the ballot is even
2 more reason to defer to the classification provided in the law by the Legislature.

3 The Sponsor also bases his argument on strained parallels to the Internal Revenue Service
4 (“IRS”). Sponsor’s Pet. at ¶ 23. How the IRS computes and collects federal taxes does not bear
5 on the tax at issue here. The mere fact that voters may have some familiarity with federal capital
6 gains taxes paid to the IRS does not somehow convert the tax at issue in I-1929 into an income
7 tax or warrant disregarding how it is actually classified in Washington law. The Legislature
8 crafted this tax, not the federal government, and its interpretation and classification should
9 control.
10

11 In sum, a ballot title appeal is not the forum for resolving the constitutional issues raised
12 by initiatives. The best practice is to use the same phrasing that the initiative itself does—or, in
13 this case, the law to be repealed by the initiative. Here, that is “excise” tax. The Sponsor’s
14 alternative improperly removes this important clarification. The Court should decline the
15 Sponsor’s offer to disregard the Legislature and the language of the law.
16

17 **C. The Concise Description Clearly States the Tax is Annual**

18 Ignoring the full language of the ballot title and summary, the Sponsor also argues that
19 describing the tax as applying to “the sale/exchange of stocks” will lead voters to inaccurately
20 conclude that the tax operates on a per transaction basis and not on an annual basis. Sponsor’s
21 Pet. ¶ 25 (“But the capital gains tax is annual”). This concern is unfounded. The ballot title
22 expressly states that it will repeal an “excise tax on *annual* capital-gains above \$250,000 by
23 individuals from the sale/exchange of stocks and certain other capital assets.” (emphasis added.)
24 The same is true for the summary: “annual capital gains of over \$250,000.” This formulation
25 conveys clearly to the average voter that the tax applies to *annual* profit above \$250,000 from
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1 selling certain capital assets. The Sponsor’s convoluted challenge is a solution in search of a
2 problem, and its proposed alternative premised on this challenge should be rejected. Instead, the
3 Court should adopt the Attorney General’s formulation, with the improvements offered by
4 Petitioner.

5
6 **D. The Concise Description Should Describe the Major Assets Exempt from the Tax**

7 The Sponsor also faults the Attorney General’s concise description for identifying two
8 significant assets that are exempt from the tax: real estate and retirement accounts. Sponsor’s Pet.
9 ¶ 26. The Sponsor first objects that this would mislead voters into thinking that these assets are
10 the only ones that are exempt. *Id.* Given the comprehensive nature of the capital gains excise tax,
11 there is little reason to believe that an average voter would conclude that no other type of credit,
12 deduction, or exemption applies. Even if this concern were valid, though, it can easily be
13 remedied with the addition of a simple “e.g.” or “for example” before identifying the exempt
14 assets.
15

16 The Sponsor also argues that the concise description is insufficiently precise because
17 some types of retirement accounts do not qualify for the exemption. Sponsor Pet. ¶ 26. But it
18 would be impossible to fully define every type of retirement account while still complying with
19 the 30-word limit. That is why when a measure includes exemptions, past concise descriptions
20 indicate the general category of the thing that is exempted. *See, e.g.*, I-865 (“exempting diet
21 supplements from sales tax”); I-883 (“tax exemptions for transportation project labor and
22 materials”).
23

24 Regardless, the Sponsor’s alternative concise description is far more problematic. In
25 contrast to the Attorney General’s informative and accurate identification of applicable
26 exemptions, the Sponsor proposes a generic and unhelpful one: “certain credits, deductions, and
27

1 exemptions.” Sponsor Pet. at 7. This formulation fails to convey to voters that the law does not
2 contain mere routine tax exemptions and deductions, but rather it exempts significant and
3 commonly held assets. Identifying these assets is the best way to “clearly identify the proposition
4 to be voted on.” RCW 29A.72.050(1).
5

6 Replacing the exemptions with this overbroad phrasing would be especially improper
7 considering the Sponsor’s alternative is only 20 words—10 below the 30-word limit for concise
8 descriptions. RCW 29A.72.050(1). There is no reason to use fewer words than permitted to
9 explain this law, especially when doing so would omit from the concise description information
10 and detail necessary to understand the scope of the measure.

11 In sum, the Attorney General’s concise description properly identifies two of the major
12 assets exempt from the tax and should be amended to identify the third, small businesses. The
13 Sponsor’s arguments with respect to exemptions are not well-founded, and the alternative
14 premised on these arguments would be decidedly less helpful and informative to the average
15 voter.
16

17 V. CONCLUSION

18 In contrast to the Attorney General’s imperfect but neutral and largely accurate ballot title
19 and description, the Sponsor’s alternative distorts these important voters tools into generalized
20 and at times prejudicial statements devoid of information and detail necessary to understand the
21 measure under consideration. The Court should reject the Sponsor’s alternative and revise the
22 Attorney General’s ballot title and summary according to the Petitioner’s revisions. The
23 Petitioner’s revisions will more clearly and informatively convey the essential contents of I-1929
24 to voters. With these improvements, the ballot title and summary would read as follows:
25
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27

1 **Ballot Title**

2 **Statement of Subject:** Initiative Measure 1929 concerns repealing a capital gains excise tax that
3 funds education.

4 **Concise Description:** This measure would repeal a 7% excise tax on annual individual profits
5 above \$250,000 from the sale/exchange of capital assets (e.g., stocks/bonds) dedicated to fund
6 education, exempting property, retirement accounts, and small businesses.

6 **Ballot Measure Summary**

7 This measure would repeal a 7% excise tax on the sale or exchange of stocks, bonds, and certain
8 other long-term capital assets by individuals with annual profit over \$250,000. The tax exempts
9 real estate, retirement accounts, small businesses, and certain other assets. The tax generates
10 approximately \$500 million a year that is dedicated to fund K-12 education and early learning
11 programs. This repeal would operate retroactively to January 1, 2022, as well as prospectively.

11 DATED this 19th day of April, 2022.

12 PACIFICA LAW GROUP LLP

13
14 By: s/ Paul J. Lawrence
15 Paul J. Lawrence, WSBA #13557
Kai A. Smith, WSBA #54749

16 *Attorneys for Petitioner No Tax Cut for the*
17 *Super Rich*

1 **CERTIFICATE OF SERVICE**

2
3 On the 19th day of April, 2022, I caused to be served, via electronic mail, a true copy of
4 the foregoing document upon the parties listed below:

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18 DATED this 19th day of April, 2022.

19
20
21 

22
23 _____
24 Sydney Henderson

ATTORNEY GENERAL'S RESPONSE TO PETITIONS CHALLENGING BALLOT TITLE AND
MEASURE SUMMARY FOR INITIATIVE MEASURE NO. 1929

1 Hearing date: April 28, 2022
2 Hearing time: 2:30 pm
3 Judge/Calendar:
4 Hon. Indu Thomas/Civil

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7
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9 **STATE OF WASHINGTON**
THURSTON COUNTY SUPERIOR COURT

10 In re:

11 CHALLENGE TO BALLOT TITLE
12 AND MEASURE SUMMARY FOR
13 INITIATIVE MEASURE NO. 1929

NO. 22-2-00796-34 ✓
NO. 22-2-00836-34
(consolidated)

ATTORNEY GENERAL'S
RESPONSE TO PETITIONS
CHALLENGING BALLOT TITLE
AND MEASURE SUMMARY FOR
INITIATIVE MEASURE NO. 1929

14
15
16 **I. NATURE OF THE CASE**

17 This is a special statutory proceeding contesting the ballot title and measure summary
18 prepared by the Attorney General's Office, as directed in RCW 29A.72.060, for Initiative
19 Measure No. 1929 to the People. The Petitioners in No. 22-2-00796-34 are Repeal the
20 Capital Gains Income Tax, and initiative sponsor J. Vander Stoep (Sponsors). The Petitioner in
21 No. 22-2-00836-34 is No Tax Cut for the Super Rich (Opponent). This is a consolidated case of
22 two challenges to the same ballot title.

23 **II. STATEMENT OF THE CASE**

24 **A. Statutory Framework**

25 The Attorney General is responsible for formulating a ballot title and summary for each
26 initiative measure received from the Secretary of State's Office. RCW 29A.72.060. The ballot

1 title must contain (a) a statement of subject of the measure; (b) a concise description of the
2 measure; and (c) a question whether the measure should be enacted into law.
3 RCW 29A.72.050(1)¹; *Wash. Ass’n for Substance Abuse & Violence Prevention v. State*, 174
4 Wn.2d 642, 655, 278 P.3d 632 (2012).

5 **The statement of subject** “must be sufficiently broad to reflect the subject of the
6 measure” and “sufficiently precise to give notice of the measure’s subject matter.” It cannot
7 exceed ten words. RCW 29A.72.050(1). The ten words begin after the statutorily mandated
8 phrase, “Initiative Measure No. . . . concerns.” *Id.*

9 **The concise description** must be a “true and impartial description of the measure’s
10 essential contents, clearly identify the proposition to be voted on, and not, to the extent
11 reasonably possible, create prejudice either for or against the measure.” *Id.* It cannot exceed
12 thirty words. *Id.* The word count begins after the statutorily mandated phrase, “This measure
13 would . . .” RCW 29A.72.050.

14 In addition to preparing a ballot title, the Attorney General is charged with providing the
15 Secretary of State with a **summary of the measure**, “not to exceed seventy-five words.”
16 RCW 29A.72.060.

17 The ballot title appears on petitions circulated for the measure (RCW 29A.72.120), in the
18 Voters Pamphlet if the measure qualifies to appear on the ballot (RCW 29A.32.070), and on the
19 ballot itself (RCW 29A.72.050). The ballot summary appears on all petitions directly following
20 the ballot title. RCW 29A.72.090.

21 **B. Attorney General Practice**

22 Each ballot title is prepared by an attorney in the Solicitor General’s Office, who gathers
23 information as necessary from assistant attorneys general who are subject matter experts. Each
24 title is also typically reviewed by at least two other attorneys in the Solicitor General’s Office
25 before it is sent to the Secretary of State.

26 ¹ RCW 29A.72.050 and .060 are Attachment A to this brief.

1 **C. Ballot Title and Summary of Initiative 1929**

2 As required in RCW 29A.72.050 and .060, the Attorney General prepared a ballot title
3 and summary for I-1929 that is set forth *infra* in a table at pages 6-7². The ballot title was filed
4 with the Secretary of State on April 6, 2022. On April 11, 2022, the Petitioners Repeal the Capital
5 Gains Income Tax and J. Vander Stoep challenged the title and summary. On April 3, 2022,
6 No Tax Cut for the Super Rich challenged the title and summary.

7 **III. STANDARD OF REVIEW**

8 An appeal of a ballot title or summary is heard by the Thurston County Superior Court
9 under RCW 29A.72.080. The court’s decision “shall be final,” is heard without costs to either
10 party, and is not subject to appeal. RCW 29A.72.080; *Kreidler v. Eikenberry*, 111 Wn.2d 828,
11 834, 766 P.2d 438 (1989).

12 The ballot title and summary must satisfy the statutory standards in RCW 29A.72.050(1)
13 and .060, as set out in Section II.A. above. The Attorney General’s formulation of the ballot title
14 and summary should stand unless a challenger demonstrates that the formulation is statutorily
15 deficient.

16 The ballot title “need not be an index to the contents, nor must it provide details of the
17 measure.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 217, 11 P.3d 762 (2000)
18 (*ATU*); *Wash. Fed’n of State Emps. v. State*, 127 Wn.2d 544, 555, 901 P.2d 1028 (1995). Where
19 the ballot title would lead to an inquiry into the body of the act, it has given notice to the voter about
20 what he or she is asked to decide. *Wash. Fed’n of State Emps.*, 127 Wn.2d at 555.

21 **IV. SUMMARY OF ARGUMENT**

22 The Attorney General’s ballot title and measure summary for I-1929 meet the statutory
23 requirements. The statement of subject is sufficiently broad to reflect the measure’s subject and
24 sufficiently precise to give notice of the measure’s subject matter. The concise description covers

25 _____
26 ² The ballot title and ballot measure summary is Attachment B to this brief. Ballot titles and ballot
measure summaries are also available at <https://www.sos.wa.gov/elections/initiatives/referenda.aspx?y=2022>.

1 the measure’s primary effect in a true, impartial, and non-prejudicial manner and provides voters
2 with adequate notice. The ballot measure summary requires no revision.

3 Both challengers’ objections to the title’s listing of key exemptions to the tax lack merit.
4 Retirement accounts and real estate are the two statutory exemptions that the average voter is
5 most likely to find relevant in deciding whether to vote to repeal the tax. Providing more detail
6 would jeopardize compliance with word limits, while providing less detail would fail to
7 recognize that these exemptions are not just two of many but are different in kind from other
8 exemptions in the statute.

9 Although the Opponent’s suggestion to state that the tax to be repealed funds education
10 is reasonable and accurate, it would ultimately prove duplicative of the newly-enacted “public
11 investment impact disclosure,” and thereby create prejudice against the measure by granting
12 double emphasis to one feature of the tax proposed for repeal.

13 The Sponsors’ concerns for the statutory word count are meritless, given that hyphens
14 and slashes may be used flexibly in common usage and in ballot titles specifically, but more
15 importantly they are moot should the Court choose to use the Attorney General’s alternative
16 ballot title, which is the same as one ordered by another department of this Court for I-1918,
17 which would repeal the same law I-1929 seeks to repeal. Use of the final ballot title for I-1918
18 would also address the Sponsors’ objection to “excise,” which in any event reasonably matches
19 the Legislature’s own description of the tax that the measure would repeal.

20 The petitions should be denied. In the alternative, the Court should order use of the
21 Attorney General’s alternative ballot title that uses the language approved in the challenge of the
22 ballot title for I-1918.

23 V. ARGUMENT

24 A. Statutory and Constitutional Considerations Related to the Concise Description

25 This Court’s review of the ballot title (statement of subject and concise description) and
26 ballot measure summary for I-1929 is guided by both statutory and constitutional considerations.

1 The statutory requirements are set forth in RCW 29A.72.050(1). The statement of subject
2 is limited to 10 words and must be “sufficiently broad to reflect the subject of the measure” and
3 “sufficiently precise to give notice of the measure’s subject matter.” *Id.* The concise description
4 is limited to 30 words and must “be a true and impartial description of the measure’s essential
5 contents, clearly identify the proposition to be voted on, and not, to the extent reasonably
6 possible, create prejudice either for or against the measure.” *Id.*

7 The constitutional considerations arise from “subject-in-title” requirements of article II,
8 section 19 of the Washington Constitution. The ballot title must “‘give[] notice that would lead
9 to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of
10 the law.’” *Garfield Cnty. Transp. Auth. v. State*, 196 Wn.2d 378, 398, 473 P.3d 1205 (2020)
11 (quoting *Young Men’s Christian Ass’n v. State*, 62 Wn.2d 504, 506, 383 P.2d 497 (1963)). But
12 the ballot title “‘need not be an index to its contents; nor is the title expected to give the details
13 contained in the bill.’” *Id.* (quoting *Wash. Fed’n of State Emps.*, 127 Wn.2d at 555). A ballot title
14 may not be deceptive, misleading, or false. *Id.* A ballot title might not provide adequate notice if it
15 fails to indicate that a term used in the initiative “has a meaning broader than its common meaning.”
16 *ATU*, 142 Wn.2d at 227.

17 While the constitutionality of the initiative is not directly before this court, these
18 considerations appropriately inform the process of drafting and reviewing ballot titles. *See*
19 *Coppernoll v. Reed*, 155 Wn.2d 290, 297-99, 119 P.3d 318 (2005) (holding that substantive pre-
20 election review of the constitutionality of initiatives is limited to the scope of the initiative power).

21 **B. The Attorney General’s Title and Various Alternatives**

22 The parties’ briefing proposes four different ballot titles and summaries for the Court’s
23 consideration—including an alternative that the Attorney General will now place onto the table. To
24 place these side-by-side for convenience of comparison:

Attorney General's Original	Sponsors' Proposal	Opponent's Proposal	Attorney General's Alternative³
<u>Statement of Subject:</u> Initiative Measure No. 1929 concerns taxes. [1 word]	<u>Statement of Subject:</u> Initiative Measure No. 1929 concerns taxes. [1 word]	<u>Statement of Subject:</u> Initiative Measure 1929 concerns repealing a capital gains excise tax that funds education. [9 words]	<u>Statement of Subject:</u> Initiative Measure No. 1929 concerns taxes. [1 word]
<u>Concise Description:</u> This measure would repeal a 7% excise tax on annual capital-gains above \$250,000 by individuals from the sale/exchange of stocks and certain other capital assets (the tax exempts real estate and retirement accounts). [30 words]	<u>Concise Description:</u> This measure would repeal a 7% tax on individuals with annual capital gains income above \$250,000, subject to certain credits, deductions, and exemptions. [20 words]	<u>Concise Description:</u> This measure would repeal a 7% excise tax on annual individual profits above \$250,000 from the sale/exchange of capital assets (e.g. stocks/bonds) dedicated to fund education, exempting property, retirement accounts, and small businesses. [30 words]	<u>Concise Description:</u> This measure would repeal a 7% tax on annual capital gains above \$250,000 by individuals from the sale of stocks and certain other capital assets (exempting, for example, real estate and retirement accounts). [30 words]
<u>Ballot Measure Summary:</u> This measure would repeal an excise tax imposed on the sale or exchange of certain long-term capital assets by individuals who have annual capital gains of over \$250,000. The tax applies to the sale or exchange of stocks,	<u>Ballot Measure Summary:</u> This measure would repeal a 7% tax on annual capital gains income above \$250,000. The tax is levied only on natural persons, not on corporations, and is based upon an individual's annual federal income tax filing. The tax	<u>Ballot Measure Summary:</u> This measure would repeal a 7% excise tax on the sale or exchange of stocks, bonds, and certain other long-term capital assets by individuals with annual profit over \$250,000. The tax exempts real estate, retirement accounts,	<u>Ballot Measure Summary:</u> This measure would repeal a 7% tax imposed on the sale or exchange of certain long-term capital assets by individuals who have annual capital gains of over \$250,000. The tax applies to the sale or exchange of stocks, bonds, and

³ The Attorney General's Alternative is the same as the title recently revised by another department of this Court with regard to an appeal of the title of Initiative 1918, a substantively virtually-indistinguishable initiative proposed by a different sponsor. The exception is that the Attorney General's Alternative proposes changes to the ballot measure summary that are consistent with the changes made for I-1918, which were not at issue in that appeal. When multiple initiatives are presented that propose to do the same thing, here repealing the capital gains tax, consistent approaches as to the various measures are important. Without that consistency sponsors may choose from among an array of measures that propose the same thing based solely on which title they deem advantageous. Indeed, there would be no legal impediment to the sponsors of I-1929 circulating petitions in support of I-1918. Opponent has no countervailing power, and thus inconsistency potentially leads to a lack of impartiality. But this is only one relevant concern, because a prior appeal does not bind the Court in the present case and the different arguments and ideas offered by the parties here are not rendered irrelevant by a prior ruling in a case to which they were not parties.

<p>bonds, and certain other long-term capital assets, but exempts real estate, retirement accounts, and certain other assets. This repeal would operate retroactively to January 1, 2022, as well as prospectively. [68 words]</p>	<p>contains a number of credits and deductions, and it exempts capital gains from defined real estate transactions, qualified retirement accounts, and certain other assets. This repeal would operate retroactively to January 1, 2022, as well as prospectively. [72 words]⁴</p>	<p>small businesses, and certain other assets. The tax generates approximately \$500 million a year that is dedicated to fund K-12 education and early learning programs. This repeal would operate retroactively to January 1, 2022, as well as prospectively. [75 words]</p>	<p>certain other long-term capital assets, but exempts, for example, real estate, retirement accounts, and certain other assets. This repeal would operate retroactively to January 1, 2022, as well as prospectively. [72 words]</p>
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C. The Changes to the Ballot Title and Summary Urged by Either the Sponsors or the Opponent Would Bring About Prejudice Either for or Against I-1929

The Attorney General’s title describes the essential contents of the measure in a true, impartial, and non-prejudicial manner, and clearly identifies the proposition to be voted on. The same cannot be said for the changes urged by either the Sponsors or the Opponent. Their changes would either introduce prejudice in favor of the measure or prejudice against it, according to the policy preferences of the respective parties.

1. The statement of subject fairly describes the subject matter of the measure

The Sponsors urge no changes to the statement of the subject, but Opponent suggests an additional eight words that would, in context, introduce bias and prejudice against the measure. The purpose of the statement of subject is to convey to the voters the general subject of the measure. RCW 29A.72.050(1).

The Opponent’s alternative statement of subject is not a neutral description. Admittedly, Opponent is correct that there can be contexts in which mentioning the use to which tax revenue is dedicated can be entirely appropriate. The legal context of this idea changed this year, because of new legislation on the topic. Substitute House Bill 1876 (SHB 1876), 67th Leg., Reg. Sess.

⁴ The word count displayed in the Sponsors’ Opening Brief is incorrect, apparently because it neglects to include the phrase “this measure would” in the word count.

1 (Wash. 2022), chaptered as Laws of 2022, ch. 114. Under this new law, starting this year any
2 initiative or referendum that “repeals . . . any tax or fee” must include a “public investment
3 impact disclosure.” *Id.*, § 2(1). As the Legislature provided, “[t]he public investment impact
4 disclosure must include a description of the investments that will be affected if the measure is
5 adopted.” *Id.*, § 2(2). The format for the disclosure is to be “This measure would (increase or
6 decrease) funding for (description of services).” *Id.*, § 2(3).

7 The public investment impact disclosure is not part of the ballot title itself. *Id.*, § 2(7). If
8 the measure qualifies to the ballot, however, it will appear *on the ballot* “in the middle of the
9 ballot title, after the concise description and before the question.” RCW 29A.72.050(2) (*as*
10 *amended* by Laws of 2022, ch. 114, § 3(2)).

11 The newly-mandated public investment impact disclosure would convey essentially the
12 information about the effect of I-1929 on education funding that Opponent proposes to inject
13 into the ballot title. This would unduly emphasize a point that a new state law requires to be
14 presented in another manner. This would create prejudice against the measure by doubly
15 emphasizing the information about the effect of I-1929 on education. The addition of the public
16 investment impact disclosure changes the context in which the Court must consider the ballot
17 title, and renders inappropriate a drafting choice for which an argument might otherwise be
18 made.

19 Having said all this, it is also important to note that the Attorney General is not called
20 upon by SHB 1876 to prepare the public investment impact disclosure unless the initiative
21 actually qualifies to the ballot. *See* SHB 1876, § 2(5) (setting a July 23 deadline for filing the
22 disclosure). This means that the disclosure would not appear on petitions during the preliminary
23 stage of qualifying the initiative to the ballot. A potential resolution of this concern would be to
24 mention the statutorily-dedicated purpose of the tax (to fund education) in the ballot measure
25 summary. The summary appears on the petitions, but not on the ballot. RCW 29A.72.090
26 (petition format); RCW 29A.72.050 (ballot contents).

1 Finally, that more detail *could* be added, as Opponent suggests, does not mean it *must* be
2 added. It is sometimes appropriate to use the statement of subject to convey additional information
3 about the measure’s subject matter, but as illustrated by the Attorney General’s original and
4 alternative titles, it is unnecessary to do so. A short, but broadly descriptive, statement of subject
5 can be helpful if the constitutionality of a measure is challenged after enactment. This is because
6 titles drafted in a restrictive way can give rise to a more narrow reading that may raise
7 constitutional issues if the voters approve the measure. *See, e.g., Filo Foods, LLC v. City of*
8 *SeaTac*, 183 Wn.2d 770, 782, 357 P.3d 1040 (2015). Phrases that narrow the statement of subject
9 should thus be avoided, all other considerations being equal.

10 **2. The Concise Description fairly and impartially describes the essential**
11 **contents of I-1929**

12 **a. The Attorney General reasonably identified the key categories**
13 **exempted from the tax the measure would repeal**

14 Both the Sponsors and the Opponent object to the Attorney General’s decision to inform
15 voters that the capital gains tax the measure would repeal does not apply to gains from real estate
16 or retirement accounts—the Sponsor, because they believe this is too much information, and the
17 Opponent because they believe it is too little. Both are mistaken, although if feasible within the
18 word limit the Opponent’s suggestion to add a reference to the exemption for small business
19 would be a desirable addition.

20 Contrary to the Sponsors’ view, the real estate and retirement exemptions are uniquely
21 large and important exemptions from the capital gains tax statute, and it is important that voters
22 know those key limits to the scope of the tax when considering whether to vote for repeal. An
23 important characteristic of the statutes I-1929 proposes to repeal is that the tax has a narrowly-
24 limited scope. It does not apply to capital gains that most voters experience. To omit such
25 information is to mislead voters by suggesting that the tax applies to many transactions that it
26 does not. There is—as illustrated by both the Attorney General’s original and alternative titles,
plenty of room within the concise description to convey this key information. And the alternative

1 title resolves any suggestion that the listed exemptions are exclusive, clarifying that they are
2 partial examples.

3 The Sponsors are wrong to suggest these exemptions are just two of several equally
4 important exemptions. A quick glance at the statute shows that retirement accounts and real
5 estate stand out from the other exemptions as significant assets that a large number of voters are
6 likely to possess and be concerned about—in contrast to: property subject to condemnation or
7 depreciation, livestock, commercial fishing privileges, timber sales revenue, or goodwill from
8 the sale of an auto dealership. RCW 82.87.050. Any reasonable person would recognize that real
9 estate and retirement are the two most significant of those exemptions. The ballot title
10 appropriately mentions them specifically so voters fully understand the scope of the tax subject
11 to repeal.

12 The Sponsors’ proposed language of “certain credits, deductions, and exemptions” is so
13 vague that it is unhelpful or even counterproductive. It provides no sense of the contours or
14 significance of the exemptions, and misleadingly suggests that all are so technical or
15 insignificant that they need not be identified. Although this proposed language technically
16 encompasses a broader swath of exemptions, it deprives voters of key information about the law
17 subject to repeal and makes it harder for them to make an informed decision. The Sponsors’
18 quibble that certain real estate or retirement assets are *not* exempt likewise misses the forest for
19 the trees. The Attorney General’s ballot title provides voters, in straightforward language, the
20 basic information about the scope of the capital gains tax. No more—and no less—is necessary.

21 The Opponent’s proposal to include the qualified family-owned small business
22 deduction, RCW 82.87.070, is initially benign but ultimately too complicated to fairly and
23 concisely implement. Opponent’s characterization of this provision as an “exemption” for “small
24 business” oversimplifies it: the “exemption” is in fact a “deduction,” and it is only gains from
25 the sale of certain family-owned small business assets that qualify for the deduction. An entire
26 section of the law is dedicated to defining that deduction, making it difficult to accurately

1 characterize in two or three words. In particular, leaving out “family-owned” would fail to
2 inform voters of a key limitation on the category subject to the deduction. Moreover, a cursory
3 mention of “small business” would be potentially confusing for voters in that, without further
4 explanation, it seems contradictory to the fact that the tax only applies to individual, rather than
5 corporate, capital gains. Even recognizing that many may find this deduction significant, the
6 Attorney General appropriately declined to include it because it is less straightforward than the
7 retirement and real estate exemptions, likely relevant to fewer voters, and difficult or impossible
8 to accurately characterize in the statutory word limits.

9 **b. The Sponsors’ word-limit and clarity concerns are unfounded**

10 Hyphenating “capital-gains” and using a slash to combine “sale/exchange” are both
11 reasonable drafting choices that maximize the information the concise description can convey.
12 A hyphen is merely a device to combine or divide words or parts of words. As with many aspects
13 of grammar and style, its usage is subject to conventions and preferences but rarely firm rules.
14 “Capital gains” is a term of art that is a combination of both words, and the Attorney General
15 permissibly joined those two words together with a hyphen. Similarly, a forward slash is
16 commonly used in everyday language as shorthand for “or,” such as in “he/she.” The slash in
17 “sale/exchange” reasonably employs this usage for word efficiency.

18 In any event, the Court need not pass on these punctuation choices because the Attorney
19 General offers as an alternative the court-approved ballot title adopted for I-1918, which also
20 repeals the capital gains tax. That title uses “capital gains” without a hyphen and uses “sale” in
21 place of “sale/exchange.” Although there may be certain “exchanges” that are not “sales,” and
22 therefore the Attorney General reasonably sought to be more precise in the title as originally
23 drafted, the term “sale” alone acceptably conveys the basic point.

24 The Sponsors’ other concerns for clarity lack merit. No reasonable person would read
25 the concise description to mean “individuals” rather than the State impose the tax. And capital
26 gains do accrue to individuals—that is, they are “by individuals” even if the individuals are not

1 themselves causing any appreciation. What is important for voters to know, and what the words
2 “by individuals” conveys, is that the tax applies to individuals and not corporations.
3 RCW 82.87.040 (imposing the capital gains tax only on individuals).

4 The Sponsors’ supposed workarounds are worse than any potential confusion in the title
5 as drafted. The tax is not “on individuals,” it is on the capital gains. And it would be improper
6 to use the term “income” in the ballot title when the Legislature itself has not designated the tax
7 as such. Moreover, as the Sponsors point out, the characterization of the tax is in active litigation,
8 and if the Sponsors object to the term “excise” then the term “income” is equally inappropriate.
9 Indeed, although the Attorney General maintains that it is proper to use the terminology the
10 Legislature used for the tax in the statute, it would not object to a ballot title such as that ordered
11 for I-1918, which simply refers to the statute subject to repeal as a “tax” with no descriptor,
12 neither “excise” nor “income.”

13 **c. The Opponent’s suggestion of explaining that the capital gains tax**
14 **funds education is inappropriate for all the reasons previously set**
15 **forth regarding the statement of subject**

16 Opponent is mistaken to argue that the ballot title must detail what the capital gains tax
17 revenue funds. As described above (*see* section V.C.(1), above), the Legislature thought it
18 necessary to require, beginning this year, a separate statement providing such disclosure.
19 SHB 1876. That new law, passed this year, requires a separate, 10 or 15-word “public investment
20 impact disclosure” statement for ballot measures affecting revenue that describes “the
21 investments that will be affected if the measure is adopted.” That the capital gains tax revenue
22 is dedicated to education is useful information that would likely be included in such a disclosure
23 for this measure if it qualifies to the ballot, but not inherently more important than basic
24 information about what the tax is. But, as also noted in discussing the statement of subject,
25 mention of this feature in the ballot measure summary would be unobjectionable and would
26 disclose the purpose of the tax on petition sheets.

1 **3. Changes to the ballot measure summary are unwarranted, except as already**
2 **noted**

3 The Attorney General's responses to challengers' objections to the summary are the same
4 as those with response to the concise description, save for concerns about word limit. Should the
5 Court decide that changes to the concise description are appropriate, or that adoption of the
6 alternative ballot title are appropriate, the Attorney General does not object to corresponding
7 changes to the summary.

8 **VI. CONCLUSION**

9 The Attorney General's formulation of the ballot title and measure summary for Initiative
10 No. 1929 satisfies the statutory standards set out in RCW 29A.72.050(1) and .060. The Court
11 should dismiss the Petitions and affirm the Attorney General's formulation of the ballot title and
12 ballot measure summary for I-1929. Alternatively, the Court should adopt the Attorney
13 General's proposed alternative ballot title.

14 DATED this 22nd day of April, 2022.

15 ROBERT W. FERGUSON
16 *Attorney General*

17 *s/ Jeffrey T. Even*

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1 **CERTIFICATE OF SERVICE**

2 I certify, under penalty of perjury under the laws of the state of Washington, that on this
3 date I served a true and correct copy of the foregoing document via electronic mail, by agreement
4 of the parties, on the following:

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25 DATED this 22nd day of April, 2022, at Olympia, Washington.

26
s/ Leena Vanderwood
LEENA VANDERWOOD
Legal Assistant

RCW 29A.72.050 Ballot title -- Formulation, ballot display. (1) The ballot title for an initiative to the people, an initiative to the legislature, a referendum bill, or a referendum measure consists of: (a) A statement of the subject of the measure; (b) a concise description of the measure; and (c) a question in the form prescribed in this section for the ballot measure in question. The statement of the subject of a measure must be sufficiently broad to reflect the subject of the measure, sufficiently precise to give notice of the measure’s subject matter, and not exceed ten words. The concise description must contain no more than thirty words, be a true and impartial description of the measure’s essential contents, clearly identify the proposition to be voted on, and not, to the extent reasonably possible, create prejudice either for or against the measure.

(2) For an initiative to the people, or for an initiative to the legislature for which the legislature has not proposed an alternative, the ballot title must be displayed on the ballot substantially as follows:

“Initiative Measure No. . . . concerns (statement of subject). This measure would (concise description). Should this measure be enacted into law?

Yes
 No ”

(3) For an initiative to the legislature for which the legislature has proposed an alternative, the ballot title must be displayed on the ballot substantially as follows:

“Initiative Measure Nos. . . . and . . .B concern (statement of subject).

Initiative Measure No. . . . would (concise description).

As an alternative, the legislature has proposed Initiative Measure No. . . .B, which would (concise description).

1. Should either of these measures be enacted into law?

Yes
 No

2. Regardless of whether you voted yes or no above, if one of these measures is enacted, which one should it be?

Measure No.
 or
 Measure No. ”

(4) For a referendum bill submitted to the people by the legislature, the ballot issue must be displayed on the ballot substantially as follows:

“The legislature has passed Bill No. . . . concerning (statement of subject).
This bill would (concise description). Should this bill be:
Approved
Rejected ”

(5) For a referendum measure by state voters on a bill the legislature has passed, the ballot issue must be displayed on the ballot substantially as follows:

“The legislature passed . . . Bill No. . . . concerning (statement of subject) and voters have filed a sufficient referendum petition on this bill. This bill would (concise description). Should this bill be:
Approved
Rejected ”

(6) The legislature may specify the statement of subject or concise description, or both, in a referendum bill that it refers to the people. The legislature may specify the concise description for an alternative it submits for an initiative to the legislature. If the legislature fails to specify these matters, the attorney general shall prepare the material that was not specified. The statement of subject and concise description as so provided must be included as part of the ballot title unless changed on appeal.

The attorney general shall specify the statement of subject and concise description for an initiative to the people, an initiative to the legislature, and a referendum measure. The statement of subject and concise description as so provided must be included as part of the ballot title unless changed on appeal.

[2003 c 111 § 1806. Prior: 2000 c 197 § 1. Formerly RCW 29.79.035.]

RCW 29A.72.060 Ballot title and summary by attorney general. Within five days after the receipt of an initiative or referendum the attorney general shall formulate the ballot title, or portion of the ballot title that the legislature has not provided, required by RCW 29A.72.050 and a summary of the measure, not to exceed seventy-five words, and transmit the serial number for the measure, complete ballot title, and summary to the secretary of state. Saturdays, Sundays, and legal holidays are not counted in calculating the time limits in this section.

[2003 c 111 § 1807. Prior: 2000 c 197 § 2; 1993 c 256 § 9; 1982 c 116 § 4; 1973 1st ex.s. c 118 § 2; 1965 c 9 § 29.79.040 ; prior: 1953 c 242 § 2; 1913 c 138 § 2; RRS § 5398. Formerly RCW 29.79.040.]



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Administration Division
PO Box 40100 • Olympia, WA 98504-0100 • (360) 753-6200

April 6, 2022

The Honorable Steve Hobbs
Elections Division
ATTN: Initiative and Referendum
PO Box 40220
Olympia, WA 98504-0220

Re: Initiative No. 1929

Dear Secretary Hobbs:

Pursuant to RCW 29A.72.060, we supply herewith the ballot title and ballot measure summary for Initiative No. 1929 to the People (an act relating to repealing the tax on capital gains income authorized in chapter 82.87 RCW).

BALLOT TITLE

Statement of Subject: Initiative Measure No. 1929 concerns taxes.

Concise Description: This measure would repeal a 7% excise tax on annual capital-gains above \$250,000 by individuals from the sale/exchange of stocks and certain other capital assets (the tax exempts real estate and retirement accounts).

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

BALLOT MEASURE SUMMARY

This measure would repeal an excise tax imposed on the sale or exchange of certain long-term capital assets by individuals who have annual capital gains of over \$250,000. The tax applies to the sale or exchange of stocks, bonds, and certain other long-term capital assets, but exempts real estate, retirement accounts, and certain other assets. This repeal would operate retroactively to January 1, 2022, as well as prospectively.

Sincerely,

s/ Jeffrey T. Even
JEFFREY T. EVEN
Deputy Solicitor General
(360) 586-0728

ATTACHMENT B

SPONSORS' MEMORANDUM IN OPPOSITION TO PETITIONER'S OPENING BRIEF

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X EXPEDITE
 No hearing set
X Hearing is set
Hearing Date: April 28, 2022
Hearing Time: 2:30 p.m.
Judge/Calendar: Hon. Indu Thomas

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

In the Matter of:)
)
A CHALLENGE TO THE BALLOT TITLE)
AND SUMMARY OF INITIATIVE NO. 1929)
)
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No. 22-2-00796-34

SPONSORS' MEMORANDUM
IN OPPOSITION TO
PETITIONER'S OPENING
BRIEF

1 **I. INTRODUCTION AND SUMMARY OF SPONSORS’ OPPOSITION**

2 The sponsors of I-1929 object to the misleading and prejudicial ballot title proposed by
3 Petitioner No Tax Cut for the Rich (“No Tax Cut”) for several reasons, detailed below.

4 First, No Tax Cut seeks to create prejudice against I-1929 by adding to the proposed
5 ballot title and ballot measure summary argument about the potential consequences of the
6 measure. The assertions No Tax Cut wants to add are demonstrably inaccurate and have no
7 place in what is supposed to be an accurate and neutral statement of the contents of the measure.
8 The Court should reject these suggestions in favor of the title and summary proposed by
9 Sponsors in their appeal and separate brief.

10 No Tax Cut is free of course to press on voters its view of the potential consequences of
11 passing I-1929, and presumably it will do so in the campaign. Opponents of the initiative can
12 make similar arguments in the “statement against” in the voters’ pamphlet. And, if the Office of
13 Financial Management determines the measure would have a negative effect on State revenues, a
14 new law requires the AG to include – in the middle of the ballot title – a “public investment
15 impact disclosure.” This would appear between the concise description and the question
16 presented to voters on the ballot. But the statement of subject, the concise description, and the
17 ballot measure summary are supposed to be accurate and neutral statements on what is in the
18 measure, not argumentative predictions about what might happen if the measure is passed.

19 Second, No Tax Cut wants the title to state that the capital gains tax at issue is an
20 “excise” tax, but this would pick sides in an unsettled court battle over the nature of the tax and
21 create a substantial risk that the ballot title is fatally inaccurate at the time of the vote. The ballot
22 title must be accurate, Const. art. II, § 19, and the only court to have considered the issue has
23 rejected the State’s characterization of the tax as an excise tax and held it is an unconstitutional
24 income tax. That ruling is still in place today, and it is likely to be the only court decision on the
25 issue at the time of the vote. This Court should not, and does not have to, pick a side in the
26 “excise tax” versus “income tax” debate when crafting an accurate and impartial ballot title for I-
27 1929. Sponsors’ proposed title offers a middle ground, referring to the tax as simply “a tax on

1 capital gains income.” This is unquestionably accurate and neutral, unlike No Tax Cut’s
2 proposed title.

3 Third, No Tax Cut’s proposed concise description would create further prejudice against
4 the initiative by refusing to use the term “capital gains” to describe the subject of capital gains
5 tax. “Capital gains” is common parlance, and No Tax Cut’s suggested wording to avoid the term
6 would be more confusing to the average informed voter. The ballot title and ballot measure
7 summary should call the tax what it is: a capital gains tax.

8 Finally, No Tax Cut tries to create prejudice against the measure by including in the title
9 and summary only some of the exemptions to the capital gains tax. There are a large number of
10 credits, deductions, and exemptions in the capital gains tax, and cherry-picking a few exemptions
11 that are favorable to opponents of I-1929 would be unfairly prejudicial to the measure.

12 Moreover, the unqualified language proposed by No Tax Cut will mislead voters into believing
13 the exemptions are broader than they actually are. For example, even though No Tax Cut’s
14 proposed language states “small businesses” are exempted, the exemption in RCW 82.87.070(1)
15 does not apply to all small businesses or to all types of transactions pertaining to covered small
16 businesses. Inaccurately overstating the breadth of exemptions would prejudice voters against
17 the measure.

18 In contrast to No Tax Cut’s proposal, the Sponsors’ proposed ballot title and ballot
19 measure summary are true and impartial, using neutral language to give an average informed
20 voter sufficient information about the content of I-1929. Sponsors’ proposal allows the Court to
21 avoid picking a side in the “excise tax” versus “income tax” debate by describing the tax simply
22 as a tax on capital gains income above \$250,000, a neutral description that is unquestionably
23 accurate.

24 II. SUPPLEMENTAL FACTS

25 In addition to the facts about the adoption of the capital gains tax and the filing of I-1929
26 set out in Petitioner’s and Sponsors’ opening briefs, the Court should also be aware of the recent
27 passage of an amendment to RCW 29A.72, requiring new content in ballot titles for initiatives

1 that would repeal or modify an existing tax or fee. In March 2022, Governor Inslee signed into
2 law Substitute House Bill 1876, Supplemental Declaration of Harry Korrell at ¶ 2, Ex. 12. SHB
3 1876 amended RCW 29A.72 to require “public investment impact disclosures” on the ballot for
4 some measures. These disclosures are required for any ballot measure that “repeals, levies, or
5 modifies any tax or fee” and for which the Office of Financial Management (“OFM”) has
6 prepared a fiscal impact statement “that shows that adoption of the measure would cause a net
7 change in state revenue.” *Id.* at Sec. 2. The disclosure “must include a description of the
8 investments that will be affected if the measure is adopted.” *Id.* at Sec. 3. And the disclosures
9 are required to be placed “in the middle of the ballot title, after the concise description and before
10 the question.” *Id.* Despite being located in the middle of the ballot title, the Legislature
11 specified that such disclosures “are not considered part of the ballot title and are not subject to
12 any of the legal requirements for ballot titles.” *Id.* The Legislature’s stated purpose for SHB
13 1876 is that “a neutral, nonprejudicial disclosure of the public investments affected will provide
14 greater transparency and necessary information for voters.” *Id.* at Sec. 1. If OFM determines (as
15 No Tax Cut argues) that I-1929 will decrease revenue and affect education spending, then SHB
16 1876 will require a statement to that effect to appear on the ballot immediately before the
17 question presented to voters. Petitioners’ misleading arguments about the possible consequences
18 of passing I-1929 should not be added to the title or measure summary.

19 **III. ARGUMENT**

20 **A. The Court Should Reject Petitioner’s Attempts to Add to the Ballot Title and** 21 **Ballot Measure Summary Misleading and Prejudicial Arguments About the** 22 **Potential Implications for Education Funding.**

23 Petitioner No Tax Cut seeks to have the ballot title and ballot measure summary say that
24 I-1929 would reduce education and childcare funding. Specifically, No Tax Cut proposes the
25 statement of subject include the words “funds education,” the concise description include
26 “dedicated to fund education,” and the ballot measure summary include “The tax generates
27 approximately \$500 million a year that is dedicated to fund K-12 education and early learning

1 programs.” These proposed additions are (1) misleading and (2) inappropriate for a ballot title.
2 Obviously, including these arguments in either place would prejudice voters against the measure.

3 No Tax Cut wants to use the title of the measure to argue its (disputed) view that passing
4 the initiative will have specific consequences for education funding. *See* Pet. Br. at 8-9 (arguing
5 the title should reflect the “impact” and “consequences” of the measure). No Tax Cut’s
6 arguments about the significance of the tax to be repealed and the supposed fiscal consequences
7 of the initiative are simply wrong.

8 First, merely because a tax statute states the funds generated will be used for a particular
9 purpose does *not* mean the Legislature (or a subsequent Legislature) will actually spend the
10 money on that purpose. The Legislature can repurpose dedicated funds, and it *frequently* raids
11 dedicated funds, including funds dedicated to education, for other purposes.¹ Dollars are
12 fungible: even if the tax generates X dollars “dedicated” to education funding, nothing stops the
13 Legislature from taking X other dollars previously earmarked for education and spending those
14 X dollars elsewhere, leaving education funding flat. A ballot title that implies that repeal of the
15 capital gains tax would mean cutting education funding would be misleading and prejudicial
16 against I-1929.

17 Second, No Tax Cut argues that I-1929 “seeks to substantially alter the existing tax
18 regime in Washington,” Pet. Br. at 6-7, and that the ballot title should “put the average voter on
19 notice that the measure would eliminate a significant source of revenue for education funding.”
20 *Id.* at 8-9. Again, this is wrong. The tax (which has never been in effect or collected as part of
21 “the tax regime in Washington”) does not fund anything now, let alone substantially fund
22 education. The State has never collected the tax, and the Douglas County Superior Court

23 ¹ The Legislature has raided dedicated funds in every recent biennium budget. In the 2009
24 biennium budget, the Legislature transferred \$51 million from the Education Savings Account to
25 increase General Fund-State reserves. Washington State Legislative Budget Notes: 2009 – 11
26 Biennium, at 16 (2009), <https://leap.leg.wa.gov/leap/budget/lbns/2009LBN.PDF>. In the 2011
27 biennium budget, the Legislature transferred \$249 million from dedicated education accounts.
Washington State Legislative Budget Notes: 2011 – 13 Biennium, at 12 (Oct. 2011),
<https://leap.leg.wa.gov/leap/budget/lbns/2011LBN.PDF>. And in the 2019 biennium budget, the
Legislature transferred \$160 million from the Public Works Assistance Account to the Education
Legacy Trust Account. Washington State Legislative Budget Notes: 2019 – 21 Biennium, at O-
12 (Rev. Apr. 2020), <https://leap.leg.wa.gov/leap/budget/lbns/2019LBN.pdf>.

1 declared it unconstitutional. Ignoring this reality and suggesting that a vote for I-1929 cuts
2 existing education funding prejudices voters against I-1929.

3 Third, even if the capital gains tax were being collected, repealing the capital gains tax
4 would not decrease education funding as No Tax Cut claims. Under the Washington
5 Constitution “[i]t is the paramount duty of the state to make ample provision for the education of
6 all children residing within its borders, without distinction or preference on account of race,
7 color, caste, or sex.” Const. art. IX, § 1. Under *McCleary v. State*, 173 Wn.2d 477, 269 P.3d
8 227 (2012), the State must meet its constitutional requirements by fully funding education
9 through regular and dependable tax sources. This means the first dollars of the budget will be
10 applied to education to ensure it is fully funded. If the State were to make education funding
11 dependent on capital gains tax revenues, it would violate its constitutional duty.

12 Even Senator Wilson, a sponsor of the capital gains tax bill, stated in October 2021 that
13 funding for early childhood programs “is not contingent on the capital gains tax revenue being
14 collected, and it will be funded regardless of what the courts decide.” Jenn Smith, *Washington’s*
15 *‘huge investments’ in early childhood development praised in national report*, SEATTLE TIMES
16 (Oct. 13, 2021), [https://seattletimes.com/education-lab/washingtons-huge-investments-in-early-
17 childhood-development-praised-in-national-report/](https://seattletimes.com/education-lab/washingtons-huge-investments-in-early-childhood-development-praised-in-national-report/). Whether I-1929 succeeds or fails, education
18 programs will be fully funded. Because education must be fully funded regardless of whether
19 the capital gains tax is ever collected or repealed, a ballot title and ballot measure summary that
20 leads voters to believe, incorrectly, they must choose between repealing the capital gains tax or
21 maintaining education funding is inaccurate and prejudices voters against I-1929.

22 No Tax Cut’s proposed ballot measure summary is problematic for the additional reason
23 that it asserts the capital gains tax provides a specific amount of funding – \$500 million – each
24 year to education. Capital gains are unpredictable. Potential revenue from the tax depends in
25 part upon taxpayer behavior (including in response to the passage of the new tax) and market
26
27

1 conditions.² The State has never collected the tax and so it cannot accurately estimate at this
2 time what steps taxpayers will take to limit their exposure. Proof of unpredictability is
3 everywhere. Since the capital gains tax was passed, the global economy has been thrown into
4 flux. Just in November 2021, the Economic and Revenue Forecast Council decreased the
5 Education Legacy Trust Account’s forecasted revenue by \$179 million in the 2021-23 biennium
6 and \$44 million in the 2023-25 biennium because of decreases in forecasted capital gains tax
7 revenue. Wash. State Economic and Revenue Forecast Council, Revenue Review, at 7 (Nov. 19,
8 2021), <https://erfc.wa.gov/sites/default/files/public/documents/meetings/rev20211119.pdf>. Since
9 November, inflation has soared, Russia invaded Ukraine, and major tech stock prices have fallen.
10 It would be inappropriate to issue a ballot measure summary that contains inflated revenue
11 projections in an effort to scare voters about the potential consequences of repealing the tax.

12 The place for No Tax Cut’s arguments about the potential (and disputed) consequences of
13 the initiative is in their campaign materials and the voters’ pamphlet, not in the ballot title and
14 summary. No Tax Cut repeatedly argues the title should inform voters of the potential “impact”
15 and “consequences” of the measure. *See* Pet. Br. at 8-9. They cite no support for these
16 assertions because there is none. The purpose of the title and summary is to inform voters, in an
17 accurate and impartial manner, of the essential content of the measure. RCW 29A.72.050. It
18 would not be appropriate to use the title and summary to convey one side’s (disputed)
19 predictions about the possible consequences of passing the measure.

20 No Tax Cut argues that including fiscal consequences in a ballot title is common, but
21 none of the examples cited involved repeal of a tax, and the titles of the measures at issue in
22 those examples would obviously have been incomplete, if not completely useless, if they just
23 said the initiatives at issue “involved funding” without stating what the funding was for. Here,
24 telling voters that the measure would repeal the tax on capital gains income above \$250,000

25
26
27 ² Korrell Supp. Decl. ¶ 3, Ex. 13 at 2. (“Capital gains are extremely volatile from year to year. Revenue from this proposal will depend entirely on fluctuations in the financial markets and can be expected to vary greatly from the amounts presented here.”)

1 provides an undeniably accurate statement of what the measure does, without including
2 arguments about the disputed potential impact on education funding.

3 No Tax Cut further argues that, without its proposed revisions, voters would be denied
4 information about the (disputed) potential consequences of passage of the initiative. But that too
5 is wrong. Initiatives that are certified to the ballot must be accompanied by a fiscal impact
6 statement prepared by the Office of Financial Management. RCW 29A.72.025. These fiscal
7 impact statements are made available on the Secretary of State's website and in the voters'
8 pamphlet. *Id.* Thus, a voter can read the fiscal impact statement to learn the potential
9 consequences of the repeal of the tax. In addition, under the recently passed SHB 1876, the
10 AGO must draft a public investment impact disclosure for any initiative measure that repeals a
11 tax and has a fiscal impact statement showing an impact on State revenues. If such a disclosure
12 is required for a measure, it will be placed *on the ballot*, right in the middle of the ballot title,
13 between the concise description and the question. SHB 1876 § 3(2).

14 Thus, if OFM determines that I-1929 reduces State revenues, the required public
15 investment impact disclosure will inform voters – on the ballot – of the potential consequences
16 for education funding. In that case, No Tax Cut's proposed statement of subject and concise
17 description would be redundant. And if the law does not require an impact disclosure for this
18 measure because OFM determines there would be no impact on State revenues (a likely outcome
19 for the repeal of a tax that has never been implemented or collected), then No Tax Cut's
20 proposed title would be inaccurate and thus misleading to voters. Either way, the Court should
21 not include No Tax Cut's arguments about the potential (disputed) consequences of the measure
22 in the title. Save it for the voters' pamphlet.

23 Finally, that arguments about the possible fiscal implications are not appropriate for
24 ballot titles is further shown by the passage of SHB 1876, which requires the public investment
25 impact disclosure and exempts it from the rules governing ballot titles. SHB 1876 would have
26 no purpose if ballot titles were the appropriate place for assertions about the fiscal consequences
27 of a measure. As SHB 1876 will be in effect as of June 2022, if OFM determines that I-1929

1 would have a budget impact as No Tax Cut argues, that information will go in the public
2 investment impact disclosure. And of course opponents of the initiative are free to argue about
3 the (disputed) consequences of the measure in the campaign and in the voters' pamphlet. Placing
4 these arguments in the ballot title and ballot measure summary would be prejudicial and
5 improper.

6 **B. Petitioner's Proposed Statement of Subject Unnecessarily Creates Prejudice
7 and Error.**

8 "The statement of the subject of a measure must be sufficiently broad to reflect the
9 subject of the measure, sufficiently precise to give notice of the measure's subject matter, and
10 not exceed ten words." RCW 29A.72.050(1). "[A] title complies with the constitution if it gives
11 notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the
12 scope and purpose of the law." *Washington Fed'n of State Employees v. State*, 127 Wn.2d 544,
13 555, 901 P.2d 1028 (1995) (quoting *YMCA v. State*, 62 Wash.2d 504, 506, 383 P.2d 497 (1963)).

14 The AGO's proposed statement of subject meets statutory and constitutional
15 requirements. The AGO's proposal simply states, "Initiative Measure No. 1929 concerns taxes."
16 This is true, as I-1929 does nothing more than repeal a tax statute. Nothing more is required to
17 put voters on notice of the subject matter of the initiative. No Tax Cut's longer proposed
18 statement of subject would create prejudice against the measure and create a substantial risk of
19 misleading voters. First, No Tax Cut states the statement of subject should include the term
20 "repeal" in order "to convey to voters that the measure does not seek merely to add to the
21 contours of Washington's existing tax regime, but instead seeks to substantially alter the existing
22 tax regime in Washington by repealing an entire category of tax." Pet. Br. at 6-7. But the capital
23 gains tax was signed into law in 2021, has never been collected, is enjoined by an order declaring
24 it unconstitutional, and is touted by its advocates as only affecting a select few Washingtonians.
25 If opponents of I-1929 want to make the argument that repealing RCW 82.87 "substantially
26 alters Washington's tax regime," they should do so in the voters' pamphlet and campaign
27 materials, not in the statement of subject.

1 Second, No Tax Cut argues that the Court “should defer to the Legislature” in
2 characterizing the capital gains tax as an excise tax. But the statement of subject must be true.
3 Const. art. II, § 19. No Tax Cut cites no authority that the Court is required to defer to the
4 Legislature when that deference could result in the statement of subject being untrue or
5 misleading. The only court that has considered whether the tax authorized by RCW 82.87 is an
6 excise tax or an income tax has rejected the State’s position that it is an excise tax and declared
7 the tax an unconstitutional income tax. If that ruling is in place at the time of the vote, which is
8 likely, a ballot title that characterizes the capital gains tax as an excise tax will be fatally flawed.
9 Such a misstatement of the nature of the measure (repealing an “excise tax”) could expose the
10 successful initiative to a constitutional challenge. *Cf. Wash. Citizens Action of Wash. v. State*,
11 162 Wn.2d 142, 171 P.3d 486 (2007) (holding that an initiative violated Article II, Section 37 of
12 the Washington Constitution where the measure’s text recited the substance of an act that had
13 been declared unconstitutional by the time of the vote). This Court should adopt an accurate
14 ballot title that avoids picking sides in the “excise tax” versus “income tax” debate and its
15 resultant risk. With respect to the statement of subject, the AGO’s proposal is an accurate and
16 risk-free option. Rather than infuse potential error into the statement of subject, the Court should
17 reject No Tax Cut’s proposal and use the AGO’s statement of subject: “Initiative Measure 1929
18 concerns taxes.”

19 **C. The Petitioner’s Proposed Concise Description is Confusing and Prejudicial.**

20 No Tax Cut requests a number of changes to the AGO’s proposed concise description, all
21 of which should be rejected. First, No Tax Cut wants the concise description to use the term
22 “excise tax.” As discussed immediately above, that would pick a side (so far the losing side) in
23 the ongoing dispute about the nature of the tax and create a risk of a post-election challenge to
24 the measure. The Court should reject the use of “excise tax” anywhere in the title and summary.

25 Second, Petitioner wants the concise description to say the measure would repeal a tax
26 dedicated to funding education, implying that passing I-1929 would reduce education funding.
27 As explained in detail above, this is inaccurate and misleading because dollars are fungible and

1 education will be fully funded regardless of the passage of I-1929. The proposed changes are
2 inappropriate for a ballot title and would create unfair prejudice against I-1929.

3 Third, No Tax Cut wants the concise description to state that the capital gains tax
4 exempts small businesses, in addition to property and retirement accounts mentioned in the
5 AGO's proposal. Pet. Br. at 9-10. There is no requirement that a ballot title contain an index of
6 the measure's contents or that the title give details contained in the bill. *Garfield Cty. Transp.*
7 *Auth. v. State*, 196 Wn.2d 378, 398, 473 P.3d 1205 (2020). And it would be impossible for I-
8 1929's title to index all of the capital gains tax's exemptions and computation rules. No Tax Cut
9 describes their three preferred exemptions as "the most significant asset exemptions in the law,"
10 Pet. Br. at 10, but they have cherry-picked these exemptions out of the large number of credits,
11 deductions, and exemptions to create prejudice against I-1929. Why refer in the description only
12 to these three exemptions but not the charitable contribution deduction or the credit for taxes
13 imposed by other taxing jurisdictions? The Court should reject both the AGO's and No Tax
14 Cut's incomplete and prejudicial lists and simply state that the tax to be repealed is "subject to
15 certain credits, deductions, and exemptions." This language, proposed by Sponsors is
16 unquestionably accurate and neutral.

17 No Tax Cut's proposal would create further prejudice against the measure by failing to
18 include important qualifiers – exemptions to the exemptions. For example, the small business
19 deduction No Tax Cut wants to highlight only applies to "the amount of adjusted capital gain
20 derived in the taxable year from the sale of substantially all or the fair market value of the assets
21 of, or the transfer of substantially all of the taxpayer's interest in, a qualified family-owned small
22 business[.]" RCW 82.87.070(1). Yet No Tax Cut's proposed language gives the impression the
23 deduction is far broader. Similarly, even though RCW 82.87.050(3) only exempts certain
24 retirement accounts (mostly in line with accounts defined by the Internal Revenue Code), No
25 Tax Cut's (and the AGO's) proposed concise description gives the impression that any account
26 with savings for retirement is exempt from the tax. The proposed characterizations of the
27 breadth of the exemptions to the capital gains create prejudice against I-1929. Again, using

1 Sponsor’s proposed description avoids this problem by employing accurate and neutral language
2 to put voters on notice (“subject to certain credits, deductions, and exemptions”).

3 Fourth, No Tax Cut objects to using the term “capital gains” to describe the tax to be
4 repealed by I-1929. But there is no debate that I-1929 repeals a tax on capital gains income
5 above \$250,000. The term “capital gains” should be used in the concise description. No Tax
6 Cut argues the term “capital gains” is “technical tax jargon” that will confuse voters. Pet. Br. at
7 10. But that’s self-evidently wrong. Capital gains is common parlance. When people describe
8 making or losing money in the stock market, they describe it in terms of capital gains or losses.
9 This is a natural product of the IRS’ long requiring individuals to report “capital gain” on their
10 annual federal income tax returns. No Tax Cut’s proposed replacement, in contrast, is confusing.
11 Is there really a Washington voter who will be confused by the term “capital gains” but will
12 better understand “annual individual profits . . . from the sale/exchange of capital assets (e.g.,
13 stocks/bonds)[.]” This confusion and attempt to hide the term “capital gains” from voters only
14 serves to prejudice I-1929.

15 Finally, to try to come in under the word limit, No Tax Cut’s proposal uses informal and
16 ungrammatical abbreviations to the concise description: “e.g., stocks/bonds” in place of “for
17 example, stocks and bonds.” Most voters will only read the ballot title. Abbreviating words is
18 never going to be as clear as spelling words out. There is no reason why the ballot title should
19 present the essential contents of the ballot measure using abbreviations and made up
20 punctuation.³ Such descriptions could cause confusion and, thus, prejudice I-1929.

21 **D. The Court Should Reject Petitioner’s Proposed Ballot Measure Summary.**

22 No Tax Cut’s proposed ballot measure summary fails for the same reasons as the concise
23 description: It unnecessarily picks sides (the losing side so far) in an ongoing legal battle over
24 the nature of the tax, causes confusion by refusing to use the term “capital gains,” and cherry-
25 picks exemptions in a misleading manner. As described above, No Tax Cut’s proposed ballot

26 ³ If the Court allows drafters of ballot titles (“ballot-title-drafters,” perhaps?) to start using
27 hyphens and slashes to trick word processing programs into counting two or three words as one,
it will open a Pandora’s box. There will be no end to lawyers’ creativity in trying to evade the
statutory limits.

1 measure summary also inappropriately attempts to quantify annual revenue from the capital
2 gains tax to create prejudice against its repeal. But this attempt is misleading because it suggests
3 the tax is currently being collected and because it offers an inflated estimate that is very likely
4 incorrect. The ballot measure summary should accurately and impartially state the essential
5 contents of I-1929. Arguments about the predicted (and disputed) consequences of passing I-
6 1929 should be left to the voters' pamphlet.

7 **E. The Court Should Use Sponsors' Proposed Ballot Title and Ballot Measure**
8 **Summary, Which are Accurate and Impartial.**

9 The Sponsors' proposed ballot title and ballot measure summary, explained in detail in
10 their opening brief, avoid the pitfalls of the AGO's and No Tax Cut's proposals. First, the
11 Sponsors' proposal avoids taking sides (and the attendant risk of inaccuracy) in the ongoing
12 "excise tax" versus "income tax" legal battle. Both the AGO's and No Tax Cut's proposed
13 ballot titles will be fatally inaccurate if the Douglas County Superior Court's ruling is still in
14 effect at the time of the vote. The Sponsors' proposal to call the tax a "tax on individuals with
15 annual capital gains income above \$250,000" will be accurate no matter the outcome of the
16 ongoing litigation.

17 Second, the Sponsors' proposal avoids argumentative or misleading characterizations of
18 I-1929. The Sponsors' proposal does not make explicit reference to the capital gains tax's
19 current legal status. Nor does the proposal attempt to cherry-pick aspects of the tax that are
20 favorable to one side or the other. It sets forth the essential contents of the tax, including its
21 \$250,000 standard deduction, so that voters are given the information needed to make further
22 inquiry.

23 Finally, the Sponsors' proposal is clearly organized. The Sponsors' ballot title and ballot
24 measure summary do not contain unnecessary abbreviations or combine words with hyphens and
25 slashes. It uses plain, grammatical, and precise language to make sure that voters understand the
26 essential contents of I-1929 so they can make a fair decision as to whether it should be enacted
27 into law.

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IV. CONCLUSION

The Sponsors respectfully request the Court deny Petitioner's request and adopt the Sponsors' proposed ballot title and ballot measure summary for I-1929.

Respectfully submitted this 22nd day of April, 2022.

Davis Wright Tremaine LLP
Attorneys for Sponsors

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CERTIFICATE OF SERVICE

I, the undersigned, certify under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of the document entitled *Sponsors' Opposition Memo of Appeal of Ballot Title and Summary for Initiative 1929* on the following:

Via E-mail on April 22, 2022
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DATED this 22nd day of April, 2022.

s/Lesley Smith
Lesley Smith
Legal Assistant

PETITIONERS' REPLY IN SUPPORT OF APPEAL OF BALLOT TITLE AND SUMMARY
FOR INITIATIVE NO. 1929

1 X EXPEDITE
2 No hearing set
3 X Hearing is set
4 Hearing Date: April 28, 2022
5 Hearing Time: 2:30 p.m.
6 Judge/Calendar: Hon. Indu Thomas
7
8
9

10 SUPERIOR COURT OF THE STATE OF WASHINGTON
11 THURSTON COUNTY

12 In the Matter of:)

13 A CHALLENGE TO THE BALLOT TITLE)
14 AND SUMMARY OF INITIATIVE NO. 1929)

No. 22-2-00796-34

15) PETITIONERS' REPLY IN
16) SUPPORT OF APPEAL OF
17) BALLOT TITLE AND
18) SUMMARY FOR INITIATIVE
19) NO. 1929
20)
21)
22)
23)
24)
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26)
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28 **I. INTRODUCTION**

29 Petitioners J. Vander Stoep and Repeal the Capital Gains Income Tax (“Sponsor”) reply
30 to the Attorney General’s Office (“AGO”) Response to Petitions Challenging Ballot Title and
31 Measure Summary for Initiative Measure No. 1929 (“AGO’s Response”). *First*, as drafted, both
32 the AGO’s and No Tax Cut for the Rich’s (“No Tax Cut”) proposed ballot titles call the tax an
33 excise tax, which is inaccurate and potentially fatal to the measure; there is no need for this court
34 to pick a side (and certainly not the currently losing side) in the ongoing dispute. *Second*, both
35 proposed ballot titles exceed the thirty-word limit in RCW 29A.72.050(1) and have to be revised
36 at a minimum to correct that violation. *Third*, both proposed titles list exemptions that are
37 cherry-picked not to inform voters but to prejudice them against the measure. (No Tax Cut goes

1 further and includes language suggesting dire consequences for education in its proposed title
2 and summary, which is misleading, prejudicial, and potentially redundant.) Because of these
3 reasons, the ballot titles and summaries proposed by both the AGO and No Tax Cut are deficient
4 and should not be used.

5 In its response to Sponsor's appeal, the AGO offers an alternative ballot title and
6 summary, dropping "excise tax" from both the description and summary. This is an
7 improvement, but it is still problematic because it is confusing and its selection of exemptions is
8 misleading.

9 The Sponsor's proposed ballot title and summary on the other hand are indisputably
10 accurate and neutral. They are clearer and more accurate than the alternatives before the court
11 and they should be adopted.

12 II. ARGUMENT

13 A. RCW 82.87 Should Not Be Described as an Excise Tax

14 Both the AGO and No Tax Cut's original proposed Concise Descriptions contain the
15 term "excise tax." *See* AGO's Response at 6. RCW 82.87 is a not an excise tax, it is an income
16 tax; indeed, the Douglas County Superior Court (the only court to rule on the issue) has
17 categorized it as such. *See* Petitioner's Opening Brief in Support of Appeal of Ballot Title and
18 Summary for Initiative No. 1929 ("Opening Brief"), Korrell Decl. ¶ 5, Ex. 4 at 11. The Superior
19 Court's ruling is the subject of an appeal, but the appeal may not be complete before the election.
20 In addition, an appellate court may very well affirm that RCW 82.87 is an income tax. If that
21 happens and the tax is referred to as an excise tax in the ballot title and summary, the title and
22 summary will be untrue and misleading, in violation of RCW 29A.72.050(1). In its response, the
23 AGO admitted as much when it noted that the characterization of the tax (income vs. excise) is in
24 active litigation and said it would be amenable to referring to it simply as a "tax" with no
25 descriptor.¹ *See* AGO's Response at 12.

26 _____
27 ¹ The AGO has offered an updated ballot title that does not contain "excise tax". *See* AGO's
Response at 5-6.

1 In contrast to both the AGO and No Tax Cut, Sponsor’s proposed title and summary
2 simply refer to the tax to be repealed as a tax on “capital gains income.” This is indisputably
3 accurate and neutral. No party disputes that the tax applies to capital gains income above
4 \$250,000, as Sponsor’s proposal states.

5 **B. Use of Dashes and Slashes to Combine Words is Confusing and is an**
6 **Improper Attempt to Avoid the 30-Word Limit**

7 Sponsor objects to the attempts by AGO and No Tax cut to avoid the statutory word limit
8 by combining words with slashes and hyphens. In its response, AGO also fails to justify its
9 circumvention of the 30-word limit. AGO’s use of punctuation marks to combine two words
10 into one is grammatically incorrect. It could have also combined “tax-exempts,” “capital-assets”,
11 “real-estate,” and “retirement-accounts” to allow itself four *more* words in the concise
12 description. AGO does not provide any valid arguments supporting these impermissible word
13 combinations; it merely notes that it wanted to “maximize the information the concise
14 description can convey” and that it “permissibly joined [capital-gains and sale/exchange]” with a
15 hyphen and a slash. AGO’s Response at 11. But these are four words, not two, as any dictionary
16 will confirm. If the court allows it here, there will be no end to creative-word-joining in future
17 ballot-titles and related litigation. The court should not start down this slippery slope and should
18 instead revise the Concise Description as proposed by Sponsors.

19 **C. The Cherry-Picked Exemptions are Misleading**

20 The subset of exemptions flagged by both the AGO’s and No Tax Cut’s proposals are
21 misleading and should not be included in the Concise Description. In its response, AGO claims
22 that the exemptions it included, real estate and retirement accounts, are “uniquely large and
23 important exemptions.” AGO’s Response at 9. It further asserts that retirement accounts and real
24 estate exemptions are “the two most significant” exemptions that voters are likely “to be
25 concerned about.” *Id.* at 10.

26 It is for those reasons that any reference to these exemptions must be accurate and
27 truthfully convey the actual scope of the exemptions. Many voters *will* be concerned about their

1 retirement savings and real estate. Listing those exemptions, without the necessary explanations
2 and qualifiers, will create prejudice against the measure that can be avoided by using Sponsor’s
3 proposed accurate and neutral language: “subject to certain credits, deductions, and
4 exemptions.” This language puts voters on notice without misleading them about the scope of
5 the exemptions in the tax to be repealed.

6 AGO’s original proposed ballot title and summary implies that only real estate and
7 retirement accounts are exempt from the tax on capital gains income: “the tax exempts real
8 estate and retirement accounts.” In its alternative title and summary, AGO adds “for example” to
9 signal to voters that there are there are other exemptions too: “exempting, for example, real
10 estate and retirement accounts.” However, both statements are deficient, as they both provide an
11 incomplete list of exemptions and both inaccurately suggest that all real estate sales and all gains
12 in a person’s retirement savings are exempt from the tax at issue. This misleading description
13 will create bias against the initiative measure that would repeal the tax.

14 Even more problematic, No Tax Cut wants to list an additional, vague exemption for
15 “small businesses”:

16 This measure would repeal a 7% excise tax on annual individual
17 profits above \$250,000 from the sale/exchange of capital assets
18 (e.g. stocks/bonds) dedicated to fund education, exempting
property, retirement accounts, and small businesses.

19 The AGO noted in its response that this exemption is “too complicated” to “accurately
20 characterize in two or three words.” AGO’s Response at 10-11. It also said that the phrasing
21 chosen by No Tax Cut is an oversimplification and confusing. *Id.* Sponsor agrees that this
22 exemption is too complicated to fairly and accurately include in the ballot title and summary, and
23 the way No Tax Cut phrased it is confusing and unclear. Does this language mean small
24 businesses don’t have to pay the tax? Or capital gains from small businesses are exempt? As
25 written, voters would not be able to tell.
26
27

1 Finally, both the AGO (in its original proposal) and No Tax Cut improperly combine
2 words in order to make room for their lists of preferred exemptions. As discussed above, the
3 very nature of the summary is to *summarize*, not lay out every detail. It is unfair to list only
4 some likely popular exemptions to the tax on capital gains income and to suggest, by omitting
5 the statutory qualifiers, that they are broader than they really are. Sponsor’s proposed inclusion
6 of “subject to certain credits, deductions, and exemptions” is the most accurate and fair way to
7 signal to voters that there are limitations to the tax that they can investigate further if interested.

8 **D. Implying Measure I-1929 Would Cut Certain Budgets is Prejudicial and**
9 **Potentially Redundant**

10 In its response, AGO agreed with Sponsor that No Tax Cut’s attempt to include
11 arguments about the potential consequences for education funding is inappropriate. In relevant
12 part, the Concise Description and Ballot Measure Summary proposed by No Tax Cut would state
13 that I-1929 would repeal a tax “dedicated to fund education” and that “[t]he tax generates
14 approximately \$500 million a year that is dedicated to fund K-12 education and early learning
15 programs.” The obvious (and incorrect) implication is that passing I-1929 would cut education
16 funding by \$500 million per year.

17 As both AGO and Sponsor have explained in earlier briefs, this discussion of funding is
18 potentially redundant, as a new law requires a “public impact disclosure statement” that
19 describes how certain qualified ballot measures would affect the budget. *See* AGO’s Response
20 at 12 (noting that information about the education funding would likely be included in such a
21 disclosure); I-1929 Ballot Title Sponsors’ Opposition Memo at 7 (same). Including the funding
22 information is unnecessary here because if the Office of Financial Management determines I-
23 1929 would have an adverse effect on the state budget, the AGO would have to include a
24 disclosure statement in the middle of the ballot title. SHB 1876 § 3(2).

25 In addition, as Sponsor argued in its brief in response to No Tax Cut’s proposed title and
26 summary, arguments about the potential (and disputed) consequences for the state budget and
27 education funding do not belong in the ballot title or the summary. The purpose of the ballot title

1 is to inform voters about what is in the measure. Opponents are free to make their arguments
2 about the potential consequences in the campaign and in the voter's pamphlet.

3 **E. Sponsor's Concise Description is the Most Accurate and Neutral of the**
4 **Alternatives**

5 Sponsor's proposed Concise Description is clearer than AGO's. As shown below,
6 Sponsor's proposal plainly and simply tells voters the basic contours of the measure. It provides
7 voters with a clear and accurate statement of what is in I-1929. In contrast, the AGO's original
8 proposed concise description (1) muddles the type of tax being repealed; (2) implies that only
9 certain types of capital gain income is subject to the tax to be repealed; and (3) suggests there are
10 two categorical, unqualified exemptions to the tax.

Attorney General's Original	Sponsor's Proposal
Concise Description: This measure would repeal a 7% excise tax on annual capital-gains above \$250,000 by individuals from the sale/exchange of stocks and certain other capital assets (the tax exempts real estate and retirement accounts).	Concise Description: This measure would repeal a 7% tax on individuals with annual capital gains income above \$250,000, subject to certain credits, deductions, and exemptions.

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16 Under the statutory requirements, the concise description must be true, impartial, and
17 clear. RCW 29A.72.050(1). Here, Sponsor's proposed Concise Description fits those
18 requirements much better than the alternatives.

19 **F. AGO's Alternate Title and Summary is an Improvement but Still Deficient**

20 In its response, the AGO proposed a more acceptable, but still deficient, alternative ballot
21 title and summary. AGO's removal of the term "excise tax" is an improvement, and in line with
22 the statutory requirements and current legal proceedings. However, the rest still contains
23 misleading and confusing phrasing.

24 The new Concise Description and Summary still say the tax applies to annual capital
25 gains rather than net capital gains. This is misleading, as the fact that it applies to net gains (as
26 opposed to gross value) is one of the reasons why the Douglas County Superior Court held that
27 the RCW 82.87 capital gains tax was properly characterized as an income tax and not an excise

1 tax. *See* Opening Memo, Korrell Decl. ¶ 5, Ex. 4 at 26. Further, as discussed in detail above, the
2 alternative title and summary still cherry-pick from the exemptions and present them in an
3 unclear and misleading way, suggesting they are broader than they really are.

4 III. CONCLUSION

5 For the reasons set out in Sponsor’s prior briefing and above, the Court should revise the
6 ballot title and ballot measure summary so they comply with the word limit, avoid picking sides
7 in the “excise tax” versus “income tax” debate, and provide an impartial description of the
8 measure to voters. Sponsor’s proposed title and summary are clear and accurately provide voters
9 the most salient details of the ballot measure. Sponsor respectfully request that this Court grant
10 their Petition and adopt their proposed ballot title and ballot title summary for I-1929 as set forth
11 in Sponsor’s proposed order (a copy of which is attached hereto as Appendix A).

12
13 Respectfully submitted this 25th day of April, 2022.

14
15 Davis Wright Tremaine LLP
Attorneys for Petitioners

16
17 By: *s/Harry J. F. Korrell*
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24 robmaguire@dwt.com
25
26
27

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, certify under the penalty of perjury under the laws of the state of
3 Washington that I am now and at all times herein mentioned a citizen of the United States, a
4 resident of the State of Washington, over the age of eighteen years, not a party to or interested in
5 the above-entitled action, and competent to be a witness herein.

6 On this date I caused to be served in the manner noted below a copy of the document
7 entitled *Petitioners' Reply in Support of Appeal of Ballot Title and Summary for Initiative 1929*
8 on the following:

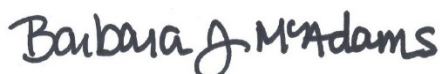
9 Via E-mail on April 25, 2022

10 Steve Hobbs, Secretary of State
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22 sydney.henderson@pacificallawgroup.com

23 DATED this 25th day of April, 2022.

24 

25

Barbara McAdams
26 Legal Assistant

Appendix A

1 EXPEDITE
2 No hearing set
3 X Hearing is set
4 Date: April 20, 2022 (trial setting date)
5 Time: N/A
6 Judge/Calendar: Hon. Indu Thomas

7
8 SUPERIOR COURT OF THE STATE OF WASHINGTON
9 THURSTON COUNTY

10 In the Matter of:

11 A CHALLENGE TO THE BALLOT TITLE
12 AND SUMMARY OF INITIATIVE NO. 1929

No. 22-2-00796-34

13 [PROPOSED] FINAL ORDER
14 REGARDING INITIATIVE NO. 1929

15 The Court having considered the Petition appealing the Ballot Title and Summary for
16 Initiative Measure No. 1929, and all pleadings filed in support and opposition thereto, and
17 having heard the arguments presented and being fully advised,

18 IT IS ORDERED that the appeal of the ballot title and ballot measure summary for
19 Initiative Measure No. 1929 is granted. The ballot title and ballot measure summary shall be
20 modified as set forth in Attachment A to this order.

21
22 DATED this ___ day of April, 2022.

23
24
25 _____
Superior Court Judge

1 PRESENTED BY:

2 Davis Wright Tremaine LLP
3 *Attorneys for Petitioners*

4 By: *Harry J.F. Korrell*

5 Harry J. F. Korrell, WSBA# 44479

6 Robert J. Maguire, WSBA # 29909

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1 **ATTACHMENT A**

2
3 **BALLOT TITLE**

4 Statement of Subject: Initiative Measure No. 1929 concerns taxes.

5 Concise Description: This measure would repeal a 7% tax on individuals
6 with annual capital gains income above \$250,000, subject to certain
credits, deductions, and exemptions.

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

8
9 **BALLOT MEASURE SUMMARY**

10 This measure would repeal a 7% tax on annual capital gains income above
11 \$250,000. The tax is levied only on natural persons, not on corporations,
12 and is based upon an individual's annual federal income tax filing. The
13 tax contains a number of credits and deductions, and it exempts capital
gains from defined real estate transactions, qualified retirement accounts,
and certain other assets. This repeal would operate retroactively to
January 1, 2022, as well as prospectively.