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July 8, 2015

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PO Box 18250  
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**Re: Review of Initiative 1366**

Gentlemen:

Here is our legal analysis of Initiative 1366.

The opinions below are based on my 29 years of practice in public policy litigation, including over 35 arguments in either the Court of Appeals or Supreme Courts of three states and federal courts, often involving constitutional interpretation. As you know, I've drafted legislation for the Washington House Republican Caucus and drafted state and local initiatives for many different groups. Litigation involving statutory and constitutional interpretation regarding government regulation has been the focus of my practice.

I-1366 is a straightforward taxpayer protection initiative that would adopt legislation that the Legislature has the power to enact. The initiative involves simple statutory changes and is clearly within the bounds of the initiative process. In addition, the Attorney General has assigned a ballot title to the initiative that gives the voters full disclosure and complete notice of the initiative's policies.

We begin our analysis with the text of the initiative itself. Its bill title reads: "AN ACT Relating to taxes and fees imposed by state government." All nine sections of the initiative clearly relate to and connect with this bill title.

- Section 1: describes the initiative's intent;
- Section 2: amends RCW 82.08.020 and concerns the state sales tax;
- Section 3: creates a new section and concerns the measure's effective date and the contingency that the legislature may refer a two-thirds-for-taxes constitutional amendment to the ballot;
- Section 4: amends RCW 43.135.031 and concerns cost analysis of tax and fee increase bills;
- Section 5: amends RCW 43.135.041 and concerns tax advisory votes;
- Section 6: creates a new section defining the phrase "raises taxes";

- Section 7: provides a construction clause (requires the initiative to be liberally construed to “effectuate the intent, policies, and purposes of this act”).
- Section 8: makes the provisions severable; and
- Section 9: establishes the title of the act, calling it the “Taxpayer Protection Act.”

The Attorney General analyzed the initiative and assigned it the following Statement of Subject: “Initiative Measure No. 1366 concerns state taxes and fees.” All nine sections of the initiative clearly relate to and connect with this Statement of Subject. The Attorney General’s Concise Description reads: “This measure would decrease the sales tax rate unless the legislature refers to voters a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes, and legislative approval for fee increases.” All of these provisions are germane to the subject of state taxes and fees.

1) Does the Attorney General’s ballot title comply with the subject in title requirements of Article II, Section 19 of the Washington Constitution?

Yes. The Washington Supreme Court has said that Article II, Section 19 applies to initiatives as well as to legislative enactments by the Legislature.

In approving an initiative measure, the people exercise the same power of sovereignty as the Legislature when enacting a statute. *Wash. Fed’n of State Employees v. State*, 127 Wn.2d 544, 556 (1995). This power is subject to the same constitutional restraints placed upon the Legislature when making laws.

*City of Burien v. Kiga*, 144 Wn. 2d 819, 824 (2001).

The first part of the single subject test is to determine whether the subject of the measure is adequately described in the title. For initiatives, it is the title prepared by the Attorney General. The Court is reluctant to find an initiative that has been adopted by the voters invalid under this requirement because of the failing of a single person, the Attorney General.

The purpose of the subject-in-title rule is to notify members of the legislature and the public of the subject matter of a measure. ... “[A] title complies with the constitution if it gives notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law.” ... The title need not be an index to the contents, nor must it provide details of the measure.

*Washington Ass'n for Substance Abuse and Violence Prevention v. State*, 174 Wn. 2d 642, 660 (2012) (citations omitted).

Although a measure's title can be broad and general—without any particular expressions or words required—the material representations in the title must not be misleading or false, which would thwart the underlying purpose of ensuring that “no person may be deceived as to what matters are being legislated upon.” ... (“[A] title which is misleading or false is not constitutionally framed.”). Any “ ‘objections to the title must be grave and the conflict between it and the constitution palpable before we will hold an act unconstitutional.’ ”

*Id.* (citations omitted).

In regard to I-1366, the title's reference to taxes and fees is general and certainly not misleading or false. It is sufficiently suggestive of the general topic of the initiative. It provides notice to an inquiring mind concerning the subject of state taxes and fees. Based on decades of consistent history of finding no fault with the Attorney General's choice of ballot titles, we believe courts will not rule that the Attorney General's title for I-1366 is defective.

2) Do the policies in Initiative 1366 have rational unity to satisfy the single subject requirement?

Yes. In addition to the subject-in-title requirements, Article II, Section 19 also requires that the initiative, just like bills before the Legislature, have a single subject.

Once an initiative ballot title is identified as being general, we look to the body of the initiative to determine whether a rational unity among the matters addressed in the initiative exists. An initiative can embrace several incidental subjects or subdivisions and not violate article II, section 19, so long as they are related. In order to survive, however, rational unity must exist among all matters included within the measure and the general topic expressed in the title.

*Kiga*, 144 Wn. 2d at 825-26.

Here, the reduction of the sales tax and the opportunity to vote on a constitutional amendment to make it more difficult to raise taxes are germane to the subject of taxes and fees.

This is well-demonstrated by the decision in the recent case involving the liquor initiative. The Supreme Court heard arguments that the initiative had non-germane subjects, like privatization, an earmark of funds for public safety, liquor advertising, and separate subjects of dealing with spirits and wine, which had been previously been regulated differently. *Washington Association for Substance Abuse and Violence Prevention*, 174 Wn. At 656-58.

The Court took a very practical approach by noting that liquor and funds for public safety had effects on each other and were, therefore, germane to each other. Here, the provision for allowing people to vote on whether there should be a two-thirds vote of the Legislature for tax measures is expressly and historically tied to the subject of taxes. A different result might occur if the constitutional amendment called for a two-thirds vote of the legislature for non-tax or fee related bills. But that is not the case here. All provisions in I-1366 are germane to government revenue raising tools, namely taxes and fees.

3) Does the initiative “force” the Legislature to put a constitutional amendment on the ballot?

No. In section 2, the initiative institutes a simple statutory requirement that the state sales tax rate be reduced from 6.5% to 5.5% effective April 15, 2016. Nothing in the state Constitution requires the sales tax to be any particular rate. In fact, over the preceding decades, the state sales tax rate has been changed many times by the Legislature. The Legislature could, if it was so inclined, reduce the sales tax rate; therefore, the people may as well.

Section 3 provides a contingency: if the Legislature, prior to April 15, votes to refer to the ballot a 2/3 constitutional amendment, then the reduction in the sales tax expires on April 14. The Legislature has the power to refer a constitutional amendment to the ballot. It may choose to; it may not. It is the Legislature’s choice. As the intent section reads:

This measure provides a reduction in the burden of state taxes by reducing the sales tax, enabling the citizens to keep more of their own money to pay for increases in other state taxes and fees due to the lack of a constitutional amendment protecting them, unless the legislature refers to the ballot for a vote a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes and majority

legislative approval for fee increases. The people want to ensure that tax and fee increases are consistently a last resort.

The initiative is called the "Taxpayer Protection Act." The intent of the measure is to protect taxpayers, either by resetting the sales tax to a lower rate or by giving them the chance to vote on a tougher-to-raise-taxes constitutional amendment. The initiative prods the Legislature to take action on the issue of taxpayer protection. Like all initiatives, Initiative 1366 tackles an issue the Legislature has avoided. And the truth is that all legislation adopted by initiative is essentially forcing the Legislature to live with legislation adopted by the people. When approved by the voters, many initiatives simply enact legislation which gives the Legislature no choice. I-1366 would enact legislation that gives the Legislature a choice.

4) Does the initiative implement policies that the Legislature could not do?

No. The Legislature could pass a bill that contained the exact same policies as those contained in the initiative. The Legislature is free to reduce the sales tax. The Legislature is free to submit a potential constitutional amendment to the voters. The provisions dealing with the title, severability and the intent are all commonly used provisions for legislation.

5) If the Legislature does not refer a 2/3 Constitutional Amendment to the ballot, is the revenue reduction from the lower sales tax unprecedented?

No. Even if the Legislature remains steadfast that the voters not be allowed to vote on a constitutional amendment, the Legislature will have time to adjust to the lower sales tax because it will be effective more than five months after the initiative is approved, on April 15, 2016.

If the Legislature prefers not to let the people vote, the Legislature has the 2016 legislative session to plan for the reduced sales tax. Additionally, the Legislature is capable of dealing with that revenue reduction; it has done so on numerous occasions, sometimes without the advanced notice that this initiative provides. For instance, the Legislature adjusted to the elimination of the state motor vehicle excise tax in 2000 following the approval of a citizen initiative repealing it. The Legislature adjusted to the loss of revenue from the economic slowdown in 2008/2009. In both situations, the Legislature had to adjust the state budget either to accommodate the decision of the electorate or changes in the economy. The revenue impact from the passage of the initiative, should the sales tax be lowered, is not unprecedented. In fact, during this year's legislative session, the Governor and the Legislature proposed raising taxes by an amount that is comparable to the revenue reduction from this initiative's possible lowering of the sales tax.

6) Does the initiative conflict with the *McCleary* decision?

No. Neither reducing a specific tax or creating a two-thirds vote requirement for tax increases would prevent the Legislature from funding education as *McCleary* requires. Protecting taxpayers and funding government services are not mutually exclusive propositions. Initiative 1366 does not limit how the Legislature prioritizes spending. With or without I-1366, the Legislature can increase the percentage of spending for education, allocate more existing revenue for education, or raise revenue for education. The initiative's passage simply provides taxpayers with a reduction in the tax burden (helping offset the Legislature's recent tax increases) or it provides the opportunity to vote on a constitutional amendment requiring certain revenue-raising protections and procedures. There are plenty of examples where the Legislature has adopted revenue-raising bills that received a two-thirds vote in the House and Senate. There are plenty of examples where a majority vote of the Legislature has referred a tax-raising bill for a public vote. Having these protections enshrined in our State Constitution does not prevent tax increases, it only ensures greater legislative consensus or voter approval before the Legislature can raise taxes.

If Initiative 1366 is approved by the voters, we firmly believe a challenge to the initiative's legality has no support in existing law. None of the arguments raised that I have seen are sufficient to invalidate this initiative.

We hope that this analysis has been helpful.

Sincerely,

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