No. 95749-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TIM EYMAN,

Respondent/Cross-Appellant

and

MICHAEL J. PADDEN,

Intervenor-Respondent/Cross-Appellant

vs.

KIM WYMAN, in her capacity as Secretary of State,

Defendant,

WASHINGTON STATE LEGISLATURE,

Appellant/Cross-Respondent

and

DE-ESCALATE WASHINGTON and CYRUS HABIB,

Intervenors-Appellants/Cross-Respondents

REPLY BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

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I. INTRODUCTION

The reply briefs[1] to which this brief responds tend to obscure the fundamental question raised in this case: what is the duty of the Secretary of State when confronted with Initiative 940 and the actions of the Legislature in the 2018 session. To be sure, a closely related question is what law will be in place between June 8 and December 6 (thirty days after the November 2018 election). The parties and intervenors have conflicting theories as to the correct answer to the latter question. But that question is not presented to the Court by Plaintiff or Plaintiff-Intervenor, and cannot be resolved by the present litigation, as a later section of this brief discusses.

As the Secretary of State has made clear in her appearance in this case, she has received conflicting advice as to what her constitutional obligations are. The sole result of this case will be to clarify what the Constitution requires her to do in the short time interval between the close of a legislative session and the time when ballots must be printed. The outcome of this case will be the basis of a rule that she can follow if such a case should arise in the future.

[1] Since there is a both an appeal and a cross-appeal in this case, the Legislature designated its second brief as a "Reply Brief," although it also contained a Response to the Cross-Appeal filed by Plaintiff and Plaintiff-Intervenor. This brief is a Reply to the Legislature's response to the cross-appeal.

II. ARGUMENT

A. Standard Of Review

The Legislature repeats its incorrect claim that Plaintiff and Plaintiff Intervenor have challenged the constitutionality of ESHB 3003 and I-940.[2] It is important to point out that the Secretary of State—whose actions are the sole focus of this litigation—does not declare any action of the Legislature invalid when she places the initiative and the alternative on the ballot, pursuant to Art. II § 1(a). Instead, she simply does what the Constitution requires her to do, namely, to present the initiative and the Legislature's alternative to the voters for their choice. As will be discussed in further detail later in this brief, her action does not determine whether an act of the Legislature became law 90 days after the end of the session, or whether it will become law only if and when the voters approve it.

But the Secretary must make a decision and act. Either she places the legislative act (in this case I-940B, that is, I-940 as amended by ESHB 3003) on the ballot, or she does not. The question before the Court is what rule should guide her decision when she makes that choice and decides what to print on ballots. The Legislature has proposed a rule that she may only place

[2] "Mr. Eyman bears the burden of proving each of these contentions [that the Legislature proposed an alternative to I-940] because each is an argument that the Legislature did not validly enact the laws at issue as reflected in the text of the measures the Legislature voted on." Reply Brief of the Legislature at 4.

an item on the ballot when the Legislature explicitly asks her to do so. Plaintiff and Plaintiff-Intervenor propose a different rule, the rule found in the Constitution: when an initiative is certified to the Legislature, and the Legislature does not adopt the initiative without change or amendment, but passes a different measure "dealing with the same subject" as the initiative, she is obligated to place both on the ballot.

The Secretary of State's actions do not have the benefit of a judicial determination of, and therefore do not decide, the question of whether the two measures deal with the same subject.[3] As this case illustrates, the time frame between the discovery of a potential overlap between an initiative and legislative action does not permit timely resolution of the question before the Secretary of State must act. The question of whether the Legislature's act became effective 90 days after the end of the session (or whether it would only become effective if and when adopted by the voters) is not directly[4] at issue in this case. If a law enforcement officer's use of force that occurs on or after June 9, 2018 is challenged, a future court must decide what law governs that use of force. Even if this Court determines that the

[3] As noted below, in some cases the question of whether the measures deal with the same subject will be difficult. In this case there is no question that they do.

[4] To be sure, the same constitutional provision that requires the Secretary of State to place an alternative measure on the ballot also determines whether a law is effective 90 days after the legislative session or instead must await the voter's approval. But precisely because the Secretary of State might be wrong in some cases (although not in this one) when deciding whether the legislature's action conflicts with a pending initiative, she must have clear guidance how to make that decision.

Secretary of State is constitutionally required to place I-940 and I-940B on the ballot, that action does not preclude a later argument in a different case that she was wrong to do so.[5]

To summarize, there is no party in this case that has any higher burden of proof than any other. It is a strictly legal question of whether the Constitution requires the Secretary of State to place either I-940 alone or both I-940 and I-940B on the November ballot.

B. A "Different" Measure Requires Submission to the Voters

1. The Duty is not Limited to "Conflicting" Measures

The Legislature relies on a misreading[6] of Art. II § 1(a) to suggest that the Secretary of State is only obligated to submit an alternative measure to the voters when that measure and the initiative are "conflicting."[7] Ironically, given the Legislature's limited view of the authority of the Secretary of State,[8] the Legislature does not explain how the Secretary of State would

[5] No party to this case represents either the interest of a prosecutor or the interest of a law enforcement officer who would be most directly affected by the determination of the legal effect of the passage of ESHB 3003 and I-940. In addition to the absence of necessary parties, the compressed briefing schedule (precluding any factual discovery) followed in this case would be inadequate to make such a determination.

[6] The Legislature seizes on the word "conflicting" which appears in the direction to the Secretary of State as to how the two measures are to appear on the ballot. This instruction only applies *after* the Secretary of State's duty has been triggered by the passage of a "different [measure] dealing with the same subject." Thus, although the word *conflicting* is not read out of the constitution, it is given its proper role in describing the two alternatives, rather than forming the basis of whether they must be submitted to voters.

[7] "[T]he constitution makes clear that the only bills that must appear on the ballot as an alternative are 'conflicting measures.'" Reply Brief of the Legislature, at 6.

[8] "The Secretary of State properly has no role drawing legal conclusions as to whether I-940 or ESHB 3003 should appear on the ballot lacking any legislative directive to do

distinguish a measure that "conflicts" with the initiative from one that is merely "different." The Legislature suggests that a "bright line" rule is not needed, but at the same time it proposes one of its own: the Secretary of State may place on the ballot a "different [measure] dealing with the same subject," Art. II § 1(a), only when the Legislature requests that she do so.[9] This would indeed function as a bright-line rule, but it would also be in direct conflict with the explicit constitutional mandate of Art. II § 1(a) and the "liberal construction," *Andrews v. Munro*, 102 Wn. 2d 761, 767, 689 P.2d 399, 402 (1984), this Court has required of it in order to protect the right of the people to legislate. If the Legislature were free to adopt an amended version of an initiative, and then decide for itself that its amendment did not conflict with the original initiative (thereby withholding an instruction to the Secretary of State that she place the amended version on the ballot), then the procedure spelled out in Art. II § 1(a) would be rendered a "futile exercise." *Washington State Dept. of Revenue v. Hoppe*, 82 Wn. 2d 549, 557, 512 P.2d 1094 (1973).

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so. State law assigns the Secretary only ministerial duties of a largely mechanical nature with regard to placing measures onto the ballot." Reply Brief of the Legislature, at 12.

[9] As the previous quotation illustrates, the Legislature claims that it has the sole authority to determine whether an alternative should be placed on the ballot. The Legislature's position ignores the clear directive of the Constitution that in order to avoid giving the voters the opportunity to enact an initiative by approving it at the polls, the Legislature must adopt the initiative "without change or amendment." The Constitution could not be more explicit in setting the terms for taking away the people's right to vote for an initiative.

It is clear in this case that the two acts *do* conflict. As the previous brief of Plaintiff and Plaintiff-Intervenor points out, both I-940 and I-940B cannot simultaneously be the law. I-940 imposes a duty to render first aid. I-940, § 6(1), CP 24. I-940B (I-940 as amended by ESHB 3003) only requires that a law enforcement officer "facilitate first aid such that it is rendered at the earliest safe opportunity." ESHB 3003, § 2, CP 40. So even under the "conflicting" standard proposed by the Legislature, the Secretary of State is still obligated to place both I-940 and I-940B on the ballot.

But the constitutional obligation of the Secretary of State does not depend on a determination whether the two measures are "conflicting." The constitutional text is quite clear—and the intent of the constitution is equally clear—that the Legislature may do away with the people's right to vote on an initiative only when the initiative is adopted "without change or amendment." If instead the Legislature chooses to propose a "different [measure] dealing with the same subject," the people are entitled to choose whether to adopt either measure, and if so, which one.

2. Some Cases Might Generate Genuine Dispute Over Whether the Legislature Has Addressed "the Same Subject"

To be sure, there may be cases—but not this one—that pose a genuine question about whether legislation deals with the same subject as an initiative. Plaintiff and Plaintiff-Intervenor address this possibility not

because it is an issue in this case, but in order to demonstrate that the legislature's proposed reading of the Constitution is simply not plausible or workable as a guiding rule for the Secretary of State. Thinking that it was addressing a different subject, the Legislature might enact a measure that arguably addresses the same subject as an initiative. Judicial resolution may be necessary to determine whether the initiative and the Legislature's measure are like ships passing in the night (and thus may both become law without conflict), or whether they are more like trains on the same track that eventually will collide unless one is given priority over the other. The Secretary of State must do the best she can (by seeking legal advice) to make a judgment concerning what she should do. She may place neither item on the ballot (if the Legislature has adopted the initiative and the Legislature's enactment deals with a different subject), or place only the initiative on the ballot (if the Legislature has rejected or ignored the initiative and she determines that they deal with different subjects), or put both items on the ballot (if the Legislature has ignored or rejected the initiative and they deal with the same subject).[10] But no matter what, she must decide what to print on ballots. Only a later court judgment can determine if she acted rightly or

[10] Contrary to the Legislature's repeated assertion, its decision regarding its own characterization of the legislation, whether as an alternative to the initiative or not, cannot dispose of the Secretary of State's constitutional obligation.

wrongly.[11] If she places both items on the ballot, but a later court determines that they do not address the same subject, then the legislative act is valid regardless of the vote of the people and the initiative becomes law if and only if it is approved by the voters. By contrast, if she places only the initiative on the ballot, but a later court determines that the legislation addressed the same subject, then (if the initiative is approved by the voters) the court would be forced to perform the type of surgery that the Court reluctantly performed in *Hoppe*.

But to repeat, that dilemma is not present in this case. The two measures clearly deal with the same subject, and they are different. Thus, the obligation of the Secretary of State is clear.

3. The Legislature's Powers are not Impaired

A central claim made in the Legislature's Reply Brief is that the relief requested in this case would impair the Legislature's power to adopt legislation. Plaintiff and Plaintiff Intervenor only ask this Court to recognize the limitation that the Constitution itself places on the Legislature. To avoid having both the people's legislation and the Legislature's legislation conflict with each other, the Constitution specifies a procedure for

[11] As stated previously, there simply isn't time between the end of the legislative session and the printing of the ballots to obtain final judicial determination of the merits of a genuinely contested case.

addressing what happens when an initiative and an enactment of the Legislature address the same subject in different ways. To adopt the Legislature's view of its powers—that the Legislature can deal with initiatives as they see fit, limited only by a prohibition against "an obvious attempt to circumvent the initiative process"—is to ignore the limitations the Constitution places on the Legislature in order to protect the right of the people themselves to legislate.

C. The Enrolled Bill Doctrine Prevents the Legislature from Characterizing Its Own Actions

The constitution's mandate to the Secretary of State is quite simple: if the Legislature proposes a different measure from an initiative, but that deals with the same subject, the Secretary must place them both on the ballot in the fall. The constitution imposes no further procedural or structural requirements on the Legislature than that it propose a different measure dealing with the same subject as an initiative. It did so here, and thus, the constitution requires the Secretary of State to place that different measure on the ballot alongside I-940.

Having misdirected the Court by claiming that the enrolled bill doctrine prevents the Court from acknowledging that on its face, ESSB 3003 states that it amends I-940, and that it would take effect only if I-940 would be passed in the future, the Legislature then *sub silentio* asks the Court to

ignore the enrolled bill doctrine where it actually does apply, and decide the Secretary's constitutional obligation with respect to ESSB 3003 based instead on what the Legislature says it wanted to have happen, rather than based on the text of the enrolled bill. This Court cannot do so. "The constitutional principle upon which [the enrolled bill] doctrine is based is that the three branches of state government are co-equal in dignity and that none of them is entitled to look behind the properly certified record of another to determine whether that branch has followed the procedures prescribed by the constitution, but rather each is responsible and answerable only to the people for its proper performance of the function for which it is constituted." *Citizens Council Against Crime v. Bjork*, 84 Wn. 2d 891, 897 n.1, 529 P.2d 1072 (1975). The Legislature seeks to avoid the constitutional mandate to the Secretary of State – that she put the different measure dealing with the same subject on the ballot – by having the Court "look behind the properly certified record," *id.*, of the Legislature, namely, the face of ESHB 3003, and determine whether the legislature wanted it to appear on the ballot, or intended it to be a different measure dealing with the same subject. None of that matters. The constitution has no intent requirement for the proposal of a "different" measure, nor a requirement that the legislature label it a specific way or consider that they look forward to a ballot campaign. All that is required is that an initiative be certified to the

legislature, and that thereafter the legislature propose a different measure dealing with the same subject. If that occurs, both must appear on the November ballot. Here, where there is no doubt or debate that ESHB 3003 differs from I-940, and deals with the same subject as I-940, the enrolled bill doctrine precludes the very inquiry the Legislature asks the Court to undertake in order to prevent the Secretary of State from executing her constitutional mandate.

D. The Secretary of State Does Not Legislate When She Places an Alternative on the Ballot

The Legislature repeats the claim made in its earlier briefing that the relief requested would require the Secretary of State (or this Court) to "legislate."[12] The previous brief submitted by the Plaintiff and Plaintiff Intervenor explains why the Constitution used the word "propose" to describe what the Legislature does in passing legislation that is different from an initiative "dealing with the same subject." The Legislature fails to address the complete silence of the Secretary of State in response to the request for a writ of mandamus. Presumably if the Secretary of State were unclear as to what was being asked of her, or if she thought that it exceeded either her constitutional authority or institutional competence, she would

[12] "What Mr. Eyman really asks is for this Court to create a new legislative proposal in the guise of ordering Secretary Wyman to do so." Reply Brief of the Legislature, at 21.

have raised an objection, given the many opportunities in the course of these proceedings to do so. Instead, as the earlier brief points out, her task is clear; it is no different from the task assigned to the Code Reviser to translate legislation into the Revised Code of Washington—a task and undertaking that the Legislature argues incorrectly should be the outcome of this litigation.

The Legislature is entitled to jealously guard its right to adopt legislation as it sees fit. The Constitution allows unfettered opportunity to propose amendments to any initiative duly certified to the Legislature. On the other hand the Constitution requires that the Secretary of State perform her duty in order to preserve the right of the people to legislate "**independently of the Legislature**" (Art. II § 1(a), emphasis added). The Legislature is free to choose one of the three options specified in Art. II § 1(a), but having done so, it must allow the other constitutional actors to fulfill their constitutional roles.

III. CONCLUSION

In order to preserve the right of the people to legislate independently of the Legislature, this Court should affirm the trial court's decision to require I-940 to appear on the November ballot, and reverse the trial court's decision to include I-940B. A writ of mandamus to the Secretary of State should issue accordingly.

RESPECTFULLY SUBMITTED this 31st day of May 2018.

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The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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