Hearing is Set:
Date: May 21, 2021
Time: 3:00 p.m.
Judge/Calendar: Honorable Sharonda Amamilo

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

In re:	No. 21-2-00865-34
CHALLENGE TO BALLOT TITLE FOR INITIATIVE MEASURE NO. 1357	PETITIONER'S REPLY TO ATTORNEY GENERAL'S RESPONSE TO PETITION CHALLENGING BALLOT TITLE FOR INITIATIVE MEASURE NO. 1357

In response to "STANDARD OF REVIEW" on page 3, the Attorney General misinforms the Court as to the legal standard – ballot titles are reviewed *de novo*. So their statement – "The Attorney General's formulation of the ballot title and summary should stand unless a challenger demonstrates that the formulation is statutorily deficient" – is not true. The Legislature did not assign unassailable authority to the Attorney General regarding ballot titles. They vested in this Court – you, your Honor, a neutral, non-partisan judge – the critical role of ensuring that the Attorney General not get away with using different standards based on the leanings and preferences and biases of any partisan politician holding that office.

In response to "Attorney General Practice" on page 2, they neglect to highlight the disparate treatment their office provides to titles for ballot measures that their office agrees with compared to those they disagree with. As highlighted in Petitioner's Opening Brief, the ballot title for Initiative Measure No. 1639 (This measure would require enhanced background checks, training, and waiting periods for sales or delivery of **semiautomatic assault rifles**; ...) and the ballot title for Initiative Measure No. 1631 (This measure would charge **pollution fees** on ...) never highlighted those measures contained new terms (designated in bold) and that those new terms were defined in the measures. On page 5, the Attorney General protests "The term 'taxes based on income' does not currently appear anywhere in the Revised Code of Washington" – well, neither did semiautomatic assault rifles or pollution fees when I-1639 and I-1631 were filed. And yet, in those cases, the Attorney General's ballot titles gave no indication the measures contained new definitions and instead focused on the actual policies in the initiatives themselves (this was likely due to the Attorney General's very public support – expressed inappropriately during the ballot title drafting process – for both these ballot measures).

INITIATIVE MEASURE NO. 1357 DOES NOT CREATE A DEFINITION

Unlike I-1639 and I-1631, Initiative Measure No. 1357 does not create a definition – the term "taxes based on income" is not defined. When a definition is created, the word "definition" and/or "means" is used. For example, in section 16 of Initiative Measure No. 1639, the text read: "Unless the context clearly requires otherwise, the **definitions** in this section apply throughout this chapter." And subsection 25 read:

(25) "Semiautomatic assault rifle" **means** any rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.

But in Initiative Measure No. 1357, section 2(2), section 3(2), section 4(2), section 5(2), section

6(2), section 7(2), section 8(2), section 9(2), and section 10(2) do not use the word "means" and do not provide a definition. They read: "For the purposes of this section, 'taxes based on income' **includes** any payroll tax, excise tax, and any other tax based on an individual's or household's personal income, whether not, gross, or adjusted gross income, capital gains income, or any other portion, or type of income." **That is not a definition, it is a list of names such taxes are sometimes called.**

For Initiative Measure No. 1357, the Attorney General uses nine words – create a new definition of 'taxes based on income' – that say the initiative does something it does not. Those nine words are inaccurate.

Later in the brief, the Attorney General says that there are not sufficient words to include key aspects of Initiative Measure No. 1357. But that is only because of their version's inaccuracies.

Removing them frees up words for key elements of the measure: it allows the naming of the specific governments affected by the measure – the state, counties, and cities. It allows naming both prohibited activities "imposing and collecting" of taxes based on income. And it permits including the enactment year and rate of the tax being repealed.

STATEMENT OF SUBJECT

The Statement of Subject for a ballot measure allows a maximum of 10 words. For Initiative Measure No. 1357, the Attorney General uses just one word to describe the measure's subject: "taxes." Nine additional words are available. As stated in the Original Petition, the measure specifically prohibits "the state, counties, and cities from imposing taxes based on income." Nowhere in the Attorney General's Ballot Title are the voters informed which governments are affected. Why not do so in the Statement of Subject? There are plenty of words available. Petitioner proposes a Statement of Subject that informs voters – within the word limit – about the measure that the Attorney General's version does not. Petitioner asks the Court to consider either:

Statement of Subject: Initiative Measure No. 1357 concerns prohibiting state, county, and city taxes based on income.

OR

Initiative Measure No. 1357 concerns prohibiting taxes based on income by state, counties, and cities.

THE SUPREME COURT RULED THAT THE ATTORNEY GENERAL'S BALLOT TITLE FOR INITIATIVE MEASURE NO. 976 WAS "DECEPTIVE AND MISLEADING"

The sponsors of I-976 did not write its' ballot title, the Attorney General did. So now that the State Supreme Court has ruled that their ballot title was "deceptive and misleading," it is baffling for the Attorney General to say such a definitive decision does not "call into question the quality of the advocacy by the Attorney General's office." Quite the contrary. In fact, reading about the Attorney General celebrating losing the case (https://shiftwa.org/democrat-ag-bob-ferguson-celebrates-losing-the-30-car-tab-lawsuit) calls into question their sincerity as well.

CONCISE DESCRIPTION

Initiative Measure No. 1357 is a relatively short ballot measure. Its policies can be described very concisely. Section 2 prohibits "the state" from imposing or collecting taxes based on income. Sections 3 and 4 prohibit counties from imposing or collecting taxes based on income. Sections 5-10 prohibit cities from imposing or collecting taxes based on income. Section 11 repeals legislation that imposes certain taxes based on income.

The Attorney General has repeatedly stated in previous ballot title challenges, "the best practice is simply to use the same phrasing that the initiative itself adopts." In addition to the example provided in Petitioner's Opening Brief (Initiative Measure No. 1525, Case #16-2-001480-34, April 2016), there was also the legal challenge to the Attorney General's Ballot Title for Initiative Measure No. 1000

(Case #18-2-04230-34, September 2018). Here are excerpts from the "Attorney General's Response to Petition" where they defend their title and their procedure for drafting it:

* "It cannot be true that using a phrase directly from the measure puts a 'thumb on the scale,' especially when the phrase accurately covers the subject matter of the measure."
* "It is certainly accurate to use the very term defined in the statute to say to whom the measure would affect."
* "Using the phrase directly from the measure neither creates bias, nor is it inaccurate."

Petitioner believes that the Attorney General's legal arguments in 2016 and 2018 are still valid, preferred, and operative and should be considered by the Court in support of the Petitioner's proposed Ballot Title.

There is even definitive evidence that this Attorney General has given preferential treatment to his political allies when drafting their ballot titles (EXHIBIT A) involving personal phone calls, back-and-forth redrafting, shortening the time to draft their titles deter court challenges, and more). Petitioner, on the other hand, is an obvious political adversary of the Attorney General and is only asking that this Court provide effective oversight to ensure the rules and procedures for describing ballot measures be applied the same to both friends and foes of Bob Ferguson.

For decades, the Courts have consistently ruled that what the legislature calls a government charge does not determine whether it requires a constitutional amendment if it is based on income – how it functions is what is determinative. But on page 5, the Attorney General, seemingly to defend ESSB 5096 from current litigation against it, states "Under current law, an 'income tax' and an 'excise tax' are two distinguishable types of taxation."

Here is why this Court must step in with regard to the ballot title for I-1357: the Attorney General's office is conflicted here. They are in court defending ESSB 5096's taxes based on income (a policy this Attorney General supports). And this measure repeals these taxes because they are based

on income (which this Attorney General obviously opposes). Initiative Measure No. 1357 specifically says that "For the purposes of this section, 'taxes based on income' includes any payroll tax, excise tax, and any other type of tax based on an individual's or household's personal income, whether net, gross, or adjusted gross income, capital gains income, or any other portion, or type of income." That is what the Courts have consistently ruled – Initiative Measure No. 1357 simply clarifies and codifies that.

Throughout their brief, the Attorney General continually brings up the term "income tax" even though that term appears nowhere in Initiative Measure No. 1357. The measure repeatedly and consistently prohibits "taxes based on income" and it explicitly lists the specific governments prohibited from "imposing and collecting" them, and specifies the legislation repealed ("and repeal legislation enacted in 2021 imposing a 7% excise tax on certain individual's capital gains.").

THE ATTORNEY GENERAL'S CONCISE DESCRIPTION HIDES INFORMATION FROM THE VOTERS

Section 11 of Initiative Measure No. 1357 specifically repeals section 5 of ESSB 5096 that was enacted in 2021. The taxes that will be "imposed and collected" by section 5 are taxes based on income. The rate identified in section 5 is "seven percent." The Attorney General claims identifying the rate will create bias against the measure. In other words, the AG is afraid voters will be dissuaded from voting for the measure if they are notified what it does. But as they have stated previously in court:

"Using the phrase directly from the measure neither creates bias, nor is it inaccurate."

In light of these facts, Petitioner asks the Court to consider this for the Concise Description:

This measure would prohibit the state, counties, and cities from imposing or collecting taxes based on income, and repeal legislation enacted in 2021 imposing a 7% excise tax on certain individuals' capital gains.

As stated in the Original Petition, the animus between this Attorney General and Petitioner is well-known and well-documented. In light of *Garfield County v State of Washington* (#98320-8) and *State of Washington v Tim Eyman* (#17-2-01546-34), this Court must guard against allowing this

animus to result in the Attorney General drafting a ballot title for Initiative Measure No. 1357 that is intentionally or unconsciously sabotaged. Equal treatment should be provided to initiatives opposed by the Attorney General (like this one) just as for initiatives supported by the Attorney General (like I-1639 and I-1631).

Unlike the inaccurate version proposed by the Attorney General, the Petitioner's proposed Ballot Title is superior because it is accurate, matches the language within the initiative itself, and provides more information to the average voter (for example, the governments affected by the measure).

Petitioner believes that this alternative is superior to the Attorney General's version and is more informative and more in compliance with RCW 29A.72.050. It is imperative that this court order the initiative's ballot title to describe its essential elements within the word limit. The Petitioner asks the court to ensure that this requirement is met with the ballot title for Initiative Measure No. 1357.

V. RELIEF REQUESTED

Petitioner respectfully requests that this court grant the following relief:

(A) that the court, pursuant to RCW 29A.72.080, file with the Secretary of State a certified copy of the Ballot Title meeting the above objections, in the amended form recommended in this petition; and

(B) such other legal and equitable relief as this court deems just.

Respectfully submitted this 19th day of May, 2021.

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EXHIBIT A

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WA ASIANS FOR EQUALITY

www.waasians4equality.org

PRESS RELEASE

November 10, 2020

For Immediate Release

Contact: Linda Yang 425-588-8011; linda@waasians4equality.org

Internal documents reveal that a Washington State Assistant Attorney General knowingly and improperly re-wrote a ballot title to mollify a "friendly" initiative sponsor with political connections, in violation of a ruling by a judge, while also ignoring a request for fair treatment from Asian Americans.

Facts of the case to date:

I-1000 sponsors from last year filed two **identical initiatives** this year: I-1200 and I-1234.

Initially, the Washington State AGO issued a decent ballot title for I-1200 on September 2nd. They properly alerted voters that I-1200 would: "Remove a prohibition on preferential treatment by government".

The initiatives' sponsor, Jesse Wineberry, saw the ballot title for I-1200, and called Deputy Solicitor General, Alan Copsey on the morning of September 3rd. According to a public records act disclosure that was obtained by our group, Mr. Wineberry told Mr. Copsey that with the new AGO I-1200 ballot title, **they "could not run the measure".**

In an internal email, Mr. Copsey specifically mentioned that Mr. Wineberry was a former State Representative, and he clearly was concerned that "it reaches a higher level in the office".

Less than 6 hours, Mr. Copsey worked with Mr. Wineberry, through "**a whole lot of back and forth**", and reversed the course expressed in the original ballot language, and issued a completely different ballot title for I-1234. In Mr. Copsey's own words that **the sponsors "would be comfortable with"**.

The new and reissued I-1234 ballot title completed removed the language that I-1234 would "remove a prohibition on preferential treatment by government".

Deputy Solicitor General, Peter Gonick raised his objection and said, "**I think our version was better, and I am not fond of revising ballot titles to mollify sponsors**, unless of course we think it makes the ballot title better (or at least no worse). For the reason we've previously discussed, **I prefer mentioning the removal of preferential treatment.**"

Notwithstanding that opposition from within the Attorney Generals own office, they went with the improperly influenced version that Mr. Copsey and Mr. Wineberry agreed upon.

American Coalition for Equality challenged the I-1234 ballot title, and a Judge ruled that I-1234 would "remove a statutory prohibition on preferential treatment by state and local government". One would think that with this history, and much more importantly, the Judge's ruling, the AGO would adopt the Judge's ruling for similar initiatives. Knowingly abandoning a standing legal precedent and going so far as documenting improper influence from political connections, in writing, is deeply troublesome.

The I-1234 sponsors could not run the measure with the Judge's ruling, so they decided to file more initiatives. Mr. Copsey was tasked with issuing ballot titles for those initiatives. After watching several ballot titles issued by Mr. Copsey that intentionally misled voters and hid the fact those initiatives would limit or remove preferential treatment, we contacted Solicitor General Noah Purcell. We were demanding Mr. Copsey to be removed from issuing ballot titles for any initiatives related to I-1234. We even sent a follow up email to Mr. Purcell. Our emails continue to go unanswered.

Not only has Mr. Copsey not been removed from issuing misleading ballot titles related to I-1234, but he also was able to improperly rush the ballot title process. The AGO standard process is 6 days to allow peer review. Mr. Copsey cut the process short by two days in an attempt to hide what he is doing from public scrutiny and proper review.

Solicitor General Noah Purcell was sent Mr. Copsey's email about his discussion with Mr. Wineberry. The AGO was quick to address Mr. Wineberry's request, yet when our group tried to request fair treatment, the AGO ignored Asian Americans in Washington State, as they have in the past.

From a public policy point of view, last year, by rejecting R-88, Washington voters clearly reaffirmed our state's ban on preferential treatment that has been in place since 1998. Just last week, voters in California rejected Prop. 16 by a 56-to-44 percentage landslide, — despite the reject side being outspent by nearly13-to-1 — and reaffirmed California's ban on preferential treatment that has been in place since 1996.

It is crystal clear what the voters want. Our AGO is supposed to support those voters and their wishes. I-1000 sponsors know that if informed, voters will reject any attempt to bring back racial preferences and official discrimination here in Washington State. The only way to get voters to pass an initiative that would re-introduce preferential treatment and discrimination based on race is to mislead voters via an improperly written ballot title.

A ballot title is a center piece of the initiative process. The taxpayer funded AGO should remain neutral and unbiased when issuing ballot titles. Clearly, the AGO should always follow legal precedent and the past lawful determinations of judges. Improper political influence in this process by special interests and friends is completely improper. The cooperation in this case with I-1234 sponsors is a gross betrayal of public trust and shakes the foundation of our initiative process. There needs to be a full public investigation of this matter by the media and an outside agency to determine if any laws, ethics, procedures or operating standards were broken in this process.

PRA records available upon requests.

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