

FILED
SUPREME COURT
STATE OF WASHINGTON
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No. 101153-9

SUPREME COURT OF THE STATE OF WASHINGTON

TIM EYMAN,

Respondent,

v.

ROBERT FERGUSON, in his official capacity as the
Attorney General of the State of Washington, and
STEVEN HOBBS, in his official capacity as the Secretary
of the State of Washington,

Petitioners,

**Respondent's Answer to the Attorney General's
Emergency Motion for Discretionary and Expedited
Review**

Tim Eyman, *pro se*
500 106th Ave NE #709
Bellevue, WA, 98004
timeyman@protonmail.com
509-991-5295

INTRODUCTION

The Attorney General is trying to mislead the Court. The Temporary Restraining Order (TRO) written and granted by Judge Dixon does not prevent the Secretary of State from printing ballots or voters pamphlets. The TRO does not stop the election. The TRO does not prevent the people from voting. As things stand now, the Secretary of State can begin printing ballots and voters pamphlets and the election will proceed. The TRO simply requires an advisory vote on the Cap & Trade bill be included on the ballot and in voters pamphlets.

There is no harm in having three advisory votes rather than the two that are already set for the general election. Providing information to the public and letting the people express their opinions and advise the Legislature on the Cap & Trade bill is not costly or

inconvenient. There is only harm to the public by not having an advisory vote on it.

The Attorney General relies on RAP 4.2 for various grounds for seeking direct review but such review is still discretionary. He must prove a need for discretionary review and that such review must be on an emergency basis. This he failed to do. There is no need to drop everything because people are being allowed to vote on something the Attorney General believes they should not.

I. Tax advisory votes are well-established.

Tax advisory votes are a type of ballot measure and were first approved by voters in 2007. As required by RCW 29A.72.290, qualified initiatives appear first, then referendums, then tax advisory votes.

This court has consistently upheld the people's right to vote on ballot measures. In 2005, opponents of Initiative 330 (limits on lawsuits) asked this court to

block the vote. This Court ruled unanimously to let the voters cast their vote. From the ruling: **“Because ballot measures are often used to express popular will and to send a message to elected representatives (regardless of potential subsequent invalidation of the measure), substantive preelection review may also unduly infringe on free speech values.”**

Coppernoll v. Reed, 155 Wn.2d 290, 298 (2005).

In 2007, opponents of Initiative 960 (limits on legislature raising revenue) asked to block the vote. Again, a 9-0 ruling from this Court allowed the people to vote. From the ruling: **“... we will not engage in (judicial review) before the voters have had their say.”** *Futurewise v. Reed*, 161 Wn. 2d 407, 414 (2007).

In 2018, opponents of Initiative 1639 (limits on guns) tried to block the vote. A lower court judge found the petitions contained errors and ruled it should not be

on the ballot. But this Court allowed the people to vote.
Ball v. Wyman, 435 P.3d 842 (2018).

In all those cases, this Court saw no harm in allowing the people to vote on those *binding* ballot measures.

In this case, Judge Dixon determined, after thoroughly examining the relevant statutes and the \$3.9 billion Cap & Trade bill, that a *non-binding* advisory vote was required. As he said in his oral ruling: “**The public has a right to know.**” The fact that the vote itself is advisory weighs heavily against the Attorney General’s effort to prevent the people from receiving information about the bill, voting records of legislators, and its cost.

The Attorney General’s hysterical effort to insist that this Court stop everything to rule with only emergency briefing that people should not be allowed to vote on a purely advisory measure is a

gross overreaction. A judge ruled against the Attorney General – it happens. But one adverse ruling should not force the Court and the parties to drop everything else they are doing and make a decision that could deprive people of their right to vote based on briefs prepared in a day.

The Attorney General argues that direct review is warranted because Judge Dixon's TRO "prevents" the Secretary of State from performing his duties to have an election in November. That's simply not true. Here, the printing of ballots and voters pamphlets will proceed, voters will be sent them, and voters will be allowed to vote on all federal, state, and local races and issues in November, including one more advisory vote that is disputed. If the Attorney General ultimately prevails on his theory that an advisory vote is not required (which Respondent believes should not happen), what is the harm in allowing the people to express their opinion with

their vote on this legislation? None. And yet stopping the vote is precisely what the Attorney General seeks.

The Attorney General also seeks to mislead the Court on the difficulty of adding an advisory vote on the Cap & Trade bill. It won't be difficult. The Office of Financial Management's most recent cost projection (\$3,947,790,216) is on their website (<https://content.govdelivery.com/accounts/WAGOV/bulletins/2e3faf1>). The bill's roll call which shows how legislators voted is on the Legislature's website (<https://app.leg.wa.gov/bills/summary?BillNumber=5126&Year=2021&Initiative=false>). It is already determined this will be Advisory Vote No. 41 because the Secretary of State has already assigned Advisory Vote No. 39 and Advisory Vote No. 40 to the other two advisory votes. Nothing is standing in the way of the Attorney General drafting the 33-word short description now.

Respondent believes that once full briefing, and not the rushed versions the Attorney General's motion demands, on the nature of advisory votes, it will be clear that Judge Dixon did not abuse his discretion by determining that this \$3.9 billion bill was subject to an advisory vote. **In any event, the Court should not stop the vote as the Attorney General seeks on quick turnaround briefing.**

From the intent section of Initiative 960 which was approved by voters in 2007: *"An advisory vote of the people at least gives the legislature the views of the voters and gives the voters information about the bill increasing taxes and provides the voters with legislators' names and contact information and how they voted on the bill. The people have a right to know what's happening in Olympia."*

From this Court's 2020 ruling on Initiative 976:
"Initiatives are read as the average informed lay voter

would read them". *Washington Ass'n. of Substance Abuse and Violence Prevention v. State*, 174 Wn.2d 642, 662 (2012). When considering legislative intent for a citizen initiative, courts consider how the legislation was understood by an average informed lay voter.

Initiative 960 in 2007, Initiative 1053 in 2010, Initiative 1185 in 2012, and Initiative 1366 in 2015 were all approved by average informed lay voters. And significantly, all four contained a construction clause. Initiative 960's section 15 read: "*The provisions of this act are to be liberally construed to effectuate the intent, policies, and purposes of this act.*" An average informed lay voter would understand that to mean this: that any reviewing court must interpret the wording of the initiative's policies to give them the fullest force and effect. In other words, such wording must not be interpreted narrowly, diluting their effectiveness, but to

construe them broadly to ensure the voters receive the benefits of the policies they repeatedly voted for.

Here, the Legislature passed this Cap & Trade bill. The Office of Financial Management determined that it was a “bill that raised taxes under RCW 43.135.034,” which is a very broad definition, and projected it’ll cost \$3.9 billion in its first 10 years. The bill included a delay in its’ implementation and no advisory vote on it was held in 2021. It will not appear on the ballot for binding vote, via referendum or initiative. Therefore, with the Cap & Trade legislation taking effect on January 1, 2023, it is required under RCW 43.135.041 that it be on the “next” general election ballot which is November 2022.

The voters repeatedly passed initiatives mandating:

1. The voters pamphlet provide the people with information about that legislation (OFM’s cost

projection, a list of legislators and their contact information and how they voted, and a short description describing the increase and its cost); and

2. The ballot provide the people with the chance to express their opinion with their vote.

The people have every right to receive this information in their voters pamphlet, express their opinion on this legislation at the ballot, and advise the Legislature with their vote.

It is contrary to the public's right to know for the Attorney General to so aggressively attempt to hide this information from the public, prevent the people from expressing their opinion, and block the people from voting. And he's doing that by not "liberally construing" these voter-approved statutes and by not interpreting them in a way that will "effectuate the intent, policies, and purposes" as average informed lay voters intended.

II. The definitions of “raises taxes” and “next” must be liberally construed by the Court to ensure the intent, policies, and purposes of the advisory vote policy is carried out. The Attorney General’s narrow, misinterpretation of the relevant statutes results in voters getting no information, no chance to express their opinion, and no chance to vote and advise the Legislature on this \$3.9 billion Cap & Trade bill.

RCW 43.135.034(1)(b) (originally section 5 of Initiative 960 and never changed by the legislature in 15 years) reads: *“For the purposes of this chapter, ‘raises taxes’ means any action or combination of actions by the state legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.”*

This is a very broad definition, one that is, frankly, much broader than the legislature and the courts are accustomed to. But it is the law that average informed lay voters have repeatedly passed. And it makes sense that voters would insist on a more comprehensive

definition than usual. Because prior to the passage of Initiative 960, the definition of raises taxes only affected general fund revenue. But by approving this initiative, the people mandated a definition that cast a much wider net: “... revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.”

Under such a broad definition, an average informed lay voter would believe and conclude, as Judge Dixon did, that the Cap & Trade bill and its \$3.9 billion price tag fits this definition and therefore would be subject to an advisory vote.

After the passage of Initiative 960, Lieutenant Governor Brad Owen was called upon to interpret its policies. He, like this Attorney General, clearly did not like the initiative's policies and expressed that displeasure in his ruling (see Exhibit A): “*The President begins by reminding the body that neither he nor they*

adopted the law that was enacted by I-960. I-960 was drafted with very strict parameters and the President, like the members of this august body, is charged with enforcing its strictures. It may be that the strict language of 960 results in harsh and undesirable consequences but this is a result of the strict language of the initiative, not the judgement of the President.”

To his credit, the Lieutenant Governor followed the strict language of the initiative. But this Attorney General refuses to do the same. Instead, he seeks to dilute its policies and exclude this increase from the ballot because it does not fit his desired definition. But the statute does not read “raises taxes as defined by Bob Ferguson” – it reads “raises taxes as defined by RCW 43.135.034.” And that voter approved definition, liberally construed and as understood by an average informed lay voter, is very broad and certainly encompasses the \$3.9 billion increase in the Cap & Trade bill.

Since 2007, Bob Ferguson has been free to lobby the legislature to change these statutes. But to date, the Legislature has not done so. These statutes are the same as they were when they were originally proposed 15 years ago by Initiative 960 and then re-approved by voters in 2010, 2012, and 2015. The law should be followed as it is, not as Bob Ferguson would like it to be.

RCW 43.135.041 requires an advisory vote when *“the legislative action raising taxes as defined by RCW 43.135.034”* is not on the ballot due to a referendum or initiative. In other words, if there isn't going to be a binding vote on the legislation, then an advisory vote “is required” (RCW 43.135.041(1)).

The term “is required” is significant. It must be put to a public vote. Average informed lay voters would expect and demand that the “required” advisory vote be on the “next” general election available. Judge Dixon decided that the word “next” is subject to interpretation (I think he

called it an “inartful term”) and could be interpreted two ways. He chose to liberally construe the word “next” and made a finding that the next general election is the November 2022 election. That interpretation certainly effectuated “the intent, policies, and purposes” of the advisory vote statutes and is therefore a reasonable one.

III. The Attorney General inappropriately tries to blame me for this.

I didn’t write the Cap & Trade bill. I didn’t add a provision that delayed its implementation. Four days after I learned the Attorney General wasn’t going to put this \$3.9 billion increase on the November 2022 ballot as an advisory vote, despite me bringing it to his attention, I filed this lawsuit. That was the day before the Attorney General issued short descriptions.

I timely filed this Petition for Declaratory Judgment challenging the Attorney General’s interpretation of two

statutes. Nothing in RCW 43.135.041, the statute that provides for tax advisory votes, nor RCW 43.135.034, the statute that provides a very broad definition of “raises taxes,” prevents judicial review of the Attorney General’s interpretation of these statutes. I am not challenging a tax advisory vote’s short description (which under the statute is the only action not subject to appeal) – in this case, it’s obvious I’m not challenging the short description because there was none – no short description was issued because the Attorney General did not designate this increase to the Secretary of State for a tax advisory vote.

As of now, the Secretary of State can print voters pamphlets and ballots as long as they include the required advisory vote on this increase. It is the Attorney General who is seeking to prevent those voters pamphlets and ballots from being printed because he insists on keeping this increase a secret. I

have timely filed my briefs and scheduled a hearing to decide this issue before the Secretary of State's deadline of Friday, August 19, 2022.

There is no harm to the public in having three advisory votes rather than two. Providing information to the public and letting the people express their opinions and advise the Legislature on this bill is not costly nor inconvenient. There is only harm to the public by not having an advisory vote on this increase.

The public has a right to know about this bill and its price tag and how legislators voted on it because that is what the voters four times mandated be done.

IV. An average informed lay voter would agree with the Lieutenant Governor's interpretation: that it's a tax when it benefits society as a whole and it's a fee when it's for the benefit of the fee payer.

Exhibit A is the Lieutenant Governor's ruling as it related to the provisions in Initiative 960 after it passed.

He made this ruling about the definition of “raises taxes as defined by RCW 43.135.034” as it related to a proposed bill. In his ruling, he made it clear that for it to be a fee, there must a close nexus between fee payers and the benefits derived from the fee. If the beneficiary of the revenue is society at large, then it is a tax. From his ruling: *“The question then becomes a determination of whether there is a sufficient nexus between the purpose of which the raised revenue may be spent and those that are paying the increase. In this case, the President believes that there is not a sufficient nexus. While it may come to pass that those paying the increase will receive an indirect benefit from this action, it seems more appropriate to characterize the benefits as being one to society at large.”*

The Lieutenant Governor’s interpretation certainly makes sense to an average informed lay voter. Here, the Cap & Trade legislation itself proclaims that it benefits

everyone. It is a Christmas tree bill with all the money derived from it being deposited into all sorts of accounts and spent on all sorts of broadly beneficial purposes. But as the definition of “raises taxes as defined by RCW 43.135.034” reads: “ ... *revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.*” This \$3.9 billion increase clearly falls under this broad definition and is therefore subject to an advisory vote.

And just because the Attorney General failed to put this increase on the November 2021 ballot (possibly due to the delay contained in the legislation), then that does not mean it cannot be put on the November 2022 ballot. RCW 43.135.041(1)(a) reads: “*After July 1, 2011, if legislative action raising taxes as defined by RCW 43.135.034 is blocked from a public vote or is not referred to the people by a referendum petition found to be sufficient under RCW 29A.72.250, a measure for an*

*advisory vote of the people is required and **shall be placed on the next general election ballot** under this chapter.” (bold face and underline added). As Judge Dixon found, the “next general election ballot” is the November 2022 ballot.*

There is no time limit for the court to grant a Declaratory Judgment of the Attorney General’s interpretation of these two statutes. In his response brief, the Attorney General argues his decision to exclude an increase from an advisory vote cannot be reviewed by the judicial branch – that his decision is immune to review. Nothing in these statutes grants exclusive decision-making to the Attorney General that is beyond the scope of the judiciary under a Petition for Declaratory Judgment. The Attorney General’s arrogant view that his designation of legislation is not subject to an advisory vote cannot be independently reviewed by the judiciary

is pure fantasy. The statutes do not grant unchecked power to the Attorney General.

The Legislature's approval of E2SSB 5126 established a Cap & Trade system that OFM confirms will generate \$3,947,790,216 in revenue in the first 10 years. That legislation takes effect on January 1, 2023. Four times, the people voted for a law requiring that the voters pamphlet provide information about such an increase (a short description of the increase, then year cost projection, how legislators voted, and their contact information) and that the ballot provide the chance for each voter to vote to advise the Legislature whether they want the increase 'repealed' or 'maintained.'

The Attorney General argues that I'm not harmed enough to have standing to bring this legal challenge. Judge Dixon disagreed. Like all citizens, I am harmed when politicians refuse to follow the laws, especially laws passed by the people.

"What higher interest can anyone have in an election and its result than the citizen and voter?" *State ex rel. Harvey v. Mason*, 45 Wash. 234, 237 (1907).

Further, as an initiative activist, I am harmed when the voters four times pass a law that I helped draft, and politicians refuse to abide by its strict requirements. Such actions undermine faith in the initiative process which I've dedicated my life to protecting and utilizing to give voters a greater voice in their government.

To his credit, Lieutenant Governor Brad Owen followed the strict language of the law. Attorney General Bob Ferguson refuses to do the same.

An advisory vote on this increase will provide voters with valuable information about this increase, how much it'll cost, legislators' votes on it, and easy to access contact information for legislators. And significantly, it will give voters the opportunity to register their advice to the legislature on whether they support or oppose the

legislation. And after the election, vote totals will allow the public and the politicians to know what level of public support there is for this program. I am obviously harmed and all voters are obviously harmed by not designating this increase for an advisory vote because all of that valuable information will be hidden from the public if the Attorney General's view prevails and he stops the expression of opinions and prevents the voters from voting.

This is a case of ongoing public concern. If this Court decides that the Attorney General's decisions are unappealable (on whether a bill "raises taxes as defined by RCW 43.135.034," on whether an increase is subject to an advisory vote, on the meaning of the word "next"), then this will set a dangerous precedent for this Attorney General and future Attorney Generals. There are three branches of government exactly because the people demand checks and balances in the system.

The Cap & Trade system implemented by the Legislature – and the corresponding \$3.9 billion increase in revenue – will start on January 1, 2023. Four times the voters passed initiatives requiring advisory votes to ensure that such increases appear on the ballot and in the voters pamphlets before they take effect.

CONCLUSION

Respondent respectfully requests the state supreme court DENY the Attorney General's Emergency Motion for Discretionary and Expedited Review. Any appeals can be handled under the normal procedures. If it is determined that judicial review is warranted regarding the Superior Court's decisions in this case, those can be handled by the Court of Appeals or this Court after the election.

DATED this 12th day of August, 2022.



TIM EYMAN, *pro se* Respondent

Exhibit A

Lieutenant Governor construes I-960 correctly

From: Tim Eyman [mailto:tim_eyman@comcast.net]

Sent: Monday, March 09, 2009 10:58 AM

During Saturday's Senate Floor debate on Second Substitute Senate Bill (2SSB) 5809, Senator Janea Holmquist received a favorable decision from Lieutenant Governor Brad Owen. Here is a transcript of their exchange:

Sen. Holmquist: *Point of inquiry.*

Lieutenant Governor Brad Owen: *Please state your point of inquiry.*

Sen. Holmquist: *Thank you, Mr. President. I believe that this measure before us creates a new tax and requires a two-thirds vote under the provisions of Initiative 960 and I have some arguments to offer on this.*

Lt. Gov. Owen: *Senator Holmquist has raised a point of inquiry as to the number of votes necessary to pass Second Substitute Senate Bill 5809. Let me remind members that when you are making your comments on a point of order that your comments are to be brief. Senator Holmquist?*

Sen. Holmquist: *Thank you, Mr. President. My argument is that this bill deposits an amount equal to .1% of taxable wages paid by an employer into a separate fund for educational grants to be awarded by the state board for community and technical colleges. The funds are paid by all employers who pay unemployment insurance premiums. This new funding is not part of the unemployment insurance program. In fact, the reason for the separate fund is that federal law prohibits the use of unemployment insurance funds for anything but the payment of unemployment insurance benefits. This appears to me to be a new tax. Initiative 960 has had a very broad definition of a tax and covers "any action or combination of actions by the Legislature that increases state tax revenue deposited in any fund, budget, or account ...". This bill raises revenue through a new tax on employers and deposits it into a separate account within the administrative contingency fund. If it is to be argued that this is a fee and not a new tax, Mr. President, you have provided us guidance in past rulings. There must be "a very close nexus between those paying a fee and the purpose for which that fee is being used. Absent this tight connection, a revenue action is more properly characterized as a general tax, not a specific fee." There appears to be a very tenuous connection between those paying this tax -- all employers in this state -- and those benefiting from the tax -- the unemployed workers seeking educational opportunities. I agree that it is a benefit to all of us if we are able to provide educational opportunities. However, this is a social benefit which makes this a tax and not a fee. Some might argue that because the bill also reduces the unemployment insurance premiums paid by an employer by an equal amount that this is a "wash" and not really a new tax or a tax increase, that this is merely a rate transfer. However, Mr. President, I believe that we need to look at what is really happening to the funds in this bill. Employers are paying into a fund for work force training grants. The fact*

that their unemployment insurance premiums are being reduced by an equal amount does not change this. It cannot cancel out the creation of a new tax for a separate purpose. I submit to you that Second Substitute Senate Bill 5809 creates a new tax requiring a two-thirds vote and I respectfully request a ruling thereon. Thank you, Mr. President.

Nearly an hour and a half later, Lieutenant Governor Brad Owen issued his ruling:

Lt. Gov. Owen: *In ruling upon the point of order raised by Senator Holmquist as to the application of Initiative 960 to Second Substitute Senate Bill 5809, the President finds and rules as follows. The President begins by reminding the body that neither he nor they adopted the law that was enacted by I-960. I-960 was drafted with very strict parameters and the President, like the members of this august body, is charged with enforcing its strictures. It may be that the strict language of 960 results in harsh and undesirable consequences but this is a result of the strict language of the initiative, not the judgement of the President. That said, the President is once again called upon to determine whether an action of the Legislature may be properly characterized as a tax or a fee. The President begins by addressing the threshold question of whether the proposed language of the measure is a revenue increase in the first place. While it is true that the net effect to individual ratepayers is unchanged, the President believes that this measure contains two significant but separate actions. The first reduces the rate of tax paid for traditional unemployment purposes. The second increases the rate paid into a fund for the purpose of retraining unemployed workers which is presently not permitted under the federal unemployment program. The President believes that simply achieving a net effect of payer neutrality does not dispose of the I-960 implications. Instead, the President believes that the proper analysis is to view the actions separately. That is, one which reduces the amount paid and another that increases the amount paid. It is this second action that is the focus of this ruling. The President believes that it is the rate of tax, not the funds which are transferred under this measure. As a result, the question then becomes a determination of whether there is a sufficient nexus between the purpose of which the raised revenue may be spent and those that are paying the increase. In this case, the President believes that there is not a sufficient nexus. While it may come to pass that those paying the increase will receive an indirect benefit from this action, it seems more appropriate to characterize the benefit as being one to society at large. For this reason, the President believes this second action is more properly characterized as a tax increase that requires a two-thirds vote under the plain language of I-960. For these reasons, Senator Holmquist's point is well taken and this measure as presently drafted will take a two-thirds vote of this body for final passage.*

Sen. Eide: *Thank you, Mr. President, and with that we therefore defer consideration of 2SSB 5809 and have it hold its place on the second reading calendar.*

Lt. Gov. Owen: *Hearing no objection, so ordered.*

-- END --

TIM EYMAN - FILING PRO SE

August 12, 2022 - 2:53 PM

Transmittal Information

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Comments:

I am the pro se Respondent. I understand I needed to provide my Answer to the Attorney General's "Emergency Motion for Discretionary and Expedited Review" by today at 5:00pm (Friday, August 12th). The pull down menu doesn't give me the option that matches exactly that wording of the AG's motion. I think this is correct, but if I must resubmit, please let me know.

Sender Name: Tim Eyman - Email: timeyman@protonmail.com
Address:
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Bellevue, WA, 98004
Phone: (425) 590-9363

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