

No. 105644-3

**IN THE SUPREME COURT OF
THE STATE OF WASHINGTON**

**ARTHUR WEST,
Appellant,
vs.
SECRETARY OF STATE
STEVE HOBBS, et al,
Respondents.**

Review of a decision of the
Honorable Judge Lanese of the
Thurston County Superior Court

**BRIEF OF AMICUS CURIAE PAUL JACOB AND
CITIZENS IN CHARGE FOUNDATION**

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I. Introduction

“The people have declared in their constitution that the legislature may act with regard to the initiative process, but only for the purpose of oiling the wheels. When the legislature enacted this provision, it set down the oil can and picked up the monkey wrench.”¹

The same could be said of RCW 29A.72.027’s requirement a “public investment impact disclosure” (PIID) be inserted in the middle² of a ballot title for initiatives that affect a state tax or fee.

The mandatory PIID begins with six mandatory words “This measure would decrease funding for” followed by 15 words that must list “the three top categories of state services funded by the general fund in the current state budget.”

¹ *State v. Conifer Enterprises*, 82 Wn.2d 94, 107-08, 508 P.2d 149 (1973) (Justice Rosellini, dissenting)

² RCW 29.72.050(2)

And the statute also mandates “The public investment impact disclosure *must* include a description of the investments that will be affected if the measure is adopted.” (italics added)

On the same day in the same courthouse that Judge Lanese approved the PIID, Judge Egeler held in a related proceeding challenging Initiative IP26-645’s Explanatory Statement, that Statement *must not* contain the challenged PIID text here at issue because “Indicating how funds in the general fund will be allocated in the future would be both inaccurate and misleading to the voters.”³

Notwithstanding Judge Egeler’s ruling, and in strict compliance with the statutory mandate, the Attorney General formulated the ballot title including the PIID (italics added) as follows:

³ RP 517-18

Initiative Measure No. IP26-645 concern state and local taxes. This measure would repeal a 9.9% tax on annual individual income over \$1,000,000; prohibit taxes measured by individual income and taxes on individual income or the receipt of individual income; and define “income.” *This measure would decrease funding for public K-12 education, higher education (including universities and community colleges), and human services (primarily healthcare).*

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

Judge Lanese held the aforementioned strictly complied with the statute, denied Mr. West’s motion to preliminarily enjoin placing the proposed PIID text in the middle of the initiative’s ballot title, and dismissed his complaint for lack of merit.

On appeal, however, the same issue of statutory validity recurs, inviting the court’s attention to our constitutional mandate which limits legislation affecting the initiative process to that which especially “facilitate[s] its operation.”⁴

⁴ Wash. Constitution Art. II, Sec. 1(d)

The simple answer is this statute does *not* “facilitate” the initiative process but frustrates it by misleading the public about the fiscal consequence of passing Initiative IP26-645, i.e. claiming it is necessarily true if enacted the initiative would in fact “decrease funding for public K-12 education” or any other specific program.

As the trial court conceded, IP26-645 works “no direct cut”⁵ to any of the three named service categories.

Misleading the public about the consequence of a ballot measure does not “facilitate” its consideration, it undermines it.

Therefore, the statute which compels such misrepresentation violates Const. Art. II, Sec. 1(d), is void, and Mr. West’s motion for an injunction striking the offensive language is not only meritorious but essential.

⁵ RP 16

II. Statement of the case

The important operative facts are set forth above however require further context to put their view in sharper perspective.

The issue relevant to this pleading is the constitutional validity of RCW 29A.72.027 insofar as it mandates identification of specific budget items that would receive less money upon passage of the tax initiative even though the Office of Financial Management confirms the “current state budget” would actually save money if voters approve it.⁶

The “current” state budget is burdened by the *presence* of the proposed income tax because of the cost of bureaucratically preparing for the collection of said tax starting in April 2029.⁷

The Office of Financial Management’s Fiscal Impact Statement estimates the state income tax legislation (ESSB

⁶ RCW 29A.72.027(2)

⁷ Laws of 2026 c. 238 Sec. 201, 910

6346) will *cost* the State \$48,047,000 in the current biennium budget.⁸

But putting that aside, it is true that the effect of the passage of this ballot measure will affect future state budgets by repealing the recently enacted state income tax. However in what way future legislatures will respond to the elimination of this tax is not only unknown, but also unknowable.

That being said, it is the operative fact of this case that the statutory PIID claim passage of the initiative would “decrease funding” for any particular program *is* false and misleading as held Judge Egeler in the related proceeding.⁹

Moreover, such a claim of decreased funding for a particular program has not just theoretical electoral effect but proven by scientific studies.

⁸

<https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=77653>

⁹ RP 501 et seq

Attached to the declaration of Paul Jacob¹⁰, for example, is a study on exactly this issue by Change Research commissioned by SEIU 775 and Washington Conservation Action.¹¹

That study compared initiative ballot titles with and without a PIID to determine their impact, concluding adding a PIID to their ballot titles (such as we have here) substantially decreases public support and significantly increases public opposition.

The attorney general's brief concedes/claims the PIID is "highly informative" as demonstrated by the study and "reflects that considering additional information affects voters' decision making."¹²

Then the AG argues this "illustrates how the PIID statutes facilitates the initiative process;" however if the

¹⁰ CP 115

¹¹ CP 123

¹² Answer to Plaintiff's Motion for Preliminary Injunction p. 8

information provided in a PIID is inaccurate or misleading it equally follows that its presence would not facilitate the initiative process but obstruct it.

It would be a “poison pill” (which, let’s be honest, was exactly what the legislature intended.)

III. Argument

A. Standard of Review is *de novo*

The AG argues statutes are presumed constitutional unless proven otherwise “beyond a reasonable doubt.”¹³ Although some of the older cases assert this, more modern formulations reject the prior formulation as an incoherent evidentiary standard unsuitable for determining legal questions such as the constitutionality of a statute which should be

¹³ Answer to Plaintiff’s Motion p. 2
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properly reviewed *de novo*.¹⁴ Moreover the hearing in this case was not evidentiary but only for argument on the written record, entitling the trial judge to no deference for his legal conclusions.

**B. Statutes which do not facilitate
the initiative process are unconstitutional**

Const. Art. II, Sec. 1 was enacted by constitutional amendment enabling “the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at polls, *independent of the legislature...*” (italics added)

In essence the amendment created a fourth branch of government completely separate from the legislature. However,

¹⁴ See e.g. *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998); *Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). See also Hugh D. Spitzer, “Unconstitutional Beyond a Reasonable Doubt”—A Misleading Mantra that Should be Gone for Good, 96 Wash. L. Rev. Online 1 (2021) and Hugh D. Spitzer, Reasoning v. Rhetoric: The Strange Case of “Unconstitutional Beyond a Reasonable Doubt,” 74 Rutgers L. Rev. 1429 (2022)

section (d) allowed a narrow and circumscribed role for the legislature:

This section is self-executing, but legislation may be enacted especially to facilitate its operation.

This court has interpreted the cited provision as a constraint on legislative action limiting it to that which “facilitates” the exercise of the people’s power of initiative and striking down that which doesn’t.

In trial court and *this court’s* briefing the AG neglected to even mention *only* legislation which “facilitates” the exercise of the people’s legislative power passes constitutional muster. That is the most important word in the case as “Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.”¹⁵

¹⁵ *Malyon v. Pierce County*, 131 Wn.2d 779,799, 935 P.2d 1272 (1997)

Justice Story reminds us

Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or extraordinary gloss.¹⁶

In practice most if not all of such legislation, with the exception of RCW 29A.72.027, deals with process and procedure rather than substance designed to influence *how* a voter might exercise his franchise. Yet that is the plain import of the PIID.

Take, for example, *State v. Conifer*, 82 Wn.2d 94, 508 P.2d 149 (1973). There our court considered a challenge to

¹⁶ Joseph Story, Commentaries on the Constitution of the United States Sec. 451 (Melville M. Bigelow ed., 5th ed. 1891)

RCW 29.79.490(4) which criminalized payment to persons who collect signatures for ballot measures.

The majority concluded the legislation facilitated the integrity of the initiative process reasoning paid canvassers have the “inevitable tendency to corrupt the electorate”¹⁷ and rejected First Amendment claims to the contrary.

Justice Rosellini’s dissent, however, saw it otherwise. That dissent provided the best analytical approach to the “facilitate” clause to date. Referencing Const. art 2, Sec 1(d), he opined:

“This section is self-executing, but legislation may be enacted especially to facilitate its operation.”

Thus the people, in reserving a portion of the legislative power to themselves, clearly decreed that the legislature should not interfere with its exercise but should only “facilitate” it.

¹⁷ 82 Wn.2d at 99

We are not here concerned with a question whether the legislation in question is reasonably designed to promote the public health, safety or welfare—the sole question before us is whether the provision...facilitates or hinders the enjoyment of the right of initiative.

This court has said...: Those provisions of the constitution which preserve the right of referendum are to be liberally construed to the end that this right may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.¹⁸

Quite appropriately, Justice Rosellini continued:

The word “facilitate” means, according to Merriam-Webster Third Int’l Dictionary (1964):

1: to make easier or less difficult: free from difficulty or impediment...

2: to lessen the labor or (as a person)...

¹⁸ Citing *State ex rel Case v. Superior Court*, 81 Wash. 623, 143 P. 461 (1914); *State ex rel Howell v. Superior Court*, 97 Wash. 569, 166 P. 1126 (1917); *Rousso v. Meyers*, 64 Wn.2d 53, 390 P.2d 557 (1964)

Justice Rosellini then cited with approval 82 C.J.S. Statutes Sec. 117b (1953) recounting the general rule that with regard to initiatives and referendums the legislature is generally authorized to enact legislation to facilitate the operation of the constitutional provision; however “If the legislation unreasonably obstructs the initiative or referendum, it is unconstitutional.” [citing cases]

And “As this court stated in *Rousso v. Meyers, supra*, the legislature has no authority to enact provisions which hamper the initiative process further than is necessary to fairly guard against fraud or mistake.”

So reasoning, Justice Rosellini eschewed the “need to resort to those police power limitations embodied in the due process and equal protection clauses...to ascertain the invalidity of this legislation.

It is clearly outside the legislative authority because it not designed to facilitate, but rather is designed (thoughtlessly designed, perhaps, but nevertheless designed) to

hinder the exercise of the initiative power. The people have declared in their constitution that the legislature may act with regard to the initiative process, but only for the purpose of oiling the wheels. When the legislature enacted this provision, it set down the oil can and picked up the monkey wrench.

Although Justice Rosellini wrote in dissent, his analysis was plainly correct. And the United States Supreme Court honored him by quoting from this very dissent when holding a similar Colorado provision unconstitutional.¹⁹

C. A statute which misleads voters about an initiative clearly undermines, and does not facilitate, the initiative process

As outlined in the Jacob Declaration, the Washington state's PIID law is an outlier amongst the 24 states which have the initiative process:

Washington's statute is unusual because it applies only after examining the measure's substantive subject—whether it “repeals, levies, or modifies” a tax or fee—and then converts the resulting revenue change into a

¹⁹ *Meyer v. Grant*, 486 U.S. 414, 423-24 (1988)

statement about hypothetical impacts upon selected public services-funding impacts that may never materialize in the real world.²⁰

To the same extent an accurate fiscal impact statement enlightens, an inaccurate statement deceives, defeats, and neither enhances nor facilitates the initiative process. Proper legislation enhances fairness to the electors, not the other way around.²¹

However, this statute is specifically designed to misinform by its mandatory text which compels the attorney general to position a misleading PIID in the middle of the initiative's ballot title. It is misleading by any normal reading

²⁰ Declaration of Paul Jacob p. 2, CP 116

²¹ Proper legislation looks to "orderly procedure and fairness to the electors." *State ex rel Kiehl v. Howell*, 77 Wash. 651, 654, 138 P. 286 (1914); the right to initiative is to be liberally construed so the right may be facilitated, "and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of their constitutional right." [citing cases] *Sudduth v. Chapman*, 88 Wn.2d 247, 251, 558 P.2d 806 (1977)

of the words “This measure would decrease funding for public K-12 education...”

The AG’s defense of this language requires rhetorical gymnastics which are hard to comprehend:

The Court:...Mr. Smith, the question for you, then, is—again, I had hard questions for Mr. West. Hard question for you is, again, there’s no direct cut, right, in this initiative, so then how do we get that this decreases funding in the end? Why is this a true statement?

Mr. Smith: Sure. And so this is actually an important distinction, Your Honor. The public investment impact disclosure doesn’t say it would make cuts to spending. It says it would decrease funding for—and then it lists the top three categories from the general fund and that’s undeniably true.

There is no dispute here that under the existing law over the next five years the State will have an additional \$11.4 billion in revenue that, if this initiative is passed, it will not have. So it is literally true that it will reduce funding for the general fund.²²

But the PIID *doesn’t* say it would simply reduce the general fund, it says it would reduce funding for public K-12

²² RP 16-17

education, etc. That is what it says, and that is what the reasonable voter would understand it to mean. Unfortunately, that is the law passed by the 2022 legislature which the AG is duty-bound to defend, and the court did indeed pose a “Hard question for you...”

On the same day in a different proceeding in the same courthouse Judge Anne Egeler denied a challenge by the “No on 645” campaign to the Attorney General’s Explanatory Statement for the initiative that will appear in the voters pamphlet.

The AG’s Explanatory Statement accurately disclosed revenue from the new state income tax would go to the general fund (that the legislature did not earmark the revenue toward specific government services), but the opponents requested the AG’s Explanatory Statement mirror the PIID by stating the revenue would not fund those three specific categories. AAG Gonick disagreed: “So we don’t think it’s accurate to say that

the law as it presently exists is that the money must be used to fund those services.”²³

Judge Egeler agreed with the AAG and answered the same substantive question posed in this proceeding with respect to the wording of the Attorney General’s Explanatory Statement, but opposite Judge Lanese’s ruling. She specifically held the same language at issue here in the PIID would be inaccurate and misleading if in the Explanatory Statement:

The tax on millionairess does not control appropriations from the general fund. There, it was accurate to simply state what portion of the tax revenue is deposited into the general fund. Indicating how funds in the general fund will be allocated in the future would be both inaccurate and misleading to the voters.²⁴

Amen.

²³ RP 514

²⁴ RP 506, 517-18 Judge Egeler also commented at RP 507 “With respect to the State general fund, it doesn’t direct. It has hopes, at best, doesn’t it?”

D. A Preliminary Injunction Should Issue

Applying traditional criteria, the trial judge denied Mr. West's petition for preliminary injunction to strike the PIID's offending language from the middle of the initiative's ballot title based on his mistaken legal conclusion that Mr. West's claim lacked merit. So doing the judge failed to credit the mandatory language of Const. Art. II, Sec. 1 which prohibits legislative enactments which fail to "facilitate" the initiative process but rather undermine it.

Claiming, as the wording of the PIID does, the passage of the initiative would necessarily "decrease funding for public K-12 education" and other specific government services, is patently false. This is a future legislative decision not dictated in any way by whether this initiative is approved by the voters or not.

As Mr. Jacob's Declaration²⁵ makes clear, no other initiative state has a law like RCW 29A.72.027. Other states avoid a content-based constitutional violation by requiring a neutrally worded description for *all initiatives*, not just tax initiatives as does Washington.

Some states require the initiative's description on the ballots *be exactly the same* as the description that appears on the petitions that voters sign (unlike Washington). RCW 29A.72.027 is an outlier and recently enacted deserving close scrutiny.

IV. Conclusion

This court should defend the people's reserved power of initiative from obvious and injurious deception by granting the preliminary injunction.

²⁵ CP 115

Certificate of compliance

Your undersigned certifies this pleading contains 2,998 words apart from those exempt by rule by RAP 18.17(b), well within the limit of 5,000 words set by RAP 18.17(c)(6).

Respectfully submitted,

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