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1 **I. INTRODUCTION**

2 Plaintiff Tim Eyman initiated this litigation to clarify whether Article II, section 1 of the
3 Washington State Constitution permits the Legislature to enact into law an amended version
4 of an initiative duly certified to it by the Secretary of State, without first submitting both the
5 initiative and the alternative to the people for a vote. The parties agree on every relevant fact
6 about the contents of I-940 and ESHB 3003 and the timing of the votes on the two measures.
7 Given the three possible actions the Constitution leaves to the legislature when the Secretary
8 of State certifies an initiative to it, this Court only needs to determine (1) which option it chose
9 and (2) if, indeed, it rejected I-940 and proposed an alternative, must both appear on the
10 November ballot?

11 **II. RELEVANT FACTS**

12 On May 23, 2017, Leslie Cushman filed with the Secretary of State the final text of an
13 initiative to the legislature. First Amended Complaint ¶ 30 (hereafter “FAC”); Legislature’s
14 Answer ¶ 30; Secretary’s Answer ¶ 30 (hereafter “Answers”).¹ That same day, the Secretary
15 of State assigned it serial number I-940. FAC ¶ 31; Answers ¶ 31. On June 9, 2017, Thurston
16 County Superior Court entered a stipulated order regarding the ballot title for I-940. FAC ¶ 35;
17 Answers ¶ 35. Between June 10, 2017 and December 31, 2017, as certified by the Secretary
18 of State, 359,895 registered voters of the State of Washington signed the I-940 initiative. FAC
19 ¶ 39; Answers ¶ 39. This exceeded the minimum number required for certification to the
20 legislature. FAC ¶ 40; Answers ¶ 40.

21 On March 8, 2018, the last day of the regular session of the Washington Legislature, a
22 majority of members of the House of Representatives voted in favor of I-940: 55 in favor and
23 43 against. FAC ¶¶ 49-51; Legislature’s Answer ¶¶ 49-51. Later that same day, the a majority
24 of members of the Washington State Senate also voted in favor of I-940: 25-24. FAC ¶¶ 66-

25 _____
26 ¹ Where this Motion refers to the two separately filed answers together as the “Answers,” it
relies on those facts alleged in the FAC and identically admitted in both Answers.

1 68; Legislature’s Answer ¶¶ 66-68. According to the votes of both chambers, I-940 becomes
2 effective on June 7, 2018. FAC ¶ 72; Answers ¶ 72.

3 Prior to voting on I-940, the legislature took action on a bill, ESHB 3003. FAC ¶¶ 112-
4 116; Legislature’s Answer ¶¶ 112-116. Section 1 of ESHB 3003 states that it amends I-940.
5 FAC ¶ 86; Legislature’s Answer ¶ 86; FAC Exh. G p. 2. Section 10, the final section, states
6 that:

7 This act takes effect June 8, 2018, only if chapter . . . (Initiative Measure No. 940),
8 Laws of 2018, is passed by a vote of the legislature during the 2018 regular legislative
9 session and a referendum on the initiative under Article II, section 1 of the state
10 Constitution is not certified by the secretary of state. If the initiative is not approved
11 during the 2018 regular legislative session, or if a referendum on the initiative is
12 certified by the secretary of state, this act is void in its entirety.

11 FAC ¶ 111; Legislature’s Answer ¶ 111; FAC Exh. G. p. 9.

12 Both chambers of the legislature voted in favor of ESHB 3003, and the Governor signed
13 it, before either chamber voted on I-940. FAC ¶ 112-116; Legislature’s Answer ¶¶ 112-116.
14 In the House, 73 Representatives voted in favor of ESHB 3003; 25 voted against. FAC ¶ 89-
15 91; Legislature’s Answer ¶¶ 89-91. In the Senate, however, 25 Senators voted in favor and 24
16 voted against. FAC ¶ 101-103; Legislature’s Answer ¶¶ 101-103. In other words, less than 2/3
17 of the members elected to the Senate voted in favor of ESHB 3003. The Governor signed
18 ESHB 3003 after both votes, and before either chamber voted on I-940. FAC ¶ 112-116;
19 Legislature’s Answer ¶¶ 112-116. Thus, according to the text of Section 10, the various
20 amendments to I-940 take effect on June 8, 2018, one day after I-940 takes effect.

21 **A. The Changes To I-940 In ESHB 3003 Are Amendments**

22 “The determination whether an act is an amendment does not depend on whether it
23 purports on its face to be amendatory. . . The test to be applied . . . is whether it changes a prior
24 act in scope and effect.” *Weyerhaeuser Co. v. King Cty.*, 91 Wash. 2d 721, 731, 592 P.2d 1108,
25 1114 (1979). Here, not only does ESHB 3003 explicitly identify that it “amends” I-940, it does
26 in fact change substantive portions of I-940 in scope and effect.

1 According to the legislature, on June 7, 2018, “Law enforcement officers will . . . be
2 required to render first aid . . .” I-940 Sec. 2 (FAC Exh. B p. 1). One day later, however, that
3 requirement is substantially relaxed, such that “law enforcement personnel must provide or
4 facilitate first aid such that it is rendered at the earliest safe opportunity to injured persons at a
5 scene controlled by law enforcement.” ESHB 3003 Sec. 2(1) (FAC Exh. G p. 4).

6 The training requirements of I-940 included mandated training in “[a]lternatives to the
7 use of physical or deadly force so that deadly force is used only when unavoidable and as a
8 last resort.” I-940 Sec. 5(2)(f) (FAC Exh. B p. 4). In ESHB 3003, that requirement is
9 eliminated, and replaced with training in “[a]lternatives to the use of physical or deadly force
10 so that de-escalation tactics and less lethal alternatives are part of the decision-making process
11 leading up to the consideration of deadly force.” ESHB 3003 Sec. 1(1)(e) (FAC Exh. G p. 3).

12 Pursuant to I-940, “the Washington state criminal justice training commission” will, for
13 one day, be required to “develop guidelines for implementing the duty to render first aid
14 adopted in this section [which] establish that law enforcement officers have a paramount duty
15 to preserve the life of persons whom the officer comes into direct contact with while carrying
16 out official duties, including providing or facilitating immediate first aid to those in agency
17 care or custody at the earliest opportunity.” I-940 Sec. 6(2) (FAC Exh. B p. 4). ESHB 3003
18 eliminates that requirement, just as it eliminates the requirement for law enforcement officers
19 to render first aid. Under ESHB 3003, “the guidelines must . . . address best practices for
20 securing a scene to facilitate the safe, swift, and effective provision of first aid to anyone
21 injured in a scene controlled by law enforcement or as a result of law enforcement action; and
22 (c) assist agencies and law enforcement officers in balancing the many essential duties of
23 officers with the solemn duty to preserve the life of persons with whom officers come into
24 direct contact.” ESHB 3003 Sec. 2(2) (FAC Exh. G p. 4).

25 Another significant change between I-940 and ESHB 3003 concerns the defense available
26 to an officer who does use deadly force. Under I-940, the officer must meet both an objective

1 and subjective reasonableness test, laid out in Section 7(5)(a)-(d). (FAC Exh. B p. 6-7). One
2 day later, an officer’s defense need only meet the objective test of acting “in good faith, where
3 ‘good faith’ is an objective standard which shall consider all the facts, circumstances, and
4 information known to the officer at the time to determine whether a similarly situated
5 reasonable officer would have believed that the use of deadly force was necessary to prevent
6 death or serious physical harm to the officer or another individual.” ESHB Sec. 3(4) (FAC
7 Exh. G pp 5-6).

8 Each of these significant changes to the law governing conduct of law enforcement
9 officers changes the prior law in scope and effect, *Weyerhaeuser*, ., 91 Wash. 2d at 731, *supra*,
10 and thus constitutes a true amendment to I-940. According to the legislature, I-940, as filed
11 with the Secretary of State and certified to the legislature under Art. II, § 1(a) of the
12 Constitution, becomes the law of the State of Washington on June 7, 2018. Twenty-four hours
13 later, that new law is amended. The amendments will take effect that day, according to the
14 legislature, because before agreeing to enact I-940 “without change or amendment,” as
15 required by Art. II, § 1(a), the legislature first agreed to amend it.

16 III. ARGUMENT

17 A. The Legislature May Respond To A Certified Initiative In Three Ways

18 After the Secretary of State certifies an initiative to the legislature, the legislature has
19 three – and only three – available alternatives. It can adopt the initiative, reject the initiative,
20 or reject the initiative and propose an alternative. Whether it adopts or rejects the initiative, the
21 legislature must do so without change or amendment. “[I]nitiative measures . . . shall be either
22 enacted or rejected *without change or amendment* by the legislature before the end of such
23 regular session.” Wash. Const. art. II, § 1(a) (emphasis added).

24 On February 20, 2018, when I-940 was presented to the Senate Law and Justice
25 Committee for consideration, it was introduced by Shani Bauer, Senior Counsel to the
26 Committee, with the following explanation:

1 As you know, the Washington state constitution authorizes the initiative process,
2 allowing the people to place a proposition on the ballot or to submit a proposed law to
3 the legislature. If an initiative to the legislature receives sufficient signatures for
4 certification, The legislature must take one of three actions. One, adopt the initiative as
5 proposed, in which case it becomes a law without a vote of the people; reject or refuse
6 to act on the proposed initiative in which case the initiative must be placed on the ballot
7 at the next general election; approve an alternative to the proposed initiative in which
8 case both the original proposal and the legislature’s alternative must be placed on the
9 ballot at the next general state election.

6 FAC ¶ 56; Answers ¶ 56.

7 This was not simply the opinion of the Senior Counsel to the Committee; it is the well
8 established law in Washington.² For example, in *Washington State Dept. of Revenue v. Hoppe*,
9 82 Wn. 2d 549, 512 P.2d 1094 (1973), the people had adopted both a constitutional amendment
10 as well as an initiative capping the amount of property tax that could be assessed. At the same
11 time the legislature adopted a different scheme for allocating taxes. When the state sought to
12 prohibit King County from collecting taxes in a way that would reduce revenue to the state,
13 the trial court was asked to determine the enforceability of the statute passed by the legislature.
14 The trial court ruled that both the initiative and the statute passed by the legislature were
15 invalid. On appeal, the Washington Supreme Court recognized that the constitution protected
16 the right of the people to exercise the initiative power, and that the legislature was
17 constitutionally limited in its ability to frustrate the reserved power of the people to legislate:

18 The seventh amendment to the constitution is explicit in its direction to the legislature
19 as to an initiative: the legislature shall either enact or reject the measure before the end
20 of the regular session. Here the legislature did neither. The constitution contemplates
21 such inaction and requires the Secretary of State to submit the initiative to the people
22 at the next regular general election. . . . But the constitution does not stop there. It
23 provides in effect that the legislature must not and cannot propose a different measure
24 dealing with the same subject without submitting the alternative proposal to the people
25 along with the people-originated initiative. Both Initiative 44 and section 24 expressly

23 ² See also, Even, *Direct Democracy In Washington: A Discourse On The Peoples’ Powers Of Initiative
And Referendum*, 32 GONZ. L. REV. 247 (1996-97) (footnotes omitted):

24 The legislature has three options when an initiative is submitted to it: (1) enact the
25 initiative; (2) reject the initiative and propose an alternative measure dealing with the
26 same subject, with both to be voted on by the people; or (3) simply reject the initiative
(or take no action upon it), in which case the Secretary of State shall certify it to the
ballot for approval or rejection by the people.

1 concern limitation of millage and the effective date of such limitation. Section 24 was
2 not submitted to a vote of the people. [¶] However, while both section 24 and Initiative
3 44 expressly concern limitation of millage, we do not agree with the trial court that both
4 are null and void. **To so hold would create in the legislature a veto power over every
5 initiative. To so hold would turn the reserved initiative power of the people into a
6 futile exercise.**

7 *Hoppe*, 82 Wn. 2d at 557, 512 P.2d at 1099 (emphasis added).

8 In *Hoppe* the initiative had already been approved by the voters. The Supreme Court
9 found no intent on the part of the legislature to turn the initiative power of the people into a
10 futile exercise: “It is apparent to us that the legislature was not endeavoring to subvert the
11 initiative power of the people.” *Hoppe*, 82 Wn. 2d at 558, 512 P.2d at 1099. Regardless of an
12 apparently benign motive on the part of the legislature, the Court insisted on protecting the
13 initiative process. Since the remedy available in this case—placing both the initiative and
14 alternative on the ballot—was unavailable in *Hoppe*, the Court did the best it could by giving
15 full effect to the rate cap of the initiative while affording as much effect to the later statute as
16 possible, consistent with the initiative cap. Carrying the logic of *Hoppe* to this case, Plaintiff
17 Eyman requests that this Court preserve the Constitutionally protected right of the people to
18 legislate by requiring both I-940 and ESHB 3003 to be presented to the people on the
19 November 2018 ballot.

20 Because *Hoppe* and other authorities make it clear that the Legislature may take only one
21 of three actions in response to a duly certified initiative, this Court must determine which of
22 the three options the legislature actually chose in its drafting and voting on ESHB 3003, then
23 voting on I-940.

24 **1. The Legislature May Adopt The Initiative**

25 The legislature adopts an initiative by majority vote in both chambers. This does not
26 require, and indeed, does not permit, gubernatorial action. *See* Wash. Const. art. II, § 1(d)
 (“The veto power of the governor shall not extend to measures initiated by or referred to the
 people”). If a majority of both houses vote in favor of the initiative, the legislature can

1 nonetheless refer it for a vote, or the people can subject it to a referendum petition. “If any
2 such initiative measures shall be enacted by the legislature it shall be subject to the referendum
3 petition, or it may be enacted and referred by the legislature to the people for approval or
4 rejection at the next regular election.” Wash. Const. art. II, § 1(a).

5 If the legislature adopted I-940 without change, then the substance of I-940 will become
6 law 90 days after the end of the legislative session (unless it is challenged by referendum), and
7 it cannot be amended within the next two years except by a vote of two thirds of both houses
8 of the legislature. Wash. Const. art. II, § 1(c). But the legislature insists that the unamended
9 text of I-940 ceases to be the governing law of Washington on June 8. And this significant
10 alteration in the laws of the state was the obvious, expressed intent of the legislators who voted
11 for ESHB 3003 and then I-940. Their understanding, as expressed by Sen. Jaime Pedersen in
12 recommending a vote on I-940, was that a vote in favor of I-940 (after the passage of ESHB
13 3003) resulted in the law the legislature really desired: I-940 as amended by ESHB 3003.³
14 Thus, it is impossible to conclude that the legislature chose this option, enacting I-940 without
15 change or amendment.

16 **2. The Legislature May Reject The Initiative**

17 The legislature can reject the initiative either by voting against it or by simply doing
18 nothing. In either case, the Secretary of State presents the text of the initiative to the voters at
19 the next general election. “If [an initiative] is rejected or if no action is taken upon it by the
20 legislature before the end of such regular session, the secretary of state shall submit it to the
21 people for approval or rejection at the next ensuing regular general election.” Wash. Const.
22 art. II, § 1(a). If the legislature had ignored I-940, or if it had voted to reject I-940, then I-940
23 would be placed on the ballot in November for a vote by the people. But the legislature did not
24

25 ³ See <https://www.tvw.org/watch/?eventID=2018031082>, 58:03: “I guess I’ll just say it is a
26 necessary part of the process to implement the striking amend – er, the other bill that we
want to become law that we adopt Initiative 940. So I will recommend a yes vote.”

1 do this, either. After all, it voted in favor of I-940, albeit after adopting amendments to it. Thus,
2 not only did they *not* reject I-940, but they actually passed I-940. Thus, it is equally impossible
3 to conclude that the legislature followed the option of ignoring I-940 or voting against it.

4 **3. The Legislature May Propose An Alternative**

5 While the legislature plainly did not follow either of the first two options, this Court must
6 nonetheless decide whether it followed the third available, permissible course of action. If the
7 legislature rejects the initiative, it may propose an alternative for voter consideration together
8 with the initiative it rejected. “The legislature may reject any measure so proposed by initiative
9 petition and propose a different one dealing with the same subject, and in such event both
10 measures shall be submitted by the secretary of state to the people for approval or rejection at
11 the next ensuing regular general election.” Wash. Const. art. II, § 1(a).

12 Plainly, in evaluating I-940, the legislature could not accept many of the substantive
13 policy choices proposed to it in I-940. While the legislature desired to change the state’s law
14 governing police conduct, it did not want to see Washington law become exactly as proposed
15 in I-940. Instead, it wanted to see a different set of policies enacted into law – the policies in
16 ESHB 3003. Thus, the legislature elected to pass a bill dealing with the same subject matter,
17 but in a substantively different manner.

18 As the court in *Hoppe* noted, the legislature is given an option to do precisely what the
19 legislature did in 2018—propose an alternative to the initiative proposed by the people. But
20 by doing so it triggers the constitutional requirement that both the initiative and the alternative
21 proposed by the legislature be presented to the people for their approval or disapproval. The
22 only interpretation of the legislature’s action that is consistent with the Constitution is that it
23 rejected I-940 and proposed an alternative, both of which must appear on the ballot.

24 Of the three foregoing, Constitutional actions the legislature may take, only one fits the
25 actions taken on the subject matter of I-940 and ESHB 3003 in the 2018 Session. The
26 legislature did not reject I-940 by inaction or a majority ‘no’ vote in either chamber. But it also

1 did not adopt I-940 to become the law of the state of Washington without change or
2 amendment. Before voting in favor of I-940, the legislature altered it in significant ways. The
3 legislature plainly wants to alter the law governing police conduct in Washington, but does not
4 want the exact policies found in I-940 to be law. It wants an alternative. And it did not attempt
5 to adopt I-940 until it first attempted to ensure – by votes in both chambers and a gubernatorial
6 signature – that I-940 would not remain the law in Washington for more than 24 hours. In other
7 words, the legislature proposed an alternative to I-940.

8 **B. I-940 And The Proposed Alternative Must Appear On The Ballot**

9 Because the legislature did not adopt I-940 without change or amendment, but instead
10 drafted and approved an alternative, the only Constitutionally permissible result is that both
11 appear on the ballot: “The legislature may reject any measure so proposed by initiative petition
12 and propose a different one dealing with the same subject, and in such event both measures
13 shall be submitted by the secretary of state to the people for approval or rejection at the next
14 ensuing regular general election.” Wash. Const. art. II, § 1(a).

15 The legislature rejected I-940, because it did not adopt it without change or amendment.
16 It proposed a different measure dealing with the same subject – ESHB 3003, or more precisely,
17 I-940 as amended by ESHB 3003. In light of this event – the majority vote in both houses of
18 the legislature for both ESHB 3003 and its amendments followed by the majority vote in both
19 houses for I-940 – “both measures shall be submitted by the secretary of state to the people for
20 approval or rejection at the next ensuing regular general election.” *Id.*

21 This result gives full deference to both sources of legislative power in the State: the
22 people, through the initiative process, and the legislature, which has the power and authority
23 to propose alternatives to initiatives for ballot consideration. Any other outcome rejects one or
24 the other source of legislative power. If I-940 alone appears on the ballot or becomes and
25 remains law, unamended, this Court rejects the legislature’s right to consider and reject
26 initiatives, including by proposing an alternative. As noted above, a majority of the state

1 legislature does not want the state’s law enforcement officers who use deadly force to be
2 judged on both an objective and subjective reasonableness standard. Nor did a majority of the
3 legislature want to compel officers to render first aid, or give them, by statute, a paramount
4 duty to preserve life. The legislature unmistakably rejected these policies, which the people
5 had presented to them in I-940 as proposed changes to the state’s laws. Yet, a majority of the
6 legislature did, in fact, agree that the state’s laws governing official use of deadly force,
7 provision of first aid to the public, and training requirements ought to change. If the Court does
8 not put the legislature’s preferred policy on the ballot as an alternative, it rejects the
9 legislature’s considered judgment that a change is needed, and the exact proposed change it
10 prefers. Instead, by ordering the Secretary of State to put both measures on the November
11 ballot, the Court will enforce the Constitutional requirements of the initiative, which “provides
12 in effect that the legislature must not and cannot propose a different measure dealing with the
13 same subject without submitting the alternative proposal to the people along with the people-
14 originated initiative.” *Hoppe*, 82 Wn.2d at 557, 512 P.2d at 1099. As the Court warned in
15 *Hoppe*, any alternative “would create in the legislature a veto power over every initiative. To
16 so hold would turn the reserved initiative power of the people into a futile exercise.” *Id.*

17 **IV. CONCLUSION**

18 The Constitution reserves to the people a legislative power, that of the initiative. The
19 legislature’s role on initiatives is constrained by the Constitution, and it may only take one of
20 three actions. Here, in its evaluation of the policy proposals put to it by the proponents of I-
21 940, the legislature rejected I-940 and proposed an alternative, I-940 as amended by ESHB
22 3003. Thus, pursuant to the Constitutional constraints on the initiative process, neither I-940
23 nor ESHB 3003 can become law unless first approved by a vote of the people. The only way
24 for such a vote to occur is for the Secretary of State to ensure that both the initiative and the
25 legislature’s proposed alternative appear on the November ballot.

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DATED this 6th day of APRIL, 2018.

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1 **CERTIFICATE OF SERVICE**

2 I certify that on April 6, 2018, I served the foregoing via email per agreement between the
3 parties on the following:

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15 I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of
16 America that the foregoing is true and correct.

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