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## SUPREME COURT REJECTS BID TO QUASH INITIATIVE 960, MEASURE MOVES TO THE NOVEMBER BALLOT

### BRIEFLY

Initiative 960, titled *the Taxpayer Protection Act of 2007*, will be the only initiative on the November ballot. The complete text of the measure is available at:

<http://www.secstate.wa.gov/elections/initiatives/text/i960.pdf>

On Friday, September 7, Washington Supreme Court rejected 9-0 Futurewise and the Service Employees International Union's request for an injunction to prevent Secretary of State Sam Reed from placing Initiative 960 on the November Ballot, ruling that the constitutional issues cited by the plaintiffs can only be raised after the measure receives voter approval (*Futurewise and SEIU Healthcare 775 v. Reed*).

I-960 will be the only initiative on the statewide ballot this November. It has been described by proponents as "one part clean up bill, two parts public disclosure." Much of the bill is aimed at making it more difficult –both procedurally and politically –for the legislature to raise taxes.

The initiative contains four provisions that would alter the way revenue-increasing proposals are handled in Washington:

**Public Notice Regarding Tax Bills:** I-960 would require the Office of Financial Management to estimate the ten-year cost to tax payers of any bill introduced in the legislature that would raise taxes or fees. An email alert system would distribute these cost projections and would also notify subscribers when hearings are scheduled and how legislators have voted on the bills.

**Supermajority to Raise Taxes:** State law currently requires a two-thirds majority in both houses to raise general fund taxes (RCW 43.135.035). I-960 would extend the supermajority requirement to all state taxes.

**Advisory Votes:** Any tax increase enacted without a voter referendum would be subject to an advisory vote at the next general election.

**Fee Increases:** State law currently requires that the legislature approve fee increases in excess of the fiscal growth factor (see box "I-601 Basics" on page 2). I-960 would require that all fee increases receive (simple-majority) legislative approval.

The Office of Financial Management estimates the cost of implementing I-960 would range up to \$1.8 million a year, with the majority of the burden falling on local governments who are responsible for administering elections.

### COST PROJECTIONS

Under current law, OFM is required to prepare *fiscal notes* documenting the fiscal impact of proposed legislation over a six-year horizon:

The office of financial management shall, in cooperation with appropriate legislative committees and legislative staff, establish a procedure for the provision of fiscal notes on the expected impact of bills and resolutions which increase or decrease or tend to increase or decrease state government revenues or expenditures. Such fiscal notes shall indicate by fiscal

year the impact for the remainder of the biennium in which the bill or resolution will first take effect as well as a cumulative forecast of the fiscal impact for the succeeding four fiscal years. Fiscal notes shall separately identify the fiscal impacts on the operating and capital budgets. Estimates of fiscal impacts shall be calculated using the procedures contained in the fiscal note instructions issued by the office of financial management. (RCW 43.88A.20)

I-960 extends the time horizon for cost projections on bills raising taxes or fees to ten years. A press release detailing the ten-year costs of each tax or

fee bill would then be distributed through an email alert system to the legislature and any member of the press or the public who signs up on the OFM website to receive email notification of such measures. The press release would include the names and contact information of the bill's sponsors.

When a hearing on a bill raising taxes or fees is scheduled, OFM must issue a press release through the email alert system including the most up to date cost estimates for the bill, the time and place of the hearing, and the names and contact information for legislators who are members of the relevant committee.

Whenever a committee passes the bill or the bill receives a simple majority vote in either house, OFM must issue yet another email press release, including the most up to date cost estimate as well as a record of how legislators voted on the measure.

Preparing these cost analyses would take priority over other types of analysis such as fiscal notes.

OFM estimates that implementing the email alert system and preparing the 10-year projections will cost the agency \$205,000 for the first year and \$154,000 for subsequent years. This includes computer system modifications and staff dedicated to new responsibilities such as maintaining a web site with cost and legislative contact information, notifying legislators, the press and the public when committee hearings are scheduled for tax bills, or tax measures pass a committee or legislative vote, as well as updating cost projections.

### I-601 BASICS

In 1993 Washington voters approved Initiative 601, establishing a limit on the amount that state spending can be increased each year.

Until recently this limit applied only to spending from the general fund. Beginning with the 2007-09 biennium, the expenditure limit will encompass five "related funds" in addition to the general fund: the health services account; the violence reduction and drug enforcement account; the public safety and education account; the water quality account; and the student achievement fund.

For each year, the limit on spending is set equal to the previous year's spending adjusted by the *fiscal growth factor*. The original language of I-601 defined the fiscal growth factor to be the sum of population and inflation growth averaged over the three prior fiscal years. The 2005 legislature changed the definition, however, so that beginning in the 2007-09 biennium the fiscal growth factor is equal to the average growth in state personal income for the prior ten fiscal years.

When actual expenditures fall below the allowed spending limit, future limits are based on the lower amount. This is known as "re-basing." The spending limit is also adjusted when revenues or program costs are shifted between the general fund (or related accounts) and other funds.

Initially, the bill required a decrease in the spending limit if program costs were shifted out of the general fund, but did not allow a corresponding increase when costs were shifted to the general fund. In 2000, I-601 was amended to allow the limit to be adjusted upward for program costs or ongoing revenue sources that are transferred into the state general fund. This change, called the *two-way street*, created an apparent loophole through which the legislature could artificially raise the limit by moving funds back and forth between the general fund and other state accounts. A complaint challenging the legality of the loophole is currently before the state Supreme Court (*Washington State Farm Bureau Federation v. Gregoire, et al.*).

The 2005 legislature amended I-601 again to close this loophole, effective July 1, 2007. As of that date both program costs and the accompanying revenue source must be transferred to the general fund to qualify for the limit increase.

I-601 requires a two-thirds majority vote in both houses in order to pass tax increases. Additionally, tax increases require voter approval when the new revenue will exceed the spending limit. In addition, fee increases in excess of the fiscal growth factor must have legislative approval before being implemented.

In 2002 the supermajority vote requirement for the legislature to increase state taxes or to appropriate money from the Emergency Reserve Fund was suspended for the 2001-03 biennium and in 2005 the two-thirds requirement was again suspended and changed to a simple majority vote for legislation enacted between the effective date and June 30, 2007.

OFM would collaborate with other state agencies that collect taxes and fees to determine the 10-year costs to taxpayers. It is predicted the Department of Revenue would require \$280,000 a year for new staff and an indeterminate amount would be required for staff at other agencies.

### TWO-THIRDS REQUIREMENT

I-601 contained this language:

After July 1, 1995, any action or combination of actions by the legislature that raises state revenue or requires revenue-neutral tax shifts may be taken only if approved by a two-thirds vote of each house, and then only if state expenditures in any fiscal year, including the new revenue, will not exceed the state expenditure limits established under this chapter. (RCW 43.135.20)

This has been interpreted to require two-thirds majorities only for increases in general fund taxes. I-960 intends to extend the two-thirds requirement to all state taxes. To accomplish this, the initiative replaces the phrase “raises state revenue or requires revenue-neutral tax shifts” with the words “raises taxes” and then states that “ ‘raises taxes’ means any action or combination of actions by the legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.”

The Washington State Budget and Policy Center argues that this provision could be construed to define transfers of money between state accounts to be tax increases subject to two-thirds approval, providing an opportunity for a minority of legislators to hold up routine legislative action.

We do not find this interpretation to be compelling. The initiative includes this statement of intent:

The two-thirds requirement for raising taxes has been on the books since 1993 and the people find that this policy has provided the legislature with a much stronger incentive to use existing revenues more cost effectively rather than reflexively raising taxes. The people want this policy continued and want it to be clear that tax increases inside and outside the general fund are subject to the two-thirds threshold.

A more serious issue raised by I-960’s opponents is whether the state constitution allows the two-thirds requirement to be imposed on the legislature by initiative. This was one of the issues raised by Futurewise and SEIU in their attempt to keep the measure off of the ballot.

The state constitution sets a simple majority standard for passing laws: “No bill shall become a law unless on its final passage the vote be taken by yeas and nays, . . . and a majority of the members elected to each house be recorded thereon as voting in its favor.” The people cannot amend the constitution by initiative, and I-960 does not purport to amend the constitution.

The vote requirement might be construed to be a legislative rule. (The U.S. Senate’s filibuster rule is an example of a rule that effectively requires a 60 percent majority to pass a bill when a constitutional standard is simple majority.) The constitution gives each house the authority to determine its own procedural rules; however, it is unclear whether procedural rules may be imposed by initiative. The presiding officers of the two houses, the Speaker Frank Chopp in the house and Lieutenant Governor Brad Owen

in the senate, will play critical roles in interpreting whether the two-thirds requirement binds.

The state Supreme Court may speak to this issue in the near future, when it releases its decision in the case of Washington State Farm Bureau Federation v. Gregoire et al.

I-960 does provide that only a simple majority in both houses is needed for tax increases that are forwarded to the people as referenda. This is clearly the route that the initiative's authors' prefer for tax increases to follow.

***The two way street.*** Other language in I-960 is intended to close a loophole (the two-way street) that has allowed legislators to game the I-601 spending limit. This loop was opened when the legislature rewrote parts of I-601 in 2000, making it possible to ratchet up the spending limit by appropriating money from the general fund to another state account and then transferring those funds back to the general fund.

Legislation passed in 2005 (SSB 6078) closed this loophole, effective July 1, 2007, so the patch that is proposed in I-960 is superfluous. Moreover, I-960's patch would have the undesirable consequence of discouraging lawmakers from consolidating spending into the general fund if the revenue had previously been moved out of the general fund.

#### ADVISORY VOTES

From the perspective of voters, the most visible change I-960 would bring is the "advisory vote" on tax increases. Any tax increase that does not come before the voters as a referendum would be subject to a non-binding advisory vote on whether the tax increase should be maintained or repealed.

The initiative specifies that each tax measure up for an advisory vote would be given two pages in the voters' pamphlet that would include a thirteen-word description of the measure, the ten-year cost breakdown, the names and contact information of the legislators, and their voting record on the bill. Pointedly, there would be no pro or con statements.

The initiative's sponsors have said:

The goal of I-960 is not to have advisory votes on tax increases; the goal is to encourage the Legislature to not raise taxes without broad public support (which, again, is what they've already promised). But if they do break their promise and raise taxes anyway, I-960 encourages them to follow our state Constitution's referendum requirements. . . .

I-960 is also a clear message to the Legislature: if you want the benefits of a referendum (pro and con arguments in the voters pamphlet, anonymity on your voting record, "marketing" of your tax increase), then follow the Constitution and put the tax increase on the ballot yourself or at least don't block the citizens from exercising their right to referendum. (Eyman, Fagan and Fagan)

The sponsors of the initiative are motivated, in part, by anger at the legislature's use of declarations of emergency to prevent citizens from initiating referenda on tax measures. The state constitution declares that a referendum may not be called on any bill that "may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions." Courts have deferred to

## TABOR

I-960 has been compared to the Tax Payers' Bill of Rights, which voters in Colorado passed in 1992.

TABOR, as it is known, is Colorado's counterpart to I-601, which passed in Washington in 1993. Like the original I-601, TABOR's key feature is a limit that grows at the percentage growth in population and inflation. Unlike I-601, TABOR's limit applies to revenue rather than expenditure. Any revenue collected in excess of the TABOR limit must be refunded to voters.

The TABOR limit applies to both state and local governments. The I-601 limit applies only to the state.

TABOR also includes a provision that any tax increase must be approved by the voters of the effected government.

TABOR is embedded in the Colorado's Constitution and therefore cannot be amended by the Colorado legislature. I-601, in contrast, is only a statutory law and has been modified a number of times by the Washington legislature.

TABOR proved to be successful throughout the 1990s. This was due to large demographic and economic expansion in the region. Taxpayers saw substantial returns as the excess revenue was refunded to them.

However, once the economy declined TABOR created serious financial challenges for governments in Colorado. When the recession hit in 2001 revenues declined sharply. Under TABOR, when revenue declines the following year's limit is ratcheted down. This forced deep cuts in government services like health care and education. It has also prevented governments from sharing in the improving economy.

Coloradoans recently passed a referendum that suspended the TABOR revenue limit for five years. This is intended to allow the state government to play catch-up by allowing them to keep the excess revenues for investments in education, health care and transportation.

While TABOR has caused serious financial problems for Colorado's state and local governments its provisions are quite different from those of I-960. Colorado's experience with TABOR has little relevance to understanding the potential impact of I-960.

legislative judgment that many tax increases fall under this provision.

However, the advisory vote requirement applies to all tax bills that do not receive a referendum, not just those where the legislature has blocked referendum via a declaration of emergency.

**Cost.** OFM estimates advisory votes will cost up to \$1.3 million per year, including \$1.2 million a year for local election expenses, which are fully born by local governments in odd numbered years. The actual cost will vary depending on the number of advisory ballot measures.

In administering local elections, county auditors must provide a separate list and description of advisory vote measures. Should this increase the number of pages required in the county's ballot; the cost per additional page per ballot is 37 cents.

The cost of adding one page to every county's ballot would be \$1.21 million for 3.3 million ballots. The number of counties that would require additional pages is unknown and could vary significantly as legislators find ways to minimize the number of measures referred to the ballot.

While I-960 requires a minimum of two pages in the voter's pamphlet for

each advisory measure, OFM estimates that each measure would require an average of four pages at a cost of \$94,000 (\$23,000 per page) to be included in 3.3 million pamphlets.

The Office of the Attorney General must identify the legislation that will require an advisory vote and write a brief description of each, which is estimated to cost \$1,250 per ballot measure.

## DISCUSSION

Initiative 960 is intended to make it more difficult for our elected representatives to raise taxes without referring the matter to a direct vote of the people. As such, it would take the state a step further away from representative democracy.

The value of delegating public decision making to a small number of representatives was well expressed by James Madison:

The effect of [the delegation of the government to a small number of citizens elected by the rest is] to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose

wisdom may best discern the true interest of their country and whose patriotism and love for justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. (Federalist 10)

The Research Council likes representative democracy. While both the initiative and the referendum provide useful checks on the legislature, public votes should be the exception not the rule.

We find the advisory ballots to be particularly problematic, as they are designed more to intimidate legislators rather than to engage the public.

If the initiative passes, the two-thirds majority requirement will almost certainly be challenged for violating the state Constitution. For some who choose to vote for the initiative, the constitutional question will not matter. As the Washington Supreme Court noted in its 2005 Coppernoll decision, “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” (155 Wn2d at 298). Certainly one of the messages that the sponsors want to send is the people do not want their taxes increased. Futurewise and the SEIU pressed to keep the measure off of the ballot, rather than waiting to challenge its constitutionality after the election, because they did not want voters to have the chance to send that message.

The recently enacted 2007–09 budget has set the state on an unsustainable spending course. If the turmoil in the financial markets pulls the national economy into recession, the state could be facing budget shortfalls by 2009. In light of this, many voters may welcome the chance to send a message. Legislators have only themselves to blame.

If it passes and survives constitutional challenge, the Initiative is unlikely to be either a great panacea or a great catastrophe. While some opponents have compared I-960 to Colorado's “Taxpayers Bill of Rights” (TABOR, see the box on page 5), they really are quite different. The meat of TABOR is a hard cap on revenue growth, with the requirement that excess revenue be returned to taxpayers. This provides a much more stringent constraint on funding government services than I-960's supermajority requirement would provide. In addition, TABOR is written into the Colorado state constitution. In contrast, I-960 would just be statutory.

The existing supermajority requirement for general fund tax increases has been in place since 1994, and the legislature has suspended it twice, first during the 2003–05 biennium and again for 2005–07. In 2008 and 2009 it would take two-thirds majorities in the legislature to suspend or even repeal I-960. After two years, simple majorities would suffice.

#### REFERENCES

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