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8 **STATE OF WASHINGTON**
KING COUNTY SUPERIOR COURT

9 FUTUREWISE and SERVICE
10 EMPLOYEES INTERNATIONAL UNION
11 775,

12 Plaintiffs,
13 v.

14 SAM REED, in his official capacity as
15 Secretary of State of the State of
16 Washington,

Defendant.

NO. 07-2-16119-8 SEA

SECRETARY OF STATE
REED'S CROSS-MOTION
IN RESPONSE TO
PLAINTIFFS' MOTION FOR
JUDGMENT ON THE
PLEADINGS

17 **I. RELIEF REQUESTED**

18 Plaintiffs bring this action seeking relief that the Washington Supreme Court has held,
19 through a recent unanimous opinion, is unavailable: Plaintiffs allege that a proposed initiative
20 measure, which has not yet qualified to the ballot or been approved by the voters, would be
21 unconstitutional if enacted, and seek to prevent an election upon it on that basis. This relief is
22 clearly precluded under Washington law. *Coppernoll v. Reed*, 155 Wn.2d 290, 297-98, 119
23 P.3d 318 (2005). Accordingly, the Defendant, Secretary of State Sam Reed, is entitled to
24 judgment on the pleadings dismissing the Complaint for failure to present a justiciable
25 controversy, and for failure to state any claim on which relief could be granted.
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1 **II. COUNTER-STATEMENT OF FACTS**

2 **A. Description Of Proposed Initiative Measure 960**

3 Plaintiffs’ statement of the facts is too summary, and specifically misstates the
4 description of I-960’s sections 5 and 6. Initiative Measure 960 concerns tax and fee increases
5 imposed by state government and contains nineteen (19) sections amending and adding new
6 sections to the laws of Washington:

- 7 • Section 1 is a statement of legislative intent.
- 8 • Section 2 would add a new section to RCW 43.135 containing six subsections.
9 Subsection (1) would require the Office of Financial Management (OFM) to prepare a
10 cost analysis of any bill increasing taxes or fees, as defined, for the first ten years of its
11 imposition, including a yearly breakdown of the costs. OFM would be required to
12 promptly and publicly report the cost analysis, in a report that would also include the
13 names and contact information of the legislators that sponsor or co-sponsor the bill.
14 Subsection (2) would require OFM to further promptly and publicly report an updated
15 cost analysis with legislator contact information whenever a bill increasing taxes or
16 fees is scheduled for a public hearing. Subsection (3) would require OFM to re-
17 calculate its cost analysis required under subsection 1 whenever a bill increasing taxes
18 or fees is amended, and comply with the reporting requirements of subsection 1, and
19 supply voting records on the bill. Subsection (4) would define “names of legislators
20 and their contact information” for complying with the reporting requirements under
21 subsection 1. Subsection (5) would define “news media” entitled to receipt of public
22 reports required by subsection 1. Subsection (6) would define “the public” entitled to
23 receipt of public reports required by subsection 1.
- 24 • Section 3 would amend RCW 43.88A.020 regarding OFM’s obligation to coordinate
25 with legislative committees and staff in preparing fiscal notes for bills that impact state
26 revenues or expenditures. The amendment would require the preparation and public

1 reporting of OFM’s cost analysis and certain other information on bills increasing state
2 revenue, and would require OFM to give precedence to these analyses over other fiscal
3 notes.

- 4 • Section 4 would amend RCW 43.88A.030 and would require OFM’s cost analysis
5 pursuant to section 2 to be provided prior to the first hearing on a bill, and to be
6 attached to the particular bill analyzed throughout the legislative process.
- 7 • Section 5 would amend RCW 43.135.035 and apply the *existing* requirement of a two-
8 thirds vote of each house of the legislature to any legislative action that “raises taxes”.
9 Section 5 declares that as an alternative, tax increases may be referred to the voters for
10 their approval pursuant to article II, section 1(b) of the state constitution. Section 5
11 would also restrict the circumstances where the legislature may increase the state
12 expenditure limit when revenue has previously been shifted from the general fund or
13 related funds, and would define “raises taxes” to include any actions by the legislature
14 to increase revenues in any fund, budget or account.
- 15 • Section 6 would add a new section to RCW 43.135 containing four subsections.
16 Subsection (1) would require a non-binding “advisory vote”, to be placed on the next
17 general election ballot, on any legislative action that raises taxes when such action is
18 blocked from a citizen referendum or is not referred to the people by a referendum
19 petition found to be sufficient under RCW 29A.72.250. If a legislative action that
20 raises taxes includes more than one revenue source, each tax being increased would be
21 subject to a separate advisory vote. Subsection (2) would require the attorney general
22 to notify the secretary of state of any tax increase subject to an advisory vote for the
23 purpose of assigning a serial number. Subsection (3) would define “blocked from a
24 citizen referendum” to include adding an emergency clause to a bill increasing taxes,
25 obligating taxes through bonds or contract, or otherwise preventing a referendum on a
26 bill increasing taxes. Subsection (4) would exempt tax increases from an advisory vote

1 where the bill raising taxes is referred to the people by the legislature, or the bill is
2 subject to an initiative found to be sufficient under RCW 29A.72.250.

- 3 • Section 7 would amend RCW 29A.72.040 requiring the secretary of state to assign a
4 serial number for advisory measures, such as those that would be placed on the ballot
5 pursuant to Section 6.
- 6 • Section 8 would add a new section to RCW 29A.72 requiring the attorney general to
7 formulate a ballot title for an advisory measure, and such title would not be subject to
8 appeal.
- 9 • Section 9 would add a new section to RCW 29A.72 requiring the secretary of state to
10 file the ballot title submitted by the attorney general, and to notify the legislature, and
11 any person requesting notice, of the ballot title.
- 12 • Section 10 would amend RCW 29A.72.250 requiring the secretary of state to certify the
13 serial number, ballot title, and advisory measure to county auditors for election
14 purposes.
- 15 • Section 11 would amend RCW 29A.72.290 requiring county auditors to print the serial
16 numbers and ballot titles of advisory measures on official ballots under the heading
17 “Advisory Vote of the People”.
- 18 • Section 12 would amend RCW 29A.32.031 requiring the voter pamphlet to contain
19 information regarding a measure for an advisory vote of the people.
- 20 • Section 13 would amend RCW 29A.32.070 defining specified information to be
21 contained in a voter pamphlet regarding a measure for an advisory vote of the people.
- 22 • Section 14 would amend RCW 43.135.055 requiring the imposition of any fee, and all
23 fee increases, to be subject to the provisions of section 2 of this act.
- 24 • Section 15 is a liberal construction provision.
- 25 • Section 16 is a severability clause.

- 1 • Sections 17, 18, and 19 are miscellaneous provisions concerning headings, creating a
2 name for the act, and establishing an effective date.

3 **B. The Plaintiffs' Vaguely Articulated Threat To Its Membership Is Not Relevant To**
4 **The Issue Of Whether A Pre-Election Legal Review Is Appropriate**

5 Plaintiffs argue that their interests will be harmed if I-960 is processed for several
6 reasons including: (1) public money will be wasted on processing I-960; (2) state revenue
7 would be drained affecting Plaintiffs' missions which rely on state spending; (3) the stability of
8 state revenue will be in doubt; and (4) the Legislature's authority to enact laws and to delegate
9 authority to levy administrative fees will be impeded. *Motion* at 4. None of these arguments
10 are pertinent. The sole issue before the court is whether I-960 meets the constitutional
11 requirements for a proposed initiative measure. If so, it is immaterial whether I-960 would be
12 a wise and prudent measure to enact. That is an issue for the voters and not for this Court.

13 **III. COUNTER-STATEMENT OF ISSUES**

14 Plaintiffs' statement of the issues is too broad. The only issue in the case is:

15 Given the general rule that Washington courts do not consider pre-election challenges
16 to proposed initiatives, does Initiative Measure 960 exceed the scope of the initiative power of
17 the people under Article II, section 1(a) of the Washington constitution so as to bring this
18 measure within a narrow exception to that rule?

19 **IV. EVIDENCE RELIED UPON**

20 In a motion for judgment on the pleadings, the only evidence presented to the court is
21 the facts and allegations contained in the pleadings. Such pleadings consist of the complaint,
22 answer, motion for judgment on the pleadings, and the reply to the motion.

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V. ARGUMENT

A. Standard Of Review For Judgment On The Pleadings

The Plaintiffs have properly cited to *North Coast v. Factoria Partnership*, 94 Wn. App. 855, 861, 974 P.2d 1257 (1999) for the standard in reviewing motions for a judgment on the pleadings. *North Coast* stands for the proposition that the court should draw all factual inferences in favor of the non-moving party, and that the moving party *admits* all denials of allegations by the non-moving party.

In this case, there are virtually no “facts.” The parties agree that Initiative 960 was filed with the Secretary of State in January of 2007 and was supplied a ballot title and a ballot measure summary by the Attorney General as required by law. On information and belief, Defendant understands that the proponents of the measure are circulating petitions and seeking signatures in the hope of qualifying I-960 for the November 2007 ballot, but it is not yet known whether they will collect sufficient signatures to qualify for the ballot or submit them to the Defendant for verification. The contents of I-960 are a matter of public record and an issue of law, not of fact. Therefore, Defendant agrees with the Plaintiffs that judgment on the pleadings is appropriate in this case.

B. Pre-Election Review Is Not Proper Since I-960 Is Within The Scope Of Initiative Powers

1. The Washington Supreme Court Has Established A General Rule Against Pre-Election Review Of The Constitutionality Of Proposed Ballot Measures

Washington courts will not consider challenges to the constitutionality of proposed initiatives. *Coppernoll*, 155 Wn.2d at 297-87. *Coppernoll* directly controls this case, because there, exactly as here, the Plaintiffs failed to distinguish between a proposed initiative measure which is beyond the initiative power itself and a proposed measure which, at most, might be unconstitutional if enacted. *Coppernoll* could not be more clear in its holding that courts will not entertain pre-election challenges to the constitutionality of proposed initiative measure. *Id.*

1 The *Coppernoll* plaintiffs sought a declaration that portions of proposed Initiative
2 Measure 330 to the Legislature (I-330) would be unconstitutional if enacted. They asserted
3 that portions of I-330 would unduly infringe on the right to trial by jury and would violate
4 separation of powers principles. Therefore, they asserted, I-330 exceeded the scope of the
5 legislative power under article I, section 2, of the Washington Constitution because it would be
6 unconstitutional if enacted.

7 The Washington Supreme Court unanimously affirmed an order of the King County
8 Superior Court dismissing the *Coppernoll* complaint. The supreme court noted, first, that pre-
9 election challenges to statewide initiatives and referenda fit into three categories: “(1) the
10 measure, if passed, would be substantively invalid because it conflicts with a federal or state
11 constitutional . . . provision; (2) the procedural requirements for placing the ballot have not
12 been met; and (3) the subject matter is not proper for direct legislation.” *Coppernoll*, 155
13 Wn.2d at 197, quoting from James D. Gordon III & David B. Magleby, *Pre-election Judicial*
14 *Review of Initiatives and Referendums*, 64 Notre Dame L. Rev. 298, 298 (1989).

15 The *Coppernoll* opinion went on to note that “the first type of challenge, substantive
16 invalidity, is not allowed in this state because of the constitutional preeminence of the right of
17 initiative.” *Coppernoll*, 155 Wn.2d at 297 (citations omitted). The court went on to note that
18 courts will entertain pre-election review of claims that a proposed initiative is not compliant
19 with procedural requirements (such as challenges to the number of signatures filed, or timing
20 deadlines). *Id.* at 298. As to the third category—proposed measures challenged as not proper
21 for direct legislation—the court noted that the only case in which the supreme court has
22 accepted a challenge to a statewide initiative before an election in the entire history of
23 Washington’s initiative process was *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 911 P.2d
24 389, *cert. denied*, 117 S. Ct. 167 (1996), which involved an initiative proposing to establish a
25 federal, nationwide initiative process, including a call for a world meeting. Because it
26 purported to enact federal and not state legislation, the measure before the *Philadelphia II*

1 court was excluded from the ballot.¹ Accordingly, unless Plaintiffs’ challenge falls within one
2 of these two narrow exceptions, this case must be dismissed and any challenge to the
3 constitutionality of the initiative must await its enactment by the voters—if that occurs.

4 **2. This Case Is Indistinguishable From *Coppernoll* , Which Flatly Rejected**
5 **Pre-Election Challenges To The Constitutionality Of An Initiative Measure**

6 Plaintiffs’ action can proceed only if it falls into one of the two narrow exceptions to
7 the general prohibition against pre-election challenges. That is, it must fit into either the
8 second or third of the three categories of cases outlined in *Coppernoll*--, challenges based on
9 procedural insufficiencies, or challenges to measures not properly within the scope of the
10 initiative process respectively. Plaintiffs allege no procedural insufficiencies in qualifying I-
11 960 to the ballot, and so their claim can proceed only if I-960 is not proper for direct
12 legislation. *Coppernoll*, 155 Wn.2d at 297.

13 As in *Coppernoll*, the Plaintiffs in the present case confuse an argument that an
14 initiative would be unconstitutional if enacted with an argument that it exceeds the scope of the
15 initiative process. As in *Coppernoll*, the Plaintiffs argue that I-960 exceeds the scope of the
16 initiative process *precisely because* it would be unconstitutional if enacted. The *Coppernoll*
17 court clearly rejected such verbal gymnastics, noting that the argument directly contradicts the
18 rule against pre-election challenges. *Id.* at 302.

19 The *Coppernoll* court went on to reiterate the distinction between an initiative that
20 exceeds the legislative power (such as *Philadelphia II*) and an initiative whose contents are
21 asserted to be substantively inconsistent with the Constitution (such as *Coppernoll* itself, or
22 this case). As the court noted:

24 ¹ In *Philadelphia II*, as in *Coppernoll*, the court explained that as a general rule, “Courts are reluctant to
25 rule on the validity of an initiative before its adoption by the people. This reluctance stems from our desire not to
26 interfere in the electoral process or give advisory opinions.” *Philadelphia II*, 128 Wn.2d at 716.

1 I-330 does not purport to effectuate a federal law; amend the United States or
2 Washington Constitution; or create any other type of law outside the state’s
3 legislative power. I-300 is plainly legislative in nature and concerns a general
subject matter within the legislative authority of the people.

4 *Id.* at 303. The court went on to reject the theory that “any proposed legislation that could be
5 potentially unconstitutional would operate as an amendment to the constitution, which is
6 beyond the legislative power.” *Id.* at 304. Accordingly the court declined to provide a pre-
7 election review of I-330, and dismissed the challenge.²

8 **3. Initiative Measure No. 960’s Subject Matter Is Within The Legislative
9 Powers Reserved Under The Washington Constitution**

10 As *Coppernoll* teaches, there is a test as to whether the subject matter of a proposed
11 initiative is within the legislative powers reserved to the people under Article II, § 1 of the
12 Constitution. “[I]n order to be a valid initiative, [an initiative] must be legislative in nature and
13 enact a law that is within the state's power to enact.” *Id.* at 302 (citing *Philadelphia II* at 719).
14 As in *Coppernoll*, Plaintiffs here fail to argue that I-960 is not legislative in nature. Instead
15 plaintiffs in *Coppernoll* and also here argue that portions of I-960 would be unconstitutional if
16 enacted. They assert that a substantively unconstitutional law is *ipso facto* beyond the
legislative power—the same logical fallacy rejected in *Coppernoll*.

17 Even a cursory examination of the text of I-960 reveals that it contains no language
18 purporting to amend the state constitution, or the constitution and laws of the United States. I-
19 960 proposes the following changes in Washington statute, any of which the Legislature could
20 also enact in the form of a bill: (1) the measure would require the Office of Financial
21 Management (OFM) to produce fiscal notes on certain bills raising revenues, and would
22 require publication of reports containing this and related information at various points in the
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24 ² I-330 qualified for the November 2006 ballot, but was rejected by the voters and therefore never
25 enacted. The election results bore out the courts’ concern that they were dealing with a request for an advisory
26 opinion on legislation which was merely a proposal.

1 legislative process³; (2) the measure would change the definition of the term “taxes” for
2 purposes of applying pre-existing statutes requiring a two-thirds legislative majority for certain
3 tax increases⁴; (3) the measure would require advisory ballots on any tax increases enacted by
4 the legislature in bills not already referred by the legislature to the people or not subject to
5 petitions for a referendum measure, and would amend a number of statutes to carry out the
6 “advisory ballot” requirement⁵, and (4) the measure would subject certain fee increases to the
7 same requirements previously imposed on tax increases.⁶ All of these sections are legislative
8 in nature. The legislature is free to enact bills on such subjects as fiscal notes, procedural
9 requirements on enactment of bills, calling for advisory votes and setting procedures for such a
10 process, and the procedure for changing taxes and fees. The people, acting as an alternative
11 legislature, may use the power of initiative to enact laws on the same subjects.

12 Like the petitioners in *Coppernoll*, the Plaintiffs in this case have confused (1)
13 proposing a measure that might be inconsistent with the constitution if enacted with (2)
14 proposing a measure that is beyond the the State’s power to enact (such as a state or federal
15 constitutional amendment or federal law). In other words, the inquiry is into the nature of the
16 proposed measure, not its constitutionality. Like the *Coppernoll* petitioners, the Plaintiffs
17 here assume that it is beyond the initiative power to enact a measure that is substantively
18 unconstitutional. As the *Coppernoll* opinion illustrates, their assumption is incorrect.

19 To illustrate the point, consider the following two items which might be (though not
20 likely) proposed as initiative measures:

- 21 a. Article I, section 11, of the Constitution [“religious freedom”] is hereby repealed.

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24 ³ Initiative 960, sections 2-4.

25 ⁴ Initiative 960, section 5.

26 ⁵ Initiative 960, sections 6-13.

⁶ Initiative 960, section 14.

1 b. No member of the Methodist Church shall ever be entitled to any protection from
2 discrimination on the basis of religion.

3 Item A above expressly purports to amend the state constitution. This power is not included in
4 the initiative powers reserved to the people in Article II, § 2, of the Constitution. (Instead,
5 Article XXIII of the Constitution sets forth how the Constitution may be amended.) Thus, an
6 initiative measure purporting to amend the Constitution would, like the proposal to enact
7 federal law considered in *Philadelphia II*, would be subject to pre-election challenge and
8 would not be qualified to appear on the ballot.

9 Item B presents a different case. It is within the legislative power to enact laws relating
10 to discrimination, and laws determining which classes of people will be entitled to procedural
11 and substantive protection. Item B does not purport to change the Constitution and would, if
12 enacted, be subject to constitutional limitations on its implementation and enforcement. In the
13 case of a proposed law withdrawing all legal protection from members of the Methodist
14 Church, it is highly unlikely that any court would uphold such a law against a claim that it
15 would be inconsistent with various provisions of the state and federal constitutions. *But that*
16 *would not render Item B subject to pre-election challenge.* Indeed, in the unlikely case that
17 such a measure qualified for the ballot and were enacted, *only then* would it be appropriate to
18 consider whether it could constitutionally be implemented or enforced. Until then, Item B is
19 simply a proposal, like a bill filed in the legislature, and is not ripe for judicial review. The
20 people, like the members of the legislature, are entitled to propose legislation even when its
21 constitutionality might be subject to later challenge, and the courts should avoid unnecessarily
22 addressing constitutional issues and unwarranted judicial interference with the legislative
23 process. *Coppernoll*, 155 Wn.2d at 298 (citation omitted).

24 This analysis is consistent with the most recent Washington decision on pre-election
25 challenges. In *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006), the court
26 considered a pre-election challenge to a local initiative. Following the analysis set forth in

1 *Coppernoll*, the court explained that a proposed measure exceeds the scope of the initiative
2 process if , by its nature, it is not the type of measure that the voters of the jurisdiction are
3 empowered to enact. *Id.*, 157 Wn.2d at 261. In that case, the proposed initiative concerned the
4 city’s issuance of certain revenue bonds. *Id.* at 255. The court concluded that the initiative
5 exceeded the scope of local initiative power because state law vested authority over the
6 issuance of the bonds in the *city council*, and not in the city’s voters. *Id.* at 261-63. Thus the
7 inquiry when deciding whether a pre-election challenge is available depends upon the nature of
8 the measure and scope of legislative authority, not whether it would be valid if enacted.

9 Additionally, pre-election challenges naming the election official as Defendant, such as
10 this one, are inappropriate forums for litigating the constitutionality of an initiative that is, at
11 this stage, merely a *proposed* law. The Secretary of State has an interest in properly
12 conducting an election, but as to the merits of a proposal that might appear on the ballot he is a
13 neutral, not a combatant. Before an initiative is passed, it does not have the force of law, and
14 thus the Secretary, or even the State more generally, does not have a duty to enforce or defend
15 it. The dispute is accordingly nonjusticiable because there is no case or controversy between
16 the present parties as to the measure’s constitutionality. *See City of Sequim*, 157 Wn.2d at 289
17 (Chambers, J., concurring in part/dissenting in part).

18 **4. I-960 Does Not Purport To Amend The State Constitution**

19 In support of their notion that I-960 purports to amend the Constitution, the Plaintiffs
20 primarily rely on *Amalgamated Transit Union Local 587 v. State (“ATU”)*, 142 Wn.2d 183, 11
21 P.3d 762 (2000), a case in which the supreme court struck down Initiative 695 on several
22 grounds, one being that the initiative purported to require a state referendum on any legislative
23 act increasing taxes. *ATU* is distinguishable from this case on at least two bases: (1) *ATU* was
24 not a pre-election challenge, but a post-election challenge to a measure that had already been
25 enacted; and (2) I-695 did not purport to amend the Constitution, but rather called for
26 referendums to be conducted in circumstances requiring neither referral by legislative act or

1 referral by petition as set forth in the Constitution. In other words, the court found that I-695
2 was substantively unconstitutional because its provisions were inconsistent with those of the
3 Constitution. *ATU* provides no exception from the *Coppernoll* rule that courts will not assess
4 the substantive constitutionality of a proposed bill or measure before its enactment.

5 The Plaintiffs here do not suggest that I-960 would (or could) actually amend the
6 Constitution. Rather, they argue that I-960 if enacted would be inconsistent in various ways
7 with the provisions of the Constitution relating to the powers of initiative and referendum.
8 This is exactly analogous to the arguments rejected in *Coppernoll*. Applied to I-960, a
9 proposed measure that has neither qualified to appear on the ballot nor been enacted, the
10 Plaintiffs here invite the Court to provide an advisory opinion on a measure that may not ever
11 be enacted, and (worse yet), to seriously interfere with the legislative power of initiative
12 reserved to the people.

13 **5. The Plaintiffs Raise No Points Justifying Pre-Election Review Of I-960**

14 The Plaintiffs raise several arguments why pre-election review of I-960 would be
15 appropriate. Neither is convincing.

16 The first argument offered by Plaintiffs in support of pre-election review is that I-960
17 would take effect on December 9, 2007 which is an “insufficient amount of time to rely upon
18 post-election judicial review to prevent the harm stemming from this invalid measure.”
19 Motion at 8. In other words, Plaintiffs argue that because of its purported unconstitutionality,
20 the court should not wait to see if the voters approve it, but should strike it down now. The
21 state constitution, however, provides a general rule that initiatives take effect 30 days after the
22 election at which they are adopted. This argument could be made in favor of pre-election
23 review as to any ballot measure asserted to be unconstitutional, and therefore cannot be
24 reconciled with *Coppernoll*. The courts have never entertained the notion that there is a
25 category of measure “too dangerous” to be allowed to appear on the ballot, and *Coppernoll*
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1 clearly provides that there is no such exception to the “no pre-election review” principle. No
2 considerations similar to this play any role in the court’s *Coppernoll* analysis at all.⁷

3 Plaintiffs similarly assert that this pre-election challenge should proceed in order to
4 avoid the cost of conducting an election. They allege that harm would result both from the
5 State’s expenditure of funds to conduct an election and from expenditures that initiative
6 opponents may make in order to exercise their First Amendment right to oppose the initiative.
7 As with the argument about the initiative’s effective date, this argument could be made with
8 regard to every initiative, and thus cannot be reconciled with *Coppernoll*. Moreover, the cost
9 of conducting an election to afford voters the opportunity to express their views on a proposed
10 measure is a burden that the State voluntarily accepts as part of the price of democratic
11 government. Finally, initiative opponents have no basis for objecting to the appearance of an
12 initiative on the ballot on the basis of costs involved in campaigning against it. The sponsors
13 of an initiative exercise a constitutional right in proposing it to the ballot and advocating its
14 enactment. *Schrempp v. Munro*, 116 Wn.2d 929, 809 P.2d 1381 (1991); *see also Coppernoll*,
15 155 Wn.2d at 298 (noting First Amendment interests of initiative sponsors). Initiative
16 opponents have the right to urge voters to reject the proposal, but they have no concomitant
17 right to preclude the sponsor from qualifying it to the ballot and advocating its enactment.

18 Another argument offered by Plaintiffs in support of pre-election review is that
19 legislators, who are asserted to be among Futurewise’s members, will likely be harmed before
20 I-960 is voted upon. Motion at 9-10. Plaintiffs, purportedly on behalf of the legislature, argue
21 that the harm to the legislature is that (1) funds spent processing I-960’s signature petitions will

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23 ⁷ Plaintiffs rely heavily on a court of appeals decision that predates *Coppernoll*. Motion at 8 (discussing
24 *Seattle v. Yes For Seattle*, 122 Wn. App 382, 93 P.3d 176 (2004). The question of whether there may or may not
25 be any urgency to post-election review is simply not a factor in the analysis set forth in *Coppernoll*, which
26 established a blanket rule that the question of whether a measure would or would not be unconstitutional if
enacted is not subject to pre-election review. Accordingly, to the degree that any portion of the court of appeals
analysis is inconsistent with *Coppernoll* it is no longer good law under *Coppernoll*.

1 come out of legislative budgets; and (2) new and increased fees by administrative agencies
2 with legislatively delegated authority would not go into effect without specific legislative
3 approval; and (3) I-960 might have a retroactive effect for the fiscal year that runs from July 1,
4 2007 through June 30, 2008. The Plaintiffs do not (and cannot) assert in this case that they
5 represent the institutional interests of the Legislature. The Plaintiffs' attorneys may represent
6 legislators only as individuals or as members of a private organization. Again however, such
7 an assertion could be made in virtually any challenge to an initiative, and this consideration
8 plays no role in the analysis under *Coppernoll*.

9 **C. The Court Should Not Address Any Questions As To The Constitutionality Of**
10 **Initiative 960**

11 The Plaintiffs go to some length arguing that various provisions in I-960 would, if
12 enacted, be inconsistent with the Washington Constitution and could not be implemented or
13 enforced. Plaintiffs' Motion at 10-19. For the reasons stated above, it would be inappropriate
14 to address any of those questions unless the initiative is enacted by the people. The Attorney
15 General and Secretary of State take no position at this time on any of the constitutional
16 arguments made by the Plaintiffs, and will take no position unless the measure is enacted.

17 A couple of points should be clarified however. First, the Defendant does not concede
18 that the Plaintiffs have properly analyzed or characterized what I-960 would do or how it
19 would operate if enacted. Specifically, the Defendant does not concede that I-960 seeks to
20 "replace the referendum petition process", or that I-960's references to "advisory ballots"
21 amount to an attempt to extend or change the referendum power, or that I-960 would subject
22 revenue measures to mandatory referendum, or that I-960 purports to change the constitutional
23 process for enacting legislation, or that I-960 is not severable, or that it has any effect in
24 advance of the election. In a proper (post-election) case concerning I-960, the State would
25 review the text of the measure and would reach conclusions as to how it should be analyzed in
26 light of the issues raised in such a case.

1 Second, the Plaintiffs have taken the unusual step of attaching to their Complaint in this
2 case a brief submitted by the Attorney General on behalf of the State in another case.
3 Complaint, Exhibit B (State’s Opening Brief in *Washington State Farm Bureau Federation v.*
4 *Gregoire*, Washington Supreme Court No. 78637-2). In that brief, the State observed (pp. 40-
5 45) that the voter approval requirements in RCW 43.135.035(2)(a) are of doubtful
6 constitutionality. Initiative 960 (Section 5) would amend RCW 43.135.035, although it would
7 not amend any portion of subsection (2), the language discussed in the State’s *Farm Bureau*
8 brief.

9 The *Farm Bureau* brief should not be construed by the Court as indicating the State’s
10 position on any of the issues raised in this case. The issues in this case are different from those
11 presented in the *Farm Bureau* case, and the language at issue in that case is not altered by
12 Initiative 960. More to the point, the underlying constitutionality of RCW 43.135.035 is
13 immaterial here. Even if the state supreme court were to declare RCW 43.135.035(2)(a)
14 unconstitutional tomorrow, that would not affect the fact that I-960 is legislative in nature and
15 therefore is not subject to *pre-election* challenge. It might present issues to be confronted after
16 the initiative is enacted (if it is), and it might present interesting questions of statutory
17 construction and severability, but the time to consider all of those issues is after the measure’s
18 enactment.

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VI. CONCLUSION

For the reasons stated above, the court should deny the Plaintiffs' Motion for Judgment on the Pleadings, and should instead dismiss the Complaint in this matter.

RESPECTFULLY SUBMITTED this 8th day of June, 2007.

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