No. 77010-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE FARM BUREAU FEDERATION, WASHINGTON STATE GRANGE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, EVERGREEN FREEDOM FOUNDATION, and DAN WOOD, individually,

Petitioners,

v.

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

Respondent.

An Original Action Against the Secretary of
State, Sam Reed, A State Officer

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF FACTS 2

ARGUMENT 4

I. A WRIT OF MANDAMUS IS THE PROPER REMEDY 4

A. WHETHER SECTIONS 1 AND 2 OF SSB 6078 ARE SUBJECT TO THE PEOPLE'S REFERENDUM POWERS IS A QUESTION IN THE PUBLIC INTEREST. 5

B. A WRIT OF MANDAMUS IS APPROPRIATE TO COMPEL THE RESPONDENT TO UNDERTAKE MANDATORY DUTIES 7

C. THERE IS NO PLAIN, SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW. 7

II. THE EMERGENCY CLAUSE AND ATTEMPT TO MAKE SECTIONS 1 AND 2 OF SSB 6078 EFFECTIVE IMMEDIATELY ARE INVALID 9

A. WASHINGTON'S CONSTITUTIONAL STRUCTURE 10

B. THE CONSTITUTIONAL RIGHT TO REFERENDUM SHOULD BE LIBERALLY CONSTRUED 13

C. WHETHER A BILL IS SUBJECT TO REFERENDA IS A JUDICIAL QUESTION. 16

D. SSB 6078 CONTAINS NO FINDINGS TO SUPPORT THE VALIDITY OF THE EMERGENCY CLAUSE 22

E. SSB 6078 IS NOT IMMUNE FROM THE REFERENDA POWER 26

1. There is No Emergency Related to a Need for Immediate Preservation of Public Peace, Health or Safety 27

2. Sections 1 and 2 of SSB 6078 are not Necessary for Support of State Government. 29

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Brower v. State,
137 Wn.2d 44, 967 P.2d 42 (1998).. 15

City of Seattle v. McCready,
123 Wn.2d 260, 868 P.2d 134 (1994).. 16

City of Spokane v. Harris,
25 Wn. App. 345, 606 P.2d 291 (1980).. 25

CLEAN v. State,
130 Wn.2d 782, 928 P.2d 1054 (1996)... passim

Goodman v. Stewart,
57 Mont. 144, 187 P. 641 (1920).. 21

Hall v. Corp of Catholic Archbishop of Seattle,
80 Wn.2d 797, 801 P.2d 844 (1972).. 14, 34

Illinois State Board of Elections v. Socialist Workers Party,
440 U.S. 173 (1979).. 13

Langdon v. City of Walla Walla,
112 Wash. 446, 193 P.1 (1920) 15

McClure v. Ney,
22 Cal. App. 248, 133 Pac. 1145 (1913) 17

Myers v. United States,
272 U.S. 52 (1926)... 20

Nicholson v. Cooney,
265 Mont. 406, 877 P.2d 486 (1994)... 30

O'Connell v. Kramer,
73 Wn.2d 85, 436 P.2d 786 (1968).. 8

Philadelphia II v. Gregoire,
128 Wn.2d 707, 911 P.2d 389 (1996)... 7

Save our State Park v. Hordyk,
71 Wn. App. 84, 856 P.2d 734 (1993)..................................... 12, 13, 19

State ex rel. Blakeslee v. Clausen,
85 Wash. 260, 148 P. 28 (1915) 30, 31

State ex rel. Brislawn v. Meath,
84 Wash. 302, 147 P. 11 (1915) .... passim

State ex rel. Case v. Howell,
85 Wash. 281, 147 P. 1162 (1915) 12, 14, 16

State ex rel. Case v. Superior Court,
81 Wash. 623, 143 P. 461 (1914) 14, 16

State ex rel. Gray v. Martin,
29 Wn.2d 799, 189 P.2d 632 (1941).......... 24, 26, 28

State ex rel. Hamilton v. Martin,
173 Wash. 249, 123 P.2d 1 (1933) 23

State ex rel. Helm v. Kramer,
82 Wn.2d 307, 510 P.2d 1110 (1973).......... 30

State ex rel. Hoppe v. Meyers,
58 Wn.2d 320, 363 P.2d 121(1961).......... 30

State ex rel. Humiston v. Meyers,
61 Wn.2d 772, 380 P.2d 735 (1963).......... passim

State ex rel. Kennedy v. Reeves,
22 Wn.2d 677, 157 P.2d 721 (1945).......... 11, 19, 24, 30

State ex rel. Mullen v. Howell,
107 Wash. 167, 181 P. 920 (1919) 12

State ex rel. Porter v. Superior Court,
145 Wash. 551, 261 P.90 (1927) 28

State ex rel. Reiter v. Hinkle,
161 Wash. 652, 297 P. 1071 (1931) 30

Sudduth v. Chapman,
88 Wn.2d 247, 557 P.2d 1351 (1977).......... 16

Swartout v. City of Spokane,
21 Wn. App. 665, 586 P.2d 135 (1978).......... 25, 26

Washington State Labor Council v. Reed,
149 Wn.2d 48, 65 P.3d 1203 (2003).......... 5, 6, 19, 20

Wesberry v. Sanders,
376 U.S. 1 (1964).......... 13

Wheeler School Dist. No. 152 of Grant County v. Hawley,
18 Wn.2d 37, 137 P.2d 1010 (1943).......... 12

Williams v. Rhodes,
393 U.S. 23 (1968).......... 13

STATUTES

RCW 7.16.160 7

RCW 7.16.170 8

RCW 29A.72.060.......... 4

RCW 29A.72.090.......... 4, 6

RCW 29A.72.170.......... 7, 8

RCW 43.135.035 .... 1, 2, 28

OTHER AUTHORITIES

Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247, 281 (1996) 29

Phillip A. Trautman, *Initiative and Referendum in Washington*, 49 WASH. L. REV. 55, 73 n. 68 (1973).......... 16, 26

CONSTITUTIONAL PROVISIONS

WA Const. art I, § 1 11

WA Const. art 1, § 5 13

WA Const. art. 1, § 19 13

INTRODUCTION

With the passage of SSB 6078 the Legislature suspended the two-thirds vote requirement previously enacted through Initiative 601 (I-601), codified as RCW 43.135.035, for bills which raise taxes. To prevent this amendment to I-601 from being referred to the people for approval, the Legislature added a standard emergency clause. Petitioners are prohibited from circulating referendum petitions to have this matter placed before the voters because Secretary of State Reed has assumed that the mere existence of the emergency clause trumps the power of the people to vote on the bill.

Because Petitioners' 90 day window to collect more than 100,000 signatures ends on July 23, 2005, Petitioners request that this Court expeditiously review the validity of the emergency clause as it has on numerous occasions. Only this Court can give a final answer as to whether the emergency clause is invalid and whether the Legislature has violated the separation of powers doctrine by attempting to shut out a co-equal legislative body, the people who in this State constitute the fourth branch of government. Ultimately, Petitioners seek a ruling from this Court, as it has given in other cases, that the bare declaration of emergency in this case does not preclude the exercise of the referendum power.

STATEMENT OF FACTS

Petitioners believe that the following facts are undisputed.

In the 59th Legislative 2005 Regular Session, the Legislature passed Substitute Senate Bill 6078 (SSB 6078), Chapter 72, Laws of 2005, which was approved by Governor Christine Gregoire on April 18, 2005. A copy of SSB 6087 is attached hereto as Appendix A.

SSB 6078 contains seven sections. Section 2 amends RCW 43.135.035, which was originally adopted by the people by means of Initiative 601. A significant feature of this section of I-601 is in Subsection (1) which requires a two-thirds vote of the Legislature in order to approve increased taxes:

> 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.

Appendix A.

SSB 6078 suspends the two-thirds vote requirement by adding the following to RCW 43.135.035(1):

> However, for legislation enacted between the effective date of this 2005 act and June 30, 2007, any action or combination of actions by the Legislature that raises state revenue or requires revenue-neutral tax shifts may be taken with the approval of a majority of members elected to each house, so long as state expenditures in any fiscal year, including the new revenue, will not exceed the state expenditure limits established under this chapter.

Appendix A. Sections 3 through 6 of SSB 6078 make changes in how the expenditure limit is calculated and handled.

Section 7 includes a standard emergency clause which states:

> (1) Sections 1 and 2 of this act are necessary for the immediate preservation of the public peace, health or safety, or support of state government and its existing public institutions, and take effect immediately.
>
> (2) Sections 3 through 6 of this act take effect July 1, 2007.

Appendix A.

Section 1 of SSB 6078 provides an uncodified statement of legislative intent. It refers generally to the importance of the state expenditure limit from I-601. *See* Appendix A. It provides no recitation of facts, policy, intent, or basis for emergency related to the suspension of the two-thirds vote requirement.

On April 29, 2005, Petitioner Wood filed in the Secretary of State's Office an Affidavit for Proposed Referendum Measure to propose a referendum on Sections 1 and 2 of SSB 6078. A copy of the Affidavit is attached to the Petition for Writ of Mandamus as Exhibit B. Although the Secretary of State gave this referendum the designation Referendum 60, the Secretary of State has decided that the referendum is not within the scope of the referendum power due to the existence of the emergency clause in Section 7(1) and, therefore, has refused to accept the measure. Attached to the Petition for Writ of Mandamus as Exhibit C is a copy of the Secretary of

State's letter dated April 29, 2005 to Petitioner Wood expressing the Secretary of State's position on this measure.[1]

Because the Secretary of State has refused to process Referendum 60, the Attorney General has not and will not prepare a ballot title pursuant to RCW 29A.72.060, which is a prerequisite for the gathering of signatures on referenda petitions. RCW 29A.72.090 and .100.

Petitioner Dan Wood is the proponent of Referendum 60. The remaining Petitioners are organizations with members who are voters and taxpayers in Washington and who intend to solicit signatures on petitions calling for Referendum 60 to be placed on the ballot if the Court grants the Petition in this case.

ARGUMENT

I.

A WRIT OF MANDAMUS IS THE PROPER REMEDY

This Court has nonexclusive and discretionary jurisdiction to issue a writ of mandamus against a state officer. Article IV, Section 4 of the Washington Constitution. For the following reasons, the requested writ should issue.

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[1] Petitioners have requested that Attorney General Rob McKenna enforce Secretary of State Sam Reed's duty to process Referendum 60. Petitioners believe that Attorney General McKenna has decided not to do so. *See* Appendix B, attached hereto.

A. Whether Sections 1 and 2 of SSB 6078 are Subject to the People's Referendum Powers is a Question in the Public Interest.

Just two years ago, this Court was faced with a challenge to the legality of Referendum 53 after it had been accepted by the Secretary of State and signatures gathered. In *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 65 P.3d 1203 (2003), the Court found that a petition for writ of mandamus was the proper vehicle for resolving the issues. The Court explained:

> [T]he established rule [regarding mandamus proceedings] seems to be that as original jurisdiction is conferred in order that the court of highest authority in the state should have the power to protect the rights, interests, and franchises of the state, and the rights and interests of the whole people, to enforce the performance of high official duties affecting the pubic at large, … the court is vested with a sound legal discretion to determine for itself, as the question may arise, whether or not the case presented is of such a character as to call for the exercise of its original jurisdiction.

Id. at 54 (quotations omitted).

Significantly, this Court found that "there is sufficient public interest in whether a referendum before the voters as the general election was, in fact, within the scope of the referendum power set forth in Article II, section 1(b)." *Id*. Public interest in the present case is even higher considering that the referendum here is on the Legislature's attempt to circumvent a state taxing and spending measure originally adopted by the voters through Initiative 601.

This Court in the *Washington State Labor Council* referenced the common reluctance to give advisory opinions on the propriety of a

referendum prior to the election because the voters may, in fact, approve the bill being referred which might render objections to the referendum moot. However, this Court found that principles of judicial economy called for resolution of whether Referendum 53 could be submitted to the people for a vote, to avoid having further rounds of briefing after an election. *Id.* at 55.

While those same concerns exist here, this case involves an even stronger basis for consideration of the Petition now. Here, no theoretical "advisory opinion" is involved. Unlike *Washington State Labor Council* where the Secretary of State was planning to place Referendum 53 on the ballot, Petitioners here **cannot circulate petitions** because they must contain the ballot title prepared by the Attorney General. RCW 29A.72.090, .100. The Attorney General has not prepared a ballot title presumably because the **Secretary of State has not accepted the referendum for filing.** Therefore, unless this Court acts quickly, the people of Washington will be deprived of their referendum right simply by the decision of the Secretary of State in accepting the Legislature's emergency clause at face value coupled with the passage of 90 days. Petitioners need an immediate resolution of whether this emergency clause is sufficient to prohibit a referendum since they have only until July 23, 2005 to gather more than 100,000 signatures. Only this Court can provide that answer.

B. A Writ of Mandamus is Appropriate to Compel the Respondent to Undertake Mandatory Duties

While a writ of mandamus is not appropriate to require the Respondent to exercise discretion in any particular manner, it is an appropriate remedy where Petitioners seek to require a state official to carry out a mandatory duty. RCW 7.16.160. Here the Secretary of State is charged with the statutory duty under RCW 29A.72.170 to file and process a referendum petition after it has been submitted unless it does not meet the specific criteria set forth in RCW 29A.72.170, namely, that the petition does not contain the required information, that the petition contains insufficient signatures, or that the petition is untimely.

In refusing to file the referendum petition, the Secretary of State did not reject the petition on any of these permissible grounds in the statute. Instead, the Secretary of State chose to conclude that the emergency clause was valid and, therefore, trumped his statutory duties. The Secretary of State does not have the authority to reject a referendum on the presence of an emergency clause in the legislation. Courts have specifically determined that election officers, such as the Secretary of State, may not refuse to file a petition based upon its subject matter. *See Philadelphia II v. Gregoire*, 128 Wn.2d 707, 911 P.2d 389 (1996) (holding Attorney General does not have discretion to refuse to prepare ballot title and summary based on belief that initiative exceeds scope of initiative power); *see also State ex rel. O'Connell*

v. Kramer, 73 Wn.2d 85, 88-89, 436 P.2d 786 (1968) (holding that Secretary of State could not refuse to transit initiative to Attorney General); *see also Ballasiotes v. Gardner*, 97 Wn.2d 191, 642 P.2d 397 (1982) (holding that county prosecutor had overstepped the bounds of his authority by refusing to prepare a ballot title for a referendum because he believed the subject matter to be exempt from the county charter authorizing referenda). This Court explained it best in *O'Connell*:

> The Secretary of State can no more thwart the legislative processes of the initiative by a claim of unconstitutionality than could the Speaker of the House or the Lieutenant Governor as the presiding officer of the Senate refuse to have the vote taken on a bill because he did not believe it to be constitutional.

O'Connell, 73 Wn.2d at 87. Even the Secretary of State acknowledges this in his letter rejecting the petition. *See* Exhibit C to Petition for Writ of Mandamus.

The duty under RCW 29A.72.170 is mandatory. Therefore, a writ of mandamus is an appropriate remedy because the Secretary of State is prohibited from rejecting the Petition unless one of the grounds for refusal exists, and none exist in this case.

C. There is no Plain, Speedy and Adequate Remedy in the Ordinary Course of Law.

This Court issues a writ of mandamus only in cases where there is no plain, speedy, and adequate remedy at law. RCW 7.16.170. There is no plain, speedy and adequate remedy at law in this case. Petitioners need a

final decision on whether Sections 1 and 2 of SSB 6078 are subject to a referendum because, under Article II, Section 1 of the Washington Constitution, they must submit signatures on referendum petitions within 90 days from the end of the legislative session. The end of the legislative session was on April 24, 2005, which makes the 90-day deadline July 23, 2005. Within those 90 days, Petitioners must obtain signatures of 4% of the number of voters registered and voting for the office of Governor at the last gubernatorial election. *See* Article II, Section 1(b).

Although petitions for writs of mandamus may be filed in Superior Court, any decision by the lower court is likely to be appealed to the highest court. Such a process would consume the relatively few days Petitioners have to gather signatures. Petitioners have no other plain, speedy and adequate remedy in the ordinary course of law.

II

THE EMERGENCY CLAUSE AND ATTEMPT TO MAKE SECTIONS 1 AND 2 OF SSB 6078 EFFECTIVE IMMEDIATELY ARE INVALID

The question in the present case is a straightforward one. It is essentially identical to the one this Court wrestled with in the very first case involving the referenda powers of the people in *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 P. 11 (1915):

> There is but one question to be decided: Whether the Legislature can declare an emergency in the instant case, so as to free the act of

> the restraints contained in the recent amendment to the Constitution, known as the initiative and referendum amendment.

Id. at 305. The specific restraints were framed by the court in *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 380 P.2d 735 (1963):

> The question for our determination is simply this: Is … the emergency clause valid so that the act becomes effective immediately, or, is the emergency clause invalid so that the act is subject to a possible referendum vote by the people?

Id. at 775. This case involves the same questions. Is the emergency clause in Section 7(1) of SSB 6078 valid so as to prohibit Petitioners' proposed referendum?

The history of reviewing emergency clauses makes clear that the Court does so on a case-by-case basis.[2] As recognized in *Humiston* in 1963, the Court upheld emergency clauses in eleven cases and invalidated them on seven occasions. *Id.* at 777. For the following reasons, the emergency clause at issue here should be held invalid.

A. Washington's Constitutional Structure

Our constitution begins with the fundamental premise as to the source of all legislative power in this state:

> All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

[2] *Ballasiotes,* 97 Wn.2d at 199 ("In determining what meaning to give the word 'support' in exception to the referendum power of the people, however, each case must be treated individually").

WA Const. Article I, § 1, *quoted in Humiston*, 61 Wn.2d at 775 n.3 (reviewing validity of emergency clause to preclude referendum) and *State ex rel. Kennedy v. Reeves*, 22 Wn.2d 677, 679, 157 P.2d 721 (1945) (reviewing emergency clause).

The constitution's declaration of rights also contains a critical imperative as to the balancing of constitutional rights and constitutional powers. After noting the confusion surrounding the various cases regarding the validity of emergency clauses vis-à-vis referenda, this Court recognized the following guiding principle:

> It would seem that we have arrived at a point where it is well to heed the admonition which the people, in adopting our constitution in 1889, attached to the first article of the instrument, which article is entitled "bill of Rights":
>
>> A frequent recurrence to fundamental principles is essential to the security of individual rights, and the perpetuity of free government.

State ex rel. Kennedy v. Reeves, 22 Wn.2d at 679 (quoting) Article I, Section 32.) Describing this constitutional requirement regarding fundamental principles this Court explained:

> Clearly, it is but an admonition not only to the Legislature but also to the courts to constantly keep in mind the fundamentals of our republican form of government--among others, the cleavage between the legislative and the judicial powers.

Wheeler School Dist. No. 152 of Grant County v. Hawley, 18 Wn.2d 37, 48, 137 P.2d 1010 (1943). With this in mind, the Court is asked to return to fundamental principles in resolving the issues of this case.

Article II, Section 1 starts with the delineation of legislative powers in this state.

> The legislative authority of the state of Washington shall be vested in the Legislature, consisting of a senate and house of representatives, which shall be called the Legislature of the state of Washington, **but the people reserve to themselves** the power to propose bills, laws, and to enact or reject the same at the polls, independent of the Legislature, and **also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act, or law passed by the Legislature**
>
> .

Article II, Section 1 (emphasis added). The rights of initiative and referendum are the "first of all the sovereign rights of the citizen—the right to speak ultimately and finally in matters of political concern." *State ex rel. Mullen v. Howell*, 107 Wash. 167, 171, 181 P. 920 (1919), *quoted in Save our State Park v. Hordyk*, 71 Wn. App. 84, 90, 856 P.2d 734 (1993) (Alexander, J.).

In *Hordyk*, then Court of Appeals Judge Alexander also quoted from the very first opinion reviewing the constitutional right of referendum in *Brislawn*, 84 Wash. 302, for the proposition that delay or inefficiency caused by the existence of referenda rights may not weigh against the people's right to vote on legislation.

> The people have a right to adopt any system of government they see fit to adopt. In its workings, it may not meet their expectations; it may be unwieldy and cumbersome; it may tend to inconvenience and prodigality; it may be the express of a passion or sentiment rather than of sound reason; but it is the people's government and, until changed by them, must be observed in the Legislature and protected by the courts.

Id. at 320, *quoted in Hordyk*, 71 Wn. App. at 90. That a right to referendum creates some delay (at least 90 days) for legislation to go into effect may frustrate the Legislature's wishes for expediency is no cause for approving a mere declaration of emergency purporting to cut off any exercise by the people of their power to vote on the measure.

B. The Constitutional Right to Referendum Should be Liberally Construed

It is beyond question that the right to vote is among the "most precious in a free country." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). "[O]ther rights, even the most basic, are illusory if the right to vote is undermined." *Id.*; *see also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("voting is of the most fundamental significance under our constitutional structure"). The right to vote is akin to the right to free speech; both are protected by the federal and state constitutions. WA Const. art. 1, § 19 (right to vote); WA Const. art 1, § 5 (free speech); First, Fourteenth and Twenty-fourth Amendments to the United States Constitution. Liberal construction is appropriate because the right of the people to exercise the

referendum power is fundamental and by no means trivial.

The beginning of Article II, Section 1 provides that the people who adopted and amended the constitution "reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act, or law passed by the Legislature." The emergency clause which shows up later in Article II, Section 1 (b) is an exception to that general rule. Exceptions to general rules are to be strictly construed. *Hall v. Corp of Catholic Archbishop of Seattle,* 80 Wn.2d 797, 801, 801 P.2d 844 (1972) (citations omitted) ("It is a well settled rule of statutory construction that exceptions to legislative enactments must be strictly construed. …One who claims the benefit of such an exception has the burden of bringing himself clearly within it").

Moreover, that general rule has been applied by this Court in the context of referenda rights and emergency clauses.

> Much confusion will be avoided by recognizing the plain fact that this is not the usual general emergency provision, but an *exception* to the otherwise universal application of the reserved power of referendum.

State ex rel. Case v. Howell, 85 Wash. 281, 284, 147 P. 1162 (1915).

In *Humiston*, this Court indicated that the intent of the people in adopting Amendment 7 was to create a clear line between those pieces of legislation for which a referendum would be allowed and those for which a referendum would be prohibited.

> We believe it is self-evident that, by the adoption of amendment 7, the people intended to mark a line between laws that might be emergent and those that clearly are not, reserving to themselves the right to pass upon legislative acts that affect public measures and policies; that they fixed a limit beyond which the Legislature cannot go without doing violence to the will and voice of the people; that **the Legislature has no right to tack an emergency clause onto an act** in order to prevent the people from exercising their right of referendum, **unless** that act is **clearly within** the *exception* set forth in the amendment.

Humiston, 61 Wn.2d at 776 (emphasis added; italics in original).

If the exceptions are construed broadly or the Legislature's mere declaration of emergency is construed broadly, there is nothing left of the general rule. After all, it takes no effort to tack the standard emergency clause language on to any piece of legislation as was done in Section 7(1) of SSB 6078. Indeed, the Legislature did not even attempt to include any statements as to what constituted the so-called emergency.

Consistent with the policy of favoring the right to vote on public policy questions, this Court found in *Brower v. State*, 137 Wn.2d 44, 967 P.2d 42 (1998) (Madsen, J.), that when the Legislature referred matters to the people, that decision would not be subject to referendum because it would, ironically, defeat the right to vote. Even the right of referendum itself could not be used "to delay an election on a matter already referred to the people." *Id.* at 74 (citing *Langdon v. City of Walla Walla*, 112 Wash. 446, 193 P.1 (1920)).

Therefore, the Court has a longstanding policy of liberal construction favoring the people's right to referendum. *Sudduth v. Chapman*, 88 Wn.2d 247, 251, 557 P.2d 1351 (1977); *State ex rel. Howell v. Superior Court*, 97 Wash. 569, 577, 166 P. 1126 (1917); *State ex rel. Case v. Superior Court*, 81 Wash. 623, 632, 143 P. 461 (1914).[3] Otherwise, the Court is at risk of allowing the usurpation of the people's legislative powers.[4]

C. Whether a Bill is Subject to Referenda is a Judicial Question.

In *Humiston*, the Court ruled that the validity of the emergency clause was a judicial question.

> The question before us is one of construction or interpretation of an act of the Legislature and of a provision of the constitution; this is a judicial question.

61 Wn.2d at 777; *see also* Phillip A. Trautman, *Initiative and Referendum in Washington*, 49 WASH. L. REV. 55, 73 n. 68 (1973).

A casual reading of *CLEAN,* 130 Wn.2d at 807-08, would incorrectly suggest that the validity of the declaration of emergency has been changed to

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[3] If the right to vote is suspended every time there is an incantation of the emergency clause by the Legislature, what good is it?

> Yet it is often when government is most eagerly pursing what it believes to be the public interest that it is most likely to sidestep constitutional safeguards or denigrate constitutional liberties.

City of Seattle v. McCready, 123 Wn.2d 260, 281, 868 P.2d 134 (1994) (Utter, J).

[4] As noted by Justice Sanders and Madsen, "[t]he constitutional exception to referendum is not so infinitely broad that this Act and almost everything else will fit within it." *CLEAN v. State,* 130 Wn.2d 782, 833, 928 P.2d 1054 (1996) (Sanders, J., dissenting).

a "legislative question."

> If the act be doubtful, the question of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body.

Id. at 808 (quoting *Brislawn*, 84 Wash at 318). A closer look at both *CLEAN* and *Brislawn* is warranted.

A complete reading of *Brislawn* makes clear the Court was not intending to adopt an approach deferential to the Legislature's declaration of emergency, but rather ruled quite forcefully that doubt about the referenda power should be resolved in favor of the people.

> When, therefore, the question comes whether the Legislature has a right to declare an emergency which will take away the right of referendum, the doubt, if there be any, should be resolved in favor of the reserved power of the people instead of in the admittedly unwarranted declaration of the Legislature.

Brislawn, 84 Wash. at 315. This Court specifically held that this was not a question of abuse of discretion, but a question of power. *Id*. at 314.

> "The said legislative declaration has no greater effect and is no more binding upon the court than if the Legislature had declared that a certain measure is or is not constitutional. In such contingency that question would still remain for the courts to determine. The question before us is simply one of construction or interpretation of an act of the Legislature and of a provision of the Constitution, and that is a judicial question."

Id. at 316 (quoting *McClure v. Ney*, 22 Cal. App. 248, 133 Pac. 1145 (1913)).[5] While the *Brislawn* Court may have treated debatable facts recited

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[5] Now there is no more reason for saying that a bill is an emergent measure, when upon its

by the Legislature as a legislative question, whether those facts justify exemption from referenda is to be construed in the people's favor. Significantly, the Legislature recited no facts in SSB 6078 which could justify the emergency clause.

Brislawn is clear that treating the issue as being legislative was only in cases involving doubt. When applied to the facts in *CLEAN*, it was highly doubtful whether the loss of the Mariners would be an emergency or not and the Court therefore deferred to the Legislature as if it were a legislative question.

It is difficult, if not impossible, to square the duty to liberally construe and protect the constitutional right to referendum with simultaneously granting deference to the Legislature by merely stating that an emergency exists. And, the impact on referenda rights of the incantation of the language of the constitutional exception is nothing new.

> With all due respect, and with the earnest desire not to seem either censorious or facetious, we feel that we must say frankly and in all seriousness that the custom of attaching emergency clauses to all sorts of bills, many of which cannot by any stretch of the imagination be regarded as actually emergent … has become so general as to make it appear, in the light of recent experience, that a number of [formerly established presumptions indulged in favor of legislative declarations of emergencies] can no longer be deemed controlling. It, of course, will never be presumed that the

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face it is not, and from the very nature of its subject matter cannot be, just because the Legislature has said it so, than there is for declaring a law unconstitutional when it has been passed by the Legislature with the Constitution and its limitations lying open before it. *Brislawn*, 84 Wash. at 307-08.

> Legislature deliberately intended to infringe upon a constitutional right.

Kennedy, 22 Wn.2d at 683-84.[6] Court of Appeals Judge Alexander quoted this portion of the *Reeves* opinion from 1945 in his decision in *Hordyk*, 71 Wn. App. at 84. The "custom" of attaching emergency clauses is no less true today.[7]

Justice Chambers recently noted in *Washington State Labor Council v. Reed,* 149 Wn.2d at 61, that in giving deference to the Legislature's declaration of emergency, the Court "abdicated its constitutional duty to interpret the law, breached fundamental principles of separation of powers, and failed to establish a clear and predictable standard by which to determine the meaning of 'may be necessary for the … support of the state government and its existing institutions.'"

Courts sometimes give deference to legislative declarations by referring to the separation of powers doctrine, calling for deference to a co-

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[6] While there may be no presumption that the Legislature deliberately intended to violate the constitution when doing so, it is fair to presume that the attachment of emergency clauses is deliberately intended to take away the right of referendum.

[7] From the most recent legislative session, numerous bills contained emergency clauses. Just from those that were adopted by the Legislature, the following contained dubious assertions of an emergency: HB 2221 (exempting canning, preserving, freezing, processing, or dehydrating fresh fruits and vegetables from business and occupation tax); SB 5952 (exempting trams used for transporting people to and from parking lots to horse race facilities from vehicle licensing); SB 5034 (amending Initiative 134 to allow unions and corporations to make campaign contributions in excess of original limits adopted); HB 2241 (authorizing limited recreational activities, playing fields, and supporting facilities existing before July 1, 2004, on designated recreational lands in jurisdictions planning under RCW 36.70A.040); SB 5097 (providing for apprenticeship utilization requirements on public works projects); SB 5663(changing the tax exemptions for machinery and equipment used to

equal branch of government, the Legislature. Justice Chambers explained that the "equation is altered" when an initiative or referendum exists.

> [T]here are not three constitutionally recognized entities present in this separation-of-powers equation, but four—the fourth being the people of the state.

Id. Justice Chambers' concurrence is supported by the very first case evaluating the right of referendum and an emergency clause. In *Brislawn*, the Court explained:

> [It is] a fundamental error that this inquiry involves a controversy of opinion between co-ordinate branches of the government. …There is another factor not occurring under the old order, where we took account of the executive, the representative body (the Legislature), and the courts. There is now a fourth element; the people reserving the right to assert its will over the legislative department of the government.

Brislawn, 84 Wash. 317-18.

> [W]here is the check if the Legislature is at leave, without effective review, to declare any law immune from the people's constitutional power of referendum by simply designating it either an emergency or necessary for the support of a public institution?

Washington State Labor Council, 149 Wn.2d at 63-64.[8]

Justice Chambers argued forcefully that to make the Legislature the "arbiter of this dispute" violates separation of powers.

> "[T]he proper question is not whether the *Legislature intended* to protect the legislation from referendum, but whether this was the

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reduce agricultural burning).

[8] "The purpose of separation of powers is not to promote efficiency or good will among the departments of government, but instead to preclude the existence of arbitrary power by one branch of government and to protect the people from autocracy." *Id*. (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926)(Brandeis, J, dissenting)).

> sort of legislation that the *people intended* to be exempt from referendum when they passed the Seventh Amendment.

Id. at 64-65 (emphasis by Justice Chambers).[9] Justices Sanders and Madsen similarly noted that "[a]ppointing the Legislature to guard the people's right to refer legislation to referendum is appointing the fox to guard the henhouse." *CLEAN,* 130 Wn.2d at 827.

Again, the very first case interpreting the referendum power in the context of legislation with an emergency clause is instructive. Before referenda rights were established in 1912, *Brislawn* explained that the declarations of emergency were beyond the scope of judicial review. 84 Wash. at 302. The original Washington Constitution contained Article II, Section 31, which provided:

> No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act) the Legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house. …

Former Article II, Section 31, stricken by Amendment 7, *quoted in Brislawn*, 84 Wash. at 305.

This Court in *Brislawn* explained the old system to provide understanding for the new put in place by Amendment 7.

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[9] Justice Chambers advocates the rule in Montana which uses a presumption in favor of the people's right to vote. *Washington State Labor Council*, 149 Wn.2d at 65-66 (Chambers, J., dissenting) (citing *State ex rel. Goodman v. Stewart*, 57 Mont. 144, 187 P. 641 (1920)).

> Under the old form, the Legislature was acting under a free license to legislate. The people had reserved no right of review. Its act implied discretion, and courts had properly held that one co-ordinate branch of the government will not review the discretion of another, however violently it wrenched the moorings of constitutional restraint.

Id. at 313. However, ever since the adoption of Amendment 7 in 1912, the discretion to declare some bills to be in response to an emergency for the first time implicated a constitutional right of the people to vote.

After recognizing that generally the court will not review a declaration of emergency as authorized under former Article II, Section 31, the Court explained the significance of the inclusion of referenda rights.

> But where the people have put upon the Legislature a limitation in the way of a specific definition of its power and an elimination of acts of a certain character, the rule is that the declaration of an emergency must conform to the constitutional requirement.

Brislawn, 84 Wash. 302.

D. SSB 6078 Contains no Findings to Support the Validity of the Emergency Clause

In evaluating whether legislative pronouncements are sufficient to deprive voters of the referendum power, the Court has indicated that it "must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge." *Humiston*, 61 Wn.2d at 778. In review of the act in *Humiston*, this Court noted that the "face of the act is patently **devoid of any facts** relating to an emergency (with the exception of the emergency clause itself)." *Id* at 778 (emphasis added). **The same is true here.** SSB

6078 recites no facts to provide any basis for the bare assertion that some sort of emergency exists and that somehow Sections 1 and 2 are in support of state government. The *Humiston* Court specifically contrasted the bare declaration of emergency before it with the act at issue in *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 123 P.2d 1 (1933), which recited facts showing an emergent situation. *Id*.[10]

> We think it too clear to require argument that the Legislature cannot defeat the constitutional right, reserved by the people in the introductory paragraph of Amendment 7, " … at their own option, to approve or reject any bill, act or law passed by the Legislature" by *merely* inserting in an act the statement" from the constitutional exception.

State ex rel. Kennedy v. Reeves, 22 Wn.2d at 681 (emphasis by court).

> Such a label may obviously be utterly and completely false. It would be scandalous indeed if the constitutional right of referendum could be thwarted by mere use of false labels. As was said in argument, 'If this can be done, the right of referendum is a dead letter in this state.'"

Id. at 681-82; *see also State ex rel. Gray v. Martin*, 29 Wn.2d 799, 806, 189 P.2d 632 (1941) ("ordinance contains no statement or allegation that the city is in need of immediate support or that, as to support, a public emergency exists").

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[10] The Court also took its role of protecting the people's right to vote seriously.

> We do not indicate that the inclusion of a legislative declaration of policy in an act would, ipso facto, remove the emergency clause from the ambit of the court's constitutional duty to protect and test the clause upon the backdrop of the constitution.

Id. at 778.

The most recent case to find an emergency with only a standard emergency clause in the act itself is *CLEAN v. State.* However, the majority of the Court in *CLEAN* looked at undisputed events leading up to the passage of the Stadium Act to find an emergency which it considered to be a subject of judicial knowledge. The facts of which the Court can take judicial notice were highly controversial in that case. Justice Guy in his concurrence and dissent refused to defer to the Legislature's mere declaration of an emergency when there were no facts recited to support it.

> We have a duty to test the emergency clause against the backdrop of the constitutional right of referendum. We are not free to rubber-stamp an emergency clause when there are no facts recited in the legislation, or apparent from the subjection of the legislation, or judicially known to the Court, which would support the existence of an emergency.

Id. (Guy, J, concurring and dissenting). The Act in question in that case "provides no facts on which to base deference to the legislative decision." *Id*.[11]

Justice Sanders and Madsen had similar concerns in the Legislature using a "boilerplate emergency clause without even attempting to justify an exception to the right of referendum. In fact, the Legislature merely copied the constitutional provision into the statute." *Id*. at 838. The same absence of

[11] *See also CLEAN v. City of Spokane,* 133 Wn.2d 455, 478, 947 P.2d 1169 (1997) (Durham, C.J., dissenting).

any recitals of facts is true with Section 7 of SSB 6078 as well.[12]

Other courts have required some statement of facts besides the mere declaration. *City of Spokane v. Harris*, 25 Wn. App. 345, 606 P.2d 291 (1980); *Swartout v. City of Spokane,* 21 Wn. App. 665, 672-73, 586 P.2d 135 (1978) ("A mere statement that certain legislation is immediately needed would make the ordinance effective immediately and foreclose the right of referendum and render it illusory.")

To allow a mere declaration of emergency to be sufficient, "would effectively destroy the right of referendum reserved to the people by the charter and further deprive them of a meaningful judicial review of the ordinance under the previously stated guidelines." *Swartout*, 21 Wn. App. at 671-72.

Moreover, the emergency must be sufficient to justify a departure from the delay that accompanies allowing the people to exercise their referendum power.[13] Here, the only logical assumption that one can make about the so-called "emergency" is that a majority of legislators believed that

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[12] Justices Sanders and Madsen also explained that the Legislature is not a fact finding body and that "alleged facts, which are discussed during the legislative process … are not 'found' by the Legislature." *Id*. at 836 n. 16. Nevertheless, the Legislature in the present case purported to base its declaration of emergency on nothing other than a tautology: Sections 1 and 2 are emergent because the Legislature declared them to be so.

[13] "The purpose of emergent legislation is to enable the legislative body to provide immediate action in order to prevent or remedy a condition or situation which is of such a nature that it demands immediate attention when to postpone such action would result in some serious injury or damage to the people, government, or community directly concerned." *State ex rel. Gray v. Martin*, 29 Wn.2d at 809.

they could not get a two-thirds vote for tax increases. But the lack of sufficient votes to comply with existing law governing the procedure to increase taxes is not an emergency. Rather, that is a political reality that is either a problem, or a benefit, depending on one's perspective. Since Initiative 601 was enacted by the people, the people clearly viewed the 2/3 vote requirement as a benefit. The people should have the same right, through a referendum, to decide whether the 2/3 vote requirement should remain in place.

Moreover, any attempt to imagine how legislators would vote when their feet are to the fire at the end of legislative session is not a proper subject of judicial notice. Nor can judicial notice be taken of any facts suggesting that the two-thirds vote requirement needed to be changed in order to continue the support of state government. Since the legislature provided no facts either, the emergency clause on its face can not justify the deprivation of review by the voters.

E. SSB 6078 is not Immune from the Referenda Power

This Court has treated the exceptions from the referenda power as two separate exceptions. One relates to an exercise of the police power; the other to support of state government. Both provisions are sometimes referred to as the "emergency clause." Trautman, *supra*, at 74.

1. There is No Emergency Related to a Need for Immediate Preservation of Public Peace, Health or Safety

In regard to the ability of the Legislature to declare an emergency for immediate preservation of public peace, health and safety, the most recent case of this Court is *CLEAN v. State*, 130 Wn.2d 782, regarding the Stadium Act. That case did not involve the support of state government clause. Justice Alexander was quite clear that the exception did not simply include legislation within the police power, but rather a "combination of the Legislature's exercise of the police power and an emergency." *Id.* at 805. While the police power has historically consisted of the power of government to regulate harmful activities that threatened the public health and safety, whether the Stadium Act was an action taken under the police power was highly disputed among the members of the Court. Nevertheless, the majority found that the Stadium Act was necessary to protect a "valuable community asset" from permanent loss, namely, the Mariners, absent the Stadium Act's immediate effective date. *Id.*

Here, SSB 6078's amendment of the two-thirds vote requirement is not in any way an exercise of the police power. Rather, it is the removal of a restraint, imposed by the people, on the power of taxation. Since the procedure for raising taxes is not a power involving protection of public peace, health or safety, it cannot be exempt from referenda under the first emergent police power exemption.

Nor is this matter emergent. The term "emergency" has various definitions, but the controlling idea in all the definitions is that it is something unforeseen. It has been defined as:

> Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition.

State ex rel. Porter v. Superior Court, 145 Wash. 551, 559, 261 P.90 (1927) (citations omitted), *quoted in State ex rel. Gray,* 29 Wn.2d at 806.

RCW 43.135.035, which is amended by Section 2 of SSB 6078 is not unforeseen, but rather has been part of the Legislature's decision making process for the last decade. Nor can the replacement of a two-thirds vote with a majority vote be considered emergent because of the inability of sponsors of bills to get the requisite number of votes. Such inability is only hypothetical since no one will ever know how Legislators would have voted on proposed tax legislation if the two-thirds vote requirement were not suspended by SSB 6078. More importantly, gathering the requisite number of votes cannot be the kind of unforeseen circumstance which justifies a police power regulation to be placed in effect immediately since the Legislature never knows how votes will be cast on pending legislation until the final vote.

2. Sections 1 and 2 of SSB 6078 are not Necessary for Support of State Government.

The second exception from the right of referendum is for necessary bills which are in support of state government. The rationale for this exclusion from the referenda power is largely attributed to events occurring in Oregon just prior to the adoption of Amendment 7. Oregon has a referendum provision in its constitution, but had no limitation related to financial support of government institutions. On two occasions, in 1905 and 1907 the Oregon Legislature appropriated money for the University of Oregon. A referendum petition was filed both years, delaying the effective date the money could be disbursed for funding the University. The only reason the university did not close its doors was because "professors agreed to continue their duties and to receive no pay if the referendum was successful." Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247, 281 (1996).

The exception from the right of referendum for bills which are in support of state government has only been applied by this Court to laws which either appropriate money or raise revenues for appropriation. *See State ex rel. Helm v. Kramer*, 82 Wn.2d 307, 510 P.2d 1110 (1973) (appropriation bill); *State ex rel. Reiter v. Hinkle*, 161 Wash. 652, 297 P.

1071 (1931) (act imposing a tax).[14] In fact in *Reiter*, the Court quoted Webster's New International Dictionary for the word "support" as "to furnish funds or means for maintenance; to maintain; to provide for; to enable to continue; to carry on." *Id.* at 659. The Court in *State ex rel. Blakeslee v. Clausen*, 85 Wash. 260, 148 P. 28 (1915), quoted the same dictionary definition.

In *State ex rel. Hoppe v. Meyers*, 58 Wn.2d 320, 328, 363 P.2d 121(1961), this Court described as "unquestionably correct" the rule from *State ex rel. Robinson v. Reeves*, 17 Wn.2d 210, 135 P.2d 75 (1943), that a bill which was neither a revenue measure nor an appropriation act was not immune from referendum as being in support of state government.[15]

Moreover, even laws which make an appropriation are not automatically immune from referenda under the "support" clause. In *Ballasiotes*, 97 Wn.2d 191, the Court was reviewing a new voting machine system for Pierce County which included a specific appropriation. Pierce

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[14] Since SSB 6078 does not impose a tax, the applicability of this exemption to bills that do raise taxes is not directly at issue. Nevertheless, the decision in *Reiter* expanding the exemption from beyond appropriation bills to tax raising measures is inconsistent with the history of the provision and its wording and, whether in this case, or another, it should be overruled. Consider *Nicholson v. Cooney*, 265 Mont. 406, 877 P.2d 486 (1994) in which the Court interpreted its limitation on referendum powers to appropriations and allowed a referendum on a bill which raised revenue, but did not appropriate the money.

[15] *Hoppe* overruled *Reeves* on two points. First, *Reeves* was overruled to the extent it suggested that legislation which allows, as opposed to compels, actions could never be necessary. Second, *Reeves* was overruled to the extent it suggested that the Legislature's declaration of necessity was conclusive if the bill was a police-power matter or in support of state government. 58 Wn.2d at 127.

County had an exclusion from referenda which is practically identical to the "support of state government" exclusion in Article II, Section 1. The Court found that the matter was not immune from referenda even though an appropriation was made because the new law included basic policy questions. *Id.* at 199.

Here, the emergency clause applies to the procedure for raising taxes. Rather than a two-thirds vote approval, SSB 6078 allows increased taxes by a majority vote. But SSB 6078 itself **raises no taxes**. Nor does SSB 6078 appropriate any money. Rather, SSB 6078 is a **policy decision** regarding the extent of consensus needed for tax increases, a restraint initially adopted by the voters.

The reserved referendum power was to enable people to vote on laws which affect public policies. *Blakeslee,* 85 Wash. at 272-73. The vote requirement for tax-raising measures is clearly a public policy question on which the people have already legislated through I-601. Changes to the public policy question should be reviewable under the referendum process.

Limiting the exclusion of bills in support of state government to laws which raise taxes or appropriate money is consistent with the understood historical basis from neighboring Oregon. The voters adopting Amendment 7 did not want state institutions grinding to a halt after the Legislature appropriated money simply because a small minority of voters signed a

petition (now 4% of the voters in the last gubernatorial election).

The proposed referenda on SSB 6078 has none of those policy concerns. The two-thirds vote requirement for tax-raising measures has been around for over a decade. The Legislature has been quite aware that it exists and there is no reason that the Legislature should be surprised if amendments to it would prompt a referendum. After all, it was originally adopted by the people through Initiative 601.

CONCLUSION

The questions in this case are straightforward. Can the Legislature thwart the power of the people with a bare bones declaration of emergency? Will the Court restrict the people's reserved legislative rights by expanding an exemption for support of state government to apply no longer only to appropriation bills and tax raising measures, but also to the procedures for raising taxes? Out of due respect for the constitution's separation of powers in this state, Petitioners urge the Court to answer these questions in the negative and issue the requested Writ of Mandamus.

RESPECTFULLY SUBMITTED this 13th day of May, 2005.

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By: ______________________________
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DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP of Bellevue, Washington.

On May 13, 2005 a true copy of Brief in Support of Petition for Writ of Mandamus was transmitted via e-mail and placed in an envelope, which envelope with postage thereon fully prepaid was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington, addressed to the following persons:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 13th day of May, 2005 at Bellevue, Washington.

____
Linda Hall