

**FINAL REPORT OF
KING COUNTY BAR ASSOCIATION
REFERENDUMS & INITIATIVES PROJECT
TO
KCBA PUBLIC POLICY COMMITTEE**

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The KCBA Referendum and Initiative Project Subcommittee, hereinafter, the “Subcommittee,” respectfully submit this final report to the KCBA Public Policy Committee to outline the proposed reforms to the referendum and initiative process in Washington. In preparing this report, members of the Subcommittee have met with and solicited information from experts on initiatives and referendums, including individuals from the Office of the Attorney General, the Office of the Secretary of State, the Washington ACLU, and the National Conference of State Legislatures. In addition, members have met with academic experts on referendums and initiatives, as well as experts from professional signature gathering firms, pollsters, and others in the initiative “industry.” Our recommendations are based upon input from these sources, plus extensive independent research conducted by members of the Subcommittee. A list of the individuals and organizations with which the Subcommittee consulted is attached as Appendix A.

On November 2, 2015, the members of the King County Bar Association Public Policy Committee voted unanimously to forward these recommendations to the Board of Trustees for consideration.

EXECUTIVE SUMMARY

While direct democracy has been a cornerstone of Washington's constitution for the last century, the past several years have provided examples of the most problematic characteristics of Washington's referendum and initiative process. In just the past two years we have seen passage of initiatives that are later found to be unconstitutional, voter confusion regarding the policy impact and the budget impact of initiatives, and a perception that initiatives are a tool of out-of-state special interests. This report proposes a set of reforms to combat those problems and strengthen the initiative process.

1. Reforms to the Referendum and Initiative Development Process

In order to limit the passage of initiatives that are later found to be unconstitutional, the Subcommittee recommends a complete reworking of the initiative pre-ballot certification filing procedure. The Subcommittee recommends that the initial filing period occur much earlier, allowing for a formalized process of public review and potential judicial review prior to the signature gathering stage of the process. The Subcommittee also recommends passage of a constitutional amendment limiting the budget impact of ballot measures, requiring any ballot measure that would entail a significant outlay of public funds to identify the source of the additional revenue needed and any ballot measure that would significantly decrease tax revenue to identify offsetting programmatic cuts.

2. Online/Electronic Signature Gathering

In order to level the playing field between corporate and institutional initiative proponents and grassroots activists seeking access to the ballot and counter the perception that initiatives are simply a tool of well-financed out-of-state special interests, the Subcommittee recommends the establishment of an online/electronic signature gathering procedure. This

proposal would reduce the cost of signature collection, improve the signature verification process, assist with fraud prevention, and give voters the opportunity to make a more informed decision about the measures they sign.

3. Citizen Initiative Review

The Subcommittee recommends the establishment of a Citizen’s Initiative Review (CIR) procedure, based on a model that has proved effective in Oregon. CIR uses the jury as a model in which a group of citizens take time to develop an unbiased evaluation of measures that are scheduled to appear on an upcoming ballot.

4. Other Proposed Reforms

The Subcommittee recommends adopting other minor, but no less important, reforms, such as expanding the time limits for gathering signatures and reviewing and revising the initiative pre-certification, modifying the minimum number of signatures required, imposing mandatory certifications by signature gathering companies, and improving the financial disclosure statement.

Recognizing that any revision of the ballot measure process in Washington is a complex and political process, the Subcommittee has, where appropriate, noted dissenting viewpoints or other barriers to implementation of its proposals.

1. OVERVIEW

1.1. Current Problems with the Initiative and Referendum Process and Proposed Reforms

The initiative process is “the first power reserved to the people” of the State of Washington, fixed as part of Washington’s democratic system in Article II of the state’s constitution. Although the Subcommittee believes that the initiative process should be substantially reformed, there is a strong consensus among the Subcommittee, as well by academics and other experts the Subcommittee heard from, that the initiative process serves a useful purpose in our democracy and should be retained in a robust form. Enacting the reforms suggested in this report would help restore the initiative process to its historical roots as a counterweight to powerful political interests who tend to dominate the legislative process. In addition, there was strong consensus that certain features of Washington’s initiative process should be retained. For example, Washington’s constitution cannot be amended by initiative. The academic and experts consulted by the Subcommittee support this feature of Washington’s system, both because constitutional amendments by initiative threaten to undercut the protections for minority groups embedded in the constitution, and because the constitutions in states that allow constitutional amendments by initiative have become cluttered and unwieldy as a result of initiative proponents embedding policies in the state constitution rather than in statute.

In its current form, Washington’s initiative process suffers from a number of problems. Among the problems noted by the experts consulted by the Subcommittee are ever-increasing funding from special interest groups, poorly drafted initiatives that are overturned later as unconstitutional, the difficulty for grassroots campaigns to qualify for the ballot, the frustration of the voters and the legislature when initiatives dramatically impact the state’s budget, and

concerns (or at least the perception) that paid signature gathering encourages abuses such as fraudulent signatures.

The Washington Supreme Court's decision in *League of Women Voters v. State*,¹ finding Initiative 1240 ("I-1240"), the Charter School Act, to be unconstitutional, illustrates many of the problems identified by the Subcommittee. Following an unsuccessful legislative effort, then two failed charter school initiatives in 2000 and 2004, proponents spent more than \$3 million to gather sufficient signatures to qualify for the ballot.² On November 6, 2012, the voters by a small majority approved I-1240, which authorized up to 40 charter schools in Washington.

In the ensuing three years, nine charter schools were established in Washington, requiring significant investment by their private sponsors, and the children of approximately 1,200 families were enrolled in Washington charter schools.³ On September 4, 2015, nearly three years after the election in which I-1240 was approved, and just weeks before an initial payment of \$14 million from the state's school budget was anticipated to be paid out to most charter school operators, the Washington Supreme Court struck down I-1240. The Court concluded that I-1240 violates the Washington Constitution on its face by improperly classifying charter schools as "common schools" under article IX, section 2 of the Washington Constitution and improperly authorizing money to be expended on charter schools from Washington's common school fund.⁴

Predictably, the decision, which came just as the instruction was getting under way at many charter schools, has created a chaos for charter school operators and students enrolled in

¹ Wash. Sup. Ct. Docket No. 89714-0 (issued Sept. 4, 2015) (available at: <http://www.courts.wa.gov/opinions/pdf/897140.pdf>).

² See Brian M. Rosenthal, *Charter-School Debate's 4th Round No Less Intense*, The Seattle Times (Aug. 28, 2012) available at: <http://www.seattletimes.com/seattle-news/charter-school-debates-4th-round-no-less-intense/?syndication=rss>.

³ John Higgins & Coral Garnick, *Calls for Quick Legislative Fix After Charter-School Ruling*, The Seattle Times (Sept. 5, 2015) available at: <http://www.seattletimes.com/seattle-news/education/calls-for-quick-legislative-fix-after-charter-school-ruling/>.

⁴ *League of Women Voters v. State*, Slip op. at 6-18.

those schools.⁵ The decision has also provoked charges of “judicial activism” against the Supreme Court, with a former Washington Attorney General asserting that the Court is “very left of center,” a former Supreme Court justice characterizing the I-1240 decision as “George Wallace standing in front of the charter-school doors,” and a former United States Senator from Washington calling the decision “an absolute disgrace.”⁶

The three million dollars spent on signature gathering for I-1240 is but one example of heavy spending by wealthy individuals and interest groups on Washington initiatives in recent years. As a result, a widespread perception has developed that the original conception of initiatives, which were intended to allow direct citizen action where powerful interests controlled the legislative process, has been subverted by those same powerful, moneyed interests.

In addition to I-1240, a few recent examples illustrate the problem. In 2014, the Washington ballot had two competing gun initiatives: I-594, which required background checks for gun sales and transfers, and I-591, which increased gun owners’ rights and disallowed the background checks in I-594. For Initiative I-594 (background checks for gun sales and transfers), over 66% of the major contributions opposing this initiative came from the National Rifle Association in Washington DC.⁷ Just over 21% of the major contributions in support of I-594 were from a New York organization: Every Town for Gun Safety.⁸

Even with all the money raised by both campaigns (just under \$9 million)⁹ there is

⁵ John Higgins & Joseph O’Sullivan, *Survival Lesson Throws Parents, Charter Schools Into Fundraising, Politics*, The Seattle Times (Sept. 8, 2015) available at: <http://www.seattletimes.com/seattle-news/education/two-charters-say-they-will-stay-open-this-year-despite-supreme-court-ruling/>.

⁶ Jim Brunner & Nina Shapira, *State Supreme Court: Activist Justices or Just Different?* The Seattle Times (Sept. 12, 2015) available at: <http://www.seattletimes.com/seattle-news/politics/state-supreme-court-activist-justices-or-just-different/>.

⁷ Responsible Choices; Seattle, WA. (2014), available at <http://www.responsiblechoiceswa.org/wp-content/uploads/2014/09/Initiative-Contributions-and-Spending-for-Washington-State-2014-General-Election.pdf>.

⁸ *Id.*

⁹ *Id.*

evidence, discussed below, suggesting that significant numbers of voters voted for both initiatives despite the fact that they would result in diametrically opposed gun policies. Hence, the huge amounts of money spent on electioneering and campaign advertising for or against initiatives may be serving more to confuse than enlighten Washington's voters.

Another recent example in Washington is I-522, which appeared on the November 2013 ballot. Almost two-thirds of the voters supported the GMO labeling initiative at the beginning of the campaign, but by the day after the election, the measure lost with 54% of the electorate opposing it. Opponents spent over \$22 million (only \$550 of that total came from state residents) and in doing so, they set a record in spending on one initiative.¹⁰ The supporters also spent considerable funds, over \$8 million. The approximately \$30 million raised by both sides made the race the second-highest spending initiative in Washington history, after the 2011 liquor-privatization measure, which attracted \$32.5 million in donations.¹¹ A measure nearly identical to Washington's was defeated in California in 2014, after the same food-industry alliance outspent labeling proponents by a ratio of nearly 5-to-1.

Thus, as the U.S. Court of Appeals for the Ninth Circuit recently stated, “[t]here is mounting evidence that corporations and ultra-wealthy individuals have come to dominate the initiative process.”¹² However, as the Court noted, state and local governments “are entitled to continue striving to guarantee self-government to their citizens, notwithstanding these shortcomings of direct democracy, and to improve the initiative process should they so desire.”¹³

¹⁰ Rosenthal, Brian, *Washington ballot issues draw money from near, afar*, The Seattle Times (November 3, 2013) available at <http://www.seattletimes.com/seattle-news/washington-ballot-issues-draw-money-from-near-afar/>.

¹¹ Doughton, Sandi, *I-522 trails in all but 4 counties*, The Seattle Times (November 6, 2013), available at <http://www.seattletimes.com/seattle-news/i-522-trails-in-all-but-4-counties/>.

¹² *Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520, 533 n. 11 (9th Cir. 2015) (*en banc*).

¹³ *Id.*

The Subcommittee recommends that KCBA take up the Court's invitation to improve the initiative process by endorsing the measures set forth in this report.

As discussed in the next section, there are significant constitutional limits on some of the more obvious reforms, such as campaign spending limits that might otherwise be attractive. Except where noted, the reforms proposed below are intended to work within existing constitutional limits while improving the initiative process by, for example, removing legal barriers that restrict the use of modern computer technology, establishing mechanisms to improve the quality of drafting of initiatives, expanding the availability of pre-election judicial review, providing greater availability of neutral review and voter education about proposed initiatives, and providing easier access for grass roots campaigns.

1.2. Constitutional Limits to Reforms

Washington's initiative and referendum process has both state and federal constitutional dimensions that subject reforms of the process to heightened judicial scrutiny and may limit or eliminate the availability of some reforms. Except where specifically noted, the Subcommittee has recommended reforms that will not require an amendment to the Washington Constitution. In addition, all reforms recommended by the Subcommittee are consistent with current jurisprudence under the federal Constitution.

The initiative is protected by the First Amendment of the U.S. Constitution. Although there is no federal requirement for an initiative or referendum process, if a state creates an initiative process, participation in the initiative process is considered a form of political speech, and "the state may not place restrictions on the exercise of the initiative that unduly burden First

Amendment rights.”¹⁴ The courts therefore subject any “burden on the exercise of [initiative] rights to exacting scrutiny.”¹⁵

When courts apply “exacting scrutiny” to the constitutionality of initiative reform measures, “[n]o litmus-paper test’ will separate valid ballot-access provisions from invalid interactive speech restrictions” and states are accorded “considerable leeway to protect the integrity and reliability of the ballot-initiative process.”¹⁶ However, the state must demonstrate a “substantial relation” between any limitation on the initiative process and “a ‘sufficiently important’ government interest.”¹⁷

Applying “exacting scrutiny,” the courts have struck down a number of prior attempts at initiative reform. For example, the Washington courts have concluded that prohibiting duplicate signatures on an initiative petition is a valid measure to ensure the integrity of the petition process, but that striking all instances of duplicative signatures goes too far. Citizens exercising their First Amendment right to sign an initiative petition are entitled to have their signature counted once, even if that person later signs the same petition on one or more occasions.¹⁸ Similarly, the United States Supreme Court has struck down a prohibition on paid signature gatherers, a requirement that paid signature gatherers be registered voters, a requirement that signature gatherers wear a badge identifying them by name, and a requirement that each paid

¹⁴ *Filo Foods, LLC v. City of SeaTac*, 179 Wn.App. 401, 407-09, 319 P.3d 817 (2014), *review denied*, 181 Wn.2d 1006, 332 P.3d 984 (2014).

Filo Foods LLC v. City of SeaTac, 179 Wash. App. 401, 319 P.3d 817 review denied, 181 Wash. 2d 1006, 332 P.3d 984 (2014)

¹⁵ *Id.*

¹⁶ *Buckley v American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 183 (1999).

¹⁷ *Doe v. Reed*, 561 U.S. 186, ___ (2010).

¹⁸ *Suddeth v. Chapman*, 88 Wn.2d 247, 588 P.2d 806 (1977).

signature gatherer reveal his or her name and address and the amount he or she has been paid.¹⁹ The Ninth Circuit, acting on the strength of the Supreme Court's *Citizens United* ruling, struck down a Washington statute prohibiting individuals from donating more than \$5,000 to a political action committee within 21 days of an election, although the Court also upheld Washington's requirement that the names of any individual contributing more than \$25 to an initiative campaign be publicly disclosed.²⁰

On the other hand, the U.S. Supreme Court has upheld a requirement that Washington's Secretary of State disclose the names of those who have signed an initiative or referendum petition,²¹ and the Ninth Circuit has similarly upheld Washington's requirement that the major financial supporters of an initiative campaign be disclosed through submissions to the Public Disclosure Commission.²² Similarly, in a recent *en banc* decision, the Ninth Circuit upheld the requirement that sponsors of a city-based initiative must be qualified electors in that city and the requirement that the name of the official proponent of the initiative appear on the each section of the initiative circulated to voters for signature.²³

With these legal precepts in mind, the Subcommittee sets forth below a number of recommended reforms to Washington's initiative and referendum process. In each case, an explanation of the specific problem is presented and then addressed by a proposed reform.

¹⁹ *Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 1107 (1998).

²⁰ *Family PAC v. McKenna*, 685 F.3d 800 (9th Cir. 2011).

²¹ *Doe v. Reed*, 561 U.S. 186 (2010).

²² *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010).

²³ *Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520 (9th Cir. 2015) (*en banc*).

2. EXPANSION OF TIMELINES

2.1. Compressed Timelines Exacerbate Problems

Initiative sponsors are passionate about the subject matter, but may be untrained in drafting legislation and fail to engage critical counsel to review their proposed legislation. Some sponsors make little effort to consider the unforeseen consequences (fiscal or legal) of their proposal or whether it conflicts with existing law. Moreover, the text of the proposed initiative is frozen and unchangeable very early in the process, leading to some poorly drafted, confusing, or unconstitutional initiatives being put on the ballot.²⁴ Finally, initiative sponsors must raise significant sums of money before beginning the petition process in order to assure that enough signatures are gathered to make the ballot.²⁵ The short timelines imposed by Washington law exacerbate these problems.

Under current Washington law, initiatives to the people must be filed within ten months prior to the next state general election.²⁶ The signature petition sheets must be submitted not less than four months before the general election.²⁷ That gives an initiative sponsor less than six months to gather more than approximately 300,000 signatures (usually from early January to early July).²⁸

²⁴ State law mandates that each signature petition include a “readable, full, true, and correct copy” of the proposed measure on each petition. RCW 29A.72.100-.170. As a practical matter, once signature gathering begins, no changes can be made to the measure without voiding all signatures gathered up to that point.

²⁵ For example, in 2010, initiative proponents paid between \$591,863 and \$1,613,728 to gather the required signatures. http://ballotpedia.org/2010_ballot_measure_petition_signature_costs#Washington.

²⁶ RCW 29A.72.030.

²⁷ RCW 29A.72.030.

²⁸ The initiative sponsor must obtain a number of signatures equal to or exceeding eight percent of the votes cast for the office of governor at the last regular gubernatorial election (currently 246,372 valid signatures). RCW 29A.72.150. A referendum sponsor must obtain a number of signatures equal to or exceeding four percent of the votes cast for the office of governor at the last regular gubernatorial election (currently 123,186 valid signatures). *Id.* The Secretary of State recommends a “cushion” of 25% in order to survive the audit process. Kim Wyman, Washington Secretary of State, *Filing Initiatives and Referenda in Washington State*, Feb. 2013, p. 12, available at https://www.sos.wa.gov/_assets/elections/Initiative%20and%20Referenda%20Manual.pdf.

An initiative to the legislature must be filed within ten months prior to the next regular session of the legislature, and the signature petition sheets must be submitted not less than 10 days before the session (usually from early March to late December).²⁹ A referendum may be filed any time after the legislature has passed the act that the sponsor wants to be referred to the ballot; however, signature petition sheets (with more than 123,186 signatures) must be submitted within 90 days after the adjournment of the legislative session at which the act was passed.³⁰

After an initiative is filed, the Office of the Code Reviser has seven working days to review the draft initiative for technical errors, advise the sponsor of any potential conflicts between the proposal and existing statutes, and return the proposal to the sponsor with any recommended changes and a “Certificate of Review.”³¹ All changes suggested by the Code Reviser are advisory and subject to approval by the sponsor.³² The initiative sponsor has fifteen working days after the initial filing to file the final draft of the initiative with the Secretary of State.³³ After the final draft is submitted, the Attorney General has five working days to formulate and return a ballot title and summary.³⁴ A sponsor then has five working days to file a petition with the Thurston County Superior Court if the sponsor is dissatisfied with the title and summary and the Court must render a decision within five days of the petition.³⁵

The Office of Financial Management, in consultation with the Secretary of State and the Attorney General, must prepare a fiscal impact statement, which must be filed with the Secretary of State no later than the tenth day of August.³⁶ There are other, similarly short timeframes for

²⁹ *Id.*

³⁰ *Id.*

³¹ RCW 29A.72.020.

³² *Id.*

³³ *Id.*

³⁴ RCW 29A.72.060.

³⁵ RCW 29A.72.080.

³⁶ RCW 29A.72.025.

the Secretary of State to review the signatures and for the sponsor to file a court petition if the initiative is rejected for signature deficiencies.³⁷

One proposal to (a) reduce the number of initiatives that make the ballot that contain confusing or unconstitutional language and (b) decrease the costs of sponsoring an initiative, is to significantly lengthen the time given to qualify the initiative for the ballot. This proposal includes significantly increasing the length of time for submitting the proposed initiative, review by the Code Reviser for errors and conflicts, submitting corrections after the sponsor receives feedback from the Code Reviser, selecting and appealing the title and summary description, and gathering and reviewing signatures. The additional time will also accommodate other reforms we advocate, including an expanded, up-front public review process for proposed initiatives and a limited, expedited process for pre-election judicial review of initiatives.

2.2. Proposal—Increase Timelines

Under the Swiss initiative system (which influenced the American initiative system),³⁸ the process to qualify for the ballot takes two to four years, allows for more time to redraft the initiative, and provides a chance for the legislature to weigh in. The more time the sponsor, the Code Reviser, and the courts have to review and analyze the proposed initiative and referendum, the greater likelihood that thoughtfully crafted measures will ultimately be placed on the ballot. Lengthening the pre-certification period would increase flexibility to improve initiative measures prior to certification.

³⁷ RCW 29A.72.180-.190, RCW 29A.72.230-.240.

³⁸ *Initiative and Referendum in the 21st Century*, Final Report and Recommendations of the NSCL I&R Task Force (July 2002), p. 9.

Also, the time for gathering signatures in Washington is incredibly short. Most states in the U.S. that allow initiatives provide a year or more to gather signatures.³⁹ In Washington, a sponsor has six months or less to gather hundreds of thousands of signatures for an initiative. This short time frame all but requires a sponsor to hire paid signature gatherers at an enormous cost to the campaign. The cost of simply getting an initiative on the ballot in Washington is frequently \$1,000,000 or more.⁴⁰ Campaigns with paid signature gatherers have an almost one-hundred percent chance of qualifying for the ballot.⁴¹ Lengthening the time for gathering signatures improves access to the process for less well-funded sponsors because it gives those sponsors more time for grass roots campaigns to build momentum and for unpaid volunteers to gather signatures. The length of the circulation period is important to aid volunteer efforts. Volunteer efforts are often time consuming, less well organized, and subject to disruption when volunteers fail to show up. Longer circulation times would benefit volunteer-based petition efforts.⁴²

Moreover, studies show that longer circulation periods do not necessarily lead to an increased number of initiatives. For example, Florida and Illinois have some of the longest circulation periods but typically have very few measures on the ballot, whereas states with some of the shortest circulation periods, such as California, Colorado, and Washington, have some of

³⁹ Petition circulation time limits vary by state and range from sixty days to four years. http://ballotpedia.org/Circulation_period. Seventeen out of twenty-four states with direct initiatives provide for a year or more to gather signatures. *Initiative and Referendum in the 21st Century*, Final Report and Recommendations of the NCSL I&R Task Force (July 2002), p. 36. Only six states besides Washington provide six months or less to gather signatures for initiatives to the people (California, Colorado, Massachusetts, Michigan, Nevada, and Oklahoma). *Id.*

⁴⁰ See http://ballotpedia.org/Ballot_measures_cost_per_required_signatures_analysis (the overall average cost per signature from 2010-2014 was \$4.03).

⁴¹ *Initiative and Referendum in the 21st Century*, Final Report and Recommendations of the NCSL I&R Task Force (July 2002), p. 34.

⁴² *Initiative and Referendum in the 21st Century*, Final Report and Recommendations of the NCSL I&R Task Force (July 2002), p. 36.

the highest numbers of initiatives on the ballot.⁴³ Permitting online signature gathering, as discussed below, would be an alternative means to increase access to ballot measures for volunteer-driven initiatives without expanding the time to collect signatures.

The lengthening of time allowed for pre-certification review and for signature gathering will require amendments to the current statutes, but should not require a constitutional amendment because the Washington Constitution imposes a minimum time for filing initiatives but no maximum.⁴⁴

3. PRE-CERTIFICATION ISSUES

3.1. Ballot Measure Drafting Problems

Initiative language can be poorly drafted, creating difficult and sometimes expensive interpretation and implementation problems if the initiative is passed. In addition, Washington voters have, with some frequency, adopted initiatives that are facially invalid because they fail to meet basic requirements of the Washington Constitution and legislative draftsmanship, such as the requirement that legislation address a single subject⁴⁵ and the requirement that the full text of an amended statute be set forth in the legislation.⁴⁶ Examples over the last fifteen years include:

- I-1240, the Charter Schools initiative, which, as discussed above, was passed by Washington voters in the November 2012 election, but was struck down by the Washington Supreme Court as a facial violation of the state Constitution on September 14, 2015.⁴⁷

⁴³ *Id.*

⁴⁴ Constitution of the State of Washington, Amendment 72 (requiring petitions to be filed not less than four months before the election or not less than ten days before any regular legislative session).

⁴⁵ Washington Const. Art. 2, § 19.

⁴⁶ Washington Const. Art 2, § 37.

⁴⁷ *See League of Women Voters v. State, supra.*

- Initiative 1053, adopted by the voters in 2010, was struck down by the Washington Supreme Court in 2013 because it would have established a super-majority requirement to pass tax legislation, violating the Washington constitutional provision requiring that legislation be passed by a simple majority of both houses of the legislature.⁴⁸
- Initiative 776, which sought to limit the motor vehicle excise tax, adopted in the 2002 election but struck down by the Washington Supreme Court in 2006 because it unconstitutionally impaired bonds issued by Sound Transit which relied on MVET revenues for repayment.⁴⁹
- Initiative 747, a measure adopted in 2001 which sought to limit property tax increases to one percent per year, was struck down by the Washington Supreme Court in 2007 because it violated the Washington Constitution's requirements that legislation must accurately describe the law it sought to amend and failed to set forth at full length the law to be amended.⁵⁰
- Initiative 722, a tax limitation measure adopted by the voters in 2000 was struck down by the Washington Supreme Court in 2001 because it violated the Washington Constitution's single subject rule.⁵¹
- Initiative 695, the \$30 car tab initiative adopted by voters in 1999, was struck down by the Washington Supreme Court in 2001 on the grounds that it violated the single subject rule, the subject-in-title rule, the requirement that all amended statutes be set forth in full in the legislation, and by by-passing the constitutional

⁴⁸ *League of Education Voters v. State*, 176 Wn.2d 808, 295 P.3d 743 (2013).

⁴⁹ *Pierce County v. State*, 159 Wn.2d 16, 148 P.3d 1002 (2006).

⁵⁰ *Washington Citizens Action of Washington v. State*, 162 Wn.2d 142, 145, 171 P.3d 486, 487-88 (2007).

⁵¹ *City of Burien v. Kiga*, 144 Wn.2d 819, 31 P.3d 659 (2001).

requirement that a referendum be signed by four percent of the voters before it is subject to a vote of the people by requiring all tax increases to be subject to an automatic public vote.⁵²

In many of these cases, initiative sponsors violated the most basic requirements of statutory drafting. In other cases, the initiative on its face violated constitutional requirements such as the requirement that legislation be passed by a simple majority in each house.

Despite fundamental and fatal flaws, in each case, these ballot propositions went through the entire initiative process, successfully collecting the required number of signatures and receiving approval of the majority of voters, only to be struck down by the court because of basic failures in drafting or understanding of the Washington Constitution. The problem persists, in substantial part, because the Washington courts have concluded they lack the power to conduct pre-election review of initiatives except for a very narrow class of procedural challenges.⁵³

This repeated pattern—voters adopting fundamentally flawed ballot propositions only to be struck down by the courts because of their legal flaws—creates a number of serious problems for the administration of justice in our state. Perhaps most significantly, as demonstrated by the sometimes intemperate reaction to the Court’s recent charter schools decision, discussed above, judicial intervention in these cases undermines public trust in the judiciary by creating the impression that the courts are acting politically to thwart the will of the voters.⁵⁴ In addition, significant resources are wasted on these flawed initiatives, both by initiative sponsors, who must

⁵² *Amalgamated Transit Union Local 587 v State*, 142 Wn.2d 183, 11 P.3d 762 (2001).

⁵³ *See, e.g., Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 185 Wn. App. 1039 (2015) (unpublished opinion), *petition for review granted*, Wa. Sup. Ct. Docket No. 91551-2 (Sept. 1, 2015); *Futurewise v. Reed*, 161 Wn.2d 407, 410–411, 166 P.3d 708 (2007).

⁵⁴ *See, e.g., Amalgamated Transit Union*, 142 Wn.2d at 280 (Sanders, J., dissenting) (“The people have expressed their will that their tax burden should be limited. The constitution does not stand in their way and neither should this court.”).

expend substantial effort to obtain sufficient signatures and to conduct a ballot campaign, and by the state, which must expend substantial resources to conduct elections, distribute ballot pamphlets, and carry out other duties related to elections in which initiatives are on the ballot. Further, even when ballot initiatives successfully withstand facial challenges, the litigation can lead to delay and uncertainty in the implementation of those initiatives.⁵⁵

In addition to the charter school case, *League of Women Voters v. State*, discussed above, the problem is illustrated by a second very recent case, this one involving Initiative 1366, which would impose a one percent reduction in sales tax unless the legislature authorizes a public vote on a constitutional amendment to approve a two-thirds voting requirement for tax measures. After I-1366 received sufficient signatures to qualify for the ballot, opponents filed a pre-election challenge to the initiative in King County Superior Court. The Court concluded that the initiative suffers from a variety of constitutional flaws and therefore is unlikely to be implemented even if approved by voters. The court nonetheless declined to enjoin placing the initiative on the ballot.⁵⁶ The Washington Supreme Court subsequently denied a petition for direct review of the Superior Court's decision, although the Court has not yet explained its reasoning.⁵⁷

The Superior Court's reluctance to intervene was driven, in part, by the Washington Supreme Court's passing reference to First Amendment rights in the context of ballot

⁵⁵ *E.g. Filo Foods, LLC v. City of Seatac*, Wash. Sup. Ct. Docket No. 89723-9 (issued Aug. 20, 2015) (upholding Seatac's \$15 minimum wage initiative against challenge under single-subject rule, as well as state and federal preemption); *Washington Ass'n for Substance Abuse and Violence Prevention v. State*, 174 Wn.2d 642, 278 P.3d 632 (2012) (upholding liquor privatization initiative, I-1183, against challenges based on single-subject rule and subject-in-title rule); *State v. Stannard*, 134 Wash. App. 828, 142 P.3d 641 (2006) (upholding I-655, banning hunting of black bears with bait, against attack under single-subject rule); *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996) (upholding I-593, the Persistent Offender Accountability Act, popularly known as "three-strikes rule," against constitutional challenges, including single-subject rule and requirement to include full statutory text where amendment is proposed).

⁵⁶ *Huff v. Wyman*, King Cty. Sup. Ct. No. 15-2-18335-4 SEA (issued Aug. 14, 2015).

⁵⁷ *Huff v. Wyman*, Wa. Sup. Ct. No. 92075-3 (issued Sept. 4, 2015) available at: https://www.courts.wa.gov/content/publicUpload/news/920753WymanVsHuffOrder_20150904.pdf.

propositions that are passed but later struck down.⁵⁸ The Subcommittee believes, however, that the limited pre-election review we advocate would not impinge on First Amendment rights because there is no meaningful distinction for First Amendment purposes between initiatives that are properly drafted within constitutional rules such as the single-subject rule, and those that are not. In addition, where initiative proponents attempt to undertake action that is beyond the power of the Washington initiative, such as amendments to the state constitution, they retain multiple avenues for expressing their preferences to the legislature, ranging from organized letter or email campaigns to petition campaigns.

These repeated failures of the initiative process are at least partially the product of Washington's very limited early-stage review of proposed initiatives. Apart from a very limited review by the Office of Code Reviser, none of the required steps to qualify for the ballot are specifically intended to ensure a well-drafted law. In fact, changes to initiative language are prohibited once an initiative qualifies for the ballot.

The only "quality assurance" step in Washington's initiative process is a review of proposed initiatives provided the Office of the Code Reviser, described in more detail above. Only seven days are allowed for the review, the review involves only an assistant code reviser, and there is no public involvement in the review.⁵⁹ Additionally, while the Office of the Code Reviser may submit suggestions to sponsors to correct technical flaws in the language of an initiative or referenda, initiative sponsors have no obligation to consider the code reviser's suggestions.⁶⁰ As a result, suggestions to improve initiative language or even to avoid potential

⁵⁸ See *Coppernoll v. Reed*, 155 Wn.2d 290, 298, 119 P.3d 318 (2005).

⁵⁹ RCW 29A.72.020.

⁶⁰ *Id.*

constitutional pitfalls are rarely adopted by sponsors. By contrast, all bills before the legislature must be reviewed by the Office of the Code Reviser.

3.1.1. Proposal—Formalized Public Review

The Subcommittee recommends two measures to improve the quality of initiatives. First, the Subcommittee recommends that Washington adopt a formalized public process for initiative review based on the process currently used in Colorado.⁶¹ This process was strongly recommended to the Subcommittee by Prof. Richard Collins at the University of Colorado School of Law, who believes the process substantially improves the quality of ballot propositions in Colorado, although he criticizes Colorado for allowing inadequate time for the process to work.

In Colorado, legal review of initiative proposals goes well beyond the non-public and abbreviated process used in Washington. Colorado initiative proponents are required to submit a “plain language” version of their proposed initiative to Colorado’s Legislative Council and Office of Legislative Legal Services. Those offices then convert the proposal into legislative language, and provide for public review and comment before signature gathering begins. Within two weeks, those bodies are required to provide comments on the “format and contents” of the initiative at an open public meeting.⁶² Editorial comments may also be provided to the initiatives sponsors to improve the “plain language” drafting of the initiative, so that initiatives are worded “with simplicity and clarity and so that the effect of the measure will not be misleading or likely

⁶¹ See Colo. Rev. Stat. § 1-40-105 (2104).

⁶² Colo. Rev. Stat. § 1-40-105(1).

to cause confusion among voters.”⁶³ Editorial comments of this type are provided on a confidential basis.⁶⁴

After the public meeting, the initiative sponsors may then revise their initiative in response to the comments received and may proceed with signature gathering unless substantive amendments are made to the original initiative. If substantive amendments are made, the measure must be resubmitted to the Legislative Council and Office of Legislative Legal Services for a second round of comments and public hearing. The Subcommittee recommends that Washington expand the current review of initiatives by the Office of Code Reviser to include a public hearing requirement and a comment process modeled on the Colorado process, although, consistent with Prof. Collins’ recommendation, the Subcommittee recommends that Washington allow substantially more than two weeks for this process to occur.

3.1.2. Proposal—Expedited Judicial Review

The second measure the Subcommittee recommends to improve initiative quality is to provide for expedited judicial review of initiatives for facial invalidity after titling but before signature gathering begins.⁶⁵ Only facial challenges to the proposed initiative should be permitted. The Subcommittee recommends that the well-recognized doctrine permitting facial challenges to statutes in limited circumstances, but requiring “as-applied” challenges to await implementation and development of a factual record, be incorporated so that early-stage legal challenges are limited both as to scope and as to the time required to resolve litigation.⁶⁶

⁶³ Colo. Rev. Stat. § 1-40-105(3).

⁶⁴ Colo. Rev. Stat. § 1-40-105(1).

⁶⁵ The process would result in a judicial determination of validity, similar to the process provided in the Declaratory Judgments Act, RCW Chapter 7.24, or declaratory judgments to establish the validity of local bond ordinances, RCW Chapter 7.25.

⁶⁶ See, e.g., *Washington State Grange v. Washington State Republican Party*, 552 U.S. 448 (2008) (rejecting facial challenge to constitutionality of I-872, adopting the “top-two” primary system, concluding that facial challenges are appropriate only in limited circumstances); *Cornelius v. Dept. of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015) (as-

Accordingly, early stage challenges would be limited to claims based on the single-subject rule, the ballot-in-title rule, and similar claims that can be decided without developing a factual record and that can be resolved on an expedited basis. Any challenges requiring the development of a factual record would be deferred until after an initiative is adopted.⁶⁷

Many other states allow for this kind of limited pre-election review of initiatives. In fact, the “consensus view” of state courts is that pre-election challenges with respect to process and content requirements such as the single-subject rule are proper.⁶⁸ In addition, many states permit pre-election challenges to initiatives if the opponent can demonstrate that the initiative is facially invalid, although the opponent generally faces a heightened burden, such as showing the initiative’s flaws are “clear,” “compelling,” or “manifest.”⁶⁹

Allowing limited, up-front review of ballot propositions will provide strong incentives for initiative proponents to carefully comply with basic legislative drafting standards and with constitutional requirements. It will avoid the cycle of unconstitutional initiatives that are adopted by voters only to be struck down by the courts. It will avoid the delay, uncertainty, cost, and damage to the prestige of the judiciary that such cases entail. In addition, if an initiative violates the single-subject rule or another requirement of legislative draftsmanship, initiative proponents will have the opportunity to reformulate the initiative before undertaking the formidable tasks of

applied constitutional challenge to 2003 amendments to Washington municipal water law); *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010) (facial challenge to 2003 amendments to Washington municipal water law).

⁶⁷ See, e.g., Scott L. Kafker & David A. Russcol, *The Eye of the Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 Mich. St. L. Rev. 1279 (2012) (arguing for pre-election review of initiatives that are facially unconstitutional); Douglas C. Michael *Pre-election Judicial Review: Taking the Initiative on Voter Protection*, 71 Cal. L. Rev. 1216 (1983) (arguing for pre-election review of initiatives under single-subject rule and similar rules governing legislative drafting).

⁶⁸ See *Berent v. City of Iowa City*, 738 N.W.2d 193, 204-06 (Iowa Sup. Ct. 2007) (discussing various state rules regarding pre-election review of initiatives); Kafker & Russcol, 2012 Mich. St. L. Rev. at 1291 & n. 99 (same); Michael, 71 Cal. L. Rev. at 1226 & n. 70 (same).

⁶⁹ See *Berent*, 738 N.W.2d at 206;

signature gathering and campaigning. In the case of I-1240, for example, a judicial determination at the outset that the initiative improperly classified and funded charter schools as “common schools” would have allowed proponents to redraft the measure to, for example, fund charter schools from the general fund rather than the common school fund, and thereby to avoid the constitutional flaws found by the Washington Supreme Court. Pre-election challenges also vindicate the purposes of the single-subject rule and similar requirements because those are designed to ensure that legislation clearly spells out its purposes, avoids conflating desirable legislation with less-desirable legislation, and protects voters from unduly confusing proposals.

At the same time, limiting judicial review to facial challenges only, with no requirement for a factual record to be developed, should limit the litigation burdens imposed on initiative proponents and, because review would be expedited, allow valid petitions to proceed to signature collection in a timely manner. Allowing facial challenges to proceed at the initial stage should also simplify and expedite initiatives that are adopted by the voters, since implementation can begin immediately after the initiative is adopted, without having to await judicial resolution of claims related to drafting errors, facial constitutional invalidity, and similar matters if resolved before the initiative is placed on the ballot.

To address the concern that pre-election review might discourage citizen-based initiatives, it may be possible to tie the Attorney General’s obligation to defend the constitutionality of initiatives to the initial determination of constitutionality that would be part of the initial review process we recommend. That is, if the Attorney General determines that an initiative is constitutional in the initial review process and the initiative is then challenged as unconstitutional, the Attorney General would be required to defend its determination of the initiative’s constitutionality in the pre-election legal process. On the other hand, if the Attorney

General found the initiative to be unconstitutional, it would fall to the initiative's sponsors to defend its constitutionality if they elect not to amend the initiative in response to the Attorney General's concerns and the referendum is then challenged in court.

This process would have several advantages. First, it would create incentives to improve draftsmanship of initiatives by emphasizing basic norms of legislative drafting such as the single-subject rule and the requirement to lay out amended statutes in full when the initiative is drafted, rather than awaiting post-election litigation. Second, it would create strong incentives for initiative proponents to follow constitutional requirements from the outset of the initiative process. Third, it would relieve the Attorney General of the obligation to defend the constitutionality of obviously unconstitutional initiatives, a spectacle that has occurred with some frequency in the past two decades.

3.2. Budget Impact Issues

Washington has a history of passing initiatives that have enormous impacts on the state's budget with little apparent appreciation of the fiscal impacts of the initiatives. Initiatives such as I-728, I-732, and I-1391, offered to reduce class size and increase teacher pay, but failed to include funding mechanisms that would have provided long-term sustainable revenue needed to implement the initiative. Similarly, initiatives such as I-695 and I-1107 cut taxes without providing voters with information about what programs and projects would need to be cut as a result of the decrease in state revenue.

During the economic downturns in 2001 and again in 2008 to 2010, Washington's ability to pay for existing government programs decreased. As a result, many of the initiatives that created unfunded mandates, such as the initiatives to decrease class size and increase teacher pay, have simply remained unfunded. By contrast, initiatives that cut taxes have been

implemented. So, although Washington voters have supported both new programs and lower taxes, in practice only the initiatives that lower taxes have remained in effect, creating a one way ratchet in which voters have reduced the state's ability to collect revenue.

Washington is not the only state whose budget has been impacted by initiatives. Somewhere between one-third to one-half of California's budget has been dedicated to spending mandated by voter approved initiatives or constitutional amendments.⁷⁰ Of the 24 states that have the initiative process, approximately half of those states have some sort of limitation regarding the ways in which initiatives can impact the state budget.⁷¹ For example, Florida has a provision that prohibits initiatives that limit the government's ability to raise revenue.⁷² Maine's constitution makes an initiative inoperative if it provides for the expenditure of funds in excess of what has been appropriated.⁷³ Montana prohibits appropriations by initiative altogether.⁷⁴

3.2.1. Proposal—Budget Neutrality

The Subcommittee considered two categories of initiative reform proposals that could address the conundrum of voters approving tax cuts or spending without offsetting the budget impact: (1) a constitutional amendment to require that initiatives specify the tax increases or program cuts that would be required for the policy to be fully implemented, an idea we term a "budget neutral constitutional amendment" or (2) require more information to be provided to voters about the budget impact of initiatives.

The Subcommittee recommends the passage of a budget neutral constitutional amendment. Initiatives that create programs would be required to include appropriate tax

⁷⁰ Ballot Box Budgeting in California, Levinson 2010 p. 697.

⁷¹ Initiative and Referendum in the 21st Century, NCLC, 2002.

⁷² Article XI Section 3 of the Florida Constitution.

⁷³ Article IV Section 19 of the Maine Constitution.

⁷⁴ Article III Section 4 of the Montana Constitution.

increases or set forth the programs in the budget that will be cut to offset the increased spending. Initiatives that cut taxes would be required to identify the cuts to programs that will be necessary to offset the decrease in state revenue.

So as not to unduly burden sponsors whose initiatives have little or no budget impact, the Subcommittee recommends that these requirements only apply to initiatives that will have more than 0.1 percent impact on the operating budget. In the 2013 to 2015 biennium, the state operating budget was approximately \$33.6 billion. Therefore, 0.1 percent of the budget would be \$33.6 million for the budget biennium or \$16.8 million in one year. When an initiative is first submitted, the Office of Financial Management (OFM) will prepare a Fiscal Impact Statement, which is the same as the statement they are required to prepare for all legislation introduced by members of the legislature. If OFM's Fiscal Impact Statement concludes that the initiative will increase spending or decrease revenue by more than 0.1 percent of the general budget, then the sponsors of the initiative will have the opportunity to supplement the initiative by specifying the additional revenue sources or programmatic cuts that would be required in order to offset the impact to the budget. OFM will review the revised versions of the initiative to ensure that the proposed revenue sources or programmatic cuts properly offset the cost of the initiative.

During the 2015 Washington legislative session, Senator Joe Fain introduced Senate Joint Resolution 8201, a proposed constitutional amendment that attempted to accomplish this reform. The language of the resolution would have prohibited the Secretary of State from accepting any initiative that is not in compliance with the state's balanced budget requirement. Senator Fain's measure garnered the support of 33 co-sponsors and a companion resolution in the State House of Representatives. However, neither the Senate nor the House measure made it out of

committee. A constitutional amendment would provide the most concrete solution to the problem.

Because a constitutional amendment may be unlikely to pass, the Subcommittee also recommends adopting legislation that requires improved budget information to be provided to the voters. For example, such legislation could require that the ballot title articulate the budget impact, or allow the pro and con campaigns more room within the voters' pamphlet to explain the budget impact using graphs and charts. Currently, Fiscal Impact Statements prepared by the Office of Financial Management are difficult to comprehend and the information provided to voters in the pamphlet is equally obtuse. These statements are often dense and full of obscure data and calculations.⁷⁵ Encouraging a simple, accurate, and prominent statement of the fiscal impact is key to providing information to the voters.

4. ONLINE AND ELECTRONIC SIGNATURES

4.1. Lack of Fair Access to the Ballot and Signature-Gathering Fraud

The current signature gathering system is outdated and arguably does not provide sufficient measures for verification of signatures, prevention of fraud, or allowing fair access to the ballot for referendum and initiative proponents. Additionally, voters faced with the decision to sign a petition on the spot do not usually have a good opportunity to evaluate the contents and language of the proposed ballot measure, and others do not have access to the signature gathering petition itself, especially those individuals in rural counties. The cost of running a signature gathering campaign through paid circulators is prohibitively expensive for all but the most well

⁷⁵ For an example, see the Fiscal Impact Statement for Initiative 1351, related to an increase in class sizes, available online at http://www.ofm.wa.gov/ballot/2014/Fiscal_Impact_Statement_I-1351.pdf.

financed proponents.⁷⁶ There is also the general perception, whether valid or not, that signature gathering is rife with fraud⁷⁷ and that there is not an adequate check on the submission of fraudulent signatures.

Current law requires a complete copy of the full text of each ballot measure to be included on the petition, along with a number of other highly specific details regarding the form and content of each petition.⁷⁸ Verification of a voter's authentic signature on a petition is performed by the Secretary of State by comparing the appearance of the voter's signature on the petition against the voter's signature on file with the state.⁷⁹ Fraud prevention is implemented by the Secretary of State performing a random sampling check,⁸⁰ including a review of petitions for patterns of similar handwriting.⁸¹ Each petition circulator is also required to sign a "declaration" on the back of each submitted petition that every person who signed the sheet signed his or her true name, knowingly, and without the promise of any compensation.⁸²

4.2. Proposal—Online Signature Gathering

One proposed reform that may have great potential to help ameliorate these problems is to allow online and electronic signatures to be accepted for qualifying referendums and initiatives. This proposal contemplates legislation that would direct the Secretary of State (1) to adopt regulations allowing the submission of online signatures in connection with referenda and initiatives through the establishment of a system of third-party online signature gathering sites or

⁷⁶ For example, in 2010, initiative proponents paid between \$591,863 and \$1,613,728 to gather the required signatures. http://ballotpedia.org/2010_ballot_measure_petition_signature_costs#Washington.

⁷⁷ Jim Brunner, *Signature-gathering Fraud Found in State Initiative Campaigns*, The Seattle Times, Feb. 13, 2013, available at <http://blogs.seattletimes.com/politicsnorthwest/2013/02/13/signature-gathering-fraud-found-in-state-initiative-campaigns/>.

⁷⁸ See RCW 29A.72.100-.130; WAC 434-379-008.

⁷⁹ See WAC 434-379-020.

⁸⁰ See WAC 434-379-010.

⁸¹ WAC 434-379-009.

⁸² See e.g., RCW 29A.72.120.

(2) to directly create and operate an online system for the submission of online signatures to qualify filed referenda and initiatives. These alternatives are not necessarily mutually exclusive and either system or some combination of a system operated by the Secretary of State and private parties would be workable while meeting the objectives for reform of the signature gathering process. The proposed reforms would not need to replace paper signature gathering, but the two systems could operate side-by-side.

The first reform option would include provisions requiring online signature gathering firms to meet certain standards for voter identity verification and fraud prevention, as well as other reasonable requirements adopted by the Secretary of State. Such regulations may also include a prohibition on the sale or commercial use of the voter information obtained by the online signature gathering firms.⁸³ If adopted, online and electronic signature gathering could be combined with an increase in the filing fee⁸⁴ to help avoid a proliferation of frivolous or ill-conceived ballot measures that online signature gathering might otherwise encourage proponents to undertake. In addition, the Secretary of State would be given authority to adopt rules allowing third-party firms to create software designed to implement online signature gathering, which could substantially reduce the expense that would otherwise be incurred by the state. An online signature gathering system may also reduce the cost of reviewing petition signatures for authenticity because the signatures submitted online could be verified in near real-time through integration with the Secretary of State's voter database.

The above proposals are not an exhaustive list of possible options, but only examples of what an adequate electronic signature gathering system may look like. Nevertheless, the core

⁸³ See below Section 6.1.2, Certification by Signature Gathering Organizations, fn. 96. The Subcommittee notes, however, that following *Doe v. Reed*, 561 U.S. 186 (2010,) all petition signatures are public information subject to disclosure and parties that desire to obtain a list of voters signing any petition may not be able to be restricted.

⁸⁴ The current filing fee is \$5.00.

features to any electronic signature system should include the following: (a) rules regarding the fair presentation of information on the ballot measure; (b) a requirement that voters register and create verified accounts prior to signing a petition; (c) verification of online signatures using the registered voter database, including any email address on file with the Secretary of State; (d) the ability of voters to check whether their names have been signed to a petition; and (e) a method for voters to withdraw their signature and/or report a signature as fraudulent.

To date, no other state has authorized electronic or online signature gathering in connection with initiatives or referendums.⁸⁵ In 2012, however, Arizona adopted “E-Qual,” which allows voters to sign candidate nomination petitions online in order for candidates to meet up to 50% of the necessary signatures to appear on the ballot.⁸⁶ The E-Qual system authenticates each voter by requiring the voter to input his or her name, birth date, and driver’s license or identification number, which is then compared to the voter’s registration record.⁸⁷

In addition, Nebraska state senator Paul Schumacher has introduced a several bills to the Nebraska legislature proposing electronic signature gathering. The 2015 proposed legislation would authorize online signature gathering in Nebraska through the use of a website maintained by the Nebraska Secretary of State and would allow voters to electronically sign proposed ballot

⁸⁵ The Utah Supreme Court recently upheld electronic signature gathering in the context of the signature requirements for candidates for public office. *Anderson v. Bell*, 2010 UT 47, 234 P.3d 1147 (Utah 2010), available at <http://caselaw.findlaw.com/ut-supreme-court/1528205.html>. Later, however, the Utah legislature banned the use of electronic signatures in connection with qualifying candidates or ballot measures. In California, a private company called Verafirma attempted to rely solely on the Uniform Electronic Transaction Act in order to submit electronic signatures. Ultimately, this attempt was rejected by the courts, which held that California’s election law required manual signatures. *Ni v. Slocum*, 196 Cal. App. 4th 1636, 127 Cal. Rptr. 3d 620 (Cal. App. 1st Dist. 2011). Bills authorizing electronic signature gathering have been introduced Oregon, Nebraska, Mississippi, and Maryland, but to date none have passed. A similar effort in Tennessee to submit electronic signatures gathered online was also rejected by an opinion of the Attorney General of the State of Tennessee, who found that the state’s Uniform Electronic Transaction Act does not require the state to accept electronic signatures on petitions. *See* Op. No. 12-80(Aug. 2, 2012), available at <http://attorneygeneral.tn.gov/op/2012/op12-80.pdf>.

⁸⁶ *See* <http://www.azsos.gov/equal/>.

⁸⁷ *Id.*

measures.⁸⁸ The legislation includes detailed requirements on security and voter verification, including a post card sent to a voter after the voter signature has been applied to a ballot measure, and giving the voter 10 days to contest the validity of the signature.

A request has been submitted to the Washington Secretary of State to comment on this proposed reform. In Washington, the Secretary of State's office already has procedures in place for members of the military to cast ballots electronically. The Secretary of State's office also has the ability to use signatures on file with the Department of Licensing from driver's licenses to compare with signatures on petitions. The Secretary of State's office indicated to the Subcommittee that the process for electronic signature gathering would be feasible and that the office generally supported the idea.

Some may be concerned the online signature gathering will lead to greater fraud. However, this concern is likely unfounded. In 2013, the Utah's Office of the Lieutenant Governor issued a report on signing initiative petitions online, titled "Study of Signing a Petition Online" (hereinafter, the "Utah Study").⁸⁹ In its examination of the technological hurdles, the Lt. Governor's office met with developers and programmers and concluded that: "with the appropriate features, there do not appear to be any hurdles to verifying the identity of a voter online." The Washington Secretary of State currently maintains the "MyVote" online voter registration system, which allows voters to register, update their registration information, check the status of their ballot, and see what elections they have voted in. The Washington Secretary of State does not believe there are any current technological issues which would prevent development and maintenance of an electronic petition signing process that would be at least and probably more fraud resistant than the current manual petition signing process.

⁸⁸ <http://nebraskalegislature.gov/FloorDocs/104/PDF/Intro/LB214.pdf>

⁸⁹ Available at <http://le.utah.gov/interim/2013/pdf/00003362.pdf>.

In fact, online signature gathering may afford greater opportunities to catch fraudulent submission of signatures in a manner that is not available or practical when gathering signatures on paper-based petitions. Under this proposed reform, each online signature gathering firm or the Secretary of State could be required to maintain a real time publically available list of all petition signers. Not only would this prevent duplicate signatures, but it would allow voters to check the list and request the removal of any unauthorized use of their signature. This proposed reform would also allow a signer to request that his or her name be removed from the list if the signer changes his or her mind upon learning more about the initiative. An online system would also allow the automatic detection of anomalous signing behavior. For example, it could detect multiple submissions from the same IP (Internet Protocol) address. Additional safeguards could be implemented, such as an email automatically sent to the voter whenever the voter's name is "signed" on a petition.⁹⁰

Further, as noted above, the current cost to run a successful signature gathering campaign can run into the hundreds of thousands or even millions of dollars. Generally, this means that proponents with deep pockets are necessary to successfully get measures on the ballot. There is a perception among voters that only special-interests and large corporations are able to effectively use the referendum and initiative system.⁹¹ There is also concern that only voters in densely populated areas get the opportunity to sign petitions. Online signature gathering would help level the playing field.

⁹⁰ Although there are already many possible methods for making an electronic system in fact more fraud resistant than the current paper system, the Secretary of State's office advocated for flexibility to allow for changes in how electronic "signatures" are gathered and confirmed to take advantage of improvements in identity confirmation technology over time. It was noted that if literal signatures (on screens that allow you to use a stylus or your finger to sign) were one method of "signing," it could even be possible to compare every such electronic signature to the signature on file for that voter rather than just the random sampling that is done today.

⁹¹ Danny Westneat, *What if Signature Gathering Didn't Take \$1 Million?*, The Seattle Times, June 5, 2015, available at <http://www.seattletimes.com/seattle-news/a-one-man-crusade-to-democratize-costly-initiative-process-with-online-signatures/>.

In addition, online signature gathering would limit the ability of circulators to misrepresent the content of petitions because the complete petition language would be required to be posted online. Online petition circulation would allow a voter to review the contents of each ballot measure at the voter's leisure and make a thoughtful decision on whether it should appear on the ballot. Allowing signatures to be withdrawn might also fundamentally change the ways in which signature gathering campaigns would be conducted, because a proponent would no longer be able to rely on voter's momentary decision, possibly on the basis of misleading information, to gather signatures.

5. CITIZENS INITIATIVE REVIEW

5.1. Lack of Accurate and Reliable Information for Voters

In Washington, ballot measures drive some of the state's largest policy and fiscal decisions. But voters often find these significant measures to be complex or confusing to understand. Accurate and unbiased information can be difficult to find while well-funded campaigns advocating for or against an initiative may obscure rather than clarify the arguments for and against specific initiatives.

Unlike bills in the legislature, initiatives are presented to voters as a whole, with little or no public debate while the initiative is being formulated and no opportunity to amend the proposal or to choose an alternative. Initiatives do not go through committees where proposals are publicly debated and examined under the microscope of policy and fiscal analysis. As such, often the only information voters receive about the initiatives are directly from the initiative or opposition campaigns.

Available evidence suggests that available sources of information may confuse rather than inform voters. For example, six counties (Asotin, Clallam, Clark, Pierce, Skagit and

Spokane) totaling roughly 550,000 ballots (or 25% of ballots cast statewide) passed both Initiative 594 and 591 in the November 2014 election, even though the initiatives contradict each other.⁹² This very recent example of contradictory voting suggests that a significant number of voters lacked basic information about the content of initiatives on which they voted.

Responsibly exercising the right to direct lawmaking through the initiative process requires that voters have reliable and clear information about each ballot measure. A Citizens' Initiative Review (CIR) will put clear and trustworthy information into the hands of Washington voters, by providing voters with an unbiased and factual evaluation using this unique deliberative process based on solid evidence.

The CIR is based upon the Citizens Jury Model of public deliberation developed by Ned Crosby at the Jefferson Center in St. Paul.⁹³ It has been shown to lead to a better informed public with a greater appreciation of what happens when new public policies are created through the initiative process. The CIR process will help get accurate and unbiased information to the voters that may help cut through some of the confusing, and often biased or misleading, messages put forth by well-funded proponents and opponents.

5.2. Proposal—Citizens' Initiative Review

The Subcommittee recommends the adoption of a CIR process that substantially follows the process outlined below:

- A panel of 20 Washington residents are randomly selected and demographically balanced to match the state's electorate along seven key

⁹² O'Sullivan, Joseph, *Sending a message? Some Washington Counties voted for both gun initiatives*, The Seattle Times (November 11, 2014), available at <http://blogs.seattletimes.com/politicsnorthwest/2014/11/11/sending-a-message-some-washington-counties-voted-for-both-gun-initiatives/>.

⁹³ Jefferson Center for Democracy, St. Paul, MN. Available at <http://jefferson-center.org/what-we-do/citizen-juries/>

criteria: 1) gender; 2) age; 3) ethnicity; 4) geographic location; 5) party affiliation; 6) educational attainment; and 7) likelihood of voting.

- The panel takes several days to evaluate a statewide ballot measure, hearing directly from policy experts as well as advocates for and against the measure.
- At the conclusion of the CIR process, the panelists draft a “Citizens’ Statement” detailing their most important findings and reporting how many panelists support or oppose the measure. The Statement is not edited by anyone outside the panel.
- The Citizens’ Statement is published as a prominent page in the voters’ pamphlet, and distributed to every voting household across the state.

In the CIR process, the panel (not staff or advocates) determine what policy experts they want to call upon for additional information about the measure. Over the course of the review, panelists have the opportunity to directly ask questions of the advocates, prioritize what they want to learn about, and deliberate together. The panel review injects a key element missing from the initiative process: public deliberation.

The Citizens’ Statement does not tell people how to vote. Rather, it provides voters with well-reasoned information, developed independently of the particular interests supporting or opposing an initiative, which assists voters in coming to informed decisions about whether to support or oppose an initiative.

An independent team of nationally recognized researchers led by Dr. John Gastil, with funding from the National Science Foundation, evaluated two Oregon “pilot” CIR Reviews

completed in 2010.⁹⁴ The evaluators concluded that the CIR panels engage in high-quality deliberation, and the CIR Citizens' Statements were strongly influential among those undecided voters who read carefully the CIR statements in the voters' pamphlet.

The study showed that more than 40% of Oregonian voters saw the CIR's statement and nearly 30% used it in deciding how to vote in 2010. That translates to more than 400,000 Oregonians using the CIR statements during its first year, resulting in a likely shift of between 3% - 9% of the final vote for the measures reviewed.

In 2012, many of the same researchers who were involved in the 2010 evaluation were engaged to determine the quality of deliberation that took place during the review process itself as well as the utility of the resultant Citizens' Statements published in the statewide voters' Pamphlet.⁹⁵ By both of these metrics, the 2012 CIR received high marks. The specific findings are below.

- The two CIR panels convened in August 2012 engaged in high-quality deliberation.
- The 2012 CIR appeared to be highly deliberative process, both from the researchers' perspective as observers and from the point of view of the participants themselves. Overall, its quality was comparable to the 2010 CIR panels.
- The 2012 CIR Citizens' Statements maintained the high level of factual accuracy first achieved in 2010. As found in the 2010 report, the 2012

⁹⁴ Gastil, John and Knobloch, Katie, *Evaluation Report to the Oregon State Legislature on the 2010 Oregon Citizens' Initiative Review*, (December 2010) available at <http://jgastil.la.psu.edu/CIR/OregonLegislativeReportCIR.pdf>.

⁹⁵ Knobloch, Katherine R., Gastil, John, Richards, Robert and Feller, Traci, *Evaluation Report on the 2012 Citizen's Initiative Reviews for the Oregon CIR Commission* (March 2013), available at <http://jgastil.la.psu.edu/CIR/ReportToCIRCommission2012.pdf>

panelists drafted Statements that contained no obvious factual errors or misleading sentences.

- The CIR Citizens' Statements were helpful for Oregonians when they voted.
- Statewide surveys of Oregon voters found that 51% of likely voters were aware of the CIR by the end of the 2012 election. This amounts to a 9% increase from the peak of 42% awareness among likely voters in 2010. At least two-thirds of CIR Statement readers in 2010 found the panelists' insights helpful in making their voting decisions, also a significant increase compared to 2010.
- An online experimental survey was conducted for one of the measures reviewed by the CIR, with the results showing substantial knowledge gains for those exposed to the CIR Statement.

The reports show great promise for CIR's impact on voters making more informed decisions when facing "all or nothing" complex ballot initiatives.

6. OTHER PROPOSED REFORMS

The Subcommittee considered a number of additional reform proposals worthy of consideration and development by the Washington Legislature and Governor's Office. These are listed below.

6.1. Reforms to Signature Gathering Process

6.1.1. Modified Signature Threshold Requirements

Initiative sponsor must secure valid voter signatures equal to eight percent of votes cast for Governor in the prior general election. Wash. Const. Art II, §1(a). Thus, in 2014, an initiative

sponsor must gather at least 246,372 valid signatures to get on the ballot.⁹⁶ For grassroots efforts, this is can be an insurmountable task. The Subcommittee considered a proposal that would lower the signature threshold to four percent for citizen-directed voluntary initiative and referendum proponents. Qualifying criteria could include a voluntary agreement not to use paid signature gathers, individual campaign contribution limits, set campaign expenditure caps, and other criteria. This reform would require constitutional amendment.

6.1.2. Certification by Signature Gathering Organizations

State law requires that no person who signs a referenda or ballot initiative may be paid for his or her signature and or use a false name.⁹⁷ California law requires signature gathering organizations to sign a written certification upon submission of potential signatures for certification attesting it has complied with all state laws, no person was paid for a signature, all signatures have been reviewed for validity, and signatures will not be used for fundraising or commercial purposes.⁹⁸ The Subcommittee recommends adoption of a similar legislation.

6.1.3. Confirming Questioned Signatures

State law does not permit initiative and referendum sponsors to confirm or validate questioned signatures during the validation process. When a signature effort falls short of the requisite number for certification due to disputed signature validity, the only recourse is a writ to the superior court.⁹⁹ Other states permit sponsors to produce a timely affidavit from the voter attesting to the validity of his or her signature. The Subcommittee recommends adoption of similar legislation.

⁹⁶ Washington Secretary of State, Initiatives FAQ (Aug. 16, 2015), available at www.sos.wa.gov/elections/initiatives-faq.aspx.

⁹⁷ RCW 29A.72.110, 29A.72.120, and 29A.72.130.

⁹⁸ California Elections Code §9609.

⁹⁹ RCW 29A.72.180, 29A.72.240.

6.2. Voter Education

6.2.1. Financial Disclosure Obligations

State law requires disclosure of the contributors to initiative and referendum campaigns donating more than \$25.¹⁰⁰ The law allows voters to discover *who* is financing a ballot campaign. The Subcommittee favors increased access to information making it easier for voters to identify the interest groups financially supporting ballot initiatives.

The Washington Public Disclosure Commission makes certain reports available online.¹⁰¹ The PDC now accepts contributor disclosures online. However, more robust access and analytical tools online would improve the quality of voter information.

6.2.2. Signature Gatherer Disclosures

Signature gatherers should be required to disclose if they are paid to collect signatures through a conspicuous sign or badge identifying them as a “Paid Signature Gatherer.” The U.S. Supreme Court struck down more onerous disclosure requirements¹⁰², but expressed no opinion on a badge disclosing a paid or volunteer status. Signature gatherers should also be required to disclose the major contributors sponsoring an initiative or referenda.

6.3. Full Text of Initiatives in Voter’s Pamphlet

The Washington Constitution requires the full text of an initiative or referendum be placed in the voter’s pamphlet to “reasonably assure that each voter will have an opportunity to study the measures prior to election.” Wash. Const. Art II, §1(e). Legislation has been proposed to eliminate this requirement. The Subcommittee supports retention of the full text of the initiative in the voter pamphlet. The best evidence of a statute is the text itself.

¹⁰⁰ RCW 42.17A.240.

¹⁰¹ <http://www.pdc.wa.gov>.

¹⁰² *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 200, 119 S. Ct. 636, 646, 142 L. Ed. 2d 599 (1999)

6.4. Conflicting Initiatives

In Washington, it is possible to defeat a ballot initiative through sponsorship of a competing “poison pill” initiative. Washington law provides no means of resolving inconsistent initiatives approved in the same election.¹⁰³ For instance, had voters adopted both Initiative 591 and Initiative 594 in 2014, the State would have faced conflicting laws dictating inconsistent outcomes regarding gun background checks. In California, when voters adopt two conflicting measures in the same election, the measure with the greatest number of affirmative votes prevails to exclusion of the other.¹⁰⁴ Other states first require reconciliation, if possible, with the law receiving the greatest number of votes as paramount.¹⁰⁵ The Subcommittee recommends adoption of legislation addressing this issue.

¹⁰³ The Washington Constitution, Article II, Section 1(a) does provide a mechanism if the legislature refers a conflicting measure to the ballot, but no such mechanism is provided for two competing or conflicting initiatives to the people.

¹⁰⁴ Calif. Const. Article 11, §3(d).

¹⁰⁵ *See, e.g.*, Idaho code 34-1811.

APPENDIX A

In early 2013, the Subcommittee initiated a speaker series, inviting subject matter experts to discuss ballot measures with the Subcommittee. Over the course of the following years, the Subcommittee held the following meetings with the listed speakers:

1. January 29, 2013: Referendum and Initiative Boot Camp.

Speakers: Katie Blinn, Office of the Secretary of State,
Jeffrey Even, Deputy Solicitor General, Office of Wash. Attorney
General,
Jennie Bowser, Senior Fellow, National Conference of State Legislatures

2. April 30, 2013: ACLU: On the ground perspectives of running a ballot measure campaign.

Speakers: Jennifer Shaw, Deputy Director of the Washington ACLU
Allison Holcomb, Drug Policy Director of the Washington ACLU

3. May 29, 2013: Public Disclosure Committee: Following the money in referendum and initiative campaigns.

Speaker: Nancy Krier, General Counsel, Public Disclosure Commission

4. July 31, 2013: Healthy Democracy: Oregon's experience with the Citizen's Initiative Review.

Speaker: Tyrone Reitman, Executive Director, Healthy Democracy

5. September 8, 2014: Industry Insider Discussion.

Speaker: Christian Sinderman, NW Passage Consulting

6. April 24, 2015: Academic Panel.

Speakers: Prof. Richard B. Collins, Univ. of Colorado School of Law –“Improving Public Deliberation of Initiatives: The Citizens Initiative Review Process in Oregon and British Columbia”

Dr. John Gastil, Chair, Department of Political Studies, Penn State University – “Rocky Mountain Low? The Constitution and Colorado's Initiative Reform Efforts”

7. June 10, 2015: Second Academic Panel.

Speakers: Prof. Todd Donovan, Ph.D., Professor of Political Science, Western Washington University

Prof. Mark A. Smith, Ph.D., Professor of Political Science, University of Washington

The Subcommittee has also consulted a number of key reports and studies produced by other organizations, including the following:

Democracy by Initiative: Shaping California's Fourth Branch of Government, Center for Governmental Studies (Second Ed. 2008).

Making the Initiative Work for Oregon – A City Club Report on Reforming the Initiative, Referendum and Referral Systems in Oregon, City Club Bulletin, Vo. 90, No. 32 (Jan. 11, 2008).

Direct Democracy: The Initiative and Referendum Process in Washington, The League of Women Voters of Washington Education Fund (October 2002).

Initiative & Reform in 21st Century, Final Report and Recommendations of the NCSL I&R Task Force (July 2002).

Copies of all reports and studies are on file and available upon request.