

1 EXPEDITE

2 No Hearing Set

3 Hearing is Set:

 Date: April 20, 2018

 Time: 1:30 p.m.

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6
7 **STATE OF WASHINGTON**
 THURSTON COUNTY SUPERIOR COURT

8 TIM EYMAN,

 Plaintiff

NO. 18-2-01414-34

9 and

10 SENATOR MIKE PADDEN,

 Intervenor

SECRETARY OF STATE'S
RESPONSE

11 v.

12 KIM WYMAN, in her capacity as the
13 Secretary of State, THE STATE OF
14 WASHINGTON; THE WASHINGTON
15 STATE LEGISLATURE,

 Defendants

16 and

17 DE-ESCALATE Washington,

 Intervenor

18
19 **I. INTRODUCTION AND RELIEF REQUESTED**

20 In order to facilitate the timely printing of ballots and voters' pamphlets, the Secretary of
21 State respectfully requests that the Court maintain its expedited schedule and issue an order on
22 or before April 27, 2018. Doing so will assist the parties in obtaining a final decision including
23 all appeals by the date on which ballots and voters' pamphlets must be printed.

24 In addition, regardless of any issues with standing or justiciability, this Court should
25 determine the merits of this constitutional challenge because the issue presented is one of broad
26

1 overriding public import, and therefore it qualifies for the public interest exception to standing
2 and justiciability requirements. A decision on the merits is necessary to determine whether voters
3 are entitled to vote on I-940 and ESHB 3003 at the general election. The voting public, including
4 registered voters deciding whether to sponsor or sign future initiatives to the Legislature, is
5 entitled to know whether the Legislature's actions here were constitutional. Further, a decision
6 is necessary for the public and law enforcement so they know the extent to which law
7 enforcement must apply first aid and what standard applies to establish criminal liability for
8 excessive force. Finally, as separate branches of government, the Legislature and the Secretary
9 of State need guidance on whether the process the Legislature chose here requires placement of
10 the initiative and an alternative on the ballot. For all of these reasons, this Court should exercise
11 its discretion to decide the merits of the constitutional question presented.

12 **II. STATEMENT OF FACTS**

13 In the interest of avoiding repetition of the facts described by the other parties, the
14 Secretary of State briefly offers only the facts relevant to her arguments.

15 The deadline for mailing ballots to more than 79,500 military and overseas voters is
16 September 22, 2018. Augino Decl. ¶ 2(b). For the general election ballots and voters' pamphlets
17 to be timely formatted, printed, and distributed to military and overseas voters, the county
18 auditors must know the final list of ballot measures appearing on the ballot no later than August
19 31, 2018. Augino Decl. ¶¶ 7, 9.

20 **III. STATEMENT OF ISSUES**

21 The Secretary of State addresses only two issues:

- 22 1. The need for expedited resolution of this case; and
- 23 2. Whether this Court should exercise its discretion to decide the case on the merits,
24 despite any issues of standing or justiciability, because it presents an issue of broad overriding
25 public import sufficient to satisfy the public interest exception.

1 **IV. EVIDENCE RELIED UPON**

2 The Secretary of State relies upon the Declaration of Lori Augino, as well as the other
3 pleadings filed in this case.

4 **V. AUTHORITY**

5 **A. County and State Elections Officials Must Have a Final Mandate in this Case,
6 Including Resolution of All Appeals, By August 31, 2018**

7 By statute, ballots to more than 79,500 military and overseas voters must be mailed by
8 September 22, 2018. *See* RCW 29A.40.070(2); Augino Decl. ¶ 2(b). In order to print and mail
9 ballots and voters' pamphlets to military and overseas voters by this date, the Secretary of State
10 and county auditors must receive the final decision in this case, including resolution of all
11 appeals, by August 31, 2018. Augino Decl. at ¶¶ 3-4. Accordingly, the Secretary of State
12 respectfully requests this court issue an order as quickly as reasonably possible.

13 **B. This Action Warrants Judicial Resolution Despite Any Issues of Standing and
14 Justiciability**

15 This Court should determine the merits of Plaintiff Eyman's and Intervenor Padden's
16 constitutional challenge because the issue here is one of "broad overriding public import,"
17 and therefore it qualifies for the public interest exception to standing and justiciability
18 requirements. *Lee v. State*, 185 Wn.2d 608, 618, 374 P.3d 157 (2016) (quoting *Diversified Indus.
19 Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814, 514 P.2d 137 (1973)). Under the public interest
20 exception, this Court may exercise its discretion to render a declaratory judgment to resolve a
21 constitutional question, notwithstanding justiciability or standing concerns, if (1) the question is
22 one of "great public interest," (2) the action has been adequately briefed and argued, and (3)
23 an opinion from the Court "would be beneficial to the public and to the other branches of
24 government" *Lee*, 185 Wn.2d at 618 (quoting *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*,
25 80 Wn.2d 175, 178, 492 P.2d 1012 (1972)). The dispute must also be ripe, which in this context
26 depends on "whether the issues raised are 'primarily legal, and do not require further factual
development, and [whether] the challenged action is final.'" *Lewis County v. State*, 178 Wn.

1 App. 431, 40, 315 P.3d 550 (2013) (quoting *Jafar v. Webb*, 177 Wn.2d 520, 525, 303 P.3d 1042
2 (2013)).

3 In *Lee*, the Washington Supreme Court found that the constitutionality of an initiative
4 that would have an immediate impact on the State’s operating budget involved “issues of
5 substantial public interest” that needed immediate resolution. *Lee*, 185 Wn.2d at 618. Thus, the
6 Court concluded that the constitutionality of the initiative was a justiciable question under the
7 public interest exception. *Id.*

8 Here, there is a similar need for immediate resolution of the merits. There is a substantial
9 public interest in the issues presented and the court’s guidance would benefit the public, law
10 enforcement, the Legislature, and the Secretary of State—now and in the future.

11 **1. These are issues of great public interest**

12 First, the issues presented are of substantial public interest in at least three respects.
13 Washington courts apply the public interest exception in cases involving elections because they
14 can affect every citizen in the state. See *Wash. State Coal. for the Homeless v. Dep’t of Soc. &*
15 *Health Servs.*, 133 Wn.2d 894, 917, 949 P.2d 1291 (1997) (“Issues of major public importance
16 have included . . . matters directly affecting the freedom of choice in the election process”);
17 *Lewis County*, 178 Wn. App. at 440 (citing same). This case is no different. Whether the
18 Washington Constitution requires I-940 and ESHB 3003 to be placed on the November ballot is
19 an issue that directly affects every voter’s choice in the state.

20 Moreover, Washington’s voters, many of whom sign petitions for initiatives to the
21 Legislature, are entitled to know whether the novel process the Legislature used here is
22 constitutional. This information will help initiative sponsors and petition signers judge whether
23 they want to propose future initiatives to the Legislature or to the people instead. If the
24 Legislature’s action on I-940 and ESHB 3003 is constitutional, and an initiative sponsor wants
25 the Legislature to be able to amend the initiative without a vote of the people, they may prefer
26 to propose an initiative to the Legislature. In contrast, if an initiative sponsor does not want the

1 Legislature to amend their initiative without a vote of the people, the sponsor may prefer to file
2 initiatives to the people in the future. Whether the Legislature's novel resolution of I-940 is
3 constitutional will affect sponsors', petition signers', and voters' decisions going forward. It
4 would not be fair for it to remain a mystery whether the Legislature's process for addressing
5 I-940 was constitutionally permissible and, therefore, likely to be repeated in the future for other
6 initiatives to the Legislature.

7 Whether the *substance* of ESHB 3003 is constitutionally valid without a vote of the
8 people is also an issue of substantial public importance. Until a court definitively rules on the
9 constitutionality of ESHB 3003, it will be unclear to the public and to law enforcement which
10 standard applies to determine criminal liability for the use of deadly force and what standard
11 applies as to the duty to provide first aid. *Compare* I-940, §§ 6-7 with ESHB 3003 § 2 (amending
12 I-940 §6) and ESHB §3 (amending I-940, §7). While a police officer accused of improperly
13 using deadly force may bring a later challenge to the constitutionality of ESHB 3003, it is hardly
14 fair to the officer or the public to wait until a criminal prosecution is underway to announce
15 which standard is constitutionally valid. The resolution of what is the constitutionally valid
16 standard should not be left for a later criminal trial of a police officer who has used deadly force.

17 **2. The issues will be adequately briefed and argued**

18 Second, even though this case is on an expedited schedule, the highly qualified counsel
19 for the parties and intervenors can competently brief and argue the merits to the Court.

20 **3. A decision on the merits would benefit the public and other branches of
21 government**

22 Third, the Legislature, the Secretary of State, law enforcement, and the public need
23 guidance from the court on the merits. The Legislature needs to understand whether the process
24 it followed here can be validly repeated in the future. Similarly, the Secretary of State, as the
25 member of the executive branch responsible for certifying the contents of the general election
26 ballot, is entitled to know whether she is constitutionally required to place amendments of

1 initiatives to the Legislature on the ballot in these circumstances.¹ And as explained above, the
2 public and law enforcement are entitled to know whether ESHB 3003 is constitutionally valid
3 so that peace officers can understand what standards apply going forward. Even if this Court
4 determines that a decision on the merits would be an advisory opinion, the Washington Supreme
5 Court has acknowledged that Washington courts will render advisory opinions, though rarely, as
6 a matter of comity to the other branches of government. *Walker v. Munro*, 124 Wn.2d 402, 417,
7 879 P.2d 920 (1994).

8 **4. The issues are sufficiently ripe**

9 Finally, the issues presented are sufficiently ripe. There are no factual disputes, the issues
10 are primarily legal, the Legislature's challenged action is final, and the Secretary of State and
11 Washington's voters need to know whether I-940 and ESHB 3003 must be placed on the general
12 election ballot. *See Lewis County*, 178 Wn. App. at 439-40 (considering whether the issues are
13 legal ones and whether further factual development was needed). No further action is necessary
14 to decide the merits of this case.

15 **VI. CONCLUSION**

16 For the reasons stated above, this Court should exercise its discretion to decide the merits
17 of this case under the public interest exception to standing and justiciability requirements. The
18 Secretary of State also asks that the Court do so expeditiously so that the case can be fully
19 resolved in time for printing of the general election ballots and voters' pamphlets.

20 DATED this 12th day of April 2018.

21 ROBERT W. FERGUSON

22 *Attorney General*

23 

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25 ¹ In *Walker v. Munro*, 124 Wn.2d 402, 415, 417, 879 P.2d 920 (1994), the Court declined to invoke the
26 public interest exception because no public official sought resolution of the question presented. Instead, all of the
officials in that case sought dismissal. In contrast, the Secretary of State requests a decision on the merits in this
case.

1 **CERTIFICATE OF SERVICE**

2 I certify, under penalty of perjury under the laws of the state of Washington, that on this
3 date I served a true and correct copy of the foregoing document via electronic mail per the
4 agreement between the parties on the following:

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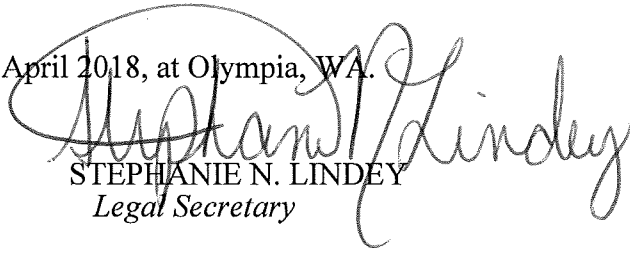
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26 DATED this 12th day of April 2018, at Olympia, WA.


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