



# POLICY BRIEF

## Citizens' Guide to Initiative 1366, the Taxpayer Protection Act

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October 2015

1. *Five times voters have approved a supermajority vote requirement for tax increases, but the trade-off policy proposed by Initiative 1366 is different.*
2. *If passed, Initiative 1366 would cut the state sales tax rate by one percentage point, from 6.5 percent to 5.5 percent, unless lawmakers choose to send voters a constitutional amendment requiring a supermajority vote in the legislature to raise taxes.*
3. *If the sales tax reduction takes effect, the state's Office of Financial Management estimates state General Fund revenue would decrease by \$8 billion over six years.*
4. *Initiative 1366 does not say whether the sales tax cut or the constitutional amendment would be the preferred choice of voters. This ambiguity may lead to confusion about what voters actually want.*
5. *Separately from Initiative 1366, Washington Policy Center recommends lawmakers give voters the final say in whether our state should have a supermajority vote requirement to raise taxes.*



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# Citizens' Guide to Initiative 1366, the Taxpayer Protection Act

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## Introduction

In November the people of Washington will vote on Initiative 1366, the “Taxpayer Protection Act.” The measure would enact a one-percentage point reduction in the state sales tax, from 6.5 percent to 5.5 percent, unless lawmakers send to voters a constitutional amendment requiring a supermajority vote in the legislature to increase taxes.

The sales tax reduction would not happen if this action is taken by lawmakers. Although Washington Policy Center has long supported a supermajority vote requirement in the legislature to increase taxes, and voters on five occasions have approved this requirement, the trade-off policy proposed by Initiative 1366 is different.

## Text of Initiative 1366

Here is the official ballot title and summary for I-1366:<sup>1</sup>

Ballot Title

*“Initiative Measure No. 1366 concerns state taxes and fees.*

*“This measure would decrease the sales tax rate unless the legislature refers to voters a constitutional amendment requiring two-thirds legislative approval or voter approval to raise taxes, and legislative approval for fee increases. Should this measure be enacted into law? Yes [ ] No [ ]”*

## Ballot Measure Summary

“This measure would decrease the state retail sales tax rate on April 15, 2016, from 6.5 percent to 5.5 percent. The sales tax rate would not be decreased if, by April 15, 2016, two-thirds of both legislative houses refer to the ballot a vote on a constitutional amendment that requires two-thirds legislative approval or voter approval to raise taxes, and majority legislative approval to set the amount of a fee increase.”

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1 “Initiative 1366: Taxpayer Protection Act,” Washington Secretary of State’s Office, January 5, 2015 at [http://sos.wa.gov/\\_assets/elections/initiatives/FinalText\\_727.pdf](http://sos.wa.gov/_assets/elections/initiatives/FinalText_727.pdf).

The actual text of Initiative 1366 does not require the legislature to do anything it chooses not to do, nor would it indicate a preference by the voters about whether they want the sales tax cut or the constitutional tax limitation. These details are explained below. According to the intent section of I-1366:<sup>2</sup>

*“The people declare and establish that the state needs to exercise fiscal restraint by either reducing tax burdens or limiting tax increases to only those considered necessary by more than a bare majority of legislators.”*

### **Does Initiative 1366 “force” the legislature to take a certain action?**

Opponents of the proposal say it amounts to blackmailing lawmakers to vote for a constitutional amendment restricting future tax increases.<sup>3</sup>

Responding to this claim, a legal analysis of Initiative 1366 by the sponsors focuses on whether the legislature would be forced to do anything under the measure:<sup>4</sup>

*“Does the initiative ‘force’ the Legislature to put a constitutional amendment on the ballot?”*

*“No. In section 2, the initiative institutes a simple statutory requirement that the state sales tax rate be reduced from 6.5 percent to 5.5 percent effective April 15, 2016. Nothing in the state Constitution requires the sales tax to be any particular rate. In fact, over the preceding decades, the state sales tax rate has been changed many times by the Legislature. The Legislature could, if it was so inclined, reduce the sales tax rate; therefore, the people may as well.*

*“Section 3 provides a contingency: if the Legislature, prior to April 15, votes to refer to the ballot a 2/3 constitutional amendment, then the reduction in the sales tax expires on April 14. The Legislature has the power to refer a constitutional amendment to the ballot. It may choose to; it may not. It is the Legislature’s choice.”*

Providing independent analysis on this point, the state Office of Financial Management’s (OFM) fiscal impact statement for Initiative 1366 makes it clear the legislature is provided a choice:<sup>5</sup>

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2 Ibid.

3 “Efforts Underway to Block Eyman Blackmail Initiative,” by Melinda Young-Flynn, Schmudget Blog, July 30, 2015 at <http://budgetandpolicy.org/schmudget/efforts-underway-to-block-eyman-blackmail-initiative>.

4 “Review of Initiative 1366,” by Richard M. Stephens, Stephens and Klinge LLP - Attorneys at Law, July 8, 2015 at <http://tinyurl.com/qhxyqgr>.

5 “Fiscal Impact Statement for Initiative 1366,” by Washington Office of Financial Management at [http://www.ofm.wa.gov/ballot/2015/I-1366\\_Fiscal\\_Impact\\_Statement.pdf](http://www.ofm.wa.gov/ballot/2015/I-1366_Fiscal_Impact_Statement.pdf).

*“The initiative presents the Legislature with a choice that leads to two possible and mutually exclusive scenarios. The Office of Financial Management (OFM) cannot predict how the Legislature will act. For the purposes of this fiscal impact statement, OFM describes the fiscal impact of each scenario.*

*“Scenario 1 – The Legislature does not refer a constitutional amendment to voters prior to April 15, 2016. On April 15, 2016, the state retail sales tax rate would decrease from 6.5 percent to 5.5 percent . . .*

*“Scenario 2 – The Legislature refers a constitutional amendment to voters prior to April 15, 2016. The constitutional amendment would appear on the November 2016 general election ballot.”*

Though the general political assumption is that most lawmakers would not want the sales tax rate reduced from 6.5 percent to 5.5 percent, leading them to send a constitutional amendment to the voters, the text of Initiative 1366 does not specify a preference on which action should occur. It only provides that taxes should either be cut or tax increases restricted, whichever the legislature chooses. While a constitutional amendment could be proposed to prevent the sales tax cut, Initiative 1366 does not require the legislature to do so, unless lawmakers decide to make that policy decision to keep the current sales tax rate.

Should the sales tax reduction take effect, OFM estimates “over the next six fiscal years, sales tax revenue for the state General Fund would decrease \$8 billion.”<sup>6</sup> This would be a substantial tax reduction for taxpayers but would also put pressure on funding current state programs.

### **Is Initiative 1366 a legal ballot proposal?**

Under Washington’s constitution, the people reserve for themselves broad powers of initiative. One restriction to this power, however, is that initiatives themselves cannot be used to amend the constitution. Opponents of Initiative 1366 say that the proposal does just that and therefore is unconstitutional. They attempted in court to prevent Initiative 1366 from appearing on the ballot.

On August 14, 2015, King County Superior Court Judge Dean Lum ruled that Initiative 1366 is likely an illegal constitutional amendment that exceeds the power of initiative, but he refrained from preventing the proposal from appearing on the ballot saying:<sup>7</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> “Huff, et al v. Wyman,” Case No. 15-2-18335-4 SEA, Order by Judge Dean Lum, King County Superior Court, August 14, 2015 at [http://www.sos.wa.gov/\\_assets/elections/image2015-08-14-125658.pdf](http://www.sos.wa.gov/_assets/elections/image2015-08-14-125658.pdf).

*“Although I-1366 appears to exceed the scope of the initiative power, our Supreme Court has not clearly and squarely ruled on whether the First Amendment to the United States Constitution and/or Article 1, Section 5 of the Washington State Constitution provide additional protections against pre-election challenges even in circumstances where the initiative may itself be invalid. The Supreme Court may clarify this issue prior to the election, but this trial court cannot.”*

Following this ruling, opponents immediately filed an appeal to the state supreme court to keep voters from considering Initiative 1366.

Defending the people’s right to vote on the proposal, Secretary of State Kim Wyman filed a brief encouraging the supreme court not only to keep Initiative 1366 on the ballot, but to rule that the proposal is not a constitutional amendment and is therefore well within the people’s power of initiative. Secretary of State Wyman argued:<sup>8</sup>

*“The voters’ fundamental right to vote on an initiative should not be abridged unless the initiative is clearly outside the scope of the people’s power. Even though the superior court allowed the initiative to remain on the ballot, the superior court erred in concluding that I-1366 fell outside the people’s initiative power.*

*“I-1366 does not amend the state constitution or alter the constitutional amendment requirements. Instead, it would amend the state sales tax rate, an act that is plainly within the people’s power, and merely proposed to the legislature a constitutional amendment that may or may not be taken up by that body.”*

On September 4, 2015, the Supreme Court issued a brief order unanimously allowing Initiative 1366 to appear on the 2015 general election ballot. The justices also said, however, that, “The [opponents’] appeal is retained by this Court for a decision on the merits.”

It is unclear whether the Court agreed with the trial court finding that Initiative 1366 is likely unconstitutional but is allowing a vote anyway, or whether the court agreed with the Secretary of State’s position. At press time, the full court ruling describing its reasoning had yet to be released.

## **What will the legislature do if Initiative 1366 is approved by voters?**

The proponents and opponents of Initiative 1366 fiercely disagree about what would happen if the measure is approved. The only thing that is certain

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<sup>8</sup> “Huff, et al v. Wyman,” Case No. 92075-3, Opening Brief by State of Washington, Washington State Supreme Court, August 26, 2015 at <http://tinyurl.com/oy6fc7g.7>

is the proposed sales tax cut would go into effect unless the legislature takes other actions.

What could those other actions be? While the text of Initiative 1366 provides one scenario, various legal filings in the court cases describe other possible outcomes.

The sponsor of Initiative 1366, in a legal brief to the Supreme Court, indicated the response from the legislature could be to raise a different tax:<sup>9</sup>

*“...the fact that the initiative includes a onetime reduction in sales tax does not force the legislature to put a constitutional amendment on the ballot. A reduction in sales tax, a particularly regressive tax in hitting poorer citizens hardest, could be replaced with increases in other taxes and/or adjustments in spending. The so-called gun to the head argument ignores that the Legislature has numerous ways of funding state activities. I-1366 deals only with one of them.”*

Senator Pam Roach, a strong supporter of the two-thirds vote requirement in the legislature to raise taxes (and sponsor of other proposed constitutional amendments on this policy), made a similar point in her brief to the Supreme Court:<sup>10</sup>

“Previous legislative votes indicate the 2016 Legislature may not have enough legislative support to refer Initiative 1366’s suggested constitutional amendment to the ballot, so, unless the Legislature amends the initiative’s policies with a 2/3 vote (which they might do), the sales tax reduction will take effect on April 15, 2016.

“That would not necessarily be a bad outcome though it is not inevitable. A lower sales tax rate would spur the 2016 Legislature to re-examine and possibly change our overall tax structure and spending priorities which would arguably be a healthy exercise.”

These appear to be the various outcomes if Initiative 1366 is approved:

- Reduction in state sales tax rate, or;
- The legislature refers to voters a supermajority requirement to increase taxes constitutional amendment, thus canceling the sales tax rate cut, or;
- The legislature suspends or amends Initiative 1366 (would require a two-thirds vote), or;

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9 “Huff, et al v. Wyman,” Case No. 92075-3, Opening Brief by Initiative 1366 sponsors, Washington State Supreme Court, August 26, 2015 at <http://tinyurl.com/ncxr3rl>.

10 “Huff, et al v. Wyman,” Case No. 92075-3, Amicus Brief by Senator Pam Roach, Washington State Supreme Court, August 25, 2015 at <http://tinyurl.com/okoghhr>.

- The legislature allows the sales tax rate cut to take effect and instead raises a different tax by a simple majority vote to collect enough revenue to balance the budget.

Of course, with the Supreme Court saying it would consider the issue later “for a decision on the merits,” another potential outcome is additional litigation that prevents Initiative 1366 from ever taking effect.

## **Supermajority requirements in other states**

If the legislature ultimately decides to send voters a proposed constitutional amendment to require a supermajority vote to raise taxes, it would be following the lead of several other states. Seventeen states have some form of supermajority vote requirement for tax increases. Of the states with supermajority tax limitations, only the requirement in Wisconsin was enacted as ordinary law. The requirements in all the other states were enacted as part of the state constitution.

## **Existing supermajority requirements in the Washington state constitution**

A supermajority requirement in a state or national constitution is not anti-democratic, as some critics claim. There are nearly two-dozen supermajority requirements currently in the Washington state constitution.<sup>11</sup> These provisions have been placed there to require a higher vote threshold for certain government actions.

These restrictions are policy choices. Requiring a supermajority vote to increase the financial burden the state places on its citizens is no more undemocratic than the many other supermajority requirements that are already part of the state constitution.

Several of these provisions have been part of Washington’s constitution since 1889. The most recent supermajority restriction was added by lawmakers, and confirmed by voters, in 2007, with the requirement for a three-fifths legislative vote to spend funds from the budget stabilization account.<sup>12</sup> Constitutional supermajority vote requirements are common. In most cases they are not even controversial.

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11 “Supermajority Vote Requirements Are a Basic Part of Washington’s Democracy,” by Jason Mercier, blog post, Washington Policy Center, September 12, 2012 at <http://www.washingtonpolicy.org/blog/post/supermajority-vote-requirements-are-basic-part-washingtons-democracy>.

12 “Citizens Guide to SJR 8206, Budget Stabilization Account,” by Jason Mercier, Washington Policy Center, September 2007 at <http://www.washingtonpolicy.org/publications/notes/citizens-guide-sjr-8206-budget-stabilization-account>.

## Popular support for the supermajority vote requirement in Washington

Voters in Washington have enacted or affirmed the two-thirds vote requirement to raise taxes five times in the past two decades:<sup>13</sup>

- 2012: Initiative 1185 – to require a two-thirds vote in the legislature or voter approval for tax increases (passed statewide with 64 percent “yes” vote and approval in 44 of the 49 legislative districts);
- 2010: Initiative 1053 – to require a two-thirds vote in the legislature or voter approval for tax increases (passed with 64 percent “yes” vote);
- 2007: Initiative 960 – to require a two-thirds vote in the legislature or voter approval for tax increases (passed with 51 percent “yes” vote);
- 1998: Referendum 49 – to affirm the tax limitation provisions of 1993’s Initiative 601 (passed with 57 percent “yes” vote);
- 1993: Initiative 601 – to require a two-thirds vote in the legislature or voter approval for tax increases (passed with 51 percent “yes” vote).

In 2011, twelve Democratic lawmakers in the House and Senate joined the Washington Education Association (WEA) and League of Education Voters in a lawsuit to overturn the voter-approved two-thirds vote requirement to raise taxes.

In February 2013, the state Supreme Court agreed in a 6-3 ruling, striking down the statutory tax-increase restriction. The justices were clear, however, that they were not ruling on the “wisdom” of the policy itself, and instead that ultimately the people should decide:<sup>14</sup>

*“Our holding is not a judgment on the wisdom of requiring a supermajority for passage of tax legislation. Such judgment is left to the legislative branch of our government. Should the people and the legislature still wish to require a supermajority vote, they should do so through a constitutional amendment.”*

In the past, when the court has invalidated a law passed by the people, the legislature has sought to implement what the people want (examples include Initiative 695 to reduce car tab costs, and Initiative 747 to limit property tax increases).

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13 “SJR 8200: Amending the Constitution to require a two-thirds majority vote of the legislature to raise taxes,” by Jason Mercier, Legislative Memo, Washington Policy Center, January 2015 at <http://www.washingtonpolicy.org/publications/legislative/sjr-8200-amending-constitution-require-two-thirds-majority-vote-legislature>.

14 “Will voters get sixth shot at supermajority for taxes?,” by Jason Mercier, Washington Policy Center, blogpost, January 27, 2014 at <http://www.washingtonpolicy.org/blog/post/will-voters-get-sixth-shot-supermajority-taxes>.

## Conclusion

Washington Policy Center has long recommended allowing the people to vote on a constitutional amendment to implement the supermajority tax restriction voters have previously approved on five occasions. Although Initiative 1366 does not directly propose a constitutional amendment (which would not be allowed through a ballot measure), it does create a choice for the legislature to permit either a sales tax rate cut of one percentage point or allow the voters to consider a constitutional amendment to make enacting future tax increases harder.

The text of Initiative 1366 itself, however, does not express a preference between the proposed sales tax cut or lawmakers acting on a constitutional amendment. This may lead to confusion about what action voters actually want the legislature to take if Initiative 1366 is passed.

What is certain is that approval of Initiative 1366 would spark a debate in the legislature over taxes that would take into account the public's views on the various policy options.

Separately from any outcome involving Initiative 1366, however, Washington Policy Center has long recommended that lawmakers give voters the final say in the seemingly unending debate over the supermajority requirement for tax increases, and let the people vote on this policy as a constitutional amendment.

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