HONORABLE MICHAEL R. SCOTT
HEARING DATE: DECEMBER 13, 2024 at 10:00 AM
WITH ORAL ARGUMENT

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LEGAL COUNSEL FOR YOUTH AND CHILDREN, a nonprofit organization; LAVENDER RIGHTS PROJECT, a nonprofit organization; MOMSRISING, a nonprofit organization; OASIS YOUTH CENTER, a nonprofit organization; PEOPLE OF COLOR AGAINST AIDS NETWORK, a nonprofit organization; SEXUAL VIOLENCE LAW CENTER, a nonprofit organization; SOUTHWEST WASHINGTON EQUITY COALITION, a nonprofit organization; KARI LOMBARD, in her individual capacity; JANE DOE, in her individual capacity; and, SOUTH WHIDBEY SCHOOL DISTRICT, a public school district,

Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant,

and

LET'S GO WASHINGTON, a political action committee, et al.,

Intervenor-Defendants.

No. 24-2-11540-4 SEA

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT & RESPONSE TO STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT



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## I. INTRODUCTION AND RELIEF REQUESTED

Washington's Constitution protects democracy and the integrity of the legislative process by requiring that proposed changes to existing law be disclosed. This transparency is necessary because if a proposed law changes existing laws—laws that the Legislature and Washingtonians have decided are important priorities—legislators and the public have a right to be apprised about those changes so they can make an informed decision to depart from previous law and policy. As a result, article II, section 37 requires that a new law must show explicitly how it relates to statutes that it amends. *Wash. Educ. Assoc. v. State*, 93 Wn.2d 37, 39, 604 P.2d 950 (1980) ("WEAI"). The purpose of article II, section 37 is to make sure "the effect of the new legislation is clear and to avoid[ ] confusion, ambiguity, and uncertainty in the statutory law." *El Centro De La Raza v. State*, 192 Wn.2d 103, 129, 428 P.3d 1143, 1156 (2018).

Initiative 2081 violates the mandate of article II, section 37. Laws of 2024, ch. 4, § 1 ("I-2081").[1] The Initiative amends numerous laws without disclosing its effect. It creates "confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes [and] different portions of the same volume." *See, e.g.*, *El Centro*, 192 Wn.2d at 129. The Initiative should be invalidated in its entirety.

In addition to a textual analysis of Initiative 2081's effect on existing law, its failure to transparently set out its amendments is also apparent in the history of its passage, resulting in confusion about the actual impact of the Initiative by legislators and the public. Initiative 2081

[1] Leavitt Decl. ¶ 2, Ex. A (attaching I-2081).



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appears to have been a direct response to the dissatisfaction of its proponents to laws passed over the past several years that reflect Washington's long-standing public policy prioritizing youth privacy, autonomy, and education. Those laws include protections for youth privacy and access to health care, access to shelter for youth at risk of homelessness who have compelling reasons to delay notification of their parents, and comprehensive education that includes sexual health curriculum and curriculum which accurately reflects the histories and lived experiences of Washington's diverse Black, Indigenous, immigrant, and LGBTQ+ communities. Each of those laws and policies were passed through a rigorous legislative process where they were discussed, debated, and voted upon by the Washington Legislature.

Initiative 2081 is part of a nationwide trend pushing legislation taking aim at curriculum inclusive of the histories and perspectives of historically marginalized and underrepresented groups, the rights and safety of LGBTQ+ students, and youth access to health care, including reproductive and gender-affirming care. It is nearly identical to Louisiana's so-called "Parents' Bill of Rights," but with additional parental notification requirements relating to medical care, unique provisions related to youth access to shelter and services, and additional curriculum notice and opt-out requirements.

Initiative 2081's proponents explicitly intended for the law to attack youth medical privacy rights—explaining that the Initiative was intended to address "an erosion of the parents' rights to know what has been going on with their child medically." The Initiative was also drafted in response to ESSB 5599, a law passed during the 2023 legislative session that targeted the overlooked causes of youth homelessness, including transgender youth facing familial rejection. Initiative 2081 is commensurate with legislative attacks across the country aimed at preventing



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classroom education intended to reflect history—including the historical and ongoing effects of systemic racism—and inclusive of materials that reflect the experiences of diverse communities, including LGBTQ+ materials and discussions in the classroom.

Despite its intended purpose, in conflict with Washington's constitutional requirement, the Initiative failed to disclose its effects on youth privacy laws, ESSB 5599, or the other areas of Washington law it changes. It is difficult to conceive that the Initiative would have passed had it properly disclosed its actual effect on existing laws. Washington has a long history of laws supporting youth privacy and access to health care, which the Legislature has revisited in recent sessions to ensure youth privacy and access to health care, shelter, and related services. During the same legislative session that Initiative 2081 was passed, the Legislature passed an inclusive curriculum bill to ensure the histories, contributions, and perspective of historically marginalized and underrepresented groups, including Indigenous, Black, and LGBTQ+ people are taught in school.

Initiative 2081's failure to disclose its effect on existing Washington law led the legislature to conclude that Initiative 2081 did not have any effect on existing laws. While the Initiative's effect on existing statutory law is complex and difficult to track, a detailed analysis reveals that it modifies existing laws, precisely as it was designed to do. A thorough search of existing laws establishes that the language of the Initiative conflicts with the plain language of a myriad of Washington statutes that cover youth privacy, youth access to health care, youth access to shelter and social services, youth access to education, and duties of school districts and school employees. Washington's Office of the Superintendent of Public Instruction (OPSI), the State agency responsible developing technical guidance and tools to assist with implementation of Initiative



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2081, acknowledged provisions of the Initiative "conflict with current law—particularly around students' right to privacy in school." Leavitt Decl. ISO MSJ ¶ 13, Ex. E.

Article II, section 37 is intended to prevent misunderstanding of a proposed legislation's effect on existing law. To determine whether article II, section 37 is violated, courts must analyze two questions. A new enactment is unconstitutional if it fails either part of the inquiry. *Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 210, 457 P.3d 453 (2020). The first question is whether the law is "such a complete act that the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment." *El Centro*, 192 Wn.2d at 129. The second question is whether a determination of the scope of rights or duties under the new law new renders a straightforward determination of the scope of rights or duties under the existing statutes erroneous. *Id.* Initiative 2081 fails both parts of the article II, section 37 test.

Initiative 2081 is not "such a complete act that the scope of the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment." *State v. Manussier*, 129 Wn.2d 652, 663, 921 P.2d 473 (1996). To the contrary, anyone trying to understand the "rights or duties created or affected by" Initiative 2081 must necessarily refer to a host of other statutes that cover youth health, privacy, and education, because the Initiative affects rights and duties far beyond those rights of parents of public-school youth. One must refer to a host of other statutes to understand its effect on youth rights and the duties of public-school districts, educators, and employees. *See, e.g., El Centro*, 192 Wn.2d at 129 (setting forth the analysis for whether a newly enacted law is a complete act). Initiative 2081 separately violates



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article II, section 37, because it renders erroneous a straightforward determination of the scope of rights or duties under the existing statutes.

"Citizens or legislatures must not be required to search out amended statutes to know the law on the subject treated in a new statute." *Wash. Citizens Action of Wash. v. State*, 162 Wn.2d 142, 152, 171 P.3d 486 (2007). Initiative 2081 produces the exact harm article II, section 37 attempts to avoid: it requires a thorough search of existing laws in myriad chapters to understand its effect on those laws. The Initiative violates article II, section 37 in its formation and it cannot be implemented in a manner that is constitutional. The plaintiffs respectfully request that the Court declare Initiative 2081 to be unconstitutional in its entirety.

## II. STATEMENT OF FACTS

### A. The Legislature Passed Initiative 2081.

Initiative 2081 was one of six initiatives to the Legislature that Let's Go Washington, a political action committee led by Brian Heywood, campaigned to pass. Heywood Decl., Sub No. 49, ¶¶ 2, 4. The PAC invested "considerable resources" for signature gathering, publicity, and organizing. *Id.* Representative Jim Walsh—who was among the authors of the Initiative—sponsored the Initiative. Walsh Decl., Sub No. 50, ¶ 4.

As an initiative to the Legislature, lawmakers faced significant limitations on their ability amend Initiative 2081's language. After an initiative is submitted to the Legislature, the Legislature can take only one of three actions: (1) it may adopt the initiative as proposed, in which case it becomes effective law; (2) it may reject or refuse to act on the proposed initiative, in which case it is placed on the ballot at the next general election; or (3) it may propose a different measure on the same subject, in which case both the original initiative and the Legislature's proposed initiative



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appear on the ballot at the next general election. Const. art II, section 1. There was only one public hearing on Initiative 2081—jointly held by the House and Senate Education Committees. Leavitt Decl. ISO MSJ ¶ 3. The Committees passed the Initiative out of their respective committees two days later. *Id.*

Initiative 2081 is one of many laws in a nationwide trend of legislation attacking inclusive curriculum, LGBTQ+ youth, instruction on sexual health, and youth medical rights, all under the guise of parental rights.[2] The Initiative closely tracks the language of the Louisiana 2014's so-called "Parents' Bill of Rights for Public Schools." *See* Louisiana 17:406.9*; see also* Leavitt Decl. ISO MSJ ¶ 19, Ex. K. Many of the subsections of Initiative 2081 match the Louisiana law, with minor stylistic changes. The drafters of Initiative 2081 did make some substantive additions that address specific provisions of Washington law. First, the Initiative's drafters added two additional parental rights to receive notification regarding medical services, including when the school has arranged directly or indirectly for medical treatment. I-2081(2)(e). Second, the Initiative' drafters added language to specify that if a child is removed from school to go to a youth shelter, the parent must be notified immediately. I-2081(2)(h). And finally, its drafters expanded the notice and opt-out requirements to apply not only to surveys, but broadly to assignments and student engagements

[2] *See, e.g.*, Iowa SF 496 (enacted) (limiting teaching related to gender identity and sexual orientation, removing requirements to teach about HPV and HIV, prohibiting student participation in decisions about proposals to ban books from school libraries, limiting surveys on student emotional and mental health); North Carolina SB 49 (enacted) (modifying public school parent involvement policies, limiting teaching related to gender identity and sexuality, requiring parental consent to medical care); Florida HB 1557 (prohibiting classroom discussion of gender identity and sexual orientation, prohibiting policies that protect youth privacy regarding mental and emotional health, increasing parent access to records).



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I-2081(2)(j). *Compare* RCW 28A.605.005 *with* Louisiana 17:406.9; *see also* Leavitt Decl. ¶ 20, Ex. L.

There is a stark difference between how the architects of Initiative 2081 and the lawmakers who passed the Initiative view the policy issues the Initiative was designed to address and, more urgently, the actual legal effect of the law. Both Let's Go Washington's founder Mr. Heywood and Representative Walsh articulated that one of the goals of the Initiative is to address youth medical privacy. Representative Walsh explained: "The Parents Bill of Rights just focuses on keeping parents informed, it says that teachers or school administrators or health care providers or health care administrators can't hide essential information about kids about minors [sic] from their parents." Leavitt Decl. ISO MSJ ¶ 8. In an interview, Mr. Heywood explained why he thought people should support Initiative 2081: "There has even been an erosion of the parents' rights to know what has been going on with their child medically. There are reports that parents are being forced to pay medical bills for their teenager, yet no one is permitted to tell the parents what the bill is for. This is not right. This initiative is simple common sense that people of all political beliefs can support." Leavitt Decl. ISO MSJ ¶ 7.

Some proponents of Initiative 2081 also believed it would undo parts of ESSB 5599, passed in 2023 to remove barriers to safe shelter for youth seeking reproductive care or gender-affirming care. Former Chair of the Clark County Republican Party Ann Donnelly identified passing Initiative 2081 as one of "two paths to counter SB 5599," the other being repeal via referendum. Leavitt Decl. ISO MSJ ¶ 10. This follows statements by the Washington State Republican Party that "SB 5599 is a radical bill that will allow the state to step in, take control of your child and transition their gender without parental consent." Leavitt Decl. ISO MSJ ¶ 9. The Washington



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Policy Center, a political policy think tank, indicated that the Initiative's shelter notification requirement was designed as a direct response to ESSB 5599 and "would bar school officials from promoting or facilitating children in seeking harmful medical interventions without parental knowledge." Leavitt Decl. ISO MSJ ¶ 4.

Despite the proponents' rationale behind Initiative 2081, many lawmakers believed that the Initiative did not change existing laws, including medical privacy and shelter-related protections. After voting to pass the law, Senator Jamie Pedersen and Speaker Laurie Jinkins explained that the Initiative included "some ambiguous language about health care records and decision-making," but they believed—and were advised—that the Initiative did not change existing law. Leavitt Decl. ISO MSJ ¶ 11, Ex. D. Senator Pedersen and Speaker Jinkins explained that they relied upon analysis offered during public hearings that Initiative 2081 did not "amend adolescent access to health care treatment, student privacy protections for health care records, or youth access to home and shelter support." *Id*. "We believe the initiative does not pose a threat to our LGBTQ+ youth." *Id.*

**B. The Initiative's Interactions with Existing Laws is Opaque—Leading to Confusion.**

How Initiative 2081 interacts with existing State law is complex and opaque. Both the Legislature and Washington's Office of the Superintendent of Public Instruction (OSPI) created detailed charts in an attempt identify the multitude of State and federal laws that relate to the same topics as the Initiative. Leavitt Decl. ISO MSJ ¶ 4, Ex. B; Leavitt Decl. ISO MSJ ¶ 17, Ex. I. These charts span many areas of law and go far beyond Title 28A RCW, the Title governing common school law where Initiative 2081 is codified. For example, in an internal document assessing the effects of the Initiative, OSPI notes that the Initiative's medical notification requirements "may



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conflict with existing law prohibiting interference with a pregnant individual's right to choose to terminate a pregnancy prior to viability." Leavitt Decl. ISO MSJ ¶ 17, Ex. I. Likewise, the Legislature's chart includes laws governing age of consent and protections against disclosure of sensitive health information by insurance companies. Leavitt Decl. ISO MSJ ¶ 4, Ex. B. Even with these detailed charts, there is a lack of clarity and consensus about the legal effect of the Initiative.

On June 5, 2024, one day before Initiative 2081 became effective law, OSPI issued a statement that provisions of Initiative 2081 "conflict with current law—particularly around students' right to privacy in school." Leavitt Decl. ISO MSJ ¶ 13, Ex. E. Two days later, OSPI also issued a guidance bulletin noting that the Initiative does not reduce student privacy rights under federal law. However, OSPI's bulletin was silent as to the Initiative's effects on existing State privacy rights. The bulletin included a chart outlining some of the Initiative's sections and how each section relates to existing State law, but the chart does not include any of the Initiative's sections related to medical records and medical notification—sections that implicate state medical privacy laws. Leavitt Decl. ISO MSJ ¶ 14, Ex. F. OSPI's earlier statement that the Initiative appears to conflict with a students' right to privacy in school appears to be its latest statement on the issue. OSPI also raised questions in an internal document about how the Initiative affects counseling records and sexual health education. *Id.* ¶ 18, Ex. J. As is set forth in detail, below, the Initiative's plain language conflicts with previously existing laws covering youth privacy, and access to health care.

Initiative 2081 went into effect on June 6, 2024. Thereafter, this Court preliminarily enjoined portions of the Initiative that changed the time for districts to respond to records requests



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and that contradicted State youth health privacy protections. Sub No. 90. The Initiative's failure to inform Washingtonians of its myriad departures from existing Washington laws results in harm.

## III. STATEMENT OF ISSUES

Whether Initiative 2081 should be declared unconstitutional and permanently enjoined because it violates article II, section 37 of the Washington Constitution since it is not a complete act and, separately, because it renders erroneous a straightforward determination of the scope of rights and duties under existing statutes?

## IV. EVIDENCE RELIED ON

Plaintiffs rely on their briefing and prior declarations incorporated herein. In addition, Plaintiffs rely on the accompanying declarations in support of Plaintiffs' Motion for a Summary Judgment, including:

1. Leavitt Declaration ISO Plaintiffs' Motion for Summary Judgment ("Leavitt Decl. ISO MSJ");
2. Carson Declaration ISO Plaintiffs' Motion for Summary Judgment ("Carson Decl. ISO MSJ");
3. LCYC Declaration ISO Plaintiffs' Motion for Summary Judgment ("LCYC Decl. ISO MSJ");

## V. ARGUMENT

### A. Summary Judgment Standard.

A party may seek summary judgment to obtain declaratory action. CR 56(a). "Summary judgment is appropriate only when there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c)." *State v. City of Sunnyside*, 3 Wn.3d 279, 296, 550 P.3d 31 (2024) (citing CR 56(c)). The court must consider the facts submitted in the



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light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Id*. Summary judgment is granted "if, from all the evidence, reasonable persons could reach but one conclusion." *Id*.

**B. Initiative 2081 Violates Article II, Section 37 of the Washington Constitution.**

Article II, section 37 of the Washington State Constitution provides that "[n]o act shall ever be revised or amended by mere references to its title, but the act revised or the section amended shall be set forth at full length." Const. art. II, § 37. Article II, section 37 was drafted to protect the legislature and the public against fraud and deception. *Black*, 195 Wn.2d at 205. It ensures that "those enacting an amendatory law are fully aware of the proposed law's impact on existing law." *Id.*

To determine whether article II, section 37 is violated, courts must analyze two questions. If the law fails either of the questions, it is unconstitutional. *Id*. at 210. First, whether the enactment is "such a complete act that the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment." *El Centro*, 192 Wn.2d at 129. Second, whether "a straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment." *Id.*

**i. Initiative 2081 Violates Article II, Section 37 Because It Is Not a Complete Act.**

"The new statute must either be complete in itself or it must show explicitly how it relates to statutes that it amends." *WEAI*, 93 Wn.2d at 39. To determine whether a new enactment is a complete act, courts must consider whether "the new enactment [is] such a complete act that the scope of the rights or duties created or affected by the legislative action can be determined without



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referring to any other statute or enactment." *El Centro*, 192 Wn.2d at 129 (citing *State v. Manussier*, 129 Wn.2d at 652) (internal quotation marks omitted). The purpose of the requirement that it be a complete act is "to make sure the effect of new legislation is clear and to avoid[ ] confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume." *El Centro*, 192 Wn.2d at 129.

Initiative 2081 is not a complete act. While the Initiative purports to be limited to a singular topic—the rights of parents of youth attending public schools— "the scope of the rights or duties created or affected by the legislative action" goes much further than affecting the rights of parents and impacts the legal duties, obligations, and rights of thousands of youth attending public schools, and myriad actors that interface with public school students, including the schools, school employees, and health care providers. To understand the rights and obligations the law effects, one must refer to the bodies of laws that apply to youth, school districts, educators and other school employees, health professionals, records production, and other parental rights, because these other laws constrain and conflict with the provisions of the Initiative. The Initiative is not a complete act because the rights it affects cannot be understood without reference to other laws, many of which fall outside of Title RCW 28A. *See, e.g.*, *Elford v. City of Battle Ground*, 87 Wn. App. 229, 238, 941 P.2d 678 (1997).

The rights the Initiative affects include rights contained in pre-existing laws that grant youth the right to confidentiality over their health information when accessing critical health care that does not require parental consent, including mental health, sexual and reproductive, and substance abuse health care. *See* RCW 70.24.110 (sexually transmitted disease diagnosis and



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treatment); RCW 71.34.530 (outpatient mental and behavioral health treatment); compare with RCW 71.34.305 (schools must notify parents for inpatient behavioral health treatment referrals). The right to consent to care is paired with and effectuated through confidentiality. RCW 70.02.130; RCW 70.02.020; RCW 48.43.505 (health insurers must protect private health information if the minor has the right to consent to the care, including preventing disclosure to the health insurance policyholder); RCW 9.02.100 (fundamental right to reproductive health care).

Initiative 2081 clearly affects those rights in several ways. One way is by granting parents the right to inspect their child's school records, broadly defined to include health records, mental health records, and any other student-specific documents. I-2081(2)(b)(iv). Under pre-existing law, if a school nurse creates notes about a student's mental health, the notes would not be part of the "public school record" and would not be disclosed without the youth's permission. The Initiative's language expands "public school record" to include private information: OSPI, the State agency responsible for implementation of the Initiative, agrees that I-2081 "conflict[s] with current law—particularly around students' right to privacy in school[.]" Leavitt Decl. ISO MSJ ¶ 14, Ex. G. Those pre-existing student rights are affected by Initiative 2081, yet its effect cannot be understood in a vacuum by reviewing only Initiative 2081 because it fails to even flag the existence of those rights. The Initiative is not a complete act because the "scope of rights and duties affected" by the Initiative cannot be determined solely by reading the Initiative. There is no evidence the Legislature intended to revoke existing confidentiality laws, because the Initiative did not disclose the existence of those laws. Because the Initiative fails to disclose the rights and duties it affected, it is an incomplete act.



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The utter confusion about the Initiative's impacts is illustrative of its failure to satisfy the complete act requirement. After voting to pass the law, Senator Pedersen and Speaker Jenkins explained that they believed the Initiative does not change existing law, and thus voted to pass it. Leavitt Decl. ISO MSJ ¶ 11, Ex. D. Meanwhile, OSPI issued a statement warning about the impact of the Initiative's vague language across vast areas of the law. *See also*, Leavitt Decl. ISO MSJ ¶ 12, Ex. D. The gulf between the legislators' understanding of the Initiative compared to its actual impacts as described by OSPI is precisely because of the Initiative's failure to comply with the complete act requirement. The Initiative is not complete itself because to understand it, one must conduct a thorough search of "separate and disconnected legislative provisions…scattered through different volumes or different portions of the same volume," precisely what the complete act requirement is designed to avoid.

The State suggests that the "complete act" inquiry is less critical and perfunctory because a law has been invalidated only once because it was not a complete act. State MSJ, Sub. No. 105, p. 9-10. Just because newly enacted laws typically satisfy the "complete act" requirement does not mean that Initiative 2081 is a complete act. Caselaw has never examined a newly enacted "Bill of Rights," which presents unique issues particularly when the newly enacted law purports to only re-state existing right but instead changes law across vast subject matters as Initiative 2081 does here.

*Amalgamated Transit Union Local 587* illustrates how Initiative 2081 fails the complete act requirement. 142 Wn.2d 183, 192, 11 P.3d 762 (2000). The plaintiffs brought an article II, section 37 challenge against an initiative repealing the motor vehicle excise tax, limiting license tab fees to $30, and requiring voter approval of any tax increase. *Id.* at 183. The Court found that



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the challenged initiative was not a complete act because, while the existing law required a public vote if specific action was taken by a port district, the initiative contained a more general voter approval provision that applied for the same assessments but did "not release or mention the existing statute." *Id.* at 253. The new law did not "stand[] alone" on the subject of voter approval requirements. *Id*. at 254. "This causes the very obscurity and tendency to confuse which the constitutional provision seeks to prevent, hence violates the constitution." *Id.* at 246.

Like the failed initiative at issue in *Amalgamated Transit Union Local 587*, Initiative 2081 is not a complete act because it grants rights to parents that affect a whole host of other rights and duties that are covered by other statutes without expressly referencing those laws that it amends. Initiative 2081 requires examination of multiple statutes across legislative volumes to understand the impact of the Initiative causing "the very obscurity and tendency to confuse" that the complete act requirement seeks to prevent and, like *Amalgamated Transit Union Local 587*, violates the constitution.

**ii. Initiative 2081 Violates Article II, Section 37 Because It Renders Erroneous a Straightforward Determination of the Scope of Rights Under Existing Statutes**.

The Initiative separately violates article II, section 37, because it fails the second prong: It renders erroneous "a straightforward determination of the scope of rights or duties under the existing statutes." *See, e.g.*, *El Centro*, 192 Wn.3d at 129. "This prong of the test ensures that the legislature is aware of the legislation's impact on existing laws." *Id*. The legislators and the public are not aware of the Initiative's "impact on existing law" because it changes many areas of existing



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law, scattered through many code Titles and Chapters, and it makes no reference to those laws failing to identify changes and revisions.

The crux of the article II, section 37 inquiry is whether lawmakers and the public can understand how a new statute affects the law on the subject. As the Supreme Court explained:

> The new statute must either be complete in itself or it must show explicitly how it relates to statutes that it amends. Likewise, a citizen or legislator who is interested in an existing statute should be alerted when that statute is amended.

*WEAI*, 93 Wn.2d at 39.

Initiative 2081 fails the second prong of the article II, section 37 test by amending existing law without explicitly identifying the changes in at least four distinct ways[3], as described in detail in the following sections:

> (1) It modifies laws governing when and how schools must produce student records;
>
> (2) It modifies existing laws regarding youth health care privacy and access to health care and services;
>
> (3) It modifies existing law mandating DCYF notification in specific circumstances when young people access shelter;

[3] Plaintiffs focus on the most egregious conflicts between Initiative 2081 and existing law, but the above sections are not an exhaustive list of all ways in which the Initiative renders erroneous a determination of rights and duties under existing law. For example, the Initiative requires schools to assure parents that the school will not discriminate on the basis of religion, which could be interpreted as prioritizing religious non-discrimination over discrimination based on other protected statuses, thus modifying existing anti-discrimination mandates. *Compare* I-2081(2)(i) *with* RCW 28A.642.010 (prohibiting discrimination in public schools on multiple, equal bases, including religion, race, gender expression or identity, and more). It also renders erroneous a straightforward reading of existing dress code statutory requirements. *Compare* I-2081(2)(n) (establishing a blanket dress code notification requirement) *with* RCW 28A.320.140(5) (requiring schools to notify parents about dress codes related to gang-related apparel).



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> (4) It modifies existing laws that balance parents' access to the classroom with schools' duties to provide education and students' rights to autonomy and education.

Taken as a whole, Initiative 2081 presents the exact harm that the second prong of article II, section 37 is designed to protect against: Legislators and the public are not aware of the Initiative's impact on existing laws because the Initiative fails to identify how it impacts numerous laws across vastly different subjects and titles. "We return to the purpose of article II, section 37, which is to ensure that citizens or legislatures must not be required to search out amended statutes to know the law on the subject treated in a new statute." *El Centro*, 192 Wn.2d at 131 (quoting *Wash. Citizens Action of Wash.*, 162 Wn.2d at 152) (cleaned up). Like the statute in *El Centro*, Initiative 2081 "produces the exact harm article II, section 37 attempts to avoid: it requires a thorough search of existing laws in order to understand the Act's effect on other [laws]." *Id.* at 131-132.

**(1) Initiative 2081 Modifies Laws Governing When and How Schools Must Produce a Student's Education Records.**

Initiative 2081 renders erroneous State law establishing the categories of records parents can review and the procedural requirements for schools to respond to records requests. Under existing law, parents have the right to "review all education records of the student" and school districts are required to adopt procedures for access to education records that complies with the Family Educational and Privacy Rights Act of 1974 ("FERPA"). RCW 28A.605.030. Initiative 2081's new procedural requirements conflict with existing law. The Initiative requires schools to provide parents with a copy of their child's records within 10 business days of submitting a written request. I-2081(2)(b)(i) (requiring record production within 10 days). In contrast, existing law



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allows schools up to 45 days to produce records. RCW 28A.605.030 (incorporating FERPA's production deadline by reference, 34 C.F.R. § 99.10(b)). The Initiative also conflicts with existing law governing when and how schools can recoup fees for production of records. *Compare* I-2081(2)(b)(i) (prohibiting schools charging for production of electronic records) *with* RCW 28A.605.030 (incorporating by reference FERPA's requirement that schools may charge for records production, including electronic records, unless the imposition of a fee effectively prevents a parent from inspecting student education records, codified in 34 C.F.R. § 99.11(a)).

By setting up a parallel right to view "public school records" when there is already a similar but not identical right to view "education records" under RCW 28A.605.030, the Initiative alters existing law and creates ambiguity about parental rights and school duties. While many "education records" are also "public school records,", the definition of "public school records" under the Initiative is more expansive than only "education records."[4] For example, while the Initiative includes "records of any vocational counseling" in the definition of "public school records," which could include notes by a counselor, "education records" does not include any counselor or educator notes if they are kept in the sole possession of the maker. *Compare* RCW 28A.605.005(2)(b)(iv) *with* 20 U.S.C. § 1232g(a)(4)(B).

[4] The Initiative defines "public school records" by providing an enumerated list of categories of records followed by a catch-all provision stating, "any other student-specific files, documents, or other materials that are maintained by the public school." I-2081(2)(b)(iv). RCW 28A.605.030 does not define "education records," but requires procedures to comply with FERPA. FERPA defines "education records" as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). FERPA excludes certain types of documents from this definition, including any documents which are in the "sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. § 1232g(a)(4)(B).



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**(2) Initiative 2081 Modifies Existing Laws Regarding Youth Health Care Privacy and Access to Health Care and Services.**

By creating sweeping exceptions to State medical privacy rights, Initiative 2081 renders erroneous existing State laws granting privacy protections for youth accessing health care. Washington State has long recognized and supported the rights of youth to access specific, sensitive health care confidentially, without parental notification or authorization. The Washington Health Care Information Act protects youth rights to privacy of their health care information for any care to which the youth has the right to consent. *See* RCW 70.02.020 (health care provider may not disclose health care information, whether written or oral, without a patient's written authorization); RCW 70.02.130 (when a youth can consent to health care, they hold the privacy rights for that care). The types of health care that young people in Washington can independently consent to, and for which they have a right to privacy, are some of the most essential and sensitive forms of care. *See* RCW 9.02.100 (right to access reproductive health care, including birth control and abortion); RCW 70.24.110 (right to consent to testing and treatment for sexually transmitted diseases); RCW 70.125.120 (right to consent to sexual assault forensic examination); RCW 71.34.530 (right to consent to outpatient mental and behavioral health treatment).

There are also pre-existing laws that set out specific privacy protections for certain types of care to which youth can consent. For example, RCW 70.02.220 provides "no person may disclose or be compelled to disclose...information...related to sexually transmitted diseases." See also RCW 70.02.265 (precluding release of any information or records relating to mental health services unless an adolescent has consented); RCW 70.02.240 (fact of admission and all information and records related to mental health services must be kept confidential and limited



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exceptions, such as to law enforcement); RCW 48.43.5051 (ensuring confidentiality by health carriers and insurers of all communication regarding an individual's receipt of sensitive health care services). These protections are grounded in carefully thought-out, evidence-based policy decisions. The Legislature created confidentiality protections for health care related to reproductive rights, domestic violence, mental health, and gender affirming care, in the context of insurance (RCW 48.43.505), recognizing that "[a]ll people deserve the right to choose the health services that are right for them, and the right to confidential access to those health services" and that "[w]hen denied confidential access to needed care, people may delay or forgo care, leading to higher rates of unprotected sex, unintended pregnancy, untreated sexually transmitted infections, and mental health issues." RCW 48.43.5051 Findings—Declarations—2019 c 56 (1),(2). *See, e.g.*, POCAAN Decl. ISO PI, Sub No. 19, ¶¶ 22-24, Oasis Decl. ISO PI, Sub No. 23, ¶¶ 52-54.].

When the Legislature identified an urgent need for an effective public health response to sexually transmitted infections, it noted that sexually transmitted infections "involve sensitive issues of privacy, and it is the intent of the legislature that all programs designed to deal with these diseases afford patients privacy, confidentiality, and dignity." RCW 70.24.015. "[W]hen adolescents do not have privacy or even perceive that they do not have privacy, they are less likely to seek out protective health care (such as contraceptive services) or to disclose and seek help for risky behaviors[,]" including sensitive topics like drug use, sexual behaviors, and suicidal ideation. Carson Decl. ISO MSJ ¶ 14(a).

The Initiative directly conflicts with these privacy protections by requiring schools to provide parents access to medical, health and mental health counseling records. Initiative 2081(2)(b)(iv). The Initiative further conflicts with privacy protections placed to ensure access by



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creating multiple new affirmative duties for schools to notify parents about healthcare that is offered to or received by a student. *See* I-2081(2)(c) (right to prior notification when medical services are being offered to their child, except for needed emergency medical treatment); I-2081(2)(d) (right to notification when a medical service or medications have been provided that could result in financial impact to the parent's health insurance); I-2081(2)(e) (right to notification when a school arranges "directly or indirectly" for medical treatment that results in follow-up care beyond normal school hours).

These are not trivial modifications of existing law—these expansions harm student confidentiality and access to protected health care. For example, if a school nurse creates notes about a student's mental health, the notes could now be requested by the parent as part of the "school record," whereas previously the nurse could not disclose them without the youth's permission under RCW 70.02. If a young person asks a school nurse about where to get birth control, the Initiative's provisions require the nurse to affirmatively notify the parent before indirectly arranging for the student to get birth control, such as by providing a referral to a nearby health center. But the Initiative's provisions render existing Washington law erroneous: RCW 70.02 requires confidentiality of information for youth who are legally entitled to consent to care. The nurse cannot comply with both Initiative 2081 and existing laws.

The notice requirements interfere with youth's existing rights to consent to their own reproductive health care, sexual health care, and mental and behavioral health care by deterring youth from seeking care and opening them up to negative repercussions if they do seek care. See Carson Decl. ISO MSJ, ¶ 14(a),(b); *see also* Lombard Decl. ISO PI ¶¶ 14-24 (students confidentially sought support regarding gender identity, serious mental health needs, and



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reproductive and sexual health services, and some students were not able to talk with their parents about these needs). Being able to have confidential conversations with supportive teachers is a matter of life or death for some students. Lombard Decl. ISO PI, Sub No. 40 ¶¶ 24-28; SVLC Decl. ISO PI, Sub No. 38, ¶¶ 25-29. Under existing law, youth have the statutory right to consent to certain types of care – but with the Initiative 2081's prior notification requirement, providers must wait to provide care until notice is given, thus interfering with youth's statutory right to consent to care. Requiring schools to notify parents about any health care offered to students, directly or indirectly, will have a chilling effect on educators and cut off referrals and care that vulnerable students need. Lombard Decl. ISO PI, Sub No. 40, ¶¶ 27-28; LCYC Decl. ISO PI 48-49; Oasis Decl. ISO PI, Sub No. 36, ¶¶ 39-40, 45-46; *see also*, SVLC Decl. ISO PI, Sub No. 38, ¶ 59-63 (chilling students' access to trusted adults to share sensitive information about sexual assaults). Eroding confidentiality is especially harmful to LGBTQ+ students and youth of color "who fear being 'outed' or labeled as LGBTQ+ if their parents learn about their interest in sexual health services." POCAAN Decl. ISO PI, Sub No. 37, ¶ 33, *see also* LRP Decl. ISO PI, Sub No. 34, ¶¶ 36-37; Carson Decl. ISO MSJ ¶ 14(b) ("The consequences are life and death....45% of LGBTQ youth seriously considered attempting suicide in the past year, with an even higher percentage for transgender and nonbinary youth."). The prior notification requirement also interferes with youth's ability to receive timely care. *See, e.g.*, Love Decl. ISO PI, Sub. No. 81, ¶ 28; SWSD Decl. ISO PI, Sub. No. 42, ¶ 22; TSD Decl. ISO PI, Sub No. 44, ¶ 11 (discussing how prior notification requirements will prevent schools from providing timely care). Even sharing information that youth are seeking healthcare is a harmful violation of a youth's trust." Carson Decl. ISO MSJ ¶ 14(b). Fear of harm through repercussions from disclosure of health information is an issue of



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particular concern for vulnerable youth because of "historical trauma, including systemic racism and inequities in access to care[.]" Carson Decl. ISO MSJ ¶ 14(b).

These are not unintended conflicts between parents' rights in education and health care privacy and access laws. Initiative 2081 intentionally undermines these laws, but it does so surreptitiously by framing its attacks on youth health care through the lens of parents' role in education. In a 2023 interview, Mr. Heywood explained that he was pushing for the Parents' Bill of Rights in part because he had heard about parents not knowing what medical care their children were receiving and their insurance company could not tell the parents what care their child had received. Leavitt Decl. ISO MSJ ¶ 7; *compare* I-2081(d) (requiring the school to provide a parent with notification about any financial impact on health insurance payments or copays) *with* RCW 48.43.505 (prohibiting health carriers and insurers from disclosing personal health information concerning "sensitive health care services"—which includes reproductive and sexual health, substance use disorder, gender-affirming care, domestic violence, and mental health—to anyone, including to the policy holder, or the primary subscriber, absent written or recorded consent of the individual who received care). Statements by Representative Walsh also indicate that the law was intended to apply expansively: "The Parents Bill of Rights just focuses on keeping parents informed, it says that teachers or School administrators or health care providers or Health Care administrators can't hide essential information about kids about minors from their parents." Leavitt Decl. ISO MSJ ¶ 8. In their own explanation of the bill, the drafters and proponents of the Initiative made clear their intention to change youth health privacy. This is precisely the type of obfuscation that section II, article 37 is intended to avoid: if a lawmaker or initiative proponent wants to change existing law, they must say so directly.



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**(3) Initiative 2081 Modifies Existing Law Mandating DCYF Notification in Certain Circumstances When Youth Access Shelter; It Requires Schools to Interface, Instead.**

Initiative 2081 renders erroneous existing law that protects youth safety and establishes Department of Children, Youth, and Families (DCYF) as responsible for contacting families and assisting with family reconciliation when a young person accesses a youth shelter in certain challenging circumstances. *See* RCW 13.32A.082. Under existing law, if a youth goes to a shelter without parental permission, the shelter must contact the youth's parent within 72 hours *unless* "compelling reasons" exist not to notify a parent. RCW 13.32A.082(1)(b)(i). "Compelling reasons" explicitly includes circumstances where parental notification will subject the youth to abuse or neglect or when the youth is seeking or receiving gender-affirming medical care or reproductive health services. RCW 13.32A.082(2)(c),(d). When "compelling reasons" exist, then the shelter must notify DCYF instead of the parent. RCW 13.32A.082(1)(b)(i). DCYF then must make a good faith attempt to notify the parent, offer services to help reconcile and reunify the family, and offer to make referrals for the youth for behavioral health services. RCW 13.32A.082(3). This law carefully balances the need to reduce youth homelessness with the reality that some youth are not safe in their own homes and that transgender youth are especially at risk of homelessness. *See* RCW 13.32A.082 – Legislative Findings-Intent.[5] The purpose of the DCYF

[5] "The legislature finds that unsheltered homelessness for youth poses a serious threat to their health and safety. The Trevor project has found that one in three transgender youth report attempting suicide. Homelessness amongst transgender youth can further endanger an already at-risk population. The legislature further finds that barriers to accessing shelter can place a chilling effect on exiting unsheltered homelessness and therefore create additional risk and dangers for youth. Youth seeking certain medical services are especially at risk and vulnerable. Therefore, the legislature intends to remove barriers to accessing temporary, licensed shelter accommodations for youth seeking certain protected health care services."



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notification requirement is to provide family support and resources for youth fleeing abuse, neglect, or familiar rejection due to seeking protected health care, with the explicit goals of youth safety and family reunification, which can reduce conflicts and reduce the risk of violence and homelessness. LCYC Decl. ISO MSJ ¶¶ 17-19.

Initiative 2081 prevents DCYF and shelters from carrying out legislated procedures and safeguards by mandating parental notification by a school when a student accesses a shelter from school. I-2081(2)(h). In limited circumstances, a student will leave school to go to a youth shelter instead of returning home. LCYC Decl. ISO MSJ ¶¶ 20-22. Although these incidents are rare, the circumstances prompting school-based counselors, advocates, and attorneys to assist a young person in accessing shelter directly from school are exceptionally critical. *Id.* In these circumstances, if a school immediately notifies a parent that the student has gone to a shelter—as is required by Initiative 2081—DCYF no longer serves as the intermediary, and is unable to deliver services, and reunification.

Such notification also eviscerates youth's rights under RCW 13.32A.082 to access shelter. In compelling circumstances, existing law grants youth the right to access youth shelter without immediate parental notification; Initiative 2081 contradicts that right by mandating schools immediately alert parents. The Initiative fails to disclose its impact on the rights of a young person under RCW 13.32A.082.

Like the medical records and notification requirements, Initiative 2081's shelter notification provision is an attack on youth statutory rights through the guise of benign school-related parental rights. When RCW 13.32A.082 was amended by ESSB 5599, the Washington Republican party raised concerns that the law allowed youth to access gender affirming care



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without parental permission. Leavitt Decl. ISO MSJ ¶ 10. Proponents of the Initiative highlighted it as a path to undo ESSB 5599. Leavitt Decl. ISO MSJ ¶ 10. While the Initiative is substantially similar to the law passed in Louisiana, the Initiative's drafters included a clause t to specifically target ESSB 5599's protections, requiring immediate notification from the school, bypassing the procedure set forth in ESSB 5599, when youth access shelters directly from school. *Compare* I-2081(2)(h) *with* RS 17:406.9.

**(4) Initiative 2081 Modifies Existing Laws that Balance Parental Access to the Classroom with Schools' Duties to Provide Education and Students' Rights to Autonomy and Education.**

Initiative 2081 renders erroneous existing laws that carefully balance parental access to classroom materials and limited curriculum opt-out rights, with schools' obligations to educate students for a diverse world. RCW 28A.150.210. *See also*, TSD Decl. ISO PI, Sub No. 42, ¶¶ 10-16; 23-27; MomsRising Decl. ISO PI, Sub No. 35, ¶¶ 34-35. The Initiative drastically expands parents' rights to opt their children out of an expansive range of instruction reaching across countless areas of education. The Initiative requires both written notice and the option to opt children out of "surveys, assignments, questionnaires, role-playing activities…or other student engagements that include questions about" the child's sexual experiences or attractions, the child's family beliefs, morality, religion, or political affiliations, or mental health or psychological problems of the child or a family member." I-2081(2)(j). The Initiative interferes with educators' ability to provide instruction on a wide range of topics that may trigger classroom discussion related to morals, political beliefs, or mental health, such as social studies, literature, and history. Schools and educators are burdened by the need to anticipate when covered topics may arise in



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class discussion, provide advance notice, manage supervision of students who are opted-out, and mitigate the stigma that attaches to topics from which students opt out. SWSD Decl. ISO PI, Sub No. 42, ¶¶ 23-24; TSD Decl. ISO PI, Sub No. 42, ¶ 12.

The Initiative's expansive curricular opt-outs conflict with several existing laws that address constitutional obligations to provide education in Washington schools. *See* I-2081(2)(j). Educators will not be able to meet the requirements of existing laws without touching upon beliefs, morality, or political affiliation: RCW 28A.150.210 (basic education includes civics and history and is intended to "provide students with the opportunity...to explore and understand different perspectives"); RCW 28A.230.094 (requiring schools to teach mandatory civics education, which must include "rights and responsibilities of citizens, current issues, electoral issues [and]...the importance in a free society of living the basic values and character traits" of "honesty, integrity, trust, respect, responsibility, respect for law and authority, healthy and positive behavior, and family as basis of society"); *see also* 28A.150.211 (setting out essential values and character traits). The opt-outs also negate students' rights to inclusive curricula under RCW 28A.345.130, which requires that school districts adopt inclusive curricula and use instructional materials that include the histories and perspectives of historically marginalized and underrepresented groups. In passing the inclusive curriculum law, the Legislature recognized that inclusive curricula often improve the mental health and academic performance of historically marginalized communities and increase students' sense of belonging and participation. RCW 28A.345.130 – Intent.[6]

[6] Studies show that omission of instruction about race and racism is harmful to K-12 students' academic success, their engagement with school, their acceptance of people from other backgrounds, and ultimately, their future ability to function as productive citizens in a multi-racial, inclusive democracy. Carson Decl. ISO MSJ ¶ 15(a). Restricting



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Additionally, Initiative 2081 expands schools' existing obligations to provide notice and opt-out when teaching certain topics related to sexual activity, without setting forth this amendment in the relevant codes. The Initiative requires notice and opt out opportunities for any instruction "on topics associated with sexual activity," a concept that goes far beyond the curricular areas covered by existing law on "comprehensive sexual health education." *See* I-2081(2)(k); RCW 28A.300.475 (setting out detailed standards and guidelines for comprehensive sexual health education). For example, a literature class discussion of a book with a romantic plotline or a history lesson on women's rights and access to contraception could be deemed "topics associated with sexual activity." OSPI staff raised this conflict: "If instruction is being provided around gender identity for the purpose of bullying prevention or clarifying that there's a classmate or staff member who is openly transition, for example, and they want to do education to create understanding and empathy, does that count as sex ed?" Leavitt Decl. ISO MSJ ¶ 18, Ex. J, p. 4. By expanding the scope of what content triggers the comprehensive sexual health education notice and opt-out procedures, but not amending the comprehensive sexual health education statute itself, the Initiative renders erroneous a reading of school districts' obligations under the existing law. The Initiative's "associated with sexual activity" opt-out also directly conflicts with existing law governing opt-out procedures for HIV/AIDS prevention instruction and existing law mandating instruction in sex trafficking prevention. *Compare* I-2081(2)(k) (opt-out permitted with no conditions) *with* RCW 28A.230.070 (opt-out from AIDS education is permitted if the parent

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discussion of race and sexuality also harms "vulnerable students who are further marginalized" sending a message that their identities are "inherently wrong, stigmatizing and marginalizing children" and leading to depression, anxiety, self-harm, and even suicide." *Id.* at ¶ 15(c); *see also* SWEC Decl. ISO PI, Sub No. 39, ¶¶ 41-42; LRP Decl. ISO PI, Sub No. 34, ¶¶ 33, 45; MomsRising Decl. ISO PI, Sub No. 35, ¶¶ 19, 36.



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attends a district presentation on the AIDS curriculum and the opt-out is in writing) and with RCW 28A.320.168 (mandating instruction in sex trafficking awareness and prevention).

The Initiative changes existing laws that carefully balance parental engagement with schools' obligations to educate. The Initiative renders erroneous the existing limitation on parental access to classrooms for observational purposes. Compare I-2081(2)(a) (right to "examine the textbooks, curriculum, and supplemental material used in their child's classroom" without limitation) *with* RCW 28A.605.020 (right to access classroom to observe procedure and teaching material, but not if parental observation disrupts the classroom or learning activity). If a parent accesses a classroom to view teaching material under existing law, they must do so without disrupting the learning process, but Initiative 2081's extensive opt-outs implicating a vast array of curriculum disrupt and delay classroom discussions and the learning process. And students whose parents opt them out, who "due to limited exposure" may be "less capable of responding to others" excluding development "of a greater range of social understanding." Carson Decl. ISO MSJ ¶ 15(a). The Initiative's opt out requirements divert already strained educators from teaching material to students to instead undertaking the burdensome task of identifying every assignment or engagement in which these topics could come up, providing notice to parents each time, tracking opt-outs, and arranging for students who have opted out to receive alternate instruction. SWSD Decl. ISO PI, Sub No. 42, ¶ 23.



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### iii. Caselaw Establishes that Initiative 2081 Violates Article II, Section 37.

The Initiative's opaque changes to the rights and duties set out in existing laws are similar to, and at times more significant, than those courts have found unconstitutional in other cases.[7] In *WEAI*, the Washington Supreme Court found that a new law limiting salary increases by school districts violated article II, section 37 because existing law gave districts authority to set salaries. *WEAI*, 93 Wn.2d at 38-39. The existing law and new law were not directly in conflict: A district could set salaries pursuant to the existing law, but the new law required it to do so subject to certain salary caps. *Id.* at 41. The Court concluded that by capping salary raises in the new law, a straightforward reading of the existing law was rendered erroneous. As set forth in the section preceding, Initiative 2081 presents numerous direct conflicts, so someone reviewing the new law would have an incorrect understanding of the existing laws. Similarly, in *El Centro*, the Washington Supreme Court found that the Charter School Act violated Article II, Section 37 by amending part of the existing law governing bargaining rights of public employees to limit bargaining by charter school employees, but it failed to set out all the ways its new limitation on charter school employee's rights modified preexisting rights applicable to public employees generally. *El Centro*, 192 Wn.2d at 132.The amendatory nature of Initiative 2081 is significantly more pronounced in this case than in *WEAI* and *El Centro*. Existing law sets out health privacy rights of young people; Initiative 2081 conflicts with these pre-existing rights and duties—making a category of previously confidential information no longer confidential if the providers are in or

[7] As set forth in detail in Section i., the Initiative is not a complete act, and it is importantly distinguished from laws analyzed in caselaw under the first prong. Caselaw analyzing the two prongs most frequently focus on the second prong.



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connected with public schools. Existing law sets out a process for parental notification when a vulnerable young person goes to a youth shelter; Initiative 2081 sets out a new parental notification scheme. Existing law sets out procedures for schools to respond to parent information and records requests; Initiative 2081 sets out different procedural requirements. Existing law requires schools to provide education, while balancing parental access to the classroom, with student autonomy in education; Initiative 2081 requires schools to comply with burdensome notice and opt-outs, permitting parental interference with myriad classroom engagements. None of its changes to existing laws are referenced in Initiative 2081.

Article II, section 37 is meant to ensure that enactments "apprise those who are affected by an existing law of any important changes." *WEAI,* at 41. Where courts have found amendatory laws do not violate article II, section 37, they have done so because they concluded the risk for deception or confusion was not great. *See, e.g.*, *Wash. State Ass'n of Counties v. State*, 199 Wn.2d 1, 17, 502 P.3d 825 (2022) (new enactment regarding reimbursement of county elections costs does not violate article II, section 37 because it expressly references the unfunded mandate section that it conflicts with); *Black*, 195 Wn.2d 198 (newly enacted motor vehicle excise tax lists which statutes apply and includes "notwithstanding" language).

While Courts recognize that nearly all acts affect existing rights and duties to some degree, that recognition does not render the prong two inquiry superfluous, rather the prong two inquiry "is more a matter of degree than an absolute." *Wash. State Legislature v. Inslee*, 198 Wn.2d 561, 594, 498 P.3d 496 (2021). The degree to which Initiative 2081 renders existing law erroneous, without signaling that these other areas of law are affected, goes far beyond the cases in which courts have found no violation of article II, section 37. *See e.g.*, *Wash. Educ. Ass'n v. State*, 97



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Wn.2d 899, 906, 652 P.2d 1347 (1982) ("WEAII"). Initiative 2081 affects rights and duties located in many chapters of the Revised Code of Washington. The Initiative appears in Chapter 28A, Common School Provisions, which is separate from many of the rights and duties it affects. *See, e.g.*, RCW 70.02 ("Medical Records – Health Care Information Access and Disclosure"); RCW 9.02 ("Abortion"); RCW 48.43.505 (Right to privacy under Chapter "Insurance Reform."); RCW 13.32A.082 (procedure for involving DCYF and delaying parental notice if youth go to youth shelter when seeking gender-affirming care or reproductive care); RCW 28A.230.094 (civics requirement); RCW 28A.320.168 (sex trafficking prevention curriculum requirement). Nor does the Initiative's sections undermining health privacy law include a "notwithstanding" signal to help the reader see that existing rights are being changed, or preserved, for that matter. *Cf. Black*, 195 Wn.2d 198. Even where the Initiative references existing statutes by signaling a right is in "accordance with" existing law, it creates confusion for the reader, since the Initiative changes the applicability of existing law rather than restating or acting in conformity with existing law. It is not readily "apparent" to a reader of the new Parental Rights code section that rights and duties in other chapters—and other titles—of the Code are affected.

By modifying existing law without explicitly identifying it is doing so, Initiative 2081 "renders erroneous" "a straightforward determination of the scope of rights or duties under the existing statutes." *See e.g.*, *El Centro* at 129. This produces the "exact harm article II, section 37 attempts to avoid: it requires a thorough search of existing laws to understand the Act's effect," on myriad existing laws.



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## C. Initiative 2081 Should Be Permanently Enjoined Because of Its Constitutional Infirmity.

### i. An Injunction is Appropriate Because Initiative 2081 Violates the Constitution and Causes Harm.

Injunctions are appropriate where: (1) legal remedies would be inadequate; (2) there is a clear legal or equitable right; (3) there is a well-grounded fear of immediate invasion of that right; (4) the acts complained of have resulted or will result in actual and substantial injury; and (5) the relative equities of the parties and the public interest favor granting the injunction. *Kucera v. State, Dep't of Transp.,* 140 Wn.2d 200, 209-10, 995 P.2d 63 (2000).

Remedies are inadequate where: "(1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature." *Kucera,* 140 Wn.2d at 210. OSPI and school districts are expending taxpayer funds as they work to understand and implement this unconstitutional law. The harms that Plaintiffs suffer if the Initiative is not enjoined cannot be remedied or compensated by money damages. Plaintiffs have a clear legal right because Initiative 2081 fails both parts of the article II, section 37 analysis and thus violates the Constitution, as set forth above. Plaintiffs have a well-grounded fear of immediate invasion of the right to be governed by laws that fully inform legislators and the public of revisions to existing laws, as guaranteed by article II, section 37. Public school students, including Plaintiffs' clients and constituents, and taxpayers will suffer substantial injury until Initiative 2081 is enjoined. An injunction is the only way to ensure that the State will no longer enforce Initiative 2081 after it is declared unconstitutional.



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### ii. The "No-Set-Of-Circumstances" Test Does Not Apply.

The State argues the no-set-of-circumstances analysis precludes this Court's constitutional analysis. The analysis has no application here. The no-set-of-circumstances analysis made its way into Washington by way of a footnote referencing a dissent by Justice Scalia in a federal abortion case. *In re Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999) (citing Scalia dissent in *Ada v. Guam Soc'y of Obstetricians Gynecologists*, 506 U.S. 1011 (1992)).[8] It has been the subject of heated debate on a national level, and courts have repeatedly rejected the narrow application the State is arguing for.[9] The State's suggested approach conflicts with the controlling decision in *Robinson v. City of Seattle*, 102 Wn. App. 795, 805-06, 10 P.3d 452 (2000) (holding the test does not apply to taxpayer claims). The analysis has rarely been applied in Washington, and the courts have decided issues on other grounds.[10]

The no-set-of-circumstances analysis does not apply here, because this case involves a taxpayer claim that the Initiative violates article 2, section 37, which is a procedural claim. While the claim could be framed as inherently a "facial challenge", because it is focused on whether the government has acted unlawfully, rather than on whether its application violates a particular individual's rights, it does not apply to article II, section 37. The State and the Intervenors offer

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[8] The phrase was first articulated in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

[9] Courts have repeatedly rejected the logic of the overly narrow approach to facial challenges, including the United States Supreme Court in *City of L.A. v. Patel*, 576 U.S. 409, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015).

[10] In *City of Redmond v. Moore*, 151 Wn.2d 664, 677, 91 P.3d 875 (2004), the court held the statutes facially invalid as a violation of due process. In *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 252-3, 259, 481 P.3d 1060 (2021), *cert. denied*, 142 S. Ct. 1094, 212 L. Ed. 2d 318 (2022), the court referenced the no-set-of-circumstances test but did not apply it; instead analyzing the facial challenge through the balancing test for privilege and immunities clause challenges. In *City of Pasco v. Shaw*, 161Wn.2d 450, 458, 166 P.3d 1157 (2007), the Court references the rule but determined constitutional privacy interests were not involved in a private landlord-tenant transaction. In *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000), the court found under article IX, the challenged statute was constitutional on its face.



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no support that it does, because there is none. Despite the substantial body of caselaw in Washington addressing article II, section 37, no Washington court has applied the no-set-of-circumstances analysis to constitutional challenges relating to Washington's article II, section 37, which has no federal analog. If the no-set-of-circumstances analysis was applicable to Article 2, Section 37 claims, the Constitutional provision would be rendered meaningless. This is so because the no-set-of-circumstances analysis necessarily requires an "as-applied" analysis, and the statute in question was constitutionally infirm at its formation.[11]

## V. CONCLUSION

Plaintiffs request that the Court grant its motion and issue a permanent injunction barring enforcement of the Initiative.

Dated this 16th day of October, 2024.

I certify that this memorandum contains 10,586 words in compliance with the stipulated word count limit authorized by the Court in this matter.

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[11] Alternatively, the Plaintiffs can establish that because the statute violated article II, section 37, and there are no set of circumstances under which the statute could be applied constitutionally, because it failed to inform the legislatures and the public of how it modifies existing State law. Therefore, every application of the statute is unconstitutional.



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