HONORABLE MICHAEL R. SCOTT
HEARING DATE: JANUARY 24, 2025
HEARING TIME: 10:00 A.M.
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' REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The fundamental issue in this case is found in the purpose of article II, section 37: "to

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protect the legislature and the public against fraud and deception." *Black v. Cent. Puget Sound Regional Transit Auth.,* 195 Wn.2d 198, 205, 456 P.3d 452 (2020). Initiative 2081's framing as a collection of existing laws re-codified in one place—a purported simple rearticulation of parental rights into a "Parents' Bill of Rights"—deceived the legislature and the public from understanding its actual impact. Initiative 2081 is far from an innocuous recitation of existing laws, as Defendants assert. It changes a myriad of existing laws across vast swaths of subject matters, impacting the rights of public-school students across the State as well as the duties and obligations of school districts, educators, heath care providers, and more. Initiative 2081 fundamentally changes laws related to education—among the State's greatest duties—and youth privacy rights that are essential to young peoples' health and well-being. It does all of this without identifying its impact on existing laws, obfuscating its true effect and creating "confusion, ambiguity, and uncertainty in the statutory law." *See El Centro De La Raza v. State,* 192 Wn.2d 103, 129, 428 P.3d 1143, 1156 (2018).

II. ADDITIONAL EVIDENCE RELIED ON IN REPLY

Plaintiffs rely on all pleadings and all prior declarations incorporated in their Motion and herein. In addition, Plaintiffs rely on the Declaration of Adrien Leavitt in Reply in Support of Plaintiffs' Cross-Motion for Summary Judgment ("Leavitt Decl. ISO Reply") and its exhibits.

III. REPLY

A. Initiative 2081 Is Not a Complete Act.

Initiative 2081 is not a complete act because the "scope of the rights or duties created or affected" by the act cannot "be determined without referring to any other statute or enactment." *Wash. Educ. Assoc. v. State*, 93 Wn.2d 37, 40, 604 P.2d 950, 952 (1980). "An act is amendatory in character, rather than complete, if it changes the scope or effect of a prior statute, and therefore

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must comply with section 37." *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 641, 71 P.3d 644, 654 (2003) (citing *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 518, 104 P. 791 (1909)).

The complete act inquiry looks at whether the act is "complete in itself" and in no way dependent upon any other statute to give it meaning or force such that "it stand[s] alone as the law upon the particular subject of which it treats." *Amalgamated Transit Union Loc. 587 v. State,* 142 Wn.2d 183, 246, 11 P.3d 762, 800 (2000), as amended (Nov. 27, 2000), *opinion corrected*, 27 P.3d 608 (Wash. 2001). The State's argument implies that the "complete act" requirement is less rigorous than the second part of the article II, section 37 inquiry because fewer cases have been decided on this prong. This is incorrect. The article II, section 37 two-part inquiry is a conjunctive test. *See State v. Manussier*, 129 Wn.2d 652, 663, 921 P.2d 473 (1996). The complete act inquiry is independent from the second part of the test and each part has equal weight. *See Black*, 195 Wn.2d at 210.

Whether a statute is a complete act requires analysis beyond whether the reader can readily understand the statute's meaning. While an initial review of Initiative 2081 may suggest it is a complete act—it purports to simply articulate parents' rights over their children attending public schools—it in fact changes legal rights and duties far beyond its stated purpose. Initiative 2081's purported purpose as a "Parents' Bill of Rights" disguises it as a complete act when, in reality, "the scope of rights or duties created or affected" cannot be determined without reference to other statues. *See Wash. State Ass'n of Cntys. v. State*, 199 Wn.2d 1, 15, 502 P.3d 825 (2022). Contrary to the State's assertion[1], Initiative 2081 is in fact "virtually incomprehensible" without reference

[1] *See* State Response to Cross Motion and Reply ISO SJ "State's Response", Dkt. 129, p. 10.

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to existing law. *See Elford v. City of Battle Ground*, 87 Wn. App. 229, 236-38, 941 P.2d 678 (1997); *see also State ex rel. Living Servs., Inc. v. Thompson*, 95 Wn.2d 753, 756, 630 P.2d 925 (1981). For example, Initiative 2081 grants parents the right to inspect a student's public school record, but the actual rights of parents to access records—and conversely long-standing privacy rights that young people hold over specific records—are "virtually incomprehensible" without reference to other laws.[2]

In re Dietrick provides a useful example of an independent law that stands alone on a subject and does not violate article II, section 37. 32 Wash. 471, 475, 73 P. 506 (1903). There, the Washington Supreme Court found that a law making it a felony to conduct "gambling games" repealed by implication a prior law making it a misdemeanor to conduct those same gambling games. Analyzing article II, section 37, the Court held the new law was a complete and independent statement of punishments for gambling acts, because the new law fully replaced the prior act. *Id*. at 475. Unlike the many provisions of Initiative 2081 which modify many areas of existing law across myriad chapters, the criminal statute in *Dietrick* was self-contained, "entirely independent . . . [i]t refers to no other laws, and no further search is required to learn what is the entire law upon the exact subject of which it treats," so it did not violate article II, section 37. *Id*. at 480. *see also Manussier*, 129 Wn.2d at 663-64 (holding that a newly enacted persistent offenders' statute was a "complete act capable of being understood without references to statutes not set forth in its provision" because "there is no need to go beyond the wording of the [new enactment] to determine the penalty for engaging in certain delineated recidivist conduct [.]"). In contrast, Initiative 2081 is not independent and does not stand alone as the law upon the many

[2] Plaintiffs are not arguing that the Initiative is "not 'complete' merely because it is a list of parental rights" that touches different subjects. S*ee* State's Response, Dkt. 129, p. 5. Rather, it is not a complete act because it modifies the law across many subjects and its effects cannot be understood without reviewing those areas.

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subjects it covers. Initiative 2081's amendatory nature is apparent in its changes to health privacy protections for youth, notification and reunification procedures for youth accessing shelter, and schools' duties regarding providing records, allowing unlimited parent access, and providing opt-out notices and opportunities.

Initiative 2081's numerous changes to existing law are akin to the statutory changes that courts have found to violate article II, section 37 in other cases. In *Washington Education Association v. State*, the Washington Supreme Court found that a newly enacted cap on school district salary increases was not a complete act because one could only understand the effects of the newly enacted salary limitation by referring to existing law that confers general powers on districts and school boards to set salaries. 93 Wn.2d 37, 41, 604 P.2d 950 (1980) ("*WEAI*"); s*ee also State ex rel. Living Servs.,* 95 Wn.2d at 757 (new act setting a ceiling for property reimbursement for nursing care facilities was not a complete act, because existing law set out nursing home reimbursement requirements, including recognition of cost-related factors and allowable costs under federal regulations); *see also Naccarato v. Sullivan*, 46 Wn.2d 67, 68-76, 278 P.2d 641 (1955) (holding that a new act that allowed the state retirement board to buy and lease property, expanding the board's previously granted investment authority, was not complete because its purpose and effects could only be understood by referring to the original employees' retirement act to understand how it changed the trustees' authority). In *WEAI* and *State ex rel. Living Services*, one could read the new enactments to understand there were limit on salaries and reimbursement amounts, respectively, but without the context of the existing statutes that these new limits restricted, the acts were not complete. *WEAI,* 93 Wn.2d. at 40-41; *State ex rel. Living Services,* 95 Wn.2d 757-58. Similarly, Initiative 2081 is a new enactment that changes the scope and application of a broader, complex, pre-existing statutory scheme, such that its effects can only

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be understood by reading the other laws that it modifies.

In *Amalgamated Transit,* the Washington Supreme Court found a section of an initiative setting out a general voter approval requirement for tax increases was not complete because an existing statute required voter approval in certain circumstances and set forth voting procedures for only those circumstances. 142 Wn.2d at. 253-54. As such, the new law did not "stand alone" on the subject of voter approval for tax increases and the impact of the new law was "not at all clear." *Id*. Like the general voter approval requirement that conflicted with existing law, Initiative 2081's health access provisions conflict with existing laws and make the impacts of both the new and existing laws unclear. In contrast, the *Amalgamated Transit* Court found a different section of the initiative was complete because it explicitly repealed existing acts related to taxes and fees, since it was clear that those repeals would decrease funding for programs set out in other areas of code. *Id.* at 254. Initiative 2081's provisions related to health information disclosure do not stand alone on the subject. Moreso, Initiative 2081's covert changes to youth medical privacy laws disguised as parental rights are more obtuse than the tax repeals found to be complete in *Amalgamated Transit*.

Initiative 2081's mandatory parental notification requirement when a student is taken to a youth shelter cannot be understood either, without reference to existing laws that protect youth accessing shelter. *Compare* Initiative 2081(h) *with* RCW 13.32A.082. The Initiative's parental notification requirement undoes existing protections for young people, including delayed notification and family reunification support. Because Initiative 2081 alters existing law on the same topic—protections (or lack thereof) from immediate notification when a youth accesses a youth shelter in certain circumstances—both Initiative 2081 and existing statutes must be read to understand the Initiative effect. Initiative 2081 is not a complete act.

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Initiative 2081's provisions modifying existing law regarding access to instructional materials, records requests, and opt-outs are further evidence that it is not a complete act because each does not stand alone on the subject addressed. To understand their rights to review classroom materials, and any limitations thereto, a parent must look to both Initiative 2081, allowing parents to review classroom materials, and RCW 28A.605.020, which limits parental access to classrooms. To understand their rights to access their student's records, parents must look to both Initiative 2081, which gives parents the right to access student records, broadly defined, and sets some new procedural requirements, and to RCW 28A.605.030—allowing parental access to education records and requiring school districts to adopt procedures in compliance with the federal Family Educational and Privacy Act of 1974 ("FERPA").

Defendant asserts the Initiative references and incorporates existing law, here, but even where the Initiative references existing law, it ultimately changes that law without disclosing how. *See* I-2081(b)(i) (referencing RCW 28A.605.030 generally but changing that existing law's production requirements without disclosing the change). Initiative 2081 is amendatory, because it sets a shorter, more stringent timeline than the existing statute. "Where the new act is not complete but refers to a prior statute which is changed but not repealed by the new act, one is required to read both statutes before the full declaration of the legislative will on the subject can be ascertained. This causes the very obscurity and tendency to confuse which the constitutional provision seeks to prevent, hence violates the constitution." *State ex rel. Living Services*, 95 Wn.2d at 757. Similarly, a parent cannot understand their rights under Initiative 2081(2)(k)—allowing opt out of "instruction on topics associated with sexual activity"—without cross-referencing existing law in

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RCW 28A.300.475 regarding "comprehensive sexual health education"[3]. Even after cross-referencing the two laws, it is "not at all clear" how the two laws interact and whether they are meant to be coextensive, since they use different language to define what triggers opt-out. *See Amalgamated Transit,* 142 Wn.2d at 254. These provisions violate the complete act requirement and contravene the central purpose of this requirement, "to avoid uncertainty created by the need to refer to existing law to understand the effect of the new enactment." *WEAI*, 93 Wn.2d at 40.

No previous case has analyzed a newly enacted "Bill of Rights" in the context of article II, section 37, and a "Bill of Rights" like Initiative 2081 presents unique considerations. It styles itself as a collection of parents' rights, but this collection necessarily impacts the rights and duties of many others. Under Initiative 2081 parents gain access to previously confidential health care information about young people, impacting the rights of young people. In turn, this impacts the legal duties of health care providers, who must now make sense of cross-reference preexisting confidentiality laws with the newly granted parents' right to access records. Initiative 2081's newly granted right for parents to opt their child out of broad subjects of curriculum impacts the legal duties of school districts, which now must manage endless opt-outs and disruption to classrooms. Initiative 2081's newly granted parental notification when a student plans to or accesses a youth shelter directly from school impacts a young person's right to receive support and services from DCYF when seeking shelter to access reproductive health care or gender affirming health care services. Because Initiative 2081 affects more than just parents' rights, it is not a complete act.

B. Initiative 2081 Renders Erroneous a Straightforward Determination of the Scope of Rights and Duties Under Existing Statutes.

Initiative 2081 renders erroneous "a straightforward determination of the scope of rights or

[3] Comprehensive sexual health education is defined as "recurring instruction in human development and reproduction that is age-appropriate and inclusive of all students..." RCW 28A.300.475(11)(b).

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duties under the existing statutes." *See, e.g.*, *El Centro*, 192 Wn.2d at 129. The State works hard to minimize the second prong of article II, section 37's two-part test by asserting it does not apply where a new enactment is deemed a complete act.[4] The State also asserts that the inquiry does not turn on whether there could be an incorrect understanding of existing laws.[5]

The State's repeated effort to cabin the test's second prong section as applicable only if a new enactment is deemed incomplete[6] has been expressly rejected by Washington's Supreme Court repeatedly, most recently in 2020. *Black* , 195 Wn.2d at 210.The *Black* Court repeatedly makes clear that courts must separately analyze the second part of the test to determine if it passes constitutional muster. "A complete act...may still violate article II, section 37 because a complete act can still render existing statutes erroneous by not informing readers how the statute is impacting or modifying a straightforward determination of the scope of rights and duties created by those other statutes." *Id*. Rejecting, here, the Washington Supreme Court reiterated the second inquiry is required, even where an act is deemed complete. complete.

> Therefore, we reiterate that when considering whether a statute violates article II, section 37, courts must consider both whether the statute is a complete act and whether it renders erroneous a straightforward determination of the scope of rights and duties created by other existing statutes.

Black , 195 Wn.2d at 210.[7]

The State also misleadingly attempts to limit the analysis of the second prong of the test to

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[4] State's Response, Dkt. 129, p. 7.
[5] State's Response, Dkt. 129, p. 19.
[6] *See, e.g.,* State's Response, generally and throughout.
[7] "Reference statutes" like those that repeal prior acts or sections on the same subject, or that adopt by reference provisions of prior acts, that are complete acts and that refer to other statutes and make them applicable to the subject of the legislation do not violate article II, section 37. *State v. Rasmussen,* 14 Wn.2d 397, 402, 128 P.2d 318 (1942). Initiative 2081 is not a reference statute, because the scope of the rights creates or affected by the Initiative cannot be ascertained without referring to any other statute or enactment. *See, e.g., Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 641, 71 P.3d 644 (2003).

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"what the new law does" instead of considering its effect on existing laws, claiming the focus is not whether "someone reviewing the new law would have an incorrect understanding of the existing laws."[8] Instead, the State relies on a case decided over 100 years ago to argue the purpose of this second prong is so "legislators and the people understand what the *new law* does."" State's Response, Dkt. 129, p. 19 (citing for support *Spokane Grain & Fuel Co.,* 59 Wash.76, 78-79, 109 P. 316 (1910)). Understanding what a new law does, however, provides an incomplete puzzle without understanding how it is different from what already exists.

Modern cases make clear that the independent purpose of "[t]his prong of the test ensures that the legislature is aware of the legislation's impact on *existing laws*." *El Centro*, 192 Wn.2d at 130 (emphasis added). In *El Centro,* Washington's Supreme Court clarified the purpose is to ensure "'[c]itizens or legislatures must not be required to search out amended statutes to know the law on the subject treated in a new statute.'" *Id*. at 131 (*citing Wash. Citizens Action of Wash. v. State*, 162 Wn.2d 142, 152, 171 P.3d 486 (2007) (quoting *Wash. Ass'n of Neigh. Stores v. State*, 149 Wn.2d 359, 373, 70 P.3d 920, *abrogated on other grounds by Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 357 P.3d 1040 (2015)).

Contrary to the State's assertion, various cases it relies on establish the proper focus is on whether someone reviewing the new law would have an incorrect understanding of existing laws:

> The second purpose of the constitutional provision is the necessity of insuring that legislators are aware of the nature and content of the law which is being amended and the effect of the amendment upon it. *Flanders,* 88 Wash.2d at 189, 558 P.2d 769. *Or, stated another way, to disclose the act's impact on existing laws. Thorne,* 129 Wash.2d at 753, 921 P.2d 514. The second test for compliance with art. II, § 37 is, therefore, [w]ould a straightforward *determination of the scope of rights or duties under the existing statutes* be rendered erroneous by the new enactment? *Wash. Educ. Ass'n,* 93 Wash.2d at 41, 604 P.2d 950.

[8] State's Response, Dkt. 129, p. 19.

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Amalgamated Transit, 142 Wn.2d at 246 (emphasis added). This "purpose of the constitutional limitation is to apprise those who are affected by an existing law of any important changes." *WEAI*, 93 Wn.2d at 41.

As the State sets forth, "the obligations of schools under I-2081's terms are straightforward and clear"[9] and it is "plain as day that it requires disclosure of…students' health care information"[10] and additional affirmative disclosures to parents. These mandatory disclosures under I-2081, however, conflict with existing statutes. Because the Initiative changes existing laws and fails to disclose that it does so, it violates article II, section 37. For example, a school counselor with knowledge of pre-existing statutes protecting youth privacy would find it impossible to comply with existing law preventing disclosures and Initiative 2081's mandate to disclose.

The new act in question in *Amalgamated Transit* provides an example of the type of law that violates the Constitution because its true effect is hidden. 142 Wn.2d at 251-52. While all laws that amend existing laws will not necessarily run afoul of article II, section 37, the second prong asks whether the new enactment "tend[s] to mislead or deceive[.]" *Id.*, at 251. "This question cannot be answered in isolation, because complete acts may well result in a person reading an existing statute and being unaware there is new law on the subject. Thus, it is not enough to ask whether one reading an existing statute would be aware that a new enactment changes it." *Id*. at 253. The Court concluded that the new act (I-695) violated article II, section 37 because the new act impacted an existing statute, but it failed to disclose its impact:

> [The new act] contains a more general voter approval provision that applies in general to such assessments. [Yet, the new act] does not repeal or mention the existing statute, but it clearly has impact since it encompasses voter approval for all taxes. However, because both statutes contain voter approval requirements, the impact is not at all clear. At the least, one would not know the law by

[9] State's Response, Dkt. 129, p. 7.
[10] State's Response, Dkt. 129, p. 12.

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> referring to the existing statute. Nor can it be said that [the new act] stands alone on the subject[.] [The new act] does not set forth the existing statute which is affected, nor does it show how it is impacted.
>
> *Amalgamated Transit,* 142 Wn.2d at 253-54.

The Court held that "section 2 of I–695 violates art. II, § 37 because it fails to set forth an existing law that is amended or revised by I–695, thus causing confusion, ambiguity and conflict in respect to existing law." *Id.* at 257.

Just as was the case in *Amalgamated Transit,* Initiative 2081 violates article II, section 37 because it contains broad notification and disclosure requirements that mandate disclosure of any health-related information for youth in public schools. Yet it does not repeal or mention the existing health care statutes that apply to minors, "but it clearly has impact since it encompasses" and requires disclosure of minors' confidential health information. *See id.* at 253-54. However, because Initiative 2081 and these existing statutes address disclosure of health care information, "the impact is not at all clear. At the least, one would not know the law by referring to the existing statute[s]." Initiative 2081 does not stand alone on the subject of disclosable health care information. It "does not set forth the existing statute[s] which [are] affected, nor does it show how [those existing statutes are] impacted." *Id. See also WEA I,* 93 Wn.2d 37, 41 (a "straightforward reading of [existing] statutes indicates that [school] districts have the power to spend funds, from whatever source, as they choose on teacher salaries. The challenged limitation purports to amend this authority" and because it was not fully set forth in the new act, the offending limitation is unconstitutional).[11]

The Initiative renders erroneous at least four categories of laws, which are described below.

[11] *See also State ex rel. Living Servs.,*95 Wn.2d at 758 (recognizing new act have "in effect been amended" but the "statutes as amended were not set forth in" the new act "as required by Const. Art. 2, s 37[.] So that section was properly voided).

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1. I-2081 Renders Erroneous a School's Obligation to Produce Student Records Under RCW 28A.605.030.

Initiative 2081 conflicts with existing laws that govern the scope and production of educational records. The Initiative expands existing law on what is considered an educational record,[12] and it substantially narrows the time that existing law provides for school districts to comply. *Compare* RCW 28A.605.030 *with* I-2081(2)(b)(i). This provision not only increases the burden on school districts to produce records on a significantly expedited timeline, it changes existing law that permits school districts to charge costs for the records production in some circumstances. RCW 28A.605.030. [13] Instead, the Initiative precludes school districts from doing so in all instances for electronic records and sets limits for paper copies. I-2081(2)(b)(iii).

The State argues there is no conflict here because Washington law merely refers to FERPA, and "FERPA leaves the states free to determine the…parameters of their compliance programs."[14] But Washington did determine the parameters of their compliance programs by conscripting FERPA's 45-day limit for production as well as the ability to charge for production of records. *See* RCW 28A.605.030. Those parameters are express and reside in a pre-existing Washington statute. *Id*. Initiative 2081 sets a 10-day limit, expands the definition of what is considered a record, and prohibits charging, all of which directly conflict with preexisting law. Whether I-2081 conflicts

[12] While many "education records" are also "public school records,", the definition of "public school records" under the Initiative is more expansive. I-2081(2)(b)(iv). RCW 28A.605.030 incorporated the definition in FERPA of "education records". 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).

[13] RCW 28A.605.030 incorporates FERPA's production deadline by reference, 34 C.F.R. § 99.10(b) and incorporates 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).

[14] State's Response, Dkt. 129, pp. 8-9.

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with FERPA is not material to Plaintiffs' constitutional claim. I-2081 conflicts with Washington RCW 28A.605.030, which explicitly adopts specific language from FERPA into State law. These conflicts were not disclosed.

2. I-2081 Renders Erroneous Youth Rights to Health Information Confidentiality and Interferes with Their Rights to Access Health Care Absent Parental Consent or Notification.

Initiative 2081 renders erroneous existing State laws granting privacy protections for youth accessing health care. The State acknowledges that the Initiative mandates disclosure of all information pertaining to student's access to health care: "[T]he obligations of schools under I-2081's terms are straightforward and clear"[15] and it is "plain as day that it requires disclosure of…students' health care information."[16] This mandatory disclosure directly conflicts with long-established Washington law ensuring youth access to 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 that they have the right to consent to receive. *See* RCW 70.02.020; RCW 70.02.130. Such laws were enacted to decrease barriers to accessing essential care.[17] Additionally, confidentiality protections exist for health care related to reproductive rights, domestic violence, mental health, and gender affirming care in the context of insurance, because the Legislature recognizes "[a]ll people deserve the right to choose the health services that are right

[15] State's Response, Dkt. 129, p. 7.
[16] State's Response, Dkt. 129, p. 12.
[17] Young people have a right to privacy to and to independently consent to essential and sensitive forms of care. *See* RCW 9.02.100 (reproductive health care); RCW 70.24.110 (sexually transmitted diseases); RCW 70.125.120 (sexual assault forensic examination); RCW 71.34.530 (outpatient mental and behavioral health treatment). They also have specific privacy protections for certain types of care. *See e.g.,* RCW 70.02.220 ("no person may disclose or be compelled to disclose...information...related to sexually transmitted diseases."); 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 exceptions, such as to law enforcement).

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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); s*ee also* RCW 70.24.015 (need for privacy regarding sexually transmitted disease). *See, e.g.*, POCAAN Decl. ISO PI, Dkt. No. 19, ¶¶ 22-24, Oasis Decl. ISO PI, Dkt No. 23, ¶¶ 52-54; Carson Decl. ISO MSJ ¶ 14(a).

The State recognizes that youth are entitled to confidentiality for "certain types of treatment" but that their rights are not absolute.[18] Initiative 2081 contradicts these carefully legislated rights. The State ultimately claims these contradictions do not amend existing law, because of a conflicting law provision that exists in RCW 70.02.900—a law enacted in 1991, thirty years before Initiative 2081—that provides "nothing in Chapter 70.02 restrict[s] a health care provider, a third-party payor, or an insurer…from complying with obligations imposed by federal or state health care payment programs or federal or state law." The State asserts this language does not restrict providers from complying with Initiative 2081.[19] But neither RCW 70.02, nor Initiative 2081, nor basic notions of logic support that conclusion.

The State fails to credibly explain how a conflicting law provision enacted more than three decades earlier in a separate chapter on distinct subjects serves as evidence of legislative intent to subjugate the critical protections in RCW 70.02 to Initiative 2081. Initiative 2081's silence on the matter is evidence that the legislature lacked any intent for the Initiative's disclosure requirements to override RCW 70.02's protections. Indeed, the 1991 Uniform Health Care Information Act was

[18] State's Response, Dkt. 129, p. 12.
[19] State's Response, Dkt. 129, p. 11.

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meant to protect health information and meet a "need for uniform law, rules, and procedures" governing disclosure of health care information in light of interstate information exchange and the rise multistate health care providers, which provides context for why the Legislature may have included the conflicting laws provision. *See* RCW 70.02.005(5).

Initiative 2081 requires disclosures that conflict with confidentiality rights in RCW 70.02, and in the myriad statutes that provide youth can consent to and access sensitive health care without parental notification or consent.[20] Initiative 2081's requirement that schools provide parents with access to medical and mental health records directly conflicts with these privacy protections. Initiative 2081(2)(b)(iv).[21] The Initiative further conflicts with privacy protections by creating multiple new affirmative duties for schools to notify parents about health care that is offered to, provided to, or arranged for a student. *See* I-2081(2)(c)-(e). These 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. Sub. No. 40 ¶¶ 14-28; SVLC Decl. ISO PI, Sub. No. 38, ¶¶ 25-29.

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[20] Even if one were to accept the State's argument that Initiative 2081 does not amend the privacy rights protected by RCW 70.02 because of the conflicting laws provision in RCW 70.02.900, Initiative 2081 would still violate article II, section 37 because it contradicts health privacy rights contained in other chapters, including youth privacy rights for behavioral health (RCW 71.34.520) and insurance-related privacy rights (RCW 48.43.505).

[21] The State minimizes the impact of this disclosure requirement by arguing that such records are already available under FERPA and that FERPA's notes exemption does not apply to nurses, counselors, or other medical personnel. See State's Response at 10. FERPA's notes exemption applies to records held in the sole possession of "instructional, supervisory, and administrative personnel *and educational personnel ancillary thereto*," which would include educational staff such as school nurses. *See* 20 U.S.C. § 1232g(a)(4)(B)(i) (emphasis added); WAC 181-79A-140 (defining nurses, counselors, and psychologists as "educational staff associates"). Additionally, documents that are not "maintained" in a centralized manner, such as emails and other decentralized documents, are not education records under FERPA. See 20 U.S.C. § 1232g(a)(4)(A)(ii); S.B. v. San Mateo Foster City Sch. Dist., No. 16-cv-01789-EDL, 2017 U.S. Dist. LEXIS 217440, at *57 (N.D. Cal. Apr. 11, 2017) (emails need not be disclosed under FERPA if they were not placed in a central file); *see also Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 435, 122 S. Ct. 934, 940 (2002) (students' classroom work and peer grading are not "education records" under FERPA, in part because they are not "maintained" by the institution).

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The State tries to brush aside Initiative 2081's significant impact on student health privacy by downplaying schools' role in providing and connecting youth to health care.[22] The State is incorrect. Under the Initiative, even referrals require prior notification. Because prior notice is required, the Initiative interferes with youths' statutory right to independently, confidentially, and timely access[23] and consent to care.[24] School nurses provide health care directly, such as by assessing and managing illnesses, and indirectly, frequently collaborating with school-based health centers. *See* Leavitt Decl. ISO Reply, Exhibit C. School nurses "refer and coordinate care," "facilitate insurance enrollment," and "serve as members of a student's health team." *Id.* These activities would trigger Initiative 2081's broad notice requirements that apply when school staff "offer" or "arrange directly or indirectly" for medical care. RCW 28A.605.005(2)(c),(d). A chart received in response to a request made to OSPI displays the myriad statutes that make health care services accessible to minors without parental consent or parental notification. *See* Leavitt Decl. ISO Reply, Exhibit A. Initiative 2081's notification requirements conflict with each of the provisions that entitle youth to access care confidentially absent parental notification. Plaintiffs have updated that chart to display how Initiative 2081's requirements create a sea change and conflict with numerous statutes ensuring youth access to health care, including emergency medical care, non-emergency health care, sexual transmitted disease testing and treatment, birth control services, abortion services, and more. *See* Leavitt Decl. ISO Reply, Exhibit B. These notification requirements harm students, especially LGBTQ+ students and youth of color. *See* POCAAN Decl.

[22] State's Response, Dkt. 129, p. 13-14.

[23] *See, e.g.*, Love Decl. ISO PI, Dkt. No. 81, ¶ 28; SWSD Decl. ISO PI, Dkt. No. 42, ¶ 22; TSD Decl. ISO PI, Sub No. 44, ¶ 11 (discussing how prior notification requirements will prevent schools from providing timely care).

[24] 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).

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ISO PI, Sub. No. 37, ¶ 33, *see also* LRP Decl. ISO PI, Sub. No. 34, ¶¶ 36-37; Carson Decl. ISO MSJ ¶ 14(b).

The Initiative conflicts with numerous statutes that prevent disclosure of health care information. Because Initiative 2081 fails to disclose that it overrides those protections, it violates article II, section 37.

3. Initiative 2081 Renders Erroneous Legislation Intended to Prevent Youth Homelessness in RCW 13.32A.082.

The State points out that the Legislature will often balance competing policies, and that legislation often services multiple goals that can be in tension with one another.[25] Yet here, there is no evidence that the Legislature balanced competing policies and intended to modify ESSB 5599, which it enacted during the legislative session immediately preceding Initiative 2081.[26] To the contrary, that Initiative 2081 directly contradicts the actions and the express intentions of the Legislature in ESSB 5599, just a year later. That it does so with no reference to ESSB 5599 or its underlying policy, is evidence that the Initiative violates article II, section 37.

Through ESSB 5599, the Legislature changed who notified parents about youth accessing shelter. Prior to ESSB 5599, licensed shelters themselves had to contact parents within 72 hours of a youth's arrival unless there were compelling circumstances not to, e.g., when notifying the parent would subject the minor to abuse or neglect. *See* ESSB 5599, § 2. Washington's Legislature passed ESSB 5599 to address the health and safety risks to transgender or pregnant youth experiencing homelessness. ESSB 5599, § 1. Finding "that barriers to accessing shelter can place

[25] State's Response, Dkt. 129, p. 16.

[26] Wash. Rev. Code § 13.32A.082, incorporates amendments enacted in the 2023 legislative session by ESSB 5599 and Substitute House Bill 1406. The Legislature enacted Engrossed Substitute S.B. 5599, 68th Leg., Reg. Sess. (Wash. 2023), enacted as 2023 Wash. Sess. Laws, ch. 408, and Substitute H.B. 1406, 68th Leg., Reg. Sess. (Wash. 2023), enacted as 2023 Wash. Sess. Laws, ch. 151, further amending Wash. Rev. Code § 13.32A.082.

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a chilling effect on exiting unsheltered homelessness and therefore create additional risk and dangers for youth[,]" ESSB 5599 "remove[s] barriers to accessing temporary, licensed shelter accommodations for youth seeking certain protected health care services." *Id.* Fear of the parental notification requirement caused some transgender youth to leave the safety of shelters or avoid them altogether. *See* House Floor Debate on ESSB 5599 (Wash. Apr. 12, 2023), at 2:31:08–2:34:12, video recording by TVW, https://tvw.org/video/house-floor-debate-april-12-2023041141 (remarks of Representative Julio Cortes). To remedy this, ESSB 5599 specified that if a youth seeking protected health care services—including gender-affirming care or reproductive health care—arrives at a licensed shelter, the shelter must contact DCYF instead of contacting the youth's parents directly. ESSB 5599, § 2. ESSB 5599 gives DCYF an opportunity to connect vulnerable youth and their families to additional services with the goal of family reunification.

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. In these circumstances, if a school immediately notifies a parent that the student intends to go or has gone to a shelter—as is required by Initiative 2081—DCYF no longer serves as the intermediary, is unable to deliver services to the youth, and is unable to assist with reunification, as the Legislature expressly intended for it to do when it passed ESSB 5599.

4. I-2081 Renders Erroneous Laws That Balance Parental Notice, Youth Engagement in Education, and their Right to Obtain Education.

Plaintiffs do not ask this Court "to adjudicate alleged policy tensions between various state

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laws" as the State asserts.[27] The Court's role in analyzing applicability of article II, section 37, is to determine "whether the Act alters any existing rights" and "separately analyze[s] the existing" laws. *El Centro,* 192 Wn.2d at 129. With regard to its opt-out provisions, several existing statutes already carefully balance the competing interests between parents, schools, and youth autonomy in education. The Initiative overwhelmingly tips that balance in favor of parental involvement[28] at the detriment of youth autonomy and development[29] with additional burdens on schools to accommodate that involvement while satisfying educational requirements.[30] The State minimizes the Initiative's effect here, proclaiming: "Nothing in I-2081 requires schools to give parents notice before a student engages in a discussion about racial discrimination or writes a report on Harvey Milk."[31] The Initiative does not preclude a student from engaging in the activity. But the plain text of the Initiative requires that *a school* disclose in advance and provide opportunity to opt-out of any planned classroom discussions that might address these wide-ranging topics. I-2081(2)(g). Yet, schools must still satisfy educational requirements.[32] Initiative 2081's requirements divert already strained educators from teaching mandatory material. Instead, teachers must identify every

[27] State's Response, Dkt. 129, p. 16.

[28] 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). While the statutes address parental observation, the Legislature's express intent to limit classroom disruption is applicable to classroom disruption inherent in accommodating I-2081's unlimited examination and notice and opt-outs.

[29] RCW 28A.150,210 recognizes improving student achievement requires that students take responsibility for their education. Additionally, when 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.

[30] SWSD Decl. ISO PI, Sub No. 42, ¶¶ 23-24; TSD Decl. ISO PI, Sub No. 42, ¶ 12.

[31] *See* State's Response, Dkt. 129, p.17.

[32] 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).

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assignment or engagement that addresses these wide-ranging topics, 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. Initiative 2081's opt-out requirement for topic related to sexual activity also create confusion by rendering erroneous the scope of existing requirements, expanding the topics that require notice under the "comprehensive sexual health education" statute and setting out contradictory procedures for HIV/AIDS prevention opt-outs. *See* I-2081(2)(k); RCW 28A.300.475; RCW 28A.230.070. A school left to determine how to comply with its obligations under existing laws and Initiative 2081, is inevitably left to sort out these conflicts between I-2081 and existing law, because the Initiative only injects confusion and does not explain how it effects existing laws.

V. CONCLUSION

Initiative 2081 violates article II, section 37 because it is not a complete act. It separately violates this constitutional provision because it renders erroneous a straightforward determination of several existing laws. The Initiative's failure to comply with article II, section 37 requires that it be invalidated. There is no evidence in the Initiative that the Legislature was aware it amended numerous carefully legislated laws, including laws that ensured youth safety and autonomy in public schools. As Harvey Milk famously proclaimed: "All young people, regardless of sexual orientation or identity, deserve a safe and supportive environment in which to achieve their full potential." Plaintiffs request that the Court grant Plaintiffs' Motion for Summary Judgment, deny Defendant's Motion for Summary Judgment, issue a permanent injunction barring all implementation and enforcement of Initiative 2081, and declare that it is unconstitutional because it violates article II, section 37.

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Dated this 13th day of December, 2024.

I certify that this memorandum contains 6,985 words in compliance with the stipulated word count limit authorized by the Court in this matter.

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