NO. 73731-1

SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT A. FICALORA, Petitioner, v. CINDY ZEHNDER, Chief Clerk of the House of Representatives; and MILT DOUMIT, Secretary of the Senate, both of the State of Washington and in their official capacities, Respondents.	MOTION TO DISMISS OR TRANSFER

I. PARTY FILING MOTION

This motion is filed on behalf of Respondents Cindy Zehnder and Milt Doumit, by and through the undersigned counsel.

II. STATEMENT OF RELIEF SOUGHT

Respondents respectfully request that this Court dismiss this action with prejudice. As an alternative, if the Court does not dismiss the case in its entirety, it should transfer the case to the Superior Court for Thurston County pursuant to RAP 16.2.

III. RECORD RELEVANT TO MOTION

This motion is based upon the Petition for Writ of Mandamus, Respondents' Answer thereto, the Affidavit of Robert A. Ficalora in Support of Notice and Demand to the Washington State Legislature for Exception from Cutoffs under SCR 8400 (Ficalora Affidavit 1), and Ficalora Affidavit in Support of Petition For Writ of Mandamus.

IV. GROUND FOR RELIEF SOUGHT

A. Factual And Legal Background

Petitioner Robert A. Ficalora commenced this original action seeking a writ of mandamus against Respondents, the chief administrative officers of the House of Representatives and Senate of the state of Washington, respectively. Mr. Ficalora seeks a writ directing these administrative officers to except two proposed joint memorials from the cutoff dates established by Senate Concurrent Resolution 8400.

Two joint memorials, HJM 4022 and SJM 8021, were introduced during the 2003 session of the Washington State Legislature. Both memorials were advocated or supported in a petition authored by Mr. Ficalora and signed by a number of individuals. Ficalora Affidavit 1, attachments A, B. Each memorial was introduced in its respective legislative chamber by several elected members. Copies are appended to the Petition.

Early in its 2003 session, both houses of the Legislature adopted Senate Concurrent Resolution 8400, a copy of which is appended to the Petition. That resolution establishes a series of "cutoff" dates, which apply to most bills, memorials, and joint resolutions introduced during the session. Under the terms of this resolution, in order to remain under active consideration as the session progresses, a measure must be reported out of

its assigned committee by no later than March 5, 2003. Further deadlines arise throughout the session by which bills must continue to progress in order to remain under consideration. The only exceptions stated are for "budgets, matters necessary to implement budgets, initiatives to the legislature, and alternatives to initiatives to the legislature". SCR 8400.

Neither HJM 4022 nor SJM 8021 were reported out of their respective committees by March 5. Since they were not reported out of committee by that cutoff date, they also failed to progress past later cutoff dates also established by SCR 8400. Accordingly, neither memorial remains under active consideration. Mr. Ficalora asks this Court to order the chief administrative officers of each house to except them from the cutoff dates.

B. Issues Presented Pursuant To RAP 16.2(d).

This matter is currently before the Commissioner for a determination pursuant to RAP 16.2(d). That rule provides the Commissioner with three options: (1) determine that the Supreme Court should decide the case; (2) transfer the case to the superior court; or (3) dismiss the case. *Id.* If the Commissioner decides that the case should be decided in this Court, an order establishing a briefing schedule is appropriate.

Two issues should be considered at this stage of the litigation. First, the Court should consider whether this action should be dismissed outright

or retained in some fashion. The case should be dismissed because Mr. Ficalora fails to state a claim upon which relief could be granted.

Second, if the case is not dismissed, the Court should decide whether to retain the case or transfer it to Thurston County Superior Court. This Court has recently reiterated the rare and exceptional nature of original actions. *Washington State Labor Council v. Reed*, No. 73235-3, 2003 WL 1741096, at *2 (Wash. April 3, 2003). This Court's original jurisdiction is both nonexclusive and discretionary. *State ex. rel. Heavey v. Murphy*, 138 Wn.2d 800, 804, 982 P.2d 611 (1999) (quoting *Dep't of Ecology v. State Fin. Comm.*, 116 Wash.2d 246, 251, 804 P.2d 1241 (1991). The framers of the constitution provided it for the limited purpose of permitting the state's highest court to resolve serious and significant issues of extraordinary moment. *See Labor Council*, 2003 WL 1741096, at *2 (quoting *State ex. rel. O'Connell v. Meyers*, 51 Wn.2d 454, 459-60, 319 P.2d 828 (1957)). The clearly insubstantial nature of the claim that this Court can intervene in the internal functions of the Legislature would not rise to that level.

C. Mandamus Does Not Lie In This Action Because Respondents Have No Duty To Except Any Memorial From Cutoff Dates

This Court's original jurisdiction extends only to actions in the nature of mandamus or quo warranto against state officers. Mr. Ficalora requests a writ of mandamus directing Respondents to except HJM 4022 and SJM 8021 from internal legislative cutoff dates. Mr. Ficalora fails to recognize,

however, that neither the Chief Clerk of the House of Representatives nor the Secretary of the Senate are empowered to perform this function.

Mandamus lies only to compel a state officer to undertake a clear duty. *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998). Far from possessing a duty to except memorials from cutoff dates, the Respondents lack even the *authority* to do so. The Chief Clerk and the Secretary are administrative officers of their respective chambers. They perform significant functions to be sure, but neither possess the authority to make legislative decisions as such. *Permanent Rules of the House of Representatives, Fifty-Eighth Legislature*, Rule 5; *Permanent Rules of the Senate, Fifty-Eighth Legislature*, Rule 3.[1]

Since neither Respondent has the authority, much less an affirmative duty, to perform the function that Mr. Ficalora seeks to compel, no writ of mandamus can be issued.

D. The Doctrine Of Separation Of Powers Precludes This Court From Intervening In The Internal Processes Of The Legislature

Separation of powers also precludes this Court from entering into the internal processes of the Legislature by ordering that particular measures be excepted from internal cutoff dates. Just as the Court will not order the

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[1] Both of the cited rules are available on the Internet. The House rules can be found at: http://www.leg.wa.gov/house/hadm/rules.htm. The Senate rules are at: http://www.leg.wa.gov/senate/sadm/senate_rules.htm.

Legislature to enact a statute,[2] no less will it tell the Legislature to consider a bill despite its internal cutoffs. As Justice Talmadge has explained:

> In general, this Court has been exceedingly reluctant, and rightfully so, to intrude upon the decisionmaking process of a coordinate branch of state government. The examples of such reluctance are numerous and varied. We have declined to interfere with the Legislature's right to refer a bill to the people. *Walker v. Munro*, 124 Wn.2d 402, 423, 879 P.2d 920 (1994). Under the enrolled bill doctrine, we do not inquire into the Legislature's process for enacting legislation. *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 P. 201 (1893). Similarly, with respect to gubernatorial sectional vetoes, we give considerable deference to the Legislature's designation of sections subject to the veto power. *Washington State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 763 P.2d 442 (1988).

CLEAN v. State, 130 Wn.2d 782, 814-15, 928 P.2d 1054 (1996) (Talmadge, J., concurring) (footnote omitted). With particular regard to the enrolled bill doctrine, this Court has explained:

> The constitutional principle upon which [the enrolled bill doctrine] is based is that the three branches of state government are co-equal in dignity and that none of them is entitled to look behind the properly certified record of another to determine whether that branch has followed the procedures prescribed by the constitution, but rather each is responsible and answerable only to the people for its proper performance of the function for which it is instituted.

Id. at 814 n. 15 (quoting *Citizens Council v. Bjork*, 84 Wn.2d 891, 897-98 n. 1, 529 P.2d 1072 (1975)).

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[2] *See Cedar Cy. Comm. v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998) ("This court has stated that it will not order the Legislature to enact a statute unless that enactment is specifically mandated by the constitution.").

This Court's reluctance—and perhaps the choice of words is far too mild—to enter into the Legislature's internal proceedings is well grounded in the concept of separation of powers. Judges simply do not tell legislatures whether or not to consider pending bills.

E. The Joint Memorials Are Not "Alternatives To An Initiative" And Are Not Exempt From Cutoff On That Basis

In the final analysis, Mr. Ficalora's request for a writ of mandamus is dependent upon the conclusion that HJM 4022 and SJM 8021 are "alternatives to initiatives." Mr. Ficalora reasons that SCR 8400 excludes from the various cutoff dates "initiatives to the legislature, and alternatives to initiatives to the legislature". SCR 8400. Mr. Ficalora argues that because he submitted petitions urging the adopting of the memorials, they constitute an "alternative to an initiative" and, therefore, the cutoff dates do not apply. Mr. Ficalora confuses a simple petition drive with an initiative.

The process that SCR 8400 excludes from cutoff dates is the procedure established by the state constitution for an "initiative to the Legislature." The constitution establishes two different kinds of initiatives, and Mr. Ficalora's petitions constitute neither. The constitution permits either an "intiative to the people" or "an initiative to the Legislature." Const. art. II, § 1(a). The two differ in terms of the consequences of securing sufficient signatures to qualify them to the

ballot. If an initiative to the people garners sufficient signatures, it is placed on the ballot for a vote by the people. *Id.* An initiative to the Legislature, in contrast, is presented to the Legislature, which can then either enact it, reject it, or propose an alternative. If the Legislature proposes an alternative, then both the original initiative and the alternative proceed to the ballot. *Id.*

Rather clearly, this is the process referred to in SCR 8400 as an exception to the usual set of cutoff dates. The constitution provides that the Legislature shall give priority to initiatives, suggesting a strong reason why it may choose not to apply its usual cutoff dates to such measures. *Id.* There is no reason to conclude, as Mr. Ficalora contends, that the Legislature intended to provide an exception to cover every measure that might bear some superficial similarity to an initiative, and therefore be described loosely as an "alternative".

The similarities between HJM 4022 and SJM 8021 and an initiative are exceedingly superficial. It is true that Mr. Ficalora, or others with whom he worked, gathered a few signatures on petitions, but the similarity begins and ends there. The copies of petitions submitted by Mr. Ficalora[3] bear no more than 1500 or so signatures.[4] In order to qualify an

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[3] Those petitions are reproduced as Attachment B to the bound Affidavit of Robert A. Ficalora In Support of Notice and Demand to the Washington State Legislature For Exception From Cutoffs Under SCR 8400.

[4] This is based on a quick and exceedingly rough count by counsel. It does not take into account, of course, that some signatures may represent duplicates or individuals

initiative, including qualifying an initiative for presentation to the Legislature, 197,734 valid signatures are required.[5] Mr. Ficalora submitted his petitions to the Legislature, asking that they adopt a memorial. Petitions for real initiatives are submitted to, and verified by, the Secretary of State. The presentation of an initiative involves additional preliminary steps, none of which Mr. Ficalora engaged in. These include an initial filing with the Secretary of State, review by the Code Reviser, the preparation of a title by the Attorney General, and finally the submission of signed petitions to the Secretary of State. *See generally* RCW 29.79.

Mr. Ficalora's pleadings offer no reason to believe that the use of the term "alternatives to initiatives" in SCR 8400 refers to anything other than the article II, section 1(a) procedure for an initiative to the Legislature and potential alternative. There is simply no reason to believe that it was intended to include a memorial that bears no similarity to an initiative other than the submission of a petition that was very different from petitions that support proposed initiatives.

In short, there is no basis upon which a court could conclude that these memorials are not subject to cutoff under SCR 8400.

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not registered to vote. The Secretary of State invariably identifies significant numbers of both when checking petitions supporting real initiatives. *See, e.g., Vangor v. Munro*, 115 Wn.2d 536, 538-39 798 P.2d 1151 (1990) (describing verification process).

[5] This represents 8% of the votes cast for Governor in 2000. Const. art. II, § 1(a).

V. CONCLUSION

For the foregoing reasons, this Court should dismiss this action with prejudice. Alternatively, if the case is not dismissed, it should be transferred to the Superior Court for Thurston County rather than retained in this Court.

RESPECTFULLY SUBMITTED this 9th day of April, 2003.

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