No. 77534-6

J.M. JOHNSON, J. (dissenting)—The Official Ballot Title submitted to the people for Initiative 692 (I-692) in 1998 asked: "Shall the medical use of marijuana for certain terminal or debilitating conditions be permitted, and physicians authorized to advise patients about medical use of marijuana?" *State of Washington Voters Pamphlet, General Election* 8 (Nov. 3, 1998). By overwhelming vote, the people of Washington enacted the law. Because today's majority decision deprives Sharon Tracy of the protections afforded by the people through this legislation, and allows her to be convicted of a crime for exercising that privilege, I dissent.

Article II, section 1 of the Washington Constitution provides the people the power to adopt such laws:

> The legislative authority of the state of Washington shall be vested in the legislature . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature . . . .
>
> . . . The first power reserved by the people is the initiative. . . .

Const. art. II, § 1.

Washington Constitution article II, section 1 was amended to provide that power early in the 20th century when demand grew for direct participation in

lawmaking. In 1912, the people ratified the seventh amendment to article II, section 1, which "reserved" to the people the powers of initiative and referendum.[1] *Fritz v. Gorton*, 83 Wn.2d 275, 281, 517 P.2d 911 (1974). Several subsequent amendments clarified the mechanisms by which these powers were exercised. Most important for this case is the thirty-sixth amendment, a constitutional mandate for a voters pamphlet, which the secretary of state must distribute to each residence. Each pamphlet must include the full initiative and a section describing the legal effect of the proposed measure, written by the state attorney general, as well as arguments for and against by proponents and opponents. As a consequence, we have informed voters.

This court recently reiterated our starting point for considering initiatives when dismissing a pre-election challenge to one proposed initiative, "the right of initiative is nearly as old as our constitution itself, deeply ingrained in our state's history, and widely revered as a powerful check and balance on the other branches of government. Accordingly, this potent vestige of our progressive era past must be vigilantly protected by our courts." *Coppernoll v. Reed*, 155 Wn.2d 290, 296-97, 119 P.3d 318 (2005) (citing *In re Estate of Thompson*, 103 Wn.2d 292, 294-95, 692

[1] The same year, voters ratified the eighth amendment (approved Nov. 1912) to Washington Constitution article I, section 33, allowing recall of all elective public officers, except judges.

P.2d 807 (1984)).

Pursuant to their initiative power, the people of Washington passed I-692, approving the use of marijuana by qualifying patients for enumerated medical purposes. *State v. Butler*, 126 Wn. App. 741, 748, 109 P.3d 493 (2005). The initiative has since been codified at chapter 69.51A RCW. The official ballot title communicated state permission for medical marijuana, with doctor advice. The constitutionally-required voters pamphlet also included I-692's statement of purpose: to allow persons suffering from specified medical conditions to use marijuana as part of their physician-directed treatment regimens without running the risk of prosecution for a drug crime. The voters pamphlet contained the following statement of purpose and intent:

> The People of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana. . . .
>
> The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.
>
> Therefore, The people of the state of Washington intend that:
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> Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their

possession and limited use of marijuana . . . .

Voters Pamphlet, supra, at 17 (codified at RCW 69.51A.005). Note that nowhere in this statement of policy was "physician" defined or restricted to those licensed by this state.

I-692 was passed by a margin of 59 percent to 41 percent of the vote.[2] The present case turns on whether, in enacting I-692, the people of Washington provided protection from prosecution for Ms. Tracy and others in her circumstance. It is hard to conclude to the contrary, as does the majority.

Factual Background

In 2002, while living part time in California to care for her terminally ill mother, Ms. Tracy visited a California physician regarding her own health. *State v. Tracy*, 128 Wn. App. 388, 391, 115 P.3d 381 (2005). Ms. Tracy sought treatment for chronic pain, which she has suffered for decades as a result of a hip deformity, migraine headaches, and a series of corrective surgeries. Majority at 4. To relieve her pain and lessen her dependence on addictive prescription painkillers, Ms. Tracy's California-licensed physician provided written authorization to possess and use marijuana in accordance with that state's comparable law. Cal. Health &

[2] Wash. Secretary of State, Previous Election, https://www.secstate.wa.gov/elections/previous_elections.aspx (follow "Election Results Search" hyperlink; then search "Ballot Measures" and "1998 General").

Safety Code §§ 11362.5, 11362.7 (Derring 2006); *Tracy*, 128 Wn. App. at 391.[3]

After receiving this doctor's authorization, Ms. Tracy purchased and used marijuana for medical purposes during the time she spent in California with her mother. *Tracy*, 128 Wn. App. at 391. She also continued to use this marijuana when she returned to her home in Skamania County, Washington. Ms. Tracy never purchased or sold marijuana in Washington. *Id.* However, after returning to Washington on a more permanent basis, Ms. Tracy did keep four marijuana plants at her home to grow marijuana for personal use. *Id.*

In March 2003, while visiting Ms. Tracy's home for an unrelated purpose, Detective Brett Robinson became aware of Ms. Tracy's marijuana use. *Id.* at 390-91. When questioned, Ms. Tracy readily admitted to possessing and using marijuana for medical purposes. *Id.* She also provided the police with her California medical marijuana card. Majority at 2. Ms. Tracy explained that she had not yet obtained a Washington medical marijuana card because she had not found a Washington doctor who "'believed in prescribing medical marijuana.'" *Tracy*, 128 Wn. App. at 391 (quoting clerk's papers).

Ultimately, Ms. Tracy was charged with one count of manufacturing

[3] I-692 applies to persons suffering from a variety of "debilitating illnesses" including "some forms of intractable pain." RCW 69.51A.005.

marijuana and one count of possessing more than 40 grams of marijuana. *Id.* at 390. The trial court granted the State's motion in limine to bar Ms. Tracy from raising a medical marijuana defense under I-692, over Ms. Tracy's objection. *Id.* at 392. Ms. Tracy was then convicted on both counts, following a bench trial on stipulated facts. *Id.* at 393. Division Two of the Court of Appeals affirmed this conviction, as does a majority of this court.

The majority, like the Court of Appeals and the trial court, concludes that Ms. Tracy is not entitled to raise an affirmative defense pursuant to I-692 because she is not a "'qualifying patient.'" Majority at 1. In particular, the majority finds that Ms. Tracy does not come within the definition of qualifying patient because she has not been treated by "a physician *licensed under chapter 18.71* or 18.57[4] RCW." RCW 69.51A.010(3)(a) (emphasis added). Majority at 7-8; 128 Wn. App. at 396-97.

The majority adopts a strict reading of the phrase "licensed under chapter 18.71." Namely, the majority concludes that a patient only qualifies if treated by a physician who possesses a Washington state medical license. Majority at 7-8. In adopting this definition, the court rejects Ms. Tracy's argument that the term

[4] Chapter 18.57 RCW covers osteopathic physicians and surgeons and is not relevant for purposes of this case.

"licensed under chapter 18.71" should be interpreted broadly, and as understood by the voters, to include doctors with Washington state licenses and also physicians validly licensed to practice medicine by other states and thus exempted from the licensing requirements of chapter 18.71 RCW. *See* RCW 18.71.030(6).[5]

Essentially, Ms. Tracy proposes that "licensed" be interpreted by this court as the voters understood it, and in accordance with its commonly accepted definition, to mean having permission or authority to act.[6] Under her reading of the statute, Ms. Tracy's physician in California would be considered "licensed," assuming he acted in compliance with RCW 18.71.030(6).

Ms. Tracy correctly points out that initiatives susceptible to reasonable alternative interpretations, such as I-692, are to be construed in order to effectuate the intent of the electorate. *State ex rel. Public Disclosure Comm'n v. Wash. Educ. Ass'n*, 156 Wn.2d 543, 554, 130 P.3d 352 (2006). Moreover, remedial statutes are

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[5] RCW 18.71.030 provides, in relevant part:

> Nothing in this chapter shall be construed to apply to or interfere in any way with the practice of religion or any kind of treatment by prayer; nor shall anything in this chapter be construed to prohibit:
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> . . . .
>
> (6) The practice of medicine by any practitioner licensed by another state or territory in which he or she resides, provided that such practitioner shall not open an office or appoint a place of meeting patients or receiving calls within this state . . . .

[6] Webster's Third New International Dictionary 1304 (2002)

to be construed liberally to further their remedial purposes. *State v. Grant*, 89 Wn.2d 678, 685, 575 P.2d 210 (1978).

Because initiatives are not accompanied by the usual sources of legislative history, such as committee files and bill reports, courts look to the constitutionally-required voters pamphlet to determine the meaning and purposes of the measures. *Wash. Educ. Ass'n*, 156 Wn.2d at 554; *Wash. State Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973). As noted above, the ballot title of I-692 clearly covers Ms. Tracy and others like her. The purpose language contained in the voters pamphlet for I-692 (*see supra*) also includes broad statements in favor of providing access to medical marijuana for patients suffering from certain terminal or debilitating illnesses.

Finally, the description of the legal effect of I-692, written by the attorney general for the voters pamphlet, describes qualifying patients as those treated by "physicians" or "licensed physicians"—it does not restrict this legislation to physicians with Washington medical licenses. Accordingly, the phrase "licensed under chapter 18.71" should be given a reasonable interpretation, which protects all patients whom the people of Washington intended to protect when they adopted the law.

Today, as when I-692 was enacted, Washington law permits out-of-state physicians, who are licensed in their home states, to treat patients who are residents of the state of Washington without obtaining a Washington medical license. *See* RCW 18.71.030(6); *see also* RCW 69.41.030 (recognizing legend drug prescriptions from physicians "licensed . . . in any state of the United States"). The treatment of patients includes the administration of drugs. RCW 18.71.011(2). Had Ms. Tracy's California physician given her a prescription for Vicodin,[7] one of the addictive pain medications which she was trying to avoid with the help of small amounts of marijuana, that prescription would be legal, and she could have filled the prescription at any Washington pharmacy. *See* RCW 69.50.101(w)(3); RCW 69.50.308(b).

The majority offers no persuasive rationale for holding that the people of Washington understood, let alone intended, that an otherwise qualified patient would be excluded from protection by I-692 simply because the patient's treating physician was licensed in California or Oregon rather than Washington. Thus, it contradicts established canons of statutory construction to interpret I-692 in the manner advocated by the majority. The majority also violates special canons for

[7] *Tracy*, 128 Wn. App. at 391 n.4 ("Vicodin is a narcotic similar to codeine." (citing Physicians' Desk Reference 525 (58th ed. 2004))).

initiative interpretation. "In determining intent from the language of the statute, the court focuses on the language as the average informed voter voting on the initiative would read it." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000).

The majority may believe that permitting out-of-state physicians to prescribe marijuana to otherwise qualified patients under Washington law is an unwise policy (or that medical marijuana is a bad policy). However, "'[i]t is not the prerogative nor the function of the judiciary to substitute what they may deem to be their better judgment for that of the electorate in enacting initiatives . . . unless the errors in judgment clearly contravene state or federal constitutional provisions.'" *Amalgamated Transit*, 142 Wn.2d at 206 (alteration in original) (quoting *Fritz*, 83 Wn.2d at 287). No such constitutional violation is threatened by Ms. Tracy's common sense interpretation of I-692.

The majority concedes that "Tracy may have been exactly the kind of patient the voters of this State had in mind when they enacted the medical marijuana initiative, I-692, in 1999." Majority at 4-5. Because I-692 may be reasonably interpreted to effectuate the people's intent to protect people like Ms. Tracy, and because I believe it is this court's duty to respect and protect the people's

constitutional right to make such decisions through the initiative process, I respectfully dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:

Justice Barbara A. Madsen

Justice Richard B. Sanders