No. 78637-2

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE FARM BUREAU FEDERATION; *et al.*,

Respondents,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; *et al.*

Appellants.

(PROPOSED) AMICUS BRIEF OF:
(1) WASHINGTON EDUCATION ASSOCIATION;
(2) WASHINGTON FEDERATION OF STATE EMPLOYEES AFL-CIO; &
(3) WASHINGTON STATE LABOR COUNCIL

Hugh D. Spitzer, WSBA No. 5827
Attorneys for (Proposed) Amici
Washington Education Association,
Washington Federation of State
Employees, and Washington State
Labor Council

FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
www.foster.com ◆ 206-447-4400

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 OCT 26 PM 4:55

Original

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. INTEREST OF AMICI 2

A. Washington Education Association. 2

B. Washington Federation Of State Employees AFL-CIO. 2

C. Washington State Labor Council, AFL-CIO. 3

III. STATEMENT OF THE CASE 4

IV. ARGUMENT 5

A. Initiative 601 Is Unconstitutional Because The People Lack The Power To Subject An Entire Class Of Future Legislation To Voter Approval 5

1. In 1889, The People Surrendered Their Legislative Power To The Legislature, And Did Not Create or Preserve Any Right Or Ability To Exercise Direct Democracy. 5

2. In 1912, The People Amended The Constitution To Grant Themselves The Identical Powers Of The Legislature Through Initiative, Along With A Carefully Defined Referendum Power. 6

(a) The People's initiative power is identical to the Legislature's powers. 7

(b) The referendum power is carefully defined to allow the People or the Legislature to determine if a particular piece of legislation should be subject to a vote of the People 8

3. The Constitution Cannot Be Amended By Initiative.....9

4. Intitiative 601 Is Unconstitutional Because It Seeks To Amend Article II, Section 1(b) By Subjecting An Entire Class Of Future Legislation To Voter Approval. 9

B. The Court's Opinion In *Amalgamated Transit Union* Cannot Be Distinguished.....11

1. The Fact That Initiative 601 Acts On A Narrower Class Of Legislation Than Initiative 695 Does Not Save Initiative 601. 11

2. The Fact That The Legislature Re-Enacted Initiative 601 Does Not Save The Initiative. 12

C. *Amalgamated Transit Union*'s Analysis Of Article II, Section 1(b) Is Not *Obiter Dictum*.....13

D. Initiative 601 Is An Unconstitutional Attempt To Circumvent Article II, Section 1(b)'S Express Exemption Of State Tax Measures From Referendum.....14

E. The Voter Approval Provision Is Not Severable From The Remainder Of Initiative 601. 15

V. CONCLUSION.....17

TABLE OF AUTHORITIES

Page

Cases

Amalgamated Transit Union Local 587 v. State,
142 Wn.2d 183, 11 P.3d 762 (2000) .....passim

Anderson v. Howell,
106 Wash. 542, 181 P. 37 (1919) 14

Berry v. Superior Court,
92 Wash. 16, 159 P. 92 (1916) 5

Brower v. State,
137 Wn.2d 44, 969 P.2d 42 (1998) 9

Citizens for Financially Responsible Gov't v. City of Spokane,
99 Wn.2d 339, 662 P.2d 845 (1983) 5

Culliton v. Chase,
174 Wash. 363, 25 P.2d 81 (1933) 9

DCR, Inc. v. Pierce County,
92 Wn. App. 660 (1998) 13

Farris v. Munro,
99 Wn.2d 326, 662 P.2d 821 (1983) 15

Gerberding v. Munro,
134 Wn.2d 188 (1998) 9

Hall v. Niemer,
97 Wn.2d 574, 649 P.2d 98 (1982) 16, 17

Larson v. Seattle Popular Monorail Authority,
156 Wn.2d 752, 131 P.3d 892 (2006) 14

Leonard v. City of Spokane,
127 Wn.2d 194, 897 P.2d 358 (1995) 16

Love v. King County,
181 Wash. 462, 44 P.2d 175 (1935) 7

Lynden Transport, Inc. v. State,
112 Wn.2d 115, 768 P.2d 475 (1989) 16

Milwaukee Terminal RR Co. v. City of Seattle,
86 Wash. 102, 149 P. 644 (1915) 14

Priorities First v. City of Spokane,
93 Wn. App. 406, 968 P.2d 431 (1998) 16

Reiter v. Hinkle,
161 Wash. 652, 297 P. 1071 (1931) 14

Ruano v. Spellman,
81 Wn.2d 820, 505 P.2d 447 (1973) 6

Sloan v. Lemon,
413 U.S. 825, 93 S. Ct. 2982, 37 L. Ed. 2d 939 (1973) 16

Wash. State Farm Bureau v. Reed,
154 Wn.2d 668 (2005) 14, 15

Constitutions & Statutes

Washington State Constitution Article II, section 1 ..... passim

RCW § 43.135.025 4

RCW § 43.135.035 10

RCW § 43.135.035(1) 4

RCW § 43.135.035(2)(a) 4

RCW § 43.135.035(3) 15

RCW § 43.135.035(3)(a) 15

RCW § 43.135.101(4)(f) 17

I. INTRODUCTION

Under the Washington Constitution, there is no inherent right of the People to pass initiatives or referenda. In Washington's 1889 constitution, the People surrendered the entirety of their legislative power to the Legislature. Until the Seventh Amendment was adopted, the Legislature itself lacked the ability to submit legislation to a vote of the People.

Upon the adoption of the Seventh Amendment in 1912, the People regained some legislative powers. First, the Seventh Amendment gave the People the initiative: the power to enact legislation that was identical to the power of the Legislature.

The Seventh Amendment also created the power of referendum. The People could challenge legislation by submitting a petition with the appropriate number of signatures. The Legislature was also granted a power to condition an individual piece of legislation on voter approval.

The Seventh Amendment fully defines the People's initiative and referendum powers. Nothing in the Seventh Amendment gave the People or the Legislature the ability to condition an entire class of future legislation on voter approval.

Initiative 601 is an attempt to amend the constitution by creating a presumptive veto and an automatic referendum requirement without complying with the requirements of the Seventh Amendment. This allows "referendum on the cheap." But the initiative process cannot amend

Washington's constitution or its constitutionally prescribed processes. Therefore, Initiative 601 is unconstitutional.

Finally, Initiative 601 is also unconstitutional because it conflicts with Article II, section 1(b)'s express exemption of tax measures from referendums.

II. INTEREST OF AMICI

A. Washington Education Association.

The Washington Education Association is a state-wide organization of approximately 80,000 education employees in our State. The Washington Education Association is a Washington non-profit corporation founded in 1889, the year Washington's constitution was adopted. The Washington Education Association's mission statement is "to make public education the best it can be for students, staff, and communities."

Under Article IX of the Washington State Constitution, the state's paramount duty is to fund education. The WEA and its members have an interest in ensuring that the State has the ability to generate sufficient funds to meet its obligation to the school children of our state.

B. Washington Federation of State Employees AFL-CIO.

Washington Federation of State Employees is the largest of the local unions that represent state employees. It has over 19,000 members, who work throughout the entire state. As part of its mission, WFSE works to ensure adequate funding for the many programs staffed by its members.

As a representative of state employees, WFSE also has a direct interest in ensuring that the State has the ability to generate sufficient funds to meet its obligation to the State employees charged with implementing the policies and programs mandated by elected officials and the voters.

C. Washington State Labor Council, AFL-CIO.

Widely considered to be the "voice of labor" in Washington State, the Washington State Labor Council, AFL-CIO, represents and provides services for hundreds of local unions and trade councils throughout Washington state. The WSLC's core programs are legislative advocacy, political action, communications and media relations, and assistance with organizing campaigns.

Currently, there are more than 500 local unions affiliated with the WSLC, representing approximately 400,000 rank-and-file union members working in our state, including approximately 32,300 state employees represented by 53 different locals, including the Washington Federation of State Employees. The WSLC is the largest labor organization in our state and is the only organization representing all AFL-CIO unions in the state.

As a representative of state employees, WSLC has a direct interest in ensuring that the State has the ability to generate sufficient funds to meet its obligation to State employees.

III. STATEMENT OF THE CASE

Initiative 601 was passed by the voters by a thin margin in 1993: 774,342 for, 737,735 against.[1] Currently codified at chapter 43.135 RCW, the initiative provides that "any action or combination of actions by the legislature that raises state revenue or requires revenue-neutral tax shifts may be taken only if approved by a two-thirds vote of each house, and then only if state expenditures in any fiscal year, including the new revenue, will not exceed the state expenditure limits established under this chapter." RCW 43.135.035(1). It then provides: "If the legislative action under subsection (1) of this section will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people at a November general election." RCW 43.135.035(2)(a). Finally, the initiative provides a formula for determining the "state expenditure limit." RCW 43.135.025.

The initiative therefore conditions all future tax legislation that will result in expenditures above statute's state expenditure limit on voter approval, *even when the People have not submitted a petition* seeking such a referendum or *the legislature has not exercised its discretion* to submit the legislation to referendum.

[1]See www.secstate.wa.gov/elections/initiatives/statistics_initiatives.aspx.

IV. ARGUMENT

A. Initiative 601 Is Unconstitutional Because The People Lack The Power To Subject An Entire Class Of Future Legislation To Voter Approval.

"Article II, section 1(b) defines the legislative, intitiative and referendum powers of *state* government." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 230-31, 11 P.3d 762 (2000) ("*ATU*") (citing *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 349, 662 P.2d 845 (1983)). "[A]bsent a constitutional amendment" Article II, section 1(b) does not permit "conditioning *all* future *state* measures of a certain class on voter approval". *ATU* at 242.

In *Amalgamated Transit Union*, this Court held that Initiative 695 was unconstitutional, in part because it purported to condition an entire class of legislation — all tax legislation — on voter approval before such legislation could be effective. *ATU*, 142 Wn.2d at 241-42, 244.

Under *Amalgamated Transit Union* and the extensive history of case law cited and relied upon in that opinion, Initiative 601 is similarly unconstitutional because it also conditions all future state legislation of a certain class — legislation increasing taxes so that state expenditures exceed the state expenditure limit — on voter approval.

1. In 1889, The People Surrendered Their Legislative Power To The Legislature, And Did Not Create or Preserve Any Right Or Ability To Exercise Direct Democracy.

"The people in their legislative capacity are not . . . superior to the written and fixed constitution." *ATU*, 142 Wn.2d at 239 (quoting *State ex rel. Berry v. Superior Court*, 92 Wash. 16, 26, 159 P. 92 (1916)). When

the People adopted the constitution in 1889, they surrendered their legislative power by vesting it in the Legislature under the original Article II, section 1. *ATU*, 142 Wn.2d at 238. By doing so, the People opted for representative, as opposed to direct, democracy. *See ATU*, 142 Wn.2d at 242.

Because the original version of Article II, section 1(b) vested complete authority in the Legislature, the Legislature itself "lacked the authority to condition measures on a vote of the people." *ATU*, 142 Wn.2d at 241. "[T]he right to act directly through either the initiative or referendum is not an inherent right of the People. In fact, that right was nonexistent under our state constitution until Amendment 7 was adopted in 1912." *ATU*, 142 Wn.2d at 238 (quoting *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973)). If such powers had been inherent powers, "there would have been no need for adoption of the Seventh Amendment." *ATU*, 142 Wn.2d at 241 n.18.

2. In 1912, The People Amended The Constitution To Grant Themselves The Identical Powers Of The Legislature Through Initiative, Along With A Carefully Defined Referendum Power.

Twenty-two years after surrendering their legislative powers to the Legislature, the People of Washington State passed the Seventh

Amendment[2] to take back some of that power by granting themselves the power of initiative and referendum. *ATU*, 142 Wn.2d at 238. The Seventh Amendment, "Article II, section 1(b)[,] . . . describes how the reserved powers of the people are to be exercised." *ATU*, 142 Wn.2d at 231.

Under the Seventh Amendment, the People may subject a piece of legislation to voter approval by submitting a petition with signatures of four percent of the voters. Article II, section 1(b); *ATU*, 142 Wn.2d at 242. The amendment also allows the Legislature to refer a particular measure to the voters for voter approval, at the Legislature's discretion. Article II, section 1(b); *ATU* at 231, 232 n.13.

(a) The People's initiative power is identical to the Legislature's powers.

To determine the scope of the People's intitiative power under the Seventh Amendment, it is necessary to "identify[] the scope of the Legislature's power before the people's adoption of the Seventh Amendment" because "the people reserved the right to legislate — 'exercise[ing] the same power of sovereignty as that exercised by the Legislature'". *ATU*, 142 Wn.2d at 239, 241 (quoting in part, *Love v. King County*, 181 Wash. 462, 469, 44 P.2d 175 (1935)).

---

[2] Article II, section 1 has been amended on four occasions since the Seventh Amendment, but these amendments did not affect the two basic requirements relevant in the case before the court: that the People must obtain signatures to subject legislation to referendum, and the legislature may refer a particular piece of legislation to voter approval. See S.S.J. Res. 7, Laws of 1951, p. 959 (amend. 26); S.J. Res. 4, Laws of 1955, p. 1860 (amend. 30); S.J. Res. 9, Laws of 1961, p. 2751 (amend. 36); S.S.J. Res. 1233, Laws of 1981 (amend. 72). Accordingly, this brief will use the "Seventh Amendment" to refer to Article II, section 1 after 1912.

"Because the Legislature lacked power to condition state measures solely on statewide voter approval, the same is true of the people exercising their legislative power once the initiative and referendum rights were reserved." *ATU*, 142 Wn.2d at 241. "Neither the Legislature nor the people acting in their legislative capacity has the power to *condition* a state law solely on voter approval". *ATU*, 142 Wn.2d at 241.

(b) The referendum power is carefully defined to allow the People or the Legislature to determine if a particular piece of legislation should be subject to a vote of the People.

The Seventh Amendment does grant the People the power to approve or disapprove legislation, but "the right must be exercised in conformity with the constitutionally mandated procedures" as described in Article II, section 1(b). *ATU*, 142 Wn.2d at 242. The Seventh Amendment "specifically set[s] forth the manner in which [the initiative and referendum] powers may be exercised. *ATU*, 142 Wn.2d at 238.

This means that the referendum proponents must satisfy "the four percent voter signature requirement <u>each</u> <u>time</u> the people petition for a referendum on a piece of legislation the Legislature has passed." *ATU*, 142 Wn.2d at 242 (emphasis added). The Legislature can also "refer a measure to the people for a statewide vote . . . . through the referendum process set forth in article II, section 1."[3] *ATU*, 142 Wn.2d at 242. But the Seventh Amendment requires that the Legislature maintain the "<u>discretionary</u> authority to refer measures it passes to the people." *ATU*,

[3] **NOTE**: The Westlaw version of the *ATU* opinion abbreviates and misquotes the official reporter by citing to "art. <u>I</u>, § 1(b)". The official reporter properly cites to "article <u>II</u>, section 1(b)." *ATU*, 142 Wn.2d at 242.

142 Wn.2d at 232 n.13 (citing *Brower v. State*, 137 Wn.2d 44, 56, 969 P.2d 42 (1998)) (emphasis added). The referendum power accordingly works only on "a particular measure" and cannot be used to "condition[] *all* future *state* measures of a certain class on voter approval". *ATU*, 142 Wn.2d at 242.

3. The Constitution Cannot Be Amended By Initiative.

"The initiative process cannot be used to amend the constitution." *ATU*, 142 Wn.2d at 232 (citing *Gerberding v. Munro*, 134 Wn.2d 188, 210 n.11, 949 P.2d 1366 (1998)); *see also Culliton v. Chase*, 174 Wash. 363, 373-74, 25 P.2d 81 (1933). When exercising the initiative power, the People "must conform to the constitution, just as the Legislature must do when enacting legislation." *ATU*, 142 Wn.2d at 232. "The state constitution does not provide that the initiative power can be used to alter the method by which the referendum power is exercised." *ATU*, 142 Wn.2d at 232.

4. Intitiative 601 Is Unconstitutional Because It Seeks To Amend Article II, Section 1(b) By Subjecting An Entire Class Of Future Legislation To Voter Approval.

In *Amalgamated Transit Union*, this Court held that Initiative 695 was unconstitutional because it "effectively authorized mandatory referendum elections on all future tax legislation passed by the Legislature". *ATU*, 142 Wn.2d at 231-32. This mandatory referendum election was required even "where the Legislature has not referred the legislation" to the People and "without regard to the four percent signature requirement." *ATU*, 142 Wn.2d at 232, 244. The Seventh Amendment is

meant to allow a referendum when there is public opposition or controversy over a particular measure, but Initiative 695 created "a presumptive veto" by establishing a mandatory referendum "without regard to whether a particular piece of legislation would engender enough interest or opposition" to force a referendum under those constitutional requirements. *ATU*, 142 Wn.2d at 231-32. Accordingly, Initiative 695 was held unconstitutional because it effectively amended the constitution by "chang[ing] the way in which a piece of legislation is enacted." *ATU*, 142 Wn.2d at 244.

Initiative 601 suffers from the identical fault. It requires a tax increase that "will result in expenditures in excess of the statute expenditure limit [a formula contained in the initiative], then the action of the legislature shall not take effect until approved by a vote of the people at a November general election." RCW 43.135.035 (codifying Initiative 601, §4, as amended). It therefore "effectively authorized mandatory referendum elections on all future tax legislation passed by the Legislature" that increases expenditures above the state expenditure limitation. See *ATU*, 142 Wn.2d at 232. This amounts to "conditioning *all* future *state* legislation of a certain class on voter approval" which cannot be done "absent a constitutional amendment". And the People cannot use the initiative process to amend the constitution. See *ATU*, 142 Wn.2d at 242. Accordingly, Initiative 601, like Initiative 695, is unconstitutional.

B. The Court's Opinion In *Amalgamated Transit Union* Cannot Be Distinguished.

Recognizing the force of the Court's opinion in *Amalgamated Transit Union*, the respondents try to distinguish it by arguing that Initiative 601 applies to a narrower class of legislation than Initiative 695, and that the Legislature has re-enacted the initiative when amending it. Neither ground is legally significant.

1. The Fact That Initiative 601 Acts On A Narrower Class Of Legislation Than Initiative 695 Does Not Save Initiative 601.

This Court was very clear in distinguishing between situations where the Legislature has placed a voter-approval requirement on a "particular measure", and "conditioning *all* future *state* measures of a certain class on voter approval." *ATU*, 142 Wn.2d at 242 (underscore emphasis added). The former is permissible, and the latter is not. This is because, if the People could pass an initiative conditioning any class of legislation on voter approval, "it would mean that voters could pass several initiatives, each requiring every measure of a certain class passed by the Legislature to be submitted to the voters for approval." *ATU*, 142 Wn.2d at 242. This would allow the voters — in a piecemeal fashion — to completely erode the Legislature's ability to enact legislation. *ATU*, 142 Wn.2d at 242. "Such a result would be inconsistent with the representative form of government in this state." *ATU*, 142 Wn.2d at 242.

Accordingly, while it is true the Court stressed the broad reach of Initiative 695 because it applied to all future tax legislation, if the Court were to permit the People to use the initiative process to subject a

somewhat narrower class of tax legislation to voter approval, the People could then pass a series of initiatives, each aimed at a subclass of tax legislation, but collectively encompassing all tax legislation. The only relevant distinction recognized by this Court in *Amalgamated Transit Union*, is the difference between a single statewide measure and subclasses identified in future measures. The Seventh Amendment grants the Legislature the discretion to determine whether a particular measure should be referred to the People, and cannot be used to eliminate the discretion by requiring all future legislation of a particular class be subjected to referendum. *See ATU*, 142 Wn.2d at 232 n.13. Initiative 601 operates on an entire class, and is therefore unconstitutional.[4]

2. The Fact That The Legislature Re-Enacted Initiative 601 Does Not Save The Initiative.

The fact that the Legislature has re-enacted Initiative 601 is irrelevant. One of the cornerstones of the Court's opinion in *Amalgamated Transit Union* was that the Legislature did not have the inherent power to refer measures for voter approval. *ATU*, 142 Wn.2d at 241. The Legislature's power to refer measures is therefore fully defined by the Seventh Amendment, which only allows the Legislature to refer a particular measure to the voters, not an entire class of measures. *ATU*, 142 Wn.2d at 231-32, 242. Thus, the Legislature lacked the power to enact the

[4] The Court also recognized that the Legislature could delegate the authority to municipal governments to decide local measures, including local taxes, but distinguished local measures from statewide measures. *ATU*, 142 Wn.2d at 243-44. Initiative 601 affects statewide measures and accordingly, this exception does not apply.

limitations contained in Initiative 601 in the first place, and could not save the initiative by re-enacting it.

C. *Amalgamated Transit Union*'s Analysis Of Article II, Section 1(b) Is Not *Obiter Dictum.*

The thrust of the respondents' attack on the Court's analysis of Article II, section 1(b) in *Amalgamated Transit Union* is their claim that the analysis is *obiter dictum*. But respondents fail to fully define *obiter dictum*, and if they had, they would have concluded that the Court's analysis does not meet the definition.

Two requirements must be met before a court will consider an earlier ruling as *obiter dictum*. First, the prior statements must "not relate to an issue before the court". *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 n.16, 964 P.2d 380 (1998). Second, the statements must be "unnecessary to decide the case". *DCR*, 92 Wn. App. at 683 n.16.

In *Amalgamated Transit Union*, however, the Court's decision on Article II, section 1(b) was an alternate holding, not a statement on an unrelated issue not before the Court. "[W]here a case presents two or more points, any one of which is sufficient to determine the ultimate issue, but the court actually decides all such points, the case is an authoritative precedent as to every point decided, and none of such points can be regarded as having merely the status of a *dictum*". 21 C.J.S. *Courts* § 143 (2006). As this Court has noted, "[i]t may be that the case could have been rested on the first ground suggested in the opinion, . . . but both questions were clearly in the case, and simply because the court decided both does not necessarily mean that the one or the other is *dictum*."

Milwaukee Terminal RR Co. v. City of Seattle, 86 Wash. 102, 105, 149 P. 644 (1915) (quotation omitted).

This Court entered its ruling on Article II, section 1(b) after the issue was squarely presented to the Court. The Court carefully considered the relevant and binding precedent and found that Initiative 695 violated Article II, section 1(b). The analysis served as an independent ground for finding the initiative unconstitutional. This Court reaffirmed that holding in *Larson v. Seattle Popular Monorail Authority*, 156 Wn.2d 752, 759, 131 P.3d 892 (2006). It is accordingly *stare decisis* and binding authority, not *obiter dictum*.[5]

D. Initiative 601 Is An Unconstitutional Attempt To Circumvent Article II, Section 1(b)'s Express Exemption of State Tax Measures From Referendum.

Article II, section 1(b) bars referenda on any legislation "necessary for . . . support of the state government and its existing institutions" from referendum. *See Wash. State Farm Bureau v. Reed*, 154 Wn.2d 668, 673 & n.3, 115 P.3d 301 (2005) ("*Farm Bureau*") (analyzing Article II, section 1(b) in an attempt to allow a referendum on the legislation at issue in this current appeal); *see also State ex rel. Reiter v. Hinkle*, 161 Wash. 652, 657-58, 297 P. 1071 (1931); *State ex rel. Anderson v. Howell*, 106 Wash. 542, 181 P. 37 (1919). Any legislation that "generates revenue for the state is deemed support" for the purposes of this exemption. *Farm*

[5] Even if it were considered "*dictum*," it would be "*judicial dictum*" and still binding, not "*obiter dictum*." *See* Justice Robert F. Utter, *Swimming In The Jaws Of The Crocodile: State Court Comments On Federal Constitutional Issues When Disposing Of Cases On State Constitutional Grounds*, 63 Tex. L.R. 1025, 1047-48 (1985) (noting that when a state court rules on state constitutional grounds and federal constitutional grounds, the second ruling is *judicial dictum* and binding, rather than *obiter dictum*).

Bureau, 154 Wn.2d at 678 (quoting *Farris v. Munro*, 99 Wn.2d 326, 336, 662 P.2d 821 (1983).

Initiative 601, by purporting to require an automatic mandatory referendum on certain tax legislation, conflicts with the provision in Article II, section 1(b) providing that state tax legislation is not subject to referendum. If the People do not have the power under Article II, section 1(b) to force a referendum on tax legislation when the Legislature deems it necessary for the support of state institutions, then the People cannot use the initiative power to force referendums on such legislation. See *ATU*, 142 Wn.2d at 242 (holding the People cannot amend the constitution by initiative). Accordingly, Initiative 601 is unconstitutional for this independent reason as well.

The drafters of Initiative 601 tried to avoid this limitation by allowing for the "declaration of an emergency". RCW 43.135.035(3). This clause, however, limits "emergencies" to those caused by natural disasters. RCW 43.135.035(3)(a). In contrast, under Article II, section 1(b), the Legislature's power to enact support legislation exempt from referendum "does not require immediacy or an emergency." *Farm Bureau*, 154 Wn.2d at 673-74. The inclusion of this limited emergency power in Initiative 601 thus compounds, rather than cures, the initiative's constitutional flaw.

E. The Voter Approval Provision Is Not Severable From The Remainder Of Initiative 601.

Although Initiative 601 contains a severance clause, the unconstitutional provision requiring voter approval cannot be severed

from the rest of the initiative. The existence of a severability clause in an act is not dispositive on the issue of whether the legislative body would have enacted the remainder of the act. *ATU*, 142 Wn.2d at 228, "[A] severability clause will not save other portions of the act [1] if the court nonetheless decides that the Legislature probably would not have passed the remaining portion of the act without the invalid part[,] or [2] if we believe the remaining valid enactment would not reasonably accomplish the legislative purpose." *Lynden Transport, Inc. v. State*, 112 Wn.2d 115, 124, 768 P.2d 475 (1989) *see also Priorities First v. City of Spokane*, 93 Wn. App. 406, 413, 968 P.2d 431 (1998) (holding unconstitutional voter-approval requirement was not severable).

Under the first prong of the severance analysis, it is not sufficient to find that a statute can still achieve some, but not all, of its intended purposes. *Hall v. Niemer*, 97 Wn.2d 574, 583-84, 649 P.2d 98 (1982). If the unconstitutional portions of the statute eliminate a key component of the act, the Court will throw out the entire act. *Leonard v. City of Spokane*, 127 Wn.2d 194, 202, 897 P.2d 358 (1995). Said another way, if giving effect to a severance clause would "create a program quite different from the one the legislature actually adopted," the Court should rule the entire act unconstitutional. *Sloan v. Lemon*, 413 U.S. 825, 833-34, 93 S. Ct. 2982, 37 L. Ed. 2d 939 (1973).

Under the second prong of the severance analysis, the Court cannot determine that an act is severable simply by finding that the people would have voted for the constitutional portions of the act if those sections were

presented in a separate bill or initiative; rather, the Court must consider the purposes of the entire act and determine whether the voters would have voted for it knowing that certain portions would be ineffective. *See Hall*, 97 Wn.2d at 582-83 (recognizing that the legislature would likely have passed a bill containing just the constitutional portion of the act at issue, but finding the entire act unconstitutional because the constitutional portions of the act could not achieve all of its express purposes).

Here, it cannot be assumed the People would have enacted Initiative 601 if they know the voter-approval provision was unconstitutional and the initiative effectively amounted to a complete bar on legislation raising taxes above the state expenditure limit. One of the express purposes codified in Initiative 601 is to "[p]rovide for voter approval of tax increases." RCW 43.135.101(4)(f). If the voter-approval provision were severed from the remainder of the initiative, it would serve as a complete bar on new tax legislation, defeating this express purpose. Thus, Initiative 601 cannot achieve one of its fundamental purposes and it cannot be assumed that the People would have enacted it, knowing it contained this complete bar. As a result, the entire initiative is unconstitutional.

V. CONCLUSION

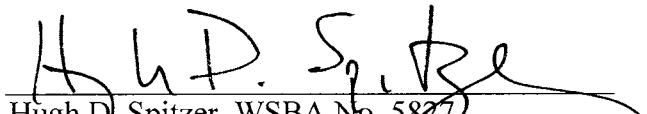
The Washington State Constitution and the Seventh Amendment strike a balance between the powers of the Legislature and the People. Each group has the identical power to enact legislation. And each group has the discretion to seek a referendum on any particular piece of

legislation. The Legislature exercises this discretion by referring particular measure to the People. The People exercise their discretion regarding a specific legislative enactment by submitting a petition with the appropriate number of signatures.

Initiative 601 seeks to upset this constitutionally-prescribed balance by requiring that an entire class of tax legislation be automatically conditioned on voter approval. The initiative is unconstitutional because it seeks to amend Article II, section 1(b) by eliminating the Legislature's discretion and relieving the People of their responsibility to collect sufficient signatures. When the People enacted the Seventh Amendment, they could have required an automatic referendum such as this. But they did not. Instead, they chose to allow for a referendum when there was a specific controversy significant enough to prompt the People or the Legislature to force a referendum. The People cannot use the initiative process to rewrite the Seventh Amendment. Only another constitutional amendment can do that. Accordingly, the Court should rule Initiative 601 unconstitutional.

RESPECTFULLY SUBMITTED this 26th day of October 2006.

FOSTER PEPPER PLLC



Hugh D. Spitzer, WSBA No. 5827
Attorneys For Amici Washington Education Association, Washington Federation Of State Employees AFL-CIO & Washington State Labor Council