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BY RONALD R. CARPENTER

No. 80430-3

SUPREME COURT OF THE STATE OF WASHINGTON

FUTUREWISE and SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE 775NW,

Appellants,

v.

SAM REED,

Respondent.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY.....1

II. ARGUMENT.....3

A. There is no legal or policy rationale for deferring the scope analysis until after the election.....3

1. The parties agree that this Court is to conduct pre-election review to determine whether the subject matters of I-960 are proper for direct legislation.....3

2. The Court should reject Respondent's syllogistic argument that would allow improper subject matters on the ballot.....5

3. Allowing improper subject on the ballot deceives voters and degrades the initiative process.....6

4. This Court has a special duty to police the ballot when the mere placement of an improper measure on the ballot threatens to seriously disrupt the function and revenue of State Government.....9

B. Unlike the measure in Coppernoll, I-960 is beyond the scope of the initiative process because it attempts to modify the fundamental, organic laws of the state, which can only be changed by constitutional amendment.....10

1. Under *ATU*, the initiative process does not extend to measures that seek to alter the referendum process.....12

2. *Alaskans for Efficient Government* and *ATU* show that I-960 exceeds the initiative process by seeking to amend/replace the Constitution's explicit vote passage requirements.....15

3. The availability of a constitutional amendment process creates a "subject matter restriction" preventing

initiatives on matters that are properly addressed by constitutional amendment.....16

C. I-960's multiple amendments to existing law create a completely new statutory regime with significant uncertainties.....18

1. For example, it is unclear whether I-960 adds Washington to the list of nine states that require supermajorities for passage of appropriation bills.....19

2. Allowing I-960 to proceed to the ballot would lead to future expansion of supermajority requirement.....21

D. The entire measure should be removed from the ballot and/or invalidated.....22

III. CONCLUSION.....23

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

1000 Friends of Washington v. McFarland,
159 Wn.2d 165 (2006).....17

Amalgamated Transit Union ("ATU") v. Washington,
142 Wn.2d 183, 198, 216; 11 P.3d. 762, 776, 786 (2000).....passim

City of Sequim v. Malkasian,
157 Wn.2d 251, 260, 138 P.3d 943 (2006).....4, 14

Coppernoll v. Reed,
155 Wn.2d 290, 297, 119 P.3d 318 (2005).....passim

Philadelphia II v. Gregoire,
128 Wn.2d 707, 911 P.2d 389 (1996).....4

Sofie v. Fireboard Corp.,
112 Wn.2d 636, 771 P.2d 711 (1989).....14

Washington Farm Bureau v. Gregoire,No. 78637-2
Case pending.....1, 14

Washington State Labor Council v. Reed,
149 Wn.2d 48, 56 (2003).....9

Out of State Cases

Alaskans for Efficient Government v. State of Alaska,
153 P.3d 296 (2007).....11, 15, 16, 17, 21, 22

Statutes

RCW 28B.85.060.....4

RCW 43.63A.470.....4

RCW 74.12.340.....4

RCW 43.135.035.....18

RCW 43.135.035(1).....19

RCW 43.135.035(2)(a).....14, 19

Constitutional Provisions

Wa. Const. Art. II, § 1.....3, 6, 10, 15

Wa. Const. Art. II, § 1(b).....13

Wa. Const. Art. II, § 1(c).....21

Wa. Const. Art. II, § 5.....3

Wa. Const. Art. II, § 14.....3

Wa. Const. Art. II, § 19.....3

Wa. Const. Art. II, § 21.....11

Wa. Const. Art. II, § 37.....3

Wa. Const. Art. II, § 41.....21

Wa. Const. Art. IV, § 1.....12

Wa. Const. Art. XXIII.....13, 16

Wa. Const. Art. XXVIII.....22

I. INTRODUCTION AND SUMMARY

Respondent never seriously rebuts Plaintiffs' assertion that the central provisions of Initiative 960 have the purpose and effect of amending the Constitution and therefore are beyond the scope of the initiative process. Instead, Respondent primarily argues that the Court should defer its ruling until after the election.

Respondent can find no legal support for deferring judgment on whether the challenged provisions of I-960 are proper subject matters for an initiative. This is the only issue Appellants put before the Court. Even in *Coppernoll v. Reed,* 155 Wn.2d 290 (2005), where the Court found no legitimate "subject matter" claim, the Court went on to decide this constitutional question before the election.

Invalid subjects are not allowed on the ballot. Specifically, *Amalgamated Transit Union Local 587 v. State,* 142 Wn.2d 183, 11 P.3d 762 (2000) ("*ATU*") unequivocally held that the initiative process cannot be used to alter the referendum process. The sponsors of I-960 did not prevail in *ATU* and now disregard the Court's clear ruling in that case. Indeed, the State, in *Washington Farm Bureau v. Gregoire,* currently before this Court, has argued this holding from *ATU* – that initiatives

cannot be used to alter the referendum process - is good law. *ATU* indisputably controls this case and prohibits most of I-960's provisions.

Similarly, the Washington Constitution fully regulates the votes necessary to pass legislation and this cannot be modified by initiative, but this is exactly what I-960 would do. Because an initiative binds the legislature, for at least two years, I-960 would replace the Constitution's explicit provisions regulating votes necessary for bill passage.

Allowing these types of improper measures to reach the ballot allows a new form of logrolling. Sponsors include popular -- but decidedly improper -- subjects like universal referenda in their initiatives to make it easier to collect signatures and to secure passage of less popular provisions that might not pass on their own. It is only by removing measures containing improper subject matters from the ballot that voters are presented with a fair election.

While the judiciary always has the duty to prevent improper subjects from reaching the ballot, the responsibility is even greater here, where the mere placement of these improper subjects on the ballot threatens to disrupt the functioning and revenue of our state government. Such harm is unwarranted if I-960 is improper for direct legislation.

II. ARGUMENT

A. THERE IS NO LEGAL OR POLICY RATIONALE FOR DEFERRING THE SCOPE ANALYSIS UNTIL AFTER THE ELECTION.

Neither the Court's precedents nor public policy offer support for deferring a ruling on Appellants' subject matter challenge.

1. The parties agree that this Court is to conduct pre-election review to determine whether the subject matters of I-960 are proper for direct legislation.

Appellants have limited their pre-election challenge to only their subject matter challenge to I-960. If I-960 were to be placed on the ballot and be enacted, it is safe to say that much litigation would ensue, including substantive constitutional challenges. These would include I-960's patent violations of Article II, Section 19 (subject in title)[1] and Article II, Section 37 (amended sections must be set forth).[2]

The parties agree that the task before this Court at this time is limited to deciding whether the purpose and effect of I-960 is beyond the legislative authority of the people under Article II, Section 1 of the

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[1] The ballot title promises a vote of the people as an alternative to obtaining a supermajority approval of the Legislature. However, the substantive provision of I-960, § 5 clearly does not allow a vote of the people as an alternative. Supermajority legislative approval is always required.

[2] I-960, § 14 does not allow any fee to be imposed or increased without legislative approval. However, I-960 fails to set forth the numerous sections of existing law that are amended by this provision, including

Constitution. As it did before the trial court, the State acknowledges that it is proper for the Court to hear the subject matter challenge now, and if the initiative is not within the initiative power, it may not proceed to the ballot. Brief of Respondent ("Response"), at 4. *See City of Sequim v. Malkasian*, 157 Wn.2d 251, 260, 138 P.3d 943 (2006) ("Where the subject matter of an initiative is beyond the scope of the initiative power, it is 'not proper for direct legislation.' It is well-settled that it is proper to bring such narrow challenges prior to an election.") (emphasis added).[3]

Even in *Coppernoll v. Reed,* 155 Wn.2d 290 (2005), despite finding that the petitioners had raised no legitimate subject matter challenge, the Court fully decided the question of whether there was an improper subject matter. It allowed the measure to proceed because it was "plainly legislative in nature" and its subject matters (regulating causes of actions and attorneys fees) were "within the legislative authority of the people." 155 Wn.2d at 303.

RCW 28B.85.060, 43.63A.470 and 74.12.340 (authorizing various agencies to set and impose fees).

[3] Citing *Coppernoll v. Reed,* 155 Wn.2d 290, 119 P.3d 318 (2005), and *Philadelphia II v. Gregoire,* 128 Wn.2d 707, 718, 911 P.2d 389 (1996), *cert. denied,* 519 U.S. 862, 117 S. Ct. 167, 136 L. Ed. 2d 109 (1996).

2. The Court should reject Respondent's syllogistic argument that would allow improper subject matters on the ballot.

Under this Court's precedents, the general rule against pre-election review and the narrow exception allowing pre-election subject matter challenges are *equally* well established. Just has this Court refused to accept syllogistic arguments that would cause the exception to swallow the rule, *Coppernoll,* 155 Wn.2d at 304,[4] it should also reject Respondent's syllogistic arguments that would eliminate pre-election review and allow improper measures on the ballot.

For example, Respondent admits that the initiative process does not extend to amending the State Constitution, Response at 19, but its flawed logic would allow such improper measures on the ballot. Respondent argues: "In order to conclude, however, that a constitutional amendment is necessary, one must first conclude that I-960 would violate the constitution." Respondent concludes that "Appellants cannot escape the fact that their argument is simply that the initiative is unconstitutional" and constitutional challenges must occur post-election.

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[4] Rather than bringing a valid "scope" challenge in *Coppernoll*, "Petitioners instead argue that these sections are unconstitutional and accordingly exceed the legislative power as a matter of law." 155 Wn.2d at 302. Accepting this view "would eliminate our rule against preelection review and open the floodgates to preelection challenges of nearly any proposed initiative." *Id. at* 304.[4]

Response at 21. In this and other arguments, Respondent tries to redefine the scope issue as a mere constitutional challenge that must wait until after the election. *See e.g.,* Response at 11-12, 20-21. Such syllogism, if accepted, would overrule well-established jurisprudence and allow improper measures on the ballot.

The State fails to acknowledge this Court's appreciation of the distinction between subject matter challenges that implicate constitutional questions and direct constitutional attacks. It ignores the Court's teaching in *Coppernoll* that "We *carefully distinguish* between review of initiatives for general constitutionality and review for being beyond the legislative power of Article II, Section 1 of the Washington Constitution." *Id.* at 303 (emphasis added). The question of whether an initiative is within the legislative power of the people "was expressly held to be separate and distinct from a challenge to the measure's substantive validity." *Id.* at 299. "While a court may decide whether an initiative is authorized by article II, section 1, of the state constitution, it may not rule on the constitutional validity of a proposed initiative." *Id.*

3. Allowing improper subjects on the ballot deceives voters and degrades the initiative process.

Allowing improper initiatives to appear on the ballot actually threatens to deceive voters and weakens the initiative process – especially

in this case. If initiative sponsors expect that improper subjects will be removed from the ballot, they will take greater care to limit their measures to proper subjects. This is the sponsors' responsibility in this serious lawmaking process.

Unfortunately, some initiative sponsors mistakenly read *Coppernoll* as immunizing statewide proposals from pre-election review altogether. That can be the only explanation for I-960's blatant disregard for this Court's prior holding. At least one of the key sponsors of I-960 was also the key sponsor of Initiative 695, and did not prevail in this Court's *ATU* decision. In *ATU,* this sponsor vigorously defended the use of the initiative process to alter the referendum process, and lost.

Certainly, I-960's sponsors made a conscious decision to ignore this Court's holding in *ATU* regarding the scope of the initiative process, and specifically its holding that the initiative process may not be used to enact a universal referendum provision or to alter the referendum process.

Yet, if improper subjects are allowed to reach the ballot, sponsors have every incentive to include popular – but decidedly improper – subjects in their initiatives. Sponsor can increase the likelihood of qualifying their measure and securing its passage by including such provisions. This is a dangerous form of "logrolling" that is unfair to

voters. Removal of the improper subjects post-election could result in passage of secondary provisions that could not quality and/or pass on their own. Meanwhile, it is not at all clear that post-election invalidation provides any deterrent to this practice.

Public and private polling confirm this threat here. According to polling, 24% of I-960 supporters said they supported the measure because it "Give voters more power." *Exhibit A.* This was by far the most popular reason for support. Seven percent supported I-960 specifically for its super-majority provision. Similarly, the Seattle Post Intelligencer recently reported "There's good news for Tim Eyman's Initiative 960 in the latest Elway Poll. Seven out of 10 of those surveyed like the idea of requiring a two-thirds majority of the Legislature or a public vote to raise any state taxes."[5] *Exhibit B.*

While poll results change and are not "evidence" here, they illustrate the likelihood that I-960 can secure passage *because* of its improper promise to alter the Constitution's referendum and vote-passage requirements. Moreover, Proponents do not have a right to use the initiative process to "send a message" on issues that are beyond the scope of the initiative process. Thus, *Coppernoll* held only "substantive preelection review" implicated free speech concerns. 155 Wn.2d at 298.

In fairness, voters should be presented with only those measures that they are empowered to enact. These should be the questions described in ballot titles and debated in ballot campaigns.

4. This Court has a special duty to police the ballot when the mere placement of an improper measure on the ballot threatens to seriously disrupt the function and revenue of State Government.

Respondent claims that Appellants are trying to expand the scope of pre-election review based upon the inadequacy of post-election review to prevent significant harm to the state government. Response at 13. But Appellants are clear: "Such harm is unwarranted *if I-960 is beyond the scope of the initiative process*." Opening Brief at 13 (emphasis added).

While the "harm" from placing I-960 on the ballot does not expand the scope of pre-election review, it justifies Appellants' request that the Court decide the subject matter challenge on what ordinarily would be an unreasonably short schedule.

I-960 does not merely represent a conflict between competing interest groups and implementation of business regulations, like the doctor vs. lawyer battle at issue in *Coppernoll* or the builders vs. organized labor battle *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 65 P.3d 1203 (2003).

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[5] http://blog.seattlepi.nwsource.com/seattlepolitics/archives/119876.asp

Respondent does not even try to deny that the mere placement of I-960 on the ballot will have impacts to the function of our state government and its revenue, in part because the Initiative will take effect only a few days after the election is certified, leaving insufficient time for post-election review. *See* Opening Brief, at 12 *et seq.* Respondent does not deny that the passage of I-960 would halt duly enacted fee increases scheduled for January 1, 2008, and disrupt the functions of the Legislature, which will have to wait for the courts to determine whether I-960 is valid and, if so, what it means.

If I-960 were a proper initiative, the dire results from its passage would be the will of the people. However, this interference with the functioning of our state government is unwarranted to the extent that I-960 exceeds the scope of the initiative process. That makes the Court's role in this case particularly important.

B. UNLIKE THE MEASURE IN *COPPERNOLL*, I-960 IS BEYOND THE SCOPE OF THE INITIATIVE PROCESS BECAUSE IT ATTEMPTS TO MODIFY THE FUNDAMENTAL, ORGANIC LAWS OF THE STATE, WHICH CAN ONLY BE CHANGED BY CONSTITUTIONAL AMENDMENT.

Respondent never argues that the People's right to propose direct legislation under Article II, Section 1 extends to proposals that alter the referendum process and/or impose a supermajority vote passage

requirement. Respondent's arguments on the merits of the subject matter claim boil down to these (1) attempting to draw a a parallel with *Coppernoll,* (2) trying to distinguish strong controlling and persuasive authority in *ATU* and *Alaskans for Efficient Government v. Alaska,* 153 P.3d 296 (2007) (*"AEG"),* and (3) arguing that this Court cannot provide relief because portions of I-960 are already on the books. None of these arguments can save this improper measure.

Appellants' arguments here are easily distinguishable from those presented in *Coppernoll*, where it was "abundantly clear" that petitioners' "scope" claim was merely a "pretext for a challenge to the possible constitutionality of several sections of I-330." 155 Wn.2d at 305.[6]

Here, in contrast, I-960 has the purpose and effect of amending the Constitution's *explicit provisions* that comprehensively regulate the referendum process and bill passage requirements. This Court in *ATU* and the Alaska Supreme Court in *AEG* have ruled such provisions are outside of the scope of the initiative process because they must be addressed by constitutional amendment.

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[6] *Coppernoll* noted that petitioners "rely upon several cases to argue that I-330's limits on noneconomic damages and contingency fees are unconstitutional. Specifically, petitioners argue that the limits on noneconomic damages in section 1 and 2 would violate article I, section 21 of the Washington Constitution by unduly infringing upon the right to trial by jury. ... Petitioners similarly argue that the restrictions on attorneys

1. Under *ATU*, the initiative process does not extend to measures that seek to alter the referendum process.

Respondent has not disputed that I-960 has the purpose and effect of modifying the constitutional provisions relating to the referendum process. As discussed in Appellants' Opening Brief, I-960 alters the referendum process in three ways:

- It requires universal referendum, bypassing the constitution's requirement that citizens may only call a referendum by collecting petitions. *See* Opening Brief, at 22 *et seq.*
- It has the *stated* purpose and effect of circumventing the constitutionally-delineated exceptions to the referendum process. *See* Opening Brief, at 24 *et seq.*
- It alters the referendum process by creating a non-binding referendum process, even thought the people reserved for themselves only the power to call binding referendum. *See* Opening Brief, at 28 *et seq.*

Like Section 2 of I-695, I-960 would automatically subject certain tax legislation to a statewide vote (some binding, some non-binding), bypassing the Constitution's petition requirement. The Court in *ATU* held

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fees in section 4(2) violates the separation of powers principals derived from article IV, section 1 of the Washington Constitution." *Id.*

that such a measure is both unconstitutional *and outside of the scope of the initiative process:*

> Not only does section 2 [of Initiative 695] fail to comply with the article II, section 1(b) procedures for referenda, *it also was adopted in an improper way. The state constitution does not provide that the initiative power can be used to alter the method by which the referendum power is exercised.* .... Here, *exercise of the initiative power to enact section 2 has the effect of replacing the referendum petition process for any future state taxing legislation. The initiative process cannot be used to amend the constitution.* Article XXIII sets forth the method by which the constitution may be amended and requires that amendments be proposed by the Legislature.

ATU, 142 Wn.2d at 232 (emphasis added; citations omitted).

Just as in *ATU,* I-960 "*has the effect of replacing the referendum petition process*" in the Constitution. It does in two distinct ways:

- I-960 subjects all legislation that "increases taxes" (as defined by I-960) and exceeds the expenditure limits (as modified by I-960) to automatic, binding referendum.
- Any legislation that "increases taxes" and is not subject to a binding vote, still goes to a non-binding statewide referenda.

These two provisions work together in I-960 and, collectively, would fundamentally alter the referendum process and have the effect of replacing the petition requirement. Like Section 2 of I-695, they are proposed as statues, not as constitutional amendment.

Respondents' only attempt to distinguish *ATU* is based upon the fact that the *ATU* decision was decided post-election. This distinction was rejected in the *Sequim* case:

> Malkasian has cited no authority, and we have found none, to support his position that voter approval of an initiative changes, modifies, or enlarges the subject matter that is proper for direct legislation through initiative or referendum. Indeed, the law is plainly to the contrary. As we recently concluded in *Coppernoll,* 155 Wn.2d at 299, the subject matter of the initiative is either proper for direct legislation or it is not.

157 Wn.2d at 260.

ATU explicitly reached the "scope" issue and its holding is good law. In *Washington Farm Bureau et al v. Christine Gregoire, No. 78637-2,* currently pending before this Court, the State of Washington has argued that that this exact holding in *ATU* controls and applies to RCW 43.135.035(2)(a), the *same* voter approval requirement that I-960 seeks to reenact and significantly expand. An excerpt of the State's brief is attached as *Exhibit E.*

Reliance upon *ATU* is not in any way equivalent to the *Coppernoll* petitioners' improper reliance upon *Sofie v. Fireboard Corp.,* 112 Wn.2d 636, 771 P.2d 711 (1989). As the Court noted, *Sofie* had nothing to do with the scope of the initiative power, so it could not be relied upon during

a pre-election challenge.[7] In contrast, *ATU*'s precedent goes directly to the pre-election issue of the scope of the initiative process.

2. *Alaskans for Efficient Government* and *ATU* show that I-960 exceeds the initiative process by seeking to amend/replace the Constitution's explicit vote passage requirements.

Respondent has made no effort to rebut Appellants' allegation that I-960 has the purpose and effect of amending/replacing the Constitution's explicit vote-passage requirements. It also has not disputed the fact that our State Constitution comprehensively regulates this area, requiring a simple majority of the Legislature to pass bills and specifying each of instance in which a supermajority may be required. *See* Opening Brief, at 30.

Respondent cannot dispute the sound reasoning of *Alaskans for Efficient Gov't,* which held that the initiative process cannot be used to alter the vote-passage requirements set forth in the State Constitution.

The fact that an Alaska court <u>may</u> conduct pre-election review for "clearly unconstitutional proposals" – unlike a Washington Court -- does

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[7] The Court held that "Petitioners reliance on this *precedent applying other sections of our state's constitution* to other laws is misguided. We carefully distinguish between review of initiatives for general constitutionality and review for being beyond the legislative power of article II, section 1 of the Washington Constitution. 115 Wn.2d at 303 (emphasis added).

not distinguish *AEG,* because the Alaska Supreme Court did not exercise that authority in *AEG.* As Respondent admits "The Alaska court excluded the initiative from the ballot on the authority of the first exception [to its general rule against pre-election review], relating to initiatives that do not comply with state constitutional and statutory provisions regulating initiatives, rather than the second exception for clearly unconstitutional proposals." Response, at 22. The *AEG* decision was based upon the scope of the people's initiative power under the Alaska Constitution, which is materially identical to Washington's.

Respondent also does not dispute that I-960's supermajority requirement is hostile to our constitutional regime. For example, it undermines the framer's intent that the vote to override a veto is to be greater than the vote necessary to secure bill passage in the first instance.

3. The availability of a constitutional amendment process creates a "subject matter restriction" preventing initiatives on matters that are properly addressed by constitutional amendment.

In adopting the Constitution, the People chose to create an initiative process that is distinct from the more rigorous process for amending the State Constitution. Washington and Alaska are among the slim minority of "initiative states" that do not allow constitutional amendment by initiative. Article XXIII of our state constitution sets forth

a process for making changes to express constitutional provisions, including those relating to the referendum process or vote-passage requirements. The existence of this amendment process, and its clear application to these constitutional provisions, precludes initiatives on these subjects.

In *ATU,* the existence of a specific constitution amendment process led to finding a subject matter restriction on initiatives that seek to alter the referendum process. 142 Wn.2d at 232. In *AEG,* the Alaska Supreme Court found that the constitution's comprehensive regulation of vote passage requirements and its specific amendment process created a "constitutionally based subject-matter restriction" that "prevents an initiative from addressing the subject of the votes needed to enact a bill into law." 153 P.3d at 302.

The Court's recent decision *1000 Friends of Washington v. McFarland,* 159 Wn.2d 165 (2006), while involving a local initiative, is also persuasive. There, the Court held that the Growth Management Act's explicit avenues for public participation created a broad subject matter restriction that prohibited referenda on ordinances that are "necessary to or passed for the purposes of implementing [GMA's] statutory scheme." 159 Wn.2d at 624, 626.

Because the Constitution provides a specific method to alter the Constitution's explicit referendum and vote-passage requirements, Article II, Section 1 powers do not extend to initiatives on these subjects.

C. I-960'S MULTIPLE AMENDMENTS TO EXISTING LAW CREATE A COMPLETELY NEW STATUTORY REGIME WITH SIGNIFICANT UNCERTAINTIES.

Respondent appears to concede that the existence on the books of RCW 43.135.035 is irrelevant to the scope of the People's legislative powers. *See* Opening Brief, at 36 *et seq.* Instead, Respondent argues that removing the measure from the ballot would provide no relief since this statute would remain on the books. This is not the case.

While I-960 utilizes existing statutory language, it makes sufficient changes to create a new statutory regime. In so doing, I-960 adds significant ambiguities to a statutory regime that is finally, after thirteen years, understood. Courts have interpreted RCW 43.135.035 and the Legislature has repeatedly conformed the statute to legal requirements. *See* Response at fn 13.

Respondent admits that I-960 removes the existing supermajority and voter approval requirements from one class of legislation and adds them to another. Response, at 28. Respondent claims that "the *potential effect of that change is subject to debate*," and "the *extent to which I-960*

would affect the supermajority requirement is a question for another day." Response at 28 (emphasis added). Nevertheless, the functioning of our state government will endure fundamental uncertainties during the years it takes the courts to answer these questions.

1. For example, it is unclear whether I-960 adds Washington to the list of nine states that require supermajorities for passage of appropriation bills.

It is very possible that the statutory amendments proposed by I-960 would be interpreted as expanding the supermajority requirement to all "appropriation and budgeting measures."

Under current law, the supermajority requirement applies to "*actions by the legislature that raise state revenue* or require revenue neutral tax shifts". RCW 43.135.035(1). The voter approval requirement also incorporates this definition. RCW 43.135.035(2)(a). Adding a short clause could have extended these requirements beyond the general fund.

Instead, I-960 applies the supermajority and voter approval requirements to an entirely new class of legislation that appears to encompass budget and appropriation measures:

> For the purposes of this act, "raises taxes" means any action or combination of actions by the legislature that *increase state tax revenue deposited in any fund, budget, or account*, regardless of whether the revenues are deposited into the general fund.

I-960, § (5)(6) (emphasis added).

Respondent's paraphrase of this new definition is telling. Respondent claims that I-960 defines "raises taxes" as "actions that raise revenue *for deposit* in any treasury fund." Response at 28 (emphasis added). But this paraphrase ignores I-960's focus on the act of depositing revenue into a fund, budget, or account.

According to the National Conference of State Legislatures, "some states require an extraordinary vote to pass general appropriation bills for state operations. Although they are not spending limits in a traditional sense, requirements for a supermajority – two-thirds, three-fourths, or three-fifths of the legislature – can limit spending decisions if an agreement cannot be reached." *National Conference of State Legislatures, Supermajority Vote Requirements to Pass the Budget, Nov/Dec. 1998*[8], *Exhibit C.* "Nine states have some type of requirement. Three – Arkansas, California, and Rhode Island – need a supermajority each budget cycle to pass appropriations bills." *Id.*

If the Courts' interpretation of I-960 acknowledges its focus on "deposited into any fund, budget, or account," then I-960 would likely make Washington the fourth state to require a supermajority for passage of appropriation bills.

2. Allowing I-960 to proceed to the ballot would lead to future expansion of supermajority requirement.

Regardless of the effect of I-960, if this Court allows I-960 to proceed to the ballot it will open the floodgates to additional initiatives imposing supermajority requirements. Given political trends in their state, proponents aligned with a minority party may very well see supermajority requirements as an avenue to increase their influence in Olympia, as illustrated by the current budget deadlock caused by California's constitutional amendment requiring budgets to be passed by a supermajority.

Also, *every initiative proponent* would consider increasing the longevity of their law by including within their initiative a requirement that it can only be amended by a supermajority or unanimous vote. Such an initiative provision would obviously have the effect of amending or replacing the Article II, Sections 1(c) and 41 (amending initiatives require a supermajority for only two years). But I-960 presents an equally stark example.

As the Alaska Supreme Court recognized in *AEG, every* other state has adopted their supermajority requirements by constitutional

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[8] http://www.ncsl.org/programs/fiscal/supermjbudg.htm

amendment.[9] *See AEG,* 153 P.3d at 299. This should also be the requirement in Washington.

Now is the time to enforce the Court's clear rules on the scope of the initiative process.

D. THE ENTIRE MEASURE SHOULD BE REMOVED FROM THE BALLOT AND/OR INVALIDATED.

Appellants have shown that the heart of I-960 is its new definition of legislation that "raises taxes" (whatever that means) and the many requirements applicable to it. Therefore, as discussed in the Opening Brief at 41 *et seq.*, the measure cannot be severed and should be entirely prohibited from the ballot and/or invalidated. Moreover, both the ballot title and proponents' voter pamphlet statement statement[10] clearly show that the voters are going to be focusing on the decidedly improper elements of I-960. The campaigns and media attention focus on the supermajority and voter approval requirements.

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[9] The attached "Legisbrief" from the National Conference of State Legislatures cites each of the constitutional provisions with the exception of Connecticut's. While the Connecticut statute cited therein (C.G.S.A. Sec. 2-33a) sets the expenditure limit, Article XXVIII of the Connecticut Constitution enacts the supermajority requirement.

[10] For example, I-960s proponents ask voters to "close the loopholes" in I-601 thereby expanding the supermajority and voter approval requirements, and to require a statewide vote on "emergency" bills that the constitution exempts from referenda. *Exhibit D.* The statement never even mentions the most *arguably* severable requirement, requiring the Legislature to enact *every* administrative fee, is not even mentioned.

If the Court were to find the measure severable, it benefits the initiative process and the voters to simply remove the improper portions of the initiative and the references to them in the ballot title. Respondent misquotes *Coppernoll* in claiming, "courts cannot and will not edit an initiative." Response at 31. In what was clearly dicta, since petitioners there raised no valid subject matter challenge, *Coppernoll* merely noted that petitioners challenged only 3 of the measure's 20 sections and editing the measure "would raise obvious questions whether the newly-edited initiative remains true to the intent of those who signed the proposed initiative." 155 Wn.2d at 304-305.

Here, it is likely that *many voters* did sign I-960 primarily for its supermajority and referendum provisions. But this harm would merely be compounded by allowing these invalid provisions on the ballot, thereby misleading *all voters* about the scope of their authority and increasing the likelihood of passage of ancillary provisions that could not pass on their own.

III. CONCLUSION

For the reasons stated herein, Appellants respectfully request that the Court rule on the subject matter issues presented herein at its earliest opportunity.

Respectfully submitted this 23rd day of August, 2007

SMITH & LOWNEY PLLC

By _____
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DECLARATION OF SERVICE

I, Lonnie Lopez, hereby declare that on I caused/will cause this document to be delivered on the respondent in this matter as follows:

1) By e-mail on August 23, 2007.

Stated under oath this 23rd day of August, 2007, in Seattle Washington.

Lonnie Lopez

Davis, Hibbitts & Midghall, Inc.
Washington Statewide Survey I-960-Annotated
June 5-7 2007; N=600; likely voters (2 of 4)

Q1. All in all, would you say that things in the state of Washington are headed in the right direction, or are things pretty much off on the wrong track?

Right direction ----------
Wrong track ----------
[DON'T READ] DK / Na / Refused ----------

Q2. Which one of these major issues concerns you the most? (READ LIST. ROTATE.)

Cost of health care ----------
Public education funding ----------
Environmental issues and climate change ----------
Traffic and highways ----------
High taxes ----------
Jobs and the economy ----------
[DON'T READ] DK / Na / Refused ----------

Q3. Let me read an initiative that you may be voting on in November of this year. It is known as I-960. This measure would require two-thirds legislative approval or voter approval for tax increases, legislative approval of fee increases, certain published information on tax increasing bills, and advisory votes on taxes enacted without voter approval. As of today would you vote for Initiative 960, or against it?

TOTAL FOR ----------
Vote for ----------
Lean for (Q8) ----------
TOTAL AGAINST ----------
Vote against ----------
Lean against (Q8) ----------
[DON'T READ] DK / Na / Refused ----------

Q4. (If FOR on Q3) Are there any particular reasons that you would vote for this initiative? (OPEN, PROBE FOR COMMENTS)

Give voters more power ---------- 24%
Taxes too high ---------- 10%
Eliminates unnecessary tax increases ---------- 9%
Govt. can't be trusted/ Govt. doesn't listen to the people --- 9%
Generally good idea ---------- 8%
Support of the two-thirds rule ---------- 7%
Need more information on the initiative ---------- 6%
Creates a need for majority consensus/agreement ---------- 6%
Places a check/accountability on the government ---------- 5%
All other responses ---------- 4% or less
[DON'T READ] DK / Na / Refused ---------- 1%

EXHIBIT A

ADV If you could you'd stop her headache

Strange Bedfellows

« Recycling at Seattle parks, or How the Mayor & Council claim headline dibs | **Main** | Elway Poll: Gregoire approval rating at 52 percent »

Eyman's tax initiative a hit in Elway Poll

There's good news for Tim Eyman's Initiative 960 in the latest Elway Poll. Seven out of 10 of those surveyed said they support the idea of requiring a two-thirds majority of the Legisalture or a public vote to raise any state taxes.

Pollster Stuart Elway said 50 percent of Democrats were inclined to vote for I-960, as were 76 percent of Republicans and 67 percent of Independents. The poll of 405 registered voters in Washington state was taken earlier this month and has a margin of error of 5 percent.

Next month the state Supreme Court will hear a legal challenge designed to keep Eyman's initiative off the November ballot.

Posted by Chris Grygiel at August 12, 2007 5:29 p.m.
Categories: political polls, Seattle politics, Taxes

COMMENTS

Posted by **8bitjoystick** at 8/13/07 11:11 a.m. **#46022**

It is blatantly un-constitutional since you can't amend the state constitution via a bought and paid for Initiative.

Report violation

Posted by **unregistered user** at 8/13/07 5:03 p.m. **#46113**

:hat is too bad it that popular. People need to know that this is the Rich men nititive. I agree it will be thrown out in court as it is unconstitutional. Simple majority should be it and for always

Report violation

EXHIBIT B

BLOGGER BIOS

AmyRolph (Amy Rolph): reporter

Angela Galloway: City Hall Reporter

Brandon Eng: seattlepi.com intern

Charlie Pope: P-I Washington correspondent

Chris Grygiel: Politics Editor

Chris McGann: Olympia Correspondent

Christine Frey: Staff reporter

Daniel Lathrop: P-I computer-assisted reporter

Gregory Roberts: County Politics Reporter

Joel Connelly: Columnist

Neil Modie: State Politics Reporter

ARCHIVES

August 2007

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

Browse by month
August 2007 go

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upermajority Vote Requirements to Pass the Budget

Legisbrief

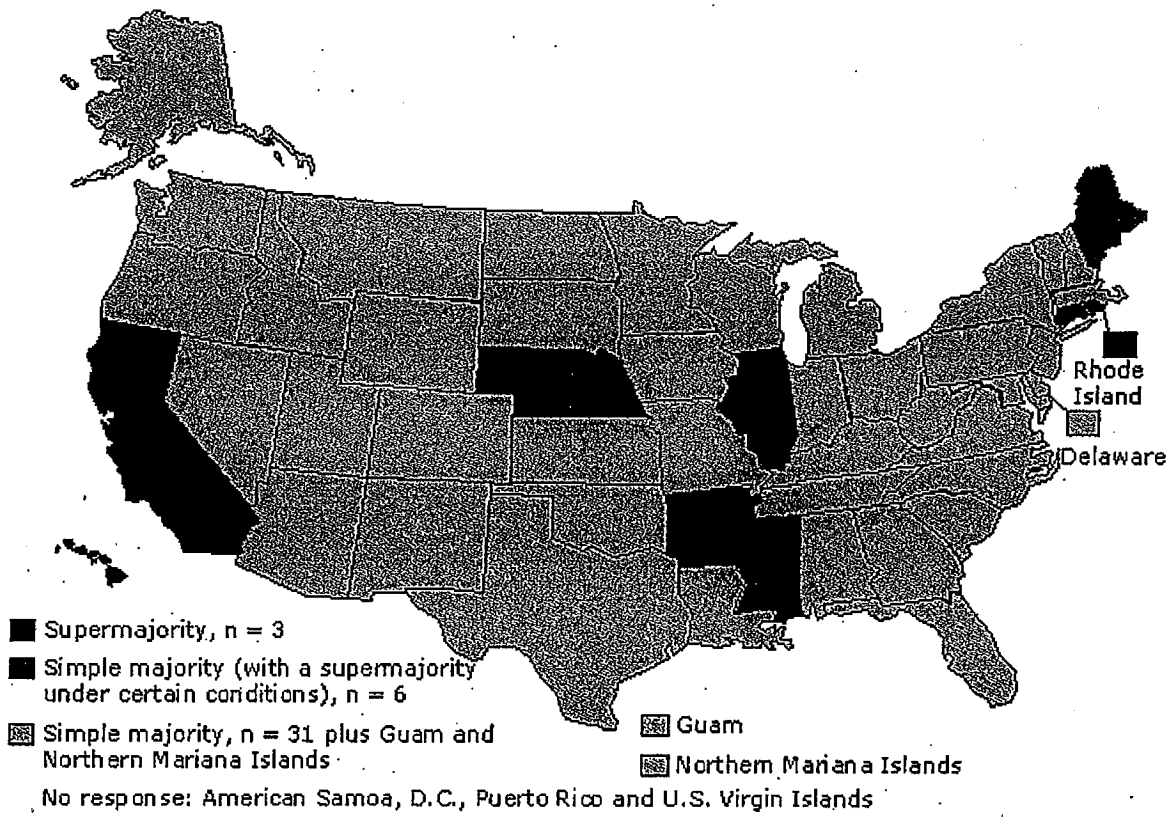
ovember/December 1998
ol. 6, No. 48

Some states require an extraordinary vote to pass general appropriations bills for state operations.

In an effort to control spending or limit certain types of appropriations, some states require an extraordinary vote to pass general appropriations bills for state operations. Although they are not spending limits in the traditional sense, requirements for a supermajority--two-thirds, three-fourths or three-fifths of the legislature--can limit spending decisions if an agreement cannot be reached.

Extraordinary vote requirements vary. Nine states have some type of requirement. Three--Arkansas, California and Rhode Island--need a supermajority vote each budget cycle to pass appropriations bills. Of the 47 states that require a simple majority vote, six--Connecticut, Hawaii, Illinois, Maine, Mississippi and Nebraska--require a supermajority under certain conditions.

Vote Required to Pass the Budget for State Operations



Arkansas. A constitutional amendment that become effective in 1934 requires the Arkansas legislature to obtain a three-fourths majority on appropriations for all purposes except education, highways, and paying down the state debt. (Const., Art. V, Sec. 39). Appropriations for these purposes require a simple majority of members elected.

California. A constitutional provision dating back to 1879 requires a two-thirds vote for general fund appropriations for purposes other than public schools (Const., Art. IV, Sec. 12). Because the Legislature

typically passes one main budget bill, the requirement has effectively applied to the whole budget bill.

Connecticut. Appropriations require a simple majority of members elected, unless the general fund expenditure ceiling is exceeded. In that case, the Legislature must obtain a three-fifths majority (C.G.S.A. Sec. 2-33a). (Const. Art. XXVIII)

Hawaii. Appropriations require a simple majority of members elected, unless the general fund expenditure ceiling is exceeded. In that case, the Legislature must obtain a two-thirds majority (Const., Art. VII, Sec. 9).

Illinois. Since 1994, an amendment to the constitution has required a majority vote until June 1 to pass all legislation, including the budget. After that date, the legislature must obtain a three-fifths vote (Const., Art. IV, Sec. 10). The intent is to provide an incentive for the legislature to complete its work in a timely fashion before the supermajority is required. Budgets were passed on time in 1995, 1996 and 1997, but it is not certain that the supermajority vote is responsible. The previous requirement--that a three-fifths majority was needed after June 30--failed to prevent late budget on a number of occasions in the 1980s and early 1990s.

Maine. A simple majority is required to pass all bills, and they become effective 90 days after the Legislature adjourns (Const., Art. IV, Sec. 16). If the budget isn't passed before April 1, however, it will not take effect by July 1, the beginning of the fiscal year. For the budget to be operative in time. The Legislature must pass it as an emergency, requiring a two-thirds vote. (Bills passed as emergencies take effect immediately.) In at least the last two years, a budget has been enacted as nonemergency legislation to avoid the supermajority requirement. Shortly afterward, the governor and the Legislature resolved pending budget issues in a special session.

Nebraska. Similar to Maine, a Nebraska provision dictates bill effective dates to be 90 legislative days after they are enacted in odd years (Const., Art. III, Sec. 27, Rule 6, Sec. 10). If the budget is passed after the end of March in an extended session, an emergency clause requiring a two-thirds vote is attached to make it operative at the beginning of the fiscal year.

Rhode Island. For appropriations for local or private purposes, a two-thirds majority vote is required (Const., Art. VI, Sec. 11). Because the state typically drafts all main appropriations bills for operations into a single budget bill, a two-thirds vote has been effectively necessary for all appropriations.

There is little empirical evidence identifying the effects of supermajority vote requirements on the budget process.

There is little empirical evidence identifying the effects of supermajority vote requirements on the budget process. Anecdotal evidence suggests that they may cause states to miss or bump up against their budget deadlines, making it even harder to pass a budget on time. And, according to a new report released by the California Citizens Budget Commission, instead of slowing the growth in state spending, California's two-thirds vote requirement may have the opposite effect, allowing the legislative minority to frustrate the process of reaching compromise by withholding votes for spending in other areas. Ultimately, however, it is important to note that difficult budget decisions are probably more likely to be an obstacle to getting the budget passed on time than the number of votes required.

Selected References

21st Century Budget Process for California. Los Angeles: California Citizens Budget Commission, 1998.

side the Legislative Process. Denver: Colorado: National Conference of State Legislatures, February 1998.

gislative Budget Procedures in the States, Commonwealths and Territories. Denver, Colorado: National Conference of State gislatures, June 1998.

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sted November/ December 1998, reviewed December 2003.
ıail statebudget-info@ncsl.org for more information.
ıitor counts for this page.

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Denver Office: Tel: 303-364-7700 | Fax: 303-364-7800 | 7700 East First Place | Denver, CO 80230 | Map
Washington Office: Tel: 202-624-5400 | Fax: 202-737-1069 | 444 North Capitol Street, N.W., Suite 515 | Washington, D.C. 20001

1. Ballot Title

Statement of the Subject: **Initiative Measure No. 960 concerns tax and fee increases imposed by state government.**

Concise Description: **This measure would require two-thirds legislative approval or voter approval for tax increases, legislative approval for fee increases, certain published information on tax-increasing bills, and advisory votes on taxes enacted without voter approval.**
Should this measure be enacted into law? Yes ___ No ___

Statement For Initiative Measure 960

I-960 CLOSES LOOPHOLES THE LEGISLATURE PUT IN TAXPAYER PROTECTION INITIATIVE 601, VOTER-APPROVED IN 1993

I-601 put reasonable limits on state government's fiscal policies. But over the years, Olympia has put loophole after loophole into it to circumvent the law. I-960 closes those loopholes.

In 2005, the Court ruled the Legislature broke the law by shifting funds to spend the same money twice. Justice Owens called it "a shell game." Incredibly, Olympia defended itself saying I-601 DIDN'T SPECIFICALLY PROHIBIT THEM FROM SPENDING THE SAME MONEY TWICE! I-960 says shifted money isn't new revenue and can only be spent once.

For 13 years, the law has required two-thirds legislative approval for tax increases. The Legislature re-enacted this two-thirds requirement in 1998 and 2005. But to circumvent the law, Olympia takes tax increases off-budget. I-960 says Olympia must follow the law whether the tax increase is off-budget or on-budget.

No one is above the law, not even the Legislature.

TO CIRCUMVENT OUR CONSTITUTION AND REPEAL OUR RIGHTS, OLYMPIA DECLARES A BILL AN "EMERGENCY"

I-960 alerts voters anytime Olympia imposes an "emergency" tax increase with two-pages in the general election voters pamphlet listing the costs, how legislators voted, and provides voter feedback with an advisory vote. We can't stop politicians from repealing our constitutionally-guaranteed rights, but we're entitled to know which politicians are doing it.

I-960 helps Olympia follow the law and respect our Constitution.

I-960 REQUIRES THE GOVERNMENT TO PUBLICLY DISCLOSE COSTS AND LEGISLATORS' SPONSORSHIP AND VOTING RECORDS ON ...

... any tax increase bill. I-960 guarantees email updates get sent to the press and the people anytime a tax increase bill "moves." The people have the right to know what Olympia is doing.

WASHINGTON'S THE 9TH HIGHEST TAXED STATE IN THE NATION – I-960 KEEPS US FROM HITTING #1

I-960 reminds politicians that taxpayers don't have bottomless wallets. Vote Yes.

EXHIBIT D

For more information, visit www.TheTaxpayerProtectionInitiative.com or call 425.493.8707.

Voters' Pamphlet Argument Prepared by:
ERMA TURNER, beauty shop owner, gathered 3455 signatures, Cle Elum, STEVEN BENCZE, retired warehouseman, fisherman/hunter, gathered 2461 signatures, Othello, ERIC PHILLIPS, hiker, label company owner, gathered 2348 signatures, Everett, KAREN CURRY, housewife & husband Lee (plumber), gathered 2172 signatures, Yakima, ANDRE GARIN, retired post office, bowler, gathered 1989 signatures, Vancouver, MIKE DUNMIRE, husband, community leader, retired businessman, initiative volunteer, Woodinville

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SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE FARM BUREAU FEDERATION, WASHINGTON STATE GRANGE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, EVERGREEN FREEDOM FOUNDATION, WASHINGTON ASSOCIATION OF REALTORS, and STEVE NEIGHBORS,

Respondents/Cross-Appellants,

v.

CHRISTINE O. GREGOIRE, Governor of the State of Washington; STATE EXPENDITURE LIMIT COMMITTEE; and STATE OF WASHINGTON,

Appellants/Cross-Respondents.

STATE'S OPENING BRIEF

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Attorneys for
Appellants/Cross-Respondents

EXHIBIT E

TABLE OF CONTENTS

I. NATURE OF THE CASE 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUES 4

IV. STATEMENT OF THE CASE 5

A. The State General Fund Expenditure Limit 7

B. 2005 Legislation Relevant To The Spending Limit 10

C. November 2005 Actions Of The ELC 12

D. 2006 Legislation Relevant To The Spending Limit 13

E. Respondents' Claim 14

F. The Trial Court Decision 15

G. Proceedings On Appeal 19

V. SUMMARY OF ARGUMENT 20

VI. ARGUMENT 23

A. In Enacting Laws Of 2006, Ch. 56, § 7(6) (ESSB 6896, § 7(6)), The Legislature Adopted The ELC's Fiscal Year 2006 Projected Spending Limit, And Thereby Rendered This Case Moot 23

B. The Legislature's Enactments In The 2005 Supplemental Operating Budget Increased The 2006 Fiscal Year Spending Limit By $250 Million And The ELC Was Correct In So Concluding 29

1. The Transfer Of Funds From The Health Services Account To The General Fund Increased The 2005 Expenditure Limit By $250 Million, As Provided By Statute 29

2. The Legislature's $250 Million Appropriation From The General Fund To The Violence Reduction And Drug Enforcement Account Was A Fiscal Year 2005 Expenditure From The General Fund, And Thus Properly Is Included in Projecting The Expenditure Limit For Fiscal Year 2006 32

3. In Calculating The General Fund Spending Limit For Fiscal Year 2005 And In Projecting The Limit For Fiscal Years 2006 And 2007, The ELC Was Correct To Effectuate Laws Of 2005, Ch. 518, §§ 1607 And 1701 As The Legislature Intended 39

C. Although The Court Need Not Reach The Issue, Under This Court's Decision In *Amalgamated Transit*, 142 Wn.2d At 232-33, The Voter Approval Requirement Of RCW 43.135.035(2)(a) Is Of Doubtful Constitutionality 40

VII. CONCLUSION 46

approximately $250 million too high, and so erred in concluding that ESHB 2314 raised general fund revenues for expenditure in excess of the fiscal year 2006 spending limit.

C. Although The Court Need Not Reach The Issue, Under This Court's Decision In *Amalgamated Transit*, 142 Wn.2d At 232-33, The Voter Approval Requirement Of RCW 43.135.035(2)(a) Is Of Doubtful Constitutionality

The Court need not reach the argument in this section of the State's brief to reverse the trial court's judgment, because the trial court's judgment should be reversed based on the statutory arguments in Section A or B above. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000) (where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds). If the Court disagrees, however, the law established by the Court's decision in *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000), provides a third and independent reason to reverse the decision below.

Respondents contend that the legislature lacked authority to increase taxes under ESHB 2314 absent voter approval under RCW 43.135.035(2)(a). Respondents' reliance upon the statutory requirement for voter approval of future tax increases thus squarely injected into this case the Court's invalidation of such provisions in *Amalgamated Transit*.

In *Amalgamated Transit*, this Court held that it is not within the initiative power of the people under article II, section 1(b) of the Washington Constitution; or within the power of the legislature itself, to require voter approval of future state tax increases.

Amalgamated Transit concerned challenges to Initiative 695. Insofar as it is relevant to this case, *Amalgamated Transit* considered a challenge to section 2(1) of Initiative 695 which provided that, "Any tax increase imposed by the state shall require voter approval." Laws of 2000, ch. 1, § 2(1). This Court held that section 2(1) of Initiative 695 established an impermissible referendum on future tax legislation without following the constitutional requirements for such referenda, set forth in article II, section (1)(b). In this respect, this Court specifically noted the inconsistency between Initiative 695 and the constitutional requirement that a petition for referendum signed by four percent of the voters in the last gubernatorial election be filed before a referendum election must be held on a bill. *Amalgamated Transit*, 142 Wn.2d at 232 ("As did the trial court, we conclude that section 2 calls for universal referenda on all legislation which would impose increased taxes without regard to whether a particular piece of legislation would engender enough interest or opposition for four percent of the voters to petition for referendum.")

The Court in *Amalgamated Transit* also rejected the argument that a statutory provision requiring voter approval of future tax increases would be within either the people's or the legislature's inherent legislative authority. "Neither the legislature nor the people acting in their legislative capacity has the power to *condition* a state law solely on voter approval, and accordingly section 2 is invalid". *Id.* at 241. Rather, according to the Court in *Amalgamated Transit*, the legislature, like the people, would be required to invoke and follow the referendum process provided by the state constitution.

> This does not mean, however, that the people lack the authority to approve or disapprove legislation under the reserved initiative and referendum powers. They do. However, that right must be exercised in conformity with the constitutionally mandated procedures, including the four percent voter signature requirement each time the people petition for a referendum on a piece of legislation the Legislature has passed. Nor does it mean that the Legislature cannot refer a measure to the people for a statewide vote. Plainly it can do so, not, however, as conditional legislation, but rather through the referendum process set forth in article II, section 1(b).

Id. at 242.

In a case decided earlier this year, the Court similarly explained the holding of *Amalgamated Transit*, saying: "The people can petition for referendum of legislation that the legislature has passed" or "[a]lternatively the legislature may refer a measure to the people", but a

statutory requirement for voter approval of future tax legislation passed by the legislature is "not allowed under the state constitution." *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 759, 131 P.3d 892 (2006) (citing *Amalgamated Transit*, 142 Wn.2d at 191).

Although the voter approval requirement of RCW 43.135.035(2)(a),[25] which originated as a provision of Initiative 601 and upon which Respondents rely, operates on a narrower class of revenue bills (those raising revenues in excess of the state expenditure limit), this difference does not appear to be a significant one under the rationale of the Court in *Amalgamated Transit*. The statute provides in relevant part: "If the legislative action under subsection (1) of this section [raising state revenues] 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."

The Attorney General vigorously but unsuccessfully defended the voter approval provision of Initiative 695 in *Amalgamated Transit*. This Court rejected the arguments that the Attorney General pressed in defense of such provisions. There is no point in reiterating arguments that this

---

[25] A copy is attached as Appendix A, in the form in which it was effective as of the time the legislature enacted ESHB 2314 and the 2005 state operating budget. Although the statute has been amended numerous times, the language related to voter approval has not changed.

Court fully considered and previously rejected in *Amalgamated Transit.* It is, of course, within the authority of this Court to overrule *Amalgamated Transit* if it is demonstrated that its holding in this regard is clearly incorrect and harmful. Given the importance of *stare decisis* to the rule of law and to the predictability of the law's application, this Court has stated that it will only overrule a prior decision upon, "a clear showing that an established rule is incorrect and harmful." *State v. Clark,* 143 Wn.2d 731, 778, 24 P.3d 1006 (2001). Apart from arguments that the Attorney General fully pressed in *Amalgamated Transit,* and that the Court already considered and found unavailing, the State discerns no such clear showing.

At oral argument on the parties' summary judgment motions, the trial court recognized that if it were to consider the validity of RCW 43.135.035(2)(a), it "would have to declare subsection 2(a) of RCW 43.135.035 unconstitutional . . . [as] improperly [giving] the voters the right to stop a tax increase". RT 40 ll 16-20 (March 17, 2006). However, on its own initiative, the trial court concluded that the State had not timely raised the question and declined to rule on it. CP 2434. The trial court reached this conclusion in the absence of any argument by Respondents that the question was untimely.

The trial court erred in concluding that the issue was not timely raised. In its Answer, the State pled that the complaint failed to state a

claim upon which relief could be granted. CP 995. The unconstitutionality of a statute is not an affirmative defense listed in CR 8(c), or otherwise required to be pled with greater specificity. CR 8(c). Moreover, the State raised the question of the constitutionality of RCW 43.135.035(2)(a) under this Court's established law in *Amalgamated Transit* in the State's first brief on the merits of this case. CP 619-20.[26] Both sides fully briefed and argued the constitutional question below.[27] Even where a constitutional issue has not been raised *at all* in the lower court, this Court will consider constitutional issues raised for the first time on appeal where doing so relates to a manifest error affecting a constitutional right. *State v. WWJ Corp.*, 138 Wn.2d 595, 601, 980 P.2d 1257 (1999). Given this Court's established case law holding that statutes purporting to require voter approval of future tax increases are not valid, it would be incongruous for the Court to decline to consider the constitutionality of the provision, if necessary to its decision, particularly where the parties fully briefed and argued the issue below.

---

[26] Respondents did not independently inform the trial court of the decision of this Court in *Amalgamated Transit*.

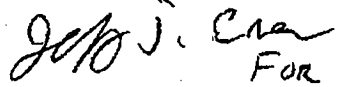
[27] CP 619-20 (State's response to summary judgment); CP 423-428 (Plaintiffs' summary judgment reply); CP 111-14 (Defendants' Motion for Reconsideration); CP 25-29 (Plaintiffs' Opposition to Defendants' Motion for Reconsideration).

VII. CONCLUSION

For these reasons, this Court should reverse the decision of the Snohomish County Superior Court.

RESPECTFULLY SUBMITTED this 28th day of August, 2006.

ROB MCKENNA
Attorney General



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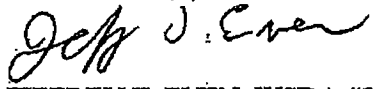
Solicitor General



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