

No. 81287-0

SUPREME COURT OF THE STATE OF WASHINGTON

LISA BROWN, Washington State Senator and Majority Leader of the
Washington State Senate,

Petitioner,

v.

BRAD OWEN, Lieutenant Governor of the State of Washington,

Respondent.

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**PETITIONER'S *UPDATED* INITIAL BRIEF IN
SUPPORT OF PETITION AGAINST STATE OFFICER**

[Pursuant to this Court's April 18 Order, this is Petitioner's March 3 Initial Brief, updated solely to include citations to the Agreed Statement of Facts ("ASF") and pertinent changes acknowledging this Court's March 6 denial of accelerated review]

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[Pursuant to this Court's April 18 Order, this is Petitioner's March 3 Initial Brief, updated solely to include citations to the Agreed Statement of Facts ("ASF") and pertinent changes acknowledging this Court's March 6 denial of accelerated review]

I. INTRODUCTION

A straightforward constitutional question underlies this Petition. That question is whether RCW 43.135.035(1) can amend the simple-majority passage provision of Article II, §22 by creating a new category of bills that requires a 2/3 supermajority for passage instead.

This is at least the third time this Court has been asked to answer the above constitutional question.

The first time was in *Walker v. Munro*. This Court declined to rule on the constitutionality of this statute's 2/3 supermajority provision because that case did not present a bill which had triggered RCW 43.135.035(1) by passing with a majority but not a 2/3 supermajority. 124 Wn.2d 402, 413 (1994). The Petition in this case, however, presents such a bill: Senate Bill 6931.

Another time was in *Futurewise v. Reed*. This Court declined to rule on the constitutionality of the 2/3 supermajority provision because that case challenged a hypothetical version of that provision (i.e., the constitutionality of that provision in a not-yet-voted-on Initiative), instead of challenging the actual version of that provision as it existed in RCW 43.135.035(1). 161 Wn.2d 407, 412-13 (2007). The Petition in this

case, however, is based on the actual, currently-existing 2/3 supermajority provision in RCW 43.135.035(1).

The current controversy arose because Senate Bill 6931 passed by a majority, but not the 2/3 supermajority specified in RCW 43.135.035(1). If the 2/3 supermajority provision in RCW 43.135.035(1) is constitutional, then the Respondent State Officer's refusal to forward that bill on to the House as "passed" was correct. But if the 2/3 supermajority provision in RCW 43.135.035(1) is not constitutional, then Senate Bill 6931 passed the Senate, and the Respondent had no legal right or authority to refuse to allow that bill to be forwarded on to the House as passed.

As Part III of this Brief explains, a constitutional amendment can amend the simple-majority provision in Article II, §22 of our State Constitution by creating a new category of bills that requires a 2/3 supermajority for passage instead. But a statute cannot make that constitutional amendment. The provision of RCW 43.135.035(1) that creates a new category of bills requiring a 2/3 supermajority for passage (instead of the simple-majority passage requirement established by Article II, §22) is therefore unconstitutional.

It is the exclusive province and duty of this Court to decide whether a statute is or is not constitutional. This Court should accordingly issue the writs and relief requested in the Petition to timely resolve the current controversy and definitively answer the straightforward constitutional question of whether the 2/3 supermajority provision of RCW 43.135.035(1) is constitutional.

II. STATEMENT OF THE CASE

A. The Parties

The Petitioner is Lisa Brown.¹ She is a member of the Washington State Senate elected by the voters of the 3rd Legislative District in Eastern Washington.² She is also the Majority Leader of the Washington State Senate.³

The Petitioner cast one of the 25 votes in favor of Senate Bill 6931.⁴ She contends that the Respondent State Officer had no legal right or authority to refuse to forward Senate Bill 6931 on to the House as passed (by a simple majority) because the 2/3 supermajority provision of RCW 43.135.035(1) is unconstitutional.

The Respondent is Brad Owen.⁵ He is the Lieutenant Governor of the State of Washington, and his constitutional duties include serving as the President of the Senate.⁶ The Respondent State Officer contends that

¹ ASF000002, ¶1.

² ASF000002, ¶1.

³ E.g., ASF000140, ¶8 (“Respondent admits that Petitioner is an elected member of the Washington State Senate, where she serves as Majority Leader”); ASF000134 (this Court’s March 6, 2008 Order, noting that “This is an original action filed in this court by state senate member (and majority leader) Lisa Brown”).

⁴ E.g., ASF000138-39 at ¶1 (“Respondent admits that on February 29, 2008, the Senate voted upon Senate Bill 6931 (“SB 6931”) and that 25 of the 49 Senators voted in favor of the bill. The Respondent further admits that Petitioner Brown cast her vote in favor of the bill.”); ASF000140, ¶8 (“Respondent also admits that Petitioner was on of the 25 Senators to vote in favor of SB 6931”); .

⁵ ASF000002, ¶2.

⁶ Washington State Constitution, Article III, §16. And as a Statewide elected official, he also takes the oath of office specified in RCW 43.01.020 to faithfully discharge the duties of his office. More fully, Respondent admits that “Respondent Brad Owen is the Lieutenant Governor of the State of Washington, and as such his Constitutional duties include serving as the President of the Senate. Article III, §16. As a Statewide elected official, he takes the oath of office specified in RCW 43.01.020 to faithfully discharge the duties of his office.” ASF000067, ¶9 and ASF000141, ¶9.

Washington law prohibited him from forwarding Senate Bill 6931 on to the House as passed (by a simple majority) because he has no lawful right or authority to declare the 2/3 supermajority provision of RCW 43.135.035(1) unconstitutional.⁷

The March 3 Petition in this case and its accompanying pleadings were served on the Respondent on March 3.⁸ Since the Petition challenges the constitutionality of a State statute, the Petition and its accompanying pleadings (including Petitioner's March 3 Initial Brief) were also served that same day on the State Attorney General in compliance with RCW 7.24.110.⁹

The Respondent emphatically denies the Petition's claim that SB 6931 passed the Senate because the 2/3 supermajority provision of RCW 43.135.035(1) is unconstitutional.¹⁰

⁷ E.g., ASF000020-21.

⁸ ASF000068, ¶12; ASF000141, ¶12.

⁹ *The facts surrounding the February 29 verbal notice given to the Attorney General's attorneys in this case and this Court's Clerk, and the March 3 service, are described more fully at ASF000067-68 at ¶¶11-12 and ASF000141 at ¶¶11-12 (admitting notice and service relating to Respondent and Attorney General's Office).*

¹⁰ E.g., ASF000140, ¶5 ("Respondent denies that RCW 43.135.035(1) is unconstitutional"); ASF000140, ¶6 ("Respondent denies Petitioner's legal conclusion that RCW 43.135.035(1) is unconstitutional or that it amends the State Constitution"); ASF000142, ¶13 ("Respondent denies that the Constitution includes any provision that renders RCW 43.135.035(1) invalid"); ASF000142, ¶15 (Petitioner's reading of Article II, §22 "errs in characterizing this provision as precluding a statute that requires the affirmative vote of more than a majority of the elected members to pass a bill"); ASF000142-143, ¶16 ("Respondent denies Petitioner's implied conclusion of law that RCW 43.135.035(1) represents an attempt to amend or that it amends the State Constitution"); ASF000143-144, ¶19 ("Respondent ... denies that the statute [RCW 43.135.035(1)] is inconsistent with the constitution"); ASF000144, ¶20 ("Respondent ... denies that SB 6931 passed the legislature"); ASF000144, ¶23 ("Respondent denies Petitioner's legal conclusion that SB 6931 accordingly passed the Senate").

B. Jurisdiction & Venue

This Court has original jurisdiction pursuant to Article IV, §4 of our State Constitution. This action is also properly brought in this Court pursuant to RAP 16.2 & Form 16, and Chapter 7.16 RCW.

C. Majority Vote Passage of Senate Bill 6931

A copy of Senate Bill 6931 is at ASF000006-000009.¹¹ That bill imposes a 42¢ per liter surcharge on certain liquor to fund increased DUI patrols and chemical dependency treatment.¹²

A majority of Senators voted in favor of that bill. Respondent's submissions to this Court state that "On final passage, there were 25 votes in favor of the bill, 21 opposed, 1 senator absent and 2 excused".¹³

Similarly:

Respondent admits that on February 29, 2008, the Senate voted upon SB 6931, with 25 out of 49 Senators voting in favor of it, and their votes were properly cast.¹⁴

In short, Senate Bill 6931 passed the Senate under the majority-vote provision of Article II, §22 of our State Constitution.

¹¹ ASF000002, ¶3 agrees on that fact.

¹² ASF000006, lines:7-10, 000007, lines:19-25, and 000008, lines:20-30; ASF000198 at n.2 (Respondent's filing stating that "Senate Bill 6931 would impose a liquor liter surcharge to fund DUI enforcement and chemical dependency treatment").

¹³ ASF000200.

¹⁴ ASF000144, ¶23. Accord, ASF000021 (Journal of the Senate regarding "the roll on the final passage of Senate Bill No. 6931", recording "Yeas, 25; Nays, 21; Absent, 1; Excused, 2", and concluding "SENATE BILL NO. 6931, having not received the constitutional majority, was declared lost"); ASF000083 (Senate roll call transcript for "3rd Reading & Final Passage" of SB 6931, recording "Yea: 25 Nay: 21 Excused: 2 Absent: 1").

D. The Current Controversy

The Respondent State Officer nonetheless refused to forward Senate Bill 6931 on to the House as “passed” because that bill had not received the 2/3 supermajority specified for passage in RCW 43.135.035(1).¹⁵ As the Respondent’s submissions to this Court state:

Respondent did not forward SB 6931 to the House of Representatives because it did not receive a two-thirds vote.¹⁶

The Respondent explained that Washington law prohibits him from forwarding such a bill on to the House as passed (by a simple majority) because he had no lawful right or authority to declare the 2/3 supermajority provision of RCW 43.135.035(1) unconstitutional. In response to Petitioner’s argument concerning the unconstitutionality of the 2/3 supermajority provision in RCW 43.135.035(1) – the most recent version of which was reenacted with the November 2007 adoption of I-960 – the Respondent State Officer therefore stated:

Under our Constitutional framework of separation of powers, the authority for determining a legal conflict between the Constitution and a statute is clearly vested with the courts. It is for this reason that the President [of the Senate, i.e., the Lieutenant Governor] has a long standing tradition of refraining from making legal determinations, and he does so, again, in this case. Senator Brown’s arguments are cogent and persuasive, but the proper venue for these legal arguments is in the courts, not in a parliamentary body. For these reasons, the

¹⁵ RCW 43.135.035(1) provides in relevant part that “After July 1, 1995, any action or combination of actions by the legislature that raises taxes may be taken only if approved by a two-thirds vote of each house of the legislature”. Accord, ASF000143, ¶17.

¹⁶ ASF000139, ¶4. The Respondent has also confirmed that “Respondent does not assert that SB 6931 would raise revenue in excess of the state expenditure limit under RCW 43.135.” ASF000144, ¶22.

President believes he lacks any discretion to make such a ruling, and he explicitly rejects making any determination as to the Constitutionality of I-960 and instead is compelled to give its provisions the full force and effect he would give any other law.¹⁷

As noted earlier, the Petitioner – one of the 25 Senators in the majority who had properly cast their vote in favor of Senate Bill 6931 – disagrees, contending that the Respondent State Officer must forward that bill on to the House as passed because the 2/3 supermajority provision of RCW 43.135.035(1) is unconstitutional. There accordingly exists an actual and existing dispute between parties with genuine, direct, and substantial opposing interests, and the judicial determination of this constitutional dispute by this Court will be final and conclusive.

E. Prior Instances Raising This Same Constitutional Question

The parties in *Walker v. Munro*, 124 Wn.2d 402 (1994), presented this Petition's underlying constitutional question to this Court – namely, whether RCW 43.135.035(1) could amend the simple-majority passage provision of Article II, §22 by creating a new category of bills that requires a 2/3 supermajority for passage instead. This Court declined to rule on this constitutional question, however, because this Court did not have before it a bill that had passed with a majority but not a 2/3 supermajority. As this Court explained:

The course of future events is, at this time, purely speculative and subject to a challenge when a specific dispute arises in regards to a particular bill. Until presented with an existing, fact-specific action, this court will not involve itself in what is an essentially political dispute.

¹⁷ ASF000020; same quote at ASF000084-85.

Walker, 161 Wn.2d at 413.¹⁸

The parties in *Futurewise v. Reed*, 161 Wn.2d 407 (2007), also presented to this Court the underlying question of the constitutionality of the statutory 2/3 supermajority requirement. This Court declined to rule on this constitutional question, however, because the petitioners challenged what was at that time a hypothetical version of the statute (the not-yet-voted-on Initiative 960), not the actual version of the statute existing at that time (RCW 43.135.035(1)). As this Court explained:

[Plaintiffs] challenge the supermajority requirement of I-960. They contend that, except in specifically enumerated instances, legislative bills require only a simple majority vote to pass. See, e.g., CONST. art. II, §22 (no bill shall become law except upon majority vote)... [Plaintiffs'] argument is essentially that the initiative would be unconstitutional if enacted. We ... will not entertain such a claim prior to an election. While the initiative might not ultimately withstand a constitutional challenge (a proposition on which we offer no opinion here), it is not subject to preelection review on the ground that it would conflict with, and therefore improperly "amend," the constitution.

Futurewise, 161 Wn.2d at 412-13.¹⁹

F. Need For Timely Relief from This Court

Unlike the *Walker* case, this case presents this Court with a bill that triggered the 2/3 supermajority requirement of RCW 43.135.035(1) –

¹⁸ This Court's April 18, 2008 Ruling On Original action (ASF000257) also noted at n.1 that "the court declined to issue a writ, in part because some of the initiative's provisions had not yet taken effect. *Walker v. Munro*, 124 Wn.2d 402, 409, 879 P.2d 920 (1994)."

¹⁹ Accord, this Court's April 18, 2008 Ruling On Original action (ASF000257) at n.1 ("The court more recently declined to review a pre-election challenge to the supermajority requirement of Initiative 960, ruling that it would not entertain such a claim prior to an election. *Futurewise v. Reed*, 161 Wn.2d 407, 412-13, 116 P.3d 708 (2007).").

i.e., Senate Bill 6931. And unlike the *Futurewise* case, this case challenges the actual, currently-existing version of the 2/3 supermajority requirement in RCW 43.135.035(1). The reasons this Court gave for postponing resolution of the constitutionality of the 2/3 supermajority requirement in RCW 43.135.035(1) therefore do not exist in this case.

Instead, timely resolution is now required.

Given the March 6 denial of Petitioner's Motion For Accelerated Review (discussed in the next section below), the 2/3 supermajority provision of RCW 43.135.035(1) has already operated as a practical matter to amend the simple majority provision of our Constitution for passage of Senate Bill 6931. If this Court continues to decline to resolve the underlying question of whether the 2/3 supermajority provision in RCW 43.135.035(1) is constitutional, this Court will, by that inaction, only continue to allow the 2/3 supermajority statute at issue to stand as an amendment of the simple majority provision of our Constitution.

The petitioner accordingly filed this Petition Against State Officer directly in this Court to timely and finally resolve this controversy over the constitutionality of the 2/3 supermajority provision in RCW 43.135.035(1). As her filings in this case summarize:

The Respondent in this case, Lieutenant Governor Brad Owen, is a State Officer. And if the 2/3 supermajority requirement specified by RCW 43.135.035(1) is not constitutional (as the Petition in this case asserts), then that State Officer had no lawful authority under Washington law other than to declare Senate Bill 6931 "passed" for forwarding on to the House. Washington law does not provide the Lieutenant Governor any power to veto legislation that passes the Senate by simply declaring it "lost" instead. This Court accordingly has

jurisdiction to resolve the merits of this Petition and, if the Petitioner's claim with respect to the unconstitutionality of the 2/3 supermajority provision in RCW 43.135.035(1) is correct, confirm that the Lieutenant Governor had no lawful authority under Washington law in his constitutional role as President of the Senate other than to declare Senate Bill 6931 as "passed" for forwarding on to the House of Representatives.²⁰

G. Denial Of Accelerated Review & Resulting Procedural History.

The Respondent opposed Petitioner's request for accelerated review before the March 13 end of the 2008 legislative session. The Respondent argued that such accelerated review was not necessary to prevent this case from becoming "moot" after the end of that session because

even if a case is technically moot, the Court will retain jurisdiction if the case involves "matters of continuing and substantial public interest are involved." *Matter of Eaton*, 11 Wn.2d 892, 895, 757 P.2d 961, 963 (1988). To fall within this exception, "[t]hree criteria must be considered when determining whether the requisite degree of public interest exists: (1) the public or private nature of the question presented, (2) the need for a judicial determination for future guidance of public officers, and (3) the likelihood of future recurrences of the issue." *Id.* in Respondent's view, this case meets these criteria and the Court may retain jurisdiction.²¹

²⁰ ASF000182-183; similar description at ASF000181 ("if the 2/3 supermajority requirement specified by RCW 43.135.035(1) is not constitutional (as the Petition in this case asserts), then the Lieutenant Governor had no lawful authority under Washington law other than to declare Senate Bill 6931 as 'passed' for forwarding on to the House. But if that provision is constitutional (as the Answer in this case asserts), then the Lieutenant Governor had no lawful authority under Washington law other than to do as he did in this case and declare that Bill 'lost.'"); same at ASF000178 and ASF000190.

²¹ ASF000125 (Respondent's March 4 Response in opposition to acceleration); ASF000130 (Petitioner's March 4 Reply agreeing with the Respondent's Response that this controversy satisfies the legal criteria for the exception to the mootness doctrine if it is not decided before the March 13 end of the legislative session.)

This Court denied Petitioner's request for accelerated review on March 6, and Ordered the subsequent filings and proceedings to date in this case. ASF000002-4 at ¶¶7-11.

III. LEGAL DISCUSSION

A. The Vote Passage Provisions Of Our State Constitution

Our State Constitution establishes the fundamental structure of our State government, including the fundamental requirements for the legislature to enact a bill into law.²²

Our State Constitution provides that ten types of votes require a 2/3 supermajority in the legislature for passage.²³ None of those ten include the category of bills covered by RCW 43.135.035(1).

²² For example, the legislative power is established under Article II of the Washington State Constitution. As this Court explained in Lemon v. Langlie, 45 Wn.2d 82, 109 (1954), our "written Constitution is not only the direct and basic expression of the sovereign will, but is the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it and must control as it is written until it shall be changed by the authority that established it." Accord Greive v. Martin, 63 Wn.2d 126, 137 (1963) ("Our sole concern is to see that the applicable provision of our state constitution as originally adopted by the people (and as later amended) shall continue to be the fundamental law of this state"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law. If the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.")

For all bills not covered by one of the supermajority provisions of our State Constitution, our Constitution provides for passage in the legislature with a simple majority. Specifically, Article II, §22 of our State Constitution states: “**Passage of bills.** No bill shall become a law unless ... a majority of the members elected to each house be recorded thereon as voting in its favor.” (Underline added.)²⁴

B. Amending The Vote Passage Provisions Of Our State Constitution Requires a Constitutional Amendment – not a statute

Our State Constitution provides a specific process for amending its provisions. Article XXIII.²⁵

²³ Washington State Constitution Article II, §1(c) [2/3 supermajority of each house required to alter direct legislation within two years of its enactment]; Article II, §9 [2/3 supermajority of house required to expel a member]; Article II, §12 [2/3 supermajority of each house required to call a special session]; Article II, §36 [2/3 supermajority of each house required to introduce a bill within a session’s last ten days]; Article II, §43 [2/3 supermajority of each house required to modify the redistricting commission’s plans or to reconvene that commission]; Article III, §12 [2/3 supermajority in each house required to overturn the governor’s veto]; Article V, §1 [2/3 supermajority vote of Senate required to impeach public officers]; Article XXIII, §1 [2/3 supermajority of each house required to propose amendments to the constitution]; Article XXIII, §2 [2/3 supermajority of each house required to call a constitutional convention]; Article XXVIII, §1 [2/3 supermajority of each house required to alter the law establishing a legislative salary commission].

²⁴ Thus, as Respondent states in this case, “Article II, Section 22, of the State Constitution provides, in pertinent part, “No bill shall become a law unless ... a majority of the members elected to each house be recorded thereon as voting in its favor.” ASF000139 at ¶2. In full, this Constitutional provision states: “**Passage of bills.** No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house, and a majority of the members elected to each house be recorded thereon as voting in its favor.” Article II, §22.

²⁵ See also *Culliton v. Chase*, 174 Wash. 363, 373 (1933) (“The constitution provides the means, methods, and processes for its own amendment”); *Ford v. Logan*, 79 Wn.2d 147, 155-56 (1971) (the deliberative constitutional amendment process safeguards the minority and stabilizes our form of government).

Pursuant to that constitutional amendment process, our Constitution can be amended to require a 2/3 supermajority for passage of the category of bills covered by RCW 43.135.035(1).

But as this Court has made abundantly clear, a statute – even one enacted by initiative – cannot amend our Constitution.²⁶

C. **The 2/3 Supermajority Provision In RCW 43.135.035(1) Effectively Amends The Vote Passage Provisions Of Our State Constitution**

RCW 43.135.035(1) creates a category of legislation that requires a 2/3 supermajority vote to pass into law. Specifically, that statute's supermajority provision states: "After July 1, 1995, any action or combination of actions by the legislature that raises taxes may be taken

²⁶ E.g., *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 290-91 (2007) ("What is true of statutes enacted by the legislature is likewise true of initiatives, for when the people pass an initiative, they exercise legislative power that is coextensive with that of the legislature. A law passed by initiative is no less a law than one enacted by the legislature. Nor is it more."), accord *id.* at 318 (Cambers, J., concurring) ("the initiative process cannot be used to amend the constitution [citing *Gerberding and Culliton*]); *Culliton v. Chase*, 174 Wash. 363, 373-74 (1933) ("All laws on any subject whatever, enacted by either the people or the legislature, must be governed by the provisions of the constitution in force at that time. The people in their legislative capacity are not ... superior to the written and fixed constitution"); *Ford v. Logan*, 79 Wn.2d 147, 155-56 (1971) ("the act of amending or repealing the basic organic instrument of government is of a higher order than the mere enactment of laws within the framework of that organic structure.... Amendment of our constitution is not a legislative act and thus is not within the initiative power reserved to the voters."); *Gerberding v. Munro*, 134 Wn.2d 188, 210 & n.11 (1998) ("the initiative power may not be used to amend the Constitution").

only if approved by a two-thirds vote of each house of the legislature”.
RCW 43.135.035(1).²⁷

If valid, that statute effectively adds an eleventh category of State legislative acts to the ten specified in our State Constitution as requiring a 2/3 supermajority vote, and operates to amend the simple majority provision of Article II, §22 to instead provide as follows “**Passage of bills.** No bill shall become a law unless ... a majority of the members elected to each house be recorded thereon as voting in its favor, *with the exception that no bill that raises taxes shall become a law unless it receives a 2/3 supermajority vote in each house.*”

D. The 2/3 Supermajority Provision In RCW 43.135.035(1) Is Unconstitutional Because a Statute Cannot Amend The Constitution

As noted earlier, this Court has made it abundantly clear that a statute cannot amend our Constitution. The 2/3 supermajority requirement imposed by RCW 43.135.035(1) is therefore unconstitutional – for as explained above, it effectively amends the vote passage provisions of our State Constitution.

As this Court knows from the recent briefing in the *Futurewise* case, the Supreme Court of Alaska reached this same conclusion last year

²⁷ *The 2/3 supermajority requirement in RCW 43.135.035(1) was originally enacted as part of Initiative 601. This statute and its 2/3 supermajority requirement was then reenacted by the legislature in later years. The scope of bills subject to this statute’s 2/3 supermajority requirement was recently amended by Initiative 960 – but the 2/3 supermajority requirement of RCW 43.135.035(1) itself was not amended by that Initiative. ASF000070-71 at ¶18 (Petitioner’s description of the history of prior versions of RCW 43.135.035(1)) and ASF000143, ¶18 (“Respondent agrees with Petitioner’s description of the history of prior versions of RCW 43.135.035(1).”).*

when it addressed this constitutional issue in *Alaskans for Efficient Government v. State of Alaska*, 153 P.3d. 296 (2007). Similar to Article II, §22 of our State Constitution, the State Constitution of that State provides that “No bill may become law without an affirmative vote of a majority of the membership of each house.” 153 P.3d at 299 (citing Alaska Constitution Article II, §14).

Given that simple majority provision in the State Constitution, the State Supreme Court held that the enactment of a statutory supermajority requirement for a specific type of legislation is unconstitutional. 153 P.3d at 302 (the majority-vote provision of the above-quoted Article II, §14 “prohibit[s] the enactment of any law that proposed to modify the majority-vote standard”).²⁸

This same constitutional issue has also been addressed in Michigan. Similar to Article II, §22 of our State Constitution, the State Constitution of that State provides that “No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house.” 1998 Mich. OAG No. 6990, 1998 WL 477683 (Mich.A.G.) at *1 (citing Michigan Constitution Article IV, §§22 & 26).

Given that simple majority provision of the State Constitution, the Attorney General of that State issued a formal legal opinion that

²⁸ Like Washington, Alaska allows statutes to be enacted by voter-approved initiative, and the statute at issue in that case was such an initiative proposal. See 153 P.3d at 302 (“Because the legislature itself cannot change this constitutional standard by enacting a law, and an initiative cannot enact laws that the legislature has no authority to enact, it follows that article II, section 14 prevents an initiative from addressing the subject of the number of votes needed to enact a bill into law”) (footnote citation omitted).

concluded a statutory supermajority requirement is unconstitutional. *Id.* at *2 (“the Legislature may not, by statute, require a three-fifths vote to enact legislation for which the constitution otherwise requires a simple majority vote”).

In short, the answer to the underlying constitutional question in this case is clear. The 2/3 supermajority requirement imposed by RCW 43.135.035(1) is unconstitutional. Such a supermajority requirement can be added by a constitutional amendment. But it cannot be added by the enactment of a statute.

E. Need For Timely Relief From This Court

It is the sole province (and duty) of this Supreme Court to determine whether a State statute is or is not constitutional. The legal decision as to whether or not the 2/3 supermajority provision of RCW 43.135.035(1) is constitutional is not a decision delegated to non-judicial State Officers such as the Respondent Lieutenant Governor. Rather, this constitutional determination is a judicial decision to be exclusively made by this Court. E.g., *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 303-04 (2007) (“The legislature is precluded by the constitutional doctrine of separation of powers from make judicial determinations”).

Only this Court can finally resolve the controversy presented by this Petition – for only this Court can decide whether it is constitutional for the statute at issue (RCW 43.135.035(1)) to change the passage

requirement for a category of bills from the simple majority requirement established by Article II, §22 of our State Constitution.

Washington law provides that a writ of mandamus “must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.”²⁹ Washington law also provides that this Court has original jurisdiction to issue the writ of mandamus and related relief requested in the Petition Against State Officer in this case.³⁰ Since a statute cannot amend our State Constitution, and since Petitioner has no alternative plain, speedy, or adequate remedy under the law to secure the enforcement of our Constitution and the majority-vote passage provision of Article II, §22, this Court should timely issue the writ of mandamus and related relief requested in the Petition.

IV. CONCLUSION

The 2/3 supermajority requirement established by RCW 43.135.035(1) is unconstitutional under Article II, §22. The Lieutenant Governor accordingly had no legal right or authority to refuse to forward Senate Bill 6931 on to the House as “passed” based on the fact that it received a majority vote instead of the 2/3 supermajority vote specified in RCW 43.135.035(1). The Lieutenant Governor similarly has no legal right or authority to refuse to forward any other Senate Bill on to the House as “passed” based on the fact that that bill received a majority

²⁹ RCW 7.16.170.

³⁰ E.g., *Washington State Constitution, Article IV, §4; and RAP 16.2 & Form 16.*

vote instead of the 2/3 supermajority vote specified in RCW 43.135.035(1).

As noted earlier, this Court has denied the procedural ruling requested by the Petitioner (accelerated review before the March 13 end of the 2008 legislative session), ruling that this case would instead proceed on its current schedule.

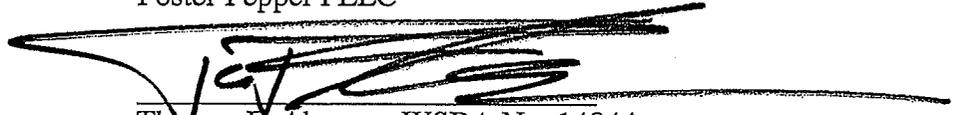
For the reasons outlined in this Brief, this Court should, on that non-accelerated schedule, now issue the substantive relief requested in that Petition. This Court should therefore:

1. Consistent with the parties' agreement that this is a case of continuing and substantial public import that satisfies the exception to the mootness doctrine, this Court should issue writs of mandamus and/or prohibition that
 - (a) confirm that Washington law prohibited the Lieutenant Governor from refusing to forward Senate Bill 6931 on to the House as passed on the grounds that it received only a majority vote instead of the 2/3 supermajority vote specified by RCW 43.135.035(1), and
 - (b) confirm that Washington law obligated the Lieutenant Governor to comply with his duty to forward Senate Bill 6931 on to the House as passed because the 2/3 supermajority requirement of RCW 43.135.035(1) is unconstitutional under Article II, §22.
2. Issue writs of mandamus and/or prohibition that prohibit the Lieutenant Governor from refusing to forward Senate Bills on to the House as passed on the grounds that they received only a majority vote instead of the 2/3 supermajority vote specified by RCW 43.135.035(1), because the 2/3 supermajority requirement of RCW 43.135.035(1) is unconstitutional under Article II, §22.
3. Issue such other relief as this Court deems just or equitable, including but not limited to whatever additional writs, declarations, or Orders are necessary or proper to resolve the constitutional question raised by this controversy, and to confirm that the 2/3 supermajority requirement imposed by

RCW 43.135.035(1) is unconstitutional under Article II, §22 of
the Washington State Constitution.

RESPECTFULLY SUBMITTED this 25th day of April, 2008.

Foster Pepper PLLC

A large, stylized handwritten signature in black ink, appearing to be 'T. Ahearne', is written over a horizontal line. The signature is somewhat abstract and spans across the width of the text block below it.

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