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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEAGUE OF EDUCATION VOTERS, *et al.*,

Respondents,

v.

STATE OF WASHINGTON,

Appellant,

and CHRISTINE GREGOIRE, Governor of the State of Washington,

Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE FREEDOM FOUNDATION

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ORIGINAL

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I. IDENTITY & INTEREST OF AMICUS CURIAE

The Freedom Foundation is a Washington nonprofit corporation dedicated to advancing individual liberty, free enterprise and limited, accountable government, and is supported by more than thousands of Washington residents. Foundation staff provide public policy analysis to legislators in the areas of state budgeting and taxation. The Foundation supports a supermajority requirement for tax increases as a useful mechanism to ensure fiscally-responsible budgeting. Additionally, the Foundation frequently provides commentary and analysis related to the interpretation of the Washington Constitution.

II. STATEMENT OF THE CASE

The Freedom Foundation adopts Appellant State of Washington's Statement of the Case.

III. ARGUMENT

The Freedom Foundation agrees with the State of Washington that this Court can resolve this case without reaching the constitutional question by concluding that the matter presents no justiciable controversy. But should the Court reach the merits, the Washington Constitution does not prohibit a supermajority requirement for tax increases. From the state's earliest days, Washingtonians have sought to safeguard their personal rights and economic interests from encroachment. The

constitution emphasizes this from its opening line: “governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.” Const. art. I, § 1.

Article II, section 22 of the Washington Constitution sets a minimum threshold for passage of legislation. A review of the convention debates shows that delegates sought only to prevent hasty passage with less than a majority of both houses. Where the constitution is silent the legislature (or the people) can impose additional restrictions upon itself. There is no evidence that the state’s framers would have opposed requiring a higher degree of consensus for tax increases.

The supermajority requirement at issue is therefore consistent with the historical record, a textual analysis, and with the constitution’s emphasis on individual rights.

A. The Two-Thirds Vote Requirement is Consistent with Washington State’s Formation and Early History.

A discussion of Washington’s historical context shows that the two-thirds vote requirement in RCW 43.135.034(1) is consistent with the framers’ intent to protect individual economic rights.

1. The Washington Constitution was Adopted during a Period of Frustration over Legislative Abuses.

The Washington Constitution was formed during a period of great skepticism toward legislative bodies. Robert F. Utter & Hugh D. Spitzer,

The Washington State Constitution: A Reference Guide 51 (2002). By 1889, the year Washington achieved statehood, the constitutions of states entering the union bore many similarities, and constitutional “experimentation” had been all but exhausted. Charles H. Sheldon, *A Century of Judging: A Political History of the Washington Supreme Court* 18 (1988). But one of the prime concerns addressed at this time was the legislature. Many “detailed limitations on government were directed toward the lawmaking branch.” *Id.*

State legislatures were seen as easily corruptible and prone to abuses of individual rights, thereby earning passionate criticism: “of all oppressive and unjust instruments of government the legislature is the greatest and most irresponsible.” Lebbeus J. Knapp, *Origin of the Constitution of the State of Washington*, 4 Wash. Hist. Q. 227, 250 (1913). Constitutional drafters therefore constructed lengthy documents to control the “excesses” of “sloppy, corrupt, and selfish legislation.” Sheldon, *supra*, at 19.

The delegates to the Washington Constitutional Convention were certainly possessed of a strong distrust of legislative bodies. General sentiment “placed the responsibility of financial distress upon the legislative bodies of the country.” Knapp, *supra*, at 230. The “wholesale corruption of state legislatures [was] laughed at by honest men throughout

America.” *Tacoma Daily Ledger*, July 19, 1889. During the convention the attitude toward the legislature was so adversarial that one delegate remarked, “If . . . a stranger from a foreign country were to drop into this convention, he would conclude that we were fighting a great enemy, and that this enemy is the legislature.” Knapp, *supra*, at 265.

The “troubled record” of Washington’s territorial legislature inflamed these concerns. Brian Snure, Comment, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 677 (1992). Legislative abuses abounded and the territorial legislature was notorious for adopting special legislation that benefited only private interests. *Id.* at 671. “Logrolling”—the practice of embracing several distinct matters in one bill in order to procure passage, also troubled the constitutional delegates. *Pierce County v. State*, 150 Wn.2d 422, 429-30, 78 P.3d 640 (2003).

The delegates looked with suspicion even upon well-intentioned legislators. As one delegate commented dryly, the constitution protected citizens’ rights from “the greed and rapacity of trusted servants.” John R. Kinnear, *Notes on the Constitutional Convention*, 4 Wash. Hist. Q. 276, 279 (1913).

The Washington Constitution, therefore, was viewed as a opportunity to correct legislative abuses, and even out-of-state newspapers urged Washington to prevent the corruption that had typified other legislatures. James L. Fitts, *The Washington Constitutional Convention of 1889*, at 28-29 (1951) (unpublished master's thesis, Univ. of Wash.).

The delegates who gathered in Olympia had the benefit of a proposed constitution written by W. Lair Hill. *The Journal of the Washington State Constitution Convention: 1889*, at v (Beverly Paulik Rosenow ed., 1999). Even this resource stressed the need to protect individual rights from legislative power. Mr. Hill wrote that state constitutions “contain not much of value except inhibitions, restraints, regulations and other precautionary safeguards against encroachments by legislative authority upon the rights of individuals” W. Lair Hill, “A Constitution Adapted to the Coming State,” *The Morning Oregonian*, July 4, 1889, at viii.

2. The Framers of the Washington Constitution Enacted Restrictions on Legislative Power.

Consistent with “the growing distrust of the people in legislative bodies,” Washington delegates sought to restrict legislative power in order to protect individual rights and individual pocketbooks. Knapp, *supra*, at 228. The framers removed many traditional powers from the legislature.

Snure, *supra*, at 670. One delegate, who later served on the state supreme court, noted the significance of the constitution: “In its operation upon the executive, and especially the legislative branches of government, the constitution is an instrument of limitation” Theodore L. Stiles, *The Constitution of the State and its Effects Upon Public Interests*, 4 Wash. Hist. Q. 281, 282 (1913). Numerous constitutional provisions illustrate the delegates’ motivation to restrict legislative power, especially in areas of fiscal appropriation and special legislation.¹ Details about the legislature’s operation, such as the body’s size and the duration of the session, were aimed at restricting the legislature. Fitts, *supra*, 29-31.

Given this context, the delegates were concerned with placing *too much* power in the hands of the legislature—not, as Respondents argue, additional limitations imposed by the people in order to protect their economic interests.

3. Subsequent Actions of the People Also Indicate a Distrust of Legislative Power.

Actions of the electorate in Washington’s early years also demonstrate the desire to protect their pocketbooks from legislative abuse.

¹ The delegates prohibited the legislature granting special privileges or immunities (Const. art. I, § 12); prohibited “logrolling” (Const. art. II, § 19); prohibited authorizing lotteries and granting divorces (Const. art. II, § 24); prohibited 18 categories of special legislation (Const. art. II, § 28); prohibited contracting out convict labor (Const. art. II, § 29); prohibited accepting free transportation passes (Const. art. II, § 39); required special indebtedness to be submitted to a vote (Const. art. VIII, § 3); and prohibited lending money or credit to private companies (Const. art. VIII, § 5; Const. art. XII, § 9).

The populist “direct democracy” movement in Washington resulted in adding the people’s right to initiative and referendum to the constitution. See Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples’ Powers of Initiative and Referendum*, 32 Gonz. L. Rev. 247, 251-56 (1996-97). Supporters of direct democracy forthrightly stated their motivations for the amendment: “Direct legislation will make it possible to stop graft, reduce the tax rate and bring about honesty in the politics of the state.” Direct Legislation League of Washington, *Direct Legislation or the Initiative, Referendum, and Recall* (1912) (emphasis omitted).² Supporters complained of an out-of-control legislature, and argued that taxes could be reduced with direct legislation. *Id.* at 1.

The history of Amendment 17, some years later, illustrates how the people asserted control over public expenditures. *Seattle School Dist. No. 1 v. Odell*, 54 Wn.2d 728, 729, 344 P.2d 715 (1959). In 1932, voters approved a measure that limited property taxes and required a sixty percent vote to exceed the limit. Thereafter, at two-year intervals, the voters approved similar measures. Finally, in 1944, the voters adopted Amendment 17 to fix a similar limitation in the constitution. Const. art. VII, § 2. The reenactment of the property tax limitation by the voters from

² Available at: <http://www.secstate.wa.gov/oralhistory/pdf/OH448.pdf> (last visited August 1, 2008).

1932 through 1942 effectively barred the legislature from eliminating the supermajority requirement.³

In recent years, the legislature has recognized the necessity of supermajority requirements. Since passage of Initiative 601 in 1993, the legislature has amended the supermajority requirement numerous times, but has not repealed or permanently suspended the two-thirds requirement in RCW 43.135.034(1).⁴ The legislature has placed similar restrictions upon its own internal functions. The senate's permanent rules require a supermajority vote to expel members from the legislature, to suspend permanent rules, and to waive the deadline for bill introductions. Senate Resolution 8604, 62nd Leg., Reg. Sess. (2011).

Throughout Washington's history, therefore, the people have attempted to safeguard their personal and economic rights from legislative encroachment. The two-thirds requirement in RCW 43.135.034(1) is entirely consistent with this history.

³ Prior to the adoption of Amendment 26 (1952), an initiative could not be amended in the two years following approval except by a vote of the people.

⁴ Laws of 2000, 2d Spec. Sess., ch. 2, § 2; Laws of 2002, ch. 33, § 1 (temporary suspension of 2/3 requirement); Laws of 2005, ch. 72, § 2 (temporary suspension of 2/3 requirement); Laws of 2006, ch. 56, § 8; Laws of 2007, ch. 484, § 6. Each of the bills above left intact the supermajority requirement at issue.

B. The Two-Thirds Vote Requirement Does Not Violate Article II, Section 22 of the Washington Constitution.

While the people are the original source of political power, they granted power to the legislature to act as their representatives when they formed a republican government. Const. art. I, § 1. Limitations on this power were expressly written or “fairly implied” in the constitution, *State ex rel. Todd v. Yelle*, 7 Wn.2d 443, 451, 110 P.2d 162 (1941), and this Court has been “reluctant to find a restriction on the legislature’s power unless some limitation is found in the wording of the constitution itself.” *Public Utility District No. 1 of Snohomish County v. Taxpayers and Ratepayers of Snohomish County*, 78 Wn.2d 724, 728-29, 479 P.2d 61 (1971). But Petitioner wishes to turn this rule on its head, asking the court to ignore (1) the plain language of Section 22, (2) its context in the constitution, (3) the intent of its writers and adopters, and (4) the positive role supermajority requirements play in a balanced democracy.

1. The Plain Text of Section 22 Sets Only a Minimum Voting Requirement for Bill Passage.

When attempting to determine the meaning of a constitutional section, scholar Thomas J. Cooley suggests “the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them.” Thomas J. Cooley, *Treatise on Constitutional Limitations*

127 (8th ed., 1927). It is “elementary . . . that, in construing the constitution, words are to be given the usual and ordinary meaning.” *Yelle*, 7 Wn.2d at 167. That’s how the people who adopted the constitution understood them, and “[t]he fundamental principle of constitutional construction is to give effect to the intent of the . . . people adopting it.” *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wn.2d 652, 659, 171 P.2d 838 (1946).

On its face, the negative phrasing of Section 22 (“No bill shall become a law unless . . .”) sets a minimum standard: a bill cannot pass if a majority of members do not vote for it. A bill passing by a two-thirds vote satisfies this requirement. Courts have noted the significance of negative phrasing and how such wording “merely fixes a minimum of qualifications below which [government] may not go.” *State ex rel. Griffiths v. Superior Court In and For King County*, 177 Wn. 619, 624, 33 P.2d 94 (1934).

2. The Context of Section 22 Sets a Minimum Requirement, Consistent with its Plain Language.

While the meaning of Section 22 is plain on its face, prudence dictates that we look at it in light of the remainder of the constitution, to ensure there is “no absurdity and no contradiction between different parts of the same writing . . .” *Cooley, supra*, at 127. There is none here.

Other constitutional sections make it abundantly clear that the constitution—in its original and amended format—included “ceilings” and “floors” into the text. For example, Article II, Section 2 limits the number of representatives to “not less than sixty-three nor more than ninety-nine members,” and Article II, Section 12 limits legislative sessions to “not be more than sixty consecutive days.” While not an original clause, the positive wording in Article II, Section 1(d) of the constitution is instructive, “Any measure . . . shall take effect and become the law if it is approved by a majority of the votes cast.” This provision, adopted in 1913, strengthens the assumption that the constitutional drafters have understood the distinction of negative and positive phrasing when setting the thresholds for passage of legislation.

It is reasonable to assume that constitutional drafters used exclusive text when they intended a requirement to be exclusive and used phrasing like that used in Section 22 to set only a minimum requirement. Such reasoning leads to no absurdities, and allows the Court to maintain a general approach of not reading hidden meanings into the text.

Ignoring the grammar of Section 22 and its surrounding clauses should not be done lightly. “Courts must . . . lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.” Cooley, *supra*, at 128.

3. The Constitutional Framers were Concerned about Bill Passage by Less Than a Majority, Not by Supermajorities.

Based on its plain text and context, Article II, Section 22 does not prevent the legislature from passing a supermajority requirement. But if there are any doubts, extrinsic aids can help determine the intent of those who wrote and approved the section, in order to find “the object to be accomplished or the mischief designed to be remedied or guarded against.” Cooley, *supra*, at 141. The available evidence suggests that the “mischief designed to be remedied” was not a two-thirds threshold, but a fear of bills being passed hastily by *less* than a majority of the full houses.

Looking first to the minutes of the constitutional convention, what little debate there was on Section 22 concerned whether bills could pass with less than a majority. *Journal, supra*, at 536. Two amendments offered would have struck the majority requirement. Both motions lost, indicating concern about bills passing with a mere majority of those present. *Id.*⁵

Why was there concern? The drafters of California’s 1879 constitution provide a likely answer in their debates over the provision that served as a basis for Section 22.⁶ Every California delegate who spoke

⁵ Delegate George Turner’s amendment would have struck the last clause, beginning with “and a majority.” James Power’s amendment would have inserted a provision that a majority of those present could pass a bill. *Journal, supra*, at 536.

⁶ Article II, Section 22, was modeled on a California provision. *Journal, supra*, at 535. Cal. Const. art. IV, § 15 (now Section 8) read in part, “No bill may be passed unless, by roll call vote entered in the journal, a majority of the membership of each

about the purpose of the section said it was designed “to guard against hasty legislation, so that a bill could not be rushed through when there is a very thin house.” 2 *Debates and Proceedings of the Constitutional Convention of the State of Cal.* 780 (1881). One delegate even alluded to the minimum nature of the section when he complained an early version would not prevent hasty legislation, saying, “A bill may be . . . voted upon immediately . . . in the course of fifteen minutes, and, perhaps, one half of the members know nothing about it. There is no safety in that, *unless the laws of the Assembly should prevent it . . .*” *Id.* at 778 (emphasis added). Subsequent California case law affirmed that the language merely established a “floor” for the legislature. *People v. Cortez*, 6 Cal.App.4th 1202, 8 Cal Rptr.2d 580 (Cal. Ct. App. 1992).

The other procedural requirements the Washington drafters included around Section 22 strengthen the evidence that they had the same primary concern as the California delegates. The ten-day cutoff for introduction, the journal requirements, the single subject rule and similar rules all appear designed to prevent hasty legislation.⁷

house concurs.” The influence of the California Constitution was so strong on the Washington drafters that the *Seattle Post-Intelligencer* reported: “So marked is the tendency to imitate [the California Constitution] that a member one day objected to a certain provision because it was not found in that Constitution.” Fitts, *supra*, at 35 n.33.

⁷ Const. art. II, §§ 11, 19, 21, 22 and 36.

Nothing in Section 22 prohibits a supermajority requirement for tax increases. “[A] state constitution is not a grant, but a restriction upon the powers of the legislature, and, hence, an express enumeration of legislative powers is not an exclusion of others not named, unless accompanied by negative terms.” *State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 203, 191 P.2d 241 (1948).

The supermajority requirements in the 1889 constitution contained no exclusionary language, nor was there any expressed intent to make them so in the convention debates.⁸ It appears the constitutional drafters wished to ensure widespread agreement to waive constitutional requirements, change the state’s founding document or take the grave step of impeaching an official. Requiring a two-thirds vote in these instances does not mean the drafters hoped to preclude other uses of a supermajority vote, but only that these far-reaching actions were issues worthy of constitutional safeguards.⁹

⁸ The 1889 constitution required supermajority votes for: expelling a legislator (Const. art. II, § 9); waiving the waiting period for bills to go into effect (Const. art. II, § 31 (*repealed*)); waiving the cutoff for bill introduction (Const. art. II, § 36); overriding a veto (Const. art. III, § 12); removal of judges (Const. art. IV, § 9); impeachment (Const. art. V, § 1); amending the constitution (Const. art. XXIII, § 1); and calling a constitutional convention (Const. art. XXIII, § 2).

⁹ For example, in the extensive debate over the governor’s veto power, several of the delegates commented on the need for a working veto power as a foundational element in the balance of power. While several delegates wanted to reduce the veto requirement to three-fifths or a simple majority, the two-thirds requirement was set to ensure the survival of this “fundamental principle of government.” *Journal, supra*, at 573.

IV. CONCLUSION

The two-thirds vote requirement at issue is consistent with the historical record, is consistent with a textual analysis, and is consistent with our constitution's emphasis on individual rights.

For the foregoing reasons, the Freedom Foundation respectfully urges the Court to reverse the trial court.

RESPECTFULLY SUBMITTED this 24th day of August, 2012.

FREEDOM FOUNDATION

A handwritten signature in black ink, appearing to read "Michael J. Reitz". The signature is written in a cursive style with a prominent "M" and "R".

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v.

STATE OF WASHINGTON,

Appellant,

and CHRISTINE GREGOIRE,
Governor of the State of Washington,

Respondent.

Certificate of Service

I, the undersigned, certify that on the 24th day of August 2012, I caused to be served a true and correct copy of the enclosed Motion for Leave to File as *Amicus Curiae* Freedom Foundation and Brief of *Amicus Curiae* Freedom Foundation by electronic mail and first class mail, postage prepaid, to the following persons:

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Rec. 8-24-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Subject: League of Education Voters. State and Gregoire, No. 87425-5

Dear Clerk,

Attached please find the following documents for filing regarding *League of Education Voters, et al., v. State of Washington and Christine Gregoire*, No. 87425-5:

- 1) Motion for Leave to File Amicus Curiae Freedom Foundation;
- 2) Brief of Amicus Curiae Freedom Foundation; and
- 3) Certificate of Service.

If you have any questions or if you are unable to download the attachments, please contact me. Thank you.

Sincerely,

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...BECAUSE PEOPLE WANT TO BE FREE.