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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.

STATE'S OPENING BRIEF

ROBERT M. MCKENNA
Attorney General

MAUREEN HART, WSBA #7831
Solicitor General
JEFFREY T. EVEN, WSBA #20367
ALLYSON ZIPP, WSBA #38076
Deputy Solicitors General
PO Box 40100
Olympia, WA 98504-0100
(360) 753-2536
Attorneys for State of Washington

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

IV. STATEMENT OF THE CASE.....3

A. Respondents And Their Claims Below.....3

B. The Challenged Statutory Provisions.....4

C. Proceedings In The Trial Court.....5

D. Proceedings In This Court6

V. SUMMARY OF ARGUMENT.....7

VI. ARGUMENT10

A. Review Standards.....10

B. The Court’s Jurisdiction Depends Upon A Justiciable Controversy, And There Is None Here10

1. LEV Has No Legal Interests At Issue11

2. LEV Fails To Demonstrate It Is Actually And Substantially Harmed By The Statute It Challenges14

3. LEV And The Governor Present Only Premature Hypothetical Political Questions17

C. This Case Is Not Within The Narrow Category Of Cases The Court Will Consider In The Absence Of A Justiciable Controversy22

D.	Article II, Section 22 Of The Washington Constitution Does Not Prohibit The Statutory Supermajority Vote Provision Of RCW 43.135.034(1)	25
1.	The Plain Language Of Article II, Section 22 Only Prohibits Passage Of Laws By Less Than Majority Vote	26
2.	Nothing In The Debate On Article II, Section 22 Demonstrates That The Framers Intended To Impose A Maximum Majority Vote Limit	29
3.	Washington Precedent Supports That Article II, Section 22 Establishes Only A Minimum Majority Vote Threshold For Bill Passage, Not Also A Maximum Vote Limit	34
4.	Foreign Authority Cannot—And Should Not— Negate The Plain Language Meaning Of Article II, Section 22	37
E.	Article II, Section 1 Does Not Prohibit The Voter Approval Provision Of RCW 43.135.034(2)(a)	42
1.	Article II, Section 1 Expressly Reserves To The People The Power To Enact Laws At The Polls, And RCW 43.135.034(2)(a) Was Such An Enactment	42
2.	RCW 43.135.034(2)(a) Does Not Restrict The Legislature’s Authority	43
3.	The Legislature Has Reenacted The Voter Approval Provision, And The Provision Is Within Its Power To Refer Bills To The Voters	44
4.	This Court’s Decision in <i>ATU</i> Is Inapposite, And The Trial Court Erred In Concluding <i>ATU</i> Is Controlling	45

5.	If <i>ATU</i> Were Read To Invalidate RCW 43.135.034(2)(a), The Decision Would Be Incorrect And Harmful, And To That Extent, Should Be Overruled	47
F.	The Court Should Dismiss This Action, But If the Court Concludes That Either Challenged Provision of RCW 43,135.034 Is Unconstitutional, Its Remaining Provisions Should Be Severed	47
VII.	CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Alaskans for Efficient Government, Inc. v. State</i> , 153 P.3d 296 (Alaska 2007)	39, 40
<i>Amalgamated Transit Union Local 587 v. State</i> ; 142 Wn.2d 183, 11 P.3d 762 (2001).....	17, 45- 47
<i>Bank of America, N.A. v. Owens</i> , 173 Wn.2d 40, 266 P.3d 211 (2011).....	19
<i>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	17
<i>Brower v. State</i> , 137 Wn.2d 44, 969 P.2d 42 (1998).....	37
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	7, 10, 13, 15, 18, 20, 25
<i>City of Ellensburg v. State</i> , 118 Wn.2d 709, 826 P.2d 1081 (1992).....	16
<i>Concerned Coupeville Citizens v. Town of Coupeville</i> , 62 Wn. App. 408, 814 P.2d 243 (1991).....	49
<i>Coppernoll v. Reed</i> , 155 Wn.2d 290, 119 P.3d 318 (2005).....	10, 18
<i>Federal Way Sch. Dist. 210 v. State</i> , 167 Wn.2d 514, 219 P.3d 941 (2009).....	13
<i>First United Methodist Church v. Seattle</i> , 129 Wn.2d 238, 916 P.2d 374 (1996).....	17
<i>Futurewise v. Reed</i> , 161 Wn.2d 407, 166 P.3d 708 (2007).....	25

<i>Gerberding v. Munro</i> , 134 Wn.2d 188, 949 P.2d 1366 (1998).....	36, 37
<i>Grant County Fire Protection District 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	14, 17
<i>Hardee v. State</i> , 172 Wn.2d 1, 256 P.3d 339 (2011).....	47
<i>Howard Jarvis Taxpayers Association v. City of San Diego</i> , 120 Cal. App. 4th 374, 15 Cal. Rptr. 3d 457 (2004).....	38
<i>In re Parentage of C.A.M.A.</i> , 154 Wn.2d 52, 109 P.2d 405 (2005).....	49
<i>Klossner v. San Juan Cnty.</i> , 93 Wn.2d 42, 605 P.2d 330 (1980).....	14
<i>Las v. Yellow Front Stores, Inc.</i> , 66 Wn. App. 196, 831 P.2d 744 (1992).....	14
<i>Madison v. State</i> , 161 Wn.2d 85, 163 P.3d 757 (2007).....	39
<i>Malyon v. Pierce Cnty.</i> , 131 Wn.2d 779, 935 P.2d 1272 (1997).....	26, 39
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).....	20
<i>Robb v. City of Tacoma</i> , 175 Wash. 580, 28 P.2d 327 (1933)	34- 36
<i>Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State</i> , 170 Wn.2d 599, 244 P.3d 1 (2010).....	26
<i>State ex rel. Craig v. Town of Newport</i> , 70 Wash. 286, 126 P. 637 (1912)	36
<i>State ex rel. Distilled Spirits Inst., Inc. v. Kinnear</i> , 80 Wn.2d 175, 492 P.2d 1012 (1972).....	22- 24, 26

<i>State ex rel. Gunning v. Odell</i> , 58 Wn.2d 275, 362 P.2d 254 (1961).....	15
<i>State ex rel. O’Connell v. Slavin</i> , 75 Wn.2d 554, 452 P.2d 943 (1969).....	27, 29
<i>State v. Abrams</i> , 163 Wn.2d 277, 178 P.3d 1021 (2008).....	48
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	32
<i>State v. Siers</i> , 174 Wn.2d 269, 274 P.3d 358 (2012).....	47
<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403, 27 P.3d 1149 (2001).....	11, 14, 17
<i>Tunstall ex rel. Tunstall v. Bergeson</i> , 141 Wn.2d 201, 5 P.3d 691 (2000).....	19
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	8, 13, 19, 22, 23, 25
<i>Washington Beauty Coll., Inc. v. Huse</i> , 195 Wash. 160, 80 P.2d 403 (1938)	12
<i>Washington Econ. Dev. Fin. Auth. v. Grimm</i> , 119 Wn.2d 738, 837 P.2d 606 (1992).....	28
<i>Washington State Farm Bureau Fed. v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007).....	20, 26, 33, 37, 39, 43, 44

Constitutional Provisions

Alaska Const. art. II, § 14	39
Ariz. Const. art. IV, § 1(1).....	40
Ariz. Const. art. IV, § 1(2).....	40

Ariz. Const. art. IX, § 22.....	40
Ariz. Const. art. IX, § 22(A)	40
Ark. Const. art. V, § 1	40
Ark. Const. art. V, § 38.....	40
Cal. Const. art. II, § 8(a)	40
Cal. Const. art. XIII A, § 4.....	40
Cal. Const. art. XIII C, § 2(b)	38
Cal. Const. art. XIII C, § 2(d)	38
Colo. Const. art. V, § 1	40
Colo. Const. art. X, § 20	41
Colo. Const. art. X, § 20(6)(a)	40
Del. Const. art. VIII, § 11(a).....	40
Ky. Const. § 36(1).....	40
La. Const. art. VII, § 2.....	40
Miss. Const. art. IV, § 70	40
Miss. Const. art. XV, § 273	40
Okla. Const. art. V, § 1	40
Okla. Const. art. V, § 2	40
Okla. Const. art. V, § 33	41
Okla. Const. art. V, § 33(C).....	40
Okla. Const. art. V, § 33(D).....	40

Or. Const. art. IV, § 1.....	40
Or. Const. art. IV, § 25.....	40
S.D. Const. art. XI, § 13.....	40
S.D. Const. art. XXIII, § 1	40
Wash. Const. art. II	31
Wash. Const. art. II, § 1	2, 6, 18, 29, 42, 44, 47
Wash. Const. art. II, § 1(b).....	9, 45, 46, 47
Wash. Const. art. II, § 1(c).....	43
Wash. Const. art. II, § 1(d).....	29
Wash. Const. art. II, § 7	36
Wash. Const. art. II, § 9	31
Wash. Const. art. II, § 21	28, 32
Wash. Const. art. II, § 22	2, 3, 6, 9, 25-30, 32-34, 36-42
Wash. Const. art. II, § 36	31
Wash. Const. art. III, § 12.....	24, 31
Wash. Const. art. III, § 25.....	36
Wash. Const. art. IV, § 9.....	31
Wash. Const. art. V, § 1	31
Wash. Const. art. VIII, § 6.....	34, 35
Wash. Const. art. XXIII, § 1	31
Wash. Const. art. XXIII, § 2.....	31

Statutes

Laws of 1911, ch. 42, § 1	29
Laws of 1994, ch. 2, § 4	24
Laws of 1994, ch. 2, § 4(2)(a)	43
Laws of 2000, ch. 1, § 2	45
Laws of 2002, ch. 33, § 1	25, 49
Laws of 2005, ch. 72, § 1	25, 44, 46
Laws of 2005, ch. 72, § 2	25, 44, 46, 49
Laws of 2010, ch. 4, § 2	25, 49
Laws of 2011, ch. 1, § 2	24
Laws of 2011, ch. 1, § 7	48
RCW 7.24	2, 10, 11, 14
RCW 7.24.020	11
RCW 28A.505.040	16
RCW 28A.505.060	16
RCW 28A.505.070	16
RCW 43.135.025(1)	43, 46
RCW 43.135.034	3, 4, 7-12, 18-22, 24, 44, 46, 47
RCW 43.135.034(1)	1, 3, 4-6, 8, 9, 12, 15-17, 19, 25, 36, 42, 48-50
RCW 43.135.034(2)(a)	2-6, 9, 17, 19, 42-44, 46-50

Rules

CR 56 14
CR 56(e).....14

Other Authorities

Engrossed S.B. 6635, 62d Leg., 2d Spec. Sess. (Wash. 2012) 16
Seattle Times, Aug. 9, 1889, in *Washington State Constitutional Convention 1889: Contemporary Newspaper Articles* (William S. Hein & Co., Inc. 1999) 30
Substitute H.B. 2078, 62d Leg., 1st Spec. Sess. (Wash. 2011) 16
The Journal of the Washington State Constitutional Convention 1889 with Analytical Index (Beverly Paulik Rosenow ed., William S. Hein & Co., Inc. 1999) 28, 30
Webster's Third New International Dictionary (2002) 27

I. INTRODUCTION

This case concerns the fundamental nature of our state government as one of divided powers: (1) judicial power to resolve actual, concrete, controversies concerning harm to existing legal rights; and (2) plenary legislative power in the people and the Legislature, except as expressly or necessarily limited by the state constitution. This fundamental division of power requires reversal of the decision below and dismissal of this case.

II. ASSIGNMENTS OF ERROR

The King County Superior Court erred in entering its May 30, 2012, Order Granting Plaintiffs' Motion For Summary Judgment And Denying Defendant State Of Washington's Motion For Summary Judgment, and accompanying Memorandum Opinion.

1. The King County Superior Court erred in concluding that this case presents a justiciable controversy;
2. The King County Superior Court erred in concluding that this case falls within the narrow category of cases presenting an issue of such overriding public importance that the judicial branch should decide the matter in the absence of a justiciable controversy;
3. The King County Superior Court erred in concluding that RCW 43.135.034(1), which calls for a supermajority vote of the

Legislature to raise taxes, violates article II, section 22 of the Washington Constitution;

4. The King County Superior Court erred in concluding that RCW 43.135.034(2)(a), which calls for voter approval of tax increases that would result in spending in excess of the state expenditure limit, violates article II, section 1 of the Washington Constitution; and

5. The King County Superior Court erred in denying the State's motions to strike incompetent factual assertions.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The Court should dismiss this case by addressing only the first three issues set forth below, as the merits of this case are not appropriate for judicial decision. Only if the Court determines otherwise, need it address the remaining issues.

1. To invoke the court's jurisdiction under the Declaratory Judgments Act, the Plaintiffs below (hereinafter LEV) must demonstrate a justiciable controversy. Where LEV has shown only a hypothetical, speculative, political dispute, has it demonstrated a justiciable controversy?

2. Are factual assertions not verified on personal knowledge and not supported by declaration competent evidence on summary judgment?

3. Does this case fall within the very narrow category of cases that the Court occasionally decides in the absence of a justiciable controversy?

4. Has LEV demonstrated beyond a reasonable doubt that article II, section 22 of the Washington Constitution prohibits the provision of RCW 43.135.034(1) that calls for a supermajority vote of the Legislature to raise taxes?

5. Has LEV demonstrated beyond a reasonable doubt that article II, section 1 of the Washington Constitution prohibits the provision of RCW 43.135.034(2)(a) that calls for voter approval of tax increases that will result in spending in excess of the state expenditure limit?

6. If any part of RCW 43.135.034 is invalid, should it be severed from the remaining provisions of the statute?

IV. STATEMENT OF THE CASE

A. Respondents And Their Claims Below

This lawsuit was brought by two nonprofit corporations, the League of Education Voters and the Washington Education Association, twelve members of the State House of Representatives (one of whom was also a school board member at the time the case began), a school district director, three teachers, the parents of a child who attends public school, and a former Justice of this Court. LEV sued the State of Washington and

Governor Gregoire as defendants. LEV sought a declaratory judgment invalidating the supermajority vote and voter approval provisions of RCW 43.135.034 and injunctive relief. CP at 1-26.

Although named as a defendant, the Governor is not defending the challenged provisions. The Governor has appeared through a special assistant attorney general. CP at 104-05. The Governor has not joined LEV's complaint or separately filed a complaint or answer, and necessarily disclaims advocating a view with respect to the constitutionality of the challenged provisions. CP at 107. The Governor argues that the Court should decide LEV's challenge to the supermajority vote provision of RCW 43.135.034(1). CP at 107. This brief refers to LEV and the Governor separately, because their arguments are different.

B. The Challenged Statutory Provisions

The first statutory provision that LEV challenges, RCW 43.135.034(1), provides that "[a]fter July 1, 1995, any action or combination of actions by the legislature that raises taxes may be taken only if approved by at least two-thirds legislative approval in both the house of representatives and the senate." The second challenged provision, RCW 43.135.034(2)(a), states that "if the legislative action under [RCW 43.135.034(1)] 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.”

C. Proceedings In The Trial Court

This case was decided below on cross-motions for summary judgment by the State and LEV. CP at 278-321, 375-424. The Governor filed no summary judgment motion or declarations.¹

The State sought summary judgment on the bases that (1) LEV failed to present a justiciable controversy as to either RCW 43.135.034(1)'s legislative supermajority vote provision or RCW 43.135.034(2)(a)'s voter approval provision; and that (2) LEV failed to demonstrate that this case falls within the very narrow category of cases the Court has heard absent a justiciable controversy. Alternatively the State sought summary judgment on the basis that (3) LEV could not meet its burden to show beyond a reasonable doubt that the state constitution prohibits either challenged statutory provision. The State also sought to strike facts alleged without competent foundation by LEV, and facts alleged in the Governor's Memoranda that were not supported by declaration and not subject to judicial notice. CP at 521-23, 552, 556-57, 567-68.

¹ The Governor filed only a “Governor’s Memorandum Re Jurisdiction” and a “Governor’s Response Memorandum Re Jurisdiction.” CP at 107-28, 474-84.

Although LEV pled that the challenged statute violated several provisions of the state constitution, LEV moved for summary judgment on only two: arguing that the supermajority vote provision is prohibited by article II, section 22, and that the statutory voter approval provision is prohibited by article II, section 1. CP at 375-424. LEV responded to the State's summary judgment motion on LEV's other claims.

The trial court granted LEV's summary judgment motion, denied the State's cross-motion, and denied the State's motions to strike. CP at 736-39. In its Memorandum Opinion, the trial court first concluded that this case "raises an issue of public importance" and should be heard without regard to whether it presents a justiciable controversy. CP at 744. ~~Alternatively, the trial court concluded that this matter presents a~~ justiciable controversy. CP at 746-48. On the merits of LEV's claims, the trial court held that article II, section 22 of the state constitution prohibits the supermajority vote provision of RCW 43.135.034(1), and that article II, section 1 of the state constitution prohibits the voter approval provision of RCW 43.135.034(2)(a). CP at 738.

D. Proceedings In This Court

The State filed a notice of appeal directly to this Court. CP at 702-03. By order of July 11, 2012, the Court accepted direct review.

V. SUMMARY OF ARGUMENT

This case, at its heart, is about the balance and separation of powers in our state government: (1) judicial power to resolve actual, concrete controversies concerning harm to existing legal rights; and (2) plenary legislative power in the people and the Legislature to determine the public policy of the state, except as expressly or necessarily limited by the state constitution. Respect for this fundamental, divided nature of our state government requires reversal of the decision below and dismissal of this case, for several reasons.

First, LEV has failed to present a justiciable controversy, and this Court should reverse the trial court on that basis alone. This case presents a challenge to the constitutional authority of the voters to exercise their reserved legislative powers through the initiative process. Particularly in light of the importance of the people's legislative prerogatives, this Court should adhere strictly to its jurisdictional principles. *Brown v. Owen*, 165 Wn.2d 706, 717, 206 P.3d 310 (2009) (courts cannot reach questions without jurisdiction to do so). No justiciable controversy is present here because: (1) LEV has no legal interests at issue with regard to the hypothetical application of the super majority vote and voter approval provisions of RCW 43.135.034, and (2) LEV has failed to demonstrate actual or substantial harm caused by RCW 43.135.034. LEV's claims of

harm depend upon multiple levels of speculation. These include speculating that RCW 43.135.034(1) has prevented the Legislature from enacting tax increases, that if the Legislature had enacted a tax increase it would have dedicated the revenues to the programs LEV prefers, and that local budgetary decisions would similarly have favored LEV. LEV's premature, hypothetical, political questions ask this Court to enter a purely advisory ruling on the constitutionality of RCW 43.135.034, before the Legislature has taken any action necessitating the Court's review. LEV's hypothetical questions would short circuit the actual questions presented by a justiciable controversy concerning the effect of RCW 43.135.034 on an act that raises taxes, and instead seek to invalidate the challenged statute. While LEV's hypothetical questions might ease the political environment for some legislators, easing the political environment is not the role of the judiciary.

Second, this Court should also reject the trial court's conclusion that it could reach the merits of LEV's challenge without regard to these jurisdictional concerns, based on its determination that the case presents issues of "great public importance." CP at 746. This Court has previously rejected the notion that "it will hear matters of great public interest without regard to justiciability." *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994). And the question of the supermajority vote provision's

validity is no more important now than it has been when this Court has declined to hear it on three previous occasions. Thus, for reasons of justiciability alone, this Court should reverse the decision of the trial court and dismiss this action, without further addressing LEV's claims.

Third, if this Court nonetheless elects to proceed to the merits, it should conclude that RCW 43.135.034 is valid. This is so, with regard to the supermajority vote provision of RCW 43.135.034(1), because the plain language of the Washington Constitution merely prohibits the passage of bills on less than a majority vote. Const. art. II, § 22. It does not prohibit the people, or the Legislature, from concluding as a statutory matter that tax increases require an added measure of consensus. *Id.* And neither the history of the constitutional provision, nor this Court's prior decisions, support a contrary conclusion.

Nor does the Washington Constitution preclude the voters from enacting, by initiative, the voter approval provision of RCW 43.135.034(2)(a). Given that the voter approval provision has never been triggered or invoked, the absence of a justiciable controversy regarding this portion of LEV's challenge is particularly manifest. The text of article II, section 1(b) of the state constitution neither restricts the voters from providing for voter approval of a limited class of measures, nor precludes the Legislature from committing itself to such a provision.

Finally, if this Court concludes that either of the challenged statutory provisions is invalid, it should sever and uphold the remainder of RCW 43.135.034.

This Court should leave it to the Legislature and the people, acting in their lawmaking capacities, to determine within their respective spheres and subject to the actions of the other, the public policy of this state with respect to these matters of taxation. The Court should decline LEV's and the Governor's invitation to overstep its judicial role and to override the legislative determinations of the people and the Legislature.

VI. ARGUMENT

A. Review Standards

When reviewing a grant of summary judgment, this Court engages in the same inquiry as the trial court. “[A]ll questions of law are reviewed de novo,” while all competent “facts and reasonable inferences are considered in a light most favorable to the nonmoving party.” *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005).

B. The Court's Jurisdiction Depends Upon A Justiciable Controversy, And There Is None Here

The court “cannot reach [a constitutional] question unless [it] has jurisdiction to do so.” *Brown*, 165 Wn.2d at 717. LEV brought this action under the Declaratory Judgments Act, RCW 7.24 (the Act). The Act

provides that “[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of . . . validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.” RCW 7.24.020. Before this Court assumes jurisdiction under the Act, LEV must demonstrate that the action presents a justiciable controversy. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). A justiciable controversy requires the party invoking the Act to demonstrate all of the following elements:

- (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,
- (2) between parties having genuine and opposing interests,
- (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
- (4) a judicial determination of which will be final and conclusive.

Id. LEV presented no facts competent to demonstrate these elements.

1. LEV Has No Legal Interests At Issue

First, LEV demonstrates no legal interests affected by the supermajority vote or voter approval provisions of RCW 43.135.034. Under the Act, “[w]here the plaintiff has no legal interest, no judgment, can be rendered.” *Washington Beauty Coll., Inc. v. Huse*, 195 Wash.

160, 165, 80 P.2d 403 (1938) (quoting *Acme Fin. v. Huse*, 192 Wash. 96, 73 P.2d 341 (1937)). LEV's lack of legal interests becomes apparent upon examining its alleged interests.

LEV nonprofit corporations, the League of Education Voters and the Washington Education Association, assert an interest in successfully lobbying the Legislature to enact laws that would advance their public policy preferences. CP at 3-6. *Successfully* lobbying the Legislature for preferred public policy is not a legal interest. LEV does not (and cannot) assert that RCW 43.135.034 prevents LEV from lobbying the Legislature. Accordingly, LEV corporate respondents have no legal interest at issue in this case.

LEV school board member, school district director, teachers, parents of a child who attends a public school, and former Justice allege an interest in additional funding for public programs that they prefer and from which they benefit, including education programs. CP at 10-16.² These respondents have no legal interest in additional state funding for programs that they prefer. "Mere interest in state funding mechanisms is not sufficient to make a claim justiciable" where the plaintiffs had no right

² LEV withdrew ¶ 33.a of its Complaint, asserting the supermajority vote provision of RCW 43.135.034(1) has precluded reduction of class sizes "resulting in a more difficult teaching environment" and "impacting the children's educational experience." CP at 455-56.

to the funding at issue. *Federal Way Sch. Dist. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009) (citing *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994)). In *Walker*, moreover, this Court determined that students and teachers did not present a justiciable claim where they failed to show that they were “denied some benefit by Initiative 601 which is rightfully theirs.” *Walker*, 124 Wn.2d at 412.

LEV legislators (twelve members of one house) assert a “constitutional right as elected officials to advance bills through the legislative process.” CP at 9. As this Court made plain in *Brown*, “[t]he power to establish and administer the procedural rules of the legislature has been committed solely to the legislature.” *Brown*, 165 Wn.2d at 722. As *Brown* also recognizes, under the rules of the Senate, any member may challenge a parliamentary ruling on the number of votes required to pass a bill, and on a simple majority vote, the body may overturn that ruling. *Id.* at 721; *see also* CP at 464, 467. The same is true in the House. CP at 457, 460, 462. The Legislature, accordingly, may pass any bill that a majority of each house chooses to pass. Individual legislators do not have a right to advance or pass bills, and individual legislators do not have a right to pass bills when they and their fellow legislators have determined not to pass them under parliamentary rules that allow for passage. LEV legislators have no individual right or legal interest at issue in this case.

2. LEV Fails To Demonstrate It Is Actually And Substantially Harmed By The Statute It Challenges

Even if LEV had legal interests at stake in this case, LEV fails to demonstrate that the challenged statute causes actual and substantial harm to those interests. Under the Declaratory Judgments Act, plaintiffs “‘may not . . . challenge the constitutionality of a statute unless it appears that [they] will be *directly* damaged in person or in property by its enforcement.’” *To-Ro Trade Shows*, 144 Wn.2d at 411-12 (quoting *De Cano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941)). To the same effect is *Grant County Fire Protection District 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004), which holds that “[t]o establish harm under the [Declaratory Judgments Act], a party must present a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract.”³

³ To assert harm, LEV relied on its own answers to the State’s interrogatories, not verified on personal knowledge, and its unverified complaint. CP at 209-56, 387-89. Answers to interrogatories must “satisfy the other requirements of CR 56 and contain admissible material to be considered on summary judgment. Affidavits or answers to interrogatories verified on belief only and not on personal knowledge do not comply with CR 56(e).” *Klossner v. San Juan Cnty.*, 93 Wn.2d 42, 45, 605 P.2d 330 (1980) (citations omitted). To support summary judgment, a plaintiff must set forth specific facts based on personal knowledge, admissible at trial, and not merely conclusory allegations, speculative statements, or argumentative assertions. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). The State moved to strike LEV’s unsupported allegations. CP at 521-22. The State also moved to strike factual allegations in the Governor’s Memorandum Re Jurisdiction because they were not supported by declaration or otherwise verified. CP at 552, 557, 567. The trial court denied the State’s motions to strike (CP at 739), and considered this incompetent evidence in concluding LEV presented a justiciable controversy. CP at 737-38, 740, 745-46, 749-50. This was error. The assertions similarly are not competent to be considered on appeal.

LEV's claim of direct and substantial harm from the supermajority vote provision of RCW 43.135.034(1) requires multiple levels of speculation.⁴ First, LEV's claimed harm requires speculation that RCW 43.135.034(1) has prevented the Legislature from increasing taxes. Of course, no one contests that the Legislature may raise taxes by a two-thirds majority vote. Moreover, the Legislature may pass any bill that a majority in each house chooses to pass. *Brown*, 165 Wn.2d at 720-21. "[T]he courts will not enjoin proposed legislative action." *State ex rel. Gunning v. Odell*, 58 Wn.2d 275, 278, 362 P.2d 254 (1961) (quoting *Vincent v. City of Seattle*, 115 Wash. 475, 478, 197 P. 618 (1921)). If a majority of the Legislature wished to pass a bill increasing taxes, that is what the Legislature would have done.

Second, LEV's claimed harm requires further speculation that the Legislature would allocate increased tax revenues to programs that LEV

⁴ For example, a high school teacher speculates that because of RCW 43.135.034(1), the budget of his school district has been cut, and as a result, he will no longer be able to teach advanced placement physics. CP at 11 (¶ 33.c). A school district director speculates that as a result of the "State's inability to pass legislation that raises taxes (and consequential budget cuts)," he is forced to make decisions that undercut the quality of education. CP at 12 (¶ 33.d). An elementary school teacher speculates that as a result of "the State's inability to raise revenue to fund public education," her hours have been reduced, she has been relocated to a different school, and she receives fewer hours of support from education assistants. CP at 14 (¶ 33.f). And two teachers speculate that they have been harmed by RCW 43.135.034(1) based upon reduction in force notices from a school district "due to the State's inability to raise revenue and the resulting budget cuts." CP at 15 (¶ 33.g). The reduction in force notices attribute the action to "the District's adverse financial situation next year [that] has developed as a result of several factors," and do not mention the supermajority vote provision. CP at 430, 432.

prefers. It is “a legislative fact of life, however,” that “[l]egislatures often provide laudable programs but may fail to fund them adequately or may decline to fund them at all.” *City of Ellensburg v. State*, 118 Wn.2d 709, 715, 826 P.2d 1081 (1992). Indeed, after this litigation was filed, the Legislature passed the tax measure at the center of LEV’s complaint, SHB 2078, but did not direct resulting revenue to education.⁵

Third, LEV’s claimed harm requires yet further speculation that local decision makers would spend those revenues to benefit LEV. But local governments, including school districts, establish their own budgets and make discretionary policy decisions about program offerings and funding allocations. See RCW 28A.505.040, .060, .070; see also CP at 12-13, ¶¶ 33.d, e (identifying discretionary decisions by school district directors regarding educational programs and their funding). Apart from speculation and conjecture, there is no basis to conclude that revenues would be allocated to benefit LEV. LEV has not demonstrated direct and substantial harm caused by RCW 43.135.034(1).⁶

⁵ Compare SHB 2078 (removing financial institutions’ B&O tax deduction for mortgage interest and directing resulting revenue to education funding) with ESB 6635 (enacted by the Legislature, removing financial institutions’ B&O tax deduction for mortgage interest but not directing resulting revenues to education). CP at 163-66, 611-15.

⁶ The trial court concluded that this did not matter, asserting that “[t]he State cites no legal authority requiring a party to demonstrate the impacts of a statute with such precision in order to establish the existence of an actual dispute.” CP at 748. The trial

With respect to LEV's challenge to the voter approval provision of RCW 43.135.034(2)(a), LEV has not even alleged a legal interest, much less harm to that legal interest. The trial court recognized this: "RCW 43.135.034(2)(a) has never been invoked and there is no indication it has resulted in harm to the plaintiffs." CP at 750.⁷

3. LEV And The Governor Present Only Premature Hypothetical Political Questions

LEV and the Governor ask the Court to adjudicate the constitutionality of RCW 43.135.034(1) and (2)(a) before a majority of the

court's conclusion is puzzling. *To-Ro* and *Grant County*, argued to the trial court, and quoted above, plainly state this requirement.

The trial court's related effort to identify and analogize "hindrance" of non-existent legal interests in this case to the harm to legal rights evident in *First United Methodist Church v. Seattle*, 129 Wn.2d 238, 244, 916 P.2d 374 (1996), also fails. CP at 748. In *First United*, Seattle nominated a church for landmark preservation. When the church brought a declaratory judgment action to invalidate the nomination, the City argued that the case was not ripe because the City had only nominated the church as a landmark, and had not yet designated it as one. *First United* held that the church's declaratory judgment action was ripe because "[u]nder the Landmarks Preservation Ordinance, nomination alone carries with it *severe restrictions*," including "*prohibit[ing]* owners of nominated buildings from making alterations or significant changes" to the site and "*prevent[ing]* United Methodist from either remodeling its sanctuary or selling the church property." *First United*, 129 Wn.2d at 244-45 (emphases added). The challenged action thus imposed severe *legal* prohibitions on fundamental *rights* of property ownership, and those prohibitions provided the underpinning for the court's determination that a ripe controversy was presented. By contrast, RCW 43.135.034(1) imposes no legal restrictions on LEV, let alone restrictions in any way similar to those in *First United*.

⁷ Nonetheless, the trial court erroneously held LEV's challenge to this provision was justiciable based solely on *Amalgamated Transit Union Local 587 v. State*, (ATU) 142 Wn.2d 183, 11 P.3d 762 (2001)—a decision involving a different statute and different facts, and where the question of justiciability was neither preserved nor analyzed. CP at 750. As this Court has held, "cases where a legal theory is not discussed in the opinion [are] not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

Legislature has even determined to pass a bill to increase taxes, let alone a bill to increase taxes in excess of the state expenditure limit. They ask the Court to prematurely wield judicial authority to address hypothetical questions—whether two provisions of RCW 43.135.034 are constitutional—before the Legislature has taken an action triggering reason to consider those questions.

The premature and hypothetical nature of the questions is important for at least two reasons. First, the initiative power is part of the separation of powers fundamental to our form of government. It is the first power reserved by the people. Const. art. II, § 1. It “is nearly as old as our constitution itself, deeply ingrained in our state’s history, and widely revered as a powerful check and balance on the other branches of government.” *Coppernoll*, 155 Wn.2d at 296-97. The judiciary should not prematurely interfere with this important legislative check and balance of the people. Where separation of powers concerns are raised with respect to the judicial branch, “our primary concern[] [is] that the judiciary not be drawn into tasks more appropriate to another branch.” *Brown*, 165 Wn.2d at 719.

Second, the premature and hypothetical constitutional questions LEV and the Governor pose are not even the questions that would be posed by an actual and existing dispute with respect to the effect of

RCW 43.135.034 on a bill that increases taxes on a majority vote. If the Legislature chose to pass a tax increase on a majority vote and it was challenged by a taxpayer based on RCW 43.135.034(1) or (2)(a), before the Court ever reached a question of constitutionality—if it reached one at all—the Court would consider whether the statutes could be harmonized, and if not, how a conflict between the statutes would be resolved. “Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds.” *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000). The Court “attempt[s] to harmonize apparently contradictory statutes prior to resorting to canons of construction that give preference to one statute over another.” *Bank of America, N.A. v. Owens*, 173 Wn.2d 40, 53, 266 P.3d 211 (2011) (citing *Wark v. Wash. Nat’l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)).

LEV and the Governor seek to short circuit the actual questions that would be presented by a justiciable controversy concerning the effect of RCW 43.135.034 on a bill that increases taxes, and instead LEV seeks its invalidation. In *Walker*, this Court rejected a challenge to section 13 of Initiative 601 for lack of justiciability precisely because, as here, there was no showing the Legislature had passed any bill that would be subject to its voter approval provision. *Walker*, 124 Wn.2d at 422-23.

The trial court brushed aside these important justiciability defects for the reason that “[i]t is for the courts, not the legislature, to determine the constitutionality of a statute.” CP at 747-48. The trial court’s reason misses the point. First, simply because the judiciary has unquestioned authority to determine the constitutionality of statutes does not suggest it is appropriate to exercise that authority in the absence of an actual justiciable controversy. Precisely the opposite is true. Judicial power exists in relation to the need to resolve actual conflicting legal interests. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60 (1803). Second, the Legislature does not need to determine the constitutionality of RCW 43.135.034 to enact any bill it wishes to enact by simple majority vote. In *Brown*, the Court explained that the presiding officer’s ruling on the number of votes required to pass a bill is a parliamentary ruling, not a constitutional or legal ruling. *Brown*, 165 Wn.2d at 719. The courts will not interfere with the internal proceedings of the Legislature in determining whether to pass a bill. *Id.* at 720. And *Brown* made plain what was already fundamental: An existing state statute does not limit the authority of the Legislature to pass any other statute that it determines to pass. *Washington State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 301, 174 P.3d 1142 (2007).

In this respect, LEV is simply urging the Court to ease the political environment for some legislators by judicially excising the people's policy preference with respect to tax increases in an abstract exercise. Adjudicating a constitutional question because it might lessen political discomfort for some legislators is not the role of the judiciary. And it would be particularly inappropriate where, as here, such adjudication prematurely and unnecessarily would inject the Court into the people's legislative check and balance in our system of government.

The supermajority vote and voter approval provisions of RCW 43.135.034 may make it politically uncomfortable for some legislators to pass a bill that raises taxes or that raises taxes in excess of the state spending limit, but neither provision prevents the Legislature from passing any bill that a majority of the Legislature chooses to pass. When the Legislature plainly may, but has chosen not to, use readily available legislative authority to raise an actual, present, and concrete dispute with respect to the effect of RCW 43.135.034, the Court should not fill the breach and intervene in what, at this time, are nothing more than premature, hypothetical, political questions.

C. This Case Is Not Within The Narrow Category Of Cases The Court Will Consider In The Absence Of A Justiciable Controversy

The trial court erroneously concluded that it could reach the merits of LEV's challenge to the supermajority vote provision of RCW 43.135.034 without regard to justiciability because the provision is of "great public importance." CP at 746. In *Walker*, a case the trial court does not even acknowledge, this Court rejected the petitioners' argument that it "will hear matters of great public importance without regard to justiciability." *Walker*, 124 Wn.2d at 414. *Walker* explained, "not only is this an overstatement, but that even if we do not always adhere to all four requirements of the justiciability test, this court will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged." *id.* at 415. This is just such a case.

Walker also distinguished *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972), upon which the trial court here and the petitioners in *Walker* relied, on grounds that also distinguish it from the instant case. First, as *Walker* explained, *Distilled Spirits* was a constitutional challenge to a liquor tax, and was brought by a taxpayer who had paid the tax. *Walker*, 124 Wn.2d at 414. No tax has been passed here and no taxpayer is challenging a tax. The Court in *Distilled Spirits* explained that "an opinion will serve to remove doubts

concerning the validity of a number of important legislative acts passed not only in this session, but in previous sessions.” *Distilled Spirits*, 80 Wn.2d at 178. In the instant case, the judgment sought would not remove doubt about any “legislative acts passed,” because the Legislature has chosen not to pass any. Second, as *Walker* points out, “[f]urthermore . . . the Legislature, the Governor, and the Attorney General also desired an opinion on the constitutional issue presented in *Distilled Spirits*, as it affected a number of legislative acts already passed.” *Walker*, 124 Wn.2d at 414. Here, *the Legislature* has expressed no such desire, only twelve legislators of one house have, and the Attorney General seeks dismissal for lack of justiciability.

Moreover, in *Distilled Spirits*, the Legislature sought a determination as to the validity of laws that *it* had enacted. In other words, the *Legislature* requested the Court to render an opinion as to the *Legislature’s own* legislative authority. That is not the case here. Instead, the request is for an adjudication of the validity of a law enacted by a separate legislative body—the people—and is brought by a mere twelve legislators of one house, after the Legislature chose not to enact a tax increase by simple majority.

Finally, the court in *Distilled Spirits* pointed out that “[w]e are warned of no evil consequences which may follow if the court renders its

opinion interpreting the constitutional provision in question.” *Distilled Spirits*, 80 Wn.2d at 178. Here, by contrast, the requested adjudication prematurely and unnecessarily would intrude upon the exercise of the legislative authority of the citizens of this state, contrary to the respect their authority is due in our government of divided powers. It also would compel the Court to consider constitutional questions that may be unnecessary to decide in an actual and existing dispute with respect to the effect of RCW 43.135.034 on a bill that increases taxes by majority vote.

Moreover, even if the Court ignored justiciability requirements with respect to issues of great public importance, the issues in this case would not meet that standard. First, it is difficult to conclude that LEV’s questions are so important the Court should take the extraordinary step of exercising judicial authority in the absence of justiciability, when the Legislature has chosen not to take readily available legislative steps to pass a tax increase and raise a justiciable question.

Second, the supermajority vote provision first was enacted by the voters in 1993, and most recently in 2010. Laws of 1994, ch. 2, § 4 (*codified as* RCW 43.135.035); Laws of 2011, ch. 1, § 2 (*codified as* RCW 43.135.034). It also has been reenacted or amended by the Legislature on three occasions, in bills that the Governor and her predecessor approved under article III, section 12. Laws of 2002, ch. 33,

§ 1 (reenacting both provisions and temporarily suspending two-thirds vote provision for 2001-03 biennium), CP at 345; Laws of 2005, ch. 72, §§ 1, 2 (doing same for 2005-07 biennium and affirming benefit of state expenditure limit), CP at 349-50; Laws of 2010, ch. 4, § 2 (suspending two-thirds vote provision effective July 1, 2011), CP at 448. The voter approval provision has never been triggered. CP at 276, 750. This history belies the contention that a challenge to the provisions now is so important that it compels judicial review in the absence of a justiciable controversy.

Third, the Court has declined to consider the constitutional challenge posed by LEV with respect to the supermajority vote provision for justiciability and related jurisdictional reasons on three prior occasions. *See Futurewise v. Reed*, 161 Wn.2d 407, 166 P.3d 708 (2007); *Walker; Brown*. The question of the provision's validity is no more important now than it was then.

D. Article II, Section 22 Of The Washington Constitution Does Not Prohibit The Statutory Supermajority Vote Provision Of RCW 43.135.034(1)

For reasons previously expressed, the Court need not and should not reach the merits of this challenge to the constitutionality of RCW 43.135.034(1)'s supermajority vote provision. If it does, however, the provision is valid, because article II, section 22 of the state constitution

establishes only a minimum majority vote threshold for the passage of bills, and not also the maximum vote that may be established by statute.

The state constitution is “not a grant but a restriction upon the legislative power.” *Distilled Spirits*, 80 Wn.2d at 180. A constitutional provision, accordingly, limits legislative power no more than it clearly states, either expressly or by fair inference. *Washington State Farm Bureau Fed’n*, 162 Wn.2d at 300-01. Statutes are presumed to be constitutional, and a party challenging a statute bears the “heavy burden” of “prov[ing] that the statute is unconstitutional beyond a reasonable doubt.” *Sch. Dists.’ Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010).

1. The Plain Language Of Article II, Section 22 Only Prohibits Passage Of Laws By Less Than Majority Vote

“Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.” *Malyon v. Pierce Cnty.*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997). “The text necessarily includes the words themselves, their grammatical relationship to one another, as well as their context.” *Id.*

Article II, section 22 of the state constitution provides:

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.

(Italics added.) The text at issue, “[n]o bill shall become a law unless . . . a majority of the members elected to each house be recorded thereon as voting in its favor[.]” manifestly describes the minimum vote threshold required for a bill to become a law, a majority vote of the members. It does not simultaneously set a majority vote of the members as the maximum vote.

The phrase “[n]o bill shall become a law unless” describes a circumstance under which a bill *does not become law*. “Words in the constitution must be given their common and ordinary meaning.” *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969). In common parlance, the term “unless” means “under any other circumstance than that : except on the condition that : if . . . not.” *Webster’s Third New International Dictionary* 2503 (2002). Thus, “[n]o bill shall become a law unless” means no bill becomes a law under other circumstances than, or except on the condition that, a specified event occurs—that is, “a majority of the members elected to each house” vote in its favor. Const. art. II, § 22. Except as so restricted, the power of the Legislature to establish vote passage requirements remains plenary.

For the text to impose a maximum vote limit, it would have to be rewritten (in common bill drafting format to show changes):

“((No)) Every bill shall become a law ((unless)) if . . . a majority of the members elected to each house be recorded thereon as voting in its favor.”

Misreading the phrase “[n]o bill shall become a law unless” to mean “every bill shall become a law if” ignores the actual phrasing and replaces it with the opposite meaning. “[C]onstitutional provisions should be construed so that no clause, sentence or word shall be superfluous, void, or insignificant.” *Washington Econ. Dev. Fin. Auth. v. Grimm*, 119 Wn.2d 738, 746, 837 P.2d 606 (1992). The Court should not rewrite the Washington Constitution in this way.

That article II, section 22 sets a minimum vote threshold and not also a maximum vote limit is underscored when it is juxtaposed against concurrently-adopted article II, section 21, setting a legislative vote requirement. See *The Journal of the Washington State Constitutional Convention 1889 with Analytical Index*, at 309-15 (Beverly Paulik Rosenow ed., William S. Hein & Co., Inc. 1999) (*The Journal*). Section 21 provides: “[t]he yeas and nays of the members . . . shall be entered on the journal, on the demand of one-sixth of the members present.” Const. art. II, § 21. This establishes precisely the sort of affirmative maximum

vote limit that the text of section 22 does not. If one-sixth of the members present demand it, a journal entry shall be made. A statute purporting to require a higher vote threshold to trigger this action would run afoul of this constitutional maximum limit. The affirmative limit stands in stark contrast to article II, section 22's negatively phrased "[n]o bill shall become a law unless" a majority vote in its favor.⁸ Article II, section 22 manifestly describes the minimum vote threshold required for a bill to become a law. The Court should decline to read into it language that it does not include, and a prohibition on the otherwise plenary legislative power that it does not contain.

2. Nothing In The Debate On Article II, Section 22 Demonstrates That The Framers Intended To Impose A Maximum Majority Vote Limit

"If the constitutional language is clear and unambiguous, interpretation by the courts is improper." *O'Connell*, 75 Wn.2d at 557. The language of article II, section 22 clearly and unambiguously sets a minimum vote threshold, and not a maximum vote limit.

Even so, the available evidence in no way shows that the framers intended article II, section 22 to establish a maximum majority vote limit,

⁸ Article II, section 1(d)'s maximum majority vote limit also stands in stark contrast to the minimum majority vote threshold of article II, section 22. Article II, section 1(d) provides: "Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon." Const. art. II, § 1(d). Article II, section 1 was added by Amendment 7 to the state constitution in 1911. Laws of 1911, ch. 42, § 1.

rather than a minimum majority vote threshold for bill passage. The debate suggests only that the framers were concerned with whether to set any minimum vote threshold for bill passage and, if so, how low that minimum should be. The debate did not consider a maximum vote limit, just as the plain language of article II, section 22 reflects no such limit.

Before ultimately adopting the original proposed text, the framers debated two amendments: one entirely omitting a minimum vote for bill passage, and one setting the minimum vote at a majority of those present. See *The Journal* at 536. The record of that debate is as follows:

Motion: Turner moved that the words “majority vote” be stricken.

Action: Motion lost.⁹

Motion: Power moved to insert a provision that a majority of those present could pass a bill.

Action: Motion lost.

The Journal at 536. Thus, the framers considered how *low* to set the constitutional vote threshold for bill passage: a majority of members elected, a majority of members present, or no minimum at all. The

⁹ Contemporaneous news coverage of the constitutional convention provides this further elaboration:

Turner moved to strike out the provision that a majority vote of the members elected be necessary to pass a bill.

The motion was lost and the section passed.

Proceedings of the Constitutional Convention, Seattle Times, Aug. 9, 1889, at p. 1 col. 4, in *Washington State Constitutional Convention 1889: Contemporary Newspaper Articles*, at 2-126 to 2-127 (William S. Hein & Co., Inc. 1999).

framers' concern with setting a minimum vote threshold for bill passage provides no logical basis to infer intent to set a maximum vote limit.

The trial court erroneously reasoned, “[s]ince the framers knew how to create supermajority exceptions to the Constitution’s general rule of majority approval for other actions but did not do so for tax bills, the court presumes that the absence of supermajority language was intentional.” CP at 752. The trial court’s conclusion is flawed for several reasons.

First, the trial court’s conclusion simply assumes the proposition it is trying to prove—that the constitution imposes a general limit of majority approval from which a “supermajority exception” is required.

Second, the seven legislative supermajority approval provisions in the 1889 constitution each involve extraordinary actions of the Legislature, for example, expelling a member, overriding a veto, or proposing a constitutional amendment.¹⁰ These extraordinary actions are not analogous to the passage of ordinary legislation. Consequently,

¹⁰ The trial court incorrectly stated that the delegates approved supermajority requirements in 16 circumstances. CP at 754. The seven supermajority legislative approval provisions included in the original 1889 Washington Constitution are: article II, section 9 (expel a member); article II, section 36 (introduce bill less than ten days before final adjournment); article III, section 12 (override governor’s veto); article IV, section 9 (remove judge, attorney general, or prosecuting attorney from office); article V, section 1 (impeach); article XXIII, section 1 (submit constitutional amendment to voters); article XXIII, section 2 (propose constitutional convention to voters). Const. art. II (enacted Nov. 1, 1889).

requiring supermajority approval for these actions in no way suggests that the framers intended article II, section 22 to prohibit statutes requiring supermajority approval for passage of ordinary legislation.

Third, there is no logic in concluding that by requiring constitutional supermajorities for some purposes, the framers intended to prohibit statutory supermajorities for other purposes. The framers deemed certain actions to be sufficiently important to require an added measure of consensus as part of the state's fundamental law—the constitution—unchangeable except by supermajority legislative approval as well as voter approval. Had the framers intended to preclude the Legislature or the people from deciding from time to time, in the far less permanent form of a statute, that certain public policy determinations warrant added consensus, they knew how to say so directly. They easily could have drafted article II, section 22 in the form of an affirmative maximum limit, as they did with article II, section 21. *See State v. Delgado*, 148 Wn.2d 723, 728-29, 63 P.3d 792 (2003) (noting that, in the absence of statutory language the Legislature clearly knew how to include, the court presumes the language chosen was intentional). Instead, the framers drafted article II, section 22 only to prohibit passage of bills by less than a majority of the full membership.

Fourth, the trial court's suggestion that the framers needed to confer express authority upon law-makers to enact statutory supermajority requirements turns the fundamental nature of the state constitution on its head. CP at 754. "[T]he legislature's power to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions.'" *Washington Farm Bureau Fed'n*, 162 Wn.2d at 300-01 (quoting *State ex rel. Citizens v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004)). A constitutional provision thus must be examined for what it prohibits, not what it allows. *Id.* Reading an additional limit into article II, section 22 that the provision does not itself express is as contrary to the fundamental nature of the state constitution as it is to the text of the provision itself.

Finally, the trial court speculates that the framers' concerns with limiting the power of special interests makes it "highly improbable the framers intended the majority provision in Art. II, § 22 as a minimum threshold, thereby permitting a minority of legislators to thwart the will of the majority." CP at 753. The trial court's conclusion is not only conjecture, it also ignores that only a majority, either of the Legislature or the people, may establish (and maintain) a statutory supermajority requirement.

3. Washington Precedent Supports That Article II, Section 22 Establishes Only A Minimum Majority Vote Threshold For Bill Passage, Not Also A Maximum Vote Limit

In *Robb v. City of Tacoma*, 175 Wash. 580, 28 P.2d 327 (1933), this Court rejected the theory that an analogous constitutional provision establishing a minimum vote threshold prohibited the Legislature from requiring a greater number of votes by statute. In *Robb*, the Court upheld a statute that required a greater number of votes to incur municipal indebtedness than the three-fifths supermajority required by article VIII, section 6. *Robb*, 175 Wash. at 585.

Similar to article II, section 22's negative phrasing, article VIII, section 6 provides that "[n]o county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum . . . without the assent of three-fifths of the voters therein" The statute challenged in *Robb* additionally required that no bonds could issue unless the total number of votes cast at the bond election exceeded 50 percent of the votes cast at the preceding general election. *Robb*, 175 Wash. at 585. Thus, under the challenged statute, even if three-fifths of the voters at the election approved the excess debt as required by article VIII, section 6, the measure would fail if the number of votes cast also did not exceed

50 percent of the votes cast in the preceding election. The challengers claimed the statute was unconstitutional because, in some situations, it would require more votes to incur debt than the threshold fixed by article VIII, section 6.

This Court upheld the statute, reasoning that since the “state Constitution is but a limitation upon legislative power,” when a statute is challenged as unconstitutional “the court looks to the state Constitution only to ascertain whether any *limitations* have been imposed upon such power.” *Robb*, 175 Wash. at 586-87. This Court continued:

Article 8, § 6, of the state Constitution imposes a limitation upon the power of the Legislature, in that it may not fix a *less* number than a three-fifths majority of the votes cast, in order to validate a bond election. But the Constitution does not place any other limitation whatever upon the legislative power. It fixes a minimum limit of restriction below which the Legislature may not go, but it does not fix a maximum limit to which the Legislature may advance on “an ascending scale.”

Id. at 587. This conclusion followed from the court’s extensive review of two decisions from other states, each of which had rejected the contention that a negatively-phrased constitutional provision fixing a vote threshold prohibited a higher statutory vote requirement.¹¹ *Id.* at 588-90. *Accord*,

¹¹ The trial court asserts that the *Robb* conclusion relied upon a proviso in article VIII, section 6 that “any city or town, with such assent, *may be allowed* to become indebted to a larger amount.” CP at 756; *Robb*, 175 Wash. at 587 (italics in original). *Robb* did observe that the “may be allowed” language indicated that the power conferred on municipalities was subject to control by the Legislature. *Id.* However, it did so to

State ex rel. Craig v. Town of Newport, 70 Wash. 286, 126 P. 637 (1912). The *Robb* decision is persuasive that likewise, article II, section 22's negatively-phrased voting threshold does not prohibit RCW 43.135.034(1)'s supermajority requirement.

By contrast, this Court's decision in *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (1998), which addressed term limits, is not persuasive beyond the context in which it arose. *Gerberding* held that term limits are qualifications for office, and that an initiative imposing them for certain state offices conflicted with article II, section 7¹² and article III, section 25¹³ of the Washington Constitution.

That conclusion, however, rests on a longstanding "strong presumption in favor of eligibility for office" dictating that "any doubt as to the eligibility of any person to hold an office must be resolved against the doubt." *Gerberding*, 134 Wn.2d. at 202. Obviously these fundamental principles that provide the starting point in *Gerberding*'s reasoning are inapplicable to article II, section 22's majority vote provision. Instead, the governing presumption with respect to article II, section 22 is that a

reject the challengers' assertion that municipalities were vested with plenary power by the constitution to incur debt, which the Legislature could not limit. This is apparent from the *Robb* court's rejection of challengers' argument. *Id.* at 590-93.

¹² "No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen." Const. art. II, §7.

¹³ "No person, except a citizen of the United States and a qualified elector of this state, shall be eligible to hold any state office." Const. art. III, § 25.

constitutional provision must be examined for what it prohibits, not what it allows, with the provision properly understood to limit legislative power no more than it clearly states, either expressly or by fair inference. *Washington Farm Bureau Fed'n*, 162 Wn.2d at 300-01.

Gerberding does not stand for a broad principle of exclusivity, pursuant to which any topic addressed in the constitution is henceforth the exclusive province of the constitution. Indeed, to conclude *Gerberding* stands for such a proposition would set the decision in direct opposition to the undisputed principle that “[t]he state constitution is not a grant but rather is a restriction on the law-making power.” *Brower v. State*, 137 Wn.2d 44, 55, 969 P.2d 42 (1998). It defies logic that *Gerberding* intended to negate this understanding of the constitution, which *Gerberding* itself endorses. *Gerberding*, 134 Wn.2d at 196 (“[T]he Washington Constitution is a restriction on legislative power rather than a grant of powers.”). *Gerberding*’s conclusion that qualifications for state constitutional office are exclusive rests on unique circumstances, and is entirely inapposite to this case.

4. Foreign Authority Cannot—And Should Not—Negate The Plain Language Meaning Of Article II, Section 22

In rejecting article II, section 22’s plain language and relevant Washington precedent, the trial court relied on inapposite authority from

other states' courts and other states' constitutions. CP at 754-55. Such foreign decisions and provisions cannot, and should not, persuade this Court to negate article II, section 22's plain meaning.

In the first inapposite case, *Howard Jarvis Taxpayers Association v. City of San Diego*, 120 Cal. App. 4th 374, 15 Cal. Rptr. 3d 457 (2004), a California court properly determined, based on the very different language of California's constitution, that its majority vote provision established a maximum limit. At issue was article XIII C, section 2(b) of the California Constitution, which provides: "No local government may impose, extend, or increase any general tax unless . . . that tax is . . . approved by a majority vote." The court reasoned that the maximum limit meaning of section 2(b) was "plainly shown" by the fact that article XIII C, section 2(d), added by the same constitutional amendment, specified a "two-thirds vote" to impose or increase any special tax. *Howard Jarvis Taxpayers*, 15 Cal. Rptr. 3d at 471.

The plain language of section 2(b) and (d) of article XIII C thus indicates that the drafters of article XIII C intended that "majority vote" and "two-thirds vote" be treated as separate and distinct voting requirements: "majority vote" as a majority vote only and "two-thirds vote" as a super majority vote that cannot be required for approval of [general taxes] within the meaning of section 2(b) of article XIII C.

Id. This reasoning is utterly inapposite to Washington's article II, section 22.

The trial court also relied on *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296 (Alaska 2007). In *Alaskans*, the court concluded that Alaska's constitutional counterpart to Washington's article II, section 22 prohibited a statute that required a supermajority vote for tax increases. The Alaska provision provides in relevant part: "No bill may become law without an affirmative vote of a majority of the membership of each house." Alaska Const. art. II, § 14. However, the reasoning of the Alaska court is deeply flawed for several reasons.

First, entirely absent from the *Alaskans* opinion is any recognition of the fundamental rule in Washington that the state constitution is a restriction on otherwise plenary legislative authority. *Washington Farm Bureau Fed'n*, 162 Wn.2d at 300-01. Second, entirely absent from *Alaskans* is any recognition that statutes are entitled to a presumption of constitutionality. *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007). And third, entirely absent from *Alaskans* is any discussion of or deference to the plain language of the Alaska Constitution. *Malyon*, 131 Wn.2d at 799. In short, *Alaskans* ignores the fundamental guideposts of Washington law for considering a challenge to the constitutionality of a statute. This Court should not repeat the Alaska court's mistake of

disregarding article II, section 22's actual language in the guise of construing it. *Malyon*, 131 Wn.2d at 799.

Additionally, the trial court points to *Alaskans'* reliance on the inclusion of supermajority vote provisions elsewhere in the Alaska Constitution as “‘convincing evidence’” of the Alaska framers' intent to denote all instances in which supermajority votes could be required. CP at 755 (quoting *Alaskans*, 153 P.3d at 301). However, as discussed above, the fact that the same Washington Convention that drafted article II, section 22 also required supermajority approval for certain extraordinary legislative actions merely demonstrates our framers' recognition that those decisions are sufficiently important to require an added measure of consensus as a constitutional matter.

The trial court also echoes *Alaskans* in suggesting that other jurisdictions' imposition of tax-related supermajority vote requirements in their constitutions, rather than statutes, informs the meaning of Washington's article II, section 22.¹⁴ CP at 755. This is demonstrably

¹⁴ Eleven states have tax-related constitutional supermajority vote requirements. Ariz. Const. art. IX, § 22(A); Ark. Const. art. V, § 38; Cal. Const. art. XIII A, § 4; Colo. Const. art. X, § 20(6)(a); Del. Const. art. VIII, § 11(a); Ky. Const. § 36(1); La. Const. art. VII, § 2; Miss. Const. art. IV, § 70; Okla. Const. art. V, § 33(C), (D); Or. Const. art. IV, § 25; S.D. Const. art. XI, § 13. Notably, eight of the eleven states allow their constitutions to be amended by initiative. Ariz. Const. art. IV, § 1(1), (2); Ark. Const. art. V, § 1 (amend. 7); Cal. Const. art. II, § 8(a); Colo. Const. art. V, § 1; Miss. Const. art. XV, § 273; Okla. Const. art. V, §§ 1, 2; Or. Const. art. IV, § 1; S.D. Const. art. XXIII, § 1. In four states, the supermajority requirement was in fact added by initiative. Ariz. Const. art. IX, § 22 (adopted by initiative, Nov. 3, 1992); Cal. Const. art. XIII A, § 4 (adopted by

incorrect, for at least three reasons. First, contrary to the trial court's conclusion, the presence of tax-related supermajority vote requirements in other states' constitutions does not mean those states "recognized the need to amend their constitutions[.]" CP at 755. All that can be deduced from such constitutional provisions is that the legislatures and voters of those states chose a constitutional, not a statutory, approach to express their policy judgment. Second, the mere presence of a tax-related supermajority vote requirement in a state's constitution does not mean that a tax-related supermajority vote requirement in statute would be unconstitutional under that state's law. Finally and most significantly, other states' choices say nothing for whether a Washington statute requiring a supermajority to pass tax increases is prohibited by Washington's constitution.

Article II, section 22, by its plain language, simply establishes a constitutional minimum of a majority vote for bill passage. It does not, either expressly or by fair inference, prohibit statutes that require greater than a majority vote for passage. (And, of course, any bill receiving a supermajority vote has necessarily received a majority.) Absent such a

initiative, Jun. 6, 1978); Colo. Const. art. X, § 20 (adopted by initiative, 1992); Okla. Const. art. V, § 33 (amended by State Question No. 640, Initiative Petition No. 348, adopted March 10, 1992). Below, LEV erroneously contended that thirteen states have tax-related constitutional supermajority requirements. *See* CP at 697-99.

prohibition, the Legislature, or the people, are free to express their legislative policy judgment in a statute that certain types of bills warrant greater than simple majority consensus for passage. RCW 43.135.034(1) expresses such a statutory policy judgment—that a two-thirds majority vote of each house should be required for passage of bills raising taxes. Because article II, section 22’s plain language does not prohibit such a statute, the statute must stand.

E. Article II, Section 1 Does Not Prohibit The Voter Approval Provision Of RCW 43.135.034(2)(a)

For reasons explained above in part VI.B, and particularly at pages 17-18, LEV’s challenge to the voter approval provision of RCW 43.135.034(2)(a) is not justiciable, and the Court accordingly should not consider it. If the Court nonetheless considers the merits of LEV’s challenge, it should uphold the voter approval provision from constitutional challenge, as nothing in article II, section 1 prohibits it.

1. Article II, Section 1 Expressly Reserves To The People The Power To Enact Laws At The Polls, And RCW 43.135.034(2)(a) Was Such An Enactment

Article II, section 1 expressly reserves to the people the authority to enact laws by initiative: “[T]he people reserve to themselves the power to propose . . . laws, and to enact . . . the same at the polls, independent of the legislature.” Const. art. II, § 1. It is fundamental, then, that article II, section 1 recognizes legislative power in *both* the

people and the Legislature. Either body may exercise its full legislative power, by amending or repealing laws passed by the other or by passing new laws.¹⁵ The power of the Legislature, or of the people, “to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state or federal constitutions.’” *Washington Farm Bureau Fed’n*, 162 Wn.2d at 300-01 (quoting *State ex rel. Citizens v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004)). The challenged provision, RCW 43.135.034(2)(a), first was enacted by the people pursuant to this expressly sanctioned legislative authority. Laws of 1994, ch. 2, § 4(2)(a).

2. RCW 43.135.034(2)(a) Does Not Restrict The Legislature’s Authority

LEV challenges RCW 43.135.034(2)(a)’s voter approval provision by contending that it limits legislative authority, contrary to article II, section 1. On the language of the provision alone, LEV’s contention is misplaced. A statute LEV does not challenge creates a state spending limit. RCW 43.135.025(1) provides that “[t]he state shall not expend from the general fund during any fiscal year state moneys in excess of the state expenditure limit established under this chapter.” By its terms, RCW 43.135.034(2)(a) creates an exception to this spending limit, for tax

¹⁵ The state constitution limits the authority of the Legislature to amend or repeal an initiative during the two years following its passage. Const. art. II, § 1(c).

increases that would result in spending in excess of the limit. Accordingly, it broadens, rather than restricts, legislative options.

Moreover, there is no contention that if the Legislature so chooses, it may not amend or repeal the provision. RCW 43.135.034(2)(a) is a statute, like any other. The enactment of one statute does not abridge the power of a succeeding Legislature to enact another or different statute. *Washington Farm Bureau Fed'n*, 162 Wn.2d at 301.

3. The Legislature Has Reenacted The Voter Approval Provision, And The Provision Is Within Its Power To Refer Bills To The Voters

The Legislature “reenacted and amended” RCW 43.135.034’s predecessor statute in 2005, and in the same bill found that “the citizens of the state benefit from a state expenditure limit.” Laws of 2005, ch. 72, §§ 1, 2; CP at 349-50. In so doing, the Legislature ratified the voter approval language that LEV challenges. Certainly, the Legislature has the power to decide to refer to the people the narrow type of bill that RCW 43.135.034(2)(a) addresses. Article II, section 1 expressly provides that the Legislature may order a referendum on any bill passed by the Legislature.

4. This Court's Decision in *ATU* Is Inapposite, And The Trial Court Erred In Concluding *ATU* Is Controlling

The trial court erroneously concluded that: “The *ATU* Case Is Controlling Here.” CP at 757. In fact, *ATU* is readily distinguishable and, for that reason, inapposite.

ATU concerned section 2 of Initiative 695 (I-695), which provided that “[a]ny tax increase imposed by the state shall require voter approval.” Laws of 2000, ch. 1, § 2. The *ATU* plaintiffs challenged section 2 of I-695 as violating article II, section 1(b). The *ATU* court held that the voter approval provision of I-695 violated article II, section 1(b) “on the basis that section 2 establishes a referendum applying to every piece of future tax legislation,” and “without regard to the four percent signature requirement.” *Amalgamated Transit Union Local 587 v. State*, (*ATU*) 142 Wn.2d 183, 244, 11 P.3d 762 (2001). *ATU* is readily distinguishable from this case, and does not control here.

First, *ATU* held section 2 of I-695 invalid because it applied to “every piece of future tax legislation.” *ATU*, 142 Wn.2d at 231. *ATU* discussed such a broad voter approval provision as an unlawful delegation of legislative authority. *Id.* at 237. In part, based on the breadth of the voter approval provision, *ATU* distinguished prior initiatives that limited the rate of real and personal property taxes while

calling for special levies upon voter approval. *Id.* at 243; *ATU* explained that “such voter approval requirements are unlike section 2 of I-695” in that, “[f]irst, only a specified type of tax is at issue, not all future tax measures.” *Id.* at 243. RCW 43.135.034(2)(a) is unlike section 2 of I-695 in the same way. It applies only to a very narrow and specified type of tax increase—one that would result in spending in excess of the state expenditure limit.

Second, as explained above, state spending in excess of the state expenditure limit is prohibited by a separate statute, RCW 43.135.025(1), which LEV does not challenge. Rather than conditioning all tax increases on voter approval, as section 2 of I-695 did, RCW 43.135.034(2)(a) more accurately provides an exception to the existing prohibition against state spending in excess of the expenditure limit.

Third, also as explained above, while RCW 43.135.034(2)(a)’s voter approval language originated in I-601, the Legislature “*reenacted and amended*” RCW 43.135.034’s predecessor statute in 2005 and, in the same bill, found that “the citizens of the state benefit from a state expenditure limit.” Laws of 2005, ch. 72, §§ 1, 2 (emphasis added). Article II, section 1(b) expressly provides that the Legislature may order a referendum on any bill, and RCW 43.135.034(2)(a) reflects the

Legislature's choice to seek voter approval in the narrow circumstances that it addresses.

5. If *ATU* Were Read To Invalidate RCW 43.135.034(2)(a), The Decision Would Be Incorrect And Harmful, And To That Extent, Should Be Overruled

If *ATU* were read to prohibit RCW 43.135.034(2)(a), the decision would restrict the legislative authority of the Legislature and the people contrary to article II, section 1, for the reasons expressed above. To that extent, the decision would be incorrect and harmful, and properly would be overruled. *Hardee v. State*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011) (overruling prior decision because it was “both incorrect and harmful precedent”). Reading *ATU* in this way would render it incorrect. A reading of *ATU* that so disregarded the authority of the voters, reserved by article II, section 1(b), would also be harmful because it “has a detrimental effect on the public interest.” *State v. Siers*, 174 Wn.2d 269, 276, 274 P.3d 358 (2012).

F. The Court Should Dismiss This Action, But If the Court Concludes That Either Challenged Provision of RCW 43.135.034 Is Unconstitutional, Its Remaining Provisions Should Be Severed

For the several reasons set forth in this brief, the Court should not reach the merits of LEV's claims, but if it does, the Court should uphold the constitutionality of the supermajority vote provision of

RCW 43.135.034(1) and the voter approval provision of RCW 43.135.034(2)(a). If, however, this Court concludes that either or both of the challenged provisions are invalid, the valid provisions should be severed.

“The basic test for severability of constitutional and unconstitutional provisions of legislation is . . . whether the constitutional and unconstitutional provisions are so connected . . . that it could not be believed that the legislature would have passed one without the other; or [whether] the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.” *State v. Abrams*, 163 Wn.2d 277, 285-86, 178 P.3d 1021 (2008) (internal citations omitted). A severability clause “offers to the courts the necessary assurance that the remaining provisions would have been enacted without the portions which are contrary to the constitution.” *Id.* at 286 (quoting *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972)). Here, the same act that contains the supermajority and voter approval provisions also includes a broad severability clause. It states that “[i]f any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.” Laws of 2011, ch. 1, § 7.

LEV pled that “RCW 43.135.034 is unconstitutional in its entirety.” CP at 3. Below, LEV waived this claim. *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991) (“Contentions not made to the trial court in its consideration of a summary judgment motion need not be considered on appeal.”). LEV argued instead that RCW 43.135.034(1) and (2)(a) are not severable from each other. CP at 510-11. LEV’s argument is incorrect. The entirety of its argument on this score is that the provisions were enacted at the same time in the same initiative. CP at 511. Even if this were true, this would demonstrate nothing about severability. It is not the law that two provisions cannot be severed merely because they were enacted in the same act. Indeed, this is the only circumstance in which severability arises. See *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 67, 109 P.2d 405 (2005) (describing severability in terms of the connection between different portions of the same act). In addition, more than once, the Legislature suspended the supermajority vote provision, leaving the voter approval provision intact. Laws of 2002, ch. 33, § 1, Laws of 2005, ch. 72, § 2; Laws of 2010, ch. 4, § 2. This circumstance demonstrates that the provisions are not so intertwined that one may not stand or would not be enacted without the other.

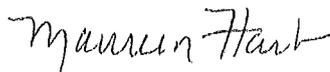
Accordingly, while the Court should not do so, if the Court determines that either the supermajority vote provision of RCW 43.135.034(1) or the voter approval provision of RCW 43.135.034(2)(a) is invalid, the Court should sever the provision.

VII. CONCLUSION

The State respectfully requests the Court to reverse the decision below and dismiss this case.

RESPECTFULLY SUBMITTED this 20th day of July, 2012.

ROBERT M. MCKENNA
Attorney General



MAUREEN HART, WSBA #7831
Solicitor General
JEFFREY T. EVEN, WSBA #20367
ALLYSON ZIPP, WSBA #38076
Deputy Solicitors General
PO Box 40100
Olympia, WA 98504-0100
(360) 753-2536
Attorneys for State of Washington

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on this date I served the foregoing State's Opening Brief, via electronic mail, upon the following:

Paul J. Lawrence
Paul.Lawrence@pacificalawgroup.com
Matthew J. Segal
matthew.segal@pacificalawgroup.com;
Gregory J. Wong
Greg.Wong@pacificalawgroup.com
Sarah Johnson
sarah.johnson@pacificalawgroup.com
PACIFICA LAW Group LLP
1191 Second Avenue, Suite 2100
Seattle, WA 98101

Michele Radosevich
micheleradosevich@dwt.com
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

DATED this 20th day of July, 2012, in Olympia, Washington.

KRISTIN JENSEN
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Jensen, Kristin (ATG); Paul.Lawrence@pacificalawgroup.com; matthew.segal@pacificalawgroup.com; Greg.Wong@pacificalawgroup.com; sarah.johnson@pacificalawgroup.com; micheleradosevich@dwt.com
Cc: Hart, Marnie (ATG); Even, Jeff (ATG); Zipp, Allyson (ATG); elainehuckabee@dwt.com; Dawn.Taylor@pacificalawgroup.com
Subject: RE: No. 87425-5, League of Education Voters, et al. v. State of Washington

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Cc: Hart, Marnie (ATG); Even, Jeff (ATG); Zipp, Allyson (ATG); elainehuckabee@dwt.com; Dawn.Taylor@pacificalawgroup.com
Subject: No. 87425-5, League of Education Voters, et al. v. State of Washington

Sent on behalf of Maureen Hart, Solicitor General

Dear Clerk and Counsel:

Attached please find the State's Opening Brief for the above-noted matter.

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KRISTIN D. JENSEN
Office of the Attorney General
Solicitor General's Office
(360) 753-4111
kristinj@atg.wa.gov



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