

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Aug 31, 2012, 2:54 pm
BY RONALD R. CARPENTER
CLERK

NO. 87425-5

RECEIVED BY E-MAIL 

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 REPLY TO BRIEF OF LEV RESPONDENTS

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

ARGUMENT IN REPLY1

 A. LEV Has Failed To Present A Justiciable Controversy1

 B. This Court Should Not Reach The Merits Of A
 Constitutional Claim Without A Justiciable Controversy6

 C. Article II, Section 22 Does Not Prohibit The
 Supermajority Vote Provision Of RCW 43.135.034(1).....8

 1. Article II, Section 22’s Plain Language Establishes
 A Majority Only As The Minimum Vote
 Constitutionally Required For Bill Passage, Not A
 Maximum Statutory Limit.....9

 2. *Gerberding*’s Determination That Constitutional
 Qualifications For State Constitutional Offices
 Cannot Be Supplemented By Statute Rests In The
 Unique Nature Of Such Qualifications, And Is
 Immaterial Here.....13

 3. Political Theory And Foreign Authority Cannot—
 And Should Not—Negate The Plain Meaning Of
 Article II, Section 2218

 D. RCW 43.135.034(2)(a) Does Not Violate Article II,
 Section 1(b).....23

 E. LEV Has Not Established That The Supermajority Vote
 Provision And Voter Approval Provision Cannot Be
 Severed.....24

CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

| | |
|---|--------------|
| <i>Alaskans for Efficient Gov't, Inc. v. State</i> 153 P.3d 296 (Alaska 2007) | 22 |
| <i>Amalgamated Transit Union Local 587 v. State</i> 142 Wn.2d 183, 11 P.3d 762 (2000)..... | 6, 23, 24 |
| <i>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1</i> 124 Wn.2d 816, 881 P.2d 986 (1994)..... | 6 |
| <i>Brower v. State</i> 137 Wn.2d 44, 969 P.2d 42 (1998)..... | 18 |
| <i>Brown v. Owen</i> 165 Wn.2d 706, 206 P.3d 310 (2009)..... | 4 |
| <i>Campbell v. Clinton</i> 203 F.3d 19 (D.C. Cir. 2000)..... | 4 |
| <i>Citizens Council Against Crime v. Bjork</i> 84 Wn.2d 891, 529 P.2d 1072 (1975)..... | 7 |
| <i>Clallam Cnty. Deputy Sheriff's Guild v. Bd. of Clallam Cnty. Comm'rs</i> 92 Wn.2d 844, 601 P.2d 943 (1979)..... | 7 |
| <i>Gerberding v. Munro</i> 134 Wn.2d 188, 949 P.2d 1366 (1998)..... | 9, 12-14, 18 |
| <i>Gordon v. Lance</i> 403 U.S. 1, 91 S. Ct. 1889, 29 L. Ed. 2d 273 (1971)..... | 21 |
| <i>Grant Cnty. Fire Prot. Dist. 5 v. City of Moses Lake</i> 150 Wn.2d 791, 83 P.3d 419 (2004)..... | 2 |

| | |
|--|--------|
| <i>Gruen v. State Tax Comm'n</i> 35 Wn.2d 1, 211 P.2d 651 (1949), <i>overruled on other grounds</i> , <i>State ex rel. Washington State Fin. Comm. v. Martin</i> 62 Wn.2d 645, 384 P.2d 833 (1963)..... | 21 |
| <i>Howard Jarvis Taxpayers Ass'n v. City of San Diego</i> 120 Cal. App. 4th 374, 15 Cal. Rptr. 3d 457 (2004)..... | 22 |
| <i>Klossner v. San Juan Cnty.</i> 93 Wn.2d 42, 605 P.2d 330 (1980)..... | 3 |
| <i>Malyon v. Pierce Cnty.</i> 131 Wn.2d 779, 935 P.2d 1272 (1997)..... | 9, 11 |
| <i>McCleary v. State</i> 173 Wn.2d 477, 269 P.2d 227 (2012)..... | 7 |
| <i>Raines v. Byrd</i> 521 U.S. 811, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)..... | 3, 4 |
| <i>Robb v. City of Tacoma</i> 175 Wash. 580, 28 P.2d 327 (1933)..... | 11 |
| <i>Seattle Sch. Dist. 1 v. State</i> 90 Wn.2d 476, 585 P.2d 71 (1978)..... | 7 |
| <i>State ex rel. Distilled Spirits Inst., Inc. v. Kinnear</i> 80 Wn.2d 175, 492 P.2d 1012 (1972)..... | 6, 23 |
| <i>State ex rel. O'Connell v. Slavin</i> 75 Wn.2d 554, 452 P.2d 943 (1969)..... | 10, 11 |
| <i>State v. Abrams</i> 163 Wn.2d 277, 178 P.3d 1021 (2008)..... | 24, 25 |
| <i>Thurston v. Greco</i> 78 Wn.2d 424, 474 P.2d 881 (1970)..... | 21-22 |
| <i>To-Ro Trade Shows v. Collins</i> 144 Wn.2d 403, 27 P.3d 1149 (2001)..... | 1, 2 |

| | |
|---|--------|
| <i>United States v. Fruehauf</i> 365 U.S. 146, 81 S. Ct. 547, 5 L. Ed. 2d 476 (1961)..... | 5 |
| <i>Walker v. Munro</i> 124 Wn.2d 402, 879 P.2d 920 (1994)..... | 6, 7 |
| <i>Washington Ass'n of Neighborhood Stores v. State</i> 149 Wn.2d 359, 70 P.3d 920 (2003)..... | 5 |
| <i>Washington Econ. Dev. Fin. Auth. v. Grimm</i> 119 Wn.2d 738, 837 P.2d 606 (1992)..... | 11 |
| <i>Washington Educ. Ass'n v. Pub. Disclosure Comm'n</i> 150 Wn.2d 612, 80 P.3d 608 (2003)..... | 1 |
| <i>Washington State Farm Bureau Fed'n v. Gregoire</i> 162 Wn.2d 284, 174 P.3d 1142 (2007)..... | 14, 17 |

Constitutional Provisions

| | |
|-----------------------------|------------------------|
| Const. amend. 7..... | 19 |
| Const. art. II | 16 |
| Const. art. II, § 1(b)..... | 23 |
| Const. art. II, § 22 | 8-10, 12-18, 20, 22-23 |
| Const. art. II, § 36 | 16 |
| Const. art. II, § 7 | 12 |
| Const. art. II, § 9 | 16 |
| Const. art. III, § 12..... | 16 |
| Const. art. III, § 25 | 12 |
| Const. art. IV, § 9..... | 16 |
| Const. art. V, § 1 | 16 |

| | |
|------------------------------|-------|
| Const. art. XXIII, § 1 | 9, 16 |
| Const. art. XXIII, § 2 | 9, 16 |
| U.S. Const. amend. XIV | 21 |

Statutes

| | |
|---|---------------------------|
| RCW 43.135.034(1)..... | 2-5, 7, 9, 18, 20, 21, 24 |
| RCW 43.135.034(2)(a) | 6, 7, 23, 24 |
| Former RCW 43.88.535 (1982), <i>repealed by</i> Laws of 1994, ch. 2, § 9(4) | 16 |
| Former RCW 43.135.050 (1980), <i>repealed by</i> Laws of 1994, ch. 2, § 9(9) | 16 |

Other Authorities

| | |
|--|--------|
| Cornell W. Clayton, <i>Toward A Theory Of The Washington Constitution,</i> 37 Gonz. L. Rev. 41 (2001-2002) | 19, 20 |
| Kristen L. Fraser, <i>Method, Procedure, Means, And Manner: Washington's Law Of Law-Making,</i> 39 Gonz. L. Rev. 447 (2003-2004) | 19, 20 |
| Op. Att’y Gen. 06-4 (Me. 2006), 2006 WL 3923861 | 22 |
| Op. Att’y Gen. 6990 (Mich.1998), 1998 WL 477683 | 22 |
| 10-year cost projection prepared for ESB 6635 by OFM | 8 |

ARGUMENT IN REPLY

A. LEV Has Failed To Present A Justiciable Controversy

This Court has cautioned that overuse of the Uniform Declaratory Judgments Act (UDJA) could open the floodgates to litigation between parties with no more than hypothetical or speculative disputes. “Where the four justiciability factors are not met, ‘the court steps into the prohibited area of advisory opinions.’” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Accordingly, while League of Education Voters, et al. (LEV) notes the UDJA’s broad, remedial nature, this does not excuse LEV from satisfying justiciability requirements. *Id.* at 410-11. This Court “steadfastly adhere[s] to ‘the virtually universal rule’ that there must be a justiciable controversy before the jurisdiction of a court may be invoked.” *Washington Educ. Ass’n v. Pub. Disclosure Comm’n*, 150 Wn.2d 612, 622, 80 P.3d 608 (2003) (quoting *To-Ro Trade Shows*, 144 Wn.2d at 411).¹

LEV does not once accurately articulate the showing required for a justiciable controversy under the UDJA, and LEV has not satisfied it. A

¹ LEV asserts that, “[o]n appeal, the State does not challenge Respondents’ standing other than to contend that Respondents do not satisfy the third element of the UDJA justiciability test.” Respondents’ Opening Brief (LEV Br.) 11 n.4. As this Court has noted, under the UDJA, the requirement of standing and of justiciability overlap. *To-Ro Trade Shows*, 144 Wn.2d at 411 n.5.

party “‘may not . . . challenge the constitutionality of a statute unless it appears that [the party] will be *directly* damaged in person or in property by its enforcement.’” *To-Ro Trade Shows*, 144 Wn.2d at 411-12 (bracketed alteration ours) (quoting *De Cano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941) (emphasis added)). “To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract.” *Grant Cnty. Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004).

All of LEV’s claims proceed from the fundamentally erroneous premise that RCW 43.135.034(1) prohibits a majority of the Legislature from passing bills that increase taxes if that is what a majority chooses to do. Additionally, LEV has not demonstrated that any LEV respondent possesses a legal right affected by the supermajority vote provision. And LEV has offered nothing more than layers of speculation and conjecture to assert the statute has caused any LEV respondent harm.

Perhaps recognizing as much, LEV endeavors to convert its actual challenge to RCW 43.135.034(1) into a challenge based on the State’s obligation to adequately fund basic education under article IX of the Washington Constitution. Respondents’ Opening Brief (LEV Br.) 12-14. No such claim was pled and no such claim is properly before the

Court. Moreover, LEV's effort to attribute current funding levels for basic education to RCW 43.135.034(1) is based on the same multiple layers of incompetent speculation and conjecture that LEV offered to attribute other asserted harms to the statute.

In response to the State's argument that LEV has not provided competent evidence of harm caused by RCW 43.135.034(1), LEV cannot and does not assert that its interrogatory answers are verified based on personal knowledge of persons competent to testify to the matters asserted. *See* LEV Br. 11 n.5. Discovery responses, like declarations, must be verified based upon personal knowledge to be considered on summary judgment. *Klossner v. San Juan Cnty.*, 93 Wn.2d 42, 45, 605 P.2d 330 (1980). LEV's answers are not, and this is no mere technical deficiency. *Id.* Moreover, the answers themselves are plainly speculative and conjectural.

LEV's argument that individual members of the Legislature have a special claim to injury must also fail. At most, a legislator may claim to have suffered an injury when his or her vote in the legislative body has been "completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823-24, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997) (distinguishing *Coleman v. Miller*, 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939), upon which LEV relies). Indeed, the United States Supreme Court has explicitly rejected

the argument that legislators are permitted to turn to the courts instead of to political remedies. *Raines*, 521 U.S. at 824-25; *see also Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000) (citing *Raines*). Just as in *Brown v. Owen*, 165 Wn.2d 706, 720-21, 206 P.3d 310 (2009), the individual LEV legislators had a plain political remedy that none sought to invoke.

Nor may LEV convincingly argue that separation of powers limitations require this Court to inject itself into the legislative process. LEV Br. 15. Contrary to LEV's argument, it is not necessary for the Legislature to determine whether RCW 43.135.034(1) is constitutional to pass a bill that increases taxes by a simple majority vote. *Brown*, 165 Wn.2d at 720-21; Brief Of Respondent Governor Christine Gregoire 6-8.

Finally, LEV claims that the State posits an inappropriate barrier to "judicial review." LEV Br. 18. The State posits only what the Court repeatedly and properly has held—that the Court will not entertain speculative, abstract, premature, political controversies under the UDJA. This constraint not only reflects the proper role of the judicial branch, it also recognizes that issues are appropriately defined and presented in relation to particular facts and circumstances. This case provides a good example. If the Legislature actually passed a tax increase on a majority vote and the statute enacting the increase were challenged based on

RCW 43.135.034(1), a different factual context and different legal questions would be presented to the Court. Before the Court ever reached a constitutional question, if it reached one at all, the Court presumably would consider whether the statutes could be harmonized, and if not, how a conflict between the statutes would be resolved. Perhaps the Court ultimately would need to determine the constitutionality of the supermajority vote provision, but perhaps not.² LEV's premature hypothetical challenge to the supermajority vote provision, however, would foreclose any other question, and would deprive the Court of a question that "emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation[.]" *United States v. Fruehauf*, 365 U.S. 146, 157, 81 S. Ct. 547, 5 L. Ed. 2d 476 (1961) (explaining why the court consistently declines to provide advisory opinions).

Proceeding from the erroneous premise that the supermajority vote provision precludes passage of a tax increase, LEV seeks to invalidate the supermajority vote provision. While LEV clearly would prefer the Court

² LEV assumes that such a legislative action would necessarily constitute an amendment of RCW 43.135.034(1), necessitating a two-thirds vote if done within the first two years after the enactment of an initiative. LEV Br. 15. LEV fails to explain why this would be so. Indeed, a bill enacting a tax increase may constitute a complete act in and of itself, necessitating no amendment to RCW 43.135.034(1). See *Washington Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 373, 70 P.3d 920 (2003) (holding an act did not amend another, pre-existing statute when a person reading a new act would need look no further than the new act to know that it authorized a new tax).

to hold the supermajority vote provision invalid, this case presents a good example why courts should be, and are, extremely hesitant to involve the judiciary in resolving speculative, premature, political disputes.³

B. This Court Should Not Reach The Merits Of A Constitutional Claim Without A Justiciable Controversy

LEV relies on *State ex rel. Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972), to argue that the Court should determine the validity of the supermajority vote provision even though this case is not justiciable, simply stating in a single unexplained sentence that the criteria the Court relied on in *Distilled Spirits* are presented here. LEV Br. 19. This is not so, and the State's opening brief, to which LEV does not respond, fully explains why this is not so. State's Opening Brief (State's Br.) 22-24.

Otherwise, LEV seems to take issue with the plain holding of *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994), upon which the State relies. *Walker* rejected LEV's contention here—that the courts will

³ In lieu of even attempting to demonstrate a justiciable controversy with respect to the voter approval provision of RCW 43.135.034(2)(a), LEV relies only upon a footnoted statement in this Court's *ATU* decision. LEV Br. 22 (citing *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203 n.4, 11 P.3d 762 (2000) (*ATU*)). But that case concerned a different statute and different facts. It also included no analysis of the point in question, because this Court held that justiciability was not properly at issue in the case. *ATU*, 142 Wn.2d at 203. Accordingly, *ATU* is not controlling authority on this point. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). In the same regard, to the extent it refers to RCW 43.135.034(2)(a), LEV's assertion that Governor Gregoire "urg[ed] the trial court to rule on the constitutionality of RCW 43.135.034" is inaccurate. LEV Br. 8.

hear matters of great public importance without regard to justiciability—as “an overstatement” and held that the Court “will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged.” *Walker*, 124 Wn.2d at 415. The *Walker* holding describes to a “T” LEV’s challenge to RCW 43.135.034(1) and .034(2)(a). See Brief Of Respondent Governor Christine Gregoire 12-15.⁴

LEV also cites *McCleary v. State*, 173 Wn.2d 477, 269 P.2d 227 (2012), and *Seattle School District 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), to contend that education funding is important. LEV Br. 19. That is true, but it is not the issue in this case. The amount of revenue the Legislature decides to allocate to basic education is, in the first instance, a matter of legislative prerogative, and is a function of multiple complex political, fiscal, and legal considerations. Neither RCW 43.135.034(1) nor .034(2)(a) determine school funding, and resolution of LEV’s challenges would not change that fact. Indeed, the tax increase at the heart of LEV’s

⁴ Neither *Clallam County Deputy Sheriff’s Guild v. Board of Clallam County Commissioners*, 92 Wn.2d 844, 849, 601 P.2d 943 (1979), nor *Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 895, 529 P.2d 1072 (1975), cited by LEV, support its position that the Court should adjudicate the validity of RCW 43.135.034(1) in the absence of a justiciable controversy. LEV Br. 21 n.10. In *Clallam County Deputy Sheriff’s Guild*, the Court determined that all of the elements for a justiciable controversy were presented. In *Bjork*, upon the Governor’s request, the Court determined whether the Legislature properly overrode actual vetoes that the Governor had taken. In neither case was there any suggestion that any party offered reason why the determination should not be made. Analogous circumstances are not presented in the instant case.

complaint was subsequently passed by the Legislature, and the Legislature did not choose to direct the increase to school funding.⁵

LEV also suggests that the issues presented by this case must be important enough to justify this Court discarding its rule against advisory opinions, because the State argued for sufficient time to brief the matter. LEV Br. 20 (citing State's Opposition To LEV's Motion For Expedited Review at 5). The two considerations do not equate. The State's request for the time allowed by rule to brief this case does not somehow support this Court departing from established jurisdictional requirements.

C. Article II, Section 22 Does Not Prohibit The Supermajority Vote Provision Of RCW 43.135.034(1)

By its plain language, article II, section 22 of the Washington Constitution establishes a simple majority vote as a constitutional minimum for bill passage. LEV agrees that “[t]he text of Article II, § 22 is plain and unambiguous” (LEV Br. 24) and acknowledges that “‘when [the constitution] is not ambiguous there is nothing for the courts to construe.’” LEV Br. 24 (quoting *Washington State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442

⁵ LEV's contention that tax reductions in the same bill made the measure “essentially revenue neutral” and there was no revenue to direct to education (LEV Br. 6 n.2) is not supported by the record or fact. The ten-year cost projection prepared for ESB 6635 by the Office of Financial Management shows substantial additional revenue from the tax increase alone and an overall increase from the bill as a whole. See <http://listserv.wa.gov/cgi-bin/wa?A2=ind12&L=TAX-AND-FEE-PROPOSALS&T=0&F=&S=&P=260288> (last visited Aug. 30, 2012).

(1988)). Notwithstanding this acknowledgment, LEV disregards the provision's plain language. Instead, attempting to persuade the Court that article II, section 22 does not mean what it says, but what LEV would like for it to say, LEV offers misplaced argument based on inapposite precedent governing qualifications for state constitutional office, political theory, and unpersuasive foreign authority. The Court should reject these unavailing arguments and properly conclude that article II, section 22 sets a constitutional minimum for bill passage, with which RCW 43.135.034(1)'s supermajority vote provision clearly comports.⁶

1. Article II, Section 22's Plain Language Establishes A Majority Only As The Minimum Vote Constitutionally Required For Bill Passage, Not A Maximum Statutory Limit

“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). “Where the words of a constitution are unambiguous and in their commonly received sense lead

⁶ LEV initially contends, incorrectly, that RCW 43.135.034(1) is invalid because it purports to amend article II, section 22. LEV Br. 24. But, as LEV must and does concede, the constitution can be amended only on a two-thirds vote of the Legislature followed by voter approval. Const. art. XXIII, §§ 1, 2; LEV Br. 25. RCW 43.135.034(1) cannot amend the constitution. *Gerberding v. Munro*, 134 Wn.2d 188, 210, 949 P.2d 1366 (1998). It either comports with constitutional limitations and is valid, or conflicts with those limitations and is invalid. The issue here is therefore one of constitutional analysis. And the language of article II, section 22, which plainly sets forth a constitutional minimum number of votes for a bill to become law, dictates the result—that RCW 43.135.034(1) comports with the constitution.

to a reasonable conclusion, it should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation.” *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 558, 452 P.2d 943 (1969).

Article II, section 22 of the Washington Constitution states: “No bill shall become a law unless . . . a majority of the members elected to each house be recorded thereon as voting in its favor.” The natural and obvious reading of “[n]o bill shall become a law unless” is that a bill does not become a law *unless*—under other circumstances than or except on the condition that—a specified event occurs. That event is “a majority of the members elected to each house be recorded thereon as voting in its favor.” Const. art. II, § 22. Thus, article II, section 22 sets forth a circumstance that must be met or else a bill *does not pass*. This manifestly describes a constitutional minimum vote requirement for a bill to become a law.

Article II, section 22 imposes no additional vote requirements. It neither states nor implies that every bill receiving a majority vote does pass. Yet LEV contends precisely that. Dismissing the provision’s phrasing as “Irrelevant,” LEV claims that article II, section 22 “sets both a floor and a ceiling” for passage of legislation. LEV Br. 34. But LEV’s argument would effectively write out the provision’s negative phrasing and replace it with affirmative phrasing: “((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.” Adopting LEV’s argument would flatly contradict the precept that “constitutional 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).

In a similar disregard for precedent, LEV invents a novel rule of constitutional interpretation in an attempt to distinguish *Robb v. City of Tacoma*, 175 Wash. 580, 28 P.2d 327 (1933). Without authority, LEV announces that the meaning of a constitutional provision turns on whether the provision is substantive or procedural, claiming provisions “that create and define” a process set forth “matter[s] of exclusive constitutional concern.” LEV Br. 38. The constitution makes no such distinction. Nor does this Court. “[T]he state constitution is not a grant, but a restriction on the lawmaking power; and the power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state or federal constitutions.” *O’Connell*, 75 Wn.2d at 557. This settled, fundamental principle contains no caveat of the sort LEV invents. Rather, courts look to the language of the specific constitutional provision to determine whether it sets forth any limitation on legislative authority. *See Malyon*, 131 Wn.2d at 799.

LEV also attempts to justify its outright dismissal of what article II, section 22 actually says through misplaced reliance on *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (1998). LEV Br. 34-36 (arguing *Gerberding* rejected significance of negative phrasing in constitutional provisions). *Gerberding* involved qualifications for state constitutional offices, and held that the qualifications for such offices set forth in the state constitution were exclusive.⁷ Therefore, *Gerberding* held, an initiative imposing term limits for such offices was invalid. *Gerberding*, 134 Wn.2d at 191. However, as discussed more fully below, *Gerberding* was based on “fundamental principles regarding qualifications for state constitutional offices” and the particular constitutional history of the qualifications provisions. *Id.* at 201-05. In light of those unique considerations, *Gerberding* did not accord controlling significance to the qualifications provisions’ negative phrasing. “Whether phrased negatively or positively, such requirements are qualifications. The critical issue is whether such qualifications are exclusive.” *Id.* at 207. However, article II, section 22’s majority vote requirement is not related to qualifications for constitutional office and does not share the particular

⁷ Article II, section 7 provides: “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.” Article III, section 25 provides: “No person, except a citizen of the United States and a qualified elector of this state, shall be eligible to hold any state office. . . .”

constitutional history of the qualifications provisions. Consequently, *Gerberding*'s treatment of those provisions' negative phrasing is of no significance here.

2. *Gerberding*'s Determination That Constitutional Qualifications For State Constitutional Offices Cannot Be Supplemented By Statute Rests In The Unique Nature Of Such Qualifications, And Is Immaterial Here

Pointing to *Gerberding*'s conclusion that qualifications established by the constitution for state constitutional offices are exclusive, LEV proposes that this Court should ignore the plain language of article II, section 22, and determine that its majority vote requirement is similarly "exclusive and of a constitutional, not statutory, concern." LEV Br. 36. LEV's notion that *Gerberding*'s exclusivity rationale pertains beyond qualifications for state constitutional office is unprecedented and incorrect. No court has cited *Gerberding*'s rationale outside the realm of qualifications and *Gerberding* is based on fundamental principles and historical considerations unique to qualifications for office.

LEV ignores that *Gerberding*'s analysis began by recognizing certain "fundamental principles" specific to qualifications for state constitutional offices. *Gerberding*, 134 Wn.2d at 201. Most notably, *Gerberding* relied on a "strong presumption in favor of eligibility for office," explaining 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 (quoting *State v. Schragg*, 158 Wash. 74, 78, 291 P. 321 (1930)). LEV does not address these “fundamental principles,” which obviously are inapplicable to article II, section 22’s majority vote requirement. Instead, with respect to article II, section 22, the fundamental principle is that a constitutional provision must be examined for what it prohibits, not what it allows, because a provision limits plenary legislative power no more than it clearly states, either expressly or by fair inference. *Washington State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 300-01, 174 P.3d 1142 (2007).

Gerberding also discussed at length that during Washington’s constitutional convention, “qualifications for state constitutional officers were the subject of intense debate[.]” *Gerberding*, 134 Wn.2d at 202. The framers considered, but rejected, term limits for all but a limited number of constitutional offices. *Id.* at 202-04. *Gerberding* concluded from the framers’ consideration and rejection of constitutional term limits that the framers intended to prohibit statutes imposing term limits.

By contrast, during debate on article II, section 22, the framers did not consider and reject supermajority approval for bill passage. Rather, the framers debated only whether to set the constitutional vote threshold for bill passage lower than a majority of members elected, to a majority of

members present or no minimum at all. *See* State's Br. 29-31. LEV suggests that the framers' choice of a higher threshold than no minimum demonstrates intent that the vote requirement for bill passage be exclusively reserved to the constitution. LEV Br. 27. This defies logic. Considering whether to lower the minimum threshold does not evidence the intent to simultaneously set a maximum limit.

In an attempt to shore up its argument, LEV reaches beyond article II, section 22 and grasps at other constitutional provisions. For example, LEV offers excerpts from the framers' debate of simple majority versus supermajority vote requirements for some provisions relating to local government, implying those debates inform the framers' intent regarding article II, section 22. LEV Br. 27-28. And LEV points to 16 constitutional provisions that require supermajorities under certain circumstances, noting that bills increasing taxes are not among them. LEV Br. 28-29. Relying on these examples, LEV jumps to the same logically flawed conclusions as the trial court: (1) that the constitution contains a general rule limiting vote requirements to majority approval, from which the framers knew how to create supermajority "exceptions," and (2) that the absence of a constitutional "exception" for tax bills proves the framers intended to prohibit statutory supermajority vote provisions. LEV Br. 29; *see also* CP 752 (Memorandum Opinion).

This argument fails for several reasons. *See* State's Br. 31-32 (discussing reasons at more length). First, it simply assumes the proposition it is trying to prove—that the constitution contains a general rule limiting vote requirements to majority approval. Second, because the seven supermajority vote requirements adopted by the framers addressed matters other than vote requirements for bill passage, they do not support LEV's conclusion that the framers viewed these supermajority requirements to be exceptions carved out of article II, section 22's bill passage requirement.⁸ Third, there is no logical basis to conclude that by requiring constitutional supermajorities for some purposes, the framers intended to prohibit statutory supermajorities for other purposes.⁹

LEV's conjecturing aside, and although unrelated constitutional provisions are of limited if any relevance here, there is a much more

⁸ 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).

⁹ Contrary to LEV's claim (LEV Br. 29 n.19), historically Washington's Legislature and voters have found the supermajority to be a useful tool, and have included it in statutes, as well as in constitutional provisions. For example, former RCW 43.88.535 (1982), *repealed by* Laws of 1994, ch. 2, § 9(4) (I-601, § 9(4)), required a 60 percent majority to appropriate money out of the budget stabilization account. Similarly, Initiative 62 required a 60 percent majority to exceed the revenue limit established by that initiative. Former RCW 43.135.050 (1980), *repealed by* Laws of 1994, ch. 2, § 9(9) (I-601, § 9(9)).

plausible conclusion to be drawn from the framers' consideration of simple majority versus supermajority vote requirements and use of supermajority votes in some constitutional provisions. Both demonstrate the framers' recognition that certain legislative decisions are sufficiently important to require an added measure of consensus as part of the state's fundamental law—the constitution; and that a simple majority does not provide the only high-water mark of public policy. 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. Instead, they drafted article II, section 22 merely to prohibit bill passage based on less than a majority vote of the full membership.

LEV also argues that because the framers neither required supermajority approval for tax legislation nor expressly conferred authority on law-makers to supplement article II, section 22 by statute, they must have intended to affirmatively prohibit such action. LEV Br. 29-31. LEV's reasoning turns the nature of the state constitution on its head. Its provisions are properly understood to limit legislative power no more than is clearly stated, either expressly or by fair inference, and must be examined for what they prohibit, not what they allow. *Washington State Farm Bureau Fed'n*, 162 Wn.2d at 300-01.

In sum, contrary to LEV's contention, *Gerberding* did not announce some broad precept of "constitutional concern" pursuant to which topics addressed in the constitution become the exclusive province of the constitution. Indeed, to conclude *Gerberding* stands for such a precept 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 principle, which *Gerberding* itself endorses. *Gerberding*, 134 Wn.2d at 196. Contrary to LEV's conjecturing, *Gerberding*'s conclusion that qualifications for state constitutional office are exclusive rests on circumstances unique to such qualifications. It is inapposite to this case.

3. Political Theory And Foreign Authority Cannot—And Should Not—Negate The Plain Meaning Of Article II, Section 22

Finally, LEV turns to political theory and foreign authority. Neither outweighs the plain language meaning of article II, section 22.

First, LEV contends that RCW 43.135.034(1)'s supermajority vote provision is "counter to the constitutional checks put on special interests that were the concern of the framers" because "the majority will of the people as expressed through their elected representatives can be undone by a small number of legislators influenced by a strong legislative lobby."

LEV Br. 31-32. LEV's reasoning betrays its misunderstanding of the framers' concern and the constitutional checks they crafted to address it.

The framers were concerned with legislative corruption and special corporate privilege resulting in the *enactment* of legislation at the behest of special interests—"the power of corporations and special interests that might capture or corrupt public institutions." Kristen L. Fraser, *Method, Procedure, Means, And Manner: Washington's Law Of Law-Making*, 39 *Gonz. L. Rev.* 447, 449-50 (2003-2004). To address this concern, they built into the constitution four related characteristics, including a "variety of provisions imposing restrictions on the legislative branch[.]" some "intended to prevent *enactment* of special interest legislation" and others restricting "how the legislature may *enact* its intent[.]" Fraser, at 450-51 (emphases added); accord Cornell W. Clayton, *Toward A Theory Of The Washington Constitution*, 37 *Gonz. L. Rev.* 41, 67-69 (2001-2002). The framers also included democratic checks on all three branches through direct, popular, and separate elections. Fraser at 449-50; Clayton at 67-69. The check on special interests through direct democratic control of government was further enhanced by amendment 7, enacted in 1912,

which reserved to the people the power to legislate directly through the initiative and referendum processes.¹⁰ Clayton at 67-69.

RCW 43.135.034(1)'s supermajority vote provision does not run counter to the framers' constitutional checks on special interests, as LEV contends—it embodies those checks. The supermajority vote provision makes it more difficult for special interests to achieve the enactment of special interest legislation. And it reflects the will of the majority of the people who, of course, are hardly a special interest and can rid themselves of the provision if they so choose. However repugnant this policy choice may be to LEV, the people have endorsed it, both directly and through their elected legislators. The task for this Court is not to judge the people's policy choice, as LEV does, but to determine whether it is consistent with article II, section 22. For all of the reasons discussed above, it is.

LEV also argues that “[a]brogation of the simple majority rule is also counter to the fundamental principles on which our representative government is based[,]” relying on quotes from *The Federalist Papers* discussing majority rule. LEV Br. 32-33. First, such consideration of systemic political values is appropriately left to the political branches and

¹⁰ The two other characteristics are a broad declaration of individual rights and an entire constitutional article restricting the powers of private corporations. *Fraser*, 39 *Gonz. L. Rev.* at 449-50; *accord Clayton*, 37 *Gonz. L. Rev.* at 67-69.

to the voters. Second, significantly, LEV's requested relief would dictate certain assumptions regarding broad concepts of political theory that courts have refused to judicially impose.¹¹

The United States Supreme Court has held that simple majorities are not constitutionally compelled by the Fourteenth Amendment of the United States Constitution. *Gordon v. Lance*, 403 U.S. 1, 5, 91 S. Ct. 1889, 29 L. Ed. 2d 273 (1971). The Court held that states may recognize that certain decisions appropriately require higher degrees of societal consensus. The Court observed, “[c]ertainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue.” *Id.* at 6. A year earlier, the Washington Supreme Court reached the same conclusion in an equal protection challenge to the supermajority popular vote required for bond measures, rejecting the argument that a democracy must rely exclusively upon simple majorities. *Thurston v. Greco*, 78 Wn.2d 424,

¹¹ LEV also argues that RCW 43.135.034(1)'s supermajority vote provision “suspends and surrenders the Legislature’s plenary power over taxation in violation of Article VII, § 1.” LEV Br. 34. This claim fails because this Court has defined what it means to “surrender” or “suspend” the power of taxation: “[s]urrender” means to yield, render, or deliver up; to give up completely, resign, to relinquish” and “suspended” is defined as temporarily inactive or inoperative—that is, held in abeyance.” *Gruen v. State Tax Comm’n*, 35 Wn.2d 1, 53, 211 P.2d 651 (1949), *overruled on other grounds*, *State ex rel. Washington State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963) (citations omitted). RCW 43.135.034(1) addresses the manner in which the taxing power is exercised, but nothing in it purports to relinquish that power, either permanently or temporarily.

427, 474 P.2d 881 (1970). This reasoning applies to article II, section 22, as surely as to the Equal Protection Clause.

Finally, LEV points to foreign authority to buttress its position, but its reliance is misplaced. The reasoning in *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296 (Alaska 2007), is deeply flawed and thus is uninformative with respect to the question before this Court, as more fully discussed at page 39-41 of the State's opening brief.¹² And *Howard Jarvis Taxpayers Association v. City of San Diego*, 120 Cal. App. 4th 374, 15 Cal. Rptr. 3d 457 (2004), based as it is on the significantly different language of the California constitution, is utterly inapposite. See State's Br. 38-39.

The framers of our constitution and subsequent legislatures and voters have recognized that certain specified actions should command the support of more than a simple majority. LEV, to the contrary, urges that the same framers who embraced supermajorities for some purposes, as part of Washington's fundamental law, intended to prohibit statutes

¹² The Maine and Michigan Attorney General Opinions cited by LEV are similarly flawed. LEV Br. 42 n.29. Both opinions recite the fundamental principle that legislative power is plenary unless prohibited, then apply the opposite principle. On meager reasoning, both opinions conclude that statutory supermajority vote requirements are prohibited because the respective state constitutions do not expressly authorize the Legislature to impose them. See Op. Att'y Gen. 6990 (Mich.1998), 1998 WL 477683, at *2 ("no constitutional authorization for the Legislature to impose a 'super majority' voting requirement"); Op. Att'y Gen. 06-4 (Me. 2006), 2006 WL 3923861, at *9 ("Because there is no requirement for such a supermajority in Maine's Constitution, however, we believe a court would find such a requirement unenforceable.").

requiring supermajorities for any other purpose. The constitution contains no language supporting this notion, and the framers may not reasonably be presumed to have implied the prohibition of a political mechanism that they themselves adopted, through language that does not say so.

LEV's proposed reading of article II, section 22 is antithetical to the fundamental nature of the state constitution, which is "not a grant but a restriction upon the legislative power." *Distilled Spirits*, 80 Wn.2d at 180. Reading an additional limitation 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 language of the provision itself. The Court should not conclude otherwise.

D. RCW 43.135.034(2)(a) Does Not Violate Article II, Section 1(b)

LEV alleges that RCW 43.135.034(2)(a) violates article II, section 1(b) of the Washington Constitution by calling for a public vote on tax legislation that would result in spending that exceeds the state expenditure limit. The State's opening brief fully responds to the arguments LEV raises. *See* State's Br. 42-47. The State simply reiterates in short form two reasons why LEV's reliance on *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203 n.4, 11 P.3d 762 (2000) (*ATU*), to support its challenge is misplaced. First, unlike the referendum provision considered in *ATU*, which applied to every future piece of tax

legislation, the provision here is very narrow and, in fact, operates only as an exception to a statutory prohibition against tax increases in excess of the state expenditure limit—a statutory provision that LEV does not challenge. Second, unlike *ATU*, the Legislature has enacted the referendum provision that LEV challenges. Referring bills to the people is plainly within the authority of the Legislature.

E. LEV Has Not Established That The Supermajority Vote Provision And Voter Approval Provision Cannot Be Severed

LEV last contends that the supermajority vote provision of RCW 43.135.034(1) and the voter approval provision of RCW 43.135.034(2)(a) are not severable. If the Court reaches the merits of this appeal and concludes that either provision is unconstitutional, the other provision, as well as the remainder of RCW 43.135.034, should be severed.

LEV argues that the voters would not have enacted either the supermajority vote provision or the voter approval provision without the other. LEV Br. 48-49; *State v. Abrams*, 163 Wn.2d 277, 285-86, 178 P.3d 1021 (2008) (reciting standard for severability). LEV's support for this contention consists solely of the fact that the two provisions were contained in the same measure, a measure that includes a severability clause, and of its own implausible conclusion that the voters would have rejected any limit on tax increases if they could not achieve both.

Finally, LEV denies that it has abandoned its argument that this Court should invalidate RCW 43.135.034 in its entirety, even though it devoted no argument to subsections (3)-(6) of that statute. Those subsections relate to the state expenditure limit, which LEV does not challenge. LEV has nowhere argued that those provisions are “so intimately connected” with the provisions it challenges “as to make [them] useless to accomplish the purposes of the legislature.” *Abrams*, 163 Wn.2d at 285-86.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 31st day of August 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 Reply To Brief Of LEV Respondents, 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
Attorneys for Respondents

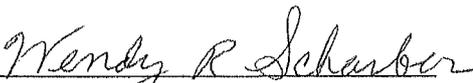
Michele Radosevich
micheleradosevich@dwt.com
Davis Wright Tremaine LLP
*Attorney for Respondent
Governor Christine Gregoire*

Michael J. Reitz
mjreitz@yahoo.com
Freedom Foundation
*Attorney for Amicus Curiae
Freedom Foundation*

Kristopher I Tefft
KrisT@AWB.org
Association of Washington Business
*Attorney for Amicus Curiae
Association of Washington Business*

Harry H. Schneider, Jr.
HSchneider@perkinscoie.com
Nicholas A. Manheim
NManheim@perkinscoie.com
David A. Perez
DPerez@perkinscoie.com
Perkins Coie LLP
*Attorneys for Amicus Curiae
League of Women Voters of WA*

DATED this 31st day of August 2012, in Olympia, Washington.


Wendy R. Scharber
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Scharber, Wendy R. (ATG)
Cc: Paul.Lawrence@pacificalawgroup.com; Matthew.Segal@pacificalawgroup.com;
Greg.Wong@pacificalawgroup.com; Sarah.Johnson@pacificalawgroup.com;
micheleradosevich@dwt.com; mjreitz@yahoo.com; KrisT@AWB.org;
HSchneider@perkinscoie.com; NManheim@perkinscoie.com; DPerez@perkinscoie.com;
Hart, Marnie (ATG); Zipp, Allyson (ATG); Even, Jeff (ATG); Sampson, Rose (ATG); Jensen,
Kristin (ATG)
Subject: RE: League of Education Voters, et al. v. State of Washington; Cause No. 87425-5

Rec. 8-31-12

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.

From: Scharber, Wendy R. (ATG) [mailto:WendyO@ATG.WA.GOV]
Sent: Friday, August 31, 2012 2:49 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Paul.Lawrence@pacificalawgroup.com; Matthew.Segal@pacificalawgroup.com; Greg.Wong@pacificalawgroup.com; Sarah.Johnson@pacificalawgroup.com; micheleradosevich@dwt.com; mjreitz@yahoo.com; KrisT@AWB.org; HSchneider@perkinscoie.com; NManheim@perkinscoie.com; DPerez@perkinscoie.com; Hart, Marnie (ATG); Zipp, Allyson (ATG); Even, Jeff (ATG); Sampson, Rose (ATG); Jensen, Kristin (ATG)
Subject: League of Education Voters, et al. v. State of Washington; Cause No. 87425-5

Sent on behalf of: Maureen Hart, Solicitor General WSBA 7831

360-753-2536 : marnieh@atg.wa.gov

League of Education Voters, et al., Respondents, Cause No. 87425-5

v.

State of Washington, Appellant,

and

Christine Gregoire, Respondent

State's Reply To Brief Of LEV Respondents

<<120831StateReplyToLEVResp.pdf>>

Wendy R. Scharber

360-753-3170 : wendyo@atg.wa.gov