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SUPREME COURT OF THE STATE OF WASHINGTON

LEAGUE OF EDUCATION VOTERS, et al.,

Respondent,

v.

STATE OF WASHINGTON,

Appellant,

and CHRISTINE GREGOIRE, Governor of the State of Washington,

Respondent.

STATE'S REPLY TO BRIEF OF AMICUS CURIAE
LEAGUE OF WOMEN VOTERS

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STATE'S RESPONSE TO LEAGUE OF WOMEN VOTERS

A. **Just As The Court Should Not Reach The Merits Of LEV's Claims For Lack Of Justiciability, It Should Not Reach Amici's Arguments**

As the State has demonstrated in its opening and reply briefs, Respondent League of Education Voters, et al. (LEV), fails to present a justiciable controversy, and for that reason, the Court should not reach LEV's challenges to RCW 43.135.034(1) and (2)(a). State's Op. Br. at 10-25; State's Reply to Br. of LEV Resp't at 1-8; State's Reply to Br. of Governor Resp't, *passim*. For the same reason, the Court should not reach the League of Women Voter's (League) new arguments challenging RCW 43.135.034(1).

B. **The Court Also Should Disregard Amici's Arguments Because They Are New Arguments Made Only By Amici**

The League makes new arguments to assert that RCW 43.135.034(1) is unconstitutional. *See* League Amicus Br. at 2 ("The League advances two unique arguments for the Court's consideration."). In fact, the League asserts three new arguments, the third not separately identified by the League. First, the League argues that RCW 43.135.034(1) "restricts the legislature's ability to exercise its plenary power to pass tax legislation." League Amicus Br. at 2. Second, in an argument the League couches as a plea for representative democracy

and protection of individual rights, the League contends that RCW 43.135.034(1) impermissibly amends the Washington Constitution. League Amicus Br. at 9-10. Third, the League argues that debate at the constitutional convention concerning article XI of the Washington Constitution establishes the meaning of a wholly distinct constitutional provision, article II, section 22. League Amicus Br. at 2. “This court will not address arguments raised only by amici.” *Sundquist Homes, Inc. v. Snohomish County Public Utility Dist. No. 1*, 140 Wn.2d 403, 413, 997 P.2d 915 (2000). Accordingly, the Court should not consider the League’s new arguments. *Id.*

As more fully addressed, below, however, if the Court considers the League’s arguments, they fail.

C. The League’s “Plenary Power” Argument Turns On Its Head The Principle Of Plenary Legislative Authority

The League first argues that RCW 43.135.034(1) “restricts the legislature’s ability to exercise its plenary power to pass tax legislation” and that “a statute that limits this power—whether passed by the legislature or through an initiative—is invalid.” League Amicus Br. at 2, 4. The League’s argument turns the principle of plenary authority on its head.

“Plenary authority” means that “[i]nsofar as legislative power is not limited by the constitution it is unrestrained.” *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 301, 174 P.3d 1142 (2007) (quoting *Cedar County Comm. v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998)). “[A]bsent contractual protection or some other form of constitutional restriction, nothing prevents one legislature from amending the work of a previous legislature.” *Farm Bureau*, 162 Wn.2d at 301-02, citing Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington’s Law of Law-Making*, 39 Gonz. L. Rev. 447, 478 (2003–2004). Thus, under their plenary legislative power, the Legislature, or the people, may enact any statute either chooses to enact, and may amend or repeal any existing law, including RCW 43.135.034(1), “except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions.” *State ex rel. Heavy v. Murphy*, 138 Wn.2d 800, 809, 982 P.2d 611 (1999).

Although the League purports to recognize the well-established principle of plenary legislative authority in the people and the Legislature, except as restricted by the state or federal constitutions, the League’s argument that RCW 43.135.034(1) restricts the Legislature’s plenary authority to pass tax legislation is a flat rejection of the principle. In this respect, the League’s argument is a nonsequitur; its erroneous conclusion

(that RCW 43.135.034(1) restricts the Legislature's authority) conflicts with its premise (that the Legislature has plenary legislative authority). It is precisely *because* the legislative authority of the Legislature is plenary that it may legislate unrestrained by the terms of RCW 43.135.034(1), and restrained only by the state and federal constitutions. In other words, as the State has repeatedly expressed, the Legislature, if it so chooses, may enact a tax increase by a simple majority. Actually applied, the principle of plenary legislative power confirms that RCW 43.135.034(1) does *not* restrict the Legislature in enacting any new law it determines to enact, or from amending or repealing RCW 43.135.034(1), except as the constitution may prohibit it.

Much like LEV, the League asks the Court to adjudge RCW 43.135.034(1) invalid based on an assumption (and a patently unsound assumption at that) as to the interrelationship between RCW 43.135.034(1) and an actual statute increasing taxes that was enacted on a simple majority vote. The League wants the Court simply to assume that RCW 43.135.034(1) would render such a statute invalid. Like LEV, the League seeks to avoid the actual questions that would be presented by a justiciable controversy concerning RCW 43.135.034(1), including: whether under the enrolled bill doctrine, the Court would even inquire into the process by which a statute increasing taxes was enacted;

whether RCW 43.135.034(1) and a statute increasing taxes could be harmonized; if not, which statute would be given effect; whether a statute increasing taxes was enacted within the two-year period that article II, section 1(c) restricts repeal or amendment of initiatives; and if so, whether the new tax statute would constitute a repeal or amendment of RCW 43.135.034(1).¹

The Court ought not prematurely and unnecessarily adjudicate the constitutionality of the people's legislative policy preference with respect to tax increases, based upon the League's unsound assumption that RCW 43.135.034(1) would render a tax increase enacted on a simple majority vote invalid. Such an adjudication would foreclose consideration of the legal issues that such a statute actually would raise. *See* State's Opening Br. at 18-19; *see also* State's Reply to Br. of LEV Resp't at 4-5. The Court should reject the League's request to cancel the voters' expression of their public policy choice regarding tax increases in this abstract, hypothetical, political dispute.

¹ Among others, the following legal principles would be implicated. "The court 'will not go behind an enrolled enactment to determine the method, the procedure, the means, or the manner by which it was passed in the houses of the legislature.'" *Brown v. Owen*, 165 Wn.2d 706, 723, 206 P.3d 310 (2009) (citations omitted). The courts "attempt 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). A claim of repeal or amendment by implication is not favored. *Misterek v. Washington Mineral Products, Inc.*, 85 Wn.2d 166, 168, 531 P.2d 805 (1975).

D. The League's Preference For Representative Democracy Ignores Article II, Section 1, And Erroneously Equates Initiatives With Constitutional Amendments

In a hyperbolic plea for the Court to “protect the rights of individual Washington residents” the League warns that if RCW 43.135.034(1) is constitutional, then the voters could adopt initiatives by majority vote that would “fundamentally alter our constitutional structure” “strip[ping] individual liberties, and threaten[ing] representative democracy.” League Amicus Br. at 10. This is an astonishing argument from the League. First, it ignores the fact that Washington’s constitution establishes direct democracy in the powers of initiative and referendum. Article II, § 1. It also appears unconcerned with the rights of the majority of Washington voters who approved RCW 43.135.034(1). More fundamentally, however, the League’s argument that through Initiative 1053 (I-1053), or any other initiative, a majority of voters could “fundamentally alter our constitutional structure” is nonsense. Initiatives do not, and cannot, amend the constitution. *Gerberding v. Munro*, 134 Wn.2d 188, 210, 949 P.2d 1366 (1998) (holding that Initiative 573 is a statutory amendment that did not and could not amend the constitution). “When the people exercise their initiative power, they ‘exercise the same power of sovereignty as the Legislature does when enacting a statute.’” *Farm Bureau*, 162 Wn.2d at 302 (quoting

Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 204, 11 P.3d 762, 27 P.3d 608 (2000)). Initiatives either enact new statutes, or amend or repeal existing statutes. This is what I-1053 did; it enacted RCW 43.135.034(1). I-1053 did not purport to amend the constitution. CP 34. Mischaracterizing a statute as a constitutional amendment does not suggest a basis for invalidating it. The League's argument does not withstand scrutiny.

E. The Debate Surrounding Article XI Of The Washington Constitution Is Irrelevant

The League next argues that this Court should look to the Framers' debate on two provisions of article XI of the Washington Constitution to determine the meaning of article II, section 22. League Amicus Br. at 2; 11-19. Without authority, the League urges this Court to reach beyond the plain language of article II, section 22 and, farther still, beyond the legislative history particular to the provision, in order to construe its meaning. But "if a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or permissible." *State ex rel. Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975). Here, as the parties agree, the text of article II, section 22 is plain and unambiguous. State's Reply to Br. of LEV Resp't at 8; Resp't Op. Br. at 24. Thus, no construction or interpretation is necessary.

Even if article II, section 22 were ambiguous, however, the Court should not follow the League's urging to construe the meaning of article II, section 22 based on the Framers' debate on unrelated provisions in a different article of the constitution. Furthermore, even if the Court were to examine the debate the League identifies and were inclined to accord it some meager quantum of persuasive weight, the debate does not support the conclusion the League suggests.

1. The Court Should Reject The League's Unsound Suggestion To Construe The Meaning Of Article II, Section 22 Based On Debate Regarding Provisions Of Article XI

From the outset, the League's contention that the Framers' debate on article XI is relevant to article II, section 22 rests on a flawed premise. The League fundamentally misconceives the parties as "in particular" disputing the meaning of the Framers' debate on article II, section 22. League Amicus Br. at 11. Building on this misconception, the League contends that the meaning of the article II, section 22 debate should be informed by the Framers' separate debate of two distinct and unrelated provisions in article XI. League Amicus Br. at 11.

But the parties do not primarily dispute the meaning of *the Framers' debate* on article II, section 22. They dispute the plain meaning of the provision itself. In particular, although both parties agree that the

text of article II, section 22 is plain and unambiguous, they disagree about how that plain meaning must be ascertained. In this regard, the State applies this Court's well-settled plain language rule, while LEV disregards that rule in favor of its own approach derived in large part from inapposite precedent governing qualifications for state constitutional office. *See* State's Op. Br. at 26-29 (applying plain language analysis); State's Reply to Br. of LEV Resp't at 10-18 (discussing LEV's departure from plain language analysis). By contrast, the League offers no authority supporting its proposed approach that article II, section 22 be analyzed by examining the debate on article XI. Nor could it, as there is no reasonable basis for its notion that the Court should form conclusions about the meaning of article II, section 22 based solely on debate associated with unrelated article XI provisions.

This Court's well established precedent provides that "[a]ppropriate constitutional analysis begins with the text and, for most purposes, should end there as well." *Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997). Accordingly, the State examines the text of article II, section 22, which 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 plain reading of this text is that a bill does not become a law *unless* a majority of members vote in its favor.

The text of article II, section 22 manifestly describes a circumstance that must be met or else a bill *does not pass*—in other words, a constitutional minimum vote threshold for bill passage. The analysis of article II, section 22’s meaning appropriately ends there. And as article II, section 22 imposes no additional vote requirements, none may properly be grafted onto it. *See* State’s Op. Br. at 26-29; State’s Reply to Br. of LEV Resp’t at 9-12.

Notably, plain language analysis does not require the Court even to consider the Framers’ debate on article II, section 22, much less to consider their debate on unrelated articles. Even so, the article II, section 22 debate offers no evidence that the Framers intended the provision to establish a maximum majority vote limit as claimed by LEV and the League, in addition to the minimum majority vote threshold the provision plainly sets forth. *See* State’s Op. Br. at 29-33; State’s Reply to Br. of LEV Resp’t at 14-15.

Perhaps in lieu of any authority to justify the Court’s consideration of the article XI debate, the League remarks that “two provisions in article XI use the same language as article II, section 22.” League Amicus Br. at 11. But even if the language were similar, similarity alone cannot, and does not, justify departing from the aforementioned well-settled rule of plain language analysis.

Nor, although the League itself raises no such argument, would textual similarity somehow warrant examining the debate on article XI as part of a plain language analysis. The text of a constitutional provision “necessarily includes the words themselves, their grammatical relationship to one another, as well as their context[.]” *Malyon*, 131 Wn.2d at 799. But the “context” of a provision must have some rational connection to the provision itself. *See, e.g., Malyon*, 131 Wn.2d at 800-01 (context of clause at issue included text of entire constitutional provision in which it appeared); *Washington Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 90 P.3d 42 (2004) (context of constitutional provision governing employment of prisoners by a private enterprise included historical use of prison labor at time provision was adopted); *Yelle v. Bishop*, 55 Wn.2d 286, 347 P.2d 1081 (1959) (context of provision governing powers of state auditor included deliberations of the Framers regarding provisions relating to office of state auditor). For purposes of understanding the plain meaning of a constitutional provision, “context” cannot reasonably be stretched to include independent debate on what numerical vote percentage would be inserted into separate constitutional provisions in a different constitutional article, unrelated except by a common turn of phrase. Defining “context” in this way would render it meaningless.

In sum, the text of article II, section 22 is plain and unambiguous, and the provision's meaning can and should be discerned from that text. The debate the League urges this Court to consider is far too attenuated from article II, section 22 to have any relevance to the provision's plain meaning. This Court should flatly reject the League's unsound suggestion that it determine the meaning of article II, section 22 based on the Framers' debate on article XI.

2. The League's Notion That The Article XI Debate "Reveals" The Framers Understood "Unless A Majority" To Mean Both A Floor And A Ceiling Is Conclusory And Erroneous

Even if the Court were to examine the Framers' debate on article XI, and to accord it some meager quantum of persuasive value, the debate does not support, much less dictate, the conclusion the League advocates.

The League contends that the Framers' debate on the article XI provisions "show[s] that the Framers intended the phrase 'unless a majority' to establish both a floor and a ceiling for voting requirements." League Amicus Br. at 11. As the League exhaustively reviews, during their consideration of article XI, the Framers debated whether to establish a simple majority or a supermajority vote percentage in each of two provisions. From that debate, the League leaps to the conclusion that the Framers must have understood each vote percentage to constitute "one

ultimate threshold—both a floor and a ceiling”.² League Amicus Br. at 13-14. The League’s conclusion does not logically follow.

All the debate demonstrates is that the Framers considered, as a constitutional matter, whether approving the particular action set forth in each provision should require at least a simple majority or at least a supermajority. For one provision, they decided on a majority. For the other, a supermajority. But their debate does not suggest the Framers understood the vote percentage itself to establish both a minimum percentage constitutionally required for approval, and simultaneously a maximum limit that ever could be required by statute. Accordingly, the debate does not reflect any intent to preclude higher vote requirements regarding future bill passage set by statute. In short, the debate offers no basis to conclude the Framers intended the phrase “unless a majority” to impose a maximum limit.

The League offers five reasons to support its conclusion to the contrary. Each is logically flawed. First, the League’s entire argument

² This Court rejected the analogous argument when it considered article XI, section 3 in *Cedar County Committee v. Munro*, 134 Wn.2d 377, 950 P.2d 446 (1998). Article XI, section 3 provides, in relevant part, that “[n]o new counties shall be established . . . unless a majority of the voters . . . shall petition therefor[.]” The Committee argued that the Legislature therefore had an affirmative duty to create a county when a majority of the pertinent voters submitted a petition. The Court disagreed, explaining “the provision does not state that a county shall be created if certain conditions are met; it mandates that no new counties can be created unless the conditions are met.” *Cedar County Committee*, 134 Wn.2d at 385. In other words, article XI, section 3 simply establishes a minimum threshold for county creation.

that the debate on article XI is relevant rests on its contention that article XI, sections 2 and 3 use the same language as article II, section 22. League Amicus Br. at 11. This contention is decidedly overstated, relying as it does exclusively on the phrase “unless a majority.” *Id.* Moreover, the League quotes only snippets of the article XI provisions, focuses solely on the Framers’ debate of what vote percentage to include, and does not discuss the meaning of the phrase in the context of either provision.³ Having failed to discuss, much less establish, the meaning of “unless a majority” as used in article XI, sections 2 and 3, the League’s ultimate conclusion—that the Framers would not have “used the exact same phrase in two separate sections of the constitution, but intended two completely different meanings” (League Amicus Br. at 18-19)—likewise fails.

Second, the League argues that the Framers must have understood the stated vote percentages to be both a maximum and a minimum because no Framer suggested during debate that the provisions “only established a

³ Article XI, section 2 more fully provides: “No county seat shall be removed unless three-fifths of the qualified electors of the county, voting on the proposition at a general election shall vote in favor of such removal, and three-fifths of all votes cast on the proposition shall be required to relocate a county seat.” The League does not venture to discuss how these differently expressed voting provisions of article XI, section 2 might be the same or different, but article II, section 22 does not contain analogous language. Similarly, article XI, section 3 more fully states: “There shall be no territory stricken from any county unless a majority of the voters living in such territory shall petition therefor and then only under such other conditions as may be prescribed by a general law applicable to the whole state.” It seems plain that article XI, section 3 contemplates additional statutory conditions on striking territory from a county. Again, the League does not venture to explain how this language comports with its argument that article XI, section 3 establishes a single minimum constitutional threshold and maximum vote limit, and its language is not the same as article II, section 22.

minimum threshold, or that a separate—and unmentioned—maximum threshold could later be altered by legislation or initiative.” League Amicus Br. at 13. In other words, the Framers were silent on whether they considered the stated vote percentages to be a minimum, or simultaneously both a minimum and a maximum. But silence no more supports one conclusion than the other. The League’s defective logic is analogous to LEV’s equally flawed suggestion that the Framers must have intended article II, section 22 to prohibit supermajority statutory vote approval provisions because they did not expressly create an exception allowing them. Both propositions turn on its head the nature of the state constitution as “not a grant but rather [a]s a restriction on the law-making power.” *Brower v. State*, 137 Wn.2d 44, 55, 969 P.2d 42 (1998). A constitutional provision must be examined for what it prohibits, not what it allows. *Farm Bureau*, 162 Wn.2d at 300-01. Contrary to the League’s reasoning, where a provision or the Framers are silent, no prohibition can be presumed to exist.

Third, the League argues if “unless a majority” means “a minimum but not a maximum threshold” then the Framers’ debate could be reopened through the legislative process. League Amicus Br. at 17. And, the League continues, “[t]he only way to reopen [the debate] is through the constitutional amendment process.” League Amicus Br. at 17. The

League's faulty reasoning assumes the conclusion it is trying to prove. The constitutional amendment process would only be required if the vote percentage establishes a maximum as well as a minimum. And that is precisely the issue. If "unless a majority" establishes a minimum threshold, as its plain language connotes, then the Legislature and the people are free to decide, from time to time, in the far less permanent form of a statute, that certain public policy determinations warrant added consensus above that minimum. The League's argument proves nothing.⁴

Fourth, the League contends that the mere fact that the Framers debated what vote percentages to set demonstrates "the Framers considered this issue—voting thresholds—to be of constitutional concern."⁵ League Amicus Br. at 17. The League speculates that "[i]f the Framers intended for the ultimate thresholds to be malleable by statute,

⁴ Moreover, the League's contention that a statutory vote requirement would "alter" the constitutional percentage "by legislation or initiative," and that the constitutional debates would be reopened through the initiative process, continues the League's erroneous effort to equate constitutional and statutory limitations. A statute requiring a higher vote threshold would not reopen the debate over the constitutional threshold or "alter" the constitutional threshold. Statutory and constitutional requirements are fundamentally different. A constitutional limitation restricts legislative authority, a statutory limitation does not.

⁵ By "constitutional concern," the State assumes the League is echoing LEV's flawed proposition that including vote percentages in the constitution implicitly reserves the subject of vote percentages to the exclusive province of the constitution. This proposition cannot stand in light of the fundamental nature of the state constitution, which "is not a grant, but a restriction on the lawmaking power." *State ex rel O'Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969). Accordingly, the constitution limits plenary legislative power no more than it clearly states, either expressly or by fair inference. *Farm Bureau*, 162 Wn.2d at 300-01. The notion that discussion of vote percentages in the constitution constitutes the clear statement necessary to create a constitutional limit on the Legislature's plenary power is unfounded.

they would not have spent so many hours debating each threshold.” League Amicus Br. at 17. Again, the League’s suggestion that a statute would change a constitutional minimum vote threshold is unfounded. Moreover, the mere fact that the Framers debated what constitutional vote percentage to set proves nothing of whether they understood that percentage to establish a constitutional minimum threshold, or simultaneously also a maximum limit. Determining what minimum vote approval threshold to include in the state’s foundational law—the constitution—is obviously of sufficient import to warrant thorough discussion, as whatever minimum the Framers selected would prohibit the Legislature from authorizing a lower vote percentage by statute. The mere fact that debate occurred does not prove the League’s conclusion.

Fifth, the League argues that the Framers “never discussed the possibility of a separate, malleable, upper limit threshold—which the State argues must exist somewhere. . . . Simply put, these debates prove that the State’s phantom ‘upper limit’ threshold does not exist.” League Amicus Br. at 19. With respect to the League’s characterization of the State’s position, the League neglected to cite to the State’s briefing and the State is frankly mystified as to what the League means. The League appears to conclude that the phrase “unless a majority” does not impose a maximum limit. League Amicus Br. at 19 (“Simply put, these debates

prove that the State's phantom '*upper limit threshold does not exist.*') (emphasis added). If so, that is precisely the point. As the State has explained at length in its merits briefing, in article II, section 22 the language "unless a majority" merely sets a minimum threshold, not a maximum limit.

With respect to the League's repeated observation that the Framers were silent regarding an upper threshold, as discussed earlier silence proves nothing. State constitutional provisions limit plenary legislative power no more than is clearly stated, either expressly or by fair inference. *Farm Bureau*, 162 Wn.2d at 300-01. The fact that during debate the Framers did not discuss "the possibility of a separate, malleable, upper limit threshold" (League Amicus Br. at 19) provides no express statement ruling one out or any basis to fairly infer they intended to do so.

In sum, there is no reason for this Court to consider the Framers' debate on article XI as part of its plain language analysis of article II, section 22, but even if it were inclined to do so, the debate provides no support for the League's position that the Framers intended the language "unless a majority" to establish a maximum upper limit as well as a minimum threshold.

CONCLUSION

This Court should reverse the decision of the King County Superior Court and dismiss this case.

RESPECTFULLY SUBMITTED this 14th day of September, 2012.

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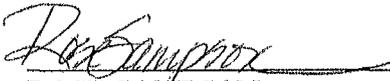
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Subject: RE: League of Education Voters, et al. v. State of Washington; WA Supreme Court No. 87425-5

Rec. 9-14-12

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Subject: League of Education Voters, et al. v. State of Washington; WA Supreme Court No. 87425-5

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

Attached for filing in the above referenced matter is the State's Reply to Brief of Amicus Curiae League of Women Voters and Certificate of Service.

<<35_StatesReplyToAmicusLWV.pdf>>

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