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NO. 87425-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEAGUE OF EDUCATION VOTERS, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant,

and CHRISTINE GREGOIRE, Governor of the State of Washington

Respondent.

BRIEF OF RESPONDENT GOVERNOR CHRISTINE GREGOIRE

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ORIGINAL

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I. INTRODUCTION

Governor Christine Gregoire asks this Court to decide the constitutionality of the supermajority requirement of Initiative 1053. The Governor's aim is not to advocate one view of constitutional interpretation or another--the plaintiffs and the Attorney General have sharpened the issues and legal arguments and present this Court with a sound basis to decide this matter. Instead, the Governor presents her view that this is the right time and the right procedural posture for the Court to decide this important constitutional issue. The Governor believes the opinion of the Court will be beneficial to the public and to the proper execution of the constitutional and statutory role of a Governor in the proposal and enactment of laws that raise state revenue. These duties are impacted by the ongoing uncertainty about the constitutionality of the two-thirds vote requirement.

Further, this request for a ruling on the constitutional issue is consistent with the jurisprudential principles that have guided this Court in prior cases. In *Walker v. Munro* the Court found the challenge was premature when the original initiative provided the two-thirds vote requirement would go into effect at a delayed future date, such that a simple majority vote of the legislature could relieve it of the challenged supermajority provision. In *Brown v. Owen* the Court found that

challenge was an inappropriate action for mandamus where the requested writ would direct the parliamentary inner-workings of the Legislature. At the same time *Brown v. Owen* confirmed that the constitutionality of the supermajority requirement is a question for judicial determination, and these provisions should not be disregarded by officials of the other branches because they question its constitutionality. The confluence of these principles confirm this case presents the proper form of action and the proper timing for the judicial branch to perform its fundamental responsibility to “say what the law is.” First, the question has matured into one appropriate for judicial resolution, where the supermajority provision has been fully implemented and reimposed by subsequent ballot measures so that a simple majority of the legislature cannot change the requirement. Second, the question is on appeal from a court of general jurisdiction that resolved the constitutional question pursuant to the Declaratory Judgment Act and does not require a writ of mandamus that would offend the separation of powers. Indeed, withholding the Court’s resolution of the constitutional question in these circumstances would leave a void in the allocation of power among the executive, legislative and judicial branches. The question is ripe and appropriate for judicial resolution.

II. FACTS

Washington voters approved Initiative Measure 601 in 1993. Laws of 1994, ch. 2. Initiative 601 added a provision, effective after July 1, 1995, that “any action or combination of actions by the legislature that raises state revenue or requires revenue-neutral tax shifts may be taken only if approved by a two-thirds vote of each house.” Former RCW 43.135.035(1) (1994) (Laws of 1994, ch. 2, § 4(1)).

Before Initiative 601 went into effect, a group including public advocacy groups, legislators, and citizens filed an original action in this Court, asking for a writ of mandamus ordering the legislature and its officers “to adhere to the requirements of the Washington State Constitution and to prohibit them from implementing and enforcing Initiative 601.” “*Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994) (quoting petition). The Court denied the request, holding that mandamus was inappropriate. *Id.* at 410-11.

The Court also found petitioners’ claim to be nonjusticiable, as Initiative 601 had not yet taken effect and, in the posture presented, concerned a political dispute. *Id.* at 411.

[T]he potential harmful effects of the initiative may never come to pass. It is possible that acts which are deemed to fall within section 4(1) will pass by two-thirds of the votes and so this greater voting

requirement will have no real effect. . . .
The course of future events is, at this time,
purely speculative and subject to a challenge
when a specific dispute arises in regard to a
particular bill. Until presented with an
existing, fact-specific action, this court will
not involve itself in what is an essentially
political dispute.

Id. at 413. Although petitioners argued Initiative 601 would cause future harm, the Court found it was just as likely that the legislature would amend the initiative to prevent those harms. *Id.* at 413–14.

Since its original enactment and the decision in *Walker v. Munro*, the supermajority requirement has been alternatively suspended and reenacted multiple times.¹ Reenacted for the third time in Initiative 1053, the supermajority requirement has been in effect for much of the past 17 years, all but 15 months in 2002-03, 14 months in 2005-06, and ten months in 2010. In each case, the Legislature, by majority vote,

¹ In 1998, the legislature expressly “reenacted and reaffirmed” Initiative 601 and also exempted certain state accounts from its requirements. Laws of 1998, ch. 321, § 14. In 2002, the legislature again reenacted and affirmed Initiative 601 but temporarily suspended its requirements for the 2001–03 biennium to address revenue shortfalls. Laws of 2002, ch. 33, § 1. In 2005, the legislature again reenacted and affirmed the initiative but suspended the supermajority requirement from April 18, 2005, to June 30, 2007. Laws of 2005, ch. 72, § 2. On April 22, 2005, the legislature passed Engrossed Substitute House Bill 2314, increasing liquor and cigarette taxes, as well as making a number of smaller tax changes. Laws of 2005, ch. 514. Before the expiration of the exemption period, the legislature reimposed the supermajority requirement, effective June 30, 2006. Laws of 2006, ch. 56, § 8. In 2007, voters approved Initiative 960, which, among other things, amended the supermajority requirement to clarify that the two-thirds majority provision applied to “tax increases inside and outside the general fund.” Laws of 2008, ch. 1, § 1.

suspended the requirement in order to raise taxes to deal with falling revenues.

Through significant periods—including at present—the Legislature has been unable to suspend the supermajority requirement by majority vote because the requirement was reenacted in ballot measures on three separate occasions—in 1998 (Referendum 49), 2007 (Initiative 960), and 2011 (Initiative 1053)—and thus a two-thirds vote of the Legislature would have been necessary to suspend the supermajority requirement for the two years following each of these reenactments. *See* Wash. Const. art. II, § 1(c).

In 2008, State Senate Majority Leader Lisa Brown brought an action for writ of mandamus to seek review of the supermajority requirement. *Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009). The action sought to compel the lieutenant governor, as president of the senate, to forward a bill to the House of Representatives that had received the votes of more than half but less than two thirds of the members. *Id.* at 711. Pursuant to the supermajority requirement in RCW 43.135.035(1), the lieutenant governor had ruled that the bill required the approval of two-thirds of the senate for passage and thus had failed to pass. *Id.*

The court denied the writ based on the separation of powers doctrine:

Before Owen's parliamentary ruling triggering this dispute, Brown appeared to urge Owen to declare RCW 43.135.035(1) unconstitutional. Owen refused to do so, observing that it is the duty of the judiciary to make legal rulings. Having failed to convince Owen to make a legal determination, she now asks this court to make a parliamentary ruling. We decline to do so.

Id. at 719.

In February 2010, the legislature again suspended the supermajority requirement. Laws of 2010, ch. 4. It then proceeded to pass SB 6143, which increased beverage taxes and B&O taxes on certain businesses, as well as making a number of other tax changes. Laws of 2010, spec. sess., ch. 23.

Meanwhile, on January 4, 2010, Initiative 1053 was filed with the Secretary of State. This initiative, which sought to reimpose the supermajority requirement in the event that the legislature suspended it in the 2010 session, stated its purpose was to "deter the governor and the legislature from sidestepping, suspending or repealing" the supermajority requirement. Laws of 2011, ch. 1, § 1. Initiative 1053 was approved by the voters in November 2010. Although Initiative 1053 has not been amended and the supermajority requirement is in effect, Initiative 1185 was filed on January 6, 2012 and has qualified for the ballot. *See*

<http://www.sos.wa.gov/elections/initiatives/Initiatives.aspx?v=2012&t=p>.

The proposed initiative would again reenact the supermajority requirement. *Id.*

III. STATEMENT OF ISSUE ADDRESSED BY GOVERNOR

Whether this case involves an important public issue that is justiciable and meets the criteria for issuance of a declaratory judgment.

IV. ARGUMENT

Under the Uniform Declaratory Judgments Act, ch. 7.24 RCW, courts are authorized to issue statements that adjudicate the “rights, status and other legal relations” of the parties. RCW 7.24.010. To obtain a declaratory ruling, a party must show either (1) an issue of major public importance or (2) an actual dispute between parties having genuinely opposing and substantial interests which can be resolved judicially.

Nollette v. Christianson, 115 Wn.2d 594, 598-99, 800 P.2d 359 (1990).

The constitutionality of the supermajority requirement is appropriate for declaratory judgment under either of these standards. Additionally, this case is appropriate for declaratory judgment because that is the only course that respects the separation of powers while still giving effect to the holding of *Marbury v. Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” 5 U.S. 137, 177 (1803).

In its Opening Brief, the State argues that the dispute over the supermajority requirement, which has resulted in two court cases, three legislative suspensions of the requirement, and three reenactments, is speculative, but the Attorney General mischaracterizes the dispute. The dispute is not over hypothetical tax and spending bills, as the State maintains. It is whether all citizens have an equal ability to participate in the law-making process, whether all legislators' votes carry the same weight, and whether the Governor's role in law-making can be limited.

Once the nature of the controversy is properly defined, it is apparent that the interests of the parties in this case are not those posited by the State in its opening brief, but instead are the kind of fundamental interests protected by the federal and Washington constitutions and long-recognized by the courts.

This dispute is not hypothetical in 2012. When *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994) was decided, it was possible that the Legislature would repeal or alter the supermajority requirement prior to its effective date because the two year delay in implementation meant that only a majority vote was necessary to amend the requirement. Now it is apparent that the requirement has been in effect for most of the past 17 years and that tax measures have failed to pass despite receiving a majority vote. HB 2078, pointed to by plaintiffs, is just one example.

A. This Case Involves an Important Public Issue.

Where an issue is of great public interest and it appears that the opinion of the court would be beneficial to the public and the other branches government, courts may render declaratory judgment to resolve issues of constitutional interpretation. *Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972).

The courts have issued declaratory judgment based on the importance of the issue in many cases. *Distilled Spirits* involved a bill enacted by the legislature after midnight on the 60th day of an extraordinary session. *Id.* at 177. The plaintiff contended that the state constitution, art. 2, § 12, limited both regular and extraordinary sessions to 60 days, and the bill was invalid because it had been adopted on the 61st day. *Id.* In reaching the merits, the court explained:

[A]n 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. And since our understanding of the constitution is that it does not in fact restrict the legislature as severely as has been feared, an opinion upon the subject should serve to relieve the legislative body from the necessity of resorting to artifice in order to obtain the time necessary for it to enact the legislation which it finds imperative for the welfare of the state.

Id. at 178.

In *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 495, 585 P.2d 71 (1978), plaintiffs sought a declaratory judgment that the State's reliance on excess levy funding failed to meet the state constitutional requirement to "make ample provision for education" under art. 9, § 1. The court found that declaratory judgment was appropriate based on the uncertainty of the legislature, attorney general, and school districts as to the meaning of the constitutional provision, as well as its impact of the uncertainty on public school students. *Id.* at 490.

In *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 559, 413 P.2d 972 (1966), legislator-plaintiffs asked the court to determine whether legislators who had voted for a salary increase were entitled to begin receiving the higher amount after the next election. In holding that the case was justiciable, the court stated that "[q]uestions of salary, tenure, and eligibility to stand for public office, all being matters directly affecting the freedom of choice in the election process are of as much moment to the voters as they are to the candidates, and make this controversy one of public importance."

Other issues of public importance have included whether the mayor of Spokane had authority under the city charter to control certain litigation (*Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 899, 86 P.3d 835 (2004)), whether the recording of any

conversation with a public employee was exempt from Washington's Privacy Act (*Kitsap Co. v. Smith*, 143 Wn. App. 893, 908-09, 180 P.3d 834 (2008)), whether the Department of Social and Health Services' failure to provide housing assistance to homeless children in dependency proceedings violated the Department's duties under the dependency statute, ch. 13.34 RCW (*Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wn.2d 894, 903, 949 P.2d 1291 (1997)), and whether the county clerk had authority under RCW 36.16.070 to hire employees without approval from the county commissioners (*Osborn v. Grant County*, 130 Wn.2d 615, 926 P.2d 911 (1996)).

There are common elements in these cases. Each involves a governmental entity and a challenge to its processes or procedures. The adequacy of government processes and procedures has an obvious ability to impact many people. The rights at issue—whether statutory or constitutional—are important in each case. The rights of individuals to privacy, of children to remain with their parents, of citizens to stand for election, are obviously important. As *Distilled Spirits* shows, however, it is also important that the legislative process is conducted in accord with the constitution.

In several of these cases, courts also found it important that the case involved an express request from the legislature or other government body or official for guidance. As the court stated in *O'Connell*: “The courts, without being bound thereby, should and do accord great respect to the official declarations of that constitutional body, possessed as it is of the sovereign legislative power, that circumstances exist so genuinely affecting the rights of citizens and members of the legislature as to require in the public interest a decision of the supreme court of the state.” 68 Wn.2d at 557-58, *see also Distilled Spirits*, 80 Wn.2d at 178 ([The legislature, governor, and attorney general] of the state, are all uncertain as to the meaning of Const. art. 2, § 12. We are made aware that each of these desires an interpretation as earnestly as does the petitioner.”).

This case presents an issue that is fundamental to lawmaking and affects every citizen: Is the constitutional requirement that a bill receive a majority vote a guarantee of majority rule, or does it constitute a minimum standard above which the legislature or the people can impose additional requirements? This issue impacts the state budget specifically but it also structurally alters the lawmaking process.

The supermajority requirement applies to bills that raise taxes and, by limiting the amount of available revenue, significantly affects the state budget. The biennial operating budget contains the appropriations for all

three branches of government, for every agency, program, and institution—from state universities to Medicaid to public schools to enforcement of environmental laws, to name but few of the areas covered.

The Governor plays an integral role in enacting the budget. RCW 43.88.030 requires the Governor to prepare a budget message which sets forth a proposal for expenditures in the ensuing fiscal period based upon the estimated revenues and caseloads. The statute invites the Governor to propose expenditures that would allocate new revenues from proposed legislative actions to raise taxes: “The governor may additionally submit, as an appendix to each supplemental, biennial, or six-year agency budget or to the budget document or documents, a proposal for expenditures in the ensuing fiscal period from revenue sources derived from proposed changes in existing statutes.” RCW 43.88.030(1). Additionally, if the Governor anticipates that the estimated receipts plus the beginning cash balance for a fund in the next ensuing fiscal period is less than the estimated disbursements, the Governor shall include in the budget document “proposals as to the manner in which the anticipated cash deficit shall be met, whether by an increase in the indebtedness of the state, by the imposition of new taxes, by increases in tax rates or an extension thereof, or in any like manner.” RCW 43.88.050.

The supermajority requirement creates great uncertainty in planning the budget. The state's fiscal year runs from July 1 to June 30. RCW 43.88.020(12). The legislature must pass a budget every two years in the odd-numbered year following an election. RCW 43.88.020(7). The Governor has to begin the planning process well prior to the November elections held in even-numbered years to meet the statutory deadline of December 20 of each even-numbered year. RCW 43.88.060.

In proposing a budget, the Governor must assume that the supermajority requirement is valid. Statutes are presumed constitutional. *Washington Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 260 P.3d 956 (2011). And despite the fact that the supermajority requirement has been suspended three times, it has always been in effect at the time the Governor is required to submit the budget.

The operation of these statutes and the impact of Initiative 1053 are illustrated by the Governor's recommendations for supplemental budget reductions to cut \$2 billion in spending, followed by several revenue options that, if approved by voters and the Legislature, would prevent elimination of priority programs and services.² In "Revenue Alternatives for Building a Better Future"³ the Governor proposed

² <http://www.governor.wa.gov/news/news-view.asp?pressRelease=1806&newsType=1>

³ <http://www.ofm.wa.gov/budget12/highlights/govrevoptions.pdf>

measures that would require a two-thirds vote of the Legislature under Initiative 1053. These alternatives would raise an estimated \$282 million from tax increases and closing tax loopholes. The proposals included an increase in business and occupation (B&O) tax rates on oil companies and financial institutions with windfall profits; an additional sales and use tax of 5% on passenger motor vehicles if the price/value exceeds \$50,000; a new 1.5% excise tax on gambling and lottery winnings; increases the combined state cigarette tax by 25 cents; and closing several tax loopholes and preferences. The report outlines uses for these revenues as outlined in a “Priorities for Preventing Cuts” section at page 6:

The Governor recommends that any additional revenue approved by the Legislature be used to prevent or mitigate reductions in the following priority:

1. Non-emergency dental coverage for 38,000 adults with developmental disabilities, long-term care clients and pregnant women (\$8.6 million). Last year, we eliminated non-emergency dental services for all but these individuals (45,000 in all).

2. Chemical dependency services for nearly 5,000 low-income individuals (\$5.9 million). These services help individuals receive outpatient treatment and detoxification services, which improve public safety and cut down on emergency medical costs.

3. Regional support networks that deliver non-Medicaid mental health services (\$4.6 million). These networks provide mental health treatment to low-income individuals with severe and persistent mental illness. The Governor's supplemental budget would reduce services such as crisis intervention, medication management and case management that help keep 8,000 people living safely in their communities.

4. The Basic Health Plan, which covers the working poor — low-income people who do not qualify for Medicaid. Over the past three years, we have dropped more than 60,000 people from Basic Health. The Governor's supplemental budget would eliminate the program (\$49 million), which would leave another 35,000 people without health care.

5. TANF/WorkFirst grants that help low-income families with children with cash assistance. Grants were reduced last year by 15 percent and the Governor has proposed another 2 percent reduction (\$7.2 million).

6. Community grants that deliver prevention and treatment services to victims of sexual assault as well as domestic violence prevention, crisis intervention, and crime victims assistance programs. The Governor has proposed cutting these programs by 20 percent (\$4.7 million).

7. Disability Lifeline medical program, which provides limited medical benefits for 20,000 low-income individuals with temporary disabilities. The Governor has proposed eliminating the program (\$95 million).

8. Subsidized child care to help low-income families in getting and keeping work. The Governor has proposed reducing the program by 12 percent (\$50 million), which would eliminate subsidies for about 4,000 children.

9. State Work Study program which provides financial aid to 7,600 students in higher education institutions. The Governor has proposed suspending the program (\$8.1 million).

10. Parole treatment and services that help keep juvenile offenders from returning to the correctional system. The Governor has proposed a 20 percent cut (\$2.9 million) that would eliminate services for about 400 youths.

The Governor also made fee proposals that she believed would require a majority vote, but if the proposals are deemed to impose taxes instead of fees as some legislators asserted, then a two-thirds vote would be required with the prospect of passage seriously diminished.”⁴

As well as proposing a budget, the Governor also has the responsibility for administering it. Thus, from time to time, the Governor is in the position of convening special legislative sessions for the purpose of dealing with revenue shortfalls. Const., Art. III, § 7 provides the Governor “may, on extraordinary occasions, convene the legislature by proclamation, in which shall be stated the purposes for which the

⁴ <http://www.kuow.org/northwestnews.php?storyID=144995281>

legislature is convened.” The specification of purpose by the governor, though not mandatory, is to be given consideration by the Legislature. *See* Art. II, § 12.

An important element in a Governor’s decisions with regard to such proposed legislation and convening of special sessions is whether proposed measures can attain sufficient legislative support. The difference between a simple majority and supermajority requirement in the support needed for passage of new laws is significant. Supermajority rules allow a minority of the legislature to impede a measure from being enacted into law. The supermajority rule will, of course, block legislation that would have passed under the simple majority rule, and can work to prevent actions that the Governor deems necessary. It is important for a Governor to know before exercising the Constitutional and statutory power to convene a special session or to recommend measures to the Legislature whether a minority of the legislature can prevent passage of legislation the majority would like to enact.

The history of the requirement over the past 17 years shows periodic but uncertain windows where taxes can be raised, but these may not coincide with economic downturns and need to adjust tax rates. The result is that the Governor’s only option is cutting the budget, with major impacts to infrastructure and programs. That is an unjust result if the

supermajority requirement is unconstitutional. The Governor, along with the legislator-plaintiffs in this case, request the court to reach the merits in this case and provide them with greater certainty in budgeting.

Beyond the budget, the supermajority requirement effects a structural change in the relationship of the legislature and governor. The Washington constitution, art. III, § 12 provides: “Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, which house shall enter the objections at large upon the journal and proceed to reconsider. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present, it shall become a law. . .” A supermajority vote requirement for tax legislation effectively eliminates the Governor’s power to decide whether or not to approve a measure that has majority support in the legislature—and transfers that power to a minority of senators and representatives in the legislature. Instead of engaging the Governor in discussion of what legislation would or would not be approved with regard to taxation, the majority must undertake this discussion with the minority and can ignore the Governor

because any such legislation would be “veto proof.” This changes the balance contemplated by the Constitution and alters the nature of the Governor’s power to approve legislation. This change is structural in nature—the Governor is elected by a majority of the voters in the state, and they have determined the Governor is the official who should determine whether all or sections of legislation that has passed the legislature should be approved or vetoed. Yet a requirement that any action 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 keeps from the Governor the ability to decide, section by section, what bills should become law. Instead, that power is given to a minority of members in each house of the legislature, who by definition represent less than a majority of the voters.

In *Osborn*, the court considered the balance of power between the county clerk and county commissioners to be an important public issue. If that is true for a single county in the state, then the relationship between the Governor and legislature is even more important.

The Attorney General ignores these structural concerns in its Opening Brief, instead arguing that (1) an insufficient number of elected officials have asked for an opinion from the Court, (2) the Court ought not intrude on the citizens’ exercise of legislative power, and (3) this Court’s

earlier decisions in *Futurewise v. Reed*, *Walker v. Munro* and *Brown v. Owen* are somehow evidence that the issue is not important. None of these arguments bear scrutiny.

1. The Governor and Many Legislators Want a Judicial Opinion in this Case.

The State suggests that this case is inappropriate for judicial resolution because “only twelve legislators” are asking for an opinion. Opening Brief at 23. While only twelve legislators have become plaintiffs, members of both the legislative and executive branch are before this Court urging that it decide the issue. This case presents issues that are fundamental to the operation of the legislature, the Governor in her legislative role, and the right of citizens to petition the legislature. The Attorney General agreed to separate representation for the Governor in this case precisely because they had differing positions on justiciability. The exact number of legislator-plaintiffs is irrelevant.

2. Initiatives are Proper Subjects of Judicial Review.

The State argues that “the requested adjudication prematurely and unnecessarily would intrude upon the exercise of the legislative authority of the citizens.” Opening Brief at 24. However, initiatives are subject to the same review as any statute enacted by the legislature. *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 174 P.3d

1142 (2007) (“A law passed by initiative is no less a law than one enacted by the legislature. Nor is it more.”) And the review can hardly be termed “premature” when the statute has been in effect for most of the past 18 years.

3. This Case is Procedurally Distinct from Earlier Cases Involving the Supermajority Requirement.

The State suggests that because the courts have declined to reach the merits of the supermajority requirement on three previous occasions, this Court should do so again. Opening Brief at 25. The procedural posture of the three cases, however, is much different from the present case. *Walker v. Munro* and *Brown v. Owen* were mandamus actions filed in the Supreme Court. The actions were deemed inappropriate for mandamus and therefore the Supreme Court was without jurisdiction over the declaratory judgment claim. *Futurewise v. Reed* was a pre-election challenge to constitutionality, which is nonjusticiable. 161 Wn.2d 407, 166 P.3d 708 (2007) (“Only two types of challenges to an initiative are justiciable before an election: that the initiative does not meet the procedural requirements for placement on the ballot, and that the subject matter of the initiative is beyond the people’s initiative power.”) The dismissal of these cases says nothing about the importance of the issue. The difference is illustrated by positions of two justices who joined the

Court's opinion in *Brown v. Owen*, agreeing a mandamus action under the Court's original jurisdiction was not appropriate, and yet in *Wash. State Farm Bureau*, 162 Wn.2d at 292, urged the Court to reach the constitutional issue on appeal from a declaratory judgment action that was filed in the superior court. In the latter case, both justices would have recognized and confronted the constitutional question rather than deciding the case on statutory grounds. Chief Justice Alexander, concurring, wrote:

I agree with the majority that we should decide a case on statutory grounds, rather than constitutional grounds, when possible. In this case, though, I believe we must necessarily decide the constitutional issue. I say that because in order to determine whether the Taxpayer Protection Act (TPA) (chapter 43.135 RCW) or Engrossed Substitute Senate Bill 6896 (the 2006 amendment) are constitutionally valid, it is necessary to determine first whether the people may constrain the plenary powers of the legislature by initiative. . . . Essentially, I agree with Justice Chambers that the TPA is an unconstitutional intrusion into the legislature's plenary power to pass laws. Accordingly, I, too, conclude that the Washington State Farm Bureau Federation's challenge based on the TPA fails. Thus, I concur in the result the majority reaches.

Id. at 308 (internal citations omitted).

In his concurring opinion, Justice Chambers wrote:

There is an elephant in the courthouse. The majority knows the elephant is there. The

majority maps out a course around the elephant. The majority never acknowledges the presence of the elephant.

It is an obvious elephant. Several years ago, a certain state supreme court justice was speaking to a classroom of high school students. Initiative 601 (I-601), the act that is ultimately before us today, came up. During the discussion, the judge explained that article II of the state constitution gives each legislature the power to pass laws, including the power to pass tax increases. Later, the judge explained that I-601 gave the people the power to veto *all* future tax increases passed by all future legislatures. One astute student asked, "then doesn't I-601 conflict with the state constitution?" The judge adeptly avoided the question by noting that, although the issue had been raised, the state supreme court had not yet reached it.

The elephant that we all keep circling around is the fundamental principle upon which our government is structured. Our constitutions create a representative democracy. It is time we recognized the elephant and confront the constitutional question. To the point, until our state constitution is amended, no legislative body may disarm future legislatures or electorates by removing or *limiting* the power to legislate or to fund state programs. *See* Const. art. II. While the majority correctly concludes that no legislative body, including the people legislating by initiative, can bind future legislative bodies, the majority fails to acknowledge that this conclusion is driven by our constitution. At its core, this case is about that constitutional question. Certainly,

we can avoid this question. But we have the undoubted power to decide it. I think we should.

Id. at 314 (internal citation omitted). The positions of these justices in *Brown v. Owen* and *Wash. State Farm Bureau* are entirely consistent. The question is inappropriate in an original mandamus action but entirely appropriate in a declaratory judgment action on appeal from a court of general jurisdiction.

B. This Case Satisfies the Criteria for Justiciability.

For purposes of declaratory relief, a justiciable controversy is

(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 involve 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.

Washington State Coalition of the Homeless, 133 Wn.2d at 917. Contrary to the assertions in the State's Opening Brief, each of these elements is present in this case.

1. There Is an Actual Dispute.

In 1994 in *Walker v. Munro*, the court found that the dispute over the supermajority requirement was not ripe.

In regards to an actual, as opposed to hypothetical, dispute, most of the provisions of Initiative 601 are not yet in effect. When a statute is not in effect, and when it may be amended by the very persons the Petitioners claim are being harmed, state legislators, we cannot do otherwise than find that this is only a speculative dispute.

Walker, 124 Wn.2d at 412. The court expressly stated that, by the time the supermajority requirement became effective, it could be amended by a simple majority. *Id.* at 413.

Eighteen years later, the situation is very different. The requirement has been in effect most of that time, economic conditions have gone up and down, and the two-thirds vote requirement has been in effect for significant periods—including at the current time—when it may not be amended by a legislative majority.

The suspensions and reenactments demonstrate actual controversy. There is an obvious difference of opinion as to whether and under what conditions taxes should be raised to meet the perceived need for revenue to support state services. The nature of the dispute is such that the court will never be presented with a tax increase enacted by a simple majority when the supermajority requirement is in effect. The legislature and Governor will not ignore the statute in order to create a justiciable controversy and the court should not make that the only option.

Neither is it possible for any party to demonstrate the impacts of the statute with particularity. What would have happened in the absence of the supermajority requirement is necessarily an educated guess. But courts have not required such particularity. In *First United Methodist Church v. Seattle*, 129 Wn.2d 238, 244, 916 P.3d 374 (1996), the court issued a declaratory judgment in a case in which Seattle had nominated, but not officially designated, a church as a landmark. The church opposed the nomination and brought a declaratory judgment action. *Id.* The City argued that the case was not ripe, but the court found an actual controversy because the nomination itself “hindered” the church from selling its property. *Id.* at 245. The court stated that hardship to the parties of withholding review was a consideration and “[s]ince the Landmarks Preservation Ordinance already has placed constraints on United Methodist, we conclude that his case is ripe for review.” Similarly, in this case, the supermajority requirement has constrained the legislature and prevented legislation from advancing to the Governor for approval.

The Attorney General argues that *First United* is distinguishable because the nomination placed constraints on the church that are somehow more onerous than those placed on the plaintiffs in this case. Opening Brief at 17, n. 6. However, in requiring a supermajority for tax votes, Initiative 1053 makes it far more difficult for plaintiffs to enact a new or

increased tax just as the landmark nomination made it more difficult for the church to find a buyer. The court in *First United* did not require the church to show that it had an offer to purchase the property that it could not accept due to the landmark nomination, and plaintiffs here need not show that but for the challenged requirement, they could have enacted a particular law benefiting their interests. Indeed, in both cases, the existence of the constraints makes it difficult to show what would have happened in their absence. It is sufficient to show there is a real constraint on some cognizable interest.

2. The Parties Have Genuinely Opposing and Substantial Interests.

The right to participate on an equal basis in the political process is a fundamental right. In the landmark case on legislative apportionment, the State of Tennessee argued that the controversy was not justiciable and the plaintiffs lacked standing. *Baker v. Carr*, 369 U.S. 186, 196-97 (1962).

The U.S. Supreme Court disagreed:

The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false

tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.

It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," not merely a claim of "the right, possessed by every citizen, to require that the Government be administered according to law"

Id. at 207-08 (citations omitted). *See also Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.")

In another landmark case, the U.S. Supreme Court recognized the right of citizens to petition government on the same basis as other citizens. *Romer v. Evans*, 517 U.S. 620 (1996), involved a Colorado initiative that would have repealed any statutes or ordinances to the extent they afforded

protection based on sexual orientation. The court overturned the initiative because it imposed a “disability” on those citizens seeking to exercise their right to seek legislation of a certain kind. *Id.* at 632.

These federal cases were brought under the 14th Amendment to the U.S. Constitution, but Washington’s constitution also contains important protections of a citizen’s right to participate in the law-making process. Art. I, § 4 ensures the right to petition government. Art. I, § 19 guarantees “free and equal” elections, and Art. I, § 32 counsels a “frequent recurrence to fundamental principles.” Art. II, § 1, gives citizens the power to directly legislate via initiative and referendum. Two provisions are aimed at giving citizens information with which to participate in law-making. Art. II, § 19 requires that the subject of a bill give notice of its contents, and Art. II, § 37 requires that bills set forth the sections that are being amended.

If the Washington Constitution allows a legislative enactment or initiative to establish a supermajority requirement for a certain type of legislation, then no rights are being violated. However, if the Washington Constitution does *not* permit such a requirement, then basic tenets of the system of government established by the framers of the Washington Constitution are being violated on a recurring basis.

The State avoids addressing these interests in a number of ways. First, it focuses on the impacts of the supermajority requirement as alleged in the Complaint, mischaracterizing these impacts as interests and then dismissing them.⁵ For instance the State claims that plaintiffs assert a right to additional funding of education. Opening Brief at 12-13. The State then cites *Federal Way School District No. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009) for the proposition that plaintiffs had no right to particular funding. However, this case is not about whether a particular program should be funded, it is about the law-making process with regard to education.⁶ Moreover, plaintiffs do have a right to “ample” funding of education. See *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012). They also have a right to not to have limits placed on their participation in the legislative process if those limits are not constitutional.

The State also incorrectly characterizes some of the interests involved. For instance, the State claims that plaintiff nonprofit corporations “assert an interest in *successfully* lobbying the legislature,” and then states that *successful* lobbying is not a right or legally protected

⁵ The Complaint states specific impacts in order to establish the injury requirement for standing. The Complaint does not allege that plaintiffs have a right to specific kinds of education funding.

⁶ While education bills do not technically require a two-thirds vote, K-12 education is the state’s largest single general fund expenditure, and thus inextricably tied to taxes. Office of Financial Management, *Washington State Budget Process* at 6 (2011), available at www.ofm.wa.gov/reports/default.asp.

interest. Brief at 12 (emphasis added). However, Art. I, § 4 of the state constitution guarantees the right of assembly and petition. The right of citizens to participate in the lawmaking process is recognized not only in Article I's declaration of rights, but also throughout the provisions of Article II related legislation. Washington courts have long recognized that the procedures for passage of legislation protect not only members of the legislature, but also the interests of citizens who seek to encourage or defeat the passage of laws. A decade after Washington's constitution was adopted the Washington Supreme Court wrote:

[T]he constitutional provision (section 19, art. 2) which provides that no bill shall embrace more than one subject, and that shall be expressed in the title, was incorporated in the Constitution for a beneficial purpose, viz., for the protection and enlightenment of the members of the Legislature, *and for notice to citizens at large of proposed legislation which they might desire by proper methods to encourage or defeat*; and, when laws are enacted or amended in substantial violation of this guaranty, the taint of at least suspicion of unfairness is upon them, and courts should not hesitate to declare them void.

State v. King County, 49 Wash. 619, 623, 96 P. 156, 157 (1908) (emphasis added). Similarly, the courts have recognized the public's interest in Article II, § 37 procedural requirements for amendments to statutes:

. . . WEA concedes that the legislature has the power to do what it did, but contends that the legislature must, and did not, comply with an applicable, controlling, and determinative constitutional provision. We agree.

* * *

The reason that this legislative limitation effort must fail is not attributable to some notion of this court, but rather to the command of our state constitution. Article 2, section 37, is explicit:

No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

The rationale for the constitutional provision was explicated in *State ex rel. Gebhardt v. Superior Court*, 15 Wn.2d 673, 685, 131 P.2d 943 (1942). When reading a new statute, a citizen or legislator must not be required to search out other statutes which are amended to know the law on the subject treated in the new statute. The new statute must either be complete in itself or it must show explicitly how it relates to statutes that it amends. ***Likewise, a citizen or legislator who is interested in an existing statute should be alerted when that statute is amended.***

Washington Educ. Ass'n v. State, 93 Wn.2d 37, 39, 604 P.2d 950, 951 - 952 (1980) (emphasis added). Neither the constitution nor the courts have been dismissive of the role of citizens in the enactment of laws, and there is no reason to distinguish the interest of citizen in the culmination of the

process: the enactment or defeat of legislation. The constitution does not limit citizen participation to the initiative process, but invites involvement with the legislature.

Members of the two plaintiff organizations are unmistakably acting pursuant to these constitutional guarantees in asking for education funding. They are disadvantaged in doing so by the supermajority requirement in a way that other citizens are not. Thus they clearly have a strong interest in determining whether this disadvantage is constitutionally permissible.

The State's most flagrant mischaracterization of plaintiffs' interests, however, is in its approach to the legislator plaintiffs. The State claims that the legislators have asserted a right to advance and pass bills that they and their fellow legislators have determined not to advance or pass. Brief at 13. The legislators' right, however, is the right to cast their votes and have them counted equally with the votes of their fellow legislators. It is like the Governor's right under Art. 3, § 12 to consider legislation for signature or veto. If a supermajority requirement is in violation of the Constitution, it nullifies the lawful votes of those who voted in the majority and nullifies the right of the governor to shape the law of the state by approving or vetoing legislation or sections thereof, "placing them in a position of constitutionally unjustifiable inequality,"

much like the underrepresented plaintiffs in *Baker v. Carr*, 369 U.S. at 207.

The State argues that the legislators may not come to the Court because they themselves may pass legislation by majority vote simply by appealing the ruling of the House Speaker or Senate President that a supermajority was required to pass tax legislation. This appeal requires only a majority vote, so presumably such a maneuver would advance the legislation to the next house, which presumably would then engage in the same tactic and pass the bill to the Governor. To keep the measure moving to the courts, the Governor would be required to ignore the procedural infirmities and sign the bill, the opponents of which would immediately file suit.

The idea that legislators and the governors should ignore RCW 43.135.034 is dangerous to the separation of powers. It presumes that the majority of legislators can decide on the constitutionality of statutes without reference to the courts, ignoring those statutes it deems unconstitutional. However, it is beyond the power of the legislature to rule that a law it has enacted is unconstitutional. *Wash. State Farm Bureau*, 162 Wn.2d at 303-04 (“[T]he legislature is precluded by the constitutional doctrine of separation of powers from making judicial determinations.” (quoting *City of Tacoma v. O’Brien*, 85 Wn.2d 266, 271, 534 P.2d 114

(1975))).⁷ Failing to follow statute would require legislators, the lieutenant governor, and Governor to ignore their oath of office. As Lieutenant Governor Owen stated in ruling on the bill at issue in *Brown v. Owen*:

[T]he President has taken an oath to uphold all the laws of the state and nation, including both Constitutional and statutory law. Whatever the merits of Senator Brown's legal argument-and the President is inclined to agree with her arguments-it is not for him to decide legal matters. Under our Constitutional framework of separation of powers, the authority for determining a legal conflict between the Constitution and a statute is clearly vested with the courts.

165 Wn.2d 706, 719, 206 P.3d 310 (2009). As a matter of law and comity, legislators and executive branch officials cannot act in the manner suggested by the State here. And if that is the only way to make the supermajority requirement justiciable, then the requirement is effectively

⁷ Certainly executive officials must take in account clearly established law "where the unconstitutionality of a statute is sufficiently established so as to provide public officials with fair notice that the conduct the statute requires is constitutionally prohibited." *See Illinois v. Krull*, 480 U.S. 340, 355 (1987) ("Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.") However, the standard for government officials to determine whether there are clearly established constitutional rights is pre-existing case law where the judiciary has determined the constitutionality of the action. *See Hope v. Pelzer*, 536 U.S. 730, 739, (2002). It is a quite different matter to suggest officials should disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional, based solely upon the official's opinion that the statute is unconstitutional.

insulated from judicial review. As a matter of law and comity, therefore, it is incumbent upon the court to render a decision.

The purpose of the requirement that parties in a legal action be adversarial and have sufficient opposing interests in the matter is to ensure the adversaries can be relied upon to provide the foundation for sound adjudication by the court. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 270, 138 P.3d 943 (2006) (citing 13 WRIGHT, MILLER & COOPER, § 3530, at 308). Certainly that foundation is provided here by plaintiffs and the Attorney General.

C. The Separation of Powers Doctrine Requires Reaching the Merits.

The State suggests that the separation of powers doctrine requires the Court to exercise restraint and “not prematurely interfere” with the citizens’ check and balance on the legislature through the initiative process. Opening Brief at 18. This suggestion betrays a fundamental misunderstanding of the separation of powers doctrine and the role of the courts. This case presents a question uniquely appropriate for a declaratory judgment. A declaratory judgment action to determine the constitutionality of RCW 43.135.034 is the only way to respect the separation of powers while still giving effect to the holding of *Marbury v. Madison* that “[i]t is emphatically the province and duty of the

judicial department to say what the law is.” 5 U.S. 137, 177 (1803). The parties can obtain resolution of a legal question that is the unique province of the courts without the intrusive issuance of a writ of mandamus⁸ ordering a legislative officer to make a particular parliamentary ruling.

This result is the only course that brings together the two strands of the Supreme Court’s decision in *Brown v. Owen*. There the Supreme Court declined to issue a writ of mandamus ordering Lieutenant Governor Brad Owen to forward a bill that had received a majority Senate vote to the House of Representatives. At the same time, the Court agreed with the Lieutenant Governor’s observation that “[w]hatever the merits of Senator Brown’s legal argument—and the President is inclined to agree with her arguments—it is not for him to decide legal matters. Under our Constitutional framework of separation of powers, the authority for determining a legal conflict between the Constitution and a statute is clearly vested with the courts.” 165 Wn.2d at 719. In *Brown*, the Supreme Court held that issuance of a writ of mandamus would be an improper intrusion into the inner workings of the Senate, yet the court also expressed complete agreement with the Lieutenant Governor’s observation that he could not declare the statute requiring a two-thirds

⁸ Each of the two prior cases in which the court declined to reach the merits of the supermajority requirement were brought as original actions to the Supreme Court seeking a writ of mandamus. See *Walker*, 124 Wn.2d at 410; *Brown*, 165 Wn.2d at 711.

supermajority vote unconstitutional, and that it is the duty of the judiciary to make legal rulings. The Supreme Court observed that “Owen acted properly by declining to decide the constitutionality of RCW 43.135.035(1).” *Id.* at 726.

Unless the court takes up the duty to declare the validity of statutes under our state constitution, a power vested in the courts, there is a complete void and this statutory provision would be completely insulated from judicial review. Surely this is not what the Washington Supreme Court intended. Instead, the Supreme Court’s finding that the challenge in *Brown v. Owen* was an inappropriate action for mandamus, coupled with its statements that the constitutionality of laws is a question for judicial determination, indicates the question is appropriately reached in an action under the Declaratory Judgment Act.

This dichotomy harkens back to *Marbury v. Madison*, where the court noted it was not appropriate for the United States Supreme Court to issue a writ of mandamus but also recognized the role of the courts in determining if a statute contravenes the constitution:

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

5 U.S. at 177. The court famously went on to observe the following:

· It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id.

Once a court issues a declaratory judgment the parliamentary rulings of legislative officers can consider the court's ruling in accordance with the rules and traditions of the legislative branch. This course is illustrated by the following ruling by Lieutenant Governor Owen on a point of inquiry regarding whether a measure required a two-thirds vote for final passage because it amended a section enacted by Initiative 872. In his role as President of the Senate, he found a two-thirds vote was not required because of his consideration of a court decision that he factored into his parliamentary ruling:

Last Session, the President did rule that a similar measure required a two-thirds vote

for final passage because it amended sections of the law enacted by I-872. Since that time, this has been a high-profile issue that is being litigated in the courts. The President begins by reminding the body that its presiding officers have a long tradition of ruling on parliamentary issues, not legal or constitutional matters. The President's rulings do not, however, take place in a vacuum. When appropriate, the President must, as a matter of comity and parliamentary necessity, take notice of actions undertaken by other branches of government which have a practical impact on parliamentary issues.

On July 15, 2005, a federal judge issued an order declaring, among other things, I-872 to be unconstitutional, and the judge's ruling is relevant to the analysis on this point of order. It is important to note the precise language used by the judge in the case because it bears directly on the state of the law before us. The judge wrote on page 38 of his Order:

In this case, the Court's holding that Initiative 872 is unconstitutional renders it a nullity, including any provisions within it purporting to repeal sections of the Revised Code of Washington. Therefore, the law as it existed before the passage of Initiative 872, including the Montana primary system, stands as if Initiative 872 had never been approved.

It is hard to imagine the Court being clearer in its statement that the law is returned to its former status as if I-872 had never been approved. Since this is the case, it necessarily follows that any change to the law proposed by this body takes only a

simple majority vote because there is no initiative left to amend.

It may well be that the federal judge's ruling will not be the final word on this matter. The President is aware that the matter is being appealed and further litigated in the courts, and it is uncertain when or how further court action might change the trial court's decision. It may be prudent for proponents of this measure to seek a two-thirds vote as a means of removing all doubt and risk which may flow from subsequent and different court action. It is precisely because of this uncertainty, however, that the President cannot engage in speculative analysis, but must instead confine himself to the state of the law as it exists at the time of his ruling. Presently, a duly-constituted Court has declared I-872 unconstitutional and returned the law to its pre-I-872 status. In appropriate deference to this Order, the President finds and rules that the measure before us takes only a simple majority vote for final passage. (Pages 161-162—2006).

RULINGS OF LIEUTENANT GOVERNOR BRAD OWEN, 1997-2011,
Indexed & Annotated by Mike Hoover, Senate Counsel, Last Updated:
May 25, 2011 at pp. 135-136.⁹ An order in a declaratory judgment action respects the functions of both the judicial and the legislative branches by leaving the ruling on the issue of law to the judicial branch and the ruling on how that declaration affects parliamentary rulings to the legislative officers.

⁹ <http://ltgov.wa.gov/rulings/PRESIDENT%20OWEN%20RULINGS.pdf>

V. CONCLUSION

For the above stated-reasons, this Court should affirm the trial court's decision that this case is justiciable.

RESPECTFULLY SUBMITTED this 10th day of August, 2012.

Davis Wright Tremaine LLP
Attorneys for Governor Christine Gregoire

By 
Michele Radosevich, WSBA #24282
Special Assistant Attorney General

CERTIFICATE OF SERVICE

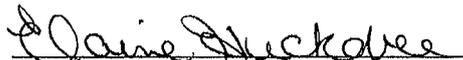
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Declared under penalty of perjury under the laws of the state of Washington dated at Seattle, Washington this 10th day of August, 2012.


Elaine Huckabee

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

Attached please find Brief of Respondent Governor Christine Gregoire to be filed in the above matter.

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