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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Appellant,

v.

LEAGUE OF EDUCATION VOTERS, *et al.*
Respondents.

**RESPONDENTS' RESPONSE TO AMICUS BRIEFS OF
ASSOCIATION OF WASHINGTON BUSINESS, FREEDOM
FOUNDATION AND LEAGUE OF WOMEN VOTERS**

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I. INTRODUCTION

The power to determine the constitutionality of a state law lies exclusively with the courts, not the Legislature. Amicus Association of Washington Business' ("AWB's") suggestion that the Legislature should decide the constitutionality of RCW 43.135.034 through use of parliamentary procedure contradicts that basic principle, misunderstands the purpose of parliamentary procedure and requires legislators to violate their oaths of office. AWB's suggestion that this case presents "political questions" outside this Court's purview likewise reflects a misunderstanding of the political question doctrine, which has no application here. The question of RCW 43.135.034's constitutionality is fully briefed between opposing parties with real and demonstrated interests in the outcome of this litigation. A question of such public importance should be decided by this Court and this Court alone.

The Two-Thirds Requirement violates the simple majority provision in Article II, § 22. As Amicus League of Women Voters ("LWV") further demonstrates, the Two-Thirds Requirement also violates the Legislature's Article II, § 1 plenary power over legislation. Despite Amicus Freedom Foundation's (the "Foundation's") assertion otherwise, the negative phrasing of Section 22 is irrelevant. The plain language, constitutional history and constitutional context of Section 22 demonstrate that it sets forth an exclusive constitutional requirement: bills pass on a simple majority vote unless otherwise provided for in the Constitution. The individual rights protected in Article I of the Constitution are,

contrary to Foundation's suggestion, not relevant to the constitutionality of RCW 43.135.034. The imposition of a simple majority vote requirement reflects the framers' concern to limit the influence of special, corporate and private interests on legislative action. RCW 43.135.034 is in direct contravention of these concerns. This Court should hold the Two-Thirds Requirement unconstitutional.

II. ARGUMENT

A. **The Issues Before the Court are Real, Important and Justiciable.**

This action presents a justiciable controversy for all the reasons set forth in Respondents' brief. *See* Resp. Br. at 10-22. AWB's claim that the Legislature could use parliamentary procedure to declare the law unconstitutional is incorrect, as is its claim that the issues before the Court are political in nature and outside this Court's review. Only the Court can and should decide the constitutionality of the Two-Thirds Requirement.

1. **The Two-Thirds Requirement impacts legislation.**

AWB mischaracterizes Respondents' justiciability position in arguing it is based solely on the failure of SHB 2078.¹ Instead, Respondents relied on this bill to illustrate the impact of the Two-Thirds Requirement on legislation generally. Its relevance in this regard is straightforward: SHB 2078 received a majority vote in the House, but failed to advance in the legislative process because it did not receive a

¹ *See* AWB's Br. at 6, 9 (claiming Respondents' "specific grievance" is the failure of SHB 2078; asserting that this Court's action on the constitutional question would not "revive SHB 2078 nor enact it into law").

two-thirds supermajority. And it is only one example. Indeed, AWB completely ignores Respondents' discussion of SB 6931, which also received a constitutional simple majority vote but was deemed failed because of the Two-Thirds Requirement. Resp. Br. at 6. SHB 2078 and SB 6931 demonstrate that there is nothing speculative or hypothetical about the impact of the Two-Thirds Requirement on legislation; it works as intended to hinder passage of legislation increasing state revenue.

The subsequent passage of ESB 6635 does not moot this impact. ESB 6635, which was passed after oral argument on summary judgment in this case but before Judge Heller issued his opinion, was entirely different legislation from SHB 2078. The bill closed a tax loophole at issue in SHB 2078 not to increase revenue, but to offset (in large part) four tax cuts created or extended in the bill.² CP 668-94. In essence, ESB 6635 provided for tax cuts by closing a tax loophole.³ This is entirely inapposite to SHB 2078 and SB 6931.

2. Parliamentary procedure may not be used to circumvent the Two-Thirds Requirement.

AWB, like the State, attempts to erect an insurmountable and inappropriate barrier to review – that is asking the Legislature and

² During debate, Senator Frockt stated that “essentially what the bill does is it buys down, it nets out to a very small amount of money because we are granting other tax exemptions while closing up this one loophole.” CP 680. Senator Rolfes observed that “this bill makes it clear to me that the only way to get a two-thirds vote from the legislature to close a tax loophole is to grant four additional tax loopholes in exchange.” CP 681. To Respondents' knowledge, recently enacted ESB 6635 is the only bill ever to meet the Two-Thirds Requirement since the requirement first passed in 1993.

³ As Republican Senator Benton pointed out during the debate, ESB 6635 is a classic example of logrolling legislation: if you are for closing tax loopholes you are forced to vote on tax cuts and vice-versa. CP 682.

Governor to disregard the Two-Thirds Requirement and enact a revenue law by simple majority. AWB seeks to accomplish this trick by suggesting the Legislature and Governor may ignore a state law through parliamentary procedure if they think the law is unconstitutional. That is improper and contrary to law.

First, the judiciary, not the legislature, is the proper branch of government to address the constitutionality of government acts. As this Court recently stated: “[T]he notion that potentially unconstitutional government conduct must be redressed through the legislature is frankly astonishing given the bedrock principle that it is ‘emphatically the province and duty of the judicial department to say what the law is.’” *Auto. United Trade Org. v. State* (“*AUTO*”), ___ Wn.2d ___, ___ P.3d ___, 2012 WL 3756308, *8 (Aug. 30, 2012) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803)). Relying on parliamentary procedure (as suggested by AWB) or the Legislature ignoring duly enacted legislation (as suggested by the State) are not appropriate means to address the constitutional issues raised here.

Second, parliamentary rules provide a mechanism to address procedural issues not substantive issues like the constitutionality of laws. That conclusion is demonstrated by the rules passed respectively by the House and Senate regarding the powers of the heads of those respective bodies to rule on parliamentary questions. Nowhere in the powers of the President of the Senate or the Speaker of the House are decisions on constitutional questions given over to parliamentary rulings. *See Senate*

Rule No. 1, *Senate Resolution No. 8604* (as amended) (2012); House Rule No. 4, *House Resolution No. 2011-4600*. As Speaker Chopp stated in response to a request for a parliamentary ruling on the constitutionality of RCW 43.135.034: “the speaker does not have the authority to rule on the constitutionality of any statutory requirement.” CP 171-72.⁴

Brown v. Owen, 165 Wn.2d 706, 206 P.3d 310 (2009), supports, rather than undermines, this understanding of the procedural role of parliamentary rules. There, the Court was asked to overturn the Senate President’s parliamentary ruling on a point of order based on constitutional concerns. 165 Wn.2d at 711. The Court rejected that request noting the limited role of parliamentary procedure: “The president of the senate decides all questions of order. ‘When interpreting these rules, however, the presiding officer makes parliamentary rulings, not constitutional rulings.’” *Id.* at 721 (quoting Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington's Law of Law-Making*, 39 Gonz. L. Rev. 447, 459 (2003-04)) (citations omitted). Indeed, in *Brown* this Court held that “[i]t is beyond the power of the legislature to rule that a law it has enacted is unconstitutional. [Lieutenant Governor] Owen acted properly by declining to decide the constitutionality of RCW 43.135.035(1)...” *Id.* at 726 (citations omitted). Yet, AWB seems to be urging that the presiding officer (or the legislative body overturning such officer) make constitutional rulings despite the admonition of *Brown*.

⁴ See also CP 172-74 (“neither House Rule 22 [providing for appeal of the speaker’s decision] nor any other parliamentary device would authorize the members of this body to determine the constitutionality of the statutory super majority requirement”).

This Court, not the President of the Senate or the Speaker of the House or the body of the Legislature overturning those respective officers, makes constitutional rulings on issues such as the one here.⁵

Third, the parliamentary trick AWB suggests would require legislators and the Governor to violate their oaths of office. Legislators and the Governor are bound by their oaths to support “the Constitution and laws of the state of Washington”. RCW 43.01.020 (oath for state officers); Att’y Gen. Letter Op. 1975 No. 23 (legislators take same oath as state officers). Elected officials who violate their oath are subject to recall and discharge. Const. art. I, § 33. This Court has stated that “it is not to be presumed that the legislature would violate their oath of office.” *Farquharson v. Yeargin*, 24 Wash. 549, 553, 64 P. 717 (1901). Indeed, this Court has seen “no reason to assume legislators will fail to act in good faith to comply with their oath.” *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 538, 585 P.2d 71 (1978). Ignoring the Two-Thirds Requirement is not an option for legislators and the Governor.

⁵ AWB’s position that the Legislature should have disregarded the Two-Thirds Requirement and adopted a different parliamentary procedure as a means to pass SHB 2078 stands in conflict to the position it has recently taken in similar circumstances. Compare AWB’s Br. at 6-7 with Br. for AWB as Amici Curiae Supporting Direct Review in *AUTO* at 2 (“AWB finds offensive the notion that state officers might act contrary to the constitution or contrary to statute with respect to taxpayer money....”); see also cf. Br. for AWB as Amici Curiae at 11, *Tesoro Refining and Mktg. Co. v. State, Dept. of Revenue*, 164 Wn.2d 310, 190 P.3d 28 (2008) (“The Department should not be allowed to assess a tax contrary to one of its own duly adopted rules.”).

3. The question before this Court is a constitutional, not political, one.

AWB's claim that Respondents ask the Court to resolve a "nonjusticiable political question" is incorrect and reflects a misunderstanding of the political question doctrine. AWB's Br. at 5-6. Although not entirely clear (since AWB fails to articulate why the political question doctrine comes into play or to apply political question doctrine cases to the circumstances here), AWB seems to suggest that because the harm identified by Respondents relates to political impediments to consideration of legislation that furthers the interests of Respondents, the constitutional question before the Court comes under the political question doctrine. The political question doctrine has no such application. Instead, the doctrine's "primary concerns are that the judiciary not be drawn into tasks more appropriate to another branch and that its institutional integrity be protected." *Brown*, 165 Wn.2d at 722. In *Brown*, the Court made this distinction clear: the Legislature may not infringe on issues in the courts' purview (ruling on the constitutionality of a law) and the courts may not infringe on issues in the Legislature's purview (internal parliamentary rulings). *Id.* at 718-19.⁶ Thus, the judiciary should, for example, not "second-guess the wisdom of the legislature". *Rouso v. State*, 170 Wn.2d 70, 91, 239 P.3d 1084 (2010). But the Court here is not being asked to address whether the Two-Thirds Requirement is a good or bad idea, only

⁶ The political question in *Brown* was whether this Court should intervene in an internal parliamentary dispute in the Legislature. 165 Wn.2d at 726. This Court did not hold that the constitutionality of the Two-Thirds Requirement was a political question. *Id.* at 711 (declining to reach the constitutional question because mandamus was not appropriate).

whether it is a matter of constitutional concern. The question is not a political one for the Legislature to decide; it is a constitutional one for the courts to decide. *See id.* at 92.⁷

AWB attempts to color Respondents' argument as political by raising Respondents' discussion of *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012). But Respondents cite *McCleary* to show that education has not been adequately funded, resulting in shortfalls consistent with Respondents' claimed harms. In other words, *McCleary* demonstrates that Respondents' interests and injuries are not speculative or hypothetical. Respondents are not before the Court asking it to address the way the Legislature should respond to *McCleary*, either through appropriations from existing revenue or additional taxes. They are asking this Court to rule whether the Two-Thirds Requirement unconstitutionally restricts the Legislature's power to exercise one of those options.

4. The Legislator-Respondents' interests are justiciable.

AWB's attacks on the Legislator-Respondents' interests are similarly unsupported.⁸ First, the Legislator-Respondents have identified an interest in the effectiveness of their votes, which are diminished improperly by the Two-Thirds Requirement. *See* Resp. Br. at 12-13.

Second, the Legislature's reenactment of the Two-Thirds Requirement at various times does not mean that the Legislator-

⁷ Nor do the factors in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), the quintessential test for application of the political question doctrine, suggest the Court should not rule here.

⁸ AWB completely ignores and does not address the interests of the individual taxpayer, parent and teacher Respondents in this case.

Respondents have conceded its constitutionality or that the dispute is nonjusticiable. An unconstitutional law is not rendered constitutional by being passed repeatedly. Further, AWB mischaracterizes the Legislator-Respondents' votes on the bills "reenacting" the Two-Thirds Requirement. The effect of these bills was to suspend the Two-Thirds Requirement after the constitutionally-mandated two year restriction placed on initiatives. See Laws of 2005, ch. 72, § 2 (suspension until June 30, 2007); Laws of 2006, ch. 56, § 8 (changing suspension end date from 2007 to 2006); Laws of 2010, ch. 4, § 2 (suspension until July 1, 2011). There is nothing inconsistent with the Legislator-Respondents voting to suspend the Two-Thirds Requirement and their position in this action that the law is unconstitutional.

5. AWB acknowledges that this case is one of public importance.

Finally, although AWB argues that this case is not one of public importance, its statements reveal otherwise. AWB acknowledges that the Court's opinion is of substantial public importance: "Obviously, the outcome of this case is of great interest to AWB and its membership." AWB's Br. at 3. And AWB's position is further belied by its recent briefing to this Court in *AUTO*: where "legal arrangements...are completely walled off from judicial scrutiny, that lack of accountability impacts broad and fundamental public interests of the sort 'our whole system is based upon.' Whether or not that ought to be the case merits the urgent attention of this Court." Br. for AWB as Amici Curiae Supporting

Direct Review at 5 (emphasis added). This Court’s decision in *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972), is directly on point. The constitutionality of the Two-Thirds Requirement indisputably has been well-briefed and an opinion would be beneficial to the other branches government and the public. Indeed, This Court recently restated the principle applicable here: “When the constitution and a legislative enactment collide, it is the constitution that represents the interests of the people. In this case, the public interest in having the constitutionality of [legislative] conduct addressed is paramount.” *AUTO* at *9 (word “executive” changed for context). This Court should address the constitutional question.⁹

B. Vote Thresholds to Pass Legislation are Matters of Constitutional Concern and May be Changed Only by Constitutional Amendment.

The central issue before the Court is whether Article II, § 22’s simple majority vote threshold is a matter of constitutional concern. If so, “[t]he Constitution provides the means, methods, and processes for its own amendment.” *Culliton v. Chase*, 174 Wash. 363, 373, 25 P.2d 81 (1933). The people may not change constitutional requirements by initiative. *Id.* “Constitutional provisions cannot be restricted by legislative enactments.” *Belas v. Kiga*, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998). The Foundation’s arguments offer nothing new to this analysis.¹⁰ Rather, the

⁹ AWB also asserts arguments regarding the Governor’s interests in this litigation. Respondents incorporate the Governor’s response to AWB’s brief in its entirety.

¹⁰ The Foundation’s brief addresses only the Two-Thirds Requirement and not the Mandatory Referendum Requirement. Accordingly, Respondents’ response is limited to the Two-Thirds Requirement.

Foundation reiterates the same arguments the State makes in its briefs and attempts to create a diversion from the substantive constitutional issue by discussing inapposite legal principles. Neither tactic has merit.

1. Article II, § 22 sets forth an exclusive constitutional requirement.

Passing legislation is the primary and fundamental role of the Legislature. *See* Const. art. II, § 1. The constitution defines how the Legislature may carry out this role by, among other things, establishing legislative vote thresholds. The plain language and constitutional history and context of Article II, § 22 make clear that the Legislature may pass legislation by a simple majority vote unless provided otherwise in the constitution. Resp. Br. at 22-42.

LWV's Amicus Brief further supports this conclusion.¹¹ As LWV points out, the Two-Thirds Requirement violates not only Article II, § 22, but also each Legislature's Article II, § 1 plenary power to enact legislation. LWV's Br. at 3-10; *see also Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007).¹²

¹¹ Respondents agree with and adopt the arguments in LWV's brief in their entirety.

¹² The Two-Thirds Requirement is particularly offensive because it also violates the Legislature's plenary power over taxation. Resp. Br. at 33-34. The Legislature "possesses a plenary power in matters of taxation except as limited by the Constitution." *Belas*, 135 Wn.2d at 919 (holding a referendum approved by the people unconstitutional for violating Article VII, § 1). The Constitution commands that the power of taxation "shall never be suspended, surrendered or contracted away." Const. art. VII, § 1. The Legislature's ability to pass tax legislation is essentially suspended while the Two-Thirds Requirement is in effect because it is temporarily inactive and inoperable. *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 53, 211 P.2d 651 (1949), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963) (internal citation omitted) (defining "suspended" in Article VII, § 1 as "temporarily inactive or inoperative-that is, held in abeyance."). And the Two-Thirds Requirement also surrenders the power of taxation because it yields that power from the constitutional

Counter to these well-established constitutional requirements, the Foundation argues that the number of votes required for the Legislature to pass a bill is a topic left to the whim of each and every Legislature and initiative cycle. Like the State, the Foundation bases its argument on the “negative phrasing of Section 22.” Foundation’s Br. at 10. But the Foundation ignores the very case where this Court addressed the negative phrasing of constitutional provisions: *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (1998). At its core, *Gerberding* stands for the proposition that some issues are “a matter of constitutional, not statutory, concern.” *Id.* at 204. Whether a matter is addressed in the constitution with positive or negative phrasing is not determinative of whether the particular issue is a matter of constitutional concern. *See* Resp. Br. at 34-38. The Foundation ignores this controlling precedent.

The Foundation makes the unsupported statement that “[o]n its face, the negative phrasing of Section 22...sets a minimum standard....” Foundation Br. at 10. But the plain language of Article II, § 22 implies no such conclusion. Rather, the plain language states how bills pass: with a simple majority vote. Any other requirement is a deviation from the constitution’s plain language. The Foundation’s citation to *State ex rel. Griffiths v. Super. Ct. of King County*, 177 Wash. 619, 33 P.2d 94 (1934), is disingenuous. The Court there did not discuss negative or positive phrasing at all. Instead, the Court looked to the state law at issue and

majority of the Legislature to a one-third minority of legislators. *Id.* (“surrender” means “to yield, render, or deliver up,...; to give up completely, resign, to relinquish.”).

determined that the Legislature had no intent to limit cities from enacting additional qualifications for office and therefore there was no conflict between the statute and the city charter at issue. 177 Wash. at 623-24. Likewise, the Foundation's attempt to contrast Article II, § 22's language with "the positive wording" of Article II, § 1(d) does not undercut the *Gerberding* analysis.

As argued in Respondents' brief and further demonstrated in the LWV brief, the framers of the State Constitution intended legislative voting requirements to be of a constitutional concern. The debates around Article XI, § 2 and Article XI, § 3 establish that the framers intended the phrase "unless a majority" to set both a floor and ceiling for vote requirements. *See* LWV's Br. at 11-19. Vote thresholds were debated and supermajority requirements adopted in numerous instances. *Id.* at 19. Accordingly, the framers were deliberate in specifying where a supermajority vote is required.

The Foundation's other citations support this conclusion. The Foundation discusses Amendment 17, which created a constitutional requirement that no specific taxing district may exceed a 40 mill limit unless three-fifths of the voters in the taxing district approve such an excess levy. *Seattle Sch. Dist. No. 1 v. Odell*, 54 Wn.2d 728, 729, 344 P.2d 715 (1959). Amendment 17 put into the constitution requirements that had previously been passed by initiative.¹³ *Id.* The constitutionality

¹³ *See* Laws of 1933, ch. 4, § 1 (allowing local taxes in excess of 40 mill limit "when authorized so to do by the electors of such county, school district, city or town by a three-fifths majority"); Laws of 1935, ch. 2, § 1 (same and adding in road districts); Laws of

of those prior initiatives was never adjudicated. More importantly, these vote requirements have been appropriately enshrined in the constitution for 70 years. Further, that the legislative power has been used to impose supermajority requirements on lesser municipal corporations is of no note. Statutory supermajority requirements on local taxing districts are inapposite to the vote thresholds established in the constitution for passing statewide legislation. *See* Resp. Br. at 38-40.

Further, the Foundation cites to Article II, § 2 (limiting the number of representatives to “not less than sixty-three nor more than ninety-nine members”) and Article II, § 12 (limiting legislative sessions to “not be more than sixty consecutive days”). But these provisions demonstrate that the framers knew how to build flexibility in-between a floor and ceiling. The framers chose not to do so with legislative vote requirements.

The Foundation makes the same mistaken argument as the State in asserting that the framers’ only concern in Article II, § 22 was whether bills could pass with less than a majority. First, the framers explicitly rejected a proposed amendment to Section 22 that would have removed any language establishing a vote requirement for passing legislation. *See* Resp. Br. at 27. Second, as set forth in Respondents’ and LWV’s briefs, the discussion and adoption of supermajority provisions in other parts of the constitution establish that the constitutional context in which Section 22 was drafted evidences intent to create an exclusive requirement.

1937, ch. 1, § 1 (same); Laws of 1939, ch. 2, § 1 (same), ch. 83, § 1 (same); Laws of 1941, ch. 176, § 1 (same and adding in similar requirement for municipal corporation bonds).

Finally, the Foundation's discussion of California's constitutional history does not provide insight into why Washington's framers adopted the simple majority rule. As an initial matter, even if "preventing hasty legislation" was the intent behind the Washington framers' inclusion of a simple majority requirement in the constitution, it does not change the fact that legislative voting requirements are a matter of constitutional concern. Regardless, the debate at the California constitutional convention is not conclusive that the simple majority requirement was included solely to prevent hasty legislation. Committee on Legislative Department report Section 15 as proposed at the California convention contained seven different requirements for legislation.¹⁴ 2 Debates and Proceedings of the Constitutional Convention of the State of California 777 (1881). The majority of the debate around this provision concerned a proposed amendment by a Mr. Reynolds to include a requirement that all bills be printed and read on three different days prior to final passage. *Id.* Mr. Reynolds made clear that the purpose of the amendment to add a waiting period was to "prevent hasty legislation". *Id.* There followed a debate whether Section 15 sufficiently guarded against hasty legislation. *Id.* at 777-79. The various components of Section 15 were discussed in light of how they may prevent hasty legislation. But whether the simple majority requirement was originally included in Section 15 in order to prevent

¹⁴ (1) No law shall pass except by bill; (2) bills may originate in either house; (3) the non-originating house may amend or reject any bills; (4) on final passage the bill shall be read at length; (5) votes on the bill shall be by ayes and noes separately; (6) votes shall be entered on the journal; and (7) no bill shall become law without a majority vote in each house.

hasty legislation was not discussed. Indeed, the goal of preventing hasty legislation is evident in many of adopted Section 15's provisions, which slow-down and make more deliberate the process through which bills become law. But the simple majority requirement is of a different type. It does not slow down the process. Rather it serves the separate purpose of ensuring sufficient consensus among legislators for a bill to become law. The Foundation's assertion that the simple majority requirement's sole purpose is to prevent hasty legislation lacks support.

The Foundation's reliance on *People v. Cortez*, 6 Cal. App. 4th 1202, 8 Cal. Rptr. 2d 580 (1992) is also misplaced. In *Cortez*, an initiative measure imposed a five-year sentence enhancement for repeat felony offenders and required a two-thirds supermajority requirement for the legislature to amend provisions of the initiative. *Id.* at 1209-10. The legislature subsequently amended the initiative by the requisite two-thirds supermajority to remove trial courts' discretion to strike the sentence enhancements. *Id.* at 1211. A defendant subject to the five-year sentence enhancement challenged the legislature's ability to remove this discretion, arguing that the two-thirds requirement was unconstitutional. *Id.* The court rejected this argument, relying on a California constitutional provision not found in Washington's constitution. The California constitution provides that the legislature may amend or repeal an initiative only if it approves a statute and the voters also approve the statute, unless

the initiative permits otherwise. *Id.*¹⁵ The latter applied to the initiative at issue in *Cortez*, which by its own terms defined how the legislature could amend the initiative (by a two-thirds vote and without a vote of the people). *Id.* at 1211-12. In California's constitutional scheme, the court did not find any conflict between the initiative requiring a two-thirds supermajority to change the initiative and the general rule that bills pass with a simple majority vote.¹⁶ *Id.* at 1212. Further, in *Cortez* it was irrelevant whether a simple majority or a two-thirds supermajority was required because the amendment to the initiative passed both of those thresholds. *Id.*

Regardless, the California Court of Appeal has subsequently held that a two-thirds supermajority vote to approve tax legislation is not consistent with constitutional language that requires only a majority vote. *Howard Jarvis Taxpayers Assn. v. City of San Diego*, 120 Cal. App. 4th 374, 392-93, 15 Cal. Rptr. 3rd 457 (2004) (“Had the drafters of article XIIC intended the term ‘majority vote’ to mean ‘*at least* a majority vote’ or a ‘majority vote, *including a two-thirds vote at the election of the electorate,*’ they easily could have done so.”).

¹⁵ In Washington, the Legislature may amend an initiative with a two-thirds vote within the first two years of its enactment, and by a simple majority vote thereafter. Const. art. II, § 1(c). No vote of the people is required.

¹⁶ The California constitution, unlike Washington's, may be amended by initiative. Cal. Const. art. II, § 8.

2. The Two-Thirds Requirement is the only constitutional issue here, and it is contrary to the framers' concerns.

In an effort to distract from the constitutional infirmities of the Two-Thirds Requirement, the Foundation discusses irrelevant legal principles in its brief. Contrary to the Foundation's assertion, this case has nothing to do with personal, economic or individual rights. While those rights are protected by the constitution, as articulated in Article I's Declaration of Rights, they are not probative to whether the constitutional vote requirement for passing bills established in Article II may be amended by statute. And while the Foundation and even the people may find the Two-Thirds Requirement "a useful mechanism to ensure fiscally-responsible budgeting", Foundation's Br. at 1, this is irrelevant to whether the Two-Thirds Requirement is a constitutional mechanism to accomplish that goal. *See Gerberding*, 134 Wn.2d at 196 ("[T]he people in their legislative capacity remain subject to the mandates of the Constitution.").

The Foundation's attempt to skew the constitutional context is also without merit. The Foundation asserts that the constitution was drafted to combat unjust, oppressive, greedy, corrupt and abusive legislative actions. But the Foundation omits the critical fact that the legislative abuses were the symptom. The influence of special interests, specifically corporations, was the cause. Indeed, while the Foundation quotes one legal commentator labeling the Legislature as the most "oppressive and unjust instrument[] of government", the Foundation leaves out that the statement was made while describing the undue influence railroads had on elected

officials. See Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 Wash. Historic Q. 227, 248-250 (1913) (“The attempts and success of great corporations in influencing legislation, and the administration of laws at the period of the state convention is well known.”). Thus, the framers’ concern was not the Legislature *per se*, but that special interests would unduly influence legislative action. Indeed, the two major concerns of the delegates at the convention were “government corruption” and “private corporate power”. Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 670 (1992). “The presence of powerful corporations in Washington was often at the root of the governmental corruption.” *Id.* at 671. The Legislature had prior to the constitution served special interests rather than the people. *Id.* at 671 (“In 1862-63, the legislature reportedly passed no general laws, but enacted more than 150 pieces of special legislation for the benefit of ‘private interests against the general welfare.’ The delegates to the Constitutional Convention carried these experiences with them; one delegate remarked that if a stranger were to step into the convention ‘he would conclude that we were fighting a great enemy and that this enemy is the legislature.’”).¹⁷ As Respondents establish in their brief, the Two-Thirds Requirement is counter to the constitutional checks put on special

¹⁷ See also James L. Fitts, *The Washington Constitutional Convention of 1889* at 28-29 (1951) (unpublished Masters thesis, University of Washington) (the framers’ attempt to reform the Legislature was based on “wholesale corruption of state legislatures” and therefore the concern was to create legislative bodies that would not be “too easily influenced by corporations”).

interests. *See* Resp. Br. at 31-33. Under the Two-Thirds Rule, corporate interests need only secure the votes of 17 senators to defeat any tax legislation. Such a minority rule is in direct opposition to the concerns of the framers.¹⁸

III. CONCLUSION

The issues before this Court and the impacts of the Two-Thirds Requirement on Respondents are real and justiciable. The question of the constitutionality of RCW 43.135.034 is one for this Court to decide, not one subject to parliamentary or political processes. The Two-Thirds Requirement violates Article II, § 22 and the Legislature's Article II, § 1 plenary power. This Court should hold RCW 43.135.034 unconstitutional.

RESPECTFULLY SUBMITTED this 14th day of September, 2012.

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¹⁸ Notably, the state's largest corporate interest group of today, the Association of Washington Business ("the state's chamber of commerce and largest general business membership federation"), is advocating for the Two-Thirds Requirement as amicus in this action and has helped support and pass every single initiative that includes the Two-Thirds Requirement. AWB's Br. at 3. Indeed, special and corporate interest support of the Two-Thirds Requirement is readily apparent: "The AWB has donated \$495,000 to help qualify the measure [(I-1185)] for the ballot. The Washington, D.C.-based Beer Institute, BP Oil and ConocoPhillips contributed an additional \$600,000 combined. Business provided most of the funding for Eyman's last two-thirds initiative as well." Andrew Garber, *Voters may make it tougher for Legislature to raise taxes — again*, Seattle Times, Sep. 10, 2012, available at http://seattletimes.com/html/localnews/2019112187_twothirds10m.html.

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Attached for filing please find Respondents' Response to Amicus Briefs of Association of Washington Business, Freedom Foundation and League of Women Voters and attached Certificate of Service.

This pleading is being filed by Gregory J. Wong on behalf of Respondent League of Education Voters. Greg Wong's bar number is 39329, and his email address is greg.wong@pacificallawgroup.com

Hard copies are being distributed to opposing counsel via email and US Mail.

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