

No. 78637-2
(Snohomish County Superior Court No. 05-2-10166-9)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE FARM BUREAU FEDERATION,
WASHINGTON STATE GRANGE, NATIONAL FEDERATION
OF INDEPENDENT BUSINESS, BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON, EVERGREEN FREEDOM FOUNDATION
WASHINGTON ASSOCIATION OF REALTORS,
and STEVE NEIGHBORS,

Respondents,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington;
STATE EXPENDITURE LIMIT COMMITTEE; an agency of the State of
Washington; and STATE OF WASHINGTON,

Appellants.

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- (1) RESPONDENTS' ANSWER TO AMICUS CURIAE GARY LOCKE**
- (2) RESPONDENTS' ANSWER TO AMICI CURIAE WASHINGTON
EDUCATION ASSOCIATION, WASHINGTON FEDERATION OF
STATE EMPLOYEES AFL-CIO, & WASHINGTON STATE LABOR
COUNCIL**
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Respondents submit this brief in answer to the amicus curiae brief of Gary Locke (“Amicus”) and in answer to the amicus curiae brief of Washington Education Association, Washington Federation of State Employees AFL-CIO, & Washington State Labor Council (“Amici”).¹

I.
ANSWER TO AMICUS CURIAE GARY LOCKE

Several of the “facts” presented by Amicus merit attention from Respondents, not only because they are potentially misleading, but also because they contain legal conclusions that are ultimate issues for resolution in this case.

First, Amicus claims that “[t]he Legislature did not send the[] tax increases [in ESHB 2314] to a vote of the people, reflecting its understanding that these increases would not result in expenditures in excess of the fiscal year 2006 expenditure limit.” Br. of Amicus at 2. While Amicus is free to speculate regarding the subjective understandings of legislators, such speculation openly contradicts the record in this case.

Legislators did know that that they were breaching the spending limit. For example, legislators requested staff from the Office of Financial

¹ Pursuant to RAP 10.4(b), “[a]n amicus curiae brief, or answer thereto, should not exceed 20 pages.” The instant brief answers two amicus curiae briefs. For the Court’s convenience, Respondents have consolidated answers in a single brief not exceeding 40 pages.

Management (OFM) to ‘provide...options to increase the limit pretty significantly...without amending the expenditure limit statute.’ CP 316. Similarly, others plotted an ‘attack on the limit,’ C P 318, which resulted in an bizarre scheme of triangulating funds between state accounts to artificially increase the limit—a scheme that not even a single amicus has stepped forward to defend. Finally, the mere existence of ESSB 6896, which Amicus (and the State) argue retroactively cured the ineffective triangulation scheme, is a tacit admission by the Legislature that it did indeed exceed the state expenditure limit.

Next, Amicus perpetuates the State’s spin regarding ESSB 6896 — insinuating that the trial court disregarded the enactment of ESSB 6896 in its entirety. *See* Br. of Amicus at 4 (‘[T]he trial court declined to give effect to the legislature’s most recent enactment on the fiscal year 2006 expenditure limit.’). Amicus first parrots the State’s position by noting that “[a]fter ESSB 6896 was signed into law, the trial court heard summary judgment motions.” *Id.* (emphasis added). Tellingly, Amicus fails to note that ESSB 6896 was signed into law by Governor Gregoire on March 15, 2006, just two days before the trial court hearing on cross motions for summary judgment and that the State did not brief the effect of ESSB 6896 on the instant litigation until it filed its Response to Plaintiffs’ Motion for Reconsideration on May 25, 2006. CP 1061-1154. Finally, Amicus also

fails to note that when the State addressed ESSB 6896 in that reply, the State never made the mootness argument that it now raises on appeal. CP 1070-74. Again, while Amicus is free to opine regarding the application of the law to the facts of this particular case, such facts should be based upon the record.

A. The Vast Majority of the Amicus Brief Imputes an Argument to Respondents that Was Never Made—Respondents Have Never Argued that the Legislature Cannot Pass Legislation Directly Bearing on Pending Litigation

Amicus expends the overwhelming majority of its brief responding to arguments that were never made by Respondents. Amicus frames its first straw man argument as follows:

Whether giving effect to the Legislature’s most recent enactments in ongoing litigation is consistent with the separation of powers when legislation is enacted before entry of any final judgment.

Br. of Amicus at 4. Inasmuch as Respondents have never argued that the Legislature cannot pass legislation that directly bears on pending litigation, the amicus brief represents either a wholesale misunderstanding of Respondents’ position or constitutes a distortion of that position. Whatever its classification, it merits little attention from Respondents.

Respondents have never argued that the Legislature cannot pass legislation directly bearing on pending litigation. Indeed,

Amicus launches its straw man argument by quoting Respondents entirely out of context.

In the State's Opening Brief, the State argued that "the legislature's statutory enactment of [ESHB 6896]...renders this case **moot**." Opening Br. of State at 28 (emphasis added). It is well settled that unless a case meets the substantial public interest exception, the appropriate **remedy for a moot case is dismissal**. See, e.g., *State v. Ross*, 152 Wn.2d 220, 241, 95 P.3d 1225 (2004); *Hart v. Dep't of Social & Health Servs.*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988). However, it appeared that the relief sought by the State was not dismissal, but was merely that the Court apply ESHB 6896 to the instant litigation in a manner differently than the trial court. It was in this context that Respondents correctly observed that ESSB 6896 "simply cannot divest a coordinate branch of government from performing its function of judicial review." Opening Br. of Resp't at 4. In other words, where there is new legislation that bears upon pending litigation, the remedy is not dismissal. Instead, the court merely applies the new law to the same set of facts.

Unfortunately, Amicus takes Respondents' quote entirely out of context in order to launch into a prolonged discourse regarding the virtues of separation of powers. Respondents do not quibble with the central tenet of the argument advanced by Amicus: "the legislature may pass a law that

directly impacts a case pending in Washington courts.” *Id.* at 6 (quoting *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 625, 90 P.3d 659 (2004)). Instead, the real disagreement between the State and Respondents with respect to ESHB 6896 is regarding its legal effect.

Amicus simply does not answer what legal effect, if any, ESSB 6896 had on the instant litigation. This glaring omission renders the brief of little assistance to the Court. For example, ESHB 6896 expressly states that “[i]n calculating the expenditure limit for fiscal year 2006, the calculation shall be the expenditure limit established by the State expenditure limit committee in November 2005 **adjusted as provided by [chapter 43.135 RCW].**...” Again, Respondents’ Opening Brief observed that this lawsuit merely asks this Court to apply the legal standards in Chapter 43.135 RCW to reduce the expenditure limit. *See* Opening Br. of Respts. at 30. Neither the State nor Amicus ever responded to this argument.

In summary, Respondents’ Opening Brief merely highlighted the fact that the State’s argument regarding mootness incorrectly applied the mootness doctrine as established by our courts. In fact, a careful reading of the State’s Reply Brief reveals that the State has essentially retracted its prior argument regarding mootness. The State never uses the term “mootness” in its 11 pages of argument regarding the effect of ESSB 6896. *See* Reply Br. of State at 4-15. Rather, the State now concedes that the

effect of new legislation on pending litigation simply requires the court to “apply new law to the facts of th[e] case” as opposed to dismissing the case. *Id.* at 7 (quoting *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 143, 744 P.2d 1032 (1987)).

B. Retroactive Legislation May Only Cure Tax Obligations in Narrow Circumstances

Continuing its pattern of straw man arguments, Amicus implies that Respondents’ position is that the Legislature can never retroactively cure an illegal tax. *See* Br. of Amicus at 10-11. However, this simply is not Respondents’ position. *See* Respts.’ Opening Br. at 35 (conceding that the Legislature “can ‘cure’ an illegal tax and that cure can apply retroactively, but the ‘cure’ must result in taxpayers either obtaining a refund or a tax credit paid.”).

Respondents’ Opening Brief dedicated several pages of to the issue of whether ESSB 6896 could retroactively “cure” the illegal taxes in ESHB 2314. *Id.* at 33-36. In particular, Respondents relied upon *Tyler Pipe Indus. Inc. v. State*, 105 Wn.2d 318, 715 P.2d 123 (1986) and its progeny to analyze how Washington courts have limited the ability to retroactively “cure” illegal taxes. Again, neither the State nor Amicus address this jurisprudence.² Such avoidance is perplexing inasmuch as the

² Instead, the State marginalizes this jurisprudence by summarily declaring it to be “inapposite,” because “*Tyler Pipe* and its progeny... concern only the manner in which a state may retroactively cure a constitutional defect in a tax, after the tax has been finally

jurisprudence derives from this Court. Instead, Amicus attempts to shift this Court's focus to federal jurisprudence that is itself inapposite.

The primary authority cited by Amicus is *United States v. Carlton*, 512 U.S. 26, 114 S.Ct. 2018, 129 L. Ed. 22 (1994), which it cites for the proposition that courts may impose retroactive tax obligations without offending due process rights. However, *Carlton* does not address a situation, such as the instant one, in which the tax was wholly invalid *ab initio*. Rather, in *Carlton*, Congress only attempted to retroactively cure the scope of an otherwise valid tax, which it realized was improperly designated.

In relying on this case, Amicus appears to assert that the Legislature's ability to retroactively cure an illegal tax is unlimited. This State's jurisprudence clearly states otherwise. *See* Opening Br. of Respts. at 33-36. For the sake of brevity, Respondents do not reiterate its previous analysis here.

determined to be invalid." Resp. Br. of State at 14 n.1. However, the State offers no explanation why the requirements of due process in retroactively curing a tax would differ based upon whether the tax was invalid based upon constitutional or statutory grounds.

C. The Legislature Must Abide By Its Own Enactments Unless it Chooses to Amend Them—This Has Absolutely Nothing to Do With One Legislature Binding Another

In its final straw man argument, Amicus criticizes the trial court for an alleged failure to “consider the current legislature as a co -equal with prior legislatures.” Br. of Amicus at 14. As an illustration, Amicus observes that the trial court expressed concern regarding the manner in which the state expenditure limit was “manipulate[ed] b y the legislature,” CP 1316-17, that the Legislature “exploited a loophole in I -601,” CP 1322, and that the Legislature’s actions “ha[d] the potential to trump[] the intent and spirit of Initiative 601 altogether.” CP 1322. However, Amicus again fails to provide these quotes proper context.

First, each and every quote cited above arose from oral argument on summary judgment, which occurred before the State argued the legal effect of ESHB 6896, the legislation that is the particular focus of the amicus brief. Rather, the quotes concerned the State’s triangulation of funds, which Amicus has understandably declined to defend.

Second, the trial court’s comments were not intended to foreclose “the Legislature’s ability to change the law” as suggested by Am icus. *Id.* at 14. To the contrary, the trial court repeatedly acknowledged the Legislature’s ability to amend the TPA and expressly invited it to do so. *See, e.g.*, CP 1323 (stating that authorizing increases to the state expenditure

limit via triangulation “is certainly within the province of the legislature through duly enacted amendments to RCW 43.135. However, no such amendments were proposed during the 2005 legislative session...”). The record demonstrated that OFM specifically sought to provide the Legislature “options to increase the limit pretty significantly... **without amending the expenditure limit statute.**” CP 316 (emphasis added). Until the Legislature amends the statute, it is bound to follow it and is not above the law. *See* Opening Br. of State at 33 n.9 (citing *City of Tacoma v. State*, 117 Wn.2d 348, 816 P.2d 7 (1991)).

II.
**REPLY TO AMICI CURIAE WASHINGTON EDUCATION
ASSOCIATION, WASHINGTON FEDERATION OF STATE
EMPLOYEES AFL-CIO, & WASHINGTON
STATE LABOR COUNCIL**

A. While Amici in their Zeal Clearly Invite this Court to Declare the TPA Unconstitutional, Even the Party that they Support Urges this Court to Avoid Reaching the Constitutional Issue

At the outset, it must be recognized that Amici appear all too eager to encourage this Court to declare the TPA unconstitutional. Yet, even the State, the party that Amici support, does not share the same zeal. The State’s unambiguous position is that this case may be resolved on statutory grounds. *See* Opening Br. of State at 40 (“The court need not reach the [*Amalgamated Transit*] argument...because the trial court’s judgment should be reversed on...statutory arguments.”).

Similarly, Respondents believe that this Court need not reach this constitutional issue. Respondents agree with the trial court's determination that the constitutional issue was never properly raised in the first instance. CP 11 ("Defendants' challenge to the constitutionality of RCW 43.135.035(2)(a) was not raised by the pleadings and is not an issue included in this litigation or ruled upon by the Court.").

The State makes no attempt in its briefing to defend the merits of *Amalgamated Transit* and has openly refused to do so: "There is no point in reiterating arguments that this Court fully considered and previously rejected in *Amalgamated Transit*." In other words, other than relying on the mere existence of *Amalgamated Transit*, the State has not briefed the issues presented therein. Recently, when confronted with an argument posed by an amicus that was not briefed by the party that amicus supported, this Court stated: "We decline to consider this argument because [the party supported by amicus] did not brief the issue, and this court does not consider arguments raised first and only by an amicus." *See State v. Clarke*, 156 Wn.2d 880, 134 P.3d 188 (2006) (citing *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993)). The arguments of Amici in the instant case should fare no better.

In addition, the sheer complexity of this case and the issues of first impression presented herein, including the state expenditure limit/budgeting

process and executive and legislative privileges, have admittedly occupied the overwhelming majority of the respective parties' briefings. This Court simply has not received adequate briefing regarding this constitutional issue. Accordingly, this Court should decline to reach the issue pressed by Amici as this Court has done so in the past:

Amicus Washington State Trial Lawyers Association asks that we take an even broader stance [than the party it supports]... [W]e decline to do so at this time. Such a ruling is unnecessary to the resolution of this case and, as such, would be dicta. More importantly, we have not had the benefit of the inclusive legal briefing from all parties necessary to undertake such a multifaceted analysis.

Indus. Indem. Co. of the Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 928, 792 P.2d 520 (1990) (emphasis and insertions added). This Court simply has not received the type of briefing necessary to reach a comprehensive resolution to this constitutional issue.

B. The Analysis in *Amalgamated Transit* Regarding Art. II, Section I of the State Constitution is *Dicta*

Amici criticize Respondents for asserting that the analysis in *Amalgamated Transit* regarding Article II, Section 1(b) of our State Constitution is *obiter dictum*. Br. of Amici at 13 ("respondents fail to fully define *obiter dictum*, and if they had, they would have concluded that the Court's analysis did not meet the definition."). However, it is telling that rather than defining *dicta* as recognized by this Court, the Washington State

Supreme Court, Amici look elsewhere to support their shaky assertions.³

This Court's jurisprudence squarely answers Amici's criticism.

This Court has on numerous occasions explained what it deems to be *dicta*—"a ruling [that] is unnecessary to the resolution of [a] case." *Indus. Indem. Co.*, 114 Wn.2d at 928 (1990). Accord Black's Law Dictionary 967 (5th ed. 1979) (defining "obiter dictum" as "[w]ords of an opinion entirely unnecessary for the decision of the case.'). In *State v. Connors*, 59 Wn.2d 879, 880, 371 P.2d 541 (1962), for example, the appellant argued that his conviction should be overturned on three grounds, including double jeopardy, among others. *Id.* at 880 n.1. Because this Court reversed the conviction based on double jeopardy claim, the court refused to consider the remaining two grounds, stating unequivocally that "any discussion of [the remaining grounds] would be *obiter dictum* in view of our disposition of this case. *Id.* Cf. *Andersen v. King County*, ___ Wn.2d ___, 138 P.3d 963, 1040 (2006) ("Because the lead opinion concludes that no fundamental right is implicated, the rest of its discussion on article I, section 12 is unnecessary and dicta.")(Chambers, J. dissenting).

³ One such authority relied upon by Amici is Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comments on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 Tex. L. Rev. 1025, 1047-48 (1985). According to Amici, this article stands for the proposition that even if the disputed analysis in *Amalgamated Transit* is "dictum," it would still be "judicial dictum" and still binding." However, as noted by Amici "judicial dictum" only occurs where a state court rules on federal constitutional grounds." Inasmuch as *Amalgamated Transit* did not involve federal constitutional issues, Amici's analysis is perplexing and misguided.

As previously observed by Respondents, the *Amalgamated Transit* court held that Initiative 695 (I-695) was **unconstitutional in its entirety** because it violated the single subject rule of Article II, Section 19 of the State Constitution. *See* Opening Br. of Respts. at 47-48 (citing *Amalgamated Transit*, 142 Wn.2d at 217).

After the *Amalgamated Transit* court struck down I-695 in its **entirety**, it proceeded to take the redundant step of holding that a **specific provision**, specifically the voter approval requirement of I-695 (section 2), was unconstitutional under Art. II, Section 1(b) of the State Constitution. In fact, after declaring this specific provision to be unconstitutional, the Court was constrained to determine whether, in light of a finding of unconstitutionality of this specific provision, it should be severed from the remainder of the Act. In this regard, the Court stated:

The next issue that the parties dispute is whether section 2's unconstitutionality under art. II, § 1(b) requires invalidation of section 2 or I-695 in its entirety... **However, since section 2 and I-695 are unconstitutional in their entirety under art. II, § 19, section 2 retains no validity...**

Amalgamated Transit, 142 Wn.2d at 244. Thus, even the *Amalgamated Transit* majority's own analysis regarding Article II, Section 1 discloses its redundancy. Similarly, the concurrence by Justices Alexander and C. Johnson was expressly based upon this redundancy:

The majority does not, however, stop with its analysis of I-695's collision with article II, section 19, but rather goes on to hold that the measure violates another provision of article II, section 19, as well as article II, sections 1(a) and (b), and article II, section 37. It is, in my view, unnecessary for the court to make these additional conclusions. I say that because when a bill embraces more than one subject, whether it is passed by the Legislature or the people, it violates the state constitution and must be struck down... [W]e should resist the temptation to hold that I-695 is unconstitutional on other grounds.

Id. at 257 (Alexander, J., concurring).

In light of this Court's unambiguous definitions of *dicta* and its application in analogous circumstances, Amici cleverly attempt to create a new two-part test from a nonbinding court of appeals decision. *See* Br. at 13 (citing *DCR, Inc. v. Pierce County*, 92 Wn. App. 660 n. 16, 964 P.2d 380). However, although one of said prongs is to demonstrate that the prior statements were "unnecessary to decide the case" Amici does not articulate how the analysis regarding Art II, Section 1 was necessary in *Amalgamated Transit* or how the Legislature's authority to refer such bills was implicated by a case involving an initiative.

Finally, Amici argue that the holdings in *Amalgamated Transit* are merely "alternative holdings." While it may be common for a trial court to issue alternative holdings to avoid unnecessary and costly remands from appeal, it is another for an appellate court

to have “alternative holdings.” The cases cited by Respondents above clearly reject the notion of alternate holdings.

Finally, even if Amici believe that the analysis in *Amalgamated Transit* is not *dicta*, Amici simply cannot deny that the analysis of Article II, Section 1 contravenes this Court’s own prudential rules. On countless occasions this Court has declared that it will not entertain unnecessary constitutional issues. *See, e.g., Ohnstad v. City of Tacoma*, 64 Wn.2d 904, 907, 395 P.2d 97 (1964) (“We have consistently held that we will not pass on constitutional issues unless absolutely necessary to a determination of the appeal.”).

C. The Holding of *Amalgamated Transit* With Respect to Article II, Section 1 Does Not Support Amici’s Position

The primary thrust of Amici’s argument (and the State’s for that matter) is that neither the People nor the Legislature have the authority to condition a class of legislation on voter approval. However, such a conclusion simply is not part of the holding the section of *Amalgamated Transit* regarding Article II, Section 1. Specifically, the holding reads as follows:

We hold that section 2 of I-695 violates the four percent signature requirement of art. II, § 1(b) because it effectively establishes a referendum procedure applying to every piece of future taxing legislation without regard to the four percent signature requirement. *Id.* at 244.

Notably, nothing in this holding touches upon the Legislature's authority to seek a referendum, only the People's authority to do so, which is subject to the four percent signature requirement of Article II, Section 1. Limiting the holding to the People's authority to order a referendum on a class of legislation was appropriate inasmuch as the authority of the Legislature to do so was not presented by the facts of the case. Although the opinion references the Legislature's authority, which both Amici and the State seize upon, the issue was not before the Court.

D. The Entirety of the *Amalgamated Transit* Court's Analysis Regarding Article II, Section 1 Must Be Considered in Context

Amici and the State have argued that the analysis in *Amalgamated Transit* regarding Article II, Section 1 is not *dicta*. Not surprisingly, however, when it comes to recognizing other aspects of this Court's same analysis, Amici and the State wear blinders. Amici and the State simply cannot have it both ways. If this Court reached the constitutionality argument and finds that the *Amalgamated Transit* analysis regarding Article II, Section 1 is not *dicta*, it should look to the entirety of the Court's analysis in its proper context.

1. The Expansive Nature of I-695 Is Relevant to the Analysis in *Amalgamated Transit*

Respondents have previously demonstrated the *Amalgamated Transit* court's overwhelming concern regarding the sheer breadth of I-695.

See Opening Br. of Respts. at 48-51. As this Court noted in *Amalgamated Transit*, the voter approval provision in I-695 applied not only to state taxes, but also to local taxes and fees and “any monetary charge by government.” 142 Wn.2d at 193. The court stressed the universality of the provision no less than 14 times in the section addressing this very constitutional question.

I-695, section 2(1) provides that **any tax increase** imposed by the state **shall require voter approval**. *Id.* at 231 (emphasis added)

[S]ection 2 **automatically suspends** in the future **every tax-related action of government** until the voters **approve** or disapprove of the action. *Id.* (emphasis added)

section 2 is therefore **universal** *Id.* (emphasis added)

[A]s a **universal referenda provision** section 2...*Id.* (emphasis added)

We uphold the trial court’s ruling on the basis that **section 2 establishes a referendum process applying to every piece of future tax legislation**. *Id.* (emphasis added)

Under section 2 of I-695 **all state tax measures** passed by the legislature **are automatically subject to voter approval**. *Id.* (emphasis added)

Section 2 of **I-695 effectively authorizes mandatory referendum elections on all future tax legislation** passed by the Legislature where the Legislature has not referred the legislation. *Id.* at 232 (emphasis added)

As did the trial court, we conclude that **section 2 calls for universal referenda** on all legislation... *Id.* (emphasis added)

[S]ection 2 has the effect of replacing the referendum petition process for **any** future state taxing legislation.” *Id.* (emphasis added)

None of these cases cited by the State involves the question here whether a legislative body (here the people) can require voter approval as a condition to ***all future*** taxing legislation passed by the Legislature, as opposed to a specific piece of legislation. *Id.* at 235 (italics in original; emphasis added)

Here, section 2 encompasses ***all future*** state legislation imposing increased taxes as defined in I-695. *Id.* (italics in original; emphasis added)

[T]he State and the Campaign cite no cases, and none have been found, permitting conditioning ***all future state measures*** of a certain class on voter approval absent a constitutional amendment to that effect.” *Id.* at 242 (italics in original; emphasis added)

[S]uch voter approval requirements are unlike section 2 of I-695. First, only a specified type of tax is at issue, ***not all future tax measures***.” *Id.* at 243 (emphasis added)

We hold that section 2 of I-695 violates the four percent signature requirement of art. II, § 1(b) because it effectively establishes a referendum procedure applying to ***every piece of future taxing legislation*** without regard to the four percent signature requirement. *Id.* at 244 (emphasis added)

Again, Amici urge this Court to ignore the *Amalgamated Transit* court’s obvious concern regarding the scope of I-695. Respondents respectfully suggest that the extreme nature of I-695 itself, requiring voter approval for ***all*** tax or fee increases, even fees as trivial as late fees for library books, was an open invitation for the *Amalgamated Transit* court to launch multiple missiles to kill a mouse. Here, the TPA only operates to require voter

approval for those few bills that would result in expenditures in excess of the state expenditure limit. *See* RCW 43.135.035(2)(a).

2. The Legislature Does Have the Authority to Condition Legislation on Voter Approval

Amici also urge this Court to ignore the express concerns of the *Amalgamated Transit* court regarding the People, via initiative, foisting their desire to vote on tax increases, upon an unwilling Legislature. In this regard, the Court stated:

Finally, under section 2 of I-695 the legislation that is allegedly conditioned is not legislation enacted by the people acting in their legislative capacity but is instead legislation enacted by the Legislature. Thus, the legislative body passing the tax legislation is not the legislative body determining that effectiveness would be expedient only on approval of the voters.

Id. at 242. Here, by ‘reenact[ing] and reaffirm[ing]’ the TPA, the Legislature has found it expedient to refer its own bills to the People.

Amici dismiss the above analysis by arguing that the Legislature must have the discretion to refer individual measures to the voters. First of all, nothing in the plain language of Article II, Section 1 refers to discretion on individual bills. Second, the *Amalgamated Transit* decision never explained how such discretion could be exercised. In fact, Article II, Section 1(d) expressly states that “[Article II, Section 1] is self-executing but legislation may be enacted to facilitate its operation.” In other words, the Legislature has the authority to provide its own procedures for

“facilitating” the right of referendum. *See also Coppernoll v. Reed*, 155 Wn.2d 290, 297 n.4, 119 P.3d 318 (2005). The Legislature’s decision to “reenact[] and reaffirm[]” the TPA unquestionably facilitates the right of referendum. RCW 43.135.080.

In addition, inasmuch as the Legislature reenacted and reaffirmed the TPA it has, in effect, chosen to exercise its discretion each time that a bill is considered that would increase spending over the state expenditure limit. Such discretion is exercised each time that the Legislature enacts legislation that would result in expenditures in excess of the state expenditure limit, while simultaneously declining the amend or repeal the voter approval requirement of the TPA. A simple majority vote is all that is required for either action.

E. Amici’s Emergency Clause Issue Has Not Been Advanced By Any Party to this Litigation

Next, Amici argue that the TPA “is an unconstitutional attempt to circumvent Article II, Section 1(b)’s express exemption of state tax measures from referendum.” Br. of Amici at 14. Inasmuch as this is an issue only raised by Amici, the Court is obligated to disregard it. However, Respondents will provide a brief response.

Amici are keenly aware that the manner in which the Legislature invokes the “emergency” exception of Article II, Section 1(b) is to place an emergency clause in the considered legislation. *See Washington State Farm*

Bureau v. Reed, 154 Wn.2d 668, 673, 115 P.3d 301 (2005) (Under Article II, section 1 of the Washington State Constitution, legislation **enacted pursuant to the emergency clause** is exempt from the referendum process.”) (emphasis added). However, Amici then argue that “any legislation that ‘generates revenue for the state is deemed support.” In other words, Amici argue that any tax measure is *per se* an emergency, regardless of whether the Legislature deems it as such via the attachment of an emergency clause. This is not the law.

F. Even if the Voter Approval Provision of the TPA is Unconstitutional, it is Severable from the Remainder of the Act

Finally, Respondents have previously argued that, even if the State prevails on its argument that the voter approval requirement in RCW 43.135.035(2) is unconstitutional, that does not give the State the practical result that it seeks. Opening Br. of Respts. at 53-54. If the voter approval requirement is unconstitutional, the State is left with the following language:

If the legislative action under subsection (1) of this section will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect

...

RCW 43.135.035. *Id.* Similarly, even if this Court were to strike this subsection in its entirety, RCW 43.135.025(1) is an independent portion of the TPA that expressly reiterates the same principle: “The state shall not

expend from the general fund during any fiscal year state moneys in excess of the state expenditure limit established under this chapter.”

Contrary to the assertions of Amici, there simply is no authority that suggests that unless each and every purpose is fulfilled, partially invalid legislation must be struck down in its entirety. If this were the case, no severance clause could ever be given effect by this Court. The mere decision to invalidate one part of legislation, would be a decision *per se* not to fulfill one of the purposes of the legislation.

Amici reach this conclusion by citing *Hall v. Niemer*, 97 Wn.2d 574, 583-84, 649 P.2d 98 (1982) for an incorrect proposition: “Under the first prong of the severance analysis, it is not sufficient to find a statute can still achieve some, but not all, of its intended purposes.” Br. of Amici at 16. In reality, the *Hall* court declined to sever an invalid portion of an Act not because one of the purposes was no longer fulfilled, but rather because “[a]ll [five] purposes, except the last [were undermined by the invalidity of the [specific provision.]” *Hall*, 97 Wn.2d at 583.

Here, the best that Amici can muster is to argue that only one of the seven express purposes of the TPA cannot be fulfilled if the voter approval provision is severed. All other stated purposes of the TPA can be fulfilled even if the voter approval requirement is invalidated, which include the following:

- Establish a limit on state expenditures, RCW 43.135.010(4)(a)
- Assure that local governments are provided funds adequate to render those services deemed essential by their citizens, RCW 43.135.010(4)(b)
- Assure that the state does not impose responsibility on local governments for new programs or increased levels of service under existing programs unless the costs thereof are paid by the state, RCW 43.135.010(4)(c)
- Provide for adjustment of the limit when costs of a program are transferred between the state and another political entity, RCW 43.135.010(4)(d)
- Establish a procedure for exceeding this limit in emergency situations, RCW 43.135.010(4)(e)
- Avoid overfunding and underfunding state programs by providing stability, consistency, and long-range planning, RCW 43.135.035

It is indeed ironic that in their zeal to request this Court to invalidate the TPA, Amici argue that no parts of the TPA are severable. Yet, wholesale invalidation of the TPA I-695 would remove one of the last tools that local jurisdictions have in Washington State to prevent unfunded state mandates. *See* RCW 43.135.060(1) (“[T]he legislature shall not impose responsibility for new programs or increased levels of service under existing programs on any political subdivision of the state unless the subdivision is fully reimbursed by the state for the costs of the new programs or increases in service levels.”). Local governments have often sought the assistance of our courts to enforce this provision.

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FILED AS ATTACHMENT
TO E-MAIL

DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On November 15, 2006, a true and correct copy of 1) Respondents' Answer to Amicus Curiae Gary Locke, (2) Respondents' Answer to Amici Curiae Washington Education Association, Washington Federation of State Employees AFL-CIO, & Washington State Labor Council was transmitted either by e-mail or facsimile and placed in an envelope, which envelope with postage thereon fully prepaid was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington, addressed to the following persons:

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I declare under penalty of perjury that the foregoing is true and
correct and that this declaration was executed this 15th day of November,
2006 at Bellevue, Washington.

Linda Hall

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