

NO. 81287-0

SUPREME COURT OF THE STATE OF WASHINGTON

LISA BROWN, Washington State
Senator and Majority Leader of the
Washington State Senate,

Petitioner,

v.

BRAD OWEN, Lieutenant Governor of
the State of Washington,

Respondent.

RESPONSE TO
PETITIONER'S
MOTION FOR
ACCELERATED
REVIEW

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I. IDENTITY OF RESPONDENT

Respondent, the Lieutenant Governor of the State of Washington, submits this response to Petitioner's Motion For Accelerated Review of Petition Against State Officer.

II. STATEMENT OF THE CASE

This action, brought by a single legislator and styled as an original action in mandamus against the Lieutenant Governor seeks to have the Court declare that the supermajority vote requirement for tax increases in RCW 43.135.035(1) is invalid. This statutory provision has existed without challenge by the Legislature for more than fourteen years. In fact, the Legislature has reenacted it on several occasions. Through this action,

filed yesterday afternoon, Petitioner asks to have the statute's fate briefed, argued and determined by the Court in the space of less than ten days – before the end of the current legislative session on March 13, 2008.

III. ARGUMENT

This action presents several complex and important legal issues, including questions relating to whether mandamus properly lies, justiciability, separation of powers, and the scope of legislative authority under the state Constitution. These matters cannot be fully or fairly briefed by Respondent or determined by the Court in less than two week's time, as Petitioner requests. Accordingly, Petitioner's Motion for Accelerated review should be denied.

Petitioner's filings assume that the question – and the only question – presented by this action is the validity of RCW 43.135.035(1). As briefly explained below, it is doubtful that this action properly presents that issue at all. However, it plainly presents other important and complex issues, some of which are set forth below, and none of which are discussed in Petitioner's Initial Brief, also filed yesterday afternoon. These issues cannot be fairly or fully presented to the Court, or fairly and carefully considered by the Court on the accelerated basis that Petitioner seeks.

A. This Action Implicates Significant Issues Relating To The Propriety Of Mandamus And This Court's Original Jurisdiction

A writ of mandamus properly issues from this Court only to compel the performance of a ministerial duty expressly imposed upon a state officer. *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998). The only action of Respondent in this case is his ruling on a point of order, that under RCW 43.135.035(1), SB 6931 required a two-thirds majority vote for passage. In this regard, Respondent concluded only that the Lieutenant Governor is without authority to hold an existing state statute unconstitutional. Petitioner would seem to agree with Respondent's conclusion in this respect, recognizing in several pleadings filed with this Court, that it is the exclusive province of the judiciary to determine the constitutionality of statutes. See, e.g., Petition at 9; Petitioner's Initial Brief at 13. Moreover, in *Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994), the Court stated that rulings of the sort at issue here made while "presid[ing] over the Legislature, certainly [are] not an appropriate subject for mandamus"

Nonetheless, Petitioner styles this case as an action in mandamus. What law imposes a mandatory duty – or even the authority – on the Lieutenant Governor to determine the validity of existing state law? Petitioner points to none. How then does mandamus appropriately lie in

this case? Petitioner does not address the question. Rather, Petitioner argues that if RCW 43.135.035(1) is unconstitutional, then the Lieutenant Governor should have declared SB 6931 passed as it received a simple majority vote in the Senate. However, if the only body empowered to make that decision, the judiciary, were to declare that RCW 43.135.035(1) is unconstitutional, the Lieutenant Governor would not be called upon to rule on the question of votes required for passage at all.

Second, the Court will not grant a writ of mandamus if there is a plain, speedy, and adequate remedy in the ordinary course of law. *Washington State Coun. of Cy. and City Employees v. Hahn*, 151 Wn.2d 163, 167, 86 P.3d 774 (2004). Under the Permanent Rules of the Senate, Engrossed Senate Resolution 8601, Rules 4 and 32, a legislator who disagrees with a ruling of the presiding officer, may challenge the ruling and it will be overturned if a majority of that body agrees with the challenge. Neither Petitioner nor any other member of the Senate invoked this provision. Why does not this plain speedy and adequate remedy foreclose the availability of mandamus? Petitioner does not say.

Mandamus is not the appropriate vehicle to seek a declaratory judgment that a statute is invalid. "This court's original jurisdiction is governed by the constitution and, by the plain language of the constitution, does not include original jurisdiction in a declaratory judgment action."

Walker v. Munro, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). True enough, Petitioner has found a party to name as Respondent in this action. But for reasons explained above, in actuality, the relief requested is nothing more or less than a declaratory judgment that RCW 43.135.035(1) is invalid. How is that relief a proper matter for the original jurisdiction of this Court? Petitioner does not say.

Moreover, a declaratory judgment would require a justiciable controversy, including parties having genuine and opposing interests. *Walker*, 124 Wn.2d at 411. As previously noted, the Lieutenant Governor did not rule that RCW 43.135.035(1) is valid. Rather, Respondent ruled only that it was not within his authority to make such a determination. What genuinely opposing interest exists between the named parties in this action as to the validity of RCW 43.135.035(1)? Again, Petitioner is silent on this question.

B. This Case Presents Significant Separation Of Powers Issues

“When directing a writ [of mandamus] to the Legislature or its officers, a coordinate, equal branch of government, the judiciary should be especially careful not to infringe on the historical and constitutional rights of that branch.” *Walker*, 124 Wn.2d at 407. If this action actually is an action in mandamus, then a single legislator is asking the Court to inject

itself into the internal procedures of the state Senate and overturn a ruling of its presiding officer. How is this action proper for the judiciary under separation of powers principles? Even if Petitioner could demonstrate that the required elements of mandamus are satisfied, a proposition not demonstrated in Petitioner's pleadings to date, this Court's original jurisdiction in mandamus is discretionary in nature. *Id.* Given the significant separation of powers issues presented by an invitation to inject the Court into an internal legislative proceeding, this Court should exercise that discretion with the aid of ample briefing and with ample time for its own consideration of the matter.

C. Even If This Action Provides An Appropriate Vehicle To Challenge RCW 43.135.035(1), The Statute's Validity Presents An Important Issue Of Constitutional Law And Broad Public Interest That Should Be Given Full And Deliberate Consideration

Even if this case provided a proper vehicle to challenge RCW 43.135.035(1), and even if its validity was the only question before the Court, that issue alone would warrant full and considered briefing by the parties and careful determination by the Court that cannot reasonably be accomplished in the time proposed by Petitioner. The validity of RCW 43.135.035(1) implicates fundamental issues of legislative power that are of as great importance to the people in their legislative capacity as to the Legislature itself. If such a determination is to be made, in good

conscience, it should not be made in a mere handful of days, as Petitioner seeks.

D. If The Court Grants The Petitioner's Alternative Request For A More Reasonable Briefing Schedule, Respondent Should Not Be Foreclosed From Briefing And Arguing All The Important Issues Raised In This Case

As an alternative to accelerated review, Petitioner asserts that "this Court should retain this case to determine the Constitutional question raised, and set a briefing and hearing schedule that allows the final termination of that decision before the next legislative session begins in January 2009." Although petitioner does not expressly make this argument, her request for alternative relief is based on the contention that the case falls within the exception to the rule that the Court will not decide cases that are moot. However, even if a case is technically moot, the Court will retain jurisdiction if the case involves "matters of continuing and substantial public interest are involved." *Matter of Eaton*, 110 Wn.2d 892, 895, 757 P.2d 961, 963 (1988). To fall within this exception, "[t]hree criteria must be considered when determining whether the requisite degree of public interest exists: (1) the public or private nature of the question presented, (2) the need for a judicial determination for future guidance of public officers, and (3) the likelihood of future recurrences of the issue." *Id.* In Respondent's view, this case meets these criteria and the Court may retain jurisdiction.

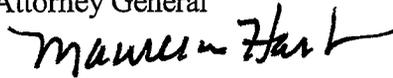
Respondent does not agree that the Court should retain jurisdiction only to decide the Constitutional question raised by Petitioner. If the Court grants the alternative relief, the only issue that is not before the Court is mootness. As the above discussion briefly demonstrates, this case may well be disposed of without reaching the validity of RCW 43.135.035(1). To the extent Petitioner's alternative request regarding review seeks to foreclose Respondent from raising issues legitimately presented by this case, the request is overly broad and to that extent, it should be denied.

Respondent has no objection to litigating this case in the ordinary course, or even on an accelerated basis, provided that Respondent is afforded the full time for briefing provided by the rules of this Court. Nor does Respondent intend to assert that this case must be litigated within this legislative session or not at all. However, Respondent does not agree to the relief sought by the Petitioner that "this Court should retain this case to determine the constitutional question raised." As the above discussion briefly demonstrates, this case may well be disposed of without reaching the validity of RCW 43.135.035(1). To the extent Petitioner's alternative

request regarding review seeks to foreclose Respondent from raising issues legitimately presented by this case, the request is overly broad and to that extent, it should be denied.

RESPECTFULLY SUBMITTED this 4th day of March,
2008.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of March, 2008, at Olympia, WA.



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