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No. 81287-0

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SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

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.

FILED
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CLERK OF SUPREME COURT
STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

We all see the elephant.¹ It's the straightforward question of whether the 2/3 supermajority provision in RCW 43.135.035(1) is constitutional. It either is or isn't.

Senate Bill 6931 received the simple majority vote specified for passage by Article II, §22 of our State Constitution. The Lieutenant Governor nonetheless pronounced that Bill "lost" because it did not receive the 2/3 supermajority specified by RCW 43.135.035(1). His submissions to this Court state that he "did not forward SB 6931 to the House of Representatives because it did not receive a two-thirds vote."²

But if the statute's 2/3 supermajority provision is unconstitutional, the Lieutenant Governor had no lawful authority or discretion in our Constitutional democracy to do anything other than declare that Bill "passed" for forwarding on to the House.

This Court should not ignore the elephant. It is the exclusive province and duty of this Court to decide whether a statutory provision is constitutional. The Petitioner in this case simply asks that this Court fulfill that constitutional duty. And as outlined below, the Lieutenant Governor's Response does not refute the dispositive conclusion that the 2/3 supermajority provision in RCW 43.135.035(1) is unconstitutional.

¹ "There is an elephant in the courthouse. The majority knows the elephant is there. **** It is an obvious elephant." Washington State Farm Bureau Federation v. Gregoire, 162 Wn.2d 284, 314, 174 P.3d 1142 (2007) (Chambers, J., concurring).

² ASF000139, ¶4.

II. LEGAL DISCUSSION

A. **The Lieutenant Governor Is Wrong: *The Statute's 2/3 Supermajority Provision Is Not Constitutional.***

The constitutionality of the statutory provision at issue turns on how this Court interprets the following clause in our Constitution:

Passage of bills. No bill shall become a law unless ... a majority of the members elected to each house be recorded thereon as voting in its favor.

Article II, §22.

The Lieutenant Governor emphatically denies that this clause renders the 2/3 supermajority provision in RCW 43.135.035(1) unconstitutional.³ Petitioner emphatically argues the opposite.⁴ As the following pages explain, the Lieutenant Governor's Response Brief fails to refute that the Petitioner's interpretation is correct.

1. **Petitioner's interpretation of Article II, §22 makes sense.**

This interpretation dispute boils down to a basic question: does the simple majority clause of our Constitution set only a "floor", or does it also set a "ceiling".

The Lieutenant Governor's Response insists that Article II, §22 sets only a "constitutional floor" – and thus "It does not prohibit the

³ E.g., *Resp.Br. at 1:17-18* ("this Court should deny the petition on the merits because RCW 43.135.035(1) is valid") and at 34-48 (arguing "the statute is valid"); see also *Petitioner's April 25, 2008 Updated Initial Brief at 4 n.10* (quoting the passages from ASF000140-44 where the Respondent Lieutenant Governor repeatedly denies that RCW 43.135.035(1) is unconstitutional).

⁴ E.g., *Petitioner's April 25, 2008 Updated Initial Brief at 11-16*; see also ASF000065 at ¶5, ASF000071-72 at ¶¶19-21, ASF000073-74 at ¶¶25-28, and ASF000075 at ¶4 (*Petitioner's Petition insisting that RCW 43.135.035(1) is not constitutional*).

Legislature or the people from enacting statutes that require a larger majority when they deem greater legislative consensus advisable.”⁵

If that “floor-but-not-a-ceiling” interpretation is correct, then it is constitutional for RCW 43.135.035(1) to impose a 2/3 supermajority requirement on the passage of bills which increase taxes.

Under that interpretation of Article II, §22, however, it would likewise be constitutional for a statute to impose a 9/10 supermajority requirement on the passage of bills which decrease taxes. And it would also be constitutional for that statute to require a 9/10 supermajority to amend its supermajority requirement.

That interpretation of our Constitution does not make sense.

Instead, it makes sense to interpret the bill passage clause of our State Constitution to provide that the passage of a bill requires a majority. Not less. Not more. Simply a majority. Article II, §22 provides that a simple majority is what passes a bill in our Constitutional framework.

2. Petitioner’s interpretation is consistent with the underlying premise of democracy: *majority (not minority) rule*.

The interpretation of Article II, §22 proposed by Respondent’s Brief also ignores the fact that *majority* rule has been a bedrock tenet of our democracy since its founding. E.g., Thomas Jefferson, *Notes on the State of Virginia* (1787), at 171 in *The Portable Thomas Jefferson* (Merrill D Peterson, ed., Viking 1975) (majority rule “is the natural law of every assembly of men”).

⁵ *Brief Of Respondent at 38:3-8 and at 9:11-14 (underline added).*

That is important because a supermajority system allows a *minority* to rule instead. As James Madison explained when describing why supermajority votes were inappropriate for the passage of legislation:

In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority.

The Federalist No. 58, at 397 (James Madison) (Jacob E. Cooke ed., 1961). Alexander Hamilton accordingly described laws requiring a supermajority as “a poison” – explaining that:

To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser.

The Federalist No. 22, at 149 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

For example, a 2/3 supermajority requirement allows a minority of 34% to dictate if a bill becomes law. A 9/10 supermajority requirement allows a minority of 11% to dictate if a bill becomes law. The Response Brief’s floor-but-not-a-ceiling interpretation of Article II, §22 allows a statute to so substitute *minority* rule for the fundamental principle of *majority* rule that underlies the constitutional framework of our democracy.

The Petitioner’s interpretation, on the other hand, is consistent with our democracy’s bedrock principle of majority (not minority) rule. Petitioner interprets Article II, §22 to provide that passage of a bill requires a majority. Not less. Not more. Simply a majority.

3. Petitioner's interpretation is consistent with the fact that when our Constitution intends to allow the exception of *minority* rule, it does so expressly.

Given the fundamental premise of majority (rather than minority) rule underlying the constitutional framework of our democracy, it is not surprising that when our Constitution intends to allow for the exception of minority (rather than majority) rule, our Constitution expressly specifies when those exceptions occur. The Response Brief misses the importance of this fact as well.

When our Constitution's framework intends to allow a minority of 34% to dictate whether legislative action is taken, our Constitution provides so expressly by specifying a 2/3 supermajority requirement which trumps the simple majority requirement of Article II, §22. For example, our State Constitution specifies such a 2/3 supermajority requirement to amend an initiative within two years, to overturn the governor's veto, or to call a constitutional convention.⁶

In fact, our State Constitution specifies ten types of votes that require a 2/3 supermajority in the legislature for passage.⁷ That our framers separately specified ten instances where a 2/3 supermajority is allowed as an exception to our democracy's fundamental principal of majority rule supports the conclusion that our framers believed

⁶ Article II, §1(c); Article III, §12; Article XXIII, §2. These three supermajority provisions are described in Petitioner's April 25, 2008 Updated Initial Brief at 12 n.23.

⁷ In addition to the three cited above, the other seven are Article II, §9; Article II, §12; Article II, §36; Article II, §43; Article V, §1; Article XXIII, §1; and Article XXVIII, §1. These seven supermajority provisions are also described in Petitioner's April 25, 2008 Updated Initial Brief at 12 n.23.

supermajority requirements are of constitutional (rather than merely statutory) significance.

None of the ten instances specified by our Constitution, however, include the category of bills covered by RCW 43.135.035(1). Instead, RCW 43.135.035(1) creates a new, eleventh category of legislative acts in our State that require a 2/3 supermajority vote – a statutory creation which in practical effect revises the simple majority provision of Article II, §22 to instead provide as follows:

Passage of bills. No bill shall become a law unless ... a majority of the members elected to each house be recorded thereon as voting in its favor, *with the exception that no bill that raises taxes shall become a law unless it receives a 2/3 supermajority vote in each house.*

Interpreting Article II, §22 to allow a mere statute to effectively add that italicized language to the bill passage clause of our Constitution is not consistent with the fact that when our Constitution intends to allow for the exception of 34% minority (rather than simple majority) rule, it does so expressly by specifying a 2/3 supermajority requirement.

The Petitioner's interpretation, on the other hand, is consistent with that constitutional fact. Correctly interpreted, Article II, §22 provides that passage of a bill requires a majority. Not less. Not more. Simply a majority. When our Constitution intends for an exception to this fundamental premise of majority rule underlying the framework of our democracy, our Constitution says so expressly. And RCW 43.135.035(1) is not one of those express exceptions.

4. **Petitioner's interpretation of the "negative phrasing" in Article II, §22 is consistent with this Court's interpretation of such "negative phrasing" in Article II, §7 and Article III, §25.**

The Response Brief's main argument in favor of its "floor-but-not-a-ceiling" interpretation is that the "negative phrasing" of Article II, §22 means its majority vote requirement is merely a minimum which can be added to by statute.

But that is the same negative phrasing argument that this Court rejected in *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (1998).

Gerberding concerned the qualification clauses of our Constitution (Article II, §7 and Article III, §25) – clauses which, like our Constitution's bill passage clause (Article II, §22), are phrased in the negative:

Qualifications of legislators. No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen. [Article II, §7.]

Qualifications, compensation, offices which may be abolished. No person, except a citizen of the United States and a qualified elector of this state, shall be eligible to hold any state office.... [Article III, §25.]

The Respondents in *Gerberding* argued that a statute could add a term limit requirement to those qualifications because "the negative phraseology of the Constitution indicates the qualifications for state constitutional officers are minimums to which the Legislature or the people may add by statute." 134 Wn.2d at 201 (underline added).

This Court unequivocally rejected the Respondents' "negative phrasing" argument, and accordingly struck down as unconstitutional the statute at issue that added an additional term limit requirement. *Gerberding*, 134 Wn.2d at 191.

The Respondent's Brief in *this* case nonetheless argues that the framers' use of that same type of negative phrasing in the bill passage clause must be interpreted the opposite way because:

- *Gerberding* observed that there is a "strong presumption in favor of eligibility for office" that is a "fundamental principle" in a democracy (Resp. Br. at 44:1-4). But that same type of circumstance exists here since the bedrock principle of majority (rather than minority) rule in a democracy is no less "fundamental".
- *Gerberding* observed that the framers considered the subject of term limits, and adopted them for only certain specified offices (Resp. Br. at 44:6-9). But that same type of circumstance exists here since the framers considered the subject of 2/3 supermajorities as well, and adopted them for only ten specified types of legislation.
- *Gerberding* observed that its interpreting negative phrasing as both a floor and a ceiling was supported by "nearly uniform precedent from throughout the country" (Resp. Br. at 44:9-12). But that same type of circumstance exists here – indeed *Gerberding* interpreted the same type of negative phrasing language that is at issue here.

In short, Petitioner's interpretation of the "negative phrasing" in Article II, §22 is consistent with this Court's interpretation of such phrasing in Article II, §7 and Article III, §25. And the Response Brief does not refute the straightforward conclusion that that phrasing should be interpreted the same way when it is used in different parts of our Constitution.

5. Petitioner's interpretation of Article II, §22 is consistent with Michigan's interpretation of the Michigan Constitution's similarly-phrased bill passage clause.

Petitioner's Brief explained that her interpretation of Article II, §22 is consistent with the formal opinion issued by the Michigan Attorney

General interpreting the similarly-phrased bill passage clause in the Michigan Constitution.⁸

Respondent's Brief does not address or refute the Attorney General's reasoning. Instead, it summarily states that this Court should ignore that formal State Attorney General Opinion because its conclusion is based on "meager reasoning". Resp. Br. at 40 n.15. Its analysis and reasoning, however, is far more developed than the conclusory assertion in the California court of appeals decision that Respondent cites as the only legal authority accepting the interpretation Respondent advances.

6. Petitioner's interpretation of Article II, §22 is consistent with the Supreme Court of Alaska's interpretation of the Alaska Constitution's similarly-phrased bill passage clause.

Petitioner's Brief also explained that her interpretation of Article II, §22 is consistent with the Supreme Court of Alaska's interpretation last year of the similarly-phrased bill passage clause in the Alaska Constitution.⁹

Respondent's Brief suggests that this Court should ignore the Alaska Supreme Court's conclusion because, unlike Washington:

- Alaska might not recognize that "the State Constitution is a restriction on otherwise plenary legislative authority" (Resp. Br. at 40:9-10). But Alaska does.¹⁰

⁸ *Petitioner's April 25, 2008 Updated Initial Brief at 15-16 (discussing 1998 Mich. OAG No. 6990, 1998 WL 477683 (Mich.A.G.)).*

⁹ *Petitioner's April 25, 2008 Updated Initial Brief at 14-15 (discussing Alaskans for Efficient Government v. State, 153 P.3d 296 (Alaska 2007)).*

¹⁰ *E.g., Yute Air Alaska v. McAlpine*, 698 P.2d 1173, 1176 (Alaska 1985) ("Analytically, laws may be enacted on any subject under the sun. ... Only if one can point to some prohibition expressed or implied in the state or federal constitutions can it be said that some proposed law would violate the constitution and may not, therefore, be the subject of [the legislation at issue]")

- Alaska might not recognize that “statutes are entitled to a presumption of constitutionality” (Resp. Br. at 40:12). But Alaska does.¹¹
- Alaska might not look to “the plain language” when interpreting its Constitution (Resp. Br. at 40:14-15). But Alaska does.¹²

Given our two States’ similar rules of constitutional interpretation, it is therefore not surprising that this Court’s interpretation of the negatively phrased qualifications clause in the Washington Constitution expressly cited (and adopted) the Alaska Supreme Court’s interpretation of such negative phrasing in the Alaska Constitution. *Gerberding*, 134 Wn.2d at 206 & 200 (citing *Alaskans for Legislative Reform v. State*, 887 P.2d 960, 966 (Alaska 1994)). Although Respondent’s Brief dismisses the Alaska Supreme Court’s (and thus also the *Gerberding* Court’s) interpretation as giving a “short shrift” to negative phrasing language, Respondent’s Brief provides no persuasive reason to now change course and start interpreting negatively phrased language the opposite way.

7. The California intermediate court ruling cited by Respondent does not refute the logic of the above or establish that the Washington Constitution allows statutes to establish minority rule in our State.

The Response Brief argues at 38-39 that the logic of Petitioner’s interpretation of Article II, §22 is refuted by an intermediate court of appeals ruling from California – i.e., *People v. Cortez*, 6 Cal.App.4th 1202 (1992).

¹¹ E.g., *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 34 (Alaska 2007) (“Statutes are presumed to be constitutional, and the burden of showing that they are unconstitutional is on the party challenging the statute (footnote citation omitted).”)

¹² E.g., *Alaska Public Interest Research Group*, 167 P.3d at 34 (“In interpreting the constitution, we adopt a reasonable and practical interpretation in accordance with commonsense based upon the plain meaning and purpose of the provision and the intent of the framers”) (footnote citations & internal quotation marks omitted).

That case concerned a felony enhancement statute enacted by the California voters as part of Proposition 8. That voter initiative provided that it could be amended by the legislature only with a two-thirds vote.¹³ In 1986, the California legislature did amend it by a two-thirds vote.¹⁴ After being sentenced for a domestic violence kidnapping pursuant to that amendment,¹⁵ Mr. Cortez challenged his sentence on several grounds – one of which was a claim that the legislature’s prior amendment of the enhancement statute was invalid because the initiative’s two-thirds requirement for amendments (subdivision (f)) conflicted with the following two interrelated provisions of the California Constitution:

Article IV, §8(b): The Legislature may make no law except by statute and may enact no statute except by bill.... No bill may be passed unless ... a majority of the membership of each house concurs.

Article II, §10(c): The Legislature ... may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

6 Cal.App.4th at 1211. (The Response Brief’s suggestion *Cortez* involved only one provision is accordingly misplaced.)

The court of appeals disagreed, noting that (1) the initiative statute’s provision permitting amendment without voter approval only if the amendment received a two-thirds vote of the legislature is consistent with these two interrelated provisions of the California Constitution

¹³ 6 Cal.App.4th at 1209-10 (codified as subdivision (f) of Penal Code §667).

¹⁴ 6 Cal.App.4th at 1211 (noting that it was amended in 1986 by the means specified in the previously-noted subdivision (f)).

¹⁵ 6 Cal.App.4th at 1207-08.

[6 Cal.App.4th at 1211-12 (“Section 667, subdivision (f) is consistent with these provisions”)], and that (2) the amendment which the defendant wanted the court to invalidate had in fact passed by the majority vote that the defendant insisted was constitutionally required [6 Cal.App.4th at 1212 (“Clearly a bill which obtains the approval of two-thirds of the membership of each house has also obtained the approval of a majority of the legislators in each house”)].

In short, the intermediate California decision upon which the Respondent’s Brief relies does not even address – never mind analyze or refute – the previously discussed reasons that support the Petitioner’s interpretation of the Washington Constitution’s Article II, §22.

8. The Response Brief’s arguments do not refute Petitioner’s interpretation of Article II, §22.

In short, the answer to the underlying constitutional question in this case is clear. The 2/3 supermajority requirement imposed by RCW 43.135.035(1) is unconstitutional. Such a supermajority requirement can be added by a constitutional amendment. But it cannot be added by the enactment of a statute.

B. Separation Of Powers Supports (rather than prohibits) The Judicial Branch’s Deciding If The 2/3 Supermajority Statute Is Constitutional.

The Lieutenant Governor insists that Washington law prohibits him from forwarding on to the House tax Bills (like Senate Bill 6931) that receive a simple majority vote because he has no lawful right, discretion, or authority to anything other than obey the 2/3 supermajority provision in

RCW 43.135.035(1) unless a court declares it unconstitutional. And he explains that the reason for his insistence is separation of powers:

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. ... Senator Brown's arguments are cogent and persuasive, but the proper venue for these legal arguments is in the courts, not in [the Senate]. For these reasons, the [Lieutenant Governor] believes he lacks any discretion to make such a ruling, and he explicitly rejects making any determination as to the Constitutionality of [RCW 43.135.035(1)] and instead is compelled to give its provisions the full force and effect he would give any other law.¹⁶

His lawyers now argue the opposite – insisting that separation of powers prevents this Court from resolving whether the 2/3 supermajority provision in RCW 43.135.035(1) is constitutional.

The Lieutenant Governor's lawyers are wrong:

One of (if not the) most fundamental functions of the judicial branch is to resolve Constitutional questions. The “ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary.”¹⁷ This Court accordingly holds that it “is emphatically the province and duty of the judicial department to say what the law is, even when that interpretation serves as a check on the activities of another

¹⁶ ASF000020; same quote at ASF000084-85.

¹⁷ *Seattle School District v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978) (citations and quotation marks omitted); see also, e.g., *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 303-04, 171 P.3d 1142 (2007) (“The legislature is precluded by the constitutional doctrine of separation of powers from making judicial determinations”).

branch or is contrary to the view of the constitution taken by another branch.”¹⁸

¹⁸ Seattle School District, 90 Wn.2d at 496 (citations and quotation marks omitted). This Court accordingly does not hide behind the separation of powers doctrine to avoid cases involving constitutional provisions, even in contentious disputes between legislative officers regarding the action of legislative branch officers with respect to legislation. For example, “when vetoing bills, the Governor acts as part of the Legislature”. Spokane County Health District v. Brockett, 120 Wn.2d 140, 154, 839 P.2d 324 (1992). This Court has nonetheless exercised its role as final arbiter of our State Constitution in disputes between the elected legislators on the one hand and the Governor (serving in his legislative capacity exercising a veto) on the other. Washington State Legislature v. Lowry, 131 Wn.2d 309, 931 P.2d 885 (1997); Washington State Legislature v. State, 139 Wn.2d 129, 985 P.2d 353 (1999); see also Washington State Grange v. Locke, 153 Wn.2d 475, 105 P.2d 9 (2005) (resolving merits of original jurisdiction action brought by coalition that included four individual legislators who challenged the Governor’s action in his legislative capacity in exercising a veto). The shotgun of cases characterized in the Response Brief do not even address – never mind refute – this basic separation of powers point. Daschbach v. Meyers, 38 Wn.2d 330, 229 P.2d 506 (1951) was really a mootness/standing ruling, not a constitutional question ruling. Gunning v. Odell, 58 Wn.2d 275, 362 P.2d 254 (1961) is not applicable to this suit’s challenge to the existing version of RCW 43.135.035(1) because, as in Futurewise, the Gunning case was not a challenge to an existing law. Dank v. Benson, 5 P.3d 1088 (Okla. 2000) similarly did not challenge any actual legislation. Smith v. City of Centralia, 55 Wn. 573, 104 P. 797 (1909) actually supports the Petitioner here, for the court in that case ended up invalidating the legislation at issue, holding that “clearly the courts have power to inquire into the validity of a law or ordinance after it has passed the legislative body and an attempt to enforce it is made or threatened”. 55 Wn at 576. Grendell v. Davidson, 86 Ohio St. 3d 629, 716 N.E.2d 704 (1999) did not even involve any constitutional provision – it was instead a dispute about over the interpretation of one of the legislature’s conference committee rules. Spaeth v. Meiers, 403 N.W.2d 392 (N.D. 1987) likewise concerned the interpretation of one of the Senate’s rules instead of a constitutional question. Indeed, the prior case cited in that decision, Sanstead v. Freed, 251 N.W.2d 898 (N.D. 1977), held that judicial intervention is warranted when the constitutionality of a rule is challenged. Ex Parte Eschols, 1866 WL 515 (Ala. 1866) does not apply here because it involved the preliminary matter of whether the 2/3 supermajority statute at issue applied (a point that is not an issue in this case) – not the constitutionality of that statute (the dispute that is the issue here). Tuck v. Blackmon, 798 So.2d 402 (Miss. 2001) concerned a procedural rule concerning what happens inside the Senate chamber instead of a substantive provision dictating what legislation passes that chamber. Indeed, Tuck contrasted its ruling on that procedural rule with its prior case law where the court had intervened, quoting the court’s ruling in Dye v. Hale, 507 So.2d 332, 338-39 (Miss. 1987), that “legislators nor the bodies in which they serve are above the law, and in those rare instances where a claim is presented that the actions of a legislative body contravene rights secured by the constitutions of the United States or of

In short, the separation of powers doctrine – and this Court’s fundamental function and duty under that doctrine to be the sole arbiter of constitutional questions – supports (rather than prohibits) this Court’s deciding if the 2/3 supermajority statute violates Article II, §22 of our State Constitution.

C. The Response Brief’s Declaratory Judgment Act Argument Does Not Prevent This Court From Ruling On The 2/3 Supermajority Statute’s Constitutionality.

Respondent’s Brief argues that the Petitioner’s claim does not meet all of the “justiciability” factors for a declaratory judgment.

With respect to the *fourth* factor (whether a judicial determination would be final and conclusive), the Response Brief does not dispute that this factor is satisfied. Indeed, a ruling by this Court is the only way to finally and conclusively determine if the 2/3 supermajority provision in RCW 43.135.035(1) is constitutional under Article II, §22.

With respect to the *first* factor, however, Respondent’s Brief asserts that there is no actual dispute or even the mature seeds of one (Resp. Br. at 30:8-9).

But that assertion is not correct. The Petitioner and Respondent emphatically disagree on whether the statute at issue in this case, RCW 43.135.035(1), violates Article II, §22 of our State Constitution.

this state, it is the responsibility of the judiciary to act, notwithstanding that political considerations may motivate the assertion of the claims nor that our final judgment may have practical political consequences.” Tuck, 798 So.2d at 405 (quoting Dye).

And one thing they agree on is that this case's central dispute over the constitutionality of that statute continues to exist despite the end of the Spring 2008 legislative session which voted on Senate Bill 6931. As Respondent's prior submission to this Court explained:

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*, 11 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 [e.g., the Respondent Lieutenant Governor], 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.¹⁹

The prior submission of the other public officer in this case – Senate Majority Leader Lisa Brown – agreed with the Lieutenant Governor's conclusion about the substantial public interest involved, the need for a judicial determination for future guidance of public officers, and the likely recurrence of this issue if not resolved now.²⁰

With respect to the *second* and *third* factors, Respondent's Brief asserts that the Respondent and Petitioner do not have a substantial, genuine, and opposing interest (rather than a merely theoretical or academic one). Resp. Br. at 32-33.

But the Respondent emphatically maintains that the 2/3 supermajority provision of RCW 43.135.035(1) is constitutional, while

¹⁹ ASF000125 (*Respondent's March 4 Response in opposition to acceleration*);

²⁰ ASF000130 (*Petitioner's March 4 Reply agreeing with the Respondent's Response that this controversy satisfies the legal criteria for the exception to the mootness doctrine if it is not decided before the March 13 end of the legislative session.*)

the Petitioner emphatically insists that it is not. The parties could not be more “opposite”.

As one of the 25 Senators necessary to create the simple majority that voted in favor of Senate Bill 6931, the Petitioner (Senate Majority Leader Lisa Brown) has a direct and substantial interest in this case’s dispute over whether Senate Bill 6931 “passed” or “lost” pursuant to our State Constitution. Indeed, if Senator Brown is correct that the 2/3 supermajority provision at issue in this case is unconstitutional, then her vote (and those of the Washington citizens who elected her) was unconstitutionally dismissed, disregarded, and diluted.

The Respondent (Lieutenant Governor Brad Owen) likewise has a direct and substantial interest in this dispute because this suit’s resolution of the constitutionality of RCW 43.135.035(1) will directly define a significant aspect of his legal obligations with respect to the passage of tax bills out of the Senate – for he contends that Washington law prohibits him from forwarding bills such as Senate Bill 6931 on to the House as passed (by a simple majority) because he has no legal right or authority to disobey the 2/3 supermajority provision of RCW 43.135.035(1) or to declare that provision unconstitutional. The State Attorney General who is vigorously defending the constitutionality of RCW 43.135.035(1) also has a direct and substantial interest in defending the constitutionality of

State statutes.²¹ The extensive briefing and active defense of the statute's constitutionality in this case only further confirm the substantial, genuine, and opposing interests of the two sides actively litigating this dispute.

In short, the "justiciability" factors for a declaratory judgment are satisfied in this case. The Response Brief's claim to the contrary does not prevent this Court from resolving the parties' dispute over the constitutionality of the 2/3 supermajority provision in RCW 43.135.035(1).

D. The Response Brief's Mandamus Argument Does Not Prevent This Court From Resolving This Dispute.

The Response Brief argues this dispute is not a proper "mandamus" case for this Court to resolve under its original jurisdiction.

As a practical matter, the result urged by the Response Brief makes no sense. The Respondent and Petitioner agree there are no factual issues here for superior court fact finding.²² And any superior court ruling on this dispute's legal issue (the constitutionality of RCW 43.135.035(1)) would inevitably be appealed to this Court for final resolution anyway. Requiring a superior court to hear this case first would serve no purpose other than to needlessly increase this litigation's cost and delay its ultimate resolution.

The Response Brief's argument also lacks legal merit.

²¹ *Since Petitioner challenges the constitutionality of a State statute, the original Petition and all this suit's other pleadings have consistently been served on the Attorney General in compliance with RCW 7.24.110. See ASF000067-68 at ¶¶11-12 and ASF000141 at ¶¶11-12.*

²² ASF000177, ASF000219-20, ASF000258.

1. The Response Brief's "discretionary duty" argument is hollow.

This Court recognized over 100 years ago that the Lieutenant Governor's constitutional duties as presiding officer of the Senate under Article III, §16 include approving bills passed by the Senate: "[I]t is made the duty of the lieutenant governor, under the constitution, to be the presiding officer of the state senate (section 16, art. 3), and as such to approve all bills passed by that body". *Murphy v. McBride*, 29 Wn. 335, 340, 70 P. 25 (1902).²³

The Response Brief asserts, however, that this duty with respect to approving bills passed by the Senate is not subject to mandamus because the Lieutenant Governor's decision to comply with the 2/3 supermajority provision enacted by the voters in RCW 43.135.035(1) is a "discretionary" one.²⁴

But that is not how the Lieutenant Governor describes his duty with respect to the action he took in this case. The Lieutenant Governor stated to this Court that he "did not forward SB 6931 to the House of Representatives because it did not receive a two-thirds vote" as required

²³ As a Statewide elected official, the Lieutenant Governor also takes the oath of office specified in RCW 43.01.020 to faithfully discharge the duties of his office." ASF000067, ¶9 and ASF000141, ¶9.

²⁴ E.g., *Resp. Br.* at 26:3-4 (calling it "a discretionary ruling of the Lieutenant Governor"), at 10:10 (calling it an action within the Lieutenant Governor's "discretionary decision-making authority"), at 2:2 (calling it a "discretionary parliamentary ruling"). The Response Brief's repeatedly calling the Lieutenant Governor's compliance with RCW 43.135.035(1) a "discretionary" act, a "parliamentary" matter, or a "point of order" ruling does not change the fact that RCW 43.135.035(1) is currently a Washington State law, and our State's public officials are not above the law. The Response Brief cites no legal authority for the proposition that our State's public officials lawfully have the "discretion" to violate State statutes at their whim or choosing.

by RCW 43.135.035(1).²⁵ And the Lieutenant Governor unequivocally described his action as a *non-discretionary* one that he was *compelled* to take under Washington law:

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. ... Senator Brown's arguments are cogent and persuasive, but the proper venue for these legal arguments is in the courts, not in a parliamentary body. For these reasons, [the Lieutenant Governor] believes he *lacks any discretion* to make such a ruling, and he explicitly rejects making any determination as to the Constitutionality of [RCW 43.135.035(1)] and instead is *compelled* to give its provisions the full force and effect he would give any other law.²⁶

Nor does the Response Brief refute the fact that if the 2/3 supermajority requirement specified in RCW 43.135.035(1) is not constitutional, then in this particular case the Lieutenant Governor had no legal authority under Washington law other than to forward Senate Bill 6931 to the House of Representatives as "passed" pursuant to the bill passage clause of Article II, §22 – for our Constitution does not grant the Lieutenant Governor any power to veto or hold up legislation that constitutionally passes the Senate by simply declaring it "lost" instead.

The Response Brief attempts to avoid this point by citing the statement in *Walker* that "signing of a bill is not a ministerial task, as it involves a decision regarding [1] the number of votes required for a particular action and [2] whether those votes have been properly cast". 124 Wn.2d at 410. But that statement does not apply in this particular

²⁵ ASF000139, ¶4.

²⁶ ASF000020; same quote at ASF000084-85 (*bold italics added*).

case because neither of those two decisions are at issue here. There is no dispute that Senate Bill 6931 triggered the 2/3 supermajority provision of RCW 43.135.035(1) – and thus the number of votes statutorily required for passage was two-thirds. Nor is there any dispute that the 25 votes cast in favor of Senate Bill 6931 were properly cast. The elements of discretion explained in *Walker* simply are not present here. If the supermajority provision of RCW 43.135.035(1) is not valid (as Petitioner claims), all that remained for the Lieutenant Governor to do in this particular case was the ministerial task of approving Senate Bill 6931 as “passed” under Article II, §22 for forwarding on to the House.

2. The Response Brief’s “alternative legal remedy” argument is also hollow.

Washington law provides that a writ of mandamus “must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.”²⁷

The Response Brief asserts that the Petitioner had an alternative legal remedy in that she could have appealed the Lieutenant Governor’s declining to invalidate RCW 43.135.035(1) as unconstitutional to the full Senate.

But that argument fails for at least two reasons.

²⁷ RCW 7.16.170. *Washington law also provides that this Court has original jurisdiction to issue the writs and related relief requested in the Petition Against State Officer in this case. E.g., Washington State Constitution, Article IV, §4 (this Court “shall have original jurisdiction in ... quo warranto and mandamus as to all state officers”); RAP 16.2 & Form 16.*

First, an “appeal” would have been futile because the full Senate had no more authority to declare RCW 43.135.035(1) unconstitutional than did the Lieutenant Governor. Washington law does not require a mandamus petitioner to exhaust avenues that cannot provide the relief sought.²⁸

Second, this Court holds that the legislature does not need to go through the exercise of trying to override a Governor’s veto action before a mandamus challenging that action is sought.²⁹ The same rationale applies here. A mandamus petitioner does not need to go through the exercise of trying to override a Lieutenant Governor’s action that effectively results in a veto before a mandamus challenging that action is sought.

In short, the Response Brief does not refute the simple fact that the Petitioner has no alternative plain, speedy, or adequate remedy under the law to resolve whether the 2/3 supermajority provision of RCW 43.135.035(1) is unconstitutional under Article II, §22.

3. The Response Brief does not refute that this Constitutional dispute is appropriate for resolution in a mandamus action.

This case presents a classic situation where this Court should address the merits of the original jurisdiction mandamus action brought before it. See, e.g., *Pacific Bridge Co. v. Washington Toll Bridge*

²⁸ *E.g., D.C.R. Entertainment v. Pierce County*, 55 Wn.App. 505, 511, 778 P.2d 1060 (1989) (where administrative appeal suffered from the same constitutional deficiency as the official’s action, petitioner could seek a mandamus without exhausting the appeal).

²⁹ *Washington State Legislature v. State*, 139 Wn.2d 129, 136-37, 985 P.2d 353 (1999).

Authority, 8 Wn.2d 337, 1121 P.2d 135 (1941) at 341 (factors relevant to whether the Court will address the merits of a mandamus petition are whether the case “involve[s] the interests of the state at large, or of the public, or when it is necessary in order to afford an adequate remedy”) and at 342 (proper to issue mandamus when petitioner seeks “to enforce the performance of high official’s duties affecting the public at large”); *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 54, 65 P.3d 1203 (2003) (agreeing to address merits because “there is sufficient public interest” in the merits). This is particularly true “where it appears to [the Court] that the ordinary course of procedures will not be capable of giving justice.” *State v. Hinkle*, 131 Wn. 86, 90, 229 P. 317 (1924).

The fundamental legal issue in this case – the constitutionality of the 2/3 supermajority provision in RCW 43.135.035(1) – has broad public import. This dispute involves the constitutional authority of a State Officer (the Lieutenant Governor), and the constitutional authority vested in the People’s duly elected representatives in the State Senate to enact laws with the simple majority vote specified in Article II, §22. And as confirmed by the fact that this is now the third time a petitioner has attempted to bring this unresolved constitutional issue to this Court, this 2/3 supermajority issue involves a fundamental question of constitutional law that is incapable of being resolved through other legal procedures.

III. CONCLUSION

Unlike *Walker*, this case presents an actual bill that triggered the 2/3 supermajority requirement of RCW 43.135.035(1). And unlike

Futurewise, this case challenges the actual, currently-existing version of the 2/3 supermajority requirement in RCW 43.135.035(1). The reasons this Court gave for postponing its resolution of the constitutionality of the 2/3 supermajority requirement in RCW 43.135.035(1) therefore do not exist in this case.

The 2/3 supermajority provision in RCW 43.135.035(1) is either constitutional or is it not. Part II.A of this Reply Brief confirms that it is not.

The Lieutenant Governor accordingly had no legal right or authority to refuse to forward Senate Bill 6931 on to the House as “passed” based on the fact that it did not receive the 2/3 supermajority vote specified in RCW 43.135.035(1). The Lieutenant Governor similarly has no legal right or authority to refuse to forward any other Senate Bill on to the House as “passed” based on the fact that that bill did not receive the 2/3 supermajority vote specified in RCW 43.135.035(1).

No legitimate purpose is served by once again putting off the resolution of this case’s underlying constitutional dispute for yet another day. Consistent with the Respondent Lieutenant Governor’s and State Attorney General’s admissions that this controversy is of such continuing and substantial public import that it satisfies the exception to the mootness doctrine, this Court should issue the relief requested by the Petitioner in this case. The Petitioner therefore respectfully requests that this Court accordingly confirm that:

1. the 2/3 supermajority requirement imposed by RCW 43.135.035(1) is unconstitutional under Article II, §22 of the Washington State Constitution;
2. Washington law therefore (a) prohibited the Lieutenant Governor from refusing to forward Senate Bill 6931 on to the House as passed on the grounds that it received only a majority vote instead of the 2/3 supermajority vote specified by RCW 43.135.035(1), and (b) obligated the Lieutenant Governor to forward Senate Bill 6931 on to the House as passed because it received the majority vote specified in Article II, §22, and the 2/3 supermajority requirement of RCW 43.135.035(1) is unconstitutional.
3. Washington law prohibits the Lieutenant Governor from refusing to forward Senate Bills on to the House as passed on the grounds that they received only a majority vote instead of the 2/3 supermajority vote specified by RCW 43.135.035(1), because the 2/3 supermajority requirement of RCW 43.135.035(1) is unconstitutional under Article II, §22.

RESPECTFULLY SUBMITTED this 14th day of July, 2008.

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