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SUPREME COURT
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STATE OF WASHINGTON,

Petitioner,

v.

LEAGUE OF EDUCATION VOTERS, *et al.*,

Respondent.

BRIEF OF *AMICUS CURIAE* ON BEHALF OF THE LEAGUE OF
WOMEN VOTERS OF WASHINGTON

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The League of Women Voters of Washington (“the League”) is a statewide, nonprofit, nonpartisan organization that encourages informed and active participation in government, and influences public policy through education and advocacy. The League has developed a reputation for thorough study before building consensus and taking action. The League’s members are committed to a representative government that maintains an equitable and flexible taxation system. To that end, the League has voiced its opposition to the unconstitutional process by which the Legislature’s plenary power to pass tax laws has been restricted.

II. STATEMENT OF THE CASE

Appellants have asked the Court to resolve many issues in this case, but *amicus* addresses only one: whether RCW 43.135.034(1)’s requirement that two-thirds of the legislature approve tax legislation before it can be enacted is constitutional. The State of Washington, relying on a textual interpretation of the phrase “unless a majority,” contends that this requirement is constitutional. Respondents disagree, asserting, in part, that legislative vote thresholds are matters of “constitutional concern” that cannot be changed through the initiative process. *Amicus* agrees with Respondents’ position and respectfully

requests that the Supreme Court affirm the superior court's holding that RCW 43.135.034(1) is unconstitutional.

The League advances two unique arguments for the Court's consideration. First, the two-thirds requirement is unconstitutional because the legislature possesses plenary power to enact legislation—including tax legislation—which can only be limited by the state or federal constitutions, not by statute or initiative. Because the two-thirds requirement restricts the legislature's ability to exercise its plenary power to pass tax legislation, it cannot be accomplished through initiative. Second, the debates surrounding article XI during Washington's constitutional convention in 1889 show that the Framers intended vote thresholds to be both minimum and maximum requirements, and intended such provisions to be included in the constitution, not adopted as ordinary legislation.

Accordingly, the League of Women Voters of Washington respectfully requests that the Washington Supreme Court affirm the superior court's conclusion that RCW 43.135.034(1) is invalid.

III. ARGUMENT

A. The Two-Thirds Requirement in RCW 43.135.034(1) Is an Unconstitutional Restriction on the Legislature's Plenary Power to Enact Legislation

1. Any Limit on the Legislature's Plenary Power Must Be Enshrined in the United States Constitution or Washington Constitution

It is a fundamental principle of Washington's system of government that only the United States Constitution and Washington Constitution can limit the legislature's plenary power. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007) ("It is a fundamental principle of our system of government that the legislature has plenary power to enact laws, except as limited by our state and federal constitutions.") (emphasis added) (citing *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004) ("[T]he legislature's power to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions.")).

The Washington Supreme Court has recognized this holding since its early days, holding in 1904 that the legislature has the power to enact any laws "not expressly or by necessary implication prohibited either by the federal Constitution or by the Constitution of the state enacting the law." *State v. Fair*, 35 Wash. 127, 133 (1904). The Court has reaffirmed

this holding many times. See *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 809, 982 P.2d 611 (1999) (“[T]he power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions.”) (emphasis added) (internal quotation marks and citations omitted); *Cedar Cnty. Comm. v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998) (“[I]nsofar as legislative power is not limited by the constitution it is unrestrained.”) (emphasis added) (quoting *Moses Lake Sch. Dist. No. 161 v. Big Bend Cnty. Coll.*, 81 Wn.2d 551, 555, 503 P.2d 86 (1972)).

Thus, the legislature “is limited only by the constitutions.” *Farm Bureau*, 162 Wn.2d at 290 (emphasis added). Because only the United States Constitution and the Washington Constitution can limit the legislature’s plenary power, a statute that limits this power—whether passed by the legislature or through an initiative—is invalid.

2. The Plenary Power Cannot Be Used to Restrict Itself

Underlying the fundamental rule that only the constitutions can limit the state legislature’s plenary power, is the basic principle “that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power.” *Farm Bureau*, 162 Wn.2d at 301. This principle is “implicit in the plenary power of each legislature.” *Id.*

As explained above, the legislature has plenary power to adopt legislation except as limited by the United States or Washington constitutions. To be plenary, this power must include the power to adopt new legislation and also the power to reject old legislation. It might be argued—and the State might argue—that conversely, to be plenary, the legislative power must be able to bind itself. The Washington Supreme Court, however, has resolved this theoretical dilemma—whether the legislature’s plenary power means it can bind itself or it cannot—by repeatedly holding that the legislative power cannot bind future legislatures. See *Farm Bureau*, 162 Wn.2d at 301 (citing *Gruen v. State Tax Comm’n*, 35 Wn.2d 1, 54, 211 P.2d 651 (1949), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963)).

Moreover, the Court has held that initiatives are no exception to this rule. Like legislative enactments, initiatives cannot limit the legislature’s plenary power to enact legislation. *Farm Bureau*, 162 Wn.2d at 302 (“The people cannot, by initiative, prevent future legislatures from exercising their law-making power.”). This is because “[t]he passage of an initiative measure as a law is the exercise of the same power of sovereignty as that exercised by the Legislature in the passage of a statute.” *Love v. King County*, 181 Wn.2d 462, 469, 44 P.2d 175 (1935).

The restriction in article II, section 1(c)—which limits the legislature’s ability to amend or repeal initiatives within two years—illustrates this principle, because the two year restriction is embedded within the constitution itself. Thus, it is a valid limit on the legislature’s plenary power. By contrast, the two-thirds rule limits the legislature’s plenary power through initiative, an invalid vehicle because the restriction does not originate within the constitution.

3. RCW 43.135.034(1) Is Invalid Because It Attempts to Restrict the Legislature’s Plenary Power Through Statute

RCW 43.135.034(1) violates Washington’s constitutional structure and this Court’s clear precedent because it limits the legislature’s plenary power through a statute, not a constitutional amendment. RCW 43.135.034(1) provides in part that “any action or combination of actions by the legislature that raises taxes may be taken only if approved by at least two-thirds legislative approval.” There is little doubt that the purpose and effect of this statute is to limit the legislature’s power to pass legislation.

RCW 43.135.034 was adopted in 2010 by an initiative, I-1053, and the intent of the statute, as stated in the measure filed with the Secretary of State, is to “require either two-thirds legislative approval or voter approval for tax increases . . . [to] ensure that taking more of the people’s money

will always be an absolute last resort.” Initiative Measure No. 1053

(2010), *available at*

<http://www.sos.wa.gov/elections/initiatives/text/i1053.pdf>. Thus, the statute’s explicit purpose is to limit the legislature’s power by preventing it from passing legislation except in extreme circumstances.

The statute, moreover, has this effect. Conditioning a bill’s enactment on two-thirds approval in each house of the legislature effectively prevents passage of any such bill. In fact, the sponsors of I-1053 and its predecessors proudly advertised this effect. In a press release to supporters in January 2012, Voters Want More Choices, an organization led by the sponsors of I-1053 and its 2007 predecessor I-960, sent an email to their supporters stating that because I-960 re-enacted the two-thirds requirement, “[f]or the next two years, there wasn’t a single tax increase,” and “[t]hanks to I-1053, there were no tax increases imposed in the 2011 legislative session.”¹ According to its own supporters, the two-thirds requirement is not just a theoretical limitation on the legislature’s plenary power, but a substantive one.²

¹ Release, Voters Want More Choices, “Our 2/3 initiatives are protecting everyone,” Jan. 19, 2012, *available at*

<http://www.voterswantmorechoices.com/Archives2012/Release01192012.pdf>.

² See also “Supermajority Law’s Damaging Legacy: I-1185 Would Renew A Policy That Has Eliminated Jobs And Thwarted Economic Recovery In Washington State,” Wash. State Budget & Policy Ctr., Aug. 24, 2012 (noting that the two-thirds rule makes it “nearly impossible” to pass any tax legislation to fund state priorities such as education), *available at* <http://budgetandpolicy.org/reports/supermajority-laws-damaging-legacy/>.

In its Opening Brief, the State of Washington even acknowledges that voting thresholds, like the majority and two-thirds requirements specified in article II, restrict the legislature’s plenary power. The State explains that article II, section 22 of the Washington Constitution creates a majority-approval “minimum vote threshold” and then clarifies that “[e]xcept as so restricted, the power of the Legislature to establish vote passage requirements remains plenary.” Op. Br. at 28 (emphasis added). Therefore, the State agrees that a vote threshold requirement—whether by majority or supermajority—constitutes a restriction or limitation on the legislature’s otherwise plenary power to enact legislation. If a voting threshold is itself a restriction on the legislature’s authority—which the State acknowledges—then surely raising the threshold makes the limit more restrictive. Here, the supermajority requirement in RCW 43.135.034(1) raises the threshold to pass legislation through the initiative process, which is an invalid statutory restriction on the legislature’s plenary power.

Ultimately, only the federal and state constitutions can limit the legislature’s plenary power to enact legislation. Because the two-thirds requirement is a statutory restriction of the legislature’s plenary power, rather than a restriction embedded within the constitution itself, it is an invalid limitation on the legislature’s authority.

4. The Process by Which the Two-Thirds Rule Was Adopted Jeopardizes Constitutional Principles and Individual Liberty

Invalidating RCW 43.135.034(1) is important for reasons that go beyond the mechanics of enacting tax legislation. Members of the Court have previously expressed concern that litigants and the Court sometimes lose sight of the importance of individual rights when addressing the powers of the legislature in cases like this one. *See Farm Bureau*, 162 Wn.2d at 321-22 (Johnson, J., dissenting). This is an important warning, and invalidating RCW 43.135.034(1) as an unconstitutional statutory restriction on the legislature's power would protect the rights of individual Washington residents.

The Framers, in approving the constitutional amendment process outlined in article XXIII, made sure to protect individuals "from hasty or emotional action." Utter, Robert F. & Spitzer, Hugh, *Washington State Constitution, A Reference Guide* 230 (2002) ("UTTER & SPITZER"). The safeguards provided by the amendment process "consist of the deliberative nature of a legislative assembly, the public scrutiny and debate made possible during the legislative process, the requirement of a two-thirds vote in each independent house of a bicameral body, and the tempering element of time." *Ford v. Logan*, 79 Wn.2d 147, 156-57, 483 P.2d 1247 (1971). It was the Framers' intent that "[t]hese safeguards [were] not to be

lightly cast aside in an understandable zeal for the right of the people to act directly on matters of common legislation.” *Id.* at 156.

If the process by which the two-thirds requirement was enacted were held to be constitutional, there would be no safeguards preventing voters from passing an initiative requiring, for example, two-thirds approval by the legislature to enact any bill introduced by Republicans or by Democrats or by representatives of a certain legislative district. Simple majorities could adopt initiatives like these and, in doing so, fundamentally alter our constitutional structure, strip individual liberties, and threaten representative democracy. Fortunately, the Washington Constitution prohibits this result by requiring an overwhelming majority—two-thirds of each house of the legislature and a majority of voters—to effect such a dramatic change to the structure of Washington’s government.

Without these safeguards and the corresponding principle that restrictions on the legislature’s plenary power must be enshrined in the federal or state constitution, the rights of individual Washingtonians would be in jeopardy. The Court should decline the State’s request to abandon these principles and the protections they provide.

B. The Debate Surrounding Article XI Shows that the Framers Understood Article II, Section 22 to Mean a Minimum and Maximum Threshold to Pass Ordinary Legislation

The State argues that article II, section 22’s negative phrasing—that “[n]o bill shall become a law unless . . . a majority” votes in its favor—describes only a minimum threshold, but not a maximum threshold to pass legislation. In particular, the parties dispute whether the Framers’ debate on article II, section 22 demonstrates that they intended to impose a simple majority vote requirement—both a floor and a ceiling—to pass ordinary legislation. However, two provisions in article XI use the same language as article II, section 22. Fortunately, the article XI debates were robust, and show that the Framers intended the phrase “unless a majority” to establish both a floor and a ceiling for voting requirements.

Article XI establishes principles for county, city, and township governance. Section 1 recognizes that “effective civil administration requires local direction,” and establishes the various counties as the foundation for the state’s political organization. *UTTER & SPITZER* 167. In addition to establishing the various counties as basic subdivisions of state government, the Framers placed limitations on subsequent alterations of county seats and boundaries. Like article II, section 22, two provisions in article XI—sections 2 and 3—are “negatively phrased.”

1. The Article XI, Section 2 Debate Shows That the Framers Debated and Established the Legislature's Maximum Voting Threshold

Article XI, section 2 provides that “[n]o county seat shall be removed unless three-fifths of the qualified electors of the county . . . shall vote in favor of such removal.” Wash. const., art. XI, sec. 2 (emphasis added). The original draft of section 1, as submitted by the committee to the convention, required only a majority vote to relocate a county seat: “That no county seat be removed without a majority vote of the qualified electors.” *See The Journal of the Washington State Constitutional Convention 1889 with Analytical Index* 705 (Beverly Paulik Rosenow, ed.) (1999) [hereinafter: “CONSTITUTIONAL CONVENTION”]. The ensuing debate focused on how large a majority should be required to relocate the county seat.

An amendment was introduced “requiring a two-thirds vote to move a county seat, instead of a majority.” *Id.* at 706. That motion lost 35 to 30. *Id.* Those who wished to make the process more difficult favored a two-thirds vote, *id.* at 707 (“[T.P.] Dyer said that a majority of one should not be allowed to change a county seat.”), while those who wanted more flexibility favored a simple majority. *Id.* (“[James] Power pointed out that centers of population in counties were continually shifting and argued that a two-thirds vote was prohibitory. [Others] favored a

majority vote as being more democratic.”). Dyer then moved to strike “‘a majority’ and insert ‘three fifths,’” which failed 35 to 22. *Id.* After another motion to strike “majority” and insert “two-thirds” failed, Dyer renewed his motion to insert “three-fifths” instead of “majority” or “two-thirds.” This motion passed as a compromise option, 38 to 26. *Id.* at 707-08. The following day, T.L. Stiles moved to reconsider the vote that changed “majority” to “three-fifths,” which lost 42 to 30. *Id.* at 708. The “unless three-fifths” language carried the day.

After much debate, the convention decided to enshrine, within the constitution’s text itself, a supermajority requirement to make it “more difficult to remove or relocate a county seat by substituting a three-fifths vote of the electors for a majority vote as reported by the committee.” *Id.* at 705. The debate reveals that the Framers understood the phrase “unless three-fifths” as erecting one ultimate threshold—both a floor and a ceiling—and focused their debate on whether to lower or to raise that one threshold. Tellingly, at no point did anyone suggest that the provision only established a minimum threshold, or that a separate—and unmentioned—maximum threshold could later be altered by legislation or initiative.

This back and forth about the vote threshold also demonstrates that the Framers considered the matter to be of constitutional concern.

Constitutional matters cannot be reconsidered through the initiative process. *See Culliton v. Chase*, 174 Wash. 363, 373, 25 P.2d 81 (1933) (holding that an initiative cannot “be likened to an amendment to the Constitution” because “[t]he Constitution provides the means, methods, and processes for its own amendment”).

2. The Debate on Article XI, Section 3 Demonstrates That the Framers Understood “Unless a Majority” to Mean Both a Minimum and Maximum Voting Threshold.

If the debate surrounding section 2 sheds some light into the Framers’ understanding of negatively-phrased voting requirements, the debate regarding article XI, section 3 removes any doubt that the Framers understood the phrase “unless a majority” to mean one ultimate threshold—both a floor and ceiling.

Section 3 establishes the process to change county lines. Wash. const., art. XI, sec. 3. “The debate on Section 3 centered on the provision that ‘[t]here shall be no territory stricken from any county unless a majority of the voters living in such territory shall petition therefor.’” UTTER & SPITZER 168 (emphasis added). At the time there was a boundary dispute on the north line between Pierce and King counties, which made the debate “acrimonious.” CONSTITUTIONAL CONVENTION 705. “A determined effort to change the necessary petition signers from a majority to two-thirds or three-fifths met with failure.” *Id.*

After the committee submitted its draft to the convention, which only required a simple majority to change county boundaries, P.C. Sullivan moved to insert “nor shall any new county be created unless two-thirds of the electors voting shall vote for such division.” *Id.* at 709 (emphasis added). The motion failed. *Id.* Once again, the discussion focused on how difficult the process to change boundaries ought to be. Those who favored striking this sentence asserted that the Legislature should have final say about when and how counties should be divided, not a small group of voters. UTTER & SPITZER 169; CONSTITUTIONAL CONVENTION 709. A spirited debate ensued, and eight separate motions were introduced to increase the threshold from “unless a majority” to either “two-thirds” or “three-fifths.” Each one failed. CONSTITUTIONAL CONVENTION 709-13. The final effort to increase the threshold reveals the Framers’ understanding of the phrase:

Motion: Kinnear moved to strike the word “majority” and insert “two-thirds”

Motion: Warner moved an amendment to the motion to change “two-thirds” to “three-fifths.”

Action: Warner’s motion lost 44 to 25. . . .

Action: A vote was then taken on Kinnear’s motion which lost 49 to 23. . . .

Motion: Tibbetts then moved to strike the entire section dealing with territory to be stricken.

Action: Motion lost.

Motion: P.C. Sullivan moved to have a three-fifths vote necessary to create a county.

Action: Motion lost.

Id. at 712-13.

The committee’s draft became the final language: county lines could not be changed “unless a majority” of those affected voted to do so. The phrase “unless a majority” did not mean two-thirds or three-fifths; it meant a simple majority. *See* UTTER & SPITZER 169 (“The motion to strike the provision failed, as did motions to increase the number of votes needed to petition the Legislature from a simple majority to majorities of two-thirds and three-fifths.”). The Framers’ acrimonious debate reveals that they understood this language—which is the exact same phrase as in article II, section 22—to mean both a floor and a ceiling. Again, just like the debate surrounding article XI, section 2, at no point during the discussion on section 3 did any Framer, on either side of the debate, suggest that the phrase created only a floor but not a ceiling. *See Cedar Cnty.*, 134 Wn. at 383 (interpreting article XI, section 3, and noting that “the plain language of the constitution specifies that the petition [to change county boundaries] must bear the signature of a majority of the voters living in the territory”).

The State’s argument—that “unless a majority” only creates a minimum but not a maximum threshold—would permit these century-old debates to be reopened through the initiative process. For instance, under the State’s interpretation, Kinnear’s failed motion from July 25, 1889, that would have raised the threshold to change county lines from a “majority” to “two-thirds,” could be resurrected through the initiative process. Or any of the other eight failed amendments that tried to do the same. And Dyer’s compromise motion, which required a three-fifths vote to relocate a county seat, rather than a simple majority or a two-thirds vote, could be upended by initiative. But these debates are over. The only way to reopen them is through the constitutional amendment process. *See Wash. const., art. XXIII.* The initiative process cannot be used to change what the Framers already debated and decided. *Culliton*, 174 Wash. at 373.

These debates also demonstrate that the Framers considered this issue—voting thresholds—to be of constitutional concern. If the Framers intended for the ultimate thresholds to be malleable by statute, they would not have spent so many hours debating each threshold. That the Framers focused such intense debate on how high to make these thresholds is evidence that subsequent revisions would have to come about through the constitutional amendment process.

Although articles II and XI deal with different areas of state constitutional law, the language used to communicate their respective voting thresholds is remarkably similar. The debate on article II, section 22, was not drawn out because the threshold by which the legislature would pass ordinary legislation—simple majority—was not controversial. But this same threshold sparked furious debate with article XI. The article XI debates led to an increased threshold for section 2 (three-fifths), and a somewhat lower threshold for section 3 (simple majority). The lattermost debate clearly demonstrates that the Framers understood the phrase “unless a majority” to mean a simple majority requirement—both a floor and a ceiling—to change county lines or to pass ordinary legislation such as taxes and revenue. The State’s textual argument is inconsistent with this history.

The State may reply that the absence of a debate during article II, section 22’s enactment means that the language from the two provisions ought to be treated differently. But that rebuttal would not be responsive. The article XI debates show that the Framers understood the phrase “unless a majority” to mean one absolute threshold that must be met before a certain outcome could issue, *e.g.*, passage of a bill or changing a county’s boundaries. The notion that the Framers would have used the exact same phrase in two separate sections of the constitution, but

intended two completely different meanings, would be illogical. When debating these thresholds, the Framers never discussed the possibility of a separate, malleable, upper limit threshold—which the State argues must exist somewhere. The debate on one (article XI) shows what the Framers meant by the other (article II). Simply put, these debates prove that the State’s phantom “upper limit” threshold does not exist.

IV. CONCLUSION

Unlike the U.S. Congress, the state legislature’s power to enact laws is plenary. This plenary power can only be restricted by limitations placed upon it by the federal or state constitution. As the State acknowledges in its brief, one such restriction on the Washington Legislature’s plenary authority is that a law cannot be enacted unless it receives a majority vote in its favor. Increasing this threshold from a simple majority to a supermajority makes the limitation more restrictive. That is why the initiative process is an improper vehicle to effect this restriction.

Indeed, the Framers debated vote thresholds more than any other matter during the convention. As a result, our state’s Constitution is precise: there are 37 instances where majority rule determines outcomes, 17 references to two-thirds, and 13 references to other some supermajority requirement (either three-fifths or three-quarters). Most of these

requirements have been enshrined for over 120 years. These debates show that the Framers were deliberate when they imposed simple majority and supermajority requirements. In particular, the debates surrounding sections 2 and 3 of article XI clearly demonstrate that the Framers were not simply debating a minimum threshold, but rather an absolute threshold—a floor and a ceiling—to effect certain outcomes.

The phrase “unless a majority” means what it says: a majority of legislators can vote to enact ordinary legislation, including tax laws. Any other interpretation would be an invalid restriction on the legislature’s plenary power, and inconsistent with the Framers’ intent.

DATED: August 27, 2012

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CERTIFICATE OF SERVICE

I, David A. Perez, attorney for Amicus Curiae League of Women Voters of Washington, certify that on August 27, 2012, I personally served to each of the following persons a copy of the document on which this certification appears:

Paul Lawrence and Greg Wong (via email)	Counsel for Plaintiffs/Respondents
Maureen Hart (via email)	Counsel for Defendant/Petitioner
Michelle Radosevich (via email)	Counsel for Respondent

Signed at Seattle, Washington, this 27th day of August, 2012.

/s/ David A. Perez
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Subject: State v. League of Education Voters, No. 87425-5

Dear Clerk,

Please accept for filing in *State v. League of Education Voters, et al.*, No. 87425-5, the following three documents, attached to this email:

1. Motion for Leave to Participate as Amicus Curiae
2. Motion for Oral Argument
3. Brief of Amicus Curiae the League of Women Voters of Washington

Thank you.

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