HON. BRUCE E. HELLER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LEAGUE OF EDUCATIONAL VOTERS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; LAURIE JINKINS, an individual taxpayer and Washington State Representative; DAVID FROCKT, an individual taxpayer and Washington State Senator; JAMIE PEDERSON, an individual taxpayer and Washington State Representative; ROBERT UTTER, an individual taxpayer and former Chief Justice of the Washington Supreme Court; KIM BIELSKI, an individual taxpayer; ANDY BUNN, an individual taxpayer; REBECCA BUNN, an individual taxpayer; REUVEN CARLYLE, an individual taxpayer and Washington State Representative; JOHN CHESBROUGH, an individual taxpayer; DEB EDDY, an individual taxpayer and Washington State Representative; SAM HUNT, an individual taxpayer and Washington State Representative; AMY MCKENNEY, an individual taxpayer; KURT MILLER, an individual taxpayer and President of the Tacoma Public Schools Board of Directors; JIM MOELLER, an individual taxpayer and Washington State Representative; TIMM ORMSBY, an individual taxpayer and Washington State Representative; RYAN	**No. 11-2-25185-3 SEA** MEMORANDUM OPINION

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PAINTER, an individual taxpayer; ERIC PETTIGREW, an individual taxpayer and Washington State Representative; CHRIS REYKDAL, an individual taxpayer, Washington State Representative and Tumwater School Board Member; CINDY RYU, an individual taxpayer and Washington State Representative; MIKE SELLS, an individual taxpayer and Washington State Representative; KRISTIN SKANDERUP, an individual taxpayer,

Plaintiffs,

v.

The State of Washington; CHRISTINE GREGOIRE, in her official capacity as Governor of the State of Washington,

Defendants.

I. INTRODUCTION

Plaintiffs challenge the constitutionality of RCW 34.135.034. This statute requires that any tax increases passed by the legislature be approved by two-thirds of both houses. The statute also provides that any tax increases that will result in expenditures in excess of the state expenditure limit shall not take effect until approved by the voters.

The parties here do not dispute that the citizens of the State of Washington can require a two-thirds majority in the legislature for passage of tax increases. Rather, the issue presented in this case is whether such a supermajority requirement can be implemented through the initiative process or whether an amendment to the Washington Constitution is required. Secondly, is a constitutional amendment necessary before the legislature can be required to

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submit all expenditures in excess of the state expenditure limit to the voters for approval ("the mandatory referendum requirement").

This matter is before the court on cross motions for summary judgment.

II. BACKGROUND FACTS

In 1993, Washington voters approved Initiative Measure 601, which provided: "[A]ny action or combination of actions by the legislature that raises state revenue or requires revenue-neutral tax shifts may be taken only if approved by a two-thirds vote of each house." § 4(1). I-601 also provided that if legislative action resulted in "expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people at a November general election." § 4(2). Both requirements have been enacted into a statute, RCW 43.135.034.

For most of the last 16 years, the supermajority requirement has been in effect, except for relatively brief periods when it was suspended by a majority of the legislature. Under the Washington Constitution, a two-thirds majority of the legislature is necessary to suspend an initiative within two years of its passage. Wash. Const. art. II, § 1(c). The legislature has been unable to suspend the supermajority requirement by a majority vote for much of the last 16 years because of three separate ballot reenactments of the supermajority requirement – Referendum 49 in 1998, I-960 in 2007 and I-1053 in 2011. On January 6, 2012, I-1185 was filed. If approved by the voters, it would reenact the supermajority requirement upon expiration of the two year period following the effective date of I-1053.

Prior to the effective date of the original supermajority provision in I-609 – July 1, 1995 – a lawsuit was filed asking our Supreme Court to prohibit its implementation. *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994). The court held that since I-601 had not yet gone

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into effect, the challenge was premature. *Id.* at 413-14. In 2008, State Senate Majority Leader Lisa Brown brought an action before the Supreme Court to compel the lieutenant governor as president of the Senate to forward a revenue bill to the House of Representatives that had received a majority but less than two-thirds approval of the members. *Brown v. Owens*, 165 Wn.2d 706, 206 P.3d 310 (2009). Based on the separation of powers doctrine, the court declined to involve itself in a dispute over parliamentary procedure. *Id.* at 719-20.

The mandatory referendum requirement of RCW 43.135.035(2) has never been challenged. However, the requirement approved in I-695 that all tax increases (as opposed to those that exceed the state expenditure limit) be approved by the voters was addressed by our Supreme Court in *Amalgamated Transit Union Local 587 v. State ("ATU")*, 142 Wn.2d 183, 232, 11 P.3rd 1162 (2001). The court struck down the requirement as unconstitutional. *Id.* at 232.

This case represents the first constitutional challenge to the supermajority and mandatory referendum requirements brought before a trial court. Unlike *Walker* and *Brown,* the plaintiffs are asking for declaratory relief instead of a writ of mandamus. In other words, they are requesting a ruling regarding the constitutionality of a statute, as opposed to an order requiring another branch of government to perform or refrain from performing an act.[1]

For the reasons set forth in this opinion, the court concludes that this is an appropriate case for judicial review. The court also concludes that the proper procedure for implementing the supermajority and mandatory referendum requirements is to amend the Washington Constitution rather than to employ the initiative process.

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[1] While plaintiffs' complaint seeks injunctive as well as declaratory relief, in their summary judgment briefing they request only declaratory relief. The court therefore does not address the appropriateness of injunctive relief.

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III. SHOULD THE CASE BE HEARD?

Before reaching the merits, the court must address the State's contention that this case should not be heard. Plaintiffs have brought their challenge to RCW 43.135.034 under the Uniform Declaratory Judgment Act, which authorizes courts to adjudicate "the rights, status and other legal relations" of the parties. RCW 7.24.010. To obtain a declaratory ruling, a party must show that the case either (1) raises an issue of public importance, or (2) is "justiciable" -- one that involves an actual dispute between opposing parties having a genuine stake in the outcome, as opposed to a hypothetical or speculative disagreement. *Nollette v. Christiansen*, 155 Wn.2d 594, 598-99, 800 P.2d 359 (1990). *ToRo Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3rd 1149 (2001). The court concludes that both requirements are satisfied.

A. This Case Presents an Issue of Public Importance

The courts have issued declaratory judgments in a variety of different circumstances. In *State ex. Rel. Distilled Spirits Inst., Inc. v. Kinnear,* 80 Wn.2d 175, 178, 492 P.2d 1012 (1972), our Supreme Court agreed to rule on a constitutional challenge to legislation passed after the 60th day of an extraordinary legislative session:

> [T]he court does have the power and it is its duty in a case properly presented to it to construe the provisions of the constitution. Where the question is one of great public interest and has been brought to the court's attention in the action where it is adequately briefed and where it appears that an opinion of the court would be beneficial to the public and the other branches of government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation.

In *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 495, 585 P.2d 71 (1978), the court found that issuing a declaratory judgment was appropriate in a case challenging the funding mechanism to meet the state constitutional requirement to "make ample provision for

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education" under Wash. Const. art. 9, § 1. In the context of a dispute over when legislators were entitled to receive a higher salary, the court stated that "[q]uestions of salary, tenure and eligibility to stand for public office . . . are of as much moment to the voters as they are to the candidates, and make this controversy one of public importance." *State ex. Rel. O'Connell v. Dubuque,* 68 Wn.2d 553, 559, 413 P.972 (1966). In determining the appropriateness of issuing a declaratory judgment, the Supreme Court has given significant weight to requests for judicial guidance from the legislature, the governor and the people. *Distilled Spirits*, 80 Wn.2d at 178.

Here, the Governor, numerous legislators, members of the educational community, and taxpayers, including a former Chief Justice of the Washington Supreme Court, have requested that the court rule on the constitutionality of RCW 34.135.034. According to the Governor, the supermajority requirement has resulted in severe budget cuts with major impacts to infrastructure and programs. In addition, the Governor maintains that the supermajority requirement represents a structural change in the relationship between the legislature and governor. Wash. Const. art. III, § 12 grants the governor the ability to influence legislation by withholding her approval, in which case two-thirds of the members of each house are required to override the governor. The supermajority requirement, according to the Governor, eliminates her power to approve or disapprove a bill that has majority support and instead places that power with a minority of legislators in each house.

In *McCleary v. State*, 173 Wash.2d 477, 269 P.3d 227 (2012), the Supreme Court held that the State is failing to meet its constitutional duty to adequately provide for the education of all children. The plaintiffs argue that the supermajority requirement has made it more difficult to fund education. They point to Substitute Bill 2078 which would have funded

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reductions in kindergarten through third grade class size that the voters had approved in 2000 when they passed I-728. Funding for these class size reductions would have come from narrowing a tax deduction for large banks and other financial institutions. On May 24, 2011, SHB 2078 received a majority of 52 out of 98 votes. The Speaker of the House, however, ruled that SHB 2078 "raises taxes" under RCW 43.135.034 and therefore required two-thirds approval for passage. He also noted that only the courts can resolve whether RCW 43.135.034 is constitutional.

Irrespective of the merits of these arguments regarding the effects of the supermajority requirement, there is no denying that the requirement is a matter of great public importance. Since courts are the only institution that can adjudicate the constitutionality of RCW 43.135.034, it is appropriate for this court to render an opinion on this issue. *Citizens Council Against Crime v Bjork*, 84 Wn.2d 891, 895, 529 P.2d 1072 (1975)(court provided guidance to legislature and governor regarding legislature's power to override governor's veto, despite plaintiff's lack of standing and other justiciability issues).

B. The Issues Presented to this Court are Justiciable

A justiciable controversy is one that is (1) an actual, present, and existing dispute, (2) between parties having genuine and opposing interests, (3) which interests are direct and substantial, and (4) a judicial determination of which will be final and conclusive. *To-Ro Trade Shows*, 144 Wn.2d at 411. The parties in this matter plainly have genuinely and opposing interests, and a judicial ruling on the constitutionality of the supermajority and mandatory referendum requirements will constitute a final and conclusive resolution of this dispute. Therefore, the two remaining issues are (1) whether the constitutional issues presented are "actual" or merely hypothetical and (2) whether plaintiffs have standing to bring

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this lawsuit. *To Ro Trade Shows,* 144 Wn.2d at 414 (the third justiciability factor encompasses the doctrine of standing).

1. This Case Presents an Actual Dispute

As noted above, in *Walker* our Supreme Court declined to rule on the constitutionality of the supermajority requirement prior to its implementation. The court held that until a specific dispute arose regarding the implementation of the law, judicial intervention was premature. 124 Wn.2d at 413. Since *Walker*, 18 years have passed. During this time, except for brief periods when the legislature suspended it, the supermajority requirement has been in effect. In *McCleary*, the Supreme Court described the legislature's inability to fund constitutionally required basic K-12 education. 173 Wn.2d at 532-37. SBH 2078, which would have provided funds to reduce K-3 class size, failed to pass in the House because of the supermajority requirement. The inability of the House to pass this legislation with a simple majority demonstrates that the dispute over the constitutionality of the supermajority requirement is an actual one with known consequences.

The State contends that this dispute would only be justiciable if the legislature had passed a tax bill by a majority in violation of the statute because they deemed the statute to be unconstitutional. According to the State, under House rules a majority of the legislators could have overruled the Speaker's ruling that RCW 43.135.034(1) required the vote of two-thirds of the members and passed SHB 2078 by a majority.

This argument reflects a fundamental misunderstanding of the respective roles of the judiciary and the legislature. It is for the courts, not the legislature, to determine the constitutionality of a statute. *Marbury v. Madison*, 5 U.S. 137, 177 (1803)("[i]t is emphatically the province and duty of the judicial department to say what the law is"). Our

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Supreme Court affirmed this principle in *Brown*, emphasizing that under the constitutional doctrine of separation of powers, the legislature may not rule a law it has enacted to be unconstitutional. 165 Wn.2d at 726-27. Accordingly, this court will not require the legislature to pass a tax bill in contravention of the statute's supermajority requirement as a precondition for the court's exercising jurisdiction over this dispute.

The State also contends that the claims of the plaintiffs require one to speculate that (1) but for the supermajority requirement, the legislature would have increased taxes, and (2), even if the legislature decided to increase taxes, it would have directed those revenues to educational programs desired by the plaintiffs. However, the State cites no legal authority requiring a party to demonstrate the impacts of a statute with such precision in order to establish the existence of an actual dispute. In any event, plaintiffs have demonstrated that SHB 2078, which would have closed a tax loophole to fund K-3 class size reductions, did not advance in the legislative process because of the supermajority requirement.

In *Methodist Church v. Hearing Examiner*, 129 Wn.2d 238, 916 P.2d 374 (1996), the Supreme Court issued a declaratory judgment in a case where the City of Seattle had nominated, but not officially designated, a church as a historical landmark. The court concluded that the case should be heard because the nomination "hindered" the church from selling its property. 129 Wn.2d at 245. Likewise here, the supermajority requirement hinders the legislature from passing tax legislation. Whether this is desirable or undesirable is not for the court to decide. However, an actual dispute clearly exists, even if one cannot predict with one hundred percent certainty what bills the legislature would have passed in the absence of the supermajority requirement and what programs those bills would have funded.

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2. Plaintiffs Have Established Standing to Bring This Action

The second justiciability issue is whether the interests of the parties are direct and substantial, which includes the requirement of "standing." In the *Seattle Sch. District* case, a school district, members of the school board and parents of children attending school within the district brought a declaratory action seeking a ruling that the State's mechanism for funding education was inadequate and unconstitutional. The Supreme Court held that the plaintiffs had standing to bring the action, noting that courts are taking a broader and less restrictive view of standing, particularly where the constitutionality of a statute is concerned. 90 Wn.2d at 493-94. This result is consistent with the willingness of courts to hear cases of public importance, even in the absence of justiciability. *Nollette v. Christiansen*, 155 Wn.2d at 598-99. As the Governor aptly put it in her brief to the court:

> The ability to raise taxes with a simple majority vote of the legislature will, as plaintiffs argue, mean that it will be easier to fund education, social services, or even courts. Access to these services and institutions is clearly important to all citizens. Equally important is a fair and just tax policy that does not take more money from citizens than is necessary to adequately fund services. Many citizens feel that the supermajority requirement is necessary to further that interest. Whichever group is right, the interests on both sides are important.

Governor's Memorandum at 17.

Plaintiffs have established standing to bring this action. A plaintiff has standing to challenge a statute's constitutionality if he or she can show that (1) the "interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" and (2) a "sufficient factual injury." *Seattle School Dist.*, 90 Wn.2d at 493-94. The legislator plaintiffs have an interest in advancing bills through the legislative process with the constitutionally required number of votes. The non-legislator plaintiffs have an interest in the adequate funding of education. The legislator plaintiffs allege

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that they have suffered injury because they have been unable to address funding gaps in education. The plaintiffs from the educational community allege that cuts in educational funding and services have resulted in substantial harm to educators, teachers, students and education groups, such as the plaintiffs. Plaintiffs Kim Bielski and Ryan Painter, for example, are teachers who lost their jobs as a result of budget cuts.

3. Justiciability and the Mandatory Referendum Requirement

The court concludes that the mandatory referendum issue should also be heard, even though RCW 43.135.034(2)(a) has never been invoked, and there is no indication it has resulted in harm to the plaintiffs. First, in *ATU*, the court summarily determined that plaintiffs challenging a similar referendum requirement had standing with justiciable claims. *ATU*, 142 Wn.2d at 203, n.4. Second, the requirement raises an issue of public importance and can be heard on that basis alone. *Nollette*, 155 Wn.2d at 598-99.

III. THE STATUTORY SUPERMAJORITY REQUIREMENT CONTRAVENES THE CLEAR LANGUAGE OF OUR STATE'S CONSTITUTION

The court is guided by the following principles in evaluating the constitutionality of RCW 43.135.034. First, the statute is presumed constitutional and parties challenging its constitutionality must demonstrate its unconstitutionality beyond a reasonable doubt. Second, while initiatives measures reflect the reserved power of the people to legislate, the people in their legislative capacity remain subject to mandates of the Constitution. Third, the Washington Constitution is a restriction on legislative power rather than a grant of powers. *Gerberding v. Munroe*, 134 Wn.2d 188, 196, 949 P.2d 1366 (1998). This means that the legislature's power to enact a statute is unrestrained unless the Constitution prohibits it.

Art. II, § 22 of the Washington Constitution provides:

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> **Passage of bills**. No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house, and a majority of the members elected in each house be recorded thereon as voting in its favor.

RCW 43.135.034(1), re-enacted in 2011 after passage of I-1053, requires that all laws raising taxes be passed by a two-thirds vote: ". . . [A]ny action or combination of actions by the legislature that raises taxes may be taken only if approved by at least two-thirds legislative approval in both the house of representatives and the senate."

A. The Issue

The fundamental question presented in this case is whether under Art. II, § 22, a majority, and only a majority, is required for a bill to become law, or whether the majority language establishes only a minimum threshold. If Art. II, § 22 was intended only as a "floor," i.e., as a restriction on the legislature's ability to pass a bill by less than a majority, then the supermajority requirement would be constitutional. On the other hand, if it was intended both as a "floor" and a "ceiling," i.e., as a requirement that all bills be passed by no more and no less than a majority, then the supermajority requirement could only be enacted by amending the constitution. *ATU,* 142 Wn.2d at 232. (holding that the Constitution cannot be amended by an initiative). A constitutional amendment requires approval by two-thirds of the legislators in both houses, and approved by a majority of voters in the next general election. Wash. Const. art. XXIII.

B. Constitutional History

"In determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered." *Yelle v. Bishop*, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959). During the 1889

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Constitutional Convention, the framers rejected amendments to Art. II, § 22 that would have stricken the word "majority vote" and inserted a provision that a majority of those present could pass a bill. Quentin Shipley Smith, *The Journal of the Washington State Constitution Convention 1889 with Analytical Index* at 536 (Beverly P. Rosenow, ed., W.S. Hein & Co. Inc. 1999). None of the framers proposed that certain bills subject to Art. II, § 22 should require a supermajority to pass. As a result, the issue presented in this case was not debated during the Constitutional Convention. However, the framers did debate whether to impose supermajority vote requirements in other contexts. As already noted, a two-thirds favorable vote is required for bills to amend the Constitution. In fact, the Constitution contains 16 legislative supermajority provisions, none of which include tax bills. Declaration of Paul Lawrence, Exhibit K, Appendix A hereto.

When interpreting statutes, courts frequently apply the rule that "to express one thing implies the exclusion of the other." *State v. Delgado*, 148 Wn.2d 723, 728-29, 63 P.3rd 792 (2003) (in the absence of statutory language the legislature knew how to include, the court presumes the absence of language was intentional). The court applies those same principles to constitutional interpretation. Since the framers knew how to create supermajority exceptions to the Constitution's general rule of majority approval for other actions but did not do so for tax bills, the court presumes that the absence of supermajority language was intentional.

Historical context supports this presumption. During the Constitutional Convention, the framers expressed concern about limiting the power of special interests. As noted in Kristen L. Fraser, *Method, Procedure, Means and Manner: Washington's Law of Law Making*, 39 Gonz.L.Rev. 447, 449-450 (2004) "the Washington Constitution evinces fear not of majoritarian tyranny, but of the power of corporations and special interests that might capture

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or corrupt public institutions." Further "[t]he growth of power . . . by corporations made the question of limiting corporate power one of the most vital and earnestly discussed questions before the constitutional convention . . . They were confronted with the problem of . . . a strong legislative lobby." Labbeus J. Knapp, *Origins of the Constitution of the State of Washington*, 4 Wash. Hist. Q. 227, 239 (1913). Given these concerns, it is highly improbable the framers intended the majority requirement in Art. II, § 22 as a minimum threshold, thereby permitting a minority of legislators to thwart the will of the majority.

C. The Wording of Art. II, § 22 Does Not Support the State's Argument that the Framers Intended It As a Minimum Vote Requirement.

The State argues that the negative phrasing of Art. II, § 22 ("No bill shall become a law" without a majority vote) is evidence that the framers intended it as a minimum vote requirement. According to this argument, the framers would have drafted the provision in the affirmative ("Every bill shall become law if passed by a majority vote"), had they wanted the majority vote requirement to be absolute.

Our Supreme Court rejected this same argument in *Gerberding*, 134 Wn.2d 188. There, the court struck down as unconstitutional an initiative imposing term limits on state legislators, the governor and lieutenant governor. One of the constitutional provisions at issue, Wash. Const. art. II, § 7, provides that "[n]o 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." As in this case, the proponents of the initiative in *Gerberding* argued unsuccessfully that the negative phraseology of the constitutional provision indicated that the qualifications for state constitutional offices are minimums to which the legislature or the people may add by statute. 134 Wn.2d at 201. The Supreme Court observed that the delegates to the

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Constitutional Convention debated term limits and imposed them for certain offices but not others. *Id.* at 203-04.

Likewise here, the delegates approved supermajority requirements in 16 specific circumstances, but not in Art. II, §22. *Gerberding's* conclusion that the framers did not confer express authority upon the legislature to add to qualifications for office applies equally to the ability of the legislature to add a more stringent vote requirement to Art. II, § 22.

Consistent with *Gerberding*, the courts of California and Alaska have rejected the argument that a majority vote requirement in their constitutions constituted a floor, not a ceiling. In *Howard Jarvis Taxpayers Assn. v. City of San Diego*, 120 Cal.App.4th 374 (2004), the court struck down as unconstitutional a Proposition that would have required a two-thirds approval by the electorate of local tax increases. Article XIIIC of the California Constitution provides that:

> No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote.

As in this case, the proponents of the Proposition argued that this language required that tax increases be approved by <u>at least</u> a majority of voters. In rejecting this argument, the court observed that if the drafters of Article XIIIC had intended the term "majority vote" to mean "at least a majority vote" or "a majority vote, including a two-thirds vote at the election of the electorate," they could easily have said so. *Id.* at 392-93.

In *Alaskans for Efficient Government, Inc. v State of Alaska*, 153 P.3rd 296 (Alaska 2007), the court addressed the identical issue presented in this case: whether an initiative requiring a two-thirds legislative vote for the passage of tax increases was inconsistent with Art. II, §14 of the Alaska constitution, which provides: "No bill may become law without an

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affirmative vote of the majority of the membership of each house." *Id.* at 299. The Alaska Supreme Court reasoned that the inclusion of supermajority provisions elsewhere in the constitution was "convincing evidence of the framers' intent to include provisions in the Alaska Constitution describing all instances in which supermajority votes could be required to enact a bill." *Id.* at 301.

D. Other States That Have Implemented Supermajority Requirements Have Done So By Changing Their Constitutions

As pointed out in *Alaskans for Efficient Government*, with the exception of Washington, every state that has adopted supermajority or voter-approved requirements for enacting tax-related bills has done so through constitutional enactments or amendments. 153 P.3d at 299, n.12. Those states include Arizona, Arkansas, California, Colorado, Delaware, Florida, Kentucky, Louisiana, Michigan, Mississippi, Oklahoma, Oregon, and South Dakota. *Id.* Significantly, many of these states recognized the need to amend their constitutions, even though the language in many of their constitutions contained the same negative phraseology as Washington's Article II, §22. Amended Exhibit L to Declaration of Paul Lawrence.

E. The Decision in *Robb v. Tacoma* Addressing the Legislature's Power Over Municipalities Is Not Applicable Here

In support of its contention that Art. II, § 22's majority requirement is a minimum that may be added to by statute, the State relies on *Robb v. Tacoma*, 175 Wash. 580, 28 P.2d 327 (1933). *Robb* addressed the question of whether the legislature could impose a more stringent vote requirement on municipalities issuing bonds to finance public expenditures. Wash. Const. art. VIII, § 6 requires that bond measures receive at least three-fifths of the popular vote to pass. The legislature added to that requirement by mandating that the number of votes cast in favor of a municipal bond measure exceed fifty percent of the total number of votes voting

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in the last general election. The Supreme Court found the additional vote requirement to be constitutional, relying on the following proviso to Wash. Const. art. VIII, § 6: "Provided, further, that any city or town, with such assent, may be allowed to become indebted to the larger amount . . ." *Id.* at 587 (emphasis added). Based on this language, the court concluded that "the power conferred upon municipalities . . . is not plenary and unconditional, but restrictive and subject to control by the legislature." *Id.* at 587-88.

Robb did not announce a rule of constitutional interpretation that applies outside the limited context of Art. VIII, § 6. It addresses an entirely different subject matter – the legislature's power over municipalities. As plaintiffs point out, unlike that relationship, the legislature does not have the power to change the majority rule requirement set forth in Art. II, § 22, unless there is an emergency as set forth in Wash. Const. art. II, § 42. Robert F. Utter & Hugh D. Spitzer, *The Washington Constitution: A Reference Guide*, p. 62 (2002). Thus, *Robb's* holding that Art. VIII, § 6 "fixes a minimum limit of restriction below which the Legislature may not go, but it does not fix a maximum limit to which the Legislature may advance on an ascending scale," *id.* at 587, is limited to the facts of the case. Consistent with this limited interpretation, *Gerberding*, which reached a result directly contrary to *Robb* – that the constitutional list of qualifications for office could not be supplemented by the legislature – saw no need even to distinguish *Robb*.

F. Conclusion

Based on the plain language of Art. 2, § 22, the concerns expressed by the framers during the Constitutional Convention, and the existence of 16 supermajority provisions in other parts of the Constitution, the court concludes that the Constitution restricts the

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legislature's and the people's ability to require a supermajority for the passage of tax measures. RCW 43.135.034(1) is therefore unconstitutional.

IV. THE MANDATORY REFERENDUM REQUIREMENT DOES NOT CONFORM TO CONSTITUTIONAL REQUIREMENTS

RCW 43.135.034(2)(a) provides: "If the legislative action under subsection (1) of this section [raising taxes] will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people at a November general election." Wash. Const. art. II, § 1(b) creates two different methods by which legislative action can become the subject of a referendum of the people. (1) The people can require a referendum after a petition is circulated and signed by four percent of the votes cast for the office of governor in the last gubernatorial election, or (2) the legislature can vote to refer a bill to the people.

The Issues

The mandatory referendum requirement raises two issues: (1) Does it violate the four percent requirement of the Constitution, and (2) by requiring future legislatures to refer all tax increases to the voters for approval, does it unconstitutionally infringe on the legislature's plenary power to enact legislation under Art. II, § 1 of the Constitution?

A. The *ATU* Case Is Controlling Here

In *ATU*, the Washington Supreme Court struck down section 2 of I-695 which required voter approval of all tax increases:

> 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 and where four percent of registered voters have not signed petitions for [a] referendum on the particular legislation passed by the Legislature. . .

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> The state constitution does not provide that the initiative power can be used to alter the method by which the referendum power is exercised. The people in exercising their reserved powers must conform to the constitution, just as the Legislature must when enacting legislation.

142 Wn.2d at 232. The court also stated:

> This does not mean, however, that the people lack the authority to approve or disapprove legislation under the reserved initiative and referendum powers. They do. However, the right must be exercised in conformity to the constitutionally mandated procedures, including the four percent signature requirement each time the people petition for a referendum on a piece of legislation the Legislature has passed. Nor does it mean the Legislature cannot refer a measure to the people for a statewide vote. Plainly it can do so, not, however as conditional legislation, but rather through the referendum process set forth in art. II, § 1(b).

142 Wn.2d at 242.

B. The Reasoning of *ATU* Applies to This Case

Like I-695, the mandatory referendum requirement of RCW 43.135.034(2) subjects all tax increases that exceed the state expenditure limit to a mandatory referendum, regardless of whether the Constitution's four percent signature requirement has been met. In addition, it unconstitutionally restricts the legislature's plenary power to enact legislation under art. II, §1. "Implicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power . . . The people cannot, by initiative, prevent future legislatures from exercising their law-making power." *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 301-02, 174 P.3rd 1142 (2007). As pointed out in *ATU*, if the voters could require certain types of legislation to be submitted to the voters for approval, whole areas of legislation would be removed from the legislature's authority, which would violate our representative form of government. 142 Wn.2d at 242.

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The State argues that *ATU* is distinguishable on a number of grounds. First, while *ATU* struck down the referendum requirement in I-695 because it applied to "every future piece of tax legislation," 142 Wn.2d at 231, RCW 43.135.034(2)(a) applies only to a very narrow type of tax increase – one that would result in spending in excess of the state expenditure limit. The State is correct that *ATU* did distinguish between I-695, which required all tax increases to obtain voter approval, and referendum requirements for certain specific types of taxes. The court however, was distinguishing between a referendum requirement for statewide taxes (unconstitutional) and local tax measures that could be submitted to the voters for approval (constitutional). 142 Wn2d at 243. The mandatory referendum requirement at issue here not only applies to state-wide tax measures but to all tax measures that exceed the state expenditure limit.

Second, the State notes that while the mandatory referendum language originated in 1993 with the passage of I-601, the legislature reenacted and amended RCW 43.135.034(2)'s predecessor statute in 2005, finding that "the citizens of the state benefit from a state expenditure limit." Laws of 2005, ch. 72 §§ 1, 2. According to the State, in so doing, the legislature ratified the referendum language that is now being challenged.

For constitutional purposes, however, it makes no difference whether the people, through an initiative, or the legislature, through a statute, condition an entire class of future legislation on a public vote. The issue before the court in *ATU* was "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." 142 Wn.2d at 235. The Supreme Court in *ATU* said it could not.

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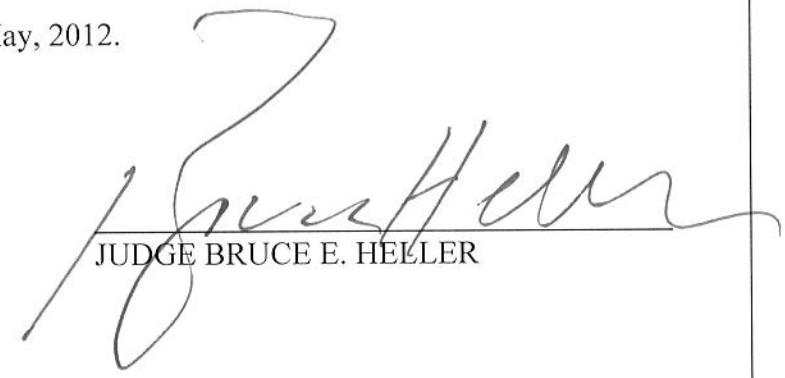
V. CONCLUSION

The majority provision of Art. II, § 22 is a clear restriction on the legislature's power to require more than a majority for passage of tax measures. This restriction applies to statutes initiated by the legislature and to statutes passed pursuant to voter initiatives. While initiative measures reflect the reserved power of the people to legislate, the people in their legislative capacity remain subject to mandates of the Constitution. *Gerberding,* 134 Wn.2d at 196. RCW 43.135.034(1) is therefore unconstitutional.

The mandatory referendum requirement of RCW 43.135.034(2) is unconstitutional for two reasons. First, it eliminates the four percent requirement embodied in Art. II, § 1(b). Second, by mandating the referral of a certain category of bills to the voters for approval, it prevents future legislatures from exercising their law-making power under Art. II, § 1.

Plaintiffs' motion for summary judgment is therefore **GRANTED**. The State's cross-motion for summary judgment is **DENIED.**

ENTERED this 30th day of May, 2012.



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Appendix A

Legislative Supermajority Provisions in the Washington State Constitution

Article/Section	Excerpts of Relevant Provisions
Art. II, Sec. 1(c)	"No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided,* That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum."
Art. II, Sec. 9	"Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and, with the concurrence of two-thirds of all the members elected, expel a member, but no member shall be expelled a second time for the same offense."
Art. II, Sec. 12(2)	"Special legislative sessions may also be convened for a period of not more than thirty consecutive days by resolution of the legislature upon the affirmative vote in each house of two-thirds of the members elected or appointed thereto . . . ." . . . "The resolution convening the legislature shall specify a purpose or purposes for the convening of a special session, and any special session convened by the resolution shall consider only measures germane to the purpose or purposes expressed in the resolution, unless by resolution adopted during the session upon the affirmative vote in each house of two-thirds of the members elected or appointed thereto, an additional purpose or purposes are expressed."

Art. II, Sec. 24	"Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon."
Art. II, Sec. 36	"No bill shall be considered in either house unless the time of its introduction shall have been at least ten days before the final adjournment of the legislature, unless the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house, said vote to be taken by yeas and nays and entered upon the journal, or unless the same be at a special session."
Art. II, Sec. 41 (same as Article II, Sec. 1(c))	"No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided,* That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum."
Art. II, Sec. 43(7)	"The legislature may amend the redistricting plan but must do so by a two-thirds vote of the legislators elected or appointed to each house of the legislature."
Art. II, Sec. 43(8)	"The legislature shall enact laws providing for the reconvening of a commission for the purpose of modifying a districting law adopted under this section. Such reconvening requires a two-thirds vote of the legislators elected or appointed to each house of the legislature." . . . "Any modification adopted by the commission may be amended by a two-thirds vote of the legislators elected and appointed to each house of the legislature."

Art. III, Sec. 12	"Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, which house shall enter the objections at large upon the journal and proceed to reconsider. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present, it shall become a law; but in all such cases the vote of both houses shall be determined by the yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journal of each house respectively. If any bill shall not be returned by the governor within five days, Sundays excepted, after it shall be presented to him, it shall become a law without his signature, unless the general adjournment shall prevent its return, in which case it shall become a law unless the governor, within twenty days next after the adjournment, Sundays excepted, shall file such bill with his objections thereto, in the office of secretary of state, who shall lay the same before the legislature at its next session in like manner as if it had been returned by the governor: *Provided,* That within forty-five days next after the adjournment, Sundays excepted, the legislature may, upon petition by a two-thirds majority or more of the membership of each house, reconvene in extraordinary session, not to exceed five days duration, solely to reconsider any bills vetoed."
Art. IV, Sec. 9	"Any judge of any court of record, the attorney general, or any prosecuting attorney may be removed from office by joint resolution of the legislature, in which three-fourths of the members elected to each house shall concur, for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution."
Art. V, Sec. 1	"No person shall be convicted without a concurrence of two-thirds of the senators elected."
Art. VII, Sec. 12(d)(iii)	"Any amount may be withdrawn and appropriated from the budget stabilization account at any time by the favorable vote of at least three-fifths of the members of each house of the legislature."

Art. VIII, Sec. 1(i)	"The legislature shall prescribe all matters relating to the contracting, funding or refunding of debt pursuant to this section, including: The purposes for which debt may be contracted; by a favorable vote of three-fifths of the members elected to each house, the amount of debt which may be contracted for any class of such purposes; the kinds of notes, bonds, or other evidences of debt which may be issued by the state; and the manner by which the treasurer shall determine and advise the legislature, any appropriate agency, officer, or instrumentality of the state as to the available debt capacity within the limitation set forth in this section."
Art. XXIII, Sec. 1	"Any amendment or amendments to this Constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the state for their approval, at the next general election; and if the people approve and ratify such amendment or amendments, by a majority of the electors voting thereon, the same shall become part of this Constitution . . . ."
Art. XXIII, Sec. 2	"Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this Constitution, they shall recommend to the electors to vote at the next general election, for or against a convention, and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session, provide by law for calling the same; and such convention shall consist of a number of members, not less than that of the most numerous branch of the legislature."
Art. XXVIII, Sec. 1	"Salaries for members of the legislature, elected officials of the executive branch of state government, and judges of the state's supreme court, court of appeals, superior courts, and district courts shall be fixed by an independent commission created and directed by law to that purpose." . . . "After the initial adoption of a law by the legislature creating the independent commission, no amendment to such act which alters the composition of the commission shall be valid unless the amendment is enacted by a favorable vote of two-thirds of the members elected to each house of the legislature and is subject to referendum petition."

Art. XXXII, Sec. 1	"After the initial adoption of a law by the legislature authorizing the issuance of nonrecourse revenue bonds or other nonrecourse revenue obligations, no amendment to such act which expands the definition of industrial development project shall be valid unless the amendment is enacted by a favorable vote of three-fifths of the members elected to each house of the legislature and is subject to referendum petition."