

NO. 81287-0

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioner,

v.

BRAD OWEN, Lieutenant Governor of the State of Washington,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This matter is styled as an original action in mandamus against Respondent Brad Owen, who is the Lieutenant Governor and President of the State Senate. Petitioner Lisa Brown is a single member of the Senate.¹ She challenges a discretionary parliamentary ruling of the Respondent, made in response to a point of order, raised on the Senate floor, during consideration of Senate Bill 6931. The Senate could change this ruling on a simple majority vote. Petitioner also seeks a declaratory judgment that RCW 43.135.035(1) is invalid.

This Court should decline Petitioner's request to inject the courts into the internal legislative process of the Senate and to direct the course of legislation. The Court should dismiss the petition because it does not properly invoke the Court's jurisdiction in mandamus, because the relief that it requests plainly would offend separation of powers principles, and because Petitioner's request for declaratory relief fails to present a justiciable controversy. If the Court does not dismiss the petition on one or more of these grounds, the Court should deny the petition on its merits because RCW 43.135.035(1) is valid.

¹ Petitioner does not assert that she has been authorized by the Legislature to bring this action on its behalf, or that she acts on behalf of anyone other than herself.

II. ISSUES PRESENTED

Petitioner challenges a discretionary parliamentary ruling of the President of the Senate, and requests the Court to issue a writ of mandamus directing the course of the Senate's proceedings with respect to Senate Bill 6931 and future bills.

1. Should the Petition be dismissed because it fails to invoke the original jurisdiction of the Court in mandamus?
2. Would the Petitioner's requested writ invade the province of the Legislature and violate separation of powers principles?

Petitioner additionally requests a declaratory judgment that RCW 43.135.035(1), which requires a two-thirds vote of each house of the Legislature to enact bills that increase taxes, violates article II, section 22 of the State Constitution.

3. Does Petitioner's request for declaratory relief present a justiciable controversy?
4. Is RCW 43.135.035(1) prohibited by article II, section 22, of the Washington Constitution, which simply precludes the Legislature from passing any bill with the votes of less than a majority of the elected members of each house of the Legislature?

III. STATEMENT OF THE CASE

A. Factual Background

Article III, section 16 of the Washington Constitution provides that, “[t]he lieutenant governor shall be presiding officer of the state senate.” Under article II, section 9, “each house may determine the rules of its own proceedings.”

Respondent, the Lieutenant Governor, serves as President of the State Senate, presiding over its sessions. Const. art. III, § 16; RCW 43.15.010(1) (the Lieutenant Governor serves as President of the Senate). The rules of the Senate’s proceedings, adopted by that body pursuant to article II, section 9, call on the President of the Senate to make parliamentary rulings on points of order raised by members of the Senate. Agreed Statement of Facts (ASF) 35 (Engrossed Senate Resolution 8601 (“ESR 8601”), Duties of the President, Rule 1.4).² This rule provides:

² The Senate Rules as they appear in the 2007 Journal of the Senate are Exhibit 3 to the Agreed Statement of Facts. “The permanent Senate rules adopted at the first regular session during a legislative biennium shall govern any session subsequently convened during the same legislative biennium”. ASF 39 (ESR 8601, Adoption and Suspension of Rules, Rule 35.1).

Rule 1.4. *The president may speak to points of order in preference to members, arising from the president's seat for that purpose, and shall decide all questions of order subject to an appeal to the senate by any member, on which appeal no member shall speak more than once without leave of the senate.*

(Emphasis added).

Such rulings are internal to the Senate and are subject to appeal to the Senate itself on the request of any member. ASF 39 (ESR 8601, Point of Order-Decision Appealable, Rule 32). Rulings by the president on points of order may be changed by the Senate on simple majority vote. ASF 38-9 (Rule 32; ESR 8601, Voting, Rule 22.5). Rule 32 provides:

Rule 32. *Every decision of points of order by the president shall be subject to appeal by any senator, and discussion of a question of order shall be allowed. In all cases of appeal the question shall be: "Shall the decision of the president stand as the judgment of the senate?"*

(Emphasis added).

Thus, rulings of the president on points of order become the final parliamentary decision of the Senate, only if the Senate allows them to stand.

On February 29, 2008, Senator Sheldon raised the following point of order on the floor of the Senate:

“Mr. President, I’d ask that you announce the number of votes necessary to pass Senate Bill No. 6931.”

ASF 16 (Senate Journal, 47th Legislative Day, at 6). Senator Sheldon then spoke to his point of order, and requested Respondent to “rule that a two-thirds super-majority or thirty-three votes in support of this bill is required in order to pass Senate Bill No. 6931.” ASF 17. Senator Brown, the Petitioner, spoke in response to Senator Sheldon’s point of order, opposing his request. ASF 17.

On Senator Sheldon’s point of order, Respondent ruled that “a super-majority vote of this body—that is, 33 votes—is needed for final passage.” ASF 21. No senator, including Petitioner, appealed Respondent’s ruling to the Senate. On final passage, there were 25 votes in favor of the bill, 21 opposed, 1 senator absent and 2 excused. Accordingly, the bill was declared lost. ASF 21.

B. Procedural Background

Three days later, on March 3, 2008, Petitioner filed this matter in this Court, styled as an original action in mandamus against the Lieutenant Governor. Petitioner requests:

2. Writs of mandamus and/or prohibition that
 - (a) prohibit the Lieutenant Governor from refusing to forward Senate Bill 6931 on [sic] the House on the grounds that it passed with only a majority instead of the 2/3 supermajority specified by RCW 43.135.035(1), and

- (b) order the Lieutenant Governor to comply with his duty to forward Senate Bill 6931 on to the House as passed because the 2/3 supermajority requirement of RCW 43.135.035(1) is unconstitutional under Article II, §22.
- 3. Writs of mandamus and/or prohibition that prohibit the Lieutenant Governor from refusing to forward Senate Bills on [sic] the House on the grounds that they passed with only a majority instead of the 2/3 supermajority 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.

ASF 75 (Pet. at 11).

This Court denied Petitioner's motion for accelerated review, and set a schedule under which the Court's Commissioner considered whether the Court should retain the case, transfer it to a superior court, or dismiss the Petition. ASF 133-36 (Order dated March 6, 2008). Although noting strong support for Respondent's arguments that the merits of this case are not properly presented, the Commissioner declined Respondent's request to dismiss this action, at that stage of the proceedings. ASF 258-59 (Ruling on Original Action at 3-4).

IV. SUMMARY OF ARGUMENT

The petition should be dismissed without reaching the merits of Petitioner's claim for three reasons. First, the petition does not invoke the original jurisdiction of the Court. Mandamus is an extraordinary writ available only to compel a state officer to perform a duty that is required by law and that does not entail the exercise of discretion. Petitioner

challenges a ruling of the Respondent, President of the Senate, on a point of order concerning the number of votes necessary for Senate Bill 6931 to pass the Senate. The duty of the President of the Senate in ruling on points of order is discretionary, not ministerial. It is not subject to mandamus. Petitioner seeks a writ that would direct Respondent “to forward Senate Bill 6931 [and other bills] on to the House.” Respondent has no such duty. Moreover, the decision whether a bill passes the Senate is a decision of the Senate, not Respondent, and the Senate did not determine that Senate Bill 6931 had passed its chamber. For these reasons, mandamus does not lie against Respondent. The additional relief sought in the Petition is a declaratory judgment that RCW 43.135.035(1) is invalid. The Court has no original jurisdiction over claims for declaratory judgment, and considers them only incidental to a properly presented claim for mandamus. As mandamus is not appropriate in this case, Petitioner’s incidental claim for declaratory relief also fails.

Second, the requested writ would offend cardinal principles of separation of powers. The Petition, brought by a single member of the Senate, seeks to inject the Court into the internal processes of the Senate. The constitution commits the legislative authority of the state to the Legislature. The Petitioner seeks a writ directing the Senate and its officers as to how to conduct the process of enacting legislation. This

would offend the respect due a coequal and coordinate branch of government, especially in the performance of its core constitutional function (legislating). The constitutional authority of the judicial branch to interpret and rule on the validity of laws enacted by the Legislature, in cases appropriately brought, does not extend to interfering with the Legislature in the legislative process. That is all the more true in this case, where processes of the Senate, readily available to address Petitioner's complaint, were not employed.

Third, Petitioner's request for a declaratory judgment that RCW 43.135.035(1) is invalid fails justiciability requirements. It presents only an abstract, hypothetical and speculative question. In essence, it asks: If, by majority vote, the Senate and the House were to enact a bill that raises taxes, and if the Governor were to sign the bill into law, and if its validity were to be challenged by a proper plaintiff on the basis of the two-thirds vote provision of RCW 43.135.035(1), would RCW 43.135.035(1) cause that law to be declared invalid? There is no such law and no such challenge before the Court. It is hypothetical. And, the speculative nature of the instant case is all the more pronounced when, in 14 years since its passage, the Legislature has not chosen to repeal or permanently amend the two-thirds vote requirement of RCW 43.135.035(1). Nor do the Respondent's duties as President of the Senate repose in him any genuine

and opposing interest with respect to the validity of RCW 43.135.035(1). And, this case does not present the rare circumstance where the Court has issued an advisory opinion as a matter of comity for other branches of government. No branch of government is before the Court seeking an advisory opinion, and the Respondent seeks dismissal.

If the Court nonetheless reaches the merits of Petitioner's challenge to RCW 43.135.035(1) under article II, section 22 of the State Constitution, the statute is valid. First, RCW 43.135.035(1) is a statute. It neither amends nor purports to amend article II, section 22, and accordingly, it is not infirm on that basis, as Petitioner suggests. By its plain language, article II, section 22 establishes only the minimum number of votes constitutionally required to enact bills. It does not prohibit the Legislature or the people from enacting statutes that require a larger majority when they deem greater legislative consensus advisable. Indeed, the framers' recognition of the value of supermajority requirements as part of Washington's fundamental law supports the conclusion that the framers did not foreclose enactment of such requirements as a matter of statute.

V. ARGUMENT

A. **Petitioner's Argument Is Based On An Erroneous Description Of The Role Of The President Of The Senate, The Nature Of His Rulings And The Authority Of The Senate Itself**

Petitioner characterizes the parliamentary ruling of the President of the Senate on Senator Sheldon's point of order as though it was a judicial ruling on the validity of RCW 43.135.035(1). Petitioner then argues that only the Court may make such rulings and so, Petitioner's argument goes, the Court should intercede into this internal matter of legislative procedure in the Senate, direct the discretionary decision-making authority of the Respondent and the Senate as to the course of Senate proceedings, and along the way, rule on the constitutionality of RCW 43.135.035(1).³ Characterizing the Lieutenant Governor's ruling as a judicial decision may suit the Petitioner's purpose in trying to recast this matter of internal Senate procedure as a justiciable controversy sounding in mandamus, but the characterization is fundamentally erroneous.

Article III, section 16 provides that, "[t]he lieutenant governor shall be presiding officer of the state senate", and by virtue of article II, section 9, "each house may determine the rules of its own proceedings."

³ See, for example, Petitioner's Updated Initial Brief at 16: "The legal decision as to whether or not the 2/3 supermajority provision of RCW 43.135.035(1) is constitutional is not a decision delegated to non-judicial State Officers such as Respondent Lieutenant Governor. Rather, this constitutional determination is a judicial decision to be exclusively made by this Court."

Under the rules of the Senate, adopted pursuant to article II, section 9, and in response to points of order raised by Senate members, Respondent is authorized to make parliamentary decisions—rulings as to how the Senate may proceed in the legislative process—not judicial rulings. Respondent has no authority to make judicial rulings, and makes none. His decisions are made under the rules of the Senate, concern only the manner in which the Senate may proceed in the legislative process, and all of his decisions are subject to revision by majority vote of the Senate. *See* Kristen L. Fraser, *Method, Procedure, Means and Manner: Washington’s Law of Law-Making*, 39 Gonz. L. Rev. 447, 459 (2003-2004) (“When interpreting [parliamentary rules that mirror constitutional requirements], the presiding officer makes parliamentary rulings, not constitutional rulings.”) Thus, an argument endeavoring to cast Respondent’s role and rulings on points of order as judicial rulings addressing the validity of RCW 43.135.035(1) misstates the wholly legislative and parliamentary character of the duty that the President of the Senate performs under article III, section 16 and article II, section 9. *See State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 98, 273 P.2d 464 (1954) (“[W]hile acting as such presiding officer [of the senate] the lieutenant governor actually is serving as an officer of the legislative branch of government”).⁴

⁴ Respondent’s ruling on Senator Sheldon’s point of order explains that the

Such rulings are simply matters of parliamentary procedure. That being so, had a majority of the Senate determined that it wished to pass Senate Bill 6931 by a simple majority vote, it readily could have done so by following the course that it has set for itself, in its own rules. ASF 39 (Rule 32). Any member of the Senate, including Petitioner, could have appealed Respondent's ruling and by simple majority vote, the Senate could have determined that Respondent's ruling on the number of votes necessary to pass Senate Bill 6931 would not stand. ASF 39 (Rule 32). Petitioner did not do so; nor did any other member of the Senate. The only logical conclusion to be drawn from this circumstance is that, for whatever reason, a majority of the Senate decided that it did not wish to pass a tax increase in Senate Bill 6931 by a simple majority vote.

Asserting a similar and equally unsound view of the authority and role of the Senate itself in the legislative process, Petitioner suggests that following the Senate's own rules in this case "would have been futile because the full Senate has no more authority to declare a statute

President of the Senate does not make judicial rulings, and that rather, his rulings are simply parliamentary decisions:

"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. It is for this reason that the President has a long-standing tradition of refraining from making legal determinations, and he does so, again in this case . . . [T]he proper venue for these legal arguments is in the courts, not in a parliamentary body." ASF 20.

unconstitutional than does the Lieutenant Governor.” ASF 188. (Petitioner’s Memorandum Addressing Three Issues at 12). Again, implicit in Petitioner’s argument is that the passage of bills—the Legislative process itself—entails judicial decision-making on legal and constitutional questions. Petitioner offers no support for this extraordinary view of the lawmaking process, because there is none. The Legislature may enact any bill that it chooses to enact; the Senate may pass any bill that a majority of its members choose to pass. *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 300-01, 174 P.3d 1142 (2007) (noting the plenary nature of legislative authority). The Senate could have enacted Senate Bill 6931 by simple majority vote had it wished to do so.

Once a law is enacted, questions with respect to its meaning or validity are subject to determination by the judiciary, provided that the questions are presented in the context of a justiciable controversy. In fact, from time-to-time, the judiciary finds constitutional fault with laws enacted by the Legislature. But, that possibility hardly precludes a legislative body from passing a bill as Petitioner asserts, and it hardly supports the unprecedented judicial interference in the internal proceedings of the Senate that Petitioner seeks in this case. *Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994) (court declined to issue

a writ directing internal legislative proceedings as to passage and signing of bills). This Court has previously recognized the distinction between the power of a legislative body to pass a law, and the question of whether it would be constitutional if enacted. *Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007) (“That the law enacted by an initiative might be unconstitutional does not mean that it is beyond the power of the State to enact.”). The decision as to whether to pass a bill belongs to the Legislature, and does not depend upon any advance determination of its validity if enacted. *Id.* Indeed, Petitioner’s erroneous description of the process would have the judiciary sit as the “super parliamentarian” of the state Senate, whenever a member disagrees with a parliamentary ruling on a point of order. This is at odds with the Senate’s own rules, and as discussed more fully below, would amount to an unprecedented intrusion of the judiciary into the internal legislative processes of the Senate.⁵

⁵ Petitioner also argues that she needn’t take advantage of the Senate’s procedures before commencing this original action seeking a writ of mandamus, analogizing her circumstances to challenging a gubernatorial veto, where the Legislature need not first seek to override the Governor’s veto. See *Washington State Legislature v. Locke*, 139 Wn.2d 129, 985 P.2d 353 (1999). ASF 189 (Petitioner’s Memorandum Addressing Three Issues at 13). There is no analogy. By definition, in veto cases, the Legislature has *enacted a law*. Here, it has not. Not even one house of the Legislature chose to pass Senate Bill 6931. In addition, veto challenges do not stem from internal Senate parliamentary rulings over which a majority of the body has full control. Rather, veto issues stem from the Governor’s exercise of separate constitutionally granted authority to negate part of a law that the Legislature has enacted. Finally, as demonstrated by the veto case Petitioner cites such matters are not heard in mandamus. *Legislature v. Locke*, 139 Wn.2d at 136-37. Finally, *Locke* was brought by the Legislature itself, not by a single member of one of its chambers, as is the case here.

B. The Petition Does Not State A Claim In Mandamus And Is Not Within The Original Jurisdiction Of The Court

The original jurisdiction of this Court is limited and where it exists, it is discretionary and nonexclusive. *Staples v. Benton Cy. ex rel. Bd. of Comm'rs*, 151 Wn.2d 460, 464, 89 P.3d 706 (2004). The Court's original jurisdiction cannot be properly invoked in this matter.

Petitioner seeks to invoke the Court's original jurisdiction in mandamus, but the most fundamental prerequisites to mandamus are not present in this case. The writ of mandamus exists "to compel the performance of an act which the law especially enjoins as a duty resulting from an office." *Washington State Coun. of Cy. & City Employees v. Hahn*, 151 Wn.2d 163, 166-67, 86 P.3d 774 (2004) (quoting RCW 7.16.160). "[M]andamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official." *Walker*, 124 Wn.2d at 410.

Respondent's duty related to this matter is to preside over the Senate, in accordance with rules adopted by the Senate. (Article III, section 16 provides that, "[t]he lieutenant governor shall be presiding officer of the state senate", and under article II, section 9, "each house may determine the rules of its own proceedings.") Respondent's rulings on points of order are discretionary. Neither the Senate Rules, nor any law

require its president to make any particular ruling on a point of order.

ASF 35 (ESR 8601, Rule 1.4, 32). Senate Rules provide:

Rule 1.4. *The president may speak to points of order in preference to members, arising from the president's seat for that purpose, and shall decide all questions of order subject to an appeal to the senate by any member, on which appeal no member shall speak more than once without leave of the senate.*

Rule 32. *Every decision of points of order by the president shall be subject to appeal by any senator, and discussion of a question of order shall be allowed. In all cases of appeal the question shall be: "Shall the decision of the president stand as the judgment of the senate?"*

ASF 35, 39 (ESR 8601, Rule 1.4, 32) (emphasis added).

As this Court recognized in *Walker*, such rulings are discretionary, not ministerial.⁶ In *Walker*, the Court declined to reach the merits of an original action seeking, among other things, to challenge the predecessor of the statute that Petitioner seeks to challenge in this case. As this Court held in *Walker*, the duties of the President of the Senate in presiding over that chamber, "certainly [are] not an appropriate subject for mandamus." *Walker* 124 Wn.2d at 410. The Court explained that "[t]he signing of a

⁶ See *State ex rel. Clark v. Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926):

The distinction between merely ministerial . . . and other official acts is that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial."

bill is not a ministerial task, as it involves a decision regarding the number of votes required for a particular action and whether those votes have been properly cast. In fact, these presiding legislative officers will be required to determine whether Initiative 601 applies to a particular bill if some or all of Initiative 601 remains the law. We will not grant a writ relating to these tasks.” *Id.* As the presiding officer of the Senate and acting under the rules of the Senate, Respondent made the very decisions that *Walker* held to be discretionary—“determin[ing] whether [RCW 43,135.035(1)] applies to a particular bill”, here Senate Bill 6931, and “a decision regarding the number of votes required for a particular action”, *id.*, its passage. The ruling is discretionary and thus, not subject to mandamus.

In addition to this Court’s recognition in *Walker* of the discretionary nature of the duties of legislative officers in presiding over their respective chambers, the relevant rules of the Senate also make the discretionary nature of its president’s rulings on points of order abundantly clear. The rules call upon Respondent as President of the Senate to decide questions of order, but do not compel a particular ruling.⁷

⁷ Petitioner seems to assert that because, like many state officers, Respondent takes an oath of office to uphold the constitution and laws of the state, his duty in ruling on points of order is ministerial, presumably on the theory that he must “follow the law.” ASF 67 (Pet. at 3). ASF 181-82 (Petitioner’s Memorandum Addressing Three Issues at 5- 6). Such an obligation is hardly defined “with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *State ex rel. Clark*, 137 Wash. at 461. If Petitioner were correct, then every duty of every state officer who takes such an oath and administers laws would be ministerial. Plainly, however, that is not the case.

In addition, neither the Senate Rules nor any law places on Respondent a duty to forward Senate Bills to the House, the “duty” that Petitioner requests this Court to order Respondent to perform. Even if Respondent’s ruling on the number of votes required for a bill to pass the Senate were not discretionary (and as explained above, it is) and even if the decision whether a bill has received sufficient votes to pass the Senate ultimately rested with the discretion of Respondent (and as explained above, that decision resides with the Senate), the Petitioner asks the Court to issue a writ that “order[s] the Lieutenant Governor . . . to forward Senate Bill 6931 [and other bills] on to the House.” ASF 75 (Pet. at 11). Petitioner points to no law that creates such a duty on Respondent.⁸ Respondent’s only duty relevant to this case is to decide points of order for the limited purpose of the internal proceedings of the Senate, according to his best judgment, all subject to revision by the Senate.

There is no rule of the Legislature even approximating a requirement that Respondent “forward [a] Senate Bill . . . on to the House.” ASF 75 (Pet. at 11). The closest thing to such a rule is Rule 23 of the Joint Rules of the Sixtieth Legislature, Senate Concurrent

⁸ Petitioner also alleges that Respondent “refuse[d] to forward Senate Bill 6931 on [sic] the House”. ASF 75 (Pet. at 11). Petitioner points to no request by the Senate that Respondent forward Senate Bill 6931 to the House, and no refusal by Respondent in the face of such a request.

Resolution 8400, and it neither requires any bill to be forwarded anywhere, nor requires Respondent to do anything. Rule 23 is entitled “Final Action on Bills, How Communicated”, and provides:

Each house shall communicate its final action on any bill or resolution, or matter in which the other may be interested, in writing, signed by the secretary or clerk of the house from which such notice is sent.

ASF 59 (SCR 8400, Rule 23). Respondent is not the Secretary or Clerk of the Senate. He has no duty to forward Senate bills to the House, and he has no duty under Rule 23. For all of these reasons, this action does not state a claim in mandamus and does not invoke the original jurisdiction of the Court.⁹

Moreover, as previously explained, it is not Respondent who ultimately determines whether a bill has passed the Senate. Senate Rules leave the decision of whether a bill has passed that chamber to a majority of the Senate itself. Under Rule 32, any ruling of the president on a point of order is subject to appeal by any member, and to reversal by majority vote. ASF 38 (Rule 22.5). Thus, it is not Respondent whose discretionary

⁹ Petitioner seems to suggest that the Lieutenant Governor’s duties in this case somehow shifted from duties involving the exercise of judgment and discretion, to ministerial duties, simply because no party is before the Court challenging his ruling that Senate Bill 6931 increased taxes within the meaning of RCW 43.135.035(1), or that it received 25 properly cast votes. ASF 190 (Petitioner’s Memorandum Addressing Three Issues at 14, n.13). Whether others agree or disagree with a decision that involves the exercise of judgment or discretion is not the measure of whether the decision is ministerial or discretionary. By Petitioner’s logic, for example, the same court decision would be ministerial if the parties before the court agreed that it was correct, but discretionary if they did not.

decision ultimately determines whether a bill has passed the Senate; it is the Senate's decision. Senate Bill 6931 failed because, first, the number voting for it was insufficient given the presiding officer's ruling as to the majority required for passage and, second, because no member of the Senate appealed the Respondent's ruling on that point. In the absence of a majority vote overruling the senate president, "the decision of the president [shall] stand as the judgment of the senate." ASF 39 (Rule 32). The judgment whether a bill has passed the Senate is a judgment of the Senate, not Respondent. Mandamus is an extraordinary remedy and will not lie where there is a plain, speedy and adequate remedy at law. *Staples*, 151 Wn.2d at 464. Here, there is a plain speedy and adequate remedy in the parliamentary rules of the Senate, and the same principle should apply. For this additional reason mandamus does not lie as to Respondent.

Finally, the additional relief requested by Petitioner is not within the original jurisdiction of this Court. In addition to mandamus, Petitioner seeks a declaratory judgment that RCW 43.135.035(1) is invalid. ASF 75 (Pet. at 11). "This court's original jurisdiction is governed by the constitution and, by the plain language of the constitution, does not include original jurisdiction in a declaratory judgment action." *Walker*, 124 Wn.2d at 411. Indeed "[t]he only grounds on which this court could render declaratory relief [in an original action] is if such a declaration

necessarily underlies a writ of mandate.” *Hahn*, 151 Wn.2d at 170, citing *Walker*, 124 Wn.2d 411 (brackets in original). As explained above, in this case there is no basis for a writ of mandamus directed to Respondent and that being so, the Court is without original jurisdiction to issue a declaratory judgment. *Hahn*, 151 Wn.2d at 171. *See also Walker*, 124 Wn.2d at 422 (rejecting consideration of a declaratory judgment claim “being brought in on the shirttail of a mandamus action, which is improperly before us in the first place”).¹⁰

This action does not sound in mandamus, is not within the original jurisdiction of this Court, and should be dismissed.

C. Petitioner’s Requested Writ Would Invade The Province Of The Legislature In Violation Of Separation Of Powers Principles

Under article II, section 1, “[t]he legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington.” Petitioner, a single member of the Senate, asks this Court to inject itself into the internal proceedings of the Legislative Branch by reviewing a parliamentary ruling of the President of the Senate,

¹⁰ Moreover, as discussed *infra* at pages 27-29, a decision by this Court on the validity of RCW 43.135.035(1), whatever that decision might be, would not make Respondent’s duty to rule on points of order ministerial, rather than discretionary.

and directing the president to proceed with a particular bill (and future bills) in a specific way. ASF 75 (Pet. at 11).

This Court has clearly stated its understanding of the separation of powers consequences of accepting such an invitation. “When directing a writ [of mandamus] to the Legislature or its officers, a coordinate, equal branch of government, the judiciary should be especially careful not to infringe on the historical and constitutional rights of that branch.” *Walker*, 124 Wn.2d at 407. The Court has expressly declined to enter a writ supervising the decisions of the presiding officers of the Legislature with regard to signing bills and resolving the parliamentary issues associated with the passage of bills. *Id.* at 410 (concluding that judicial supervision of the manner in which the President of the Senate and Speaker of the House preside over those bodies is “certainly not an appropriate subject for mandamus,” and that “[t]he signing of a bill is not a ministerial task.”). Reflecting the respect due a coequal branch of government, in *State ex rel. Daschbach v. Myers*, 38 Wn.2d 330, 229 P.2d 506 (1951), the Court similarly refused to entertain an action in mandamus against the President of the Senate and other officials of the Legislature to affix the true date of passage to a bill. “The legislature and this court are co-ordinate branches of our state government, and we cannot interfere with the legislature in its legislative processes, but are limited to a consideration of the

constitutionality and interpretation of its acts.” *Id.* at 332. To the same effect is *State ex rel. Gunning v. Odell*, 58 Wn.2d 275, 362 P.2d 254 (1961), reversing the judgment of a trial court enjoining a board of county commissioners from taking legislative action to rezone property. “The right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of government. The separation of powers doctrine is so fundamental that it needs no discussion.” *Id.* at 278. *See also Smith v. City of Centralia*, 55 Wash. 573, 576, 104 P. 797 (1909) (“[T]he courts will not interfere with an action of a body exercising legislative functions to correct mere errors or mistakes in its proceedings”).

This Court’s recognition of the constitutional impropriety of judicial supervision of internal legislative proceedings is well grounded in separation of powers principles also recognized by sister jurisdictions. “A writ of *mandamus* will not issue to a legislative body or its officers to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control.” *Ohio ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 719 N.E.2d 704, 709 (Ohio 1999) (grounding this conclusion in the separation of powers).

Thus, courts properly decline, on separation of powers grounds, to entertain cases in which legislators sue the presiding officers of one or

both houses regarding the consideration of pending legislation. “In recognition of these abiding [separation of powers] principles, the judiciary exercises great restraint when requested to intervene in matters entrusted to the other branches of government.” *North Dakota ex rel. Spaeth v. Meiers*, 403 N.W.2d 392, 394 (N.D. 1987). In *Spaeth*, the House had passed a bill by simple majority vote, but the presiding officer of the Senate concluded that it required a two-thirds vote under a provision of the state constitution. The Senate accordingly returned the bill to the House without consideration. *Id.* at 393. The court declined to consider a request by the speaker of the House and the Attorney General for a writ of mandamus directing the presiding officer of the Senate to accept the bill, reasoning that the presiding officer’s ruling, and the failure of the members of the Senate to overrule it, were simply “internal matters capable of resolution by the legislative branch, which has various nonjudicial remedies available to it within the political forum.” *Id.* at 394. The same is true in this case. Respondent’s ruling is internal to the Senate and the rules of the Senate provide a readily available mechanism to appeal rulings on points of order to the Senate for its determination. Petitioner chose not to avail herself of that legislative mechanism. “This court ordinarily will not issue its prerogative writs in order to bring about that which voluntary political action can perform.” *Id.*

To similar effect is *Ex Parte Echols*, 1866 WL 515 (Ala. 1866). In that case, the speaker of the Alabama House of Representatives decided that a bill had not passed the House for lack of a two-thirds vote, and upon appeal, the House sustained the speaker's decision. Citing separation of powers principles, the Alabama Supreme Court held that it lacked jurisdiction to order the speaker to cause the bill to be sent to the Senate. "No other department of the government can revise [the House] action in this respect, without a usurpation of power." *Id.* at *2. *See also Tuck v. Blackmon*, 798 So. 2d 402, 410 (Miss. 2001) ("Our law recognizes the pernicious consequences of unwarranted intrusion by the judiciary into the legislative process, and we will in the absence of compelling justification leave disputes within the deliberative bodies as to their practices and procedures to be decided by those bodies").

Similarly, based on separation of powers principles, the Oklahoma Supreme Court declined to issue a writ of mandamus against the Speaker of that state's House of Representatives regarding the requirements prescribed by the state constitution for reading bills prior to passage. *Dank v. Benson*, 5 P.3d 1088, 1092 (Okla. 2000). "Generally speaking, the separation-of-powers doctrine prevents the Court's intrusion by writ of mandamus into the House's exercise of its constitutionally-assigned legislative function." *Id.*

Just as the courts in *Spaeth* and *Echols* declined to intervene in an internal legislative dispute as to whether a bill required a simple or two-thirds majority, this Court should decline to review the discretionary ruling of the Lieutenant Governor or to direct the manner in which pending bills should be handled. Moreover, the Court should be particularly hesitant to invade the legislative process of the Senate at the request of a single member, when the body itself has established a legislative mechanism to address the member's complaint and the member has chosen not to use it. *See* ASF 39 (Rule 32).

Petitioner argues that the separation of powers doctrine “does not require the three branches of government to be “hermetically sealed off from one another””, and that its purpose is to protect the “*fundamental functions*” of each branch of government from interference by other branches, quoting *Spokane Cy. v. State*, 136 Wn.2d 663, 667, 966 P.2d 314 (1998) (emphasis in original). ASF 185 (Petitioner's Memorandum Addressing Three Issues at 9). The relief that Petitioner seeks in this case asks the Court to intrude into the “fundamental function” of the Senate—its legislative process—to direct its course in this and other cases. This is

precisely the sort of judicial action that the separation of powers doctrine guards against.¹¹

Petitioner also cites two cases—veto challenges—where the Legislature itself—a *branch* of government, sought a judicial decision concerning the constitutional authority of the Governor to veto legislation that it had enacted. ASF 186 (Petitioner’s Memorandum Addressing Three Issues at 10). This case is decidedly different. *No branch* of government is challenging the actions of another branch of government, seeking the Court’s resolution of their respective constitutional powers. Here, only Petitioner seeks the Court’s interference in this matter, and

¹¹ Petitioner’s reliance on *Kavanaugh v. Chandler*, 72 S.W. 2d 1003 (Ky. 1934) is misplaced. See ASF 190-91 (Petitioner’s Memorandum Addressing Three Issues at 14-15). The *Kavanaugh* court declined to issue the writ requested because the case was moot. Accordingly, the language from the opinion on which Petitioner relies is dicta. Moreover, the language Petitioner quotes is removed from its context. The relevant passage, quoted below, demonstrates two things that fundamentally distinguish *Kavanaugh* from this case. First, the passage demonstrates that the particular duty at issue was prescribed by the Kentucky constitution in ministerial terms. That is not the case here. Second, the passage demonstrates that the *Kavanaugh* court would have provided a judicial remedy only if the legislative body itself had no means to change the presiding officer’s act. Here, the Senate’s rules provide a ready means:

It is said that for every wrong there is a remedy. The immediate remedy would seem to lie in the body over which the officer is presiding. He is but its agent. Section 83 of the Constitution makes the Lieutenant Governor, by virtue of his office, the president of the Senate, and section 85 provides for the election of a president pro tempore. He may sign bills as the presiding officer. [citations omitted]. Doubtless if the conditions should be that such relief is not then and there available, the processes of the courts could be invoked, for, since the Constitution peremptorily directs that the officer shall sign the bills under the conditions specified, he has no discretion and his act is ministerial in character.

Id. at 1005.

Petitioner seeks it not with respect to the constitutional authority of the Legislature vis-à-vis another branch of government, but with respect to how the Senate should conduct its internal lawmaking proceedings.

Finally, Petitioner responds by asserting that it is the function of the judiciary to resolve constitutional questions. ASF 185-86 (Petitioner's Memorandum Addressing Three Issues at 9-10). The response is overly general, and misses the mark in any event. Simply raising a constitutional question does not trump separation of powers constraints. Moreover, the writ of mandamus that Petitioner seeks—and the wholesale separation of powers breach that it invites—is not connected in any legally significant way to her request for a declaratory judgment that RCW 43.135.035(1) is prohibited by article II, section 22.

This is so, because a decision from this Court on the validity of RCW 43.135.035(1), whatever that decision might be, would not fundamentally alter the discretionary nature of the Respondent's duty to make parliamentary rulings on points of order raised by members of the Senate. For example, as to bills that raise taxes, even if this Court were to hold RCW 43.135.035(1) invalid, it still would be Respondent's discretionary duty to determine whether votes cast for or against such bills are properly cast. *Walker*, 124 Wn.2d at 410. And, it still would be Respondent's discretionary duty to rule as a matter of parliamentary

procedure on whether particular bills are otherwise subject to a supermajority vote requirement, and the propriety of votes cast for or against them. See, e.g., const. art. II, § 1(c) (supermajority vote required to amend direct legislation within first two years); const. art. II, § 36 (supermajority vote required to introduce bill during last ten days of session); const. art. XXVIII, § 1 (supermajority vote required to alter the law establishing legislative salary commission). The nature of Respondent's duty to rule on points of order is discretionary and its essential nature would not change, depending on whether this Court were to uphold or invalidate RCW 43.135.035(1). The fact of the matter is that Respondent's parliamentary ruling has been enlisted as a convenient, but legally unsound vehicle for Petitioner's effort to challenge RCW 43.135.035(1) in an action in mandamus.

D. Petitioner's Request For Declaratory Relief Does Not Present A Justiciable Controversy

The petition also should be dismissed because Petitioner's request that the Court declare RCW 43.135.035(1) unconstitutional does not meet threshold standards for justiciability. A justiciable controversy, necessary to invoke a court's jurisdiction to hear a declaratory judgment action, requires: "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical,

speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.” *To-Go Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2003), quoting *Diversified Indust. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). The present case fails the justiciability test on at least three of its four elements. First, there is no “actual, present and existing dispute, or the mature seeds of one.” *Id.* In this case, the Legislature has enacted no law by majority vote that raises taxes, and accordingly, no one is before the Court challenging such a law on the basis of RCW 43.135.035(1). The only question presented to the Court in this case is hypothetical: If the Senate and the House were to enact a law that raises taxes based on a simple majority vote, and if the Governor were to sign that bill into law, and if its validity were to be challenged on the basis of RCW 43.135.035(1), would RCW 43.135.035(1) cause that law to be declared invalid?

In this case, the Senate chose not to pass Senate Bill 6931 with a majority vote. Had the Senate chosen otherwise, as was its option, had the House followed suit, had the Governor signed the bill into law, and had a proper plaintiff challenged that law based on the two-thirds vote provision

of RCW 43.135.035(1), there would be an actual existing dispute as to the validity of RCW 43.135.035(1). At this point, however, no such law has been enacted by the Legislature. Petitioner's request that the Court declare RCW 43.135.035(1) unconstitutional is a "hypothetical . . . disagreement", not an "actual, present and existing dispute, or the mature seeds of one". *To-Ro*, 144 Wn.2d at 411.

Moreover, it is mere speculation whether the House of Representatives would have passed Senate Bill 6931 and whether the Governor would have signed the bill into law had the Senate elected to declare Senate Bill 6931 passed. In addition, "when [a statute] may be amended by the very persons the Petitioners claim are being harmed, state legislators, we cannot do otherwise than find that this is only a speculative dispute." *Walker*, 124 Wn.2d at 412.¹² In the 14 years since RCW 43.135.035(1) was enacted, the Legislature has not chosen to repeal the statute or permanently amend its two-thirds vote provision, although it could have. *Washington Farm Bur. Fed'n*, 162 Wn.2d at 301 ("[S]ucceeding legislatures may repeal or modify acts of a former legislature."). Notably, the Legislature has amended the two-thirds vote

¹² In *Walker*, one of the statutes that Petitioners sought to challenge had not yet gone into effect. In this case, that statute, RCW 43.135.035(1), is in effect, but the Legislature has enacted no law that would trigger its terms, and as in *Walker*, RCW 43.135.035(1) may be amended if the Legislature chooses to amend it. The mere fact that a statute is on the books, does not mean that any action challenging it is justiciable.

requirement of RCW 43.135.035(1) on two occasions to substitute a majority vote requirement for designated periods. *See* Laws of 2002, ch. 33, § 1, amending RCW 43.135.035(1) to substitute a majority vote requirement for the 2001-2003 biennium; and Laws of 2005, ch. 72, § 2, amending RCW 43.135.035(1) to substitute a majority vote requirement from the effective date of the 2005 act through June 30, 2007. For these reasons, this case presents neither an actual existing controversy, nor the mature seeds of one, and rather posits a speculative hypothetical issue for academic debate.

In addition, in its current posture, this is not a case “between parties having genuine and opposing interests.” *To-Ro*, 144 Wn.2d at 411. Neither the constitution nor any statute assigns to the Lieutenant Governor a duty to enforce RCW 43.135.035(1), or to defend the validity of challenged initiative measures or statutes enacted by the Legislature. The Lieutenant Governor’s consideration of existing statutes in ruling on points of order in presiding over the Senate, is purely an internal parliamentary function with respect to how that body may choose to proceed, and is subject to acceptance or rejection by a majority of the Senate. It does not repose in him any “genuine and opposing interest”, *id.*, with respect to the validity of RCW 43.135.035(1). His interest in the

validity of RCW 43.135.035(1) is no more “genuine and opposing” than that of any other person who may be affected by a law.

For essentially the same reasons, this case does not “involve[] interests that must be direct and substantial, rather than potential, theoretical, abstract or academic”, and so does not satisfy the third requirement for justiciability. *To-Ro*, 144 Wn.2d at 411.

Finally, this is not a case of the sort where, on rare occasion, the Court has determined it appropriate for jurisdiction to be exercised over a request for declaratory relief without regard to justiciability requirements. *Walker*, 124 Wn.2d at 417 (“[T]his court has, on the rare occasion, rendered an advisory opinion as a matter of comity for other branches of the government or the judiciary.”). No branch of government is before the Court seeking an advisory opinion on the validity of RCW 43.135.035(1). Unlike the rare exceptions addressed in *Walker* (and instead, much like *Walker*) “[h]ere, not only is there no request by the Legislature itself that we adjudicate this case”, “but the Respondent . . . seek[s] dismissal of the case.” *Walker*, 124 Wn.2d at 417. This is precisely the kind of hypothetical case that the Court has found nonjusticiable in the past, and should again. “[E]ven if we do not always adhere to all four requirements of the justiciability test, this court will not render judgment on a

hypothetical or speculative controversy, where concrete harm has not been alleged.” *Id.* at 415.

Petitioner observes that the question of the validity of the two-thirds majority vote requirement of RCW 43.135.035(1) has been brought to the Court two other times. Petitioner’s Updated Initial Brief at 1. Each of those times, the Court correctly has declined to reach the question because it was not presented to the court in a justiciable context. *Walker*, 124 Wn.2d at 411; *Futurewise*, 161 Wn.2d at 412. Petitioner asserts that “[n]o legitimate purpose is served by once again putting off resolution of this underlying constitutional issue for another day.” ASF 180 (Petitioner’s Memorandum Addressing Three Issues at 4). Justiciability requirements serve not only “legitimate” but important purposes, including avoiding unnecessary constitutional issues and placing the judiciary in the role of rendering advisory opinions. The fact that an issue previously raised in a nonjusticiable posture again is raised in a nonjusticiable posture is not reason for the Court to abandon its justiciability requirements. Rather, it simply argues for those, such as Petitioner, who wish to challenge the statute, to take the necessary steps to

present the issue to the Court in a posture appropriate for the Court to entertain.¹³

E. The Supermajority Vote Requirement Of RCW 43.135.035(1) Does Not Conflict With Article II, Section 22 Of The Washington Constitution

For reasons previously expressed, the Court need not and should not reach Petitioner's challenge to the constitutionality of RCW 43.135.035(1). If it does, however, the statute is valid. Contrary to Petitioner's claim, RCW 43.135.035(1) does not conflict with article II, section 22 of the State Constitution.

1. RCW 43.135.035(1) Does Not Amend Or Purport To Amend Article II, Section 22

Before turning to the reasons that RCW 43.135.035(1) is not prohibited by article II, section 22, it is important first to correct Petitioner's oft-repeated misimpression that RCW 43.135.035(1) somehow amends article II, section 22. (See, for example, Petitioner's Updated Initial Brief at 14, erroneously asserting that RCW 43.135.035(1) "operates to amend the simple majority provision of Article II, §22.") RCW 43.135.035(1) is a statute, not a constitutional amendment. It either is consistent with article II, section 22, in which case it is a valid statute, or

¹³ Cases may be nonjusticiable for many different reasons. Petitioner's Updated Initial Brief at 1, points out justiciability shortcomings in *Walker* and *Futurewise* that do not apply to this case. The fact that the instant case is nonjusticiable for reasons not entirely the same as the reasons in *Walker* and *Futurewise*, does not make it any less nonjusticiable.

it is prohibited by article II, section 22, in which case it is an invalid statute. But either way, it is a statute. RCW 43.135.035(1) neither purports to amend nor serves to amend the constitution. It does not, as Petitioner seems to suggest, “add[] an eleventh category of State legislative acts to the ten specified in our State Constitution as requiring a 2/3 supermajority vote.” Petitioner’s Updated Initial Brief at 14. And, as discussed at pages 45-47, *infra*, as a statutory supermajority requirement, RCW 43.135.035(1) is fundamentally different from a constitutional supermajority requirement.

2. Article II, Section 22 Does Not Prohibit RCW 43.135.035(1) Either Expressly Or By Fair Inference, And The Statute Accordingly Stands Under The Plenary Lawmaking Power Of The Legislature And The People

The power of the Legislature, or of the people, “to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state or federal constitutions.” *Washington Farm Bur. Fed’n*, 162 Wn.2d at 300-01 (quoting *State ex rel. Citizens v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004)). “Insofar as legislative power is not limited by the constitution it is unrestrained.” *Id.* at 301 (quoting *Cedar County Comm. v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998)). The general rule under our democratic system, accordingly, is that the people’s elected legislative representatives, or the people directly, establish the law

and policy of the state, subject only to clear constitutional limitations. Const. art. II, § 1 (vesting legislative authority in the legislature, as well as reserving it to the people through initiative and referendum). “Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception.” *Washington Farm Bur. Fed’n*, 162 Wn.2d at 301 (quoting *State v. Fair*, 35 Wash. 127, 132-33, 76 P. 731 (1904)). In addition, statutes are presumed to be constitutional, and the party challenging the statute bears the burden of sustaining the challenge beyond a reasonable doubt. *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007).

3. The Plain Language Of Article II, Section 22 Merely Prohibits Enactment Of Laws On Less Than Majority Vote, And Defeats Petitioner’s Claim

“Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.” *Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997). “The text necessarily includes the words themselves, their grammatical relationship to one another, as well as their context.” *Id.*

Petitioner attempts to meet her “responsibility of proving that [RCW 43.135.035(1)] is unconstitutional beyond a reasonable doubt” (*Madison*, 161 Wn.2d at 92) on the basis of a constitutional provision that, by its own terms, does not prohibit the statute that she challenges. Article

II, section 22 provides, “[n]o 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, section 22 establishes a constitutional minimum number of votes for a bill to become law. It only describes the circumstances under which a bill *does not pass*. In other words, article II, section 22 does not prohibit statutes by which the legislature (or the people) express their legislative policy judgment that certain types of bills warrant greater than simple majority consensus for passage. RCW 43.135.035(1) expresses such a legislative policy judgment—that a two-thirds majority vote of each house should be required for passage of bills raising taxes. The statute hardly conflicts with the constitutional floor set by article II, section 22, as any bill receiving its supermajority support has met the requirement of article II, section 22.

A California court construed its essentially identical constitutional provision in just this way. *People v. Cortez*, 6 Cal. App. 4th 1202, 8 Cal. Rptr. 2d 580 (Cal. Ct. App. 1992). The constitutional provision at issue in *Cortez* provided in relevant part, “No bill may be passed unless . . . a majority of the membership of each house concurs.” Cal. Const., art. IV, § 8(b). *Cortez* correctly reasoned that a requirement for a legislative supermajority did not conflict with the passage of bills clause of the California Constitution because, “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.” *Id.*, 8 Cal. Rptr. 2d at 585. The constitution merely restricts the passage of bills to those that obtain at least majority approval, rather than establishing an affirmative rule that all bills receiving a majority must be deemed passed. *Id.*

Petitioner essentially asks this Court to amend article II, section 22, to treat it as if it read (in common bill drafting format to show changes): “((No)) Every bill shall become a law ((unless)) if . . . a majority of the members elected to each house be recorded thereon as voting in its favor.” This reading would transform the phrasing from a “negative” minimum requirement to a “positive” universal standard.¹⁴ The court should reject the Petitioner’s invitation to rewrite the Washington Constitution in this way.

4. The Alaska And Michigan Authority On Which Petitioner Relies Is Fundamentally Flawed

Petitioner relies on *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296, 300-01, (2007) to argue that RCW 43.135.035(1) runs afoul of article II, section 22. In *Alaskans*, the court concluded that

¹⁴ The *minimum* standard expressed in article II, section 22 contrasts with the affirmative standard applied to initiatives and referenda. “Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon.” Const. art. II, § 1(d).

Alaska's constitutional counterpart to article II, section 22, prohibited a statute that required a supermajority vote for tax increases. The Alaska provision, article II, section 14, provides in relevant part: "No bill may become law without an affirmative vote of a majority of the membership of each house." *Id.* at 299 (quoting Alaska Const. art. II, § 14).

The reasoning of the Alaska court is deeply flawed for several reasons and thus, is uninformative with respect to the question before this Court. First, entirely absent from the *Alaskans* opinion is any recognition of the fundamental rule in Washington, that the State Constitution is a restriction on otherwise plenary legislative authority. *Washington Farm Bur. Fed'n*, 162 Wn.2d at 300-01. Entirely absent from *Alaskans* is any recognition that statutes are entitled to a presumption of constitutionality. *Madison*, 161 Wn.2d at 92. And, entirely absent from *Alaskans* is any discussion of or deference to the plain language of the Alaska Constitution. *Malyon*, 131 Wn.2d at 799. In short, *Alaskans* ignores the fundamental guideposts of Washington law for considering a challenge to the constitutionality of a statute.¹⁵

¹⁵ The same is true of the Michigan Attorney General Opinion on which Petitioner relies. After reciting the fundamental principle that legislative power is plenary unless prohibited, the opinion completely fails to apply it. Instead, in its meager reasoning, the opinion concludes that there is "no constitutional authorization for the Legislature to impose a "super majority" voting requirement." 1998 WL 477683 (Mich. A.G.) *1-2.

Like the Washington Constitution, the Alaska Constitution states a minimum requirement for passage of bills, prohibiting passage of a bill with less than majority support. The Alaska court, however, gave short shrift to this constitutional language, reading its constitution as if it provided that all bills receiving majority support shall become law, rather than giving effect to its actual words, prohibiting bills from becoming law without that support. *Alaskans*, 153 P.3d at 300-01. This Court should not repeat Alaska's mistake of disregarding the constitution's actual language in the guise of construing it. *Malyon*, 131 Wn.2d at 799.

Moreover, the reasons offered by the Alaska Supreme Court for concluding that its bill passage provision prohibited statutes requiring a supermajority vote, either are clearly unsound or far less than compelling. The first reason given by the court in *Alaskans* is that, in other jurisdictions, supermajority vote requirements for tax increases are almost always found in constitutions, rather than statutes. *Alaskans*, 153 P.3d. at 299-300. That may be the case, but it says nothing for whether a statute requiring a supermajority to pass certain bills is constitutionally prohibited. And even so, *Alaskans* identified Washington as an exception to this ordinary circumstance. *Id.* Indeed, citing RCW 43.135.035(1), the Alaska Supreme Court correctly observed that when the Washington Legislature has determined that this statutory requirement should not be

followed, it simply has suspended the requirement through a bill enacted by *majority* vote. *Id.*; See Laws of 2002, ch. 33 § 1; Laws of 2005, ch. 72 § 2. Washington's Legislature and voters have historically found the supermajority a useful tool, and have included such requirements in both statutory and constitutional provisions. Historically, both the legislature and the people have enacted statutes requiring the consensus of more than a simple majority for certain actions. Under RCW 43.88.535 (repealed effective July 1, 1995, by Initiative 601, § 9(4)), the Legislature required a sixty percent majority to appropriate money out of the budget stabilization account. Initiative 62 required a sixty percent majority to exceed the revenue limit established by that initiative. RCW 43.135.050 (repealed effective July 1, 1995, by Initiative 601, § 9(9)).

Second, *Alaskans* concluded that a supermajority vote requirement is substantive, rather than procedural, and thus, not within the Alaska Legislature's constitutional authority to establish its rules of procedure. *Alaskans*, 153 P.3d at 300. Again, even accepting the court's characterization, it says nothing for whether a statutory supermajority requirement conflicts with the constitution.

Third, *Alaskans* rejected the argument that the negative phrasing of its constitutional provision, like Washington's, established only a constitutional minimum for passage of bills. The court gave only two

reasons. One, it stated that negative phrasing is not of “automatic significance”, and two, it criticized one way the parties suggested that the Alaska Constitution could have been written to establish a majority vote requirement as both a floor and a ceiling. *Id.* The parties’ proffered alternative constitutional language would seem irrelevant to the question of how to read the negative phrasing of the actual provision. The other basis given by the court, that negative phrasing is not of “automatic significance” is far from compelling. Among the cases cited by *Alaskans* to discount the actual negative phrasing of its counterpart to article II, section 22, is the opinion of this court in *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (1998), but *Gerberding* is readily distinguishable. *Gerberding* held that term limits are qualifications for office, and that an initiative imposing them for certain state offices conflicted with article II, section 7¹⁶, and article II, section 25¹⁷, of the Washington Constitution. In this respect, *Gerberding* concluded that, notwithstanding their negative phrasing, the qualifications provisions of the Washington Constitution were exclusive. *Gerberding*’s conclusion, however, rests on circumstances entirely absent from this case. The court based its

¹⁶ “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.” Const. art. II, § 7.

¹⁷ “No person, except a citizen of the United States and a qualified elector of this state, shall be eligible to hold any state office.” Const. art. III, § 25.

conclusion on what it termed “fundamental principles” specific to qualifications for public office. *Gerberding*, 134 Wn.2d at 201. Most notably, the court relied on a longstanding “strong presumption in favor of eligibility for office”, explaining that “any doubt as to the eligibility of any person to hold an office must be resolved against the doubt.” *Id.* at 202. In addition, the *Gerberding* court recounted Washington’s constitutional convention history, demonstrating that the framers considered but rejected term limits for all but a limited number of constitutional offices. *Id.* at 202-06. Finally, *Gerberding* relied on longstanding Washington precedent, as well as nearly uniform precedent from throughout the country, based on the strong presumption in favor of eligibility for office, that qualifications for constitutional office are exclusive. *Id.* at 205-08. None of these circumstances are present in this case to support an argument that article II, section 22, should be construed other than according to its plain language.¹⁸

¹⁸ *Alaskans* also erroneously relies on a passage that it paraphrases from *Mississippi v. Green*, 200 Ark. 204, 379, 138 S.W.2d 377 (1940):

“Why fix [legislative qualifications, even in negative phrasing] in the first place if the makers of the constitution did not intend to fix all the qualifications required, and why fix only a part of them and leave it up to the legislators to fix other qualifications?”

Alaskans, 153 P.3d at 301, n.19.

Regardless of whether this is a good question with respect to qualifications for office, it is not a good question with respect a constitutionally established minimum vote

Fourth, *Alaskans* pointed out that the Alaska Constitution includes several provisions establishing more stringent voting requirements for laws dealing with various subjects. The *Alaskans* court concluded that this was convincing evidence of the intent of Alaska's constitutional framers to include in the Alaska Constitution all instances in which supermajority votes could be required to enact a bill. *Id.* at 301. According to *Alaskans*, this circumstance undercut the contention that its bill passage provision established only the minimum vote required for passage of a bill. *Id.* Petitioner makes the same argument in this case, and it is decidedly unsound for two reasons. Petitioner's Updated Initial Brief at 11-12.¹⁹ First, any logic in the conclusion is based on the unstated assumption that a constitutional provision requiring a supermajority vote to pass certain bills, and a statutory provision requiring a supermajority vote to pass such bills, are essentially the same. So, the reasoning apparently goes, if the framers had intended any other supermajority vote requirements, they would have included them in the constitution. But the assumption is erroneous. A constitutional provision requiring a supermajority vote

requirement to pass bills. The answer to why have a minimum vote requirement that is not also a maximum, is to preclude legislation from being passed on less than a simple majority vote, while allowing the people or the legislature to determine, by statute, that certain types of bills warrant a greater consensus than a simple majority.

¹⁹ The Michigan Attorney General's Opinion relied on by Petitioner makes the same error. 1998 WL 477683 (Mich. A.G.) *2.

requirement on a particular subject, and a statute requiring such a supermajority vote on the same subject, are very different. Constitutional provisions are part of the fundamental law of the state, and as such, are far more significant in their permanence than statutes. In Washington, constitutional provisions may be amended only on a two-thirds vote of the legislature and voter approval, or on the calling of a constitutional convention on the same terms, and approval by the people. Const. art. XXIII, §§ 1, 2. By contrast, a statute is not part of the state's fundamental law. Except for the limited period during which the constitution provides otherwise, a statute expresses the will of the legislature or the people only until the Legislature or the people decide to amend or repeal the statute or otherwise make a different legislative policy choice, by simple majority vote. *Washington Farm Bur. Fed'n*, 162 Wn.2d at 301 (one legislature may not tie the hands of another.) *Gunther v. Huneke*, 58 Wash. 494, 499, 108 P. 1078 (1910) ("What one legislature may do, the same or another legislature may directly or indirectly undo.")²⁰ In other words, a statute providing for a supermajority vote on a particular matter is otherwise subject to the ordinary legislative process. A constitutional provision is not. And for this reason, there is no logic in concluding that supermajority

²⁰ The Washington Constitution requires a supermajority in the legislature in order to amend initiatives within two years of enactment, but a simple majority thereafter. Const. art. II, § 1(c).

vote requirements in a constitution evidence intent that no others may be enacted by statute.

Contrary to the *Alaskans* rationale and Petitioner's contention, other provisions in Washington's Constitution requiring supermajorities to enact certain legislation support, rather than undercut, the validity of RCW 43.135.035(1). The fact that the same convention that drafted article II, section 22, also required supermajority approval for certain legislative acts demonstrates a recognition that certain legislative decisions are sufficiently important to require an added measure of consensus, as part of the state's fundamental law, and that a simple majority does not provide the only high-water mark of public policy. Had the drafters of the constitution—again, at that same convention—intended to preclude the Legislature or the people from recognizing additional such circumstances, they certainly could have said so directly. *See State v. Delgado*, 148 Wn.2d 723, 728-29, 63 P.3d 792 (2003) (noting that, in the absence of statutory language the Legislature clearly knew how to include, the court presumes the language chosen was intentional). Instead, they drafted article II, section 22, merely to state a prohibition against passage of bills based on less than a majority of the full membership, such as the majority of a quorum present and voting. Const. art. II, § 22.

Both the framers of the constitution and subsequent legislatures and voters have recognized that certain specified actions should command the support of more than a simple majority. Petitioners, to the contrary, urge that the same constitutional convention that embraced supermajorities for some purposes intended to prohibit statutes requiring supermajorities for any other purposes. The Constitution contains no language supporting this notion, however. Const. art. II, § 22. The framers may not reasonably be presumed to have implied the prohibition of a political mechanism that they themselves adopted through language that does not say so. *Bogert v. Kinzer*, 93 Idaho 515, 465 P.2d 639, 649 (1970), *appeal dismissed*, 403 U.S. 914 (1971). Given the plenary legislative authority of the people and the legislature, and the absence of a clear constitutional prohibition, the Court should not conclude otherwise.

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VI. CONCLUSION

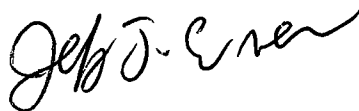
For these reasons, the Court should dismiss this Petition.

RESPECTFULLY SUBMITTED this 9th day of June, 2008.

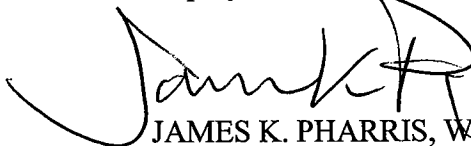
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