The Honorable Bruce E. Heller
Hearing Date: February 17, 2012
Hearing Time: 9:00 a.m.
With Oral Argument

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

LEAGUE OF EDUCATION 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 PEDERSEN, 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 PAINTER, an individual taxpayer; ERIC PETTIGREW, an individual taxpayer and Washington

NO. 11-2-25185-3

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 245-1700
FACSIMILE (206) 245-1750

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.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 245-1700
FACSIMILE (206) 245-1750

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PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 245-1700
FACSIMILE (206) 245-1750

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 245-1700
FACSIMILE (206) 245-1750

TABLE OF AUTHORITIES

Cases

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 245-1700
FACSIMILE (206) 245-1750

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 245-1700
FACSIMILE (206) 245-1750

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 245-1700
FACSIMILE (206) 245-1750

Statutes, Constitutional Provisions and Rules

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 245-1700
FACSIMILE (206) 245-1750

Other Authorities

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 245-1700
FACSIMILE (206) 245-1750

I. INTRODUCTION AND RELIEF REQUESTED

The Washington Constitution is the fundamental plan for the operation of Washington's government and sets forth the framework under which laws may be enacted and the Constitution itself amended. RCW 43.135.034, enacted in 2010 by Initiative 1053 ("I-1053"),[1] violates this fundamental plan by imposing an unconstitutional two-thirds supermajority legislative voting requirement to enact laws that raise taxes (the "Two-Thirds Requirement"). This supermajority requirement contravenes Article II, § 22 which provides that only a simple majority vote in each house of the Legislature is necessary to pass legislation. Our framers debated the simple majority rule and wrote it into the Constitution. It acts as one of the fundamental checks and balances upon which our system of government is based. It may be altered only by constitutional amendment pursuant to Article XXIII, not by statute or initiative.

In addition, RCW 43.135.034 requires a public vote on all bills that result in expenditures in excess of the state expenditure limit (the "Mandatory Referendum Requirement"). The Mandatory Referendum Requirement conflicts with the constitutional requirements in Article II, § 1(b) which govern the referendum process and with the Legislature's power to enact legislation pursuant to Article II, § 1. The referendum power can only be altered through the Article XXIII process of amending the Constitution, not by statute or initiative. A similar mandatory referendum requirement in Initiative 695 ("I-695") was previously declared unconstitutional.

The impacts of RCW 43.135.034 on our State's ability to fund essential services such as public education, public safety, elder care, and the justice system are stark. The Plaintiffs in this action are education advocacy groups, legislators, taxpayers, parents, and educators, all of whom have been directly and negatively impacted by the unconstitutional requirements of

[1] RCW 43.135.034 and I-1053 are the same and used interchangeably.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

RCW 43.135.034. The unconstitutional conditions created by I-1053 can be traced back to 1993 when Initiative 601 ("I-601") was enacted. In response to legislative efforts to amend the Two-Thirds Requirement since I-601, a frequent initiative sponsor, Tim Eyman, has pushed two replacement initiatives (960 and 1053) and vows to continue to do so in the future. Indeed, Mr. Eyman recently filed an initiative for inclusion on the November 2012 ballot described as "Son of 1053." This is an issue that has and will continue to harm the State. Thus, Plaintiffs' constitutional challenges to this statute are justiciable. As the branch of government entrusted with responsibility to interpret the Constitution, this Court should exercise its jurisdiction to decide this case.

II. STATEMENT OF FACTS

A. A Series of Initiatives Have Imposed the Two-Thirds Requirement and Mandatory Referendum Requirement.

I-1053 is the most recent in a series of initiatives intended to restrict the Legislature's ability to pass revenue measures. The first of these initiatives, I-601, was passed in 1993. Declaration of Paul J. Lawrence ("Lawrence Decl.") Ex. A. I-601 included a provision that "any 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...." Former RCW 43.135.035(1) (1994) (Laws of 1994, ch. 2, § 4(1)). Under I-601, 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." *Id.* § 4(2).

In response to the Legislature's suspension for two years of I-601's Two-Thirds Requirement, Mr. Eyman and others submitted Initiative 960 ("I-960") in 2007. Lawrence Decl. Ex. B. I-960 contained a Two-Thirds Requirement and a Mandatory Referendum Requirement. It was enacted.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

Anticipating a similar suspension of I-960 in the 2010 legislative session, the I-960 sponsors filed I-1053. Lawrence Decl. Ex. C. As anticipated, the Legislature suspended I-960. ESSB 6130 (2010). In November 2010, I-1053 was passed, re-enacting the requirements of I-960. Lawrence Decl. Ex. C.

I-1053 is codified at RCW 43.135.034. Similar to its predecessors, RCW 43.135.034(1) sets forth the Two-Thirds Requirement providing that "any action or combination of actions by the Legislature that 'raises taxes' may be taken only if approved by at least two-thirds legislative approval in both the house of representatives and the senate." RCW 43.135.034(6) defines "raises taxes" as "any action or combination of actions by the legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund." Further, RCW 43.135.034(2)(a) sets forth the Mandatory Referendum Requirement providing that if a tax bill "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."

On January 6, 2012, the I-960/I-1053 sponsors filed Initiative 1185 ("I-1185") – self-styled the "Son of 1053 (2/3 vote for tax increases)" – for potential inclusion on the November 2012 ballot. Lawrence Decl. ¶ 5, Ex. D. I-1185 is substantively the same as I-1053, once again including the Two-Thirds and Mandatory Referendum Requirements. *Id.*

B. The Two-Thirds Requirement Prevents Legislation From Passing.

On May 24, 2011, the House of Representatives voted on Substitute House Bill 2078. *Id.* at Exs. E-G. Consistent with the State's paramount duty to provide for education under Article IX, § 1 of the Washington Constitution, SHB 2078 would have funded reductions in kindergarten through third grade class size that the voters had approved in 2000 when they passed Initiative 728. *Id.* at Ex. E. Funding for these class size reductions would have come from narrowing a tax deduction for large banks and other financial institutions. *Id.*

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1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

Prior to the House vote on SHB 2078, several legislators raised points of order with Speaker of the House Frank Chopp. *Id.* at Ex. F. Speaker Chopp stated that SHB 2078 "raises taxes" and therefore was subject to the two-thirds supermajority approval requirement of RCW 43.135.034. *Id.* at Ex. F at 1-3. Speaker Chopp also noted that only the courts can resolve the question of whether RCW 43.135.034 is constitutional. *Id.* at Ex. F at 4-5.

SHB 2078 received a constitutional majority of 52 out of 98 votes to pass out of the House and advance in the legislative process. *Id.* at Ex. G. Absent a specific constitutional provision requiring a higher voting threshold, bills that receive a constitutional majority are sent from the House to the Senate. SHB 2078 did not receive the two-thirds supermajority required by RCW 43.135.034. *Id.* Thus, Speaker Chopp declared that SHB 2078 failed, and the bill did not advance to the Senate. *Id.* at Ex. F at 37.

C. The Impacts of RCW 43.135.034 on Plaintiffs.

Plaintiffs in this action include two non-profit education advocacy groups, the League of Education Voters ("LEV") and the Washington Education Association ("WEA"), several State legislators, school board members, educators, parents, and taxpayers. *See* Compl. at ¶¶ 2-24. RCW 43.135.034 has had direct and negative impacts on Plaintiffs. *Id.* at ¶¶ 28-34.

For example, LEV is a non-profit educational advocacy group representing the interests of Washington students. *Id.* at ¶ 2. LEV works to create an education system in which all children have an equal and adequate opportunity to learn and succeed. *Id.* WEA represents the interests of approximately 82,000 educator and taxpayer members across Washington. *Id.* at ¶ 3. WEA's mission is to advance the interests of these members to make education the best it can be for students, staff and communities. *Id.* Both LEV and WEA regularly participate in the legislative process and lobby for the passage of education related bills. *Id.* at ¶¶ 2-3; Lawrence Decl. Ex. H at 10-18, 21-23. The Two-Thirds Requirement has directly impacted the interests of LEV and WEA by preventing the passage of important education measures

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

supported by these organizations and by preventing the Legislature from funding already enacted education-related laws that advance LEV's and WEA's interests. Lawrence Decl. Ex. H at 10-18, 21-23.

RCW 43.135.034 also impacts the interests of the legislator Plaintiffs, each of whom has seen his or her ability to vote impacted as a result of the Two-Thirds Requirement. *Id.* at 25-27. The taxpayer parents and educators have also felt the impacts of this law as they watch the budgets for public education shrink in response to budget constraints. *Id.* at 15-20, 24, 31, 35-37. The result is teacher layoffs, a reduction in educational programming and services, and an increase in class size. *Id.* Each of these impacts is the direct result of education funding cuts, which negatively affect students and educators. *Id.* As the Washington Supreme Court recently held, the State Legislature has continually failed to provide funding sufficient to meet the State's paramount duty to provide a basic education. *McCleary v. State*, 2012 WL 19676, at *33, ___ P.3d ___ (Wash. Sup. Ct., Jan. 5, 2012).

Plaintiffs requested that the Attorney General institute this proceeding to challenge the constitutionality of RCW 43.135.034. Lawrence Decl. Ex. I. The Attorney General's Office declined to do so, and Plaintiffs filed the instant suit. *Id.* at Ex. J.

III. STATEMENT OF ISSUES

A. Whether the Two-Thirds Requirement violates Article II, § 22, which requires only a simple majority vote to pass legislation.

B. Whether the Mandatory Referendum Requirement for legislation that exceeds the State expenditure limit conflicts with the referendum process set forth in Article II, § 1(b) and/or impairs the Legislature's plenary power under Article II, §1.

C. Whether Plaintiffs' claims are justiciable when Plaintiffs have standing to bring such claims and those claims are ripe for judicial review.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

IV. EVIDENCE RELIED UPON

This Motion relies on the Declaration of Paul J. Lawrence, the exhibits attached thereto, and the papers and pleadings on file with this Court.

V. AUTHORITY

A. Summary Judgment Standard.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Declaratory judgment actions may be decided upon a motion for summary judgment. *Tran v. State Farm Fire and Cas. Co.,* 136 Wn.2d 214, 223, 961 P.2d 358, 362 (1998). The question of the constitutionality of a statute is particularly appropriate for resolution by summary judgment. *See Optimer Int'l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 771, 246 P.3d 785 (2011) ("Interpretation of constitutional provisions…is a question of law"); *State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 623, 957 P.2d 691 (1998) (holding similarly). As demonstrated below, despite the "presumption of constitutionality," as a matter of law, there is "no reasonable doubt that [RCW 43.135.034] violates the constitution." *Amalgamated Transit Union Local 587 v. State* ("*ATU*"), 142 Wn.2d 183, 205, 11 P.3d 762 (2000), *opinion corrected*, 27 P.3d 608 (2001) (internal citations omitted).

B. The Power of the Legislature is Established Through and Limited By the Washington Constitution.

Article II, § 1 of the Constitution vests the legislative authority of the State in the "legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington . . . ."[2] Article II, §§ 18 – 22 establish a series of

[2] As discussed later, the Constitution also reserves certain of the legislative power to the people to be exercised through defined initiative and referendum processes.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

requirements that "define and therefore limit how the legislature may enact laws." Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 60 (2002). These constitutional provisions set forth the style of laws (§18) , the requirement that a bill contain only one subject (§19), the origin and amendment of bills (§20), the recording of yeas and nays on votes (§21), and the passage of bills (§22).

Specifically, Article II, § 22 sets forth how a bill becomes law:

> 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 to each house be recorded thereon as voting in its favor.

The text of Article II, § 22 is plain and unambiguous and provides that bills require a simple majority vote to become law. Its meaning "should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of...extending its operation." *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 558, 452 P.2d 943 (1969); *see also Washington State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988) ("[T]he constitution means what it says, and when it is not ambiguous there is nothing for the courts to construe.").

"The provisions of th[e] Constitution are mandatory, unless by express words they are declared to be otherwise." Const. art. I, § 29. The Legislature's power to act by simple majority under Article II, § 22 is mandatory.

C. The Two-Thirds Requirement Violates the Constitution's Simple Majority Rule Governing the Passage of Legislation.

1. Article II, § 22's Simple Majority Rule is a Matter of Constitutional Concern and May Not be Altered Absent Valid Constitutional Amendment.

RCW 43.135.034(1) purports to change the process for the Legislature to pass bills that "raise taxes." Rather than allowing passage by a simple majority vote as set forth in Article II, § 22, RCW 43.135.034(1) imposes the requirement of a two-thirds supermajority for passage

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

of tax bills. The fundamental question presented here is whether the simple majority vote provision in Article II, § 22 can be altered by initiative.[3] The answer is no.

Article XXIII sets forth the procedure through which the Constitution may be amended and requires that amendments be proposed by the Legislature, approved by two-thirds of legislators in both houses, and approved by a majority of voters in the next general election. Const. art. XXIII. This is the exclusive means of amending the Constitution. The Constitution cannot be amended by initiative. *ATU*, 142 Wn.2d at 232 (citing *Gerberding v. Munro*, 134 Wn.2d 188, 210, n.11, 949 P.2d 1366 (1998)). RCW 43.135.034, as enacted by I-1053, impermissibly attempts to amend the provisions of the Constitution governing the manner in which certain legislation is passed without following the constitutionally required procedures necessary to do so.

The Washington Supreme Court has previously rejected similar attempts to alter or supplement constitutional requirements by initiative. In *Gerberding*, the court struck down an initiative that added a period of non-incumbency to the qualifications for state constitutional officers (effectively a term limit), finding that it improperly added to the constitutional requirements for elected officers. 134 Wn.2d at 211. The court held that "[a] statute, whether adopted by the Legislature or the people, may not add qualifications for state constitutional officers where the Constitution sets those qualifications." *Id.* The court's ruling was based on a number of factors, including the long held rule in Washington that the "Constitution is a restriction on legislative power rather than a grant of powers." *Id.* at 196. The court also looked to the history of these constitutional provisions to determine the framers' intent, including the historical context and debates of the 1889 Constitutional Convention. The court concluded that qualifications for office are a matter of constitutional concern and may be

[3] The issue is the same whether the Two-Thirds Requirement is imposed by initiative or passage of a law by the Legislature.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

altered only by constitutional amendment. *Id.* at 210. This same principle applies to the simple majority provision of Article II, § 22 – it may not be altered absent valid constitutional amendment.

"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). The history of Article II, § 22 demonstrates that the framers considered the requirements for the passage of bills to be a significant constitutional concern. The framers understood that majority and supermajority voting requirements constituted two separate and distinct prerequisites to legislative passage and discussed various voting requirements at the 1889 Constitutional Convention. Indeed, the framers considered and ultimately rejected amendments to Article II, § 22 which would have required something other than simple majority approval for legislation:

> **Motion:** Turner moved that the words "majority vote" be stricken.
> **Action:** Motion lost.
> **Motion:** Power moved to insert a provision that a majority of those present could pass a bill.
> **Action:** Motion lost.

Quentin Shipley Smith, The Journal of the Washington State Constitutional Convention 1889, with Analytical Index at 536 (Beverly P. Rosenow, ed., W.S. Hein & Co., Inc. 1999) (1962). Throughout the Constitutional Convention, the framers debated whether to impose simple majority or supermajority vote requirements in various other constitutional provisions establishing their intent to make the vote requirement an issue of constitutional concern:

> Mr. Kinnear moved to amend Section 3 by striking out the words "a majority" in fourth line and insert in place thereof "two-thirds." Mr. Wagner moved an amendment of the amendment to strike out "two-thirds" and insert "three-fifths."
> . . .
> The amendment was lost. [Relating to the amount of votes required within a county to form a new county]

Id. at 159-60.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

> Mr. Stiles moved the following amendment: That the vote by which the Convention amended the article by striking out "a majority" and inserting "three-fifths" in Section 2, lines two and three, be reconsidered.
>
> . . .
>
> It was lost. [Relating to the amount of votes required to move a county seat]

Id. at 163.

> Mr. Kinnear moved to strike the word [] "majority" and insert "two-thirds." Lost. [Relating to amount of votes required to adopt a city charter]

Id.

> Mr. Turner moved that "three-fifths" in line four, Section 6, be stricken out and the words "a majority" inserted.
>
> . . .
>
> [T]he amendment was lost. [Relating to amount of votes required to surpass municipal debt limits]

Id. at 208-09.

The framers' intent that vote requirements be a matter of constitutional concern is underscored by the numerous constitutional provisions requiring a vote greater than a simple majority to pass legislation. The Constitution contains 16 legislative supermajority provisions.[4] For example, bills must receive a three-fifths favorable vote in both houses where they would provide for contracting, funding or refunding of state debt[5] or make a withdrawal from the budget stabilization account.[6] A two-thirds favorable vote is required for bills that propose a constitutional amendment[7] or alter the composition of the commission that determines government officials' salaries.[8] None of the 16 constitutional supermajority provisions includes the category of bills encompassed by I-1053's Two-Thirds Requirement.

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[4] A chart summarizing the 16 legislative supermajority provisions is attached to the Lawrence Declaration as Exhibit K.

[5] Const. art. VIII, § 1(i)

[6] Const. art. VII, § 12(d)(iii)

[7] Const. art. XXIII, § 1.

[8] Const. art. XXVIII, § 1

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

These provisions illustrate that the framers knew how to – and did – create specific supermajority exceptions to the Constitution's general rule of simple majority approval as to specific legislation subjects. But the framers did not specifically require that tax bills pass with a supermajority as required by the Two-Thirds Requirement. Had they intended this to be the case, they would have provided as such. Indeed, the framers knew how to and did impose constitutional restraints on the Legislature's taxing authority. For example, they required uniformity of taxation in Article VII, § 1. And the Constitution has been subsequently amended to cap the aggregate of all tax levies at one percent (unless a supermajority of voters approve otherwise) (Const. art. VII, § 2) and to require that gas taxes be spent only on roads (Const. art. II, § 40). The omission of a supermajority requirement for tax legislation evidences the framers' intent that Article II, § 22's simple majority requirement be of general application, including to tax legislation, and excepted only as set forth in the Constitution.

Gerberding is instructive here. Just like the qualifications for office at issue in that case, the simple majority requirement of Article II, § 22 was debated at the 1889 Constitutional Convention and was intended by the framers to be a matter of "constitutional, not statutory, concern." *Gerberding*, 134 Wn.2d at 204-05. And, like *Gerberding*, the framers did not confer authority on the legislative branch to alter or amend the constitutional simple majority provision by statute or initiative. *Id.* (noting that "[v]arious constitutional provisions demonstrate the framers knew how to grant, and expressly did grant the Legislature lawmaking authority pertaining to certain constitutional offices"). "[I]f the framers intended the Legislature to have authority to add to the [requirements] of Wash. Const. art. II, § [22] . . . they would have so stated." *Id.* (alterations to apply to current context). The framers' intent in establishing the specific voting requirements set forth in the Constitution must be honored.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

2. The Simple Majority Provision of Article II, § 22 Establishes Both a Floor and a Ceiling for Legislative Votes.

The simple majority requirement of Article II, § 22 sets both a floor and a ceiling for the passage of all legislation that is not otherwise expressly addressed in the Constitution. The negative phrasing of this provision does not indicate intent to set only a minimum requirement for the passage of bills, which could be exceeded by statutes addressing certain types of legislation. Indeed, the *Gerberding* court expressly rejected the argument that "the negative phraseology of the Constitution indicates the qualifications for state constitutional officers are minimums to which the Legislature or the people may add by statute." 134 Wn.2d at 201. The negative phrasing of Article II, § 22 is substantially similar in structure to the constitutional provisions at issue in *Gerberding*. *Compare* Const. art. II, § 22 ("No bill shall become a law unless . . . a majority of the members elected to each house be recorded thereon as voting in its favor.") *with* Const. art. III, § 25 ("No person, except a citizen of the United States and a qualified elector of this state, shall be eligible to hold any state office . . . .") and Const. art. II, § 7 ("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"). Just like the constitutional requirements for office at issue in *Gerberding*, Article II, § 22's simple majority requirement may not be added to or amended by statute. 134 Wn.2d at 202-04 (holding that qualifications in the Constitution "were meant to be the exclusive qualifications for such state constitutional officers" and could not be added to by initiative or statute).

3. The Two-Thirds Requirement is Contrary to the Framers' Concern and the Fundamental Principles of Our Representative Government.

The Two-Thirds Requirement is also counter to the constitutional checks put on special interests that were the concern of the framers at the 1889 Constitutional Convention. *See Yelle*, 55 Wn.2d at 291 (historical context provides guidance in interpreting framer intent). The "Washington Constitution evinces fear of not majoritarian tyranny, but of the power of corporations and special interests that might capture or corrupt public institutions." Kristen L.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

Fraser, *Method, Procedure, Means and Manner: Washington's Law of Law-Making*, 39 Gonz. L. Rev. 447, 449-450 (2004); *see also* Lebbeus J. Knapp, *Origin of the Constitution of the State of Washington*, 4 Wash. Hist. Q. 227, 239 (1913) ("The 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"); Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 Gonz. L. Rev. 41, 71 (2002) ("[t]he different political context of 1889, the different concerns of the framers of the Washington Constitution . . ., and their fear of private power as the single greatest threat to liberty"). By permitting a minority of either house to thwart tax legislation, the Two-Thirds Requirement is counter to the constitutional checks on special interests. Indeed, the majority will of the people as expressed through their elected representatives can be undone by a relatively small number of legislators influenced by a strong legislative lobby. For instance, corporations seeking to prevent closing of tax loopholes need receive the support of only 17 state senators to defeat any tax legislation under the Two-Thirds Requirement. Such a minority rule undermines the framers' concerns to limit the power of special interests in the Legislature.

Abrogation of the simple majority rule is also counter to the fundamental principles on which our representative government is based. Article I, § 32 of the Washington Constitution provides: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." This provision is "an admonition...to constantly keep in mind the fundamentals of our republican form of government . . . ." *Wheeler Sch. Dist. No. 152 v. Hawley*, 18 Wn.2d 37, 48, 137 P.2d 1010 (1943).

One such fundamental principle is that of majority rule. In explaining why supermajority votes are inappropriate for the passage of legislation, James Madison said:

> In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free

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1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

> government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular emergencies to extort unreasonable indulgences.

THE FEDERALIST No. 58, at 397 (James Madison) (Jacob E. Cooke ed., 1961). Alexander Hamilton expressed the same concern with supermajority requirements, stating:

> The public business must in some way or other go forward. If a pertinacious minority can controul the opinion of a majority respecting the best mode of conducting it; the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings. Hence tedious delays-continual negotiation and intrigue-contemptible compromises of the public good. And yet in such a system, it is even happy when such compromises can take place: For upon some occasions, things will not admit of accommodation; and then the measures of government must be injuriously suspended or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savour of weakness-sometimes border upon anarchy.

THE FEDERALIST No. 22, at 141 (Alexander Hamilton). In short, Hamilton believed that constitutions should not "give a minority a negative upon the majority." *Id.* at 140. But that is exactly the result of the Two-Thirds Requirement.

Another fundamental principle of our form of government is that legislative power is checked by the executive veto. *See* Const. art. III, § 12. The Governor's veto may be overridden only by a two-thirds legislative vote. *Id.* While this constitutional balance of power may be altered by specific provisions of the Constitution itself, it cannot be changed by a legislative act. Otherwise, the Legislature could always render the Governor's veto authority a nullity by removing an entire class of legislation from the executive check. The Governor's review of the bill would then be perfunctory rather than a true check on the legislative power. That is exactly what the Two-Thirds Requirement does here. While the Constitution may impose such a limitation on the executive power, legislation may not. RCW 43.135.034 attempts to undo the checks and balances carefully put into place by our Constitution's framers

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

and alters substantially the structure of state government in disregard of the constitutional safeguards of representative democracy.

4. Other States Have Declared Unconstitutional Attempts to Increase Legislative Majority Voting Requirements to a Supermajority.

Other state courts construing statutory supermajority requirements in light of constitutional simple majority provisions have struck those requirements down as unconstitutional. For example, Alaska's Constitution contains a simple majority clause similar to Washington's Article II, § 22. *See* Alaska Const. art. 2, § 14 ("No bill may become law without an affirmative vote of a majority of the membership of each house."). In *Alaskans for Efficient Gov't, Inc. v. State*, the Alaska Supreme Court struck down as unconstitutional an initiative requiring a supermajority voting requirement to pass tax-related bills (a law very similar to the Two-Thirds Requirement). 153 P.3d 296, 298-302 (Alaska 2007).[9] The court found that the constitutional majority voting requirement did not constitute a "floor" which could be raised via voter initiative. The court reached this conclusion by identifying numerous instances in which "Alaska's constitutional framers, well aware of their ability to require more stringent voting requirements, included such requirements in the Alaska Constitution for laws dealing with various subjects." *Id.* at 299-301.[10] As described above, the same is true for the framers of the Washington Constitution.

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[9] In *Futurewise v. Reed*, 161 Wn.2d 407, 414, 166 P.3d 708 (2007), the Washington Supreme Court declined to apply *Alaskans for Efficient Gov't* to invalidate a prior initiative related to the Two-Thirds Requirement on the ground that both cases represented pre-election constitutional challenges to voter initiatives, and the two states have different standards regarding a court's ability to entertain such pre-election constitutional challenges.

[10] *See also Howard Jarvis Taxpayers Ass'n v. City of San Diego*, 120 Cal. App. 4th 374, 392-93, 15 Cal. Rptr. 3d 457 (Cal. Ct. App. 2004) ("This constitutional language clearly and unambiguously means that approval of a local government's imposition or increase of any general tax requires only a majority vote, and a two-thirds vote cannot be required for such approval. Had the drafters of article XIIIC intended the term 'majority vote' to mean 'at least a majority vote'...they easily could have done so"); Mich. Att'y Gen. Op. No. 6990 (August 10, 1998) ("the Legislature may not, by statute, require a three-fifths vote to enact legislation for which the constitution otherwise requires a simple majority vote").

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

The Alaska Court noted that "to the extent that other jurisdictions have addressed the issue, the clear consensus appears to view supermajority voting requirements as implicating the kind of basic subject matter usually addressed by constitutional provision rather than legislation." *Id.* at 300. Thus, in states in which a supermajority requirement is necessary to raise taxes, this requirement is expressly set forth in the constitution and not through legislation.[11] Like the initiative struck down in *Alaskans for Efficient Gov't*, the Two-Thirds Requirement improperly changes the constitutional provisions of Article II, § 22 by initiative.

D. The Mandatory Referendum Requirement of RCW 43.135.034 Disregards the Referendum Process Established in Article II, § 1(b) and Violates the Legislature's Plenary Power.

RCW 43.135.034(2)(a) requires voter approval for bills that "will result in expenditures in excess of the state expenditure limit." This Mandatory Referendum Requirement violates Article II, § 1(b) because it requires a referendum on legislation without following the constitutional process. This requirement also impairs the plenary power of future legislatures under Article II, § 1 by constraining their ability to govern.

RCW 43.135.034(2)(a)'s Mandatory Referendum Requirement violates Article II, § 1(b), which specifies the conditions and procedures under which a bill may be subject to referendum. A bill may be referred only if a petition is circulated and signed by the required percentage of legal voters, or if the Legislature votes to refer the bill. Const. art. II, § 1(b). While the people reserved certain initiative and referendum powers, those powers must be exercised through the process set forth in Article II, § 1(b). *ATU*, 142 Wn.2d at 242. Different referendum procedures cannot be created by statute or initiative.

[11] This includes the constitutions of Arizona, Arkansas, California, Colorado, Delaware, Florida, Kentucky, Louisiana, Michigan, Mississippi, Oklahoma, Oregon, and South Dakota. Excerpts of the relevant portions of these states' constitutions are attached to the Lawrence Declaration as Exhibit L.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

The Supreme Court's analysis in *ATU* is on point. There, the court addressed whether an initiative that automatically subjected to voter approval all state tax measures passed by the Legislature was constitutional and concluded:

> We hold that section 2 of I-695 violates the four percent signature requirement of art. II, § 1(b) because it effectively establishes a referendum procedure applying to every piece of future taxing legislation without regard to the four percent signature requirement. Section 2 does not merely provide for conditional legislation; it changes the way in which a piece of legislation is enacted.

Id. at 244. The Supreme Court in *ATU* noted the problematical consequences of allowing initiatives to change the referendum process:

> If carried to its logical conclusion, it would mean that the voters could pass several initiatives, each requiring every measure of a certain class passed by the Legislature to be submitted to the voters for approval. In a piecemeal way, all, or nearly all, areas of legislation could thereby be removed from the Legislature's authority. Such a result would be inconsistent with the representative form of government in this state.

Id. at 242.

RCW 43.135.034(2)'s Mandatory Referendum Requirement suffers from the same problem as the mandatory referendum provision of I-695. It changes the way in which bills that result in expenditures in excess of the state expenditure limit are enacted. All such bills, like in I-695, are subject to a mandatory referendum without regard to the Constitution's signature requirement. This conflicts with Article II, § 1(b) and is unconstitutional.

Further, the Mandatory Referendum Requirement unconstitutionally infringes on the Legislature's plenary power to enact legislation under Article 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.3d 1142 (2007). Thus, "[n]either the Legislature nor the people acting in their legislative capacity has the power to

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

condition a state law solely on voter approval." *ATU*, 142 Wn.2d at 241 (emphasis in original). But that is exactly what the Mandatory Referendum Requirement does by conditioning the enactment of a certain class of legislation on voter approval.

The question whether the Mandatory Referendum Requirement violated the Legislature's plenary power to enact legislation under Article II, §1 was before the Court in *Farm Bureau*, but the court majority decided the case on alternative grounds. Justice Chambers in his concurrence did reach the question – the "elephant in the courthouse" as he termed it. *Farm Bureau*, 162 Wn.2d at 314 (Chambers, J. concurring). First, Justice Chambers noted: "Right or wrong, good or bad, until our constitution is amended, neither the people through their initiative and referendum powers nor the legislature through its general legislative powers may prevent a future body of duly elected legislators from exercising their constitutional authority to pass laws or raise taxes." *Id.* at 318. His conclusion was based on the court's holdings from prior cases: "'Neither the Legislature nor the people acting in their legislative capacity has the power to condition a state law solely on voter approval . . . .' *ATU*, 142 Wn.2d at 241 . . . . Nor can one legislature require future legislatures to refer a class of legislation for referendum. *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 759, 131 P.3d 892 (2006) . . . ." *Id.* at 318-19. Applying these principles, he concluded that "I-601's referendum requirement is an unconstitutional intrusion into the legislature's plenary power to pass laws. *See* CONST. art. II, § 1 . . . ." *Id.* at 319. Justice Alexander's concurrence in *Farm Bureau* agreed with Justice Chambers that I-601 "is an unconstitutional intrusion into the legislature's plenary power to pass laws." *Id.* at 308 (Alexander, C.J., concurring).

The reasoning and conclusion of Justices Chambers and Alexander were correct and should be adopted as an alternative ground to find I-1053 unconstitutional.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

E. Plaintiffs' Challenge to RCW 43.135.034 is Justiciable.

Plaintiffs' claims before this Court are justiciable. To satisfy the test for justiciability under the declaratory judgments act, Plaintiffs' claims must present (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. *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 489-90, 585 P.2d 71 (1978). These requirements embody the "traditional limiting doctrines of standing, mootness, and ripeness." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). Their purpose is to "ensure the court will be rendering a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution." *Id.* Each of these elements is satisfied here.[12]

1. This Case Presents an Actual, Present and Existing Dispute Regarding the Constitutionality of RCW 43.135.034.

The dispute over the constitutionality of RCW 43.135.034 is actual, present and existing and can only be resolved by a judicial determination. The Two-Thirds Requirement limits the Legislature's ability to enact revenue measures and limits which bills are introduced for legislative consideration. The result is an inability to fund essential state services such as public education. *See, e.g., McLeary*, 2012 WL 19676.

In *Walker v. Munro*, the court declined to address the constitutionality of the Two-Thirds Requirement because, although it had been passed by I-601, its provisions had not yet gone into effect. 124 Wn.2d 402, 413-14, 879 P.2d 920 (1994). The court found that the actual impacts of the legislation were still unknown and that, until a specific dispute arose over its terms, judicial review would be premature. *Id.* at 413. The Two-Thirds Requirement is now in effect and its impacts on the legislative process are known. This requirement has resulted in the failure of revenue bills including SHB 2078, which would have funded K-3

[12] Even absent satisfaction of these factors, however, the Court may still consider the merits of this action given that it presents an issue of substantial public importance. *See* Section V.E.5 *infra*.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

class size reductions by closing a tax loophole for large banks. The House passed this measure by simple majority in May 2011, but not by the two-thirds supermajority required by RCW 43.135.034. Had this bill passed, it would have provided over $100 million in funding to support public education. Because of the Two-Thirds Requirement, however, the bill could not advance in the normal legislative process by being forwarded to the Senate for consideration.[13]

The significance of the dispute is highlighted by the Supreme Court's recent decision in *McCleary*, *supra*. There, the court outlined the recent inability of the Legislature to fund the constitutionally required basic K-12 education. 2012 WL 19676, at *27-33. The Two-Thirds Requirement stands as a real impediment to the Legislature fulfilling the State's constitutional duty to provide a basic education. And the harm from this law will not go away given the I-960/I-1053 sponsors' commitment to re-file similar initiatives every two years. Indeed, the most recent initiative, I-1185, was styled as the "Son of I-1053" by its sponsors, and contained the same general provisions as I-1053.

This case presents the type of specific dispute about the constitutionality of the Two-Thirds Requirement that the *Walker* court stated would be justiciable. 124 Wn.2d at 413 (two-thirds requirement would be "subject to a challenge when a specific dispute arises in regards to a particular bill"). The dispute over the constitutionality of the Two-Thirds Requirement is actual and existing and requires a judicial determination.

2. The Parties Have Genuine and Opposing Interests.

The parties here also have genuine and opposing interests in the outcome of this action. The Plaintiff group is composed of individual legislators, school board members, parents of school-aged children, educators, and non-profit education organizations. Each Plaintiff has a

[13] Additional examples of failed legislative efforts under the Two-Thirds Requirement include Second Substitute House Bill 2029 (2009), which would have created an enhanced 911 emergency communication system, and Senate Bill 6931 (2008), which would have provided additional emphasis patrols for DUI enforcement and chemical dependency treatment.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

genuine interest in having RCW 43.135.034 declared unconstitutional because of its direct impacts on the Legislature's ability to fund public education and other essential state services. These interests are directly opposed to those of the State, which is defending the statute's constitutionality. The parties' interests are adequately represented in this action, and the issues regarding the constitutionality of RCW 43.135.034 will be fully briefed for the Court.

3. Plaintiffs' Interests in this Action are Direct and Substantial.

The third justiciability factor relates to traditional notions of standing. *To-Ro*, 144 Wn.2d at 414. Here, Plaintiffs have multiple, alternative bases for standing to challenge RCW 43.135.034. Plaintiffs have standing in their individual and representative capacities as parties whose interests are protected by the constitutional guarantees in question, and who have been injured by the unconstitutional Two-Thirds Requirement. Plaintiffs also have standing as taxpayers of the State of Washington who have made demand on the Attorney General to institute this action, which request has been denied. The legislator Plaintiffs also have standing due to the nullifying effects of the Two-Third Requirement on their votes. Further, because this case presents issues of broad public importance, a liberal approach to standing is appropriate, and any question regarding Plaintiffs' standing must be resolved in their favor. Washington courts "no longer consider standing an insurmountable barrier to reaching a decision on the merits," especially for questions of constitutional significance. *Seattle Sch. Dist.*, 90 Wn.2d at 493. Instead, courts are "increasingly taking a broader, less restrictive view" of standing. *Wash. Fed. of State Emp. v. Joint Ctr. Higher Educ.*, 86 Wn. App. 1, 4, 933 P.2d 1080 (1997). Here, Plaintiffs have been harmed by the unconstitutional Two-Thirds and Mandatory Referendum Requirements, and recognition of their standing is appropriate.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

a. Plaintiffs Have Standing in Their Individual Capacity.

A plaintiff will be granted individual standing to challenge a statute's constitutionality if it can demonstrate that 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 a "sufficient factual injury." *Seattle Sch. Dist.*, 90 Wn.2d at 493-94 (internal quotations omitted). "Past unrealistically strict considerations of 'standing' have been eroded thus permitting broader factual 'interests' to give rise to standing." *Id.* at 493. Here, Plaintiffs can establish that the interests they seek to protect are arguably within the broad zone of interests sought to be protected or regulated by both the constitutional guarantees and statute at issue, and they also can establish that they have suffered injury in fact sufficient to establish individual standing to assert their claims.

First, Plaintiffs' interests are within the zone of interests sought to be protected by the constitutional majority provisions and the declaration of legislative authority contained in the Washington Constitution. The simple majority provision of Article II, § 22 is intended to protect the political process and ensure fairness in the manner in which the government conducts the business of the State. Courts have recognized that "[p]rotection for the integrity of the political process" is an interest that falls within the zone of interests protected by the equal protection clause. *City of Seattle v. State*, 103 Wn.2d 663, 668-69, 694 P.2d 641 (1985) (noting that the City of Seattle has a "direct interest in the fairness and constitutionality" of the annexation process). Likewise, the constitutional provisions governing the passage of legislation are intended to ensure fairness in the manner in which elected representatives conduct business on behalf of their constituents. All named Plaintiffs have an interest in the "fairness and constitutionality" of the political process. *Id.* The legislator Plaintiffs have an interest in ensuring their constitutional right to effectively legislate and advance bills through the legislative process with the constitutionally required number of votes. As regular

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

participants in the legislative process, WEA and LEV also have a substantial interest in ensuring its integrity. The interests Plaintiffs seek to protect are within the zone of interests protected by the constitutional guarantees at issue here.[14]

Plaintiffs have also suffered injury in fact as a result of the Two-Thirds Requirement. RCW 43.135.034 has prevented the Legislature from addressing funding gaps in the public education system. Bills that would fund education have failed to pass with the required supermajority or simply were never introduced, and the current funding levels are inadequate to provide constitutionally mandated education services. *See, e.g., McCleary*, 2012 WL 19676, at *28-33 (discussing state's consistent shortfalls in adequately funding public education). The result has been cuts in education funding and services, which cause direct and substantial harm to educators, teachers, parents, students and education groups, such as Plaintiffs. *See generally* Compl. at ¶¶ 29-34; Lawrence Decl. Ex. H.

For example, budget cuts have forced districts across the state to cut numerous teaching positions, resulting in fewer teachers and larger class sizes. Lawrence Decl. Ex. H at 15-16, 19-21, 24, 31, 35-37. Plaintiffs Kim Bielski and Ryan Painter are teachers who lost their jobs as a result of the budgetary force reductions. *Id.* at 36-37, Exs. M, N. Teachers who have retained their employment are faced with larger class sizes and the burdens and challenges that result. *Id.* Ex. H at 15-20, 24. Layoffs of other school personnel, such as paraeducators, librarians and counselors, have also reduced basic educational services. *Id.* at 15-20, 31. The

[14] As Washington citizens and taxpayers, the individual and legislator plaintiffs are also within the zone of interests ostensibly sought to be protected by the Two-Thirds Requirement itself. The Two-Thirds Requirement was purportedly intended to protect the interests of all Washington taxpayers by controlling tax increases and state expenditures. *See generally* Lawrence Decl. Ex. C. Although Plaintiffs disagree that RCW 43.135.034 benefits their interests, these interests are nonetheless within those sought to be protected by its passage, and they have standing to challenge its constitutionality.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

remaining staff has been required to take unpaid furlough days, reducing educational services for students, and impacting the livelihood of educators around the state. *Id.*

Budget cuts have also led to the elimination of summer school programs, programs designed to support struggling students, and professional development programs for educators. *Id.* at 19-20. And past measures designed to benefit students and educators, such as legislation requiring class size reduction, have not been funded because of the Legislature's inability to pass any revenue increases. *Id.* at 13-15, 22-23. These cuts have significant impacts on the quality of educational services provided to students, and on educators across the state.

These harms are directly akin to those recognized in the *Seattle School District* case. In recognizing both the school district's and individual voter-taxpayers' standing to challenge the education funding system, the court noted that inadequate funding of education harmed all plaintiffs, including parents, educators and students. *Seattle Sch. Dist.*, 90 Wn.2d at 493-95. Indeed, the court dismissed out of hand the challenge to the standing of the individual plaintiffs in that case, acknowledging that school board members and parents of students in public school have a sufficient interest and injury to challenge the manner in which school programs are funded. *Id.* at 494. The types of harms sustained by Plaintiffs as a result of the Two-Thirds Requirement are like those acknowledged in the *Seattle School District* case, and are adequate to confer individual standing here.

The organization plaintiffs, LEV and WEA, have also suffered harms by seeing their past lobbying and advocacy efforts invalidated as a result of the Legislature's failure to fund already enacted measures that benefit the educational system. *See, e.g.,* Lawrence Decl. Ex. H at 10-18, 21-23. LEV and WEA are also prevented from lobbying for bills in support of education because those bills are simply not introduced if they call for any revenue increase. *Id.* As educators, WEA's members are also substantially harmed by education budget cuts and

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1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

the Legislature's failure to fund legislation calling for additional educational programming and reduced class size. *Id.* at 15-16, 24. These interests and harms are sufficient to confer standing on these organizations.[15]

Although the State may allege that Plaintiffs' injuries are too speculative to constitute sufficient injury in fact, the impacts of the Two-Thirds Requirement on Plaintiffs are undeniable. *See, e.g., McCleary*, 2012 WL 19676. And even assuming these injuries are speculative, "the assertion of a hypothetical or speculative injury does not necessarily negate a party's standing to sue." *Wash. Fed. of State Emp. v. Joint Ctr. for Higher Ed.*, 86 Wn. App. 1, 4, 933 P.2d 1080 (1997). Plaintiffs have met their burden of establishing that their interests are within the zone of interests to be protected, and that they have suffered an injury in fact as a result of the Two-Thirds Requirement. Plaintiffs have standing in their individual capacity to challenge the constitutionality of RCW 43.135.034.

b. Plaintiffs Have Taxpayer Standing.

Plaintiffs also have standing to bring this action as taxpayers of the State of Washington.[16] Taxpayer standing is a broadly applicable doctrine that may be invoked by a

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[15] Plaintiffs LEV and WEA also have asserted representative standing to bring claims on behalf of their individual members. *Save a Valuable Environ. (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978) (non-profit organization had standing to assert claims on members' behalf). An organization may "bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Am. Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 595, 192 P.3d 306 (2008) (quoting *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)). "Thus, 'even in the absence of injury to itself, an association may have standing solely as the representative of its members.'" *National Elec. Contractors Ass'n v. Emp. Sec. Dep't of the State of Wash.*, 109 Wn. App. 213, 220, 34 P.3d 860 (2001) (quoting *To-Ro*, 144 Wn.2d at 415). LEV and WEA have standing on behalf of their members who individually have standing to challenge the constitutionality of the Two-Thirds Requirement. The interests these groups seek to protect are germane to their purposes, namely to ensure that the education system is adequately funded and able to serve Washington students. The claims that are asserted here do not require the participation of each of LEV's and WEA's individual members, and these organizations should be granted representative standing.

[16] With the exception of the two non-profit organizations, LEV and WEA, Plaintiffs are all Washington taxpayers. LEV and WEA, however, have representative standing for their taxpayer members. *See supra* note 15.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

party seeking to challenge the legality and constitutionality of government laws and actions. *See, e.g., State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985) (taxpayer standing is "given freely in the interest of providing a judicial forum when this state's citizens contest the legality of official acts of their government"). Only when the recognition of taxpayer standing "would encourage 'unwarranted harassment' of public officials" has the court "implied that standing would be denied." *Id.*; *see also Fransen v. Board of Nat. Resources*, 66 Wn.2d 672, 404 P.2d 432 (1965) (absent demonstration that "taxpayers' suits result in more harm than good" court will not overturn rule allowing them).

To obtain taxpayer standing, Plaintiffs need not allege a "direct, special or pecuniary interest in the outcome of their action." *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Kightlinger v. Pub. Util. Dist. No. 1 of Clark Cty.*, 119 Wn. App. 501, 81 P.3d 876 (2003) (holding same). Rather, they must only establish that they have made a request to the Attorney General to institute their action, which the Attorney General has declined. *O'Brien*, 85 Wn.2d at 269. Here, the Attorney General has refused Plaintiffs' request to challenge the constitutionality of the Two-Thirds Requirement, and Plaintiffs have standing to bring this action as Washington taxpayers. Lawrence Decl. Exs. I-J.

Taxpayer suits have been expressly acknowledged as a means to challenge the constitutionality of government laws and resulting actions, such as the instant challenge to RCW 43.135.034. In a seminal taxpayer standing case, *State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856, 859, 329 P.2d 841 (1958), the Washington Supreme Court considered the question of whether "the declaratory judgment act grant[s] to a resident taxpayer the right to test the constitutionality of an act, when the attorney general declines to do so." The court answered in the affirmative, holding that the declaratory judgment act "authorizes the appellant, as a taxpayer of this state, to challenge the constitutionality of chapter 214, since the attorney general has refused to do so." *Id.* at 861. The court did not require the challenger to allege any

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1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

specific injury that would be redressed, instead finding that his status as a taxpayer was adequate to confer standing to raise this constitutional claim. *Id.* at 859-60.

Similarly, in *O'Brien*, the Washington Supreme Court recognized the City of Tacoma's taxpayer standing, permitting it to contest the "constitutionality of a statute" which allowed governments to compensate private contractors for increased petroleum costs incurred in performing government contracts. 85 Wn.2d at 268. And more recently, taxpayer standing was recognized to challenge a pre-employment drug testing program that the City of Seattle required for certain prospective city employees through a city ordinance. *Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000). The *Robinson* plaintiffs had not applied for employment with Seattle, and their standing to challenge the constitutionality of the program was based solely on their status as taxpayers. *Id.* at 457-58. These cases illustrate the appropriateness of a taxpayer suit to challenge the constitutionality of a statute such as RCW 43.135.034. *See also Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 893, 529 P.2d 1072 (1975) ("We have permitted the validity of statutes to be questioned in taxpayer actions properly instituted after making demand upon the Attorney General.").[17]

The "value of taxpayer suits generally outweighs any infringement on governmental processes." *Boyles*, 103 Wn.2d at 614. Because taxpayers are harmed by the government's failure to observe the requirements of the Constitution, Plaintiffs' challenge to an unconstitutional law such as RCW 43.135.034 has value for all taxpayers. Invoking the jurisdiction of the courts to hear a constitutional challenge to a statute does not infringe on

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[17] Courts have recognized taxpayer standing in a variety of contexts to permit taxpayers with no personal stake in a matter to test the legality and constitutionality of government actions. *See, e.g., Calvary Bible Presbyterian Church of Seattle v. Bd. of Regents of the Univ. of Wash.*, 72 Wn.2d 912, 436 P.2d 189 (1967) (granting ministers taxpayer standing to challenge constitutionality of public university's literature course regarding Bible); *Kightlinger*, 119 Wn. App. at 506-07 (granting taxpayer standing to challenge legality of public utility district's appliance repair business); *Boyles*, 103 Wn.2d at 614-15 (granting taxpayer standing to challenge constitutionality of jail work release program requiring participation in religious activities).

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
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governmental processes. Rather, such legal challenges are a basic tenet of our system of checks and balances on government power. *See, e.g., McCleary*, 2012 WL 19676, at *19 (judiciary must "say what the law is" to serve in part "as a check on the activities of another branch") (internal citations and quotations omitted).

As Washington taxpayers, Plaintiffs need not allege any "direct, special or pecuniary interest" to have standing to challenge RCW 43.135.034. *O'Brien*, 85 Wn.2d at 269. The only prerequisite to the recognition of taxpayer standing – a refused demand on the Attorney General – has been satisfied here. Lawrence Decl. Exs. I-J. The important constitutional questions at issue here are properly before this Court. The Court should recognize Plaintiffs' standing to bring this action as Washington taxpayers.

c. Legislator Plaintiffs Have Standing.

The legislator Plaintiffs also have standing to challenge the Two-Thirds Requirement on the grounds that it resulted in the nullification of their votes in favor of SHB 2078. Although SHB 2078 passed with a constitutional simple majority in the Washington House, and with the support of all of the legislator Plaintiffs, it was nonetheless declared defeated because it did not garner the required two-thirds support under RCW 43.135.034. In effect, the Two-Thirds Requirement nullified these votes in favor of SHB 2078 which, but for RCW 43.135.034, would have been adequate to pass the measure to the Senate. Federal and state courts have recognized that such vote nullification is sufficient to confer standing on legislative plaintiffs. *See, e.g., Coleman v. Miller*, 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939); *Silver v. Pataki*, 755 N.E.2d 842, 96 N.Y.2d 532, 730 N.Y.S.2d 482 (N.Y. Ct. App. 2001).

In *Coleman*, a group of state senators challenged the Kansas lieutenant governor's ability to break a deadlock by casting the deciding vote in favor of ratification of a federal constitutional amendment. 307 U.S. at 436. In recognizing the senators' standing to bring their challenge, the Supreme Court stated that senators had a "plain, direct and adequate

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

interest in maintaining the effectiveness of their votes." *Id.* at 438. The Court further noted that the lieutenant governor's actions "virtually held for naught" the senators' votes, which would have been sufficient to defeat ratification. *Id.* In subsequent authority, the Supreme Court stated that *Coleman* stands for the proposition that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997).

This is precisely the effect of the Two-Thirds Requirement on the legislator Plaintiffs' votes here. The legislator Plaintiffs have "alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated" and not permitted to move through the legislative process because of the Two-Thirds Requirement. *Id.* at 824. *Raines* recognized that the "critical fact in *Coleman* was that if the plaintiff-senators were correct on the merits, their votes should have been sufficient to effect a particular result . . . but the allegedly illegal act instead effected the opposite result." *Gutierrez v. Pangelinan*, 276 F.3d 539, 545-46 (9th Cir. 2002); *see also Raines*, 521 U.S. at 822 (if *Coleman* senators were "correct on the merits" of their claims, their votes not to ratify were deprived of all validity). Likewise here, if the legislator Plaintiffs are correct on the merits of their claims that the Two-Thirds Requirement is unconstitutional, their simple majority vote in favor of SHB 2078 would have been sufficient to pass the measure out of the House and to the Senate. *Coleman* is on point and its principles should be applied to confer standing here.

At a minimum, the voting power of the legislator Plaintiffs has been diluted by the Two-Thirds Requirement, and their standing to sue should also be recognized on this ground. *See, e.g., Vander Jagt v. O'Neill,* 699 F.2d 1166, 1167-68 (D.C. Cir. 1983) (finding standing for Republican House members to challenge Democrats' allocation of committee seats to the

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

parties on grounds that Republicans' power and influence was diluted as a result); *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (recognizing standing of congressional representatives and individual voters to assert dilution of voting power as result of voting rights granted to congressional delegates). The Two-Thirds Requirement dilutes the voting power of House members because in effect each member's vote on revenue bills is diluted to 1 in 66 (to meet the requirement of two-thirds), rather than 1 in 50 (as required for a constitutional simple majority). As established in federal authority, this type of vote dilution is itself a sufficient injury to confer standing on the legislator Plaintiffs to challenge the constitutionality of the Two-Thirds Requirement. *Skaggs v. Carle*, 110 F.3d 831, 834 (D.C. Cir. 1997) ("The lesson of *Michel* is that vote dilution is itself a cognizable injury regardless whether it has yet affected a legislative outcome.").[18] This Court should recognize the legislator Plaintiffs' standing to challenge RCW 43.135.034 under vote nullification and dilution principles.

d. This Case Presents an Issue of Public Importance, and Liberal Standing Principles Apply.

To the extent the Court has any question regarding Plaintiffs' standing, it must err in their favor because of the broad public importance of the issues presented here. Washington courts apply a liberal standing doctrine when a controversy "is of serious public importance and immediately affects substantial segments of the population" and when its outcome "will have a direct bearing on the commerce, finance, labor, industry or agriculture generally." *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969); *see also City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985)

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[18] In *Skaggs*, the D.C. Circuit held that members of the U.S. House did not have standing to challenge a House rule that required a three-fifths majority to pass federal tax increases. 110 F.3d at 833. The court found that because the House could amend or repeal the rule with only a simple majority vote and then pass any tax increase by that same majority, the representatives had not been injured. *Id.* at 835. Contrary to *Skaggs*, the supermajority provision of RCW 43.135.034 cannot be suspended at any time without supermajority approval until the two-year period for amending laws passed by initiative expires. Const. art. II, § 1. When and if it will expire is uncertain given the initiative sponsor's consistent efforts to thwart legislative changes by re-filing the same initiative.

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

("Where a controversy is of serious public importance the requirements for standing are applied more liberally."). The constitutionality of RCW 43.135.034 is an issue of state-wide public importance, the outcome of which will have broad impacts on all Washington citizens. The public's interest in ensuring adequate funding for basic state services, including the provision of public education, is significant. *See Seattle Sch. Dist.*, 90 Wn.2d at 490 (issue of adequate school funding is one of "great public interest").[19] And more broadly, the public has a substantial interest in ensuring that its government observes the requirements of the Constitution. Given the significant public importance of the constitutional questions raised here, a liberal approach to standing is appropriate. This is especially true given the likelihood that the Two-Thirds and Mandatory Referendum Requirements will consistently recur as restrictions on the Legislature. Indeed, I-960/I-1053's sponsors have filed multiple initiatives with the same substantive requirements, including the now-pending I-1185. And those sponsors have promised to continue bringing similar initiatives. Only a judicial determination of the constitutionality of those requirements will resolve the issue.

If the Court finds that none of the named Plaintiffs have standing to challenge the constitutionality of the Two-Thirds Requirement, it is difficult to understand what plaintiff, if any, would be able to do so. Recognizing taxpayer standing (and arguably standing of any nature) is "particularly appropriate" when, absent such standing, "no one is in a position to complain about the allegedly illegal [government act]". *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 287, 937 P.2d 1082 (1997) (Madsen, J. concurring/dissenting).

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[19] Courts have found a variety of cases present issues of substantial public importance. *See, e.g., Huntamer v. Coe*, 40 Wn.2d 767, 770, 246 P.2d 489 (1952) (challenge to statute requiring candidates for public office to attest they are not subversive is issue of substantial public importance); *Kightlinger*, 119 Wn. App. at 508 (legality of county PUD's appliance repair program was of "substantial public importance"); *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 559, 413 P.2d 972 (1966) (finding "[q]uestions of salary, tenure, and eligibility to stand for public office" were issues of public importance); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 433, 260 P.3d 245 (2011) (challenge to red light camera initiative would be considered "even if the question of [plaintiff's] standing were debatable" because the case presented issues of substantial public importance); *Vovos v. Grant*, 87 Wn.2d 697, 701, 555 P.2d 1343 (1976) (question regarding legality of fingerprinting juveniles absent advance consent from juvenile court issue of significant public importance).

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

Indeed, courts will overlook standing deficiencies entirely to ensure that matters of public importance are considered on their merits. For example, in *Farris v. Munro*, the court considered a taxpayer challenge to the constitutionality of the State Lottery Act, despite the taxpayer's failure to make demand on the Attorney General to institute the suit, because the case presented "an issue vital to the state revenue process" warranting the court's consideration. 99 Wn.2d 326, 330, 662 P.2d 821 (1983); *see also Huntamer,* 40 Wn.2d at 770-71 (considering plaintiffs' challenge to constitutionality of oath required of public officials even though plaintiffs had not applied for office); Section V.E.5, *infra*.

Plaintiffs have standing to bring this action.

4. A Judicial Determination Will Be Final and Conclusive.

"The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary." *Seattle Sch. Dist.*, 90 Wn.2d at 496; *see also McCleary*, 2012 WL 19676, at *19 (same). Whether RCW 43.135.034 is constitutional is an issue that may only be resolved by the courts, and such a judicial determination will be final and conclusive.

Each of the justiciability factors is present here, and the Court should consider the merits of Plaintiffs' important constitutional claims.

5. As a Matter of Public Importance, Consideration of this Case is Appropriate.

Setting aside the justiciability factors above, the Court may also exercise its jurisdiction to hear this case because of the significant public issues involved. *See, e.g.*, *Kitsap County v. Smith*, 143 Wn. App. 893, 842-43, 180 P.3d 834 (2008) (exercising jurisdiction to hear case involving privacy of public employees conversations due to its public importance). Courts look both to the "public interest which is represented by the subject matter of the challenged statute" as well as the "extent to which public interest would be enhanced by reviewing the case." *Id.* at 842 (internal quotations omitted). As the Supreme Court has held:

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

> [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 argued, and where it appears that an opinion of the court would be beneficial to the public and to the other branches of government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation.

State ex rel. Distilled Spirits Inst., Inc. v. Kinnear, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972) (overlooking enrolled bill doctrine to decide case) (internal citations omitted).

The issues regarding the constitutionality of RCW 43.135.034 will be fully briefed before the Court, and the Court's opinion will provide substantial benefit to the public and to the other branches of government. Plaintiffs have brought this action requesting a determination of the constitutionality of RCW 43.135.034. As the only body able to adjudicate the constitutionality of this statute, the Court should render an opinion on this issue and provide the parties the requested guidance. *See, e.g., Bjork*, 84 Wn.2d at 895 (despite plaintiff's lack of standing and other justiciability issues, court rendered opinion on legislative power to override Governor's veto to provide requested guidance to Governor and Legislature); *Clallam County Deputy Sheriff's Guild v. Bd. of Clallam County Comm'rs*, 92 Wn.2d 844, 849, 601 P.2d 943 (1979) (declaratory judgment proper to decide constitutional questions when judicial opinion would benefit public and other branches of government).[20]

VI. CONCLUSION

Since 1993, the Two-Thirds and Mandatory Referendum Requirements of Initiatives 601, 960 and 1053 have restricted the Legislature's ability to enact bills raising taxes. The members of the Legislature are subject to election every two or four years, giving the people an opportunity to evaluate their elected officials' judgment on questions of taxes and to replace them if so inclined. Similarly, the people retain the power of referendum to overturn

[20] The constitutionality of RCW 43.135.034 was raised in the House debate on SHB 2078, where the Speaker of the House stated that a ruling on the constitutionality of the Two-Thirds Requirement could only be rendered by the courts and requesting that guidance. Lawrence Decl. Ex. F at 4-5

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750

the judgments of the Legislature on the question of taxes so long as that power is exercised in conformity with the process set forth in the Constitution. Ruling that I-1053 is unconstitutional will not eliminate the sovereign rights of the people, nor will it abrogate any of those constitutional checks on legislative power.

The framers of our Constitution sought to balance the respective powers of the people, the Legislature and the Executive. I-1053 unconstitutionally upsets that balance. The impact is real and undeniable. Whether these limitations on the Legislature's power are constitutional is a question that begs to be answered. This constitutional question should not be answered by the Legislature, the Governor, or the people through the initiative and referendum process. Rather, as just re-emphasized by the Supreme Court in *McCleary*: "[T]he judiciary has the ultimate power and the duty to interpret . . . the constitution." 2012 WL 19676, at *19 (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 506).

On the merits of the constitutional question, no law or initiative can amend the Constitution. Article II, § 22 establishes a simple majority requirement for passage of laws that I-1053 cannot amend. Moreover, Article II, § 1(b) establishes the sole processes for the exercise of the referendum power that I-1053 cannot amend. I-1053 is and should be declared unconstitutional.

DATED this 13th day of January, 2012.

PACIFICA LAW GROUP LLP

By _____
Paul J. Lawrence, WSBA # 13557
Matthew J. Segal, WSBA # 29797
Sarah Johnson, WSBA # 34529
Gregory J. Wong, WSBA # 39329
Attorneys for Plaintiffs

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245-1700
FACSIMILE: (206) 245-1750