The Honorable Bruce Heller
Hearing Date: February 17, 2012
Hearing Time: 9 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

LEAGUE OF EDUCATION VOTERS, a Washington non-profit corporation; et al., Plaintiffs, v. STATE OF WASHINGTON, CHRISTINE GREGOIRE, in her capacity as Governor of the State of Washington, Defendants.	No. 11-2-25185-3 GOVERNOR'S MEMORANDUM RE JURISDICTION

I. INTRODUCTION

Governor Christine Gregoire asks this Court to decide the constitutionality of the supermajority requirement of Initiative 1053. The Governor's aim is not to advocate one view of constitutional interpretation or another--the plaintiffs and the Attorney General have sharpened the issues and legal arguments and present this Court with a sound basis to decide this matter. Instead, the Governor presents her view that this is the right time, the right court and the right procedural posture for the Court to decide this important constitutional issue. The Governor believes the opinion of the Court will be beneficial to the public and to the proper execution of her duties, which include a constitutional and statutory role in the proposal and

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enactment of laws that raise state revenue. These duties are impacted by the ongoing uncertainty about the constitutionality of the two-thirds vote requirement.

Further, this request for a ruling on the constitutional issue is consistent with the jurisprudential principles that have guided the Washington Supreme Court and will guide this Court. In *Walker v. Munro* the Washington Supreme Court found the challenge was premature when the original initiative provided the two-thirds vote requirement would go into effect at a delayed future date, such that a simple majority vote of the legislature could relieve it of the challenged supermajority provision. In *Brown v. Owen* the Washington Supreme Court found that challenge was an inappropriate action for mandamus where the requested writ would direct the parliamentary inner-workings of the Legislature. At the same time *Brown v. Owen* confirmed that the constitutionality of the supermajority requirement is a question for judicial determination, and these provisions should not be disregarded by officials of the other branches because they question its constitutionality. The confluence of these principles confirm this case presents the proper form of action and the proper timing for the judicial branch to perform its fundamental responsibility to "say what the law is." First, the question has matured into one appropriate for judicial resolution, where the supermajority provision has been fully implemented and reimposed by subsequent ballot measures so that a simple majority of the legislature cannot change the requirement. Second, the question is now presented in a court of general jurisdiction that can resolve the constitutional question pursuant to the Declaratory Judgment Act without the issuance of a writ of mandamus that would offend the separation of powers. Indeed, withholding the Court's resolution of the constitutional question in these circumstances would leave a void in the allocation of power among the executive, legislative

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and judicial branches. The question is ripe and appropriate for judicial resolution through a declaratory judgment.

II. RELIEF REQUESTED

The Governor requests that the Court find it has jurisdiction over this matter under Ch. 7.24 RCW and issue a decision on the constitutionality of the supermajority requirement.

III. FACTS

Washington voters approved Initiative Measure 601 in 1993. Laws of 1994, ch. 2. Initiative 601 added a provision, effective after July 1, 1995, 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)).

Before Initiative 601 went into effect, a group including public advocacy groups, legislators, and citizens filed an original action in the Supreme Court, asking for a writ of mandamus ordering the legislature and its officers " 'to adhere to the requirements of the Washington State Constitution and to prohibit them from implementing and enforcing Initiative 601.' " *Walker v. Munro,* 124 Wn.2d 402, 407, 879 P.2d 920 (1994) (quoting petition). The court denied the request, holding that mandamus was inappropriate. *Id.* at 410-11.

The court also found petitioners' claim to be nonjusticiable, as Initiative 601 had not yet taken effect and, in the posture presented, concerned a political dispute. *Id.* at 411.

> [T]he potential harmful effects of the initiative may never come to pass. It is possible that acts which are deemed to fall within section 4(1) will pass by two-thirds of the votes and so this greater voting requirement will have no real effect. . . . The course of future events is, at this time, purely speculative and subject to a challenge when a specific dispute arises in regard to a particular bill. Until presented with an existing, fact-specific

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> action, this court will not involve itself in what is an essentially political dispute.

Id. at 413. Although petitioners argued Initiative 601 would cause future harm, the court found it was just as likely that the legislature would amend the initiative to prevent those harms. *Id.* at 413–14.

Since its original enactment and the decision in *Walker v. Munro*, the supermajority requirement has been alternatively suspended and reenacted multiple times.[1] Reenacted for the third time in Initiative 1053, the supermajority requirement has been in effect for much of the past 16 years, all but 15 months in 2002-03, 14 months in 2005-06, and ten months in 2010. In each case, the Legislature, by majority vote, suspended the requirement in order to raise taxes to deal with falling revenues.

Through significant periods—including at present—the Legislature has been unable to suspend the supermajority requirement by majority vote because the requirement was reenacted in ballot measures on three separate occasions—in 1998 (Referendum 49), 2007 (Initiative 960), and 2011 (Initiative 1053)—and thus a two-thirds vote of the Legislature would have

[1] In 1998, the legislature expressly "reenacted and reaffirmed" Initiative 601 and also exempted certain state accounts from its requirements. Laws of 1998, ch. 321, § 14. In 2002, the legislature again reenacted and affirmed Initiative 601 but temporarily suspended its requirements for the 2001–03 biennium to address revenue shortfalls. Laws of 2002, ch. 33, § 1. In 2005, the legislature again reenacted and affirmed the initiative but suspended the supermajority requirement from April 18, 2005, to June 30, 2007. Laws of 2005, ch. 72, § 2. On April 22, 2005, the legislature passed Engrossed Substitute House Bill 2314, increasing liquor and cigarette taxes, as well as making a number of smaller tax changes. Laws of 2005, ch. 514. Before the expiration of the exemption period, the legislature reimposed the supermajority requirement, effective June 30, 2006. Laws of 2006, ch. 56, § 8. In 2007, voters approved Initiative 960, which, among other things, amended the supermajority requirement to clarify that the two-thirds majority provision applied to "tax increases inside and outside the general fund." Laws of 2008, ch. 1, § 1.

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been necessary to suspend the supermajority requirement for the two years following each of these reenactments. *See* Wash. Const. art. II, § 1(c).

In 2008, State Senate Majority Leader Lisa Brown brought an action for writ of mandamus to seek review of the supermajority requirement. *Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009). The action sought to compel the lieutenant governor, as president of the senate, to forward a bill to the House of Representatives that had received the votes of more than half but less than two thirds of the members. *Id.* at 711. Pursuant to the supermajority requirement in RCW 43.135.035(1), the lieutenant governor had ruled that the bill required the approval of two-thirds of the senate for passage and thus had failed to pass. *Id.*

The court denied the writ based on the separation of powers doctrine:

> Before Owen's parliamentary ruling triggering this dispute, Brown appeared to urge Owen to declare RCW 43.135.035(1) unconstitutional. Owen refused to do so, observing that it is the duty of the judiciary to make legal rulings. Having failed to convince Owen to make a legal determination, she now asks this court to make a parliamentary ruling. We decline to do so.

Id. at 719.

In February 2010, the legislature again suspended the supermajority requirement. Laws of 2010, ch. 4. It then proceeded to pass SB 6143, which increased beverage taxes and B&O taxes on certain businesses, as well as making a number of other tax changes. Laws of 2010, spec. sess., ch. 23.

Meanwhile, on January 4, 2010, Initiative 1053 was filed with the Secretary of State. This initiative, which sought to reimpose the supermajority requirement in the event that the legislature suspended it in the 2010 session, stated its purpose to "deter the governor and the legislature from sidestepping, suspending or repealing" the supermajority requirement. Laws of 2011, ch. 1, § 1. Initiative 1053 was approved by the voters in November 2010. Although

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the supermajority requirement is in effect, Initiative 1185 was filed on January 6, 2012. *See* http://www.sos.wa.gov/elections/initiatives/Initiatives.aspx?y=2012&t=p. The proposed initiative would again reenact the supermajority requirement. *Id.*

IV. STATEMENT OF ISSUE ADDRESSED BY GOVERNOR

Whether this case involves an important public issue that is justiciable and meets the criteria for issuance of a declaratory judgment.

V. EVIDENCE RELIED UPON

The Governor relies upon matters that are subject to judicial notice, in particular, the legislative history of the supermajority requirement.

VI. ARGUMENT

Under the Uniform Declaratory Judgments Act, ch. 7.24 RCW, courts are authorized to issue statements that adjudicate the "rights, status and other legal relations" of the parties. RCW 7.24.010. To obtain a declaratory ruling, a party must show either (1) an issue of major public importance or (2) an actual dispute between parties having genuinely opposing and substantial interests which can be resolved judicially. *Nollette v. Christianson*, 115 Wn.2d 594, 598-99, 800 P.2d 359 (1990). The constitutionality of the supermajority requirement is appropriate for declaratory judgment under either of these standards. Additionally, this case is appropriate for declaratory judgment because that is the only course that respects the separation of powers while still giving effect to the holding of *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803).

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A. This Case Involves an Important Public Issue.

Where an issue is of great public interest and it appears that the opinion of the court would be beneficial to the public and the other branches government, courts may render declaratory judgment to resolve issues of constitutional interpretation. *Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972).

The courts have issued declaratory judgment based on the importance of the issue in many cases. *Distilled Spirits* involved a bill enacted by the legislature after midnight on the 60th day of an extraordinary session. *Id.* at 177. The plaintiff contended that the state constitution, art. 2, § 12, limited both regular and extraordinary sessions to 60 days, and the bill was invalid because it had been adopted on the 61st day. *Id.* In reaching the merits, the court explained:

> [A]n opinion will serve to remove doubts concerning the validity of a number of important legislative acts passed not only in this session but in previous sessions. And since our understanding of the constitution is that it does not in fact restrict the legislature as severely as has been feared, an opinion upon the subject should serve to relieve the legislative body from the necessity of resorting to artifice in order to obtain the time necessary for it to enact the legislation which it finds imperative for the welfare of the state.

Id. at 178.

In *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 495, 585 P.2d 71 (1978), plaintiffs sought a declaratory judgment that the State's reliance on excess levy funding failed to meet the state constitutional requirement to "make ample provision for education" under art. 9, § 1. The court found that declaratory judgment was appropriate based on the uncertainty of the legislature, attorney general, and school districts as to the meaning of the constitutional provision, as well as is impact of the uncertainty on public school students. *Id.* at 490.

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In *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 559, 413 P.2d 972 (1966), legislator-plaintiffs asked the court to determine whether legislators who had voted for a salary increase were entitled to begin receiving the higher amount after the next election. In holding that the case was justiciable, the court stated that "[q]uestions of salary, tenure, and eligibility to stand for public office, all being matters directly affecting the freedom of choice in the election process are of as much moment to the voters as they are to the candidates, and make this controversy one of public importance."

Other issues of public importance have included whether the mayor of Spokane had authority under the city charter to control certain litigation (*Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 899, 86 P.3d 835 (2004)), whether the recording of any conversation with a public employee was exempt from Washington's Privacy Act (*Kitsap Co. v. Smith*, 143 Wn. App. 893,908-09, 180 P.3d 834 (2008)), whether the Department of Social and Health Services' failure to provide housing assistance to homeless children in dependency proceedings violated the Department's duties under the dependency statute, ch. 13.34 RCW (*Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wn.2d 894, 903, 949 P.2d 1291 (1997)), and whether the county clerk had authority under RCW 36.16.070 to hire employees without approval from the county commissioners (*Osborn v. Grant County*, 130 Wn.2d 615, 926 P.2d 911 (1996)).

There are common elements in these cases. Each involves a governmental entity and a challenge to its processes or procedures. The adequacy of government processes and procedures has an obvious ability to impact many people. The rights at issue—whether statutory or constitutional--are important in each case. The rights of individuals to privacy, of children to remain with their parents, of citizens to stand for election, are obviously important.

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As *Distilled Spirits* shows, however, it is also important that the legislative process is conducted in accord with the constitution.

In several of these cases, courts also found it important that the case involved an express request from the legislature or other government body or official for guidance. As the court stated in *O'Connell:* "The courts, without being bound thereby, should and do accord great respect to the official declarations of that constitutional body, possessed as it is of the sovereign legislative power, that circumstances exist so genuinely affecting the rights of citizens and members of the legislature as to require in the public interest a decision of the supreme court of the state." 68 Wn.2d at 557-58, *see also Distilled Spirits*, 80 Wn.2d at 178 ([The legislature, governor, and attorney general] of the state, are all uncertain as to the meaning of Const. art. 2, § 12. We are made aware that each of these desires an interpretation as earnestly as does the petitioner.").

This case presents an issue that is fundamental to lawmaking and affects every citizen: Is the constitutional requirement that a bill receive a majority vote a guarantee of majority rule, or does it constitute a minimum standard above which the legislature or the people can impose additional requirements? This issue impacts the state budget specifically but it also structurally alters the lawmaking process.

The supermajority requirement applies to bills that raise taxes and, by limiting the amount of available revenue, significantly affects the state budget. The biennial operating budget contains the appropriations for all three branches of government, for every agency, program, and institution—from state universities to Medicaid to public schools to enforcement of environmental laws, to name but few of the areas covered.

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The Governor plays an integral role in enacting the budget. RCW 43.88.030 requires the Governor to prepare a budget message which sets forth a proposal for expenditures in the ensuing fiscal period based upon the estimated revenues and caseloads. The statute invites the Governor to propose expenditures that would allocate new revenues from proposed legislative actions to raise taxes: "The governor may additionally submit, as an appendix to each supplemental, biennial, or six-year agency budget or to the budget document or documents, a proposal for expenditures in the ensuing fiscal period from revenue sources derived from proposed changes in existing statutes." RCW 43.88.030(1). Additionally, if the Governor anticipates that the estimated receipts plus the beginning cash balance for a fund in the next ensuing fiscal period is less than the estimated disbursements, the Governor shall include in the budget document "proposals as to the manner in which the anticipated cash deficit shall be met, whether by an increase in the indebtedness of the state, by the imposition of new taxes, by increases in tax rates or an extension thereof, or in any like manner." RCW 43.88.050.

The supermajority requirement creates great uncertainty in planning the budget. The state's fiscal year runs from July 1 to June 30. RCW 43.88.020(12). The legislature must pass a budget every two years in the odd-numbered year following an election. RCW 43.88.020(7). The Governor has to begin the planning process well prior to the November elections held in even-numbered years to meet the statutory deadline of December 20 of each even-numbered year. RCW 43.88.060.

In proposing a budget, the Governor must assume that the supermajority requirement is valid. Statutes are presumed constitutional. *Washington Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 260 P.3d 956 (2011). And despite the fact that the supermajority

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requirement has been suspended three times, it has always been in effect at the time the Governor is required to submit the budget.

The operation of these statutes and the impact of Initiative 1053 are illustrated by the Governor's recommendations for supplemental budget reductions to cut $2 billion in spending, followed by several revenue options that, if approved by voters and the Legislature, would prevent elimination of priority programs and services.[2] In "Revenue Alternatives for Building a Better Future" [3] the Governor proposed measures that would require a two-thirds vote of the Legislature under Initiative 1053. These alternatives would raise an estimated $282 million from tax increases and closing tax loopholes. The proposals include in business and occupation (B&O) tax rates on oil companies and financial institutions with windfall profits; an additional sales and use tax of 5% on passenger motor vehicles if the price/value exceeds $50,000; a new 1.5% excise tax on gambling and lottery winnings; increases the combined state cigarette tax by 25 cents; and closing several tax loopholes and preferences. The report outlines uses for these revenues as outlined in a "Priorities for Preventing Cuts" section at page 6:

> The Governor recommends that any additional revenue approved by the Legislature be used to prevent or mitigate reductions in the following priority:
>
> 1. **Non-emergency dental coverage** for 38,000 adults with developmental disabilities, long-term care clients and pregnant women ($8.6 million). Last year, we eliminated non-emergency dental services for all but these individuals (45,000 in all).
>
> 2. **Chemical dependency services** for nearly 5,000 low-income individuals ($5.9 million). These services help individuals receive outpatient treatment and detoxification services, which improve public safety and cut down on emergency medical costs.
>
> 3. **Regional support networks** that deliver non-Medicaid mental health services ($4.6 million). These networks provide mental health treatment to low-income individuals with severe and persistent mental illness. The Governor's supplemental budget would reduce services such as crisis intervention,

[2] http://www.governor.wa.gov/news/news-view.asp?pressRelease=1806&newsType=1

[3] http://www.ofm.wa.gov/budget12/highlights/govrevoptions.pdf

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medication management and case management that help keep 8,000 people living safely in their communities.

4. **The Basic Health Plan**, which covers the working poor — low-income people who do not qualify for Medicaid. Over the past three years, we have dropped more than 60,000 people from Basic Health. The Governor's supplemental budget would eliminate the program ($49 million), which would leave another 35,000 people without health care.

5. **TANF/WorkFirst grants** that help low-income families with children with cash assistance. Grants were reduced last year by 15 percent and the Governor has proposed another 2 percent reduction ($7.2 million).

6. **Community grants** that deliver prevention and treatment services to victims of sexual assault as well as domestic violence prevention, crisis intervention, and crime victims assistance programs. The Governor has proposed cutting these programs by 20 percent ($4.7 million).

7. **Disability Lifeline medical program**, which provides limited medical benefits for 20,000 low-income individuals with temporary disabilities. The Governor has proposed eliminating the program ($95 million).

8. **Subsidized child care** to help low-income families in getting and keeping work. The Governor has proposed reducing the program by 12 percent ($50 million), which would eliminate subsidies for about 4,000 children.

9. **State Work Study program** which provides financial aid to 7,600 students in higher education institutions. The Governor has proposed suspending the program ($8.1 million).

10. **Parole treatment and services** that help keep juvenile offenders from returning to the correctional system. The Governor has proposed a 20 percent cut ($2.9 million) that would eliminate services for about 400 youths.

The Governor has also made fee proposals that she believes would require a majority vote, but if the proposals are deemed to impose taxes instead of fees as some legislators assert, then a two-thirds vote would be required with the prospect of passage seriously diminished."[4]

As well as proposing a budget, the Governor also has the responsibility for administering it. Thus, from time to time, the Governor is in the position of convening special legislative sessions for the purpose of dealing with revenue shortfalls. Article III, § 7 provides the Governor "may, on extraordinary occasions, convene the legislature by proclamation, in which shall be stated the purposes for which the legislature is convened." The specification of

[4] http://www.kuow.org/northwestnews.php?storyID=144995281

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purpose by the governor, though not mandatory, is to be given consideration by the Legislature. *See* Art. II, § 12.

An important element in a Governor's decisions with regard to such proposed legislation and convening of special sessions is whether proposed measures can attain sufficient legislative support. The difference between a simple majority and supermajority requirement in the support needed for passage of new laws is significant. Supermajority rules allow a minority of the legislature to impede a measure from being enacted into law. The supermajority rule will, of course, block legislation that would have passed under the simple majority rule, and can work to prevent actions that the Governor deems necessary. It is important for the Governor to know before exercising her Constitutional and statutory power to convene a special session or to recommend measures to the Legislature whether a minority of the legislature can prevent passage of legislation the majority would like to enact.

The history of the requirement over the past 16 years shows periodic but uncertain windows where taxes can be raised, but these may not coincide with economic downturns and need to adjust tax rates. The result is that the Governor's only option is cutting the budget, with major impacts to infrastructure and programs. That is an unjust result if the supermajority requirement is unconstitutional. The Governor, along with the legislator-plaintiffs in this case, request the court to reach the merits in this case and provide them with the ability to better allocate state resources.

Beyond the budget, the supermajority requirement effects a structural change in the relationship of the legislature and governor. The Washington constitution, art. III, § 12 provides: "Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his

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objections, to that house in which it shall have originated, which house shall enter the objections at large upon the journal and proceed to reconsider. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present, it shall become a law. . ." A supermajority vote requirement for tax legislation effectively eliminates the Governor's power to decide whether or not to approve a measure that has majority support in the legislature—and transfers that power to a minority of senators and representatives in the legislature. Instead of engaging the Governor in discussion of what legislation would or would not be approved with regard to taxation, the majority must undertake this discussion with the minority and can ignore the Governor because any such legislation would be "veto proof." This changes the balance contemplated by the Constitution and alters the nature of the Governor's power to approve legislation. This change is structural in nature—the Governor is elected by a majority of the voters in the state, and they have determined the Governor is the official who should determine whether all or sections of legislation that has passed the legislature should be approved or vetoed. Yet a requirement that any action 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 keeps from the Governor the ability to decide, section by section, what bills should become law. Instead, that power is given to a minority of members in each house of the legislature, who by definition represent less than a majority of the voters.

In *Osborn*, the court considered the balance of power between the county clerk and county commissioners to be an important public issue. If that is true for a single county in the state, then the relationship between the Governor and legislature is even more important.

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B. This Case Satisfies the Criteria for Justiciability.

For purposes of declaratory relief, a justiciable controversy is

> (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 involve 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.

Washington State Coalition of the Homeless, 133 Wn.2d at 917. Each of these elements is present in this case.

1. There Is an Actual Dispute.

In 1994 in *Walker v. Munro*, the court found that the dispute over the supermajority requirement was not ripe.

> In regards to an actual, as opposed to hypothetical, dispute, most of the provisions of Initiative 601 are not yet in effect. When a statute is not in effect, and when it 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. The court expressly stated that, by the time the supermajority requirement became effective, it could be amended by a simple majority. *Id.* at 413.

Eighteen years later, the situation is very different. The requirement has been in effect most of that time, economic conditions have gone up and down, and the two-thirds vote requirement has been in effect for significant periods—including at the current time—when it may not be amended by a legislative majority.

The suspensions and reenactments demonstrate actual controversy. There is an obvious difference of opinion as to whether and under what conditions taxes should be raised to meet the perceived need for revenue to support state services. The nature of the dispute is such that

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the court will never be presented with a tax increase enacted by a simple majority when the supermajority requirement is in effect. The legislature and Governor will not ignore the statute in order to create a justiciable controversy and the court should not make that the only option.

Neither is it possible for any party to demonstrate the impacts of the statute with particularity. What would have happened in the absence of the supermajority requirement is necessarily an educated guess. But courts have not required such particularity. In *First United Methodist Church v. Seattle,* 129 Wn.2d 238, 244, 916 P.3d 374 (1996), the court issued a declaratory judgment in a case in which Seattle had nominated, but not officially designated, a church as a landmark. The church opposed the nomination and brought a declaratory judgment action. *Id.* The City argued that the case was not ripe, but the court found an actual controversy because the nomination itself "hindered" the church from selling its property. *Id.* at 245. The court stated that hardship to the parties of withholding review was a consideration and "[s]ince the Landmarks Preservation Ordinance already has placed constraints on United Methodist, we conclude that his case is ripe for review." Similarly, in this case, the supermajority requirement has constrained the legislature and prevented legislation from advancing to the Governor for approval.

2. The Parties Have Genuinely Opposing Interests.

The history of the supermajority requirement demonstrates that there are opposing parties that have the necessary adversity of interests to ensure the Court hears fully developed arguments in challenge to and in support of the constitutionality of the initiative. The plaintiffs have clearly articulated their interests in the ability to seek and obtain action in the legislature through majority votes. The Attorney General has long been designated as the official who defends the constitutionality of legislation, including legislative adopted by the people through

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their initiative power, and the Attorney General has a long tradition of presenting the Court with the arguments in support of the constitutionality of initiatives so that the Court can make a decision fully informed by all the available arguments. The very purpose of the requirement that parties in a legal action be adversarial and have sufficient opposing interests in the matter is to ensure the adversaries can be relied upon to provide the foundation for sound adjudication by the court. *City of Sequim v. Malkasian*, 157 Wash.2d 251, 270, 138 P.3d 943 (2006) (citing 13 WRIGHT, MILLER & COOPER, § 3530, at 308). Certainly that foundation is provided here by plaintiffs and the Attorney General.

Moreover, all state public officials have an interest in knowing whether the supermajority requirement is constitutional, no matter what they think about its wisdom. As discussed in Section A, the Governor has a particular interest in obtaining certainty.

3. **The Interests Are Direct and Substantial**.

Taxing and spending policy choices affect all state programs, as discussed in Section A. The ability to raise taxes with a simple majority vote of the legislature will, as plaintiffs argue, mean that it will be easier to fund education, social services, and even courts. Access to these services and institutions is clearly important to all citizens. Equally important is a fair and just tax policy that does not take more money from citizens than is necessary to adequately fund services. Many citizens feel that the supermajority requirement is necessary to further that interest. No matter which group is right, the interests on both sides are important.

The structural changes to lawmaking may be even more important in the long run. The role of the Governor vis-a-vis the legislature and majoritarian rule are fundamental cornerstones of our state constitution. The supermajority requirement clearly impacts both. Whether permissibly so is an important question that deserves an answer.

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4. Judicial Determination Will Be Final and Conclusive.

A judicial determination of constitutionality will end the dispute. A decision will either put an end to frequent initiatives or frequent law suits, and in either event, guide the Governor and legislature.

C. The Separation of Powers Doctrine Requires Reaching the Merits.

This case presents a question uniquely appropriate for a declaratory judgment. A declaratory judgment action to determine the constitutionality of RCW 43.135.034 is the only way to respect the separation of powers while still giving effect to the holding of *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803). The parties can obtain resolution of a legal question that is the unique province of the courts without the intrusive issuance of a writ of mandamus[5] ordering a legislative officer to make a particular parliamentary ruling.

This result is the only course that brings together the two strands of the Supreme Court's decision in *Brown v. Owen.* There the Supreme Court declined to issue a writ of mandamus ordering Lieutenant Governor Brad Owen to forward a bill that had received a majority Senate vote to the House of Representatives. At the same time, the Court agreed with the Lieutenant Governor's observation that "[w]hatever the merits of Senator Brown's legal argument—and the President is inclined to agree with her arguments—it is not for him to decide legal matters. 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." 165 Wn.2d at 719. In *Brown,* the Supreme Court held that issuance of a writ of

[5] Each of the two prior cases in which the court declined to reach the merits of the supermajority requirement were brought as original actions to the Supreme Court seeking a writ of mandamus. *See Walker,* 124 Wn.2d at 410; *Brown*, 165 Wn.2d at 711.

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mandamus would be an improper intrusion into the inner workings of the Senate, yet the court also expressed complete agreement with the Lieutenant Governor's observation that he could not declare the statute requiring a two-thirds supermajority vote unconstitutional, and that it is the duty of the judiciary to make legal rulings. The Supreme Court observed that "Owen acted properly by declining to decide the constitutionality of RCW 43.135.035(1)." *Id.* at 726.

Unless the court takes up the duty to declare the validity of statutes under our state constitution, a power vested in the courts, there is a complete void and this statutory provision would be completely insulated from judicial review. Surely this is not what the Washington Supreme Court intended. Instead, the Supreme Court's finding that the challenge in *Brown v. Owen* was an inappropriate action for mandamus, coupled with its statements that the constitutionality of laws is a question for judicial determination, indicates the question is appropriately reached in an action under the Declaratory Judgment Act.

This dichotomy harkens back to *Marbury v. Madison*, where the court noted it was not appropriate for the United States Supreme Court to issue a writ of mandamus but also recognized the role of the courts in determining if a statute contravenes the constitution:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

5 U.S. at 177. The court famously went on to observe the following:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or

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> conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id.

Once a court issues a declaratory judgment the parliamentary rulings of legislative officers can consider the court's ruling in accordance with the rules and traditions of the legislative branch. This course is illustrated by the following ruling by Lieutenant Governor Owen on a point of inquiry regarding whether a measure required a two-thirds vote for final passage because it amended a section enacted by Initiative 872. In his role as President of the Senate, he found a two-thirds vote was not required because of his consideration of a court decision that he factored into his parliamentary ruling:

> Last Session, the President did rule that a similar measure required a two-thirds vote for final passage because it amended sections of the law enacted by I-872. Since that time, this has been a high-profile issue that is being litigated in the courts. The President begins by reminding the body that its presiding officers have a long tradition of ruling on parliamentary issues, not legal or constitutional matters. The President's rulings do not, however, take place in a vacuum. When appropriate, the President must, as a matter of comity and parliamentary necessity, take notice of actions undertaken by other branches of government which have a practical impact on parliamentary issues.
>
> On July 15, 2005, a federal judge issued an order declaring, among other things, I-872 to be unconstitutional, and the judge's ruling is relevant to the analysis on this point of order. It is important to note the precise language used by the judge in the case because it bears directly on the state of the law before us. The judge wrote on page 38 of his Order:
>
> In this case, the Court's holding that Initiative 872 is unconstitutional renders it a nullity, including any provisions within it purporting to repeal sections of the Revised Code of Washington. Therefore, the law as it existed before the passage of Initiative 872, including the Montana primary system, stands as if Initiative 872 had never been approved.

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> It is hard to imagine the Court being clearer in its statement that the law is returned to its former status as if I-872 had never been approved. Since this is the case, it necessarily follows that any change to the law proposed by this body takes only a simple majority vote because there is no initiative left to amend.
>
> It may well be that the federal judge's ruling will not be the final word on this matter. The President is aware that the matter is being appealed and further litigated in the courts, and it is uncertain when or how further court action might change the trial court's decision. It may be prudent for proponents of this measure to seek a two-thirds vote as a means of removing all doubt and risk which may flow from subsequent and different court action. It is precisely because of this uncertainty, however, that the President cannot engage in speculative analysis, but must instead confine himself to the state of the law as it exists at the time of his ruling. Presently, a duly-constituted Court has declared I-872 unconstitutional and returned the law to its pre-I-872 status. In appropriate deference to this Order, the President finds and rules that the measure before us takes only a simple majority vote for final passage. (Pages 161-162—2006).

RULINGS OF LIEUTENANT GOVERNOR BRAD OWEN, 1997-2011, Indexed & Annotated by Mike Hoover, Senate Counsel, Last Updated: May 25, 2011 at pp. 135-136.[6] An order in a declaratory judgment action respects the functions of both the judicial and the legislative branches by leaving the ruling on the issue of law to the judicial branch and the ruling on how that declaration affects parliamentary rulings to the legislative officers.

VII. CONCLUSION

For the above stated-reasons, this Court should issue a declaratory judgment pursuant to ch. 7.24 RCW.

[6] http://ltgov.wa.gov/rulings/PRESIDENT%20OWEN%20RULINGS.pdf

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DATED this 13th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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