HONORABLE BRUCE HELLER
Hearing Date: February 17, 2012
Hearing Time: 9:00 a.m.

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

LEAGUE OF EDUCATION VOTERS, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. 11-2-25185-3 SEA STATE'S MOTION FOR SUMMARY JUDGMENT

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

TABLE OF CONTENTS

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

TABLE OF AUTHORITIES

Cases

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Constitutional Provisions

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Statutes

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Other Authorities

House And Senate Rules

Treatises

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

I. RELIEF REQUESTED

The State of Washington seeks summary judgment dismissing this action on the basis that Plaintiffs fail to present a justiciable controversy. Alternatively, the State is entitled to summary judgment because Plaintiffs fail to show that the challenged provisions of RCW 43.135.034 are unconstitutional.

II. STATEMENT OF FACTS

This section briefly describes the challenged statutory provisions, the Plaintiffs, and their claims. Remaining facts are discussed in the context of the legal arguments to which they relate.

Plaintiffs assert that two provisions currently codified in RCW 43.135.034 are invalid. The first challenged provision is part of RCW 43.135.034(1), and provides that "[a]fter July 1, 1995, 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." The second challenged provision is part of RCW 43.135.034(2)(a), and states that "if the legislative action under [RCW 43.135.034(1)] 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." The state expenditure limit, referenced by this second challenged provision, stipulates that "[t]he state shall not expend from the general fund during any fiscal year state moneys in excess of the state expenditure limit." RCW 43.135.025(1).[1]

The supermajority vote provision of RCW 43.135.034(1) and the referendum provision of RCW 43.135.034(2)(a) first were enacted by Washington's voters in 1993, through Initiative 601 ("I-601"). Laws of 1994, ch. 2, ¶ 4 (later codified at RCW 43.135.035, and then at RCW 43.135.034);[2] Hart Decl. ¶ 3, Ex. A. The state expenditure limit was also

[1] The state expenditure limit is the total of state spending from the state general fund and related accounts in the prior fiscal year, increased by a fiscal growth factor. RCW 43.135.025(4). The fiscal growth factor is the average growth in state personal income for the prior ten fiscal years. RCW 43.135.025(7).

[2] This brief refers to the statute by its current codification, RCW 43.135.034.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

first enacted through I-601. *Id.* They since have been amended by the voters and the legislature.[3] Voters twice have amended the supermajority vote provision of RCW 43.135.034(1). Laws of 2008, ch. 1, § 5 (Initiative 960 ("I-960")), Hart Decl. ¶ 3, Ex. H; Laws of 2011, ch. 1, § 2 (Initiative 1053 ("I-1053")), Hart Decl. ¶ 3, Ex. K.

The legislature has amended what is now codified as RCW 43.135.034 several times, has suspended the supermajority vote provision from time to time, and has also reenacted both the supermajority vote and referendum provisions. *See, e.g.*, Laws of 2002, ch. 33, § 1 (reenacting both provisions and temporarily suspending two-thirds vote provision for 2001-03 biennium), Hart Decl. ¶ 3, Ex. D; Laws of 2005, ch. 72, §§ 1, 2 (doing same for 2005-07 biennium and affirming benefit of state expenditure limit), Hart Decl. ¶ 3, Ex. E; Laws of 2010, ch. 4, ¶ 2 (suspending two-thirds vote provision effective July 1, 2011), Hart Decl. ¶ 3, Ex. J.

In the 18 years since I-601 was enacted, the legislature has not referred any bill to the voters under RCW 43.135.034(2)(a). Baker Decl. ¶ 4. Accordingly, RCW 43.135.034(2)(a)'s referendum provision has not been triggered. In addition, for the current and last four fiscal years, state revenues have been below the state expenditure limit, and are projected to remain so for the remainder of the biennium. Espeseth Decl. ¶ 4.

This action is brought by two nonprofit corporations, the League of Education Voters and the Washington Education Association, twelve members of the State House of Representatives (one of whom also is a school board member), a school district director, three teachers, the parents of a child who attends a public school, and a former judicial officer. Plaintiffs generally allege that the two-thirds supermajority vote provision of RCW 43.135.034(1) has prevented the legislature from enacting tax increases. They then allege that the legislature either has been unable to increase, or has had to cut, state revenues

[3] All session laws affecting the challenged statute since it first was enacted in 1993 are set forth in Exhibits A – K to the Hart declaration.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

for programs that Plaintiffs support. Based on these allegations, Plaintiffs attribute certain unwelcome circumstances related to funding for such programs to the supermajority vote provision of RCW 43.135.034(1).

Although Plaintiffs also challenge the constitutionality of RCW 43.135.034(2)(a)'s referendum provision, their complaint is devoid of any allegation that the legislature has enacted a tax increase that would result in spending in excess of the state expenditure limit; it is devoid of any claim that the legislature has sent any bill to the voters under RCW 43.135.034(2)(a); and it is devoid of any claim that the provision has affected any legal interest of any Plaintiff.

Plaintiffs seek a declaration that RCW 43.135.034 is unconstitutional, and an injunction "prohibiting further enforcement of RCW 43.135.034." Complaint ¶¶ 1, 3.

III. STATEMENT OF ISSUES

1. Have Plaintiffs established a justiciable controversy as required to invoke the court's jurisdiction under the Declaratory Judgments Act?
2. If Plaintiffs have established a justiciable controversy, have Plaintiffs demonstrated beyond a reasonable doubt that either challenged provision of RCW 43.135.034 is unconstitutional?
3. If any part of the statute is invalid, should its remaining provisions be severed?

IV. EVIDENCE RELIED UPON

This motion is based upon the pleadings filed in this case and the accompanying declarations of Barbara Baker, Candace Espeseth, and Maureen Hart.

V. AUTHORITY

A. Summary Judgment Standards

A defendant may move for summary judgment in one of two ways: (1) by setting out the defendant's version of the facts and alleging that there is no genuine issue of material fact,

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

or (2) by pointing out to the trial court that the plaintiff lacks sufficient evidence to support its case. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

A defendant moving for summary judgment in this second way may do so "by 'showing – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case.'" *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The failure of proof as to an essential element of the plaintiff's case "necessarily renders all other facts immaterial." *Id*. at 225 (quoting *Celotex*, 477 U.S. at 322-23). The defendant need not support such a summary judgment motion by affidavit. *Id*. at 226.

"The inquiry then shifts to the party with the burden of proof at trial, the plaintiff." *Id*. at 225. The plaintiff must set forth specific facts based on personal knowledge, admissible at trial, and not merely conclusory allegations, speculative statements, or argumentative assertions. *Las v. Yellow Front Stores, Inc*., 66 Wn. App. 196, 198, 831 P.2d 744 (1992). If the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the court should grant the defendant's motion. *Young*, 112 Wn.2d at 225 (quoting *Celotex*, 477 U.S. at 322).

B. This Case Should Be Dismissed Because Plaintiffs Fail To Present A Justiciable Controversy

1. Plaintiffs Fail To Demonstrate A Justiciable Controversy As Is Required To Invoke The Court's Jurisdiction Under The Declaratory Judgments Act

Plaintiffs bring this action under the Declaratory Judgments Act, RCW 7.24 (the "Act"). The Act provides that "[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of . . . validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. Thus, the Act authorizes a cause of action to determine the validity of a

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

statute in order to protect or determine a person's rights when those rights are affected by the statute. "[N]o additional private right of action is necessary for parties to seek a declaratory judgment whenever their rights are affected by a statute." *Nelson v. Appleway Chevrolet, Inc*., 160 Wn.2d 173, 187, 157 P.3d 847 (2007).

The court "cannot reach [a constitutional] question unless [it] has jurisdiction to do so." *Brown* v. *Owen*, 165 Wn.2d 706, 717, 206 P.3d 310 (2009). Before this court assumes jurisdiction under the Declaratory Judgments Act, the Plaintiffs must demonstrate that the action presents a justiciable controversy. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Indust. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)); *see* Complaint ¶ 84 (alleging a justiciable controversy). A justiciable controversy requires all of the following elements:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Id. Plaintiffs do not present facts competent to demonstrate any of these justiciability standards, let alone all of them, as they must.

As previously noted, with respect to the referendum provision of RCW 43.135.034(2)(a), Plaintiffs' complaint is devoid of any allegation that the legislature has passed a tax increase that would result in spending in excess of the state expenditure limit thereby implicating the referendum provision, or that the referendum provision has prevented passage of such an increase; and it is devoid of any claim that RCW 43.135.034(2)(a) has affected any right of any Plaintiff. The provision has not been triggered, and it would be wholly speculative to conclude that it will be, let alone that it will be in the near future, given that projected state revenues remain substantially lower than the state expenditure limit. It is difficult to imagine a more speculative, abstract, and hypothetical dispute, unrelated to any

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

right of Plaintiffs, than their challenge to the referendum provision of RCW 43.135.034(2)(a). It fails on every element of justiciability.

Plaintiffs also fail to present factual allegations competent to demonstrate the requirements for justiciability with respect to the supermajority vote provision of RCW 43.135.034(1). First, Plaintiffs fail to present a dispute "between parties having genuine and opposing interests" and "which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic," two of the elements required for a justiciable controversy. *To-Ro Trade Shows*, 144 Wn.2d at 411. Plaintiffs fail to demonstrate that they have any right or legally protected interest affected by RCW 43.135.034(1), let alone legal interests that are genuine and opposing, and direct and substantial.

Plaintiff non-profit corporations assert that they have an interest in successfully lobbying the legislature to enact laws that they and their members would support, and that would advance their public policy preferences. Complaint ¶¶ 2, 3. Successfully lobbying the legislature is not a right or legally protected interest, and the corporate Plaintiffs do not (and could not) assert that RCW 43.135.034(1) prevents them from lobbying the legislature to promote their interests.

Plaintiffs, school board member, school district director, three teachers, parents of a child who attends a public school, and former judicial officer, assert an interest in additional funding for their public policy preferences, including education programs. But an interest in additional state funding for programs that Plaintiffs support does not amount to a right or legally protected interest required to challenge the statute, nor do these Plaintiffs identify any right or legal interest that does. For example, the parent of an elementary school student, who is active in fundraising for the PTA, asserts that state budget cuts in arts programs at the school have heightened pressure on the PTA and parents to raise funds for such programs. Complaint ¶ 33.b. A high school teacher asserts that because of RCW 43.135.034(1), the budget of his school district has been cut, and as a result, he will no longer be able to teach

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

advanced placement physics. *Id*. ¶ 33.c. A school district director alleges that as a result of the "State's inability to pass legislation that raises taxes (and consequential budget cuts)," he is forced to make decisions that undercut the quality of education. *Id*. ¶ 33.d. And an elementary school teacher alleges that as a result of "the State's inability to raise revenue to fund public education," her hours have been reduced, she has been relocated to a different school, and she receives fewer hours of support from education assistants. *Id*. ¶ 33 f.[4]

While Plaintiffs understandably would like to avoid these unwelcome circumstances, freedom from them is not a right or a legal interest, let alone a genuine, direct, and substantial right or legal interest required to invoke the jurisdiction of the court under the Act. "Mere interest in state funding mechanisms is not sufficient to make a claim justiciable" where the plaintiffs had no right to the funding at issue. *Federal Way School Dist. No. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009) (citing *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) (determining that students and teachers did not present a justiciable claim where they failed to show that they were "denied some benefit by Initiative 601 which is rightfully theirs." *Walker*, 124 Wn.2d at 412.).

The twelve Plaintiff legislators similarly fail to demonstrate a genuine and substantial right or legally protected interest necessary for a cause of action challenging the two-thirds supermajority provision of RCW 43.135.034(1). Plaintiff legislators assert a "constitutional right as elected officials to advance bills through the legislative process." Complaint ¶ 31. As discussed immediately below, the right asserted by Plaintiff legislators actually amounts to an alleged right to advance and pass bills that they and their fellow legislators have determined not to advance or pass. Plaintiff legislators have no such right or legal interest.

To support their erroneous allegation that RCW 43.135.034 prevents the legislature from enacting tax increases, Plaintiffs rely on proceedings with respect to SHB 2078,[5] a bill

[4] Plaintiffs have withdrawn ¶ 33.a. of their complaint. Hart Decl. ¶ 4, Ex. L.
[5] Substitute H.B. 2078, 62d Leg., 1st Spec. Sess. (Wash. 2011).

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

brought to the floor of the house on May 24, 2011, the day before adjournment of the special session of the 2011 Legislature. It does nothing to bolster Plaintiffs' erroneous claim.

On final passage, a Plaintiff legislator raised a point of parliamentary inquiry, asking the speaker of the house the number of votes required to pass SHB 2078. Hart Decl. ¶ 5, Ex. M, p. 252. As a matter of parliamentary procedure, the speaker ruled that the affirmative vote of two-thirds of the members was required for final passage under RCW 43.135.034. *Id*.

Under article II, section 9 of the Washington Constitution, "[e]ach house may determine the rules of its own proceedings." The rules of the house of representatives provide that any member may appeal a decision of the speaker of the house on a point of order (Rule 4(C)), and that "[i]n all cases of appeal, the question shall be: "Shall the decision of the chair stand as a decision of the house?" (Rule 22). Hart Decl. ¶¶ 6, 7, Exs. N, O. As the speaker correctly pointed out, "House Rule 22 provides that any member of the house may appeal the ruling of the presiding officer to the body which may sustain or overrule the speaker's ruling by a simple majority vote."[6] Hart Decl. ¶ 5, Ex. M., p. 252. No member of the house, including legislator Plaintiffs, appealed to overrule the speaker's ruling by simple majority vote and proceed with passage of SHB 2078.

The supermajority vote provision of RCW 43.135.034(1) did not prevent the house from passing SHB 2078. What prevented the house from passing SHB 2078 was the decision of the members of the house – including each of the twelve individual Plaintiff legislators in this case – not to appeal the speaker's parliamentary ruling and, on a simple majority vote, overrule it. *See Brown v. Owen*, 165 Wn.2d at 722 (declining to involve the judiciary in an essentially identical parliamentary ruling of the president of the senate as to the number of votes required to pass a tax increase "particularly where no member of the senate attempted to

[6] The rules of the senate contain analogous provisions. Senate Rule 1.4 (rulings of the president on points of order are subject to an appeal by any senator), Hart Decl. ¶ 8, Ex. P; Senate Rule 32 (decisions on points of order subject to appeal by any senator, as to which the question shall be: "Shall the decision of the president stand as the judgment of the senate?"), Hart Decl. ¶ 9, Ex. Q.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

do so by exercising a right of appeal"–"finding this a political question."). Further, the possibility that a court may subsequently determine that a law enacted by the people or the legislature is invalid does not mean that it was beyond the power of the people or the legislature to enact. *Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007).

As to Plaintiff individual legislators, the two-thirds supermajority vote provision of RCW 43.135.034(1) may make it politically difficult to raise taxes, but freedom from political difficulty is not a right or legally protected interest of Plaintiff legislators. "[B]allot measures are often used to express popular will and to send a message to elected representatives." *Coppernoll v. Reed*, 155 Wn.2d 290, 298, 119 P.3d 318 (2005) (declining to consider pre-election challenge to validity of Initiative 330 for lack of justiciability, noting that the people's policy direction has value and practical consequences); *see Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994) ("The main contention of the petitioners seems to be that the legislature is having difficulty raising taxes, a political problem which was resolved by the voters when Initiative 601 was enacted to limit the ability of the government to raise taxes."). Political difficulty passing a tax increase does not present a dispute involving legal interests that are "genuine and opposing" and "direct and substantial rather than potential, theoretical, abstract or academic." *To-Ro Trade Shows*, 144 Wn.2d at 411.

Second, Plaintiffs fail to demonstrate "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement." *Id*. at 415. Plaintiffs' challenge to RCW 43.135.034(1) not only is based on the erroneous premise that RCW 43.135.034(1) prevents the legislature from passing bills that increase taxes, it also depends on several additional layers of speculation. First, the claims of all of the Plaintiffs require one to speculate that but for RCW 43.135.034(1), the legislature would increase taxes. Whether the legislature would have done so or would do so, particularly in the current economic downturn, is wholly speculative. Indeed, since the legislature may pass any bill that it chooses to pass, one logically would conclude that if the

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

legislature wished to pass a bill increasing taxes, that is precisely what it would do. *See Walker*, 124 Wn.2d at 412 ("[W]hen [a statute] may be amended by the very persons the Petitioners claim are being harmed, state legislators, we cannot do otherwise than find that this is only a speculative dispute.").

The claims of the non-legislator Plaintiffs require one to further speculate that even if the legislature decided to increase taxes, it would direct those revenues to programs and purposes that Plaintiffs prefer. It is "a legislative fact of life" that "[l]egislatures often provide laudable programs but may fail to fund them adequately or may decline to fund them at all." *City of Ellensburg v. State*, 118 Wn.2d 709, 715, 826 P.2d 1081 (1992) (quoting *Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979)). Absent a constitutional mandate, "[t]he decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative." *Id*.

The claims of the non-legislator Plaintiffs also require one to speculate that even if the legislature decided to increase taxes, and even if it decided to make those revenues available for programs and purposes that Plaintiffs prefer, local school districts would allocate the revenues to address Plaintiffs' individual concerns. School districts establish their own budgets, and in that process, make discretionary policy decisions about education programs and how to allocate state and local school funding. *See* RCW 28A.505.040, .060, .070; *see also* Complaint ¶¶ 33.d., e. (identifying discretionary decisions by school district directors regarding educational programs and their funding). Under the Declaratory Judgments Act, Plaintiffs "may not . . . challenge the constitutionality of a statute unless it appears that [they] will be *directly* damaged in person or property by its enforcement." *To-Ro Trade Shows*, 144 Wn.2d at 411-12 (quoting *DeCano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941)).

For each of these reasons, Plaintiffs' challenge to the two-thirds supermajority vote provision of RCW 43.135.034(1) fails to satisfy a necessary third element of justiciability, "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

possible, dormant, hypothetical, speculative, or moot disagreement." *To-Ro Trade Shows*, 144 Wn.2d at 411.

The final element necessary for a justiciable controversy under the Declaratory Judgments Act is a judicial determination that "will be final and conclusive." *To-Ro Trade Shows*, 144 Wn.2d at 411. Like all of the elements of justiciability, this element necessarily assumes a determination of rights or legal interests of the Plaintiffs. As explained above, none of the Plaintiffs demonstrate a right or legal interest as necessary for a cause of action under the Act. For this reason, a judgment with respect to Plaintiffs' claims would not be a final and conclusive determination within the contemplation of the Act.

Plaintiffs have failed to demonstrate a justiciable controversy as required to invoke the court's jurisdiction, and the State is entitled to summary judgment dismissing their complaint.

2. Standing Is Not A Substitute For A Justiciable Controversy, And Plaintiffs Lack Standing In Any Event

Plaintiffs assert that they possess standing to bring this action, and appear to assert taxpayer standing. Complaint ¶¶ 28, 29. Standing is not a substitute for justiciability and Plaintiffs do not have standing in any event. The elements required for a justiciable controversy under the Declaratory Judgments Act tend to overlap with the traditional two-part "zone of interest" and "injury in fact" test for standing, including harm to the party that is substantial, rather than speculative or abstract. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 712-14, 42 P.3d 394 (2002), *vacated in part on rehearing* 150 Wn.2d 791, 83 P.3d 419 (2004). Justiciability and standing requirements are not the same. *Five Corners Family Farmers v. State*, No. 84632-4, 2011 WL 6425114, *14 (Wash. Dec. 22, 2011) (declining to consider justiciability requirements when only a lack of standing was alleged).

In any event, Plaintiffs lack standing. The first part of the standing test "asks whether the interest sought to be protected" is "arguably within the zone of interests to be protected or

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

regulated by the statute . . . in question." *Grant County*, 150 Wn.2d at 713 (internal citations omitted). The second prong considers whether the challenged statute has caused "injury in fact." *Id*. "Both tests must be met by the party seeking standing." *Id*. For many of the same reasons that Plaintiffs fail to present a justiciable controversy, Plaintiffs also lack standing. As explained in section V.B.1. above, Plaintiffs have demonstrated no right or legal interest as required to challenge RCW 43.135.034, and no injury to any legal right by virtue of it.

Nor do Plaintiffs possess taxpayer standing. In *Federal Way School District*, the court rejected a claim of taxpayer standing by parents and teachers who challenged limits on a school district's taxing authority. "While taxpayers may have standing to protest high taxes or improper expenditures, this court has said it is doubtful there is taxpayer standing to protest lower taxes or limits on taxation." *Federal Way School District No. 210*, 167 Wn.2d at 529 (citing *Walker*, 124 Wn.2d at 402). Plaintiffs acknowledge, as they must, that RCW 43.135.034 has not resulted in their payment of additional taxes. Hart Decl. ¶ 10, Ex. R. As in *Federal Way School District*, Plaintiffs lack taxpayer standing to challenge RCW 43.135.034(1)'s supermajority vote provision for tax increases.

3. The Court Should Not Consider This Case In The Absence Of A Justiciable Controversy

Plaintiffs also allege that they "have standing because this matter is of serious public importance." Complaint ¶ 30. As explained above, the elements of standing and justiciability are not the same, standing does not substitute for justiciability, and Plaintiffs lack standing. Plaintiffs actually contend that the court should entertain their challenge to RCW 43.135.034 despite the fact that it fails to present a justiciable controversy, because Plaintiffs allege that it is important.

The Supreme Court considered and rejected such a contention in *Walker*, 124 Wn.2d at 414-18. In *Walker*, the petitioners asked the court to follow what petitioners termed "the well-established rule that this court will hear matters of great public importance without

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

regard to justiciability," and consider their challenge to provisions of I-601. *Id*. at 414. The court rejected the existence of such a rule: "[E]ven if we do not always adhere to all four requirements of the justiciability test, this court will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged." *Id*. at 415. "We choose instead to adhere to the long-standing rule that this court is not authorized under the declaratory judgments act to render advisory opinions or pronouncements upon abstract or speculative questions." *Id*. at 418. Plaintiffs similarly seek an advisory opinion and pronouncement on abstract and speculative questions in this case and the court should reject Plaintiffs' request.

Indeed, the Supreme Court has declined to consider the validity of the two-thirds supermajority vote provision now codified in RCW 43.135.034(1) on three separate occasions because, for varying reasons, the question was not justiciable or otherwise did not properly invoke the jurisdiction of the court. *See Walker*, 124 Wn.2d at 411, 425 (declining request of public advocacy groups, several legislators, and citizens to declare the supermajority vote provision of I-601 invalid prior to its effective date, and declining to declare its referendum provision that was in effect invalid for lack of justiciability); *Futurewise*, 161 Wn.2d at 411 (2007) (declining to consider the validity of the two-thirds supermajority vote and referendum provisions of I-960 in a pre-election challenge for lack of justiciability); *Brown v. Owen*, 165 Wn.2d at 727 (declining request of state senator to declare the supermajority vote provision then codified in RCW 43.135.035 unconstitutional for the reason that the action was improperly before the court on application for a writ of mandamus, and presented a nonjusticiable political question). That the instant case is nonjusticiable for different reasons from those in *Walker*, *Futurewise*, and *Brown v. Owen* does not make it any less nonjusticiable.

Finally, this is not a case of the sort where, on rare occasion, the court has determined it appropriate to exercise jurisdiction over a request for declaratory relief without regard to

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

justiciability requirements. *Walker*, 124 Wn.2d at 417 ("[T]his court has, on the rare occasion, rendered an advisory opinion as a matter of comity for other branches of the government or the judiciary."). No branch of government is before the court seeking an advisory opinion on the validity of RCW 43.135.034(1) or (2)(a). Unlike the rare exceptions discussed in *Walker* (and instead, much like the situation presented in *Walker*) "[h]ere, not only is there no request by the Legislature itself that we adjudicate this case," but the State seeks its dismissal. *Walker*, 124 Wn.2d at 417.

The court should grant summary judgment to the State, dismissing this action for lack of justiciability.

C. RCW 43.135.034(1) and (2)(a) May Be Invalidated Only If Plaintiffs Demonstrate That They Are Unconstitutional Beyond A Reasonable Doubt

Statutes are presumed to be constitutional, and the party challenging a statute bears the "heavy burden" of "prov[ing] that the statute is unconstitutional 'beyond a reasonable doubt.'" *Sch. Districts' Alliance for Adequate Funding of Spec. Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). The "beyond a reasonable doubt" standard in this context means that "' one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution.'" *Id.* (quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)).

For reasons previously expressed, the court need not and should not reach Plaintiffs' challenge to the constitutionality of RCW 43.135.034. If it does, however, the statute is valid.

D. RCW 43.135.034 Does Not Amend The State Constitution And Does Not Violate Article XXIII

Article XXIII provides that the Constitution may be amended only on a two-thirds vote of the legislature, followed by voter approval, or on the calling of a constitutional convention on a two-thirds vote of the legislature, followed by voter approval. Const. art. XXIII, §§ 1, 2. Plaintiffs allege that "RCW 43.135.034 is unconstitutional because it amends the Constitution by initiative, and contrary to the requirements of Article XXIII." Complaint

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

¶ 72. More specifically, Plaintiffs assert that "RCW 43.135.034 amends Article II, § 22 by imposing a two-thirds supermajority vote on certain legislation," and that "RCW 43.135.034's referendum requirement changes the plenary power granted to the Legislature in Article II, § 1 and the referendum process established in Article II, § 1(b)." Complaint ¶¶ 73, 74. These claims lack merit.

"When the people exercise their initiative power, they 'exercise the same power of sovereignty as the Legislature does when enacting a statute.'" *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 302, 174 P.3d 1142 (2007) (quoting *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762, 27 P.3d 608 (2000)). I-1053 neither amends nor purports to amend any provision of the Constitution. I-1053 amends and repeals existing statutes and enacts new statutory provisions. Hart Decl. ¶ 3, Ex. K. Either its statutory terms comport with constitutional limitations, in which case they are valid, or they do not, in which case they are invalid. In neither case do they amend the constitution. *See Gerberding v. Munro*, 134 Wn.2d 188, 210, 949 P.2d 1366 (1998) (holding that Initiative 573 is a statutory amendment that did not and could not amend the Constitution). I-1053 does not implicate, let alone violate, Article XXIII.

E. The Supermajority Vote Requirement In RCW 43.135.034(1) Does Not Conflict With Article II, Section 22 Of The Washington Constitution

1. The Plain Language Of Article II, Section 22, Which Merely Prohibits Enactment Of Laws On Less Than Majority Vote, Defeats Plaintiffs' Claim

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

Plaintiffs allege that "RCW 43.135.034(1)'s additional vote requirements for certain bills violate Article II, § 22." Complaint ¶ 56. But Plaintiffs cannot carry their burden of

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

proving RCW 43.135.034(1) unconstitutional beyond a reasonable doubt on the basis of a constitutional provision that, by its own terms, does not prohibit the statute they challenge.

Article II, section 22 provides, "[n]o bill shall become a law unless . . . a majority of the members elected to each house be recorded thereon as voting in its favor." The negative phrasing, "[n]o bill shall become a law unless . . . ," describes a circumstance under which a bill *does not pass*. If a bill does not receive the approval of a majority of legislators elected to each house, the bill does not become law. Thus, the plain language of article II, section 22 establishes a constitutional minimum number of votes for a bill to become law.

Article II, section 22 does not, as Plaintiffs assert, "provide[] that bills require *only* a majority vote" to become law. Complaint ¶ 53 (emphasis added). Article II, section 22 is devoid of any language establishing a maximum number of votes that may be required for a bill to become law. Plaintiffs essentially ask this court to amend article II, section 22—to ignore its plain language and instead treat the provision as if it read (in common bill drafting format to show changes):

> "((No)) Every bill shall become a law ((unless)) if . . . a majority of the members elected to each house be recorded thereon as voting in its favor."

This reading would transform article II, section 22's actual phrasing from a "negative" minimum majority vote requirement (a constitutional floor) to an "affirmative" maximum majority vote limitation (a constitutional ceiling). The court should reject Plaintiffs' invitation to rewrite the Washington Constitution in this way.

The significance of article II, section 22's negative phrasing is further demonstrated by comparing it with article II, section 21, a concurrently-adopted constitutional provision that likewise sets out a legislative vote ratio. Article II, section 21 provides, "[t]he yeas and nays of the members . . . shall be entered on the journal, on the demand of one-sixth of the members present." Unlike section 22, section 21 establishes precisely the sort of affirmative maximum vote limitation that Plaintiffs claim is present in section 22—a journal entry *shall* be made if

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

one-sixth of the members present demand it.[7] Section 21 shows that the framers knew how to—and did—impose affirmative maximum limits when they chose to do so. Significantly, they did not choose to do so in article II, section 22. The court should decline to read into the provision a meaning its authors did not include.

Nor is there any logic in concluding that the same constitutional convention that embraced supermajorities for some purposes intended to prohibit statutes requiring supermajorities for other purposes. At the same convention that drafted article II, section 22, the framers adopted several provisions requiring supermajority approval for certain legislative actions.[8] Provisions requiring supermajorities to enact certain legislation support the validity of RCW 43.135.034(1). They demonstrate the framers' recognition that certain legislative decisions are sufficiently important to require an added measure of consensus, and that a simple majority does not provide the only high-water mark of public policy.

Had the framers intended to preclude the legislature or the people from recognizing in statute additional circumstances warranting supermajority approval, they could have said so directly. For instance, they easily could have drafted article II, section 22 in the form of an affirmative maximum limitation on the number of votes that may be statutorily required to enact a bill. *See State v. Delgado*, 148 Wn.2d 723, 728-29, 63 P.3d 792 (2003) (noting that, in the absence of statutory language the legislature clearly knew how to include, the court presumes the language chosen was intentional). Instead, they drafted article II, section 22

---

[7] The *minimum* requirement expressed in article II, section 22 also contrasts with the affirmative maximum limitation applied to initiatives and referenda. "Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon." Const. art. II, § l(d).

[8] Provisions of the original 1889 Washington Constitution requiring supermajority legislative approval include: article II, section 9 (requiring two-thirds of elected members to expel a member); article II, section 36 (requiring two-thirds of all members to introduce bill less than ten days before final adjournment); article III, section 12 (requiring two-thirds of members present to override governor's veto); article IV, section 9 (allowing removal of judge, attorney general, or prosecuting attorney from office by concurrence of three-fourths of elected members); article V, section 1 (prohibiting impeachment conviction on less than two-thirds of elected senators); article XXIII, section 1 (requiring two-thirds of elected members to submit constitutional amendment to voters); article XXIII, section 2 (requiring two-thirds of elected members to propose constitutional convention to voters).

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

merely to state a prohibition against passage of bills based on less than a majority of the full membership, such as the majority of a quorum present and voting.[9] Const. art. II, § 22.

The power of the legislature, or of the people, "to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state or federal constitutions." *Washington Farm Bureau Fed'n*, 162 Wn.2d at 300-01 (quoting *State ex rel. Citizens v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004)). The framers may not reasonably be presumed to have implied the prohibition of a political mechanism, the supermajority vote requirement, that they themselves adopted, through language that does not say so. Given the absence of a clear constitutional prohibition, the court should not conclude otherwise.

2. That Article II, Section 22 Establishes Simply The Minimum Votes To Pass A Bill, Not Also The Maximum, Is Supported By Washington Precedent

The Washington Supreme Court has previously considered—and rejected—Plaintiffs' theory that a statute may not require a greater number of votes than is fixed by a constitutional provision. In *Robb v. City of Tacoma*, 175 Wash. 580, 28 P.2d 327 (1933), the court upheld a statute that required a greater number of votes to incur municipal indebtedness than the three-fifths supermajority required by article VIII, section 6. *Robb*, 175 Wash. at 585.

Similar to article II, section 22's negative phrasing, article VIII, section 6 provides, "[n]o county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum . . . without the assent of three-fifths of the voters therein . . .." The statute challenged in *Robb* additionally required that no bonds could issue unless the total number of votes cast at

[9] Nothing in the debate on Section 22 supports Plaintiffs' notion that the framers were concerned with establishing an affirmative maximum majority vote limitation for enacting legislation. Two amendments were offered and defeated. Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 62 (2002). One would have allowed a majority of those present to pass a bill, and its defeat indicates the framers' concern with setting a constitutional floor for bill passage. *Id.* The other amendment would have prevented bills from being introduced in the last 10 days of the session, and in no way suggests any concern along the lines Plaintiffs postulate.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

the bond election exceeded fifty percent of the votes cast at the preceding general election. *Robb*, 175 Wash. at 585. Thus, even where three-fifths of the voters at the election approved the excess debt as required by article VIII, section 6, the measure would fail based on the challenged statute, if the number of votes cast did not exceed fifty percent of the votes cast in the preceding election. The challengers claimed the statute was unconstitutional because, in some situations, it would require more votes than the threshold fixed by article VIII, section 6.

The court held the statute was constitutionally sound, reasoning that since the "state Constitution is but a limitation upon legislative power," when a statute is challenged as unconstitutional "the court looks to the state Constitution only to ascertain whether any *limitations* have been imposed upon such power." *Robb*, 175 Wash. at 586-87. The court continued:

> Article 8, § 6, of the state Constitution imposes a limitation upon the power of the Legislature, in that it may not fix a *less* number than a three-fifths majority of the votes cast, in order to validate a bond election. But the Constitution does not place any other limitation whatever upon the legislative power. It fixes a minimum limit of restriction below which the Legislature may not go, but it does not fix a maximum limit to which the Legislature may advance on 'an ascending scale.'

Id. at 587. The court supported its conclusion with an extensive review of two decisions from other states, each of which had rejected the notion that a negatively phrased constitutional provision fixing a voting threshold prohibited a higher statutory vote requirement.[10] *Id.* at 588-90 (discussing decisions examining constitutional language "no county seat shall be removed unless" the specified vote threshold be achieved).

In sum, the *Robb* Court held that article VIII, section 6's negatively-phrased voting threshold did not prohibit a statute fixing a higher voting threshold. *See also State ex rel. Craig v. Town of Newport*, 70 Wash. 286, 126 P. 637 (1912) (holding article VIII, section 6's

[10] The court also noted that article VIII, section 6 concludes with the proviso "any city or town, with such assent, *may be allowed* to become indebted to a larger amount." *Robb*, 175 Wash. at 587 (italics in original). The court observed the "may be allowed" language indicated that the power conferred upon municipalities was restrictive and subject to control by the Legislature. *Id.* The court did not further discuss or rely on this proviso.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

three-fifths voter approval requirement to incur municipal debt in excess of 1.5% was not violated by a statute that required three-fifths approval to incur any debt). The *Robb* decision is persuasive that likewise, article II, section 22's negatively-phrased voting threshold does not prohibit RCW 43.135.034(1)'s supermajority requirement.

By contrast, the court's decision in *Gerberding*, 134 Wn.2d 188 (1998), which addressed term limits, is not persuasive. *Gerberding* held that term limits are qualifications for office, and that an initiative imposing them for certain state offices conflicted with article II, section 7,[11] and article III, section 25,[12] of the Washington Constitution. *Gerberding* concluded that, notwithstanding their negative phrasing, the qualifications provisions of the Washington Constitution were exclusive. That conclusion, however, rests on circumstances entirely absent from this case—what the court termed "fundamental principles" specific to qualifications for public office. *Gerberding*, 134 Wn.2d at 201. Most notably, the court relied on a longstanding "strong presumption in favor of eligibility for office," explaining that "any doubt as to the eligibility of any person to hold an office must be resolved against the doubt." *Id.* at 202. In addition, the court recounted Washington's constitutional convention history, demonstrating that the framers considered but rejected term limits for all but a limited number of constitutional offices. *Id*. at 202-06. Finally, the court relied on longstanding Washington precedent, as well as nearly uniform precedent from throughout the country, based on the strong presumption in favor of eligibility for office, that qualifications for constitutional office are exclusive. *Id.* at 205-08. None of these circumstances are present in this case.

Article II, section 22, by its plain language, establishes a constitutional minimum of a simple majority vote for bill passage. It does not, either expressly or by fair inference, prohibit statutes that require greater than a simple majority vote for passage. (And, of course, any bill

[11] "No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen." Const. art. II, § 7.

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

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

receiving a supermajority vote has received a simple majority.) Absent such a limitation, the legislature, or the people, are free to express their legislative policy judgment that certain types of bills warrant greater than simple majority consensus for passage. RCW 43.135.034(1) expresses such a policy judgment—that a two-thirds majority vote of each house should be required for passage of bills raising taxes. By the provision's plain language, Plaintiffs' claim that article II, section 22 renders RCW 43.135.034(1) unconstitutional fails.

F. I-1053 Satisfies The Single-Subject Requirement Of Article II, Section 19, And The Court Should Decline To Reach Beyond It To Predecessor Initiatives

Article II, section 19 of the state constitution provides, in part: "[n]o bill shall embrace more than one subject."[13] The purpose of the single-subject requirement is to prevent a bill from being drafted "such that voters may be required to vote for something of which the voter disapproves in order to obtain approval of an unrelated law." *Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d 622, 632, 71 P.3d 644 (2003). The requirement applies to initiatives. *Amalgamated Transit Union Local 587 v. State*, ("*ATU*") 142 Wn.2d 183, 206, 11 P.3d 762 (2001). The requirement is "to be liberally construed in favor of upholding the legislation." *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 249, 88 P.3d 375 (2004).

Plaintiffs claim that I-1053, and earlier initiatives I-960 and I-601, violate the single-subject requirement. Complaint ¶ 79. Plaintiffs assert that all three initiatives contained at least two subjects: the supermajority vote provision and the referendum provision. *Id.* Plaintiffs contend these identified subjects "lack rational unity, and, therefore violate the single-subject requirement." *Id.*

Plaintiffs' claim fails for at least three reasons. First, the referendum provision that Plaintiffs allege to be a second subject within I-1053 was merely the continuation of existing

[13] The remainder of article II, section 19 requires that the subject of a bill "shall be expressed in the title." Plaintiffs do not challenge I-1053 based on this constitutional requirement.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

law. Therefore, it was not a subject of I-1053 at all. Second, even if the referendum provision were considered, I-1053 satisfies article II, section 19's single-subject requirement because there is rational unity between and among the referendum provision, the supermajority vote provision, and the general subject of I-1053. Third, with respect to I-960 and I-601, the court should flatly reject Plaintiffs' novel request that it consider the constitutionality of superseded enactments, especially where it would necessarily be forced to reach behind current law across numerous intervening legislative acts over the course of as long as 18 years to do so.

1. I-1053 Poses No Single-Subject Issue Because The Referendum Provision Merely Continued Existing Law And Was Not A Subject Of I-1053

Plaintiffs' claim that I-1053 contains two subjects fails from the outset, because the alleged second subject, the referendum provision, is not a subject of I-1053 at all. I-1053 made no change to the referendum provision. Rather, it merely set forth the provision, in full and unaltered, as a ministerial consequence of the provision appearing in the same statute as the two-thirds supermajority vote provision, which I-1053 did amend.

The existing provisions of a statute which are merely set forth in full, in compliance with article II, section 37, but not amended, continue existing law rather than create new law.[14] "Our constitution requires that, where a section of an act is amended, the section must be set forth at length; and it follows, from this, that . . . [the] part of the original enactment which is repeated remains the same as if there had been no amendment." *Mudgett v. Liebes*, 14 Wash. 482, 486, 45 P. 19 (1896). "When a statute continues a former statute law, that law common to both acts dates from its first adoption, . . . and only new provisions are new laws." *Spokane County v. City of Spokane*, 156 Wash. 393, 395, 287 P. 675 (1930).

The Supreme Court applied this principle recently, rejecting an article II, section 19 single-subject challenge in *Citizens Against Tolls*, 151 Wn.2d 226. In that case, a citizens

[14] Article II, section 37 provides that "[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

group asserted that EHB 2723 violated the single-subject requirement because it contained multiple subjects: provisions relating to public financing for specific projects, and an exemption for certain projects from the state bidding process. *Citizens Against Tolls*, 151 Wn.2d at 249-50. That argument failed, however, because it was an earlier act, not EHB 2723, that created the exemption from the state bidding process. *Id.* at 250. In other words, where EHB 2723 merely set forth the provision establishing the exemption but did not change it, the exemption was not a subject of EHB 2723.

Also instructive is *State v. Musgrave*, 124 Wn. App. 733, 103 P.3d 214 (2004), in which a criminal defendant challenged his sentence for first degree murder, claiming that the applicable sentencing statute (RCW 9.94A.120(4)) had earlier been declared unconstitutional as violating article II, section 19. *Musgrave*, 124 Wn. App at 734. The court acknowledged that portions of RCW 9.94A.120(4) enacted by Initiative 593 (I-593) had been struck pursuant to an article II, section 19 challenge to the initiative. *Musgrave*, 124 Wn. App. at 736. However, the portion of the statute establishing the mandatory minimum sentence for first degree murder was not enacted by I-593. *Musgrave*, 124 Wn. App at 737. Therefore it continued in force. *Id*

Here, the referendum provision is no more a subject of I-1053 than the exemption from the state bidding process was a subject of EHB 2723 in *Citizens Against Tolls* or the minimum sentence for first degree murder was a subject of I-593 in *Musgrave*. As in those cases, the referendum provision merely continues existing law, repeating part of an earlier enactment.

The referendum provision was originally approved as part of I-601 in November 1993. Laws of 1994, ch. 2, § 4; Hart Decl. ¶ 3, Ex. A. It originally was codified at RCW 43.135.035(2)(a). Although RCW 43.135.035 was amended multiple times in the ensuing years, the referendum provision remained unchanged throughout. I-1053 also made no change to the referendum language appearing at RCW 43.135.035(2)(a).

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Thus, RCW 43.135.034(2)(a) contains the same referendum provision that was originally approved as part of I-601 in November 1993. The language, which was unchanged by I-1053, simply continued existing law. Consequently, it is not a subject of I-1053 for purposes of article II, section 19. Plaintiffs' claim that I-1053 violates the single-subject requirement should be dismissed.

2. Even If The Referendum Provision Were Considered A Subject Of I-1053, The Initiative Does Not Violate The Single-Subject Requirement Because Its General Subject, The Supermajority Vote Requirement And The Referendum Provision Are Rationally Related

"An initiative embraces a single subject if its parts are rationally related to one another." *Pierce County v. State*, 150 Wn.2d 422, 431, 78 P.3d 640 (2003). By contrast, the single-subject requirement is violated "when the measure is drafted such that voters may be required to vote for something of which the voter disapproves in order to obtain approval of an unrelated law." *Citizens for Responsible Wildlife Management*, 149 Wn.2d at 632. Thus, "the rational relationship inquiry centers on what is in the measure itself, i.e., whether the measure contains unrelated laws." *ATU*, 142 Wn.2d at 212.

In considering a single-subject challenge, "the first step is to determine whether the title of the enactment is general or restrictive." *Wash. Ass'n. of Neighborhood Stores v. State*, 149 Wn.2d 359, 368, 70 P.3d 920 (2003). Presumably, the court begins its single-subject inquiry by considering the ballot title, because article II, section 19 requires the subject of the bill to be expressed in its title. Where an initiative to the people is concerned, "the relevant title for the art. II, § 19 inquiry is the ballot title." *ATU*, 142 Wn.2d at 211-12. An initiative ballot title contains a statement of the subject of the measure, not exceeding ten words, formulated as: "Initiative Measure No. . . . concerns (statement of subject)."[15] RCW 29A.72.050.

[15] It also contains a concise description of the measure, not exceeding thirty words, formulated as: "This measure would (concise description)." RCW 29A.72.050.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

"'A general title is broad, comprehensive, and generic as opposed to a restrictive title that is specific and narrow.'" *Neighborhood Stores*, 149 Wn.2d at 368 (quoting *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001)). A general title need not "'contain a general statement of the subject of an act; a few well-chosen words, suggestive of the general subject stated, is all that is necessary.'" *Id.* (quoting *ATU*, 142 Wn.2d at 209)). A restrictive title "'is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation.'" *Wildlife Management*, 149 Wn.2d at 633 (quoting *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997)). "'A restrictive title expressly limits the scope of the act to that expressed in the title.'" *Id.* (quoting *ATU*, 142 Wn.2d at 210).

To determine whether I-1053's title is general or restrictive, examining recent titles the Supreme Court deemed general is instructive. It held general: Initiative Measure No. 773 concerns "'[a]dditional tobacco taxes for low-income health programs and other programs.'" *Neighborhood Stores*, 149 Wn.2d at 369 (quoting *State of Washington Voters Pamphlet General Election* 6 (Nov. 6, 2001)). It held general: "'Shall it be a gross misdemeanor to capture an animal with certain body-gripping traps, or to poison an animal with sodium fluoroacetate or sodium cyanide?'"[16] *Wildlife Management*, 149 Wn.2d at 632, 636 (quoting *State of Washington Voters Pamphlet General Election* 8 (Nov. 7, 2000)). And it held general: "'Shall voter approval be required for any tax increase, license tab fees be $30 per year for motor vehicles, and existing vehicle taxes be repealed?'" *ATU*, 142 Wn.2d at 212, 217.

The statement of subject for I-1053 reads, "Initiative Measure No. 1053 concerns tax and fee increases imposed by state government." *State of Washington Voters Pamphlet General Election* 9 (Nov. 2, 2010). This conveys a general subject, tax and fee increases by state government. By comparison with the examples above, I-1053's title is at least as "broad, comprehensive, and generic" as the most general of those general titles, Initiative Measure

[16] In 2000, the format of the statement of subject for ballot titles was changed from this question-posing form to "Initiative Measure No. . . . concerns (statement of subject)." Laws of 2000, ch. 197 § 1.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

No. 773 concerns "[a]dditional tobacco taxes for low-income health programs and other programs." *Neighborhood Stores*, 149 Wn.2d at 369. The title of I-1053 is general.

Where a title is general, "great liberality will be indulged to hold that any subject reasonably germane to such a title may be embraced within the body of the bill." *ATU*, 142 Wn.2d at 207. "[A]ll that is required is rational unity between the general subject and the incidental subjects." *Id.* at 209. "Rational unity requires included subjects to be reasonably connected to one another and the ballot title." *Neighborhood Stores*, 149 Wn.2d at 370.

Applying the rational unity analysis to I-1053 involves assessing, first, whether there is a rational unity between its general subject and each of the subjects identified by Plaintiffs, and second, whether those subjects "bear some rational relation to one another." *Wildlife Management*, 149 Wn.2d at 637. The answer to both queries is yes.

First, the general subject of I-1053 is tax and fee increases by state government. Plaintiffs' first 'subject,' the supermajority vote provision, concerns the requirement 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." I-1053 § 2(1) (codified at RCW 43.135.034(1)). This 'subject' concerns certain tax increases, and so is plainly "reasonably connected" and "germane" to the general subject of tax and fee increases by state government.

Plaintiffs' second 'subject' concerns the referendum provision, which states, "If the legislative action under [RCW 43.135.034(1), *i.e.*, legislative action raising taxes] will result in expenditures in excess of the state expenditure limit, then the action of the legislature shall not take effect until approved by a vote of the people . . .." I-1053 § 2(2)(a) (codified at RCW 43.135.034(2)(a)). It also concerns certain tax increases, and accordingly, is "reasonably connected" and "germane" to the general subject of tax and fee increases by state government.

Second, the identified subjects obviously "bear some rational relation to one another." *Wildlife Management*, 149 Wn.2d at 636. Indeed, they each concern related tax increases. The

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

provisions of I-1053 are interrelated and germane to each other, and to the general subject of I-1053. Therefore, I-1053 is rationally unified and constitutional.

3. The Court Should Decline To Reach Plaintiffs' Single-Subject Challenges To The Superseded Initiatives, I-960 And I-601

In addition to challenging I-1053, Plaintiffs allege the same single-subject claim regarding I-960 and I-601. Complaint ¶ 79. Where, as here, the current law is valid, the court has no cause to reach behind it and consider alleged constitutional infirmities of earlier enactments.

Additionally, I-960 and I-601 have been amended or reenacted on several occasions as parts of other bills. Hart Decl. ¶ 3, Exs. A-J. A single-subject challenge is precluded when allegedly infirm legislation is subsequently reenacted or amended with proper procedural formalities. *Morin v. Harrell*, 161 Wn.2d 226, 232-33, 164 P.2d 495 (2007). Moreover, Plaintiffs' complaint is devoid of any challenge that the bills enacted subsequent to I-960 were infirm under article II, section 19. Thus, even if there were any basis to reach Plaintiffs' challenge to I-960, and there is not, it fails for lack of any challenge to these bills. And the same defect precludes Plaintiffs' challenge to I-601. For each of these reasons, the court should decline to address Plaintiffs' single-subject claims regarding I-601 and I-960.

G. RCW 43.135.034 Does Not Violate Article II, Section 1, Of The Washington Constitution

1. Article II, Section I Grants Legislative Power To *Both* The People And The Legislature

Article II, section 1 provides that "[t]he legislative authority of the state of Washington shall be vested in the legislature . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature." It is fundamental, then, that article II, section 1 grants legislative power to *both* the people and the legislature. The legislative power of the legislature does not impair the people's power to pass laws, any more than the people's legislative power impairs the legislature's power to pass

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

laws. Either body may exercise its full legislative power, by amending or repealing laws passed by the other or by passing new laws. The possibility that a court may subsequently determine that a law enacted by the people or the legislature is invalid does not mean that it was beyond the power of the people or the legislature to enact. *Futurewise*, 161 Wn.2d at 411 (2007). Moreover, the power of the legislature, or of the people, "'to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state or federal constitutions.'" *Washington Farm Bureau Fed'n*, 162 Wn.2d at 300-01 (quoting *State ex rel. Citizens v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004)).

Contrary to these fundamental principles, Plaintiffs contend that RCW 43.135.034(1) and (2)(a) violate article II, section 1.

2. Neither RCW 43.135.034(1) Nor (2)(a) Violates Article II, Section 1

Plaintiffs contend that the supermajority vote provision of RCW 43.135.034(1) and the referendum provision of RCW 43.135.034(2)(a) violate article II, section 1. Complaint ¶¶ 61, 62. Plaintiffs point to no language in article II, section 1 that either expressly or by necessary implication limits or prohibits the people's legislative authority to enact RCW 43.135.034(1) or (2)(a). Nor could they, because there is none. Article II, section 1 expressly authorizes the people to enact laws by initiative, and that is precisely what the people did when they approved I-1053.

Plaintiffs instead assert that RCW 43.135.034(1) "is an unconstitutional impairment of the legislature's plenary power to pass laws." Complaint ¶ 61. They make essentially the same claim with respect to the referendum provision of RCW 43.135.034(2), asserting that "it constrains the ability of future legislatures to govern." Complaint ¶ 62. These claims are fundamentally incorrect. As explained above, the legislature may exercise its full constitutional authority to amend or repeal RCW 43.135.034, or to enact new laws. In fact, the legislature has amended the predecessor to this statute numerous times. *See supra* p. 1-2. RCW 43.135.034 does not impair the legislature's legislative power in any way.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Plaintiffs' Complaint acknowledges in a footnote (Complaint ¶ 60, note 1) that article II, section 1(c) of the constitution limits the authority of the legislature to amend or repeal an initiative during the two years following its passage.[17] An initiative may not be repealed within that period, and may be amended only upon a two-thirds supermajority vote of the legislature. But these constraints on legislative power to amend or repeal laws enacted by initiative, to the extent they apply to RCW 43.135.034 by virtue of I-1053, derive directly from the constitution itself, not from the statute. They apply to all initiatives, regardless of their subject or substance. *ATU*, 142 Wn.2d at 233 (all initiatives subject to same constitutional strictures). And, as explained, these constitutional limitations do not preclude the legislature from passing any law that it determines to pass. *Futurewise*, 161 Wn.2d at 411 (2007)

In sum, Plaintiffs' argument fails both because RCW 43.135.034 does not preclude the legislature from exercising its law-making power, and because the only limitation on that power is imposed directly by the state constitution, not RCW 43.135.034.

3. RCW 43.135.034(2)(a) Does Not Violate Article II, Section 1(b)

Plaintiffs also assert that the referendum provision of RCW 43.135.034(2)(a) "violates Article II, section 1(b), which specifies the conditions under which a bill may be subject to referendum." Complaint ¶ 63. Under article II, section 1(b), a referendum may be ordered on any bill passed by the legislature "either by petition signed by the required percentage of legal voters, or by the legislature as other bills are enacted." The number of voters signing a referendum petition on a law enacted by the legislature must be "equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election." Const.

[17] Article II, section 1(c) states: "No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided,* That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members . . .."

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

art. II, § 1(b). Plaintiffs note this requirement of article II, section 1(b), and contend that RCW 43.135.034(2)(a) violates article II, section 1(b).

For this challenge, Plaintiffs cite *ATU*, 142 Wn.2d 183. Complaint, Ex. 1. p. 2. *ATU* concerned Initiative 695 (I-695), Laws of 2000, ch. 1. Section 2 of I-695 provided that "[a]ny tax increase imposed by the state shall require voter approval." Laws of 2000, ch. 1, § 2. The *ATU* plaintiffs challenged section 2 of I-695 as violating article II, section 1(b). The *ATU* court held that the referendum provision of I-695 violated article II, section 1(b) "on the basis that section 2 establishes a referendum applying to every piece of future tax legislation," and "without regard to the four percent signature requirement." *Id*. at 244. *ATU* is readily distinguishable from this case on multiple grounds, and does not control here.

First, there was no timely challenge to justiciability or standing in *ATU*, as there is in this case. In *ATU*, the I-695 campaign raised justiciability and standing for the first time on appeal, and on appeal, did not provide sufficient argument regarding those issues. *ATU*, 142 Wn.2d at 202. For these reasons, the *ATU* court declined to consider them. *Id*. As more fully discussed in section V.B *supra*, Plaintiffs' challenge to RCW 43.135.034 is nonjusticiable, and Plaintiffs lack standing to raise it. Plaintiffs fail to show any right or legal interest that has been affected by RCW 43.135.034(2)(a). The provision has never been triggered, and there is no reason to anticipate that it will be at any point in the near future. Baker Decl. ¶ 4; Espeseth Decl. ¶ 4. None of the allegations in the Complaint suggest any relationship between the harm Plaintiffs allege and a requirement for voter approval of tax measures that cause spending to exceed the expenditure limit, and the expenditure limit itself is not at issue. Plaintiffs' article II, section 1(b) challenge to RCW 43.135.034(2)(a) thus fails at the outset.

Second, *ATU* held section 2 of I-695 invalid because it applied to "every future piece of tax legislation." *ATU*, 142 Wn.2d at 231. The *ATU* court discussed such a broad voter referral provision as an unlawful delegation of legislative authority. *Id*. at 237. In part based

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

on the breadth of the voter referral in I-695, section 2, the *ATU* court distinguished prior initiatives that limited the rate of taxation of real and personal property, while allowing for special levies upon voter approval. *Id*. at 243. The *ATU* court explained that "such voter approval requirements are unlike section 2 of I-695" in that, "[f]irst, only a specified type of tax is at issue, not all future tax measures." *Id* at 243.

RCW 43.135.034(2)(a) is unlike section 2 of I-695 in the same way. It applies only to a very narrow and specified type of tax increase—an increase that would result in spending in excess of the state expenditure limit. Moreover, state spending in excess of the state expenditure limit is prohibited by a separate statute, RCW 43.135.025(1), which Plaintiffs do not challenge. Rather than conditioning all tax increases on voter approval, as section 2 of I-695 did, RCW 43.135.034(2)(a) more accurately provides an exception to the existing prohibition against state spending in excess of the limit.

Third, Plaintiffs' challenge to the referendum provision under article II, section 1(b) on the theory that it disregards the requirement that "a bill may be referred [by the voters] only if a petition is circulated and signed by the required percentage of legal voters" (Complaint ¶ 63), defies the provision's history. While RCW 43.135.034(2)(a)'s referendum language originated in I-601 in 1993, it has not since been amended by initiative. Notably, however, the legislature "*reenacted* and amended" RCW 43.135.034's predecessor statute in 2005, and in the same bill, found that "the citizens of the state benefit from a state expenditure limit." Laws of 2005, ch. 72, §§ 1, 2 (emphasis added); Hart Decl. ¶ 3, Ex. E. In so doing, the legislature ratified the referendum language that Plaintiffs challenge. Certainly, as it did in 2005, the legislature has the power to decide to refer to the people the narrow type of bill that RCW 43.135.034(2)(a) addresses, and *ATU* does not hold otherwise. Article II, section 1

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

expressly provides that a referendum may be ordered on any bill passed by the legislature "as other bills are enacted."[18]

For these reasons, RCW 43.135.034(2)(a) comports with article II, section 1(b).

H. RCW 43.135.034(2)(a) Does Not Violate Article III, Section 12

Plaintiffs also allege that the voter approval provision of RCW 43.135.034(2)(a) violates article III, section 12, of the state constitution. Complaint ¶ 64. That section describes the governor's authority to sign or veto legislation, subject to potential legislative override. Const. art. III, § 12.

Plaintiffs' contention that RCW 43.135.034(2)(a) unconstitutionally deprives the governor of veto authority is contradicted by the language of the constitution itself. The state constitution provides that, "The veto power of the governor shall not extend to measures initiated by or referred to the people." Const. art. II, § 1(d). The constitution thus expressly exempts referenda from the governor's veto power under article III, section 12.

I. RCW 43.135.034 Does Not Violate Article VII, Section 1, Of The Washington Constitution By Suspending or Surrendering The Power Of Taxation

Article VII, section 1, of the Washington Constitution begins, "The power of taxation shall never be suspended, surrendered or contracted away." Const. art. VII, § 1. Plaintiffs contend that RCW 43.135.034 violates this provision "by effectively suspending or surrendering the power of taxation." Complaint ¶ 68. RCW 43.135.034 does no such thing, but merely addresses the manner in which the taxing power is exercised.

The Washington Supreme Court has defined what it means to "surrender" or "suspend" the power of taxation. "'Surrender' means to yield, render, or deliver up, to give up completely, resign, to relinquish." *Gruen v. Tax Comm'n*, 35 Wn.2d 1, 53, 211 P.2d 651

[18] If *ATU* were read to prohibit RCW 43.135.034(2)(a), the decision would restrict the legislative authority of the legislature and the people contrary to article II, section 1, would be incorrect and harmful, and properly would be overruled. *Hardee v. State*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011) (overruling prior decision because it was "both incorrect and harmful precedent.").

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

(1949), *overruled on other grounds, State ex rel. Washington State Finance Committee v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963) (citations omitted). Similarly, "[t]he word 'suspended' is defined as temporarily inactive or inoperative–that is, held in abeyance." *Id*. RCW 43.135.034 addresses the manner in which the taxing power is exercised, but nothing in it purports to relinquish that power, either permanently or temporarily. Plaintiffs' claim based on article VII, section 1, fails.

J. Article I, Section 32, Of The Washington Constitution Merely States An Interpretive Principle And Does Not Establish An Independent Basis For Invalidating State Laws

Plaintiffs contend, finally, that RCW 43.135.034 is unconstitutional as a violation of article I, section 32, of the Washington Constitution. That section provides that, "[a] frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Const. art. I, § 32. It merely states an interpretative principle to guide construction of other constitutional provisions, and does not independently restrict the permissible scope of legislation. *Brower v. State*, 137 Wn.2d 44, 69, 969 P.2d 42 (1998). Consequently, this provision does not give rise to a separate cause of action.

K. The Court Should Dismiss This Action, But If the Court Concludes That Either Challenged Provision of RCW 43.135.034 Is Unconstitutional, Its Remaining Statutory Provisions Should Be Severed

For the several reasons set forth in this brief, the court should enter judgment in favor of the State and dismiss Plaintiffs' challenges to the constitutionality of the supermajority vote provision of RCW 43.135.034(1) and the referendum provision of RCW 43.135.034(2). If, however, the court concludes that either or both of the challenged provisions are invalid, the remainder of the statute should be severed.

Based upon their claim that the supermajority vote provision of RCW 43.135.034(1) and the referendum provision of RCW 43.135.034(2) are invalid, Plaintiffs contend that "RCW 43.135.034 is unconstitutional in its entirety." Complaint ¶ 1. Plaintiffs' contention is unsound.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

"The basic test for severability of constitutional and unconstitutional provisions of legislation is . . . whether the constitutional and unconstitutional provisions are so connected . . . that it could not be believed that the legislature would have passed one without the other; or [whether] the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *State v. Abrams*, 163 Wn.2d 277, 285-286, 178 P.3d 1021 (2008) (internal citations omitted). A severability clause "offers to the courts the necessary assurance that the remaining provisions would have been enacted without the portions which are contrary to the constitution." *Id*. at 286 (quoting *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972)). Section 7 of I-1053 contains a broad severability clause. It states that "[i]f any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." Laws of 2011, ch. 1, § 7; Hart Decl. ¶ 3, Ex. K, p.140.

Plaintiffs' complaint does not claim that subsections (3) through (6) of RCW 43.135.034 are independently unconstitutional (indeed, the complaint does not mention them), and they concern matters other than the two-thirds supermajority vote provision of RCW 43.135.034(1), and the referendum provision of RCW 43.135.034(2).[19] Nor do Plaintiffs complain that the second sentence of RCW 43.135.034(1) is invalid, and it too, concerns a matter other than the two-thirds supermajority vote provision.[20] In other words, the challenged provisions of RCW 43.135.034(1) and (2) are not "so intimately connected" with these provisions of the statute "as to make them useless to accomplish the purposes of the legislature." *Abrams*, 163 Wn.2d at 285.

---

[19] RCW 43.135.034(3)(a) and (b), (4), and (5) concern the state expenditure limit; RCW 43.135.034(3)(c) concerns taxation of intangible personal property; and RCW 43.135.034(6) defines "raises taxes" for purposes of statutes in addition to RCW 43.135.034(1) and (2).

[20] The second sentence of RCW 43.135.034(1) provides that "[p]ursuant to the referendum power set forth in Article II, section 1(b) of the state Constitution, tax increases may be referred to the voters for their approval or rejection at an election."

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Nor are the challenged provisions so connected to each other that it could not be believed the legislature or the people would have passed one without the other; or so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature. *Id*. More than once, the legislature has suspended the supermajority vote provision, leaving the referendum provision intact. The fact that only part of an initiative section is invalid is not a bar to severing it from the remainder of the section where it is grammatically, functionally, and volitionally severable. *McGowan v. State*, 148 Wn.2d 278, 295, 60 P.3d 67 (2002). That is the case here.

Accordingly, while the court should not do so, if the court determines that either the supermajority vote provision of RCW 43.135.034(1) or the referendum provision of RCW 43.135.034(2)(a) is invalid, the court should reject Plaintiffs' request to declare RCW 43.135.034 invalid in its entirety, hold only the particular offending provision(s) invalid, and sever the remaining statutory provisions.

DATED this 13th day of January 2012.

s/ Maureen Hart
MAUREEN HART, WSBA No. 7831
Solicitor General
marnieh@atg.wa.gov

JEFFREY T. EVEN, WSBA No. 20367
Deputy Solicitor General
Jeffe@atg.wa.gov

ALLYSON ZIPP, WSBA No. 38076
Deputy Solicitor General
Allysonz@atg.wa.gov

Attorneys for State of Washington

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on this date I served the foregoing document, via electronic mail per agreement of the parties, upon the following:

Paul J. Lawrence
Paul.Lawrence@pacificalawgroup.com
Matthew J. Segal
matthew.segal@pacificalawgroup.com;
Gregory J. Wong
Greg.Wong@pacificalawgroup.com
PACIFICA LAW Group LLP
1191 Second Avenue, Suite 2100
Seattle, WA 98101

Michele Radosevich
micheleradosevich@dwt.com
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

Signed this 13th day of January 2012 in Olympia, Washington.

s/Kristin D. Jensen
KRISTIN D. JENSEN
Legal Secretary