

No. 87425-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEAGUE OF EDUCATION VOTERS, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant,

and CHRISTINE GREGOIRE, Governor of the State of Washington,

Respondent.

BRIEF OF *AMICUS CURIAE*
ASSOCIATION OF WASHINGTON BUSINESS

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I. INTRODUCTION

The notion that a bill imposing or increasing a state tax receive a two-thirds vote of the members of the House and Senate is an interesting, even unique, feature of state law. As in the other states where such a requirement has been adopted, it fosters what is essentially a political dialogue between the people and the Legislature, and amongst legislators themselves, over a subject that since the earliest days of the American founding has been singled out for special treatment: taxation.

The Two-Thirds Requirement for tax increases is fundamentally a political mechanism. It says to the Legislature, and those who participate in the legislative process, that tax votes should require special attention. It encourages bi-partisan dialogue across competing political philosophies, as it is unlikely – though not unheard of – that a single political party’s caucus will have two-thirds majority control of either chamber of the Legislature. It proposes for tax and fiscal policy the initial consideration that state government “live within its means” – that, by appropriate political prioritization, essential state services, including the paramount duty to amply fund basic education, can be funded with existing revenue and without simply resorting to tax increases.

However, when the Legislature has decided to impose new or increased taxes, the Two-Thirds Requirement has not stopped it. Since its

original enactment as part of Initiative 601 in 1993, the Two-Thirds Requirement has not only been suspended but also imposed by the Legislature – including by the affirmative votes of legislators who are parties to this action. While the people have more recently ratified this legislative action through the initiative power, nevertheless, taxes have been raised several times since the adoption of I-601. Most recently, taxes were raised in 2010 while the Two-Thirds Requirement was suspended. This year, the very tax at issue in respondents’ complaint was raised *with a two-thirds vote*. Clearly, this mechanism does not prevent legislative action when there is sufficient political consensus to act.

Now, for the fourth time in two decades, and the third time since 2007, an assortment of lobbying groups, public officials, and others who chafe under this political framework, seeking an easier political environment in which to enact tax increases, would have this court intervene into the legislative domain. As in the past, today’s litigants attempt to push the square peg of a political question through the round hole of justiciability doctrine. Once again, as essentially the same challenge has failed at least three times previously in this court, it should fail again.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Businesses pay the majority share of taxes in Washington.

According to the Council on State Taxation, in 2011, the share of all state taxes paid by business was 60.8 percent. Council on State Taxation, Total State and Local Business Taxes, State-by-State Estimates for Fiscal Year 2011 (July, 2012) at 11, *available at* <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=81797> (last visited Aug. 27, 2012).

The Association of Washington Business (“AWB”), the state’s chamber of commerce and largest general business membership federation, is the principal institutional representative of this taxpaying business community. AWB has long been a political and legislative supporter of a two-thirds supermajority vote for tax increases at the Legislature because business taxes, as opposed to sales or property taxes, are the most frequently targeted for increase and expansion.

AWB supported the original Initiative 601 in 1993, and has helped pass Initiative 960 in 2007, Initiative 1053 in 2010, and now supports Initiative 1185 on the fall ballot. Like lead respondents League of Education Voters and Washington Education Association, AWB maintains active legislative and political advocacy programs on matters of tax, fiscal, budgetary, and education policy. Obviously, the outcome of this case is of great interest to AWB and its membership.

III. ISSUES OF CONCERN TO *AMICUS CURIAE*

Should the court dismiss the case on jurisdictional and justiciability grounds or, if it goes to the merits, does the supermajority requirement for tax increases in RCW 43.135.034(1) violate Const. art. II, § 22? *Cf. State's Opening Br.* at 2-3 (Issues 1, 3-4).

IV. STATEMENT OF THE CASE

AWB adopts, as if set forth herein, the Appellant's Statement of the Case. *State's Opening Br.* at 3-6.

V. ARGUMENT

AWB's principal contention in this brief is that the court should decline to exercise its jurisdiction where there is no justiciable controversy between the parties, as was the rule in *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) and *Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009). While in general agreement with the State's briefing on justiciability, section V.A goes further into discussion of the political question doctrine, urging the court to find this case nonjusticiable and decline to render a constitutional advisory opinion. Although not briefed separately here, should the Court find justiciability, or a rationale for reaching the merits despite failing the traditional justiciability test, AWB

notes its full agreement with the briefing presented by the State as to the constitutionality of RCW 43.135.034(1) under Const. art. II, § 22.¹

A. THIS CHALLENGE IS NOT JUSTICIABLE AND SHOULD BE DISMISSED.

This case fails the traditional justiciability test for lack of genuine legal interests on the part of Respondents, or alternatively for lack of interests that are direct and substantial. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (stating the four elements of a justiciable controversy). It is black letter law that “[u]nder the [Declaratory Judgments] Act, [o]ne may not challenge the constitutionality of a statute unless it appears that he will be directly damaged in person or in property by its enforcement.” *To-Ro Trade Shows*, 144 Wn.2d 403, 411-12, 27 P.3d 1149 (2001) (quoting *DeCano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941)). Further, the challenge to the Two-Thirds Requirement fails the “great public importance” rationale of *Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 492 P.2d 1012 (1972). Instead, the dispute turns on contested issues of political philosophy and parliamentary procedure germane to the legislative branch. As such, it asks the court to “step[] into the prohibited area of advisory

¹ This brief also does not touch upon either the never-before-invoked voter approval provision of RCW 43.135.034(2)(a) or the issue of severability. In both instances, AWB would agree with the briefing presented by the State.

opinions,”” *Walker*, 124 Wn.2d at 412 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)), and resolve a “nonjusticiable political question.” *Brown*, 165 Wn.2d at 727.

1. The failure of SHB 2078.

Respondents’ specific grievance in this case is the failure of a tax increase and appropriation measure, Substitute House Bill 2078, in the House of Representatives during the first special session of the 2011 Legislature, despite the bill receiving a simple majority of votes in the House, after a parliamentary ruling that the measure required a two-thirds vote. This legislative inaction is in substance the same circumstance Senator Lisa Brown brought to this court when the Senate failed to advance Senate Bill 6931 during the 2008 legislative session despite that measure receiving a simple majority of votes in the Senate, also after a parliamentary ruling that the measure would require a two-thirds vote. *Brown*, 165 Wn.2d at 716. The outcome here should be no different.

First, the State points out that, as in *Brown*, the House of Representatives had the procedural prerogative to pass SHB 2078 with a simple majority vote had it decided to. “The right of a legislative body to exercise its legislative powers will not be invaded by the judicial branch of government.” *Brown*, 165 Wn.2d at 720 (quoting *State ex rel. Gunning v. Odell*, 58 Wn.2d 275, 278, 362 P.2d 254 (1961)). It was entirely within the

Legislature's powers to determine to pass SHB 2078. For example, there could have been no parliamentary inquiries raised by House members as to the number of votes necessary to pass the measure. There could have been a different parliamentary ruling made by the Speaker of the House as to the number of votes necessary to pass the measure. The Speaker's parliamentary ruling on the number of votes necessary could have been appealed by a member of the body and overturned by a simple majority of the body. None of this happened.

Rather than take actions that would have led to the passage of the measure, effort was instead invested in an elaborately choreographed set of colloquys preceding the floor vote, all evidently designed to tee up this specific legal dispute over the predestined failure of the measure. *See, e.g.,* Democrats Begin Legal Challenge to Two-Thirds Rule, Publicola, May 25, 2011, <http://publicola.com/2011/05/25/democrats-begin-legal-challenge-to-two-thirds-rule/> (last visited Aug. 24, 2012) (“PubliCola has confirmed that the Democrats took the vote in order to cue up a formal court challenge to I-1053, the rule that requires a two-thirds vote to raise taxes.”). This is not a constitutional crisis; it is a chamber of the Legislature exercising its own political prerogative not to pass a bill on to the other chamber. A simple majority could have just as well exercised a different prerogative.

Second, no legally significant conclusion can be drawn from the fact SHB 2078 did not pass the House of Representatives regardless of the vote margin. For respondents to plausibly claim they are aggrieved by the failure of SHB 2078 to raise taxes and make appropriations to educational programs, they would have this court assume that after hypothetical passage by the House, the bill would have been passed by the Senate in the same form, without amendment, and that the unamended bill would have been signed by the Governor into law. The sheer number of possible intervening actions or inactions, and legislative and citizen actors, that play political and procedural roles in the legislative process make it entirely unpredictable that such a measure would follow this straightforward course to enactment. But to claim some legally cognizable consequence from the failure of the bill in one chamber, respondents invite the court on precisely that flight of speculation.

Finally, it should be fatal to respondents' claims about the inability to pass tax increases under the Two-Thirds Requirement to note, as the State notes, that the tax increase at the heart of SHB 2078 *passed the Legislature a year later by greater than a two-thirds supermajority vote*. Indeed, Engrossed Senate Bill 6635 was enacted in the second special session of the 2012 Legislature, passing the Senate 35-10 and the House 74-24. Laws of 2012, 2d Spec. Sess., ch. 6 (Certificate of Enrollment).

Like SHB 2078, ESB 6635 eliminated the mortgage interest deduction from the B&O tax for certain financial institutions. Unlike SHB 2078, ESB 6635 did not direct the projected revenue from this tax increase to educational programs.

This demonstrates two things that undermine respondents' basic contentions about the failure of SHB 2078. First, it is entirely possible for the Legislature to reach the political consensus to raise taxes under the Two-Thirds Requirement. Second, merely because the Legislature takes action to raise taxes, that does not mean the Legislature will use the projected revenue increase to fund the specific programs certain legislators or interests groups would desire them to fund.

In the end, it is undisputable that SHB 2078 "lost" in 2011 and no action of this court can change that. Even if it declares the Two-Thirds Requirement unconstitutional, that does not revive SHB 2078 nor enact it into law.

2. Lack of genuine legal interests

Although the refusal of one chamber of the Legislature to advance SHB 2078 is their specific concern, respondents suggest the bill's failure is an example of three categories of broader interests they believe are directly harmed by the Two Third Requirement. First, the educational lobbying groups, teachers, and citizens believe the Legislature's funding

of essential state services, most prominently education, is insufficient due to the perceived inability to raise taxes occasioned by the Two Thirds Requirement. The existence of the requirement, furthermore, frustrates their ability to lobby the Legislature to enact higher taxes to fund such services. *Br. of Resp't* at 11-12. Second, the legislator respondents believe their ability to propose tax increase legislation is limited by the Two Thirds Requirement, and that their votes are rendered less effective by the requirement. *Id.* at 12-13. Third, the Governor believes her ability to participate in the Legislative process as directed by the constitution and statutes is impaired by the Two Thirds Requirement, including the ability to propose budgets premised on tax increases and veto bills passed by a two-thirds majority. *Br. of Resp't Governor* at 12-14. Each category of purported interest fails because each rests intrinsically on political and speculative, rather than legal and direct, interests.

a. Lobbying groups' purported interests

First, with respect to the lobbying groups, the general contention that the Two Thirds Requirement makes it more difficult to fund educational services through tax increases is a political problem. This is a variant of the precise interest rejected in *Walker's* analysis of the Declaratory Judgment Act. *Walker*, 124 Wn.2d at 411-12. Describing “the purely political nature of the Petitioners’ challenge,” this court stated:

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.

Id. at 412. The essence of the contention is the same in this case, except that a more explicit link is presented between tax increases and education funding.

Indeed, in their ostensible attempt to hitch this challenge to the court's retention of jurisdiction over education funding in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), respondent lobbying groups seem to suggest that education cannot be sufficiently funded in this state with the Two-Thirds Requirement in place. This argument fails due to the fact that RCW 43.135.034(1) does not address appropriations at all. Appropriation bills take a simple majority vote to pass. But implicit in the respondents' argument is that education cannot be sufficiently funded within existing revenue, making tax increases necessary, and the Two-Thirds Requirement effectively takes tax increases off the table. As demonstrated above, however, even with the Two-Thirds Requirement in place, it is possible for the Legislature to increase taxes. That education cannot be funded without raising taxes is a contested political position, not an "interest" as the Declaratory Judgments Act would see it.

b. Legislators' purported interests

With respect to respondent legislators, the general contention that the Two-Thirds Requirement limits their policy options and weakens the value of their votes is just as much a “political problem” as the lobbying groups’ claim that tax increase legislation is too difficult to pass. Subject to basic constitutional limitations, legislators are free to introduce any bills they choose to introduce, and are equally free to use their office to advocate, build coalitions, rouse the public, and cajole colleagues to secure the passage of their bill. If the Two-Thirds Requirement affects these legislative prerogatives even hypothetically, it is only because individual legislators make the determination that it is politically unwise at a given time to advance or support a given tax measure. Such a state of affairs, if and when it exists --- it did not exist in 2012, when more than a two-thirds majority of legislators voted for tax increases -- is wholly insufficient to invoke this court’s jurisdiction to make a constitutional ruling.

Moreover, it is important to recall that the Legislature has chosen to be bound by the Two-Thirds Requirement (just as the Legislature has, and can, with sufficient will, choose not to be bound by it). Initiatives 960 and 1053 (and Initiative 1185 pending on the fall 2012 ballot) are legislative acts of the people that have simply amended and re-enacted a

matter that the Legislature had most recently, prior to I-960, itself ratified on multiple occasions. In 1998's Referendum 48, the Legislature "reenacted and reaffirmed" Initiative 601, including the Two-Thirds Requirement, before referring the matter to the voters, where the referendum bill was approved. Laws of 1998, ch. 321. More recently, the Legislature in 2005 suspended (but did not abolish) the Two-Thirds Requirement for two years, Laws of 2005, ch. 72, and then in 2006, re-instated the Two-Thirds Requirement one year earlier than it would have been effective under the 2005 act. Laws of 2006 ch. 56, § 8. In 2010, the Legislature again suspended (but did not abolish) the Two-Thirds Requirement, instead enacting that it be in place for any tax increase legislation "[a]fter July 1, 2011," Laws of 2010, ch. 4, § 2, in other words, for the next state budget cycle.

Notably, each of the legislator respondents who were serving in the Legislature during the 2005-06 biennium voted "yea" on both the 2005 and 2006 acts re-instating the Two-Thirds Requirement. Roll Call, Final Passage on Reconsideration, SSB 6078 (Apr. 15, 2005) *available at* <http://dlr.leg.wa.gov/rollcall/rollcall.aspx?bienid=18&legnum=6078> (last visited Aug. 24, 2012); Roll Call, Final Passage, ESSB 6896 (Mar. 7, 2006) *available at* <http://dlr.leg.wa.gov/rollcall/rollcall.aspx>

?bienid=18&legnum=6896 (last visited Aug. 24, 2012). Each of the legislator respondents who were serving in the Legislature during the 2009-10 biennium voted “yea” on the 2010 act, making the Two-Thirds Requirement applicable to the next biennium’s budget, except respondent Deb Eddy, who voted “no” on the suspension of the requirement in the first place. Roll Call, Final Passage, ESSB 6130 (Feb. 17, 2010) *available at* <http://dir.leg.wa.gov/rollcall/rollcall.aspx?bienid=20&legnum=6130> (last visited Aug. 26, 2012). These are curious positions for respondent legislators to have taken, as recently as 2010, on a matter they now vigorously assert a direct interest in the court declaring unconstitutional.²

c. Governor’s purported interests

Finally, with respect to respondent Governor Gregoire, her stated interest is in maintaining her constitutionally (and statutorily) provided participation in the Legislative branch, including the proposal of budgets and vetoing of legislation. Like the lobbying groups and legislators, the Governor’s justiciability claims rest on a series of political and procedural assumptions.

First, the Governor contends the Two-Thirds Requirement curtails her discretion to propose budgets because she believes she cannot feasibly

² Of course, respondent Governor Gregoire signed each of these bills re-imposing the Two-Thirds Requirement into law. But the Governor is not before this court asserting that the Two-Thirds Requirement is unconstitutional.

propose budgets premised upon tax increases while the Two-Thirds Requirement is in effect. But all that is required of the Governor is that she submit a budget proposal to the Legislature. As this court has recognized, it is the Governor's own policy and political decision what she determines to propose:

It is difficult to imagine an act more essentially a policy decision for the governor than the submission to the legislature of a budget during an economic downturn. The creation and submission of a budget proposal is clearly one of those discretionary acts that are 'in their nature political, or which are, by the constitution and laws, submitted to the executive[...]

SEIU Healthcare 775NW v. Gregoire, 168 Wn.2d 593, 600, 229 P.3d 774 (2010) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60 (1803)). In other words, the Governor can propose whatever she determines to propose in her budget, and the Two-Thirds Requirement does not limit that discretion in any legally significant way. Just as she cannot assume, in the preparation of a budget submission, that tax increase proposals will garner support of two thirds of legislators, nor can she assume that tax increase proposals would garner support from any number of legislators. These are political, not legal, calculations.

Equally political is the Governor's observation that during the history of the Two-Thirds Requirement, there have been only "periodic but uncertain windows where taxes can be raised," which "may not

coincide with economic downturns and [the] need to adjust tax rates,” the consequence being “the Governor’s only option is cutting the budget,” which is “an unjust result” if the Two-Thirds Requirement ends up being unconstitutional. *Br. of Resp’t Governor* at 18-19. First, the Governor does not “cut” (or expand) the state budget, only the Legislature has the authority to make appropriations. The Governor instead makes a budget proposal, which, as argued above, can include whatever policy choices the Governor determines to include. Second, the Governor’s most recent budget proposal belies her assertion that her “only option” is to “cut” the budget. As her brief illustrates, *Br. of Resp’t Governor* at 14-17, she proposed a budget proposal that did reduce expenditures, but that included a menu of tax increases the Legislature might enact to “buy back” the budget “cuts” the Legislature might enact should it pass the budget in the form the Governor proposed. *Id.* at 15. So the Two-Thirds Requirement did not prevent the proposal of a budget, much less a budget premised in part on the Legislature increasing taxes. As it turned out, the Legislature adopted a different supplemental budget proposal and, as discussed above, did increase a tax by more than a supermajority vote as part of that budget’s financing.

Finally, the Governor argues that tax measures passed by a two-thirds vote impair her constitutional option to veto legislation, since the

veto can be overridden by a two-thirds vote of the Legislature, making the legislation “veto proof.” *Id.* at 20. This argument assumes too much.

First, its logic would apply to any measure passed by a two-thirds or more vote. Second, it assumes a legislative vote to override a Governor’s veto is of no more consequence to the Legislature than its vote on the passage of a bill itself. Just because a bill passes with a two-thirds or more vote, the Governor’s constitutional veto decision is not automatically impaired.

In 2012, for example, Governor Gregoire vetoed two bills in their entirety, HB 2509 related to a workplace safety program and HB 2514, related to sealing juvenile court records. HB 2509 passed the Senate 49-0 and the House 98-0. Washington State Legislature, Bill Information, House Bill 2509, *available at* [http://apps.leg.wa.gov/billinfo/](http://apps.leg.wa.gov/billinfo/Summary.aspx?bill=2509)

[Summary.aspx?bill=2509](http://apps.leg.wa.gov/billinfo/Summary.aspx?bill=2509) (last visited Aug. 26, 2012). HB 2541 passed the House 97-0 and the Senate 44-3. Washington State Legislature, Bill Information, House Bill 2509, <http://apps.leg.wa.gov/billinfo/>

[/summary.aspx?bill=2541&year=2012](http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2541&year=2012) (last visited Aug. 26, 2012). The Legislature did not override either veto. Clearly, the Governor is willing to veto “veto proof” bills, and clearly, the Legislature does not simply or automatically override every such veto. There is nothing about the fact that a bill passes, whether a statute requires it or not, with a two-thirds or

more vote that impairs the Governor’s constitutional role in approving or vetoing legislation.

3. The “great public importance” exception to justiciability does not apply.

If the court determines this case is nonjusticiable under the Declaratory Judgments Act, respondents seek a declaratory judgment anyway, on the basis that the question posed here is of “great public importance” under *Distilled Spirits*, 80 Wn.2d at 178, and consistent with times “on the rare occasion,” *Walker*, 124 Wn.2d at 417, the court has rendered an advisory opinion as a matter of comity. AWB submits, consistent with the State, that *Walker*’s nuanced rejection of *Distilled Spirits* and similar early cases should control here as well. It is not because I-601 had yet to go into effect that an advisory opinion was rejected in *Walker*, or the less than full participation of state officials from other branches of the government seeking a constitutional advisory opinion. Rather, the court in *Walker* repeatedly emphasized it “will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged.” *Id.* at 415. Indeed, rather than “readily ignore justiciability requirements,” the court stated bluntly:

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 (citing *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938)).

To be sure, respondents *allege* concrete harm from the failure of SHB 2078 and the perceived difficulty to raise taxes to increase state budget appropriations. But they cannot show it. Their argument assumes a course of hypothetical legislative action with respect to tax bills that may or may not come to pass, and in any event, recent history shows could be enacted by either a simple majority or two-thirds vote if the Legislature determines to do so.

To be sure, the Governor and twelve of the 98 members of the House of Representatives are before the court as parties seeking an advisory opinion. But this is a far cry from the *entire* legislative branch of government, Governor, and Attorney General allied seeking an advisory opinion, as in *Distilled Spirits*. In this case, even the Governor and several of the legislators here have approved or voted for legislation that has made the Two-Thirds Requirement effective for various years. And this year, over two-thirds of legislators voted for, and the Governor approved, a bill that removed the tax deduction at the heart of SHB 2078. There is nothing about the speculative and hypothetical harms of not raising taxes in this case, or with this configuration of parties, or this year, or in this budget

climate, that makes an advisory opinion any less irregular or any more a matter of “great public importance” than when the court declined the opportunity to render one in *Walker* and in *Brown* (and *Futurewise v. Reed*, 161 Wn.2d 407, 166 P.3d 708 (2007) and *Washington State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007)).

VI. CONCLUSION

Amicus curiae AWB urges the court to reject the petition on both jurisdictional and justiciability grounds. The court should particularly note the strong separation of powers and political question considerations that militate against resolving the claim. If it reaches the merits, AWB urges the court to adopt the State’s position that RCW 43.135.034(1) does not violate the plain language and fair inference of Const. art. II, § 22.

Respectfully submitted this 27th day of August, 2012.

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