

NO. 81287-0

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioner,

v.

BRAD OWEN, Lieutenant Governor of the State of Washington,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

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

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

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

II. ISSUES PRESENTED

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

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

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

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

III. STATEMENT OF THE CASE

A. Factual Background

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

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

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

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

(Emphasis added).

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

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

(Emphasis added).

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

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

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

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

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

B. Procedural Background

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

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

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

ASF 75 (Pet. at 11).

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

IV. SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

V. ARGUMENT

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

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

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

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

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

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

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

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

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

"Under our Constitutional framework of separation of powers, the authority for determining a legal conflict between the Constitution and a statute is clearly vested with the courts. It is for this reason that the President has a long-standing tradition of refraining from making legal determinations, and he does so, again in this case . . . [T]he proper venue for these legal arguments is in the courts, not in a parliamentary body." ASF 20.

