

No. 81287-0

IN THE 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 *AMICUS CURIAE*
ASSOCIATION OF WASHINGTON BUSINESS

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I. INTRODUCTION

The Association of Washington Business (“AWB”), the principal representative of the taxpaying business community in Washington, notes its general agreement with respondent’s jurisdictional and justiciability objections to this petition as well as respondent’s explanation why, should the court reach the question, the plain language of Const. art. II, § 22 disposes the merits in his favor. *See Br. of Resp’t* at 15-21 (jurisdiction); 39-34 (justiciability); 36-39 (merits).

AWB makes this short amicus submission to add an additional dimension to respondent’s separation of powers argument, contending that the petition raises essentially a political question that the court, as a matter of prudence and restraint, should decline to reach. Should the court reach the merits and grant the writ, it would in essence absolve a coordinate and co-equal branch of government from the difficult political and policy choices it must confront under RCW 43.135.035(1) by invalidating the statute under the same constitutional principle – majority rule – that the Legislature may itself use at any time (and has used in the past) to avoid the statute’s procedural requirements. The court should refrain from granting a single member of a single political caucus of a single chamber of the Legislature the extraordinary relief of striking down an enhanced procedural requirement the full Legislature has chosen for itself when the

full Legislature could, by its own authority and through its own processes, loose the binds of that requirement at any time.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

AWB, founded in 1904, is the state's oldest and largest general business membership organization. AWB represents over 6,750 large and small member businesses engaged in all aspects of commerce in Washington and which employ over 650,000 people in Washington.

AWB participated as a major stakeholder in the drafting, campaign, and voter approval of Laws of 1994 ch. 2 (Initiative 601) (hereafter "I-601"), and has long worked with the Legislature and successive governors to defend the core elements of that initiative, including the supermajority requirement for tax increases codified at RCW 43.135.035(1). AWB and its members have a consistent history of involvement in amendments to I-601 in the political and legislative process since 1993.¹

More fundamentally, AWB's aggressive tax and fiscal policy advocacy is rooted in the fact that Washington's business community in the aggregate pays over half – 51% -- of the state's tax burden, largely

¹ For a helpful guide to I-601 amendments, *see* Expenditure Limit Committee, *Chronology of Initiative 601 Amendments*, available at <http://www.elc.wa.gov/sub/chronology.pdf>.

through gross receipts, retail sales, and property taxes.² Initiative 601 was intended to address growth in state expenditures which is necessarily linked to increases in state tax burden by ensuring “budget discipline and taxpayer protection.” RCW 43.135.010(1)-(2); Laws of 2005, ch. 72 § 1 (Findings). Its supermajority requirement for tax increases is a central component of that carefully balanced legislative purpose, as well as a partial corrective to the perceived problem of an unstable state budget system that “encourages crisis budgeting and results in cutbacks during lean years and overspending during surplus years.” RCW 43.135.010(3). The constitutionality of that provision is of direct interest to the state’s largest single community of taxpayers.

III. ISSUE OF CONCERN TO *AMICUS CURIAE*

Should the court dismiss the petition on jurisdictional and justiciability grounds or, should it go to the merits, does the supermajority requirement for tax increases in RCW 43.135.035(1) violate Const. art. II, § 22? *Cf. Br. of Resp’t* at 2 (Issues 1-4).

IV. STATEMENT OF THE CASE

AWB adopts, as if set forth herein, Respondent’s Statement of the Case. *Br. of Resp’t*. at 3-6.

² See Washington Alliance for a Competitive Economy, *Washington Remains Near the Top in Business Tax Burden* at 1-2 (May 12, 2008), available at <http://www.researchcouncil.org/washace-publications/COST%20report%202008%20Final.pdf>.

V. ARGUMENT

A. THE COURT SHOULD REJECT THE PETITION BECAUSE THIS IS NEITHER A PROPER MANDAMUS NOR DECLARATORY JUDGMENT CASE.

AWB notes its general agreement with respondent's careful dissection of the propriety of mandamus relief in this case. *See Br. of Resp't* at 15-29.

1. This is not a proper mandamus case.

Mandamus relief applies only to a state officer's ministerial acts, that is, acts which the law "especially enjoins." RCW 7.16.160; *Washington State Coun. Of Cy. & City Employees v. Hahn*, 151 Wn.2d 163, 166-67, 86 P.3d 774 (2005) (quoting RCW 7.16.160). Indeed, a ministerial duty is one "where the law prescribes and defines the duty which is to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Kruse v. Lovette*, 52 Wn.2d 215, 218, 324 P.2d 819 (1958); *see also Washington State Farm Bureau Federation v. Reed*, 154 Wn.2d 668, 672, 115 P.3d 301 (2005).

Mandamus relief does not apply to a legislative officer's discretion to rule one way or another on a parliamentary question and then refuse to take action on a legislative proposal inconsistent with that ruling. No law "especially enjoins" the outcome of a parliamentary ruling nor does any law "prescribe" or "define" the outcome of a parliamentary ruling, much

less “with such precision and certainty” as to leave the parliamentary officer no discretion to judge one way or the other. If it were otherwise, there would be no need for parliamentary officers.

This seems clear enough from the directly applicable statement in *Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994) (emphasis added) that:

The Petitioners claim that the Respondents, Speaker of the House and President of the Senate, have the duties to preside over the Legislature, *certainly not an appropriate subject for mandamus*, and to certify and sign bills passed. The signing of a bill is not a ministerial task, as it involves a *decision regarding the number of votes required for a particular action and whether those votes have been properly cast*. In fact, these presiding legislative officers will be required to *determine whether Initiative 601 applies to a particular bill if some or all of Initiative 601 remains the law*. We will not grant a writ relating to these tasks.

These are matters of discretion because they involve determinations – individual judgments -- on the application of legal and parliamentary rules to specific legislative proposals. The determinations could go one way or another. They might be right or wrong. They might be subject to appeal or reversal by a vote of the body. They might be held up to political opprobrium. Obviously, they might be challenged in court, as in the instant case. But they are no less discretionary for these reasons “certainly not an appropriate subject for mandamus.” *Walker*, 124 Wn.2d at 410.

2. Petitioner’s arguments in support of mandamus are unpersuasive.

The court should find petitioner’s three primary arguments³ in support of mandamus unavailing. The first effort is to appeal to judicial economy – there are no factual issues in dispute, and this case would be appealed to the Supreme Court for final resolution anyway. *Pet. Reply Br.* at 18. Judicial economy is an important, but not constitutional, consideration. Const. art. IV, § 4 does not say, as petitioner might read it, “[t]he supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and . . . other important cases that might eventually come before it anyway.”

Petitioner’s second effort is to describe respondent’s role as President of the Senate as non-discretionary because that is how respondent himself appeared to describe it from the rostrum during debate on Senate Bill 6931. *Pet. Reply Br.* at 20. But respondent’s subjective description of his role (or his opinion about the appropriate forum for the

³ Petitioner also claims no “plain, speedy, and adequate remedy in the ordinary course of law.” *Pet. Reply Br.* at 21. But as respondent points out, any member of the Senate, like petitioner, could have appealed and overturned respondent’s parliamentary ruling on Senate Bill 6931 – on a simple majority vote. *Br. of Resp’t* at 20. That may not be an *easy* remedy but it’s hard to imagine a speedier remedy. But more fundamentally, as argued *infra* at 9-12, the plain alternative remedy for the Legislature to pass tax increase legislation on a simple majority is for both houses of the Legislature, on a simple majority, to muster the will to amend, suspend, or repeal RCW 43.135.035(1) and persuade the Governor to sign the act. That the alternative remedy is a political one according to the procedures of the legislative branch itself makes it no less adequate to address petitioner’s concern.

dispute) during the course of a parliamentary ruling is not determinative. Rather, the very fact, as this court has recognized in *Walker* and elsewhere, that the President of the Senate is called upon to make a decision one way or the other underscores the discretionary nature of that parliamentary role.

Petitioner's third argument, not entirely unlike her first, is to claim the court should excuse any jurisdictional defects in the mandamus posture of this case and decide the case because of substantial public interest in the subject matter and because the subject matter has escaped merits review in two prior cases. But the statewide public importance of a case is a reason for the court to exercise its discretionary, non-exclusive original jurisdiction *when the prerequisites for a writ of mandamus have been met*. That is not the case here. And exasperation over the elusiveness of the petitioner's constitutional claims in prior Initiative 601 litigation is hardly a reason to excuse another procedurally defective attempt to invalidate the statute here.

3. This is not a proper declaratory judgment case.

The prerequisite for obtaining a declaratory judgment on the constitutionality of RCW 43.135.035(1) in this original action is a valid claim for writ of mandamus, the issuance of which would be justified by

the underlying declaratory judgment. But if mandamus does not lie, petitioner's request for declaratory judgment is nothing more than a request for a constitutional advisory opinion "on the shirttail of a mandamus action, which is improperly before [the court] in the first place." *Walker*, 124 Wn.2d at 421. This is a further basis to reject the petition.

If, however, the court were to determine that the mandamus action is sufficiently before it to consider petitioner's request for declaratory relief, AWB notes its general agreement with respondent's assessment of the non-justiciability of that claim under the law governing declaratory judgments. *See Br. of Resp't* at 29-35.

B. THE COURT SHOULD REJECT THE PETITION BECAUSE PETITIONER'S PROPER REMEDY IS WITHIN THE POLITICAL AND LEGISLATIVE PROCESSES.

The respondent has presented a compelling argument for why resolution of this claim would violate the separation of powers doctrine. *Br. of Resp't* at 21-29. As an adjunct to that argument, AWB would also note that resolution of petitioner's claim would also involve the court in what is essentially a political issue that, upon a showing of sufficient political will, the Legislature can resolve for itself. Respondent is right when he characterizes the statutory supermajority vote requirement of

RCW 43.135.035(1) as “a recognition that certain legislative decisions are sufficiently important to require an added measure of consensus” and thus “a political mechanism.” *Br. of Resp’t* at 47- 48.

1. The court routinely declines to resolve political issues.

Although without an expressly articulated “political question” limitation on its jurisdiction, this court has on numerous occasions refused to delve into issues which are largely political in nature. *See Philip A. Talmadge, Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Courts Systems*, 22 *Seattle U. L. Rev.* 695, 713-14 (1999) (citing cases where political questions have been held outside the cognizance of the judiciary). Styling this case as a constitutional challenge to a piece of legislation does not empty the question of its essentially political nature because what petitioner would ultimately have the court establish – that the Legislature may pass an act that raises taxes on a simple majority vote – can also be established through the legislative process on a showing of sufficient political will.

2. Whether the Legislature abides by RCW 43.135.035(1) is a political consideration in the province of the Legislature.

While the Legislature has taken many actions with respect to

I-601 since its approval in 1993, four of them are particularly notable.⁴ First, in 1998, the Legislature “reenacted and reaffirmed” the initiative, including the supermajority vote requirement of RCW 43.135.035(1) in Referendum 49, which was approved by the voters that year. Laws of 1998, ch. 321 (Engrossed House Bill 2894). Before being referred to the voters, this bill passed the Legislature by a simple majority vote, 25-24 in the Senate and 57-38 in the House. *Id.* (Certificate of Enrollment).

In 2002, the Legislature suspended the supermajority vote requirement of RCW 43.135.035(1) for the 2001-03 biennium, Laws of 2002 ch. 33 (Senate Bill 6819), and did so by a simple majority vote of 26-23 in the Senate and 50-46 in the House. *Id.* (Certificate of Enrollment). Incidentally, petitioner was the primary sponsor of this legislation.

Again, in 2005, the Legislature again suspended the supermajority vote requirement of RCW 43.135.035(1) for the 2005-07 biennium, Laws of 2005 ch. 72 (Substitute Senate Bill 6078) again by a

⁴ In addition to the acts of the Legislature described herein, the people approved Laws of 2008 ch. 1 (Initiative 960), which amended RCW 43.135.035(1) but did not amend, enact, or re-enact the supermajority vote requirement itself – a point which is important for the discussion which follows because it excuses subsequent legislative action on the supermajority vote requirement from the effect of Const. art. II, § 1(c) (requiring a supermajority vote of the Legislature to amend an initiative within the first two years of approval by the voters).

simple majority vote of 25-16 in the Senate and 50-43 in the House. *Id* (Certificate of Enrollment).

Finally, in 2006, the Legislature limited the 2005 suspension of the supermajority vote requirement, making it applicable one year earlier than it would have been under the 2005 act. Laws of 2006, ch. 56, § 8 (Engrossed Substitute Senate Bill 6896). This, again, passed by a simple majority, 25-22 in the Senate and 51-47 in the House. *Id.* (Certificate of Enrollment). Petitioner was a co-sponsor of this legislation.

From this brief history, one conclusion is readily apparent. The supermajority vote requirement to raise taxes only restrains the Legislature so long as a simple majority of both houses of the Legislature want it to. What it does in light of that conclusion – continue to abide by RCW 43.135.035(1); repeal it outright; suspend it for a given time – is ultimately a determination within the legislative sphere, fraught with political considerations and political consequences.

No one doubts those considerations are urgent and important. Indeed, not long before this action was filed, non-partisan committee staff of the Senate Ways & Means Committee forecast a general fund budget

deficit for the coming biennium of nearly \$2.4 billion,⁵ a figure that has subsequently been adjusted to nearly \$2.7 billion.⁶ Given the strong political pressure to avoid deficit financing and enact a balanced budget,⁷ the Legislature will undoubtedly be faced with challenges inherent in a methodology the committee staff somewhat mildly described as “implement[ing] spending reductions and/or revenue changes to balance the 2009-11 budget.”⁸ But as just discussed, the policy choice to require a supermajority vote to enact “revenue changes” is one the Legislature has set aside under similar circumstances in prior years, but always under the competing interests and considerations of a political context. And given that the Legislature has full authority to grant itself the same ultimate relief petitioner seeks in this suit, the court should resist the invitation to intervene and remove from the Legislative province the robust policy and political deliberation that the “political mechanism” of RCW 43.135.035(1) is designed to bring about.

⁵ Staff of the Senate Comm. on Ways & Means, 60th Legis., Estimated Six-Year GF-S Outlook (Feb. 16, 2008 Update), *available at* <http://www.leg.wa.gov/documents/Senate/SCS/WM/Swmwebsite/Balance%20Sheets/6%20YearGF-SOutlook%20Feb%2016%20Update.pdf>

⁶ *Id.* (June 26, 2008 Update) at 2 *available at* <http://www.leg.wa.gov/documents/Senate/SCS/WM/SwmWebsite/Balance%20Sheets/June%202008%20Six%20Year%20Outlook.pdf>.

⁷ Contrary to popular belief, the “requirement” to balance the state budget is neither constitutional nor statutory. *See* Kristen L. Fraser, *Method, Procedure, Means and Manner: Washington’s Law of Law-Making*, 39 Gonz. L. Rev. 447, 479 (2003-2004). It is political.

⁸ *Id.* at 1.

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, while not addressed here, AWB would agree with respondent that RCW 43.135.035(1) does not violate the plain language and fair inference of Const. art. II, § 22.

Respectfully submitted this 11th day of August, 2008.

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