No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW & STEPHANIE McCLEARY, on their own behalf and on behalf of Kelsey & Carter McCleary, their two children in Washington's public schools;

ROBERT & PATTY VENEMA, on their own behalf and on behalf of Halie & Robbie Venema, their two children in Washington's public schools; and

NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Plaintiffs/Respondents,

v.

STATE OF WASHINGTON,

Defendant/Appellant.

PLAINTIFFS' ANSWER TO THE AMICUS BRIEF OF PAST GOVERNORS

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I. INTRODUCTION

This Court summoned the State to address three topics:

- "why the State should not be held in contempt for violation of this Court's order dated January 9, 2014";
- "why, if it is found in contempt, any of the following forms of relief [list of seven remedial sanctions] ... should not be granted"; and
- "the appropriate timing of any sanctions."

June 12, 2014 Order To Show Cause at pp.3-4.

The past Governors' amicus brief addresses the third topic. They "urge the Court to delay further consideration of the Court's Show-Cause Order until after the 2015 Budget Session for three reasons."[1]

(1) They believe the legislature may make "real progress" in 2015.

(2) They believe 2015 could be a better year than 2014 to make "meaningful progress".

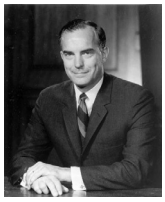
(3) They believe it would "help ensure the legitimacy of the process and the result" if this Court did nothing this year.[2]

Plaintiffs respect the past Governors' prior service in our State. But as Part II below explains, their three reasons do not support their proposal that this Court close its eyes, be quiet, and facilitate more delay.

[1] *Past Governors' Amicus Brief at p.1.*
[2] *Past Governors' Amicus Brief at pp.1-2.*

II. DISCUSSION

This is not the first time the words of past Governors have been heard in this case:[3]



"Now it is important to provide long-term, consistent and dependable financing for basic education."

Gov. Dan Evans' **1977** State of the State Address
Trial Exhibit 577, p.30, 6th para. (underline added)

"We have already delayed too long....
full funding of K-12 is mandated by the courts.
We should do it now."

Gov. Dixy Lee Ray's **1979** State of the State Address
Trial Exhibit 578, p.141, 2nd & 3rd paras. (underline added)

"Education is the number-one business of this state government.... We must finish the work of meeting our mandate to provide fully for basic education...."

Gov. John Spellman's **1984** State of the State Address
Trial Exhibit 579, p.43, 7th para. (underline added)

"Last year's fourth-graders need help now –
and so do this year's second, third and fourth-graders."

Gov. Gary Locke's **1998** State of the State Address
Trial Exhibit 580, p.50, 2nd para. (underline added)

"It is time for bold, purposeful action. ... It is time to make some big changes to Washington's education system. ... It is time to get to work."

Gov. Christine Gregoire's **2006** Washington Learns Report
Trial Exhibit 16, p.3, last 3 paras. (underlines added)

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[3] *The illustrative photos are found in the Washington State Library, Governors of Washington State, available at http://content.statelib.wa.gov/cdm/landingpage/collection/governors.*

Carter McCleary's mom was 13 years old when Governor Evans told the legislature it had to act now.[4] Carter himself had not yet been born when Governors Ray, Spellman, and Locke then reiterated to the legislature that it had to act now.[5] And he was in 2nd grade when Governor Gregoire told the legislature that it was time to get to work and make big, bold changes.[6]

Carter McCleary is now in high school.[7] And now, contrary to the urgency expressed when they were at the helm, the past Governors urge more delay. The following pages explain why their three reasons do not justify the additional delay they now request.

A. Amici's Delay Reason #1: The Legislature May Make "Real Progress" Next Year

May comply next year: Amici's first reason for urging this Court to delay consideration of the pending Show Cause Order is that the legislature may make "real progress" next year.[8] But the Court Order

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[4] *CP 2876, ¶16 (Final Judgment) (Stephanie McCleary was 13 years old when this Court issued its Seattle School District decision in 1978 – hence she could not have been any older than 13 when Gov. Evans delivered his previously quoted State of the State Address in 1977).*

[5] *CP 2876, ¶15 (Final Judgment) (Carter was a 7-year-old 2nd grader when this suit was filed on January 11, 2007 – hence born in 1999).*

[6] *CP 2876, ¶15 (Final Judgment) (Carter was a 2nd grader when this suit was filed on January 11, 2007 – hence in 2nd grade when Governor Gregoire's Washington Learns Report was issued in November 2006).*

[7] *CP 2876, ¶15 (Final Judgment) (Carter was a 2nd grader when this suit was filed on January 11, 2007 – hence a sophomore this school year).*

[8] *Past Governors' Amicus Brief at p.1.*

required the legislature to make that progress this year. And amici do not dispute that the legislature instead opted to leave town without complying.

Should comply next year: These amici assert "The Legislature Can and Must Make Real and Measurable Progress in the 2015 Budget Session."[9] But this Court ordered that the legislature must make steady, real, and measurable progress in the **2014** session. Amici do not dispute that the legislature did not do what this Court ordered the legislature must do. And they offer no support for their premise that the legislature will nonetheless do what they say the legislature must do.[10]

Compliance wasn't likely anyway: Amici suggest this Court should just sit still and be quiet because they think "it was never likely" that the legislature would comply this year anyway.[11] But amici offer no foundation for presuming they have current knowledge about the 63rd legislature and its violation of this Court's January 2014 Order. And while they repeatedly reference the 60-day "short session", they ignore the fact that the legislature can (and does) meet for more than 60 days if it needs or wants to. For example, while these amici were Governor, the legislature convened or reconvened in special or extraordinary sessions on

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[9] *Past Governors' Amicus Brief at p.4, first reason's section heading "A".*

[10] *Nor do they explain why, if the legislature didn't do what they said the legislature must do when they were the Governor (see prior quotes above), the legislature will now do what they say the legislature must do when they're retirees.*

[11] *Past Governors' Amicus Brief at p.4.*

44 separate occasions.[12] The 63rd legislature, on the other hand, just didn't have a desire to do that.[13]

Planning takes years: Amici suggest this Court should sit still and be quiet for another year because "the best laid plans are usually developed over a period of years, not days."[14] But lawmakers have had many, many, many years.

- For over 35 years, Washington Governors have been demanding that the legislature take action now.[15]
- Since 1990 alone, the State has conducted over 100 K-12 education finance studies.[16]

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[12] *"Session Dates of the Washington State Legislature" (2014 ed.), available at http://www.leg.wa.gov/LIC/Documents/Statistical%20Reports/Leg_Session_Dates.pdf.*

[13] *See Plaintiffs' 2014 Post-Budget Filing at pp.29-33. The past Governors' brief contains the conclusory assertion that legislation concerning "hundreds of millions or billions of dollars ... realistically could not be crafted in an off-budget year." Past Governors' Amicus Brief at p.5. But as this Court knows, recent history shows that is not accurate – for the legislature has in prior years met on shortened time frames (even in "off-budget" years) to negotiate and enact multi-million and even multi-billion dollar legislation when requested by a plane company or sports team. Plaintiffs' 2014 Post-Budget Filing at pp.29-33. The difference here is that the legislature found it politically expedient to do what the plane company or sports team requested – but it was not politically expedient for the legislature to do what their State Supreme Court had Ordered. (Although amici imply the multi-billion-dollar Boeing legislation was to "keep aerospace jobs in the State" (Past Governors' Amicus Brief at p.11), amici overlook that "the State" that may very well receive the supposedly saved aerospace jobs is South Carolina. See, e.g., Dominic Gates, "Washington worries as Boeing pours $1B into S.C.,"* The Seattle Times *(April 9, 2013), available at http://seattletimes.com/html/businesstechnology/2020743615_boeingscxml.html; Dan Catchpole & Jerry Cornfield, "Boeing got huge tax breaks, state got no job guarantees,"* Herald Net *(May 4, 2014) (noting the $8.7 billion tax break package did not require Boeing to maintain a specific number of workers in Washington), available at http://www.heraldnet.com/article/20140504/BIZ/140509578; Harriet McLeod, "Boeing to make longest 787-10 Dreamliner exclusively in South Carolina,"* Reuters *(July 30, 2014), available at http://www.reuters.com/article/2014/07/30/us-boeing-idUSKBN0FZ29R20140730.)*

[14] *Past Governors' Amicus Brief at p.5.*

[15] *See, e.g., the previous quotes from Washington's past Governors on page 2.*

[16] *CP 2939, ¶261 (February 2010 Final Judgment); see also, e.g., Trial Exhibits 16, 124, 125 & 261.*

- The binding Final Judgment in this *McCleary* case was entered against the State over 4½ years ago.[17]
- To secure a reversal of the trial court's affirmative injunction requiring the State to determine (1) how much it will cost to comply with the Court's interpretation of Article IX, §1 and (2) how the State will fund that cost, the State assured this Court that it had already fully studied those cost and funding issues when adopting ESHB 2261 and SHB 2776.[18]
- This Court issued its *McCleary* decision over 2½ years ago.[19]
- This Court's ensuing Orders repeatedly ordered the State must make steady, real, and measurable progress towards full compliance by 2018.[20]

Needing years for planning hasn't been the roadblock to constitutionally required progress. Legislators' procrastination has been the roadblock.

More important things to do: Amici suggest that in 2014 legislators were so preoccupied with recovering from "the shadow" of their 2013 sessions, focusing on their 2014 election campaigns, and worrying about the "looming" 2015 session, that taking action to obey this Court's January 2014 Order would have required legislators to "elevate legislative form over fiscal substance".[21] But this Court's closing its eyes to lawmakers' violation of Court Orders and ongoing violation of Washington schoolchildren's constitutional rights each year would elevate lawmakers' convenience over the rule of law and constitutional mandates.

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[17] *CP 2866-2971. The binding nature of that Final Judgment's declaratory rulings was explained in Plaintiffs' 2012 Post-Budget Filing at p.40 & nn.110-111.*
[18] *See Plaintiffs' 2014 Post-Budget Filing at p.8.*
[19] *McCleary v. State, 173 Wn.2d 477, 269 P.3d 227 (January 5, 2012).*
[20] *See Plaintiffs' 2014 Post-Budget Filing at pp.10-12.*
[21] *Past Governors' Amicus Brief at p.5.*

Washington lawmakers should obey Washington Supreme Court Orders and the Washington State Constitution. Even when they're busy with other, constitutionally non-paramount, matters.

B. Amici's Delay Reason #2: 2015 May Be An Easier Year To Make "Meaningful Progress"

Next year's better: Amici's second reason for urging this Court to delay consideration of the Show Cause Order is that they think 2015 could be a better year to make "meaningful progress".[22] But this Court ordered the legislature to make that progress in **2014**. And amici do not dispute that the legislature opted instead to leave town without complying.

Forest or trees: Amici suggest this Court should close its eyes and be quiet, because addressing the 63rd legislature's violation of the Court Orders in this case could run the "risk of focusing on the procedural trees rather than the constitutional forest."[23] But Supreme Court Orders and the State's ***paramount*** duty are not mere procedural trees. This Court has held that Article IX, §1 grants every Washington child a positive constitutional right to an amply funded K-12 education – and has issued Orders to ensure the State's longstanding violation of that constitutional right comes to an end. Deciding at this stage to sit still and be quiet while the legislature violates those Court Orders would focus on the convenience

[22] *Past Governors' Amicus Brief at pp.1-2.*
[23] *Past Governors' Amicus Brief at p.6.*

of Washington lawmakers rather than the paramount constitutional rights of Washington schoolchildren. That's not the constitutionally proper focus.

Prior legislatures did it too: Amici suggest this Court should give the 63rd legislature a pass because "there are probably many instances in the decades since the *Seattle School District* case in which legislators should have been hauled before the Court on show-cause orders."[24] True, prior legislatures failed to take the significant action that past Governors reiterated was required by this Court's *Seattle School District* ruling. But those prior legislatures did not violate a standing Court Order like the 63rd legislature has in this case.

Evolution takes time: Amici say this Court should sit quiet and ignore the 63rd legislature's violation of the Court Orders in this case because "there is a clear sense that the political process is evolving and that the Legislature is devoted to meeting its constitutional duty."[25] Plaintiffs agree the political process has been evolving ever since Stephanie McCleary was 13. But it's now a generation later.[26] And the State is still continuing its ongoing violation of Washington children's

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[24] *Past Governors' Amicus Brief at p.7.*

[25] *Past Governors' Amicus Brief at p.8.*

[26] *Stephanie McCleary's daughter (Kelsey) was 13 when this suit was filed. CP 2876, ¶16 (Final Judgment). Kelsey's now passed 12th grade, and as noted earlier, Kelsey's younger brother (Carter) is now in high school. Supra footnote 7.*

positive constitutional right to an amply funded K-12 education. Glacially slow "evolution" does not make a generation of constitutional violations constitutionally acceptable.[27] As these amici repeatedly reiterated to the legislature when they were Governor, our Constitution mandates ample funding now.

Let politics work: Amici suggest this Court should sit quiet because "the people's representatives should be afforded the chance to make democracy work."[28] But as noted earlier, lawmakers have had many, many, many years to let the political process work. Lack of a chance is not the problem. Lack of urgency is. The bedrock of the "democracy" amici invoke is our Constitution. Plaintiffs respectfully submit that this Court should make our democracy's Constitution work for our State's schoolchildren: enforce (rather than just talk about) each

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[27] *As the one State court whose judgment was affirmed in the consolidated Brown v. Board of Education case aptly held: delay is like telling the plaintiffs, "Yes, your Constitutional rights are being invaded, but be patient, we will see whether in time they are still being violated", and that to postpone relief "is to deny relief, in whole or in part, and to say that the protective provisions of the Constitution offer no immediate protection". Belton v. Gebhart, 87 A.2d 862, 870 (Del. Ch.),* aff'd*, 91 A.2d 137 (Del. 1952),* aff'd sub nom. *Brown v. Board of Education, 349 U.S. 294 (1955); accord Montoy v. Kansas, 112 P.3d 923, 940 (Kan. 2005) ("we cannot continue to ask current Kansas students to 'be patient.' The time for their education is now"); see Abbott ex rel. Abbott v. Burke, 20 A.3d 1018, 1038 (N.J. 2011) ("To state the question is to present its answer: how is it that children of the plaintiff class of Abbott schoolchildren, who have been designated victims of constitutional deprivation and who have secured judicial orders granting them specific, definite, and certain relief, must now come begging to the Governor and Legislature for the full measure of their education funding? And, how can it be acceptable that we come to that state of affairs because the State abandoned its promise? The State's position is simply untenable.").*

[28] *Past Governors' Amicus Brief at p.8.*

child's positive constitutional right to an amply funded K-12 education. And to use the word repeatedly reiterated by past Governors: do it now.

Silence is golden: Amici do not dispute that the 63rd legislature did not make the significant progress or submit the complete plan ordered by this Court. Instead, amici argue "it would be ineffective, if not counterproductive" for this Court to actually say so.[29] Plaintiffs respectfully submit that the major reason lawmakers keep kicking this can down the road until "maybe next year" is that they never feel a sense of real urgency to take significant concrete action this year. This Court's sitting quietly in the corner does not create the needed sense of urgency. Instead, such silence renders the judicial branch ineffective and irrelevant.

It's complicated: Amici suggest this Court should ignore the 63rd legislature's violation of the Court Orders in this case because "There are myriad legislative policy choices to be made along the way as to how education funding should be spent".[30] But amici overlook (or were not told) that the State previously secured a reversal of the trial court's affirmative injunction by assuring this Court that determining how the increased education funding should be spent was done as part of the legislature's enactment of ESHB 2261 and SHB 2776.[31] Unless the State

[29] *Past Governors' Amicus Brief at p.10.*
[30] *Past Governors' Amicus Brief at p.11.*
[31] *See supra footnote 18.*

is going to attempt a bait-and-switch on this Court, amici's "myriad policy choices" argument does not now justify more delay.

Violation this year doesn't mean violation next year too: Amici argue "It would be a mistake to conclude that the lack of sufficient progress in the 2014 Short Session is a fair predictor of the 2015 Budget Session's outcome".[32] But the issue here isn't whether the **64th** legislature will comply with Court rulings next year. It's whether the **63rd** legislature complied this year. And amici do not dispute that the 63rd legislature did not comply.

C. Amici's Delay Reason #3: "Legitimacy" Helped If This Court Does Nothing

Sit quietly in the corner: Amici's third reason for urging this Court to delay consideration of the Show Cause Order is that amici believe it would "help ensure the legitimacy of the process and the result" if this Court stayed silent and did nothing this year.[33]

But a court's sitting by silently watching while State officials violate court orders and constitutional rights does not aid or ensure legitimacy. To the contrary, such silence and inaction renders the judicial branch, court orders, and constitutional rights meaningless and irrelevant.

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[32] *Past Governors' Amicus Brief at p.13.*
[33] *Past Governors' Amicus Brief at p.2.*

How K-12 funding "fits" with non-paramount programs: After noting the State has finite resources, the economy isn't great, and in 1973 voters rejected an income tax that could be used for education funding, amici argue that if this Court speaks up now to require the State to obey the State's ***paramount*** constitutional duty, legislators might reduce funding for non-paramount programs that help people.[34] Amici conclude this Court must therefore be quiet in order to give legislators "space to consider ... how its paramount duty to fund K-12 education fits within those [other] obligations".[35]

But this Court has already made it clear how the State's obligation to amply fund its K-12 schools "fits" with the State's other programs and operations. ***Paramount*** duty means "the State must amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations."[36] Lack of time to consider how K-12 funding "fits" with non-paramount programs isn't the roadblock here. Instead, it's lack of urgency on legislators' part. Amici's "just sit quiet and wait" approach does not provide the needed urgency.

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[34] *Past Governors' Amicus Brief at pp.16-17.*

[35] *Past Governors' Amicus Brief at p.17.*

[36] McCleary, *173 Wn.2d at 520 (internal quotation marks omitted) (underline added). This Court's January 2012* McCleary *decision was not the first time this Court made the "fit" mandated by the* ***paramount*** *duty clear. E.g.,* Seattle School District v. State, *90 Wn.2d 476, 510-512, 585 P.2d 71 (1978).*

III. CONCLUSION

With a line that people who remember lawyer Brendan Sullivan's retort to Senator Inouye at the Iran-Contra Hearings might better appreciate, amici's brief asserts: "That is not to say that the Court should be a potted plant."[37]

But a potted plant is what this Court would be if it adopts amici's approach of having a "watchful" eye,[38] but saying and doing nothing. In other words, sit in a corner watching the State government violate Court Orders and constitutional rights – but don't say or do anything about it.

Plaintiffs respectfully submit that the role of an independent (as opposed to irrelevant) judiciary is to not throw up its hands and be quiet when State government violates Court Orders and citizens' constitutional rights.[39] With all respect to these amici, their three reasons do not justify the potted plant role they urge this Court to take.

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[37] *Past Governors' Amicus Brief at p.13.*

[38] *E.g., Past Governors' Amicus Brief at p.2 ("under the watchful eye of the Court"), at p.4 ("under this Court's vigilant watch"), at p.15 ("under the constitutional vigilance of this Court"). The Conclusion section of these amici's brief does, however, raise another type of appropriate enforcement order that could be used in this case when they point out that in Thigpen v. Meyers, 231 F.Supp. 938 (W.D. Wash. 1964), the court coerced the Washington legislature's compliance with rulings requiring the State to enact redistricting legislation by issuing to the legislature a "court order to redistrict before attending to any other legislation". Past Governors' Amicus Brief at p.19. Similarly here, this Court could issue a court order requiring the legislature to comply with the Court Orders in this case before attending to any other legislation.*

[39] *As plaintiffs have noted before, this Court has long recognized that if a court does not enforce its orders and judgments, "it would then be nothing more than a mere advisory body." Keller v. Keller, 52 Wn.2d 84, 88, 323 P.2d 231 (1958), quoting Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 423, 63 P.2d 397 (1936); see also*

RESPECTFULLY SUBMITTED this 25th day of August, 2014.

Foster Pepper PLLC

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*Plaintiffs' **2014** Post-Budget Filing at pp.41-43; Plaintiffs' **2013** Post-Budget Filing at p.44 & n.130.*

DECLARATION OF SERVICE

Adrian Urquhart Winder declares:

I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years. I am not a party to this action, and I am competent to be a witness herein. On Monday, August 25, 2014, I caused PLAINTIFFS' ANSWER TO THE AMICUS BRIEF OF PAST GOVERNORS to be served as follows:

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Amici Curiae The Honorable Daniel J. Evans, The Honorable John Spellman, The Honorable Mike Lowry, The Honorable Gary Locke, and The Honorable Christine Gregoire

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED in Seattle, Washington, this 25th day of August, 2014.

s/ Adrian Urquhart Winder
Adrian Urquhart Winder