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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW & STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

Filed
Washington State Supreme Court
AUG 12 2014
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BRIEF OF AMICI CURIAE WASHINGTON STATE BUDGET AND POLICY CENTER, CENTERSTONE, ELDERCARE ALLIANCE, EQUITY IN EDUCATION COALITION, STATEWIDE POVERTY ACTION NETWORK, SOLID GROUND, JENNIFER PAPEST, KRISTIN LINDENMUTH, PATRICK LENNING AND VIRAL SHAW

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I. INTRODUCTION

Both Plaintiffs and the State ignore the elephant[1] in the rooms of the Capital and the Temple of Justice: revenue neutral solutions cannot provide the level of basic education funding required by this Court and committed to by the State in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012). After three legislative sessions, the Legislature has made only modest unsustainable basic education allocations and otherwise has failed to secure long-term education funding or to articulate a plan to do so by 2018. A political stalemate (euphemistically termed "legitimate policy disagreements") over the need for new revenue to pay for basic education funding does not relieve the State from its constitutional obligations. To meet the 2018 deadline, and to sustain long term funding for education and other essential state functions and obligations, the Legislature must reform the existing state revenue system. The State's failure to adopt any new revenue measures constitutes contempt of this Court's order.

In designing a remedy to facilitate the Legislature's compliance with *McCleary*, therefore, it is essential that the Court account for the limitations of the State's revenue system, which has remained largely

[1] *See Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 314, 174 P.3d 1142 (2007) (Chambers, J., concurring) (accusing majority of avoiding "elephant in the courthouse," namely, whether challenged initiative violated Legislature's constitutional authority to raise taxes to fund state programs); *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 615, 244 P.3d 1 (2010) (Stephens, J., concurring) ("elephant in the room" is "especially palpable in the education context").

unchanged since 1935. The current mix of taxes, including heavy reliance on consumer sales, B&O and property taxes, does not provide a dependable and stable revenue source in today's economy. The shrinking tax base is insufficient to support the additional billions of dollars in basic education funding required by article IX of the Washington Constitution, while continuing to meet the State's other basic duties and responsibilities. Even accounting for increased revenue driven by the economic recovery, there will not be sufficient funds to maintain state services at their current levels in the 2015-17 biennial budget, let alone additional revenue to get the State on track to meet the 2018 *McCleary* deadline.

Amici encourage the Court to reject remedies that assume revenue neutrality, such as "fund education first" proposals. Instead, the Court should adopt a course of action that will facilitate the State's progress toward full basic education funding through regular and dependable funding sources, including generation of new revenue.

II. IDENTITY AND INTEREST OF AMICI

Amicus Washington State Budget & Policy Center ("BPC") is a non-profit research organization that focuses on the prosperity of all Washingtonians. BPC policy analysts and leadership have broad expertise in a variety of areas including tax policy, budget analysis, jobs and social policy, and equity. In addition to analysis and research on legislative

proposals and options, BPC also produces the Progress Index, an education and evaluation tool for measuring progress on public investments. The organization is responsible for all of the research for KIDS COUNT in Washington, a joint effort with the Children's Alliance to pursue measurable improvements in kids' lives.

BPC is joined by other leading organizations that represent and serve at-risk communities in Washington:

- Centerstone is one of Washington's oldest community action agencies, working to ensure all people in Seattle have the opportunity to be self-sufficient by providing access to basic needs and programs that educate and nourish, creating a thriving community of neighbors helping neighbors.

- The ElderCare Alliance consists of twelve organizations that provide services to, or advocate on behalf of, over 300,000 elderly people and/or people with disabilities in all 39 Washington counties.

- The Equity in Education Coalition ("EEC") is a state-wide coalition working towards a more targeted and comprehensive approach to improve educational achievement and growth as well as closing the opportunity gap throughout Washington. EEC works to ensure that children, particularly low-income children and children of color, have access to the resources and services they need to be successful in and out of the classroom.

- Statewide Poverty Action Network ("Poverty Action") is Washington's largest anti-poverty program, committed to building grassroots power to end causes of poverty and create opportunities for everyone to prosper. Poverty Action is a recognized leader in developing and advocating for innovative public policy solutions that address the root causes of poverty and build sustainable economic security for low income Washingtonians.

- Solid Ground is a multi-service agency working for over 40 years to end poverty and undue racism and other oppressions that are the root causes of poverty.

This Brief is also joined by students Jennifer Papest (University of Washington ("UW") employee working toward her associate degree, who was a part-time employee and full-time student but had to cut class hours due to increase in tuition and decrease in financial aid), Kristin Lindenmuth (graduate student in the UW Department of Music), Patrick Lenning (UW undergraduate studying math) and Viral Shaw (graduate student in the UW Department of Atmospheric Sciences).

III. STATEMENT OF ISSUES

Whether the remedies for the State's contempt should facilitate the identification of new sources of dependable revenue to meet the State's paramount basic education duty rather than limiting the solution to existing revenues from the State's shrinking and volatile revenue system.

IV. STATEMENT OF THE CASE

The Legislature has failed to comply with this Court's directive to establish a plan to achieve full funding for basic education from dependable tax sources by 2018, and to implement that plan.[2] On June 12, 2014, the Court therefore ordered the State to show cause why it should not be held in contempt for violation of the Court's prior orders.

[2] Order, *McCleary v. State*, No. 84362-7 (June 12, 2014).

V. ARGUMENT

The State's revenue system lacks the capacity to fund fully K-12 education on a sustainable basis without jeopardizing funding for other essential state functions and obligations because the system is outdated and riddled with tax loopholes. Yet, many of the remedies identified in the Court's June 12, 2104 Order would divert public funds to fill the gap in basic education funding. Indeed, part of the ongoing debate about education finance has been whether the State can and should meet article IX's mandate without raising new revenues. It cannot and should not. The Court should carefully craft remedies to support the Legislature in generating new revenues, which is a necessary step toward the long-term constitutional imperative to provide full funding from dependable sources.

A. Washington's Revenue System Is No Longer Dependable or Stable.

Washington's revenue system does not have the capacity to deliver sufficient and stable revenue to provide a basic education to all children residing in the State as required by article IX. This system, which has changed little since 1935, is incompatible with our contemporary service economy. As a consequence, the tax base is shrinking and the State is ill-equipped to weather economic downturns.

Prior to the 1930s, the principal source of state revenue was real property tax, which was considered a good measure of ability to pay in the

nineteenth-century agricultural economy.[3] As Washington shifted to a manufacturing based economy and the population grew, however, property tax revenue became insufficient to meet the growing need for government services.[4]

In 1935, in the midst of a deepening financial crisis, the Legislature enacted comprehensive tax legislation that shifted the principal source of state revenue to excise taxes (*i.e.*, taxes on transactions based on gross proceeds of each sale), including retail sales, use, business and occupation ("B&O"), public utility, liquor and cigarette taxes.[5] This mix of taxes was designed for the then-existing economy based on agriculture, manufacturing, resource extraction and locally based commerce.[6]

Today, more than three-quarters of the state general fund comes from the same tax sources as 1935, including consumer sales, business receipts and real property.[7] But the shift in consumption over the last several decades from tangible goods to services and remote sales has resulted in significant erosion of the tax base. Between 1995 and 2013, state tax revenues fell more than 30 percent relative to the total state

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[3] William H. Gates, Sr., Chair, Washington State Tax Structure Study Committee, *Tax Alternatives for Washington State: A Report to the Legislature* 9 (Nov. 2002) ("Gates Report"), *available at* http://dor.wa.gov/content/aboutus/statisticsandreports/wataxstudy/final_report.htm.

[4] *Id.* at 9-10.

[5] *Id.* at 10.

[6] *Id.*

[7] *See id.* at 10-11.

economy.[8] Had revenues kept pace with growth in the economy tax revenues would have been about $6.1 billion higher for fiscal year 2014.[9] The sales tax excludes health and medical services (the largest growing category of consumer spending) and many consumer services (*e.g.*, cosmetic, massage and spa services, sports and music instruction).[10] Other excluded areas include business inventories, intangible assets, rental of real property, nonfinancial businesses' investment income, individual income and food for home consumption.[11]

Washington's current mix of taxes is also unable to respond to regular fluctuations in economic activity.[12] To maintain established government services without resorting to significant increases in tax rates, the amount of revenue collected by the tax system must grow congruently with the economy during good economic times while remaining stable during recessions.[13] In Washington, however, tax revenues contract more than the economy during downturns, in large part because of the heavy

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[8] *See* Wash. Office of the Governor, *Working Washington: Budget Priorities for 2013-15*, at 6 (Mar. 28, 2013), *available at* http://www.ofm.wa.gov/budget13inslee/revenue.pdf; Forecasting Div., Wash. Office of Fiscal Mgmt. ("OFM"), *The Distribution of Income, Wealth, and Taxes Across Washington Households* 52-53 (Sept. 2012), *available at* http://www.ofm.wa.gov/reports/income_wealth_report.pdf.

[9] *See Id.*; *see also* Wash. Econ. & Revenue Forecast Council ("ERFC"), *Budget Outlook Adoption Meeting Agenda* 8 (May 1, 2014), *available at* http://www.erfc.wa.gov/forecast/documents/bo_20140501.pdf.

[10] Wash. Dep't of Rev. ("DOR"), *2012 Tax Exemption Study, Summary Listing of All Major Tax Preferences* 14-15 (Jan. 2012), *available at* http://dor.wa.gov/docs/reports/2012/Exemption_study_2012/Summary_List.pdf

[11] Gates Report at 27.

[12] *Id.* at 25.

[13] *See id.*

reliance on retail sales tax.[14] And revenues do not grow quickly enough during good economic times to support an adequate rainy day fund to address revenue shortfalls during recessions.[15]

These shortcomings in Washington's revenue system have been thoroughly analyzed and confirmed by bipartisan legislative committees and other research institutes, including BPC.[16] Not surprisingly, the Legislature's progress toward full implementation of education reforms has been hampered by its exclusive reliance on existing revenue sources.

B. "New" Basic Education Funding in the 2013-15 Budget Is Not Sustainable.

The Legislature claims to have cobbled together approximately $1 billion in additional funding for K-12 education in the 2013-15

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[14] *Id.*

[15] By fiscal year 2017, total budget reserves (including the rainy day fund) will reach only 5 percent ($962 million) of annual expenditures ($18.4 billion). ERFC, *supra* n.9, at 8. This is considerably less than the minimum 15-percent rainy day fund recommended by public finance experts. *See, e.g.*, Elizabeth C. McNichol, Ctr. on Budget & Policy Priorities, *When and How States Should Strengthen Their Rainy Day Funds* (April 16, 2014), *available at* http://www.cbpp.org/files/4-16-14sfp.pdf. And it pales in comparison to the more than $18 billion in budget shortfalls encountered by Washington state policymakers during and after the Great Recession. *See* Andrew Nicholas & Lori Pfingst, BPC, *Strengthening Washington's Rainy Day Fund* 4 (Feb. 28, 2011), *available at* http://budgetandpolicy.org/reports/strengthening-washingtons-rainy-day-fund/pdf_version.

[16] *See, e.g.*, Gates Report; Andrew Nicholas, BPC, *Building Tax System for the 21st Century* (presented to Wash. House Finance Comm. on Jan. 21, 2013), *available at* https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=VEkcqesbEIU&att=false; Inst. on Taxation & Econ. Policy, *Who Pays?: A Distributional Analysis of the Tax Systems in All 50 States* 1, 4, 15, 119-20 (4th ed. Jan. 2013) (ranking Washington #1 of the "Terrible 10," *i.e.*, the ten states with the most regressive overall tax systems), *available at* http://www.itep.org/whopays/.

budget.[17] This modest increase was insufficient to put the State on track to meet the 2018 deadline.[18] The 2013-15 budget falls about $400 million short of what was recommended by the Joint Task Force on Education Funding ("JTFEF") and fails to provide *any* increase for teacher and staff compensation, estimated to cost at least $1 billion more per fiscal year.[19]

Worse, even this unexceptional funding increase is not sustainable. OFM concedes that the 2013-15 budget "largely" relied on one-time transfers and other temporary devices that will not be available again.[20] This short-sighted approach conflicts with the Court's directive to the Legislature to find a long-term sustainable solution to education funding.[21]

In yet another unsustainable fix, the 2013-15 budget suspended cost-of-living adjustments for teachers, resulting in a one-time "savings" of $295 million.[22] Cutting educator salaries is robbing Peter to pay Paul. Adequate pay is an essential component of basic education. But

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[17] *See* Order, *McCleary v. State*, No. 84362-7, at 2 (Jan. 9, 2014) (citing 2013 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation at 2).

[18] *Id.* at 6-7.

[19] *Id.*

[20] OFM, *State Budget Update: More Big Challenges Ahead* 7 (June 16, 2014) ("OFM Update"), *available at* http://www.ofm.wa.gov/budget/documents/State_budget_prelim_outlook_pres_2014.pdf. For example, the Legislature redirected $387 million from the Capital Budget to cover operating expenses and captured $351 million in one-time savings from the expansion of Medicaid. *Id.*

[21] *McCleary*, 173 Wn.2d at 484 ("Ample funding for basic education must be accomplished by means of dependable and regular tax sources.").

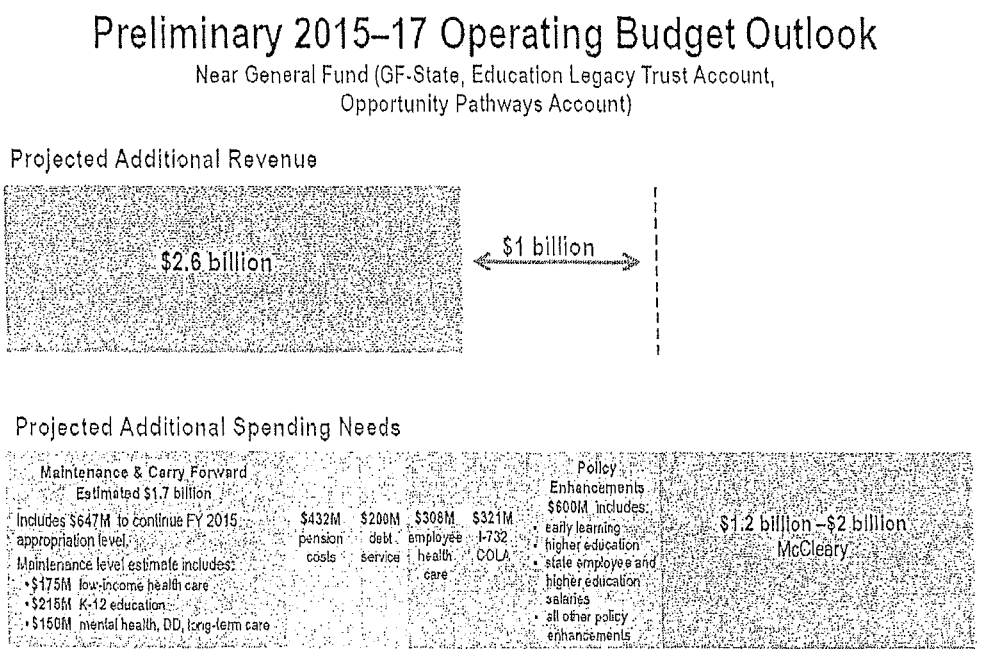
[22] *See* Order, *McCleary v. State*, No. 84362-7, at 5-6 (Jan. 9, 2014) ("[S]tate funding of educator and administrative staff salaries remains constitutionally inadequate.").

presumably current revenue sources were insufficient to support funding teacher cost-of-living adjustments.

C. An "All Cuts" Approach Would Require Significant Cuts to Essential Government Services.

While state revenues are slowly recovering, this growth is not enough to cover the State's current needs, much less to increase education spending by at least $5.7 billion dollars to fund basic education reforms and by $1 billion per year for staff and teacher compensation.[23]

Anticipated revenues fall short: In the 2015-17 biennium, the State will face a shortfall of more than $1 billion simply to maintain current services and obligations. On top of that, an additional up to $2 billion will be needed to get on track to meet the *McCleary* requirements.[24] There is no "surplus" to dedicate to public education:



[23] OFM Update at 14; Order, *McCleary v. State*, No. 84362-7, at 6 (Jan. 9, 2014).
[24] OFM Update at 11.

$10 billion in cuts have already been made: Since 2009, more than $10 billion in budget cuts that have been made by the Legislature in response to sharply declining revenues brought on by the Great Recession.[25] Low- and moderate-income families across Washington have borne the brunt of these cuts. For example:

- Over 20,000 adults and children were cut off from job and income assistance through Temporary Assistance to Needy Families.[26]
- Over 15,000 children have had their food assistance reduced, putting them at greater risk of hunger.[27]
- Over 30,000 students eligible for financial assistance for post-secondary education were turned away due to lack of funds.[28]
- Approximately 20,000 people with disabilities saw their income support disappear.[29]

All-cuts approach is unworkable: Without new revenue, lawmakers would need to make billions of dollars of cuts that would be

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[25] Wash. Office of the Governor, Proposed Supplemental 2012 Budget Highlights 6 (Nov. 2011), *available at* http://www.ofm.wa.gov/budget12/highlights/highlights.pdf.

[26] *See* Cmty. Servs. Div., Wash. Dep't of Soc. & Health Servs. ("DSHS"), *Policy Charts & Caseload Data* 7 (April 23, 2012), *available at* http://www.leg.wa.gov/JointCommittees/LEWOTF/Pages/default.aspx.

[27] Based on BPC analysis of data from DSHS (June 27, 2014). *See also* Children's Alliance, *Hungry in Washington* 4 (Sept. 2012), *available at* http://www.wsahnc.org/download/Hungry_in_Washington2012.pdf.

[28] Wash. Student Achievement Council, *Student Financial Aid and Access Programs Annual Report* 8 (Dec. 2013), *available at* http://www.wsac.wa.gov/sites/default/files/2013.SFAAnnualReport-Rev.Final_0.pdf.

[29] Kim Justice & Andrew Nicholas, BPC, *No denying it: At least $10 billion has been cut from the state budget* 2 (analyzing data from DSHS Economic Services Administration), *available at* http://budgetandpolicy.org/reports/no-denying-it-at-least-10-billion-has-been-cut-from-the-state-budget/pdf_version.

damaging to the economy and the health and well-being of Washingtonians. In fact, the Governor has asked government agencies and the judiciary to draw up proposed budgets assuming a 15 percent across-the-board funding cut.[30]

The magnitude of the cuts that would be required is evidenced by the limited savings that would result from the following draconian cuts:

- Dismantle the entire Department of Corrections ($1.7 billion)
- Close all community and technical colleges ($1.2 billion)
- Eliminate all student financial aid for post-secondary education ($721 million)
- Abolish all child welfare services ($595 million)[31]

Significantly, the options for these substantial budget cuts are limited because constitutional and federal requirements leave only one-third of the budget (about $11 billion) available for "cuts."[32] Many of the specific cuts proposed in response to budget shortfalls in the past (and likely to be considered again) would be extremely harmful to children and their ability to succeed in school. For example:

- Eliminate food assistance for over 12,000 families who do not meet federal eligibility requirements.

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[30] Budget Div., OFM Directive 14B-01, *2015-17 Biennium Operating Budget Instructions* 3 (June 2014), *available at* http://www.ofm.wa.gov/budget/instructions/operating/2015_17/2015-17instructions.pdf.

[31] *See* Laws of 2014, ch. 221, §§ 202 (child welfare services), 220 (Dep't of Corr.), 604 (community and technical colleges), 612 (student financial aid).

[32] OFM Update at 12.

- Eliminate state funding for school-based medical services.
- Eliminate school guidance and counseling to prepare students for college (Navigation 101).
- Eliminate school dropout prevention services (Readiness to Learn and Building Bridges).
- Reduce intervention services for families with children at risk of entering foster care.
- Eliminate family reconciliation services for more than 500 at-risk adolescents and their families.
- Eliminate job and income support to 2,000 families by shortening the length of time families can receive Temporary Assistance to Needy Families services.[33]

Cutting these public programs and services would undermine any benefit from additional investments in public schools. Even fully funded, public education is an empty promise if a child's basic needs, including shelter, food and health care, are not met.

Early in 2014, policymakers put forward a "fund education first" proposal that would dedicate two-thirds of revenue growth to education in

[33] *Proposed Senate 2012 Supplemental Operating Budget* (Mar. 5, 2012), ¶¶ 208 (food assistance), 240 (school-based medical), 427 (Building Bridges), 432 (Navigation 101), 463 (Readiness to Learn), *available at* http://leap.leg.wa.gov/leap/Budget/Detail/2012/SOAgencyDetail0303.pdf; *Proposed Senate 2011-13 Operating Budget* (April 12, 2011), at 105 (intervention), *available at* http://leap.leg.wa.gov/leap/Budget/Detail/2011/SOAgencyDetail0412.pdf; Wash. Office of the Governor, *Proposed 2012 Supplemental Budget* (Dec. 2011), at 73 (family reconciliation), 88 (job and income), *available at* http://www.ofm.wa.gov/budget12/recsum/2012OperatingRecsum.pdf.

the coming years.[34] If enacted, this proposal would widen the shortfall simply to maintain current services and obligations to *$2.6 billion* in the 2015-17 biennium, forcing deep cuts like those described above. And, even with this redirected revenue, the State would remain well short of what is necessary to satisfy *McCleary*.

D. The Legislature Has Missed Multiple Opportunities to Raise Additional Revenue.

Since *McCleary* was decided in 2012, the Legislature has failed to take advantage of numerous opportunities to raise new resources for basic education and to reform the State's flawed revenue system, including closing tax breaks, increasing property taxes by eliminating the one-percent cap on annual revenue growth, enacting a new excise tax on capital gains and extending temporary tax increases:

Tax Breaks: There are currently more than 650 special tax preferences on the books in Washington that, collectively, amount to billions of dollars in foregone resources every year.[35] Although tax breaks have a similar impact on the budget and taxpayers as direct expenditures, they receive far less attention and oversight during the budget process compared to budgeted items. The Governor and legislators have repeatedly introduced, but failed to enact, legislation that would generate

[34] SB 5881 (introduced during 2013 Regular Session; reintroduced during 2013 Special Session and 2014 Regular Session).
[35] *See* DOR, *supra* n.10.

more than $800 million per biennium to help fund education by eliminating tax breaks. *See* Appendix A (describing each of the major revenue packages, including tax break reductions, that have been proposed since 2012). Worse, since *McCleary*, the Legislature actually has *reduced* state revenue by about $10 million per biennia by adopting 28 new tax breaks.[36] Although perhaps not sufficient to satisfy the State's substantial education funding needs in full, cutting tax breaks is a logical first step toward meeting the *McCleary* mandate.

Increase Property Tax Revenue: The State passed up about $2.9 billion per biennium in property tax revenue by failing to impose the State's full share of the property tax rate allowed under the Constitution.[37] This unrealized revenue is the unsurprising (and avoidable) consequence of the one-percent cap on annual growth of state property tax revenue, enacted by the Legislature in 2007.[38] By repealing this cap, the State could generate billions of dollars prior to the 2018 *McCleary* deadline.

Capital Gains Tax: Washington also forgoes significant revenue by failing to tax individual profits from the sale of corporate stocks, bonds and other high-end financial assets. The Legislature failed to act on

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[36] *See* Wash. Citizen Comm'n for Performance Measurement of Tax Preferences, *available at* http://www.citizentaxpref.wa.gov/reports.htm.

[37] While the maximum state property tax rate is $3.60 per $1,000 assessed value, the state rate in 2012 was only $2.22 per $1,000. *See* JTFEF, *Final Report* 6-7 (Dec. 2012), *available at* http://www.leg.wa.gov/JointCommittees/EFTF/Pages/default.aspx.

[38] *See* Laws of 2007, 1st Spec. Sess., ch. 1, § 1.

proposed capital gains tax legislation that would have generated about $1.4 billion per biennium in new revenue for education.[39]

Extend Temporary Taxes. The Legislature also missed an opportunity to generate up to $800 million per biennium in new resources for basic education by allowing temporary tax increases (B&O tax surcharge and beer excise tax) to expire in July 2013.[40]

Presumably, the State argues "legitimate policy disagreements" justify the Legislature's failure to act on *any* of these measures in response to the Court's *McCleary* orders.[41] But the political stalemate about whether to raise new revenue to fund *McCleary* is neither a "good faith effort" nor a legitimate justification for the State's ongoing violation of article IX, particularly in view of the magnitude of the constitutional interests at stake.[42] In light of the limitations of the current state revenue system, a no-new-revenue solution simply is not feasible.

E. Remedial Judicial Action to Facilitate Implementation of Education Funding Reform Should Encourage (Not Foreclose) Generation of Additional Stable Revenue.

Amici agree with Plaintiffs that the State has violated the Court's *McCleary* decision and subsequent orders and that the Court should take

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[39] JTFEF, *supra* n.37, at 6.
[40] *Id.*
[41] State's Opening Br. Addressing Order to Show Cause at 1.
[42] *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 511, 585 P.2d 71 (1978) (State's duty to provide for basic education is "superior in rank, above all others, chief, preeminent, supreme, and in fact dominant").

decisive action to enforce its rulings. But judicial action must be carefully crafted to ensure that the State gets on track to achieve full funding for basic education by 2018, without harmful collateral consequences.

The Court should reject enforcement measures that would force a revenue-neutral solution because such an approach necessarily requires cuts to parts of the budget supporting essential government services. For example, mandating that a portion of state revenue be dedicated to basic education (*a.k.a.*, "fund schools first" approach) or prohibiting expenditures on certain other matters until the State complies with *McCleary* would put the State's most vulnerable populations in peril. Likewise, while shutting down public schools altogether would ramp up pressure on legislators to take decisive action, current students should not be punished for the State's ongoing failures.[43] Other one-time fixes, like forcing the sale of public school lands, should also be avoided.

It is time for the State to find a long-term solution to the persistent underfunding of public schools. A meaningful enforcement order should facilitate, not prevent, generation of new revenue for education. While the legislative branch exercises broad discretion in areas of taxation and appropriation, the State's constitutional duty to fund basic education is not limited to those programs that can be sustained within the current state

[43] Not to mention the adverse impact on working parents without affordable day care.

revenue system.[44] Specific direction by the Court may prevent the Legislature from continuing to miss opportunities to raise new revenue.

Courts in other states have worked successfully with the political branches to address constitutionally deficient public education funding by directly commenting on the need for new revenue. For example, in 1989, having found the Kentucky public school system constitutionally inadequate, the Kentucky Supreme Court confirmed the judiciary's authority to analyze possible methods of financing the public school system and to opine that "imposition of new taxes appeared to be the only viable alternative" because "a major reallocation of funds would 'cripple' other government functions[.]"[45] The following year, the Kentucky legislature dramatically increased public school funding by raising sales and property taxes.[46] Similarly, the New Jersey legislature generated new state revenue shortly after New Jersey's highest court expressed "doubt[] that the thorough and efficient system of schools required by the [constitution] can realistically be met by reliance upon local taxation."[47]

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[44] *See Seattle Sch. Dist.*, 90 Wn.2d at 526 ("We do not doubt that ever increasing demands upon the Legislature by state agencies, departments and institutions have reached near crisis proportions...[but] it does not change the constitutional duty of the court or the Legislature.").

[45] *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 193, 214 (Ky. 1989).

[46] *See* 1990 Ky. Acts, ch. 476, §§ 104(3), 306(6), 320(3), 331(1), 358(7), 617; *see also Bd. of Educ. of Hopkins Cnty. v. Brooks*, 824 S.W.2d 431, 432 (1992) (noting that legislature modified then-existing taxing structure in response to *Rose*).

[47] *Robinson v. Cahill*, 62 N.J. 473, 520, 303 A.2d 273 (1973) (cited with approval in *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 538); *accord Abbott ex rel. Abbott v. Burke*, 170

Amici urge the Court to reject the false premise that funding for basic education will be (or can be) derived from the State's flawed revenue system. Instead, the Court should take steps that will force the Legislature to take decisive action to phase-in full basic education funding, even though doing so requires generating new sources of dependable revenue.

VI. CONCLUSION

The State has failed to comply with this Court's constitutional directives to establish a plan to phase-in increased funding to ensure full funding for basic education from dependable and general tax sources by the 2017-18 school year. The State justifies this failure by reference to policy debates over the need to raise new revenue to meet the State's constitutional obligations. But there is a distinction between a good-faith policy debate and an exercise in futility. Wishing basic education can be fully funded on a sustaining basis without raising new revenue does not comport with the reality of the current state revenue system's limitations. The need for new revenue by tax reform and/or closing tax loopholes is the elephant in the room that the State wishes to ignore. The Court should take action to force the Legislature to recognize the realities of the State's

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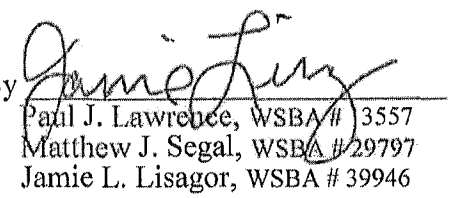
N.J. 537, 566, 790 A.2d 842 (2002) (LaVecchia, J., concurring in part and dissenting in part) (describing history of public school funding); *see also Idaho Sch. for Equal Educ. Opportunity v. State*, 142 Idaho 450, 460, 129 P.3d 1199 (2005) (identifying potential alternatives to achieve constitutionally adequate funding, including raising new revenue).

current revenue limitations and accelerate the Legislature's debate on the need to generate new revenue to meet the *McCleary* mandate. Accordingly, any order resulting from this show cause proceeding should include, at a minimum, direction to the State to evaluate in good faith tax reform, including raising tax rates, broadening the tax base and eliminating special tax preferences.

RESPECTFULLY SUBMITTED this 4th day of August, 2014.

PACIFICA LAW GROUP LLP

By 

Paul J. Lawrence, WSBA # 13557
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Attorneys for Amici Curiae

APPENDIX A

Revenue measures considered by the Legislature or proposed by the Governor since 2012		
Proposals	***Biennial Revenue (millions)***	***Sources***
Close or narrow tax breaks		
Limit sales tax exemption on the value of vehicle trade-ins to $10,000	$107	Governor Inslee proposal (early 2013)
Repeal sales tax exemption for custom computer software	$97	Governor Inslee proposal (early 2013)
Trim preferential B&O rates for most industries by 25%	$90	Governor Inslee proposal (early 2013)
Narrow sales tax exemption for non-residents	$72	Governor Inslee proposal (early 2013); HB 2796 (2014); HB 2038 (2013); HB 2036 (2013)
Repeal B&O tax exemption for long-term rental of commercial real estate	$71	Governor Inslee proposal (early 2013)
Extend the tobacco products to electronic cigarettes	$71	HB 2795 (2014)
Eliminate sales tax exemption on candy and gum	$69	Governor Gregoire proposal (late 2012)
Eliminate the PUT deduction on the in-state portion of interstate hauls	$63	HB 2038 (2013)
Narrow tax exemption for import commerce	$61	Governor Inslee proposal (early 2013); HB 2038 (2013)
Repeal sales tax exemption on bottled water	$55	Governor Inslee proposal (early 2013); HB 2796 (2014); HB 2038 (2013)
Repeal use tax exemption for extracted fuel, except hog fuel	$42	Governor Gregoire proposal (late 2012); Governor Inslee proposal (early 2013); HB 2796 (2014); HB 2465 (2014) HB 2038 (2013)
Eliminate preferential tax rate for resellers of prescription drugs	$34	Governor Inslee proposal (early 2013); HB 2796 (2014); HB 2038 (2013)
Eliminate preferential rate for travel agents and tour operators	$15	HB 2038 (2013)
Repeal sales and use tax exemption for farm auction purchases	$6	Governor Inslee proposal (early 2013)
Total	***$853***	

APPENDIX A

Proposals	*Biennial Revenue (millions)*	*Sources*
Extend temporary tax increases		
0.3 percentage-point B&O surcharge applied to services	$534	Governor Gregoire proposal (late 2012); Governor Inslee proposal (early 2013); HB 2037 (2013); HB 2038 (2013); HB 1122 (2013); SB 5039 (2013); Joint Task Force on Education Funding (late 2012)
50-cents per gallon beer excise tax increase	$128	Governor Gregoire proposal (late 2012); Governor Inslee proposal (early 2013); HB 1122 (2013); SB 5039 (2013); Joint Task Force on Education Funding (late 2012)
Total	***$662***	
Property tax options		
Eliminate the 1% limit on annual levy growth	$600	Joint Task Force on Education Funding (late 2012)
Increase the state school levy to $3.60/$1000 assessed value	$2,350	Joint Task Force on Education Funding (late 2012)
Total	***$2,950***	
New taxes		
Excise tax on capital gains over $20,000 per year (5% 2012 proposal; 6.5% 2013 proposal)	$1,400	HB 2563 (2012); HB 2087 (2013); SB 5738 (2013); Joint Task Force on Education Funding (late 2012)
Excise tax on fuel sold at wholesale	$367	Governor Gregoire proposal (late 2012); HB 1122 (2013); SB 5039 (2013)
19-cents per gallon excise tax on soda	$57	Governor Gregoire proposal (late 2012)
Total	***$1,824***	
Grand Total	**$6,298**	

Source: Revenue estimates from fiscal notes and the Joint Task Force on Education Funding's final report, table 2.

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Subject: Matthew & Stephanie McCleary et al. v. State of Washington: Cause No.: 84362-7: Motion for Leave to File Amicus Brief; Brief of Amicus Curiae; Proof of Service

Good morning.

On behalf of Paul J. Lawrence, Matthew J. Segal, and Jamie Lisagor, attached please find our Motion by Washington State Budget and Policy Center, Centerstone, Eldercare Alliance, Equity In Education Coalition, Statewide Poverty Action Network, Solid Ground, Jennifer Papest, Kristin Lindenmuth, Patrick Lenning and Vinal Chow for Leave to File Amicus Curiae Brief; the Brief of Amici Curiae Washington State Budget and Policy Center, et al. and a Proof of Service for filing in the above-referenced matter.

Should you have any difficulty with the attachments, please do not hesitate to contact me.

Thank you.

Dawn M. Taylor
Assistant to Paul J. Lawrence;
Matthew J. Segal; Sarah C. Johnson
& Taki V. Flevaris

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