

No. 84362-7

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Defendant/Appellant,

v.

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.

**PLAINTIFF/RESPONDENTS'
SUPPLEMENTAL BRIEF
RE: RETAINED JURISDICTION**

Thomas F. Ahearne, WSBA No. 14844
Christopher G. Emch, WSBA No. 26457
Adrian Urquhart Winder, WSBA No. 38071
Kelly Lennox, WSBA No. 39583
Foster Pepper PLLC
1111 Third Avenue, suite 3400
Seattle, WA 98101-3299
Telephone: (206) 447-8934/447-4400
Telefax: (206) 749-1902/447-9700
E-mail: ahearne@foster.com
Attorneys for Respondents/Plaintiffs

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Note: Using “Petitioner” and “Respondent” in this brief could invite confusion since the McCleary family, Venema family, and Network for Excellence in Washington Schools (NEWS)¹ were the “Petitioners” below but are the “Respondents” in this Court, and the State was the “Respondent” below but is the “Petitioner” in this Court. To avoid such confusion, this brief simply refers to the McCleary family, Venema family, and Network for Excellence in Washington Schools as “plaintiffs”, and to the State as “defendant”. Cf. RAP 10.4(e).

I. INTRODUCTION

This Court has held that it is retaining jurisdiction of this *McCleary* case in order to “hold the State accountable to meet its constitutional duty under Article IX, §1.”²

The defendant State proposes that this retained jurisdiction should have three basic steps:

1. Step One (defendant): Within 60 days after the Governor signs a budget into law, a legislative committee and defense counsel draft a report for filing in this case that describes what they believe the legislature has done to implement ESHB 2261 and comply with this Court’s Article IX, §1 ruling.
2. Step Two (plaintiffs): Plaintiffs read the copy of that filing that defense counsel serves on plaintiffs’ counsel.
3. Step Three (Court): This Court reads defendant’s filing and decides what, if anything, it wants to do.

Supplemental Brief Of Appellant at pages 9-10 (section labeled “What Retained Jurisdiction Should Look Like”).

¹ *A list of the over 385 community groups, school districts, and education organizations in NEWS is contained at “http://www.waschoolexcellence.org/about_us/news_members”.*

² *McCleary v. State*, 173 Wn.2d 477, 546, 269 P.3d 227 (2012)

This is plaintiffs' response to defendant's proposal.

Step One: Plaintiffs agree the defendant State should periodically file in this case a written explanation of how the State believes it is adequately progressing to achieve compliance with this Court's Article IX, §1 ruling by 2018. Plaintiffs simply propose some clarifications to defendant's wording to avoid potential ambiguities in the future. *[Section III.A below.]*

Step Two: Plaintiffs disagree with defendant's proposal that plaintiffs' involvement in plaintiffs' case from this point forward should be to simply (1) read what the defendant says to the Court in this case, and then (2) hope the members of this Court have the necessary depth and breadth of K-12 knowledge to flush out the parts of defendant's filings that overstate, misstate, and/or omit information relevant to this Court's making an informed decision as to whether the State is adequately progressing to achieve compliance with this Court's Article IX, §1 ruling by 2018. Simply put, the defendant State proposes that this Court establish a procedure that converts the McCleary family, Venema family, and NEWS from being the plaintiffs in this case to being observers of this case. Plaintiffs propose that this Court instead adopt a procedure that provides them a meaningful voice in their case. *[Section III.B below.]*

Step Three: Plaintiffs agree with the defendant that the retention of jurisdiction should remain in this Supreme Court rather than being delegated to an inferior court. That makes sense given the magnitude and public import of this case, as well as the need to have final, binding determinations without unnecessary delays during these crucial six years leading to 2018.

But to ensure for all Washington citizens that this Court's retention of jurisdiction is actually serving its stated purpose of holding the State accountable for complying with the Court's Article IX, §1 ruling in this case, plaintiffs propose that this Court rule as a matter of law on the adequacy of the "compliance" claimed by the State in each of the State's periodic reports to this Court.

To the extent that either side's filings create a genuine dispute of fact material to the State's claimed compliance, plaintiffs propose that this Court refer the resolution of such factual issues to the current judicial officer in this State who has the most in-depth knowledge, background, and experience with this State's K-12 system, Article IX, §1, and the long history of this case: i.e., this suit's trial judge, the Honorable Judge John Erlick. To ensure consistency and avoid unnecessary delays or uncertainties in the event that Judge Erlick retires from the superior court

bench at some point during the six year road ahead, plaintiffs propose that this designation be as a “special master”. [Section III.C below.]

In short, plaintiffs believe that the defendant’s proposal, with the additions summarized above (and explained below), will produce the most practical, reasonable, and efficient process to ensure that this Court makes fully informed legal decisions as it retains jurisdiction to hold the State accountable for making adequate progress to achieve compliance with this Court’s Article IX, §1 ruling by 2018.

II. BACKGROUND

This Court upheld Judge Erlick’s declaratory rulings with respect to the meaning of – and the State’s violation of – Article IX, §1.

This Court also recognized the real world reality that the defendant State’s longstanding violation of its public school children’s constitutional right to an amply funded K-12 education will continue unless this Court retains jurisdiction to ensure that the defendant State does comply (rather than just study or talk about complying) with this Court’s Article IX, §1 ruling. As the Court’s ruling in this case declared: “What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education.” *McCleary v. State*, 173 Wn.2d 477, 541, 269 P.3d 227 (2012).

This Court accordingly rejected as “unacceptable” the defendant State’s request that this Court deferentially await the State’s promised 2018 compliance. *McCleary*, 172 Wn.2d at 544.

Instead, this Court declared that it would retain jurisdiction in this case to hold the State accountable to meet its constitutional duty under Article IX, §1:

A better way forward is for the judiciary to retain jurisdiction over this case to monitor implementation of the reforms under ESHB 2261, and more generally, the State’s compliance with its paramount duty. This option strikes the appropriate balance between deferring to the legislature to determine the precise means for discharging its article IX, section 1 duty, while also recognizing this court’s constitutional obligation. This approach also has the benefit of fostering dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms. The court below did not evaluate options for retaining jurisdiction, and the parties have not had an opportunity to address the issue. Our prior experience and the experience of other courts suggests there are numerous options, including retaining jurisdiction in the trial court, retaining jurisdiction in this court, or perhaps appointing a special master or oversight entity. While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all. Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1. Accordingly, we direct the parties to provide further briefing to this court addressing the preferred method for retaining jurisdiction.

McCleary, 173 Wn.2d at 545-546 (footnote omitted).

The Supreme Court Clerk then set a briefing schedule for the defendant State and plaintiffs to file further briefing addressing the preferred method for retaining jurisdiction.³ This is plaintiffs' brief.

III. PLAINTIFFS' PROPOSAL

Rather than propose a procedure entirely different from that proposed by the defendant State, the *McCleary* plaintiffs propose a procedure that adopts most of what the State proposes, with what the *McCleary* plaintiffs believe are fair and reasonable additions to give plaintiffs a meaningful voice in their case and ensure effective vigilance by this Court during these crucial six years between now and 2018.

A. Step One: Defendant State's Periodic Compliance Filing

Plaintiffs agree that the defendant State should regularly file in this case a written explanation of how the State believes it is adequately progressing to achieve compliance with this Court's Article IX, §1 ruling by 2018. Plaintiffs propose clarifications to defendant's wording of this first step, however, to avoid potential misunderstandings or misinterpretations in the future about the "what" and "when" applicable to the State's filings.

³ *Washington State Supreme Court Clerk's January 27, 2012 letter to counsel of record.*

1. **What the State Reports.**

(a) State's language:

The Legislature, through its Joint Select Committee on Article IX Litigation (and legal counsel), will submit a report to the Washington Supreme Court summarizing legislative action taken toward implementing the reforms initiated by Laws of 2009, ch. 548 (ESHB 2261), and other legislative action intended to achieve compliance with article IX, section 1 of the Washington Constitution.

(b) Reasons for plaintiffs' proposed clarifications:

Defendant's wording leaves the door open for misunderstandings of misinterpretations in the future about issues like:

- Is defendant's report a formal case "filing", or more an administrative or FYI update from one governmental entity to another?
- Does "summarizing" mean an explanation of how the reported actions comply with this Court's Article IX, §1 ruling, or does it simply mean a list summarily identifying what the acts were?
- Does "action taken toward implementing [ESHB 2261]" mean all actions the defendant State asserts were taken toward implementing that bill, or just those implementation actions that the legislative committee in any given year thinks of as being a "reform"?
- Does "other legislative action intended to achieve compliance" mean all legislative action the State will be relying upon as this case proceeds, or just those actions apart from ESHB 2261 that a given year's legislative committee opts to include in that year's report?
- Does "intended to achieve compliance with Article IX, §1" mean intended to achieve compliance with the Court's ruling in this case on what Article IX, §1 means, or compliance with what the legislative committee in any given year thinks Article IX, §1 should mean?
- Should each report repeat what was reported in the prior report(s)?

To avoid potential misunderstandings or inconsistencies in the future about the “what” in defendant’s periodic reports to this Court, plaintiffs propose the following clarification of the State’s language quoted in the subsection 1(a) text box above.

(c) Plaintiffs’ proposed clarified language:

The Legislature, through its Joint Select Committee on Article IX Litigation (and legal counsel), shall file a report in this case explaining all legislative action taken towards achieving compliance with Article IX, section 1 pursuant to this Court’s ruling, including the legislative actions taken towards implementing Laws of 2009, ch. 548 (ESHB 2261).

After the filing of the first report, subsequent reports should explain the legislative actions taken since the filing of the prior report in this case (Case No. 84362-7).

2. When the State Reports.

(a) State’s language:

The report will be submitted (a) at the conclusion of each legislative session from 2012 through 2018 inclusive, within 60 days after the biennial or supplemental operating budget is signed into law; and (b) at such other time as the Court may order.

(b) Reasons for plaintiffs’ proposed clarifications:

Defendant’s wording leaves the door open for misunderstandings or misinterpretations in the future about issues like:

- Is defendant's report a formal case "filing", or more an administrative or FYI update from one governmental entity to another?
- Is the "at the conclusion of each legislative session" introduction superfluous, or does it instead somehow alter or amend the 60 days from commencing at the signing of a budget into law?
- Does the reference to "operating" budget mean that the State's periodic reports can ignore whatever K-12 funding the State chooses in any given year to include, exclude, or otherwise deal with in the "capital" budget instead?

To eliminate any misunderstandings or inconsistencies in the future about such issues, plaintiffs propose the following clarification of the State's language quoted in the subsection 2(a) text box above.

(c) Plaintiffs' proposed clarified language:

<p>The report shall be filed (a) within 60 days after any biennial or supplemental budget is signed into law from 2012 through 2018 inclusive; and (b) at such other time as the Court may order.</p>

B. Step Two: Plaintiffs' Opportunity To Respond

Plaintiffs disagree with defendant's proposal that this Court convert the McCleary family, Venema family, and NEWS from being the plaintiffs in this case to being observers of this case. The *McCleary* plaintiffs accordingly propose that this Court modify the second step of the defendant's proposed procedure in order to provide the *McCleary* plaintiffs a meaningful voice in their case

(a) State's language:

A copy of the report will be filed in the Court and served on the Respondents' counsel. The report will be a public document, which may be published on the Legislature's web page.

(b) Reasons for plaintiffs' proposed additions:

The American adversary process which brings daylight to the truth requires the Court to hear from both the plaintiff side and the defendant side rather than just one side. (For example, if either the trial court or this Court had based its decision solely upon the defendant State's submissions claiming compliance with Article IX, §1, the State would have been able to secure an unchallenged "pass" in this case.)

To provide both sides in this case a voice in this case, plaintiffs propose the following additions to the State's language quoted in the subsection (a) text box above.

(The following language also modifies some of the defendant's wording in order to avoid any misperception or misinterpretation in the future as to whether the defendant's filing of its report in this case is simply intended to provide courtesy "copy" for members of this Court and the public to read in the publicly available court file or on a certain publicly available government web site.)

(c) *Plaintiffs' proposed language:*

The defendant State shall file and serve the report within the 60 days noted above.

Within 30 days of defendant's filing, plaintiffs shall file and serve their Response regarding the adequacy of the State's claimed compliance during the time period covered by the State's report.

Within 15 days of plaintiffs' filing, the defendant may file a Reply strictly limited to the matters raised in plaintiffs' Response.

The above filings, like all court filings not made under seal, are public documents.

If any of the above pleadings raise a genuine issue of fact material to this Court's ruling as a matter of law on the adequacy of the State's claimed compliance during the time period covered by the State's report, then that pleading shall specifically identify each such genuine issue of material fact.

C. Step Three: Court Vigilance To Ensure Compliance

As noted earlier, plaintiffs agree with the defendant that the retention of jurisdiction should remain in this Supreme Court rather than being delegated to an inferior court.

For the retention of jurisdiction to actually serve its stated purpose of holding the State accountable for complying with this Court's Article IX, §1 ruling in this case, however, plaintiffs believe the procedure this Court adopts for that retained jurisdiction must include this Court's

ruling as a matter of law on the adequacy of the “compliance” claimed by the State in each of its periodic reports to this Court.

(a) State’s language:

After reviewing each report received, the Court, in its discretion, will determine whether to request additional information or legal briefing or argument, and whether to issue any further order or decision.

(b) Reasons for plaintiffs’ proposed language:

This Court held it is retaining jurisdiction in this case because “What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education,” and “Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1.”⁴

This Court accordingly concluded its ruling in this case by declaring that success depends on continued vigilance on the part of courts. This court intends to remain vigilant in fulfilling the State’s constitutional responsibility under article IX, §1.

McCleary, 173 Wn.2d at 547 (internal quote marks and citation omitted).

Plaintiffs believe the vigilant enforcement of this Court’s Article IX, §1 ruling requires this Court to hold the defendant State accountable each time it files its periodic compliance report in this case. Doing less is not vigilance. It is not holding the State accountable. It is

⁴ *McCleary*, 173 Wn.2d at 541 and 546.

simply delaying enforcement of this Court’s ruling until a later day – to the ongoing detriment of literally hundreds of thousands of Washington citizens in the defendant State’s public schools today.

Plaintiffs recognize that a Supreme Court is not generally equipped to conduct hearings to take evidence and resolve factual disputes, and thus this Court can refer factual disputes raised in original jurisdiction litigation to a trial judge to hear evidence and submit Findings Of Fact for this Court’s legal ruling.⁵ In this particular case, the Supreme Court has the benefit of being able to refer such factual disputes to an experienced trial judge who currently has the most in-depth knowledge, background, and experience of any judicial officer in Washington concerning this State’s K-12 system, Article IX, §1, and the long history of this case. That judicial officer is the trial judge in this case: the Honorable Judge John Erlick. Plaintiffs propose that this Court therefore designate that judicial officer as the Court’s special master in this case to hear the evidence and enter Findings Of Fact to resolve the genuine issues of material fact (if any) identified by the parties in their filings in Steps One and Two above.

Plaintiffs propose that this Court’s designation of Judge Erlick as the trier of fact in the event of factual disputes be as “special master”

⁵ *RAP 16.2(d)*.

rather than as “trial judge” solely for one reason. His experience and history as the trial judge in this case make him uniquely qualified to be the trier of fact for this Court’s retention of jurisdiction. But there’s no guaranty he will stay on the Superior Court bench throughout the upcoming six years through 2018. Designating Judge Erlick as “special master” would prevent the unnecessary uncertainties, delays, and interruptions that would result if this Court were to designate him as a sitting trial judge, but then he subsequently left the Superior Court bench at some point during the crucial six years between now and 2018.

Since the sole reason for this “special master” rather than “trial judge” designation would be to guard against such unnecessary uncertainty, delay, and interruption in this Court’s retention of jurisdiction, and since this designation’s sole purpose would be to establish the Findings Of Fact (if needed) for this Court’s legal ruling on the State’s compliance filings in this case, the costs of this designation should be born entirely by the State rather than by the McCleary family, Venema family, and NEWS.

The first text box in the following subsection (c) contains plaintiffs’ proposed language for this approach to the third step of the basic 3-step procedure proposed by the defendant State.

Plaintiffs further note that a practical alternative to the “special master” designation discussed above would be for this Court to refer the factual disputes identified in the parties’ pleadings to Judge Erlick as “trial judge” for the entry of Findings Of Fact, with the provision that he would automatically become this Court’s “special master” instead if he leaves the Superior Court bench during these upcoming six years – recognizing, of course, that either side may ask this Court to withdraw that automatic special master designation based on the situation at hand if that change ever occurs.

The second text box in the following subsection (c) contains plaintiffs’ proposed language to accomplish that alternative approach for the third step of the basic 3-step procedure proposed by the State.

(c) *Plaintiffs' proposed language:*

[special master designation]

This Court refers the resolution of any factual issues identified by the parties' above filings to the current judicial officer most familiar with the history, facts, & issues in this case. Given his experience & familiarity with those matters, this Court accordingly designates the Hon. John Erlick to serve as this Court's special master in this case. This designation does not automatically terminate if Judge Erlick retires or otherwise leaves the superior court bench. Costs shall be born by the defendant State.

The Special Master shall file written Findings Of Fact in this Court after conducting the type of evidentiary proceedings the Special Master deems appropriate. Unless the Special Master concludes more time is necessary, those Findings Of Fact shall be filed no more than 75 days after the defendant State filed its report.

This Court will request supplemental legal briefing or argument from counsel if this Court deems it helpful after reviewing the parties' filings and the above Findings Of Fact (if any).

This Court will then issue a ruling on the sufficiency of the action reported by the State to comply with the Court's Article IX, §1 ruling in this case, along with any related orders the Court deems appropriate.

[trial judge / special master alternative]

This Court refers the resolution of any factual issues identified by the parties' above filings to the current trial judge most familiar with the history, facts, & issues in this case. Given his experience & familiarity with those matters, this Court accordingly designates the Hon. John Erlick to serve as that trial judge. If Judge Erlick retires or otherwise leaves the superior court bench, this designation shall automatically become a designation as this Court's special master in this case. (Costs shall be born by the defendant State, and either side may, at the time of that transition to special master, ask this Court to withdraw that designation based on the situation at the time of that change.)

The above trial judge/special master shall file written Findings Of Fact in this Court after conducting the type of evidentiary proceedings the trial judge/special master deems appropriate. Unless the trial judge/special master concludes more time is necessary, those Findings Of Fact shall be filed no more than 75 days after the defendant State filed its report.

This Court will request supplemental legal briefing or argument from counsel if this Court deems it helpful after reviewing the parties' filings and the above Findings Of Fact (if any).

This Court will then issue a ruling on the sufficiency of the action reported by the State to comply with the Court's Article IX, §1 ruling in this case, along with any related orders the Court deems appropriate.

IV. CONCLUSION

The legislature's creation of a legislative committee to help coordinate and facilitate defense counsel's communications with the Court in this case was a good (and pragmatic) start.

But the defendant State's track record with respect to meeting its paramount education duty under Article IX, §1 is filled with good starts.⁶

And starts are not completion.⁷

The saying "justice delayed is justice denied" isn't just a saying. It's true. Especially when applied to young students who don't get a second chance to receive an amply provided education once they leave a given grade level.

This Court's ruling in this case confirmed that the defendant State has delayed compliance with its paramount duty under our State Constitution for far too long. Each year that delay continues, the State is denying literally hundreds of thousands of Washington citizens their

⁶ E.g., in response to Judge Doran's initial Seattle School District ruling, the legislature enacted a bill assuring that it would fund 100% of the State school districts' transportation costs by the 1980-81 school year. RCW 28A.41.160 (expressly mandating with respect to student transportation funding that "commencing with the 1980-81 school year, reimbursement shall be at one hundred percent or as close thereto as reasonably possible").

⁷ E.g., the State's own studies in this case confirmed that decades after the above 1980-81 deadline, the State's student transportation funding still was not anywhere near 100% – and was instead on a track that would reach funding of 2008 transportation costs in the year 2385. Plaintiff/Respondents' Brief [With Errata] filed on September 27, 2010, at page 61; and Plaintiff/Respondents' Answer To The Amicus Brief Of The League Of Education Voters filed on June 17, 2011 at pages 8-9 (noting the 377 years it would take to reach the State school districts' 2008 transportation cost level).

paramount Constitutional right to an amply provided education. This Court has accordingly assured the citizens of our State that “This court intends to remain vigilant in fulfilling the State’s constitutional responsibility under article IX, §1.” *McCleary*, 173 Wn.2d at 547.

Plaintiffs’ proposal builds upon the 3-step process proposed by the State to establish a workable procedure for this Court to effectively maintain that vigilance and fulfill its ultimate responsibility to hold the State accountable to (finally) meet its paramount education duty under Article IX, §1 of the Washington State Constitution.

Plaintiffs therefore respectfully request that this Court adopt the proposal explained in this brief.

RESPECTFULLY SUBMITTED this 16th day of April, 2012.

Foster Pepper PLLC

s/ Thomas F. Ahearne

Thomas F. Ahearne, WSBA No. 14844

Christopher G. Emch, WSBA No. 26457

Adrian Urquhart Winder, WSBA No. 38071

Kelly Lennox, WSBA No. 39583

Attorneys for Plaintiffs McCleary Family,
Venema Family, and Network for Excellence in
Washington Schools (NEWS)

DECLARATION OF SERVICE

Thomas F. Ahearne 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, April 16, 2012, I caused Plaintiff/Respondents' Supplemental Brief Re: Retained Jurisdiction to be served on the following counsel as follows:

William G. Clark
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
billc2@atg.wa.gov

Via Electronic Mail (cc to the same email sent to the Supreme Court for the filing of this Supplemental Brief)
 Via U.S. First Class Mail

Defendant State of Washington

David A Stolier, Sr.
Office of the Attorney General
1125 Washington Street SE
Olympia, WA 98504-0100
daves@atg.wa.gov

Via Electronic Mail (cc to the same email sent to the Supreme Court for the filing of this Supplemental Brief)
 Via U.S. First Class Mail

Defendant State of Washington

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 16th day of April, 2012.

s/ Thomas F. Ahearne
Thomas F. Ahearne

OFFICE RECEPTIONIST, CLERK

To: Thomas Ahearne
Cc: Stoler, Dave (ATG); Clark, Bill (ATG); Poulin, Raelynn G (ATG); Christopher Emch
Subject: RE: McCleary v. State (Supreme Court No. 84362-7) (Plaintiff/Respondents' Supplemental Brief Re: Retained Jurisdiction)

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From: Thomas Ahearne [<mailto:ahearne@foster.com>]
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To: OFFICE RECEPTIONIST, CLERK
Cc: Stoler, Dave (ATG); Clark, Bill (ATG); Poulin, Raelynn G (ATG); Christopher Emch; ahearne@foster.com
Subject: McCleary v. State (Supreme Court No. 84362-7) (Plaintiff/Respondents' Supplemental Brief Re: Retained Jurisdiction)

Dear Clerk of the Supreme Court –

The Plaintiff/Respondents' Supplemental Brief Re: Retained Jurisdiction is attached for filing.

Please contact me if there is any problem opening this pdf.

Thank you.

Tom Ahearne
Counsel for plaintiff/respondents
206-447-8934

From: Poulin, Raelynn G (ATG) [<mailto:RaelynnP@ATG.WA.GOV>]
Sent: Monday, March 12, 2012 4:03 PM
To: Thomas Ahearne; Christopher Emch
Cc: Stoler, Dave (ATG); Clark, Bill (ATG)
Subject: Supplemental Brief of Appellant - McCleary v. State/Supreme Court No. 84362-7

Dear Mr. Ahearne and Mr. Emch:

Attached please find the Supplemental Brief of Appellant in the above-referenced matter. A hard copy of this brief has also been placed in today's mail. Thank you.

Raelynn Poulin

Legal Assistant

Attorney General's Office

Education Division

360-753-2499

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