

NO. 84362-7

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Appellant,

v.

MATHEW & STEPHANIE McCLEARY, on their own 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,

Respondents.

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**STATE OF WASHINGTON'S REPLY BRIEF  
AND RESPONSE TO CROSS-APPEAL**

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## I. INTRODUCTION

This case was litigated and decided below as a constitutional challenge to the State's funding of basic education. The legal framework for resolving this case should have been a simple one—after all, this Court's decision over thirty years ago in *Seattle School District v. State*, 90 Wn.2d 476, 518-20, 585 P.2d 71 (1978), provided the proper interpretation and construction of article IX of the Washington Constitution for every claim made in this case.

The trial court, however, improperly placed its own conception of the State's constitutional obligation before this Court's interpretation and construction of article IX. Article IX, according to this Court, requires a statewide public school system that provides "opportunities for learning essential skills." But the trial court ruled that article IX requires the State to guarantee that all students meet state standards. Article IX requires the provision of "basic education" to all public school students. But the trial court ruled the State is required to provide and fund the total educational expenditures of public schools (whether or not they provide basic education). Article IX requires that basic education be financed from dependable and regular tax sources. But the trial court imposed two different requirements: the State must provide stable and dependable funding from year to year, and federal and local funding cannot be

considered any part of that funding. A constitutional challenge to a statute must be proven beyond reasonable doubt. *Federal Way v. State*, 167 Wn.2d 514, 29, P.3d 941 (2009). The trial court, however, improperly applied a preponderance of the evidence standard to conclude the Legislature violated article IX.

Instead of addressing these legal issues and the controlling decisions of this Court, Respondents dismiss the appeal as nothing more than an attempt to retry factual matters.<sup>1</sup> Respondents have submitted 90 pages of appellate briefing (a 64-page response brief with a 26-page Appendix of extended footnotes), with some 65 pages of that briefing devoted exclusively to factual issues. Respondents have tried to create the false impression that the sheer weight of facts developed at trial justifies the Judgment entered by the trial court. It does not. The trial court's Judgment is erroneous as a matter of law.

Moreover, the erroneous Judgment is an obstacle to current and future reforms of public school financing, and it encroaches both on the Legislature's constitutional authority to implement article IX and on the local autonomy and control that school districts in Washington have traditionally enjoyed regarding public school curriculum, expenditures and

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<sup>1</sup> See Resps. Br. at 7

operations. This Court should reverse the Judgment of the trial court and dismiss Respondents' cross-appeal.

## II. LEGAL ARGUMENT

### A. **The Trial Court Erroneously Substituted Its Own Constitutional Analysis In Place Of This Court's Holdings In *Seattle School District***

The Respondents (who were the plaintiffs below) invited the trial court to rule as if *Seattle School District v. State* had never been decided and as if the Legislature had not been enacting policy and funding for "basic education" over the last 33 years. The trial court accepted their invitation, improperly expanding the Legislature's article IX duty to define and fully fund "basic education" beyond the limit established in *Seattle School District*, and impermissibly limiting the Legislature's constitutional prerogative regarding acceptable funding sources for basic education. At Respondents' request, the trial court entered an enforcement order that interfered with the Legislature's constitutional responsibility for determining how to comply with article IX—an impermissible intrusion under *Seattle School District* absent proof of a "constitutional imperative" that is not being fulfilled. Such proof was absent here.

The State contends the trial court erred as a matter of law. Beginning with their discussion of the applicable standards of review (Resps. Br. at 7-10), however, Respondents inaccurately portray this

appeal as no more than a re-argument of the evidence at trial. The State assigned error to the Judgment and to 34 Conclusions of Law. The State also assigned error to 38 Findings of Fact, of which 27 were either mislabeled legal conclusions or mixed questions of law and fact.<sup>2</sup> Respondents apparently agree that all 38 challenged Findings present mixed issues of fact and law because, in their 90 pages of briefing, Respondents refer to them as “FOF/COL”.<sup>3</sup> Mixed question of fact and law are reviewed *de novo*. *Grundy v. Brack*, 151 Wn. App. 557, 213 P.3d 619 (2009); *State ex rel. Freedom Found. v. WEA*, 111 Wn. App. 586, 49 P.3d 894 (2002).

**1. The Trial Court Erroneously Constitutionalized Statutory Educational Goals And Standards**

In *Seattle School District*, 90 Wn.2d at 518-20, this Court established “basic education” as the constitutional floor for the legislative implementation of article IX of the Washington Constitution. The trial court judgment elevated that constitutional floor from “basic education” to a “current” definition of education that includes statutory goals and academic standards. CP 2866-67; CL 251, 268, 275. In so ruling, the trial court applied the faulty reasoning that the “constitutional floor” for

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<sup>2</sup> The challenged 34 Conclusions and 38 Findings are discussed in the State’s Opening Brief at 2 to 6. The 11 Findings also challenged for lack of substantial evidence are identified specifically at p. 34 of that Brief.

<sup>3</sup> Respondents have labeled each paragraph of the Findings and Conclusions (CP 2868-971) as both a Finding (FOF) and a Conclusion (COL).

complying with article IX could be raised (but not lowered) whenever the Legislature enacts education policy or financial reforms. *Id.* That ruling is wrong as a matter of law: the Legislature cannot “up the constitutional ante” through legislation, thereby creating a new constitutional floor. *See Brown v. State*, 155 Wn.2d 254, 261, 199 P.3d 341 (2005); *McGowan v. State*, 148 Wn.2d 278, 292, 60 P.3d 67 (2000).

In so doing, the trial court also erroneously redefined terms in article IX, instead of applying this Court’s definitions—particularly “ample,” “all,” and “education.” “Ample” as defined in *Seattle School District*, 90 Wn.2d at 511-12, does not preclude “non-state” funding; the trial court ruled that such funding is excluded. Finding 221; Conclusion 165. As defined in *Seattle School District*, 90 Wn.2d at 515-16, the term “all” does not mean the State fails to perform its article IX duty if some students do not pass WASL or graduate from high school; the trial court ruled to the contrary. Findings 231, 231(a), 235, 238, 262 and 266; Conclusions 251, 273 and 275. In *Seattle School District*, 90 Wn.2d at 518-19,<sup>4</sup> this Court held the term “education” in article IX refers to “basic education,” consisting of opportunities to achieve basic skills; the trial court ruled that it means guaranteed academic

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<sup>4</sup> *Accord Tunstall v. Bergeson*, 141 Wn.2d 201, 236-37, 5 P.3d 691 (2000) (J. Talmadge, concurring) (article IX requires educational opportunities, not individualized levels of achievement).

success for all students. Findings 172, 175-77, 195, 231, 231(a); Conclusions 205-12, 251.

Respondents contend these Findings and Conclusions are sustainable because the judiciary is responsible for definitively construing constitutional terms and provisions. (Resps. Br. at 38-45). However, the trial court does not have power to rule that this Court's construction of article IX can be changed by statute. It is not authorized to disregard or overrule this Court's holdings that article IX imposes a duty to provide resources or inputs ("make ample provision"). The trial court erred by ruling that new legislative goals and programs elevated the article IX duty to now require the State to guarantee universal student achievement.

The trial court's authority to "say what the law is" is not license to ignore the constitutional rulings of this Court. The constitution requires the State to financially support basic education as defined by the Legislature and as guided by this Court's direction; it does not require the impossible guarantee articulated by the trial court. The constitutional floor is the "opportunity" to learn essential skills, not the universal attainment of statutory goals and the mastery of academic standards. The trial court committed reversible error by transforming the State's duty to "provide" for basic education into a duty to guarantee student achievement.

**2. The Trial Court Erroneously Ruled That Article IX Requires The State To Pay All Costs Of Education, Whether Or Not For Basic Education**

This Court held that the State's duty under article IX is to define and fund basic education, not "total education." *Seattle Sch. Dist.*, 90 Wn.2d at 517-19. The trial court, however, ruled there was a violation of article IX because "basic education" funding does not match the total operating expenditures of the State's school districts. Findings 180, 220, 224-27, 229, 231 and 263; Conclusions 255, 273 and 275. Of course it does not match—the total operating expenditures include the costs of federal and local programs that are not part of basic education and for which the State is not responsible. RP 298, 4275-76, 5002.<sup>5</sup>

Such evidence of underfunding through comparisons of "basic education funding" against the amounts spent on all public school operations holds the State responsible for the costs of "total education," even when expressed as the "actual costs" of operating schools or as "market rates" for staff compensation. The total amounts of money that

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<sup>5</sup> The assumption that the State has to fund whatever districts spend on public schools applies equally to the illustrations/graphics depicted throughout Respondents' Brief. For example, the graphic on page 24 assumes the State must pay whatever staff salaries are negotiated by districts under collective bargaining agreements, which violates RCW 28A.400.200. The graphic about non-staff costs on page 25 is based on a "survey" of what a panel of local school officials wish they could spend annually. CP 1627-29. The two graphics on page 48 assume that the State must pay all costs of facilities construction and maintenance. Both construction and maintenance costs have local program components to them that are not the State's responsibility. RP 3569-71 and 4216-18.

school districts decide to spend on their own programs does not demonstrate that the State is underfunding basic education. It was reversible error for the trial court to conclude the State was violating article IX by conflating the costs of total education with those of basic education.

**3. The Trial Court Erroneously Constrained The Legislature's Discretion By Imposing Funding Limitations Not Found In Article IX**

This Court held over 30 years ago that basic education funding must come from “dependable and regular tax sources,” but article IX does not otherwise constrain the source of funds. *Seattle Sch. Dist.*, 90 Wn.2d at 522. The Court did not hold that article IX required “stable and dependable” funding from year to year, as Findings 228-30, Conclusions 250, 256 and 275 and the Judgment require. Nor did *Seattle School District* hold that basic education funding must come only from state funds—to the exclusion of federal funds, local funds or funds from other sources, as Finding 221 and Conclusion 275 require.

In *Parents Involved in Community Schools v. Seattle School District*, 149 Wn.2d 660, 673, 72 P.3d 151 (2003), this Court clarified that article IX is satisfied when basic education funding comes from “state

appropriations” or from dependable and regular tax sources.<sup>6</sup> This makes sense. There is no basis in logic or history for any court to prevent the Legislature from using any available monies to satisfy its article IX duties—so long as those monies come from dependable and regular tax sources. It was therefore reversible error for the trial court to enter Judgment requiring stable and dependable funding from year to year and from state-only sources.

**B. No Constitutional Imperative Justified The Entry Of An Enforcement Order That The State Commission A “Cost Study” For Basic Education**

The enforcement order entered by the trial court does more than simply require the Legislature to determine the actual costs of educating every Washington child. It effectively mandates that the Legislature determine the cost of ensuring universal student achievement, in an amount no less than whatever districts have spent on total education in their schools and that the same amount or greater must be provided in ensuing years. All those factors are potentially applicable to the “actual cost” of providing the education the trial court decided is currently required by article IX. No constitutional imperative justifies the trial court’s order.

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<sup>6</sup> In *Seattle Sch. Dist.*, 90 Wn.2d at 487, 520, this Court affirmed a ruling that article IX is satisfied by appropriations or dependable and regular tax sources.

Proof of the existence of a constitutional imperative is part of the Respondents' burden. *Seattle Sch. Dist.*, 90 Wn.2d at 519-20. Respondents do not dispute that burden, nor do they contend that there is a "constitutional imperative" that justifies court intervention in a process entrusted to the legislative branch. Instead, they argue that a court order is appropriate because ESHB 2261 (2009) contains no current commitment to future funding<sup>7</sup> and subsequent legislatures can repeal, amend or curtail the reform effort. Their argument fails.

ESHB 2261 adopted major reforms to K-12 education in Washington, to be implemented according to an established schedule. It was passed in 2009 and remains unchanged today, except for the further implementation of its provisions.<sup>8</sup> It still calls for complete implementation by 2018, a deadline unaffected by the enforcement order and unchallenged by Respondents. Indeed, the trial court congratulated the Legislature on its enactment of ESHB 2261 and concluded that its full implementation likely will remedy deficiencies in the current system. Conclusions 271, 274. Respondents' testimony at trial confirmed that this

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<sup>7</sup> In fact, funding legislation is limited by the biennial budget process and cannot constitutionally commit future legislatures to appropriate funding. *See Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 629, 62 P.3d 470 (2003) (noting the two-year limit on appropriations) and *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 54 Wn.2d 545, 550-51, 342 P.2d 588 (1959) (article II, section 19 of constitution prohibits continuing appropriations).

<sup>8</sup> Further implementation of ESHB 2261 was enacted by Laws of 2010, chs. 37 (ESSB 6444), 235 (ESSB 6696) and 236 (SHB 2776).

legislation was “the most significant reform that [Washington has] had in 30 years.” CP 4441. Both sides’ witnesses endorsed ESHB 2261 as the cure for all deficiencies perceived in the current system. Tr. Ex. 1183; RP 2859-60.

The need for an enforcement order also is undermined by Respondents’ concession that the State has already extensively studied education funding.<sup>9</sup> Resps. Br. at 63. The order is a superfluous intervention in the legislative process. Courts should not order a co-equal branch to do something that has already been accomplished.

Nor does the ability of subsequent legislatures to modify or repeal ESHB 2261 justify an enforcement order. Legislative authority to add or detract from prior legislative acts is a fact of constitutional life. *Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007) (No legislature can enact laws that prevent a future one from exercising its authority to make laws; to rule otherwise elevates prior enactments to constitutional status and reduces current legislature to second-class status). Furthermore, this Court has already held that “[l]egislators, as well as judges, are sworn to support the constitution of the State of Washington and we see no reason to assume legislators will fail to act in good faith to comply with their oath” when taking legislative action to satisfy article IX.

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<sup>9</sup> Ironically, as noted below in Section F, Respondents are asking for a redundant study even though they complain that the State already has conducted too many studies.

*Seattle Sch. Dist.*, 90 Wn.2d at 538. An enforcement order based upon hypothetical future legislative acts is improper.

The trial court's error in issuing the enforcement order is readily apparent when the circumstances here are compared with those existing in 1978, when this Court decided *Seattle School District*: the Basic Education Act had been enacted in 1977, but its full implementation was years away; subsequent legislatures could amend, water down or repeal that Act. This Court nevertheless held it was inappropriate for the trial court to monitor or supervise the legislative process so as to keep the Legislature's feet to the fire. *Seattle Sch. Dist.*, 90 Wn.2d at 538-39. The trial court's enforcement order here is more obtrusive because it both adds steps the Legislature must take in carrying out reform and also raises the specter that doing a "cost study" may itself become a part of the article IX duty, a requirement for which no "imperative" exists.

Trial courts must trust that future legislatures will comply with article IX, thereby giving full effect to the Legislature's authority to select the means of compliance with article IX. *Id.*

**C. Respondents' Challenge To The Legislature's Statutory Implementation of Article IX Must Be Demonstrated Beyond A Reasonable Doubt**

The trial court erred when it ruled that Respondents' burden was proof by a preponderance. CL 101-03. This ruling was based upon an

erroneous application of an excerpt from *Seattle School District*. See State's Brief at 60-61.

This Court has repeatedly required parties challenging the constitutionality of state laws to prove unconstitutionality beyond reasonable doubt.<sup>10</sup> More was needed below than proof of the fact that state funds do not equal total school district expenditures or that some students do not succeed. "Argument and research" must convince the Court that the Legislature's statutory funding violates the constitution. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

Unchallenged Finding 215 confirmed that every aspect of basic education—including the amounts provided by the Legislature in every fiscal year—is in statute. To rule that state funding levels are unconstitutional, as the trial court did, therefore is necessarily a ruling that statutes do not comply with article IX. The appropriate burden of proof was beyond reasonable doubt and the trial court's failure to apply that burden is reversible error.

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<sup>10</sup> See authorities cited at 61-62 of State's brief.

**D. Respondents' Characterizations Of The Factual Record Do Not Address Or Excuse The Trial Court's Erroneous Constitutional Analysis And Conclusions**

Respondents do not address the legal errors committed by the trial court. Instead, they devote 65 pages of briefing<sup>11</sup> to factual issues that pertain to uncontested matters at trial and to unchallenged Findings on appeal. For example, much of Respondents' Statement of the Case is dedicated to the importance of education to a healthy democracy, an issue that the State conceded in its Answer at the outset of the case. Finding 119. Similarly, Appendix A consists of 26 pages of footnotes and factual argument begun in the brief and continued in the appendix. Only three of those footnotes (Nos. 54, 55 and 81) relate to Findings contested for lack of substantial evidence. The rest deal with uncontested facts or Findings challenged as mixed fact/law issues. Appendix A violates the page limitations of the appellate rules and contributes nothing to resolving the legal issues raised in the State's appeal.

Respondents mischaracterize the record when they contend that 52 of the 55 trial witnesses supported their theory of the case. First, their description of these witnesses confirms that they all testified about one uncontested issue: the importance of public schools and article IX. Resps. Br. at 12. Their brief's factual presentation is primarily the product of

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<sup>11</sup> Thirty-nine pages of briefing and twenty-six pages of footnotes and factual contentions in Appendix A.

eight witnesses.<sup>12</sup> Furthermore, Respondents are incorrect when they suggest that the State's case consisted of testimony from only three "out-of-state" experts. Resps. Br. at 33, 46. Other fact witnesses, such as the Basic Education Task Force Chair, a Washington State Institute for Public Policy (WSIPP) analyst, and the Office of Superintendent of Public Instruction's Director of Apportionment and Financial Services, also confirmed that massive funding increases to education, either generally or targeted at minority populations, do not improve our public schools. RP 1647; Finding 246. Task Force Chair Grimm was adamant that the State's funding for basic education could not be deemed insufficient because some students failed to pass WASL or graduate from high school. RP 1654-56. He also related the Task Force's conclusion that a system-wide, massive increase in funding, without reforms to ensure district and teacher accountability, would not boost student achievement. RP 1647-48.

The WSIPP analyst provided a projection that was included in the Task Force's Final Report (Ex. 124, summarized in unchallenged Finding 245), showing that the State could expect only a nine percent increase (from 72.4 percent to 81 percent) in the high school graduation rate some 14 years after the infusion of billions of dollars of additional

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<sup>12</sup> A review of footnotes in the brief and in Appendix A confirms that the testimony of four school district superintendents, a state legislator, an employee of the Office of the Superintendent for Public Instruction and of two legislative staffers provided the vast majority of references to the trial record cited in respondents' brief.

state funding into public schools. RP 1663-64. The analyst also confirmed that improving the rate further would require virtually unlimited funding and even then would ultimately fail because no state has obtained graduation rates near the 90<sup>th</sup> percentile. *Id.*; RP 2341-43.

Respondents' brief fails to address why the trial court re-defined and expanded the article IX duty, why the trial court changed the constitutional duty to provide resources for basic education into a duty to fund the total costs of public schools, why the duty to provide "opportunities" became a duty to guarantee achievement, and why the obligation to fund from dependable and regular tax sources was changed to a duty to provide the same (or greater) amount of state-only funding year after year. Selectively recapitulating trial testimony cannot justify the trial court's application of the wrong legal standards to these facts.<sup>13</sup>

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<sup>13</sup> Respondents suggest that the lengthy trial and factual emphasis in their brief would have been unnecessary if the State had conceded their re-definition of article IX's terms, including the critical term "education." (Resps. Br. at 10, 39). However, the State's opposition to Respondents' summary judgment was not based on the need for testimony to establish what these terms meant. The State opposed summary judgment because this Court had defined those terms and because Respondents argued that a violation of article IX could be established solely through evidence that some students had failed a WASL test or did not graduate from high school, even if funding was sufficient. CP 632-33, 734-46.

**E. The Trial Court's Judgment Improperly Interferes With Current And Future Legislative Reforms To Basic Education And May Substantially Curtail Or Eliminate Local Autonomy Over K-12 Schools**

The trial court's Judgment could require the State to provide state funds, equal to the total amounts currently spent by 295 school districts from all funding sources, in the same or greater amounts every year. The Judgment also leaves the State open to litigation for insufficient funding—even if the State covers the total costs of education statewide—if any one of Washington's one million students does not pass state achievement tests or graduate from high school. The Judgment may establish "cost studies" as a constitutional imperative, requiring the Legislature to verify that every funding appropriation is the "actual cost" of total school operations or the "actual cost" of getting every student to meet academic standards.

This expansion of the State's responsibility will have adverse consequences for the State's current reforms to education policy and financing in ESHB 2261. When fully implemented the new system will be predicated, as were the reforms studied by Washington Learns and the Task Force, on prototypical schools at each level (elementary, middle and high school), with funding allocations for assumed staff complements (teaching, classified and administrative) based on student enrollment and funding for non-staff costs also allocated per student. Tr. Ex. 124,

pp. 7-10. This method is a more detailed version of the allocation method for basic education funding followed by the State since the adoption of the Basic Education Act of 1977. RP 4057, 4069-74 and 4093. Current and future statutory means of funding public schools will continue to be based on statutory funding formulae that produce allocations based on historical experiences of the State and its school districts, brought forward over the years to account for inflation and other factors. FF 219; RP 3514.

Respondents complain such allocations are “fictional” or “snapshots” rather than “actual costs” because Respondents prefer that the State fund whatever a district reports as its total education spending. Over time, the districts have invoked “local control” to hire more staff and pay them higher wages and benefits under locally bargained collective bargaining agreements. RP 334-36 and 3907-09. Having bargained away state and local funds, the districts now claim that what they pay their staff is really the State’s responsibility.

Requiring the State to tie “state-only” funding to whatever school districts spend abandons article IX’s focus on mandating a general and uniform statewide system of basic education. Making state funding depend on the cost of guaranteeing successful outcomes for all students—even if such a guarantee were possible—could force the Legislature to

scrap the educational reforms and funding plans enacted in ESHB 2261 and start from scratch.

The trial court's Judgment will have a chilling effect on future legislation about K-12 school policy and funding. The court ruled that ESHB 1209 (1993) and the EALRs, the product of reform legislation in the 1990s, gave further "substantive content" to basic education, thereby elevating the article IX obligation to "equipping all children with the basic knowledge and skills established by the current definition of the education required by article IX"—in effect, a new, statutorily created "solid constitutional floor below which the State cannot lawfully go."<sup>14</sup> This ruling potentially converts every legislative enactment about learning goals and standards, every legislative program about curriculum, teacher training or popular interventions like smaller class sizes, and every increased appropriation into a new constitutional floor which the State has to satisfy with "state-only" funding.

The Judgment also threatens the local autonomy that school districts currently enjoy over school facilities, staffing and curriculum. Tr. Ex. 192, p. 2. If the State is the guarantor of total district spending, the Legislature understandably will likely enforce more and more control over school operations and may even divest local school boards of control over

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<sup>14</sup> Findings 171, 172, 175, 176, 185-87 and 193-95 and Conclusion 205-12 and 251 are the basis for the trial court's ruling.

the courses taught at schools, and over the numbers and compensation of staff. RP 3569-73. The Legislature is not likely to write blank checks to school districts. Local school districts do not want that amount of state control, even if it means more funding. RP 3657-58; CP 1730-31.

**F. If The Enforcement Order Is Affirmed, This Court Should Preserve The Trial Court's Flexible Deadline (Response to Cross-Appeal)**

When Respondents filed this lawsuit, they requested a specific remedy: an order mandating that the State conclude a study of what funding levels were needed to provide the education called for by RCW 28A.150.210. CP 970-71. The deadline requested was one year from the date of final Judgment. *Id.*

This lawsuit was filed in January 2007, but did not go to trial until August 2009. Finding 1. By the time of trial, Washington Learns, the Basic Education Task Force and ESHB 2261 all had taken place. Findings 190, 244. Studies determining the potential resources needed to reform basic education had already occurred. Tr. Exs. 16, 124. The completion and partial legislative implementation of these studies put Respondents in the difficult position of demanding that the State conduct a study on the grounds that the State has already conducted too many studies. Resps. Br. at 36. ESHB 2261 had mooted their remedy. Indeed, Respondents' first trial witness confirmed their dilemma by testifying that

Respondents were asking for no deadline for the enforcement order—only that the State be ordered to act “promptly.” RP 346, ll. 3-13.

Respondents cross-appeal on the narrow issue of whether the trial court should have ordered the Legislature to conclude its study “by the end of the next school year.” Resps. Br. at 64. Public schools typically close their doors in June. They wrap up annual operations and close their books in August. Therefore, Respondents are demanding that the State comply with the enforcement order within months of the outcome of this appeal.

Respondents assigned error to none of the Findings or Conclusions other than the deadline in Conclusion 275. For purposes of the cross-appeal only, the Findings thus are treated as verities, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002), and unchallenged Conclusions are the law of the case, *Energy Northwest v. Hartje*, 148 Wn. App. 454, 465, 199 P.3d 1043 (2009). Appellate review is confined to whether the Judgment’s deadline of “real and measurable progress” is supported by the Conclusions and Findings. *See SAC-Downtown, Ltd., P’ship v. Kahn*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994). Moreover, Respondents must demonstrate that a constitutional imperative requires the very short deadline they seek. *Seattle Sch. Dist.*, 90 Wn.2d at 520.

Unchallenged Findings 182 through 192 recount the history of state legislation and reforms to basic education from 1977 to 2007. In

these Findings, the trial court indicates its belief that the State was complying with this Court's *Seattle School District* opinion in that 30-year period. This 30-year period encompasses passage of the 1977 Basic Education Act, the 1993 statutory reforms (ESHB 1209), enactment of the EALRs, a 1995 funding study conducted by the Legislature (Tr. Ex. 1376, which concluded the State's funding was sufficient) and the development of the WASL assessments. By 2005, the first WASL results were in. Findings 190-91. Washington Learns and the Task Force proceedings were getting underway. *Id.* These Findings actually compliment the State's reform efforts and flatly contradict any conclusion that the State was dilatory or engaging in "30 years of delay."<sup>15</sup>

Findings 198-202 address passage of ESHB 2261. They reflect the trial court's two concerns with that legislation: no funding is provided "for the future execution or implementation of ESHB 2261" and "subsequent legislatures can change their minds." Findings 200, 202. The trial court restated these findings in Findings 262 through 266 as the basis for establishing a "real and measurable progress" deadline.

Respondents got an enforcement order, but not a firm deadline because "This court must acknowledge, nonetheless, that recently-enacted legislation is intended to address these issues." Conclusion 273.

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<sup>15</sup> Indeed, the contents and tone of Findings 182 to 192 contradict the portions of Conclusions 269 through 275 that attempt to justify entry of any enforcement order.

ESHB 2261 is a “comprehensive, constitutionally permissive legislative effort to reform education” and the State may “fulfill [its] Const. Art. IX § 1 mandate through its intended implementation of ESHB 2261, or otherwise.” Conclusion 274. Appellant believes no enforcement order was appropriate. Should this Court disagree, “real and measurable progress” is the appropriate deadline because “the Legislature must be afforded the opportunity to exercise its proper legislative authority to comply with article IX, section 1.” Conclusion 275.

Finally, the trial court warned Respondents’ counsel during closing argument that legislative compliance with an enforcement order would take years:

THE COURT: But isn’t a study exactly what you’re requesting? In other words, it’s going to -- if you want this entity, task force, whatever you want to call it, to determine -- first of all, to define what Basic Education is, because they’re going to have to determine -- they’re going to go through the same process that the Washington Learns and BEFTF went through. Then on top of that, they’re going to have to do what BEFTF did and cost it all out.

Now, I can’t imagine that would take less than two or three years because that’s what all these other studies took.

RP 5495-96 (emphasis supplied). Respondents understood, and invited, the error from which they appeal. If this Court affirms the entry of a “cost study” order, the trial court’s deadline should be affirmed.

### III. CONCLUSION

This Court's decisions provided a roadmap for deciding every legal issue in this constitutional challenge. The trial court did not follow that roadmap. This Court should therefore reverse and remand with instructions to apply this Court's construction of article IX to the facts herein. The Court should reaffirm the following:

1. Article IX, section 1, requires the State to make ample provision for the basic education of all Washington students;

2. Basic education is the constitutional floor for compliance with article IX and it requires the State to provide "opportunities for learning essential skills," not guarantees that all students will succeed or that state funding will pay for the total costs of operating public schools.

3. Funding for basic education must come from state appropriations, the State's general fund, or dependable and regular tax sources. Federal funding or funding from "non-state sources" is not prohibited.

4. Persons challenging the constitutionality of statutorily-based basic education programs or funding must prove unconstitutionality beyond reasonable doubt.

5. If the trial court determines the State is not complying with article IX, any enforcement order must respect the Legislature's authority to establish the means of complying with article IX.

The cross-appeal also should be rejected.

RESPECTFULLY SUBMITTED, this 20<sup>th</sup> day of October, 2010.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding *Reply Brief of Appellant State of Washington* was filed by legal messenger in the Washington State Supreme Court at the following address:

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AGNES ROCHE