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SUPREME COURT OF THE STATE OF WASHINGTON

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.

SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	LEGAL ISSUES – SEPARATION OF POWERS PRINCIPLES.....	2
III.	PRACTICAL ISSUES – THE LEGISLATURE’S RESPONSE TO THE COURT’S DECISION ON THE MERITS	7
IV.	CONCLUSION – WHAT RETAINED JURISDICTION SHOULD LOOK LIKE IN THIS CASE	9

TABLE OF AUTHORITIES

Cases

Brown v. Owen,
165 Wn.2d 706, 206 P.3d 310 (2009)..... 2

Brown v. State,
155 Wn.2d 254, 119 P.3d 341 (2005)..... 4

Carrick v. Locke,
125 Wn.2d 129, 882 P.2d 173 (1994)..... 2, 3

Hale v. Wellpinit Sch. Dist. No. 49,
165 Wn.2d 494, 198 P.3d 1021 (2009)..... 3, 4

In re Salary of the Juvenile Director,
87 Wn.2d 232, 552 P.2d 163 (1976)..... 4

McCleary v. State,
___ Wn.2d. ___, 269 P.3d 227 (2012)..... 1, 3, 5, 6, 7

Seattle Sch. Dist. No. 1 v. State,
90 Wn.2d 476, 585 P.2d 71 (1978)..... 4

Constitutional Provisions

Const. art. II, § 1 3

Const. art. IX..... 4

Const. art. IX, § 1 1, 5, 6, 7, 8, 9

Statutes

Laws of 2009, ch. 548 (ESHB 2261)..... 9

Other Authorities

House Concurrent Resolution 4410,
62d Leg., Reg. Sess. (Wash. 2012).....7, 8

I. INTRODUCTION

This case concerns the State's duty under article IX, section 1 of the Washington Constitution to make ample provision for basic education, and at this juncture, the relative roles of the judicial and legislative branches of government in discharging that duty. On January 5, 2012, this Court issued a Decision holding that the State was not meeting its obligation to amply provide for the education of all children within its borders. At the same time, the Court endorsed the Legislature's recently enacted reforms to remedy the deficiencies in the funding system and recognized that the Legislature is making progress on phasing in those reforms.

The Court retained jurisdiction over the case to "monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty." *McCleary v. State*, ___ Wn.2d. ___, 269 P.3d 227, 261 (2012) (slip op. at 77). The Court described the benefit of retaining jurisdiction as "fostering dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms." *Id.* To that end, the Court directed the parties to submit supplemental briefing to address the preferred method for retaining jurisdiction.

The Legislature responded promptly to the Court's invitation for cooperative dialogue by establishing a joint select committee consisting of legislators designated by the leadership of the Legislature for the specific purposes of facilitating communication with this Court concerning school funding.

In recognition of the mutual respect due a coequal branch of government, the Court's appreciation of the relationships and historical harmony among the branches in Washington, the critical nature of the constitutional obligation, and the attendant importance of economy and efficiency in its accomplishment and review, this Court should retain jurisdiction in the Supreme Court and decline any invitation to delegate jurisdiction to a subordinate court or a special master. The Court's undertaking to monitor the core functions of the coequal legislative branch requires nothing less.

II. LEGAL ISSUES – SEPARATION OF POWERS PRINCIPLES

This Court has long recognized that “the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.” *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The

doctrine of separation of powers divides power into three coequal branches of government: executive, legislative, and judicial, and each is separate from the other. *Carrick*, 125 Wn.2d at 134. Separation of powers creates a “clear division of functions among each branch of government,” so that “each branch of government has its own appropriate sphere of activity.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009).

While the doctrine of separation of powers ensures “that the fundamental functions of each branch remain inviolate,” it does not depend on the branches of government being hermetically sealed off from one another. *Carrick*, 125 Wn.2d at 135. The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government. *Id.* “Washington State has enjoyed a rich history of cooperation and harmony among its three branches of government. Each branch has given deference to the others and all three have acted interdependently in exercising authority.” *Hale*, 165 Wn.2d at 507.

Thus, while it is emphatically the province of the judicial branch to say what the law is, *McCleary*, 269 P.3d at 246 (slip op. at 41), the legislative power is conferred on the legislative branch. Const. art. II, § 1. This Court recognizes that the judicial branch violates the doctrine when it

assumes tasks that are more properly accomplished by other branches. *Hale*, 165 Wn.2d at 506. The Legislature's role is to set policy and to draft and enact laws: "[T]he drafting of a statute is a legislative, not a judicial, function." *Hale*, 165 Wn.2d at 506 (quoting *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001)). Similarly, the constitution allocates control over appropriations to the legislative branch. *In re Salary of the Juvenile Director*, 87 Wn.2d 232, 242-43, 552 P.2d 163 (1976) (citing Const. art. VIII, § 4).

Indeed, this Court repeatedly has recognized the delicate balancing inherent in fashioning a remedy where article IX is implicated. For example, in *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 520, 585 P.2d 71 (1978), the Court explained:

While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature.

The Court repeated the same admonition in *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005) (internal citations omitted):

This court will not micromanage education and will give great deference to the acts of the legislature. However, it is uniquely within the province of this court to interpret this state's constitution and laws.

In this case, the Court again acknowledged the "delicate balancing" that is necessary in this context:

The other reason that the remedy question proves elusive has to do with the delicate balancing of powers and responsibilities among coordinate branches of government. This court is appropriately sensitive to the legislature's role in reforming and funding education, and we must proceed cautiously.

McCleary, 269 P.3d at 258 (slip op. at 71). The Court explicitly recognized that article IX, section 1 cases present a "delicate exercise in constitutional interpretation" that "test[s] the limits of judicial restraint and discretion" in determining how to ensure that the State complies with its affirmative constitutional duty. *Id.* at 248 (slip op. at 46).

It is of great importance, then, that the Court's monitoring function in this case operates in a manner that respects the fundamental functions of each branch. In its Decision, the Court recognized that the reforms enacted by the Legislature are scheduled to be phased in over time, implicitly also recognizing that the Legislature can act only within the political process and must be given an opportunity to do so. *See McCleary*, 269 P.3d at 260-61 (slip op. at 74-77).

The Court also recognized that education policy is not static and, during the course of this litigation, the Legislature will continue to act each session. *Id.* at 258 (slip op. at 70-71). In this regard, educational strategies evolve, educational reform is often controversial, education decision-makers change, and the Legislature requires latitude to debate.

and refine education policy while reforms are being phased in. Indeed, the Legislature has a continuing obligation to “review the basic education program as the needs of students and the demands of society evolve.” *Id.* at 251 (slip op. at 54).

As this necessary process plays out, it is important that the Court’s monitoring role not become a tool to leverage the judiciary into making policy choices. The policy debates must be confined to the political branches to ensure the Court does not “cross[] the line from ensuring compliance with article IX, section 1 into dictating the precise means by which the State must discharge its duty.” *McCleary*, 269 P.3d at 259 (slip op. at 72). The legislative branch must be allowed to develop workable and effective legislation so that the Court appropriately exercises its judicial function—to review that legislation for compliance with the Washington Constitution.

This Court has acknowledged its ultimate responsibility to ensure the State’s compliance with article IX, section I and articulated the importance of achieving compliance. It also has recognized the delicacy of the constitutional review to be performed and the need for judicial restraint and discretion, because constitutional compliance will require “dialogue and cooperation between coordinate branches of state government” *McCleary*, 269 P.3d at 261 (slip op. at 77). For these

reasons, the State strongly believes the Supreme Court should retain jurisdiction itself to “monitor implementation of the reforms under ESHB 2261” and more generally, “the State’s compliance with its paramount duty.” *Id.* This Court is in the best position to safeguard the constitutional balance between the coordinate and coequal branches of state government. It well understands the appropriate discretion of the legislative branch with respect to the range of permissible legislative policy choices in meeting the obligation to amply fund basic education. And, if necessary, it is best situated to provide prompt, clear, and final judicial guidance with respect to actions necessary to comply with article IX, section 1.

III. PRACTICAL ISSUES – THE LEGISLATURE’S RESPONSE TO THE COURT’S DECISION ON THE MERITS

In its Decision, this Court suggested that retaining jurisdiction would foster dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms. *McCleary*, 269 P.3d at 261 (slip op. at 77). The Legislature responded swiftly to that suggestion by establishing a structure and process to facilitate communication between the Legislature and this Court. It passed House Concurrent Resolution 4410, 62d Leg., Reg. Sess. (Wash. 2012), (attached as Appendix A), in which the House and the Senate established a Joint Select Committee on Article IX Litigation,

to facilitate communication with the Washington state supreme court on school funding legislation and other actions of the legislature related to the duty set forth in Article IX of the Washington state Constitution; to advise and provide direction to the attorneys who represent the legislature before the Washington state supreme court with respect to the *McCleary* litigation; and to apprise legislators and the legislature on communications from the Washington state supreme court with respect to the *McCleary* litigation[.]

H.C.R. 4410 at 2. The Resolution specifies Committee membership and provides for expenditures and staffing. It was filed with the Secretary of State on March 1, 2012.

The Legislature thus has acted to establish the means to communicate directly with this Court as the State moves forward. This action, at the highest level of authority of the legislative branch (legislative action jointly passed by the House and Senate) reaches out to the highest level of authority of the judicial branch. Interaction at these levels will afford coordinate branches mutual respect appropriate to cooperative compliance with the State's paramount duty under article IX, section 1, and ensure that the participants fully appreciate the delicate relationship involved in this undertaking. It also will avoid delay, uncertainty, and unnecessary expenditure of scarce resources that would inhere in transferring jurisdiction to a superior court, a special master, or a

committee designated by the Court, whose actions ultimately would require approval by this Court.

IV. CONCLUSION – WHAT RETAINED JURISDICTION SHOULD LOOK LIKE IN THIS CASE

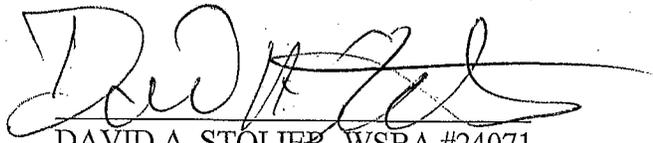
The Legislature, through its Joint Select Committee on Article IX Litigation (and legal counsel), will submit a report to the Washington Supreme Court summarizing legislative action taken toward implementing the reforms initiated by Laws of 2009, ch. 548 (ESHB 2261), and other legislative action intended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

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. 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.

RESPECTFULLY SUBMITTED this 12th day of March, 2012.

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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 *Supplemental Brief of Appellant* was hand-delivered for filing by Raelynn Poulin in the Washington State Supreme Court at the following address:

Washington State Supreme Court
Temple of Justice
415 12th Avenue SW
Olympia, WA 98504-0001

And that a copy of the preceding *Supplemental Brief of Appellant* was served on Respondents' counsel by U.S. Mail Postage Prepaid via Consolidated Mail Service at the address below:

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A courtesy copy was provided via email to Mr. Ahearne and Mr. Emch at: ahearne@foster.com; emchc@foster.com

DATED this 12th day of March, 2012, at Olympia, Washington.


RAELYNNPOULIN

Appendix A

CERTIFICATION OF ENROLLMENT
HOUSE CONCURRENT RESOLUTION 4410

62nd Legislature
2012 Regular Session

Adopted by the House February 15, 2012

Speaker of the House of Representatives

Adopted by the Senate February 27, 2012

President of the Senate

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is HOUSE CONCURRENT RESOLUTION 4410 as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

Secretary of State
State of Washington

HOUSE CONCURRENT RESOLUTION 4410

Passed Legislature - 2012 Regular Session

State of Washington 62nd Legislature 2012 Regular Session

By Representatives Sullivan, Kretz, Maxwell, and Santos

Read first time 02/14/12.

1 WHEREAS, Article IX, section 1 of the state Constitution declares
2 that "it is the paramount duty of the state to make ample provision for
3 the education of all children residing within its borders"; and

4 WHEREAS, In *Seattle School District No. 1 v. State* (1978) the
5 Washington state supreme court ruled that the mandatory duties of
6 Article IX, section 1 are imposed upon the state as a body politic, but
7 the means of implementing this duty are the province of the
8 legislature, as are the organization, administration, and operation of
9 the common schools; and

10 WHEREAS, On January 5, 2012, the Washington state supreme court
11 ruled in *McCleary v. State* that the state has not complied with its
12 Article IX duty to make ample provision for the education of all
13 children in Washington, but also that the "promising reform program" of
14 Engrossed Substitute House Bill No. 2261, chapter 548, Laws of 2009,
15 would remedy funding deficiencies, once fully implemented; and

16 WHEREAS, The *McCleary* court reaffirmed that "the legislature's
17 'uniquely constituted fact-finding and opinion gathering processes'
18 provide the best forum for addressing the difficult policy questions
19 inherent in forming the details of an education system" and that "while

1 the legislature must act pursuant to the constitutional mandate to
2 discharge its duty, the general authority to select the means of
3 discharging that duty should be left to the legislature."; and

4 WHEREAS, The *McCleary* court took the unprecedented step of
5 retaining jurisdiction over the case with the stated purpose of
6 "fostering dialogue and cooperation between coordinate branches of
7 state government in facilitating the constitutionally required
8 reforms"; and

9 WHEREAS, The Washington state Constitution enumerates many
10 responsibilities of government, but it declares only the Article IX
11 duty to make ample provision for the education of all Washington
12 children to be paramount; and

13 WHEREAS, Although the Washington state legislature, as one of three
14 coequal branches of state government, does not believe that judicial
15 oversight of its legislative prerogatives is necessary, it recognizes
16 that the Washington state supreme court has retained jurisdiction over
17 the *McCleary* case due to the unique circumstances presented by the
18 Article IX duty, and the legislature desires to establish a structure
19 and process by which the legislative and judicial branches may interact
20 formally and constructively to achieve the common purpose of making
21 ample provision for the education of all children residing in
22 Washington;

23 NOW, THEREFORE, BE IT RESOLVED, By the House of Representatives of
24 the state of Washington, the Senate concurring, That a joint select
25 committee on Article IX litigation be established to facilitate
26 communication with the Washington state supreme court on school funding
27 legislation and other actions of the legislature related to the duty
28 set forth in Article IX of the Washington state Constitution; to advise
29 and provide direction to the attorneys who represent the legislature
30 before the Washington state supreme court with respect to the *McCleary*
31 litigation; and to apprise legislators and the legislature on
32 communications from the Washington state supreme court with respect to
33 the *McCleary* litigation; and

34 BE IT FURTHER RESOLVED, That the committee consist of eight
35 members, with two members each appointed from the two largest caucuses
36 in the House of Representatives by the Speaker of the House of
37 Representatives, and two members each appointed from the two largest
38 caucuses in the Senate by the President of the Senate; and

1 BE IT FURTHER RESOLVED, That the committee be staffed by the House
2 of Representatives office of program research and Senate committee
3 services, and that the committee may incur expenses and retain
4 additional staff, counsel, and other consultants as reasonably
5 necessary to perform its duties and to represent the interests of the
6 legislature as a separate branch of the state government, subject to
7 the approval of the House of Representatives executive rules committee
8 and the Senate facilities and operations committee.

--- END ---