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SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

STATE OF WASHINGTON'S ANSWER TO PLAINTIFFS' MOTION FOR A TIMELY 2016 BRIEFING SCHEDULE

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I. INTRODUCTION

The State does not object to a reasonably expedited schedule that allows sufficient time to gather, process, and present to the Court the information and argument necessary for it to issue a fair and considered order. However, the briefing schedule proposed by the Plaintiffs is not calculated to bring the best information and briefing before the Court. Preparing a full and complete report and briefing that provide real data, explanation, and assistance to the Court is not possible under the truncated deadlines they propose. Their proposed schedule is a recipe for providing the Court with insufficient information and argument for its decision-making. The State provides an alternative schedule herein that allows time to accomplish the task, while still expediting review.

The Court should decline the Plaintiffs' request that it identify and threaten sanctions now, before the 2016 Legislature has even convened. Doing so likely would delay progress toward constitutional compliance rather than encourage it. Moreover, the sanctions advocated by the Plaintiffs are unworkable and constitutionally unsound. The proper time to determine whether further sanctions are needed is at the conclusion of the 2016 legislative session.

II. ARGUMENT

A. Neither the Court Nor the Legislature Would Be Well Served by Truncating the Briefing Schedule

1. Plaintiffs' arguments for a truncated briefing schedule rest on a series of unfounded premises

First, the Plaintiffs argue that the 2016 legislative session is the final opportunity for the State to achieve constitutional compliance by 2018. In fact, two more legislative sessions will occur before the beginning of the 2017-18 school year. And by constitutional design, the 2017 session will be a long, biennial budget-writing session.

Second, the Plaintiffs assume the 2016 Legislature will accomplish nothing. But the outcome of the legislative session cannot be assumed. The only certainty is that there is a constitutionally mandated process by which the Legislature enacts policy and budget legislation. The House and Senate are constitutionally established as deliberative bodies who can take action only by achieving a sufficient number of votes, with each vote independently cast by independently elected representatives of the people. Members are as diverse as the populace they represent and they must be responsive to all state obligations of all levels of importance. That constitutional process cannot be short-circuited or bypassed.

Moreover, there are many measures of progress toward ultimate constitutional compliance. The $4.8 billion dollars of new biennial

spending committed to basic education compared with 2012 is but one measure of progress. The issues to be addressed between now and 2018 are complicated, requiring difficult decisions about revenue and spending that affect all of the State's obligations—not just basic education. Even as to the funding of basic education, challenging problems remain to be resolved—such as how to accommodate local discretion in implementing the state's program and deploying state funding allocations while still ensuring accountability among the State's 295 school districts. The steps taken toward resolving these kinds of issues also represent progress.

Third, the Plaintiffs erroneously posit that haste is more important than providing the Court with a fair and accurate presentation of the facts and issues. Like the Court, the Legislature has schedules and deadlines it follows. Important legislation—including any adjustments to a $38 billion biennial operating budget—typically is not finalized until the closing days and hours of the legislative session, and it does not take effect without being presented to the Governor. Wash. Const. art. III, § 12. Consistent with the Court's July 2012 Order,[1] the Legislature communicates with the Court through its Article IX Committee. At the conclusion of the session, that Committee must meet, reach consensus, and direct staff in preparing the report to the Court. Typically, the Committee has scheduled one or

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[1] Order, *McCleary v. State*, No. 84362-7 (July 12, 2012).

more public meetings as part of its process. It is not reasonable to expect the Article IX Committee, legislative staff, and the State's attorneys to meet, discuss, gather information, write, format, and file an accurate, useful, and complete report and briefing mere hours after the session finishes.

The Plaintiffs do not explain how denying reasonable time to accomplish these tasks will make a positive difference in the Court's ability to evaluate the State's progress. Their sole conclusory rationale is that everyone will know what has been enacted the minute the session adjourns and therefore the State needs no time to prepare a report and brief. Pltf's Mot. at 8-9. By their logic, since legislating is a public process, the Plaintiffs will also know what has been done and therefore they need no time to prepare their critique of the State's progress. Under that logic, the Court also will know what has been enacted and therefore could skip the briefing altogether and simply issue an order the day after adjournment.

Of course, this is all absurd. The stakes are too high. For the Court to issue a well-considered order, it needs a full and complete report and briefing that addresses the actual circumstances, issues, and actions taken.

2. The Court should establish a 2016 briefing schedule that provides both parties sufficient time to prepare submissions that thoughtfully and adequately address the current circumstances

Plaintiffs give no weight to the gravity of the orders they seek from the Court. In issuing orders that are directed at compelling legislative action—a power reserved by the Constitution to the legislative branch—the Court is operating at the margin of its constitutional power, and there is no other avenue of appeal should the Court misstep. The constitutional stakes are too high—for the State, the Court, the Legislature, and the people we all serve—to rush to determine the appropriate next step. That determination should not be made until the circumstances and facts are established and the options fully briefed.

In 2012, the Court established a briefing schedule to govern reporting while the Court retained jurisdiction. It provides that the State's submissions are due at the conclusion of each legislative session from 2013 through 2018 inclusive, within 60 days after the final biennial or supplemental operating budget is signed by the Governor, and at such other times as the Court may order. The Plaintiffs seek to reduce that 60-day period to a matter of hours. Although the Plaintiffs' proposed schedule is unsupportable, the State is amenable to reasonably abbreviating the default schedule established in the Court's July 2012

Order. The State therefore can agree to shorten the default schedule by half and offers the following alternative schedule for the Legislature's report and the parties' briefing addressing that report:

- The Legislature's Report and State's Brief to be filed 30 days after the Governor signs the supplemental budget.
- Plaintiffs' Response to be filed 20 days after State's Brief.
- State's Reply to be filed 10 days after Response.

The Court then may schedule oral argument as it deems appropriate.

There is no good reason to require both a "post-adjournment filing" and a "post budget filing." Legislation does not become law until the Governor signs it, subject to any vetoes, or the constitutionally-specified time passes without the Governor's signature (five days during session, 20 days after adjournment). Wash. Const. art. III, § 12. Action by the Governor provides certainty as to the outcome of the session, and it necessarily must occur shortly after adjournment. Reporting and briefing to the Court therefore can be accomplished in one filing.

B. Plaintiffs' Proposed Sanctions Disregard Constitutional and Institutional Limits on the Court's Remedial Powers and Would Be Counterproductive and Harmful

The Plaintiffs ask the Court to decide *now* on the sanction it will impose for the 2016 Legislature's failure to produce a plan—before the Legislature has even convened and before the Court is informed as to the

facts and circumstances attending the Legislature's actions. The Court should not do so, for at least five reasons.

1. Plaintiffs disregard the basis for the Court's contempt finding

The Plaintiffs continue to treat the failure to produce a plan as if it is a constitutional failure. It is not. With regard to contempt sanctions, the issue is *not* whether the Legislature has failed to meet its constitutional duty under article IX, section 1—the Court already has decided that issue. The issue is *not* whether the State has achieved compliance by 2018—that deadline has not yet passed. The immediate issue, and the *only* basis for having found the State in contempt, is the failure to submit a "complete plan." The 2016 Legislature can remove that basis for contempt.

2. Plaintiffs disregard constitutional limits on the Court's contempt powers

In their attempt to expand contempt sanctions beyond their factual predicate—the failure to produce a plan—the Plaintiffs disregard constitutional limits on the Court's powers. There is no precedent in this state that authorizes the Court to expand its contempt power beyond the constitutional limits on judicial authority. Nevertheless, the Plaintiffs continue to ask the Court to use its contempt power to compel specific legislative actions that are constitutionally delegated to the Legislature. *See Brown v. Owens*, 165 Wn.2d 706, 718-19, 206 P.3d 310 (2009) (the

doctrine of separation of powers stands as a constitutional bar against one branch of government invading or undermining powers that are constitutionally delegated to another branch).

The Plaintiffs' second proposed sanction (suspending all "tax exemption statutes" (Pltf's Mot. at 13)) is especially problematic in this regard. In briefing filed in July 2014, the State explained the potential separation of powers problems with several sanctions suggested by Plaintiffs, including the ad hoc invalidation of taxing statutes that have not been challenged. Reaching that far afield to determine the taxing policies of Washington unquestionably invades the Legislature's constitutionally designated function.

Article VII, section 5 of the Washington Constitution vests the State's authority to impose taxes solely in the Legislature. *See Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 770, 131 P.3d 892 (2006) ("It is elementary that the power of taxation, subject to constitutional limitations, rests solely in the legislature.") (quoting *State ex rel. Tacoma Sch. Dist.* v. *Kelly*, 176 Wash. 689, 690, 30 P.2d 638 (1934)); *Ban-Mac, Inc. v. King County*, 69 Wn.2d 49, 51, 416 P.2d 694 (1966) ("[Article VII] places revenue and taxation matters under legislative control. We may construe but not legislate in tax matters."); *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 64, 211 P.2d 651 (1949) ("[T]he state's fiscal

policy has been by the constitution delegated to the legislature and not to this court."), *overruled on other grounds*, *State ex rel. Wash. State Finance Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963). If the Legislature falters, the constitutional remedy is to invalidate the effort and direct the Legislature to try again; it is not for the Court to step into the Legislature's shoes.

3. Plaintiffs' proposed sanction would harm school-children

The other sanction the Plaintiffs propose would effectively shut down schools. In briefing filed in July 2014, the State explained how this proposed sanction directly harms schoolchildren, especially those without the economic means to obtain alternative educational opportunities. It is based on the false premise that no education is preferable to the education Washington students currently receive.

4. Plaintiffs seek to invalidate statutes that are not identified, briefed, or shown to be unconstitutional

The scope of the sanctions proposed by the Plaintiffs is undefined and unknown. No one has identified to the Court which "tax exemption statutes" (Pltf's Mot. at 13) the Plaintiffs would have suspended. And the Plaintiffs do not identify which "K-12 school statutes" they believe "are not amply funded" (Pltf's Mot. at 12)—would they have all 72 chapters of Title 28A invalidated or just those they pick and choose?

Even if the specific statutes the Plaintiffs would have suspended or invalidated could be identified, they are not properly before the Court. The State is not aware of any decision of this Court that suspended or invalidated statutes that had not been specifically challenged and briefed by the parties.

Nor is the State aware of any decision of this Court that suspended or invalidated a statute for any reason other than its unconstitutionality—indeed, unconstitutionality is the only basis for the Court to invalidate a statute. *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 527–28, 520 P.2d 162 (1974) (a court has no substantive power to review and nullify acts of the Legislature apart from passing on their constitutionality).[2] Since statutes are presumed to be constitutional, the Plaintiffs bear the heavy burden of demonstrating their unconstitutionality beyond a reasonable doubt.[3] *School Dists.' Alliance for*

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[2] *See also City of Seattle v. Hill*, 72 Wn.2d 786, 435 P.2d 692 (1967), *cert. denied*, 393 U.S. 872 (1968):

> Is it proper for the courts to try to compel the adoption of legislation and the expenditure of public funds for the attainment of seemingly desirable ends by refusing to uphold existing legislation? Is this a legitimate use of the judicial power? We think not. . . . Obviously, the courts ought not invalidate legislation simply in the hope of compelling better legislation.

Id. at 800-01 (Hale, J., with two judges concurring and two concurring in result).

[3] To be precise, the State has found no case in which the Court has "suspended" a statute. Accordingly, it appears that the "suspension" the Plaintiffs seek is in reality a kind of "temporary invalidation" which, if it exists as a permissible remedy, is subject to the same constitutional presumptions and limitations as any other request to invalidate a statute.

Adequate Funding of Spec. Educ. v. State, 170 Wn.2d 599, 605-06, 244 P.3d 1 (2010); *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001). That burden cannot be met where specific statutes have not been identified or briefed.

5. Plaintiffs' proposed sanctions may not lead to more rapid constitutional compliance

The Plaintiffs wrongly assume that identifying heightened sanctions on the State now will lead to more rapid action by the Legislature and more certain compliance with article IX, section 1. In fact, the opposite may be true. Progress may slow because of legislative resistance to Court orders that are perceived—rightly or wrongly—to have invaded the Legislature's constitutional sphere.

The Legislature is not just another litigant before the Court. It is a co-equal branch of government with separate and specific constitutional obligations that may lie beyond the judicial power to compel. Imposing the proposed sanctions could have an unintended effect: shifting legislative focus away from solving the problem and toward the Court's order.[4]

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[4] *See*, *e.g.*, *Some Lawmakers Challenge Court Over Mccleary Sanctions*, SEATTLE TIMES (Aug. 22, 2015, 1:36 PM), http://www.seattletimes.com/seattle-news/some-lawmakers-challenge-court-over-sanctions/; Mike Faulk, *Local Senators Call for Push Against Supreme Court Over Education Funding*, YAKIMA HERALD (Aug. 21, 2015), http://www.yakimaherald.com/blogs/checks_and_balances/local-senators-call-for-push-against-supreme-court-over-education/article_89fdc46c-4827-11e5-8c70-934e1f3094a0.html.

Relatedly, the State believes the Court has misapprehended the substantial progress the Legislature has made since 2012. Plaintiffs' ongoing disdain for the progress made to date has only contributed to that situation. The Legislature is on track to fully fund all the commitments it made in SHB 2776 (Laws of 2010, ch. 236) by the deadlines it enacted in 2010. It is continuing to work to resolve the remaining issues necessary to achieve constitutional compliance. Plaintiffs wrongly assume only legislative inaction and failure. The Court should not do the same. The Court needs to assess the situation at the end of the 2016 session and determine at that time what action is appropriate going forward.

III. CONCLUSION

The Court should adopt the reasonable schedule proposed by the State for briefing following the 2016 legislative session:

- The Legislature's Report and State's Brief to be filed 30 days after the Governor signs the supplemental budget.
- Plaintiffs' Response to be filed 20 days after State's Brief.
- State's Reply to be filed 10 days after Response.

The Court should not identify or threaten any sanction at this time. It should wait until it is fully informed as to the facts and circumstances of actions taken by the 2016 Legislature, and it can be fully informed only if

it allows adequate time for preparation of the Legislature's Report and the parties' briefs.

RESPECTFULLY SUBMITTED this 18th day of December 2015.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the State of Washington's Answer to Amicus Brief of the Superintendent of Public Instruction, via electronic mail and U.S. Mail, postage paid, upon the following:

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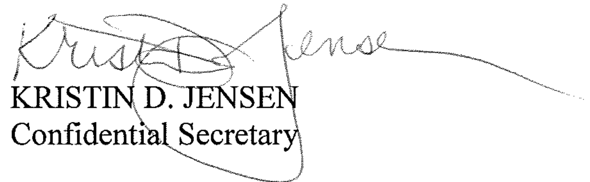
I certify under penalty of under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of December 2015, at Olympia, Washington.



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