No. 84362-7

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' 2016 POST-BUDGET FILING

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I. INTRODUCTION

Year after year of delay is not a big deal to adults running State government. But it is to a kid in our State's public schools.

Carter McCleary was 7 years old when his family filed this suit. He was in second grade at Chimacum Creek Elementary School. He's now a high school junior. And when the 2017 legislature convenes, he should be in the last semester of his senior year.[1]

Most high school juniors and seniors in Washington would have a crisp, two-word response to the State's claim that it has produced the **progress** and **plan** this Court has long ordered: *"Dude! Seriously?"*

Plaintiffs do not expect this Court to use the same words. But as the following pages explain, this Court should come to the same conclusion: *Despite the 2014 Contempt Order and 2015 Sanctions Order in this case, the State is still not complying with this Court's rulings.*

Court orders and constitutional rights either matter or they don't. If they do, this Court must effectively compel the State's full compliance with Article IX, section 1 by the firm 2017-2018 school year deadline.

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[1] *Carter, the youngest of the four children in the plaintiff McCleary and Venema families, was a 7 year old 2nd grader at Chimacum Creek Elementary School; his sister, Kelsey, was a 13 year old 7th grader (same as her mom when this Court issued its Seattle School District decision); Robbie Venema was a 12 year old 6th grader at Cathcart Elementary School; and his sister, Halie, was a high school freshman (akin to her mom when this Court issued its Seattle School District decision). McCleary Final Judgment at CP 2876-2877, ¶¶13-20.*

II. SUMMARY OF PLAINTIFFS' RESPONSE

Part III of this Response summarizes the long road since this Court's 1978 *Seattle School District* ruling.

One problem with kicking the can down the road every year is it puts the can in pretty poor shape. Which is what the State's repeated defiance of court orders has done to its K-12 schools. For example, stranding them without the classrooms and teachers needed to implement the full-day kindergarten and class size reduction components of the State's basic education program. Part IV summarizes the State's "**progress**" down the Article IX, section 1 ample funding road.

Another problem with continually kicking the can down the road is you eventually run out of road. Which is where the State now is. 2016 was the last legislative session that could produce a complete plan for phasing in the revenue and funding increases needed to reach full Article IX, section 1 compliance by the 2017-2018 school year. But instead of producing that plan, the State's taking a ride on a frequently used merry-go-round: delay another year by creating another task force. Part V addresses the State's 2016 ample funding "**plan**".

The court rulings in this case unequivocally declared that "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education", that "the State must

amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations", that "ample" means "considerably more than just adequate", and that the State is violating this constitutional mandate. Parts III.B & C.

Ever since 2012, this Court has therefore repeatedly ordered the State to (1) make steady ample funding **progress** each year, and (2) produce a complete year-by-year **plan** for phasing in full constitutional compliance by the firm 2017-2018 school year deadline. As in prior years, the State's claimed "compliance" this year falls short. Parts IV & V.

Plaintiffs believe constitutional rights are rights. Not empty platitudes. That court orders are orders. Not suggestions or mere "requests". And that in a constitutional democracy like ours, it is the judicial branch's duty to enforce constitutional rights when other branches find it politically expedient to violate those rights. Part VI.

Plaintiffs submit that the State's repeated lack of compliance has now left this Court with no meaningful option other than to firmly follow through with the vigilance it previously promised to uphold and enforce the constitutional right of every child in our State to an amply funded K-12 education. If this Court does too little, it might as well candidly

declare to Washington's public school children that their constitutional rights are just empty platitudes. And that court orders are just suggestions.

Such a declaration would terminate this case in a way that's ***easy*** for the judicial branch. ***Cheap*** for the treasury in the executive branch. And ***popular*** with politicians in the legislative branch. But condoning the State's ongoing constitutional violation is not ***right***. For the reasons outlined below, plaintiffs ask this Court to firmly uphold and enforce the constitutional right of every child in our State to an amply funded K-12 education.

III. MILEPOSTS ON THE ARTICLE IX, SECTION 1 ROAD

A. 1978 *Seattle School District* Decision & the State's Ensuing Decades of Study and Discussion.

Plaintiff Stephanie McCleary was 13 years old when this Court issued its *Seattle School District* decision directing the State to stop violating the ample funding mandate of Article IX, section 1. *Supra*, n.1.

The State enacted statutory promises (a/k/a "promising legislation"). For example, requiring the 1980 legislature to fully fund pupil transportation costs "at one hundred percent or as close thereto as reasonably possible" – but ensuing legislatures chose not to do that.[2]

[2] *This statutory promise and longstanding breach is discussed in Plaintiff/Respondents' September 27, 2010 Brief With Errata at p.46 & n.112.*

The State also created a long running series of task forces, councils, and commissions to study its education system and make recommendations for future legislatures to consider. For example:

SENATE BILL 3609
Chapter 33, Laws of 1982
TEMPORARY COMMITTEE ON EDUCATIONAL POLICIES, STRUCTURE AND MANAGEMENT

Create a committee including legislators to "investigate thoroughly" the State's public school system and give subsequent legislature findings, recommendations, etc. E.g., its January 1985 Paramount Duty Report (Trial Ex. 125).

EXECUTIVE ORDER 91-04
May 19, 1991
GOVERNOR'S COUNCIL ON EDUCATION REFORM AND FUNDING

Create a council including legislators to study the State's public school system and give subsequent legislature findings, recommendations, etc. E.g., its December 1992 Putting Children First Report (Trial Ex. 360).

SUBSTITUTE SENATE BILL 5953
Chapter 141, Laws of 1992
PERFORMANCE-BASED EDUCATION
Washington Commission On Student Learning

Create a State commission to study the State's public school system and give subsequent legislature findings, recommendations, etc. McCleary, 173 Wn.2d at 491-93, 494-95.

ENGROSSED SECOND SUBSTITUTE SENATE BILL 5441
Chapter 466, Laws of 2005
COMPREHENSIVE EDUCATION STUDY STEERING COMMITTEE

Create a committee including legislators to comprehensively study the State's public school system and give subsequent legislature findings, recommendations, etc. E.g., its November 2006 Washington Learns Report (Trial Ex. 16).

In the three decades after this Court's *Seattle School District* decision, the State accordingly produced over 100 K-12 education finance studies along with over 17 such studies by the legislature itself.[3]

B. 2007 *McCleary* Suit and its Article IX, Section 1 Rulings.

A generation passed. Stephanie McCleary's daughter, Kelsey, was 13 years old when plaintiffs filed this suit demanding the State finally stop violating the ample funding mandate of Article IX, section 1. *Supra*, n.1.

1. "basic education"

This case rejected the State's tautological argument that the State fully funds education because the word "education" in Article IX, section 1 means the basic education funding formulas the State funds.[4] This Court held the "education" mandated by Article IX, section 1 is the basic education required for a citizen to compete in today's economy and meaningfully participate in our State's democracy (a "basic education"), and that the substantive content of a basic education is defined by the knowledge and skills identified in the *Seattle School District* ruling (trial exhibit 2), the four numbered provisions of ESHB 1209 (now

[3] *McCleary Final Judgment at CP 2939, ¶¶260-261; McCleary v. State, 173 Wn.2d 477, 501, 269 P.3d 227 (2012) (noting the "at least 17 previous legislative studies").*

[4] *McCleary, 173 Wn.2d at 531-532.*

RCW 28A.150.210), and our State's Essential Academic Learning Requirements (EALRs).[5]

2. "basic education program"

The trial confirmed that for an "opportunity" to have any meaning, it must be a realistic, effective opportunity – not just a hypothetical or theoretical one.[6] This case accordingly recognized that while the State's program to deliver a basic education ("basic education program") is not constitutionally required to guarantee successful outcomes, it must provide children a realistic and effective opportunity to become equipped with the knowledge and skills encompassed in the above Article IX, section 1 "basic education".[7]

3. "all children"

This case rejected the State's suggestion that "all" can't really mean all because socioeconomic factors like poverty and race doom so

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[5] *McCleary, 173 Wn.2d at 523-524 & n.21.*

[6] *This background is discussed in Plaintiff/Respondents' September 27, **2010** Brief With Errata at p.32 & n.75 and p.35; Plaintiffs' **2015** Answer To Amicus Brief Of Superintendent Of Public Instruction at pp.3-4 & n.3; see also CP 2758:19-25.*

[7] *E.g., McCleary, 172 Wn.2d at 525 (quoting the testimony of the Chair of the Joint Task Force on Basic Education Finance that the State must provide an opportunity that is **realistic**); McCleary Final Judgment at CP 2910, ¶174 (quoting Seattle School District holding that "The **effective** teaching ... of these essential skills make up the minimum of the education that is constitutionally required") and at CP 2929, ¶231(a) ("When this ruling holds the State is not making ample provision for the equipping of all children with the knowledge, skills, or substantive 'education' discussed in this ruling, that holding also includes the court's determination that the State's provisions for education do not provide all children residing in our State with a **realistic** or **effective** opportunity to become equipped with that knowledge, skill, or substantive 'education' ").*

many kids in those segments of our society to failure.[8] The Final Judgment accordingly declared that

> the word "all" in Article IX, §1 means what it says.... It encompasses each and every child since each will be a member of, and participant in, this State's democracy, society, and economy. Article IX, §1 accordingly requires the Respondent State to amply provide for the education of every child residing in our State – not just those children who enjoy the advantage of being born into one of the subsets of our State's children who are more privileged, more politically popular, or more easy to teach.

McCleary Final Judgment at CP 2908, ¶168.

This Court unequivocally affirmed that "all" does mean all: "each and every child" in Washington; "No child is excluded."[9]

4. "ample provision"

This case rejected the State's argument that it was complying with Article IX, section 1 since some of the "experts" it hired to testify at trial said they thought the Washington schools they toured had adequate resources (without distinguishing between resources provided by State, federal, local levy, and private donation dollars). As a *factual* matter, the boots-on-the-ground in the State's public schools repeatedly confirmed that their TOTAL revenues (State, federal, local levy, and private donations combined) were not sufficient to provide all their students with

[8] *This background is discussed in Plaintiff/Respondents' September 27, 2010 Brief With Errata at pp.33-35.*

[9] *McCleary, 173 Wn.2d at 520 (underlines added).*

a realistic or effective opportunity to learn the knowledge and skills in the "basic education" mandated by Article IX, section 1.[10]

And as a *legal* matter, being "adequate" is constitutionally irrelevant. This Court affirmed the "ample" mandate in Article IX, section 1 requires "considerably more than just adequate."[11]

5. "paramount duty"

This case rejected the notion that the State is complying with Article IX, section 1 because "paramount duty" means important consideration – and spending billions of dollars on K-12 education proves the State has made K-12 education a very important consideration.

> The Final Judgment quoted the *Seattle School District* ruling:
>
> "Paramount" is not a mere synonym of "important." Rather, it means superior in rank above all others, chief, preeminent, supreme, and in fact dominant....
>
> When a thing is said to be paramount, it can only mean that it is more important than all other things concerned.

McCleary Final Judgment at CP 2906, ¶159 (quoting 90 Wn.2d at 511). And it expressly reiterated the significance of this constitutional mandate:

> During the trial, the State cross-examined many of the Petitioners' education witnesses as to whether they would prioritize education at the expense of other worthy causes and services, such as health

[10] *This background is noted in Plaintiff/Respondents' September 27, **2010** Brief With Errata at p.28 & n.66, pp.32-33 & nn.76-78 and Plaintiffs' **2015** Answer To Amicus Brief Of Superintendent Of Public Instruction at pp.1-2 & n.2; accord, McCleary Final Judgment at CP 2928-2929, ¶230.*

[11] *McCleary, 173 Wn.2d at 484 (underline added).*

> care, nutrition services, and transportation needs. But this is not the prerogative of these witnesses – or even of the Legislature – that decision has been mandated by our State Constitution.[12]

McCleary Final Judgment at CP 2906, ¶160.

This Court unequivocally affirmed that "duty" does mean duty and "paramount" does mean paramount: "the State must amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations."[13]

6. Positive and Paramount Right

This case also reiterated the legal corollary of the State's constitutional duty: "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education."[14]

And this Court left no doubt what being a ***positive*** constitutional right means. It unequivocally explained that unlike most other

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[12] *McCleary Final Judgment at CP 2906, ¶160.*

[13] ***McCleary**, 173 Wn.2d at 520 (underline added); **August 2015 Sanctions Order** at p.2 ("In McCleary, 173 Wn.2d at 520, we held that the State's 'paramount duty' under article IX, section 1 is of first and highest priority, requiring fulfillment before any other State program or operation"). This paramount duty mandate is no surprise to State budget officials, for as the Director of the State's Office of Financial Management ("OFM") testified at trial, K-12 funding must come first before State programs for other matters such as public safety, human services, and health care. RP 3561:2-15.*

[14] ***McCleary**, 173 Wn.2d at 483 (underline added); **August 2015 Sanctions Order** at p.2 ("In McCleary, 173 Wn.2d at 520, we held that the State's 'paramount duty' under article IX, section 1 ... not only obligates the State to act in amply providing for public education, it also confers upon the children of the state the right to be amply provided with an education. Seattle Sch. Dist. 1 v. State, 90 Wn.2d 476, 513...."); accord, McCleary **Final Judgment** at CP 2903, ¶148 (quoting Seattle School District ruling).*

constitutional rights which are framed in a negative sense to restrict government action, a positive constitutional right requires government action – which means this is not a typical case where the Court decides if the State is violating constitutional rights by doing too much, but rather a case where the Court must decide if the State is not doing enough.[15]

Over the past 40 years, this Court has also consistently emphasized the paramount importance of this positive right – repeatedly holding it is each Washington child's ***paramount*** right under our State Constitution.[16]

7. Civil Rights Foundation

The judicial findings in this case detail at length the critical civil rights purpose of an amply funded public education in our State's democracy.[17] And they reiterate the civil rights foundation underlying our constitution's ample funding mandate, recognizing, for example, that:

- "Education ... plays a critical civil rights role in promoting equality in our democracy. For example, amply provided, free public education operates as the great equalizer in our democracy, equipping citizens born into underprivileged segments of our society with the tools they need to compete on a level playing field with citizens born into wealth or privilege."
- "Education ... is the number one civil right of the 21st century."[18]

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[15] *McCleary, 173 Wn.2d at 518-519.*

[16] *Seattle School District, 90 Wn.2d at 510-513; McCleary, 173 Wn.2d at 514-522; McCleary Final Judgment at CP 2903, ¶¶147-149.*

[17] *McCleary Final Judgment at CP 2866-2971,¶¶118-143; see summaries in Plaintiffs' **2015** Post-Budget Filing at pp. 2-5 and Plaintiff/Respondents' September 27, **2010** Brief With Errata at pp.12-15.*

[18] *McCleary Final Judgment at CP 2898-2899, ¶¶132 & 134.*

As one of our State's civil rights leaders explained at trial, especially for minority and underprivileged kids in our State, "the only way you can be free is to be fully educated."[19]

C. State's Longstanding Civil Rights Violation.

This Court's January 2012 decision unanimously held the State is violating Article IX, section 1, and that this fact is so well known to State officials that "[w]e do not believe this conclusion comes as a surprise."[20]

Prior briefs have highlighted 40 years of Washington Governors acknowledging this constitutional violation and State officials' duty to promptly end that violation.[21] Prior briefs have also detailed the long chronology of delay as State officials repeatedly chose to instead put it off until later.[22]

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[19] *RP 2596:16-2598:2 (El Centro de la Raza's founder Roberto Maestas, emphasizing the 19th century revolutionary José Martí's observation about education being the prerequisite to freedom, and that "You need to have the fundamental skills to compete for a job, to contribute to society, and you have to know that the economics, political social processes, becoming involved in them to shape the future of the homeland of your community for your people and yourself.").*

[20] McCleary, *173 Wn.2d at 529-530 & 539; see also* ***January 2014 Order*** *at p.1 ("Two years ago, this court held unanimously that the State is not meeting its paramount duty"). The State has in this case expressly acknowledged this Court's finding that it has "failed to meet its paramount constitutional duty by 'consistently providing school districts with a level of resources that falls short of the actual costs of the basic education program.'" **State's 2014 filing** at attached Report, p.1 (quoting McCleary, 173 Wn.2d at 537).*

[21] *Plaintiffs' August 2014 Answer To The Amicus Brief Of Past Governors at p.2. The current governor joined his predecessors' choir after the January 2012 decision in this case, issuing a press release declaring: "Education is the paramount duty of our state government.... Gov. Inslee's education philosophy is: No excuses, no exceptions and excellence for all." http://www.governor.wa.gov.issues/education/default.aspx (pdf printed on 1/16/2013)*

[22] *Plaintiffs' 2015 Post-Budget Filing at pp. 6-9.*

D. Supreme Court Orders Issued To Ensure The State Stops Its Civil Rights Violation By The 2017-2018 School Year.

This Court's December 2012 Order told to each and every elected official taking the oath of office in January 2013, and 2014, and 2015, and 2016, that "Year 2018 remains a firm deadline for full constitutional compliance."[23] (This Court's repeated references to the "2017-2018 school year" confirm that "year 2018" deadline means the 2017-2018 school year – just like the "year 2018" fiscal year means the 2017-2018 fiscal year running from July 1, 2017 to June 30, 2018, or a high school's "year 2018" graduating class means its 2017-2018 school year seniors.)

Although the word "procrastination" does begin with the letter "p", that's not the "p" word mandated by the court orders in this case. Instead, to ensure the State stops its longstanding civil rights violation by the 2017-2018 school year deadline, this Court has since 2012 been ordering the State to (1) produce "steady", "real", and "measurable" ample funding **progress** each year, and (2) produce the State's complete ample funding phase-in **plan** to achieve full constitutional compliance by that firm deadline *Infra*, Parts IV.A & V.A. The following pages address whether the State's 2016 "**progress**" and "**plan**" complied with those court orders.

[23] *December 20, 2012 Order at p.2 (underline added).*

IV. STATE'S *"PROGRESS"* AS IT KICKS THE CAN DOWN THE ROAD

A. This Court's July 2012 Order Mandated Steady, Real, and Measurable Ample Funding Progress.

To break the State's longstanding habit of putting Article IX, section 1 compliance off until some later year, this Court ordered the State to submit a post-budget filing each year to show the budget signed that year made "steady", "real", and "measurable" **progress** towards full constitutional compliance by the 2017-2018 school year deadline. July 2012 Order at ¶¶1 & 4. And as prior briefing has pointed out:

> **steady** means "even development, movement, or action: not varying in quality, intensity, or direction", "UNIFORM", "CONTINUOUS", "consistent in performance or behavior: DEPENDABLE, RELIABLE".
>
> **real** means "AUTHENTIC", "GENUINE", "not illusory : INDUBITABLE, UNQUESTIONABLE".
>
> **measurable** means not merely "capable" of being measured, but in fact "great enough to be worth consideration: SIGNIFICANT".

Plaintiffs' 2012 Post-Budget Filing at p.16 & n.45, p.24 & nn.68-69.[24]

[24] *Cf. also, McCleary, 173 Wn.2d at 545 (dismissing 2012 Budget's illusory funding "increase" for K-3 class size reduction), at 505 and 506 (noting bold funding changes promised by ESHB 2261), at 545 (dismissing 2012 Budget's transportation funding increase because it "will barely make a dent" in State underfunding) (underline added);* ***December 2012 Order*** *at p.2 ("constitutional compliance will never be achieved by making modest funding restorations") (underline added).*

1. 2016 "Progress" Amply Funding Compensation to Attract and Retain Competent Personnel.

This Court has repeatedly emphasized that amply funding the compensation needed to attract and retain competent personnel is a significant part of the State's paramount constitutional duty.[25] And the State's 2016 filing confirms that one of the education funding reforms promised by ESHB 2261 was that "New funding formulas were to be

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[25] *E.g., McCleary, 173 Wn.2d* ***at 535-536*** *(the State has "consistently underfunded staff salaries and benefits" – providing "far short of the actual cost of recruiting and retaining competent teachers, administrators, and staff");* ***at 536n.29*** *(reiterating that this Court's January 2012 McCleary decision was "the second time in recent years that we have noted that state funding does not approach the true cost of paying salaries for administrators and other staff") (underline added);* ***at 493-494*** *(noting the conclusion of the State's 1995 fiscal report that the State provides "inadequate funding for administrative salaries");* ***at 508*** *(quoting QEC findings that "funding studies have already confirmed ... that our salary allocations are no longer consistent with market requirements");* ***at 532*** *(QEC findings that studies confirm State salary allocations are not consistent with market requirements);* ***January 2014 Order at pp.5-6*** *("Quality educators and administrators are the heart of Washington's education system. .... nothing could be more basic than adequate pay. The inescapable fact is that salaries for educators in Washington are no better now than when this case went to trial");* ***August 2015 Sanctions Order at p.3*** *(the January 9, 2014 Order "determined that the State's [2013 post-budget] report fell short on personnel costs. Stressing, as it had in its opinion in McCleary, that quality educators and administrators are the heart of Washington's education system, the court noted that the latest report 'skim[med] over the fact that state funding of educator and administrative staff salaries remains constitutionally inadequate.' ") &* ***at p.6*** *("As this court discussed in McCleary, a major component of the State's deficiency in meeting its constitutional obligation is its consistent underfunding of the actual cost of recruiting and retaining competent teachers, administrators, and staff.... The court specifically identified this area in its January 2014 order as one in which the State continues to fall short, finding it an 'inescapable fact' that 'salaries for educators in Washington are no better now than when this case went to trial.' "); accord,* ***State's 2016 filing*** *at 21:11-14 (acknowledging that a "major task remaining for the Legislature to finish complying with the Court's 2012 decision is to establish a compensation system that is fully funded by the State"); See generally, Plaintiffs'* ***2012*** *Post-Budget Filing at pp.22-23 & 27-28; Plaintiffs'* ***2013*** *Post-Budget Filing at pp.17-21; Plaintiffs'* ***2014*** *Post Budget Filing at pp.12-15; Plaintiffs'* ***2015*** *Post-Budget Filing at pp.25-32.*

implemented as their technical details were established by a technical working group". State's 2016 Post Budget Filing at p.4.

The ESHB 2261 technical working group issued its Final Report on compensation in June 2012.[26] It determined the salaries needed to attract and retain competent K-12 personnel required an over $2.9 billion/year funding increase above the annual Cost Of Living Adjustments (COLAs) mandated by Initiative 732 (which now compute to about 15.4%[27]), and it stressed that "immediate implementation" is needed "in order to attract and retain the highest quality educators to Washington schools through full funding of competitive salaries."[28]

This Court's August 2015 Sanctions Order reiterated that even though ESHB 2261 had recognized that attracting and retaining quality educators requires more money, and had charged the above technical working group with determining the compensation funding increases needed, the State still had "no plan for achieving a sustained, fully state-funded system that will attract and retain the educators necessary to actually deliver a quality education."[29] This Court also emphasized at

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[26] *This Final Report is discussed Plaintiffs' **2015** Post-Budget Filing at p.26; Plaintiffs' **2013** Post-Budget Filing at pp.18-19 & n.55.*

[27] *Plaintiffs' **2015** Post-Budget Filing at pp.28-29.*

[28] *E.g., Plaintiffs' **2015** Post-Budget Filing at p.26; Plaintiffs' **2013** Post-Budget Filing at pp.18-19 & n.55.*

[29] *August 2015 Sanctions Order at pp.6-7.*

least one concrete consequence – the looming shortage of 4,000 teachers for the full-day kindergarten and K-3 class size reduction components of the State's basic education program.[30]

The State responds that its 2016 legislature "considered multiple options" relating to compensation funding, and the options it chose were to (1) "provide $7 million to address teacher recruitment and retention" and (2) maintain the upcoming school year's temporary 4.8% COLA enacted by the prior 2015 legislature.[31]

Providing $7 million (compared to over $2.9 billion) and a temporary 4.8% COLA (compared to an accumulated 15.4%) is something. But "steady", "real", and "measurable" progress it is not.

School districts' continuing inability to pay the compensation needed to attract and retain needed personnel has left them with a substantial shortage of the people required to deliver a quality education. The 2016 legislature's compensation funding "progress" did nothing meaningful to solve that shortage by the 2017-2018 school year. Plaintiffs submit that's not the annual **progress** mandated by this Court.

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[30] *August 2015 Sanctions Order at p.6.*

[31] *State's 2016 Report at 13:6-8, 13:10-18, 6:1-2 and Legislature's 2016 Report at p.3, 4th bullet. Over a third of the 4.8% COLA cited by the State is just a temporary one-time increase for only the upcoming school year. ESSB 6052, §504(1) (1.8% of the 4.8% "expires August 31, 2017").*

2. 2016 "Progress" Amply Funding Full Implementation of Class Size Reduction and Full-Day Kindergarten.

This Court's January 2012 decision reiterated that amply funding full-day kindergarten and K-3 class size reduction by the 2017-2018 school year are significant components of the State's paramount constitutional duty.[32] The State's 2016 filing acknowledges the 2017-2018 school year deadline for these two components.[33]

Carefully worded assertions in the State's 2016 filing **imply** these two components are fully funded.[34] But what the State's assertions actually **mean** is State *funding formulas* will be fully funded.

And that's an important distinction – for the court rulings in this case establish the State cannot claim a component of basic education is "fully funded" if its *funding formula* only provides a part of its school districts' actual cost to provide that component.[35] As the State

[32] *McCleary, 173 Wn.2d at 506, 510, & 526 n.22.*

[33] *State's 2016 filing at 5:12-14 (3rd bullet), 18:5-7, and 5:15-19 (4th bullet) (SHB 2776 requires "Full statewide implementation of voluntary all-day kindergarten ... to be completed by the 2017-18 school year", and likewise requires the legislature "to allocate funding sufficient to reach an average class size of 17 students in K-3 classes by 2018").*

[34] *E.g., Legislature's 2016 Report at p.3, 1st bullet ("Full statewide funding for full-day kindergarten is fully implemented in the 2016-17 school year") and State's 2016 Post-Budget Filing at 18:9-19:2 ("the Legislature's funding schedule achieves an average class size of 17 students by the 2017-18 school year"); accord, State's 2016 Post-Budget Filing at 15:1-5 (stating "all-day kindergarten, and K-3 class size reduction ... has been fully funded or is on schedule to be fully funded by 2018. The schedule enacted in SHB 2776 has been followed and met."), 18:1-4 ("The Legislature fully funded all day kindergarten for the 2016-17 school year"); accord also Legislature's 2016 Report pp.11-12 ("the state has fully funded...all-day kindergarten"), p.15 ("All-day kindergarten is fully implemented beginning with the 2016-17 school year").*

[35] *E.g., **McCleary**, 173 Wn.2d at 532 ("We agree with the trial court's conclusion that the legislature's definition of full funding amounts to little more than a tautology. If the*

acknowledged in its 2014 filing, "the January 2014 Order emphasized that full funding must account for actual costs of the State program".[36] This actual cost requirement is significant to full-day kindergarten and K-3 class size reduction for several reasons. For example:

Classrooms. This Court's January 2014 Order noted that school districts lack the classrooms needed to implement the full-day kindergarten and K-3 class size components of the State's basic education program, and "stressed the need for adequate capital expenditures to ensure implementation of all-day kindergarten and early elementary class size reductions."[37]

The August 2015 Sanctions Order reiterated this capital cost requirement, emphasizing the State had failed to demonstrate "how it intends to pay for the facilities needed for all-day kindergarten and

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*State's funding formulas provide only a portion of what it actually costs a school to pay its teachers, get kids to school, and keep the lights on, then the legislature cannot maintain that it is fully funding basic education through its funding formulas."); **January 2014 Order** at p.4 ("We cautioned in 2012 that revised funding formulas cannot be used to declare 'full funding,' when the actual costs of meeting the education rights of Washington students remain unfunded.").*

[36] *State's **2014** Post-Budget Filing at attached Legislature's Report, p.52 (underline added).*

[37] ***January 2014 Order** at p.5 (noting with respect to full-day kindergarten and K-3 class size reduction that OSPI's 2013 Facilities Capacity Report found that "school districts are strapped for the physical space to meet these goals. Make no mistake, ... the State must account for the actual cost to schools of providing these components of basic education."); **August 2015 Sanctions Order** at p.3 (the court's January 9, 2014 Order "stressed the need for adequate capital expenditures to ensure implementation of all-day kindergarten and early elementary class size reductions") (underline added).*

reduced class sizes. As this Court emphasized in its January 2014 Order, the State needs to account for the actual cost to schools of providing all-day kindergarten and smaller K-3 class sizes. It has not done so."[38]

The State still has not done so. The State's 2016 filing notes $240 million in funding (compared to the $2 billion required to build the approximately 5,698 classrooms needed to implement full-day kindergarten and K-3 class size reduction by the 2017-2018 school year).[39] That partial funding is not "full funding".

New Teacher Shortage. This Court's August 2015 Sanctions Order noted the looming shortage of 4,000 **new** teachers needed to implement the full-day kindergarten and K-3 class size components of the State's basic education program, and that the State's 2015 filing said

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[38] *August 2015 Sanctions Order at p.6. The State's 2016 filing acknowledges the capital cost mandate in the Court's 2014 compliance order. State's 2016 Post-Budget Filing at 7:3 & 7:19-8:4.*

[39] *That $2 billion capital cost is explained in Plaintiffs' **2015** Post-Budget Filing at pp.34-35; Plaintiffs' **2013** Post-Budget Filing at pp.30-32. The 2015 legislature provided $200 million of that $2 billion, which the 2016 legislature increased by about $40 million. Legislature's 2016 Report at p.20 & p.7 (noting the 2015 legislature's $200 million appropriation and the 2016 legislature's $34.8 million increase for the School Construction Assistance Program (SCAP), a $34.5 million increase for the K-3 Class Size Reduction Grant Program, and $5.5 million for K-3 portable trailer classrooms). SCAP funding, however, is not directed to all-day kindergarten or K-3 class size reduction since it's for general facility planning, new construction, and modernizations that can also relate to the upcoming grade 4-12 class size reductions under the temporarily suspended Initiative 1351, aging or needed school facilities at all grade levels, obsolescence, lead pipe and other health dangers, etc.. The State's implication at one point that its "$611 million" of SCAP funding is for the full-day kindergarten or K-3 class size components of its basic education program is thus misleading at best. In short: the State's 2016 filing shows $240 million ($200 million + $34.5 million+ $5.5 million).*

nothing about how that shortfall was going to be made up or funded.[40] The State's 2016 filing did no better. That's not "full funding".

Existing Teacher Retention. The State's 2016 filing shows no meaningful progress towards providing the compensation funding increases needed to cover the actual cost of retaining and paying **existing** teachers for the full-day kindergarten and K-3 class size reduction components of the State's basic education program.[41] Partially funding the actual compensation cost of existing teachers is not "full funding".

Class Size & Full-Day Kindergarten Conclusion. This Court's August 2015 Sanctions Order noted that while the State had made some progress in some of the above areas, "there is far to go", that the State is not on course to meet the upcoming deadline, and that the State's 2015 filing offered little "other than the promise that it will take up the matter in the 2017-19 biennial budget."[42] The same applies to the State's 2016 filing. That's not the annual **progress** this Court ordered.

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[40] *August 2015 Sanctions Order at p.6.*

[41] *Indeed, the State's filing acknowledges its compensation allocation funding is now going backwards by reducing that funding for districts that lack the wealth to build classrooms to achieve the K-3 class size component of the State's basic education program (Legislature's 2016 Report at p.16) – which State budget documents confirm the State used to decrease State funding in the 2016 budget by $17 million. Senate 2016 Supplemental Operating Budget Overview at p.2. http://leg.wa.gov/Senate/Committees/WM/Documents/Budget%20docs/2016/2376%20-%20Operating/Highlights_3-28-16_website.pdf.*

[42] *August 2015 Sanctions Order at p.5.*

3. 2016 "Progress" Amply Funding The Actual Cost of Pupil Transportation and MSOCs.

This Court's January 2012 decision reiterated that amply funding pupil transportation and MSOCs (Materials, Supplies, and Operating Costs) are significant components of the State's paramount constitutional duty.[43] The State's 2016 filing accordingly acknowledges that SHB 2776 required full funding of pupil transportation to "be fully implemented by the 2013-15 biennium", and that "SHB 2776 required the Legislature to achieve full funding for MSOC by the 2015-16 school year."[44]

The State's 2016 filing repeatedly **says** pupil transportation and MSOCs are fully funded.[45] But it also acknowledges that what it instead **means** is the State's *funding formulas* for pupil transportation and MSOCs are fully funded.[46]

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[43] *McCleary, 173 Wn.2d at 533 & 535n.27; see also at 489-490, 496.*

[44] *State's 2016 Post-Budget Filing at 5:4-7 (1st bullet) and 17:11-15.*

[45] *Legislature's 2016 Report at pp.11-12 ("the state has fully funded...**pupil transportation**, the opportunity for 24 credits for high school graduation, **MSOC**, and all-day kindergarten"); State's 2016 filing at 15:1-5 ("the elements of SHB 2776 (**transportation**, **MSOC**, all-day kindergarten, and K-3 class size reduction) has been fully funded or is on schedule to be fully funded by 2018"), 17:11-15 ("The 2015-17 biennial budget fully funded **MSOC** for the 2015-16 and 2016-17 school years").*

[46] *Legislature's 2016 Report at p.3, 3rd bullet ("The fully funded pupil transportation **formula** is maintained"), p.18 ("The pupil transportation **funding formula** was fully implemented"); State's 2016 filing at 2, 1st bullet ("The enhanced statutory **formula** for materials, supplies, and operating costs (MSOC) is fully funded"), 7:9-14 ("Legislature had fully implemented the new student transportation **formula** in SHB 2776"), 17:7-10 ("The 2013-15 biennial budget provided full funding for the actual expected costs of transportation under the new **formula**. The 2015-17 biennial budget carried forward that full funding").*

The State's new funding formulas for these two components are a meaningful improvement. And the State's tautological contention that it funds the funding formulas it funds is correct. But as noted earlier, this Court has held the State cannot declare "full funding" when its funding formula leaves part of a district's actual cost unfunded. (*Supra*, pp.18-19 & nn.35-36.) Thus, for example: "If the State's funding formulas provide only a portion of what it actually costs a school to ... get kids to school, and keep the lights on, then the legislature cannot maintain that it is fully funding basic education through its funding formulas." *McCleary*, 173 Wn.2d at 532.

And as the State knows from prior post-budget filings, this actual cost requirement is significant to pupil transportation and MSOCs for several reasons. For example:

Outdated Basis. The State's transportation formula does not fund a district's actual transportation costs this year. Instead, it caps State funding at the lower of two numbers from last year: (a) that particular district's cost last year, or (b) the statewide average cost last year.[47] The

[47] *Plaintiffs' **2013** Post-Budget Filing at pp.22-26 & nn.73 & 74; Plaintiffs' **2014** Post-Budget Filing at pp.15-19; Plaintiffs' **2015** Post-Budget Filing at pp.40-43.*

State's own analysis confirmed over 3 years ago that funding this formula does not fund actual transportation costs.[48] That's not "full funding".

Outdated Snapshot. The State's own documents acknowledge the MSOC formula's funding levels are based on a snapshot of what districts purchased with the unconstitutional underfunding they had in the 2007-2008 school year.[49] This Court has reiterated that when an earlier snapshot does not correlate to constitutionally ample funding today, fully funding that outdated snapshot is not "full funding".[50]

Statewide Averages. The MSOC and transportation formulas' reliance on statewide averages does not account for obvious actual cost differences around the State. For example, a statewide average does not account for the obvious fact that snow removal and winter heating costs are significantly higher in colder Eastern Washington than milder Western Washington.[51] Blindly applying a statewide average is not "full funding".

Pupil Transporation & MSOCs Conclusion. Unlike the previously discussed compensation, full-day kindergarten, and K-3 class

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[48] *Plaintiffs' **2013** Post-Budget Filing at p.24 & n.75. Plaintiffs' **2015** Post-Budget Filing at p.41.*

[49] *Plaintiffs' **2015** Post-Budget Filing at pp.43-44; Plaintiffs' **2013** Post-Budget Filing at pp.27-28 & n.82.*

[50] *E.g., **McCleary**, 173 Wn.2d at 530 & 532 ("even assuming the funding formulas represented the actual costs of the basic education program when the legislature adopted them ... the same is simply not true today"); **January 2014 Order** at p.4 ("We cautioned in 2012 that revised funding formulas cannot be used to declare 'full funding,' when the actual costs of meeting the education rights of Washington students remain unfunded").*

[51] *Plaintiffs' **2015** Post-Budget Filing at p.44 & n.117.*

size components of the State's basic education program, the pupil transportation and MSOC components are much better funded than before the court rulings in this case. But the State has not yet finished progressing to cross the fully funded finish line for the actual cost of those two components. Standing still in 2016 is not the annual **progress** mandated by this Court.

4. 2016 "Progress" Amply Funding The Actual Cost Of Implementing The State's Highly Capable Program.

This Court's January 2012 decision held that amply funding the highly capable student program added by ESHB 2261 is another component of the State's paramount constitutional duty.[52] And prior filings have repeatedly pointed out the State's failure to fund the costs imposed by this program.[53]

The State's 2016 filing did not claim the State made any progress amply funding this component of its basic education program. That's because there was none. "None" is not the **progress** this Court ordered.

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[52] *McCleary, 173 Wn.2d at 506 and 526 n.22.*

[53] *Plaintiffs' **2013** Post-Budget Filing at pp.37-38; Plaintiffs' **2014** Post-Budget Filing at pp.23-24; Plaintiffs' **2014** Answer To Defendant's Responses To The Court's Show Cause Order With Errata at pp.25-26, n.34; Plaintiffs' **2015** Post-Budget Filing at p.45.*

B. Proclaiming An Illusory $4.8 Billion "Increase" In Prior Years Does Not Cover Up The Lack Of Mandated Progress.

Since the State's 2016 legislature did not make any meaningful ample funding progress, the State's 2016 filing repeatedly suggests this Court should overlook that failure because prior legislatures "made significant cumulative progress" through "an increase in state funding of $4.8 billion (36 percent)" in the four legislative sessions after this Court's 2012 decision.[54]

State budget documents confirm, however, that $4.8 billion is significantly **less** of an increase than if each legislature had simply maintained the status quo from the prior biennium budget and policy ("maintenance level funding").[55] The $4.8 billion "increase" repeatedly cited by the State therefore is not a net amount prior legislatures added to comply with the court rulings in this case. Instead, it's **less** than if each legislature had simply enacted that biennium's status quo maintenance funding level.

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[54] *E.g., State's 2016 Post-Budget Filing at 1:13-15, 16:24-17:2; Legislature's 2016 Report at p.4 & p.11.*

[55] *The actual 2011-13 biennium budget amount when this Court issued its January 2012 decision was $13.8 billion. 2011-13 Legislative Budget Notes at p.269. http://leap.leg.wa.gov/leap/budget/lbns/2011lbn.pdf. The actual 2015-17 biennium amount cited by the State's filing is $18.2 billion. That's an over $4 billion "increase". But the maintenance level amount for that 2015-17 biennium budget was $19.5 billion. See Plaintiffs' **2015** Post-Budget Filing at pp.19-20. $18.2 billion is thus a $1.3 billion decrease from the 2015-17 biennium's maintenance level funding amount.*

Repeatedly saying "$4.8 billion increase" does conjure up an attractive illusion of substantial funding progress by the State. But an illusion of such progress is precisely what that proclaimed "increase" is.[56]

C. Progress Conclusion.

The February 2010 Final Judgment against the State was entered over six years ago. The Supreme Court's January 2012 decision unanimously affirming the Final Judgment's declaratory rulings was entered over four years ago. But as a review of this suit's ensuing 2012, 2013, 2014, and 2015 post-budget filings confirm, the State's primary response before this year's 2016 legislative session had been to kick most of the Article IX, section 1 cans down the road for another year.

The State's 2016 post-budget response is more of the same. Plaintiffs respectfully submit that continued procrastination is not the "steady", "real", and "measurable" **progress** ordered by this Court.

V. STATE'S COMPLETE *"PLAN"* FOR NEXT YEAR'S END OF THE ROAD

A. This Court Ordered A Complete Year-By-Year Phase-In Plan.

To ensure that State officials did not make full constitutional compliance impractical by putting too much off until the final year before

[56] *Cf. the 1980 Brewster, Washington Quad-City Herald article credited with the lipstick-on-a-pig saying: "You can clean up a pig, put a ribbon on its tail, spray it with perfume, but it is still a pig." http://blog.seattlepi.com/thebigblog/2008/09/10/lipstick-on-a-pig-finds-origin-in-tiny-state-newspaper/*

the 2017-2018 school year deadline, this Court has for the past four years been repeatedly ordering the State to produce the State's complete year-by-year plan for phasing in the State's ample funding of each component of its basic education program,[57] as well as demonstrate how the State's budget each year meets that phase-in plan.[58]

The State has continually violated these court orders.[59]

For example, this Court reiterated before the 2014 legislature commenced that

> it is hereby ordered: the State shall submit, no later than April 30, 2014, a complete **plan** for fully implementing its program of basic education for each school year between now and the 2017-18 school year. This **plan** .... must include a phase-in schedule for fully funding each of the components of basic education. ... it is clear that the pace of progress must quicken.

January 9, 2014 Order at p.8 (emphasis added). But the State's **2014** legislature violated that court order – causing the State to be ruled in contempt of court.

Then before the 2015 legislature adjourned, this Court again reiterated that the **plan** submitted by the State

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[57] ***December 2012 Order*** *at pp.2-3;* ***January 2014 Order*** *at p.8;* ***July 2014 Show Cause Order*** *at pp.2-3;* ***September 2014 Contempt Order*** *at pp.1-4;* ***August 2015 Sanctions Order*** *at pp. 1-3.*

[58] ***December 2012 Order*** *at pp.2-3;* ***September 2014 Contempt Order*** *at p.1;* ***August 2015 Sanctions Order*** *at p.2.*

[59] ***August 2015 Sanctions Order*** *at pp.1, 5, & 8;* ***September 2014 Contempt Order*** *at pp.2-4.*

(a) must be a complete plan for fully implementing the State's program of basic education for each school year between now and the 2017-2018 school year, addressing each of the areas of K-12 education within ESHB 2261 and SHB 2776; and

(b) must include a phase-in schedule for fully funding each of the components of basic education.

June 8, 2015 Order at pp.2-3 (underlines added). But the State's **2015** legislature violated that court order as well – resulting in the currently accruing contempt fine in the liquidated sum of $100,000/day (thus bearing statutory interest), payable each and every day the State fails to produce the above court ordered **plan**.

The State's 2016 filing acknowledges that the State understood,[60] and repeatedly violated,[61] these court orders. The following pages accordingly address whether the State's **2016** legislature produced the court-ordered complete year-by-year **plan** for phasing in the State's ample funding of each component of its basic education program.

[60] *State's 2016 Post-Budget Filing at 6:11-7:3, 8:9-12, 10:1-6, 10:12 & 10:18-21.*
[61] *State's 2016 Post-Budget Filing at 8:17-9:3, 9:14-17, 9:18-21.*

B. Creating Another Task Force Isn't A Complete Year-By-Year Phase-In Plan.

> ***Virginia, for example, has set up a commission to 'study' the question and is expected to claim this [satisfies the Supreme Court's order].***
>
> Aiken Standard & Review*, June 1, 1955*
> *[front page story on southern States' resistance to the Brown v. Board of Education order requiring a "prompt and reasonable start" to ending racial segregation in public schools]*

The State's 2016 response to the past four years of Supreme Court Orders in this case was to create a task force to study the ample funding issue and make recommendations for the 2017 legislature to consider. The State repeatedly asserts the bill creating this task force (E2SSB 6195) "contains the plan requested by this Court."[62]

Repeatedly asserting an inaccurate statement makes that statement familiar to the ear. Which is part of why a propaganda artist in the last century maintained that if the government asserts a falsehood and keeps repeating it, people will eventually come to believe it's true.[63]

But repeated repetition does not actually make the inaccurate statement true.

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[62] *Legislature's 2016 Report at p.28, p.5, & p.6; State's 2016 Post-Budget Filing at 1:2-4, 1:9-10, 2:13-14, 2:13-17, 1:10-11, 10:7, 10:11, 11:1-2, 11:3-4, 15:20-21, 21:18-19, 22:1, 22:19-21.*

[63] *http://www.holocaustresearchproject.org/holoprelude/goebbels.html ("If you tell a lie big enough and keep repeating it, people will eventually come to believe it." Joseph Goebbels, 1897-1945).*

The State's 2016 filing identified the three elements of its E2SSB 6195 "plan":

> (1) create a task force with a January 9, 2017 deadline to submit recommendations for the 2017 legislature to consider;[64]
>
> (2) tell the 2017 legislature it "must" enact reforms;[65] and
>
> (3) say the **2016** legislature is "fully committed" to having the **2017** legislature comply with the court orders in this case.[66]

That's not a "plan" that complies with the court orders in this case. This Court specifically ORDERED (not "requested") the State to produce a **plan** that is a complete plan for fully implementing each component of the State's basic education program in each year leading up to the 2017-2018 school year deadline, with a detailed phase-in schedule for fully funding each of those components by that deadline. *Supra*, Part V.A. One cannot seriously call E2SSB 6195 that court-ordered **plan**.

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[64] *State's 2016 Post-Budget Filing at 11:15-17, 12:7-10, 14:3-4; Legislature's 2016 Report at p.9, pp.10-11, p.21.*

[65] *Legislature's 2016 Report at p.6 & p.28.*

[66] *State's 2016 Post-Budget Filing at 2:17-19, 16:3-4, 16:8-9, 16:9-11, 16:18-19, 22:10-11; Legislature's 2016 Report at p.9.*

C. The State Has No Legitimate Excuse For Its 2016 Noncompliance.

1. The State Knew It Did Not Have Another Year To Delay.

> ***There is no doubt that the utter lack of urgency and awareness about this issue starts with the people at the top.... These individuals failed to...act with all due urgency to immediately fix the problem.***
>
> *Governor Jay Inslee's March 7, 2016 press release (on Department of Corrections sentencing errors)*[67]

The "plan" offered by the State's 2016 filing is basically for this Court to wait until 2017 to see what the State comes up with.

But there's already been too much delay:

> [This Court] has repeatedly emphasized that the State is engaged in an ongoing violation of its constitutional duty to K-12 children. The State, moreover, has known for decades that its funding of public education is constitutionally inadequate. *See Seattle Sch. Dist. No. 1 v. State,* 90 Wn.2d 476, 585 P.2d 71 (1978). This proceeding is therefore the culmination of a long series of events, not merely the result of a single violation."

September 2014 Contempt Order at pp.3-4.[68] And this Court has been reiterating since 2012 that delay is not an acceptable option:

> Given the scale of the task at hand, 2018 is only a moment away – and by the time the 2013 legislature convenes a full year will have passed since the court issued its opinion in this case. .... We cannot wait until "graduation" in 2018 to determine if the State has met minimum constitutional standards. IT IS SO ORDERED.

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[67] *http://www.governor.wa.gov/news-media/inslee-continues-accountability-actions-doc-sentencing-error-announces-new-acting.*

[68] *Cf.* ***July 2014 Show Cause Order*** *at pp.2-3;* ***September 2014 Contempt Order*** *at pp.1-2;* ***August 2015 Sanctions Order*** *at p.8.*

December 2012 Order at p.3.[69] The court orders in this case have repeatedly reiterated to the State that "the need for immediate action could not be more apparent."[70]

The State's ongoing disregard of the court orders in this case dating back to 2012, and now the State's 2016 punt to 2017, leave no doubt that the lack of urgency starts with the people at the top, and that those individuals failed to act with all due urgency to comply with the Supreme Court Orders in this case. Plaintiffs respectfully submit that punting to next year does not comply with the court orders in this case.

2. The State Did Not Need Another Year Of Delay Given Its Prior Insistence That No Additional Studies Are Necessary.

After plaintiffs filed this suit, the State created more task forces, etc. to study its K-12 education system and make recommendations for a future legislature to consider. For example:

ENGROSSED SECOND SUBSTITUTE SENATE BILL 5627
Chapter 399, §2, Laws of 2007
BASIC EDUCATION FUNDING
Joint Task Force on Basic Education Finance

Create joint task force including legislators to study the State's public school system, funding, revenue, etc., and give subsequent legislature findings, recommendations, etc. E.g., its January 2009 Final Report (Trial Ex. 124).

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[69] *See also* ***December 2012 Order*** *at pp.2-3;* ***January 2014 Order*** *at p.8;* ***July 2014 Show Cause Order*** *at pp.2-3;* ***September 2014 Contempt Order*** *at pp.1-4;* ***August 2015 Sanctions Order*** *at pp.1-3.*

[70] ***January 2014 Order*** *at p.8; accord* ***July 2014 Show Cause Order*** *at p.2.*

ENGROSSED SUBSTITUTE HOUSE BILL 2261
Chapter 548, **§112,** Laws of 2009
EDUCATION
Article IX technical working group

Create technical working group to study State's public school system, compensation, funding, revenue, etc., and give subsequent legislature findings, recommendations, etc. E.g., the June 2012 Final Report on compensation (http://www.k12.wa.us/Compensation/default.aspx).

ENGROSSED SUBSTITUTE HOUSE BILL 2261
Chapter 548, **§114,** Laws of 2009
EDUCATION
Quality Education Council

Create council including legislators to study State's public school system, funding, revenue, etc., and give subsequent legislature findings, recommendations, etc. E.g., its January 2010 Report To The Governor & Legislature (http://www.k12.wa.us/qec/pubdocs/QEC2010report.pdf).

HOUSE BILL 2824
Chapter 10, §2, Laws of 2012
EDUCATION FUNDING
Joint Task Force on Education Funding

Create joint task force including legislators to study State's public school system, funding, revenue, etc., and give subsequent legislature findings, recommendations, etc. E.g., the December 2012 JTFEF Final Report. (http://leg.wa.gov/JointCommittees/Archive/EFTF2012/Documents/JTFEF%20Final%20Report%20-%20combined%20(2).pdf).

The trial court's remedial order required the State to determine the actual cost of complying with Article IX, section 1 and how the State would fully fund that actual cost.[71]

In light of all the State's recent and ongoing task forces, however, the State appealed that remedial order, assuring this Court that

[71] *McCleary Final Judgment's remedial order at ¶2 (CP 2867).*

"No additional court-ordered studies are necessary."[72] This Court accepted the State's assurances and (over plaintiffs' objection) vacated the trial court's remedial order.[73]

The State's 2016 filing suggests this Court should nonetheless condone the State's continuing delay because it decided at the end of the road to create another task force to do an additional study:

ENGROSSED SECOND SUBSTITUTE SENATE BILL 6195
Chapter 3, §2, Laws of 2016
BASIC EDUCATION OBLIGATIONS – TASK FORCE
Education Funding Task Force

Create joint task force including legislators to study State's public school system, compensation, funding, revenue, etc., and give the next legislature findings, recommendations, etc. on the first day of its legislative session.

In light of all the State's prior task forces, studies, and reports, and the State's having previously secured a vacation of the February 2010 remedial order against it on the grounds that no additional studies are necessary, the State's 2016 "plan" to delay another year by creating another task force does not comply with the court orders in this case. Instead, it simply confirms what was said earlier: the State's decision-makers lack the sense of urgency needed to comply with the Supreme Court Orders in this case.

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[72] *August 2010 Brief Of Appellant (Corrected) at p.59; see, also, e.g., Plaintiffs' **2012** Post-Budget Filing at pp.6-8; Plaintiffs' **2013** Post-Budget Filing at pp.5-6; Plaintiffs' **2014** Post-Budget Filing at p.8.*

[73] McCleary, *173 Wn.2d at 541-546; see also Plaintiffs' **2012** Post-Budget Filing at pp.6-8; Plaintiffs' **2013** Post-Budget Filing at pp.5-6; Plaintiffs' **2014** Post-Budget Filing at p.8.*

3. Creating Another Task Force Isn't Even a Credible "Plan for a Plan".

Some defend E2SSB 6195 as at least being a "plan for a plan".

But it's not even that. It's at best a "plan for giving next year's legislature some recommendations for maybe getting around to doing something next year." Much like all the other previously discussed task forces and studies have been doing over the past several decades.

Moreover, with respect to task forces, the State's 2016 filing curtly dismisses the detailed report produced by the legislature's most recent Joint Task Force on Education Funding (JTFEF) as being merely "an aspirational recommendation".[74] E2SSB 6195 is therefore more accurately described as a "plan for giving next year's legislature a merely aspirational recommendation for maybe getting around to doing something next year." Plaintiffs submit that's not the type of **plan** this Court has been ordering these past four years.

[74] *State's 2016 Post-Budget Filing at 7:17-19.*

4. Saying "But This Time We Mean It" Doesn't Transform E2SSB 6195 Into The Court-Ordered Plan.

[75]

The State previously assured this Court that "the State remains committed to ESHB 2261 and SHB 2776 and intends to fully fund its reforms, consistent with the reports of the QEC [Quality Education Council] and JTFEF [Joint Task Force on Education Funding]."[76] As noted earlier, the State's 2016 filing now dismisses such reports as merely "aspirational" – but says this Court should trust that the E2SSB 6195 report will be different because the 2016 legislature is "requiring" the 2017 legislature to comply, and the 2016 legislature is "committed" to having the 2017 legislature comply. *Supra*, p.31 & nn.65-66, p.36n.74.

Requirement. It's meaningless to say the 2016 legislature is "requiring" the 2017 legislature to enact reforms. As a legal matter, the State's prior filings have insisted that one legislature cannot "require" the next legislature to do anything. And as a practical matter, the State's legislature has repeatedly demonstrated in this case that its being legally required to do something does not mean it will actually do it – hence the

[75] https://s-media-cache-ak0.pinimg.com/736x/0e/f5/64/0ef5641e549259e22ec853a78353a6c1.jpg
[76] *January 2014 Order at pp.2-3.*

repeated violation of the court orders in this case, and the ongoing violation of Washington children's positive constitutional right to an amply funded education.

Commitment. It is similarly meaningless to say the **2016** legislature is "committed" to having the **2017** legislature comply with the court orders in this case. Although the State assures this Court that the 2016 legislature's "commitment is stated without equivocation" in E2SSB 6195, the 2016 legislature subsequently equivocated by providing for an extension of "at least one calendar year" if the 2017 legislature disregards that claimed commitment.[77] The State's assurance that the non-binding budget outlook "evidences the Legislature's commitment" likewise does nothing to actually "commit" next year's legislature to do what the State says this year's legislature is committed to having next year's legislature do.[78]

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[77] *State's 2016 Post-Budget Filing at 16:9. But see 2ESHB 2376, §515(2)(b) ("(1) The legislature confirms its obligation, as expressly recognized in [E2SSB 6195] to provide state funding in the 2017 legislative session for competitive compensation to recruit and retain competent common school staff and administrators....." "(2) ...the education funding task force established by [E2SSB 6195] shall by April 1, 2017, either: (a) Determine that the legislature will meet its obligation under subsection (1) of this section and that such legislative action will be completed by April 30, 2017; or (b) Introduce legislation that will extend current state levy policy for at least one calendar year, with the objective of enacting such legislation by April 30, 2017.").*

[78] *State's 2016 Post-Budget Filing at 19:8-9. With respect to evidence of "commitment", plaintiffs also note that the body charged with approving that outlook failed to approve motions regarding inclusion of McCleary related costs – meaning the outlook "approval" boasted by the State actually occurred by default rather than by*

The State has repeatedly assured this Court that its legislature is sincerely committed to next year's legislature taking the concrete action needed to comply with the *McCleary* rulings in this case. For example, the 2014 legislature's assurance that this Court should trust the 2015 legislature to "reach the grand agreement needed to meet the State's Article IX duty."[79] Or the State's 2014 assurances that "school funding is the number one issue on the [2015] legislature's agenda," that "education funding is the legislature's top priority," and thus the Court should trust the 2015 budget session "to develop and enact a plan for fully funding K-12 public education by 2018."[80] Or the State's assuring this Court at the 2014 contempt hearing that the 2015 legislature was going to focus on raising the State revenue needed to comply with the court orders in this case.[81]

But the State's prior assurances have been hollow.[82] As the August 2015 Sanctions Order concluded about the assurances given in the

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affirmative vote. Economic And Revenue Forecast Council Minutes at pp.2-3. http://www.erfc.wa.gov/forecasts/documents/ec20160601.pdf.

[79] ***July 2014 Show Cause Order*** *at pp.2-3. See also* ***January 2014 Order*** *at p.3 (noting the 2013 legislature's assurance that the legislature is "committed to ESHB 2261 and SHB 2776 and intends to fully fund its reforms, consistent with the reports of the QEC and JTFEF").*

[80] *September 2014 Contempt Order at pp.2&4.*

[81] *http://www.tvw.org/watch/?eventID=2014091020 (see September 3, 2014 oral argument video times 12:18-14:03, 28:31-29:27, 47:40-48:00).*

[82] *August 2015 Sanctions Order at p.8 ("Despite repeated opportunities to comply with the court's order to provide an implementation plan, the State has not [done so]").*

State's 2015 Post-Budget Filing: "We have, in other words, further promises, not concrete plans."[83] Plaintiffs submit that the 2016 legislature's enactment of a bill providing further promises about what next year's legislature will hopefully do is just more of the same. It is not the court-ordered complete **plan** for phasing in the ample funding of each component of the State's basic education program by the 2017-2018 school year deadline.

5. Suggesting "We Wanna Also Go On A Levy Reform Trip" Doesn't Excuse The State's Ample Funding Delay.

The State suggests that its production of the ample funding phase-in plan this Court mandated most recently in its January 9, 2014 Order is being delayed because the State wants to combine that ample funding plan with politically challenging levy reform. But that's not an excuse for any delay. This Court's August 2015 Sanctions Order unequivocally told the State that "Local levy reform is not part of the court's January 9, 2014 order."[84]

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[83] *August 2015 Sanctions Order at p.7.*

[84] *August 2015 Sanctions Order at p.7, n.1 (underline added) (rejecting the State's claim that its ongoing violation of the January 9, 2014 Order should be excused because increased State salary funding "must be tied to reform of the local levy system, making this a particularly complex matter requiring time and study and discussion" – expressly reiterating that "Local levy reform is not part of the court's January 9, 2014 order.... And we note that the State has had ample time to deal with this matter, not just since McCleary but well before.").*

The State's local levy system applies different "levy lids" to different school districts, and one could argue this non-uniform system established by the legislature should be reformed because it violates the uniformity provision in **section 2** of Article IX, which states: "The legislature shall provide for a general and uniform system of public schools" (underline added).

But neither uniformity nor levy reform were arguments asserted, litigated, or ruled upon in this *McCleary* case. Plaintiffs asserted, the parties litigated, and this Court ruled upon, the ample funding mandate of Article IX, **section 1**. This Court accordingly based its decision solely on **section 1**: "Article IX, **section 1** confers on children in Washington a positive constitutional right to an amply funded education." *McCleary*, 173 Wn.2d at 483 (bold added). As the State unequivocally reiterated when this Court asked about uniformity during the June 2011 oral argument: "this was not an Article IX, **section 2** case, ever."[85]

The "unconstitutional reliance on local levies" noted in this Court's decision was a rejection of the notion that the State can take credit for local levy dollars as being part of its State funding. **It was not a suggestion by this Court that the State could solve school districts'**

[85] *http://www.tvw.org/watch/?eventID=2011061010 (June 28, 2011 oral argument video time 58:47-58:57).*

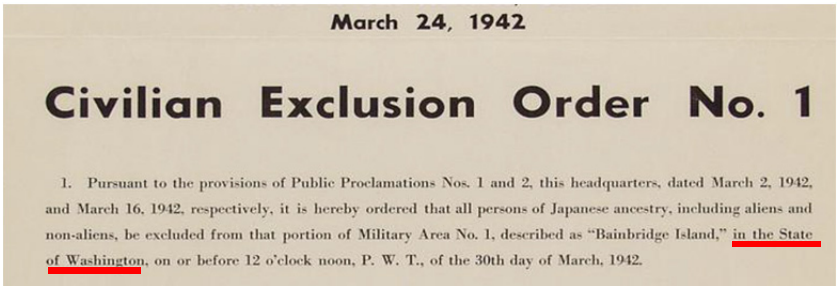
lack of ample funding with "reforms" that take local levy dollars away and then hand them back calling them State dollars (the so-called "levy swap" or "levy swipe" reform).

Nor was it a ruling by this Court to disregard the consistent testimony in this case that school districts' TOTAL revenues (State, federal, local levy, and private donations combined) are not sufficient to provide all students with a realistic or effective opportunity to learn the knowledge and skills in the "basic education" mandated by Article IX, section 1. (*Supra*, pp.8-9 & n.10.)

In short: levy reform might be an appropriate issue in some *other* lawsuit regarding the uniformity provision of Article IX, **section 2**. But it's no justification for the State's ongoing violation of the Article IX, **section 1** ample funding mandate in *this* suit. Compliance with the State's paramount constitutional duty under **section 1** requires the State to amply fund its K-12 public schools – not play a "reform" shell game that cosmetically changes the <u>name</u> on school district dollars instead of substantively increasing the <u>amount</u> of those dollars.[86]

[86] *See Plaintiffs' **2015** Post-Budget Filing at pp.31-32.*

VI. THIS COURT SHOULD NOT VEER OFF THE ROAD BECAUSE CONSTITUTIONAL RIGHTS MATTER



March 24, 1942

Civilian Exclusion Order No. 1

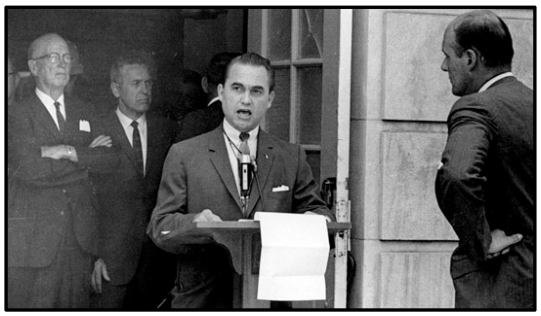
1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that all persons of Japanese ancestry, including aliens and non-aliens, be excluded from that portion of Military Area No. 1, described as "Bainbridge Island," in the State of Washington, on or before 12 o'clock noon, P. W. T., of the 30th day of March, 1942.

[First Exclusion Order in the United States and resulting removal of Japanese-Americans via the Bainbridge Island, Washington ferry dock.]
http://www.bijac.org/index.php?p=MEMORIALIntroduction;
http://encyclopedia.densho.org/Bainbridge_Island,_Washington/

Prior briefing has discussed how Washington citizens have seen first hand what happens when courts look the other way as our government violates the constitutional rights of persons not in the electoral majority.[87]

[87] *Plaintiffs' Answer To The Amicus Brief Of The American Civil Liberties Union at pp.4-6 (discussing the U.S. Supreme Court's agreeing with federal officials and amici*

Prior briefing has also noted what happens when courts uphold and enforce the constitutional rights of those not in the electoral majority.[88]



[Deputy Attorney General Nicholas Katzenbach confronting Governor George Wallace with a court order requiring the desegregation of the University of Alabama. Compare, ***August 2015 Sanctions Order*** *at p.10 ("Our country has a proud tradition of having the executive branch aid in enforcing court orders vindicating constitutional rights").]*

It accordingly makes sense that the Supreme Court rulings in this *McCleary* case have repeatedly promised the school children of our State that this Court will vigilantly enforce their paramount and positive constitutional right under Article IX, section 1 to an amply funded education.[89]

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like the State of Washington that Civilian Exclusion Orders allow the government to summarily imprison Americans on the West Coast who have Japanese ancestors (Korematsu v. United States, 323 U.S. 214 (1944), later proceeding granting writ of coram nobis, 584 F.Supp. 1406 (N.D. Cal. 1984)).

[88] *Plaintiffs'* ***2015*** *Answer To The Amicus Brief Of Mr. Eugster at pp.3-5 (discussing courts' enforcing the constitutional right of children to a desegregated public education after Brown v. Board of Education, 347 U.S. 483 (1954) & 349 U.S. 294 (1955), reversing Plessy v. Ferguson, 163 U.S. 1138 (1896)); Plaintiffs'* ***2014*** *Post-Budget Filing at pp.38-42 (discussing same).*

[89] ***McCleary****, 173 Wn.2d at 483 ("Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education") and 547 ("This court intends to remain vigilant in fulfilling the State's constitutional responsibility under article IX, section 1");* ***December 2012 Order*** *at p.2 ("Each day there is a delay risks another school year in which Washington children are denied the*

Plaintiffs respectfully ask this Court to keep that promise.

The State acknowledges that the purpose of a contempt sanction is to ***coerce*** a defendant's decision-makers to choose to comply with a court order by making compliance a better choice for those decision-makers than continued non-compliance.[90] This Court accordingly imposed a monetary fine that would be significant to most Washington State citizens: $100,000 every day, payable daily.[91]

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*constitutionally adequate education that is the State's paramount duty to provide") & p.3 ("We cannot wait until 'graduation' in 2018 to determine if the State has met minimum constitutional standards"); **January 2014 Order** at p.8 ("This court also made a promise to the school children of Washington: We will not 'idly stand by as the legislature makes unfulfilled promises for reform.' McCleary, 173 Wn.2d at 545. Our decision in this case remains fully subject to judicial enforcement."); **September 2014 Contempt Order** at p.3 ("These orders are not advisory or designed only to get the legislature's 'attention', the court expects them to be obeyed even though they are directed to a coordinate branch of government. When the orders are not followed, contempt is the lawful and proper means of enforcement in the orderly administration of justice.") & pp.3-4 ("In retaining jurisdiction in McCleary, the court observed that it 'cannot stand idly by as the legislature makes unfulfilled promises for reform.' McCleary, 173 Wn.2d at 545. Neither can the court 'stand idly by' while its lawful orders are disregarded. To do so would be to abdicate the court's own duty as a coordinate and independent branch of the government."); **August 2015 Sanctions Order** at p.8 ("The State urges the court to hold off on imposing sanctions, to wait and see if the State achieves full compliance by the 2018 deadline. But time is simply too short for the court to be assured that, without the impetus of sanctions, the State will timely meet its constitutional obligations. There has been uneven progress to date, and the reality is that 2018 is less than a full budget cycle away. As this court emphasized in its original [December 2012] order in this matter, 'we cannot wait until 'graduation' in 2018 to determine if the State has met minimum constitutional standards.' ") & p.9 (imposing sanctions because of "the gravity of the State's ongoing violation of its constitutional obligation to amply provide for public education" and "the need for expeditious action").*

[90] *State's 2014 Show Cause Response at p.8; Plaintiffs' 2014 Answer To Defendant's Response To The Court's Show Cause Order With Errata at p.24 & n.30.*

[91] ***August 2015 Sanctions Order** at p.2 ("Effective today, the court imposes a $100,000 per day penalty on the State for each day it remains in violation of this court's order of January 9, 2014") & p.9 ("ORDERED: Effective immediately, the State of Washington is*

But that monetary fine was not at all significant to Washington State officials. Indeed, the State's 2016 legislature confirmed the insignificance it placed on this court-ordered fine by refusing to fund it. (Although the 2016 legislature's Report suggests this Court should excuse that refusal since it had plenty of money to pay if it had wanted to (an over $1.2 billion reserve in its 2016 supplemental budget),[92] that "excuse" is akin to a driver being fined for violating the speed limit in front of an elementary school, and then telling the court his refusal to pay that fine should be excused since he has plenty of money in his bank account to pay if he had wanted to.)

This Court's August 2015 Sanctions Order repeatedly warned that firmer sanctions – "including directing the means the State must use to come into compliance with the court's order" – could and would be imposed if State decision-makers chose to continue the State's ongoing violation of the court orders in this case.[93]

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assessed a remedial penalty of one hundred thousand dollars ($100,000) per day until it adopts a complete plan for complying with article IX, section 1 by the 2018 school year. ***The penalty shall be payable daily****").*

[92] *Legislature's 2016 Report at pp.27-28.*

[93] ***August 2015 Sanctions Order*** *at p.9 ("Given the gravity of the State's ongoing violation of its constitutional obligation to amply provide for public education, and in light of the need for expeditious action, the time has come for the court to impose sanctions. A monetary sanction is appropriate to emphasize the cost to the children, indeed to all of the people of this state, for every day the State fails to adopt a plan for full compliance with article IX, section 1. At the same time, this sanction is less intrusive than other available options, including directing the means the State must use to come*

The State's decision-makers chose to continue the State's violation. This Court could now say it was only kidding when it previously assured the school children of our State that it would vigilantly enforce their constitutional rights. But as most young children would put it: "crossies don't count."

The State's delay has just about run out the shot clock before the 2017-2018 school year deadline. The State's decision-makers have knowingly left this Court with only two options: either (1) tell Washington's public school children that constitutional rights are empty platitudes and court orders are just suggestions, or (2) impose one of the firm sanctions previously briefed in this case to effectively compel State decision-makers to finally fulfill the State's ***paramount duty*** under Article IX, section 1 to ***amply*** fund the education of ***all*** Washington school children by the 2017-2018 school year deadline in this case.

To be effective, that contempt sanction must make compliance with our constitution's Article IX, section 1 ample funding mandate a

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into compliance with the court's order.") & pp.8-9 ("The court has inherent power to impose remedial sanctions when contempt consists of the failure to perform an act ordered by the court that is yet within the power of a party to perform. .... Monetary sanctions are among the proper remedial sanctions to impose, though the court also may issue any order designed to ensure compliance with a prior order of the court. When, as here, contempt results in an ongoing constitutional violation, sanctions are an important part of securing the promise that a court order embodies: the promise that a constitutional violation will not go unremedied.").

more desirable option for State decision-makers to choose than continued non-compliance. Just two examples from the prior post-budget filings in this case are noted below:

One: Issue a contempt sanctions order that gives the State's 2017 regular session two options:

(a) choose to fully comply with the court orders and declaratory judgments issued in this case, or

(b) choose to have the State's unconstitutionally funded school statutes struck down as unconstitutional, effective the first day of the 2017-2018 school year.[94]

Either way, it's the 2017 session's choice. The 2016 session's prompt and concrete action in response to this Court's striking down the unconstitutionally funded charter schools statute illustrates that our State's decision-makers respond swiftly to school statute invalidation.

Two: Issue a contempt sanctions order that gives the State's 2017 regular session two options:

(a) choose to fully comply with the court orders and declaratory judgments issued in this case, or

(b) choose to have all tax exemption statutes enacted by the legislature (instead of amply funding K-12 schools) struck down as unconstitutional, effective the first day of the 2017-2018 school year.

Either way, it's the 2017 session's choice. Since the sales tax exemption on food (Initiative 345) was enacted by the voters rather than by the

[94] *See, e.g., Plaintiffs' **2014** Answer To Defendant's Responses To The Court's Show Cause Order With Errata at pp.45-47.*

legislature, this sanction would not affect that exemption if the State chose to continue its non-compliance. But the 2013 session's prompt and concrete action in response to Boeing's tax break request illustrates that our State's decision-makers respond swiftly when State tax exemption statutes are involved.

VII. CONCLUSION

Last year, this Court celebrated the 800th anniversary of the Magna Carta. The Magna Carta is historically significant because it established the principle that the rule of law applies to everyone – even those who run the government.[95]

History shows us what happens if courts ignore the rule of law when elected officials violate constitutional rights. *E.g., the Japanese-American Exclusion Orders during World War II.* History also shows us what happens if courts enforce the rule of law when elected officials find it politically expedient to violate constitutional rights. *E.g., the desegregation orders during the Civil Rights Era.*

Washington law is clear: "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education."[96] Plaintiffs appreciate that complying with that constitutional

[95] *Cf. Plaintiffs' **2014** Answer To Defendant's Responses To The Court's Show Cause Order With Errata at pp.34-35 (rule of law in a democracy).*

[96] *Supra, Part II.B.6 of this brief.*

mandate is not easy, cheap, or popular for those who run State government.

But it's the law. And elected officials who run our government are not above the law. Plaintiffs respectfully request that this Court finally put an end to State government's longstanding pattern of violation and delay by firmly enforcing the paramount constitutional right of every child in our State to an amply funded K-12 education. Unfortunately, the opening plea in plaintiffs' January 2007 Complaint still applies today over nine years later: "The simple fact remains...that justice delayed is justice denied. ... Enough is enough. The time for first steps or initial down payments has long passed. It is time for compliance."[97]

RESPECTFULLY SUBMITTED this 7th day of June, 2016.

Foster Pepper PLLC

s/ Thomas F. Ahearne
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[97] *Plaintiffs' January 11, 2007 Complaint at ¶1 (CP 4 at lines 1 & 17-18).*

DECLARATION OF SERVICE

Adrian Urquhart Winder 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 Tuesday, June 7, 2016, I caused PLAINTIFF/RESPONDENTS' 2016 POST-BUDGET FILING to be served as follows:

David A. Stolier, Sr. Alan D. Copsey Office of the Attorney General 1125 Washington Street SE Olympia, WA 98504-0100 daves@atg.wa.gov alanc@atg.wa.gov	☒ Via Electronic Mail (cc of the same email sent to the Supreme Court for the filing of this 2016 POST-BUDGET FILING) ☒ 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 7th day of June, 2016.

s/ Adrian Urquhart Winder
Adrian Urquhart Winder