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' CONSOLIDATED ANSWER TO THE FOUR JUNE 7 AMICUS BRIEFS

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I. INTRODUCTION

The four amicus briefs address the same two basic issues:

- Did the actions taken by the State's 2016 legislature constitute compliance with the court orders in this case?
- If "no", what (if anything) should this Court do to compel compliance?

Instead of filing four separate Answers, plaintiffs file this one consolidated Answer to (hopefully) reduce redundancy and repetition.

II. ANSWER TO AMICI'S ARGUMENTS ABOUT THE STATE'S 2016 COMPLIANCE

A. The "Progress" Enacted By The State's 2016 Legislature.

Back in 2012, this Court unequivocally held that "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education",[1] and ordered that the 2017-2018 school year is a "firm deadline for full constitutional compliance."[2]

[1] *McCleary v. State, 173 Wn.2d 477, 483, 269 P.3d 227 (**2012**).*

[2] *December **2012** Order at p.2 (underline added). The "2018" deadline being the 2017-2018 school year has already been covered by prior briefing in this case. Plaintiffs' November **2015** Motion For A Timely 2016 Briefing Schedule at p.1 & n.2; Plaintiffs' **2016** Post-Budget Filing at p.13. The on-the-ground impracticality of implementing basic education components mid-year over the December 2017 holiday break is also a common sense reason why "by 2018" must mean by the 2017-2018 school year (starting in the Fall of 2017) instead of by the 2018 calendar year (starting on January 1, 2018).*

Several amici note that the State's 2016 legislature did not make any meaningful ample funding **progress** beyond what the 2015 legislature had already done.[3]

They're right.

The chart attached as Appendix A to Plaintiffs' July 2015 Post-Budget Filing illustrated the $18.2 billion K-12 budget enacted by the State's 2015 legislature. After this Court's August 2015 Sanctions Order, the State's 2016 legislature did some minor tinkering at the margin – e.g., adding $34 million to help school districts build classrooms needed to implement the K-3 component of the State's basic education program, while subtracting $17 million from districts that lack the independent wealth to build those classrooms on their own.[4] But it did nothing to make meaningful funding **progress** – leaving Appendix A of Plaintiffs' July 2015 Post-Budget Filing essentially unchanged.

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[3] *Corrected Superintendent Of Public Instruction's Amicus Brief Addressing 2016 Legislature's Compliance With McCleary ("Superintendent's Brief") at pp.2-3; Brief Of Amicus Curiae Washington's Paramount Duty ("Paramount Duty's Brief") at pp.4-9; see also Amicus Curiae Memorandum Of The ARC Of Washington State, et al. ("ARC Brief") at p.3 & p.17 (the 2016 legislature reduced special education funding); Amici Curiae Brief Of Columbia Legal Services, et al. ("CLS Brief") at p.17 ("funding for Washington's public schools still remains inadequate and inequitable").*

[4] *See Plaintiffs' 2016 Post-Budget Filing at pp.20-21 & nn.39 & 41.*

Amici are correct: the State's 2016 tinkering after the August 2015 Sanctions Order was not the annual **progress** mandated by the court orders in this case.

B. The "Plan" Enacted By The State's 2016 Legislature.

The State has for years been assuring this Court that it will be fully complying with the ample funding mandate of Article IX, section 1 by the 2017-2018 school year. This Court has for years therefore been ordering the State to produce its complete year-by-year plan for phasing in that ample funding for each component of the State's basic education program, as well as demonstrate how the State's budget each year meets that year-by-year phase-in plan.[5]

Several amici note the State's 2016 legislature adjourned without producing that ample funding **plan** to phase in full constitutional compliance by the 2017-2018 school year.[6]

They're right.

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[5] *See Plaintiffs' 2016 Post-Budget Filing at pp.27-29 (citing December 2012 Order; January 2014 Order; June 2014 Show Cause Order; September 2014 Contempt Order; August 2015 Sanctions Order).*

[6] *Superintendent's Brief at p.3; Paramount Duty's Brief at pp.4-9; ARC Brief at p.16 (E2SSB 6195 does not even hint that the State will fix its special education funding formula so that special education funding matches actual costs) and at p.18 (Court should "withhold a finding of compliance until the State has demonstrated a plan to fully fund basic education, including special education").*

The State claims E2SSB 6195 is the court-ordered plan. That bill created another task force to come up with ideas/recommendations for the 2017 legislature to consider. That's not a complete year-by-year plan for phasing in the State's ample funding of each component of its basic education program by the 2017-2018 school year. As the Superintendent's amicus brief aptly states: E2SSB 6195 is "nothing more than a plan to plan" – and after all the State's prior task forces, studies, and reports, the real reason for legislators' continuing non-compliance with the court rulings in this case is not a lack of information, but rather a lack of any pressing urgency for them to use that information.[7] The Paramount Duty amicus brief thus accurately notes that E2SSB 6195 is simply "a kick-the-can plan" to delay for another year.[8]

Put bluntly, E2SSB 6195 was a way for legislators and the Governor to delay serious debate and resolution until after the November 2016 election (as well as a way to ensure the legislative session adjourned without extended delay, thereby ensuring a timely end to the no-fundraising-during-session freeze impacting their November re-election campaigns. See Plaintiffs' November 2015 Motion For A Timely 2016 Briefing Schedule at p.16 & n.32).

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[7] *Superintendent's Brief at p.3.*
[8] *Paramount Duty's Brief at p.4.*

The charts attached as Appendices D though L of Plaintiffs' July 2015 Post-Budget Filing illustrated the 2015 legislature's *de facto* "plan" for amply funding the various components of the State's basic education program – i.e., wait until the last minute to come up with a plan in 2017.

In response to this Court's August 2015 Sanctions Order, the State's 2016 legislature created a task force to come up with ideas at the last minute for hopefully coming up with a plan in 2017. In other words, the State's 2016 legislature simply changed Appendices D though L of Plaintiffs' July 2015 Post-Budget Filing from illustrating the State's *de facto* "plan" to now be illustrating the State's *actual* "plan". Changing the name of the State's wait-until-the-last-minute "plan" from *de facto* to *actual*, however, was not compliance with the court orders in this case.

Amici are correct: creating a task force to come up with potential ideas at the last minute is not a complete year-by-year **plan** for phasing in the State's ample funding of each component of its basic education program as mandated by the court orders in this case. A punt is not a plan.

C. Compliance Conclusion.

Amici are correct: the actions taken by the State's 2016 legislature did not constitute compliance with the court orders in this case. The State still has not purged its September 2014 contempt.

III. ANSWER TO AMICI'S ARGUMENTS ABOUT COMPELLING THE STATE'S COMPLIANCE

A. Whether Government Officials Should Be Compelled To Obey Constitutional Rights And Court Orders.

Amici maintain that constitutional rights and court orders should be enforced.[9] They're right. Lawmakers are not above the law. Constitutional rights and court orders are not simply suggestions for lawmakers to consider when it fits their political self-interest. And as the State Superintendent of Public Instruction points out, failing to now firmly enforce the rulings in this case would "reduce the court to the level of beggar."[10] The Paramount Duty amicus similarly discusses in detail why this Court not only has the power, but the duty, to ensure that Washington children's positive constitutional right to an amply funded K-12 education is not violated by the action or inaction of another branch.[11]

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[9] *Superintendent's Brief at p.18; Paramount Duty's Brief at pp.10-20.*

[10] *Superintendent's Brief at p.6 (citing case law).*

[11] *Paramount Duty's Brief at pp.10-20 (citing case law). Accord, Plaintiffs' **2013** Post-Budget Filing at pp.39-48; Plaintiffs' **2014** Post-Budget Filing at pp.38-42; Plaintiffs' **August 2014** Answer To The Amicus Brief Of Mr. Eugster at pp.3-8; Plaintiffs' **August 2014** Answer To Defendant's Response To The Court's Show Cause Order With Errata at pp.9-16.*

Since plaintiffs agree that this Court should firmly enforce the constitutional rights and court orders at issue in this case, the following pages address amici's submissions on how this Court can effectively compel compliance.

B. How Compliance Can Be Compelled.

The State has for years acknowledged in this case 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.[12] To be effective, this Court must therefore make compliance with its prior orders regarding Article IX, section 1's ample funding mandate a more desirable option for State decision-makers to choose than continued non-compliance.

This Court's June 2014 Show Cause Order listed seven potential approaches:

[12] *See Plaintiffs' 2016 Post-Budget Filing at pp.45-48.*

1. Imposing monetary or other contempt sanctions;

2. Prohibiting expenditures on certain other matters until the Court's constitutional ruling is complied with;

3. Ordering the legislature to pass legislation to fund specific amounts or remedies;

4. Ordering the sale of State property to fund constitutional compliance;

5. Invalidating education funding cuts to the budget;

6. Prohibiting any funding of an unconstitutional education system; and

7. Any other appropriate relief.

June 2014 Show Cause Order at p.4.

Since the amici's submissions fall under several of those seven approaches, plaintiffs organize the rest of this brief under those seven headings in order to maintain continuity in these ongoing proceedings.

1. Monetary Or Other Contempt Sanctions.

(first option listed in the June 2014 Show Cause Order; see also prior briefing on this option[13]*)*

As the Superintendent's Brief points out, subjecting a defendant held in contempt to a fine or imprisonment is usually effective in coercing compliance.[14] For example, when a parent fails to obey a court order

[13] *E.g., Plaintiffs' **2013** Post-Budget Filing at p.45 & nn.134-135; Plaintiffs' **2014** Post-Budget Filing at p.47; Plaintiffs' **August 2014** Answer To Defendant's Response To The Court's Show Cause Order With Errata at pp.29-31.*

[14] *Superintendent's Brief at p.4.*

requiring the payment of child support, one type of contempt sanction to compel compliance is a fine or jail.

It therefore was not unusual for this Court to impose a large monetary fine to try to compel Washington legislators to obey the court orders in this case regarding the State of Washington's paramount constitutional duty to amply fund Washington children's K-12 education. But as amici point out, the currently accruing monetary sanction in the liquidated sum of $100,000/day, payable daily, has not compelled compliance.[15] (Indeed, the State's 2016 legislature chose to simply ignore this Court's monetary sanction and not fund its payment.)

With respect to the Superintendent's suggestion that individual legislators now be held personally accountable with monetary sanctions assessed against them personally,[16] plaintiffs do not disagree that such a sanction is permissible. But they are concerned that, at least at this point, such a sanction may divert too much energy and attention away from the ample funding task at hand by spawning satellite disputes and arguments about specific individuals "worthy" and "not worthy" of sanction.

Plaintiffs therefore continue to believe that the most effective options to compel legislators as a group to comply are the school statute

[15] *Superintendent's Brief at p.4.*
[16] *Superintendent's Brief at pp.6-9.*

and tax exemption statute options discussed in plaintiffs' prior filings (as well as in Parts 6 & 7(a) below).

2. Prohibit Expenditures On Certain Other Matters Until The Court's Constitutional Ruling Is Complied With.

(second option listed in the June 2014 Show Cause Order; see also prior briefing on this option[17]*)*

The CLS amici point out that "education is the primary vehicle for lifting children out of poverty" and that "education is a critical pathway out of poverty."[18] They argue, however, that this "prohibit expenditures" sanction should not be imposed in a way that harms funding for the social service programs discussed in their brief.[19]

But there are many types of expenditures other than those social service programs that could be enjoined if this Court imposes this type of sanction – e.g., enjoin expenditures on the pay raise legislators gave themselves and the transportation package they passed (both of which fall below the paramount rank of amply funding the State's K-12 schools first).[20]

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[17] *E.g., Plaintiffs' **2013** Post-Budget Filing at pp.45-46 & n.136; Plaintiffs' **2014** Post-Budget Filing at p.47; Plaintiffs' **August 2014** Answer To The Amicus Brief Of CLS, et al., at pp.1-4; Plaintiffs' **August 2014** Answer To Defendant's Response To The Court's Show Cause Order With Errata at pp.31-33.*

[18] *CLS Brief at p.8 & p.9.*

[19] *CLS Brief at p.1.*

[20] *The Superintendent suggests an across-the-board version of this sanction by enjoining funding beyond the partial shut-down plan drawn up in 2015. Superintendent's Brief at pp.15-16. But plaintiffs are concerned that that may invite unneeded and distracting complications in parsing out which specific expenditures and specific*

While targeted injunctions against specific expenditures could have been an effective intermediate option years ago, plaintiffs believe it is now too late to take an intermediate approach. The 2017-2018 school year is now only one regular session away (the 2017 regular session). Plaintiffs therefore continue to believe the most effective options to compel the significant revenue and funding actions needed to comply in that 2017 regular session are the school statute and tax exemption statute options discussed in plaintiffs' prior filings (as well as in Parts 6 & 7(a) below).

3. Order The Legislature To Pass Legislation To Fund Specific Amounts Or Remedies.

(third option listed in the June 2014 Show Cause Order; see also prior briefing on this option[21])

This Court's August 2015 Sanctions Order warned that firmer sanctions – "including directing the means the State must use to come into compliance with the court's order" – could be imposed if State decision-makers chose to continue the State's ongoing violation of the court orders in this case.[22]

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expenditure amounts will and will not be enjoined. (It also may implicate the concerns expressed by the CLS amici.)

[21] *E.g., Plaintiffs' **2013** Post-Budget Filing at p.46 & n.137; Plaintiffs' **2014** Post-Budget Filing at p.47; Plaintiffs' **August 2014** Answer To Defendant's Response To The Court's Show Cause Order With Errata at pp.33-38.*

[22] *See Plaintiffs' 2016 Post-Budget Filing at pp.46-47 & n.93 (quoting August 2015 Sanctions Order at pp.8-9).*

The ARC amicus brief suggests an order akin to this, specifically targeted at amply funding the actual cost of the special education component of the State's basic education program.[23] Other possible options could be specifically targeting the over $2.9 billion/year compensation amount or $2 billion K-3 classroom construction amount determined by prior State studies and reports.

While such targeted sanctions may have been an effective intermediate option years ago, plaintiffs believe it is too late to take an intermediate approach since the 2017-2018 school year is now just one regular session away (the 2017 regular session). Plaintiffs therefore continue to believe the most effective options to compel the significant revenue and funding actions needed to comply in that 2017 regular session are the school statute and tax exemption statute options discussed in plaintiffs' prior filings (as well as in Parts 6 & 7(a) below).

[23] *ARC Brief at p.16 (arguing the State should be required to "fix the funding formula in order to ensure that special education funding matches the actual costs of meeting individual needs. Neither [E2SSB] 6195 nor the 2016 supplemental budget promises – nor even hints – that will happen.").*

4. Order The Sale Of State Property To Fund Constitutional Compliance.

(fourth option listed in the June 2014 Show Cause Order; see also prior briefing on this option[24])

Since none of the amici suggest a sanction along these lines, plaintiffs do not address it in this Answer.

5. Invalidate Education Funding Cuts To The Budget.

(fifth option listed in the June 2014 Show Cause Order; see also prior briefing on this option[25])

Since none of the amici suggest a sanction along these lines, plaintiffs do not address it in this Answer.

6. Prohibit Any Funding Of An Unconstitutional Education System.

(sixth option listed in the June 2014 Show Cause Order; see also prior briefing on this option[26])

Last year, the Superintendent's amicus brief opposed this option. But then the State's 2016 legislature chose to continue the State's non-compliance. So this year, the Superintendent supports this option as being one type of sanction that is now necessary as we approach the

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[24] *E.g., Plaintiffs' **2013** Post-Budget Filing at p.46 & n.139; Plaintiffs' **2014** Post-Budget Filing at p.47; Plaintiffs' **August 2014** Answer To Defendant's Response To The Court's Show Cause Order With Errata at pp.39-41.*

[25] *E.g., Plaintiffs' **2013** Post-Budget Filing at p.46 & n.140; Plaintiffs' **2014** Post-Budget Filing at p.47; Plaintiffs' **August 2014** Answer To Defendant's Response To The Court's Show Cause Order With Errata at pp.41-43.*

[26] *E.g., Plaintiffs' **2013** Post-Budget Filing at pp.46-47 & n.141; Plaintiffs' **2014** Post-Budget Filing at p.47; Plaintiffs' **August 2014** Answer To Defendant's Response To The Court's Show Cause Order With Errata at pp.43-47.*

State's last legislative session before the looming 2017-2018 school year deadline.[27]

Plaintiffs agree that one of the two approaches most likely to be effective in compelling full compliance is an 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.

Either way, it's the 2017 regular session's choice.[28] And as the 2016 session's charter schools legislation confirms, legislators take prompt, concrete action when this Court invalidates unconstitutionally funded school statutes.

7. Any Other Appropriate Relief.

(seventh option listed in the June 2014 Show Cause Order; see also prior briefing on this option[29])

(a) Suspend All Tax Exemption Statutes Passed By The Legislature.

The Paramount Duty amicus brief argues the appropriate relief in this case is to suspend the over 600 State tax exemptions passed by the

[27] *Superintendent's Brief at pp.16-18.*
[28] *See generally Plaintiffs' 2016 Post-Budget Filing at pp.47-48.*
[29] *E.g., Plaintiffs' **2015** Post-Budget Filing at pp.47-50.*

legislature if the upcoming regular session of the State's 2017 legislature does not achieve full compliance with the ample funding mandate of Article IX, section 1.[30]

That approach is consistent with plaintiffs' prior briefing.[31] And plaintiffs agree that one of the two approaches most likely to be effective in compelling full compliance is an 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 (before 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 regular session's choice.[32] And as prior legislative sessions have shown, the Governor and legislators take prompt, concrete action when tax exemption statutes are involved.

(Although the Superintendent suggests a version of this sanction limited to enactments passed after this Court's 2012 decision, plaintiffs believe that since there is now only <u>one</u> legislative session left before the 2017-2018 school year deadline, now limiting this sanction's scope to just the past several years renders it too weak to effectively compel full

[30] *Paramount Duty's Brief at pp.20-21.*
[31] *Plaintiffs' **2015** Post-Budget Filing at pp.47-49 & n.123 & n.131.*
[32] *See generally Plaintiffs' **2016** Post-Budget Filing at pp.48-49.*

compliance by the State's 2017 legislature.[33] The Paramount Duty amici's approach covering all tax exemptions enacted by the legislature is the effective option.[34])

(b) Have Court Do A Levy Swipe.

The Superintendent suggests that this Court could in essence impose the first half of a "levy swipe reform" by taking school districts' local levy money away to make school districts "pressure" legislators to let them have the school funding their local voters had approved.[35]

Plaintiffs do not believe this approach is effective, fair, or appropriate in this case.

Not effective because it does not apply consistent pressure on State legislators: no pressure on those from areas where school districts don't

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[33] *The Superintendent notes that applying this to tax exemptions enacted after this Court's 2012 decision makes some sense because that decision put legislators "on notice" that their paramount duty under the State Constitution they swore to uphold is to amply fund the State's public schools. Superintendent's Brief at pp.11-15. Such a limitation may have been appropriate last year before the 2016 session began. But now there is only one legislative session left before the 2017-2018 school year deadline. Plaintiffs therefore believe that such a limitation is not currently appropriate for several reasons: (1) Article IX, section 1 put legislators "on notice" of the State's paramount ample funding duty long before 2012; (2) this Court's 1978 Seattle School District decision reiterated that paramount duty "notice" again; (3) the February 2010 Final Judgment in this case reiterated that "notice" yet again (and the State did not seek any stay of that Final Judgment pending appeal); and (4) most importantly, the purpose of this sanction is to coerce compliance by making continued non-compliance as tough on legislators as possible – and limiting this sanction to only some (as opposed to all) tax exemptions the legislature passed when it was not amply funding the State's public schools does not create that maximum pressure.*

[34] *Accord, Plaintiffs' **2016** Post-Budget Filing at pp.48-49.*

[35] *Superintendent's Brief at pp.9-11.*

have a local levy; relatively little pressure on those from areas where school districts have relatively small levies; and nothing more than moderate pressure on those from areas where school districts have relatively large levies (no more than "moderate" because public school parents in any legislative district are a minority of the voters a legislator caters to). The past several years of vocal "pressure" on legislators by school districts over their lack of ample funding therefore has not been effective in producing compliance thus far – and as a practical matter, plaintiffs believe that now taking away districts' local levy funds makes their lack of ample funding worse without making the "pressure" on legislators correspondingly greater.

Not fair because when local voters vote for a local levy, they are voting to tax themselves to provide the kids in their school district enhancements above the basic education that Article IX, section 1 requires the State to amply fund. Telling those voters that the kids in their district are going to be deprived of the enhancements they voted for because folks in Olympia can't do their ample funding job is simply not fair to those voters, or to the kids for whom they voted to tax themselves to give a better than basic education.

Not appropriate because this levy swipe approach isn't necessary given the existence of two other, far more effective options – i.e., the school statute and tax exemption statute options discussed in plaintiffs' prior filings (as well as in Parts 6 & 7(a) above).

IV. CONCLUSION

Amici are correct:

- the actions taken by the State's 2016 legislature did not constitute compliance with the court orders in this case, and
- this Court not only has the ability, but the duty, to compel full compliance by the 2017-2018 deadline with a firm enforcement order.

While plaintiffs do not believe some of the intermediate approaches suggested by amici would be effective in compelling compliance at this time, plaintiffs do agree with those amici who suggest the school statute and tax exemption statute options discussed in plaintiffs' prior filings (as well as in Parts 6 & 7(a) above).

The State's decision-makers are about to run out the clock. If Washington children's paramount and positive constitutional right to an amply funded education is a right rather than a platitude, and if Supreme Court Orders are orders rather than suggestions, this Court must now issue a strong and firm enforcement order that leaves the State's 2017 regular

session no reasonable choice other than to fully comply without any more excuses, gimmicks, or delays.

RESPECTFULLY SUBMITTED this 17th day of June, 2016.

Foster Pepper PLLC

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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 Friday, June 17, 2016, I caused PLAINTIFF/RESPONDENTS' CONSOLIDATED ANSWER TO THE FOUR JUNE 7 AMICUS BRIEFS to be served as follows:

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Amicus Curiae Washington's Paramount Duty

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 17th day of June, 2016.

s/ Adrian Urquhart Winder
Adrian Urquhart Winder