NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

STATE OF WASHINGTON'S OPENING BRIEF ADDRESSING ORDER TO SHOW CAUSE

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I. INTRODUCTION

On June 12, 2014, this Court issued an Order to Show Cause why the State should not be held in contempt for violating the Court's order dated January 9, 2014. The January order required the State to submit "a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year." *McCleary v. State*, No. 84362-7, Order at 8 (Jan. 9, 2014). The Order to Show Cause thus addresses only the State's failure to comply with the January order, not the State's ultimate compliance with the 2018 deadline established in *McCleary v. State*, 173 Wn.2d 477, 545-46, 269 P.3d 227 (2012).

The State should not be found in contempt. The "complete plan" ordered by the Court would have required the Legislature to agree on the details of 2018 financing during the 2014 session. The Legislature's failure to produce a plan was not willful noncompliance with the Court's order, but the product of legitimate policy disagreements that have not yet been resolved. The unresolved policy disagreements in the Legislature are representative of a lack of public consensus as to the appropriate mix of financing, budget, and policy changes needed to meet the article IX duty. The Court should not treat a legitimate policy disagreement in the legislative branch as disrespectful conduct worthy of contempt. The Court

should not misconstrue the failure of political consensus in a short legislative session as a lack of will or determination going forward.

Moreover, Plaintiffs have cited no case, and the State has found none, in which any state's highest court issued or affirmed contempt sanctions against the state for inaction by its legislature. This Court should not be the first to do so.

If the State were found in contempt, no sanction would be required to get the State's attention as to the need for responsive action. Both the legislative and executive branches are well aware of the Court's holdings in *McCleary* and its directives that action be taken to come into compliance with article IX, section 1 by 2018.

If the Court nevertheless determines to impose a sanction, it should look beyond the smorgasbord of sanctions Plaintiffs have proposed. While some of those sanctions may be within the Court's constitutional power, none would advance the objectives the Court set out in its decision: "to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty"; to foster "dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms"; and "to

help ensure progress in the State's plan[1] to fully implement education reforms by 2018." *McCleary*, 173 Wn.2d at 545-47. At best, Plaintiffs' suggested sanctions are impractical, unproductive, or destructive of those objectives.

Moreover, Plaintiffs' sanctions have the wrong focus. They assume noncompliance with a deadline that is four years away and propose sanctions to remedy that assumed outcome. The only noncompliance at issue here is the Legislature's failure to provide the plan directed in the January 2014 order.

The Legislature's 2014 Report acknowledged that the upcoming 2015 legislative session is the "most critical year for the Legislature to reach the grand agreement needed to meet the state's Article IX duty" by 2018. *2014 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* at 33 (Apr. 30, 2014) (Leg. 2014 Report). No sanction issued will be more effective at producing legislative agreement on an appropriate plan than giving the Legislature a full and fair opportunity to act in 2015. What sanction, if any, would be appropriate after the 2015 legislative session cannot be determined until

[1] This use of the term "plan" referred to the reforms and phase-in schedule enacted by the Legislature in ESHB 2261 and SHB 2776.

the Court assesses the adequacy of the Legislature's response. No sanction of any kind should be considered until that time.

II. STATEMENT OF ISSUES

The Court ordered the parties to address three issues:

(1) Why the State should not be held in contempt for failing to submit by 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," as directed in this Court's order dated January 9, 2014. Order to Show Cause at 3.

(2) Why, if the State is found in contempt, any of the forms of relief requested by the Plaintiffs should not be granted. *Id.* at 4.

(3) The appropriate timing of any sanctions. *Id.* at 4.

III. FACTUAL AND PROCEDURAL HISTORY

On January 5, 2012, this Court issued a decision holding that the State was not meeting its obligation to amply provide for the education of all children within its borders as required in article IX, section 1 of the state constitution. *McCleary*, 173 Wn.2d at 545-46. The Court rejected both the trial court's remedy ordering another study and Plaintiffs' proposed remedy requiring full compliance at the end of the next school year (2011-12). *Id.* at 541-46. Instead, the Court endorsed the Legislature's reforms enacted in ESHB 2261 (Laws of 2009, ch. 548) and

subsequent legislation, which contemplated implementation by 2018. The Court retained jurisdiction to "monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty," with the express goal of "fostering dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms." *McCleary*, 173 Wn.2d at 543-46. The Court did not specify which actions had to be taken by the 2012 Legislature, nor did it attempt to set specific priorities.

In July 2012, after the legislative session had concluded, the Court issued a procedural order for its retained jurisdiction, which provided for annual legislative reports to the Court, followed by comments filed by Plaintiffs. *McCleary v. State*, No. 84362-7, Order at 2 (July 18, 2012). The Court declined to "measure the steps taken in each legislative session between 2012 and 2018 against full constitutional compliance," but indicated that the State must "show real and measurable progress" toward achieving full compliance. *Id.* at 3.

The 2013 Legislature appropriated new funding for basic education during the 2013-15 biennium, as summarized in its 2013 report to the

Court.[2] The Court acknowledged the "meaningful steps" the 2013 Legislature had taken to address funding for education, but criticized the amount and extent of progress, suggesting possible enforcement actions might be forthcoming. *McCleary v. State*, No. 84362-7, Order (Jan. 9, 2014). The Court ordered the State to submit its next report by April 30, 2014, containing "a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year" that addresses "each of the areas of K-12 education identified in ESHB 2261, as well as the implementation plan called for by SHB 2776 [Laws of 2010, ch. 236]" that includes "a phase-in schedule for fully funding each of the components of basic education." *Id.* at 8.

The Legislature, through the Article IX Committee, submitted its Report on April 30, 2014. The Report explained that the supplemental budget adopted in a short legislative session normally includes only minor budget adjustments, not major changes. Leg. 2014 Report at 8-10, 34-38. The Report acknowledged that the Legislature had not enacted the "complete plan" the Court had ordered, but summarized relevant legislation that was enacted, along with several bills responsive to the

[2] Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation at 10-17 (Aug. 29, 2013) (Leg. 2013 Report) (summarizing funding amounts).

Court's Order that did not receive the majority support needed to pass. *Id.* at 15-33.

On June 6, 2014, the Court issued an Order to Show Cause ordering additional briefing and setting oral argument. This brief responds to the Order to Show Cause.

IV. ARGUMENT

A. The Court Should Not Find the State in Contempt

1. The Standard for Contempt

In this context, "contempt of court" means "intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b); *State v. Breazeale*, 144 Wn.2d 829, 842, 31 P.3d 1155 (2001). Constitutional courts possess both inherent and statutory contempt authority, the former as a component of the court's constitutional power. *In re Dependency of A.K.*, 162 Wn.2d 632, 645-46, 174 P.3d 11 (2007). However, this Court long has held that courts may not exercise their inherent contempt power unless the statutory procedures and remedies are specifically found inadequate. *Id.* at 647 (citing cases).[3]

[3] As a matter of procedure, this Court has decided contempt proceedings as original actions for violation of its own orders. *See, e.g., In re Koome*, 82 Wn.2d 816, 514 P.2d 520 (1973) (respondent violated stay); *State v. Thompson*, 99 Wash. 478, 169 P. 980 (1918) (respondents failed to comply with order to surrender possession of property).

Sanctions imposed for contempt may be remedial or punitive.[4] A "remedial sanction" is civil in nature and is imposed to coerce performance when the contempt consists of the omission or refusal to perform an act that is in the person's power to perform. RCW 7.21.010(3); *In re Dependency of A.K.*, 162 Wn.2d at 645-46. A court has civil contempt power to coerce a party to comply with its lawful order or judgment. RCW 7.21.020; *In re Marriage of Didier*, 134 Wn. App. 490, 501, 140 P.3d 607 (2006), *review denied*, 160 Wn.2d 1012 (2007). A civil contempt sanction will stand as long as it serves coercive, not punitive, purposes, and as long as it contains a purge clause allowing a contemnor to avoid a finding of contempt and/or a sanction for noncompliance. *Id.* (citing *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826-27, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994); *King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 799-800, 756 P.2d 1303 (1988)).

"Intent" is a distinct and essential element of contempt. *State v. Dugan*, 96 Wn. App. 346, 351-52, 979 P.2d 885 (1999). A finding that a

[4] A "punitive sanction" is imposed to punish a past contempt of court, to uphold the court's authority, and is considered criminal in nature. RCW 7.21.010(2); *In re Marriage of Didier*, 134 Wn. App. 490, 501, 140 P.3d 607 (2006), *review denied*, 160 Wn.2d 1012 (2007). The State must file a complaint or information to initiate criminal contempt. RCW 7.21.040; *see also King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988) (court may not impose a criminal contempt sanction unless the contemnor has been afforded those due process rights extended to other criminal defendants).

violation of a previous court order was intentional is required for a finding of contempt. *Holiday v. Moses Lake*, 157 Wn. App. 347, 355, 236 P.3d 981 (2010), *review denied*, 170 Wn.2d 1023 (2011) (citing RCW 7.21.010(1)(b); *In re Estates of Smaldino*, 151 Wn. App. 356, 364-66, 212 P.3d 579 (2009)).[5]

Courts have looked to a variety of indicators to determine whether the requisite intent exists to support contempt. For example, repetitive disobedience has been deemed evidence of intent. *See Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (contemnors violated a permanent injunction on at least seven occasions); *In re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.3d 189 (2008) (contemnor violated the parenting plan six times). In *In re Koome*, 82 Wn.2d 816, the court assumed requisite intent where the respondent had knowledge that a stay was in place and affirmatively took the very action prohibited by the stay.

Additional considerations are involved here, however, where the Court is considering a request for sanctions based on legislative action or inaction, because of separation of powers concerns. The Court has never held the State in contempt for the inaction (or action) of the Legislature.

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[5] The court in *Holiday* distinguished a decision that relied on a superseded version of the general contempt statute that did not require intent. *Holiday*, 157 Wn. App. at 355 (distinguishing *Mathewson v. Primeau*, 64 Wn.2d 929, 934, 395 P.2d 183 (1964) (citing former RCW 7.20.010(5))).

The Court has considered contempt orders against executive branch officers and agencies[6] and against a city,[7] but not against the Legislature or a legislator. We have found no case where any state's highest court issued or affirmed contempt sanctions against that state's own legislature.

2. The State's Failure to Produce a "Complete Plan" by April 30, 2014, Was Not Intentional Disobedience, but the Consequence of Honest Political Disagreement in the Legislature

Ordering the State to produce a "complete plan" for funding basic education essentially ordered the 2014 Legislature to agree upon specific funding and appropriation decisions regarding the 2018 endpoint contemplated in ESHB 2261 and this Court's decision.[8] To be meaningful, any "complete plan" for funding basic education must be created by the Legislature through the legislative process, since it is the Legislature—and the legislative branch alone—that possesses the constitutional power to enact laws to raise revenue and appropriate state

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[6] *See, e.g., Breazeale*, 144 Wn.2d at 841-43 (reversing court of appeals order to impose remedial contempt on state patrol because superior court had reversed order at issue); *Bresolin v. Morris*, 86 Wn.2d 241, 251, 543 P.2d 325 (1975) (delaying consideration of request to hold agency head in contempt, as alternative to mandamus) (no finding of contempt or order of mandamus was issued, *see Bresolin v. Morris*, 88 Wn.2d 167, 558 P.2d 1350 (1977)).

[7] *See R/L Assoc., Inc. v. City of Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989) (affirming judgment of contempt against city for deliberately violating a permanent injunction).

[8] The Court's apparent desire for such specificity follows from its apparent conclusion that SHB 2776 did not provide an adequate funding plan. In SHB 2776 (Laws of 2010, ch. 236), the Legislature enacted a timeline for phasing in the reforms in ESHB 2261, with which the Legislature is complying.

funds. Const. art VII, § 5 (taxation authority vested solely in Legislature),[9] art. VIII, § 4 (appropriation authority vested solely in Legislature).[10]

But members of the 2014 Legislature disagreed substantially as to how to reach the 2018 endpoint. The failure to enact a plan resulted because of that honest political disagreement, not because of a concerted effort by the Legislature to disregard the Court's order. Both houses seriously discussed the order and bills were introduced in both houses that would have responded to the Court's order. Leg. 2014 Report at 27-33 (summarizing SHB 2792, SSB 5881, ESSB 6499, SB 6574). The fact is that every member of the Legislature could have devoted every waking moment during the session to the good faith effort to enact a "complete

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[9] *See Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 770, 131 P.3d 892 (2006) ("It is elementary that the power of taxation, subject to constitutional limitations, rests solely in the legislature.") (quoting *State ex rel. Tacoma Sch. Dist. v. Kelly*, 176 Wash. 689, 690, 30 P.2d 638 (1934)). *See also New Orleans Waterworks Co. v. La. Sugar Ref. Co.*, 125 U.S. 18, 31, 8 S. Ct. 741, 31 L. Ed. 607 (1888) ("[T]he power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power") (quoted in *Larson*, 156 Wn.2d at 770 n.4).

[10] *See Washington Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 365-66, 70 P.3d 920 (2003) (article VIII, section 4 "prohibits the payment of money out of the state treasury without an appropriation. The purpose of this requirement is to prevent the expenditure of public funds without legislative authorization by those who have charge of them."); *State v. Clausen*, 94 Wash. 166, 173, 162 P. 1 (1917) (central object of article VIII, section 4 is "to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government.") (quoting *Humbert v. Dunn*, 84 Cal. 57, 59, 24 P. 111 (1890) (internal quotes omitted)).

plan" and still failed to pass anything with the necessary majority of each house agreeing on the same language. How would a court then assess intent?

To treat the Legislature's failure to achieve political agreement within a judicially specified timeframe as purposeful defiance of the Court's order would not give appropriate constitutional respect to the legislative process, to the Legislature's representative role, or to representative democracy under our constitution. *See Brown v. Owen*, 165 Wn.2d 706, 719, 206 P.3d 310 (2009) (separation of powers principles establish checks and balances, but "checks by one branch [that] undermine the operation of another branch" are "improper and destructive exercises of the authority" (quoting *In re Salary of Juvenile Dir.*, 87 Wn.2d 232, 243, 552 P.2d 163 (1976)); *id.* at 718 ("we look [to] 'whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another' ") (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)); *id.* at 719 ("our primary concerns are that the judiciary not be drawn into tasks more appropriate to another branch and that its institutional integrity be protected") (quoting *Carrick*, 125 Wn.2d at 136).

3. The 2014 Legislature Could Not Adopt a "Complete Plan" That Is Binding on Future Legislatures

This Court long has recognized that each Legislature has plenary power under article II, section 1 of the Washington Constitution that cannot be constrained by the enactment of a prior Legislature.[11,12] Accordingly, any plan that the 2014 Legislature might have adopted could not, consistent with our constitution, constrain the 2015 Legislature or any subsequent Legislature from amending, repealing, or disregarding it. And no other branch of government is constitutionally authorized to adopt a legislative plan that could bind the Legislature.

The Plaintiffs' request for an order requiring an enacted "complete plan" by December 31, 2014, suffers from the same defect. Pls.' 2014 Resp. at 49. It would require a special session of the outgoing Legislature, and any plan adopted in that special session could not bind the incoming Legislature or any subsequent Legislature.[13]

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[11] *Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 301-02, 174 P.3d 1142 (2007). *Accord State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004); *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 809, 982 P.2d 611 (1999); *Cedar County Comm. v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998); *Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 555, 503 P.2d 86 (1972); *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 180, 492 P.2d 1012 (1972); *State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 203–04, 191 P.2d 241 (1948); *State v. Fair*, 35 Wash. 127, 133, 76 P. 731 (1904).

[12] We recognize the need for an educational policy rationale when changing the definition of basic education. *See McCleary*, 173 Wn.2d at 526-27.

[13] The Joint Select Committee on Article IX Litigation lacks any power to enact a "complete plan." *See* HCR 4410 (2012), *available at* http://apps.leg.wa.gov/

4. The State Recognizes the Need for Legislative Action by the 2015 Legislature to Meet the 2018 Funding Deadline Established in ESHB 2261

The Court retained jurisdiction "to help ensure progress in the State's plan to fully implement education reforms by 2018." *McCleary*, 173 Wn.2d at 547. In that task, the Court is succeeding: the need to respond to the "*McCleary* decision" is known to every legislator and every state budget analyst. Every planning discussion for the 2015 state budget references the State's responsibilities under the *McCleary* decision.[14] Legislators and budget writers are exploring alternatives and developing proposals for the 2015 legislative session. The 2018 deadline for full compliance with article IX, section 1 looms large. An order of contempt is not necessary to get the State's attention.

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documents/billdocs/2011-12/Pdf/Bills/House%20Passed%20Legislature/4410.PL.pdf. Only the Legislature itself can do so.

[14] *See, e.g.*, State of Washington, Office of Financial Management, *State Budget Update: More Big Challenges Ahead* (June 2014), at http://www.ofm.wa.gov/budget/documents/State_budget_prelim_outlook_pres_2014.pdf; State of Washington, Office of Financial Management, *2015-17 Biennium: Operating Budget Instructions* at 2 (June 2014), at http://www.ofm.wa.gov/budget/instructions/operating/2015_17/2015-17instructions.pdf; Letter to Agency Directors from Director, State of Washington, Office of Financial Management, re "2015-17 Operating and Capital Budget Instructions" (June 13, 2104), at http://www.ofm.wa.gov/budget/instructions/operating/2015_17/covermemo.pdf. *See also* Leg. 2014 Report at 33 (acknowledging that 2015 is the "critical year" for the Legislature to reach agreement in response to the *McCleary* decision).

B. If the Court Finds the State in Contempt, It Should Not Order Any Sanction

Just as an order of contempt is not necessary to focus the State's attention on the constitutionally-mandated need to amply fund basic education, no sanction is necessary to focus the State's attention. There is agreement between the Legislature and the Court that basic education must be amply funded. While there is not current political consensus on how best to achieve that end, there is progress toward resolution and preparation for significant work in the 2015 legislative session. Leg. 2014 Report at 25-33.

Throughout this litigation, Plaintiffs have sought an order forcing immediate action by the Legislature. Pls.' 2014 Resp. at 46-49. *Compare* Pls.' 2013 Resp. at 45-48; Pls.' 2012 Resp. at 42-43. This Court properly rejected that request, recognizing its decision imposed on the Legislature a complex and challenging set of tasks that would require more than a single legislative session to resolve. *McCleary*, 173 Wn.2d at 545-47. The Court adopted the 2018 deadline the Legislature had set for itself to accomplish the tasks set before it, but declined to establish intermediate benchmarks for assessing compliance. *Id.* at 549 (Madsen, C.J., concurring/ dissenting). *See also McCleary v. State*, No. 84362-7, Order at 3 (July 18, 2012) (order regarding retained jurisdiction; "it is not realistic to measure

the steps taken in each legislative session between 2012 and 2018 against full constitutional compliance").

Plaintiffs' repeated request for sanctions reflects their refusal to accept this Court's denial of their request to require "full funding" immediately. But full funding is not the issue now before the Court. The issue presented in the Order to Show Cause is whether the Court should find contempt for the State's failure to submit a plan by April 30, 2014, and, if so, whether a sanction should be imposed for that failure. Plaintiffs' attempt to conflate that failure with a presumption of noncompliance in 2018 should be rejected.

No sanction should be imposed. The Legislature is well aware of its constitutional duty and is moving toward completion of the task by the 2018 deadline this Court established. The Legislature has made it clear through its reports to the Court that it is working to comply with article IX, section 1. Imposing the type of onerous sanction Plaintiffs advocate would create distraction and slow progress.

C. The Court Should Decline to Impose Sanctions, but if It Decides to Order a Sanction, It Should Reject Plaintiffs' Unworkable Proposals

Were the Court inclined to consider a sanction, any sanction must lie within the Court's constitutional authority and should advance the goal of helping the Legislature achieve compliance with article IX, section 1 by

2018. The sanctions listed in the Court's Order to Show Cause at 4, which recite the sanctions proposed or contemplated by Plaintiffs, do not meet those two criteria.

1. Some Sanctions Proposed by the Plaintiffs Are Outside the Court's Constitutional Authority

Plaintiffs suggest the Court could order the Legislature to pass legislation to provide specific funding. Pls.' 2014 Resp. at 47. They suggest the Court could order the Legislature to enact bills to raise additional revenue or simply order additional spending without regard to the sources of revenue necessary to support such funding.[15]

To begin with, this is the wrong remedy for the asserted failure at issue in this Order to Show Cause—the failure to provide a "complete plan" as ordered by the Court in 2014. Plaintiffs' remedy assumes ultimate noncompliance with the constitutional duty, the duty the Court has given the State until 2018 to fulfill. The Court should give it no further consideration at this time.

More importantly, such an order would ignore this Court's descriptions of the proper functions of each branch of government. Under article II, section 1, as a general rule, "the legislative authority of the State is vested in the legislature and it is unconstitutional for the legislature to

[15] These suggestions are reflected in form of relief number 3 on the list in the Order to Show Cause.

abdicate or transfer its legislative function to others." *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d at 759 (citing *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 234, 11 P.3d 762 (2000)). As part of its legislative authority, the Legislature possesses plenary power in matters of taxation except as limited by the Constitution. Const. art. VII, § 5; *Belas v. Kiga*, 135 Wn.2d 913, 919, 959 P.2d 1037 (1998). Likewise, our Constitution explicitly confers the State's spending power on the Legislature. Const. art. VIII, § 4. It is not a power that is shared by the executive or judicial branch or that can be exercised by another branch in lieu of the Legislature, except by proper legislative delegation. *See, e.g.*, Const. art. XI, § 12 (Legislature may delegate to the corporate authorities of municipalities the power to tax such municipalities, their inhabitants, and property for local purposes). A judicial order directing the enactment of specific legislation enters into the arena reserved for the legislative branch under the state constitution. *State ex rel. Hart v. Gleeson*, 189 Wash. 292, 295-96, 64 P.2d 1023 (1937) ("If the necessities of county government call for a greater measure of taxing power than is now possessed by the county, that power must come from the Legislature or from the people. We, as a court, cannot legislate in order to remedy their failure or refusal so to do.").

Put simply, it is one thing for a court to order the Legislature to comply with a constitutional mandate or limitation. It is quite another for the court to prescribe specific legislation. Doing so effectively imposes a judicial edict, rather than a democratic legislative decision arrived at by the representatives of the people of Washington. Moreover, directing specific legislation could upset the "appropriate balance" between deference to the Legislature "to determine the precise means for discharging its article IX, section 1 duty" and the Court's constitutional obligation. *McCleary*, 173 Wn.2d at 546.

In suggesting this remedy, Plaintiffs rely primarily on federal cases. Three of the cases they cite are federal school desegregation cases that invoke federal rights and the Supremacy Clause, but not separation of powers between coequal branches.[16] Federal courts are subject to

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[16] In the State of Washington's Reply filed May 29, 2014, we explained why none of the cases Plaintiffs cited provided any legal support for their proposed sanctions in the context of this case. For the Court's convenience, portions of those explanations are repeated here.

In *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 233, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964), the Supreme Court stated in dictum that the district court may, if necessary to prevent further racial discrimination in a segregated local school district, require county legislators to "*exercise the power that is theirs* to levy taxes to raise funds" adequate to reopen, operate, and maintain a nondiscriminatory public school system. (Emphasis added). The Court did not authorize the district court to assume the legislative function.

In *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990), the Court again was faced with a segregated school system. After several attempts to devise a remedy that would ensure funding for the desegregation plan, the district court ordered a property tax increase and the issuance of capital improvement bonds. *Id.* at 41-42. The Supreme Court held that the district court abused its discretion. *Id.* at 52. "In

different constitutional restraints than this Court, and the constitutional relationship between federal courts and state legislatures is different from that between state courts and state legislatures. Most notably, no separation of powers restrains federal courts when dealing with state legislatures.[17] In that circumstance, where a federal court orders a state official to take an action beyond the official's state law authority, the federal court does not expand the official's state law authority; rather the court effectively is supplementing the official's state law authority by authorizing the official to act as a matter of federal law. *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 950, 603 P.2d 819 (1979).

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assuming for itself the fundamental and delicate power of taxation the District Court not only intruded on local authority but circumvented it altogether." *Id.* at 51. The Court made a broader observation:

> "The very complexity of the problems of financing and managing a . . . public school system suggests that there will be more than one constitutionally permissible method of solving them, and that . . . the legislature's efforts to tackle the problems should be entitled to respect."

Id. at 52 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (internal quotation marks omitted)).

In *Arthur v. Nyquist*, 547 F. Supp. 468 (W.D.N.Y. 1982), *aff'd*, 712 F.2d 809 (2d Cir. 1983), *cert. denied sub nom Griffin v. Bd. of Educ. of City of Buffalo, N.Y.*, 466 U.S. 936 (1984), city officials declined to fund the cost of implementing certain desegregation efforts ordered by the district court. The district court found that the board of education had demonstrated the need for additional money to carry out the desegregation orders and that city officials had made no effort to ascertain what funds were needed, and it ordered the city to provide the funds. *Id.* at 478-79, 484.

[17] *Elrod v. Burns*, 427 U.S. 347, 351-53, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); *Mayor of City of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 615, 94 S. Ct. 1323, 39 L. Ed. 2d 630 (1974).

The single state case Plaintiffs cite provides only a cursory analysis of separation of powers in determining a remedy. They cite no case supporting judicial control over the enactment of legislation. Their state case is one decision from a long-running dispute over education funding in Kansas, but they do not provide context. The Kansas Supreme Court affirmed a trial court ruling that the legislature had not made "suitable provision" for financing public schools, as required in the state constitution, but it then stopped: "We do not dictate the precise way in which the legislature must fulfill its constitutional duty. That is for the legislators to decide, consistent with the Kansas Constitution." *Montoy v. Kansas*, 278 Kan. 769, 775, 120 P.3d 306 (2005) (*Montoy* II).

The Kansas Legislature responded by adopting legislation, which the court found inadequate in *Montoy v. Kansas*, 279 Kan. 817, 112 P.3d 923 (2005) (*Montoy* III). The court dismissed separation of powers concerns in reliance on a student note in a law review arguing that equitable power is appropriate if exercised after legislative noncompliance. *Id.* at 828-29. Finding a need for immediate relief, the court ordered the legislature to increase funding for the upcoming school year by at least $285 million. *Montoy* III, at 845.[18] A month later, the

[18] It is this part of this single decision that Plaintiffs cite. Pls.' 2014 Resp. at 47 (citing Pls.' 2013 Resp. at 46 n.137).

court approved a legislative increase of half that amount. *Montoy v. Kansas*, 282 Kan. 9, 15, 138 P.3d 755 (2006) (*Montoy* IV) (citing unpublished order).

During its next session, the legislature revised its school finance formula, adding additional funding. The court held the legislature had complied with the court's previous orders, and remanded with directions to dismiss the action. *Id.* at 24-27.[19]

Read together, the *Montoy* decisions show a pattern of deference to the legislature's constitutional role.

Even putting aside concerns about separation of powers, a court that enters into the legislative arena assumes a policy-making role for which it is ill-equipped. A court lacks the information and institutional capacity to fully assess the effects of ordering increased spending on specific programs at the expense of others. It lacks the overview of the "tangled economic factors" that must be considered in determining

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[19] The court declined to consider the constitutionality of the new legislation, holding that it must be challenged in a new action in the trial court:

> We have already made the determination that the school finance formula which was before this court in *Montoy II* was unconstitutional. The school finance system we review today is not the system we reviewed in *Montoy II* or *Montoy III*. The sole issue now before this court is whether the [legislative acts] comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed.

Montoy IV, 282 Kan. at 18-19.

whether one legislative policy choice should be chosen over an alternative.[20] It is one thing for a court to assess the legislature's compliance with a constitutional directive; it is quite another for a court to assume control of legislative decision-making or to undertake that decision-making itself.

State resources are not unlimited, and school funding decisions cannot be made without considering available revenue, which in turn implicates taxing authority and budget support for other state programs. The policy choices and tradeoffs involved in making those decisions are uniquely within the competence of the legislative branch. Evidence received in a trial narrowly focused on a single issue, as in this case, does not provide adequate information to support that kind of decision-making.

2. Some Sanctions Proposed by the Plaintiffs Are Outside the Subject Matter of This Case

a. Prohibiting Expenditures on Certain Other Matters Until the Court's Constitutional Ruling is Complied With

Plaintiffs suggest the Court could prohibit the Legislature from making expenditures for noneducational programs until the Court's

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[20] Stephen Holmes & Cass R. Sunstein, *The Cost of Rights* 126-27 (1999). *See McCleary*, 173 Wn.2d at 517 (recognizing the Legislature's "uniquely constituted fact-finding and opinion gathering processes" as providing the "best forum for addressing the difficult policy questions inherent in forming the details of an education system.").

constitutional ruling is complied with. Pls.' 2014 Resp. at 47.[21] They offer no suggestion as to what expenditures should be prohibited or on what basis, and they display no concern for the public value of other programs and services or for the citizens who rely on them. They ignore requirements flowing from federal mandates (such as match funding requirements for participation in Medicaid), or contractual obligations (such as pension funding), or rooted in other state constitutional provisions (such as the payment of bond debts and funding for courts). Further, it is difficult to imagine how the Court could determine what programs and services merit defunding without assuming a legislative role. And to support this suggestion, Plaintiffs again cite only federal cases, none of which prohibited spending on unrelated programs, and none of which involved a state legislature or implicated separation of powers.[22]

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[21] This suggestion is reflected in form of relief number 2 on the list in the Order to Show Cause.

[22] As noted above, we explained in the State of Washington's Reply filed May 29, 2014, why the cases Plaintiffs cited do not provide legal support for their proposed sanctions in the context of this case. For the Court's convenience, that explanation is repeated here.

In two of the cited cases, African-American residents prevailed in actions alleging their cities had discriminated against African-American neighborhoods in providing certain city services. *Dowdell v. City of Apopka, Fla.*, 511 F. Supp. 1375 (M.D. Fla. 1981), *aff'd in part and reversed and remanded in part*, 698 F.2d 1181 (11th Cir. 1983); *Baker v. City of Kissimmee, Fla.*, 645 F. Supp. 571, 589 (M.D. Fla. 1986). In both cases, the district court declined to order the city to institute specific programs or construction projects in African-American neighborhoods, but enjoined the city from spending any funds on the construction or improvement of municipal services in white neighborhoods until the services in African-American neighborhoods were on par with those in white neighborhoods. *Dowdell*, 511 F. Supp. at 1384; *Baker*, 645 F. Supp. at

b. Invalidating Education Funding Cuts to the Budget

Plaintiffs suggest the Court could invalidate legislation that makes cuts to education funding. Pls.' 2014 Resp. at 47.[23] While the Court unquestionably has authority to invalidate unconstitutional statutes, Plaintiffs did not challenge the constitutionality of *any* statute in their complaint. CP 3-26. In the context of this litigation, therefore, it is far from clear what legislation Plaintiffs suggest should be invalidated.

Perhaps relatedly, Plaintiffs ask the Court for an order enjoining the Legislature from imposing "any more unfunded or underfunded mandates" on schools. Pls.' 2014 Resp. at 49. Putting aside the question

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588-89. The relief in *Baker* was patterned after that in *Dowdell*. *Baker*, 645 F. Supp. at 589.

The other case cited by Plaintiffs is a discrimination case challenging racial segregation in Virginia public schools. *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964). In response to earlier court decisions, the state had tried various means to preserve segregated schools, ultimately settling on a program that repealed compulsory public education, made school attendance a matter of local option, and provided tuition grants for private schools. *Id.* at 222. After a court ordered the public schools in Prince Edward County to admit students without regard to race, the county supervisors refused to levy school taxes, closed the schools, and passed ordinances to provide financial support for segregated private schools. *Griffin*, at 222. The Supreme Court held the county's action violated equal protection and affirmed the district court's injunction barring financial support for private schools while public schools remain closed. *Id.* at 233.

[23] This suggestion is reflected in form of relief number 5 on the list in the Order to Show Cause.

of how to define an "unfunded or underfunded mandate," this suggestion lacks the precision required for an injunction.[24]

3. The Other Sanctions Proposed by the Plaintiffs Are Impractical, Unproductive, or Harmful

Any proposed sanction should be designed to remediate the asserted failure by the contemnor. In practical terms in this case, any sanction should be calculated to facilitate effective planning for the next four years. The remaining sanctions on the list fail to accomplish that goal.

a. Imposing Monetary or Other Contempt Sanctions[25]

In the ordinary case, where a defendant intentionally fails to comply with an order of the Court, despite the ability to do so, an appropriate remedy is a contempt sanction. But this is not an ordinary case, and where the Legislature, as a coequal branch of government, is the principal actor, the State is not an ordinary defendant. It would serve no purpose to sanction the entire Legislature for contempt, because the Legislature's failure to produce a plan resulted not from an intent to ignore

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[24] A court must precisely tailor a permanent injunction to prevent a specific harm. *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986). *See also* CR 65(d) (order imposing injunction must describe in reasonable detail the acts enjoined as well as the reasons supporting issuance of the injunction, above and beyond the complaint or other documents).

[25] Form of relief number 1 on the list in the Order to Show Cause.

the Court's order, but rather from disagreement as to *how to comply* with the underlying obligations this Court laid out in *McCleary*. A contempt sanction will do nothing to resolve such disagreements.

Imposing a fine on the State if legislators do not vote in a particular way similarly coerces the vote of legislators, and it places the burden of the legislators' noncompliance with the Court's order on the wrong group of people. By subjecting the State to a hefty fine, the Court may be harming the very people it intends to benefit by diminishing the funds available to finance compliance with the Court's remedial order.

Moreover, if a sanction on the State is appropriately levied on legislators who do not vote in a particular way, is it also appropriate to levy a sanction on the people when they act in their legislative capacity to repeal a measure the Legislature enacted that included school funding?[26]

These realities likely explain why no state supreme court has gone so far as to issue an injunctive order in a school finance suit and to follow through by using its traditional contempt power when the state legislature has not complied with an earlier order.

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[26] *See* Initiative 1107 (2010) (repealing 2ESSB 6143) (Laws of 2010, ch. 23) (text at https://weiapplets.sos.wa.gov/MyVote/OnlineVotersGuide/Measures?electionId=37&countyCode=xx&ismyVote=False#ososTop).

b. Ordering the Sale of State Property to Fund Constitutional Compliance[27]

Plaintiffs suggest the Court could order the sale of state property to fund constitutional compliance. Pls.' 2014 Resp. at 47. They offer no examples, of course, of property that might be sold. Neither do they offer any explanation as to how the one-time sale of state property would provide a "dependable and regular" revenue source for ongoing basic education funding. *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 522, 585 P.2d 71 (1978).[28]

c. Prohibiting Any Funding of an Unconstitutional Education System[29]

Finally, Plaintiffs suggest the Court might shut down all public schools in Washington until such time as they are amply funded. Pls.' 2014 Resp. at 47. This suggestion assumes no education is preferable to the education students in Washington currently are receiving. In fact, it would most directly harm the very schoolchildren Plaintiffs claim to be advocating for.

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[27] Form of relief number 4 on the list in the Order to Show Cause.

[28] Plaintiffs cite a single case in support of this suggested remedy, but they mischaracterize it. In *Reed v. Rhodes*, 472 F. Supp. 623 (N.D. Ohio 1979), the court did not order the sale of any state property; rather, it ordered that the proceeds of excess property that the state already had advertised for sale must be used to help pay for a school transportation system to comply with desegregation orders.

[29] Form of relief number 6 on the list in the Order to Show Cause.

Plaintiffs have cited cases in which state courts have issued orders temporarily enjoining their state from disbursing money to schools, but none of those cases provide a persuasive rationale for applying that remedy here. Only one decision, *Robinson v. Cahill*, 70 N.J. 155, 161, 358 A.2d 457 (1976), actually "closed" the schools, but it did so only for a few days in the summer of 1976 when schools were not in session.

Plaintiffs here have not articulated how the goal of fully funding education is advanced by an order enjoining any disbursement of state funds to public schools in Washington. Presumably, they believe the pressure will be so great that the Legislature will have no choice but to act and to do so quickly. But that is a dangerous strategy. If the remedy fails and schools are closed, it is schoolchildren who are harmed most directly. Moreover, those put at greatest risk of harm are those who have the fewest educational alternatives. Wealthy parents can arrange for educational alternatives during a period of school closure, but such options are seldom available to families of modest means. Plaintiffs' suggested remedy contravenes the constitutional ideal they purport to uphold.

D. If the Court Determines a Sanction Should Lie for the State's Failure to Adopt a "Comprehensive Plan," the Determination of the Appropriate Sanction Should Not Be Made Until After the 2015 Legislative Session

The State's constitutional duty is to provide ample funding for basic education. The State has enacted basic education finance reforms committing to full phase-in by the 2018 deadline. Between now and January 2015, the Legislature will be holding work sessions, there will be an election, the Governor will develop and submit a proposed budget, and further economic forecasts will inform policymakers in the legislative and executive branches. The imposition of sanctions will not increase the urgency of these preparations for the 2015 legislative session.

Moreover, the actions of the 2015 Legislature necessarily will constitute the de facto "complete plan" for meeting the 2018 deadline established in ESHB 2261 and adopted by the Court. Whatever is not provided in the 2015-17 biennium necessarily must be provided in the 2017-19 biennium to meet the 2018 deadline. Consequently, the actions of the 2015 Legislature will provide a sufficient basis for the Court to assess progress and determine whether any sanction would be productive or counter-productive in promoting ultimate compliance with article IX, section 1. Any decision regarding the propriety of sanctions or the

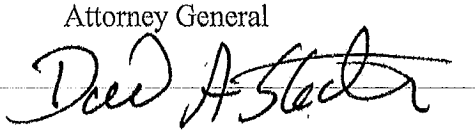
appropriateness of any particular sanction should not be reached until the 2015 Legislature has acted.

V. CONCLUSION

The State shares the Court's goal of achieving full compliance with article IX, and the Legislature continues to make progress toward meeting the 2018 deadline this Court established. Neither contempt nor sanction is necessary to compel continued progress toward that goal.

RESPECTFULLY SUBMITTED this 11 day of July 2014.

ROBERT W. FERGUSON
Attorney General



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NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al., Respondents, v. STATE OF WASHINGTON, Appellant.	CERTIFICATE OF SERVICE

I certify that I served a copy of the State of Washington's Opening Brief Addressing Order to Show Cause, via electronic mail and U.S. Mail, postage paid, upon the following:

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

SIGNED this 11th day of July, at Olympia, Washington

KRISTIN D. JENSEN
Legal Assistant

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Dear Clerk and Counsel:

Attached for filing in the above-referenced matter, please find the State of Washington's Opening Brief Addressing Order to Show Cause and Certificate of Service.

Thank you,
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