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No. 82961-6

SUPREME COURT OF THE STATE OF WASHINGTON

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SCHOOL DISTRICTS' ALLIANCE FOR ADEQUATE FUNDING OF SPECIAL EDUCATION; BELLINGHAM SCHOOL DISTRICT NO. 501; BETHEL SCHOOL DISTRICT NO. 403; BURLINGTON-EDISON SCHOOL DISTRICT NO. 100; EVERETT SCHOOL DISTRICT NO. 2; FEDERAL WAY SCHOOL DISTRICT NO. 210; ISSAQUAH SCHOOL DISTRICT NO. 411; LAKE WASHINGTON SCHOOL DISTRICT NO. 414; MERCER ISLAND SCHOOL DISTRICT NO. 400; NORTHSORE SCHOOL DISTRICT NO. 417; PUYALLUP SCHOOL DISTRICT NO. 3; RIVERSIDE SCHOOL DISTRICT NO. 416; and SPOKANE SCHOOL DISTRICT NO. 81,

Petitioners,

v.

THE STATE OF WASHINGTON; CHRISTINE GREGOIRE, in her capacity as Governor of the State of Washington; RANDY DORN, in his capacity as Superintendent of Public Instruction; BRAD OWEN, in his capacity as President of the Senate and principal legislative authority of the State of Washington; and FRANK CHOPP, in his capacity as Speaker of the House of Representatives and principal legislative authority of the State of Washington,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS
SCHOOL DISTRICTS' ALLIANCE, ET AL.

K&L GATES LLP

John C. Bjorkman, WSBA # 13426
Christopher L. Hirst, WSBA # 06178
Grace T. Yuan, WSBA # 20611
Gregory J. Wong, WSBA # 39329
Attorneys for Petitioners

K&L GATES LLP
925 Fourth Avenue
Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

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I. INTRODUCTION

It is the paramount duty of the State to make ample provision for the education of all resident children. Const. art. IX, § 1. Special education for students with qualifying disabilities is part of the State's constitutional obligation. *School Districts' Alliance v. State*, 149 Wn. App. 241, 246, 202 P.3d 990 (2009); RCW 28A.155.010. Petitioner School Districts' Alliance ("Alliance")¹ proved at trial that the State does not fully fund special education, and that school districts use local levy money to fill the gap. Thirty years ago, this Court held that the State fails in its constitutional duty if it requires districts to fund any part of the required educational program with local levies. *Seattle Sch. Dist. No. 1 v. Washington*, 90 Wn.2d 476, 526-27, 585 P.2d 71 (1978). The gap in special education funding is, therefore, unconstitutional.

The trial court and the Court of Appeals ruled against the Alliance on the constitutionally untenable theory that to prove underfunding, districts must include funds from one legislative appropriation, the basic education allocation (BEA), in the analysis of a wholly separate legislative appropriation, special education funding. But this would result in an unconstitutional diversion of basic education funds for special education

¹ All 12 member school districts of the Alliance now join in this appeal.

purposes. Further, the trial court's finding that the BEA is the average per-student cost of the basic education every student receives (CP 278-79, Finding of Fact (FF) 4 and 12(d)), does not support its conclusion that the same funds could pay for students' special education as well. The Court of Appeals' decision would deny special education students a fully-funded basic education. The Alliance respectfully requests that this Court reverse.

The trial court and Court of Appeals also imposed the wrong burden of proof on the Alliance. *Seattle Sch. Dist.*, 90 Wn.2d at 528 (preponderance of the evidence applies, not beyond a reasonable doubt). The trial court went so far as to review the case using "rational basis" scrutiny – a standard never before applied to the review of Article IX. The Alliance requests that this Court hold that an as-applied challenge to the State's compliance with its paramount duty does not require proof beyond a reasonable doubt. Instead, it should be the State's burden to prove more than a rational basis for its actions once plaintiffs establish a *prima facie* violation of Article IX.

II. STATEMENT OF THE CASE

A. Basic Education and Special Education are Different.

Special education is not the same as basic education. RP 66.

Basic education is: (1) The learning achievement goals of RCW

28A.150.210; (2) the program requirements set out in RCW 28A.150.220;

and (3) the funding determined by and distributed pursuant to RCW 28A.150.250 and .260. RCW 28A.150.200. The Basic Education Act, Chapter 28A.150 RCW, does not provide for special education services.

The Legislature has always defined special education separately, beginning with the first handicapped student laws of 1943 to the major revisions in 1971 and 2007. Laws of 1943, ch. 120, § 1; Laws of 1971, 1st Ex. Sess., ch. 66 § 2; Laws of 2007, ch. 115 § 2. Today, the Legislature implements the special education program at Chapter 28A.155 RCW.

The special education laws entitle students with qualifying disabilities that adversely affect their educational performance to receive special education services. RCW 28A.155.020; WAC 392-172A-01035; RP 67-68. Special education services are “specially designed instruction,” or planned instructional activities that adapt the content, methodology, and delivery of instruction to the needs of an eligible student with a qualifying disability. WAC 392-172A-01175(3)(c). Special education is not the place where the student receives the services (either the basic education classroom or a “pull-out” room) or a particular teacher or staff person. Special education is a set of *services* specifically tailored to a student’s needs, evaluated for efficacy and progress toward defined goals, and delivered through an Individualized Education Program. WAC 392-172A-03090 and -03105; RP 91.

B. The State Separately Funds Basic and Special Education.

The State provides the BEA to districts on an average per-student basis to pay for each student's basic education. Laws of 2005, ch. 518, § 502 and 504 (hereinafter "Sections 502 and 504"); CP 278 (FF 4); RCW 28A.150.250. For those students also requiring special education services, the State provides a separate special education allocation through a formula that is supposed to cover the average per-student cost of service in excess of the basic education services all students receive. Laws of 2005, ch. 518, § 507(5)(a)(ii) (hereinafter "Section 507"); CP 278-79 (FF 5 and 12(d)); RCW 28A.150.370.

Because the Section 507 formula does not fully fund a district's special education costs, the State makes available a limited amount of supplemental funding called the "Safety Net." CP 280 (FF 15); Laws of 2005, ch. 518, § 507(8). A district makes a two-step application for Safety Net funding. First, it must prove that the Section 507 formula has underfunded its costs. To do this, the district totals all of its special education expenses, subtracts all of its State and Federal special education revenues, and the remainder is the district's "demonstration of need." CP 280 (FF 15); WAC 392-140-626; Ex. 60, pp. 1777 and 1780-82; RP 378-80 and 463. Next, a district may apply for the extraordinarily high cost of an individual student in excess of a threshold of about \$15,000. CP 280

(FF 13). A district may apply for Safety Net funding for some or all of these high cost students, but the total amount it receives may not exceed its "demonstration of need." If a district has more "demonstration of need" than high cost students, it must pay the remainder with its levy funding. *See Appellants' Brief (App. Br.), pp. 15-17.*

The State separately funds basic education and special education consistent with codified law:

In addition to those state funds provided to school districts for basic education [RCW 28A.150.250], the legislature shall appropriate funds for ... special education programs for students with disabilities ...

RCW 28A.150.370. The Legislature simply does not appropriate the BEA to pay for special education.

C. The State Does not Adequately Fund Special Education.

The State must amply fund education with dependable and regular tax sources. *Seattle Sch. Dist.*, 90 Wn.2d at 519-20, 526-27. Local levies are not dependable and regular, and the State may not create a funding system that requires school districts to fund any portion of the State's constitutional obligation with local money. *Id.* at 524-26. That is exactly what happens today in Washington with special education. The Section 507 formula does not fund the average cost of students below the high cost Safety Net threshold, and Safety Net does not fund the remainder. For the

2004-05 school year, all of the districts statewide applying for Safety Net proved a collective “demonstration of need” of \$147 million, yet \$35 million was the maximum they could recover through Safety Net for their high cost students. Exs. 111 and 111a; RP 984-86, 990-1011; and RP 378-87, 674-76 and 1138-39 (individual districts). These districts paid for the unfunded remainder of \$112 million of special education services with their local levy money in violation of *Seattle School District*. E.g., RP 1348-49. See App. Br., pp. 25-28; Reply Br., pp. 8-13.

D. Procedural History

At trial, the Alliance sought a declaratory judgment that the special education funding system (Section 507 and the Safety Net) is unconstitutional. CP 5-27; CP 43-64. The trial court found a portion of the funding system unconstitutional, but upheld the balance. CP 310-36. The Alliance timely appealed. CP 290-336. The Court of Appeals affirmed. *School Districts’ Alliance v. State*, 149 Wn. App. 241, 202 P.3d 990 (2009). The Alliance timely filed its Petition for Review on April 8, 2009. This Court granted the Petition for Review on September 8, 2009.

III. ARGUMENT

A. The Court of Appeals’ Decision Violates Article VIII, § 4.

The trial court and the Court of Appeals erred in ruling that a court must include basic education funding when examining underfunding of

special education. This decision wrongly presupposes that the Legislature appropriates the BEA to pay for special education. The Legislature appropriates for basic education in Sections 502 and 504. RCW 28A.150.250. These appropriations do not even mention special education. The Legislature instead appropriates a distinct amount for special education in Section 507. RCW 28A.150.370.

All appropriations must be specific as to their object and amount:

No moneys shall ever be paid out of the treasury of this state...except in pursuance of an appropriation by law... and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied...

Const. art. VIII, § 4.² By requiring consideration of a source of funding the Legislature has not appropriated for the specified purpose (special education), the Court of Appeals merely substitutes a new constitutional infirmity for the one the Alliance sued to correct.

This Court has previously rejected efforts to redirect appropriations in this manner. In *State ex rel. Bloedel-Donavan Lumber Mills v. Clausen*, 122 Wash. 531, 532, 211 P. 281 (1922), the Legislature appropriated from

² The State's complaint that the Court must disregard this issue because the Alliance did not perfect it for appeal is unfounded. RAP 2.5(a)(3) (allowing review of errors affecting constitutional rights). The Court of Appeals addressed the issue without reservation, 149 Wn. App. at 255-56, and the Alliance timely sought review of its decision.

the general fund to pay for the operations of the Department of Labor and Industries and from an accident fund to pay the Department's administrative expenses. The Legislature, however, had created the accident fund to pay workers compensation claims from premiums their employers paid into the fund. Upon the depletion of the accident fund, the employers sued claiming the law did not authorize the Legislature's appropriation for administrative expenses. *Id.* They sought an order replenishing the accident fund from the general fund, so that the employers did not have to pay their premiums twice. *Id.* at 534.

This Court held that even though the Legislature may have wrongly depleted the accident fund, the Legislature had made no specific appropriation to replenish it from the general fund. *Id.* at 533-34. Article VIII, § 4 barred shifting money from one fund to another absent a specific appropriation even if for a meritorious purpose. *Id.* Similarly, the Court of Appeals here cannot presuppose the BEA is available to resolve the underfunding crisis in special education; absent an appropriation specific as to its object and amount, it is not.³

Nor should this Court read the Legislature's specific appropriation

³ Similarly, the Attorney General has advised that an appropriation for the purchase of 124 acres of land was not available to purchase only 75 acres. "[T]he requirement that that object be distinctly specified would be violated if the questioned language were construed to mean anything other than what it plainly says...." Attorney Gen. Letter Op. 1978 No. 10, at 3.

for basic education in Sections 502 and 504 so expansively as to incorporate special education. In *State ex rel. Shuff v. Clausen*, 131 Wash. 119, 125-26, 229 P. 5 (1924), this Court examined a specific appropriation from the accident fund to pay workers compensation claims. The Court held that once the payment of workers' claims had exhausted the appropriation, the State could not pay new claims out of the fund. *Id.* The Court rejected the argument that the general purpose and language of the original legislation establishing the accident fund authorized a continuing appropriation from the premiums collected from employers and deposited into the fund. *Id.* The Legislature's biennial appropriation of a specific amount from the fund to pay claims "negatives any possible inference of intent on the part of the Legislature, deducible from the general language of the act, to make or attempt to make a continuing appropriation or any appropriation in excess of the" specific amount. *Id.* at 125. Similarly, having appropriated a specific amount for special education in Section 507, this Court should refrain from interpreting Sections 502 and 504 so expansively as to render them a plenary appropriation including special education as well.⁴

⁴ In its opposition to the Petition for Review, the State argues that the Legislature's failure to use the words "provided solely" in Sections 502 and 504 means it also appropriated the BEA for special education. But the Legislature uses "provided solely" to designate appropriations that lapse if

Basic education and special education are different services that together make up the State's Article IX duty. The State recognizes this by separately funding basic and special education in two different appropriations. This has always been the case in Washington:

Under the apportionment formula [BEA], the State distributes money to school districts on the basis of FTE weighted students. However, the actual dollar amount per FTE enrolled pupil in the District does not include categorical funding for such programs as handicapped, [or] special education ...

Seattle Sch. Dist., 90 Wn. 2d at 532 (emphasis added). The BEA does not, and never has, included funding for special education.

The trial court's and Court of Appeals' decision that the BEA is available to pay for special education service violates Const. art. VIII, § 4, and denies special education students a fully funded basic education. This Court should remand to the trial court with directions to exclude consideration of the BEA in its analysis of special education funding.

B. The Basic Education Allocation is Insufficient to Fund Special Education.

Even if the law allows the courts to count the BEA in calculating underfunding in special education, the trial court found there is

unnecessary to fulfill the designated purpose. *See, e.g.*, Laws of 2005, ch. 518, § 1(2)(e). Regardless, the Legislature cannot alter existing law, much less amend the Constitution, through an appropriations bill. *Retired Pub. Employees Council v. Charles*, 148 Wn.2d 602, 629, 62 P.3d 470 (2003); Const. art. XXIII, § 2.

insufficient BEA to fill the gap. The Legislature appropriates funding for the BEA on a per-student basis based upon average costs. The trial court found that the BEA is the average cost to provide a basic education to the average student. CP 278 (FF 4). Every student is a basic education student first, and all day long, including those students who also receive special education services. CP 279 (FF 12(d)).

The Legislature has declared basic education to be “fully funded” with the BEA. RCW 28A.150.250. Though both the trial court and the Court of Appeals cited this statute as the equivalent of a proven fact (CP 321 and 149 Wn. App. at 260), neither dealt with the consequences to its decision in this case. The BEA is not more than fully funded. The trial court did not find that the BEA is the above-average cost of basic education, and the Legislature does not appropriate extra BEA for districts to use to pay for students’ special education services. Every student, including special education students, receives a basic education. Because the BEA is the cost of that basic education, there is nothing left over to pay for the excess cost of a student’s special education services as well. According to the trial court’s unchallenged findings and the Legislature’s declaration, there is only enough BEA to pay for students’ basic

education.⁵ See App. Br., pp. 31-32; Reply Br., pp. 3-8.

The Court of Appeals' response to these facts misses the point. 149 Wn. App. 259-60 ("The Alliance fails to indicate why the classroom placement eliminates the need to address the BEA in its calculations. The child receiving special education instruction cannot be in two classrooms at once. While in the special education classroom, he is not receiving services in the former classroom."). The classroom placement makes no difference, and the Alliance never argued it did. Whether a student receives special education services in a pull-out room or in the basic education classroom, the student is still receiving a basic education all day long. CP 279 (FF 12(d)). While receiving special education services, a student is still progressing toward the basic education learning achievement goals of RCW 28A.150.210, but is doing so using "content, methodology, and delivery of the instruction" that is "adapt[ed], as appropriate to the needs of an eligible student" (in other words, using "specially designed instruction"). WAC 392-172A-01175(3)(c).

To reflect the fact that the special education student receives a basic education all day long and that the special education teacher is still

⁵ The State's continued reliance on Conclusion of Law (CL) 10 is misplaced. Respondent's Opp. to Petition for Review, p. 6. Including the first sentence that the State does not quote, CL 10 states that districts exhaust their BEA on basic education. CP 285 (CL 10).

advancing students toward the basic education learning achievement goals, the State requires districts to charge part of the cost of the special education teacher to the basic education program and the remainder to the special education program pursuant to the 1077 method. CP 323 (citing Section 507(2)(a)); Ex. 4, p. 825. In doing so, the 1077 method automatically accounts for all of a student's BEA and uses it to pay for the basic education the student receives wherever and by whomever delivered. Thus, all of a student's BEA has already been automatically accounted for and used to pay for the student's basic education through the 1077 process. App. Br., pp. 32-35. The BEA has no bearing on underfunding in special education.

Having itself designed the system, the State knows that districts use their BEA to pay for the basic education every student receives. Therefore, the State does not require districts to count their BEA when "demonstrating need" for Safety Net funding. The Court of Appeals properly recognized that, when calculating Safety Net "demonstration of need," districts do not incorporate the BEA in the calculation. 149 Wn. App. at 252. But the Court of Appeals is wrong when it states that Safety Net's second step, the extraordinarily high cost student application, does incorporate a calculation of the BEA. 149 Wn. App. at 253 (citing Ex. 60,

p. 1785). It does not, and this was a critical error.⁶

Safety Net's demonstration of need is the State's own calculation of the amount that the Section 507(8) formula underfunds a district. CP 280 (FF 15). For many districts, the amount of Safety Net funding available for their high cost students is millions less than their demonstration of need. App. Br., pp. 25-27; e.g., RP 674-76; 693-94. When Safety Net does not cover the formula's underfunding, districts are forced to make up the difference with their local levy money in violation of Const. art. IX, § 1. *Seattle Sch. Dist.*, 90 Wn.2d at 526. This is precisely what the Alliance proved. See, e.g., RP 1348-49.

There is no basis in law or fact to support the argument that a court reviewing the adequacy of funding for special education must include the BEA in its analysis. This Court should reverse the decisions below.

⁶ A review of the cited exhibit, the "Worksheet C" high cost student application, proves the Court of Appeals' error. Worksheet C computes the amount of Safety Net funding available for the extraordinarily high cost student by (1) totaling up all of the special education expenditures for that student wherever delivered (right-hand column); and, (2) subtracting the \$14,902 threshold amount (line 18). Ex. 60, p. 1785; RP 2699-2702. The excess of special education expenditures over this threshold is the amount of extraordinary special education cost the district may recover for its high cost students through Safety Net. The threshold is calculated at 2.1 times average per-pupil expenditures; it is not based upon the BEA in any way. Ex. 60, p. 1769.

C. The Court Must Review the State's Compliance with its Paramount Duty with Increased Care.

When Washington's citizens made ample provision for the education of children "the paramount duty" of their government, they did something unique in American constitutional law. Nowhere else in the Washington constitution, the constitutions of the United States or the other 49 states, do the people make education, or anything else, "the paramount duty" of their government. App. Br., pp. 40-41 and Appendix B.⁷

These words have meaning. "Paramount" means supreme, and that the Constitution places no other claim to the State treasury on equal footing. *Seattle Sch. Dist.*, 90 Wn.2d at 511-12, 523. "Ample" means unrestrained. *Id.* at 516. The definite article "the," as opposed to the indefinite "a," means it is a singular duty, not one of many. *Renz v. Grey Adver., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997). By imposing this duty on the "State," Article IX reaches all three branches of government, including this Court. *Seattle Sch. Dist.*, 90 Wn.2d at 506.

⁷ While Florida's 1868 constitution included education as "the paramount duty," Fla. Const. art. VIII, § 1 (1868) (Florida's historical constitutions are available at <http://www.law.fsu.edu/crc/conhist/contents.html>), it eliminated the provision just a few years later. Fla. Const. (1885). Recently, Florida reinstated a similar provision but intentionally changed it to "a paramount duty." Fla. Const. art. IX, § 1 (1998). The drafters rejected a proposal again to make education the paramount duty of the state. See <http://www.law.fsu.edu/crc/minutes/crcminutes022698.html>, at pp. 69-72.

The unique and preeminent nature of this duty necessarily impacts the standard of review this Court should apply under Article IX. This case is not a challenge to a law allowing for community councils, *Island County v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998), nor is it a challenge to how the insurance guaranty association assesses premiums on foreign insurers. *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 528, 520 P.2d 162 (1974) (cited in *Island County*, 135 Wn.2d at 146-47). There is a significant and qualitative constitutional difference between cases involving ordinary policy power regulation and the State's paramount duty to provide for the education of Washington's children. This Court's review of the Alliance's claims requires more than the lowest standard of review, the highest burden of proof, and an unmovable presumption of constitutionality.

Consequently, both of the lower courts erred in their application of the burden of proof. In *Seattle School District*, this Court held that the burden of proof in an as-applied challenge under Article IX is preponderance of the evidence and not beyond a reasonable doubt. 90 Wn. 2d at 528. While the trial court thoughtfully tried to articulate a distinction between an evidentiary burden and the constitutional question

of law, CP 315-16, neither court in the end applied the burden this way.⁸

Tunstall v. Bergeson, 141 Wn.2d 201, 221-22, 5 P.3d 691 (2000) was a facial challenge, and this Court should limit its application of the higher burden of proof to such claims. A court upholding a facial challenge renders the statute “utterly inoperative,” *id.* at 221, a result that merits certainty beyond a reasonable doubt. By contrast, the decision on an as-applied challenge concerns “legislative compliance with a specific constitutional mandate” judged by the “normal civil burden of proof, I.e. ‘preponderance of the evidence’...” *Seattle Sch. Dist.*, 90 Wn.2d at 528.

The trial court compounded its error when, at the State’s invitation, it borrowed rational basis scrutiny from the Court’s equal protection jurisprudence and applied it throughout its analysis. App. Br., p. 41 n. 13; Reply Br., p. 19; CP 305, 306, 321, 325, 329, 330, and 331 (finding the Legislature’s actions “rational” eleven different times). No case has ever made “rationality” the governing level of review applicable to a challenge under Article IX. This was error, and the Court of Appeals should have reversed based on the trial court’s reliance on this inapplicable standard.

In other areas of the law, this Court strikes a more nuanced balance

⁸ For example, “[t]his evidence is wholly inadequate to prove violation of the constitution beyond a reasonable doubt.” CP 335; and, “Thus, under an ‘as-applied’ challenge, the Alliance must prove beyond a reasonable doubt that the legislature failed to adequately fund special education in their districts, forcing them to rely on levy funds.” 149 Wn.App. at 248.

between the deference it owes the Legislature and the importance of the issues it is called upon to judge. The courts declare reserved rights at the core of our democracy “fundamental” or “preferred” and strictly scrutinize legislative acts affecting those rights. *See, e.g., Alderwood Assoc. v. Wash. Envtl. Council*, 96 Wn.2d 230, 244, 635 P.2d 108 (1981) (some kinds of speech constitute a “preferred right” under Const. art. I, § 5). Similarly, the courts review certain invidious classifications with great care. *Paulson v. County of Pierce*, 99 Wn.2d 645, 652, 664 P.2d 1202 (1983) (“If a statute creates an inherently suspect classification such as one based on race, nationality, or alienage, the statute, when challenged, will be subjected to strict scrutiny.”). And in some instances, the State’s Privileges and Immunities clause (Const. art. I, § 12) requires a showing of “reasonable grounds,” rather than a mere rational basis. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 741, 42 P.3d 394 (2002), *vacated on other grounds*, 250 Wn.2d 791, 83 P.3d 419 (2004) (Madsen, J., concurring & dissenting).

Our system of separation of powers does not require the same level of constitutional scrutiny in every case. Unlike our Federal Constitution, which sets out enumerated powers and reserves the balance to the people, State constitutions generally express limits on the plenary powers of the States in our Federal system. R. Utter and H. Spitzer, *The Washington*

State Constitution: A Reference Guide 16 (Greenwood 2002). Article IX is thus again distinct as it constitutes the people's express delegation to their government of a specific task, rather than a limitation on its power. And that task is the State's paramount duty.

The Alliance emphasizes that it does not ask the Court to make education a fundamental or preferred right subject to strict scrutiny (*see* App. Br., pp. 40-45). The Alliance accepts its obligation to come forward with sufficient evidence in the first instance to merit further review. But once it made a *prima facie* case that districts are compelled to use their local levy money to provide a part of the required program of education, the burden should have shifted to the State to demonstrate with a sufficient degree of certainty that it actually complied with its paramount duty to make ample provision for the education of our children.

The application of an unmovable presumption of constitutionality, rational basis review, and the burden of proof of beyond a reasonable doubt reduces Const. art. IX, § 1 from the State's paramount duty to a platitude. The people of Washington assigned this constitutional obligation to their State government, not to school districts. It is the State that must comply, and it is the State that must respond with actual evidence demonstrating the discharge of its duty once its actions are sufficiently called into question.

IV. CONCLUSION

The Alliance respectfully asks this Court to hold that the basic education appropriation cannot be used to satisfy the requirement of special education funding in this case and to reverse and remand with appropriate instructions. Further, the Court should remand because the trial court found there is insufficient BEA to pay for special education in addition to basic education. The Alliance also requests that this Court hold that when ruling upon an as-applied challenge under Const. art. IX, § 1, the State must prove more than a rational basis for its actions once a plaintiff establishes a *prima facie* case that districts are using their local levy money to pay for a part of the State's constitutional duty to provide for the education of all children.

DATED this 9th day of November, 2009.

K&L GATES LLP

By /s/ John C. Bjorkman
John C. Bjorkman, WSBA # 13426
Christopher L. Hirst, WSBA # 06178
Grace T. Yuan, WSBA # 20611
Gregory J. Wong, WSBA # 39329
Attorneys for Petitioners

CERTIFICATE OF SERVICE

Katie Dillon states as follows: I am an employee of K&L Gates LLP, a citizen of the United States and a resident of King County, State of Washington and am over 18 years of age and not a party to this action.

On November 9, 2009, I caused true and correct copies of the foregoing document to be hand delivered to as follows:

DEFENDANT STATE OF WASHINGTON et al:

William G. Clark Assistant Attorneys General Washington State Office of the Attorney General 800 5th Ave, Suite 2000 Seattle, WA 98104	<input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
David Stoler Assistant Attorney General Washington State Office of the Attorney General 1125 Washington Street SE PO Box 40100 Olympia, WA 98504-0100	<input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail

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


Katie Dillon