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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.

# STATE OF WASHINGTON'S REPLY BRIEF ADDRESSING ORDER TO SHOW CAUSE

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ORIGINAL

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## I. INTRODUCTION

This is a show-cause proceeding to determine whether the State should be held in contempt because the 2014 Legislature did not submit the "complete plan" this Court directed in its January 2014 Order, and, if so, whether and when any sanction should be imposed. *McCleary v. State*, No. 84362-7, Order to Show Cause at 3-4 (June 12, 2014). The Court's Order was explicit, specifically limiting the issues to be considered. Those issues do not include whether the State can demonstrate ultimate compliance with article IX, section 1 of the Washington Constitution or whether legislative actions to date evidence sufficient progress toward that compliance.

The State's Opening Brief Addressing Order to Show Cause explained the factual and legal reasons why the State should not be found in contempt; why no sanction should be ordered; why the sanctions Plaintiffs propose are impractical, unproductive, harmful, or beyond the Court's constitutional authority; and why, if the Court determines a sanction should issue, any determination as to the proper sanction should be deferred until after the 2015 legislative session. Plaintiffs' answer responded with policy arguments and rhetorical questions, but it did not rebut those reasons with legal argument supported by pertinent authority.

Accordingly, this brief focuses primarily on whether the Court's exercise of its contempt power is the proper vehicle to promote progress toward providing ample provision for basic education by 2018, concluding with a rebuttal to Plaintiffs' request for their preferred three-part order.[1]

## II. ARGUMENT

### A. The State Should Not Be Held in Contempt for the Legislature's Failure to Submit a "Complete Plan" to the Court

The McCleary Plaintiffs (respondents in this appeal) argue that the Court must hold the State in contempt in order to coerce ample funding. Plaintiffs' Answer at 36. But the Order to Show Cause linked the possibility of contempt only to the State's failure to submit a complete plan, not a prospective failure to fully implement its program of basic education by 2018. Consequently, the relief sought by the Plaintiffs goes well beyond any sanction reasonably designed to compel preparation of a plan.

There is no doubt that the Court has power to enforce its orders. But, as explained in the State's opening brief, the January 2014 Order was no run-of-the-mill court order, as in most contempt proceedings. Indeed, Respondents have cited no contempt proceeding from any jurisdiction that

[1] This brief also includes the State's responses to the amicus briefs filed in this case. The State will file no separate answer.

involves a court order like the one at issue here. Even the order in *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975), relied on by Plaintiffs, pales in comparison. There, the Court considered holding the Secretary of the Department of Social and Health Services in contempt for failing to follow an order to make drug treatment available to an offender in a correctional institution, but ended up continuing the request for contempt pending the Department's ongoing efforts to comply.

By contrast, the January 2014 Order directed 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" that included a phase-in schedule for fully funding each component of basic education. *McCleary v. State*, No. 84362-7, Order at 8 (Jan. 9, 2014). That is a complicated and difficult task. The Legislature already had adopted scheduled phase-in dates in statute. For example, transportation funding was scheduled to be fully phased in by the 2013-15 biennium, RCW 28A.160.192, and that deadline was met. State's Reply at 7 (May 29, 2014). Funding for MSOCs (materials, supplies, and operating costs) is scheduled to be fully phased in during the 2015-16 school year. RCW 28A.150.260(8)(b). Class size reductions are to be fully implemented by 2017-18. RCW 28A.150.260(4)(b). But the Court sought additional detail that would require the Legislature to decide how to

rebalance spending priorities and/or restructure revenue generation well into the future. As explained in the State's Opening Brief at 10-12, the failure to arrive at a consensus on such a fundamental question should not be considered willful disobedience by a co-equal branch, nor should it give rise to contempt in this case. It is appropriate for the Court to maintain pressure on the Legislature to continue working toward constitutional compliance; it is not appropriate for the Court to hold the State in contempt because the Legislature did not pass a bill or resolution.

Moreover, holding the State in contempt for a failure to legislate is a slippery slope. Witness the argument in the amicus brief of the Washington State Budget & Policy Center et al. at 1, that the State's "failure to adopt any new revenue measures constitutes contempt of this Court's order." The failure to legislate new revenue measures does not provide a basis for finding contempt of the Court's order to submit a plan.

Respondents have cited no contempt case that involves a court order analogous to the task assigned to the Legislature by this Court in January. That Order called upon the Legislature to truncate a consensus-building process that properly is carried out over multiple years, as described in the amicus brief submitted by the former Governors of

Washington,[2] and by this Court in its decision. *McCleary v. State*, 173 Wn.2d. 477, 545, 269 P.3d 227 (2012). Indeed, the range of public interests highlighted in the several amicus briefs illustrates the enormity of the task of creating a sustainable plan for funding and fully implementing the reforms initiated by ESHB 2261 and SHB 2776[3] while maintaining essential services to Washington residents. Amicus brief of former Governors at 15-17; Amicus brief of the Washington State Budget & Policy Center et al. at 11-14; Amicus brief of Columbia Legal Services et al. at 4-17. Although Plaintiffs casually dismiss every state program other than basic education as "non-paramount," the Legislature has a duty to the public to consider how funding decisions will affect public health, safety, and welfare, not to mention other legal duties imposed by the constitution, the courts, and federal law.

In a very real way, the Court's January 2014 Order accomplished its purpose: it created urgency and dialogue in the Legislature, setting the stage for the "next full opportunity to make meaningful progress"—i.e., the 2015 legislative session.[4] The Plaintiffs' simplistic test for finding

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[2] Amicus brief of former Governors Daniel J. Evans, John Spellman, Mike Lowry, Gary Locke, and Christine Gregoire at 10-14.

[3] Laws of 2009, ch. 548, and Laws of 2010, ch. 236, respectively.

[4] Amicus brief of former Governors at 6. *See also Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* (Apr. 30,

contempt—whether the Legislature knowingly adjourned at the end of the 60-day session in 2014—does not do justice to the circumstances here. First, the Legislature is required by law to adjourn after 60 days. Const. art. II, § 12. Second, Plaintiffs assume, without any evidence, that more progress toward the 2018 deadline would have been accomplished in a special session than by planning for the forthcoming budget session.[5] The true measure of the State's progress will be the actions the Legislature takes in the 2015 session.

Even if the Court could find contempt, it need not do so to hold the State accountable for implementing the remedy ordered in the *McCleary* decision. As explained below, the Court already has adequate remedial tools to address laws that violate the Constitution.

### B. If the Court Finds the State in Contempt for Failing to Provide a "Complete Plan," It Should Not Order Any Sanction to Compel a Plan

#### 1. Formulating a Remedy in a Positive Rights Case Tests the Limits of Judicial Power and Restraint

The Court explained that the duty placed on the State to amply fund basic education creates a corresponding "positive right" held by

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2014) (Leg. 2014 Report) at 32-33 (explaining the enhanced prospect of achieving consensus in the 2015 Legislature and acknowledging the need to do so).

[5] Plaintiffs fail to acknowledge the substantial preparatory effort for each legislative session accomplished by legislators and their staff outside the legislative chambers.

schoolchildren, which is distinct from other "rights" such as the freedom of religion or freedom of speech, which are framed as negative restrictions on government action. *McCleary*, 173 Wn.2d at 518-19. Where a court finds that government is violating a right framed as a negative restriction, the appropriate response of the court is to order government to stop the violation. But this Court carefully explained that this approach "provides the wrong lens for analyzing positive constitutional rights." *McCleary*, 173 Wn.2d at 519. The question is not whether government has overstepped its constitutional bounds such that it must be ordered to cease the offending conduct; the proper question is whether the government's action "achieves or is reasonably likely to achieve 'the constitutionally prescribed end.'" *Id.* (quoting Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1137 (1999)).

Plaintiffs mischaracterize this Court's orders and the actions of the 2014 Legislature, and, because they have failed to acknowledge the distinction between positive rights and negative restrictions on government action, they misunderstand the options available to the Court.[6]

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[6] *See, e.g.*, Plaintiffs' Answer at 3 (characterizing the Court as having ordered the State to "cease its violation" of children's positive right to an amply funded basic education by 2018 and exhorting the Court to "stop[] the State's violation" of the right to an amply funded basic education); *id.* at 9-10 (arguing that the Court has power to "bring

As a consequence, they disregard the Court's careful recognition that this case involves a "delicate exercise in constitutional interpretation" that "test[s] the limits of judicial restraint and discretion." *Id.* at 519 (quoting *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 497, 585 P.2d 71 (1978)). There is no government action to "bring to a halt." The appropriate remedy is one that results in the enactment of legislation that "achieves or is reasonably likely to achieve 'the constitutionally prescribed end'" by 2018. *McCleary*, 173 Wn.2d at 519.

**2. Sanctioning the State to Force Compliance With the January 2014 Order Would not Increase the Likelihood of Achieving Compliance With Article IX, Section 1 by 2018**

In its January 2012 decision, the Court stated that its purpose in retaining jurisdiction was to foster a dialogue with the Legislature that would further the shared goal of providing ample funding for educational reforms by 2018. The January 2014 Order reiterated the Court's desire to "foster dialogue and cooperation in reaching a goal shared by all Washingtonians." January 2014 Order at 8. The State suggests that the order to submit a "complete plan" should be viewed as part of that dialogue, intended to further the ultimate goal of constitutional compliance.

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a halt" to the constitutional violation at issue); *id.* at 13 (arguing that the Court has power to "stop" the State from violating the constitutional right of schoolchildren).

Preferring confrontation to dialogue, Plaintiffs urge the Court to require a special legislative session to produce a plan by December 31, 2014, under the threat of a strong coercive sanction to follow.[7] Plaintiffs' Answer at 24-28. As explained in the State's Opening Brief at 13, a plan adopted by the 63rd Legislature would not bind the 64th Legislature.[8] Compelling the 63rd Legislature to convene a special session to adopt a nonbinding plan would place form over substance, and impede, not facilitate, legislative progress toward the real goal: legislative development and enactment of strategies that amply fund basic education by 2018. Amicus brief of former Governors at 5, 10.

Plaintiffs dismiss the concern that a finding of contempt followed by sanctions runs the real risk of poisoning the Court's dialogue with the Legislature, or at minimum distracting the focus of both the Legislature and the Court from the ultimate goal. In part, this risk is present because the Legislature is the only entity with constitutional authority to take the actions required by the Court's January 2014 Order to the State. And the

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[7] The Legislature may call itself into special session or may convene, if it chooses, in response to a proclamation by the Governor. Const. art. II, § 12(2), art. III, § 7. But no provision of the Washington Constitution authorizes the Court to order a special session of the Legislature.

[8] As explained both in the Leg. 2014 Report at 34-38, and in the amicus brief of the former Governors at 10-11, the Legislature operates on a biennial budget-writing cycle and is not institutionally equipped to make long-term revenue and funding plans during the non-budget-writing sessions. Because of that institutional constraint, it may have been unrealistic to expect a complete plan by April 30.

Legislature is not a normal party in civil litigation, like a private corporation or partnership (Plaintiffs' Answer at 19); it is a coequal branch in a government of constitutionally divided powers, and it possesses some powers that are beyond the Court's authority to command, as summarized below. A finding of contempt and the imposition of coercive sanctions may satisfy Plaintiffs, but it will not promote progress toward ample provision for basic education.

### 3. The Court's Power to Sanction for Contempt Is Subject to Constitutional Limits

Plaintiffs nevertheless take the position that if the Court finds the State in contempt, it is then free to take virtually any action that could coerce legislative compliance, including commandeering legislative power to force full constitutional compliance by the 2015 Legislature. In doing so, they lose sight of two important limitations.

#### a. A Sanction Must Address the Act Leading to a Finding of Contempt

The first limitation is the subject matter of this contempt proceeding. It was a failure to produce a plan that led to the possibility of contempt, and thus the purpose of any remedial sanction should be to coerce submission of a plan. *See King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988). But Plaintiffs continue to advocate much broader sanctions, as if the State has failed to meet the

2018 deadline this Court adopted. In its original decision, however, the Court recognized the difficulty of the task ahead and gave the State six years to develop and implement a constitutional system of funding basic education. *McCleary*, 173 Wn.2d at 545-47. We are not yet halfway to that deadline, and Plaintiffs' request for sanctions to compel compliance with that deadline is premature. The appropriate focus for a sanction, if there were to be one, is the Court's January 2014 Order to submit a plan.

**b. A Sanction Must Not Exceed Constitutional Limits of the Court's Power**

The second limitation is constitutional. Plaintiffs appear to believe that the Court is not bound by any constitutional limitation in crafting a sanction if it first finds the State in contempt. But the Court's power to enforce its orders is not unbounded. The Court's exercise of its power still must be guided by separation of powers limitations and by other constitutional limitations and principles.

Separation of Powers. As detailed in our prior briefing, the doctrine of separation of powers stands as a constitutional bar against one branch of government invading or undermining powers that are constitutionally delegated to another branch. *Brown v. Owen*, 165 Wn.2d 706, 718-19, 206 P.3d 310 (2009). In the context of this case, the constitutional concern is that a sanction may invade or effectively assume

control of the taxing and/or appropriation powers reserved by our constitution to the Legislature.

Article VIII, section 4 of the Washington Constitution places the authority for appropriation of funds exclusively in the Legislature. "Long ago, we recognized the central object of section 4 was 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." *Washington Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 365, 70 P.3d 920 (2003) (quoting *State v. Clausen*, 94 Wash. 166, 173, 162 P. 1 (1917) (internal quotation marks omitted)).

The Court has recognized there may be "special situations" where it may have authority to order the expenditure of state funds. *See Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 390, 932 P.2d 139 (1997) (citing *In re Juvenile Director*, 87 Wn.2d 232, 242, 552 P.2d 163 (1976) (judiciary has the inherent power to compel funding of its own functions); *see also City of Ellensburg v. State*, 118 Wn.2d 709, 717-18, 826 P.2d 1081 (1992) (citing *Seattle Sch. Dist. No. 1*, 90 Wn.2d 476, as an example of a "rare case" in which the judiciary may interfere with the Legislature's constitutional power of appropriation.). But separation of power concerns are implicated any time the judiciary seeks to exert control over

appropriations, and this Court has never held that those concerns disappear in the "rare case" in which there is a competing constitutional mandate.[9]

In like manner, article VII, section 5 of the Washington Constitution vests the State's authority to impose taxes solely in the Legislature. *See Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 770, 131 P.3d 892 (2006) ("It is elementary that the power of taxation, subject to constitutional limitations, rests solely in the legislature.") (quoting *State ex rel. Tacoma Sch. Dist.* v. *Kelly*, 176 Wash. 689, 690, 30 P.2d 638 (1934)); *Ban-Mac, Inc. v. King County*, 69 Wn.2d 49, 51, 416 P.2d 694 (1966) ("[Article VII] places revenue and taxation matters under legislative control. We may construe but not legislate in tax matters."); *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 64, 211 P.2d 651 (1949) ("[T]he state's fiscal policy has been by the constitution delegated to the legislature and not to this court."). While the Court may direct the Legislature to exercise its power of taxation to fund a program that is constitutionally mandated, *Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979), the Court may not itself assume that power. *See Ban-Mac, Inc.*, 69 Wn.2d at 51 ("We may construe but not legislate in tax

[9] Ironically, in *Juvenile Director*, the Court relied on separation of powers—the need to protect the judicial branch from improper checks by the legislative branch—as the constitutional justification for judicial incursion into the legislative function. 87 Wn.2d at 244-45.

matters."); *State ex rel. Hart v. Gleeson*, 189 Wash. 292, 295-96, 64 P.2d 1023 (1937) (Court cannot legislate to remedy the Legislature's failure or refusal to delegate additional taxing power to counties). If the Legislature falters, the constitutional remedy is to invalidate the effort and direct the Legislature to try again; it is not for the Court to step into the Legislature's shoes.

Legislative Immunity. Any sanction that would have the effect of imposing liability on legislators because they did or did not vote in a certain way would violate the state constitution's speech and debate clause in article II, section 17. *See* State of Washington's Reply at 16 (May 29, 2014). Moreover, any such sanction would be inappropriate because Plaintiffs sued the State of Washington, not any individual legislator. For the State to respond to the Court's Order, it is the Legislature that must enact legislation, and it can do so only collectively. Const. art. II, sec. 22.

**4. The Court's Power to Sanction for Contempt Is Subject to Practical Limits**

As explained above, the Court lacks constitutional power to assume the Legislature's taxing and spending functions. The Court's constitutional role is to determine the constitutionality of legislation after

it is enacted, not in anticipation of enactment.[10] It is not the Court's constitutional role to direct the content of legislation.[11]

Plaintiffs nevertheless have proposed various remedies in which the Court would order additional spending on K-12 education or prohibit expenditures for "non-paramount" purposes unless and until K-12 education is fully funded. Plaintiffs' Answer at 31-38. Amici have proposed additional remedies, in which the Court would compel tax increases[12] or adopt a sort of judicial line-item veto.[13]

To the extent these remedies are framed as options for the Legislature to choose from in exercising its constitutional taxing and appropriations powers to achieve the constitutional compliance the Court ordered in its 2012 decision, the remedies may be constitutionally permissible. But to the extent they contemplate the Court making the specific determinations regarding new taxes, spending cuts to other programs, or which "non-paramount" programs are essential or

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[10] *State ex rel. O'Connell v. Kramer*, 73 Wn.2d 85, 87, 436 P.2d 786 (1968) ("[W]e cannot pass on the constitutionality of proposed legislation . . . until the legislative process is complete and the bill or measure has been enacted into law.").

[11] *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007) ("It is neither the prerogative nor the function of this court to substitute our judgment for that of the legislature in enacting laws unless those laws clearly contravene state or federal constitutional provisions.").

[12] Amicus brief of Washington State Budget & Policy Center et al. at 16-19.

[13] Amicus brief of Superintendent of Public Instruction at 5-12.

expendable, they require the Court to assume a legislative function for which it is not equipped.

The Court should not use contempt as a vehicle for fashioning a remedy requiring reform of the existing state revenue system, as the Washington State Budget & Policy Center advocates,[14] or undertaking to take control of legislative decisionmaking, as Plaintiffs advocate,[15] or establishing a judicial process for vetoing spending decisions, as the Superintendent of Public Instruction advocates.[16] There is no need to do so, because the Court's traditional power to address unconstitutional legislative action is adequate and more appropriate. The Court possesses unquestioned constitutional authority to invalidate challenged legislation that violates the Washington Constitution. What it lacks is constitutional authority to legislate or to mandate the content of specific legislation.

### C. No Sanction Should Be Ordered, if at All, Until the 2015 Legislature Is Given an Opportunity to Act

Plaintiffs ask for aggressive enforcement action now to force compliance with article IX, section 1. Only such action, they argue, will demonstrate to schoolchildren that their rights under article IX, section 1 matter. Plaintiffs' Answer at 52.

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[14] Amicus brief of Washington State Budget & Policy Center et al. at 16-19.

[15] Plaintiffs' Answer at 31-41.

[16] Amicus brief of Superintendent of Public Instruction at 5-12.

The proper lesson for schoolchildren is that the entire constitution matters. The distribution of government power among separate branches matters. The integrity of the legislative process matters. Their rights are protected not just by article IX, section 1, but by their government's respect for and adherence to all provisions of the constitution.

The means of achieving compliance with article IX, section 1 matter every bit as much as the compliance itself. The constitutional mandate to amply fund basic education does not exist in a constitutional vacuum and provides no justification for disregarding any other provision of the constitution. It provides no constitutional basis for the judiciary to invade or arrogate the legislative function constitutionally delegated exclusively to the legislative branch.

We previously explained why no sanction should be imposed before the 2015 legislative session. State's Opening Brief at 30; *see also* amicus brief of former Governors at 1-2. The Court adopted a 2018 deadline for full compliance with article IX, section 1, and it will have a full opportunity to enforce that deadline at that time, through the use of traditional remedies for responding to unconstitutional legislation. It should continue to give the Legislature the opportunity to meet that deadline.

There is an additional reason the Court should allow the 2015 Legislature to act, rather than dictating specific solutions now. Although this case involves retained jurisdiction, at its core it is an adversary proceeding, which is not an appropriate forum to decide overarching questions of state policy. The information a court receives in an adversary proceeding is dominated by the parties, often to the exclusion of the wider universe of information possessed by the public.

When deciding a dispute between adversaries, those evidentiary limitations are efficient and effective, but not when deciding public policy, as this case illustrates. The State's paramount duty is not its sole duty. Plaintiffs focus solely on obtaining more money for education. Their single-minded focus suggests a willingness to risk real harm to Washington residents to achieve that goal. There is no doubt that ample provision for basic education is the State's paramount duty under the constitution. But the health, safety, and welfare of residents also are vitally important, yet Plaintiffs dismiss them as "constitutionally irrelevant." Plaintiffs' Answer at 30.

Amici address some of the harms at issue if the Court were to mandate increased education spending without consideration of other public interests. *See* Amicus brief of former Governors at 15-18; Amicus brief of Columbia Legal Services et al. at 4-17; Amicus of Washington

State Budget & Policy Center et al. at 11-12. Plaintiffs would sacrifice these interests, many of which provide critical support for children.[17] Balancing these interests for the residents of Washington is the Legislature's responsibility, not Plaintiffs—and not the Court's, in the context of one lawsuit.

The Court should not get distracted by "the procedural trees rather than the constitutional forest." Amicus brief of former Governors at 6. Rather than dwell on the Legislature's failure to submit a plan, the Court should restore the focus of this case to the shared goal of determining how to provide the best educational opportunities to all of Washington's children. *Id.* at 1. Plaintiffs' proposed remedies will not further that goal.

### D. Plaintiffs' Proposed Three-Part Remedy Will Not Promote Progress Toward Constitutional Compliance

The Plaintiffs propose a three-part enforcement order that makes little sense. First, they ask the Court to hold the State in contempt until it complies with the Court's various orders. Plaintiffs' Answer at 6, 25, 53. The request rests on a faulty foundation. On its face, the request is

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[17] *See* Plaintiffs' Answer at 29-30 (characterizing all other spending as merely "non-paramount things State officials want to fund") (Plaintiffs' emphasis omitted); *id.* at 33 ("[T]he merit of any particular non-education program is not the question here. The question is whether prohibiting (or limiting) State expenditures on any particular non-education program until the legislature complies with this Court's Order can coerce compliance with that Order.") (Plaintiffs' emphasis omitted); *id.* at 38 ("[T]he State's invocation of possible funding impacts on other State programs is constitutionally irrelevant in this case.").

overbroad insofar as it links compliance to anything other than submission of a plan to the Court, because Plaintiffs candidly admit they view contempt as a means to coerce the compliance due in 2018. Plaintiffs' Answer at 36. Plaintiffs in essence ask the Court to hold the State in contempt until full compliance is achieved. But, as the State has repeatedly pointed out in this brief and in its opening brief, the Court's Order to Show Cause is based solely on the failure to submit a "complete plan"—not a failure to fully achieve the 2018 implementation goal. The Court should not hold the State in contempt for failing to achieve full compliance before 2018.

Second, Plaintiffs propose enjoining the imposition of "any more" unfunded or underfunded mandates on schools. Plaintiffs' Answer at 7, 25-27, 53. They supply no nexus between an "unfunded/underfunded mandates" injunction and the issue giving rise to the show cause order, i.e., the failure to submit a plan. Rather, this part of their three-part proposal is premature. It is an alternative remedy for an ultimate failure to implement finance reforms necessary to cure the constitutional violation.

An injunction "must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law." *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986). Plaintiffs do not dispute the legal standard. They argue that the specific harm is

"further digging the unconstitutional funding hole." Plaintiffs' Answer at 27. Their argument incorrectly presupposes that facts have been established regarding specific unfunded or underfunded mandates and that specific mandates have been identified by the Court, when in fact the Plaintiffs can cite only to their own assertions. *See, e.g.*, Plaintiffs' Answer at 25 (citing their own prior briefing).

Plaintiffs also simplistically argue that everyone knows an unfunded (and presumably, underfunded) mandate when they see it. Plaintiffs' Answer at 26-27. But Plaintiffs surely understand that such a broad injunction would be an invitation for additional litigation over whether any particular piece of education policy legislation implicates a state funding obligation and, if so, what the funding level should be. Additional sub-litigation during the period that the State is phasing in its finance remedies is unlikely to be helpful in achieving constitutional compliance. This Court recognized as much in setting the stage for retaining jurisdiction in this case. *McCleary*, 173 Wn.2d at 544 ("Too much deference may set the stage for another major lawsuit challenging the legislature's failure to adhere to its own implementation schedule.").

The final part of Plaintiffs' proposed three-part remedy asks for "strong judicial enforcement orders" in January 2015 if the 63rd Legislature does not submit a plan by December 2014. Plaintiffs' Answer

at 7, 27-28, 53. Presumably the "strong judicial enforcement orders" refers to the sanctions they previously proposed. They don't say.

The Court should reject Plaintiffs' desire to squeeze more out of the 63rd Legislature. They have failed to make any credible case for why the 63rd Legislature should be forced to act to prepare a plan that cannot bind the 64th Legislature mere weeks before the new Legislature convenes with newly-elected members. It smacks of punishment. Instead, there are sound prudential reasons for the Court not to consider such an order.[18] Just as judicial preparation may take place outside of the courtroom or even outside of chambers, legislative preparation may occur outside of the Legislative Building.[19] All branches of the State should be focused on facilitating an environment most calculated to yield progress in 2015. That includes sustained judicial vigilance. But the incoming Legislature

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[18] For example, the voters will be considering a new set of education funding requirements in Initiative 1351 in November. According to the Fiscal Impact Statement (https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2014/General-Election/Pages/Online-Voters-Guide.aspx), that initiative could impose a new statutory funding requirement of $4.7 billion through 2019 without any provision for increasing state revenues. Should I-1351 be adopted, any plan adopted by the 2014 Legislature would be incomplete or worthless for use by the 2015 Legislature. If it fails at the polls, legislators and pundits will mine its failure for its political significance. This example illustrates the uncertain political landscape continuing to year's end and the folly of Plaintiffs' demand for a plan of the eve of the new Legislature taking office.

[19] *See* Amicus brief of former Governors at 12-13 (discussing their experience with the deliberative legislative process); Amicus brief of Washington State Budget & Policy Center et al. at 11-12 (discussing preparations by the Governor's Office).

also must have time between the fall elections and the start of the 2015 session to prepare for progress.

We have argued that no sanctions should be considered before the end of the 2015 session, if at all. Nonetheless, if the Court is inclined to issue some type of "strong judicial enforcement order" between now and the end of the 2015 legislative session, the Court should not wait until January 2015. An order on the eve of the legislative session will not promote progress toward constitutional compliance. We have argued that the Court can craft a more effective and appropriate remedy, if one is necessary, at the conclusion of the 2015 legislative session once its success or shortcoming can be assessed. But if the Court determines after this show cause proceeding that it should identify a particular remedy if the 2015 Legislature fall short of expectations, the State should be informed now of that remedy, so it can be taken into consideration in planning for the 2015 legislative session.

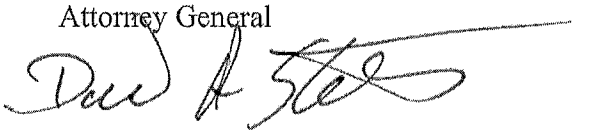
## III. CONCLUSION

The Court should not find the State in contempt and should impose no sanction on the State for its failure to submit the plan specified in the Court's January 2014 Order. If the Court determines a sanction should be

imposed, it should delay imposition until it assesses the outcome of the 2015 legislative session.

RESPECTFULLY SUBMITTED this 25th day of August, 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.,<br><br>Respondents,<br><br>v.<br><br>STATE OF WASHINGTON,<br><br>Appellant. | CERTIFICATE OF SERVICE |

I certify that I served a copy of the State of Washington's Reply 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 25th day of August 2014, at Olympia, Washington

KRISTIN D. JENSEN
Legal Assistant

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Dear Clerk:

Attached for filing in the above matter, please find the State of Washington's Reply Brief Addressing Order to Show Cause.

Sincerely,
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