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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Defendant/Appellant,

v.

MATHEW & STEPHANIE MCCLEARY, on their own behalf and on behalf of KELSEY & CARTER MCCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Plaintiffs/Respondents.

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**BRIEF OF AMICUS CURIAE**

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## I. INTRODUCTION

Stephanie McCleary was 13 years old when this Court held in 1978 that the State had failed in its Constitutional duty to amply provide for the education of all Washington children. When Ms. McCleary filed this lawsuit, her daughter Kelsey was 13. “[A] whole generation has gone by [and] I am really concerned that [Kelsey] will be out of school before there is any remedy,” Ms. McCleary testified at trial. “I don’t feel very hopeful.” Trial Transcript (“TT”) 491:11-19.

Recent events have reaffirmed Ms. McCleary’s fears. State funding for education has declined since the lawsuit began and, notably, since the trial court’s ruling in February 2010. Those cuts, coupled with rising costs, now impose even greater financial burdens on school districts—and adversely impact the education of students—throughout the State. The cuts betray the Washington Constitution’s decree that “[i]t is the *paramount* duty of the State to make *ample* provision for the *education of all* children residing within its borders . . . .” WASH. CONST., art. IX, sec. 1 (emphasis added).

## II. INTEREST OF AMICUS

League of Education Voters Foundation is a statewide, nonpartisan organization dedicated to making Washington’s schools the best in the nation. The Foundation works to shape an education system in which every student has an equal and adequate opportunity to succeed in school,

work, and life. This case has great significance for the Foundation and for all Washington citizens because of its implications on the funding of education in the State.

### III. ARGUMENT

#### A. The State Has a Duty to Amply Fund Education Under Article IX, Section 1.

The Washington Constitution features the strongest K-12 school-funding mandate of any State constitution. *See Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 498, 511, 585 P.2d 71, 84, 91 (1978) (“Clearly, art. 9, § 1 is unique among state constitutions. . . . No other State has placed the common school on so high a pedestal.”). It makes “ample provision for the education of all children residing within its borders” the “paramount duty of the state.” WASH. CONST., art. IX, sec. 1.

In *Seattle School District*, this Court explained that:

[The] State’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the market place of ideas. . . . The constitutional right to have the State make ample provision for the education of all (resident) children would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas. . . . [T]he effective teaching and opportunities for learning these essential skills make up the *minimum* of the education that is constitutionally required.

90 Wn.2d at 517-18, 585 P.2d at 94-95 (emphasis in original).

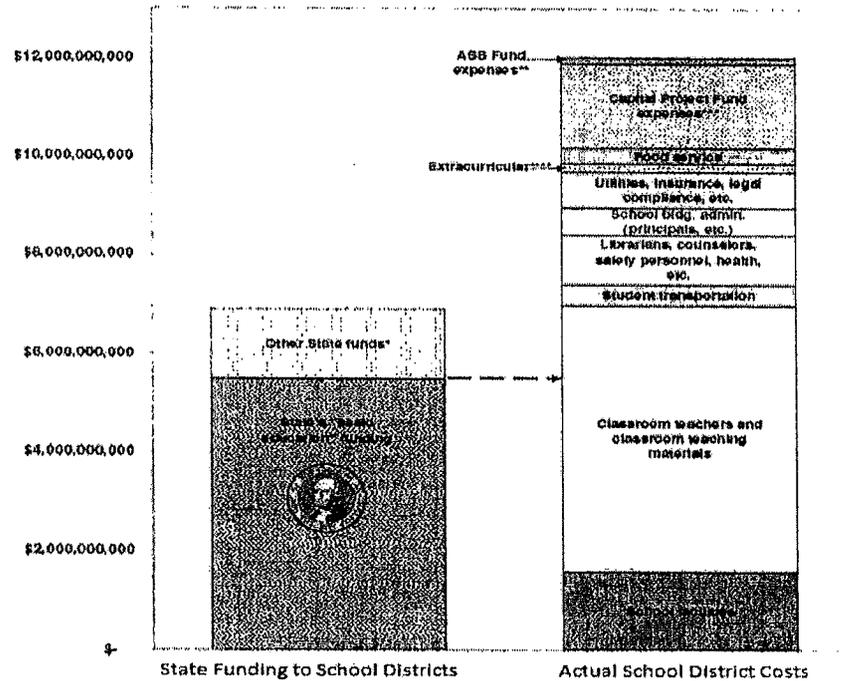
This Court then directed the Legislature to supply additional content to achieve those essential skills and to fund education, as mandated by Article IX, Section 1, “without reliance on special excess levies.” *Id.* at 482, 518-20, 537, 585 P.2d at 76, 95, 104. This Court gave the Legislature until July 1, 1981 to comply. *Id.* at 538, 585 P.2d at 105.

**B. The Trial Court Held that Funding for the 2007-08 School Year Was *Not* Ample Under Article IX, Section 1.**

Three decades after *Seattle School District*, the trial court held that the State has failed in its duty under Article IX, Section 1. “State funding is not ample, it is not stable, and it is not dependable. Local school districts continue to rely on local levies and other non-State resources to supplement state funding for a basic program of education.” Court’s Findings of Fact & Conclusions of Law (“Findings”) at 73.

In reaching this conclusion, the trial court examined funding for the 2007-08 school year, as displayed below:

Statewide - all 295 Washington School Districts  
2007-08 School Year



See [http://www.waschoolexcellence.org/impact\\_funding\\_cuts/statewide\\_examples.1](http://www.waschoolexcellence.org/impact_funding_cuts/statewide_examples.1)

<sup>1</sup> The 2007-08 "Actual School District Costs" were drawn from the Office of the State Superintendent of Public Instruction ("OSPI"), namely from (1) the database containing the Report F196s (audited Annual Financial Statements) submitted by each school district, and (2) Report 1191F (Apportionment Report). See <http://www.k12.wa.us/safs/PUB/FIN/0708/fs.asp> (2007-08 school district financial reporting summary); <http://www.k12.wa.us/safs/month.asp> (2007-08 Apportionment Reports).

With respect to "State Funding to School Districts," the State provided in discovery "the dollar amount that the State determined it cost to provide the Constitutionally required basic education to every child." Tr. Ex. 646. For the 2007-08 school year, the State stated that it provided \$5,482,416,402 for what it called "Basic Education" funding. See Tr. Ex. 660.

The State also provided "Other State Funds," which it asserted were *not* a part of "Basic Education" funding. In the 2007-09 biennium budget, the State allocated \$2,595,500,000 for what it called "*non*-basic education" funding. See Tr. Ex. 211 at 43 (2009 Washington State Operating Budget Briefing Book). Thus, for the 2007-08 school year, the State allocated approximately half of that amount, \$1,297,750,000, toward "*non*-basic education."

As shown, the actual school district costs for the 2007-08 school year were nearly \$12 billion, including capital expenses. Of that, the State provided approximately \$5.5 billion in funding for what the State called “basic education” and approximately \$1.3 billion in “Other State Funds,” for a total of about \$6.8 billion. That figure represents about *57 percent* of the \$12 billion in actual costs that school districts incurred that year.

The State does not dispute that it fails to fund all of the actual costs of education. Instead, it contends that Article IX, Section 1 only requires it to fund the “basic education program” in the manner that the State itself defines it. As the trial court noted, however:

This results in a tautological conclusion: full funding is whatever the Legislature says it is. This is without regard to whether such funding is ‘ample’ in providing children with the tools necessary and skills needed to compete in today’s economy and meaningfully participate in this State’s democracy. Further, such funding is without regard to the constitutional mandate to establish a basic program of education to provide basic education.

Finding 180.<sup>2</sup>

To make up the \$5 billion difference between State funding and actual costs, the State forced the school districts—contrary to the holding in *Seattle School District*—to rely on local levies and bonds; federal sources; private grants, gifts, and donations; and withdrawals from

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<sup>2</sup> In essence, the State claims (a) that it provides for the essential skills outlined in *Seattle School District*, 90 Wn.2d 476, 585 P.2d 71, and (b) that part of the funding necessary to provide those skills is “non-basic education” funding. By selectively labeling funding as “non-basic,” the State would like to preserve the ability to stop providing that funding whenever it chooses—no matter its nexus to achievement of the essential skills—and thereby avoid its Constitutional mandate. This it may not do.

reserves. Witnesses at trial testified that the 2007-08 school year figures were not an anomaly, but represented a recurring reality of inadequate State funding, which caused the State's school districts to raise significant local revenue—if they could—simply to keep their facilities open.<sup>3</sup>

**C. The State Has Cut K-12 Education Funding Since the 2007-08 School Year.**

**1. The State has enacted major reductions in K-12 funding since the 2007-09 biennial budget, including cuts to the “basic program of education,” as defined by the State.**

Since the trial court's determination that education funding was deficient as of the 2007-08 school year, funding for K-12 education has declined. In the 2008-09 school year, state funding for staffing and programmatic support increased by \$316 million with increased student enrollment. But in the 2009-10 and 2010-11 school years, state funding declined by \$942 million.<sup>4</sup> As a result of these cuts, the State funded \$232.35 *less* per student in the 2009-10 school year than during the 2007-

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<sup>3</sup> *E.g.*, TT 2413:6-2415:3 (State Board of Education Chair Mary Jean Ryan testifying that schools have increasingly relied on local levies to pay the operating costs); TT 250:15-251:16 (Superintendent Mike Blair testifying that the gap between the State's basic education allocation and Chimacum school district's actual expenditures is typical and getting larger); TT 2187:5-11 (Patty Venema testifying that without the local fundraising efforts, the schools would not be able to provide basic services necessary for kids to learn); TT 561:14-15 (Stephanie McCleary testifying that “[i]t would be hard to survive without levy dollars.”).

<sup>4</sup> *See* 2009 Washington State Legislative Budget Notes, <http://leap.leg.wa.gov/leap/budget/lbns/2009toc.htm>; 2010 Washington State Legislative Budget Notes, <http://leap.leg.wa.gov/leap/budget/lbns/2010toc.htm>; OSPI, School Apportionment & Financial Services, 2011-12 Budget Updates, <http://www.k12.wa.us/safs/11budprp.asp>.

08 school year—a drop of 3.5% between the two years.<sup>5</sup> As of January 2009, Washington State ranked 42nd in the nation in per-student funding (adjusted for cost-of living), according to the Office of the State Superintendent of Public Instruction.<sup>6</sup>

Indeed, the allocation for public schools as a percentage of total State expenditures has decreased over time. In 1995, for example, the State allocated 47 % of its budget to public schools.<sup>7</sup> For 2011, the State has allocated 43.1 % of its budget to public schools.<sup>8</sup>

The 2011-13 biennial budget (covering the 2011-12 and 2012-13 school years) has exacerbated the downward trend. It reduces state spending on K-12 education by \$1.8 billion, through elimination, suspension, or reduction of more than a dozen programs. It also reduces teacher salaries by 1.9 % and administrative salaries by 3 %—telling

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<sup>5</sup> In the 2007-08 school year, the State funded \$6,632.19 per student. After a modest increase in the 2008-09 school year, the State funded \$6,399.84 per student in the 2009-10 school year. These numbers do not account for inflation, and, indeed, the most recent cuts suggest that the per-student funding has worsened since the 2009-10 school year. See General Fund Expenditures, Revenue, and Ending Total Fund Balance Per Pupil by Enrollment, <http://www.k12.wa.us/safs/PUB/FIN/0708/fs.asp>; <http://www.k12.wa.us/safs/PUB/FIN/0910/fs.asp>.

<sup>6</sup> See Tr. Ex. 465 (K-12 Education: An Agenda for Change, 2009 and Beyond (Jan. 14, 2009)).

<sup>7</sup> See Washington State Fiscal Information, <http://www.fiscal.wa.gov/FRViewer.aspx?Rpt=Transportation%20Budget%20Agency%20Detail>.

<sup>8</sup> H.B. 1087, 62nd Leg., Reg. Sess. (Wash. 2011), <http://leap.leg.wa.gov/leap/Budget/Detail/2011/HOAgencyDetail0524.pdf>.

reductions insofar as the cuts are from what the State itself calls the “basic program of education.”<sup>9</sup>

This Court has recognized that the framers deliberately placed the term “paramount” in Article IX, Section 1, to distinguish education funding as “superior in rank, above all others, chief, preeminent, supreme, and in fact dominant.” *Seattle School Dist.*, 90 Wn.2d at 511, 585 P.2d at 91 (internal citations omitted). And, as the State acknowledges, difficult economic times cannot excuse noncompliance with the Constitution.<sup>10</sup> The downward trend in funding demonstrates that the State is moving further away from complying with Article IX, Section 1. The State’s more notable actions since the 2007-08 school year are explained in subsections 2-6.

2. **The State has eliminated the majority of K-4 Class Size Enhancement.**

Washington’s statutory school funding formula specifies a higher funding level for kindergarten through fourth grade in order to lower class sizes in the early grades (“K-4 Enhancement”).<sup>11</sup> When the Legislature extended the initial K-3 enhancement to include fourth grade in 2000, it

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<sup>9</sup> *Id.* at 201.

<sup>10</sup> See State’s Opening Statement, TT 48:17-23 (Constitution prohibits cuts “even in the wors[t] of economic times.”); A Citizen’s Guide to the Washington State K-12 Finance (2009), at 3 (“Neither fiscal crisis nor financial burden changes the Legislature’s constitutional duty.”), <http://www.leg.wa.gov/Senate/Committees/WMI/Documents/Publications/BudgetGuides/2009/K1209.pdf>.

<sup>11</sup> See RCW 28A.150.290 (1); WAC 392-140-900 *et seq.*

stated that the enhancement was designed “[f]or class size reduction and expanded learning opportunities,” including “intercession opportunities to assist elementary school students in meeting the essential academic learning requirements and student assessment performance standards [EALRs].”<sup>12</sup> As support for K-4 Enhancement, numerous studies have concluded that “young children learn more in smaller classes, and that the benefits are even larger for traditionally disadvantaged children.”<sup>13</sup>

Nevertheless, in February 2011, the Legislature *retroactively* eliminated the majority of funding for the K-4 Enhancement for the *entire* 2010-11 school year, causing \$84 million in reductions to school districts in the middle of the fiscal year.<sup>14</sup> This was done despite the fact that the State’s school districts had already set staffing and class sizes at the beginning of the year through employment contracts and, by law, were prohibited from cancelling those contracts mid-year in response to the State’s retroactive elimination.<sup>15</sup> Stripping the funding mid-year, the State

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<sup>12</sup> E.S.S.B. 6153, 57th Leg., 2nd Spec. Sess. (Wash. 2001), <http://leap.leg.wa.gov/leap/Budget/Detail/2001/OS0103FloorBill.pdf>.

<sup>13</sup> See Douglas D. Ready, Class-Size Reduction: Policy, Politics, and Implications for Equity, Apr. 2008 at 23, [http://www.equitycampaign.org/i/a/document/6863\\_Ready\\_Class\\_Size\\_Research\\_Review.pdf](http://www.equitycampaign.org/i/a/document/6863_Ready_Class_Size_Research_Review.pdf); Steven Aos & Marna Miller, Benefits and Costs of K-12 Education Policies: Evidence-Based Effects of Class Size Reductions & Full-Day Kindergarten, (Wash. State Inst. for Pub. Policy), July 11, 2007 at 10, [http://www.leg.wa.gov/Senate/Committees/EDU/Documents/BensCosts\\_EdPolicies.pdf](http://www.leg.wa.gov/Senate/Committees/EDU/Documents/BensCosts_EdPolicies.pdf) (noting that reduced class sizes boost test scores in kindergarten through grade 6).

<sup>14</sup> See E.S.H.B. 1086, 62nd Leg., Reg. Sess. (Wash. 2011), <http://leap.leg.wa.gov/leap/Budget/Detail/2011/coSummary0217.pdf>.

<sup>15</sup> See RCW 28A.405.210.

forced its school districts either to draw from reserves and other sources to cover for the lost funding or cut programs. This reduction of funds further deprived students of the education mandated under Article IX, Section 1. The 2011-13 budget extends elimination of the majority of the K-4 Enhancement funding.<sup>16</sup>

3. **The State has excluded “Early Learning” in its “basic program of education.”**

Early Learning is the effort to enhance educational opportunities for young children from birth through the third grade.<sup>17</sup> Calling it a “critical factor in the eventual successful outcome of a K-12 education,” the Legislature intended Early Learning to provide preschool for at-risk children as part of the State’s provision of basic education.<sup>18</sup>

Funding for Early Learning has a significant impact on the overall quality of education and on the ability of Washington students to participate in the State’s economy and democracy. For example, in developing H.B. 2261—the 2009 measure addressing education and

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<sup>16</sup> H.B. 1087, [http://leap.leg.wa.gov/leap/Budget/Detail/2011/HOAgency\\_Detail0524.pdf](http://leap.leg.wa.gov/leap/Budget/Detail/2011/HOAgency_Detail0524.pdf) at 15, 17. Although the State implements a new funding formula that includes a lower average class size for K-3 classrooms, the 2011-13 budget carries forward the elimination of most of the funding for this purpose. The State does fund a small amount for K-3 class size reduction in high poverty schools, but reduces in total K-3 class size funds by \$136 million. *Id.* Indeed, the State has long treated funding for K-3 class size reduction as part of its definition of “basic education.” By extending these cuts, the State makes clear that it is unable to meet its Constitutional duty, as defined by the State itself.

<sup>17</sup> See OSPI, Early Learning, <http://www.k12.wa.us/EarlyLearning/default.aspx>.

<sup>18</sup> E.S.H.B. 2261, 61st Leg., Reg. Sess. (Wash. 2009) § 115, <http://apps.leg.wa.gov/documents/WSLdocs/2009-10/Pdf/Bills/Session%20Law%202009/2261-S.SL.pdf>.

education funding—the Joint Task Force on Basic Education Finance relied on studies that concluded that there was a \$2.53 return on investment for every dollar spent on early childhood education.<sup>19</sup>

But the Governor vetoed the Early Learning component of the State's education program in 2009.<sup>20</sup> As a result, funding for early learning and high-quality pre-K is not guaranteed and, in fact, has recently stagnated, leaving more than 13,000 eligible three- and four-year-olds without funding.<sup>21</sup> By removing Early Learning from its basic program of education, the State—by its own measure—has fallen short of amply providing for education of all Washington children.

4. **The State has suspended Initiative 728, which created the Student Achievement Fund.**

Washington voters passed Initiative 728 (“I-728”) in November 2000 by a 72 percent majority, in response to a finding that Washington had the third-worst student-teacher ratio in the nation.<sup>22</sup> To address that

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<sup>19</sup> See Steve Aos, Early Childhood Education & Full-Day Kindergarten: Effects on K-12 Outcomes, (Wash. State Inst. for Pub. Policy) Oct. 21, 2008 at 4, [http://www.leg.wa.gov/JointCommittees/BEF/Documents/Mtg10-20\\_21-08/II-c-ii.pdf](http://www.leg.wa.gov/JointCommittees/BEF/Documents/Mtg10-20_21-08/II-c-ii.pdf); see also OSPI, Early Learning in Washington Public Schools Report, (Nov. 10, 2008) at 5 (“The more access children have to related and aligned educational opportunities in their early years, the greater success they will have in school.”).

<sup>20</sup> See Veto Message on E.S.H.B. 2261 (May 19, 2009), <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Veto/2261-S.VTO.pdf>.

<sup>21</sup> 2009-10 ECEAP Outcomes Report at 1, <http://www.del.wa.gov/publications/eceap/docs/ECEAPOutcomesReport09-10.pdf>.

<sup>22</sup> See 2000 Election State Ballot Measures – Arguments For and Against Initiative 728, [http://www.sos.wa.gov/elections/2000/i728\\_arguements.aspx](http://www.sos.wa.gov/elections/2000/i728_arguements.aspx); OSPI, About I-728, <http://www.k12.wa.us/i728/>.

problem, the voters enacted I-728 to further reduce class sizes and to provide “additional money to help students reach new state learning standards. It also dedicates certain state revenues to a ‘Student Achievement Fund,’ increasing revenue to the fund over time.”<sup>23</sup>

However, in 2009, the Legislature drastically reduced funding under I-728,<sup>24</sup> and the 2011-13 budget suspends I-728 funding for the next two years.<sup>25</sup> The impact of this suspension is significant, as the following table demonstrates.

Per-Student Funding Amount Provided Under I-728	
2008-2009 SY	\$458.10
2009-2010 SY	\$131.16
2010-2011 SY	\$0
2011-2012 SY	\$0
2012-2013 SY	\$0

See OSPI, Funding - Q&A, <http://www.k12.wa.us/I728/QandA.aspx>.

The *real cost* of *not* providing ample funding for education, of course, is measured not merely in dollars, but in the diminishment of the quality of education received by our State’s students, in contravention of

<sup>23</sup> See OSPI, About I-728, <http://www.k12.wa.us/i728/>.

<sup>24</sup> H.B. 1131, 62nd Leg., 1st Spec. Sess. (Wash. 2011), <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1131.pdf>.

<sup>25</sup> H.B. 1087, <http://leap.leg.wa.gov/leap/Budget/Detail/2011/HOOverview0524.pdf> at 16.

Article IX, Section 1. As a result of recent cuts—and in anticipation of further cuts—the State’s school districts have served lay-off notices *en masse*.<sup>26</sup> The State’s school districts are employing fewer staff per student today than they were at the time of trial.<sup>27</sup>

5. **The State has suspended Initiative 732, which funds annual cost-of-living increases.**

Washington voters also passed Initiative 732 (“I-732”) in November 2000, by a 63 percent majority.<sup>28</sup> I-732 requires the State to “fully fund the cost-of-living increase [for school district employees].” *See McGowan v. State*, 148 Wn.2d 278, 292, 60 P.3d 67, 74 (2002) (citing I-732, § 2(1)(d)). The measure recognized that salaries for teachers had not kept pace with inflation and that a “fair and reasonable cost-of-living increase [would] help ensure that the state attracts and keeps the best teachers and school employees” for Washington children. *McGowan*, 148 Wn.2d at 283, 60 P.3d at 67 (quoting I-732).

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<sup>26</sup> *See, e.g.*, <http://www.issaquahpress.com/2011/05/03/issaquah-school-district-could-lay-off-up-to-51-teachers/> (Issaquah School District: 51 teachers laid off); <http://www.spokesman.com/stories/2011/may/02/spokane-public-schools-issues-238-layoff-notices/> (Spokane School District: 238 teachers laid off); [http://www.pnwlocalnews.com/south\\_king/cmv/news/121097998.html](http://www.pnwlocalnews.com/south_king/cmv/news/121097998.html) (Kent School District: 110 employees cut); <http://www.bellinghamherald.com/2011/04/30/1992655/ferndale-schools-to-send-out-layoff.html> (Ferndale School District: 42 full-time employees cut).

<sup>27</sup> *See* OSPI, *Preliminary School District Personnel Summary Reports 2010-11 School Year*, Feb. 2011, <http://www.k12.wa.us/safs/PUB/PER/1011/ps.asp> (Tables 5 & 6).

<sup>28</sup> *See* Election Results—November 2000, [http://www.sos.wa.gov/elections/results\\_report.aspx?e=20&c=&c2=&t=&t2=5&p=&p2=&y=](http://www.sos.wa.gov/elections/results_report.aspx?e=20&c=&c2=&t=&t2=5&p=&p2=&y=)

The Legislature suspended I-732 cost-of-living increases during the 2009-11 biennium and extended that suspension during the 2011-13 biennium.<sup>29</sup> By failing to allocate State funding necessary to attract and retain good teachers, the suspension shifts the burden on school districts to either cut staffing or raise the money themselves. The suspension is yet another step backwards from compliance with Article IX, Section 1.

6. **The State raised the levy lid in 2010, thereby increasing the burden on—and inequities among—school districts.**

In *Seattle School District*, this Court held that the State *cannot* rely on special excess levies to fund education under Article IX, Section 1. As the Court explained:

The special excess levy is neither dependable nor regular. It is wholly dependent upon the whim of the electorate and is then available only on a temporary basis. . . . Such variations provide neither a dependable nor regular source of revenue for meeting the State's obligation.

*Seattle School Dist.*, 90 Wn.2d at 525-26, 585 P.2d at 98-99.<sup>30</sup>

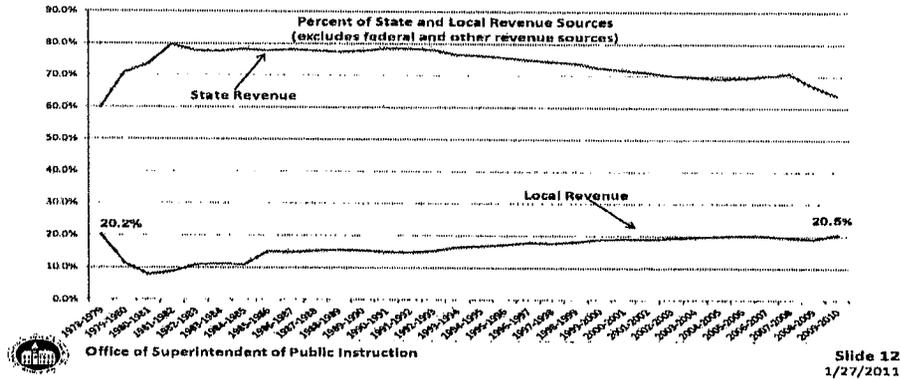
Today, revenue from local and state funds is at the *same percentage levels* as in 1978. As shown on the next page, since 1981, the State's school districts have had to increase their reliance on local revenue, as state funding has decreased.

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<sup>29</sup> See H.B. 2363, 61st Leg., Reg. Sess. (Wash. 2009), <http://leap.leg.wa.gov/leap/budget/lbns/2009ps.pdf> at 257; H.B. 1087, <http://leap.leg.wa.gov/leap/Budget/Detail/2011/HOOverview0524.pdf> at 16.

<sup>30</sup> The State represented to this Court at the time that the Basic Education Act of 1977 had "effectively eliminated the excess levy problem." Appellant's Br. 75 (Aug. 5, 1977).

## Local Revenue climbs to percentage at time of Doran Decision



OSPI, Washington K-12 Education Funding – How We Rank with Other States, Jan. 27, 2011, at 12.<sup>31</sup>

But the State's backtracking does not end there. Just days after the trial court's finding that the State unconstitutionally relied on local levies to pay for the education mandated by Article IX, Section 1, Finding 73, the Legislature *increased* the levy lid that had previously limited how much school districts could raise through local revenue to fund actual costs.<sup>32</sup> While presented as an effort to offset the rising costs of education, the measure lets the State off the hook to fund those same costs. In so doing, the State again abdicated its responsibility under the Constitution.

<sup>31</sup> The report is available at <http://www.tacoma.k12.wa.us/information/District%20Budget%20Outlook%20documents/K-12%20Spending%20vs%20%20USA.pdf>.

<sup>32</sup> See S.H.B. 2893, 61st Leg., Reg. Sess. (Wash. 2010), <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/2893-S.SL.pdf>.

Indeed, a recent report on education funding fairness gave Washington an “F” in efforts to fairly fund its public schools.<sup>33</sup>

One lawmaker, seeking to justify the Legislature’s action, said: “I wish we had better state funding. I wish we had the *option* to do that. But we cannot ignore the needs of our local schools.”<sup>34</sup> The quote evidences the fallacy that infects the State’s view of the Constitution: To provide ample education funding is *not* an option; it is a Constitutional mandate.

**D. The State May Not Rely on H.B. 2261 to Justify Seven More Years of Delay in Complying With the Constitution.**

In 1978, this Court required the State to “expressly determine[] a level of funding (or deployment of resources),” as mandated by Article IX, Section 1, *by July 1, 1981. Seattle School Dist.*, 90 Wn.2d at 537-38, 585 P.2d at 104-05. Thirty years after that deadline, the State relies on H.B. 2261 and asks for *seven more years* “to make things right.”<sup>35</sup>

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<sup>33</sup> See B. Baker, D. Sciarra & D. Farrie, *Is School Funding Fair? A National Report Card*, Educ. L. Center, Sept. 2010 at 26-28. The State has acknowledged that “our students are falling behind international standards. . . . Education is the key to success in the global economy, and our education system is not preparing our students to compete.” Wash. Learns: World-Class, Learner-Focused, Seamless Education, (Nov. 2006) at 4.

<sup>34</sup> See Rachel La Corte, Wash. House Lets Schools Raise More Through Levies, SEATTLE TIMES, Feb. 13, 2010, [http://seattletimes.nwsource.com/html/localnews/2011069680\\_apwaxgrededucationdollars1stldwritethru.html](http://seattletimes.nwsource.com/html/localnews/2011069680_apwaxgrededucationdollars1stldwritethru.html) (quoting Rep. Sam Hunt, D-Olympia) (emphasis added).

<sup>35</sup> See State’s Closing Arg., TT 5518:23-5519:9 (“If [the court] determines [that the State has violated the Constitution], then I believe you can so declare and you can order the Legislature to fix it. . . . *We have to be given a chance to make things right. That’s what happened back in 1977 when the trial court found we had done nothing to work with and we had to devise an [entirely] new system.*”) (emphasis added).

While commendable for updating the State’s basic program of education under Article IX, Section 1, H.B. 2261 merely sets milestones for work groups to assess, from now to 2018, the education needs of Washington students and the costs associated with those needs.<sup>36</sup> To facilitate that assessment, the Legislature also passed in 2010 H.B. 2776, which established prototypical schools to modify the funding distribution formulas for K-12 education.<sup>37</sup>

The State’s request that the Court give H.B. 2261 a “chance to make things right” by 2018 should be rejected for three reasons. *First*, a possible future fix does not remedy a present wrong (indeed, a wrong that has existed for at least the past 33 years). Nor can it undo an ongoing harm. For example, with respect to “Full-Day Kindergarten” and “K-3 Class Size Reduction,” H.B. 2776 contemplates full funding no sooner than the 2017-18 school year.<sup>38</sup> “The . . . State cannot avoid the question of whether it is *currently* complying with its legal duty under Article IX, § 1 by stating its intent to correct a legal violation sometime in the *future*.” Finding 253 (emphasis added). “Once lost, the quality of instruction and knowledge cannot be regained.” *Seattle School Dist. No.*

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<sup>36</sup> E.S.H.B. 2261, 61st Leg., Reg. Sess. (Wash. 2009), <http://apps.leg.wa.gov/documents/WSLdocs/2009-10/Pdf/Bills/Session%20Law%202009/2261-S.SL.pdf>; see also E.S.H.B. 2261—Basic Education: Implementation Reports & Milestones, <http://www.k12.wa.us/QEC/pubdocs/ESHB2261TimelinesChart.pdf>.

<sup>37</sup> S.H.B. 2776, 61st Leg., Reg. Sess. (Wash. 2010), <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/2776-S.SL.pdf>.

<sup>38</sup> *Id.*

*I v. State*, 97 Wn.2d 534, 542, 647 P.2d 25, 30 (1982) (Dore, J. dissenting).

**Second**, with respect to funding, H.B. 2261 is an aspiration, not an obligation. See Finding 272 (finding the bill an “empty promise”). Future Legislatures are not bound by its language, and there is no guarantee that they will subsequently fund H.B. 2261 to provide for the education it calls for. Witness after witness—including the State’s own officials—testified at trial about the funding shortcomings of H.B. 2261.<sup>39</sup> In *Seattle School District*, this Court cautioned against relying on future Legislatures for work that is necessary today: “In the final analysis, . . . it is not the failure of our early legislatures that troubles us. Rather, our current concern is the failure of subsequent legislatures to ‘make ample provision . . . for education. . . .’” 90 Wn.2d at 515, 585 P.2d at 93.

**Finally**, even assuming that the State is well-intentioned with regard to the political will of future Legislatures, H.B. 2261 backloads too much of the effort necessary to define and achieve its goals. The State concedes that H.B. 2776 “provides several legislative intent areas that are

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<sup>39</sup> *E.g.*, Dan Grimm, Chairman of State Basic Education Task Force:

Q: “Based upon your experience in the legislature, what does it mean to you when one legislature says ‘we intend that some future legislatures will do something.’”

A: That they want to get credit for the proposal, but not have to do the dirty work of actually implementing it.”

TT 1723:13-23.

Mike Blair, Superintendent of Chimacum School District: “I see 2261 as almost like putting the carrot in front of a horse . . . It is a promise. It is a 10-year implementation . . . I just see this as an ongoing process that without the help of the ruling of the Court will continue to be a process rather than a result.” TT 108:2-22.

not yet developed” and that will require “future decisions about funding policies.”<sup>40</sup> The initial cost estimates, based on the State’s own model, show that H.B. 2261 will require a “total *increase* in funding . . . at approximately \$7.5, \$8.3, and \$10.1 billion *per biennium*.”<sup>41</sup> The numbers are significant, and, to be sure, implementation is not off to a promising start. As an initial step, the Office of Financial Management estimated that the Legislature would need to appropriate \$710 million in the 2011-13 operating budget to phase-in the required funding. However, the 2011-13 biennial budget funds a mere \$100 million of that \$710 million.<sup>42</sup>

#### IV. CONCLUSION

In 1978, this Court ordered the State to provide an amply funded program of education, as mandated by Article IX, Section 1 of the Washington Constitution, *by no later than July 1, 1981*. *Seattle School Dist.*, 90 Wn.2d at 538, 585 P.2d at 105. Thirty years after that deadline, and 16 biennial budgets later, the State has still not complied.

Kelsey McCleary is now an 18-year-old high school senior; her brother Carter is a 12-year-old seventh grader. By 2018, Kelsey and Carter will be 25 and 19, respectively, and their high school days will be

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<sup>40</sup> See [Implications of 2776: New Basic Education Funding Formula For School Superintendents and Board Members](#), (OSPI/Financial Resources & Governmental Relations), 2010 at 38.

<sup>41</sup> See Final Report of Joint Task Force on Basic Education Finance, Jan. 14, 2009 at 24, <http://www.wsipp.wa.gov/rptfiles/09-01-2201.pdf>.

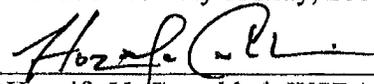
<sup>42</sup> H.B. 1087, <http://leap.leg.wa.gov/leap/Budget/Detail/2011/HOOverview0524.pdf> at 15.

in the past. With this Court's explicit order that the Legislature calculate the actual costs of the education mandated by the our Constitution and amply fund that education, Carter's education may yet be salvaged in part. Without this Court's intervention, it is not difficult to imagine another generation of McClearys before this Court three decades from today.

Nine years after *Brown v. Board of Education*, 349 U.S. 294 (1955), directed that desegregation in public schools proceed "with all deliberate speed," the U.S. Supreme Court declared that "*the time for mere 'deliberate speed' has run out.*" *Griffin v. County School Bd.*, 377 U.S. 218, 234 (1964) (emphasis added). Just five years after that, the Court mandated compliance "*at once*" and "*now and hereafter[.]*" *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969).

Here, thirty years have passed since this Court's deadline for compliance. It is time for the State of Washington to amply fund the education of all Washington children *at once* and *now and hereafter*.

RESPECTFULLY SUBMITTED this 27th day of May, 2011.

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