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IN THE SUPREME COURT
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MATHEW & STEPHANIE MCCLEARY et al.,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON,

Appellant/Cross-Respondent.

AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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ORIGINAL

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. The ACLU strongly supports the right of all children to an education and has worked for years through legal and policy advocacy to oppose discrimination in education. It therefore strongly supports adherence to the provisions of Wash. Const. art. IX, § 1.

STATEMENT OF THE CASE

The following facts are taken from the parties' briefs and the trial court record. The McCleary and Venema families, along with the Network for Excellence in Washington Schools, filed a Petition for Declaratory Judgment against the State alleging it had violated its duty to provide adequate funding for a basic education for all students in public schools under Wash. Const. art. IX, § 1. The trial court heard testimony from 55 witnesses concerning the importance of education, the varying conditions in the State's public schools and its practices for allocating "basic education" funds.

The testimony highlighted a "significant" disparity in the quality and functioning of school facilities; for example, some classroom buildings had no bathrooms and some had antiquated electrical systems which could not support computers. FOF/COL[1] ¶109, 237. There was evidence of classes being held in hallways, on a stage, and in a converted

[1] FOF/COL refers to the trial court's Findings of Fact and Conclusions of Law.

bus, in severely overcrowded schools. FOF/COL ¶237. Likewise, textbooks in certain districts were described as lacking, outdated, and too fragile to take home. FOF/COL ¶105. As a result, one witness explained that her daughter did not receive assistance with her school work because she was unable to take her textbooks home. *Id.* In that same district, the student's school building was "dilapidated" and the administration building was "condemned." *Id.*

More witness testimony illustrated the differences among districts in their access to quality teachers and school employees. The OSPI Assistant Superintendent for Financial Resources testified that Everett's higher salary allocation, the excess of which is made up of local levy money, allows it to draw away the best teachers from neighboring districts. RP 1472-73. On the other hand, Superintendents described the Chimacum and Tumwater districts' difficulty in attracting and retaining quality teachers and principals if they paid only the State funding amount for salaries. RP 3270-71; RP 178-79, 186, 384-85.

Finally, testimony demonstrated that many recent graduates from underfinanced schools are ill-equipped for the future. FOF/COL ¶113. The State Board of Education Chair testified that as many as half of the students graduating and going into community colleges need to take remedial classes. RP 2241. A representative from Washington's Workforce Training and Education Coordinating Board confirmed that employers have had difficulty finding qualified job applicants. CP 1924. Another witness testified to this concern when she expressed anxiety about

her children's futures following high school and their ability to enter into college or the workforce. FOF/COL ¶107. The trial court ultimately found that the evidence showed "Washington students are underperforming and failing to achieve in large numbers." FOF/COL ¶238.

The trial court entered extensive findings and held the State was in violation of Wash. Const. art. IX, § 1 because its funding formulas "produce far less than the resources actually required to amply provide for the education of all children residing within this State's borders." FOF/COL ¶227. The trial court noted that despite "Washington's pre-eminent status of education in our State Constitution, more than any other state, Washington's per student spending ranked 32nd compared to other states in the most recent statistics from the 2007-08 school year." FOF/COL ¶241. To remedy the State's violation of the constitution, the trial court ordered it to provide stable and dependable funding "based as closely as reasonably practicable on the actual costs of providing such programs of basic education." FOF/COL ¶273 and Conclusion. The State appealed, claiming that Wash. Const. art. IX, § 1 is satisfied by whatever program of education the Legislature decides to fund. This Court accepted direct review.

ARGUMENT

A. THE FRAMERS OF ARTICLE IX UNDERSTOOD THE PARAMOUNT IMPORTANCE OF EDUCATION PARTICULARLY IN TIMES OF FINANCIAL CRISIS.

The state constitution's Framers were no strangers to the pressures of hard economic times. In June of 1889, a month before the constitutional convention commenced, the event known as Seattle's Great Fire left some 64 acres reduced to rubble.[2] "Seattle has just suffered millions of dollars of loss in a great fire. Her streets, wharves, and public buildings were in ruins." Lebbeus J. Knapp, "Origin of the Constitution of the State of Washington," 4 Wash. Hist. Q. 227, 242 (1913).

In the midst of this financial crisis, the Framers nevertheless pushed forward creating the mandatory funding provision of art. IX, § 1:

> Just when I had begun the preparation of the proposed article, came the great fire, by which the greater part of the business portion of Seattle was destroyed. Then all the business was suspended, except that of relieving distress and devising ways and means for the restoration of the city. So, at the last moment, and in the confusion of an hour when almost an entire city is transacting business in tents, and nothing appears stable but instability, I resume the task which I cannot consent to relinquish, though sensible that it may be but ill-performed.

W. Lair Hill, *Washington, a Constitution Adapted to the Coming State: Suggestions*, at 11 (1889). In 1889, surrounded by the financial crisis of Seattle's Great Fire, the convention concluded with a proposed

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[2] See http://historylink.org/index.cfm?DisplayPage=output.cfm&file_id=5115; see also http://lib.law.washington.edu/ref/waconst.html.

constitution, ratified by the people of Washington. And with it was included the constitutional mandate that is Wash. Const. art. IX, § 1.

In 1978, in the milieu of another financial crisis, this Court held it is still the paramount duty of the State to provide ample provision for the education of all resident children:

> Appellants have reminded us of the financial burden that may be faced by the Legislature if we hold unconstitutional the statutory system of special excess levies. We do not doubt that ever increasing demands upon the Legislature by state agencies, departments and institutions have reached near crisis proportions. However, none has the mandatory constitutional recognition found in Const. art. 9, s 1 and 2. Though the crisis is recognized, it does not change the constitutional duty of the court or the Legislature.

Seattle School Dist. v. State, 90 Wn.2d 476, 526, 585 P.2d 71 (1978) (external citations omitted).

A few years later, on remand to the trial court after the Supreme Court's ruling in *Seattle School Dist.*, Thurston County Judge Doran again confirmed that the State's paramount duty to fund education under Article IX was no less strong in difficult economic times:

> The duty and responsibility of the State to fully fund the common school program required by Article IX, Sections 1 and 2, is not suspended in any part during periods of fiscal crisis, even where the existing tax revenue is not sufficient to fund . . . programs that the Legislature believes are necessary to meet the needs of people of this State.

Findings of Fact and Conclusions of Law, *Seattle School District v. State*, at 62-63, cited in Spitzer and Miller, "Legal and Policy Analysis Assessing the Potential for New School Funding Litigation and

Initiatives" (2002 Washington School Law Academy, May 21, 2002) at p. 1.

The evidence in this case proved that the State has failed to uphold its constitutional duty because budget formulas do not currently allow provision for actual costs of a basic education. FOF/COL ¶220, 222, 229-230. The Director of the Office of Financial Management confirmed that the State's funding is not determined by or based on actual market costs, but by budget constraints. BOR at 24; RP 3583-3587; RP 3603; Tr.Ex. 347. But the point of Article IX's education mandate adopted in the midst of an economic crisis is to create a mandatory priority for education funding. Neither in 1889, nor 1978, nor at the time of Judge Doran's ruling, did a pending financial crisis excuse the State from fulfilling its duty. The current economic crisis is no excuse absolving the State of its paramount duty to make ample provision for the education of all children residing within its borders. That paramount duty remains unchanged in 2011.

B. OUR STATE CONSTITUTION AND JUDICIARY DECLARED EDUCATING OUR CHILDREN IS OF PARAMOUNT IMPORTANCE BECAUSE EDUCATION PLAYS A CRITICAL ROLE IN A FREE SOCIETY.

Wash. Const. art. IX, § 1 provides:

> It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

In the momentous decision, *Seattle School Dist. v. State*, *supra*, 90 Wn.2d at 517, this Court interpreted Wash. Const. art. IX, § 1 and unequivocally declared "education must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival" and expressly stated that "education plays a critical role in a free society." *Id.* This Court held that the "paramount duty" should be given its plain meaning - a judicially enforceable, affirmative duty on the State that goes beyond providing mere reading, writing and arithmetic. *Id.* at 517-518. The Court was specific that the State's constitutional duty "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." *Id.* (emphasis added.) This Court concluded that to fulfill its art. IX, § 1 duty of preparing students for the needs of contemporary society, the Legislature must devise a state-wide equitable and reliable funding system. *Id.* at 497-503.

Contrary to the State's arguments here, the Court did not hold that the constitutional duty would forever in the future be satisfied by a funding formula adequate for a basic education in 1978. Nor did the Court in *Seattle School Dist.* approve as constitutionally sufficient whatever funding the Legislature might thereafter choose to give education. Instead, this Court emphasized that Article IX's mandate of "ample"

funding for basic education had to consider **contemporary** educational needs – the essential knowledge for students to succeed in **current** governmental and economic conditions -- and that it was the Court's duty to enforce this constitutional requirement. *Seattle School Dist.*, 90 Wn.2d at 482, 503-04.

This Court again recognized the strength of Article IX's protection for education funding in *Parents Involved in Community Schools v. Seattle School Dist.*, No. 1, 149 Wn.2d 660, 671-72, 72 P.3d 151 (2003),[3] noting:

> Strikingly, the treatment of education in the Washington Constitution is **singular among states.** ... The Washington constitutional convention delegates were practically unanimous in drawing up an education article which **protected the common school fund** and set up a democratic, nonsectarian system of public education. [emphasis added.]

These cases confirm that under the Washington Constitution, "ample" funding for a basic education that meets the contemporary needs of all students is not just an aspirational goal but a mandated legal duty of the State. The State says it has conceded the importance of education to a healthy democracy. Reply Br. of State at p. 14; FOF/COL¶ 119. But to understand why this concession supports affirmance of the trial court's ruling here, that principle must be examined in more depth than the State's concession gives it. The framers of the Washington Constitution understood not just the central importance of an education to our society, but the funding obligations that necessarily accompanied it. The trial

[3] The discussion of the state constitution in this opinion was not changed by later federal court proceedings regarding the federal constitutional issues.

judge properly recognized both parts of the equation as well. FOF/COL ¶118-143, 212 ("The word 'education' in Article IX, §1 is substantive. It means the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this State's democracy."), 265.

Courts and commentators have described the link between the contemporary needs of society and sufficient funding for education in various ways. President John Adams said in his essay "Thoughts on Government": "Laws for the liberal education of youth, especially of the lower classes of people, are so extremely wise and useful, that to be humane and generous mind, **no expense for this purpose would be thought extravagant.**" [emphasis added.] Adrienne Koch and William Peden, *Selected Writings of John Adams and John Quincy Adams* (Alfred A. Knopf, 1940), p. 56.

The United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) also linked the importance of education to funding that takes account of contemporary needs:

> [e]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the **great expenditures** for education both demonstrate our recognition of the importance of education in our democratic society. ... [Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. **Today** it is a principal instrument for awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. **In these days**, it is doubtful that any

> child may reasonably be expected to succeed in life if he has been denied the opportunity of an education. [emphasis added.]

A recent Kansas court decision explained that when, as in Washington, there is a constitutionally protected right to an education, the state's legal duty to provide funding sufficient to prepare students for current societal conditions necessarily follows from that right:

> That a certain level and quality of formal education is necessary for any citizen to function intelligently and productively in our **increasingly complex** democracy and our shrinking world is not honestly debatable. An individual citizen's right to education at this level and quality is 'fundamental' in every imaginable sense of the word. Given the mandatory language of our constitution, the clarity of the historical record, and **modern exigencies**, how can it be otherwise? Education is vital for each citizen and no less imperative for the survival and progress of our republic. [emphasis added.]

Montoy v. State, 278 Kan. 769, 120 P.3d 306, 317 (2005) (Beier, J., concurring).

More than thirty-three years after the *Seattle School District* ruling, against the backdrop of technological advances and unprecedented interdependence of global economies, the constitutional duty of the State to equip our children for their role as citizens and productive adults is again before this Court. Upon the evidence presented in this case, the trial court held the State again failed to uphold its constitutional duty under Wash. Const. art. IX, § 1, because some school children in this state are not provided the rudimentary resources for a basic education. FOF/COL ¶105. The need for the State to fulfill its duty has never been more urgent. In 1898 our constitutional framers demanded it. In 1978 our

supreme court mandated it. These authorities made clear that the requirements of a basic education were not frozen in time but had to keep pace with the evolving needs of society. The continuing failure of the State to comply with Article IX imperils our state's children, deprives them of the resources to prepare them for their role as Washington citizens, and therefore threatens the very future of Washington. This Court's affirmance of the trial court's ruling is necessary to fulfill Washington's paramount constitutional mandate.

C. IN CONJUNCTION WITH THE PARAMOUNT IMPORTANCE OF EDUCATION, THE FRAMERS OF OUR CONSTITUTION EXPLICITLY PROHIBITED DISTINCTION BASED ON RACE, COLOR, CASTE OR SEX.

In interpreting the State's paramount duty to "amply" fund basic education, special attention should be paid to Article IX's explicit prohibition against distinction based on race, color, caste or sex. The Framers of the Washington Constitution were well aware that many states had created racially segregated school systems and that those systems advantaged privileged students over poor ones. They "constantly kept before [the members of the Washington State Constitutional Convention] the constitutions of all the states and drew from each the newest and the best." John R. Kinnear, "Notes on the Constitutional Convention," 4 Wash. Hist. Q. 276, 277-278 (1913). *See also* Wash. Const. art. IX, § 1. And in rejecting discriminatory school systems, the framers spoke broadly

and clearly rejecting distinction in educational opportunities not only based on race and color, but also on sex and social status (caste).

Under our constitution, "caste" means "a division or class of society comprised of persons within a separate and exclusive order based . . . upon differences of wealth . . ." *Northshore School District No. 417 v. Kinnear*, 84 Wn.2d 685, 756 n.14, 530 P.2d 178 (1974), *overruled in part* in *Seattle School Dist., supra*, (Stafford, J., dissenting). "Caste" also refers to rigid social systems like those found in traditional India, where a person's social status is inherited from one's parents and would not change regardless of an individual's own achievements. This sort of hereditary class structure is inconsistent with our country's ideals of equal opportunity and reward for individual merit. As Justice Harlan said in his famous dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), *overruled in Brown, supra*: "There is no caste here." Justice Harlan's position was, of course, later adopted in *Brown v. Board of Education, supra*, which rejected school segregation. When Texas attempted to withhold education from children of undocumented aliens, the Supreme Court found the practice unconstitutional, in part because of the risk of creating a permanent "caste" of persons whose children, denied an education, will never have the means to integrate themselves into the rest of society. *Plyler v. Doe*, 457 U.S. 202, 218-22, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

Article IX's framers understood these principles when they chose to prohibit distinctions in education based on race, color, "caste" or sex.

They mandated not only that the State fund a basic education sufficient to allow students to succeed in current societal conditions (as discussed above in Section B), but they specifically directed that this obligation not make distinctions as to race, color, caste or sex. One hundred years ago, this Court recognized the education system must be the same for all resident children. *School Dist. No. 20 v. Bryan*, 51 Wash. 498, 502, 505, 99 P. 28 (1909):

> In adopting a Constitution the people of this state saw fit to devote a chapter to the subject of education. In it they were careful to emphasize the importance, as well as the distinct character, of the common school. ... Courts have been zealous in protecting the money set apart for the maintenance of the free schools of the country. They have turned a deaf ear to every enticement, and frowned upon every attempt, however subtle, to evade the Constitution.

In *Bryan*, the Legislature attempted to create a model training school from funds that were constitutionally mandated for the public school system. The training school would advantage some students over others. This Court, in flatly rejecting the legislation as unconstitutional, stated that education system "must be uniform in that every child shall have the same advantages and be subject to the same discipline as every other child." *Id.*

Yet the State suggests the constitutional mandate is not violated if efforts to provide students with an equal education fail to achieve equal outcomes. Article IX's wording, and especially its prohibition on distinctions based on "caste," contradicts the State's reading of the constitution. The reasoning of the State's expert witnesses in this case

cannot be reconciled with Article IX's ban on caste distinctions. The State relies on out-of-state expert David Armor (App. Op. Br. at 28-31), who is a prominent critic of desegregation and has served as an expert witness in approximately 40 education cases across the country.[4] Armor asserts that no link exists between improvements in the achievement of struggling students to the resources targeted as such populations. App. Op. Br. at 29.

In contrast, the Plaintiffs' experts - officials and educators from inside the state of Washington who know our education system intimately - testified that all Washington students can learn and get the education promised by the constitution if the public schools are provided the proper resources. Resp. Br. at 33. Concrete examples presented at trial proved the direct link between individualized attention for struggling students and successful outcomes. Resp. Br. at 34. Based on this evidence, the trial court found the testimony "compelling" that "individualized attention on challenged learners has yielded great successes." FOF/COL ¶271.

Students from all walks of life within the borders of Washington were expressly protected by the Framers' "without distinction" clause in art. IX, §1. The Framers themselves represented "[a]lmost every walk of life... in the convention at Olympia . . . [o]f all the number only one was a native born citizen of the Puget Sound country, so that, with this exception, each member of the convention could draw on his experience elsewhere to decide on what was best to retain or omit." John R. Kinnear,

[4] George Mason University School of Public Policy Faculty Expertise Database at http://policy.gmu.edu/tabid/86/defaulty.aspx?uid=8.

supra, at 277. Drawing from their diverse backgrounds, the Framers decided to write Article IX so as to require the ample education of **all** children residing within this state's borders. To make their intent doubly clear, they added to the word "all" the requirement that the provision of education be "without distinction or preference on account of race, color, caste, or sex." The Framers' choice of words and the authorities cited above prove the State's arguments lack merit. In contrast, Article IX's words and authorities interpreting them fully support the trial court's ruling that Article IX "requires the Respondent State to amply provide for the education of every child residing in our State – not just those children who enjoy the advantage of being born into one of the subsets of our State's children who are more privileged, more politically popular, or more easy to teach." FOF/COL¶168.

D. THIS COURT HAS THE DUTY TO ENFORCE THE STATE'S CONSTITUTIONAL DUTY UNDER ARTICLE IX AGAINST THE LEGISLATURE.

Wash. Const. art. I § 29 provides that "[t]he provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." Theodore L. Stiles, a member of the Washington Constitutional Convention and one of the first justices of the Washington Supreme Court, emphasized that § 29 was intended to put teeth into the duties mandated by other parts of the constitution. Stiles, "The Constitution of the State and Its Effects Upon Public Interests," 4 Wash.

Hist. Q. 281, 286 (1913). He also specifically addressed Article IX and commented: "No other state has placed the common school on so high a pedestal ... the convention was familiar with the history of ... older states, and the attempt was made to avoid the possibility of repeating the tale of dissipation and utter loss." Utter and Spitzer, *The Washington State Constitution* (Greenwood Press 2002) at p. 153.

Wash. Const. art. I § 29 served as a lynchpin for this Court's remedy in *Seattle School Dist. v. State*. The Court explained that "the constitutional command of art. 9, § 1 is not directed solely to the Legislature." *Id.* at 501. And it ultimately held:

> We cannot abdicate our judicial duty to interpret and construe Const. art. 9, § 1 and 2 merely because, as appellants seem to suggest, we lack apparent available physical power.

Id. at 506. Accordingly, the Court directed legislative action by a time certain: "it is the duty of the Legislature to enact legislation compatible with this opinion by July 1, 1981." *Id.* at 538.

The record in this case demonstrates that the State is not currently in compliance with the Article IX duty to make "ample" provision for the education of all children. The State admits that ESHB 2261 (if fully funded and implemented by 2018) may "for the first time" make the changes necessary finally to accomplish these mandated reforms. ESHB 2261, according to the State's own words, will **for the first time** tie specific revenue resources to specific school district expenditures, and **for the first time** will demonstrate where state revenues are spent, and **for the**

first time will demonstrate whether local levies are paying for basic education programs. App. Op. Br. at 18-19 [emphasis added]. This shows that the State is failing at the **current** time to comply with this Court's 1978 order that the State to cease using special levies to fund basic education. *Seattle School Dist. v. State*, 90 Wn.2d at 526.

The question before the Court, posed squarely by the State's reliance on the future promises in ESHB 2261, is whether Article IX allows the State another seven years to remedy its unconstitutional education funding system. But the harm to our state's children, which the Framers of Article IX clearly intended to prevent, will not allow this. Since the State's violation of Article was found in 1978, thirty-three years have passed, representing 33 senior graduating classes without the benefit of a proper constitutionally mandated education. And more disturbingly the delay has impacted for thirty-three years the 15 - 30 percent of each ninth grade class that does not graduate from high school.[5] And now the State asks for another seven years, another seven graduating classes, and seven more years of 15-30 percent of students failing to graduate. That is simply not acceptable under the clear mandate of Article IX. As the United States Supreme Court explained a few days ago with respect to another state's delays in bringing its prisons into constitutional compliance,

> If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment

[5] http://depts.washington.edu/uwbhs/docs/HS_Graduation.pdf at 22-23.

> violation. [citation omitted.] Courts must be sensitive to the State's interest[s] … . Courts nevertheless must not shrink from their obligation to "enforce the constitutional rights of all 'persons,' including prisoners." [citation omitted.] Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

Brown v. Plata, ___ U.S. ___, 2011 WL 1936074 at *11 (2011). Clear authority supports this Court's ruling to end the harmful delays in remedying Washington's unconstitutional school funding system that have already occurred.

CONCLUSION

The Framers memorialized the duty in our constitution more than 100 years ago. This Court spelled that duty out to the Legislature three decades ago. The foregoing reasons, and the ample authority in Respondent's briefs, in the trial court's ruling, and cited above, should lead this Court to be "fully convinced, after a searching legal analysis," that the State's education funding system violates Article IX. *School Districts' Alliance for Adequate Funding of Special Educ.*, 170 Wn.2d 599, 606, 244 P.3d 1 (2010). The ACLU of Washington respectfully asks this Court to affirm the trial court's judgment.

DATED this 31st day of May, 2011.

Respectfully Submitted,

ACLU of Washington Foundation

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