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SUPREME COURT OF THE STATE OF WASHINGTON

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.

**PLAINTIFF/RESPONDENTS' ANSWER
TO THE AMICUS BRIEF OF THE
AMERICAN CIVIL LIBERTIES UNION**

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OTHER AUTHORITIES

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RAP 10.4(e)1

Note: This case was brought by the McCleary family, the Venema family, and the Network for Excellence in Washington Schools (http://www.waschoolexcellence.org/about_us/news_members) provides the current list of that plaintiff organization's over 360 member entities). The following refers to them as "plaintiffs" (and to the State as "defendant") to avoid confusion between the "Petitioners" below who are now "Respondents" on appeal and the "Respondent" below that is now the "Petitioner" on appeal. Cf. RAP 10.4(e).

I. INTRODUCTION

The amicus brief filed by the American Civil Liberties Union presents four arguments that focus on:

- Article IX, §1's importance in times of financial crisis;
- The central role education plays in a free society;
- Article IX, §1's prohibition against distinctions based on caste, etc.; and
- This Court's duty to enforce Article IX, §1.

This Answer provides plaintiffs' position on how the new matters raised in the ACLU's brief relate to the 5 issues currently before this Court.

As noted in this case's prior briefing, the 5 issues for review raised in the State's and plaintiffs' briefing can be summarized as follows:

1. State's first issue ("education"): Did the trial court err in ruling that the term "education" in Article IX, §1 has the meaning that it held it has?
2. State's second issue (actual vs. fictional cost): Did the trial court err in ruling that Article IX, §1 requires the State to base its funding on actual costs (*instead of the existing funding formulas*)?

3. State's third issue ("stable & dependable"): Did the trial court err in ruling that Article IX, §1 requires the State to provide "stable and dependable State funding" (*instead of State funding from "regular and dependable tax sources"*)?
4. State's fourth issue (State's failure): Did the evidence at trial support the trial court's ruling that the State is currently failing to comply with Article IX, §1?
5. Plaintiffs' issue (compliance deadline): Did the trial court err in ruling that the legislature can merely proceed with real and measurable "progress" to comply with the court's ruling (*instead of setting a hard compliance deadline*)?¹

As the following pages explain, the ACLU's arguments relate to issue #4 (State's failure) and issue #5 (compliance deadline).

II. DISCUSSION

A. Article IX, §1's importance in times of financial crisis

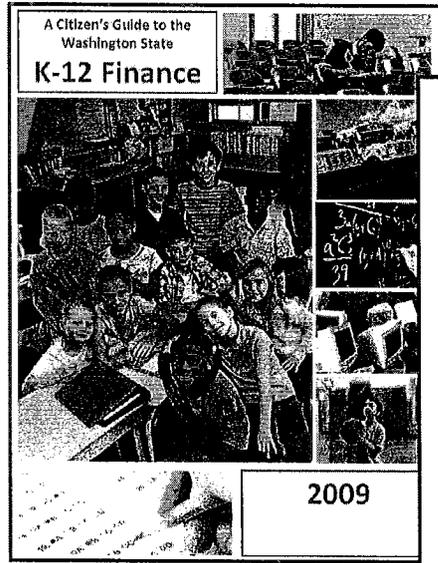
The ACLU's brief explains how the economic crisis in our State at the time of Article IX, §1's drafting and ratification confirms the deliberate nature of our Constitution's mandate that fully funding education is our State government's paramount duty above all others, and how the judicial branch has therefore repeatedly held that the State's duty and responsibility to fully fund the education mandated by Article IX, §1 can never be suspended or diluted even in times of financial crisis.²

The ACLU's point that financial constraints cannot excuse or justify a violation of Article IX, §1 is consistent with the State's own

¹ See *Plaintiffs' September 20 Brief* (Plaintiff/Respondents' Brief [with Errata] dated September 20, 2010) at pages 2-6.

² *ACLU's Brief* at pages 4-6.

documents – for example, the “Citizens Guide” it publishes for our State’s citizens, which declares that that “Neither fiscal crisis nor financial burden changes the Legislature’s Constitutional duty” under Article IX, §1.³



A Citizen's Guide to the Washington State
K-12 Finance

2009

What does the Washington State Constitution say about K-12 public school funding?

"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."

-Washington Constitution, article IX, section 1

This constitutional provision is unique to Washington. While other states have constitutional provisions related to education, no other state makes K-12 education the “paramount duty” of the state.

Neither fiscal crisis nor financial burden changes the Legislature’s Constitutional duty.

The ACLU’s point that times of crisis do not justify or excuse a Constitutional violation is important – for unfortunately, our State’s history illustrates all too well what happens when the courts turn a blind eye the violation of Washington citizens’ Constitutional rights during an asserted crisis.

³ *Tr.Ex. 192 at pp.2-3.*



On March 24, 1942, the federal government issued the first of its “Civilian Exclusion Orders”. Exclusion Order No. 1 ordered all American citizens living on Bainbridge Island, Washington who happened to have Japanese ancestors to turn themselves in on March 30 to be sent to internment camps. The above is a photograph taken during that expulsion.

In the U.S. Supreme Court, the State of Washington supported that expulsion and internment of its Bainbridge Island citizens, as well as the tens of thousands of additional Washington citizens covered by the

Exclusion Orders that followed to round up Americans of Japanese decent on the west coast.⁴

The Japanese-American Citizens League, on the other hand, objected – explaining in its U.S. Supreme Court brief that:

While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and in its performance we must never forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men.⁵

Yielding to the government's claim that circumstances left no other options, the Supreme Court looked the other way – and in so doing turned its back on the Constitutional rights of Washington citizens born into families with a Japanese ancestor. *Korematsu v. U.S.*, 323 U.S. 214 (1944).

It was not until 40 years later that the federal courts acknowledged the injustice done, noting that the Supreme Court's 1944 decision “stands as a constant caution” that in times of declared necessity, courts “must be vigilant in protecting constitutional guarantees”; that in times of distress, the shield of asserted necessity “must not be used to protect government

⁴ 1944 WL 42851 (U.S.) (Oct. 7, 1944) (brief of State of Washington et al., *Amici Curiae in Korematsu v. United States*, 323 U.S. 214 (1944)).

⁵ 1944 WL 42852 (U.S.) (Oct. 9, 1944) (brief of Japanese-American Citizens League, *Amici Curiae in Korematsu v. United States*, 323 U.S. 214 (1944)) at *5-6 (quoting *Hirabayashi v. U.S.*, 320 U.S. 81, 113 (1943)).

actions from close scrutiny and accountability”; and that especially in times of crisis, courts “must be prepared to exercise their authority to protect all citizens”. *Korematsu v. U.S.*, 584 F.Supp. 1406, 1420 (N.D. Cal. 1984).

The ACLU’s point that times of asserted crisis cannot justify or excuse a Constitutional violation relates to issue #5 (compliance deadline) because it confirms that this Court cannot close its eyes to or excuse our State government’s violation of its paramount duty under Article IX, §1 – even when the State claims financial crisis, burdens, or constraints leave it few other options. [This is especially true in a case like this where the asserted “crisis” does not even relate to whether the State currently has the revenue to fully fund its K-12 public schools (it does), but relates instead to whether the State’s current revenue can also fund the non-paramount things State officials would prefer to spend the State’s money on.]

B. The central role education plays in a free society

The ACLU’s brief explains the central role that the education of all citizens plays in a democracy.⁶

This point is consistent with the evidence at trial, which included examples such as school bonds failing by a single vote, jury decisions that can turn on a single vote, the wide array of information in our State’s

⁶ *ACLU’s brief at pages 6-11.*

Voters Pamphlets that voters need to be able to read and comprehend, and the wide variety of notifications that the State requires employers to post for all employees in Washington to read and comprehend in order to understand and exercise their legal rights.⁷

This point is also consistent with the judicial branch's repeated recognition dating back to at least *Brown v. Board of Education* that "education is perhaps the most important function of state and local governments."⁸ And it is precisely why this Court mandated over 30 years ago that the State's education duty under Article IX, §1 includes not only the effective teaching of reading, writing, and arithmetic, but also extends

⁷ E.g., Tr.Exs. 661 & 662 (*Voters Pamphlets*); Tr.Ex. 560 (*State mandated workplace posters describing rights afforded Washington laborers under State and federal law*); RP 2032:2-2033:8 (*University of Washington Prof. Soder testimony that "all" is important in democracy because it isn't just the top % of the population that needs to be educated – all people need education for democracy to work*); RP 2035:19-2036:11 (*the State mandated workplace posters are an example of why education is required to know and protect ones rights, as the posters and the concepts they contain are not simple or self-evident*); RP 2037:5-2043:23 (*education is crucial for jury service, given complicated instructions and rights at stake*); RP 2038:12-2039:9 (*level of understanding required to exercise the rights to serve as a juror*); Tr.Exs. 561, 562 & 564 (*jury instructions*); RP 91:11-92:6 (*Kettle Falls school district losing levy election by one vote, illustrating "how important it is for our citizens to participate in the democratic society and to know what that means. I learned that lesson very well in Kettle Falls."*); RP 745:21-746:15 (*Colville school district superintendent Emmil, a former ironworker, explaining why even an ironworker needs to be able to read with comprehension and vote on local initiatives and levies*).

⁸ E.g., *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (*underline added*); accord, *Bellevue School District v. E.S.*, 2011 WL 2278158 at *13 (*Chambers, J., dissenting*).

to preparing all Washington children to participate intelligently and effectively in our society.⁹

The ACLU's point about the importance of education to democracy relates to issue #5 (compliance deadline) because it confirms why this Court should not allow our State government to further delay its full and complete compliance with what Article IX, §1 unequivocally mandates is the paramount duty of our State government.

C. Article IX, §1's prohibition against distinctions based on caste, etc.

The ACLU's brief details how Article IX, §1 prohibits the State's provision for education allowing distinctions based on economic caste, racial background, etc.¹⁰

This point relates to issue #4 (State's failure) because the evidence at trial confirmed, over and over again, that the State's provision for its K-12 public schools produces dramatic educational distinctions between students in different economic castes and racial groups.

More specifically, the evidence at trial confirmed that the State enacted the four numbered provisions of HB 1209 and adopted its corresponding Essential Academic Learning Requirements (EALRs) to

⁹ *Tr.Ex. 2 [Seattle School District v. State, 90 Wn.2d 476, 517-18 (1978)].*

¹⁰ *ACLU's brief at pages 11-15.*

establish the *minimum* level of knowledge and skills that every Washington student needs to be equipped with in today's world.¹¹

¹¹ **HB 1209**; E.g., RP 977:4-12 (Fmr. Supt. of Public Instruction Billings explaining the thorough substantive process that the State's Commission on Student Learning went through developing HB 1209's substantive content areas); CP 1993:19-1994:21 (Fmr. Supt. of Public Instruction Bergeson confirming the four numbered provisions of HB 1209 are "the drivers of our learning standards" and "the core set of skills for every student in the State of Washington"); RP 114:3-18, 201:4-14 (the four numbered paragraphs of HB 1209 are the knowledge and skills that define the basic education that the State has determined all children need to have); RP 3305:6-3306:22 (the four learning standards of HB 1209 are what the State has specified as the knowledge and skills that school districts are supposed to teach, and describing those four provisions as a "goal line" that all kids need to cross to be successful in the 21st century); RP 1823:8-1824:7 (the four learning standards of HB 1209 are what the State has specified as the knowledge and skills the Yakima school district is supposed to teach, and that it is the district's responsibility to assure that its students, at the very minimum, meet those four standards); RP 719:12-21 (the State specified the knowledge and skills that Colville school district teaches its students though HB 1209 and everything that entails); CP 5211:4-18 (The four standards in HB 1209 are the basic education Sunnyside school district is supposed to get 100 percent of the kids to be able to do.); CP 5479:22-5480:6 and 5525:5-18 (defining basic education with the four numbered provisions of HB 1209); CP 1700:22-1701:7 (basic education in Washington is the four learning goals established by HB 1209); CP 6338:13-6340:7 (defining basic education with the four standards of HB 1209); CP 6611:6-6613:3 (the four learning standards of HB 1209 the definition of basic education); CP 4508:4-20 (Supt. of Public Instruction Dorn explaining that HB 1209 shifted education in Washington from "seat time" to "what you know", with the four numbered provisions being what kids need to know). **EALRs**: E.g., RP 1995:21-1997:9; RP 972:25-974:7; CP 1995:21-1997:9 (Fmr. Supt. of Public Instruction Bergeson describing the extensive process used to develop the EALRs); RP 972:25-974:7 (Fmr. Supt. of Public Instruction Billings confirming that the performance based education system was developed to ensure all students are receiving an education that will prepare them to go "into the workforce or into additional technical training or on to further education"); RP 3305:6-19 (the State then subdefined the HB 1209 learning standards with the EALRs); RP 114:3-18, 201:15-21 (the EALRs fall underneath HB 1209 and refer to the four learning standards of HB 1209); RP 977:4-12 (Fmr. Supt. of Public Instruction Billings confirming the EALRs are based on the four numbered provisions of HB 1209); RP 202:6-23 (Chimacum school district superintendent Blair: "This is what they need to know. These are the skills and knowledge that they have to have. That's the Essential Academic Learning Requirements, and I think they are essential. We've got to get there."); RP 1823:4-12 and 1824:8-24 (the EALRs clearly define what all students must know at each grade level as they matriculate through the school system); RP 719:12-720:13 (the State specified the knowledge and skills Colville school district must teach its students though the EALRs); CP 5212:8-13 (describing the EALRs as the "specific learnings that have to

But the evidence also established that the State's provision for its K-12 public schools nonetheless produces significant educational distinctions between its students depending upon economic caste or racial group.¹²

take place in classrooms so kids meet those standards" of HB 1209); CP 5479:22-5480:6 (the EALRs go into detail about how the four numbered provisions of HB 1209 will be implemented in the subject areas); CP 1700:22-1701:7 (from HB 1209, the EALRs were developed by the State to identify what students need to know and be able to do); CP 6339:6-6340:7 (defining basic education as including the EALRs); CP 6611:6-6613:7 (the definition of basic education includes the EALRs); CP 4487:2-7 (Supt. of Public Instruction Dorn explaining that the EALRs are the standards the State is expecting of all students);

¹² *E.g., Tr.Ex. 689 (State's "report card" on its public schools' performance); Tr.Ex. 293, p.16 (showing that African American students doing significantly worse than peers on WASL reading and math tests, especially African American males); RP 2676:6-12 (approximately 50% of black males drop out of high school and approximately 20-30% of black females drop out); Tr.Ex. 293, p. 22 (on-time graduation rate for all black students is 53.6%, compared to 74% for "White" students and 76.5 for "Asian/P.I." students); RP 2677:4-11 (African American males who drop out of high school are around 80% more likely to be incarcerated at some point); RP 1410:6-1411:21 (WASL achievement gap); RP 2678:9-20 (only about half of African American students who graduate from high school go on to college); Tr.Ex. 293, p.20 (those African American students who attend higher education are far less likely than their peers to graduate); Tr.Ex. 98, p.1 (more than half of recent high school graduates entering community or technical colleges had to take remedial, pre-college courses before they could move on to college level work); RP 2241:11-18 (same); CP 4373:14-4374:14; RP 2679:1-20 (African American students are over-represented in SpEd and under-represented in gifted programs); Tr.Ex. 293, p.15 (African Americans make up 14.8% of SpEd population and 5.7% of population); RP 2681:19-2682:18 (African American students who go to college more frequently must take remediation courses before doing college-level work); Tr.Ex. 293, p.17 (African American students' "participation in Advance Placement tests is disproportionately low, and has remained flat over time"); Tr.Ex. 293, p.18 (African American students "consistently scored below all other ethnic groups in all portions of the SAT"); CP 1473:13-1474:13 (people of color are underrepresented in higher education and have lower degree completion rates); Tr.Ex. 99, pp.1-2 (achievement gap; Hispanics graduate at much lower rates than other groups and below their share of the State population, and while over half of young high school graduates enter remedial programs, "Students of color, and in particular Hispanics, enroll at higher rates than white students."); CP 1986:23-1987:11 (Fmr. Supt. of Public Instruction Bergeson confirming kids that are not reading well enough or doing math well enough to be able to*

As the ACLU's brief notes, Justice Harlan's prophetic dissent in *Plessy v. Ferguson* objected that "there is no caste here."

But that is not the case in Washington's public school system. The evidence at trial showed that our State's provision for K-12 education perpetuates a caste system between the "haves" and the "have nots" in our democracy. That perpetuation makes a mockery of Article IX, §1 because an underlying purpose of the ample education it mandates is to be the great equalizer in our society – not the great perpetuator. And as the evidence at trial repeatedly confirmed, the State's public schools can

participate in the marketplace); CP 2015:20-2016:4 (63% of African American males failed to pass the WASL reading section and 84% failed to pass the entire WASL test); Tr.Ex. 17 (confirming failure rates); CP 5871:19-5872:8 (only 1 of the 14 schools evaluated in by the State's Commission on Hispanic Affairs study had an appropriate approach to educating Latino children); CP 5871:19-5874:7 (only 56.9% of Washington Latino students graduated from high school and the State's graduation rate method understates the graduation crisis); CP 5909:8-5910:4 (State's study of a representative sample of Washington schools found that Washington schools are not providing Latino students with ample opportunities to learn); CP 5887:11-24 (adequate yearly progress has not been met for Latino students in reading and math combined over the last 6 years) Tr.Ex. 297, p.29 & CP 5887:25-5888:25 (math is a "gatekeeper for college" and that being underprepared in math makes it more likely that kids will drop out of college); CP 5906:18-5907:14 (about half of Washington Latino students will graduate high school and less than half of those (around 18%) will go on to college); CP 4500:11-4501:2 (Supt. of Public Instruction Dorn testifying that the WASL passage rates don't even tell the whole story when you consider the 31% that didn't make it to graduation); RP 1179:18-1180:8 (Rep. Priest confirming that the State is "not providing the resources necessary to close that [achievement] gap"); RP 2211:17-2212:15 (State Bd. of Education Chair Ryan testifying there is a serious lack of education attainment in certain subpopulations, and the lack of a sharp progress in that area shows much work must be done to close the gap); Tr.Ex. 215 (state report on need for dropout prevention, intervention, and retrieval).

successfully perform that role of great equalizer if the State would cease its failure to amply fund its public schools.¹³

¹³ E.g., RP 1831:10-1832:4 (*ample proof in Yakima that given the right resources, all students can learn, including the poor kids, the Latino kids, and the kids from homes where their parents are illiterate*); RP 982:9-983:15 (*Fmr. Supt. of Public Instruction Billings confirming that all Washington students can learn the education described in the State's Essential Academic Learning Requirements, HB 1209, and the Seattle School District opinion*); CP 5645:11-17 (*absolutely no reservation that every child can learn equally and that low income kids can learn as well as upper income kids*); RP 4496:3-20 (*OSPI Asst. Supt. for Financial Resources confirming OSPI's conclusion that poor kids can meet the State's academic standards if given proper support*); RP 2603:18-22, 2622:5-2623:8, 2658:12-18 (*El Centro de la Raza Director Maestas confirming the success of individual attention and additional resources for at-risk students*); RP 2499:8-13, 2500:13-19, 2501:16-2502:23, 2503:7-25, 2512:25-2515:5, 2515:6-2517:2 (*the success of additional attention and resources for at-risk students*); CP 4428:20-4429:16 (*work in State's Washington Learns commission and the Basic Education Finance Task Force confirms schools need more resources to bring kids in poverty up to State standards*); RP 900:11-902:22 (*"all kids can meet those standards that have been set. all kids, all kids can end up being a positive contributing member of their community, of society and be part of democracy. all kids, given the right help and resources, can be successful in the workplace."*); RP 3316:5-17, 3343:2-6 (*all students can learn State standards: "A student who's born into poverty or has a language disadvantage or both is capable of and can learn at the high standards. I have no question about that."*); RP 214:2-8 (*emphasizing that all students can learn State standards*); RP 728:8-11, 730:13-15 (*"absolutely" all kids in Colville can meet State standards and all children can graduate*); RP 1825:12-1826:3, 1827:8-11 (*all students in Yakima can learn the necessary knowledge and skills, but that's not currently happening due to lack of resources*); RP 1861:2-12 (*getting all kids up to State standards can be done*); CP 529:3-11 and 5365:14-5366:17 (*all kids can learn and can be motivated to learn*); RP 2672:2-4 (*Asst. State Supt. of Student Achievement confirming that the achievement gap for African American students can be closed*); Tr.Ex. 293, p.5 (*"these actions can turn the tide for African American students, and lead to higher educational attainment for the more than 57,000 African American children, preschool to graduation and beyond"*); Tr.Ex. 297, p.5 (*"Academic achievement [for Latino students] can be improved, but to get there will require systemic improvements in educational services, content and attention."*); RP 2294:18-2296:11 (*causal relationship between a program of early childhood education and a student's ability to graduate from high school*); RP 2347:20-2349:5 (*statistically significant relationship between spending more money and student outcomes – "If you raise money, you will get better student outcomes, usually as measure [sic] by test scores, sometimes by graduation rates" and that "zero [i.e., no effect] is not an option here. There is a positive causal relationship."*); RP 2352:8-2353:14 (*the best way to improve student achievement is to provide an effective teacher; if we could get the best teachers into "our school system, graduation rates [and] test scores would climb rapidly out of there"*); RP 2377:11-22 (*effective teachers raise student outcomes*); RP 701:23-

In short, the ACLU's point that Article IX, §1 prohibits the State's provision for education allowing distinctions based on economic caste or racial background – and the distinctions that the State's current funding system continues to perpetuate instead – confirms why this Court should set the hard compliance deadline requested by plaintiffs. It confirms the

717:19 (the importance of co-curricular activities in increasing graduation rates and discussing in detail eight students on the Colville football team who would not have graduated otherwise); RP 890:5-891:7 (when Colville school district has put resources towards the students at the alternative school, graduation rates have increased); RP 895:8-896:4 (more resources translate into better performance – when Colville school district is able to pass a levy to fund specific resources and put those resources in front of kids, there is a marked difference in the scores for the classroom); RP 1836:10-1838:6, 1894:3-19, 1895:10-1896:25, 1953:7-1954:13 (Yakima school district graduation rates improved 10-11% in the last year and his dropout rates decreased from 21% in 2002-03 to 7.1% in 2007-08 because of his district's alternative schools, partnership with the Mexican government for appropriate curriculum, and implementation of an aggressive retention program, paid for by cobbling together funds from levy money, grants, and non-State sources – Yakima could not have produced those results with the State's funding); RP 98:15-99:12 (minorities who were four or five grade levels behind, but with additional tutoring, small classes, etc., the kids improved two grade levels within months); RP 1832:5-1835:5 (Yakima school district's relatively immediate results in working to close the achievement gap for Latino students by, for example, updating their curriculum and investing in teacher training, all of which was paid for with whatever resources they could cobble together since not fully funded by the State); RP 3696:9-3797:21, 3816:10-20 (Edmonds school district superintendent describing group of 18-19 students who didn't pass the WASL, but when given targeted tutoring as one of their classes, by the end of the semester 95% of the kids were able to graduate – "So it is not this hypothetical construct of, you know, is it possible or not possible to close the achievement gap? It is possible, given the focus and concentration of resources on those students."); RP 3313:14-3314:25 (Edmonds school district superintendent confirming that the challenges posed by the achievement gap with low-income kids can be overcome – "I know they can. It's not even a belief. I have direct experience where we take kids who are struggling learners and we're able to get a small enough number and a quality teacher to focus on those kids and have them achieve at a high level."); CP 5225:21-5228:16 (finding increased funding mitigates the variables that are affecting Sunnyside school district students to keep them on track (e.g., mitigating the gang problem in that district) and its already achieved results in keeping kids in school); CP 5811:6-13 (Battle Ground's improvement in on-time graduation rates due to lower class sizes and focused remediation for struggling students).

necessity for this Court to set a hard deadline for the State to fully comply with its paramount duty to amply provide for the education of all children residing in our State – not just those children who enjoy the advantage of being born into one of the castes or subsets of our State’s children who are more economically or socially privileged, more politically popular, or more easy to teach.

D. This Court’s duty to enforce Article IX, §1

The ACLU’s brief explains the mandatory nature of our State Constitution’s provisions and the judicial branch’s corresponding duty to enforce those provisions when another branch fails to do so.¹⁴

Highlighting the need for this Court to put a stop to the defendant State’s continuing violation of Article IX, §1, the ACLU’s brief also emphasizes that more and more students fall behind every year that the State delays its Constitutional compliance – a point the Chair of the defendant State’s Board of Education succinctly summarized as follows:

Please no more punts.... The 1 million children in our State’s public schools can ill afford more delay. They only get one shot at their education.¹⁵

The *Brown v. Board of Education* Court recognized this same point, explaining that when a State operates its school system in violation of a

¹⁴ *ACLU’s brief at pages 15-18.*

¹⁵ *Tr.Ex. 238 (by State Board of Education Chair Mary Jean Ryan); RP 2421:5-2432:5 (testimony re same).*

Constitutional mandate, the State negatively affects the minds of its school children “in a way unlikely ever to be undone.” 347 U.S. at 494.

The simple truth of this matter is that for Washington children’s paramount right to an amply provided education to have any real meaning in this State, that Constitutional right must be meaningfully upheld and enforced by this Court. The fourth point raised by the ACLU’s brief relates to this review’s issue #5 (compliance deadline) because, to paraphrase the recent *Brown v. Plata* decision quoted in the fourth section of its brief:

If the government fails to fulfill its Constitutional obligation under Article IX, §1, the courts have a responsibility to remedy the resulting Constitutional violation. Courts must not shrink from their obligation to enforce the constitutional rights of all children, including the students currently being left behind. Courts cannot allow Constitutional violations to continue simply because a remedy may involve intrusion into the realm of the State’s administration of its public schools.¹⁶

Accord, *Hurrell-Harring v. State*, 15 N.Y.3d 8, 26 (N.Y. 2010) (fact that remedy to constitutional violation in times of scarcity will require a reordering of legislative priorities does not relieve the courts of their essential obligation to provide a meaningful remedy when the government violates a citizen’s Constitutional right).

¹⁶ This paraphrasing follows the block quotation of *Brown v. Plata*, ___U.S.___, 131 S.Ct. 1910, 2011 WL 1936074 at *11 (2011) quoted at page 18 of the ACLU’s brief.

III. CONCLUSION

Plaintiffs' September 20 brief detailed why this Court should affirm the trial court's ruling on this review's issue #4 (State's failure).¹⁷ The ACLU's amicus brief provides further support for that conclusion.

Plaintiffs' September 20 and November 19 briefs detailed why this Court should set the hard compliance deadline requested in plaintiffs' narrow cross-appeal (issue #5).¹⁸ The ACLU's amicus brief provides further support for that conclusion as well.

Justice Harlan accurately stated in his *Plessy v. Ferguson* dissent that "The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done."¹⁹ The ACLU's brief confirms that the same will be true here if this Court does not uphold and meaningfully protect the *paramount* right to an amply provided education currently being denied to the hundreds of thousands of Washington students being left behind today. Cleverly disguised excuses or punts will not mislead anyone, nor atone for the wrong done to Washington students sitting in our classrooms today if this

¹⁷ Plaintiff/Respondents' Brief [with Errata] dated September 20, 2010, at pages 22-35 and 51-59.

¹⁸ Plaintiff/Respondents' Brief [with Errata] dated September 20, 2010, at pages 35-51 and 59-64; Plaintiff/Respondents' Reply Brief [re: their cross-appeal] dated November 19, 2010, at pages 1-25.

¹⁹ *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting), majority decision later overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954).

Court does not require the State to promptly and completely comply with its *paramount* education duty under our State Constitution.

The additional matters raised in the ACLU's amicus brief accordingly provide further support for the rulings requested in plaintiffs' September 20 and November 19 briefs.

RESPECTFULLY SUBMITTED this 17th day of June, 2011.

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