

No. 94269-2

SUPREME COURT OF THE STATE OF WASHINGTON

King County Superior Court, State of Washington
Cause No. 16-2-18527-4 SEA

EL CENTRO DE LA RAZA, a Washington nonprofit corporation; LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington nonprofit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington nonprofit corporation; INTERNATIONAL UNION OF OPERATING ENGINEERS 609; AEROSPACE MACHINISTS UNION, IAM & AW DL 751; WASHINGTON STATE LABOR COUNCIL, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS UNION 21; WASHINGTON FEDERATION OF STATE EMPLOYEES; AMERICAN FEDERATION OF TEACHERS WASHINGTON; TEAMSTERS JOINT COUNCIL NO. 28; WAYNE AU, PH.D, on his own behalf and on behalf of his minor child; PAT BRAMAN, on her own behalf; and DONNA BOYER, on her own behalf and on behalf of her minor children,

Appellants,

vs.

STATE OF WASHINGTON

Respondent.

INTERVENOR-RESPONDENTS' BRIEF

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I. Introduction

Severe negative reactions to charter public schools might not appear anywhere more fully than in Appellants' opening brief. Striking the Charter Public Schools Act ("Act") might satisfy Appellants' demands. But, the Act is constitutional. Appellants fail to show otherwise, nowhere mentioning the heavy burden associated with their facial challenge. None of Appellants' attacks rebuts the Act's presumed constitutionality. None shows beyond a reasonable doubt that the Act is unconstitutional under all sets of facts.

First, charter public schools fit inside the State's inclusive public school system. Appellants mischaracterize education options already available to Washington families and conflate the common school system with the broader public school system. Washington's education history shows that the public school system accommodates charter public schools.

Second, the Court below correctly rejected Appellants' funding claims as unripe. For charter public schools, the Act designates funding outside the General Fund and funds set aside for common schools. The Act appropriates no funds. The Act's plain language on this point does not result in use of common school funds for non-common school purposes. Whatever amount of funding that the Legislature appropriates for charter public schools, which could vary up or down by budget cycle, those appropriations

occur in budget laws. Further, Appellants' remarks on ample funding underscore that claim's strained nature. Not only is that claim unripe, it might well be moot in the near future.

Third, if harmonized with the Basic Education Act ("BEA"), the Act delegates nothing. But if the Court decides to reach this argument, however, the Act legally and properly delegates a part of its paramount duty.

Fourth, the Act does not displace the Superintendent's general supervisory powers over the broader public school system. Rather, the Act permissibly assigns additional, specific supervisory duties to the Superintendent in the context of charter public schools.

Fifth, the Act does not improperly amend preexisting law. The Act affects no one's rights as they existed under collective-bargaining laws before the Act's passage, and the Act does not amend the BEA.

Ultimately, Appellants urge this Court to indulge the veiled policy arguments of a few to deprive legal and educational rights for all. *See generally* CP 3837-3919. Striking the Act would curtail choice for all Washingtonians, not just families with children who attend charter public schools. *See* CP 3874-76. Choice is the Act's cornerstone: It does not force children to attend charter public schools. It does not prevent children from attending common schools. Rather, the Act enhances choice and diversity for all.

In dismissing some of Appellants' claims as unripe and denying the rest for failure to meet their burden, the lower court recognized Appellants' facial attack on the Act was baseless. This Court should affirm the lower court, because the Act is a legal method of providing public education options to close the opportunity gap that many of our State's students face.

II. Statement of the Case

A. What Washington's founders did and did not do.

Regardless of whether, as Appellants suggest, the state's founders endeavored to create a common school system available to all children, they did not reject the possibility of alternative methods for children to receive a basic education. No territorial law, state constitutional provision, or state law forbade non-common public schools. Instead, by creating a common school system, founders sought to ensure for the State's benefit,¹ as opposed to the benefit of individual opportunity and personal development, there be at least some provision of basic education. No one disputes that Washington has always provided an irreducible minimum of basic education. *See, e.g.*, Territorial Law of 1854 (April 12, 1854); Const. Art. IX, § 2; RCW 28A.150.020. Yet, Washington's early leaders created more than common

¹ *See* 12 Univ. of Wash., Message of the Governor of the Territory of Washington of the Legislative Assembly, 1854-1899, 93 (Charles M. Gates, Aug. 1940) ("Experience demonstrates the perfect success of the common school system - that the masses can be educated, and that it is cheaper to educate the people than to punish the vices and crime incident to ignorance.").

schools. The territorial government crafted a public education system that included a trustee-governed agricultural college, Territorial Law of 1865 (January 7, 1865), and a trustee-governed school for children with special needs, Territorial Law of 1885 (February 3, 1886), showing residents valued a public school system that included more than common schools.

The trustee-governed agricultural college was “for the benefit of agriculture and the mechanic arts,” Territorial Law of 1865 § 1, a practical sort of education that the founders elevated over general instruction in the classics, Tacoma Daily Ledger, at 3 (July 3, 1889). The trustee-governed school for children with special needs was established “for the education” of Washington children “too deaf, blind or feeble minded to be taught by ordinary methods, in other public schools.” Territorial Law of 1885 §§ 1-2. These examples of non-common public schools show that Washington’s territorial inhabitants wanted more than a common school system and that non-common schools in the Washington Territory shared some educational elements with common schools. Common schools and non-common public schools coexisted and worked together well before statehood.

B. Our public school system has always been inclusive.

The founders crafted an inclusive public school system:

The legislature shall provide for a general and uniform system of public schools. The *public school system shall include*

*common schools, and such high schools, normal schools,
and technical schools as may hereafter be established.*

Const. Art. IX, § 2 (emphasis added). Washington has maintained its inclusive public school system, integrating its components more tightly over time. Over a century of Washington school law shows this trend well.

Eight years after statehood, the Legislature “harmoniz[ed] existing inconsistencies and unif[ied] the school laws.” Laws of 1897, Ch. 118, § 258 (“1897 Code”). The 1897 Code included common schools alongside other components of the public school system, such as the state normal school system, *id.* §§ 212-227; a school for deaf, blind, and “feeble minded” youth, *id.* §§ 228-256; and the state “agricultural college, experiment station and school of science.” *Id.* §§ 190-211. These non-common school components of the public school system shared educational elements with common schools but maintained unique aspects. The 1897 Code also showed that the Legislature viewed common schools as including what might have been considered “optional” high schools: “A general and uniform system of public schools . . . shall consist of common schools (in which all high schools shall be included).” *Id.* § 1; Const. Art. IX, § 2 (high schools and common schools listed separately).

Twelve years later, the Legislature tightened the fit among the public school system’s components:

A general and uniform system of public schools shall be maintained throughout the State of Washington, and shall embrace common schools (*including high and elementary schools, schools for special help and discipline, schools or departments for special instruction*), technical schools, the University of Washington, the State College of Washington, state normal schools, state training schools, *schools for defective youth, and such other educational institutions as may be established by law and maintained at public expense.*

Laws of 1909, Ch. 97, Tit. I, Sub. Ch., § 1 (emphasis added). Decades later, the Legislature split school laws into “common school” and “higher education” codes. Laws of 1969, Ch. 223. There, the Legislature defined “public schools” as “common schools as referred to in Article IX of the state Constitution *and those schools and institutions of learning having a curriculum below the college or university level as now or may be established by law and maintained at public expense.*” *Id.* at 1670 (emphasis added).

The Legislature has since added charter public schools as another public school system component, RCW 28A.150.010, .295, alongside others like tribal-state compact schools. *See* RCW Ch. 28A.715. Tribal-state compact schools share many elements with charter public schools. Tribal-state compact schools’ compacts, like charter public school contracts, follow an application process. RCW 28A.715.010(2). Tribal-state compact schools, too, “are exempt from all state statutes and rules applicable to school districts and school district boards of directors, except those statutes and rules” that RCW Ch. 28A.715 and the compact applies. RCW

28A.715.020(2). Five federally recognized tribes have K-12 schools that operate under tribal-state compacts and outside the control of locally elected school boards. *See* Office of Superintendent of Public Instruction, Office of Native Education, <http://www.k12.wa.us/IndianEd/TribalSchools.aspx> (last accessed August 18, 2017). Nothing prohibits students who attend compact schools from attending common schools. Nothing prohibits children *not* enrolled as members of a tribe from attending tribal-state compact schools as an alternative to common schools. RCW 28A.715.030(2).

Another example of a recent non-common public school is the Washington Military Department's Washington Youth Academy. Washington State Military Department, <http://mil.wa.gov/youth-academy/faq> (last accessed August 18, 2017). The Youth Academy provides a partial high school program. RCW 28A.150.310. Students in the Youth Academy are not considered enrolled in any common school. *See* RCW 28A.300.165(2).

These examples, among many others, show that for over a century, the Legislature has made the public school system more inclusive, not less.

C. Washington voters welcome charter public schools but add them to the wrong place in the public school system.

Washington voters passed I-1240 in 2012. That law defined charter public schools as "common schools" and designated their funding from the basic education allocation and the common school construction fund.

League of Women Voters of Wash. v. State, 184 Wn.2d 393, 400, 407 (2015) (“*LWV*”). This Court held that charter public schools are not “common schools” under the state constitution. *Id.* at 405. As a result, I-1240’s funding mechanism was held unconstitutional. *Id.* at 409.

D. The Legislature passes the Act in 2016.

The Act placed charter public schools within the public school system. Charter public schools (1) are “[o]pen to all children free of charge”; (2) “[m]ay offer any program or course of study that any other public school may offer, including one or more of grades [K-12]”; and (3) must provide “a program of basic education that meets the goals” of the Basic Education Act and include instruction that meets “essential academic learning requirements” RCW 28A.710.020, .040.

1. Application and authorization

Each charter public school originates from an application process. An applicant must be a nonsectarian, nonreligious nonprofit organization. RCW 28A.710.010(1). Each application must give detailed information about the proposed charter public school, including (1) its academic program and alignment with state standards and a proposed instructional method design; (2) evidence that the proposed program is based on proven methods; (3) student assessment plans; (4) student discipline and teaching

policies, including performance evaluation; and (5) the population the school will serve, including community support for it. RCW 28A.710.130.

Authorizers are public-entity gatekeepers. They review charter public school applications, and, for approved applications, execute a charter contract with the charter public school. The Act allows two kinds of authorizers. The Washington State Charter School Commission (“Commission”) is an authorizer with 11 members, including the Superintendent; the State Board of Education’s (“SBOE”) Chair; and nine others, appointed by elected officials. RCW 28A.710.010(3), .070. The Commission’s mission is, *inter alia*, to authorize “especially schools that are designed to expand opportunities for at-risk students, and to ensure the highest standards of accountability and oversight” RCW 28A.710.070(1). Local school districts may also apply to SBOE for authorizer status. RCW 28A.710.010(3).

Each charter contract must establish preopening requirements; terms by which the charter public school will meet basic education standards; and performance expectations and measures by which the charter public school will be evaluated. RCW 28A.710.160(2). A charter contract’s performance framework must include information about student academic proficiency and growth, attendance, year-to-year reenrollment, graduation rates and postsecondary education readiness, and financial performance and stability.

RCW 28A.710.170. An authorizer monitors a charter public school's performance over the charter contract's term and determines whether the contract should be renewed or revoked. RCW 28A.710.010(3), .100(1).

2. Education standards

A charter public school's continued existence turns on proven academic performance. Generally, a charter contract cannot be renewed if the school's performance falls in the bottom 25% of *all* schools on the Washington achievement index. RCW 28A.710.200. Among other things, charter public schools must (1) provide basic education that meets RCW 28A.150.210's four learning goals; (2) provide instruction in the essential academic learning requirements; (3) participate in the statewide student assessment system under RCW 28A.655.070; (4) employ certificated instructional staff, except in extraordinary cases; and (5) comply with SBOE's performance improvement goals. RCW 28A.710.040.

3. Management and oversight

The Superintendent and SBOE have specific charter public school oversight responsibilities. The Superintendent the SBOE Chair are members of the Commission. RCW 28A.710.070(3)(a)(iii). The Superintendent manages funding allocations to charter public schools. RCW 28A.710.280. SBOE and the Commission report annually to the governor, the legislature, and the public about charter public schools' performance, comparing the

performance of charter public school students with comparable student groups at other public schools. RCW 28A.710.250. The annual report must provide “assessment of the successes, challenges, and areas for improvement . . . and any suggested changes in state law or policy necessary to strengthen the state’s charter schools.” *Id.*

Authorizers oversee charter public schools that they authorize. RCW 28A.710.010(3). The Commission must administer the charter public schools it authorizes, similar to a school district board of directors’ administration of non-charter public schools. RCW 28A.710.070(2). Authorizers must monitor charter public schools’ performance and legal compliance; determine whether to renew or revoke charter public school contracts; report annually to SBOE on various aspects of the charter public schools that the authorizer approved; and develop and follow chartering policies and practices. RCW 28A.710.100(1), (3)-(4), .180. Authorizers may investigate and discipline charter public schools. *Id.* At any time, an authorizer may revoke a charter contract if the charter public school has violated its charter contract or the Act; failed to meet or make sufficient progress toward the contract’s performance expectations; failed to meet general fiscal management standards; or substantially violated any applicable material provision of law. RCW 28A.710.200. To further enhance oversight, authorizers must annually report to SBOE (1) the authorizers’ strategic visions and progress

towards them; (2) performance data for the charter public schools operating under each authorizer's purview; and (3) the operating status of all overseen schools. RCW 28A.710.100.

A charter public school must report performance data annually to its authorizer, RCW 28A.710.040, and a charter public school provides annual data outputs according to a performance framework. RCW 28A.710.170. This performance framework and data reporting model foster meaningful performance data evaluation. *See* RCW 28A.710.180-.190. Charter public schools must submit to legal and fiscal compliance audits. RCW 28A.710.030-.040. Charter public school boards, whose composition is set by the application's terms, manage and operate individual charter public schools. RCW 28A.710.010(6), .030. Charter public school boards may hire and fire employees, contract with third parties for management and operation, and provide independent performance audits. RCW 28A.710.030. As public entities, charter public schools must heed the Open Public Meetings and Public Records Acts. RCW 28A.710.040(2)(h).

4. Funding

The Washington Opportunity Pathways Account ("OPA") is charter public schools' sole funding source. RCW 28A.710.270. OPA is an account in the state treasury distinct from the General Fund or any fund dedicated to common schools, and OPA may only fund specific educational programs.

RCW 28B.76.526. OPA is funded entirely from state lottery revenues. RCW 67.70.240. Charter public school funding must be “distributed equitably” with funding for other Washington public schools by the superintendent. RCW 28A.710.280. Two calculations determine the distribution amount for a charter public school: (1) a general apportionment determined in accordance with RCW 28A.150.260’s formula for providing for the minimum instructional program of basic education and (2) funding for specific programs or services, including supplemental instruction and services for underachieving students, students whose primary language is other than English, students with disabilities, and student transportation. *Id.*

5. Service to At-Risk Populations

The Act serves the underserved; Intervenor-Respondents know this well. *See* CP 3837-3919. Authorizers must prefer “applications for charter schools that are designed to enroll and serve at-risk student populations.” RCW 28A.710.140(2). “At-risk student” includes students (1) with academic or economic disadvantages; (2) at risk of dropping out of high school; (3) in chronically low-performing schools; (4) with higher than average disciplinary sanctions; (5) with lower participation rates in advanced or gifted programs; (6) who are limited in English proficiency; (7) who are members

of economically disadvantaged families; and (8) who are identified as having special educational needs. RCW 28A.710.010(2). The Act allows at-risk students a weighted enrollment preference. RCW 28A.710.050.

E. Proceedings below.

Appellants asked the court below to declare the entire Act unconstitutional and to enjoin its implementation. CP 207-47. The lower court granted the State's motion to dismiss two claims as unripe. CP 196. All parties moved for summary judgment. Rejecting Appellants' remaining claims, the lower court denied Appellants' summary judgment motion and granted the Defendants' motions. CP 3768. This appeal followed.

III. Argument

The lower court correctly rejected each of Appellants' claims as unripe or for failure to carry their burden to rebut presumptively constitutional legislation, particularly when a party challenges a law's facial validity.

A. Appellants fail to show beyond a reasonable doubt that no circumstances exist in which the Act is constitutional.

Appellants attack the Act's facial validity, Appellants Br. ("App.Br.") at 3 (asking this Court to "declare the [Act] unconstitutional in its entirety."), but fail to mention, let alone carry, their heavy burden of showing the Act is unconstitutional. The lower court, however, correctly applied the standard of review for challenges to laws' facial validity and

concluded that Appellants' claims did not meet the standard. CP 3744-45, 3759-60, 3762, 3764, 3766, 3768.

Statutes are presumed constitutional. *In re A.W.*, 182 Wn.2d 689, 701 (2015). A party challenging a statute's constitutionality bears a heavy burden to show the statute is unconstitutional. *State v. Shawn P.*, 122 Wn.2d 553, 561 (1993). That party must show, beyond a reasonable doubt, the statute is unconstitutional. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585 (2009). For constitutional challenges, "beyond a reasonable doubt" requires a court to be "fully convinced, after a searching legal analysis" that the law violates the constitution. *Wash. Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 234 (2012) (internal quotation marks and citations omitted). A court must reject a facial challenge to a statute, "unless there exists no set of circumstances in which the statute can constitutionally be applied." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221 (2000). This standard applies when, as here, this Court reviews *de novo* orders on motions to dismiss and for summary judgment. *Eugster v. State*, 171 Wn.2d 839, 843 (2011).

B. Charter public schools fit in the public school system; they do not change its "general and uniform" quality.

The State must provide a "general and uniform" public school system. That system "shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established."

Const. art. IX, § 2. Just as it generally defers to the Legislature on challenges to statutes by presuming their constitutionality, this Court similarly recognizes that “the organization, administration, and operational details of the general and uniform [public school] system required by Article IX § 2 are the province of the Legislature.” *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wn.2d 476, 518 (1978) (internal quotation marks omitted). Appellants fail to show the Legislature exceeded its power to create public education options, particularly given that charter public schools are aimed at closing the educational equity gap.

1. Appellants fail to show that charter public schools fall outside the State’s public school system.

Appellants fail to show beyond a reasonable doubt that the charter public schools authorized by the Act fall outside the Constitution’s inclusive public school system. Appellants contend that Article IX § 2 reserves exclusively for common schools the provision of “a general education to all children,” and that any public school not part of the common school system merely supplements common schools’ provision of general education. App.Br. at 19. As the lower court correctly observed, the Constitution does not support that bare assertion. CP 3754. And the Legislature’s long-standing, accommodating, and flexible definition of “public school system” refutes Appellants’ assertion.

Article IX § 2's list of public schools is not exhaustive. Nothing there states only common schools may provide some or all basic education. That list has no limiting language, and none of the surrounding language suggests that the list should be read as exhaustive. Concluding that the list is exhaustive would frustrate ordinary methods of construction. A list of specific items included within a more general category should typically be read to include only items similar to those suggested by the general term. *Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 882 (2007) (describing *ejusdem generis* and refusing to apply it where context required otherwise). Nothing about the general category "public school system" suggests that charter public schools fall outside that phrase's broad language. Similarly, no rule of construction can override "the fundamental principle underlying all rules," which requires all words be given their ordinary meaning. *State ex rel. Bloedel-Donovan Lumber Mills v. Savidge*, 144 Wash. 302, 307 (1927). Where items in a specific list seem, particularly without express limiting language, to exhaust a general category, the general category must be read more broadly. Otherwise, the general category is rendered unjustifiably meaningless. *Id.* at 306. Here, the ordinary meaning of "public school system" cannot sensibly be limited to four items.

Further, the Legislature has never organized the public school system to include only those schools listed in Article IX § 2. Nor has the Legislature ever treated common schools as the only public school system component that may provide some or all of a basic education program. From early statehood to present, the Legislature has defined the public school system in increasingly inclusive and integrated terms. Eight years after statehood, the Legislature organized all of its schools' laws into a comprehensive Code of Public Instruction. Laws of 1897, Ch. 118 ("1897 Code"). The 1897 Code included common schools alongside other public school system components. Specifically, the 1897 Code stated:

A general and uniform system of public schools . . . shall consist of common schools (in which *all high schools shall be included*), normal schools, technical schools, university of Washington, *school for defective youth and such other educational institutions as may be established and maintained by public expense.*

1897 Code § 1 (emphasis added). Significantly, that definition shows that the public school system's components overlapped—"high schools"² were

² Appellants fail to account for high schools' constitutional position within the public school system. On the one hand, Appellants describe high schools as providing unnecessary, advanced education, apparently to explain those schools distinct appearance in Article IX § 2. App.Br. at 21. Appellants also condemn the lower court's acknowledgment of the Legislature's evolving definition of "public school." *Id.* at 22. Surely, however, Appellants do not contend that today's high schools are optional components of the public school system. If they do, the unworkable nature of Appellants' proposed rule is obvious. If they do not, then the rickety framework of Appellants' rule is equally obvious—i.e., how can their formulation of the public school system be so rigid yet account for high schools' position within the state's common school system today?

part of the common school system. More broadly, the public school system was treated as all-inclusive; it included the “school for defective youth and such other educational institutions as may be established and maintained by public expense.” *Id.*

The Legislature has never abandoned its inclusive treatment of the public school system. *See* Laws of 1909, Ch. 97, Tit. I, Sub. Ch. § 1; Laws of 1969, Ch. 223, at 1671. Today, the Legislature defines “public schools” as “the common schools as referred to in Article IX of the state Constitution, charter schools established under chapter 28A.710 RCW, and those schools and institutions of learning having a curriculum below the college or university level *as now or may be established by law* and maintained at public expense.” RCW 28A.150.010 (emphasis added).

From today’s definition, several non-common public schools, including charter public schools, provide all or part of basic K-12 education. These include, as the lower court correctly observed: tribal compact schools (RCW Ch. 28A.715); Running Start (RCW 28A.600.300, .400); high schools operated at community colleges (RCW 28B.50.533); UW’s program for highly capable students (RCW 28A.185.040); Youth Offender Program operated by the Department of Corrections under contract with Centralia College (RCW 28A.193.020); Education Service District-operated programs (RCW 28A.310.200(7); 28A.190.010); OSPI-approved, non-

public agency education services providers for special education students (RCW 28A.155.060); Alternative Learning Experience (ALE) and online learning programs operated by nonprofit or private entities (RCW 28A.232.010); and alternative education service providers operated under contract by numerous entities in addition to school districts. CP 3752.

Even if, as Appellants assert, some of these schools and programs accommodate special groups or needs, Appellants fail to show beyond a reasonable doubt that any of these public schools or programs do *not* provide all or part of a basic education. Appellants also fail to show beyond a reasonable doubt that all of these public schools expressly forbid students from the general population from attending—tribal compact schools being a prime example of non-common public schools that may provide all or some of a basic K-12 education to *any* student. RCW 28A.715.030(2), .020(3)(d), .020(5). A brief review of the School for the Blind’s website also refutes Appellants’ segregated treatment of the public school system: “WSSB offers comprehensive educational programs for 6th through 12th graders. Appropriateness for attending educational programs at WSSB is not related to visual acuity.” *Enrollment – Washington State School for the Blind*, <https://www.wssb.wa.gov/wp/welcome-to-wssb/school-home/enrollment/> (last accessed August 18, 2017).

Further, Appellants conflate public education programs for incarcerated juveniles, accelerated learners, and technical high schools. *See* App.Br. at 23-24. However, if a student is an accelerated learner or may attend a technical high school, may they attend *only* those programs or may they choose to stay in a common school? If children choose to attend an accelerated learner program or a technical high school, are they not choosing an alternative to a common school? In other words, contending that such options are *not* alternatives to common schools is disingenuous.

It is in the same spirit of tribal-compact schools, Running Start, high schools in community colleges, and other public school system components that charter public schools operate as an alternative to common schools. Appellants exaggerate that charter public schools, unlike other alternatives to common schools, are aimed at supplanting, replacing, or destroying common schools. That unfair claim says nothing about whether charter public schools fit within the state's broader public school system. They do.

Textual, historical, and practical analyses of Washington's long-standing public school system refute Appellants' treatment of (1) the common school system as the only component of the public school system allowed to provide a basic education; (2) any other public school as a mere supplement to the common school system; and (3) any other public school that Appellants cannot explain away as nevertheless constitutionally sound,

so long as they are not charter public schools. *See* App.Br. 20-25. Appellants suggest a rule that crumbles under its own illogic. This Court should not adopt it. Such a rule would unnecessarily invade the Legislature’s province to organize, administer, and provide operational details for the “general and uniform” public school system. *Seattle Sch. Dist.*, 90 Wn.2d at 518.

2. Appellants fail to show that the Act violates the “general and uniform requirement.”³

The lower court correctly recited this Court’s interpretation of “general and uniform” as that phrase applies to the public school system. CP 3755. This Court has said:

A general and uniform system, we think, is, at the present time, one in which every child in the state has free access to certain minimum and reasonably standardized educational and instructional facilities and opportunities to at least the 12th grade—a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education.

³ Appellants mischaracterize charter public schools’ governance system. App.Br. at 26-27. First, charter public schools are no less accountable to voters than common schools, because charter public schools may only operate by authorization of (1) the statewide authorizer (the Commission), which is composed of elected officials or persons appointed by elected officials, RCW 28A.710.070, or (2) a school district authorizer, which is composed of the school district’s board of directors and may only operate as an authorizer upon approval by the State Board of Education. RCW 28A.710.080. Second, Appellants attempt to measure the Act’s governance structure for charter public schools against the same governance structure that applies to common schools. App.Br. at 26-27. However, Article IX § 2 does not require non-common public schools to have the same governance structure as common schools. *See, e.g., Tunstall*, 141 Wn.2d at 232-33, 235 (“[I]n many instances, the Legislature has found entities other than school districts qualified to educate our youth.”).

Fed. Way Sch. Dist. No. 210 v. State, 167 Wn.2d 514, 524 (2009) (citation omitted) (emphases added).

While this description of “general and uniform” was applied in cases involving common schools, the phrase modifies “public school system.” Const. art. IX, § 2 (“The legislature shall provide for a general and uniform system of *public* schools.”). Moreover, this description of “general and uniform” is dynamic and subject to change, otherwise this Court would not have qualified its description of “general and uniform” as one that applies “at the present time.” *Fed. Way Sch. Dist.*, 167 Wn.2d at 524.

From this Court’s most recent explanation of the meaning of “general and uniform,” the lower court correctly concluded that a component of the “general and uniform” public school system must provide and not deprive children of three things: (1) minimum and reasonably standardized educational opportunities and facilities, which must let students access skills and training reasonably understood to be fundamental and basic to sound education; (2) free and open access; and (3) the ability to transfer between public schools without a substantial loss of credit. The Act’s charter public schools provide all three to children and does not deprive children who attend non-charter public schools of any of the three.

- a. **The Act’s charter public schools serve underserved children with minimum, reasonably standardized educational opportunities and facilities and provide access to skills and training reasonably understood to be fundamental and basic to sound education.**

Appellants do not dispute that the Act provides for a “basic education,” and the lower court correctly concluded that it does. CP 3756; *McCleary v. State*, 173 Wn.2d 477, 525-526 (2012). Appellants admit that the Act requires charter public schools to “provide a program of basic education, that meets the goals in RCW 28A.150.210, including instruction in the essential academic learning requirements, and participate in the statewide student assessment system as developed under RCW 28A.655.070.” App.Br. 27-28; RCW 28A.710.040(2)(b). Appellants argue, however, that a single program of basic education, like the one that appears in the BEA, is required for all public schools. Neither of the cases that Appellants cite, however, supports their contention, particularly with regard to non-common public schools like charter public schools. *See* App.Br. 28. “[T]his court has never held . . . that the [BEA] defines the scope of the State’s paramount constitutional duty to provide education. Nor has this court ever held, nor do we now hold, that what is not within the Basic Education Act is outside the State’s paramount duty.” *Brown v. State*, 155

Wn.2d 254, 261 (2005). Further, *McCleary* requires the Legislature to review even the *common schools*' basic education program "as the needs of students and the demands of society evolve" and from time to time "evaluate whether new offerings must be included" in the common schools' basic education program. *McCleary*, 173 Wn.2d at 526. For non-common public schools, then, lower court correctly concluded that Article IX § 2 does not require charter public schools "to deliver the same program of basic education as common schools." CP 3757. Appellants have failed to show otherwise beyond a reasonable doubt.

However, if this Court concludes that charter public schools must provide a basic education program identical to the program that common schools provide, the Act's requirements must be read together as "constituting one law," because the Act and the BEA relate to the same subject matter and have the same purpose—i.e., providing a basic education to children who attend school. *In re Yim*, 139 Wn.2d 581, 592 (1999). This principle (*in pari materia*) maintains the integrity of both statutes by treating them as complementary, not conflicting, just as charter public schools and common schools are complementary parts of the public school system. Similarly, this principle dovetails with another principle of interpretation which this Court follows—"constru[ing] statutes to avoid constitutional doubt." *Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 434 (2015).

Appellants misapprehend the main case they cite to rebut the lower court's application of *in pari materia*. First, *Henry v. Lind* rejected the assumption that certain language was clear and ambiguous, instead applying *in pari materia*. 76 Wn.2d 199, 200-01 (1969). Second, Appellants contend that construing the Act to require the same basic education program that the BEA requires would render superfluous the Act's language regarding the essential academic learning requirements, *see* RCW 28A.710.040(2)(b), because the same requirement appears in RCW 28A.150.220(3)(a). The entire point of applying *in pari materia*, however, is to read statutes as complementary. *In re Yim*, 139 Wn.2d at 592. Further, the surplusage canon does not necessarily apply in situations where language is not literally identical but nevertheless strongly susceptible to identical meaning. *See Condon Bros. v. Simpson Timber Co.*, 92 Wn. App. 275, 284 n.20 (1998).

Ultimately, “[n]o canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.” Antonin Scalia & Bryan A. Garner, *Reading Law*, at 59 (2012). Here, principles that (1) presume the Act's constitutionality; (2) urge avoidance of interpreting the Act in a way that renders it unconstitutional; and (3) counsel complementary, not conflicting, readings of related statutes weigh heavily in favor of the lower court's correct reading of the Act, *see* CP 3757, and against Appellants' flawed application of other canons.

Regarding student discipline, Appellants admit that all current charter public school contracts require compliance with state laws on disciplinary procedure and prohibitions on corporal punishment. App.Br. at 29. However, the Act does not expressly require charter public school contracts to include that compliance. As the lower court observed, the Act does not *prohibit* charter public schools from obeying some or all state disciplinary laws that apply to common schools. Even if non-common public schools were required to follow common school disciplinary laws (the lower court correctly concluded they are not), *see* CP 3758-59 (citing examples of non-common schools that are not expressly bound by the same school discipline laws as common schools), the Act cannot on that ground be said to be unconstitutional in every set of circumstances. The Act's charter public schools provide children with minimum and reasonably standardized educational opportunities and facilities as well as access to skills and training reasonably understood to be fundamental and basic to sound education.

b. The Act provides free and open access.

Observing that public schools in a “general and uniform” public system must be free and open to every child, *Northshore School District No. 417 v. Kinnear*, 84 Wn.2d 685, 729 (1974), the lower court correctly concluded, and Appellants do not dispute, what is obvious from the face of the

Act: “Charter schools are open to all children and free.” CP 3759; RCW 28A.710.020(1)(a).

c. The Act allows transfer between public schools without a substantial loss of credit.

As the lower court correctly observed, the Act does not prevent the transfer of credits from common schools to charter public schools. CP 3760. Notably, no statute codifies the current common school transfer-of-credits policy, and this Court has upheld the facial validity of other non-common public school programs that also mention no transfer-of-credits policy. *Id.*

Practically speaking, charter public schools would (1) need authorization of a no-transfer policy before such a school could operate and (2) even then, such a policy would dissuade students from choosing to attend such a charter public school anyway, because the Act does not require students attending common schools to transfer to a charter public school. Nevertheless, Appellants contend: “It is not enough, as the trial court suggested, that charter schools might accept some transfer credits.” App.Br. at 29. However, a “facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can be constitutionally be applied.” *Tunstall*, 141 Wn.2d at 221 (citation omitted). Appellants have again misapprehended their burden upon this facial challenge to the Act. They must show that the Act could never be applied in a way that would allow students who

transfer to charter public schools to receive credit for courses completed at common schools. Appellants have failed to show that beyond a reasonable doubt.⁴ Charter public schools fit within the state’s public school system, and they do not disrupt that system’s “general and uniform” quality.

C. Neither of Appellants’ funding claims is ripe and Appellants’ funding claims fail to show beyond a reasonable doubt that the Act unconstitutionally diverts common school funds or burdens the Legislature’s duty to amply fund education.

1. Appellants’ “Fund Diversion” claim is unripe.

The lower court rejected Appellants’ “Fund Diversion” claim on non-merits grounds, because it is unripe. CP 3762. The merits of that claim are not before this Court. Rather, at issue is whether the lower court correctly concluded that Appellants’ “Fund Diversion” claim is unripe.⁵

⁴ Appellants entirely ignore that the third aspect of a “general and uniform” public school system requires children’s ability to transfer between public schools without a *substantial* loss of credit. No part of the public school system requires a one-to-one credit transfer, even when a child transfers from one common school to another. Simply assuming, as Appellants do, that a potential credit transfer policy “raises barriers to transfer” does not show whether and how those hypothetical barriers lead to a *substantial* loss of credit.

⁵ Appellants misrepresent this Court’s decision in *League of Women Voters*. No member of this Court concluded that the charter public schools initiative “was not susceptible to facial challenge because the Legislature might fund charter schools in a constitutional manner in future budgets.” App.Br. at 35. Rather, the majority doubted that charter public schools could be funded constitutionally from the General Fund, given a lack of segregation between common school funds and other monies within the General Fund. *LWV*, 184 Wn.2d at 409. Here, a source that contains no commingled common school monies funds charter public schools. Speculation about how the Legislature might use the OPA in a way not required by the Act is wholly different from funding issues that flow from this Court’s conclusion in *LWV* that I-1240’s funding mechanism inevitably resulted in charter public schools’ receipt of protected common school funds.

“The ripeness doctrine exists to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . .” *Asarco Inc. v. Dep’t of Ecology*, 145 Wn.2d 750, 759 (2002) (citation omitted). Appellants’ “Fund Diversion” claim rests on speculative assumptions, looks beyond the Act’s plain text at a sliver of legislative history, and now that the 2017-2019 budget has been enacted, asserts that one budget’s increase in charter public schools’ share of OPA funding shows that the Act requires using restricted common school funds. Courts are not soothsayers.

Appellants’ convoluted “Fund Diversion” claim also requires use of “evidentiary”⁶ materials irrelevant to a facial challenge. The difficult situation that Appellants present here is similar to the “justiciability conundrum” this Court confronted in *Asarco. Id.* Specifically, Appellants have challenged the Act’s facial validity. Appellants do not dispute that the Act designates only one funding source for charter public schools—the Opportunity Pathways Account (“OPA”). RCW 28A.710.270; 28B.76.526. Neither do Appellants dispute that only lottery revenues fund OPA and, further,

⁶ In light of its rejection of Appellants’ facial challenge to the Act, the lower court declined to reach evidentiary issues that Intervenor-Respondents raised. CP 3768 n.10. Further, the lower court implied that the challenged evidence was not admitted into the record below: “*Even if admitted*, the evidence at issue would not affect the outcome here.” *Id.* (emphasis added). Accordingly, Appellants improperly reference here evidence that was not admitted.

OPA contains no constitutionally protected common school funds. *See* RCW 67.70.240, .340.

Appellants' funding arguments supporting their facial challenge ignore the Act's language. Appellants speculate from (1) select legislators' characterizations of how charter public schools might eventually be funded; (2) select legislative staff documents; and (3) various forecasting documents to conclude that the Act "ultimately" relies on restricted common school funds. App.Br. 30, 34-35. In doing so, Appellants disguise as an "as applied" challenge a "general constitutional challenge[]," and this Court has stated that "[o]ne should not substitute for the other." *Asarco*, 145 Wn.2d at 759-60.

Indeed, Appellants' "Fund Diversion" claim is neither a facial nor an as-applied argument—it is something of an unrecognizable "as-will-be-applied" challenge, because the Act cannot ripen into the sort of "fund diversion" Appellants claim. The Legislature's *budget* law increased charter public schools' share of OPA for this biennium. App.Br. at 34. The Act, however, does not require using a specific amount of money from OPA, let alone a large enough sum to always and forever exceed OPA's capacity. The next budget law could *decrease* both charter public schools' share and overall amount of funds drawn from OPA; the *Act*, however, would not command that result either. Stated differently, if the Legislature were to one

day improperly divert common school funds, the Act will not have compelled that action. The Act is not susceptible to this sort of attack, especially upon a facial challenge. The lower court correctly concluded that Appellants' "Fund Diversion" claim is unripe.

2. The merits of Appellants' Fund Diversion claim fail to show that the Act is facially invalid.

If this Court reaches the merits of Appellants' "Fund Diversion" claim, they have failed to show beyond a reasonable doubt that no set of circumstances exists in which the Act can be applied to fund charter public schools constitutionally. Appellants frame the merits of their Fund Diversion claim as centering on the issue of "whether the [Act]'s intended operation will have the effect[] of utilizing common school funds." App.Br. 31-32 (citation omitted). However, Appellants' equivocal use of the phrase "intended operation" mischaracterizes this Court's precedent.

No case that Appellants cite regarding a law's "intended operation" and its necessary effects on restricted common school funds relied on legislative intent or speculative forecasting to determine whether the challenged law was unconstitutional. Rather, each law's "intended operation" arose from its literal and inescapable effects on common school funds that would always result in use for non-common school purposes. In *LWV*, charter public schools were defined as common schools and, accordingly, drew

upon common school funds. *LWV*, 184 Wn.3d at 401-02 (noting that charter public schools under I-1240 could only tap restricted funding sources if they were “common schools”). But because charter public schools there did not qualify as common schools, I-1240’s designation of common school funds for charter public school use was inescapably unconstitutional. *See id.* Similarly, in *Mitchell v. Consolidated School District No. 201*, common school funds were inevitably burdened, because the law required public school buses to transport private and parochial school students. 17 Wn.2d 61, 66 (1943). Here, the Act does not inevitably result in restricted common school funds being used for non-common school purposes; “such use is not inevitable.” CP 3763. The only way to reach Appellants’ contrary conclusion is to accept their speculative premises and follow their tenuous rationale.

First, Appellants improperly cite declarations that were not admitted into the record below and that are irrelevant to the intent argument they appear to make regarding the Act’s “intended operation” on common school funds. *See generally* CP 325-331, 346-54. Specifically, Appellants rely wholly on declarations of one legislator and one lobbyist, *see* CP 704-07, to support these sweeping claims:

- [T]he Legislature . . . recognized that General Fund revenue would be necessary to pay for the non-charter programs supported by the OPA, and called it a day. App.Br. at 32.

- The Legislature was aware that the OPA will not have sufficient funds to cover the hundreds of millions of dollars per year necessary to pay for up to 30 new charter schools, as well as substantial growth in student populations in the ten charter schools operating this school year. *Id.* at 32-33
- There is no conceivable way charter schools' rising costs over the five years authorized under the Act can be funded through the stagnant OPA. *Id.* at 33.

Legislative history as evidence of legislative intent is irrelevant here. While this Court's "primary goal" is to give effect to the Legislature's intent, it accomplishes that goal by giving effect to a law's plain language. *Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co.*, 186 Wn.2d 336, 346 (2016). If language is unambiguous, this Court "give[s] effect to that language and that language alone because [this Court] presume[s] the legislature says what it means and means what it says." *Id.*

Here, the Act's plain language shows that the Legislature avoided any fund-swapping mechanism that Appellants insist exists, because the Act's sole source of funding is the OPA. RCW 28A.710.270; 28B.76.526. The Act's plain language precludes recourse to legislative history, which Appellants misuse in any event. *See, e.g., Watson v. City of Seattle*, — Wn.2d —, 2017 WL 3428951, at *4 (Aug. 10, 2017) (rejecting single legislator's statements as evidence of legislative intent). The Act's plain language controls and rebuffs Appellants' selective distractions regarding funding mechanisms for charter public schools.

Appellants also rely on speculative forecasts to shore up their “Fund Diversion” claim. App.Br. at 33 n.7. For example, charter public schools *must* budget several years out. WAC 108-20-070(4)(a); CP 2611-2860. But those budgets assume steady student enrollment growth, which in turn increases budget figures. *Id.* Likewise, the State forecasts charter public school enrollment, but those forecasts caution: “The risks to the charter school forecast are high” and the “lack of historical data on enrollment rates poses the greatest risk to forecast accuracy.” CP 3035; Washington State Caseload Forecast Council, *Charter Schools – Enrollment | Caseload Forecast Council*, http://www.cfc.wa.gov/Handouts/Charter_Schools_Enrollment.pdf (June 21, 2017) (last accessed August 18, 2017). The Council’s forecast trend lines for charter public schools have varied significantly between June 2016 and June 2017. Trend lines from June 2016, November 2016, February 2017, and June 2017 project charter public school enrollment with little predictability. *See id.* (estimating average annual charter public school enrollment numbers for the 2018-2019 academic year of 4389, 3783, 4500, and 4168 respectively).

Finally, Appellants rely on the most recent *budget* law to support their facial challenge to *the Act*. Yet, even Appellants concede that “the newly enacted budget,” not the Act, appropriates funds. App.Br. at 35. Unconstitutional appropriations (or laws whose language inevitably causes

such appropriations) would be the proper object of Appellants' Fund Diversion challenge, not the Act, because it does not appropriate or compel appropriation of common school funds for non-common school purposes. *LWV*, 184 Wn.2d at 407-08 (incorrect designation of charter public schools as common schools necessarily involved use of funds appropriated for common schools); *Yelle v. Bishop*, 55 Wn.2d 286, 304 (1959) (unsuccessful challenge to budget and accounting act; noting restricted funds "require[] appropriation by legislative direction").

Had Appellants challenged the 2017-2019 budget law, however, they mislead with an oversimplified chart they created.⁷ They rely on the chart as their sole support for the contention that the Legislature diverted common school funds "to cover the costs of other programs eligible for OPA funds."⁸ App.Br. at 16, 34. Specifically, Appellants assert that an additional \$20 million went to charter public schools from OPA for FY 2017-

⁷ The State details the flaws of Appellants' treatment of the budget. State Br. at 38-40.

⁸ Appellants further contend that the new budget law "requires use of restricted General Fund dollars to prepare official projections of charter school enrollment three times each year." App.Br. at 34. However, Appellants do not explain how the Caseload Forecast Council's projections—which extend beyond education programs to include projections for state correctional facilities, adoption support, and medical assistance, among others—use common school funds for non-common school purposes. See RCW 43.88C.010(7). Indeed, this is the extreme result of Appellants' tacit urging that *LWV* be read to preclude General Fund expenditures as off-limits to any non-common school expenditure. This Court should not extend *LWV*'s holding to such an absurd extreme. *LWV*, 184 Wn.2d at 419 ("[T]aken to its full logical extent, it would mean that any expenditure from the general fund would be unconstitutional unless it was for the support of common schools.") (Fairhurst, J., concurring in part, dissenting in part).

2018 relative to FY 2016-2017. App.Br. at A-4. Appellants also assert that an additional “\$20M+” went to “other OPA programs” from the General Fund for FY 2017-2018 relative to FY 2016-2017. *Id.* This ignores the obvious—that “other OPA programs” had received General Fund and Education Legacy Trust Account (“ELTA”) funds before the Act existed. The “\$20M+” is more accurately stated as \$40M, accepting Appellants’ chart at face value—i.e., double the increase in OPA funds that went to charter public schools for FY 2017-2018. And because Appellants add ELTA funds, which have also been used historically to fund “other OPA programs,” the increased amount from that source equals \$23M, according to Appellants’ chart. Thus, Appellants’ chart shows no correlation between the \$20M increase in charter public school funds from OPA and the \$63M increase in amounts from the General Fund and ELTA to “other OPA programs.”

If Appellants’ compounded straining (citing select individuals’ perspective on irrelevant legislative deliberations; citing uncertain forecasts; and creating dubious links between charter public school funding and other accounts’ contributions to non-charter public school education programs) is not enough to show that its “Fund Diversion” claim is unripe, then Appellants’ claim highlights their failure to show beyond a reasonable doubt that the Act diverts common school funds for non-common school uses.

3. Appellants’ “Ample Funding” claim is unripe and they fail to argue on the merits of their Ample Funding claim, abandoning it.

The lower court correctly rejected Appellants’ “Ample Funding” claim on non-merits grounds, concluding that it was unripe. CP 196. Plaintiffs did not brief the merits of their “Ample Funding” claim at summary judgment. *See* CP 272-324. Accordingly, the merits of that claim are not before this Court. Rather, whether the lower court correctly concluded that Appellants’ “Ample Funding” claim is unripe is at issue here. The lower court’s dismissal of Appellants’ “Ample Funding” claim as unripe was correct, because it highlighted failures that predate the Act and alleged harms from the Act that were and remain “speculative and theoretical.” CP 204.

Further, Appellants’ “Ample Funding” claim might well be moot soon, because the Legislature has passed the 2017-2019 budget and Engrossed House Bill 2242 (the “McCleary Fix”), both aimed at fulfilling the Legislature’s duties to provide ample funding for basic education under Article IX § 1 of the state constitution. *See* Laws of 2017, Chs. 1, 13.

This Court does not resolve claims that are moot or present only abstract questions. *State v. Beaver*, 184 Wn.2d 321, 330 (2015). A claim is moot if a court cannot provide effective relief. *Id.* Even if technically moot, however, this Court may resolve such an issue if it is “one of continuing and substantial public interest,” which is determined by weighing three factors:

(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination for the future guidance of public officers; and (3) the likelihood of future recurrence of the question. *Id.* First, if this Court becomes satisfied that the Legislature has met its duty to amply fund basic education, then Appellants' "Ample Funding" claim is moot. Second, while Appellants presented their "Ample Funding" claim below as one of a public nature, reaching Appellants' technically moot "Ample Funding" claim will not provide future guidance for public officers, and the likelihood of the Act's recurrent effect, if any, on a resolved issue (*McCleary*) is low.

Finally, even if this Court reaches the merits of Appellants' "Ample Funding" claim, Appellants present no merits arguments to respond to or for this Court to resolve; Appellants have made bare assertions without argument on their "Ample Funding" claim. Specifically, Appellants (1) assert that the Act "hinders the State's ability to provide constitutionally adequate funding for basic education"; (2) equivocate that the new budget "may or may not solve" underfunding issues in *McCleary*; (3) conflate their Fund Diversion claim with their Ample Funding claim; and (4) unremarkably observe that until this Court officially decides whether the State has fulfilled its duty to amply fund education, the *McCleary* Orders stand. App.Br. at 36.

When, as here, a brief presents "practically nothing more than assertions of error . . . practically without argument," this Court will "dispose of

them . . . in an equally summary manner.” *Sandanger v. Carlisle Packing Co.*, 112 Wash. 480, 492 (1920); *In re Griffin*, 195 Wn. App. 1060, 2016 WL 4658969 at *13 n.15 (Sept. 7, 2016) (“We do not consider assertions without argument or authority.”) (unpublished opinion). Appellants’ “Ample Funding” assertions, not arguments, fail to show beyond a reasonable doubt that the Act precludes the State from amply funding education.

D. The Act delegates nothing of the State’s paramount duty to define a basic education program, but even if it did, the Act constitutionally delegates certain functions.

If this Court agrees that the Act and the BEA must be harmonized, *supra* 25-26, then the Legislature defined a basic education program for charter public schools and the Act delegates nothing of the State’s paramount duty as the lower court correctly concluded, CP 3764, and this Court’s analysis of this claim can end. If, however, this Court reaches Appellants’ nondelegation claim, the State may delegate aspects of its paramount duty to provide education.

Appellants contend this Court has forbidden the State from delegating any aspect of its Article IX § 1 duty. App.Br. 37-38. Neither case Appellants cite supports that contention. First, *Seattle School District* nowhere forbids the *Legislature* from delegating its Article IX § 1 duty. 90 Wn.2d 476 (1978). In fact, in explaining the *judiciary’s* duty to construe the constitution, this Court clarified that the duty falls upon the “State *rather than*

upon any *one* of the three coordinate branches of government.” *Id.* at 512 (emphasis added). Certain aspects of the State’s Article IX § 1 duty, then, will be fulfilled by branches other than the Legislature. *Id.* (“While the Legislature is an essential element thereof, it is only one segment of that intricate governmental body politic upon which has been placed the Paramount duty.”). *Seattle School District* further clarified that while Article IX § 1’s duty to provide education is imposed on the State, “the organization, administration, and operational details” of the public school system “are the province of the Legislature.” *Id.* at 518. Being within the province of the Legislature implies discretion over how to fulfill an aspect of a duty.

Further, *Parents Involved* identified a component of the State’s Article IX § 1 duty that could not be delegated to local school districts—ample funding, not the defining of a basic education program. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 673 (2003); *id.* (“The constitution require[s] that the State provide for the fully sufficient and ample funding of the program by appropriation or through regular and dependable tax sources,” as opposed to local revenue generation) (citation omitted). That component of the State’s Article IX § 1 duty is not at issue here. Rather, *Parents Involved* supports an interpretation of *Seattle School District* that is narrower than that proposed by Appellants. In the context of school segregation, this Court concluded that school districts *could* “work

to end” segregation. *Id.* at 676. While *Seattle School District and Parents Involved* could be read together to forbid the Legislature from delegating *ample funding* duties, it can delegate other aspects of its Article IX § 1 paramount duty, including defining a basic education program.

But even in the context of general constitutional bars against delegation of legislative power, those “do[] not preclude delegation to administrative agencies,” such as the Commission and school district authorizers, from being able to implement law, “provided the law enunciates standards” to guide the agencies. *Water Dist. No. 105, King Cty. v. State*, 79 Wn.2d 337, 342 (1971). And in particularly complex areas, such as the organization, administration, and operation of the State’s public schools, this Court “has exhibited greater liberality in permitting grants of discretion to administrative bodies.” *Id.* The lower court’s conclusion follows this principle. The Legislature may delegate aspects of its Article IX § 1 duty to provide education including defining the particulars of a basic education program, if the Legislature follows certain guidelines.

If the Legislature delegates power, this Court requires (1) “standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it” and (2) procedural safeguards “to control arbitrary administrative action and any administrative abuse of discretionary power.” *Barry & Barry, Inc. v. State*

Dep't of Motor Vehicles, 81 Wn.2d 155, 159-60 (1972). The Act meets both requirements, because it creates a regulatory scheme that includes (1) mandatory standards for authorizing and operating charter public schools; (2) administrative bodies that accomplish the Act's purpose of delivering a basic education through charter public schools; and (3) procedural safeguards to control arbitrary action and abuse of power.

Charter public schools may not operate unless authorized by other public entities (authorizers). RCW 28A.710.100(1). SBOE oversees authorizers and may revoke authorizing power. RCW 28A.710.120. Authorizers solicit charter public school applications according to guidelines and an SBOE-prescribed, statewide timeline. RCW 28A.710.130(1)(b), .140(1). Charter public school applications must "provide or describe thoroughly" over 30 items in detail, RCW 28A.710.130(2), which often result in applications with hundreds of pages and supporting documentation. *See, e.g.*, CP 1098-1101, ¶¶ 8, 12, 15. When evaluating applications, authorizers must draw evidence-based conclusions and conduct transparent decision-making, allowing them to conditionally approve applications if necessary. RCW 28A.710.140(2)-(4). Authorizers must submit proposed charter application acceptances to SBOE for final approval. RCW 28A.710.150.

Authorizers are also gatekeepers for proposed charter public school contracts (charter applications are not charter contracts), RCW

28A.710.100(1), .160(1), because no contract takes effect unless executed between an authorizer and an authorized school. *Id.* Contracts must set (1) “terms by which the charter school agrees to provide educational services that, at a minimum, meet basic education standards” and (2) “academic and operational performance expectations and measures by which the charter school will be evaluated” RCW 28A.710.160(2).

After contract approval, authorizers supervise schools they authorized. RCW 28A.710.160, .180. Likewise, schools must report to authorizers whether their delivery of services and school performance aligns with contract terms. RCW 28A.655.110, 28A.710.040. In turn, authorizers report to SBOE the academic and financial performance of authorized schools. RCW 28A.710.100. Authorizers must address any school failure to adhere to its contract. RCW 28A.710.180. If problems persist or are serious enough, an authorizer may revoke or refuse to renew a charter contract. RCW 28A.710.200. Due process precedes revocations or refusals to renew, which enhances transparency and allows for more orderly transitions for students. RCW 28A.710.200(3), .210.

Finally, even assuming the Legislature ultimately delegated the definition of a basic education to private entities, that is not *per se* unconstitutional. App.Br. at 38; *see United Chiropractors of Wash., Inc. v. State*, 90

Wn.2d 1, 6 (1978) (rejecting *per se* prohibition of delegation to private entities). The Act provides many standards that guide charter public schools' and authorizers' establishment and operation, including safeguards against underperforming or rogue charter public schools. Transparency and accountability enhance those safeguards. These standards and safeguards meet constitutional requirements for delegation of authority. *Barry & Barry*, 81 Wn.2d at 159, 163-64. Appellants fail to show otherwise beyond a reasonable doubt, because they ignore these standards and safeguards.⁹

E. The Act retains Superintendent supervision.

The Act aligns with the Constitution's requirement that the Superintendent "have supervision over all matters pertaining to public schools" Const. art. III, § 22. For example: "Charter schools are subject to the supervision of the superintendent of public instruction and the [SBOE], including accountability measures, to the same extent as other public schools, except as otherwise provided in this chapter." RCW 28A.710.040(5). The Act does not exempt charter public schools from the Superintendent's general supervisory power. As Appellants concede, the

⁹ Appellants inaccurately fault the lower court for citing one of the Act's many standards and safeguards (in reality, it cited more, *see* CP 3764). At any rate, this Court "may affirm a trial court's disposition of a motion for summary judgment or judgment as a matter of law on any ground supported by the record." *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 753 n.9 (2013). The record, including Respondents' summary judgment briefing, supports affirming the lower court's well-considered rejection of Appellants' nondelegation claim.

lower court correctly interpreted RCW 28A.710.040(5) to mean that the Act would have to force “displacement of the Superintendent’s supervisory authority” to violate Article III § 22. App.Br. at 42. The Act does not, however, displace the Superintendent’s constitutionally required, *general* supervisory power over the public school system.¹⁰

Neither does the Act subordinate the Superintendent to the Commission in all matters related to charter public school supervision. Rather, the Superintendent maintains general supervisory authority over the Commission, because the Commission is but one of several components of the Act’s regulatory structure. Washington State Attorney General Opinion (“AGO”) 2009 No. 8 (Dec. 11, 2009) (“[T]he Legislature may create an agency . . . to administer the program under the Superintendent’s supervision.”). At most, as a member of the Commission the Superintendent has *coordinate* authority over the Commission’s affairs, whose supervision over charter public schools (as Appellants themselves cite) is in the Commission’s role as *an authorizer* “in the same manner as a school district board of directors ad-

¹⁰ Charter public schools must comply with many provisions and programs supervised by the Superintendent, including statewide student assessments, teacher certification, discrimination prohibition, and sexual equality. RCW 28A.710.040(2). The Act also requires the Superintendent to oversee charter public schools’ funding. RCW 28A.710.110(3), .220(2)-(3), .280(2)-(3).

ministers other schools.” RCW 28A.710.070(2). This, in addition to maintaining the Superintendent’s general supervision over the public school system, inserts the Superintendent into a local role that statewide officers do not otherwise play in supervising non-charter public schools.¹¹ The Constitution does not require that, but the Act secures that additional layer of Superintendent supervision over charter public schools.

The Constitution only requires that the Superintendent have *general* supervision over the *public school system*, not all details of it or direct supervision over individual schools. AGO 1998 No. 6 (Mar. 9, 1998). The Act maintains the Superintendent’s general supervisory powers and, consistent with the Constitution’s allowance for the Legislature to specify other duties, adds the statewide officer to the Commission. *See id.* (“[T]he legislature is quite free to shape the state’s education system as it may choose and to define the Superintendent’s role within that system.”). Appellants urge otherwise by mischaracterizing the Legislature’s assignment of *specific* powers and duties to the Legislature regarding common schools. App.Br. at 41 (citing RCW Chs. 28A.150, .300). Further, Appellants cherry-pick a single case’s language to support their claim.

¹¹ As the lower court correctly observed, no dispute exists over the Superintendent’s supervision of charter public schools authorized by school districts. CP 3765.

Contrary to Appellants' urging, *State v. Preston* does not help determine when the Legislature improperly invades the Superintendent's general supervisory power. 84 Wash. 79, 86-87 (1915). Instead, when presented with the opposite issue—a challenge to the exercise of powers *given* to the Superintendent by the Legislature—this Court concluded that “general supervision means something more than the power merely to confer with and advise, or to receive reports, or file papers; in other words, that the power of supervision is not granted to an officer as a mere formality.” *See* App.Br. at 43 (quoting same). That quote, however, does not establish that the Superintendent must be afforded direct supervision over public schools' administration. Rather, when the Legislature tasks the Superintendent with specific duties, the Superintendent has discretion for discharging them. *See Preston*, 84 Wash. at 87. Appellants conflate general Superintendent supervision (constitutionally protected) with specific administrative tasks (within the legislature's discretion). The Act leaves the former unaffected, instead adding the latter in the context of charter public schools. The lower court correctly concluded that the Act does not displace the Superintendent's constitutionally protected general supervision over the public school system. Appellants fail to show otherwise beyond a reasonable doubt.

F. The Act satisfies Article II § 37's requirements.

Appellants correctly quote Article II § 37. App.Br. at 44 n.9. The only “mischief” here is that Appellants omit the practical two-part test this Court applies to determine whether a statute violates that constitutional provision: (1) whether a new law is “such a complete act that the scope of the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment,” and (2) whether a “straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment[.]” *Wash. Educ. Ass’n v. State*, 93 Wn.2d 37, 40-41 (1980).

The first part “avoid[s] uncertainty created by the need to refer to existing law to understand the effect of the new enactment.” *Id.* at 40. Accordingly, a new law must either be “complete in itself or it must show explicitly how it relates to statutes that it amends.” *Id.* at 39. The second part ensures that those affected by the law are aware of changes to existing law. *Id.* at 41.

The Act meets the first part, because it is a complete act, adding only new provisions to the RCW, not amending existing ones. As to the second part, the Act allows school-level collective-bargaining units for charter public school employees. The Public Employees’ Collective Bargaining Act

and the Educational Employment Relations Act remain unchanged as to anyone affected by the existing law. Separately, the Act only cross-references the BEA; the Act does not amend the BEA, as Appellants contend. App.Br. at 47 n.11. They cite no authority to support the proposition that cross-references in a new law somehow effectively amend the cross-referenced law. And they cite no authority that Article II § 37 otherwise forbids a new law's cross-reference to or exemptions from an old law. A simple scan of the Act in its bill form shows only cross-references to and exemptions from, not amendments of, the BEA. Appellants fail to show beyond a reasonable doubt that the Act violates Article II § 37.

IV. Conclusion ¹²

The lower court correctly rejected both of Appellants' speculative funding claims on non-merits grounds, because those are unripe. The lower court also correctly concluded that Appellants, on the merits, failed to carry their burden—i.e., show that no set of circumstances exists in which the Act can constitutionally be applied—on each of their arguments attacking the Act's facial validity.

¹² Intervenor-Respondents agree that the Court need not address standing. App.Br. at 48.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing brief of Intervenor-Respondents to be served on counsel for Appellants and for Respondent State of Washington via email pursuant to agreement between the parties re service via email.

Dated August 18, 2017.



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