

No. 84362-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW & STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

**BRIEF OF AMICI CURIAE WASHINGTON STATE BUDGET &
POLICY CENTER, EQUITY IN EDUCATION COALITION,
SENATOR JAMIE PEDERSEN, REPRESENTATIVE LAURIE
JINKINS AND REPRESENTATIVE GERRY POLLET**

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Table of Contents

I.	INTRODUCTION	1
II.	IDENTITY AND INTEREST OF AMICI	3
III.	STATEMENT OF ISSUES	4
IV.	STATEMENT OF THE CASE.....	5
V.	ARGUMENT	5
A.	The Constitution Requires the State to Pay for Basic Education Funding from Reliable, Dependable Sources.	5
B.	The State’s <i>McCleary</i> “Fix” Relies on Tax Sources that Are Neither Dependable Nor Regular.....	9
C.	The Lack of Sustainable Funding Will Disproportionately Harm Students of Color.	16
VI.	CONCLUSION.....	19
	APPENDIX.....	A-1

Table of Authorities

Washington Cases

<i>McCleary v. State</i> , 173 Wn.2d 477, 269 P.3d 227 (2012)	passim
<i>McCleary v. State</i> , No. 84362-7 (Oct. 6, 2016)	2, 10, 16
<i>Seattle Sch. Dist. No. 1 of King Cnty. v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978)	6, 9
<i>Wash. Citizens Action of Wash. v. State</i> , 162 Wn.2d 142, 171 P.3d 486 (2007)	6

Constitutional Provisions

Wash. Const. art. 7, § 2 (1972)	6
Wash. Const. art. IX, § 1	passim

Washington Statutes

Laws of 1895, ch. 68	5
Laws of 1973, 1st Exec. Sess., ch. 195	6
Laws of 2007, 1st Sp. Sess., ch. 1	6
Laws of 2017, 3d Sp. Sess., ch. 13	passim
RCW 43.88.055	15
RCW 84.52.065	10

Other Authorities

Claudia Rowe, <i>In Washington, gaps between low- and middle-income kids widening</i> , Seattle Times (Jan. 7, 2016)	16
Ctr. for Budget & Policy Priorities, <i>I-1033's Problematic Measure of Inflation</i> (Oct. 16, 2009)	15

Ctr. on Educ. Policy, <i>State Test Score Trends Through 2008-08, Part 2: Slow and Uneven Progress in Narrowing Gap</i> (Dec. 2010).....	17
Educ. Opportunity Gap Oversight & Accountability Comm., <i>2016 Annual Report: Closing Opportunity Gaps in Washington’s Public Education System</i> (Jan. 2016).....	18
Educ. Week Research Ctr., <i>Called to Account: New Directions in School Accountability</i> (Jan. 26, 2016).....	17
Wash. State Office of Superintendent of Pub. Instruction, <i>Dropout & Graduation Rate Reports for 2011 to 2016</i>	16

I. INTRODUCTION

Article IX, Section 1 requires that the State establish a school funding scheme that fully funds the State's basic education program by means of regular and reliable state tax sources. The Legislature's 2017 funding plan purports to address the State's historic failure to set aside "regular and dependable" tax sources for basic education by reinstating reliance on the state property tax, rather than local levies, to pay for basic education. In the plan, the state property tax is the only revenue source dedicated exclusively to basic education. But this *McCleary* "fix" is not sustainable. The plan relies on a one-time increase to the state property tax rate, made possible by suspending for four years the 1% statutory cap on annual property revenue growth (referred to as the "1% revenue cap" or "1% cap"). History confirms that when the 1% cap goes back into effect in 2022, state property tax collections will not keep pace with regular growth in basic education funding needs. Simply put, while the 1% cap remains, the state property tax is not a dependable and regular revenue source for basic education funding.

Contrary to the State's suggestion that no more can be done at present to mitigate or prevent the foreseeable expansion of the funding shortfall, *see* State of Washington's Memorandum Transmitting the Legislature's 2017 Post-Budget Report ("State's Mem.") at 6-7, the State

can and must establish without further delay a sustainable school funding scheme that relies on regular and dependable tax sources. Reliance on “regular and dependable” tax sources is critical to “sustaining ample state funding of basic education consistent with [the State’s] constitutional obligation,” Order, *McCleary v. State*, No. 84362-7, at 9 (Oct. 6, 2016) (“10/6/16 Order”). Without sustainable funding, the State risks depriving additional generations of Washington students a constitutionally adequate education. Worse, the lack of sustainable funding disproportionately harms students of color, widening the opportunity gap in Washington.

Amici encourage the Court to strike down the Legislature’s prospective re-imposition of the 1% revenue cap. The 1% cap unconstitutionally reduces basic education funding beginning in 2022 without providing a dependable alternative and leaves it to future Legislatures to cobble together additional funds to fill the gap. Simple math shows that school districts will not have the certainty needed to develop and approve budgets for the 2021-22 school year and beyond that meet the constitutional rights of every student to an amply funded basic education. That uncertainty can only be overcome in two ways: the Court should strike down the cap, allowing dedicated property tax revenue to grow along with inflation and other needs; or, at a minimum, the Court should retain jurisdiction and, through all appropriate means, compel the

Legislature to identify and set aside regular and dependable tax sources sufficient to pay for basic education costs in a sustainable manner, well in advance of school districts preparing budgets for the 2021-22 school year.

II. IDENTITY AND INTEREST OF AMICI

Washington State Budget & Policy Center (“BPC”) is a non-profit research organization that focuses on the prosperity of all Washingtonians. BPC policy analysts and leadership have broad expertise in a variety of areas including tax policy, budget analysis, jobs and social policy, and equity. In addition to analysis and research on legislative proposals and options, BPC also produces the Progress Index, an education and evaluation tool for measuring progress on public investments.

Equity in Education Coalition (“EEC”) is a state-wide coalition working towards a more targeted and comprehensive approach to improve educational achievement and growth as well as closing the opportunity gap throughout Washington. EEC works to ensure children, particularly low-income children and children of color, have access to the resources and services they need to be successful in and out of the classroom.

This Brief is also joined by members of the State Legislature, who also are Washington State residents and taxpayers:

- Jamie Pedersen is a Washington State Senator for the 43rd Legislative District. Senator Pedersen serves as the ranking

member on the Senate Law & Justice Committee and also serves on the Ways & Means Committee.

- Laurie Jinkins is a Washington State Representative for the 27th Legislative District. Representative Jinkins serves on the House Appropriations and Health Care and Wellness committees, and chairs the House Judiciary Committee.
- Gerry Pollet is a Washington State Representative for the 46th Legislative District. Representative Pollet is Vice-Chair of the House Higher Education Committee, and serves on the House Appropriations and Finance Committees.

Amici have a strong interest in ensuring the State fully meets its constitutional duty to amply fund basic education by means of dependable and regular tax sources. Amici believe the *McCleary* fix codified in Laws of 2017, 3d Sp. Sess., ch. 13 (“EHB 2242”) fails in that regard.¹

III. STATEMENT OF ISSUES

The Legislature’s 2017 K-12 funding plan increases state funding by temporarily lifting the 1% cap on annual growth in property tax collections for four years, but re-imposes the 1% cap thereafter. The re-imposition of the 1% cap will inevitably result in growing deficiencies in state funding because regular growth in basic education costs have consistently exceeded the rate of growth in state property tax collections under the 1% cap. Does the Legislature’s short-term fix fail to satisfy the

¹ Amici have serious concerns about other inadequacies of the State’s funding plan. By focusing on the 1% cap, Amici are not suggesting that this plan is otherwise adequate.

Court’s directive that the State establish a sustainable funding scheme to fully fund basic education by means of regular and dependable sources?

IV. STATEMENT OF THE CASE

Since 2012, this Court has retained jurisdiction over this case to ensure that the State develops and implements an ample and sustainable funding plan that guarantees present and future Washington students receive a constitutionally adequate basic education. *McCleary v. State*, 173 Wn.2d 477, 546-47, 269 P.3d 227 (2012). The State now concedes that the K-12 funding system must meet two independent requirements to satisfy Article IX, Section 1: “(1) funding must be ‘fully sufficient’ to support the State’s basic education program; and (2) the State must fund its basic education program using ‘dependable and regular tax sources’”. State’s Mem. at 6-7 (quoting *McCleary*, 173 Wn.2d at 527-28). Measured against these minimum constitutional requirements, the short-term funding fix passed during the 2017 legislative session falls well short.

V. ARGUMENT

A. The Constitution Requires the State to Pay for Basic Education Funding from Reliable, Dependable Sources.

The State’s paramount duty is to provide all Washington children an amply funded basic education. Since 1895, the Legislature has dedicated state property tax revenue to pay basic education. *See* Laws of 1895, ch. 68. In the early 1970s, the Legislature reorganized the property

tax in response to a constitutional amendment limiting the total effective tax rate limit for regular property taxes to \$10 per \$1,000 of assessed value (“AV”). Wash. Const. art. 7, § 2 (1972).² The Legislature set aside up to \$3.60 per \$1,000 of AV for the State, with all revenues dedicated exclusively to common schools. Laws of 1973, 1st Exec. Sess., ch. 195, § 106. At least since 1998, this dedicated revenue stream grew at a slightly faster pace than state K-12 funding.³ Nevertheless, state funding levels remained insufficient to provide a basic education and school districts increasingly relied on local levies to cover the balance. *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 524-25, 585 P.2d 71 (1978).

Beginning in 2002, the shortfall between state funding and the actual cost of basic education ballooned as a result of the 1% revenue cap, initially passed by initiative and reenacted by the Legislature after the Court ruled the initiative invalid. *See Wash. Citizens Action of Wash. v. State*, 162 Wn.2d 142, 162, 171 P.3d 486 (2007); Laws of 2007, 1st Sp. Sess., ch. 1 (HB 2416). Under the 1% cap, total property tax revenue collected by the State from existing properties cannot increase by more than 1 % each year (plus the value of new construction). *See id.*

² This constitutional limit on total effective tax rate is separate from the statutory 1% cap on year-to-year growth of property tax revenue that EHB 2242 temporarily suspends.

³ Based on BPC analysis of data from the Washington State Legislative Evaluation & Accountability Program (“LEAP”), the Washington State Economic & Revenue Forecast Council (“ERFC”), and the Washington State Department of Revenue (“DOR”).

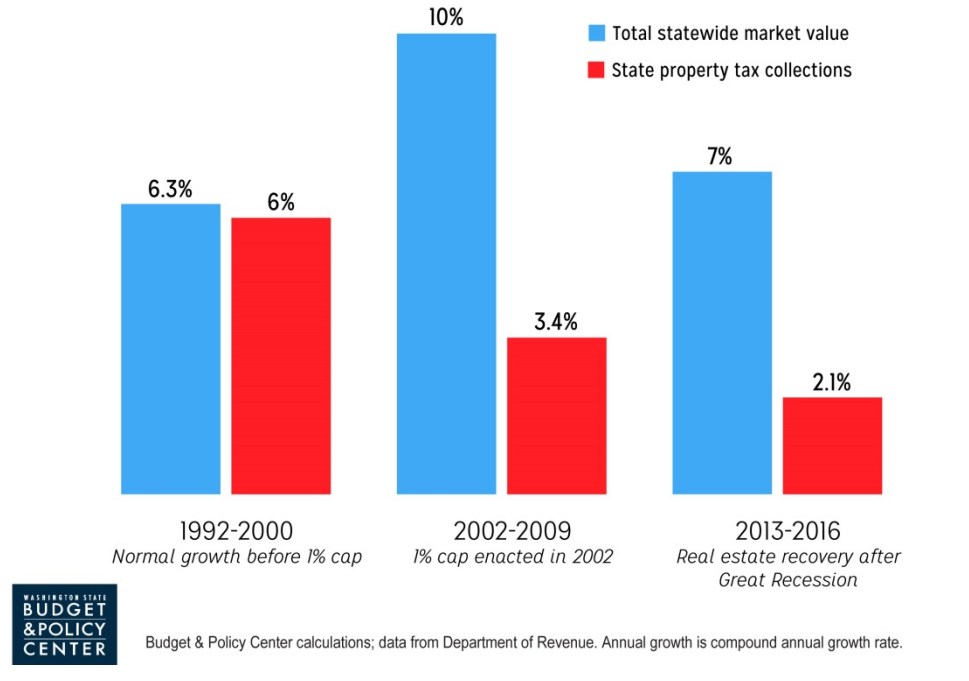
The state property tax withered under the yearly rate reductions caused by the 1% revenue cap. Prior to the 1% cap, property values and state property tax collections grew at approximately the same average annual rate of about 6% from 1992 to 2000.⁴ But from 2002 to 2009, total property tax collections grew by only 3.4% annually, despite rapid rise in property values of 10% annually during the same time period. Further, the 1% cap dramatically constrained recovery of property tax collections after the collapse of the real estate bubble in 2009. By 2013, property values had declined to their lowest point following the Great Recession. Since then, property values have quickly recovered, growing about 7% per year from 2013 to 2016. Yet, despite this rapid growth, property tax collections only grew at about 2% per year:⁵

⁴ Based on BPC analysis of data from DOR.

⁵ Data sources and methodology relied upon in Figures 1 to 4 are described in the Appendix to this Brief.

Figure 1. Growth in state property tax collections fell far below growth in property values after the 1% cap took effect in 2002

Average annual growth in state property market value and state property tax collections during periods of economic expansion, 1992-2016



Many school districts attempted to cover the growing shortfall in state funding by increasing their local excess levies, but the State’s failure to provide adequate and sustained funding left all school districts (particularly those in property-poor districts) unable to provide their students with critical components of a constitutionally adequate basic education. *See McCleary*, 173 Wn.2d at 537-39.

In 2012, this Court held that the State’s funding scheme was insufficient and unsustainable in violation of Article IX, Section 1. *McCleary*, 173 Wn.2d at 547. While declining to mandate “any particular funding structure,” the Court directed the Legislature to develop and

implement a funding scheme by 2018 that fully funds basic education through regular and dependable state tax sources. *Id.* at 546-47. Significantly, the Court held that the State cannot rely on local-level funding to pay for basic education. *Id.* at 527-28. As the Court explained, local excess levies are “neither dependable nor regular” because they are “wholly dependent upon the whim of the electorate,” only available “on a temporary basis” and inherently instable. *Id.* at 486. (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 525). The Court further explained that all local-level funding, whether by excess levy or otherwise, interferes with “both the equity and the adequacy of the K-12 funding system,” in part because less affluent school districts “will often fall short of funding a constitutionally adequate education.” *Id.* at 528. Thus, the State must rely exclusively on regular and dependable state tax sources to pay for the basic education program, with local levies dedicated solely to enhancements. *See id.*

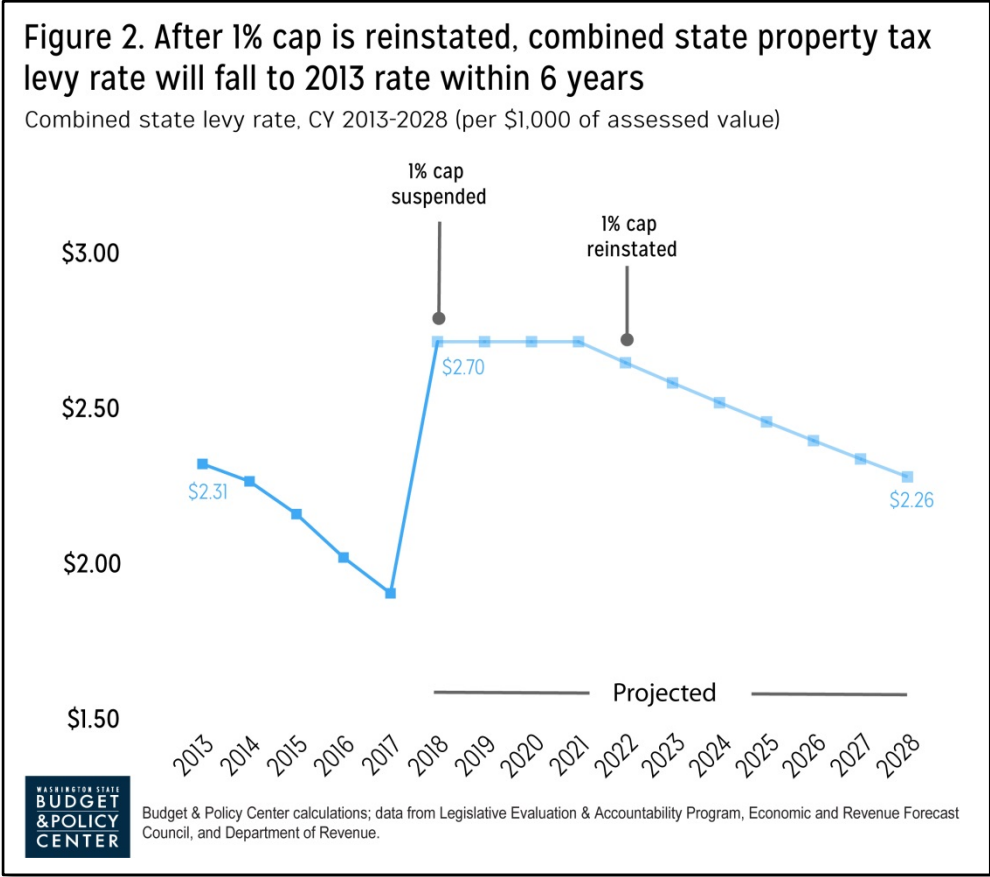
B. The State’s *McCleary* “Fix” Relies on Tax Sources that Are Neither Dependable Nor Regular.

The State claims that the 2017 K-12 funding plan satisfies the State’s paramount duty and the Court’s directives in *McCleary*. But state funding levels for this biennium are insufficient to pay for the State’s basic education program, as will be addressed in briefs by Plaintiffs and other

amici. Significant to this Brief, although the State shifts the burden of funding from local levies to the state property tax, the State does so in a way that is neither dependable nor regular. EHB 2242 temporarily suspends the 1% cap for four years to increase the state tax rate, without any plan for addressing predictable increases in K-12 costs after the 1% cap goes back into effect. This short-sighted remedy conflicts with the Court's mandate requiring the State to implement a sustainable solution to education funding. 10/6/16 Order at 9 (“[T]he court has required the State to demonstrate to the court how it intends to succeed by 2018 in implementing and **sustaining** ample state funding of basic education consistent with its constitutional obligation.” (emphasis added)).

The property tax is not a regular and dependable source for basic education funding so long as the 1% revenue cap remains. As noted above, although the maximum state property tax rate is \$3.60 per \$1,000 of AV, *see* RCW 84.52.065, the actual tax rate had dwindled to \$1.89 in 2017 due to artificially imposed reductions under the 1% cap. *See supra* at 7-8. EHB 2242 raises the total state property tax rate to \$2.70 by imposing an additional state property tax and suspending the 1% cap for 2018 through 2021. EHB 2242, § 301. Beginning in 2022, however, EHB 2242 re-imposes the 1% cap on annual revenue growth. *Id.* As a result,

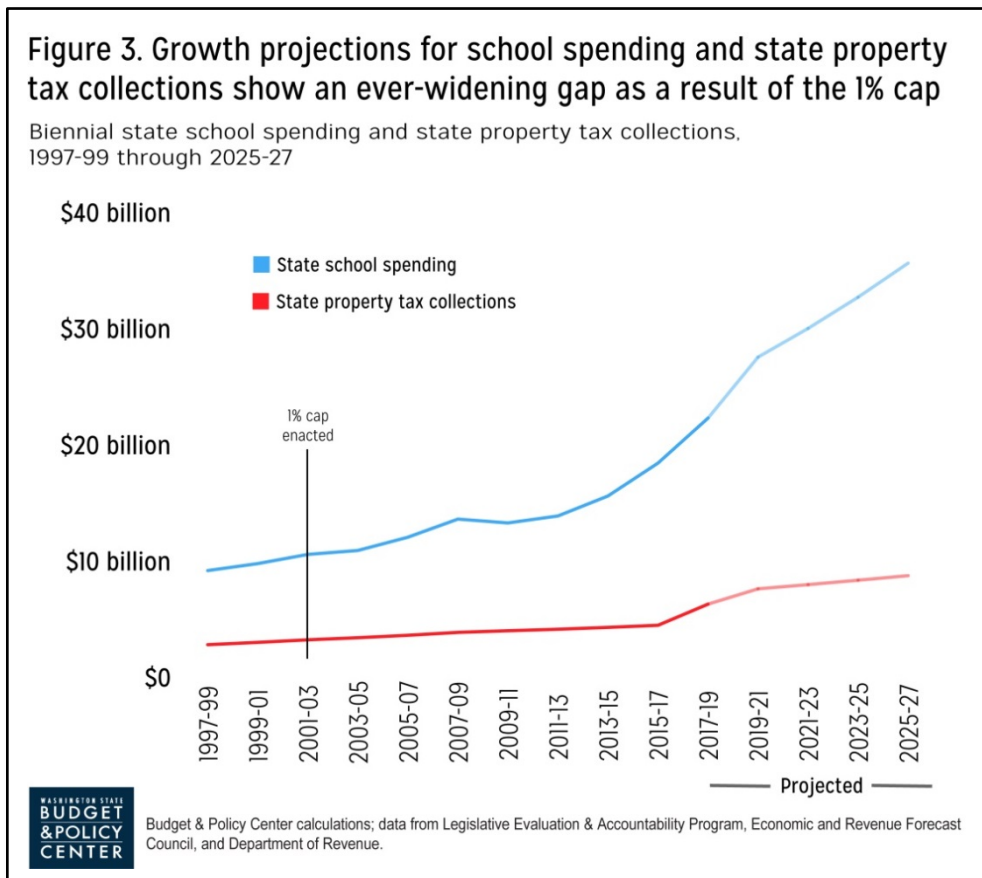
the total state levy rate will decline steadily, falling from \$2.70 in 2021 to \$2.26 by 2028—erasing half of the overall rate increase in just six years:



Because of the reduction in the property tax rate caused by the 1% cap, state property tax collections will not keep pace with regular growth in school spending. Annual costs of key components of basic education will significantly outpace growth of state property tax collections under the 1% cap. For example, as the State acknowledges, salaries will grow significantly statewide, and even more so in high cost of living areas. See State’s Mem. at 19-20. Costs of employee health insurance—which will

shift to the State under EHB 2242—are expected to increase rapidly, as are energy costs for school operations.⁶

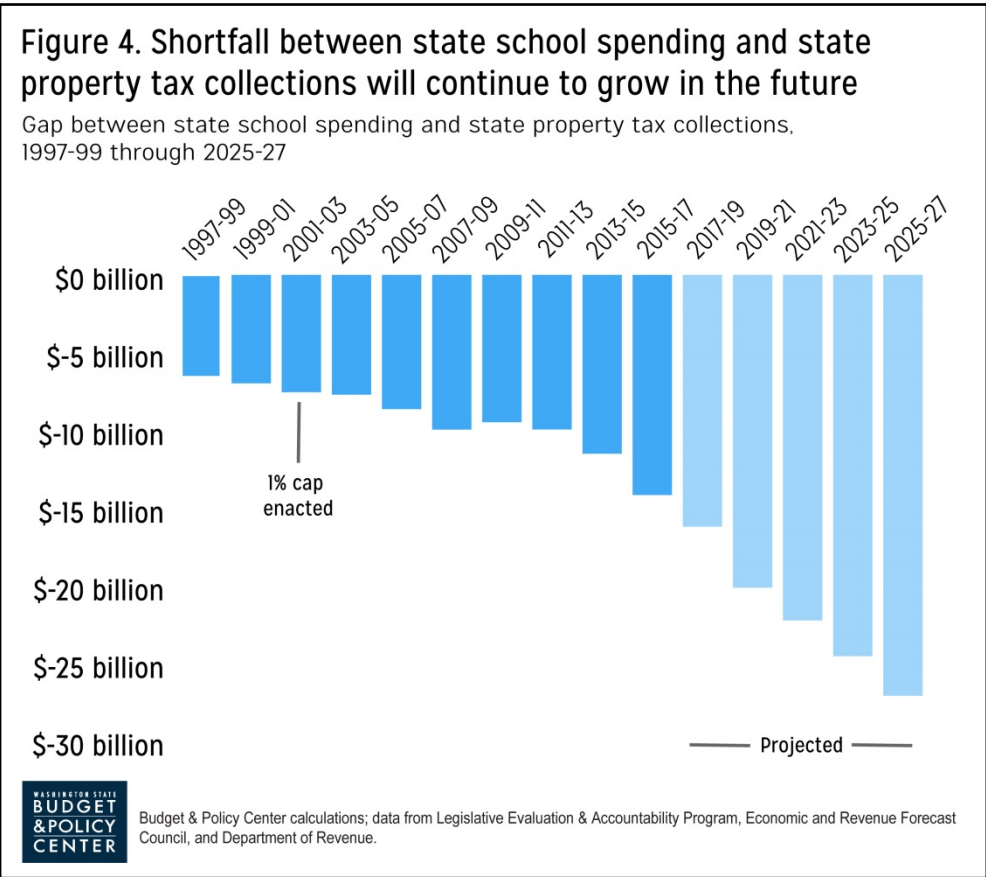
Indeed, projections based on historical regular growth rates show that, between the 2021-23 biennium and the 2025-27 biennium, state K-12 spending will grow by about 4.5% per year,⁷ while state property tax revenue will grow at just 2.5% per year, leading to an increasing shortfall:



⁶ Based on BPC analysis of data from the Washington State Office of Fiscal Management and the U.S. Bureau of Labor Statistics.

⁷ This conservative estimate, based on growth rates in Washington state school spending for fiscal years 2002 through 2009, is in line with, and in fact below, the national average for growth in state school expenditures over the same period, which exceeds 10% per biennium (or 5% per year). See Appendix, *infra*.

Put another way, expected shortfalls between state property tax collections and total state K-12 spending will widen from \$16 billion for the current biennium to nearly \$27 billion in the 2025-27 biennium:



This ballooning shortfall in state property collections relative to necessary K-12 spending puts the State on a collision course with a resurgent school funding crisis and further violation of the State’s paramount duty.

Given these fiscal realities, re-imposition of the 1% revenue cap violates the State’s paramount duty to set aside sufficient regular and dependable funding sources for basic education. Under Article IX,

Section 1, the State should not be permitted to diminish a sustainable basic education funding source without putting in place an equivalent substitute tax source. Here, EHB 2242 establishes a new property tax funding stream dedicated to basic education but pulls back four years later by re-instituting the 1% cap without any plan to cover the inevitable shortfall.

Ironically, while improperly curtailing a dedicated K-12 revenue stream, the State contends: “the 2017 Legislature has done all that it can to ensure future funding: it enacted positive law requiring that the funding be provided. It has no other means to direct future legislative action.” State’s Mem. at 32-33. This is not true. The Legislature made a calculated choice to rely on a temporary fix, rather than a sustainable solution, by passing a law that re-imposes the 1% cap without providing a sustainable alternative. Tellingly, the State’s Memorandum touts the increase to state property tax revenues in EHB 2242, but never mentions re-imposition of the 1% cap. State’s Memo. at 26. Likewise, the Legislature’s 2017 Report to the Washington Supreme Court by the Joint Select Committee on Article IX Litigation (“2017 Report”) notes the 1% cap’s re-imposition in 2022, but does not explain its impact on tax collections. 2017 Report at 48-50 (showing estimated property tax collections through 2021, but not beyond). And EHB 2242 side-stepped

balanced budget requirements under RCW 43.88.055 by re-instituting the 1% cap immediately outside of the four-year balanced budget outlook.

The mechanisms the State asserts will “keep the system moving forward and fully funded,” such as review and adjustments to compensation levels, enrichment activities, special education resources and staffing enhancements, State’s Mem. at 23 (citing EHB 2242, §§ 101(10), 407(3), 408, 502, 904, 905), are undermined by re-imposition of the 1% cap. Further, going forward, the gap between state funds and actual costs will be exacerbated by the change in the inflation index under EHB 2242 from the Seattle Consumer Price Index (“CPI”) to the implicit price deflator. 2017 Report at 25-26. The implicit price deflator does not reflect changes in state and local government costs and historically has been significantly lower than the CPI. *See* Ctr. for Budget & Policy Priorities, *I-1033’s Problematic Measure of Inflation* (Oct. 16, 2009).⁸

In sum, although the State’s funding plan provides a temporary injection of resources by lifting the 1% cap on total state property tax revenue, this fleeting improvement does not resolve the essential defect of the state property tax as a funding source for basic education—that the 1% cap arbitrarily depresses property tax revenue growth making it impossible for state collections to cover foreseeable growth in basic education

⁸ Available at <https://www.cbpp.org/research/i-1033s-problematic-measure-of-inflation> (last visited Aug. 27, 2017).

funding needs. Thus, the State's funding scheme continues to rely on tax sources that are neither regular nor dependable in violation of Article IX, Section 1. *See McCleary*, 173 Wn.2d at 546-47; 10/6/16 Order, at 5, 9.

C. The Lack of Sustainable Funding Will Disproportionately Harm Students of Color.

Although school funding has captured public attention in recent years, children of color have yet to benefit. There is a persistent and widening opportunity gap in Washington between children from low-income, diverse communities and children from wealthy, white neighborhoods.⁹ The opportunity gap manifests in many ways, including lower test scores, higher dropout rates and lack of access to accelerated classes, experienced teachers and other critical resources.¹⁰ Without ample and sustainable state funds, these inequities will worsen over time.

The opportunity gap widened at an alarming rate following the imposition of the 1% revenue cap in 2002. For example, between 2003 and 2015, Education Week Research Center found that while reading and math proficiency of Washington fourth and eighth graders improved overall, the gap between low-income students and their wealthier

⁹ *See, e.g.*, Claudia Rowe, *In Washington, gaps between low- and middle-income kids widening*, Seattle Times (Jan. 7, 2016), available at <http://www.seattletimes.com/education-lab/in-washington-gaps-between-low-and-middle-income-kids-widening/> (last visited Aug. 29, 2017).

¹⁰ *See* Wash. State Office of Superintendent of Pub. Instruction, *Dropout & Graduation Rate Reports for 2011 to 2016*, at <http://www.k12.wa.us/DataAdmin/Dropout-Grad.aspx> (last visited Aug. 27, 2017).

counterparts **increased more than any other state in America.** See Educ. Week Research Ctr., *Called to Account: New Directions in School Accountability* at 4 (Jan. 26, 2016).¹¹ Further highlighting the sheer size of Washington’s opportunity gap and the snail’s pace the State is moving to close it, the Center on Education Policy found that if the rate of improvement in fourth grade reading proficiency from 2002 to 2009 continues, the gap between African American and White students would take 105 years to close. See Ctr. on Educ. Policy, *State Test Score Trends Through 2008-08, Part 2: Slow and Uneven Progress in Narrowing Gap* at 15 (Dec. 2010).¹² A century is far too long to allow generations of children of color to pass through schools without equitable opportunity, and startlingly longer than estimates for other states facing opportunity gaps (e.g., 28 years in Florida and 12.5 years in Louisiana). See *id.*

If the State takes its own advice and follows the recommendation of the Educational Opportunity Gap Oversight and Accountability Committee (“EOGOAC”), the State will need to increase substantially

¹¹ Available at <http://edweek.org/media/ew/qc/2016/shr/16shr.wa.h35.pdf> (last visited Aug. 27, 2017). In 2015, Washington ranked 7th in the country based on the National Assessment of Educational Progress (“NAEP”) proficiency tests, with 41% of fourth and eighth graders proficient at reading and math. *Id.* At the same time, Washington was 43rd for securing the success of low-income children, with only 33.1% of fourth and eighth graders who qualify for free or reduced price lunch proficient in reading and math. *Id.* Even worse, from 2003 to 2015, the poverty gap grew by 9.4% in Washington—the largest increase of all fifty states. *Id.*

¹² Available at <http://files.eric.ed.gov/fulltext/ED513914.pdf> (last visited Aug. 27, 2017).

funding for students who need it most to narrow the opportunity gap in Washington. In its 2016 Annual Report, the EOGOAC endorses additional resources and programs for students of color and other at-risk students to achieve an equitable education, ranging from educational services for suspended or expelled children to cultural competency courses for educators to transitioning all programs to dual language. *See Educ. Opportunity Gap Oversight & Accountability Comm., 2016 Annual Report: Closing Opportunity Gaps in Washington's Public Education System* at 11, 15, 20 (Jan. 2016).¹³ Without these programs in place, opportunity gaps across Washington will persist and English Language Learners, children of immigrants, and students of color will suffer. *See id.*

The full funding of basic education means that the State provides every child in Washington with an equal opportunity to succeed. Because discrepancies in educational performance align with race and class, equal access to equal education is not currently guaranteed. The State must do more for children who need more, and that necessarily involves more funding. From a growing proficiency gap in standardized test scores to lack of access to educators who speak your language or understand your culture, children of color have been hurt most by the State's persistent failure to fully fund the basic education. Re-institution of the 1% cap on

¹³ Available at <http://www.k12.wa.us/Workgroups/EOGOAC/pubdocs/EOGOAC2016AnnualReport.pdf> (last visited Aug. 27, 2017).

property tax revenue that would otherwise be dedicated to education takes the State even further away from achieving the ample and sustainable state funding needed to turn the tide and ultimately close the opportunity gap.

VI. CONCLUSION

The State's 2017 funding plan temporarily suspends the 1% cap on state property tax revenue growth for four years to raise the tax rate, which has dwindled since the 1% cap was imposed in 2002. But once the 1% cap is reinstated, the disparity between state property tax revenue—which is dedicated to the support of common schools—and actual K-12 funding needs will persist and widen. Amici encourage the Court to strike down EHB 2242's re-imposition of the 1% cap as unconstitutional because it takes away regular and dependable basic education funding without providing a sustainable replacement. At a minimum, the Court should retain jurisdiction until the State implements a sustainable school funding scheme that relies on regular and dependable tax sources. Washington children deserve no less.

RESPECTFULLY SUBMITTED this 30th day of August, 2017.

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APPENDIX

Figure 1

Average annual growth rate. Based on Washington State Budget & Policy Center (“BPC”) analysis of data received from the Washington State Department of Revenue (“DOR”), August 2017. Average annual growth rate for each period is compound annual growth rate.

Periods of economic expansion. Also known as an economic recovery, a period of economic expansion is one in which a business cycle goes from its lowest to highest (“trough to peak”). See Nat’l Bureau of Econ. Research, *U.S. Business Cycle Expansions and Contractions*, at <http://www.nber.org/cycles/cyclesmain.html>. Data from these periods best reflect normal growth in business and economic activity because they exclude recessions. Following the recession of 2001, the national business cycle peaked in December 2007, which is typically considered to be the beginning of the Great Recession. However, it was not until the beginning of 2009 that the Recession began taking a significant toll on overall Washington state government finances and assessed property values, which is why BPC examined the 2002 to 2009 period for this analysis.

Figure 2

Combined state levy rate. Based on Washington State Budget & Policy Center (“BPC”) analysis of data received from DOR, August 2017. Property tax rate for calendar year (“CY”) 2017 is from the fiscal note for Engrossed House Bill (“EHB”) 2242. Property tax rates for CY 2018 through CY 2028 are projected by DOR.

Figures 3 and 4

School spending. Based on BPC analysis of data retrieved from the Washington State Legislative Evaluation & Accountability Program (“LEAP”) and the Washington State Economic and Revenue Forecast Council (“ERFC”).

- For the 1997-99 biennium through the 2015-17 biennium, data are actual biennial public school expenditures from Near General Fund State + Opportunity Pathways (“NGF-P”).
- For the 2017-19 biennium only, data are total public school funding from NGF-P included in the 2017-19 enacted budget.
- For the 2019-21 biennium only, maintenance level is assumed to be 2017-19 spending levels adjusted for growth (as described immediately below). Policy additions from ERFC’s June 2017 Budget Outlook are added to maintenance to ascertain 2019-21 total spending levels.
- For the 2021-23 biennium and beyond (and for calculation of 2019-21 maintenance levels), state public school spending is projected based on a growth rate of 9.1% per biennium, which was the compound biennial growth rate from a representative recent economic cycle, Fiscal Year (“FY”) 2002 through FY 2009. This representative period had normal economic growth and few significant changes in education policy and, thus, provides an accurate representation of normal growth in education spending from one biennium to the next. The growth rate in state school spending for FY 2002 through FY 2009 is likely conservative because:
 - Teacher cost of living adjustments (“COLAs”), which should be considered part of maintenance costs, were only funded sporadically during the reference period, but must be funded every year going forward.
 - Enrollment growth during that period was low and, given the rapid growth in the Puget Sound region, is likely to increase in the years ahead. While the total school-aged population (ages 5-19) grew by 2.3 percent between 2002 and 2009, the total school-aged population is projected to grow by 5.3 percent between 2022 and 2029. *See also* Wash. State Office of Fin. Mgmt., *Kindergarten through Grade 12 (K-12) Enrollment*, at <http://www.ofm.wa.gov/trends/budget/fig402.asp>.
 - Growth estimate is lower than national average during the same reference period, which was 10 percent per biennium,

based on BPC analysis of data from the National Center for Education Statistics.

Property tax revenues. BPC analysis of data received from DOR, August 2017. Property tax collections for CY 2018 through CY 2028 are projected by DOR.

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