

No. 84362-7

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Defendant/Appellant,

v.

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

Plaintiffs/Respondents.

PLAINTIFFS'  
MOTION TO STRIKE  
APPENDICES TO THE  
STATE'S REPLY BRIEF

*[Oral argument  
not requested]*

*[Defendant's Answer due  
10 days after service;  
plaintiffs' Reply due 3 days  
later. RAP 17.4(e)]*

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## I. INTRODUCTION

This motion does not address the parties' disagreement about the law – i.e., the legal test for what the State must show to establish its compliance with the court orders in this case. *Compare* Plaintiffs' August 30, 2017 Post-Budget Filing at 9-10 (listing the six elements of compliance) *to* State's September 8, 2017 Reply at 1-2 (asserting different compliance metric).

Instead, this motion addresses the propriety of the appendix "evidence" the State attached to its reply brief. Put bluntly, this motion asks whether the State must abide by the same appendix restrictions it has demanded of others in this case:

- The State has objected when others file an appendix for this Court to consider as evidence.
- This Court has struck appendices providing evidence when filed against the State.
- But now the State attaches 54 pages of marked up appendices to its reply brief, claiming its marked up appendices provide evidence for arguments the State raises in its reply.

Plaintiffs respectfully submit that the State should abide by the same rules applied to others in this case. This motion accordingly asks the Court to strike the 54 pages of appendices attached to the State's reply brief (and to do so before the upcoming October 24 hearing so plaintiffs' counsel can know what "evidence" counsel has to prepare to respond to at that hearing).

## **II. NAME & DESIGNATION OF MOVING PARTY**

[RAP 17.3(a)(1)]

This motion is filed by the Plaintiff/Respondents – i.e.:

- the McCleary family from Jefferson County;<sup>1</sup>
- the Venema family from Snohomish County;<sup>2</sup> and
- the non-profit corporation Network for Excellence in Washington Schools (“NEWS”).<sup>3</sup>

## **III. RELIEF SOUGHT**

[RAP 17.3(a)(2)]

This motion asks the Court to strike the appendices to the State’s reply brief for the reasons outlined in *Parts V.A & B* below.

## **IV. PARTS OF THE RECORD RELEVANT TO THIS MOTION**

[RAP 17.3(a)(3)]

### **A. Striking Plaintiffs’ Appendix.**

Plaintiffs’ opening brief in response to the State’s appeal included a 26-page appendix with additional citations to the trial court record.<sup>4</sup>

The State demanded that this Court strike plaintiffs’ appendix, arguing that providing information in an appendix circumvented the appellate rules and page limits.<sup>5</sup> The State insisted that providing

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<sup>1</sup> McCleary Final Judgment (CP 2866-2971) at ¶¶13-16, 104-107.

<sup>2</sup> McCleary Final Judgment (CP 2866-2971) at ¶¶17-20, 104, 108-111.

<sup>3</sup> NEWS is a non-profit corporation with 440 different member entities with various perspectives and interests from all across the State. See <http://waschoolexcellence.org/about/news-members/> (current members); McCleary Final Judgment (CP 2866-2971) at ¶¶21-97 (members at time of 2009 trial).

<sup>4</sup> Plaintiff/Respondents’ September 20, 2010 Opening Brief [with Errata] at iii & the 26-page “Plaintiffs’ Appendix A [additional record citations][with errata corrections]”.

<sup>5</sup> Appellant State’s October 20, 2010 Motion To Strike Appendix A Of Plaintiffs/Respondents’ Brief.

information on appendix pages enlarged plaintiffs' brief by 26 pages, that plaintiffs "had available a legitimate way to achieve their goal of filing an over-length brief – moving for permission to do so – and elected instead not to comply with this Court's rules", and that plaintiffs "should not be rewarded for trying to end-run the RAPs and this Court's order regarding the page limit."<sup>6</sup>

This Court struck plaintiffs' 26-page appendix.<sup>7</sup>

**B. Striking Plaintiffs' Chart.**

Counsel for both parties (the State and the plaintiffs) used a stacked-bar-chart during this appeal's first oral argument, and the State's lawyer handed the Court color copies of the State's chart. To ensure the Court similarly had a copy of the corresponding chart plaintiffs' counsel had used at that hearing, plaintiffs filed a copy of plaintiffs' chart.<sup>8</sup>

The State objected via email.<sup>9</sup>

This Court refused to accept plaintiffs' filing of the corresponding chart plaintiffs' counsel had used at that hearing.<sup>10</sup>

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<sup>6</sup> *Appellant State's November 17, 2010 Reply In Support Of Its Motion To Strike Appendix A Of Plaintiffs/Respondents' Brief* at 4.

<sup>7</sup> *December 1, 2010 McCleary Order* at 1.

<sup>8</sup> *Plaintiff/Respondents' July 1, 2011 Submission Of Posters From Oral Argument* at 2 ("The State's counsel provided this Court color copies of the State's stacked bar chart poster. Attached is a color courtesy copy of plaintiffs' corresponding stacked bar chart poster").

<sup>9</sup> Friday, July 01, 2011 3:01 PM email from "Clark, Bill (ATG) <BillC2@ATG.WA.GOV>" to "supreme@courts.wa.gov" and cc to plaintiffs' counsel [filed on Supreme Court's Docket July 1, 2011].

**C. Striking Amici's Appendices.**

Last year, Special Education amici included two appendices with their motion and proposed brief in order to provide courtesy copies of the Washington State website pages cited in their amicus pleadings:

- “Attachment 1”, labeled as “‘District Specific’ spreadsheets downloaded from the link to ‘2015-16 Special Ed Rate for Current Month’ at <http://www.k12.wa.us/SAFS/default.asp>”, and
- “Attachment 2” labeled as “excerpts of F-196 statements downloaded from <http://www.k12.wa.us/safs/reports.asp> by choosing the school district from the dropdown menu and then clicking on the link for ‘F-196 All Pages.’”<sup>11</sup>

Consistent with its granting of the State’s objection to the information provided in plaintiffs’ previously noted appendix, this Court struck the courtesy copies provided by the amici’s appendices.<sup>12</sup>

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<sup>10</sup> July 8, 2011 McCleary letter ruling at page two (“the two posters used [by plaintiffs’ counsel] at oral argument will be stricken from the submission and therefore the copies of the posters provided to the Court have been rejected for filing”).

<sup>11</sup> July 7, 2016 Motion For Leave To File Amicus Curiae Memorandum By The Arc Of Washington State, The Arc Of King County, TeamChild, Washington Autism Alliance & Advocacy, Open Doors For Multicultural Families, Seattle Special Education PTSA, Bellevue Special Needs PTA, Highline Special Needs PTA, Gary Stobbe, M.D., James Mancini, And Conan Thornhill at Attachments 1 & 2. Amici’s motion explained at 6: “A printout of the ‘District Specific’ spreadsheets, showing the percentage of students beyond the funded amount at line 35, is included in an Appendix to this motion. These State reports show that special education enrollments exceeded 15 percent in 51 school districts and even topped 20 percent in six districts. Additional evidence of underfunding is contained in the latest annual F-196 statements, reported in January 2016 for the 2014-15 school year, showing revenues and expenses for each educational program of each school district. The Appendix to this motion includes a sampling of F-196 statements downloaded from <http://www.k12.wa.us/safs/reports.asp>, illustrating continued reliance on local levies to pay for special education and other basic education components.”

<sup>12</sup> June 15, 2016 McCleary letter ruling at 1 (the Special Education amicus brief has “been filed with the exception of the appendix to the brief by Katherine George on behalf of Arc of Washington and other entities, which will not be filed. See RAP 10.3(a)(8). (appendix may not include materials outside of record without permission of the court).”).

**D. Allowing Amicus Filings By Individual Member Of The State's Executive Branch.**

An individual member of the defendant State's executive branch (the elected Superintendent of Public Instruction) has moved four times to file amicus briefs in this appeal (2014, 2015, and twice in 2016).<sup>13</sup>

This Court granted these four amicus motions filed by an individual member of the State's executive branch.<sup>14</sup>

**E. Allowing Amicus Filings By Individual Members Of The State's Legislative Branch.**

Individual members of the defendant State's legislative branch have moved to file amicus briefs in this appeal. For example,

- Senator David Frockt, identifying himself as vice-chair of the legislature's Article IX Committee (he thus co-signed the transmittal letter submitting the legislature's 2017 Report to this Court);
- Senator Jamie Pedersen, identifying himself as on the Senate Ways & Means Committee, etc.;
- Representative Laurie Jenkins, identifying herself as on the House Appropriations Committee, etc.; and
- Representative Gerry Pollet, identifying himself as on the House Appropriations and Finance Committees, etc.<sup>15</sup>

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<sup>13</sup> *Superintendent Of Public Instruction ("SPI") August 4, 2014 Motion To File An Amicus Brief Addressing The Court's Order To Show Cause; SPI July 27, 2015 Motion To File An Amicus Brief Addressing The 2015 Legislature's Compliance With McCleary; SPI December 28, 2015 Motion To File An Amicus Brief As Part Of A Timely 2016 Briefing Schedule; SPI August 29, 2016 Motion To File An Amicus Brief In Response To The Court's Order Dated July 14, 2016.*

<sup>14</sup> *August 12, 2014 McCleary letter ruling at 1; July 28, 2015 McCleary letter ruling at 1, March 2, 2016 McCleary letter ruling at 1; August 11, 2016 McCleary letter ruling at 1.*

<sup>15</sup> *Motion By Washington State Budget & Policy Center, Equity In Education Coalition, Senator David Frockt, Senator Jamie Pedersen, Representative Laurie Jenkins And Representative Gerry Pollet For Leave To File Amicus Curiae Brief at .2-3; Motion For Leave To File Amicus Brief By The Arc Of King County, The Arc Of Washington State,*

This Court granted these amicus motions by individual members of the State's 147-member legislative branch.<sup>16</sup>

**F. Prohibiting Amicus Filing By Individual Members Of The NEWS Entity.**

The following members of this suit's 440-member plaintiff entity (the non-profit corporation Network for Excellence in Washington Schools, or "NEWS") asked to file the following amicus briefs:

- Tacoma School District sought to explain how the Biennium Budget and EHB 2242 do not amply fund the Tacoma School District's actual implementation costs.<sup>17</sup>
- Seattle School District sought to explain how the Biennium Budget and EHB 2242 do not amply fund the Seattle School District's actual implementation costs, especially for its special education students.<sup>18</sup>

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*TeamChild, Washington Autism Alliance & Advocacy, Open Doors For Multicultural Families, Seattle Special Education PTSA, Bellevue Special Needs PTA, Gary Stobbe, M.D., James Mancini, And State Rep. Gerry Pollet at 4-5 (re: Representative Pollet).*

<sup>16</sup> August 24, 2017 McCleary letter ruling at 1 ("The Chief Justice has granted the following motions to file amicus curiae briefs in this case: .... The motion ... on behalf of ... Senator David Frockt, Senator Jamie Pedersen, Representative Laurie Jenkins, and Representative Gerry Pollet") and at 1 ("The Chief Justice has granted the following motions to file amicus curiae briefs in this case: .... The motion ... on behalf of The Arc of King County ... and State Representative Gerry Pollet").

<sup>17</sup> Motion for Leave to File Brief of Amicus Curiae Tacoma Public Schools at 2-3 (asking to file amicus brief "analyzing the significant impact that EHB 2242 (Laws of 2017, 3d Sp. Sess., ch. 13) and SSB 5883 (Laws of 2017, 3d Sp. Sess., ch. 1) will have on [the Tacoma school district's] ability to provide a basic education consistent with the State's paramount duty", and noting that "A fully informed decision is essential, and the additional argument provided by [the Tacoma school district] will assist this Court in doing so. RAP 10.6(a). [The Tacoma school district's] proposed amicus brief will inform the Court regarding the effect that EHB 2242 and SSB 5883 will have on [the Tacoma school district's] ability to provide a basic education to its students, including but not limited to the decrease in overall funding for [the Tacoma school district] and the restrictions on how it spends its funds. Accordingly, [the Tacoma school district's] amicus brief will aid this Court in assessing whether the State has met its paramount duty.").

<sup>18</sup> Motion for Leave to File Brief of Amicus Curiae Seattle Public Schools at 2-3 (asking to file amicus brief "analyzing the significant impact that EHB 2242 (Laws of 2017, 3d

- Northshore School District sought to explain how the Biennium Budget and EHB 2242 do not amply fund the Northshore School District’s actual implementation costs, especially for the Core 24 component of the State’s basic education program.<sup>19</sup>
- Seven so-called “Alliance” school districts sought to explain how the Biennium Budget and EHB 2242 do not amply fund those seven districts’ actual implementation costs, especially for their special education students under the corresponding levy changes.<sup>20</sup>

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*Sp. Sess., ch. 13) and SSB 5883 (Laws of 2017, 3d Sp. Sess., ch. 1) will have on [the Seattle school district’s] ability to provide a basic education consistent with the State’s paramount duty”, and noting that “A fully informed decision is essential, and the additional argument provided by [the Seattle school district] will assist this Court in doing so. RAP 10.6(a). [The Seattle school district’s] proposed amicus brief will inform the Court regarding the effect that EHB 2242 and SSB 5883 will have on [the Seattle school district’s] ability to provide a basic education to its students, including but not limited to the greatly detrimental effect on [the Seattle school district’s] ability to provide a basic education for special education students. Accordingly, [the Seattle school district’s] amicus brief will aid this Court in assessing whether the State has met its paramount duty.”).*

<sup>19</sup> *Motion for Leave to File Brief of Amicus Curiae Northshore School District at 2-3 (asking to file amicus brief “analyzing the significant impact that EHB 2242 (Laws of 2017, 3d Sp. Sess., ch. 13) and SSB 5883 (Laws of 2017, 3d Sp. Sess., ch. 1) will have on [Northshore school district’s] ability to provide a basic education consistent with the State’s paramount duty”, and noting that “A fully informed decision is essential, and the additional argument provided by [Northshore school district] will assist this Court in doing so. RAP 10.6(a). [Northshore school district’s] proposed amicus brief will inform the Court regarding the effect that EHB 2242 and SSB 5883 will have on [Northshore school district’s] ability to provide a basic education to its students, including but not limited to the lack of funding for students to achieve 24 credits for graduation. . Accordingly, [Northshore school district’s] amicus brief will aid this Court in assessing whether the State has met its paramount duty.”).*

<sup>20</sup> *The School Alliance’s Motion for Leave to File Amicus Curiae Brief at 3-4 (“The Alliance’s proposed brief will address how the Legislature’s efforts to comply with its Constitutional duty to adequately fund K-12 basic education through EHB 2242 fall short, because EHB 2242 fails to adequately fund special education. The Alliance will also address issues concerning the levy funding in EHB 2242”, and noting that “Basic education includes special education services. Additional argument is necessary to present the Court with information and data concerning the failure of EHB 2242 to adequately fund special education in Washington schools. For example, the Legislature’s increase in the cap on the number of students receiving special education services in a district that the state will fund does nothing for districts currently under the cap—they remain underfunded for the students they have. And changes to the conditions under which the ‘Safety Net’ program helps fund high cost students does not solve the failure of the State to appropriate sufficient Safety Net funds to pay for the underfunding in special education. Furthermore, the Alliance believes that it can provide information and*

- The union representing 31,000 classified staff employees in 179 of the State’s school districts (“PSE”) sought to explain how the Biennium Budget and EHB 2242 do not amply fund the actual costs of classified staff compensation.<sup>21</sup>
- El Centro de la Raza, Vietnamese Friendship Organization, and the Urban League of Metropolitan Seattle sought to join other civil rights organizations to explain how the Biennium Budget and EHB 2242 fall short of providing the ample education funding that is the positive constitutional right of the students of color in their communities.<sup>22</sup>

Although the State deems it proper for members of the defendant State’s executive and legislative branches to file amicus briefs addressing that member’s position, the State objected to any one of the non-profit

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*argument related to the new levy system that will assist the Court in determining whether this aspect of EHB 2242 requires additional review. As school districts in Washington, the Alliance members have unique insight into the on-the-ground impacts of education funding and budgeting. This insight will assist the Court in determining whether the measures the Legislature selected in EHB 2242 are sufficient to meet the Constitutional requirement that the State adequately fund basic education, including special education.”).*

<sup>21</sup> *Motion for Leave to File Amicus Curiae by the Public School Employees of Washington/SEIU 1948 at 5-6 (asking to file amicus brief explaining “how the current budget fails to comply with the Court’s order that the State must ‘amply provide’ for the basic education program to allow for the appropriate staffing levels. It will also illustrate that this model fails to provide competitive salaries and benefits to attract and retain classified public school employees in all job classifications.”, and noting that its amicus brief “will allow the Court to thoroughly consider the impact of the State’s budget which significantly underfunds basic education classified public school employees. Classified staff and PSE members are an integral component of the State’s basic education program: they ensure school buildings are clean and safe; that students are transported to school safely; and that students who need additional instructional support receive that help from paraeducators and in essence, are critical to the State’s basic education program. The moving party provides a knowledgeable and unique viewpoint as to the profound inadequacy of the State’s budget in terms of staffing, compensating and retaining basic education classified public school employees.”).*

<sup>22</sup> *Civil Rights Organizations’ Motion to File Amicus Curiae Brief at 5.*

plaintiff corporation's 440 members being allowed to file (or even join in) any amicus filing to address that member's position.<sup>23</sup>

This Court denied all amicus motions by individual members of the 440-member NEWS entity,<sup>24</sup> and denied El Centro de la Raza, Vietnamese Friendship Organization, and Seattle Urban League permission to join the other civil rights organizations' amicus brief.<sup>25</sup>

V. **GROUND'S FOR RELIEF & SUPPORTING ARGUMENT**  
**[RAP 17.3(a)(4)]**

A. **Consistency With The State's Objections To Prior Court Filings Adverse To The State's Claims.**

The State has repeatedly objected to filings adverse to its claims in this case. *Supra*, Part IV.

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<sup>23</sup> *State Of Washington's Objection To Motions To File Amicus Curiae Briefs at 1.* (Although the State's objection repeatedly represented to this Court that the amicus movants "are parties to this appeal", the State's repeated representation to this Court was false – for members of an entity party are not parties themselves. Unless the State is now asserting that individual members of the State's legislature and individual members of the State's executive branch (e.g., Governor and Attorney General) are parties to this case who have been in contempt of court these past three years and subject to individual sanctions.)

<sup>24</sup> August 24, 2017 McCleary letter ruling at 1-2 ("After considering the objections thereto, the Chief Justice has denied the following motions to file amicus briefs, all of which have been filed on behalf of members of the Network for Excellence in Washington Schools, a plaintiff in this case: ... The motions by Valerie L. Hughes and Catharine B. DeJulio, on behalf of Seattle Public Schools, Tacoma Public Schools, and Northshore School District", ... motion by John C. Bjorkman, Grace T. Yuan, and Gabrielle E. Thompson, on behalf of The School Alliance", ... motion by Elyse B. Maffeo, on behalf of the Public School Employees of Washington/SEID 1948.").

<sup>25</sup> August 24, 2017 McCleary letter ruling at 1 ("The Chief Justice has granted the following motions to file amicus curiae briefs in this case: .... The motion ... on behalf of the Civil Rights Organizations, with the exception of Urban League of Metropolitan Seattle, El Centro de la Raza, and Vietnamese Friendship Organization, which are members of the Network for Excellence in Washington Schools, a plaintiff in this case.") (underline added).

This Court accordingly struck plaintiffs’ prior appendix and chart filings. *Supra, Parts IV.A & B.* It struck appendices filed by amici who opposed the State’s claims. *Supra, Part IV.C.* It ruled school districts like Tacoma, Seattle, Northshore, and the special education “Alliance” districts cannot file any amicus briefs to explain the real-world impact of the Biennium Budget and EHB 2242 on their basic education program funding. *Supra, Part IV.F.* And it ruled the State-wide organization representing 31,000 classified staff in the State’s school districts (PSE) cannot file an amicus brief to explain the real-world impact of the Biennium Budget and EHB 2242 on their classified staff members’ compensation funding. *Supra, Part IV.F.*

The State’s reply brief nonetheless attaches 54 pages of appendices to support that reply brief’s contention that the above school districts’ basic education program implementation, as well as Washington schools’ classified employee compensation, are all amply funded.

Plaintiffs accept the reality that the State’s two political branches expect – and are given – a degree of leeway and deference. But at some point, “deference” becomes “double standard”.

Plaintiffs respectfully submit that the 54 pages of appendices that the State attaches to its reply brief ask for a double standard. Those appendix pages are marked-up (in red) printouts of pages that the State has had in its possession – indeed, on its own website – since before the

State's (and 2017 legislature's) July 31 court filings. If the State's lawyers, or the legislature's Article IX Committee, believed any of those State documents evidenced the 2017 legislature's compliance with the court orders in this case or the legislature's curing its longstanding contempt of court, those July 31 filings could have – and should have – said so on July 31 so plaintiffs' August 30 response could respond.

But instead, the State waited to submit its documents as a marked up, 54-page appendix to its September 8 reply brief – which, if allowed now, inject “evidence” to (1) support the State's July 31 claims after plaintiffs can respond, (2) support the State's contentions against school districts like Tacoma, Seattle, and the special education “Alliance” districts after plaintiffs (or those districts) can respond, and (3) support the State's contentions against the 31,000 classified staff members of PSE after plaintiffs (or PSE) can respond.

Consistency requires consistency. Consistency with the State's objections to prior filings against the State requires the striking of the September 8 appendix filings by the State.

**B. Consistency With The Appellate Rules Against New Argument In Reply.**

One of the arguments raised in the State's September 8 reply brief is that every school district ends up getting more money under the

Biennium Budget and EHB 2242. The State's September 8 reply brief attaches the 54 pages of appendices at issue to support that argument.

That's improper for at least two reasons:

- (1) The State had to make its "every district ends up with more money" point in its opening brief (so plaintiffs could respond) – not its reply (so plaintiffs cannot respond). E.g., *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967) ("We consider those points not argued and discussed in the opening brief abandoned and not open to consideration on their merits") (citing *State v. Davis*, 60 Wn.2d 233, 373 P.2d 128 (1962); *Kent v. Whitaker*, 58 Wn.2d 569, 364 P.2d 556 (1961)).
- (2) If the State wanted to contend that the net financial impact of the 2017 legislature's action is that "every district ends up with more money", the State had to make that contention in its opening brief (so plaintiffs could respond) – not its reply (so plaintiffs cannot respond). E.g., *Fosbre v. State*, 70 Wn.2d at 583 ("In addition, a contention presented for the first time in the reply brief will not receive consideration on appeal.") (citing *Washington Fish & Oyster Co., Inc. v. Halferty & Co.*, 44 Wn.2d 646, 269 P.2d 806 (1954); *Turner v. Dept. of Labor & Industries*, 41 Wn.2d 739, 251 P.2d 883 (1953)).

The 54 pages of appendices that the State attaches to its reply brief to support that brief's claim that every school district in the State ends up getting more money are marked up printouts of the State's own website pages that were readily available to legislators on the State's website before the State legislature submitted its 2017 Report to this Court on July 31.<sup>26</sup> If the legislature thought this information showed compliance

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<sup>26</sup> *Appendices A, B, & C* state their date is "(Feb.2017)"; *Appendix E* states its date is "(Dec. 5, 2016)"; *Appendices F & G* state their date is "(June 29, 2017)"; and *Appendices D, H, I, & J* are marked up printouts of the State's Multi-Year Budget Comparison Tool which has been available since at least May 2017. See <https://web.archive.org/web/20170610221427/http://k12.wa.us/SAFS/17budprp.asp>.

with the court orders in this case or the legislature's curing its longstanding contempt of court, the legislature's 2017 Report could have – and would have – said so. But it didn't.

Those 54 pages of State website printouts were also readily available to the State's lawyers before they submitted the State's 2017 Post-Budget Filing to this Court on July 31.<sup>27</sup> If the State's lawyers thought this information showed compliance with this Court's orders or any curing of the longstanding contempt of court in this case, the State's 2017 Post-Budget Filing could have – and would have – said so. But it didn't.

In short, plaintiffs respectfully submit that it is not a permissible appeal tactic for the State's reply to attach marked up printouts of State website pages that were fully available to (and omitted from) both the legislature's and the State's July 31 filings. Accord, e.g., *Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, 308 F.Supp.2d 1208, 1214 (W.D. Wash. 2003), *aff'd*, 372 F.3d 1330 (Fed. Cir. 2004) (striking declaration attached to reply brief because “declaration at issue contains new evidence on recorded phone conversations to which Defendant is not able to respond within the briefing schedule. The Court will not consider this evidence”).

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<sup>27</sup> *Supra* footnote 26.

## VI. CONCLUSION

Plaintiffs do not believe the legal test for full compliance with the court orders in this case is “Does each district get more money?” Instead, plaintiffs understand the full compliance test is “Do the State’s formulas amply fund each district’s actual cost to fully implement the ten components of the State’s basic education program for all children by September 1, 2018?”<sup>28</sup>

But even if just “more money” was the legal test, the State’s September 8 appendix filings would still be improper.

Plaintiffs appreciate that government officials in the State’s two political branches are sometimes given some leeway in court. E.g., State executive branch members such as the Attorney General and Superintendent of Public Instruction (*supra*, *Parts IV.B & D*), and State legislative branch members such as certain committee members and the co-chair of the Article IX Committee who submitted the Legislature’s 2017 Report to this Court (*supra*, *Part IV.E*).

But plaintiffs also believe that, at some point, the defendant State’s political branches should have to abide by the same rules as others in this case. Plaintiffs respectfully submit that we are at that point – and

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<sup>28</sup> *Plaintiffs’ August 30, 2017 Post-Budget Filing at 9-10 (listing the six elements of compliance).*

accordingly request that this Court strike the 54 pages of appendices that the State attached to its reply brief this month. *Supra, Parts V.A & B.*

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of September, 2017.

*s/ Thomas F. Ahearne*

Thomas F. Ahearne, WSBA No. 14844  
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### **DECLARATION OF SERVICE**

Laura G. White declares:

I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years. I am not a party to this action, and I am competent to be a witness herein. On Friday, September 29, 2017, I caused PLAINTIFFS' MOTION TO STRIKE APPENDICES TO THE STATE'S REPLY BRIEF to be served as follows:

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*Amici Curiae Washington State Budget & Policy Center, Equity In Education Coalition, Senator Jamie Pedersen, Representative Laurie Jenkins, and Representative Gerry Pollet*

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*Amici Curiae National Association For The Advancement Of Colored People (NAACP), Chinese Information Service Center, Multicultural Education Rights Alliance, Rainier Beach Action Coalition, Southeast Seattle Education Coalition, and United Indians Of All Tribes Foundation*

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED in Seattle, Washington, this 29th day of September, 2017.

s/ Laura G. White  
Laura G. White, Legal Assistant

# FOSTER PEPPER PLLC

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**Comments:**

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