No. 84362-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MATTHEW & STEPHANIE McCLEARY, et al.,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON,

Appellant/Cross-Respondent.

BRIEF OF AMICUS CURIAE, WASHINGTON'S PARAMOUNT DUTY, a Washington Nonprofit Corporation and 501(c)(4) Organization

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SUMMER STINSON
WSBA No. 40059
Counsel pro bono; Board Member
for Amicus Washington's Paramount Duty
311 NW 74th Street
Seattle, Washington 98117
(206) 239-8504

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel pro bono
for Amicus Washington's Paramount Duty
RUSSELL SELK LAW OFFICE
1037 Northeast 65th St. Private Box #176
Seattle, Washington 98115
(206) 782-3353

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A. STATEMENT OF ISSUES

The State is still not in compliance and has yet to end its ongoing violation of the Article 9, § 1 rights of Washington's 1.1. million public school children. If this Court were to relinquish jurisdiction based on the State's promises that it will ultimately comply with those duties, this Court would violate not only its Article 4 responsibilities but also its independent duties to our state's children under Article 9, § 1.

B. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Washington's Paramount Duty (WPD) is a grassroots, non-profit advocacy organization with a single mission: to compel Washington to amply fund basic education. This Court has previously granted WPD's motions to file amicus briefing in this case. A similar motion is filed herewith.

C. ARGUMENT

1. THERE IS ALREADY EVIDENCE THAT THE STATE'S NEW FUNDING SCHEME FALLS FAR SHORT OF RESOLVING THE STATE'S ONGOING VIOLATIONS OF THE ARTICLE 9, § 1, RIGHTS OF OUR STATE'S PUBLIC SCHOOL CHILDREN

This Court has already defined much of what was required under the "Paramount Duty" clause. The Constitution requires the

State, as its paramount duty, to amply fund basic education for every child in Washington State from regular and dependable tax sources. *McCleary v. Washington,* 173 Wn.2d 477, 484-485, 520, 527, 532, 546, 269 P.3d 227 (2012). "Paramount" means "more important than all other things concerned." *Seattle School District No. 1 v. State,* 90 Wn.2d 476, 510-13, 585 P.2d 71 (1978). As used in Article 9, § 1, the word "ample" "provides a broad constitutional guideline meaning fully, sufficient, and considerably more than just adequate." *McCleary*, 173 Wn.2d at 483-84.

The State is now claiming it has satisfied its Paramount Duty under Article 9, § 1. Yet even the minimal evidence available shows that is not the case.

In 2007-2008 school year, Washington spent $9980 per student; the national average was $10,615; the highest spending states spent nearly *twice* that. *Seattle School Dist.*, 90 Wn.2d at 511. No state, other than Washington, constitutionally promises that amply funding public education is the paramount duty of the state; thus Washington's "Paramount Duty" clause is the strongest such clause in the country. *Id*.

In April of 2018, our state's Superintendent of Public Instruction, Chris Reykdal, explained that *even with the State's new investments* in public schools, Washington is *still* in the bottom half of the country when it comes to school funding. He declared, "[e]ven as the Legislature has added new resources to shore up 'basic' education, we are still a state that invests less in our schools than the national average[.]" Office for Superintendent of Public Instruction, *Reykdal Asks Public to Help Develop K-12 Education Budget*, Apr. 25, 2018, *available at* http://www.k12.wa.us/Communications/PressReleases2018/DevelopBudget.aspx. Indeed, Superintendent Reykdal also indicated that current investments are insufficient to "increase student achievement." *Id*. Thus, Washington's strong constitutional promise to every child, over a decade of litigation and appellate review of this case, and the Legislature's increased investment in public schools (after slashing the K-12 education budget during the recession) has not even secured Washington as spot as a state which spends at least the national average on basic education.

In addition, the State will still be relying on local levy funds to be used, in at least part, to support funding of the basic education

program. This Court explained in its 2012 ruling that: "Reliance on levy funding to finance basic education was unconstitutional 30 years ago in Seattle School District, and it is unconstitutional now." *McCleary*, 173 Wn.2d at 539; *see also* Nov. 15, 2017 Order at 11 (reiterating that this Court held the feature of the former funding system to rely upon local funding sources to pay for basic education to be unconstitutional).

The State agrees in its brief with the requirement that the State, and not local school districts through its local levies, must provide ample funding for basic education. State's April 9, 2018 Br. at 5 ("[T]he State must fully fund its basic education program with state revenues. The State cannot rely on local levies to support the basic education program").

But in fact, reliance on local levies is *still required* in order for school districts to meet the minimum funding required for basic education. Special education is included as part of the State's definition of basic education. RCW 28A.150.220(3)(f) ("The instructional program of basic education provided by each school district shall include: . . . The opportunity for an appropriate education at public expense . . . for all eligible students with

disabilities . . . ."); *see also, McCleary*, 173 Wn.2d at 506 ("[T]he [ESHB 2261] legislation preserved the historically recognized basic education offerings: remediation, transitional bilingual education, and special education."); Nov. 15, 2017 Order ("The legislation retained the historically recognized basic education components of remediation (through the Learning Assistance Program (LAP)), a transitional bilingual instructional program (TBIP), and special education").

Although the State must amply fund basic education, including special education, through regular and dependable State funding, the Superintendent of Public Instruction recently informed school districts that they may *continue* to use local property tax levies to pay for special education, because of the continuing lack of full funding for that basic education program. Jerry Cornfield, The Everett Herald, *Public School Funding Issue Far from Being Settled*, Sept. 3, 2017, *available at* https://www.heraldnet.com/news/public-school-funding-issue-far-from-being-settled/. Superintendent Reykdal argued that allowing school districts to continue using local property tax levies to pay for special education is "the only way to

ensure districts can comply with federal requirements governing special education." *Id*.

Indeed, Mr. Reykdal wrote to school superintendents: "You are stuck in an almost impossible situation[.] . . . I/we cannot forsake federal law in an attempt to meet state law. Where you clearly make the case that you have no reasonable choice but to use local levy proceeds, I will approve those levy plans." *Id.* And in an interview Superintendent Reykdal frankly declared:

> I have consistently said none of the (legislative) scenarios will satisfy the needs for special education funding. If a district comes to me and says they need local levy dollars for special education, I am going to allow that[.] . . . We will always put civil rights ahead of legislative funding caps.

Id.

Thus, the legislature's "full funding" scheme is far from what it purports to be. If it truly met the requirements of Article 9, § 1, then Superintendent Reykdal would not have to declare that he would allow local school districts to use their levies to fund special education in order to meet even the minimal federal requirements for special education—let alone the Article 9, § 1 requirements that it be funded "amply" in our state.

Earlier in this case, however, this Court held that relying on local levy funding to pay for basic education is a violation of the State's constitutional duties under Article 9, § 1. *See McCleary*, 173 Wn.2d at 539. It is thus already evident that the State's untested claims that its current funding scheme meets the requirements of Article 9, § 1, are at best overly optimistic.

Moreover, the State's deadline for implementing the rules and procedures regarding the special education State safety net is out of compliance with its own September 1, 2018 deadline. This Court relied on and upheld the Legislature's promise that it would meet that deadline to implement ample funding. *See* Nov. 15, 2017 Order at 41 ("[t]he court in its order on October 6, 2016 was clear: 'the State has until September 1, 2018, to fully *implement* its program of basic education.") (citing Oct. 6, 2017 Order) (emphasis in Nov. 15, 2017 Order). Indeed, this Court has said, "[t]hat deadline, representing the start of the 2018-19 school year, is firm." Nov. 15, 2017 Order at 41-42.

This Court has already found that (as of November 15, 2017) the terms of the basic education salary structure funding to school districts would not be fully implemented by September 1, 2018. *Id*. at

42. Because the State allocation model would not be implemented by September 1, 2018, this Court ruled that the State was "out of full compliance with its constitutional duty under article IX, section 1." *Id.* at 43.

The State is still currently similarly out of compliance regarding special education funding. The State relies on the safety net "to supplement special education allocations for districts that are able to demonstrate additional need." State's April 9, 2018 Report at 18 (citing RCW 28.150.392).

However, the State set the deadline for the rules and procedures to administer the special education safety net and award process as December 1, 2018. Engrossed Second Substitute Senate Bill 6362 (E2SSB 6362), Laws of 2018 (K-12 policy and funding legislation), *amending* RCW 28A.150.392; *see also* State's April 9, 2018 Report at 19. This December 1, 2018 deadline—for the rules and procedures, and not the awarding of grants themselves—is two months after the September 1, 2018, deadline, when school districts commence the 2018-2019 school year. While the adjusted December 1, 2018 deadline for the rules and policies on the special education safety net and award process is earlier than the September 1, 2019

deadline the State set in 2017, the fact is that the State fails to meet the September 1, 2018 deadline.

Just as the State was out of compliance by attempting to delay the State allocation salary model to after September 1, 2018, the State is currently out of constitutional compliance by relying upon the special education safety net and delaying the new rules and procedures to December 1, 2018—two months after the September 1, 2018 deadline.

2. THIS COURT'S INDEPENDENT DUTIES UNDER ARTICLE 9, § 1 EXCEED ITS ARTICLE 4 DUTIES AND SUPPORT CONTINUING JURISDICTION AND OVERSIGHT

Once again, the State suggests that this Court should abandon its role in this proceeding, end jurisdiction and trust that the state will comply with its Paramount Duty. State's April 9, 2018 Br. at 6. This Court should reject the state's invitation to abandon both the Court's Article 4 and Article 9, § 1 duties. Instead, those duties require the Court to continue its oversight until the State finally remedies its ongoing violations of the constitutional education rights of this state's public school children.

This state has no formal "separation of powers" clause and instead implies the doctrine because it is presumed to have been intended, based on the division of the government into three branches. *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009). Our doctrine, however, differs from many others in which the separate branches are "hermetically sealed" from engaging in related tasks. *Hale v. Wellpinit Sch. Dist. No.49*, 169 Wn.2d 494, 503-504, 198 P.3d 102 (2009).

In our state, only the "fundamental functions of each branch" are kept unique and separate, but shared duties are handled, at least in theory, with "harmonious cooperation" in order to serve the best interest of the people. *See Zylstra v. Piya*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). Thus, for example, because both legislative and judicial branches have some authority over rules of evidence, the Court will try to "harmonize" conflicting statutes and court rules. *See City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), *cert. denied*, 549 U.S. 1254 (2007).

In exercising its Article 4 duties, this Court has long applied relatively extreme deference to the Legislature. *See, e.g., City of Bothell v. Barnhart*, 172 wn.2d 223, 229, 257 P.3d 648 (2011) (noting

the Court's use of a presumption that all legislative acts are constitutional); *Robb v. City of Tacoma*, 175 Wn. 580, 586, 28 P.327 (1933) (Court stating it is not part of its role to review or "revise" legislative action "but rather to enforce the legislative will when acting within its constitutional limits"). Despite this historic deference, however, this Court has rejected the idea that the benefit of the "separation of powers" doctrine is to protect the branches of government. *Hale*, 169 Wn.2d at 503-504.

Instead, this Court has found, the purpose of our state's "separation of powers" doctrine is to protect the citizens—"to ensure liberty by defusing and limiting power." *Id*. The delegates to the 1889 Constitutional Convention included farmers, merchants, bankers, and other citizens who were well aware of the government corruption in the Washington Territory, primarily by the Territorial Legislature. Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution,* 67 Wash. L. Rev. 669, 669-70 (1992). Delegates were "familiar with the history of school funds" in other states "and the attempt was made to avoid the possibility of repeating "the tale of dissipation and utter loss." Theodore L. Stiles, *The Constitution of*

the State and its Effects Upon Public Interests, 4 WASH. HISTORICAL Q. 281, 284 (1913).

Indeed, interviews with delegates to the Convention revealed a fear of government "tyranny" focused mostly on the legislative branch, so that it was reported that the halls at the convention echoed with delegates expressing a willingness "to trust the people but not the Legislature." Snure, at 672, citing, *The Journal of the Wash. State Const. Convention 1889* (Beverly Rosenow ed., 1962), at 58, 66.

This history is important because it was in this context that the delegates wrote the Paramount Duty clause. *See* Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 Wash. Hist. Q. 227, 228 (1913); *see also* Francis N. Thorpe, *Recent Constitution Making in the United States*, 2 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 160 (1891). And in choosing the language for the clause, as this Court has noted, the framers decided to make all three branches responsible for meeting the Paramount Duty - not just the Legislature alone. *Seattle School District,* 90 Wn.2d at 510-13.

Thus, the framers specifically chose to impose a duty upon this Court which exceeds its normal duties under Article 4. Article 4

charges the judiciary with the duty of interpreting and giving meaning to the constitution and serving as its final arbiter. *See In re Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1987). This Court has rejected the state's arguments that, despite Article 4, it is "the sole prerogative of the Legislature to interpret, construe and give . . . substantive content" to the Paramount Duty clause. *Seattle School Dist.*, 90 Wn.2d at 503. And the Court has held that it is tasked with not only its Article 4 duties but also its independent duties under Article 9, §1, to the children whose rights are involved. *Id.*

Moreover, this Court has recognized the importance of retaining jurisdiction as a part of its constitutionally mandated role in this case, declaring that by retaining jurisdiction, it is

> fulfilling its constitutional obligation as a member of the judicial branch of the state to determine whether the legislative branch, which controls the State's purse strings, is complying with its positive constitutional duty to make ample provision for the basic education of all children in the state; it must order compliance if it finds the legislature is falling short.

Nov. 15, 2017 Order at 21.

Once again, in this case, this Court is being asked to withdraw its oversight of whether the Legislature has finally remedied the ongoing violation of the Article 9, § 1 rights of the public school

children in this state. State's April 9, 2018 Br. at 6. This is not the first time the State has urged the Court to trust that it will ultimately comply. *See, e.g.*, State's May 18, 2016 Br. at 20-21. Nor is it even the first time that State has asked the Court to effectively "back off" and defer to the legislative branch completely. *Id.* at 14-16. That history should inform this Court's decision and inspire skepticism of the ability of the State to comply.

In addition, it is not the first time this Court has been faced with the question of the scope of its own duties to the now more than 1.1 million public school students who are guaranteed rights under Article 9, § 1. *Seattle School Dist*. 90 Wn.2d at 503; Office of Superintendent of Public Instruction, Reykdal Celebrates First Year in Office; Looks Toward Future, Jan. 11, 2018, *available at* http://www.k12.wa.us/Communications/pressreleases2018/FirstYear.aspx. This Court has already established that those children have a "true" and "absolute" right to receive an "amply" funded education which is "substantive and enforceable" by this Court. *Brown v. State*, 155 Wn. 2d 254, 258, 119 P.3d 341 (2005). It has also recognized that Article 9, § 1, is a reflection of our state's unique commitment to

education, because "[n]o other state has placed the common school on so high a pedestal." *Seattle Sch. Dist.*, 90 Wn.2d at 498.

Judge Erlick ruled, in 2010, that the state was in violation of its constitutional duty to fund public education and thus in ongoing violation of the constitutional rights of the public school children of this state. *McCleary*, 173 Wn.2d at 513. That factual finding has been upheld by this Court. *McCleary*, 173 Wn.2d at 539. This Court kept jurisdiction - despite urges for it to "step back" - in recognition of its own independent duties under Article 4 and 9, § 1. Dismissing its oversight at this point in the case would run afoul of those ongoing duties, and this Court should so hold.

D. CONCLUSION

For the reasons stated above, this Court has the power, authority, and duty to continue jurisdiction, enforce its orders and require the State to fulfill its constitutional duty to the more than one million children in this state's public schools. Despite the State's continued claims to the contrary, deferring to the Legislature in this matter would be an abdication of the Court's duties and constitutional role.

DATED this 30th day of April, 2018.

Respectfully submitted,

s/ Summer Stinson
SUMMER STINSON, WSBA No. 40059
Board Member and Counsel *pro bono* for
Amicus Washington's Paramount Duty
311 NW 74th Street
Seattle, WA. 98117
(206) 239-8504

/s/ Kathryn A. Russell Selk
KATHRYN RUSSELL SELK, WSBA No. 23879
Counsel *pro bono* for
Amicus Washington's Paramount Duty
RUSSELL SELK LAW OFFICE
1037 Northeast 65th St. #176
Seattle, Washington 98115
(206) 782-3353

RUSSELL SELK LAW OFFICE

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- hstrasberg@comcast.net
- hstrasberg@me.com
- ivy.rosa@columbialegal.org
- jamie.lisagor@pacificalawgroup.com
- jasonmackay@hotmail.com
- jmackay@pseofwa.org
- john.bjorkman@klgates.com
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- maia@pfrwa.com

- mary.vancleve@columbialegal.org
- matthew.segal@pacificalawgroup.com
- mbindas@ij.org
- michael.althauser@leg.wa.gov
- paul.lawrence@pacificalawgroup.com
- peggy.mitchell@klgates.com
- rmckenna@orrick.com
- sarahadunne@yahoo.com
- scot@johnstongeorge.com
- sea_wa_appellatefilings@orrick.com
- sgoolyef@atg.wa.gov
- summerstinson@gmail.com
- talner@aclu-wa.org
- vhughes@perkinscoie.com
- wbcollins@comcast.net

Comments:

Sender Name: Kathryn Selk - Email: KARSdroit@gmail.com
Address:
1037 NE 65TH ST
SEATTLE, WA, 98115-6655
Phone: 206-782-3353

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