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# Plaintiff/Respondents' Answer to the Amicus Brief of Washington's Paramount Duty

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**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Defendant/Appellant,

v.

MATHEW & STEPHANIE McCLEARY, on their own behalf and on behalf of Kelsey & Carter McCleary, their two children in Washington's public schools;

ROBERT & PATTY VENEMA, on their own behalf and on behalf of Halie & Robbie Venema, their two children in Washington's public schools; and

NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Plaintiffs/Respondents.

# PLAINTIFF/RESPONDENTS' ANSWER TO THE AMICUS BRIEF OF WASHINGTON'S PARAMOUNT DUTY

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## I. <u>SUMMARY OF THIS ANSWER</u>

The Brief Of Amicus Curiae Washington's Paramount Duty ("Paramount Duty Brief") argues in favor of this Court continuing to retain jurisdiction in this *McCleary* suit. This is plaintiffs' Answer.

The Paramount Duty Brief presents its **<u>first</u>** argument under the heading: "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".

Plaintiffs' answer can be summarized in two points:

- **Facts On The Ground.** The Paramount Duty Brief's factual premise is correct. If this were a trial court proceeding with sworn witness testimony about school district experience under the *new* State program funding levels, the admissible evidence would show the State is still failing to provide the ample State funding required by Article IX, section 1. *[Part II.A.1 below.]*

- **Proving Those Facts.** But this is not a trial court proceeding with sworn testimony about the State's *new* funding formulas. It's an appellate proceeding whose evidentiary record addressed the State's *prior* formulas at the time of trial. Plaintiffs accordingly recognize that clearing the way for expedited trial court proceedings to examine school district experience under the *new* State funding levels is an alternative to this Court's continuing to retain appellate jurisdiction in this appeal. *[Part II.A.2 below.]*

The Paramount Duty Brief presents its **<u>second</u>** argument under the heading: "This Court's Independent Duties Under Article 9, §1 Exceed Its Article 4 Duties And Support Continuing Jurisdiction And Oversight".

Plaintiffs' answer to this second argument can also be summarized in two points:

- **Judicial Branch Duty.** The Paramount Duty Brief's legal premise is correct. Article IX, section 1 expressly imposes its duty on "the State" – which includes all three branches (legislative, executive, <u>and</u> judicial). The judicial branch's duty under Article IX, section 1 to uphold every Washington child's constitutional right to an amply funded education is independent of the judicial branch's more generalized assignment under Article IV. *[Part II.B.1 below.]*

- **Exercising That Duty.** The Supreme Court's continuing to retain jurisdiction in the *McCleary* case is not the only way for the judicial branch to exercise its Article IX, section 1 duty to uphold Washington children's constitutional right to an amply funded education with respect to the State's *new* program funding levels. Plaintiffs accordingly recognize that the judicial branch can exercise its Article IX, section 1 duty by expediting trial court proceedings that address school district experience with the State's *new* funding formulas, and granting prompt appellate oversight when appropriate. *[Part II.B.2 below.]*

## II. <u>LEGAL DISCUSSION</u>

### A. Paramount Duty's Argument That "The State's New Funding Scheme Falls Far Short"

The Paramount Duty Brief's first argument is that this Court should retain jurisdiction because evidence already exists to show the

State's new funding scheme falls short of providing the ample funding for all children mandated by Article IX, section 1.[1]

### 1. *Facts Today.*

With respect to **facts**, plaintiffs agree that evidence of the *new* funding formulas' unconstitutional underfunding already exists in our State's public schools. But that evidence is not in this suit's appellate record because this suit's 2009 trial examined Washington school districts' experience with the State's *prior* funding formulas back then – not the State's *new* funding formulas today.[2]

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[1] *Paramount Duty Brief at 1-9 (argument under heading C.1, entitled "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's rulings confirming the ample funding right conferred on each and every Washington child by Article IX, section 1 is summarized in, e.g., Plaintiffs' 2016 Post-Budget Filing at 6-12; see also Plaintiffs' 2017 Post-Budget Filing at 2-4.*

[2] *The parties' prior briefing in this appellate proceeding (the State's appeal from the 2010 Final Judgment) accordingly could not cite any evidence from the trial court record to prove that the State's new program funding formulas do or do not in fact amply fund the State's basic education program. Instead, the State Attorney General's briefing alleged that the legislature thinks its new formulas do provide the constitutionally required ample funding, and plaintiffs' briefing noted examples of how the new formulas on their face leave funding gaps. See, e.g., Plaintiffs' 2016 Post-Budget Filing at 15-17 (noting types of salary funding gaps), at 20-21 (teacher shortage/retention issues), at 23-24 (outdated basis & inapplicable statewide averages for pupil transportation), at 24 (outdated basis & inapplicable statewide averages for MSOCs), & at 25 (highly capable); accord, Plaintiffs' 2017 Post-Budget Filing at 24-40 (noting gaps on the face of the new funding formulas, but without any citation to gaps in application since the new formulas did not exist at the time of trial). Given the trial court record's lack of evidence to prove whether the State's new program funding formulas are or are not in fact constitutionally adequate to amply fund the State's basic education program, this Court's November 2017 Order concluded that "At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate." 11/15/2017 McCleary Order at 37.*

Also with respect to **facts**, plaintiffs are confident that State officials who have the evidentiary foundation and personal knowledge required for admissible court testimony would (if required to testify in a trial court proceeding under oath) have to truthfully admit that the State's new funding formulas do not provide ample funding for the basic education of all children in our State's K-12 public schools.

**2.** ***Appellate Procedure.***

With respect to **appellate procedure**, however, plaintiffs acknowledge that it is ordinarily the role of trial courts to conduct trials. Not appellate courts. Plaintiffs accordingly recognize that this Court may therefore conclude that proving a *new* State formula's failure to provide the ample funding required by Article IX, section 1 should await trial court litigation with sworn testimony and admissible evidence about school district experience under that *new* formula.

**3.** ***Plaintiffs' Conclusion Regarding The First Argument.***

Plaintiffs are confident that, as a matter of fact, trial court evidence will prove the *new* State funding formulas violate Article IX, section 1's ample funding mandate.

But as a matter of appellate procedure, plaintiffs recognize that this Court may leave it to future trial court proceedings to prove this fact. If this Court does not retain jurisdiction as the Paramount Duty Brief

requests, plaintiffs respectfully request that this Court's ruling make it unequivocally clear to trial courts that they must resolve such proceedings promptly – for time truly is of the essence when it comes to any individual child's education.

### B. Paramount Duty's Argument That This Court Has "Independent Duties Under Article IX, Section 1"

The Paramount Duty Brief's second argument is that this Court should continue its retention of jurisdiction and oversight because this Court has an independent duty under Article IX, section 1 to protect Washington children's constitutional right to an amply funded education from infringement by the other branches of State government.[3]

#### 1. *Judicial Branch Duty.*

With respect to the judicial branch's **duty**, plaintiffs agree that the judicial branch itself has a constitutional duty under Article IX, section 1 that is distinct from the judicial branch's generalized assignment under Article IV.

This Court has long recognized that Article IX, section 1 expressly imposes its duty on "the State" – which embraces all three branches of

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[3] *Paramount Duty Brief at 9-15 (argument under heading C.2, entitled "This Court's Independent Duties Under Article 9, §1 Exceed Its Article 4 Duties And Support Continuing Jurisdiction And Oversight").*

State government: legislative, executive, and judicial.[4] This Court has therefore long recognized that the constitutional command of Article IX, section 1 makes it the express duty of the State's judicial branch to uphold and protect Washington children's judicially enforceable, constitutional right to an amply funded education.[5]

With respect to the judicial branch's **duty**, plaintiffs also agree the separation of powers doctrine implied (but not stated) in the Washington constitution does not protect other branches from the judicial branch exercising its Article IX, section 1 duty to uphold and protect Washington children's constitutional right to an amply funded education. Indeed, the very reason powers are dispersed between separate branches is to protect Washington residents from the State government violating their constitutional rights – not to protect the government branch that's violating those constitutional rights. As prior briefing in this case has repeatedly confirmed, this underlying purpose requires a *separation* of the

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[4] *Seattle School District v. State, 90 Wn.2d 476, 512, 585 P.2d 71 (1978) (by imposing its paramount duty on "the State", Article IX, section 1 applies to all three branches of government – legislative, executive, and judicial. Thus, "Article IX, section 1 is a mandate, not to a single branch of government, but to the entire state."); McCleary v. State, 173 Wn.2d 477, 515, 269 P.3d 227 (2012) (same).*

[5] *Seattle School District v. State, 90 Wn.2d at 520 (1978) ("article IX, section 1 imposes a judicially enforceable affirmative duty on the State to make ample provision for the education of all children"); McCleary v. State, 173 Wn.2d at 515 (2012) ("More than 30 years ago, we held that article IX, section 1 imposes a judicially enforceable affirmative duty on the State to make ample provision for the education of all children."), at 541 ("We will not abdicate our judicial role."), & at 544 ("As a coequal branch of state government we cannot ignore our constitutional responsibility to ensure compliance with article IX, section 1.").*

judicial branch's powers from the two other branches – not an *elimination* of the judicial branch's power to enforce a constitutional right when another branch violates that right.[6]

[6] ***Plaintiffs' 2013 Post-Budget Filing*** *at 39-48 (explaining how powers are separated to stop government violations of constitutional rights – not shelter violations, and citing Lake View School District No. 25 v. Huckabee, 91 S.W.3d 472, 484 (Ark. 2002), cert. denied, 538 U.S. 1035 (2003); McCleary, 173 Wn.2d at 515, 544 & 546; Columbia Falls Elementary School District No. 6 v. Montana, 109 P.3d 257, 261 (Mont. 2005); Montoy v. Kansas, 112 P.3d 923, 930-931 (Kan. 2005); Cooper v. Aaron, 358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); Spallone v. United States, 493 U.S. 265, 281, 301-02, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) (Brennan, J., dissenting); Robinson v. Cahill, 358 A.2d 457, 459 (N.J. 1976);* ***Plaintiffs' 2014 Post-Budget Filing*** *at 38-42 (discussing the same);* ***Plaintiffs' 2014 Answer To The Amicus Brief Of Mr. Eugster*** *at 2-7 (noting lack of authority for invoking separation of powers to protect unconstitutional activities like the government's violation of constitutional rights, or for claiming that separation of powers grants each branch the prerogative to violate constitutional rights when it's convenient, and concluding that "separation of powers ensures the judicial branch exists as a separate and independent branch with the power to stop another branch's allowing State government to violate constitutional rights. That's why it's called separation of powers – not elimination of powers.") (footnote omitted);* ***Plaintiffs' 2014 Answer To Defendant's Response To The Court's Show Cause Order*** *at 1-3 (explaining how "separation of powers ensures the judicial branch has the authority to stop the government's violation of constitutional rights when other branches do not. Separation of powers creates an independent judiciary – not an irrelevant one.") and at 9-10 (explaining that "Powers Are Separated To Stop Government Violations Of Constitutional Rights – Not To Grant The Legislative Branch Immunity To Perpetuate Them", and that "Separation of powers therefore assures citizens' constitutional rights the protection of an independent judiciary – not the empty words of an irrelevant one.");* ***Plaintiffs' 2015 Answer To The Amicus Brief Of Mr. Eugster*** *at 3-5 (discussing courts enforcing the constitutional right of children to a desegregated public education after Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), reversing Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955);* ***Plaintiffs' 2016 Post-Budget Filing*** *at 44 & n.88;* ***Plaintiffs' 2017 Post-Budget Filing*** *at 48-49 (summarizing why it's a separation of powers, not an elimination of powers);* ***Plaintiffs' 2017 RAP 10.8 Statement Of Additional Authorities Relating To Yesterday's Oral Argument*** *at 3 (citing 9/28/2017 Pennsylvania Supreme Court school funding decision's separation of powers ruling in William Penn School District v. Pennsylvania Dept. of Education, 170 A.3d 414, 418 (Pa. 2017) ("It is settled beyond peradventure that constitutional promises must be kept. Since Marbury v. Madison, 5 U.S. 137 (1803), it has been well-established that the separation of powers in our tripartite system of government typically depends upon judicial review to check acts or omissions by the other branches in derogation of constitutional requirements."), & at 435-439 ("The*

**2. *Exercising This Judicial Branch Duty.***

With respect to **exercising** this duty, however, plaintiffs acknowledge that the Court's continuing to retain jurisdiction in this *McCleary* case is not the only way for the judicial branch to uphold and protect Washington children's constitutional right to an amply funded education. This Court's November 2017 Order expressly declared that school district experience will be the judge of whether the State's *new* program funding formulas prove adequate to comply with the ample funding mandate of Article IX, section 1.[7] The judicial branch could accordingly exercise its constituional duty under Article IX, section 1 by expediting trial court proceedings that address school district experience with the State's *new* funding formulas, and granting prompt appellate oversight when appropriate. For example, expedited trial court proceedings with direct Supreme Court review when appropriate would promote the swift resolution of this long-festering school funding problem that dates back to the 1978 *Seattle School District* ruling – a year when

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*cornerstone of our republican democracy is the principle of government divided into three separate, co-equal branches that both empower and constrain one another. Judicial review stands as a bulwark against unconstitutional or otherwise illegal actions by the two political branches.") (citations omitted)).*

[7] *November 15, 2017 McCleary Order at 37 ("At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate.").*

Carter McCleary's mother was the same age that his middle school sister Kelsey was when the McCleary and Venema families filed this suit.[8]

### 3. *Plaintiffs' Conclusion Regarding The Second Argument.*

As a matter of law, the judicial branch has an independent legal duty under Article IX, section 1 to uphold and protect Washington children's judicially enforceable, constitutional right to an amply funded education.

But as a matter of application, plaintiffs recognize that this Court may conclude that the appropriate process is for the judicial branch to swiftly examine school district experience with the State's *new* funding formulas at the trial court level, overseen with prompt appellate review when appropriate. If this Court does not retain jurisdiction as the Paramount Duty Brief requests, plaintiffs respectfully request that this Court's ruling make it unequivocally clear to trial courts that they must resolve such proceedings promptly, and assure Washington's over 1 million school children that this Court will grant prompt appellate review when appropriate. For as noted earlier, time truly is of the essence when it comes to any individual child's education.

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[8] *February 2010 McCleary Final Judgment at ¶¶13-16 (CP 2876).*

## III. CONCLUSION

A second grader doesn't get a second chance at second grade. Plaintiff Carter McCleary was a second grader at Chimacum Creek Elementary School when his parents filed this suit to stop the State's violation of their son's constitutional right to an amply funded education. But the State successfully dragged this suit on past Carter's graduation from high school last year.

Some things do properly move at glacial speed. For example, the 27 glaciers on Mount Rainier.[9] But other things should move swiftly. Like the judicial enforcement of a Washington child's paramount constitutional right to an amply funded K-12 education. Plaintiffs accordingly request that this Court's upcoming Order make it unequivocally clear to all trial courts in our State that factual disputes concerning the constitutionality of the State's current K-12 education funding scheme – including the funding shortfalls identified in the Paramount Duty Brief – must be expeditiously resolved.

As the court filings in this case have been noting for over 11 years now, justice delayed is justice denied.[10] Plaintiffs respectfully request that

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[9] *https://www.nps.gov/mora/learn/kidsyouth/glaciers-for-kids.htm*

[10] ***Plaintiffs' January 2007 Complaint*** *at ¶1 (CP 4 at lines 1 & 17-18) ("The simple fact remains...that justice delayed is justice denied");* ***Plaintiffs' August 2017 Post-Budget Filing*** *at 16-17 (quoting Martin Luther King's April 1961 letter from the Birmingham jail in response to the group of Alabama religious leaders who urged him to*

this Court decline to hand State officials – be they in the legislative, executive, or judicial branch – any excuses or rationalizations for more time-consuming delays.

RESPECTFULLY SUBMITTED this 10th day of May, 2018.

Foster Pepper PLLC

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Attorneys for Plaintiffs/Respondents McCleary Family, Venema Family, and Network for Excellence in Washington Schools (NEWS)

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*back off and be patient since civil rights progress was already being made in Alabama, explaining why he was not backing off and being patient: "Justice too long delayed is justice denied", and citing Asarco Inc. v. Dept. of Ecology, 145 Wn.2d 750, 786, 43 P.3d 471 (2002), amended on denial of reconsideration, 49 P.3d 128 (2002) ("Justice delayed is justice denied"); In re Hankerson, 149 Wn.2d 695, 705, 72 P.3d 703 (2003) ("Our obligation is to dispense justice. Justice delayed is often justice denied.") (J. Chambers, dissenting in part).*

## 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 May 10, 2018, I caused PLAINTIFF/RESPONDENTS' ANSWER TO THE AMICUS BRIEF OF WASHINGTON'S PARAMOUNT DUTY to be served as follows:

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*Amicus Washington's Paramount Duty*

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 10th day of May, 2018.

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

## FOSTER PEPPER PLLC

## May 10, 2018 - 4:19 PM

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