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State of Washington's Answer to Plaintiffs' Motion to Strike Appendices to State's Reply Brief

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ELECTRONICALLY FILED

NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

STATE OF WASHINGTON'S ANSWER TO
PLAINTIFFS' MOTION TO STRIKE APPENDICES
TO STATE'S REPLY BRIEF

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I. INTRODUCTION

The Court should deny Plaintiffs' motion, which asks the Court to strike the Appendix attached to State Of Washington's Reply and Answer to Amici Briefs. The Appendix contains information supporting the State's arguments made in specific reply to the Plaintiffs' brief filed on August 30, 2017, and in answer to the four amicus briefs filed that same day. Each document in the Appendix is publicly available online and was provided solely for the Court's convenience.

II. ARGUMENT

A. **The State Is Entitled to Reply to Arguments in Plaintiffs' Response Brief and to Answer Arguments Raised for the First Time in Amicus Briefs**

The Rules of Appellate Procedure allow a party filing a reply brief to respond to "issues in the brief to which the reply brief is directed." RAP 10.3(c); *Dykstra v. Skagit County*, 97 Wn. App. 670, 676, 985 P.2d 424 (1999). The Rules allow a party filing an answer to an amicus brief to respond to "new matters raised in the brief of amicus curiae." RAP 10.3(f); *Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 616 n.25, 90 P.3d 659 (2004).

In its opening brief, the State argued that new salary allocations are consistent with evidence-based research on market rates and comparable non-education employment positions. State of Washington's

Mem. Transmitting the Legislature's 2017 Post-Budget Report at 17 (July 31, 2017) (State's Br.). Plaintiffs, in their response, dismissed the work of the consultants cited by the State and argued that the new funding formula was not written to fund actual costs known to the State and as reflected in collective bargaining agreements. Pl./Resp'ts' 2017 Post-Budget Filing at 37 (Aug. 30, 2017) (Pls.' Br.).

In its reply brief, the State rebutted Plaintiffs' argument by citing data showing actual compensation costs reported by school districts to the Office of the Superintendent of Public Instruction (OSPI) and published on the OSPI website. State of Washington's Reply & Answer to Amici Brs. at 19 n.38 (Sept. 8, 2017) (State's Reply). School districts are required to report such data, and OSPI compiles and maintains the Reports in the regular course of business. WAC 392-117-020; WAC 392-121-021. The State is entitled to cite sources like these in rebutting Plaintiffs' assertions. The Reports contain many pages of tables, which can be difficult to navigate on a computer screen. Appendices A, B, and C are hard copies of the information that appears on the computer screen, provided solely with the intent of making it more convenient for the Court to access that information.

In its opening brief, the State recited dollar figures describing funding increases enacted by the 2017 legislative actions. State's Br. at 9, 25. In disclaiming the relevancy of those numbers, Plaintiffs argued that

school districts will receive less total funding after the enactment of the 2017 legislation. Pls.’ Br. at 11 n.41. As an example, Plaintiffs cited a document on the Tacoma Public Schools website. Pls.’ Br. at 12 n.41. Under RAP 10.3(c), the State is entitled to respond to that document and rebut the argument that school districts will receive less money.

Amicus Washington Paramount Duty (WPD) argued in numerous places that the 2017 legislation results in funding cuts and makes school districts in the State financially worse off. WPD Amicus Br. at 10-14. WPD cited the same Tacoma Public Schools document Plaintiffs cited, as well as a variety of media articles that mention different school districts. *Id.* WPD also claimed that Chimacum School District, the district attended by the McCleary children, will lose money under EHB 2242—again citing a media report. *Id.* at 19-20. Under RAP 10.3(f), the State is entitled to answer the claims raised in the WPD amicus brief and challenge the reliability of the evidence upon which WPD relied.

The State rebutted, as it was entitled to do, the arguments and “evidence” cited by Plaintiffs and WPD that some, most, or all school districts will be financially worse off because of the 2017 legislation and increases in state funding. As part of its response, the State cited three sets of public documents on public websites.

First, the State cited the Legislative Evaluation and Accountability Program (LEAP) website, which shows estimated impacts on all school districts prepared by the Office of Program Research for the House of Representatives and by the Senate Committee Services. State’s Reply at 16 n.30. Appendices F and G are hard copies of these electronic documents, provided for the Court’s convenience.

Second, the State cited a Multi-Year Budget Comparison Tool created and maintained by OSPI on its website. State’s Reply at 14 n.24, 16 n.32. The Tool is interactive and requires the user to provide some input to obtain data for specific school districts. The State cited the Tool to rebut the “evidence” provided by Plaintiffs and WPD concerning Tacoma Public Schools and Chimacum School District. Appendices D, H, I, and J are hard copies of the screens that appeared for the two school districts in the Tool.¹ They were provided as a courtesy to the Court, solely for the Court’s convenience.

Third, the State cited a report from OSPI listing excess levies by school district to point out a conflict between numbers in the Tacoma Public Schools document and publicly reported data maintained by

¹ OSPI created the Comparison Tool to assist school districts. Because the Tool is projecting revenues and expenditures, OSPI continues to update and refine the model as new data become available. The most recent update, as of this writing, was on October 3, 2017. The numbers reported in the online Tool therefore now differ slightly from those reported in the Appendix, but they still support the State’s arguments.

OSPI. Appendix E is a hard copy of that electronic document provided solely for the Court's convenience.

All of the documents in the Appendix to the State's Reply are courtesy copies of public documents cited in direct rebuttal to assertions made by Plaintiffs or Amici. Plaintiffs move only to strike the Appendix—not the State's arguments or citations to web-based documents in the brief itself—but their arguments for striking the Appendix rest on the false premise that the State was required to anticipate and respond in its opening brief to the specific arguments Plaintiff and Amici might make in their subsequent briefs. That is not the law. The Court should deny their motion to strike.

B. The Appendix Contains Only Publically Available Information Provided for the Court's Convenience

This Court's appellate review normally is limited to the record presented on appeal. Normally, therefore, the content of an Appendix is limited to materials contained in the record. RAP 10.3(a)(8).

But this case is not in the same posture as the "normal" appeal heard by the Court. The Court decided the appeal in its 2012 decision which, based on the record developed at trial in 2009, found the State was not meeting its obligation under the Washington Constitution, article IX, section 1. The Court then ordered the State to take actions to fulfill that constitutional

obligation and retained jurisdiction to ensure the State complied with its order. The Legislature has taken actions each year toward achieving ultimate compliance and now, with the enactment of Engrossed H.B. 2242 (Laws of 2017, 3d Sp. Sess., ch. 13), the State contends it has done so. The trial record from 2009 cannot provide the Court with current information it needs to assess legislation enacted in response to the 2012 decision. The Court itself recognized this fact when it required annual reports from the Legislature, beginning in 2012. *See Order, McCleary v. State*, No. 84362-7 (July 18, 2012).

At issue now is whether legislation enacted in 2017 provides state funding that is fully sufficient to support the State’s program of basic education. Plaintiffs and Amici argue the funding is insufficient, and they allege “facts” supporting their arguments. The State has sound reasons to dispute their alleged facts, but—as Plaintiffs themselves asserted²—the Court should require more than just the allegations of attorneys. Precisely for that reason, the State “showed its work”—the Appendix shows exactly the sources of the numbers, projections, and calculations the State used to rebut the allegations of underfunding made by Plaintiffs and Amici.

² Pls.’ Br. at 13.

Moreover, the State relied on information and projections prepared both by nonpartisan legislative staff and by the Superintendent of Public Instruction. That fact is significant.

Nonpartisan legislative staff are charged with developing information for legislators on the real world consequences of legislation—including how much revenue will be generated and projections of the actual spending that will result from proposed appropriations and allotments.³ Legislative staff produce projections and estimates, not guarantees. But because legislators rely on those projections and estimates, they provide a window into what the Legislature is intending in the way of state funding for basic education.

The Superintendent of Public Instruction provides independent projections and estimates based on separate analyses of legislation. As the Court knows well, the Superintendent has not been consistently allied with the Legislature in this case, and there is no reason to expect OSPI analyses to be biased in the Legislature's favor. The State cited the Superintendent's projections and estimates because they are among the most reliable numbers

³ See <http://leg.wa.gov/House/Committees/OPRGeneral/Pages/jobs.aspx> (general information about the Office of program Research for the House of Representatives); <http://leg.wa.gov/SENATE/COMMITTEES/Pages/default.aspx> (general information about Senate Committee Services).

currently available, and because they are independent of the Legislature. OSPI's projections are likely to continue to be refined as time goes on.

Finally, it should be noted that the Appendix contains only publicly available information provided for the Court's convenience. Each page of the Appendix can be separately accessed by the Court (or any party) on publicly available websites. If the Appendix were stricken, as Plaintiffs request, the information cited in the States' reply brief would still be available to Plaintiffs, Amici, and the Court—albeit with substantially more inconvenience to all concerned.

C. Plaintiffs' Other Arguments Should Be Disregarded

Plaintiffs make two additional arguments for striking the Appendix attached to the State's Reply. First, they contend their motion is justified because the State filed a motion to strike in 2010, an objection in 2011, and an objection in 2017. Pls.' Mot. to Strike Apps. to the State's Reply Br. at 2-3, 6-9. Second, they appear to fault the Court for having accepted some amicus briefs over the years (including amicus briefs to which Plaintiffs themselves did not object). *Id.* at 3-6.

The petition for review in this appeal was filed in March 2010. In the seven and a half years since the petition was filed, Plaintiffs and Amici have submitted nearly 100 motions, briefs, and other filings. The State has objected or moved to strike only three times, and it did so only in a good

faith response to a filing or attempted filing that appeared to be impermissible under case law or the Rules of Appellate Procedure. No objection or motion was filed in an attempt to harass or unfairly disadvantage another party, or for any other improper purpose.

Plaintiffs' motion should be judged on its merit, not on unrelated filings in prior years.

III. CONCLUSION

Plaintiffs' Motion to Strike should be denied.

RESPECTFULLY SUBMITTED this 6th day of October 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the State Of Washington's Answer To Plaintiffs' Motion To Strike Appendices To The State's Reply Brief, via electronic mail, upon the following:

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

DATED this 6th day of October 2017, at Olympia, Washington.

s/ Wendy R Scharber

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