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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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A. SUMMARY OF ARGUMENT

The State has again failed in its constitutional duties under Article 9, § 1. Instead of the oft-promised remedy of fully funding of the reforms of ESSB 2261 (2009), the State effectively scrapped that plan. Behind closed doors, last minute, without public comment, it created something new, in such haste and secrecy that many Legislators simply did not have time to read the 600-plus page document prior to voting.¹

The State now asks the Court to apply a “presumption of constitutionality” to the result - and make Plaintiffs’ disprove it. Further, the State claims, it is “speculation” to discuss the constitutionality of the State’s bill, EHB 2242 (2017), and all of the prior proceedings, including the trial, are now effectively “moot.”²

This Court should see through these efforts to confuse. The State’s own submissions establish that EHB 2242 does not and will not halt the State’s continuing violations of Article 9, § 1, by September 1, 2018, as required. Further, this Court has its own independent duties under Article 9, § 1, separate from its usual Article IV role. This Court’s continuing

¹EHB 2242 was negotiated during a third special session, days before an impending state government shutdown, which left “little time for independent analysis of a deal that was negotiated behind closed doors.” Joseph O’Sullivan & Neal Morton, *New Washington State Budget Would Provide \$7.3B More to Public Schools Over Four Years*, The Seattle Times, June 29, 2017, available at <http://www.seattletimes.com/seattle-news/politics/lawmakers-and-the-public-will-get-little-time-to-review-budget-draft-before-vote/>

²See, e.g., 2017 State’s Memorandum (July 31, 2017) (“Memo”) at 1, 26, 31-33.

deference does not fully honor that role and depends upon a theory of “separation of powers” which reflects the federal system rather than the system set up in our State. The State has now presented a plan which fails both the deadline and the duties it has long promised to meet. This Court will fail its own independent duties if it does not impose immediate and significant sanctions to compel compliance.

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 granted WPD’s motion to file this brief.

C. ARGUMENT

THE STATE HAS FAILED TO PURGE ITS CONTEMPT
OR REMEDY ITS ONGOING VIOLATIONS OF THE
ARTICLE 9, § 1, RIGHTS OF 1 MILLION CHILDREN

The State declares that it has “achieved compliance,” this Court has no further role, and the entire case should be dismissed. *See, e.g.*, State’s Memorandum (July 31, 2017) (“Memo”) at 1, 26, 31-33. It further argues that this Court should apply a “presumption of constitutionality” to EHB 2242 and make Plaintiffs’ bear the burden to disprove it. Memo at 31-33. This Court should reject each of these claims in turn.

At the outset, the State suggests this Court should apply a

presumption that EHB 2242 is constitutional and further should force the burden of “disproof” onto Plaintiffs’ backs. Memo at 31. The State urges the Court to find all prior proceedings essentially irrelevant and to apply the presumption in order to honor “the demarcation between the function and authority of the legislative and judicial branches[.]” Memo at 29-30.

There is no question that this Court applies such a presumption as a matter of course in a direct appeal or statutory challenge case. *See, e.g., Tunstall v. Bergeson*, 141 Wn.2d 201, 233, 5 P.3d 691 (2000). It does so because, without evidence to the contrary, it will assume that, as a “co-equal branch of government that is sworn to uphold the constitution,” the Legislature has already “considered the constitutionality of its enactments.” 141 Wn.2d at 219.

This is not that kind of case. This case is before the Court on *continuing jurisdiction* to ensure a remedy occurs. The State has already lost its appeal. *See McCleary v. State*, 173 Wn.2d 477, 269 P.3d 277 (2012). This Court has already found that “[s]ubstantial evidence at trial” supported the trial court’s findings that the State has “consistently underfunded” basic education, in violation of not only the State’s duties under Article 9, § 1, but also the constitutional rights of more than one million public school children in Washington state. *Id.* There is continuing jurisdiction to ensure that the State actually performs its

promised remedy, to avoid having yet another suit. The State's Report and Memo are supposed to establish its compliance. The State mistakes the procedure in suggesting otherwise.

Further, the cases upon which the State relies, such as *Hoppe v. State*, 78 Wn.2d 164, 469 P.2d 909 (1970), involve either a different Article of the constitution or do not discuss or the Court's independent role under Article 9, § 1. For example, in *Hoppe*, taxpayers sought review of a grant of summary judgment on whether a law giving legislators a *per diem* violated Article 28, § 1, which does not refer to duties of the "State." 78 Wn.2d at 169. The discussion of judicial restraint and legislative authority in that case properly reflected that clause, but Article 9, § 1, as this Court has noted, is different - and includes duties for the Court itself. *Hoppe*, 78 Wn.2d at 169; see *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 510-13, 585 P.2d 71 (1978). *Tunstall, supra*, involved Article 9 but mostly addressed Article 9, § 2, a different clause than here. *Id.* In addition, in *Tunstall*, the Court did not discuss or rely on its independent duties under the clause, and further explicitly **chose** to "exercise judicial restraint," given the record before it. *Id.* This case is in a different procedural posture and this Court has not just general duties under Article 4 but special duties under Article 9, § 1. The burden should remain with the State to prove that its new plan to redress its constitutional violations

is sufficient in this case.

- a. The State has failed to remedy its ongoing violations of Article 9, § 1

The Constitution requires the State, as its **paramount duty**, to **amply fund** the **actual costs** of basic education for **every child** in Washington State from **regular and dependable tax** sources. *McCleary*, 173 Wn.2d at 484-85. Even cursory review of how this Court has interpreted these bolded terms shows that EHB 2242 falls far short.

- 1) The State did not treat its Article 9, § 1, duties as “Paramount”

“Paramount” means “first and highest priority.” *McCleary*, 173 Wn.2d at 520. This means the State’s “Paramount Duty” must be fulfilled “before any other State program or operation.” Order (Aug. 13, 2015), at 2. In 2017, the State yet again failed to make its Article 9, § 1, duties “Paramount” by kicking those duties down the road while making financial priority for other goals.

Since 2009, the State has promised to fund the reforms it set forth that year in ESHB 2261 (2009). *See McCleary*, 173 Wn.2d at 545; State’s Brief (May 18, 2016) at 16-21. The State set its own deadline, giving itself nearly 10 years to comply. *See* Laws of 2009, ch. 548, § 114(5)(b)(iii) (ESHB 2261); Laws of 2010, ch. 236, §§ 2(4)(b), 4(1) (SHB 2776). That date has not changed and remains September 1, 2018, for full

implementation of any reforms. *See, e.g.*, State’s Brief (Aug. 22, 2016) at 6-7; Order (Oct. 6, 2016), at 12. Indeed, this Court has been firm that “the remaining details of that program, including funding sources and the necessary appropriations for the 2017-19 biennium, are to be in place by final adjournment of the 2017 legislative session.” Order (Oct. 6, 2016), at 13.

Engrossed House Bill (EHB) 2242 (Laws of 2017, 3d Sp. Sess., ch. 13) does not comply. As the State itself concedes, with EHB 2242, the State pushed back implementation of “full” funding of its Article 9, § 1 duties by *years*. *See e.g.*, Legislature’s Report (July 31, 2017), at 11, 20-22, 39; State’s Brief (July 31, 2017), at 1, 2, 14; *see* Engrossed House Bill (EHB) 2242 (Laws of 2017, 3d Sp. Sess., ch. 13), at §101 (8) (increased salary allocations not complete until 2019-20); §103 (no increase in salaries for certified instructional staff until 2019-20). The State itself admits that it has not appropriated sufficient funds to ensure full implementation by September 1, 2018, as required. *See, e.g.*, 2017 Report of the Legislature, at 7, 10, 13, 27, 31; 2107 State’s Memo at 1, 2, 9, 14. However, it urges the Court to find that it has “done all it can” by peppering EHB 2242 with “[f]unding commitments for the next biennium.” 2017 State’s Memo, at 33. The State also avers that it could do no further as it cannot “bind” a future Legislature to act. 2017 State’s

Memo, at 33-34.

Of course, had the State provided full funding this year as required, there would be no need to bind anyone in the future, as the task would have been done. Further, this Court has seen such promises—and such claims—before. *See e.g.*, State’s Brief (May 18, 2016), at 21-22 (arguing Court should reject idea Legislature will not follow through on E2SSB 6195; State’s Brief (Aug. 22, 2016) at 38-41; State’s Brief (July 27, 2015) at 21-22; State’s Brief (Aug. 25, 2014) at 17. Those promises did not bear timely fruit.

It is also well-settled that language such that relied on by the State here as ensuring future action does no such thing. *See State ex rel. Blakeslee v. Clausen*, 85 Wash. 260, 272, 148 P. 28 (1915). The State has not explained why *this* promise in EHB 2242 is any more enforceable or real than those it has made and not met in the past. *Compare* ESSB 2261, *with* EHB 2242; *see generally*, Memo.

Notably, it is not as if this Court rushed the issue or the State was somehow unaware that 2017 would be its last opportunity to comply. State’s Brief (Aug. 22, 2016); *see* Order (July 14, 2016); Order (Aug. 13, 2015) (time is “too short” and 2018 “less than a full budget cycle away”).

While it was unable to find funding for its “Paramount” duty, however, the State was somehow able to find funding for other goals.

And in SSB 5977 (2017), it **cut** state income which could have been used to satisfy its Article 9, § 1 duties.³ *See* Laws of 2017, ch. 37 (SSB 5977). According to analysis by the Office of Governor Jay Inslee, one-fifth of one of those tax cuts would have gone to out-of-state oil companies, even though EHB 2242, which was voted on and passed within 24 hours of the business tax breaks, raised property taxes on some middle-class families. Jim Bruner & Joseph O’Sullivan, *Gov. Inslee Vetoes Tax Cut for Manufacturers Passed ‘In the Dead of Night’*, *The Seattle Times*, July 7, 2017.⁴ Moreover, the tax cut’s “value would have grown to about \$60 million a year by 2022 and \$86 million annually by 2027.” *Id.*

This cut-taxes-while-refusing-to-amply-fund-education plan is not

³Those newly enacted tax cuts and extensions include:

- (1) increasing the statewide tax credit limit for contributions to the Washington Main Street program to \$2.5 million a year;
- (2) lowering the business and occupation (B&O) tax rate that applied to manufacturers by 40 percent;
- (3) eliminating the B&O tax for agricultural fertilizer and seed products;
- (4) lowering the B&O tax rate for solar silicon manufacturing and wholesaling;
- (5) lowering the B&O tax rate on semiconductor materials manufacturing;
- (6) exempting conversion of coal-fired electric plants from sales and use taxes;
- (7) cutting taxes for utilities that provide electricity, natural gas, or manufactured gas to a silicon smelter;
- (8) deferring sales and use taxes (on buildings, machinery, equipment, and labor and services for the planning, construction, and installation) for up to two manufacturing facilities per company;
- (9) deferring sales and use taxes for historical auto museums for 5 years;
- (10) cutting property taxes for land removed from current use due to natural disasters;
- (11) cutting taxes for the motion picture and film industries;
- (12) cutting the sales tax for martial arts training; and
- (13) cutting taxes for certain colleges and universities.

⁴ Available at <http://www.seattletimes.com/seattle-news/politics/gov-inslee-vetoes-tax-cut-for-manufacturers-passed-in-the-dead-of-night/>.

new to the 2017 legislative session. See Michael Kranish, *A Question of Tax Cuts or Education*, Boston Globe, Nov. 21, 2015⁵ (noting “Washington has long cited a paucity of tax revenues” while giving away “more money in corporate tax breaks than any other state aside from New York, which has nearly three times the population”).

Notably, after the Governor vetoed two of the tax breaks, a Senate Republican threatened that—in retaliation—no capital budget would pass. Bruner & O’Sullivan, *Gov. Insee Vetoes Tax Cut*, *supra*. To date, the capital budget is stalled. See Hana Kim, *School Construction Projects Stalled or Delayed Across Washington*, Q13 Fox, July 21, 2017.⁶

Thus, the State’s lack of commitment to its Article 9, § 1 duties was again laid bare. Capital investment is an essential part of this Court’s Orders regarding the State’s proposed “fix.” Order (Aug. 13, 2015), at 6; see also *McCleary*, 173 Wn.2d at 532. The 2017 capital budget had more than **\$1 billion** which was “supposed to go to school construction and renovations.” See Kim, *School Construction*, *supra*. Without that budget, “[a]t least 11 projects statewide are grounded indefinitely.” *Id.* The 2017 Legislature failed to make its Article 9, § 1 duties “Paramount” and has

⁵ Available at <https://www.bostonglobe.com/news/nation/2015/11/21/mother-battle-exposed-inequities-are-injustices-state-held-contempt-court-flowing-corporations-save-their-tax-breaks-and-promised-education-dollars/SwEL04E3E7KYe6HaUvUiZP/story.html>

⁶ Available at <http://q13fox.com/2017/07/21/school-construction-projects-stalled-or-delayed-across-washington/>.

yet again failed to provide a meaningful, fully-funded plan.

2) The provisions were not “ample”

This Court has defined “ample” for the purposes of Article 9, § 1, as “meaning fully, sufficient, and considerably more than just adequate.” *McCleary*, 173 Wn.2d at 484. EHB 2242 fails to provide even “adequate,” let alone “ample” provisions for public schools. Despite the haste with which the bill was crafted and its incredible length, numerous school districts have been able to conduct analysis which has caused them to raise deep concerns that EHB 2242 will actually **cut** the already inadequate funding for their public schools.

For example, Tacoma Public School District’s “conservative analysis . . . shows that, even if Tacoma voters approve the full levy in February, Tacoma will lose \$151 per student beginning in the 2018-2019 school year, \$121 per student in 2019-2020 and \$154 per student in 2020-2021.” Tacoma Public Schools, *Statement on Washington State Legislature's 2017 Action on Tacoma Public Schools Budget Outlook*, Aug. 15, 2017;⁷ see also Melissa Santos, *State Officials Think They Fixed School Funding. Tacoma, Olympia Area Districts Say it’s Not True*, The News Tribune, Aug. 18, 2017.⁸ After their analysis, Tacoma Public

⁷ Available at <https://www.tacomaschools.org/news/Pages/budget-outlook.aspx>.

⁸ Available at <http://www.thenewstribune.com/news/politics-government/article167895412.html>.

Schools officials came to a stark conclusion: the district is now **worse** off financially under EHB 2242 and in fact would have had “a better financial future” if the State had not acted at all. *Id.*

For Washington’s largest school district with more than 54,000 public school students enrolled, officials say a slight increase in the first and second years per student (\$188 and \$99 per year, respectively) will then level off in 2020, when the funds will go down an estimated \$92 per year. Hana Kim, *Seattle Public Schools Says It Will Be Worse Off Under State’s New Education Plan*, Q13 Fox, Aug. 7, 2017.⁹ After being underfunded for so long, Seattle Public Schools will make little if any progress and the analysis of the district indicates that EHB 2242 “does not come close to a fix.” Ana Sofia Knauf, *Seattle Public Schools Officials “Deeply Troubled” by State Legislature’s Education Funding Plan*, The Stranger, Aug. 22, 2017 (quoting Leslie Harris, Vice President, Seattle Public School Board).¹⁰

Smaller districts, too, will see cuts. Orcas Island School District officials concluded that, “[d]espite promises to the contrary, this new plan falls short of fully funding [our] public schools.” Orcas Island School District, *What does the new state budget mean for Orcas Island public*

⁹ Available at <http://q13fox.com/2017/08/07/seattle-public-schools-say-they-will-be-worse-off-in-several-years-than-they-are-now-under-states-new-education-plan/>.

¹⁰ Available at <http://www.thestranger.com/slog/2017/08/22/25366677/seattle-public-schools-officials-deeply-troubled-by-state-legislatures-education-funding-plan>.

schools?, The Islands' Sounder, Aug. 7, 2017.¹¹

Teacher retention and hiring is also affected by EHB 2242. The Longview Public Schools superintendent, Dan Zorn, is concerned that under EHB 2242, his district and others in Cowlitz County will not be able to hire teachers to fill their educator vacancies, because a nearby district will be allowed to pay their teachers much more. Molly Solomon, KUOW, *Superintendent: 'Rich Getting Richer' Under Washington School Funding Plan*, Aug. 22, 2017.¹² The State has not explained how cutting funds from many already constitutionally underfunded public schools can be deemed “ample” funding. *See generally* Memo.

3) EHB 2242 funds less than actual costs

“Ample” provision for education under Article 9, § 1, requires the State to use funding formulas which support the **actual costs** “of meeting the education rights of Washington students.” Order (Jan. 9, 2014), at 4 (emphasis added).

Put another way, this Court has said, “[i]f the State’s funding formulas provide only a portion of what it actually costs a school to pay its teachers, get kids to school, and keep the lights on, then the legislature cannot maintain that it is fully funding basic education through its funding

¹¹ Available at <http://www.islandssouder.com/news/what-does-the-new-state-budget-mean-for-orcas-island-public-schools/>.

¹² Available at <http://kuow.org/post/superintendent-rich-getting-richer-under-washington-school-funding-plan>.

formulas.” *McCleary*, 173 Wn.2d at 532.

The funding formulas in EHB 2242 fall far short. Again, school districts have analyzed the bill and concluded that the formulas the State is now using will result in serious deficits - and thus *less* ability to provide a basic education than is provided *now*. See Editorial, *Has Legislature Solved McCleary? Not So Fast*, Seattle Times, Aug. 11, 2017.

Special education is basic education. See *McCleary*, 173 Wn.2d at 506. The Seattle Times summarized the expected shortages in special education that just a few districts are now facing due to EHB 2242:

In Spokane, school budget officials estimate state dollars will still be between \$2 million and \$4 million a year short for covering special education. In Yakima, the district expects to be more than \$5 million short. Seattle officials expect a gap of more than \$50 million.

Has Legislature Solved McCleary? supra. Seattle Public Schools, the state’s largest district with more than 54,000 kids, has explained the numbers under EHB 2242 as follows:

In the upcoming school year, the state will provide \$46.2 million, while the district will use its levy dollars to cover another \$71.4 million, for a total of \$117.6 million. In 2019-20, after the new levy restrictions kick in [under EHB 2242], the state will provide \$68 million for special education, but the district estimates special education costs to total \$121.5 million. The district doesn’t know where it will find the remaining \$53.5 million, given that it can’t raise the money locally.

Neal Morton, *Despite What State Lawmakers Say, Seattle School Officials Say the New Budget Falls Short*, Seattle Times, Aug. 7, 2017, quoting

Larry Nyland, Superintendent, Seattle Public Schools.¹³ Thus, the State’s portion of funding for special education under EHB 2242 does not fund the actual costs of the basic education districts are mandated to provide, even while removing the local levy option to fill in those holes.

4) Not funding for every child

The State’s constitutional obligations under Article 9, § 1, require it “to provide an opportunity for **every** child to gain the knowledge and skills outlined in *Seattle School District*, ESHB 1209, and the EALRs.” *McCleary*, 173 Wn.2d at 546. By failing to provide sufficient funds to cover the actual costs of basic education, however, EHB 2242 fails to provide such opportunity. *See infra*. The State’s shortfalls in basic education components—including special education, English Language Learners, and highly capable learners—are especially troubling because of a historical opportunity gap for children in poverty and children of color. 2016 Annual Report from the Educational Opportunity Gap Oversight and Accountability Committee, at 6 (“[t]he opportunity gap in Washington State is persistent, pervasive . . . a consistent 20–30 percentage point gap in student achievement”) (citation omitted).¹⁴

Likewise, schools for children in certain geographical areas are not

¹³ Available at <http://www.seattletimes.com/seattle-news/education/despite-what-state-lawmakers-say-seattle-school-officials-say-the-new-budget-falls-short/>.

¹⁴ Available at <http://www.k12.wa.us/Workgroups/EOGOAC/pubdocs/EOGOAC2016AnnualReport.pdf>

amply funded. Yakima School District is “scrambling” to figure out how to retain teachers under EHB 2242 when the school district next door, in West Valley, will be able to pay their teacher 6% more than Yakima is able to pay. *Not So Fast, supra*. EHB 2242 fails to make provision for every child as required.

5) No “Regular and Dependable” Tax Sources

The requirement that the State make “ample” provision for funding basic education “includes the requirement that funding ‘be accomplished by means of dependable and regular tax sources.’” *McCleary*, 173 Wn.2d at 527 (quoting *Seattle Sch. Dist. No. 1, supra*). Again, EHB 2242 falls short. With it, the Legislature suspended the one percent revenue growth limit on the state property tax (codified at RCW 84.55)—but only for calendar years 2018-2021. EHB 2242 § 301(2); *see also* Legislature’s Report (July 31, 2017) at 75. That cap will be reinstated and state property tax so limited once again in calendar year 2022. EHB 2242 § 301(2); *see also* Legislature’s Repot (July 31, 2017) at 75.

Thus, EHB 2242 as designed by the Legislature does not rely on dependable and regular tax sources to amply fund public schools because the Legislature left the property tax limitation in law for automatic reinstatement in 2022.

b. This Court should not give further deference to the State in light of its years of failing children

This Court is the final arbiter of the Constitution, but in cases involving Article 9, §1, it also has an additional role. *McCleary*, 173 Wn.2d at 485. The Paramount Duty clause creates responsibilities for the “State” - not just the Legislature but this Court as well. *See Seattle School District*, 90 Wn.2d at 510-13. In addition to its Article IV role in determining whether the State has met its constitutional duties, this Court itself has an independent role under Article 9, § 1, to ensure that the State as a whole meets its duties under that clause and makes “ample provision for the education of all children.” *McCleary*, 173 Wn.2d at 541.

Thus far, the Court has been extremely deferential to the State. The Court has recognized that the judiciary has the “primary responsibility” for interpreting the constitutionality of the laws but, in *Seattle School District*, deferred to ongoing legislative reforms. 90 Wn.2d at 538-39. In 2012, the Court noted that this deference led to 30 years of education that “fell short of the promise” of the Paramount Duty Clause. *McCleary*, 173 Wn.2d at 541. The Court then retained jurisdiction in this case, noting that it was learning from experience not to “stand on the sidelines and hope the State meets its constitutional mandate to amply fund education.” *Id.*

The Court’s 2012 decision did not really discuss separation of

powers at length, although it mentioned “the delicate balancing of powers and responsibilities among coordinate branches of government.” *Id.* at 540-41. The Washington Constitution does not have a specific “separation of powers” clause but the Court has presumed one with the purpose to “ensure liberty by defusing and limiting power.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 503-504, 198 P.3d 1021 (2009). But contrary to the federal “separation of powers” doctrine, in this state, the branches are not “hermetically sealed” and may even have duties which seem to overlap. *Id.*; see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991). For example, both the Legislature and the Judiciary have some authority over rules of evidence, so this Court will work to harmonize any conflicts in a way which honors that joint authority. See *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), *cert. denied*, 549 U.S. 1254 (2007).

By its nature, however, the separation of powers doctrine is meant to reflect the structure and balance of powers created by the framers of the relevant constitution. See *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612, 57 S. Ct. 549, 81 L. Ed. 2d 825 (1937). In this state, that means a relatively weak Legislature. See Lebbens J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 WASH. HIST. L. Q. 227, 229 (1913). The delegates to the 1889 Convention were well aware of the

government corruption of other Legislatures and in the Territory and had great fear of strong legislative power. Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government and the Washington State Constitution*, 67 WASH. L. REV. 669, 670 (1992). This distrust for the legislative branch was reflected in our constitution and several others, and it led to lesser power being given to that branch than in the federal system and many earlier constitutions. Hugh D. Spitzer, *The Past and Present Populist State*, in *The Constitutionalism of American States* (2008 ed.), at 771-72.

As a result, many traditional legislative powers were reserved for what some call Washington's "fourth branch," including initiative, referendum and recall amendments. Snure, at 672. Another major difference is that Washington's judicial branch is far stronger than the federal branch, because the federal courts are not courts of general jurisdiction and are limited in what they can do. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986).

This Court should rely on its independent duties under Article 9, § 1, not just its duties under Article IV. It should interpret separation of powers to reflect the unique nature of our state constitution. Greater than just its role as last arbiter of what is constitutional, here the Court

shoulders another - to ensure the Paramount Duty of the state is honored. *See e.g.*, Kathryn Russell Selk & Summer Stinson, *McCleary: Myths and Realities about Separation of Powers and Duties Under Washington's Unique Constitution*, 3 WASH. EDUCATION LAW & POLICY REV. 33, 47-52, 59-67 (2017).¹⁵

c. The State is in continuing contempt and further sanctions must be imposed

Despite this Court's orders and the accumulation of more than 74 million dollars in fines, the Legislature did not even include partial payment in the State's supplemental budget. *See generally* Legislature's Report (June 31, 2017). Thus, the Legislature continues to treat this Court—an equal branch—with far less respect than it is demanding in return. But the children of this state have waited long enough.

Carter McCleary was a seven-year-old second grader when his parents and others filed this lawsuit over a decade ago. Carter McCleary, *It's Not Right That My Calculus Textbook Is From 1994*, Seattle Times, Jan. 20, 2017.¹⁶ He has just graduated from high school. *Id.* He also just learned that his school district—Chimacum—stands to lose \$1 million from already constitutionally insufficient funding in 2019 under EHB

¹⁵ Available at <https://uwedlaw.files.wordpress.com/2017/04/washington-journal-of-education-law-and-policy-review-2017.pdf>.

¹⁶ Available at www.seattletimes.com/opinion/its-not-right-that-my-calculus-textbook-is-from-1994/.

2242. Hana Kim, *McCleary Family Fighting State for Education Funding Says Latest legislative Plan Falls Short*, Q13 Fox, Aug. 10, 2017.¹⁷ Thus all his years as a Plaintiff, proving his case in trial court and the affirmance by this Court have been worse than useless - under the bill the State urges this Court to find sufficient in the lawsuit bearing Carter's name.

It is past time for the State to comply with this Court's lawful rulings in this case. WPD asks this Court to issue an order stating that if the State does not amply public schools—from regular and dependable tax sources—to cover the actual costs of basic education by March 15, 2018—with ample funding to be fully implemented by September 1, 2018—the Court will suspend the State's over 700 legislative-enacted tax exemption statutes on April 1, 2018. Plaintiffs in this case have argued for this sanction. Plaintiff's June 17, 2016 Answer Brief at 14-16; *see also* Plaintiffs' Motion for a Timely 2016 Briefing Schedule at 13-15 (Nov. 18, 2015); Plaintiffs' 2015 Post-Budget Filing at 47-48. Likewise, a member of this Court discussed invalidating the approximately \$30 billion a biennium included in the over 600 exemption statutes. *See* Sept. 3, 2014 Show Cause Hearing, at minutes 43:39-45:29¹⁸ (Johnson, J., A.C.J.)

¹⁷ Available at <http://q13fox.com/2017/08/10/the-mccleary-family-fighting-the-state-for-education-funding-says-latest-legislative-plan-is-hard-to-believe/>.

¹⁸ Available at http://www.tvw.org/index.php?option=com_tvoplayer&eventID=2014090001/

(noting this possible option).¹⁹ This sanction would compel the State, and specifically the Legislature, to comply with this Court's orders and amply fund basic education. WPD submits, however, that any funding solution must safeguard other crucial state services and programs. *See* Educ. Funding Task Force Response, Washington's Paramount Duty (July 31, 2016).²⁰

The State is still in contempt - and worse. After years of promising to meet the September 1, 2018, full implementation date and complaining of the Court's continuing jurisdiction, we have reached the point where Plaintiffs' claims are clearly prescient. Waiting for compliance led to the same result that it did more than 30 years ago. This Court runs the serious risk of violating its own independent duties to the children of this State if it does not impose sanctions serious enough to compel a result.

¹⁹*See* WSDOR, *Tax Exemption Study* (2016) at 1-5 (2016), available at http://dor.wa.gov/docs/reports/2016/Tax_Exemption_Study_2016/2016_Tax_Exemption_Study_Entire_Report.pdf.

²⁰Available at: <http://leg.wa.gov/JointCommittees/EFTF/Documents/ResponsesForProposedSolutions.pdf>. WPD advocates for such measures, which could include enacting a capital gains tax or seeking to collect on the never-repealed 1935 personal net income tax somehow. *See* Hugh Spitzer, *A Washington State Income Tax—Again?* 16 U. of Puget Sound L. Rev. 515, 554 n.266 (1993).

D. CONCLUSION

The State is still in contempt and now has finally failed to comply with the remedy long promised. This Court should so hold and should increase sanctions to ensure compliance.

DATED this 30th day of August, 2017.

Respectfully submitted,

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