8-30-2017

Plaintiff/Respondents' 2017 Post-Budget Filing

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.

PLAINTIFF/RESPONDENTS' 2017 POST-BUDGET FILING

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I. INTRODUCTION

The 2017 legislature made real and measureable progress moving the State towards the September 1, 2018 full compliance finish line. The type of progress this Court had ordered ***prior*** legislatures to make.

But this Court ordered the 2017 legislature to cross that finish line by enacting a biennium budget that finally achieves full constitutional compliance by the September 1, 2018 deadline. And lawmakers know they cannot declare "full funding" under Washington law unless their funding formulas amply fund the actual cost to school districts of fully implementing the State's basic education program. The State nonetheless declares "full funding" without even alleging (never mind demonstrating) that its funding formulas amply fund its school districts' actual costs.

Plaintiffs respectfully request that this Court uphold the law.

II. LAWMAKERS KNOW THE LAW

Ordinary citizens are deemed to know the law.[1]

Lawmakers should not be held to a lower standard.[2]

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[1] *E.g., Maynard Investment Co. v. McCann, 77 Wn.2d 616, 624, 465 P.2d 657 (1970) ("every person is presumed to know the law and is bound thereby"). This Court has accordingly held that every "sane person" is presumed to know the law. State v. Spence, 81 Wn.2d 788, 792, 506 P.2d 293 (1973), rev'd on other grounds, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Thus in Spence, this Court upheld the conviction of a student who did not know he was violating the law by affixing a peace sign to an American flag. 81 Wn.2d at 790-791. This Court rejected the student's defense that he was not aware of our State's "flag alteration" statute because "all sane persons are presumed to know the law and are in law held responsible for their free and voluntary acts and deeds." Id.*

A. *Constitutional Right*: An Amply Funded Education.

This Court's January 2012 ruling was unequivocal:

> Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education.[3]

This Court emphasized that unlike rights framed in the negative to restrict government action, a ***positive*** constitutional right requires government action.[4] And it reiterated an amply funded education is each Washington child's ***paramount*** right under our State Constitution.[5]

Lawmakers know this "constitutional right" ruling.[6]

B. "All": *Every* Washington Child Has This Constitutional Right.

This Court's January 2012 ruling reiterated that "all children" means all children: "each and every child"; "No child is excluded."[7]

Lawmakers know this "all" ruling.[8]

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[2] *Accord, e.g., Wynn v. Earin, 163 Wn.2d 361, 371, 181 P.3d 806 (2008) ("The legislature is presumed to know the law in the area in which it is legislating").*

[3] *McCleary, 173 Wn.2d at 483 (underline added); accord, August 2015 McCleary Order at 2 ("In McCleary, 173 Wn.2d at 520, we held that the State's 'paramount duty' under article IX, section 1 ... not only obligates the State to act in amply providing for public education, it also confers upon the children of the state the right to be amply provided with an education. Seattle Sch. Dist. 1 v. State, 90 Wn.2d 476, 513....") (underline added); McCleary Final Judgment at CP 2903, ¶148 (quoting that Seattle School District ruling).*

[4] *McCleary, 173 Wn.2d at 518-519.*

[5] *Seattle School District, 90 Wn.2d at 510-513; McCleary, 173 Wn.2d at 514-522; McCleary Final Judgment at CP 2903, ¶¶147-149.*

[6] *This ruling echoed prior Article IX, section 1 court rulings against the State these past 40 years, Seattle School District, 90 Wn.2d at 482, 511-512 (1978); February 2010 McCleary Final Judgment at CP 2903, ¶¶147-149.*

[7] *McCleary, 173 Wn.2d at 520 (underlines added); additional background at Plaintiffs' September 2010 Brief With Errata at 32-35.*

C. "Paramount Duty": The State *Must* Comply Before Fundng *Any* Other State Program Or Operation.

This Court's January 2012 ruling reiterated that "duty" means duty and "paramount" means paramount: "the State must amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations."[9]

Lawmakers know this "paramount duty" ruling.[10]

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[8] *For example, the McCleary Final Judgment declared in February 2010 that "the word 'all' in Article IX, §1 means what it says.... It encompasses each and every child since each will be a member of, and participant in, this State's democracy, society, and economy. Article IX, §1 accordingly requires the Respondent State to amply provide for the education of every child residing in our State – not just those children who enjoy the advantage of being born into one of the subsets of our State's children who are more privileged, more politically popular, or more easy to teach." CP 2908, ¶168.*

[9] *McCleary, 173 Wn.2d at 520 (underline added); August 2015 McCleary Order at 2 ("In McCleary, 173 Wn.2d at 520, we held that the State's 'paramount duty' under article IX, section 1 is of first and highest priority, requiring fulfillment before any other State program or operation"). This mandate is no surprise to State budget officials, for as the Director of the State's Office of Financial Management (OFM) testified at trial, K-12 funding must come first before State programs for other matters such as public safety, human services, and health care. RP 3561:2-15.*

[10] *For example, the February 2010 McCleary Final Judgment declared that " 'Paramount' is not a mere synonym of 'important.' Rather, it means superior in rank above all others, chief, preeminent, supreme, and in fact dominant.... When a thing is said to be paramount, it can only mean that it is more important than all other things concerned." CP 2906, ¶159 (quoting Seattle School District v. State, 90 Wn.2d at 511 (1978)) (underlines added). The McCleary Final Judgment also reiterated to State officials this constitutional mandate's application in this case: "During the trial, the State cross-examined many of the Petitioners' education witnesses as to whether they would prioritize education at the expense of other worthy causes and services, such as health care, nutrition services, and transportation needs. But this is not the prerogative of these witnesses – or even of the Legislature – that decision has been mandated by our State Constitution." February 2010 Final Judgment at CP 2906, ¶160.*

D. "Ample": *Considerably More* Than Just Adequate or Merely Sufficient.

This Court's January 2012 ruling reiterated that "ample" means "considerably more than just adequate or merely sufficient."[11]

Lawmakers know this "ample" ruling.[12]

E. Accruing Monetary Penalty Of Over $80 Million.

This Court's August 13, 2015 Order imposed a daily penalty in the liquidated sum of $100,000 per day "effective immediately", and "payable daily to be held in a segregated account".[13] As of today (August 30, 2017), that daily sum has compounded to over $80 million.[14] Lawmakers know this long-accruing obligation.

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[11] *McCleary, 173 Wn.2d at 528 (ample in Article IX, section 1 means "considerably more than just adequate or merely sufficient") & 484 (ample in Article IX, section 1 means "fully sufficient, and considerably more than just adequate").*

[12] *For example, the February 2010 Final Judgment quoted the same dictionary this Court used in its 1978 Seattle School District decision ("AMPLE always means considerably more than adequate or sufficient"), and reiterated that "Consistent with this meaning, the Washington Supreme Court has held that Article IX, §1 requires the Respondent State to provide 'fully sufficient funds' and a 'level of funding that is fully sufficient' to provide for the education of all Washington children. Seattle School District v. State, 90 Wn.2d at 518, 537." February 2010 McCleary Final Judgment at CP 2907, ¶¶162-164. Although the State repeatedly asserts the Biennium Budget **"supports"** the State's basic education program (e.g., State's Brief at 1, 8, 31 & 31-32; Legislature's 2017 Report at 31, 35, 36, 38 & 44), simply providing financial **"support"** is not compliance with the Court orders in this case. As the remainder of this brief details, constitutional compliance requires **ample** funding of school districts' **actual cost** to **fully implement** the State's basic education program components.*

[13] *August 13, 2015 McCleary Order at 9-10; October 6, 2016 McCleary Order at 13 (the payable-daily penalty shall continue to accrue); as background see September 11, 2014 McCleary Order (ruling the State in contempt of court).*

[14] *Each day's penalty bears interest at the statutory 12% rate since the daily penalty amount ($100,000) is a liquidated sum. Plaintiffs' 2016 Post-Budget Filing at 29 & 45. The summation equation for each daily penalty with interest is $\{1 - (1 + [.12/365])^n\}$ divided by $\{1 - (1 + [.12/365])\}$, with "n" being the number of days over which the*

F. September 1, 2018 Deadline For State Budget To *Achieve* Full Constitutional Compliance.

This Court accepted lawmakers' assurance that they would achieve full constitutional compliance by 2018, and emphasized "Year 2018 remains a firm deadline for full constitutional compliance."[15] It accordingly ordered "Any program for full state funding of basic education must therefore be *fully implemented* not later than September 1, 2018."[16]

Lawmakers know this *full implementation* deadline.[17]

G. 2017 Deadline To *Enact* A State Budget That Achieves Full Constitutional Compliance By September 1, 2018.

This Court accepted the State's assurance that "the legislature committed itself to *enacting* a fully complying program by the end of the 2017 session."[18] It accordingly ordered "the remaining details of that program, including funding sources and the necessary appropriations for

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summation runs. Since there are 747 days from August 13, 2015, to August 30, 2017, the penalty amount through August 30, 2017, is $84,683,521.60.

[15] *December 2012 McCleary Order at 2 (underline added). The State also acknowledges the legislature specified the deadlines adopted in this case. State's Brief at 4 (the September 1, 2018 deadline), and at 5 (earlier 2017-2018 school year deadline for K-3 class size reductions and full day kindergarten).*

[16] *October 2016 McCleary Order at 12 (italics added), and then again at 13 ("We conclude, based on the relevant legislation, that the State has until September 1, 2018, to fully implement its program of basic education")(underline added).*

[17] *Indeed, the State expressly acknowledges this Court retained jurisdiction to ensure full compliance by 2018. State's Brief at 5.*

[18] *October 2016 McCleary Order at 12-13 (italics in original).*

the 2017-19 biennium, are to be in place by final adjournment of the 2017 legislative session."[19]

Lawmakers know this 2017 *enactment* deadline.

H. Full Constitutional Compliance Requires The State Budget To Amply Fund The *Actual Cost* Of Fully Implementing The State's Basic Education Program.

1. Ten components of the State's basic education program.

This Court's January 2012 ruling reiterated the following:

"Basic Education" means "the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this state's democracy"[20] – more specifically: the knowledge and skills specified in the *Seattle School District* ruling (90 Wn.2d at 517-518), the four numbered provisions of ESHB 1209 (now RCW 28A.150.210), and the State's corresponding Essential Academic Learning Requirements (EALRs).[21]

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[19] *October 2016 McCleary Order at 13 (underline added).*

[20] *McCleary, 173 Wn.2d at 524 n.21 ("For our purposes, the terms 'education' under article IX, section 1 and 'basic education' are synonymous"), at 483 ("The word 'education' under article IX, section 1 means the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this state's democracy") & at 521.*

[21] *Supra footnote 20 and McCleary, 173 Wn.2d at 523-524 (the legislature provided specific substantive content to the word education by adopting the four numbered provisions in ESHB 1209 and developing the EALRs; "Building on the educational concepts outlined in Seattle School District, ESHB 1209 and the EALRs identified the knowledge and skills specifically tailored to help students succeed as active citizens in contemporary society. In short, these measures together define a 'basic education' – the substance of the constitutionally required 'education' under article IX, section 1."). This Court's 2012 ruling was not a surprise because it reiterated prior legal rulings in the February 2010 McCleary Final Judgment and 1978 Seattle School District decision.*

"Basic Education Program" means the program enacted by the State's legislative authority to provide every child a realistic and effective opportunity to become equipped with the knowledge and skills specified in the above "basic education" definition.[22]

Ten ***components*** of the State's basic education program include:

(1) To/from pupil transportation.[23]

(2) Materials, Supplies, and Operating Costs *("MSOCs", formerly referred to as "NERCs")*.[24]

(3) Full-Day Kindergarten.[25]

(4) K-3 class sizes of 17 students per classroom.[26]

(5) Special education.[27]

(6) Remediation *(Learning Assistance Program or "LAP")*.[28]

(7) Transitional Bilingual Education *(Transitional Bilingual Instructional Program or "TBIP", formerly referred to as English Language Learners or "ELL")*.[29]

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[22] *See, e.g., McCleary, 173 Wn.2d at 525 (quoting testimony of the Chair of the Joint Task Force on Basic Education Finance (the foundation for ESHB 2261) that the State must provide an opportunity that is* **realistic***); McCleary Final Judgment at CP 2910, ¶174 (quoting Seattle School District holding that "The* **effective** *teaching ... of these essential skills make up the minimum of the education that is constitutionally required"); McCleary Final Judgment at CP 2929, ¶231(a) ("When this ruling holds the State is not making ample provision for the equipping of all children with the knowledge, skills, or substantive 'education' discussed in this ruling, that holding also includes the court's determination that the State's provisions for education do not provide all children residing in our State with a* **realistic** *or* **effective** *opportunity to become equipped with that knowledge, skill, or substantive 'education' ").*

[23] *See, e.g., McCleary, 173 Wn.2d at 496, 505-506, 526; cf. State's Brief at 3.*

[24] *See, e.g., McCleary, 173 Wn.2d at 497-499, 506, 509 n.17, 510, 533-535; cf. State's Brief at 5.*

[25] *See, e.g., McCleary, 173 Wn.2d at 505-506, 510, 526 n.22; cf. State's Brief at 4.*

[26] *See, e.g., McCleary, 173 Wn.2d at 510, 545; cf. State's Brief at 5. The State legislative authority's enactment of class reductions in grades 4-12 is noted infra at footnote 84.*

[27] *See, e.g., McCleary, 173 Wn.2d at 496, 505-506, 526; cf. State's Brief at 4.*

[28] *See, e.g., McCleary, 173 Wn.2d at 496, 505-506, 526; cf. State's Brief at 4.*

[29] *See, e.g., McCleary, 173 Wn.2d at 496, 505-506, 526; cf. State's Brief at 4.*

(8) Highly capable student instruction.[30]

(9) Core 24's increasing State high school graduation requirements from 20 credits of instruction to 24.[31]

(10) Compensation sufficient to attract, recruit, and retain competent teachers, administrators, and staff to implement the State's basic education program.[32]

Washington lawmakers know the above meaning of "basic education", "basic education program", and that program's components.

2. The State must amply fund the actual cost of a school district's fully implementing each component.

This Court's January 2012 ruling rejected the legislature's claim that basic education programs are fully funded if the legislature fully funds their funding formulas:

> We agree with the trial court's conclusion that the legislature's definition of full funding amounts to little more than a tautology. If 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 formulas.[33]

Its January 2014 Order reiterated this point again:

> We cautioned in 2012 that revised funding formulas cannot be used to declare "full funding" when the actual costs of meeting the education rights of Washington students remain unfunded.[34]

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[30] *See, e.g., McCleary, 173 Wn.2d at 505-506, 526 n.22; cf. State's Brief at 3.*

[31] *See, e.g., McCleary, 173 Wn.2d at 505-506; cf. State's Brief at 3-4.*

[32] *See, e.g., McCleary, 173 Wn.2d at 497, 507, 536; cf. State's Brief at 4; Legislature's 2017 Report at 19 (EHB 2242 acknowledges that funding sufficient to hire and retain qualified staff is an element of the State's basic education program).*

[33] *McCleary, 173 Wn.2d at 532 (underline added).*

[34] *January 2014 McCleary Order at 4 (underline added).*

In short, lawmakers know they cannot declare full funding under Washington law unless their funding formulas amply fund the actual cost of fully implementing the State's basic education program components. As the legislature's 2014 Report expressly acknowledged: "the January 2014 Order emphasized that full funding must account for actual costs of the State program".[35]

I. Law Summary.

The State distilled its over 110-page July 31 filing down to one issue: "the ultimate issue now before this Court is whether the State has complied with its obligation under Article IX, section 1 of the Washington Constitution as that obligation was set out by the Court in its 2012 decision".[36] Citing that decision's mandate that positive constitutional rights require government action, it then states the question before this Court is whether the 2017 legislature's budget enactment "achieves or is reasonably likely to achieve the constitutionally prescribed end."[37]

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[35] *Legislature's 2014 Report at 52 (underline added) (attached to State's 2014 Post-Budget Filing). This* **actual cost** *requirement is significant because the boots-on-the-ground in the State's public schools have repeatedly confirmed that school districts' TOTAL revenues (State, federal, local levy, and private donations combined) are not sufficient to provide all students with a realistic or effective opportunity to learn the knowledge and skills in the "basic education" mandated by Article IX, section 1. See, e.g., Plaintiffs' September 27, 2010 Brief With Errata at 28 & n.66, 32-33 & nn.76-78, and Plaintiffs' 2015 Answer To Amicus Brief Of Superintendent Of Public Instruction at 1-2 & n.2; accord, McCleary Final Judgment at CP 2928-2929, ¶230.*

[36] *State's Brief at 6.*

[37] *State's Brief at 7.*

The above pages have detailed the six required elements of that constitutionally prescribed end – specifically, a 2017-2019 Biennium Budget that checks off all six of the following boxes:

- ☐ amply funds
- ☐ the actual cost to school districts
- ☐ of fully implementing
- ☐ the ten components of the State's basic education program
- ☐ for all Washington school children
- ☐ by September 1, 2018

The following pages address whether the State's July 31 filing established these six elements of the full constitutional compliance this Court ordered.

III. DISTRACTIONS DO NOT MAKE THE LAW DISAPPEAR

Even an amateur magician knows the secret to making the quarter in his hand disappear is to misdirect people's attention so they focus on something else other than the quarter.[38] The State's filing similarly directs much attention to the following talking points that are irrelevant to the six elements of full constitutional compliance listed above.

[38] *See, e.g.,* The Magic Book: The Complete Beginners Guide To Anytime, Anywhere Close-Up Magic *(Harry Lorayne, 2d ed. 1977) at 9 ("Misdirection" is the art of forcing an audience to look at, or to think of, something other than that which would expose what you don't want exposed);* The Encyclopedia of Magic and Magicians *(T.A. Waters, 1988) at 232 ("Misdirection is the cornerstone of nearly all successful magic").*

1. Inapplicable Dollar "Increase" Numbers *(e.g., "$8.3 billion").*

The State asserts big dollar "increase" numbers to suggest the 2017 legislature's appropriations comply with this Court's order – e.g., an "$8.3 billion increase".[39]

Such numbers are attractive. But they're also irrelevant to the question at hand for at least three reasons:

First, many come from adding up four years of proposed annual increases going out into the future – not the increase applicable to the upcoming fiscal year in which the September 1, 2018 deadline occurs (the 2018-2019 fiscal year, a/k/a "FY 2019"). The State's budget documentation shows its funding increase relating to the *McCleary* ruling is $1.451 billion that fiscal year.[40] Not "$8.3 billion".

Second, the State's filing shows that it simultaneously takes more than $2.5 billion of local levy property tax dollars away from Washington school districts and redistributes them back as State property tax dollars.[41] Taking money and handing it back is not an "increase".

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[39] *State's Brief at 25 n.15 ("the $8.3 billion increase in K-12 spending") & at 9 ("new legislation commits the State to adding another $8.3 billion").*

[40] *http://leap.leg.wa.gov/leap/Budget/Detail/2017/hoOutlook_0630.pdf (the spreadsheet line specifying the "McCleary Related Items" for the biennium budget enacted on June 30 specifies $361 million in the 2017-2018 fiscal year (FY 2018) and $1.451 billion in the 2018-2019 fiscal year (FY 2019)).*

[41] *Legislature's 2017 Report at page 57 (showing State's reduction of local levy authority from $2.460 billion/year in 2018 to $1.907 billion/year in 2019, $1.439 billion/year in 2020, and $1.492 billion/year in 2021. Part one of the $2.5 billion math is: 2.460-1.907=**.553**; 2.460-1.439=**1.021**; 2.460-1.492=**.968**. Part two of the*

Third, the entire dollar difference between a current biennium budget and the prior biennium budget is not really an "increase" because a significant chunk of that difference simply reflects what's known as "maintenance level funding" – that is, the increased cost of maintaining in the current biennium the same things required from the prior biennium. Maintenance level funding to maintain what's already being done is treading water. It's not really an "increase".

In short, large multi-billion dollar figures invoked by the State might be arithmetically accurate, but those figures are not really funding "increases" applicable to the September 1, 2018 deadline at issue.[42]

2. Irrelevant Sales-Pitch Phrases
(e.g., "unprecedented" & "more than double").

The State's filing uses politically attractive phrases to sell the biennium budget's school funding increase – for example: "unprecedented",[43] "massive",[44] "substantial",[45] a "98.5% increase",[46] and "more than doubles State funding since the *McCleary* ruling."[47]

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*$2.5 billion math is: .553+1.021+.968=**2.542**. Part three of the math is: $2.542 billion is **over 2.5 billion**. The result leaves school districts with less funding – e.g., reducing Tacoma School District's overall funding in the 2018-2019 school year by over $4 million ($151/pupil) https://www.tacomaschools.org/news/pages/budget-outlook.aspx (Washington State Legislature's 2017 Action on Tacoma Public Schools Budget Outlook, dated August 15, 2017).*

[42] *Arithmetically accurate but misleading figures lend credence to that old line that "figures don't lie, but liars figure."*

[43] *Legislature's 2017 Report at 7&10.*

[44] *State's Brief at 1.*

But measures like "unprecedented", "98.5%", and "double" are not legally relevant. Instead, this Court's *McCleary* ruling requires ample funding of school districts' actual cost to fully implement the State's ten basic education program components.[48]

3. Attorney Allegations: *allegations aren't facts.*

The State's Brief alleges the Biennium Budget will provide Washington school districts "sufficient" or "fully sufficient" funding for the State's basic education program components,[49] and that its funding levels are "evidence-based" on the legislature's "thorough data review, policy tradeoffs, careful balancing, and coordination of implementation".[50]

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[45] *Legislature's 2017 Report at 3 & 16; State's Brief at 9.*

[46] *Legislature's 2017 Report at 8 (increase when measured against the funding cuts imposed after this suit's February 2010 Final Judgment). As that 2017 Report confirms, the "State Funding for K-12 Public Schools" at the time of the February 2010 Final Judgment was $7.1 billion, and the State responded by cutting that funding down to $6.7 billion through 2013. Legislature's 2017 Report at 9. Part of the "increase" now claimed by the State was simply bringing its funding back "up" to what the Final Judgment had previously declared unconstitutionally low.*

[47] *2017 Report at 9 (referring to the State's proposal for 2021 funding); accord State's Brief at 1 ("Legislature has doubled State K-12 education funding").*

[48] *By way of illustration, plaintiffs note that when the **first** public school in Mississippi was desegregated in response to Brown v. Board of Education, that was "unprecedented". When the **second** public school in Mississippi was desegregated, that was "an over 98.5% increase". And when the **fifth** public school in Mississippi was desegregated, that "more than doubled" Mississippi's school desegregation since the Brown v. Board of Education ruling. But no one would claim that "unprecedented", "98.5% increase", or "more than doubles" complied with the constitutional right of all Mississippi children to a desegregated education. Similarly here, our State cannot credibly suggest that "unprecedented", "98.5% increase", or "more than doubles" are legally relevant measures for compliance with the positive, constitutional right of all Washington children to an amply funded education.*

[49] *State's Brief at 19, 26, 26, 30, 31 & 32.*

[50] *State's Brief at 12, 13 & 17.*

Missouri isn't the only State with a "you gotta show me" tradition.[51] Thus, as a matter of law, Washington courts consistently refuse to treat statements in a brief as acceptable proof.[52]

And as a matter of basic common sense, the State's conclusory allegations about the June 30 enactments at issue are not even credible – for the 616-page biennium budget (SSB 5883) and its accompanying 120-page education bill (EHB 2242) were handed to lawmakers and then put to a quick vote hours later in a last-minute rush to enact them by the midnight deadline necessary to avoid triggering a State government shutdown.[53] Alleging the passage of these bills entailed more than a

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[51] *Missouri's "Show-Me" slogan can be traced back to Congressman Vandiver's statement that "I come from a state that raises corn and cotton and cockleburs and Democrats, and frothy eloquence neither convinces nor satisfies me. I am from Missouri. You have got to show me" – leading to the "show-me" phrase used to describe Missourians as unwilling to believe without adequate evidence.* https://statesymbolsusa.org/symbol-official-item/missouri/state-nickname/show-me-state .

[52] *E.g.,* Lemond v. Dep't of Licensing*, 143 Wn.App. 797, 807, 180 P.3d 829 (2008) (assertions by counsel are not evidence); see also* Bravo v. Dolsen Cos.*, 71 Wn.App. 769, 777, 862 P.2d 623 (1993) (court cannot consider allegations of fact in appellate brief), rev'd on other grounds, 125 Wn.2d 745, 888 P.2d 147 (1995); cf. also* Dollar v. Northwestern Imp. Co.*, 72 Wash. 1, 6, 129 P. 578 (1913) (rejecting sworn testimony because it was "not evidence of a fact, but a mere conclusion").*

[53] *Lawmakers confirmed this last-minute rush on the record – e.g.: "The inability to read what's within this document [SB 5883], having had this document placed on our desk about 45 minutes or an hour ago, whatever it was, is simply unacceptable.... We do a disservice that is off the charts, and very distressing for all of us.... Details matter, and facts matter, and the fine print matters, and I don't think any of us knows what is truly in this."* https://www.tvw.org/watch/?clientID=9375922947&eventID=2017061090&eventID=2017061090&startStreamAt=4197&autoStartStream=true *(Sen. Carlyle on June 30 at Timestamp 1:10:00); "*McCleary *was decided in 2012. There's been five years to work on this plan, and here we are on the eve of a government shutdown, with the budget having – and the policy having – been presented to us this morning after secret negotiations behind closed doors.... There's just no reason why we are sitting on the eve of a government shutdown at this time.... I haven't been able to get through the entire*

last-minute rush to avoid the impending midnight shutdown does not pass the straight face test.

4. Hollow Assurance: *plaintiffs' grandchildren can sue.*

The State suggests that since the State amended some of its funding formulas after the Court orders in this case, plaintiffs should file another lawsuit – assuring them that "the courthouse door will be open to plaintiffs."[54]

That's a hollow assurance.

Plaintiffs Stephanie McCleary and Patty Venema were kids in Washington's public schools when this Court issued its 1978 *Seattle*

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document.... The lack of transparency, this waiting till the last minute and not giving us sufficient time to look through this and to really understand the implications for our districts I think is irresponsible as much as it is frustrating." https://www.tvw.org/watch/?eventID=2017061076 *(Sen. Kuderer on June 30 at Timestamp 2:42:50); "When I got up this morning ... I had no idea, really, what was gonna be in this bill. ... And when I got here, I still didn't really know. I'm only on page 167.... I just have to say we need more time to think and read and understand what has been placed before us.... I don't think it has to be down to the wire, we don't have to play a game of chicken on this stuff."* https://www.tvw.org/watch/?eventID=2017061076 *(Sen. Keiser on June 30 at Timestamp 56:00). The Governor signed the budget less than an hour before midnight on June 30, 2017.* https://twitter.com/WAStateGov/status/881023013130428416 .

[54] *State's Brief at 33. The State also suggests as part of this argument that it does not have to show compliance with this Court's order if it simply amends a funding formula – instead, plaintiffs must pursue a "facial challenge" suit and prove "beyond a reasonable doubt" that the State's amendment violates Article IX, section 1. State's Brief at 8 & 27-30 (citing the League of Women Voters, Grange, Tunstall, and Hoppe cases). But as a matter of law, those cases did not concern the State's ongoing violation of a court order like here. And as Part IV below confirms, the 2017 legislature's last-minute June 30 enactment on its face does not comply with this Court's order.*

School District decision ordering the State to comply with Article IX, section 1.[55] It's now too late for these two moms.

When they filed this *McCleary* suit, Stephanie's daughter (Kelsey) and Patty's daughter (Halie) were school kids at the same age Stephanie and Patty had been when this Court issued its *Seattle School District* decision.[56] This Court once again ordered the State to comply with Article IX, section 1 – and the State's been in contempt of court for the past three years. It's now too late for Kelsey, Halie, and their two younger brothers (Carter and Robbie, who were both in elementary school when their moms filed this suit) – for all four of them have graduated from high school while this case (and the State's contempt of court) dragged on.[57]

Saying the courthouse door will be open to Stephanie's and Patty's grandkids is technically correct. But it's constitutionally hollow.

In April 1962, Martin Luther King went to Birmingham to lead a series of sit-ins. A group of Alabama religious leaders urged him to back off and be patient since civil rights progress was already being made in Alabama.[58] Dr. King wrote a response on the margins of newspaper scraps available to him in his Birmingham jail cell – a letter in which he

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[55] *Plaintiffs' 2016 Post-Budget Filing at 1 & n.1 (citing McCleary Final Judgment at CP 2876-2877, ¶¶13-20).*

[56] *Supra footnote 55*

[57] *Supra footnote 55; http://www.seattletimes.com/opinion/its-not-right-that-my-calculus-textbook-is-from-1994.*

[58] *For background history see: http://www.encyclopediaofalabama.org/article/h-1389* .

explained why he was not backing off and being patient: "Justice too long delayed is justice denied."[59]

The State's delays have successfully denied Stephanie and Patty justice under Article IX, section 1. The State's delays have now successfully denied that justice to their four kids. The State's urging this Court to back off and be patient since the courthouse door will be open for Stephanie's and Patty's grandkids to sue is a hollow distraction.

5. No Cost Options *(no cost to the State budget at least).*

Injecting some humor into the sometimes stressful ample funding task at hand, one of the State's witnesses wrote nine years ago that "the legislature will be a veritable cornucopia of ideas on no cost options!!!"[60] The legislature's 2017 Report presents several – e.g., imposing more administrative costs on public schools to "help districts avoid potential financial difficulty".[61] Although administrative requirements might be improved, that's not the constitutional mandate in this case. Ample

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[59] *Typed text at http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf; background history at http://www.encyclopediaofalabama.org/article/h-1389 . Similarly, see Plaintiffs' January 11, 2007 Complaint at ¶1 (CP 4 at lines 1 & 17-18) ("The simple fact remains...that justice delayed is justice denied. ... Enough is enough. The time for first steps or initial down payments has long passed. It is time for compliance."); see also, e.g., Asarco Inc. v. Dep't 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).*

[60] *Plaintiffs' September 2010 Brief With Errata at 37 (quoting Tr.Ex. 338).*

[61] *Legislature's 2017 Report at 62-64.*

funding is. The constitutionally mandated solution to districts' financial difficulty is to supply that ample funding – not impose more unfunded administrative costs on school districts at no cost to the State.

6. Promise About The Future: *the 2019 legislature will finish this.*

The State notes this Court's reference to ESHB 2261 as a "promising" reform package.[62] And it describes at length a litany of "promises" about what the 2019 legislature might do for the school years after the September 1, 2018 deadline.[63]

But the State's promises about the future are also irrelevant – for the State itself admits the 2017 legislature cannot commit or bind the 2019 legislature to do anything.[64] This Court ordered the 2017 legislature to enact a Biennium Budget that achieves full constitutional compliance by September 1, 2018 – not make promises about what some other legislature might maybe opt to do in the future.

7. A Crusade Not Ordered: *levy reform.*

The State says that "In *McCleary*, the Court determined that insufficient State funding unconstitutionally forced school districts to rely

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[62] *State's Brief at 3 & 6; see also Legislature's 2017 Report (ESHB 2261 "promises").*

[63] *For example, repeated promises about what the 2019 legislature will complete by the end of the State's four-year budget outlook. State's Brief at 9, 16, 19-20 & 23-25; Legislature's 2017 Report at 7-11, 13-14, 22, 31, 33, 35, 38-39, 42-43 & 67-70.*

[64] *State's Brief at 33 n.22; Legislature's 2017 Report at 1 n.2.*

on local levy revenues to support the costs of the State's basic [education] program."[65]

To halt districts' reliance on local levies to cover the actual cost of implementing the State's basic education program, the State could:

(1) Make reliance unnecessary with a biennium budget that amply funds districts' actual cost to implement the State's basic education program.

(2) Make reliance illegal with "levy reform" that prohibits districts from using levy dollars to fill the gaps left by the State's failure to amply fund those implementation costs.

(3) Make reliance unmanageable with "levy reform" that takes billions of levy dollars away from districts and imposes a host of new unfunded administrative mandates on a district if it wants to try to use levy dollars for their students' education.

The legislature's 2017 Report devotes many pages to explaining the levy reforms it enacted consistent with options (2) and (3).[66]

But this Court has already made it clear that levy reform is **not** part of its order.[67] Levy reform might be relevant to an Article IX, **section 2** *uniformity* suit – but as the State's counsel sternly told this Court at the first oral argument, this *McCleary* case is not and never has been a

[65] *Legislature's 2017 Report at 52. This ruling was no surprise to legislators – for as the State's July 31 filing explains, the legislature's 1977 Basic Education Act shifted responsibility for funding the State's basic education program from levies to the State. State's Brief at 3 n.2.*

[66] *With respect to option (2), see Legislature's 2017 Report at 52-58 & 60-61; also State's Brief at 13 & 25. With respect to option (3), see Legislature's 2017 Report at 56-58 (the levy reform taking $2.542 billion away from Washington school districts and imposing unfunded administrative mandates on a school district wanting to try to use any levy funds that might be left) and supra footnote 41 (explaining that $2.542 billion math).*

[67] *August 2015 McCleary Order at 7 n.1.*

section 2 case.[68] It's a **section 1** *ample funding* case, and this Court accordingly ordered full compliance with the ample funding mandate of Article IX, **section 1**. Levy reform is interesting – but it's not legally relevant to whether the Biennium Budget complies with the Court's ample funding order in this case.

8. A Non-Issue: *dependable & regular tax revenues for the State's General Fund.*

This Court held the State cannot rely on a school district's local levy fund for the ample funding mandated by Article IX, section 1 because all tax revenues for a district's levy fund are "wholly dependent upon the whim of the electorate" instead of being dependable and regular.[69]

This dependable and regular point has never been made or raised in this case with respect to the State's General Fund. That's because tax revenues for the State's General Fund are enacted by the State's own legislature – not the "whim of the electorate." And the tax revenues for the State's General Fund have dependably and regularly always been far more than enough to amply fund the State's K-12 schools – dependably

[68] *See Plaintiffs' 2016 Post-Budget Filing at 41 & n.85 (State's oral argument).*

[69] McCleary, *173 Wn.2d at 486. See also State's Brief at 7 ("State must fund its basic education program using dependable and regular tax sources").*

and regularly yielding an increasing amount every fiscal year since the January 2007 filing of this suit, and now at $97 billion.[70]

Although the legislature's 2017 Report devotes many pages to discussing the new tax revenues it added for the State's General Fund,[71] that discussion is not legally relevant because it addresses a non-issue in this case. The State has never claimed (and truthfully cannot claim) that existing taxes already enacted by the legislature fail to dependably and regularly produce enough tax revenue for the State's General Fund to amply fund the State's K-12 public schools. Especially since the State must use its General Fund to provide that ample funding "as the State's first and highest priority before any other State programs or operations."[72]

9. Conclusion about the State's distractions.

With the above distractions offered by the State now put aside, plaintiffs turn to whether the State's July 31 filing demonstrated that the 2017 legislature actually did what this Court ordered.

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[70] *http://fiscal.wa.gov/SpendHistSOF.aspx .*
[71] *Legislature's 2017 Report at 2 & 46-52; see also State's Brief at 25-26.*
[72] *Supra footnote 9.*

IV. LAWMAKERS ARE STILL VIOLATING THE LAW

A. Background Context.

"If you get three strikes, even the best lawyer in the world can't get you off."
Baseball Hall Of Fame member Bill Veeck[73]

The 2017 legislature failed to comply with at least three of the Court mandates in this case:

- ***Penalty.*** The legislature didn't even take a swing at complying with the penalty ordered in this case. It simply defied this Court's order. Plaintiffs don't dwell on that defiance because it's not the most significant issue in this case. But if the rule of law matters in our democracy, that defiance is strike one.

- ***Deadline.*** The legislature didn't even take a swing at complying with the September 1, 2018 deadline ordered in this case. It simply defied this Court's order.[74] Plaintiffs do not dwell on that defiance either – but if the rule of law matters in our democracy, that's strike two.

- ***Funding.*** This Court made the test for measuring constitutional compliance clear: amply fund the actual cost of fully implementing the ten basic education program components. The legislature doesn't even claim to hit that actual cost mark. It instead declares "full funding" because it funds the funding formulas it funds. If the rule of law matters, invoking that previously rejected tautology is strike three.

This brief focuses on the third strike because it's dispositive to the State's ongoing violation of Washington students' constitutional rights.

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[73] *http://www.baseball-almanac.com/quotes/Bill_Veeck_Quotes.shtml* .

[74] *See, e.g., Legislature's 2017 Report at 7 (claiming "full implementation in the 2019-21 fiscal biennium") & at 20 (claiming to begin compliance by September 1, 2018, and completing in 2019-2020 school year); State's Brief at 1 (completion "by the 2019-20 school year"), at 2 (funding compliance "by the 2019-20 school year"), at 9 (same), at 14 (completed 2019-2020 school year), at 14-15 & n.4 (only 50% completed by 2018-2019 school year), at 19 (State currently "projects" to be done by 2019-20 school year).*

B. The Legislature's Report Does Not Show Its Repackaging Of School Funding Achieved The Full Constitutional Compliance This Court Ordered.

> *"You simply can't put lipstick on a pig and repackage it, and think you can get around constitutional problems."*
>
> *Washington State Attorney General [his response to the revised travel ban]*[75]

The legislature's 2017 Report explains how lawmakers reworded and repackaged some of the budget's funding formulas.

But rewording and repackaging is not what this Court ordered. This Court ordered that the 2017-2019 Biennium Budget must make the necessary appropriations to achieve full compliance with Article IX, section 1 by September 1, 2018 – and made it clear the legislature cannot declare full funding of a basic education program component unless its funding formulas amply fund the actual cost of a school district fully implementing that component.

The 2017 legislature did the opposite. As the following pages explain, its 2017 Report does not show its formulas amply fund the actual cost of fully implementing the ten previously listed basic education program components. Instead, it declares full funding of each component

[75] *http://www.npr.org/templates/transcript/transcript.php?storyId=519446257 (March 9, 2017 answer on NPR regarding his suit against President Trump's amended travel ban). Ironically, the Washington Attorney General's lipstick-on-a-pig metaphor has its roots in our State – for it derives from an 1890 Quad-City Herald article (Brewster, Washington). See Plaintiff's 2016 Post-Budget Filing at 27 n.56.*

because it funds its funding formula. *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

1. Amply fund school districts' actual cost for the pupil transportation component.

The State knows its transportation formula caps funding at less than a district's actual cost for to/from pupil transportation each year.[76] Although the State has apparently achieved full funding of its transportation funding formula, the legislature's 2017 Report accordingly does not claim the Biennium Budget amply funds districts' actual cost to

[76] *See the prior filings in this case explaining that instead of funding a district's current transportation costs in a given year, the newer funding formula upon which the State relies caps funding at the lesser of (a) the prior year's actual cost for that district (thus ignoring inflation or (b) the prior year's Statewide average cost for all districts (thus ignoring the half of districts whose actual costs are above that average). Plaintiffs' August 2016 Answer To The State's Filing at 18-19; Plaintiffs' 2016 Post-Budget Filing at 22-25; Plaintiffs' 2015 Post-Budget Filing at 40-43; accord, e.g., 2017 Senate Bill Report for SB 5367, Staff Summary of Public Testimony at http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/Senate/5367%20SBR%20EDU%2017.pdf ("There is nothing more 'basic' to education than getting students to and from school. There are districts that receive a 100 percent efficiency rating but the district is still subsiding [sic] the student transportation program with local levy funds. Many of the small, rural, and remote school district transportation programs are underfunded because they have circular routes due to a non-gridded road system, which means the bus routes have many dead ends where they have to double-back. Some districts have a lot of back roads and many miles where there are no sidewalks so school districts must transport students to school for safety reasons."). The State also acknowledges its formula does not address categories of transportation costs required for a district to operate lawfully under federal law. Legislature's 2017 Report at 40 (districts' legal obligation to transport homeless students under the McKinney-Vento Act). Since its transportation formula does not fund its districts' actual costs, the State says it will study its formula in the next two years. Legislature's 2017 Report at 40; State's Brief at 23-24.*

implement the transportation component of the State's basic education program.[77]

Instead, it declares mission accomplished because its budget funds the formula it funds.[78] *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

2. Amply fund school districts' actual cost for Materials, Supplies, and Operating Costs (MSOCs).

The State knows its MSOC formula funds less than the actual cost of today's materials, supplies, and operating costs.[79] Although the State has apparently achieved full funding of its MSOC funding formula, the legislature's 2017 Report accordingly does not claim the Biennium Budget

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[77] *The State says its newer funding formula is based on "regression analysis" and "statistically significant factors" (Legislature's 2017 Report at 40), but it does not (because it cannot) say it's based on the constitutionally significant factor – i.e., ample funding of school districts' actual cost. See McCleary, 173 Wn.2d at 532 ("If the State's funding formulas provide only a portion of what it actually costs a school to...get kids to school,... the legislature cannot maintain that it is fully funding basic education").*

[78] *Legislature's 2017 Report at 4, 1st row of Chart; also at 39; cf. State's Brief at 9.*

[79] *Prior filings explained that instead of funding a district's actual MSOC costs in a given year, the State's funding formula restricts funding to lesser amounts – e.g., (a) instead of funding the actual heating and snow removal costs of Eastern Washington school districts, it funds a statewide average cost dominated by populous districts in temperate Western Washington; and (b) it's based on a snapshot of MSOCs back in the 2007-2008 school year instead of MSOCs today (e.g., does not include the computers required to participate in the State's on-line testing implemented in 2009). Plaintiffs' August 2016 Answer To The State's Filing at 19-21; Plaintiffs' 2016 Post-Budget Filing at 22-25; Plaintiffs' 2015 Post-Budget Filing at 43-45; accord, e.g., A Small & Rural School District's Perspective at page 15 [https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=TFOVeYn4lWw&att=false] (Davenport School District's over $1.2 million in actual MSOC costs vs. $637,695 in State MSOC funding); compare McCleary, 173 Wn.2d at 530 & 532 ("even assuming the funding formulas represented the actual costs of the basic education program when the legislature adopted them ... the same is simply not true today").*

amply funds the actual cost of today's materials, supplies, and operations to implement the State's basic education program.

Instead, it declares mission accomplished because its budget funds the formula it funds.[80] *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

3. Amply fund school districts' actual cost to expand kindergarten from half-day to full-day.

The State knows its formula funds less than a district's actual cost to implement the full-day kindergarten component of the State's basic education program.[81] The legislature's 2017 Report accordingly does not claim the Biennium Budget amply funds the actual cost of implementing this component. For example, it does not claim to fund what districts must pay for the design, permitting, and construction of the additional kindergarten classrooms that must be built by this component's implementation deadline.

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[80] *Legislature's 2017 Report at 4, 2nd row of Chart; cf. State's Brief at 9.*

[81] *See the prior filings in this case explaining, for example, that (a) the State's formula does not fund the approximately $2 billion required to build the additional classrooms required to implement full-day kindergarten and K-3 class size reduction, and (b) even when added to districts' local levy, federal, and donation funding, the State's formula does not fund the increased salaries required to eliminate the severe teacher shortage for those classrooms in the State's public (as opposed to better paid private) schools. Plaintiffs' August 2016 Answer To The State's Filing at 21-25; Plaintiffs' 2016 Post-Budget Filing at 18-21; Plaintiffs' 2015 Post-Budget Filing at 33-36 & 38.*

Instead, the State declares mission accomplished because it funds the funding formula it funds.[82] *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

4. Amply fund school districts' actual cost to reduce K-3 class sizes to 17 students per classroom.

The State similarly knows its formula funds less than a district's actual cost to reduce K-3 class sizes to 17 students per classroom.[83] The legislature's 2017 Report accordingly does not claim the Biennium Budget amply funds the actual cost of implementing this component either – for example, it never claims to fund what districts must pay to build the additional elementary school classrooms needed by this component's implementation deadline.[84]

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[82] *Legislature's 2017 Report at 4, 3rd row of Chart; cf. State's Brief at 10 & 21.*

[83] *Supra footnote 81.*

[84] *With respect to class size reduction, the Legislature's 2017 Report also acknowledges it repealed the QEC's class size reductions for grades 4-12 which were enacted into law when voters adopted Initiative 1351 mandating full implementation by the 2018-2019 school year. Legislature's 2017 Report at 44-46; cf. McCleary, 173 Wn.2d at 508 (noting the legislature created the QEC to "oversee the phase-in of ESHB 2261 and the various work groups established under the bill"). But the 2017 legislature does not offer any constitutionally permissible reason for its class size reduction repeal. Instead, it simply asserts that unidentified "research" suggests class size reductions are most important in grades K-3 (Legislature's 2017 Report at 45). The legislature's assertion could justify implementing the K-3 reductions first – but not repealing the grade 4-12 reductions and their previously enacted 2018-2019 implementation deadline. McCleary, 173 Wn.2d at 526 ("the legislature may not eliminate an offering from the basic education program for reasons unrelated to educational policy, such as fiscal crisis or mere expediency").*

Instead, it declares mission accomplished because its budget funds the K-3 funding formula it funds.[85] *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

5. Amply fund school districts' actual cost to provide Special Education to their special education students.

The legislature's 2017 Report notes this component provides the State's "special education for students with disabilities".[86] And for a Washington school district to operate lawfully, its implementation of this component must comply with both State and federal law.[87]

The legislature's 2017 Report acknowledges that its special education funding formula has at least two limitations:

- ***First,*** the formula has a set dollar amount for each special education student (93.09% more than the allocation for non-special education kids) – even when a district's actual cost for that student is more.[88]

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[85] *Legislature's 2017 Report at 4, 4th row of Chart, also at 44; cf. State's Brief at 10, 21 & 23.*

[86] *Legislature's 2017 Report at 29.*

[87] *Although this "operate lawfully" point applies to all components, with respect to special education the costly State and federal mandates include: RCW 28A.155.010, 28A.150.200(2)(a), 28A.150.220(2)(f), 28A.155.020; EHB 2242 §§401(2)(a), 506(2)(f); WAC 392-172A; 20 U.S.C. §§1400(d)(1)(A), 1414(d); 34 C.F.R. §§300.320, 300.320(a)(4), 300.34(a); Endrew v. Douglas County School District, 137 S.Ct. 988, 1001 (2017).*

[88] *State's Brief at 20 & 22; Legislature's 2017 Report at 29-30; see also State's Brief at 22. The State's filing notes that the Superintendent of Public Instruction (SPI) "may" provide so-called "safety net" funds after September 1, 2018, that SPI should make recommendations on possible safety net improvements, and that SPI should get around to complying with the State's safety net statute by September 1, 2019. Legislature's 2017 Report at 29-30. But even to the extent any "safety net" funds might be available, the legislature makes no claim that funds that might be available fill the gap between a district's actual special education costs and the State's funding formula. Moreover, the State limits safety net requests to "extraordinary high cost" special education students*

- ***Second,*** the formula sets a 13.5% cap on the number of students it will fund – even when a district's actual number of special education students is more.[89]

The legislature's 2017 Report accordingly does not claim the Biennium Budget amply funds a school district's actual cost to implement the State's special education component for all its special education students.[90]

Instead, the legislature's 2017 Report notes the State raised its formula's 12.7% cap to 13.5%, and claims mission accomplished because the budget funds the resulting funding formula it funds.[91] *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

(RCW 28A.150.392(1)(b)) – setting, for example, the State's funding application threshold at $27,613 in 2015/2016 http://www.k12.wa.us/bulletinsmemos/Bulletins2015/B065-15.pdf (SPI Bulletin No. 065–15, Special Education at 2 (Oct.16, 2015)).

[89] *Legislature's 2017 Report at 30 (formula's cap changed from 12.7% of a district's total student population to 13.5%); see also State's Brief at 22. Each district's percentage of special education students is at http://www.k12.wa.us/SAFS/reports.asp [select the district from the drop-down link, click "search", and then the "Report 1220 Special Education Allocation"]. For example, the funding formula's 13.5% cap on its face excludes funding for special education students in the Spokane School District (14.81% Special Education Enrollment [http://www.k12.wa.us/safs/rep/app/1617/32081mb.pdf]) and the Lummi School District (32.36% Special Education Enrollment [http://www.k12.wa.us/safs/rep/app/1617/37903mb.pdf]).*

[90] *See Legislature's 2017 Report at 29-30, cf. State's Brief at 22. That's because the State knows it cannot truthfully claim its formula funds its districts' actual costs – for the State knows its funding formula leaves its districts' special education costs significantly underfunded for a significant number of special education students. For example, its formula funds only $46.2 million of the projected $117.5 million the Seattle School District will have to spend in the 2017-2018 school year to lawfully implement the State's special education component in compliance with State and federal law. http://www.seattleschools.org/UserFiles/Servers/Server_543/File/District/Departments/Budget/2019%20Budget%20Development/Initial%20Analysis%20EHB2242%20FY18-19.pdf (Special Ed. Remaining Gap in State Basic Ed Funding for Staff).*

[91] *Legislature's 2017 Report at 30; cf. State's Brief at 4 & 20-22.*

6. Amply fund school districts' <u>actual cost</u> to provide Remediation to their underachieving students (a/k/a "LAP").

The State notes this remediation component provides the State's "supplemental instruction and services to assist underachieving K-12 students", and that such students need additional time in a smaller classroom.[92]

The State says it made two enhancements to this remediation component of its basic education program:

- ***First,*** the legislature added 2.3975 hours to this program – but then candidly notes this wasn't really an "increase" since it was just a codification of what prior legislatures had already been funding.[93]
- ***Second,*** the 2017 legislature added 1.1 hours for a student needing this program's remediation if his or her school has >50% free-and-reduced-price-meal students, but not if that exact same student goes to a school with <50% free-and-reduced-price-meal students.[94]

The legislature's 2017 Report accordingly does not claim the Biennium Budget made enhancements that amply fund the actual cost of providing supplemental instruction and services in smaller classrooms to all of a district's underachieving K-12 students.

Instead, the legislature's 2017 Report notes the above 1.1 hours for some (but not all) needy students, and claims mission accomplished

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[92] *Legislature's 2017 Report at 31; State's Brief at 21 (1.1 hours more time and 15-student classroom).*

[93] *Legislature's 2017 Report at 32; see also State's Brief at 22.*

[94] *Legislature's 2017 Report at 32; see also State's Brief at 21.*

because the budget funds the resulting formula it funds.[95] *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

7. Amply fund school districts' <u>actual cost</u> to provide Transitional Bilingual Education to students whose primary language is other than English (a/k/a "TBIP").

The State notes this component provides the State's "supplemental instruction and services for students whose primary language is other than English", with "additional supports for students who have transferred out of [this program]".[96]

The State asserts it made two enhancements to this bilingual education component of its basic education program:

- ***First,*** the legislature added 3 hours for students exiting this program – but then candidly notes this wasn't really an "increase" since it was just a codification of what prior legislatures had been funding.[97]
- ***Second,*** the 2017 legislature added 2 hours in smaller 15-person classrooms if a student manages to make it to 7th grade, but not for that exact same student while in kindergarten through 6th grade.[98]

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[95] *See Legislature's 2017 Report at 32; State's Brief at 21.*

[96] *Legislature's 2017 Report at 33. The Transitional Bilingual Instructional Program ("TBIP") was previously referred to as "English Language Learners" or "ELL".*

[97] *State's Brief at 22.*

[98] *See Legislature's 2017 Report at 34, see also State's Brief at 22. The State knows its amended funding formula still requires districts to expend non-State funds to cover the actual costs of implementing the transitional bilingual education programs. For example, State reports show its formula underfunded the cost of implementing TBIP in the Seattle School District by $17,933,799 in 2015-2016.* http://www.k12.wa.us/safs/rep/fin/1516/17001196.pdf *(showing actual cost of $24,668,034.39 vs. State funding of $6,734,235). Although the adding 2 hours for some students should increase that $6.7 million of State funding, the formula increase on its face does not even come close to amply funding the district's over $24 million of actual TBIP costs.*

The legislature's 2017 Report accordingly does not claim the Biennium Budget made enhancements that amply fund the actual cost of providing supplemental instruction and services in smaller classrooms to all of a district's K-12 students whose primary language is other than English.

Instead, the legislature's 2017 Report notes the above 2 hours for some (but not all) non-English speaking students, and claims mission accomplished because the budget funds the resulting formula it funds.[99] *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

8. Amply fund school districts' <u>actual cost</u> to provide Highly Capable instruction to their students.

The State notes this component provides the State's "accelerated learning and enhanced instruction for a school district's most highly capable students"[100] – a component that State witness testimony confirmed is important to lowering drop-out rates as these students too often drop out when not academically challenged.[101]

The State now asserts one enhancement to its funding formula for this component of its basic education program:

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[99] *Legislature's 2017 Report at 33-35; cf. State's Brief at 22.*

[100] *Legislature's 2017 Report at 35.*

[101] *Plaintiffs' 2013 Post-Budget Filing at 37-38 (Jarrett testimony); see also Plaintiffs' August 2016 Answer To The State's Filing at 25-27; Plaintiffs' 2016 Post-Budget Filing at 25; Plaintiffs' 2015 Post-Budget Filing at 44-46; Plaintiffs' 2014 Post-Budget Filing at 23-24.*

- The 2017 legislature amended the formula to set a 5% cap on the number of students it will fund – even when a district's actual number of highly capable students is more.[102]

But the State does not claim its amended formula amply funds the actual cost of a district providing this component's instruction to all of the district's otherwise eligible students.[103] To the contrary, the State acknowledges that its amended formula excludes a district's otherwise eligible students – mandating that when districts triage their eligible students to be within the 5% cap, the district must do that triage equitably between its low-income and non-low-income students.[104]

The State simply notes it raised the funding formula's 2.314% cap to 5%, and claims mission accomplished because it funds the resulting funding formula it funds.[105] *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

9. Amply fund school districts' actual cost to increase high school credit hours from 20 to 24 ("Core 24").

The legislature's 2017 Report does not claim the Biennium Budget amply funds the actual cost of adding the increased instructional time required to implement the Core 24 component of the State's basic education program, which increases the number of high school credits

[102] *Legislature's 2017 Report at 36 (noting formula's cap changing from 2.314% of a district's total student population to 5%); see also State's Brief at 22.*
[103] *See State's Brief at 22.*
[104] *Legislature's 2017 Report at 36.*
[105] *See Legislature's 2017 Report at 36; cf. State's Brief at 22 & 26.*

each school district must provide for graduation from 20 to 24.[106] Instead, it just declares mission accomplished because the budget funds the funding formulas it funds.[107] *In short: the tautology this Court rejected instead of the full constitutional compliance this Court ordered.*

10. Amply fund districts' actual cost to provide compensation that attracts & retains competent school personnel.

Lawmakers know that amply funding compensation levels to attract and retain competent teachers, administrators, and staff is a critical component of the State's basic education program;[108] that school districts' total funding (State, local, federal, & private funding combined) is not

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[106] *Core 24 increased the number of high school credit hours required to graduate from 20 credits to 24 credits for the Class of 2019. WAC 180-51-067 (20 credits), 180-51-068 (24 credits); RCW 28A.230.090(1), 28A.150.220(3)(b); ESHB 2242 §506(2); see also §402(4)(a)(i) (requiring one of high school teacher's 6 periods to be a planning period, thus requiring the hiring of additional staff to provide the 6 periods required to implement the State's Core 24).*

[107] *Legislature's 2017 Report at 5, top two rows of the Chart; cf. State's Brief at 10.*

[108] *E.g., McCleary, 173 Wn.2d at 535-536 (the State has "consistently underfunded staff salaries and benefits" – providing "far short of the actual cost of recruiting and retaining competent teachers, administrators, and staff"), at 536 n.29 (reiterating that this Court's January 2012 McCleary decision was "the second time in recent years that we have noted that state funding does not approach the true cost of paying salaries for administrators and other staff"), at 493-494 (noting conclusion of State's fiscal report that State provides "inadequate funding for administrative salaries"), at 508 (quoting QEC findings that "funding studies have already confirmed ... that our salary allocations are no longer consistent with market requirements"), at 532 (QEC findings that State salary allocations are not consistent with market requirements); January 2014 McCleary Order at 5-6 ("Quality educators and administrators are the heart of Washington's education system. .... nothing could be more basic than adequate pay."); August 2015 McCleary Order at 3 ("state funding of educator and administrative staff salaries remains constitutionally inadequate") & at 6 ("As this court discussed in McCleary, a major component of the State's deficiency in meeting its constitutional obligation is its consistent underfunding of the actual cost of recruiting and retaining competent teachers, administrators, and staff"); see generally Plaintiffs' 2012 Post-Budget Filing at 22-23 & 27-28; Plaintiffs' 2013 Post-Budget Filing at 17-21; Plaintiffs' 2014 Post-Budget Filing at 12-15; Plaintiffs' 2015 Post-Budget Filing at 25-32.*

sufficient to recruit and keep those people;[109] and that the additional funding districts need to recruit and keep competent employees is huge – e.g., far over $2 billion/year as detailed in the Final Report of ESHB 2261's Technical Compensation Working Group.[110]

The State's answer is to declare mission accomplished because the second year of its Biennium Budget funds 50% of a newly adopted salary funding formula[111] *echoing the tautology this Court rejected instead of actually showing the full constitutional compliance this Court ordered.*

Although the State's Brief alleges the new salary formula is based on lawmakers' "thorough data review, policy tradeoffs, careful balancing, and coordination of implementation",[112] lawmakers' rushed, last-minute June 30 enactment makes that allegation too far-fetched to believe.[113]

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[109] *Supra footnote 35; August 2015 McCleary Order at 6 (noting lawmakers' acknowledgment of the shortage of 4,000 teachers needed to implement the K-3 components of the State's basic education program).*

[110] *The June 2012 Final Report of the ESHB 2261 technical working group on compensation determined the compensation needed to attract and retain competent K-12 personnel would cost districts at least an additional $2.9 billion a year to implement. See Plaintiffs' 2013 Post-Budget Filing at 16-19 & n.54; see also Plaintiffs' 2015 Post-Budget Filing at 28-29. Moreover, foreseeing the significant teacher and staff shortages Washington school districts now face, that June 2012 Final Report warned that "immediate implementation" was needed "in order to attract and retain the highest quality educators to Washington schools through full funding of competitive salaries." See Plaintiffs' 2015 Post-Budget Filing at 26; Plaintiffs' 2013 Post-Budget Filing at 18-19 & n.55.*

[111] *State's Brief at 10 & 13-16.*

[112] *State's Brief at 12.*

[113] *The rushed, last-minute June 30 enactment was explained above in Part III.3 and footnote 53.*

Indeed, the only "evidence" the State's July 31 filing could find to rationalize some pieces of that last-minute enactment is a consultant's "Final Report" to the 2016 Education Funding Task Force and a person's 2012 submission to the ESHB 2261 Compensation Technical Working Group.[114] That Task Force was required to submit recommendations and proposed legislation based on the reliable evidence it uncovered in its work[115] – but it did **not** find the consultant's "Final Report" (which was really just a powerpoint presentation) merited any recommendations or proposed legislation.[116] And the ESHB 2261 Compensation Technical Working Group's June 2012 Final Report contains the reliable evidence it uncovered – which is not the "evidence" the State's Brief invokes.[117] And perhaps most importantly, there is not (because there truthfully cannot) be any claim that the lawmakers rushing to vote on June 30 read, considered,

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[114] *State's Brief at 17-18.*

[115] *See, e.g., State's Brief at 11.*

[116] *That's not surprising, for it based its "comparable" market-rate wage analysis on factors like (a) treating teachers as seasonal employees instead of having year-round jobs like real professionals with college degrees (thus, e.g., the hash-marked lines on comparable-wages powerpoint slide 52 that "annualizes" teacher pay for their only being such seasonal employees [https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=izzhDGqdgfw&att=false; (b) ignoring the teacher shortages produced by the total salary levels the State's underfunded school districts are currently able to pay (see State's Brief at 18, referencing that "total" salary as "reflecting market factors" – but similarly ignoring that those factors include State underfunding that prevents districts being able to pay the salaries required to attract and retain competent Washington teachers, and ignoring the teacher shortages that result); and (c) finding Washington salary levels acceptable since they are about the national average (without adjusting for States with lower – and thus cheaper – teacher qualification requirements).*

[117] *See State's Brief at 4 (noting ESHB 2261 recognized schools need additional money to attract and retain quality educators, and establishing the Compensation Technical Working Group to determine the amount of additional funding schools need).*

or even knew about the two items the State now alleges were the evidentiary basis for their rushed vote.

(a) A school district's actual salary costs.

The State's new funding formula is not written to fund the actual salary costs known to the State.[118] Instead, it sets new minimums and maximums without any correlation to actual salaries. For example:

- new formula minimums: it sets minimum State funding for a beginning teacher's salary at $40,000, without even alleging it's sufficient to end school districts' current teacher shortage.[119]
- new formula maximums: it sets maximum State funding for an experienced teacher's salary at $90,000, and makes it illegal for school districts to pay more for delivering basic education to students.[120]

The legislature's 2017 Report does not cite any evidence base for the minimum and maximum numbers set in its June 30 last-minute rush to enact something before the impending midnight government shutdown.

(b) Qualification & experience of a district's actual employees.

The State's new funding formula is not written to fund the qualifications and experience of employees that the State knows the district actually has.[121] Instead, the State changed its formula to fund the qualifications and experience of employees the district does **not** have:

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[118] *The actual salaries school districts actually have to pay to recruit and keep their employees are specified in collective bargaining agreements. State's Brief at 18.*

[119] *Legislature's 2017 Report at 23.*

[120] *Legislature's 2017 Report at 23 & 26.*

[121] *The "grid" and "staff mix" formula provisions in the current funding formula base State funding on the qualifications and level of experience of the Certificated*

- Funded quality: the formula funds a one-size-fits-all Statewide average level of qualifications and experience (thus requiring a district with higher-than-average quality employees to supplement their salaries with non-State funding).[122]
- Illegal quality: one of the formula's corresponding limitations makes it illegal for a district to keep its higher-than-average quality employees fully employed in its basic education program by supplementing their salaries with non-State funding.[123]

The legislature's 2017 Report does not cite any basis to conclude these formula changes amply fund a district's actual cost to retain the employees it actually has to implement the State's basic education program.

(c) Inflation.

State documents confirm that the Consumer Price Index (CPI) "measures inflation as experienced by consumers in their day-to-day living expenses" – and that in the counties where most Washington

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*Instructional Staff (**CIS**) a school district actually has. See Legislature's 2017 Report at 17-18. As the text after this footnote explains, the State's new formula instead disregards each district's actual CIS employment. The State also disregards the Certificated Administrative Staff (**CAS**) actually employed to implement the basic education program – for example, its formula for the upcoming 2017-2018 school year funds only half of the Seattle School District's actual costs for principals and other CAS. http://www.seattleschools.org/UserFiles/Servers/Server_543/File/District/Departments/Budget/2019%20Budget%20Development/Gap%20in%20CAS%20Funding%20August%2025,%202017.pdf (CAS – Certificated Administrative Staff Remaining Gap in State Basic Ed Funding). The State also knows it disregards the Classified Staff (**CLS**) actually employed to implement the basic education program – for example, it knows its formulas fund only about 17,225 of the 22,309 classified employees actually employed to implement the basic education program. http://www.wsipp.wa.gov/ReportFile/1646/Wsipp_Final-Report-to-the-Education-Funding-Task-Force-K-12-Public-School-Staff-Compensation-Analysis_Final-Report.pdf (Nov. 15, 2016 Final Report to the Education Funding Task Force, K-12 Public School Staff Compensation Analysis at 7).*

[122] *Legislature's 2017 Report at 20-21.*

[123] *Legislature's 2017 Report at 18 & 62; cf. at 37-38 & n.84 (also illegal to pay all Career & Technical Education (CTE) administration costs).*

residents live (Island, King, Kitsap, Pierce, Snohomish, & Thurston), the CPI has for the past 35 years consistently been higher than the Implicit Price Deflator (IPD).[124] Reducing the salary formula's metric from its current CPI measure to IPD does save the State money. But it's also a cut that puts employee salaries behind the inflation employees actually face.[125]

(d) "Regionalization".

Adding a "regionalization" measure to the salary formula that is based on residential values does use data already collected by the State's Department of Revenue.[126] But the legislature's 2017 Report does not cite any basis to conclude that resorting to that measure amply funds a district's actual cost of hiring.[127] Or even correlates to a school's actual hiring costs. Indeed, the State recognizes this lack of correlation by including hold harmless provisions for when its house-price "regionalization" measure reduces a district's salary funding to be less than its unconstitutionally low funding under the prior formula.[128]

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[124] *http://ofm.wa.gov/economy/econtopics/inflation/default.asp (at "How is Inflation Measured" section); https://www.bls.gov/regions/west/news-release/consumerpriceindex_seattle.htm (at counties covered by the "Seattle-Tacoma-Bremerton, WA. metropolitan area"); http://erfc.wa.gov/sites/default/files/public/documents/publications/mar17pub.pdf (at page 103, Table A4.1, of the March 2017 Washington State Economic & Revenue Forecast).*

[125] *Contrary to allegations in State's Brief at 30 and in the Legislature's 2017 Report at 19, 21 & 25.*

[126] *Legislature's 2017 Report at 25 (DOR's Residential Values data).*

[127] *Despite allegations to the contrary in State's Brief at 30 and in the Legislature's 2017 Report at 21 & 23-24.*

[128] *Legislature's 2017 Report at 24-25; see generally State's Brief at 15.*

(e) Fringe benefit & maintenance level "increases".

Salary funding "increases" asserted by the State include amounts that simply keep the State salary funding current – e.g., social security & Medicare taxes, health insurance, pension fund solvency, continuing 2015-2017 funding, and keeping up with enrollment & workload increases.[129] But those aren't really "increases". They're treading water.

(f) Compensation conclusion.

Lawmakers' last-minute June 30 enactments reshuffled the State's compensation funding deck to deal out a slightly larger State allocation for the least experienced teachers and make it illegal for a district to pay the current salary levels required to recruit and keep its more experienced staff for students in our public (as opposed to private) schools. But the legislature's 2017 Report does not show this hurriedly reshuffled deck amply funds the actual cost to school districts of attracting and retaining competent personnel in the three categories of staff needed to fully implement the State's basic education program. That's because, as the above pages illustrate, the amended salary formula on its face does not.

11. Constitutional Compliance Conclusion.

The legislature's 2017 Report does not even say (never mind demonstrate) that the funding formulas upon which the Biennium

[129] *See State's Brief at 16; Legislature's 2017 Report at 12-13.*

Budget's appropriations are based amply fund the actual cost to school districts of fully implementing the ten components of the State's basic education program. It accordingly does not demonstrate that the 2017 legislature complied with this Court's Order that the 2017-2019 Biennium Budget must make the necessary appropriations to achieve full compliance with Article IX, section 1 by September 1, 2018. Especially since this Court made it clear that lawmakers cannot declare full funding of a basic education program component unless that component's funding formulas amply fund the actual cost of a school district fully implementing that component.

V. LAWMAKERS ARE NOT ABOVE THE LAW

"No one is above the law – not even the President."
Washington State Attorney General [130]

This Court celebrated the 800th anniversary of the Magna Carta a few years ago because its signing established the fundamental principle that no one is above the law – not even those who run the government.[131] Our State Attorney General recently reiterated this same principle with his above-quoted declaration after a court granted his request for a restraining

[130] *http://www.seattletimes.com/seattle-news/politics/federal-judge-in-seattle-halts-trumps-immigration-order/ .*

[131] *Discussed in Plaintiffs' 2016 Post-Budget Filing at 49-50; cf. also, Plaintiffs' 2014 Answer To Defendant's Response To The Court's Show Cause Order With Errata at 34-35 (rule of law in a democracy).*

order to stop federal officials from violating the constitutional rights of immigrants residing in our State.

This principle should likewise apply to State officials and the constitutional rights of children residing in our State. No one is above the law. Not even Washington State legislators. And this Court has made Washington law unequivocally clear:

- "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education."
- The "paramount duty" mandate of Article IX, section 1 dictates that "the State must amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations."
- "Ample" funding requires "considerably more than just adequate or merely sufficient."
- Simply funding a funding formula does not satisfy this mandate: "If 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 formulas."
- 2018 is "a firm deadline for full constitutional compliance."
- The "necessary appropriations for the 2017-19 biennium are to be in place by final adjournment of the 2017 legislative session."

(The above-quoted rulings of this Court are detailed *supra*, Part II.)

Plaintiffs appreciate elected politicians' dilemma. Full compliance with the Washington constitution's paramount duty mandate is not cheap. Or easy. Or politically expedient. But lawmakers' full compliance with the law is what's right. Because, as the Washington Attorney General has

proudly affirmed, elected officials in a constitutional democracy are not above the law.[132]

VI. THIS COURT SHOULD UPHOLD THE LAW

Do not abandon your post.

General Order to military sentries[133]

This Court has repeatedly promised the school children of our State that it will stand guard to vigilantly enforce their paramount and positive constitutional right to an amply funded education.[134]

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[132] *Cf. Plaintiffs' 2015 Post-Budget Filing at 11-13 (cheap/easy/popular vs. right).*

[133] *See, e.g., Marine Corps Eleven General Orders Of A Sentry, Order 1 (take charge of your post) and Order 5 (do not leave or quit your post until properly relieved) [https://www.thebalance.com/general-orders-of-a-sentry-3354304].*

[134] *McCleary, 173 Wn.2d at 483 ("Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education") & at 547 ("This court intends to remain vigilant in fulfilling the State's constitutional responsibility under article IX, section 1"); December 2012 McCleary Order at 2 ("Each day there is a delay risks another school year in which Washington children are denied the constitutionally adequate education that is the State's paramount duty to provide"); January 2014 McCleary Order at 8 ("This court also made a promise to the school children of Washington: We will not 'idly stand by as the legislature makes unfulfilled promises for reform.' McCleary, 173 Wn.2d at 545. Our decision in this case remains fully subject to judicial enforcement."); September 2014 McCleary Order at 3 ("These orders are not advisory or designed only to get the legislature's 'attention', the court expects them to be obeyed even though they are directed to a coordinate branch of government. When the orders are not followed, contempt is the lawful and proper means of enforcement in the orderly administration of justice.") & at 3-4 ("In retaining jurisdiction in McCleary, the court observed that it 'cannot stand idly by as the legislature makes unfulfilled promises for reform.' McCleary, 173 Wn.2d at 545. Neither can the court 'stand idly by' while its lawful orders are disregarded. To do so would be to abdicate the court's own duty as a coordinate and independent branch of the government."); August 2015 McCleary Order at 8 ("The State urges the court to hold off on imposing sanctions, to wait and see if the State achieves full compliance by the 2018 deadline. But time is simply too short for the court to be assured that, without the impetus of sanctions, the State will timely meet its constitutional obligations. There has been uneven progress to date, and the reality is that 2018 is less than a full budget cycle away. As this court emphasized in its original [December 2012] order in this matter, 'we cannot wait until 'graduation' in 2018 to determine if the State has met minimum*

This Court could now abandon that promise.

But plaintiffs respectfully request that this Court not do that.

The State's 2017-2019 Biennium Budget does make progress. But as explained above, it doesn't achieve the full constitutional compliance long ago ordered in this case. The 2017 legislature decided to adjourn, leave town, and leave this Court with two fundamental options:

(1) abandon post: tell Washington's public school children that constitutional rights and court orders aren't that important; or

(2) enforce the law: issue an enforcement order strong enough to compel the State's decision-makers to finally comply with their paramount constitutional duty to amply fund the education of all Washington school children by the firm September 1, 2018 *implementation* deadline in this case.

The State has previously acknowledged that courts have the authority to issue enforcement orders which coerce a party's decision-makers to comply with the law by making compliance a preferable choice for those decision-makers than continued non-compliance.[135] And this Court has previously warned of firmer judicial enforcement if the State's

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constitutional standards.' ") & at 9 (noting "the gravity of the State's ongoing violation of its constitutional obligation to amply provide for public education" and "the need for expeditious action").

[135] *State's 2014 Show Cause Response at 8; Plaintiffs' 2014 Answer To Defendant's Response To The Court's Show Cause Order With Errata at 24 & n.30.*

decision-makers chose to continue the State's ongoing violation of its constitutional obligation in this case.[136]

As of today (August 30), the September 1, 2018 *implementation* deadline for full constitutional compliance is only 12 months away. With time now about to run out, plaintiffs respectfully request that this Court uphold its prior promises to Washington public school children by issuing one of the two enforcement orders that have already been fully briefed by both sides in this case:

First Alternative: Bearing in mind that lawmakers know "paramount duty" mandates the State must amply fund its K-12 public schools before any other government programs (e.g., before dispensing corporate tax exemptions), this Court can issue a firm enforcement order that gives lawmakers a choice:

> (a) choose to enact an amended or supplemental budget that amply funds the actual cost to school districts of fully implementing the ten components of the State's basic education program by no later than the September 1, 2018 full *implementation*

[136] *August 2015 McCleary Order at 9 (initially imposing a monetary sanction but warning that the Court has "other available options, including directing the means the State must use to come into compliance with the court's order") & at 8-9 ("The court has inherent power to impose remedial sanctions when contempt consists of the failure to perform an act ordered by the court that is yet within the power of a party to perform. .... Monetary sanctions are among the proper remedial sanctions to impose, though the court also may issue any order designed to ensure compliance with a prior order of the court. When, as here, contempt results in an ongoing constitutional violation, sanctions are an important part of securing the promise that a court order embodies: the promise that a constitutional violation will not go unremedied.").*

deadline (with that enactment signed into law no later than the March 8, 2018 end of the upcoming regular session[137]), or

(b) choose to have the tax exemption statutes enacted by the legislature (ahead of amply funding K-12 schools) struck down or suspended on September 1, 2018.[138]

Although lawmakers might choose option (b), politicians' political pragmatism makes it more likely that the above enforcement order would compel them to choose option (a) – and thereby stop the State's longstanding violation of Article IX, section 1.

Second Alternative: Bearing in mind that lawmakers have known for many years that the school statutes they enact are not constitutional when the budget they enact does not amply fund the actual cost of school districts' implementing those statutes, this Court can issue a firm enforcement order that gives lawmakers a choice:

(a) choose to enact an amended or supplemental budget that amply funds the actual cost to school districts of fully implementing the ten components of the State's basic education program by no later than the September 1, 2018 full *implementation* deadline (with that enactment signed into law no later than the March 8, 2018 end of the upcoming regular session[139]), or

(b) choose to have the State's unconstitutionally funded school statutes struck down or suspended on September 1, 2018.[140]

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[137] *https://www.sos.wa.gov/elections/calendar_list.aspx?y=2018 (the March 8 date).*

[138] *See, e.g., Plaintiffs' 2014 Answer To Defendant's Responses To The Court's Show Cause Order With Errata at 45-47.*

[139] *https://www.sos.wa.gov/elections/calendar_list.aspx?y=2018 (the March 8 date).*

[140] *See, e.g., Plaintiffs' 2014 Answer To Defendant's Response To The Court's Show Cause Order With Errata at 45-47.*

Although lawmakers might choose option (b), politicians' political pragmatism makes it more likely that the above enforcement order would compel them to choose option (a) – and thereby stop the State's longstanding violation of Article IX, section 1.

VII. CONCLUSION

This suit was filed before today's high school freshmen and sophomores had started kindergarten.[141] Back when today's juniors and seniors were in kindergarten and first grade.

Given our State government's longstanding violation of their positive, constitutional right to an amply funded education over the past 10 years in this case, it is entirely reasonable for today's high school students to draw the following conclusions:

- A **constitutional right** isn't really a right. It's just a platitude that government officials can disregard when politically expedient. The *Korematsu* Court got it right; the *Brown v. Board of Education* Court got it wrong.[142]
- A **court order** isn't really an order. It's just a suggestion that elected officials can ignore. Governor Wallace and Sheriff Arpaio got it right; Presidents Eisenhower and Kennedy got it wrong.[143]

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[141] *The two plaintiff families and Network for Excellence in Washington Schools ("NEWS") filed this suit on January 11, 2007. CP 3-26.*

[142] *Specifically: the Supreme Court got it right when it allowed government officials to imprison Americans based on their race, and got it wrong when it required government officials to stop segregating students based on their race. See Plaintiffs' 2016 Post-Budget Filing at 43-44 & n.88.*

[143] *Specifically: Governor Wallace (along with other elected officials in the South) got it right when they defied court desegregation orders, and Presidents Kennedy and Eisenhower got it wrong when they enforced such court orders. See Plaintiffs' 2016 Post-Budget Filing at 44 & n.88; see also* http://www.npr.org/templates/story/story.

- **Separation** of powers is a misnomer. It's actually an elimination of powers to prevent the judicial branch from interfering with another branch's view of constitutional mandates. President Jackson's defiant rebuke of *Worcester v. Georgia* got it right; President Nixon's obedient compliance with *Nixon v. Sirica* got it wrong.[144]
- The **rule of law** doesn't apply to lawmakers. Just the mortals over whom they govern. King Richard the Lion-Hearted and the royal families before him got it right; King John's signing the Magna Carta got it wrong.

If the above conclusions are correct, this Court should candidly say so and grant the political branches' request that the members of this Court throw up their hands, give up, and terminate this case.

But those conclusions are not correct under core concepts of civics, history, and law:[145]

- A constitutional right **is** a right. This Court's 2012 decision unequivocally held that "Article IX, section 1 confers on Washington children a positive, constitutional right to an amply funded education", and thus the State "must amply provide for the education of all Washington children as its first and highest priority before any other program or operation."[146] That's not an empty platitude. It's a constitutionally mandated legal right. When it comes to government officials' duty to uphold constitutional rights, *Korematsu* got it wrong, while *Brown v. Board of Education* got it right.

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php?storyId=14649353 (Eisenhower's enforcement of court's Little Rock school desegregation order).

[144] *Specifically: President Jackson got it right with a defiant "John Marshall has made his decision, now let him enforce it" retort (see Coleman v. U.S. Bureau of Indian Affairs, 715 F.2d 1156, 1158 (7th Cir. 1983)); President Nixon got it wrong when he turned over the Watergate tapes as ordered by the Court (see http://www.history.com/this-day-in-history/nixon-announces-release-of-white-house-watergate-tapes).*

[145] *See Plaintiffs' 2013 Post-Budget Filing at 39-46 & nn.120-141; Plaintiffs' 2014 Post-Budget Filing at 38-42 & nn.112-126; Plaintiffs' 2015 Post-Budget Filing at 2-5 & nn.2-8, and at 11-13 & nn.35-39; Plaintiffs' 2016 Post-Budget Filing at 43-49 & nn.87-94; Plaintiffs' August 2016 Answer To The State's Filing at 10-17 & nn.11-28.*

[146] *Supra footnote 9.*

- A court order **is** an order. As this Court has unequivocally declared in this case, court orders must be obeyed "even when directed to a coordinate branch of government."[147] A court order is not a suggestion. It's an order. When it comes to elected officials' duty to obey court orders, Governor Wallace and Sheriff Arpaio got it wrong, while Presidents Eisenhower and Kennedy got it right.
- Separation of powers is **not** an elimination of powers. This Court has repeatedly held that Article IX, section 1 "imposes a judicially enforceable duty" on the State.[148] When it comes to the judicial branch's power to enforce constitutional mandates, President Jackson got it wrong, while President Nixon got it right.
- The rule of law **does** apply to lawmakers. As the Washington Attorney General has emphatically declared, "No one is above the law – not even the President."[149] King Richard the Lion-Hearted and the royal families before him got it wrong, while King John's signing the Magna Carta got it right.

If a constitutional right **is** a right ... if a court order **is** an order ... if separation of powers is **not** an elimination of powers ... and if the rule of law **does** apply to lawmakers ... this Court should say so. If an amply funded K-12 education really is a true, positive constitutional right of each and every child residing in our State, it is this Court's duty to finally bring the State's many years of procrastination, obfuscation, and delay to an end by issuing the type of firm enforcement order noted above. Such an enforcement order is no surprise to any elected official in our State

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[147] *Supra footnote 134.*

[148] *McCleary, 173 Wn.2d at 485 ("article IX, section 1 imposes a judicially enforceable affirmative duty on the State" [citing Seattle School District, 90 Wn.2d at 520]) & at 514 ("More than 30 years ago, we held that article IX, section 1 imposes a judicially enforceable affirmative duty on the State" [citing Seattle School District, 90 Wn.2d at 520]).*

[149] *Supra, footnote 130.*

because both sides have already fully briefed them in this appeal's prior Post-Budget Filings.

We're now at the end of the road in this case. And a stark question stands at the end of this road: Do constitutional rights or court orders really matter in a democracy?

The State has given the four children in the McCleary and Venema families a firm "no" answer – for the youngest of them (who was in 2nd grade when his mom filed this suit) graduated from high school earlier this year.[150] Plaintiffs respectfully request that ***this Court***, on the other hand, give a strong and emphatic "yes" answer to the over 1 million kids still left in our State's public schools today.

RESPECTFULLY SUBMITTED this 30th day of August, 2017.

Foster Pepper PLLC

s/ Thomas F. Ahearne

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[150] *http://www.seattletimes.com/opinion/its-not-right-that-my-calculus-textbook-is-from-1994* .

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 Wednesday, August 30, 2017, I caused PLAINTIFF/RESPONDENTS' 2017 POST-BUDGET FILING to be served as follows:

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Amici Curiae National Association for the Advancement of Colored People, Chinese Information Service Center, Multicultural Education Rights Alliance, Rainier Beach Action Coalition, Southeast Seattle Education Coalition, and United Indians of All Tribes Foundation

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 30th day of August, 2017.

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

FOSTER PEPPER PLLC

August 30, 2017 - 4:31 PM

Transmittal Information

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Appellate Court Case Title:	MATHEW & STEPHANIE MCCLEARY ET AL VS STATE OF WASHINGTON
Superior Court Case Number:	07-2-02323-2

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Plaintiff/Respondents' 2017 Post-Budget Filing

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