6-8-2016

Brief of Amicus Curiae, Washington's Paramount Duty

No. 84362-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MATTHEW & STEPHANIE McCLEARY, et al.,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON,

Appellant/Cross-Respondent.

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

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A. OVERVIEW

In this case, this Court has unanimously said that the State is not meeting its constitutional "paramount duty . . . to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex," as required under WASH. CONST. art. IX, § 1. Today, the State is still engaging in ongoing contempt of this Court by failing to comply with its constitutional duty. Not only has the State failed to comply with this Court's lawful orders to rectify the chronic underfunding of Washington's public schools, it continues to make deliberate decisions to deny Washington's more than one million public school students their constitutionally guaranteed rights to an education which provides them "the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this state's democracy."[1]

Throughout, the State has maintained that this Court is somehow exceeding its constitutional powers and encroaching upon those of the Legislature. But in fact, this Court would be abandoning its duty and fundamental role as a separate branch of government were it to accede. Further, this Court's actions in this case are not unique or even unusual, as courts across the country have been tasked with similar questions and

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[1] *McCleary v. State,* 173 Wn.2d 477, 484, 269 P.3d 227 (2012).

reached similar results. *Amicus* asks the Court to issue an order that unless the State amply funds its public schools as our constitution requires by April 28, 2017, the Court will suspend the State's tax exemption statutes enacted by the Legislature.

B. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Washington's Paramount Duty (WPD) is a grassroots, non-profit advocacy organization with a single mission: to compel Washington to amply fund basic education. WPD formed in September of 2015 in response to Washington's chronic underfunding of basic education, the decisions of this Court in this case, and the State's ongoing contempt. As parents, members have been in the classrooms and seen the stark, real-life consequences of years of the State failing to comply with its constitutional duty. We have also seen the incredibly unfair "band-aid" system which has occurred as a result, so that children whose parents do not have resources get a very different education than those who do. We have seen the disproportionate impact of chronic underfunding in our most at-risk communities, which do not have the ability to plug the holes created by the Legislature's failures. WPD now seeks to participate in this case as *amicus curiae* and add its voice regarding the issues presented in this case.

C. STATEMENT OF ISSUES

1. Whether the actions of the 2016 Legislature were sufficient to purge this Court's contempt order?

2. Whether this Court has a separate and ongoing duty to protect the rights of more than one million children in this state?

3. Whether this Court's fundamental constitutional role requires it to take decisive action to compel the legislature to end its ongoing contempt?

D. ARGUMENT

THIS COURT HAS THE AUTHORITY AND DUTY TO PROTECT AND HONOR THE CONSTITUTIONAL RIGHTS OF THE CHILDREN IN THIS STATE

WPD rebuts the State's claims that (1) the actions of the 2016 Legislature were sufficient to purge this Court's contempt order, (2) the Court has exceeded its constitutional bounds and must abandon its oversight of whether the state complies with its paramount duty, and (3) the Court is limited in its authority and must defer to the legislative process rather than impose further sanctions to enforce lawful court orders. Further, WPD supports this Court's decisions that 1) this Court has a separate and ongoing duty to protect the rights of more than one million children from unconstitutional conditions and 2) the obligation to fulfill its constitutionally mandated role in ensuring the Constitution is not violated by acts of another branch. Even cursory examination of the acts

and rulings of courts in other states reveals the fallacy of the State's claims that the Court is somehow exceeding its constitutional bounds or making an unprecedented foray from its authority in this case.

1) The State is in ongoing contempt of this Court and the rights of more than one million children.

E2SSB 6195 is—in plain terms—a kick-the-can plan. It does not identify any further basic education funding for Washington's K-12 public schools. *See* Laws of 2016, ch. 3. It does not invest in lowering K-3 class sizes, as required by ESSB 2261 and SHB 2776. *Id*. It does not help fund the capital necessary to build classrooms to reduce class sizes and provide all-day kindergarten. *Id*. Yet the State claims that, with its passage, the State has complied with its constitutional duties, declaring, again, that it is "fully committed" to complying. State's Brief at 16 (May 18, 2016). Even more, the State chides this Court that this "statement of commitment by a coordinate branch of government is entitled to respect." State's Brief at 16 (May 18, 2016).

This Court should reject the State's renewed attempts to convince this Court to abandon its duties to the children of this state. In August 2015, this Court laid out what the State failed to accomplish in 2015, including finding that (1) the State was not on course to meet class-size reductions by 2018 (Order at 5 (Aug. 13, 2015)), (2) the State had

provided "no plan for how it intends to pay for the facilities needed for all-day kindergarten and reduced class sizes,"[2] and (3) the State had "wholly failed to offer any plan for achieving constitutional compliance" regarding personnel costs (*Id*. at 6). This Court also reiterated that the State must offer a plan "for achieving a sustained, fully state-funded system that will attract and retain the educators necessary to actually deliver a quality education." *Id*. at 7. This Court determined that further promises, rather than concrete funding plans, were not acceptable. *Id*.

E2SSB 6195 is yet another empty promise. It does not include any concrete funding plans or identify dependable and regular tax sources. This bill delayed the hard decisions the Legislature needs to make regarding funding to the 2017 Legislative session, which does not commence for another half a year. Meanwhile, the gap—between what the State is funding for basic education and what it needs to fund under ESSB 2261 and SHB 2776—continues to widen.

The State stretches to defend the Legislature's lack of action this year. The State's brief transmitting the Legislature's report, however, is

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[2] This Court's reference to capital expenditures in the August 2015 Order was not its first mention of the full range of necessary expenditures the State must make to amply fund basic education: "[i]f the State's funding formulas provide only a portion of what it actually costs a school to pay its teachers, get kids to school, and keep the lights on, then the legislature cannot maintain that it is fully funding basic education through its funding formulas." *McCleary,* 173 Wn.2d at 532.

rife with inconsistencies. For example, the State argues that the Joint Task Force on Education Funding (JTFEF) is merely "an aspirational recommendation that had not been enacted by the Legislature." State's Brief at 7 (May 18, 2016). The State intimates that it was free to disregard the JTFEF recommendations, and even faults this Court for looking to those recommendations at all. State's Brief at 7-8 (May 18, 2016). A few pages later, however, the State assures this Court that the current "Education Funding Task Force [will] analyze data and make recommendations to the Legislature for the 2017 legislative session." *Id*. at 11. But the State makes no guarantee that the 2017 legislature will not similarly disregard the current task force's recommendations. *See id*.

In addition, the State shifts positions on whether further studies are needed and how many might suffice. In the trial court, the State took the position that ESSB 2261 essentially mooted Plaintiffs' demand for the State to conduct a study to determine the actual cost of funding basic education. *McCleary*, 173 Wn.2d at 540. Compare this to the State's current argument:

> [E2SSB 6195] includes provisions specifically designed to estimate the cost of fully funding the basic education portions of K-12 teacher and staff compensation. Once that information is available, the Legislature can craft a budget and determine appropriate funding sources.

State's Brief at 15 (May 18, 2016).

This new "need for further study" claim, however, falls particularly flat, given the history of this issue—and this case. Just a few years ago, in 2010, the State declared that it had *already* done enough studies, so that no additional court-ordered studies were needed. State's corrected brief at pages 58-69 (Aug. 20, 2010). Further, the children of this state have already been waiting through years of voluminous previous "studies" and a large number of "task forces" at the Legislature's behest. *See e.g.*, Laws of 2005, ch. 496, §3(2) (creating the "Washington Learns" task force, with a steering committee, three advisory committees and a "comprehensive" K-12 "finance study").

Indeed, this Court spent nearly 20 pages of its 2012 decision in this case summarizing all of the numerous previous studies and task forces. *McCleary*, 173 Wn.2d at 491-510. And while the State spends millions of dollars to "study" the issue, Washington children continue to be forced to endure a constitutionally inadequate education. *See e.g.*, *McCleary,* 173 Wn.2d at 501-502 (noting that Washington Learns spent 18 months and spent $1.7 million without results).

The State has not explained why the previous studies and years of work are now suddenly insufficient. *See generally*, State's Brief at (May 18, 2016). Nor does it describe any compelling reason why *this* study

will be *the* study which finally supports the Legislature in actually complying with its paramount duty. *Id.* While it is not within this Court's ambit to declare the *way* the Legislature satisfies its constitutionally mandated duty or whether a certain "study" should be involved, it should be skeptical of promises that planning to do another "study" will suddenly change the recalcitrance of the State to comply with this Court.

These failures have consequences. Since this lawsuit was filed by Plaintiffs in January 2007, millions of children have gone to the schools in this state. Every day, every single one of them was deprived of the rights the founders of our state deemed so important they were set above all else, as "paramount." This Court should be skeptical of claims that this year and this study and this task force will somehow be different.

Ultimately, the State's true level of actual commitment to complying with its paramount duty appears seems revealed more clearly through its actions than its words in this Court. Although it could not find the money or will to fund basic education for common schools for more than one million children across the state, it exerted considerable effort[3] to ensure funding for the .1% of children in charter schools. *See* Laws of

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[3] This included introducing a "placeholder" blank bill. *See* http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/6670.pdf.

2016, ch. 241. Indeed, in its report to this Court, the Legislature counts its investment in charter schools as an example of the State's increased investment in education. Legislative Report at 8, 25-26 (May 18, 2016).

Yet the Supplemental Budget amount devoted to charters is not an *increase* in education spending. Instead, the Legislature shifted money from common schools to charter schools. *Id*. at 35 (explaining that the Legislature made a "downward adjustment to funding for common schools and add[ed] corresponding funding for charter school[s] . . . ."). Rather than amounting to evidence that the Legislature is attempting to fulfill its paramount duty to amply fund an education for all children in this state, the Legislature's decision to take money *away from* common schools and transfer it to charter schools is further evidence that the State has chosen to not meet its constitutional obligations. At most, it is a moving around of money from common to non-common schools.

ESSB 6195 is an information-gathering bill, not a plan for how to amply fund basic education with dependable and regular tax sources. WPD finds no solace in the State's empty assurances that it will comply with its constitutional duty to amply fund basic education in the future, given the history of this case. Neither should this Court.

2) This Court is well within the confines of its constitutional role and duties

Throughout these proceedings, the State has taken the position that this Court is somehow overstepping its constitutional bounds and improperly encroaching upon the Legislature's role. It repeats this refrain in its most recent pleadings, making assurances that it intends to fully fund education in the future and chiding this Court that such a "statement of commitment by a coordinate branch of government is entitled to respect." State's Brief at 16 (May 18, 2016).

This Court has already properly rejected the State's claims that the Court has no role to play in ensuring that the Article IX, section 1 rights of Washington's children are honored. *McCleary*, 173 Wn.2d at 541. The State's persistence in continuing to show a lack of respect for the Court's conclusion on this point, however, is very publicly on view. *See*, *e.g.*, Open letter from members of the Majority Coalition Caucus (Washington State Senate) (Aug. 21, 2015)[4](declaring that the Court's order of contempt has created a "constitutional crises" [sic] and "[d]emands a Legislative Response" because it violates constitutional prohibitions

[4] *Available at* https://www.documentcloud.org/documents/2291109-150821mccletterfinal.html.

including separation of powers); Matthew Manweller, Terry Nealey & Mike Padden, *Supreme Court now legislates – what's next?* (Jan. 27, 2014),[5] ("Contempt? If anyone is acting with contempt at our Capitol, it would seem to be the eight justices who are ignoring the constitutional separation of powers between branches of government").

But this Court is neither alone nor unique in its actions, as even cursory review of the relevant caselaw from our country's highest court and the highest courts in other states reveals. Tension between the branches of government and the desire of a legislature to avoid judicial oversight of its acts is nothing new. Well before Washington was a state, the issue came before our nation's highest court. *See Marbury v. Madison*, 5 U.S. 137, 138, 2 L. Ed. 60 (1803). That Court was clear in holding that the Constitution, as interpreted by the Court, was the highest law of the land, with the purpose of providing the limits and definitions of governmental power. *Id*. at 176-77. The Court flatly said that holding to the contrary would give "to the Legislature a practical and real omnipotence" to act without limits. *Id*. at 178-79. The Court has since reaffirmed this principle and declared that the fact another branch may be unhappy with the Court "cannot justify the court's avoiding their

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[5] *Available at* http://houserepublicans.wa.gov/news/legislature/manweller-nealey-padded-opinion-supreme-cour-now-legislates-whats-next/.

constitutional responsibility." *See Powell v.McCormack*, 395 U.S. 486, 596-97, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969).

Further, this Court is far from in the minority in its conclusion about its proper role in this case. Across the country, the highest court of a majority of states have found themselves responsible for ensuring that their state's public schools satisfy constitutional requirements. *See, e.g., Abbeville County Sch. Dist. v. State*, 767 S.E.2d 157 (S.C. 2014), *affirmed* 415 S.C.D. (2015); *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); *Connecticut Coalition for Justice in Educ. Funding, Inc., v. Rell*, 990 A.2d 206, 223 (Conn. 2010); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005), *review denied* 228 S.W.3d 864 (2007).

As one court said 20 years ago, state supreme courts have "overwhelmingly" agreed that the state's highest court may not abdicate its duty to its citizens to ensure constitutional rights, even against another branch, because "the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation." *Sheff v. O'Neill*, 678 A.2d 1267, 1276 (Conn. 1996); *see also, Davis v. State*, 804 N.W.2d 618, 641 n. 34 (S.D. 2011) ("vast majority" of jurisdictions).

Thus in Kansas, the state was recently found to have established "unconstitutional, wealth-based disparities" in schools. See *Gannon*, 319 P.3d at 1204. As here, that state's Legislature argued the Court was overstepping its bounds. *Id*. at 1235. Noting that the Constitution was the work of the people and that the people had assigned to the judiciary "the final authority to determine adherence to standards of the people's constitution," that Court rejected the idea that it should abdicate that responsibility at the Legislature's behest. *Id*. The Court declared, "[t]he people's constitutional standards must always prevail over the legislature's statutory standards should the latter be lower." *Id*.

The Kansas high court respected that the state constitution gave the Legislature "the authority to determine the broad range of policy issues involved in providing for public education," but noted that nothing in that grant of authority suggested that "the Legislature is to be the final authority on whether it has discharged its constitutional obligation." *Gannon*, 319 P.3d at 1220. The court also pointed out that the framers could easily have given the Legislature absolute discretion over education if they had written the Constitution to require "only that the Legislature provide whatever public education it deemed appropriate." *Id*.

Indeed, that is the kind of language present in the minority of states, where the highest state court found it had no role to enforce any mandate on education. In Rhode Island, for example, the constitution makes it the "duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people" those advantages. R.I. Const., Art. XII, §1. That state's high court understandably held that the provision "does not appear to have imposed on the General Assembly any new, measurable, or judicially enforceable duties to support education." *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 788-89 (R.I. 2014).

Similarly, in Iowa, where the state constitution provides only that the "general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement," the state's high court distinguished that language as unusual, "unlike the constitutions of most other states," because it does not mandate free public school or that schools are even "adequate." *King v. State*, 818 N.W.2d 1, 10 (Iowa 2012) (citing Iowa Const. Art. IX, 3nd, § 3). In Nebraska, with a constitution requiring the Legislature to "pass suitable laws . . . to encourage schools," that state's court high noted the

framers there had specifically rejected the standards of a particular level of education, *i.e.*, "thorough and efficient," as set forth in many other state constitutions. *Nebraska Coalition for Ed. Equity and Adequacy v. Heineman*, 731 N.W.2d 164 (2007) (quoting Neb. Const. Art. I, § 4, and Neb. Const. Art. VII, §. 1). Oklahoma's constitution specifically requires the legislature to "establish and maintain a system of free public schools" but leaves to the Legislature the determination of carrying out this duty, "largely within its discretion." *Okla. Educ. Ass'n. v. State ex rel.Okla. Legislature*, 158 P.3d 1058 (Okla. 2007); *see also,* Okla. Const. Art. 1, §. 5; Okla. Const. Art. X, § 32; Okla. Const. Art. XIII, § 1.

And in Alabama, the constitution mandates that it is "the policy of the state of Alabama to foster and promote education of its citizens in a manner and extent consistent with its available resources." Alabama Const. Art. XIV, § 256. In fact, that Constitution further provides, "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature in furthering or providing for education[.]" Alabama Const. Art. XIV, § 256. It is no shock that, given that language, that state's high court found itself unable to provide a remedy even after finding the state education system constitutionally

deficient. *See Ex Parte James*, 836 So.2d 813 (Ala. 2002). As that high court noted, the framers of that state's constitution had decided to exclusively trust that power to the Legislature. *Id.*

In this state, in contrast, as this Court has already repeatedly held, Article IX, § 1 is not so limited. *McCleary,* 173 Wn.2d at 515; *see Seattle Sch. Dist. No. 1 v. State,* 90 Wn.2d 476, 585 P.2d 71 (1978). The Constitution does not make it the paramount duty of the Legislature, the Court or the Executive to "make ample provision for . . . the education of all children"—it "contemplates a sharing of powers and responsibilities among all three branches of government[.]" 90 Wn.2d at 520.

Further, Article IV vests this Court with not only the power but the duty to ensure the constitutional rights of the people are not violated by the acts of another branch. *See Putnam v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). The constitutional division of powers into three branches was deliberately crafted in order to protect individuals against "centralized authority and abuses of power." *State v. Rice*, 174 Wn.2d 884, 279 P.3d 849 (2012); *see U.S. v. Nixon*, 418 U.S. 683, 703, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). While Washington's constitution does not contain a formal "separation of powers" clause, the

division of our government into has been "presumed throughout our state's history to give rise to a vital separation of powers doctrine." *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009). As this Court has noted, the checks and balances set into place by our divided but equal branches of government is intended "to ensure liberty by defusing and limiting power." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 503-504, 198 P.3d 1021 (2009).

Contrary to the State's suggestions, however, the branches are not "hermetically sealed" from engaging in related tasks, although the "fundamental functions of each branch" must "remain inviolate." *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Further, although a violation of the separation of powers doctrine technically accrues to the branch invaded, the purpose of protecting individuals underlies the concept so strongly that the doctrine is violated even if one branch *approves* the encroachment upon its territory by the other branch. *Id.* at 136. As a result, even if this Court were inclined to accept the State's renewed invitation to step back from its constitutionally mandated role of determining whether acts of the Legislature comply with mandates of the Washington Constitution, this Court could not do so without itself violating the very Constitution at issue. And indeed, the Legislature's

suggestion that this Court abdicate its constitutional duty and leave up to the State the decision of whether to ultimately comply with the requirements of Article IX, § 1, because the promise of the Legislature is "entitled to respect," borders on disrespect of this Court's crucial constitutional role.

It is important to note that this Court has a long history of respect for the separation of powers and applies great restraint in relation to legislative power in a significant number of ways. Statutes crafted by the Legislature are presumed constitutional. *See City of Bothell v. Barnhart,* 172 Wn.2d 223, 229, 257 P.3d 648 (2011). Further, a highly deferential standard is applied and anyone challenging a statute bears the burden of showing that it is unconstitutional "beyond a reasonable doubt"—the highest burden of proof. *See id.; see also State v. Wheeler,* 145 Wn.2d 116, 132, 34 P.3d 799 (2001). And this Court defers to the Legislature so strongly that it will not strike down a statute unless it is "fully convinced, after a searching legal analysis, that the statute violates the constitution." *See Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). The Court refuses to "construe or interpret" a statute which is "clear, plain and unambiguous in its terms," applying the principle that it does not "sit

to review or revise legislative action but rather to enforce the legislative will when acting within its constitutional limits." *Robb v. City of Tacoma*, 175 Wn.2d 580, 586, 28 P.2d 327 (1933). The Court further presumes that the Legislature intended to enact effective laws and engages in great effort to construe those acts so as to "preserve their constitutionality." *See State v. Williams,* 171 Wn.2d 474, 476, 251 P.3d 877 (2011).

And the Court has, in fact, exercised great restraint in this case, allowing years to pass before imposing sanctions and imposing only a fine, in comparison with the other authority it has and the patience and authority which other high courts have shown. *See*, *e.g.*, *Gannon v. State,* __ P.3d __ (2016 W.L. 3063848) (May 27, 2016) (Kansas Supreme Court staying sanctions for one session; issuing order closing schools unless Legislature complies with its constitutional duties by end of June 2016).

Put plainly, the State asserts that a "statement of commitment by a coordinate branch of government is entitled to respect." State's Brief at 16 (May 18, 2016). But it has not shown this Court such respect. This Court has exercised its constitutional authority as the judicial branch over a case and found the State in contempt for failing to comply with a lawful court order. Order at 9 (Aug. 13, 2015). Respect for another branch of government is not due the Legislature alone. *See Hale*, 165 Wn.2d at 507.

Despite this Court's order and the accumulation of more than 29 million dollars in fines, the Legislature did not even include partial payment in the State's supplemental budget. Legislative Report at 27 (May 18, 2016). Thus, it has treated this Court - an equal branch - with far less respect than it is demanding in return.

The children of this state have waited long enough. How many thousands of children have now been subjected to daily violation of their constitutional rights to an education in this state since the first ruling below? How many thousands more will graduate without ever receiving their due before their rights are finally honored?

This Court should consider a stronger contempt sanction to motivate the State to comply with this Court's Orders. Not only should the Court deny the State's request to find that it has purged the contempt, it should consider avenues to enforce the fines already accrued. In addition, WPD urges this Court to issue an order stating that if the State does not amply fund basic education by the last date of the 2017 legislative session (April 28, 2017), the Court will suspend the State's over 600 legislative-enacted tax exemption statutes. Plaintiffs in this case have argued for this sanction. Plaintiffs' Motion for a Timely 2016

Briefing Schedule at 13-15 (Nov. 18, 2015); *see also* Plaintiffs' 2015 Post-Budget Filing at 47-48. Likewise, a member of this Court discussed invalidating the approximately $30 billion a biennium included in the over 600 exemption statutes. *See* Sept. 3, 2014 Show Cause Hearing, at minutes 43:39-45:29[6](Johnson, J., A.C.J.) (noting option of Court invalidating the State tax exemptions and leaving it up to the Legislature to re-enact exemptions it so chooses after the Legislature amply funds basic education). This sanction would compel the State, and specifically the Legislature, to comply with this Court's orders and amply fund basic education.

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[6] *Available at* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014090001/.

E. CONCLUSION

This Court has the power, authority and duty to order the State to stop violating the constitutional rights of the more than one million children in the public schools in this state. Despite the State's claims to the contrary, deferring to the Legislature in this matter would be an abdication of the Court's constitutional role.

DATED this 7th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/ELECTRONIC MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Amicus Brief via electronic mail (per agreement by the below) upon the following:

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