12-28-2015

Plaintiffs' Reply Regarding Their Motion for a Timely 2016 Briefing Schedule

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 **N**ETWORK FOR **E**XCELLENCE IN **W**ASHINGTON **S**CHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Plaintiffs/Respondents.

PLAINTIFFS' REPLY REGARDING THEIR MOTION FOR A TIMELY 2016 BRIEFING SCHEDULE

TABLE OF CONTENTS

"I believe that this nation should commit itself to achieving the goal, before this decade is out, of landing a man on the moon and returning him safely to the earth. No single space project in this period will be more impressive to mankind, ... and none will be so difficult or expensive to accomplish....If we are to go only half way, or reduce our sights in the face of difficulty, ... it would be better not to go at all."

President John F. Kennedy, speech to joint session of Congress (May 25, 1961) [2]

"Houston, Tranquility Base here. The *Eagle* has landed."

Apollo 11 astronaut Neil Armstrong, on the moon (July 20, 1969) [3]

I. INTRODUCTION

The first modern rocket lifted off in 1942.[1] Nineteen years later, John Kennedy made a speech. He called on Congress to fund our nation's landing on the moon before the decade was out – readily acknowledging that no other endeavor "will be so difficult or expensive to accomplish."[2] Eight years later, we succeeded.[3]

The *Seattle School District* ruling was in 1978. Twenty-nine years later (January 11, 2007), the McCleary and Venema families filed this suit. They called on our State government to stop violating children's paramount constitutional right to an amply funded education before their kids were out of school. Compliance with Article IX, §1 is difficult and

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[1] *The first V-2 rocket took off on October 3, 1942. http://www.history .com/this-day-in-history/germany-conducts-first-successful-v-2-rocket-test .*

[2] *https://www.nasa.gov/vision/space/features/jfk_speech_text.html#.Vnn8rfk4FD8 ("For while we cannot guarantee that we shall one day be first, we can guarantee that any failure to make this effort will make us last.... I therefore ask the Congress, above and beyond the increases I have earlier requested for space activities, to provide the funds which are needed to meet the following national goals: First, I believe that this nation should commit itself to achieving the goal, before this decade is out, of landing a man on the moon and returning him safely to the earth. No single space project in this period will be more impressive to mankind ... and none will be so difficult or expensive to accomplish.... [L]et it be clear that I am asking the Congress and the country to accept a firm commitment to a new course of action, a course which will last for many years and carry very heavy costs.... If we are to go only half way, or reduce our sights in the face of difficulty, in my judgment it would be better not to go at all.").*

[3] *See http://www.nasa.gov/mission_pages/apollo/apollo11.html.*

expensive to accomplish. But it's now nine years later. And the State's response has focused more on procrastination than success.

We can reach the moon in eight years – but can't reach ample funding of our public schools in nine. The State's Answer to plaintiffs' motion says this Court should go slow and sit quiet. Plaintiffs disagree.

II. PLAINTIFFS' PROPOSED BRIEFING SCHEDULE IS NOT "UNFOUNDED"

A. The State Does Not Dispute Plaintiffs' Four Reasons For Prompt Action: *Duty*, *Violation*, *Urgency*, and *Contempt*.

Plaintiffs base their motion on (1) the State's paramount duty under Article IX, §1; (2) the State's ongoing violation of that duty; (3) the urgency of compliance before students grow up; and (4) the State's continuing contempt of court.[4] The State's Answer does not dispute this duty, violation, urgency, or contempt. Instead, it says plaintiffs' request for prompt action is "unfounded" for the three reasons discussed below.

B. The State's Three Reasons For Delay Lack Merit.

1. "We Might Comply Next Year (2017)"

First, the State points to the long 2017 session. But the State assured this Court that its 2015 long session would produce the "grand agreement" and "focus on raising revenue" required to amply fund our public schools.[5] There's a limit to how many times one can cry wolf.[6]

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[4] *Plaintiffs' Motion at p.1 & pp.4-9.*

[5] *See 6/14/2014 Show Cause Order at pp.2-3; Plaintiffs' 2015 Post-Budget Filing at p.42.*

Moreover, having that 2017 session to finish making the ample funding progress required to comply with Article IX, §1 by the 2017-2018 school year doesn't eliminate the need for significant progress this upcoming 2016 session. As this Court's December 2012 Order made clear, we cannot sit and wait until graduation to see if the State is meeting its Article IX, §1 mandate.[7]

If NASA had suggested in 1968 that it could delay making significant progress on its Saturn rocket development because the moon landing deadline was not until 1969, NASA's suggestion would have been rejected as folly.[8] The State's suggestion that it can delay making significant progress in 2016 because the full compliance deadline is not until 2017 should be similarly rejected here.

2. "Maybe We'll Comply This Year (2016)"

Second, the State suggests prompt Court action isn't needed because maybe the 2016 session will purge the State's contempt anyway.[9]

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[6] *Or as that old proverb says: "Fool me once, shame on you; fool me twice, shame on me."*

[7] *12/20/2012 Order at p.3 ("We cannot wait until 'graduation' in 2018 to determine if the State has met minimum constitutional standards").*

[8] *The progress NASA had to make with respect to that rocket development and the ensuing Apollo tests took many years. See https://www.nasa.gov/mission_pages/apollo/missions/Apollo-Saturn-Unmanned.html#.VnszNvk4FD8 (Saturn rocket development mileposts), https://www.nasa.gov/mission_pages/apollo/missions/index.html (Apollo tests).*

[9] *See State's Answer at p.2. The State also nakedly alleges that it made $4.8 billion of "progress" since 2012 (State's Answer at pp.2-3) – but as this Court knows from plaintiffs' prior Post-Budget Filings, the State's large "progress" claims rely largely on increases required to meet maintenance level funding due to factors like student population increases and increased costs rather than the increased funding mandated by the Court rulings in this case.*

Plaintiffs hope the 2016 session does that. But compliance with court orders has not been the State's practice in this case. And with only 19 months left before the firm 2017-2018 school year deadline, time for full constitutional compliance is running out. Suggesting that maybe the 2016 session will comply does not negate the reasonableness of deciding promptly after adjournment if that session did comply.

3. "It'll Take Us Over A Month To File The Plan Enacted By The Legislature"

Third, the State complains that plaintiffs' proposed schedule is too "hasty" because the legislature's Article IX Committee "must meet, reach consensus, and direct staff in preparing the report to the Court" and perhaps have "one or more public meetings as part of its process."[10] But that's not a valid reason for the delay requested in the State's Answer:

- Once the legislature adjourns, the ample funding ***plan*** it enacted is what it is. The Article IX Committee cannot change it. Thus, filing that enactment the day after adjournment is not "hasty".[11]
- Once the Governor signs the budget, any ample funding ***progress*** he signed into law is what it is. The Article IX Committee cannot change it. Filing it the day after signing is not "hasty".

Plaintiffs understand the State's desire to have its Article IX Committee characterize what the ample funding ***plan*** enacted by the 2016 legislature

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[10] *State's Answer at pp.3-4.*

[11] *The State also argues that plaintiffs will know everything the State's legislators, staff, and attorneys know about the ample funding* ***plan*** *being drafted by the State "since legislating is a public process". State's Answer at p.4. That's disingenuous – unless, of course, the Washington Attorney General is now taking the position that all memos, emails, text messages, etc. that the Governor, State's legislators, staff, and attorneys have concerning this subject must be immediately released to a Public Records Act requestor since they are all part of the "public process" to which the State suggests plaintiffs have full and unfettered access.*

said and what the ample funding ***progress*** provided in the budget signed by the Governor added up to. But plaintiffs do not agree it requires a month after the budget is signed to do that.

III. MENTIONING A FIRM JUDICIAL SANCTION IS NOT UNCONSTITUTIONAL, HARMFUL, OR COUNTERPRODUCTIVE

A. The State Does Not Dispute The Purpose Of A Contempt Sanction: *Coerce* Compliance With A Court Order By Making Non-Compliance Very Uncomfortable For The Defendant's Decision-Makers.

The State does not dispute that the purpose of a contempt sanction is to coerce the defendant to comply with a court order by making continued non-compliance more undesirable than compliance.[12]

The State's Answer instead argues there are five reasons why this Court should not warn State officials ahead of time what the contempt sanction in this case might be.

B. The State's Five Reasons For Silence Lack Merit.

1. "The 2016 Session Might Comply If The Court Stays Mum"

The State suggests this Court should not say anything about sanctions because the 2016 session can purge the State's contempt if it wants to.[13] But that's not a reason for this Court to sit quiet. It's a reason for this Court to speak up now so State officials clearly know the type of firm sanctions they invite if they fail to purge the State's contempt.

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[12] *Plaintiffs' Motion at pp.11-12.*
[13] *State's Answer at p.7.*

2. "It Violates Separation Of Powers To Warn Legislators That Their Decision To Continue The State's Contempt Could Be A Decision To Suspend Tax Exemption Statutes"

The State argues that it would violate separation of powers for this Court to invade or undermine "powers that are constitutionally delegated to another branch", and that if the 2016 session's enactments fail to purge the State's contempt, "the constitutional remedy is to invalidate the effort and direct the Legislature to try again."[14]

But violating constitutional rights is not a power delegated to the legislative branch. Constitutional mandates are not ideas dropped into a suggestion box for legislators to adopt or ignore at their political convenience. And simply directing the 2017 legislature to "try again" would close one's eyes to the State's ongoing violation of constitutional rights for another year.

The State's complaint about plaintiffs' proposed tax exemption sanction, moreover, misses the point of plaintiffs' proposal. Plaintiffs proposed that State officials be told ahead of time that **if** the 2016 regular session (or a subsequent special session) does not purge the State's contempt by the first day of the 2016-2017 school year, one sanction could be a suspension of the defendant State's tax exemption statutes until the State purges its contempt. Any effect on tax exemptions would thus be the result of the legislature choosing to continue the State's contempt. The

[14] *State's Answer at pp.8-9.*

legislature's knowingly making a choice that leads to the suspension or invalidation of tax exemptions is exactly that. The legislature's choice. The legislature making that choice does not violate separation of powers.

If NASA chose to fill Apollo 11's Saturn rocket with less fuel than it knew was needed to escape from the earth's gravitational pull, the Apollo capsule would have crashed back to earth. NASA officials could not shift blame by saying that something they knew about ahead of time – the laws of gravity – caused that crash. Instead, their decision to load less fuel than needed would be the cause.

Similarly here, if legislators choose to continue the State's ongoing contempt of court, they cannot shift blame by saying that something they were clearly told ahead of time – the laws of contempt – caused the suspension of tax exemptions. Instead, their decision to continue the State's contempt would be the cause.

3. "It Will Harm Kids To Warn Legislators That Their Decision To Continue The State's Contempt Could Be A Decision To Close Schools"

The State says this Court's deciding to close schools would harm children.[15] But plaintiffs did not propose that the Court decide whether the State's unconstitutionally funded school system would be shut down. Plaintiffs proposed that the Court put that decision in the legislature's hands by clearly warning State officials that closing schools could be the

[15] *State's Answer at p.9.*

result if the legislature chooses to not purge the State's contempt. The harm the State now feigns to care about would result from the legislature's decision to ignore court orders and continue the State's contempt of court.

4. "This Court Cannot Warn That A Contempt Sanction Might Include Suspending Statutes Unless The Court First Holds Specific Statutes Unconstitutional"

The State complains that plaintiffs do not specify which statutes should be listed in a sanctions warning.[16]

But that level of detail is not a necessary part of the warning plaintiffs proposed. The Governor and State legislators have not taken the court orders in this case seriously enough to purge the State's continuing contempt. Plaintiffs accordingly proposed a clear, unequivocal warning: If the State's contempt is not purged by the first day of the 2016-2017 school year, two possible contempt sanctions might be the invalidation (or suspension) of all tax exemption statutes or all K-12 school statutes. Specifying which RCW provisions should be included need not be decided unless the State's decision-makers opt to continue the State's contempt.

5. "Warning Legislators How Serious This Court Is About Enforcing Court Orders Might Irritate Them"

The State argues that this Court's issuing a sanctions warning may irritate some legislators so much they refuse to obey the court orders in this case. The State's don't-irritate-a-legislator argument ignores the

[16] *State's Answer at pp.9-11.*

foundation of a constitutional democracy – namely, the rule of law and its underlying principle that no citizen is above the law. Even a legislator.

Plaintiffs appreciate that separation of powers concerns make the enforcement issues in this case a delicate subject, and that a wild bull in a china shop is not productive. But constitutional rights are not bull. And a court's upholding constitutional rights when the legislative or executive branch is violating those rights is not being wild. It's being the independent judicial branch embedded in our democracy to protect the constitutional rights of citizens who are not in the electoral majority.

The State also suggests a clear sanctions warning is unnecessary because legislators are "on track" to full constitutional compliance by the 2017-2018 school year. But that's not reality. For example:

- The State knows its K-12 schools face significant teacher shortages and that salaries to attract and retain competent educators require the addition of over $2.9 billion/year – but its salary funding increases are nowhere near "on track" for the 2017-2018 school year.[17]
- The State knows the additional classrooms required for full-day kindergarten and K-3 class size reductions cost over $2 billion – but State funding is nowhere near "on track" to construct those classrooms for the 2017-2018 school year.[18]

NASA could not honestly claim in 1968 that it was "on track" for a 1969 moon landing if it was facing a significant shortage of the astronauts and Saturn rockets needed to meet that deadline. Our State similarly cannot honestly claim to be "on track" for full constitutional compliance when it

[17] *See Plaintiffs' 2015 Post Budget Filing at pp.25-32.*
[18] *See Plaintiffs' 2015 Post Budget Filing at pp.33-40.*

knows its current funding does not provide the teachers and classrooms needed to meet the 2017-2018 school year deadline in this case.

IV. CONCLUSION

President Kennedy warned that of all the tasks facing our country in 1961, "none will be so difficult or expensive to accomplish" as the mission of landing a man on the moon and returning him safely to the earth. But with leadership, courage, and dedication, our nation met the end-of-the-decade deadline for completing that mission.

Of all the tasks facing our State, perhaps none is as difficult or expensive to accomplish as the mission of amply funding our public schools. But with leadership, courage, and dedication, our State can meet the 2017-2018 school year deadline for full constitutional compliance.

The State's Answer says: "The Court needs to assess the situation at the end of the 2016 session and determine at that time what action is appropriate going forward."[19] The relief requested in plaintiffs' motion best serves that purpose – for it enables this Court to promptly address the situation at the end of the 2016 session, and ensures that before that session adjourns, State officials fully appreciate the serious contempt sanctions that may result if they choose to adjourn without purging the State's contempt of court by the first day of the 2016-2017 school year.

[19] *State's Answer at pp.12.*

RESPECTFULLY SUBMITTED this 28th day of December, 2015.

s/ Thomas F. Ahearne
Thomas F. Ahearne, WSBA No. 14844
Christopher G. Emch, WSBA No. 26457
Adrian Urquhart Winder, WSBA No. 38071
Kelly A. Lennox, WSBA No. 39583
Lee R. Marchisio, WSBA No. 45351
Attorneys for Plaintiffs

DECLARATION OF SERVICE

Adrian Urquhart Winder 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 Monday, December 28, 2015, I caused PLAINTIFFS' REPLY REGARDING THEIR MOTION FOR A TIMELY 2016 BRIEFING SCHEDULE to be served as follows:

David A. Stolier, Sr.
Alan D. Copsey
Office of the Attorney General
1125 Washington Street SE
Olympia, WA 98504-0100
daves@atg.wa.gov
alanc@atg.wa.gov

Defendant State of Washington

☒ Via Electronic Mail (cc of the same email sent to the Supreme Court for the filing of this PLAINTIFFS' MOTION FOR A TIMELY 2016 BRIEFING SCHEDULE)

☒ Via U.S. First Class Mail

William G. Clark
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
billc2@atg.wa.gov

Defendant State of Washington

☒ Via Electronic Mail (cc of the same email sent to the Supreme Court for the filing of this PLAINTIFFS' MOTION FOR A TIMELY 2016 BRIEFING SCHEDULE)

☒ Via U.S. First Class Mail

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 28th day of December, 2015.

s/ Adrian Urquhart Winder
Adrian Urquhart Winder