8-25-2014

Plaintiffs' Answer to the Amicus Brief of Mr. Eugster

No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

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,

v.

STATE OF WASHINGTON,

Defendant/Appellant.

PLAINTIFFS' ANSWER TO THE AMICUS BRIEF OF MR. EUGSTER

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I. INTRODUCTION

This Court summoned the State to address three topics:

- "why the State should not be held in contempt for violation of this Court's order dated January 9, 2014";
- "why, if it is found in contempt, any of the following forms of relief [list of seven remedial sanctions] ... should not be granted"; and
- "the appropriate timing of any sanctions."

June 12, 2014 Order To Show Cause at pp.3-4.

Amicus Eugster addresses the second topic. He argues (1) this Court cannot compel the State to comply with its Order by use of remedial sanctions because separation of powers forbids it, but (2) this Court can instead secure implementation of its Order by way of mandamus against State officers under Article IV, §4.[1]

Plaintiffs disagree with his separation of powers arguments *[Part II.A below]*. And while plaintiffs agree mandamus might be an additional type of relief, they do not agree with his suggestion that the existence of that relief makes it the only appropriate form of relief in this case *[Part II.B below]*.

[1] *Amicus Eugster's Brief at pp.1-2. Although his brief repeatedly refers to Article IX, **§4** instead of **§1** (see p.1, 7th line; p.1, n.3; & p.2, 5th line), plaintiffs presume those "§4" references were inadvertent typos from his brief's "§4" invocation under Article IV. Similarly, although his brief references a "Show Cause on September 14" (see p.12), plaintiffs presume that was an inadvertent typo since this Court's Order set the hearing for September 3.*

II. DISCUSSION

A. Amicus Eugster's Arguments Do Not Establish That Separation Of Powers Forbids Remedial Sanctions To Enforce This Court's January 2014 Order

1. Criticizing This Court's January 2012 Decision Does Not Establish His Separation Of Powers Argument

Mr. Eugster's criticisms of the Court's underlying decision have no relevance to the separation of powers argument he asserts:

- **Preamble:** He suggests this Court's constitutional rulings have little weight because Article IX, §1 is a meaningless "preamble".[2] But Washington law holds otherwise.[3]
- **Paramount:** He asserts this Court's paramount duty ruling "seems wrong".[4] But disagreeing with a ruling does not make enforcement of Court Orders a separation of powers violation.
- **Overlooked:** He asserts this Court hasn't thought about separation of powers in this case.[5] But he's wrong.[6]

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[2] *Amicus Eugster's Brief at pp.5-6.*

[3] *This Court's Article IX, §1 decisions have long and unequivocally held that Article IX, §1 is not a preamble. Seattle School District No. 1 v. State, 90 Wn.2d 476, 499, 585 P.2d 71 (1978) ("We do not know from whence the title 'preamble' was derived; but, the mere decision of an editor to volunteer captions for an otherwise untitled constitution deserves no weight in interpreting the instrument. …Const. art. 9, §1 does not merely seek to broadly declare policy, explain goals, or designate objectives to be accomplished. It is declarative of a constitutionally imposed Duty. Thus, we hold that Const. art. 9, §1 is not a 'preamble'.").*

[4] *Amicus Eugster's Brief at pp.6-7 and pp.11-12 & n.11.*

[5] *Amicus Eugster's Brief at p.7; accord, Mr. Eugster's Motion For Leave To File Amicus Curiae Brief Re Show Cause Order at p.3 (This Court "did not apply or give consideration to the separation of powers doctrine").*

[6] *Separation of powers was not only addressed in this Court's January 2012 decision, but has been briefed extensively by the parties throughout this case. E.g., McCleary v. State, 173 Wn.2d 477, 515-20, 269 P.3d 227 (2012) ("Notwithstanding these concerns, '[w]e cannot abdicate our judicial duty to interpret and construe' article IX, section 1." (quoting Seattle School District, 90 Wn.2d at 506)); 173 Wn.2d at 540-46 ("The other reason that the remedy question proves elusive has to do with the delicate balancing of powers and responsibilities among coordinate branches of government. This court is appropriately sensitive to the legislature's role in reforming and funding education, and we must proceed cautiously. At the same time, the constitution requires the judiciary to determine compliance with article IX, section 1."); State's **2012** Post-Budget Filing,*

- **Merely What Nine "Think":** He suggests this Court's decision merely says "what it thinks Article IX, §1 means".[7] But a Supreme Court decision establishes what the Constitution every elected official swears to uphold does mean – not merely what nine folks "think" it means.[8]

2. Dismissing This Suit's Parallel With Desegregation Cases As "Ad Hominem Discourse" Does Not Negate That Parallel

Mr. Eugster's Appendix has two documents: the Order To Show Cause and page 38 of plaintiffs' 2014 Post-Budget Filing ("Page 38").

Page 38 pictures and quotes a State government official as he responded to court orders directing that the Constitution required his State to take concrete action with its public schools that elected officials did not want to take.[9] He asserted his State was declining to obey because the court's order was an unwelcomed, unwanted, and unwarranted intrusion without legislative action to justify that intrusion.[10]

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*Attached Report at pp.1-4; Plaintiffs' **2012** Post-Budget Filing at pp.38-47; State's **2013** Post-Budget Filing at pp.1-5; Plaintiffs' **2013** Post-Budget Filing at pp.39-48; State's **2014** Post-Budget Filing, Attached Report at pp.10-11; Plaintiffs' **2014** Post-Budget Filing at pp.38-42; State's **2014** Post-Budget Filing Reply at pp.11-25.*

[7] *Amicus Eugster's Brief at p.8 (underline added).*

[8] *E.g., Seattle School District, 90 Wn.2d at 496 ("it is emphatically the province and duty of the judicial department to **say what the law is**." (internal quotation marks omitted) (bold italics added), quoting United States v. Nixon, 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)).*

[9] *More specifically, it was a recently elected State Governor's response to a trial court order ordering the State to allow two African-Americans (Vivian Malone and James Hood) to enroll in the University of Alabama because the State's maintaining that public school as an all-white university was unconstitutional under Brown v. Board of Education.*

[10] *See quote on the copy of Page 38 in Mr. Eugster's Appendix. The State Governor in that case was doing what the majority of his State's voters wanted – for one of that Governor's significant campaign promises had been that if voters elected him, he would resist court desegregation orders. [Wallace had run for Governor in 1958, but lost after attacking his opponent's ties to the Ku Klux Klan (for which Wallace then received the*

Since this elected official was Alabama Governor George Wallace, Mr. Eugster dismisses any parallel to this case:

> Plaintiffs mean something by this picture of segregationist George Wallace. What is that meaning? Whatever it is, Plaintiffs would have members of the Court respond to the illogic of ad hominem discourse, the appeal to feelings or prejudices rather than intellect.[11]

Plaintiffs answer Mr. Eugster's "What is the meaning" question.

Plaintiffs were not lobbing an ad hominem accusation that elected officials up here in the Pacific Northwest think about minorities the way elected officials down in "those" Southern States did.

Instead, Page 38 illustrates a sad parallel between prior school desegregation cases and this school funding case. Both concern students' constitutional rights under a Constitution that elected officials took an oath to uphold.[12] Both involve court orders directing that that Constitution requires the State to take immediate concrete action with respect to its public schools that elected officials did not want to take – action that elected officials could sincerely believe the majority of voters also did not

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endorsement of the NAACP)]. http://www.encyclopediaofalabama.org/face/Article.jsp?id=h-1676 at "Rise of Racial Politics" section. When he ran in 1962, on the other hand, he won after promising voters that he'd take a strong stand against court-ordered desegregation of the State's public schools. Id.; see also, e.g., http://www.pbs.org/wgbh/amex/wallace/sfeature/quotes.html (1962 campaign speech promising "As your governor, I shall resist any illegal federal court order, even to the point of standing at the schoolhouse door in person, if necessary").

[11] *Amicus Eugster's Brief at pp.8-9.*

[12] *Namely, their particular State Constitution and the U.S. Constitution.*

want State government to take. And in both, State officials decline to obey – complaining that court orders are an unwelcomed, unwanted, and unwarranted intrusion without any legislative action to justify that intrusion.[13]

The point of Page 38 is not to draw this Court into "the illogic of ad hominem discourse" or "appeal to feelings or prejudices rather than intellect." Instead, the point is simply that the keep-your-judicial-nose-out-of-our-legislative-business response of many elected officials in this public schools case parallels the keep-your-judicial-nose-out-of-our-legislative-business response of many elected officials in those Southern public school cases. And in both situations, the court's upholding and enforcing students' constitutional rights against recalcitrant elected officials is the proper – not improper – judicial role of a court in a constitutional democracy.

3. Enforcing This Court's January 2014 Order Does Not Invade A Legitimate Prerogative Or Activity Of Another Branch

Amicus Eugster concludes that issuing a remedial sanction to compel the legislative or executive branch to comply with the Court Orders in this case would violate separation of powers because requiring

[13] *E.g., compare the following comments in the Eugster brief's Appendix: those of the Alabama Governor (under the photo on Page 38) and those of Washington legislators (in footnote 113 on Page 38).*

compliance "not only would threaten the activities of the State, the executive and the legislature, but would invade the prerogatives of the State and its legislature and executive."[14]

Plaintiffs agree that a remedial sanction coercing the legislative or executive branch to comply with the Court Orders in this case would threaten one activity – namely, the State's ongoing violation of Washington children's paramount constitutional right to an amply funded education. But violating constitutional rights is not a legitimate activity of State government. The Eugster brief offered no argument or authority for its necessary premise that separation of powers protects unconstitutional activities like the government's ongoing violation of constitutional rights.

Similarly, plaintiffs agree that a remedial sanction coercing the legislative or executive branch to comply with the Court Orders in this case would invade the prerogatives of the State and its legislature and executive ***if*** one of their prerogatives is to violate citizens' constitutional rights when it's convenient. But violating constitutional rights is not one of their prerogatives. The Eugster brief offered no argument or authority

[14] *Amicus Eugster's Brief at p.15. That conclusion is apparently based on his brief's assertion that the "test for separation of powers violations is to ask whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Amicus Eugster's Brief at pp.10-11 & 14-15 (internal quotation marks and citation omitted). Plaintiffs note that this Court does not merely say what it "thinks" a constitutional provision means. It declares what the provision does mean. Supra footnote 8.*

for its necessary premise that separation of powers grants each branch the prerogative to violate constitutional rights when it's convenient.

Instead, as plaintiffs' prior show cause briefing explained, separation of powers ensures the judicial branch exists as a separate and independent branch with the power to stop another branch's allowing State government to violate constitutional rights.[15] (That's why it's called separation of powers – not elimination of powers.)

B. The Availability Of Mandamus Does Not Negate The Availability Of Remedial Sanctions

Amicus Eugster asserts that Chief Justice Madsen was "absolutely correct" when she wrote in her concurring/dissenting opinion that a writ of mandamus to the legislature may be used.[16]

But the existence of that mandamus alternative does not transform remedial sanctions into a separation of powers violation.

Nor does it negate the fact that the prior Orders in this case were exactly that.

Orders.

Washington courts have the power and authority to effectively enforce their Orders. Indeed, courts inherently must have that power – for

[15] *Plaintiffs' Answer To State's Response To The Court's Show Cause Order, pp.9-10.*

[16] *Amicus Eugster's Brief at p.14 (citing McCleary, 173 Wn.2d at 550, Madsen, C.J., concurring in part [constitutional rulings] / dissenting in part [retaining jurisdiction]).*

as this Court has long recognized, if a court does not enforce its orders, "it would then be nothing more than a mere advisory body."[17]

III. CONCLUSION

For the reasons outlined above, the assertions and arguments in Amicus Eugster's brief do not establish that separation of powers forbids this Court from compelling compliance with its Orders by use of remedial sanctions.

RESPECTFULLY SUBMITTED this 25th day of August, 2014.

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[17] *Keller v. Keller, 52 Wn.2d 84, 88, 323 P.2d 231 (1958), quoting Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 423, 63 P.2d 397 (1936); see also Plaintiffs' **2014** Post-Budget Filing at pp.41-43; Plaintiffs' **2013** Post-Budget Filing at p.44 & n.130.*

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, August 25, 2014, I caused PLAINTIFFS' ANSWER TO THE AMICUS BRIEF OF MR. EUGSTER to be served as follows:

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Amici Curiae The Honorable Daniel J. Evans, The Honorable John Spellman, The Honorable Mike Lowry, The Honorable Gary Locke, and The Honorable Christine Gregoire

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 25th day of August, 2014.

s/ Adrian Urquhart Winder
Adrian Urquhart Winder