NO. 101052-4

SUPREME COURT OF THE STATE OF WASHINGTON

WAHKIAKUM SCHOOL DISTRICT NO. 200,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO APPELLANT'S STATEMENT OF GROUNDS FOR DIRECT REVIEW

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I. INTRODUCTION

The superior court's dismissal of Wahkiakum School District's (WSD) action—which seeks to expand article IX, section 1 of the Washington Constitution to require the State to fully fund school district construction costs—does not warrant direct review by this Court. The Constitution's explicit reliance on local funding for public school capital costs distinguishes school construction expenditures from article IX, section 1's program of basic education that the State is required to provide using regular and dependable state tax sources. Indeed, this Court recognized as much five years ago, saying "full state funding of school capital costs is not part of the program of basic education constitutionally required by article IX, section 1." *McCleary v. State*, No. 84362-7, 2017 WL 11680212, at *14, 15 (Wash. Sup. Ct. Nov. 15, 2017) (2017 Order).

WSD ignores this precedent and fails to demonstrate any "fundamental and urgent issue" necessitating this Court's "prompt" review under RAP 4.2(a)(4)—the only grounds on

which WSD seeks review. WSD's claim could have been brought at any point since article IX was adopted over a century ago, undermining any claim of urgency. And the Legislature has already appropriated hundreds of millions of dollars to address many of the concerns upon which WSD's claims of urgency are based, including funding for capital expenditures impacting student health and safety and seismic safety specifically.

The State in no way disputes or minimizes the importance of safe and secure school facilities. Assisting local school districts with school construction and modernization is a major priority for the State, as demonstrated by its longstanding funding for those goals and recent, significant additional appropriations. But the importance of school facilities generally does not transform WSD's non-viable article IX, section 1 claim into an "urgent issue" requiring this Court's "prompt" determination. This Court should deny direct review, and the Court of Appeals should be given the opportunity to address WSD's legal claims in the first instance.

II. NATURE OF THE CASE AND DECISION

A. History of School Construction Funding in Washington

Absent from WSD's Statement of Grounds is any discussion of the State's history of school construction funding or the constitutional provisions relevant thereto. Thus the State provides this brief overview to assist the Court in its consideration of WSD's request for direct review.

At the time the Washington Constitution was adopted, local school districts "alone and locally" assumed the responsibility for their school capital expenditures. *Sheldon v. Purdy*, 17 Wn. 135, 140–41, 49 P. 228 (1897). The *Sheldon* Court, conducting one of this Court's earliest examinations of article IX, explained that "[b]uilding a new school house and purchasing a site, while at times necessary and proper, are unusual and extraordinary expenditures." *Id.* at 141. As a result, the *Sheldon* Court determined that the Common School Fund—as originally constituted in article IX, section 3—could not be used to pay for school capital costs; instead, "in consonance with

the constitution," special tax levies and bonds could be used by local school district voters to fund their local school construction costs. *Id.*; *see also, e.g.*, Laws of 1889–90, ch. 2, pp. 45–52 (allowing school districts to issue school-construction bonds with voter approval); ch. 12, title XI, § 53 (similar; property taxes). Thus, from the State's earliest days, local school district voters were primarily responsible for school capital costs and school construction was outside the ambit of article IX.

Over time, the State stepped in and began to assist local school districts with school construction during the Great Depression and World War II. *See* Laws of 1933, ch. 8, § 8; Laws of 1947, ch. 278. However, school construction has always been dependent on the support of local school district voters, and eligibility for state assistance has generally hinged on the availability of local funds to support the capital expenditures. *See, e.g., State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 646–47, 384 P.2d 833 (1963) (explaining that "[s]chool districts, in order to share in the [state's school

construction bond] fund, are required to supply extra funds from the sale of bonds or excess tax levies"). Relatedly, school facilities are real property owned and controlled by local school districts—not the State. *See* RCW 28A.335.090 (codifying that local school district boards have "exclusive control of all school property, real or personal, belonging to the district," and have the authority to "purchase, lease, receive and hold real and personal property in the name of the district, and rent, lease or sell the same").[1]

Voters have amended the Constitution on several occasions to address both their local responsibility and the State's responsibility with regard to school construction funding. *See* Wash. Const. art. VII, § 2(a), (b); art. VIII, §§ 1(e), 6; art. IX, § 3. In 1952, for instance, article VIII, section 6, which places

[1] Antecedents of this statute recognized local school district boards' control of school district facilities as far back as 1890. *See, e.g.*, Laws of 1889–90, ch. 12, §§ 25–32; Laws of 1897, ch. 118, § 44; Laws of 1909, ch. 97, Tit. III, ch. 4, art. II; Laws of 1965, Ex. Sess., ch. 49, § 1.

limitations on municipal indebtedness, was amended by voters to extend the bonding powers of school districts. Specifically, the amendment added an exception authorizing school districts, with voter approval, to incur a greater amount of debt for their "capital outlays." Wash. Const. art. VIII, § 6.

Then in 1966, article IX, section 3 was amended to create the Common School Construction Fund. Notably, this provision is the only constitutional provision that directly addresses the State's responsibility to finance school construction. That amendment was presented to voters as "one of the building blocks for a business-like program of school construction financing," along with two other proposals. A. Ludlow Kramer, Official Voters Pamphlet 20 (1966), https://www.sos.wa.gov/_assets/elections/voters'%20pamphlet%201966.pdf (1966 Voters Pamphlet). The amendment dedicated the proceeds of the original Common School Fund to "financing the construction of facilities for common schools." *Id.* at 42. As stated in the Voter's Pamphlet in support of the amendment, "[t]he money made

available over the years will be distributed around the state to local school districts for needed building projects, helping to ease the tax burden of local property owners." *Id.* at 20.

One of the companion measures to the article IX amendment was a $16.5 million school construction bond. The Attorney General's explanatory comment explained to voters that "[p]resently, elementary and secondary school construction and community college construction is financed by local school districts with assistance from the state." *Id.* at 11. The statement in support noted that absent an emergency bond issuance, "no more funds are available from the state to assist already overburdened local school districts in financing the construction they must have." *Id.* at 10. In order to access proceeds from the State's bond sale, local school districts were required to provide "funds for school building construction purposes through the issuance of bonds or through the authorization of excess tax levies or both." *Id.* at 36. Thus, the same voters who amended article IX to create a permanent State funding source for school

capital costs also expressly approved of requiring local school districts to procure local funds before receiving such capital assistance from the State.

Twenty years later, and following this Court's seminal decision in *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 518, 585 P.2d 71 (1978), which set forth the State's responsibilities under article IX, section 1, the Constitution was again amended to allow school districts to impose six-year capital levies in order to finance school construction. Wash. Const. amend. 79 (1986) (amending article VII, section 2). This amendment was promoted to voters as "a less expensive option for school construction" which "would establish a 'pay-as-you-go' option that would allow local school district voters to authorize capital levies to fund remodeling, modernization, or construction projects." Office of the Secretary of State, 1986 Voters & Candidates Pamphlet: State General Election at 14 (1986), https://www.sos.wa.gov/_assets/elections/voters'%20pamphlet%201986.pdf (1986 Voters Pamphlet). The Voters

Pamphlet further advised that the constitutional amendment was needed because "[m]any school buildings across Washington are in disrepair" and local school districts "often must wait several years to receive state matching funds." *Id.*

And finally, in 1999, article VIII, section 1 of the Constitution was amended to allow the State to guarantee school district debt, obviating the need for local school districts to obtain bond insurance. *See* Office of the Secretary of State, State of Washington Voters Pamphlet: General Election 8–9, 14–15 (1999), https://www.sos.wa.gov/_assets/elections/voters'%20pamphlet%201999.pdf (1999 Voters Pamphlet). The amendment specifies, however, that "[a]ny such guarantee does not remove the debt obligation of the school district and is not state debt." *Id.* at 14. The amendment was promoted to voters as a means to allow school districts "to borrow money for school construction at significantly lower interest rates." *Id.* at 8.

B. The State's Assistance with School Capital Costs

Today, the State has several programs designed to assist local school districts with capital costs, although none entirely displaces the school district's responsibility for raising local revenues. By far the largest of these is the School Construction Assistance Program (SCAP). Indeed, the SCAP was the largest item in the State's most recent capital budget: the Legislature appropriated more than half a billion dollars for this program, with $3.9 billion more projected in future biennia. Laws of 2022, ch. 296 § 5004. The SCAP provides a portion of the cost of school capital projects, and school districts are required to finance at least some of the cost through local levies or bonds. RCW 28A.525.162(2). State funding percentages range from approximately 20% to 90% of eligible costs depending on how property-poor or property-rich a school district is. *See* RCW 28A.525.166.

In addition to the SCAP, the State provides funding for school construction projects through a number of other programs. These include:

- Grants to address school seismic safety ($100 million appropriated). Laws of 2022, ch. 296 § 5008; *see also* Laws of 2022, ch. 113;
- Grants to finance capital expenditures for small districts and tribal compact schools ($49.7 million appropriated). *Id.* § 5005; *see also* RCW 28A.525.159; and
- Funding for emergency or urgent repairs that affect the health and safety of children in public schools ($8.9 million appropriated). Laws of 2022, ch. 296 § 5007.

The Legislature also frequently appropriates capital funds to specific school districts in response to emergency capital requests or for specific projects. *See, e.g.*, *id.* § 5010(4) (appropriating funds to replace the Almira elementary school destroyed by fire); *id.* § 5010(9) (appropriating funds to WSD "for a facilities accessibility and security improvement project").

C. This Lawsuit

WSD sued the State alleging violations of article IX, section 1 of the Washington Constitution. Appellant's App. 1 (Compl.). The Complaint generally alleges that the three school facilities owned and operated by WSD are in disrepair; that local voters have refused to pass bond measures to finance construction costs for the schools; and that it is the State's duty to "amply fund" its construction costs—which WSD estimates to be in excess of $50 million—under article IX, section 1. Compl. ¶¶ 121–65. The Complaint alleges no specific, urgent conditions in WSD's schools implicating student safety or welfare; nor does it contend that WSD has been denied emergency funds from the State needed to address urgent repairs. Instead, the Complaint asserts that WSD's facilities are "outdated" and that its elementary school requires "over $15 million of construction costs," its middle school requires "over $5 million of construction costs," and its high school requires "over $30 million of construction costs." Compl. ¶¶ 154–65.

WSD seeks a declaratory judgment that the State is violating article IX, section 1 by not fully funding its capital costs; seeks an injunction requiring the State to comply with these alleged legal duties; and seeks monetary damages in excess of $50 million. *Id.*

D. Dismissal

The State moved to dismiss the Complaint pursuant to CR 12(b)(6) on the grounds that article IX, section 1 does not require the State to fully fund a school district's capital projects. The State further argued that WSD's claim for monetary damages failed because there is no private right of action for money damages against the State for an alleged violation of article IX, section 1. The trial court granted the State's motion and dismissed the complaint with prejudice. Appellant's App. 2.

III. ISSUE PRESENTED FOR REVIEW

Is full state funding of school capital costs part of the program of basic education constitutionally required by article IX, section 1 of the Washington Constitution?

IV. DIRECT REVIEW IS NOT WARRANTED

WSD seeks direct review only under RAP 4.2(a)(4), which authorizes review for "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." This request falls short in at least two significant respects. *First*, WSD ignores that the "fundamental and urgent" issue it asks this Court to immediately review—whether full State funding of capital costs fall within article IX, section 1—is an issue this Court already considered and decided. *Second*, even as WSD makes generalized claims of importance and urgency, it ignores the hundreds of millions of dollars currently being spent by the State to address many of the very student safety concerns discussed in WSD's Statement of Grounds. Ultimately, WSD's request for direct review loses sight of the question currently before the Court: whether the legal issue presented is so urgent as to require this Court's "prompt" intervention prior to intermediate appellate review. Because it does not, this appeal should be transferred to the Court of Appeals. *See* RAP 4.2(e).

A. WSD's Sole Issue Has Already Been Addressed in the State's Favor by This Court

WSD does not—because it cannot—identify any cases conflicting with the trial court's decision to dismiss its Complaint. *See* RAP 4.2(a)(3) (permitting direct review in a case involving conflicting decisions). Instead, WSD contends only that the trial court's decision raises a "fundamental and urgent issue" that "requires prompt and ultimate determination." RAP 4.2(a)(4); Statement of Grounds for Direct Review Under RAP 4.2 (Statement) at 10. But in so arguing, WSD ignores that this Court has already declined to expand article IX, section 1 to require the State to fully fund school capital costs. In the absence of any conflicting decisions, the trial court's decision to follow authority from this Court rejecting an earlier request to expand the scope of article IX, section 1, falls far short of presenting "a fundamental and urgent issue" that requires immediate review by this Court. RAP 4.2(a)(4).

1. This Court Has Already Recognized That Article IX, Section 1 Does Not Require Full State Funding of Capital Costs

As the Court is well aware, after it issued its initial opinion in *McCleary*, the Court retained jurisdiction to "hold the State accountable to meet its constitutional duty under article IX, section 1." *McCleary v. State*, 173 Wn.2d 477, 546, 269 P.3d 227 (2012). This resulted in a period of retained jurisdiction until the Court concluded in 2018 that the State had "complied with the court's orders to fully implement its statutory program of basic education." *McCleary v. State*, No. 84362-7, 2018 WL 11422996, at *2 (Wash. Sup. Ct. June 7, 2018). For over six years, this Court issued orders, accepted briefing, heard argument, and generally managed the case to ensure the State made progress in fully complying with article IX, section 1. *See McCleary v. State*, No. 84362-7, 2012 WL 13236760, at *1 (Wash. Sup. Ct. July 18, 2012).

During this period of retained jurisdiction, the Court raised the issue of whether the State had to fully fund the capital costs

associated with the Legislature's statutory program of basic education to be in compliance with article IX, section 1: specifically, whether the Legislature had to fully fund the capital costs associated with reducing class sizes and providing all-day kindergarten. *See, e.g.*, *McCleary v. State*, No. 84362-7, 2014 WL 12978578, at *2 (Wash. Sup. Ct. Jan. 9, 2014). In an order issued on July 14, 2016, the Court directed the parties to provide briefing on the State's compliance with the Court's orders, and requested, among other things, briefing and argument from the State regarding the capital costs of its program of basic education. *McCleary v. State*, No. 84362-7, 2016 WL 11783310, at *2 (Wash. Sup. Ct. July 14, 2016).

After briefing and argument, this Court concluded that "full state funding of school capital costs is not part of the program of basic education constitutionally required by article IX, section 1." 2017 Order, 2017 WL 11680212, at *15. In reaching that conclusion, this Court first noted that "in *McCleary*, this [C]ourt did not address capital costs or suggest

that capital expenditures are a component of basic education for purposes of article IX, section 1, such that the State must fully fund capital costs attendant to the basic education program." *Id.* at *14.

The Court explained that "[t]hough classroom space is obviously needed to maintain all-day kindergarten and reduced class sizes, capital costs have never been part of the prototypical school allocation model, and it is not solely a state obligation under the constitution." *Id.* In support of this conclusion, the Court relied on article VII, subsections 2(a) and (b) of the Constitution, discussed above, which was amended in 1986 to give school district voters special powers to raise money for school capital costs. *Id.* It further relied upon the Common School Construction Fund established in article IX, section 3 of the Constitution, which has specific sources of revenue. *Id.* The Court also pointed to the SCAP, which it recognized was established by the Legislature for the "express purpose" of "establishing and providing for the operation of a program of

state assistance to school districts in providing school plant facilities." *Id.* (quoting RCW 28A.525.010).

In rejecting the plaintiffs' arguments that the State had not met its article IX, section 1 obligations by failing to fully fund the capital costs associated with class size reductions, the Court again reiterated that "full state funding of school capital costs is not part of the program of basic education constitutionally required by article IX, section 1." *Id.* at *15. Moreover, this Court thereafter determined that the State had come into compliance with its article IX, section 1 duties—notwithstanding that the Legislature never defined the State's program of basic education to include full funding of capital costs and never provided such funding. *See McCleary v. State*, 2018 WL 11422996, at *2. (terminating the Court's retention of jurisdiction).

2. Resolution of WSD's Non-Viable Claim Is Not Urgent

Here, WSD's "fundamental and urgent" legal question is premised on a contention directly at odds with this Court's prior ruling that the State is not required to fully fund educational

facilities under article IX, section 1. The trial court's decision comported with that authority.

WSD's Statement of Grounds simply ignores this Court's earlier pronouncements and argues *ipse dixit* that it has asserted a "fundamental" and "urgent" issue because it raises an education-related claim. *See* Statement at 10–12. But simply ignoring pertinent authority does not convert a non-viable claim into a "fundamental and urgent issue." RAP 4.2(a)(4). Because the trial court's dismissal was consistent with this Court's 2017 Order in *McCleary*, there is no "fundamental and urgent issue" requiring immediate review by this Court.

B. The Legislature Has Appropriated Significant Funds to Address School Facility Concerns

Glossing over its weak legal theory, WSD instead focuses its request for direct review on the importance of educational facilities and student safety in those facilities generally. *See* Statement at 15–28. WSD essentially argues that this Court should grant direct review because "facilities matter." *See id.* at 18, 19, 28. They undoubtedly do.

But notably absent from Petitioner's Statement of Grounds is any acknowledgment of the robust programs the Legislature has already developed—and is continually expanding—to address school-safety concerns. Just this past legislative session, for instance, the Legislature appropriated $100 million for school seismic retrofitting, and created a new statutory grant program to disburse those funds. Laws of 2022, ch. 296 § 5008; Laws of 2022, ch. 113. It further granted WSD $515,000 for a "facilities accessibility and security improvement project." Laws of 2022, ch. 296 § 5010(9). And when the Almira School District's elementary school burned down, the Legislature promptly appropriated nearly $13 million to replace it, and directed the Office of the Superintendent of Public Instruction to "expedite allocation and distribution of state funding under this section." *Id*. § 5010(4).

Further, to the extent that WSD is in need of an emergency or urgent repair that impacts its students' health and safety, the Legislature has appropriated nearly $9 million in funds to

address such issues. Laws of 2022, ch. 296 § 5007. It has also created a $49.7 million grant program to assist small school districts (like WSD) with capital projects, by making such schools eligible for up to $5 million in capital funds without requiring any local contribution. See *id.* § 5005; *see also* RCW 28A.525.159. Taken together, there are significant state funds available to schools for capital support—including emergency/urgent repair funding, security improvement funding, and seismic funding—undermining any claim that direct review is warranted to immediately address these concerns. WSD's gratuitous inclusion of photographs of tragedies in Sichuan Province, China (a 2008 earthquake) and Uvalde, Texas (the recent school shooting) does nothing to alter that analysis.

At bottom, there is no dispute that school facilities are important. The State agrees that they are, which is why the Legislature appropriates hundreds of millions of dollars each year to assist local school districts with their construction and modernization projects. But the issue here is not whether school

facilities are important; it is whether WSD's novel constitutional claim presents an issue so "fundamental and urgent" that it should be permitted to leapfrog the Court of Appeals. RAP 4.2(a)(4). It does not. Direct review by this Court is unwarranted.

V. CONCLUSION

For the reasons stated above, the State requests the Court deny direct review and transfer this case to the Court of Appeals.

This document contains 3,706 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 26th day of July 2022.

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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused a copy of the foregoing document to be served via electronic mail upon the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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