NO. 101052-4

SUPREME COURT OF THE STATE OF WASHINGTON

WAHKIAKUM SCHOOL DISTRICT NO. 200,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

STATE OF WASHINGTON'S RESPONSE BRIEF

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I. INTRODUCTION

The State of Washington agrees that all students should have safe schools, and the State has appropriated billions of dollars over the course of decades to assist school districts in the construction and modernization of their school facilities. But the State's significant support for school construction does not transform this assistance into a constitutional duty. As this Court recognized during its period of retained jurisdiction in *McCleary v. State*, "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 *15 (Wash. Sup. Ct. Nov. 15, 2017). That ruling—and the century of precedent supporting it—is dispositive here.

Plaintiff Wahkiakum School District No. 200 (WSD) nonetheless claims that the State has a constitutional duty under article IX, section 1 to solely fund more than $50 million in estimated costs for the renovation of its schools. But this argument cannot be squared with this Court's Order in

McCleary, would usurp the Legislature's role in defining the State's program of basic education, and is incompatible with the Constitution's text, purpose, and history.

From the territorial period to the present day, local taxing authorities have been primarily responsible for raising the money to build and purchase schools. Indeed, the Constitution has been repeatedly amended—in 1952, 1966, 1986, 1999, and 2007—to expand the ability of local school districts to take on debt in order to fund school construction. None of these amendments would have been necessary if article IX, section 1 required all along that the State alone fully fund school construction attendant to its program of basic education.

Moreover, WSD's lawsuit ignores decades of Supreme Court precedent holding that it is the Legislature's role to define the program of basic education. Indeed, the Court specifically approved in *McCleary* a definition of education that does not include school-construction funding.

Because WSD's lawsuit is contrary to the Constitution, disregards the crucial role that local school districts and their voters have played in school construction throughout Washington's history, and seeks to usurp the Legislature's role in defining the program of basic education, the trial court's dismissal of WSD's complaint should be affirmed.

II. ISSUE PRESENTED

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?

III. STATEMENT OF THE CASE

Throughout Washington's history, school construction has been primarily a local responsibility. This was the case before statehood and when the Constitution's framers drafted article IX, section 1. Indeed, the first major program of state support for school construction was not established until 1947. Since then, Washington's voters have repeatedly approved constitutional amendments affirming that local taxing authorities are primarily

responsible for building local schools with funding assistance from the State. But never in Washington's history has there been any constitutional amendment or legislative act suggesting that the State has the constitutional duty to fully fund local school construction. As the history demonstrates, the opposite is true.

A. School Construction Funding in Washington Has Always Been a Primarily Local Responsibility

1. School construction in the territorial period

During Washington's territorial period, before the Constitution was ratified, funding for the construction and maintenance of "common" (i.e., public) schools was entirely a local responsibility. When Congress established the Washington Territory in 1853, it set aside a portion of land for public school purposes. An Act to Establish the Territorial Government of Washington, 32d Cong. 90, 10 Stat. 172, § 20 (March 2, 1853). The next year, the territorial legislature enacted a "common school system." Statutes of the Territory of Washington, An Act Establishing a Common School System for the Territory of Washington at 319–38 (1854). The Act separated public school

financing into sources "for the support of the common schools" versus for "establishing and maintaining the common schools." *Id.* at 319–20.

Territory-level funding was available for the "support" of common schools, such as paying teacher salaries, whereas local funding was used for "establishing and maintaining" common schools, including school construction. *Id.* For the "support" of common schools—and "for no other use or purpose whatever"—the Act dedicated money originating from Congress's land grant. *Id.* In contrast, in order to raise funds needed "[f]or the purpose of establishing and maintaining common schools," it was "the duty of the county commissioners of each county to lay an annual tax" on property in the county. *Id.*

This early system also created school districts and gave those districts the power "to levy a tax on all taxable property in the district . . . to purchase, or lease, a suitable site for a school house, and to build, hire or purchase a school house," among

other things. *Id.* at 226.[1] In order for a school district to draw on external funding sources, the district had to "raise an amount by tax or otherwise in said district to be expended in paying teachers and building school houses in said district." *Id.* at 328.

2. The Washington Constitution's treatment of school construction and *Sheldon v. Purdy*

School construction funding remained a local responsibility at statehood and ratification. Congress permitted Washington to become a state in the Enabling Act of 1889. Enabling Act, ch. 180, 25 Stat. 676 (1889). Statehood was conditional upon the enactment of a state constitution as well as, among other things, a promise "[t]hat provision shall be made for the establishment and maintenance of systems of public schools." *Id.* § 4.

The 1889 constitutional convention was "practically unanimous in drawing up an education article which protected

[1] The page number in the digitized copy of the Statutes of the Territory of Washington (1854) is "226"; however, it appears between 325 and 327.

the common school fund and set up a democratic, nonsectarian system of public education." Beverly Paulik Rosenow, *The Journal of the Washington State Constitutional Convention 1889*, iii, 685 (1999). Article IX had (and still has) five sections. Section 1 is the focus of this appeal and reads the same today as it did in 1889: "It is the paramount duty of the state 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." Wash. Const. art. IX, § 1.

Section 2 is also unchanged since originally enacted and requires the Legislature to "provide for a general and uniform system of public schools." *Id.* § 2. It further specifies, similar to the territorial common school statutes, that "the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools." *Id.*

Section 3 as originally enacted differs significantly from the section in effect today. As originally enacted, it required that

Congress's land grants from the territorial and statehood enabling acts were dedicated to the Common School Fund and "shall remain permanent and irreducible." Wash. Const. art. IX, § 3. This Fund was dedicated to the "current use of the common schools." *Id.* As discussed *infra*, this section was amended in 1966 to provide a permanent fund for public school construction. Wash. Const. amend. 43.

Section 4 prohibits "sectarian control or influence" over public schools. Wash. Const. art. IX, § 4. And section 5 protects the Common School Fund from "defalcation, mismanagement or fraud." Wash. Const. art. IX, § 5.

Following statehood in 1889, the first Washington Legislature (during the session of 1889–90) enacted a uniform system of state schools. Laws of 1889–90, ch. 12 at 348–95. The resulting act codified provisions from article IX of the Constitution for the support of public schools and made such support a shared state and local responsibility. It provided that the Common School Fund was to remain permanent and

irreducible and "shall be exclusively applied to the current use of the common school [sic]." *Id.* at 373–74. In addition, county commissioners were directed to levy a property tax on all property in the county "for the support of the common schools." *Id.* at 374.

For school construction, however, school district boards of directors were separately given discretion to levy an additional tax on property in the district "to furnish additional school facilities for said district, or for building one or more school houses," among other capital expenses. *Id.* School districts were also given the power to borrow money and issue bonds "for the purchase of school-house site or sites, building and providing . . . the same with all necessary furniture and apparatus, or for any or all of these purposes" when authorized by a vote of school district voters. Laws of 1889–90, ch. 2 at 45–46, 51–52.

These provisions and article IX of the Constitution were construed by this Court in the early case of *Sheldon v. Purdy*, 17 Wn. 135, 49 P. 228 (1897). There, the Court determined that

responsibility for school construction fell "alone and locally" on the school district. *Id.* at 141. The issue was whether funds held by a county treasurer originating from the constitutional Common School Fund as well as the county common school tax could be used to pay interest on bonds a school district issued for the purpose of constructing a school. *Id.* at 137–39. The Court held that they could not. Construing article IX, the Court explained that "the money appropriated by the state and paid into the common-school fund" is "under the constitution, [] devoted to the support of the public schools," and "[t]hat portion coming from the irreducible common-school fund is devoted to the payment of current expenses." *Id.* at 140. The costs of constructing new school buildings were not "current expenses," the Court explained, and did not "come within any well-defined acceptation of 'support of the common schools,'" because "[b]oth the terms 'support' and 'current expenses,' when applied to the common schools of this state, mean continuing regular expenditures for the maintenance of the schools." *Id.* at 140–41.

The Court further explained that "[b]uilding a new school house and purchasing a site, while at times necessary and proper, are unusual and extraordinary expenditures." *Id.*

The Court went on to describe how the Legislature allowed for a method to fund the capital expenses of public schools:

> [A]nd the legislature, in consonance with the constitution, has evidently had this in mind. Two methods have been provided for building school houses, the first by a special tax levied by the district . . . and the second . . ., the bond act. In both ways the school district, alone and locally, assumes the responsibility of the expenditure, and it may not divert taxes raised for other purposes by the county commissioners, and paid by a general tax of the county, and aided by appropriations from the state to the payment of its special local debt.

Id. at 141 (emphasis added). Thus, at the time of statehood and constitutional ratification, school districts "alone" bore responsibility to construct public schools. School buildings were built by, and in turn owned by, local school districts. *See, e.g.*,

Laws of 1889–90, ch. 12, §§ 25–32; Laws of 1897, ch. 118, § 44.[2]

3. The State's assistance with school capital expenditures in the early twentieth century

During the early and mid-twentieth century, the State began providing assistance with school construction costs, but these programs always required local funding as well.

In the 1930s, the State began providing assistance to local school districts with their capital costs through Depression-era work relief programs. *See* Laws of 1933, ch. 8, § 8; *see also* Laws of 1935, ch. 118, §§ 3, 7. Then, in 1941, the Legislature passed the first legislation appropriating state funding exclusively for school construction purposes in response to heavy migration into Washington. Laws of 1941, ch. 223.

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[2] School buildings continue to be owned by local school districts. *See* RCW 28A.335.090. As a result, local school district boards have "exclusive control of all school property, real or personal, belonging to the district," and 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." *Id.*

In 1947, the State established its first permanent program for state assistance with school districts' capital costs. To qualify, school districts were required to raise local revenue. *See* Laws of 1947, ch. 278, § 1. The State would then contribute a certain percentage of the total construction cost to qualifying school districts. *Id.* (setting formula based on land value in the school district and number of teachers employed).

A few years after the establishment of this State assistance program, in 1952, Washington voters approved a constitutional amendment to extend the bonding powers of school districts. *See* Earl Coe, Official Voters Pamphlet, State General Election at 20 (1952), https://www2.sos.wa.gov/_assets/elections/voters'%20 pamphlet%201952.pdf. This allowed school districts to incur greater debt—up to 10% of the assessed value of property in the district (increased from five percent)—for school construction. *See id.*; Wash. Const. art. VIII (amend. 27). The increase, in turn, made it easier for school districts to qualify for state school construction funds as provided in the 1947 statute.

4. Washington voters create "a business-like program of school construction financing," requiring local funding

In the 1960s, Washington voters enacted multiple legislative resolutions in order to create a "business-like program of school construction financing," again premised on the principle that local school districts were required to raise funds for school construction. A. Ludlow Kramer, Official Voters Pamphlet at 10, 20, 22 (1966), https://www.sos.wa.gov/_assets/elections/voters'%20pamphlet%201966.pdf (1966 Pamphlet).

These resolutions were proposed as a solution to a situation in which the State was left without its primary means of assisting local school districts with school construction, due to the operation of the state debt limit. Specifically, by 1961, state assistance for school construction was a permanent feature of Washington school finance, and a special state "public school building construction account" was established. *See* Laws of 1961, Ex. Sess., ch. 3, § 2. This was paid for by limited obligation bonds guaranteed by sales taxes. *Id.* § 1. But in 1963, the

Supreme Court held that these bonds were subject to the state debt limit (which at the time was only $400,000), and their issuance would "put the state in debt beyond its constitutional debt limit[.]" *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 663, 673, 384 P.2d 833 (1963), *overruling Gruen v. State Tax Comm'n*, 35 Wn. 2d 1, 211 P.2d 651 (1949).

In reaction to *Martin*, three legislative resolutions were placed on the November 1966 ballot for consideration by the voters: two constitutional amendments and an emergency bond referendum. 1966 Pamphlet at 10, 20, 22. They were presented as a package to create "a business-like program of school construction financing." *Id.* at 10. The goal was to "assure a sound school construction financing program for the children of Washington State." *Id.* All three were enacted by the voters.

The first constitutional amendment revised article IX, section 3 to create a "common school construction fund to be used exclusively for the purpose of financing the construction of facilities for the common schools." Wash. Const. amend. 43;

1966 Pamphlet at 20. This created a new means of providing state financial assistance to local school districts. Rather than dedicating the proceeds of the original land grant to school operating expenses, those revenues would instead flow into a new Common School Construction Fund. Wash. Const. amend. 43; 1966 Pamphlet at 20. The amendment was described to voters as creating a new source of funding that would "be distributed around the state to local school districts for needed building projects, helping to ease the tax burden of local property owners." 1966 Pamphlet at 20.

The second amendment allowed the proceeds dedicated by the original land grant to be invested as permitted by the Legislature, instead of solely into government bonds. Wash. Const. amend. 44; 1966 Pamphlet at 22. The intent, again, was to help "keep local property taxes lower" by generating "extra income" that would be used to finance school construction. 1966 Pamphlet at 22.

The third companion measure was the issuance of a $16,500,000 general obligation bond for school construction purposes. *Id.* at 10. This was described as an "emergency" measure because "no more funds are available from the state to assist already overburdened local school districts in financing the construction they must have." *Id.* Like prior state assistance programs, this bond issuance did not replace a school district's role in paying for capital costs. Instead, consistent with prior state financing for school construction, capital costs were shared between the school district and the State. Specifically, the measure provided that "no allotment shall be made to a school district . . . until such district has provided 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 the Constitution to create the Common School Construction Fund required local school districts to raise funds in order to share in state bonds for school construction.

5. The statutory School Construction Assistance Program and further amendments addressing school capital costs

In the latter half of the twentieth century, public school construction financing in Washington developed into its current form, with the enactment of legislation and constitutional amendments that rely on both state and local funding.

In 1969, the Legislature established the modern model of state assistance for school construction that still exists today: the School Construction Assistance Program (SCAP). Laws of 1969, 1st Ex. Sess., ch. 244. SCAP exists as a partnership between local school districts and the State whereby the State and local school districts share responsibility for funding school construction projects. Similar to earlier legislative programs, the State contributes funds to school districts based on assessed land value per student in each school district. *Id.* § 4.

The formula was hammered out in a compromise between large and small school districts, and sponsored by then Representative (and future Supreme Court justice) Fred Dore.

See Senate Journal, 41st Leg. at 837–38 (1969). It was intended to, on average, make the State responsible for about one-third of the cost of school construction, with local school districts having responsibility for the remaining two-thirds. *See id.* Today, state funding percentages range from approximately 20% to 95% of eligible SCAP costs.[3] The State provides a higher percentage of assistance to less wealthy districts, as determined by assessed land values per student. To access funding through SCAP, local school districts must "provide[] local funds equal to or greater than the difference between the total approved project cost and the amount of state funding assistance to the district for financing the project computed pursuant to [the SCAP formula]." RCW 28A.525.162(2); *see also* WAC 392-341-045(2). Though

[3] *See* OSPI, State Funding Spending Percentages, https://www.k12.wa.us/policy-funding/school-buildings-facilities/school-construction-assistance-program-scap/state-funding-assistance-percentages. Because certain costs are excluded from SCAP, the effective assistance percentage is less than the funding percentage computed by the statutory formula. *See generally* RCW 392-343.

the state contributes funds for local school construction, local school districts generally control the design and construction of their schools and those facilities remain local assets. *See* RCW 28A.335.090; *see also* RCW 28A.335.010.

Since SCAP's inception, voters have continued to amend the Constitution to make it easier for school districts to raise their portion of the funding responsibility for school construction. In 1986, for instance, article VII was amended to allow school districts to impose six-year excess levies for capital purposes. Wash. Const. amend. 79. The measure was intended to "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," without issuing bonds. Office of the Secretary of State, Voters & Candidates Pamphlet: State General Election at 14 (1986), https://www.sos.wa.gov/_assets/elections/voters'%20pamphlet%201986.pdf (1986 Pamphlet). Proponents of the amendment explained that it was necessary because "[m]any school buildings across Washington

are in disrepair due to a shortage of money to fix or replace them." *Id.*

Then, in 1999, article VIII was amended to permit the State to guarantee school district debt incurred for capital purposes. Wash. Const. amend 92. The measure was intended to reduce local property taxes by lowering the cost for school districts to raise money for school buildings. It was described to voters as a means to allow school districts "to borrow money for school construction at significantly lower interest rates." Office of the Secretary of State, State of Washington Voters Pamphlet: General Election at 8 (1999), https://www2.sos.wa.gov/_assets/elections/voters'%20pamphlet%201999.pdf (1999 Pamphlet). As proponents explained: "The state's guarantee will not alter a school district's responsibility to pay its own bonds. However, it will reduce future property taxes due to the savings gained." *Id.*

And, most recently, in 2007, the Constitution was again amended to make school district excess levies, including the six-year capital levies first permitted in 1986, subject to

simple-majority enactment instead of a supermajority. Wash. Const. art. VII, § 2(a) (amend. 101).

B. The State's Current Appropriations for School Capital Costs

Today, the State has multiple funding programs designed to assist local school districts with their capital costs. In its most recent supplemental budget, the Legislature appropriated nearly $850 million for public school construction across different programs. *See* Washington State Fiscal Information, 2022 Supplemental Capital Budget Reports, http://www.fiscal.wa.gov/CapitalSummaryGraphicSupp.aspx. This expenditure represents approximately 10% of the State's $8 billion plus capital budget. *See generally* Laws of 2022, ch. 296 (Supplemental Capital Budget).

The largest of these funding programs is SCAP. In fact, SCAP was the largest single appropriation in the State's most recent capital budget, with more than half a billion dollars appropriated for the program and $3.9 billion projected for future biennia. Laws of 2022, ch. 296, § 5004.

In addition to SCAP, there are a number of other programs that assist school districts with their capital costs. These currently include:

- $100 million to assist schools with seismic safety. Laws of 2022, ch. 296, § 5008; *see also* Laws of 2022, ch. 113.
- $49.7 million for grants to small school districts and state–tribal compact schools. *Id.* § 5005; *see also* RCW 28A.525.159.
- $8.9 million for emergency or urgent repairs affecting the health and safety of students. Laws of 2022, ch. 296, § 5007.

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

C. WSD's Lawsuit and Procedural History

WSD's complaint alleges that the three school facilities it owns and operates are in disrepair; that local voters have refused to pass bond measures to finance needed construction for their schools; and that it is the State's duty to "amply fund" WSD's construction costs—which WSD estimates to be in excess of $50 million—under article IX, section 1. CP 22–28. The complaint asserts that the State is required to fully fund the capital components necessary "to safely provide all its students a realistic and effective opportunity to obtain the knowledge and skills encompassed within the word 'education' in Article IX, §1." CP 22.

According to WSD, "[t]he education facilities it needs include necessary components and infrastructure" such as:

> roofing, exteriors, windows, flooring, restrooms, classrooms, Science Technology Engineering & Math ("STEM") spaces, labs, Career & Technical Education ("CTE") spaces, arts and assembly spaces, educational technology spaces, health & fitness spaces, school nurse & medical spaces, capital equipment, HVAC, plumbing, wiring, internet connections, Information Technology

> ("IT") components, structural components, electrical components, fire protection components, seismic safety components, building security components, ADA/IDEA components, and life/safety protection components.

Opening Br. at 5–6; CP 22. WSD contends that the "$50 million [it seeks through this lawsuit] does not include a single enhancement beyond what's needed to safely provide Wahkiakum students" the State's program of basic education. Opening Br. at 7.

WSD further contends that local voters have no responsibility to assist with payment for any of the $50 million allegedly needed to build and renovate the district's schools. *See* CP 19; *see also* Opening Br. at 19–20 (arguing school facility funding is not a "shared responsibility"); *id.* at 58–60. In its complaint, WSD sought a declaratory judgment that the State is violating article IX, section 1; an injunction to require the State to comply with its alleged legal duties; and monetary damages in an amount to be proven at trial in excess of $50 million. CP 24–28.

The State moved to dismiss the complaint with prejudice on the grounds that, as a matter of law, article IX, section 1 does not impose a duty on the State to fully fund school capital costs. CP 11–21. The State maintained that WSD's damages claim fails as a matter of law for the additional reason that there is no private right of action for money damages against the State for an alleged violation of article IX, section 1. CP 54–56.[4]

The trial court granted the State's motion and dismissed WSD's complaint with prejudice. CP 166.

IV. ARGUMENT

The dismissal of WSD's complaint should be affirmed. From the time our Constitution was adopted, school construction costs have always been either a purely local or a shared State-local responsibility. This differentiation is apparent from the Constitution as a whole, which has been repeatedly amended

[4] Because WSD does not challenge the dismissal of its damages claim with prejudice, it has abandoned its damages claim. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

to reaffirm the necessary role of local school districts (and their voters) in financing public school construction. School capital costs have never been found to fall within the program of basic education required by article IX, section 1, by either this Court or the Legislature—and WSD's contention to the contrary flies in the face of over a century of precedent.

Indeed, during its period of retained jurisdiction in *McCleary v. State*, this Court expressly recognized 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 WL 11680212, at *14, 15. The Constitution and its amendments, properly understood in their textual, structural, and historical context, do not require the State to fully fund school capital costs. Rather, it places responsibility on local school districts to raise at least some of those funds and to work in conjunction with the State to ensure that Washington students have safe facilities in which to learn.

A. Standard of Review

Review of a trial court's dismissal under CR 12(b)(6) is *de novo*. *Freedom Found. v. Teamsters Local 117 Segregated Fund*, 197 Wn.2d 116, 139, 480 P.3d 1119 (2021). Dismissal is appropriate when "the plaintiff can prove no set of facts, consistent with the complaint, which entitle the plaintiff to relief." *Glacier Nw., Inc. v. Int'l Brotherhood of Teamsters Local Union No. 174*, 198 Wn.2d 768, 782, 500 P.3d 119 (2021). The court "accepts the factual allegations in the complaint as true, but [the court] need not accept any legal conclusions stated in the complaint." *Id.* at 783.

WSD erroneously characterizes many of the allegations in its complaint as "undisputed facts." *See* Opening Br. at 3–16, 41–42, 47, 63–64, 70. Under the 12(b)(6) standard, allegations are assumed to be true for the limited purpose of determining whether the plaintiff is entitled to relief as a matter of law. This standard does not render unproven and unadmitted allegations "undisputed." *See Glacier Nw., Inc.*, 198 Wn.2d at 783. The State

reserves the right to dispute any of the facts alleged in the complaint should the case be remanded. *See* CR 12.

B. School Construction Costs Are Not Included in the Program of Basic Education that the State Is Required to Amply Fund under Article IX, Section 1

WSD devotes much of its opening brief to reciting legal principles that, as far as they go, are undisputed, though largely irrelevant to this case. *See, e.g.*, Opening Br. at 17–19, 58–60, 65–70. It is well established that "article IX, section 1 imposes a judicially enforceable affirmative duty on the State to make ample provision for the education of all children." *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012) (citing *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 520, 585 P.2d 71 (1978)). In the context of interpreting article IX, section 1, the Supreme Court adopted "broad guidelines" defining the meaning of the words "ample," "provision," and "education." *Id.* at 516. The Legislature has the responsibility to "provid[e] the specific details of the constitutionally required 'education," *id.* at 517, as well as the responsibility to "make

ample provision for funding the 'basic education' or basic program of education defined'" and to do so using "dependable and regular tax sources." *Id.* at 517–18 (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 520).

But capital expenditures—in other words, school construction costs—have never been included in the program of basic education the State is required to amply fund under article IX, section 1, by either this Court or the Legislature. Instead, the Constitution treats such costs as a shared responsibility between the State and local school districts. *See* Wash. Const. art. VII, § 2(a), (b); art. VIII, §§ 1(e), 6; art. IX, § 3.

In an effort to have this Court conclude otherwise, WSD asks this Court to ignore its prior Order addressing this issue in the *McCleary* case, attempts to sweep aside more than 100 years of constitutional history relating to school construction as simply irrelevant, and erases the Legislature's role in defining the

program of basic education. Such an approach should not be countenanced.[5]

1. The Supreme Court determined in *McCleary* that capital expenditures are not a component of basic education under article IX, section 1

The issue of school construction costs was most recently presented to this Court during its period of retained jurisdiction in *McCleary*, when the Court explicitly determined that school construction costs are not part of the program of basic education the State is required to fully fund under article IX, section 1. WSD asks the Court to simply ignore this ruling, contending that the Court did not mean what it said. Opening Br. at 35–36, 40.

[5] In its Opening Brief (at 10–14), WSD contends the State "has mistakenly asserted that the school district claims Article IX, §1 imposes on the State 'a constitutional duty to fully fund all of the [the district's] school capital projects.'" *Id.* at 11. It is the State's understanding that while it is not responsible for funding "all possible capital expenses" under WSD's theory, *id.* at 10, the State is purportedly responsible for fully funding all construction and renovations needed for students to receive the State's program of basic education—including the "necessary components and infrastructure" identified above—just not unspecified facility "enrichments." *Id.* at 14; *see also id.* at 5–7, 58–60.

But the Court's reasoning in *McCleary* was based on the plain language of article IX, section 1, in conjunction with the Constitution as a whole, and the same reasoning applies equally here.

After ruling on the merits, the *McCleary* Court retained jurisdiction to ensure the State met its constitutional responsibilities under article IX, section 1. 173 Wn.2d at 545–46. During that period, one of the issues the Court considered was whether the State had complied with its article IX, section 1 duty with respect to all-day kindergarten and class size reductions for kindergarten through third grade (K-3), which were part of the Legislature's program of basic education. *McCleary*, 2017 WL 11680212, at *14–16; *McCleary*, 173 Wn.2d at 545. Early orders from the Supreme Court expressly required the State to address capital costs—such as classroom space—associated with those programs. *See McCleary v. State*, No. 84362-7, 2014 WL 12978578, at *3 (Wash. Sup. Ct. Jan. 9, 2014); *McCleary v. State*, No. 84362-7,

2015 WL 13935265, at *3 (Wash. Sup. Ct. Aug. 13, 2015); *McCleary v. State*, No. 84362-7, 2016 WL 11783310, at *2 (Wash. Sup. Ct. July 14, 2016).

In an order dated July 14, 2016, the State was directed to provide the estimated cost of K-3 class size reductions and all-day kindergarten and "to include the estimated capital costs necessary to fully implement those components." *McCleary*, 2016 WL 11783310, at *2. In response, the State argued that full state funding of capital costs was not part of the State's duty under article IX, section 1. *See* State of Washington's Br. Responding to July 14, 2016 Order at 19–25, https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/625160822StatesRespToOrder.pdf. Specifically, the State noted that "[s]ince statehood, the Constitution has assumed that school district voters will incur debt to construct school facilities," and argued that other constitutional provisions "plainly contemplate that both the State and school districts will contribute to the capital costs of K-12

schools." *Id.* at 19–20 (discussing article VII, section 2; article VIII, sections 1(e) and 6; and article IX, section 3).

This Court agreed. In its 2017 Order, the Court determined that article IX, section 1 does not require full funding of capital costs associated with the State's program of basic education. While observing that "classroom space is obviously needed to maintain all-day kindergarten and reduced class sizes," the Court held that "the State is correct that full state funding of school capital costs is not part of the program of basic education constitutionally required by article IX, section 1." *McCleary*, 2017 WL 11680212 at *14–15. The Court concluded that the State was "adequately funding" both the all-day kindergarten and K-3 class size reduction components of the article IX, section 1, basic education program, notwithstanding that it had not fully funded the "capital expenditures for the necessary additional space." *Id.* at *14–16.

The Court noted that "in *McCleary*, this court did not address capital costs or suggest that capital expenditures are a

component of basic education for purposes of article IX, section 1." *Id.* at *14. Indeed, the Court continued, "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, this Court first looked to article VII, subsections 2(a) and (b), which "permit school districts to levy additional local property taxes for up to six years to support the construction, remodeling, or modernization of school facilities, and permit levies to exceed the limit of one percent of the value of property for the purpose of making required payments of principal and interest on general obligation bonds issued for capital purposes." *Id.* The Court also discussed the Common School Construction Fund established in article IX, section 3, which is the only provision of article IX that explicitly addresses school construction. *Id.* Finally, the Court looked to RCW 28A.525, in which "the legislature established the state school construction assistance program, the express purpose of which is '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).

WSD's claims here cannot be reconciled with the 2017 Order. At bottom, WSD's argument is that the State is *solely* responsible for funding school construction under article IX, section 1 because school facilities are needed for students to obtain an education (although WSD acknowledges that the Constitution permits school districts to fund capital costs). *E.g.*, Opening Br. at 23 (arguing the State providing "some provision or a partial provision is not what Article IX, §1 commands"); *id.* at 12 (arguing "Article IX, §1 requires the State to amply fund the facilities which are needed to safely provide its students the previously noted 'education'").

But in *McCleary*, K-3 class size reductions and all-day kindergarten were indisputably part of the State's basic program of education, and additional classrooms were "needed to maintain" those program components. 173 Wn.2d at 545; 2017 WL 11680212, at *14–15. Yet this Court determined that the

State was *not* required to fully fund the capital costs associated with those programs because capital costs are "not solely a state obligation under the constitution" and "full state funding of school capital costs is not part of the program of basic education constitutionally required by article IX, section 1." 2017 WL 11680212 at *14–15. That conclusion is dispositive here. If the State was not required to fully fund the additional classrooms needed for its program of basic education under article IX, section 1 in *McCleary*, it follows that article IX, section 1 does not compel the State to solely fund a $50 million renovation of WSD's schools here.

In an effort to evade this conclusion, WSD asks this Court to ignore the 2017 Order for various reasons, each of which lacks merit. ***First***, WSD contends that the 2017 Order should be disregarded based on its unpublished status. Opening Br. at 36. But the orders entered during the Court's period of retained jurisdiction in *McCleary* are not the kind of ordinary summary orders that regularly go unpublished. As the Court explained in

its 2012 *McCleary* decision, by retaining jurisdiction it would be "fostering dialogue and cooperation between coordinate branches of government in facilitating the constitutionally required reforms," while still "remain[ing] vigilant in fulfilling the State's constitutional responsibility under article IX, section 1." 173 Wn.2d at 546–47.

Thus, although unpublished, the Court's orders during this period reflect the significant work undertaken by both this Court and the Legislature to ensure the State met its constitutional obligations under article IX, section 1. *See, e.g.*, *McCleary*, 2014 WL 12978578, at *4 (emphasizing the import of judicial oversight of "the State's strategy for fully meeting the mandate of article IX, section 1"); *McCleary*, 2015 WL 13935265, at *1, *4 (taking "immediate action to enforce its orders" and assessing a remedial penalty on the State "until it adopts a complete plan for complying with article IX, section 1 by the 2018 school year"). These were also orders of significant public interest, made available to the public on a court website devoted solely to

the case.[6] WSD's attempt to minimize the import of these orders based simply on their unpublished status falls short.

Moreover, the Legislature has relied on this Court's *McCleary* Orders in setting the basis for the State's current school funding model and in reforming the statewide system of education. *Cf. In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 652, 466 P.2d 508 (1970) (discussing the importance of stability in court-made law to avoid changes "likely to disrupt a statuts [sic] quo which was established in reliance upon prior pronouncements"). The oversight and coordination between the Supreme Court and the Legislature in bringing the State into compliance with article IX, section 1 laid the groundwork for the current status quo. Indeed, the Legislature reformed the statewide system of education in light of *McCleary*, including a structural change in the portion of

[6] https://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.McCleary_Education.

property taxes raised locally and those raised by the State, based on this Court's oversight. *See* Laws of 2017, 3d Spec. Sess., ch. 13; *see also* House Bill Report, EHB 2242 at 9–10, https://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/House/2242.E%20HBR%20PL%2017%20E3.pdf.

Had the 2017 Order come out the other way—in other words, if this Court had held that the State was required to fully fund the capital costs necessary to implement its program of basic education under article IX, section 1—a different reform package would have been necessary, with different state policies and associated State funding needed to cover those substantial, additional costs. But instead, the Court held that article IX, section 1 did not require the State to fully fund needed school construction attendant to its program of basic education, and the Legislature relied upon that determination in making its policy decision and appropriations. Moreover, the Legislature has continued to rely upon this determination in making policy decisions on capital funding. *See, e.g.*, Joint Legislative Task

Force on Improving State Funding for School Construction at 7 (Dec. 14, 2018), https://leg.wa.gov/JointCommittees/Archive/K12CTF/Documents/k12ctf-FinalReport.pdf (discussing the Court's 2017 *McCleary* Order and how "[t]he Court explained that the constitution establishes roles for both the state and for school districts in school construction").

Second, in addition to minimizing the importance of this Court's *McCleary* orders, WSD also attempts to rewrite history by contending that the Court did not actually mean what it said in its 2017 Order. WSD argues that because the Court's 2012 *McCleary* opinion addressed only "operational costs," its 2017 determination that "full state funding of school capital costs is not part of the program of basic education constitutionally required by article IX, section 1" is irrelevant here. Opening Br. at 37–39; *McCleary*, 2017 WL 11680212 at *15. Not so.

While it is true that *McCleary* was not a "facilities cost case," WSD's attempt to narrowly characterize it as an "operational costs" case is not correct either. Opening Br. at 37.

Rather, *McCleary* is a case about "the adequacy of state funding for K-12 education under article IX, section 1 of the Washington State Constitution." 173 Wn.2d at 482; *see also id.* at 483 ("this case concerns the overall funding adequacy of K-12 education"). And while WSD makes much of the 2017 Order's statement that "in *McCleary*, this court did not address capital costs," WSD ignores that the Court also stated—in that very same sentence—that it also "did not . . . suggest [in *McCleary*] 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." 2017 WL 11680212, at *14 (emphasis added). To the contrary, after analyzing that precise question, the Court concluded that "capital costs have never been part of the prototypical school allocation model, and it is not solely a state obligation under the constitution." *Id.* Thus, the fact that *McCleary* did not deal more extensively with facilities is not because it was an "operational costs" case—it was because construction costs fell outside the

constitutional framework for the program of basic education the State is required to fully fund under article IX, section 1.

Further, if the Court had considered *McCleary* to be only an "operational costs" case, it could have refused to consider "facilities" when deciding whether the State had satisfied its article IX, section 1 obligations with respect to all-day kindergarten and reduced class sizes. 2017 WL 11680212, at *14–15. But it did not do so. The Court itself raised the issue and directed the State to brief it. And the Court's decision—that the State was not responsible for fully funding additional needed classrooms under Article IX, section 1—was not based solely on the fact that facilities were not included in the prototypical school funding model. Instead, the Court looked to various constitutional and statutory provisions in concluding that capital costs are "not solely a state obligation under the constitution." *Id.*

In sum, the Court's 2017 Order correctly determined that capital expenditures are not a component of basic education for purposes of article IX, section 1. *Id.* That determination, and the

reasoning upon which it relied, compels dismissal here. WSD's attempt to minimize its relevance and import should therefore be rejected.

2. Constitutional text, structure, and history demonstrate that school construction costs are not a component of basic education the State must fully fund under article IX, section 1

As the *McCleary* Court correctly concluded in its 2017 Order, the Constitution's text and structure reflect that the State and school districts share responsibility for funding public school capital costs. Constitutional history reinforces that conclusion. *See Yelle v. Bishop*, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959) ("In determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered."). Unsurprisingly, WSD does not even attempt to grapple with the framers' intent, given that it was contemporaneously understood that article IX, section 1 did not alter local school districts' responsibility for school construction costs at the time of ratification. *See supra* § III.A.2.

But that is not the end of the matter. Our Constitution was not completed in 1889, but has continued to evolve. The Constitution as a whole therefore also encompasses voters' repeated amendments over the past 70 years reflecting modern expectations that the State does not bear sole responsibility for school construction costs, but rather shares it with local school districts. These amendments—cited by this Court in the 2017 *McCleary* Order—would, of course, be superfluous if article IX, section 1 required full state funding of capital costs (which it does not).

WSD claims that analyzing the text of the Constitution outside article IX, section 1 is irrelevant, and that the Court should simply read that provision in isolation. But the Constitution must interpreted as a whole, both as initially ratified and in light of its numerous amendments over the last 70 years. *See Boeing Aircraft Co. v. Reconstruction Fin. Corp.*, 25 Wn.2d 652, 659, 171 P.2d 838 (1946) (interpreting the Constitution in light of the 1889 Enabling Act); *see also Wash. Water Jet*

Workers Ass'n v. Yarbrough, 151 Wn.2d 407, 483, 90 P.3d 42 (2004) (holding that distinct clauses of art. II § 29 "cannot be interpreted independently; we must consider the provision in its entirety to determine its meaning"); *State v. Gentry*, 125 Wn.2d 570, 625, 888 P.2d 1105 (1995) (constitutional provisions should be harmonized and given effect when possible); *see also generally* 16 Am. Jur. 2d *Constitutional Law* § 66 (2022) ("A constitution must be read and considered as a whole, and every provision must be read in light of other provisions relating to the same subject matter.").

The Constitution's text, history, and structure underscores that the Court's conclusion in 2017 was correct: school capital funding is not part of the program of basic education that the State is solely responsible for under article IX, section 1.

a. Article IX, section 1 did not create a State duty to fully fund school construction at the time the Constitution was adopted

At the time of statehood, school construction costs were not included in Article IX, section 1. That provision was enacted

after almost fifty years of territorial government, when public school financing was provided by both territorial and local sources. But, while territorial government provided funding exclusively for the "support of the common schools," localities provided funding "for the purpose of establishing and maintaining common schools"—in other words, school construction. Statutes of the Territory of Washington, An Act Establishing a Common School System for the Territory of Washington at 319–20 (1854); Laws of the Territory of Washington, An Act to Provide a System of Common Schools at 275–76 (1877) (1877 Act).

Thus, article IX continued and recodified the State-local division of funding responsibility. Accordingly, the first Washington Legislature adopted an act to govern the State's public schools substantially modeled after the territorial act. *Compare* Laws of 1889–90, ch. 12 at 348–85 *with* Laws of the Territory of Washington, 1877 Act at 259–83. As a result, the first state system of common schools, similar to the prior system

of territorial schools, provided no means whatsoever for public school capital fundraising other than by the school district itself.

That capital costs have historically fallen outside the ambit of article IX, section 1 is also reflected in *Sheldon v. Purdy*, which this Court decided shortly after Washington's Constitution was ratified. *See supra* § III.A.2. In *Sheldon*, this Court explained that "Const. §§ 1–3, art. 9, created a common-school fund, which shall be exclusively applied to the support of common schools[,]" and reasoned that school construction and the purchase of schoolhouse sites "d[id] not come within any authorized signification of 'current expenses'" or "any well-defined acceptation of 'support of the common schools.'" 17 Wn. at 140. It expounded that "[b]uilding a new school house and purchasing a site, while at times necessary and proper, are unusual and extraordinary expenditures" and then explained that the legislature had provided alternative means by which local school districts could fund such needed construction "alone and

locally," which this Court found to be "in consonance with the constitution." *Id.* at 141.

WSD ignores this history. It contends that the *Sheldon* case, like the *McCleary* Order, is inapposite, because the case did not discuss or rule upon whether "the State's paramount ample education duty under Article IX, §1 exclude[s] needed educational facilities." Opening Br. at 32–33. But *Sheldon*'s holding is directly on point: article IX, sections 1–3 provide for State "support" of public schools, and such "support" excludes capital costs such as building school houses. 17 Wn. at 140. *Sheldon* explains that capital costs are "unusual and extraordinary expenditures" that fall outside the "continuing regular expenditures for the maintenance of the schools" for which the State is responsible. *Id.* at 140–41. Indeed, the State had no role whatsoever in funding school capital costs until the

Legislature began appropriating emergency funds for school construction during the Great Depression.[7] *See supra* § III.A.3.

Thus, while the State has long been responsible for supporting and maintaining the daily operation of schools, at the time the Constitution was adopted, local school districts "alone and locally" built their schools and the State had no role. It is impossible to reconcile this history with WSD's interpretation of article IX, section 1. Opening Br. at 33–34.

[7] The State recognizes this Court rejected an argument that the paucity of state funding for school operational expenses in the 1890s could justify less than "ample provision" as understood in the modern day. *Seattle Sch. Dist.*, 90 Wn.2d at 516. But there is a qualitative difference in the area of capital expenses. Unlike school operational costs—for which the State has always had a significant role—there was *no* state funding for public school capital expenses in Washington until the Legislature voluntarily assumed such a role beginning in the 1930s. Moreover, the Common School Fund, which was set aside by the Constitution's framers to permanently fund common schools, excluded capital costs. *See Sheldon*, 17 Wn. at 141.

b. Constitutional amendments reinforce that public school capital costs are funded by localities with state assistance

Not only was school construction treated differently at the time of statehood, but over the last 70 years, Washington voters have repeatedly amended the Constitution to specifically address school construction funding. These amendments are not ancient history. Instead, they reflect an intentional decision by modern voters of our State to continue to treat school construction costs differently from the program of basic education for which the State is solely responsible for funding, and to enshrine into the State Constitution the role of local school districts in assisting with school construction funding.

Importantly, these numerous amendments would not be necessary if the State, alone, were obligated to fully fund needed school construction attendant to its program of basic education under article IX, section 1. Moreover, as reflected in the history of these amendments, they were not passed in order for local school district voters to provide "extra school construction" or to

"help the State" in complying with its purported funding obligations, as WSD suggests (Opening Br. at 20–21, 34–35)—but, rather, to ease the financial burden on local school districts as they provide needed school modernization and construction to their local students. Reading article IX, section 1 alongside these more recent constitutional provisions reinforces that school districts bear at least some responsibility to assist with local school construction. *See Boeing Aircraft Co.*, 25 Wn.2d at 658–59 ("The fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it." (quoting 11 Am. Jur., *Constitutional Law* § 61)).

For instance, in 1986, eight years after *Seattle School District* held that the use of excess levies for necessary operational costs was unconstitutional (90 Wn.2d at 524), school districts were given a powerful new option to raise money via six-year excess levies for capital purposes. Wash. Const. art. VII, § 2(a) (amend. 79). This amendment was proposed to voters

because "[m]any school buildings across Washington are in disrepair due to a shortage of money to fix or replace them." 1986 Pamphlet at 14. The amendment was also promoted on the basis that levies would be faster than bonds because "districts would have the option of not waiting for state matching funds to complete their capital projects." *Id.* This amendment, therefore, reflects the shared role between the State and local school districts in paying for needed public school construction.

The same is true with respect to the passage of amendment 92 in 1999, which allowed the State to guarantee school district debt for school construction. Wash. Const. art. VIII, § 1(e) (amend. 92). Again, the proposal was promoted to voters on the basis that school districts were primarily responsible for raising funds for school construction: "By using the state's strong credit rating, our school districts will be able to borrow money for school construction at significantly lower interest rates." 1999 Pamphlet at 8.

And most recently, in 2007, the Constitution was amended to make school district excess levies, including the six-year capital levies first permitted in 1986, subject to simple-majority enactment instead of a supermajority. Wash. Const. art. VII, § 2(a) (amend. 101). Such capital levies have become an important part of the total system of public school capital finance, with more than $7 billion raised since 2015.[8]

The repeated amendment of the Constitution to address school construction funding—in 1952, 1966, 1986, 1999, and 2007—underscores that school construction funding has always been separate from the State-funded program of basic education. Unlike the basic program of education, for which the State is fully responsible under article IX, section 1, school construction is primarily a local obligation funded through bonds and levies

[8] *See* Washington Office of Superintendent of Public Instruction, Election Results for School Financing, https://www.k12.wa.us/policy-funding/school-apportionment/election-results-school-financing.

that are augmented by the Common School Construction Fund and other state support.

In WSD's opinion, these amendments simply allow local voters to "impose property taxes on themselves for extra school construction if they opt to so do," but in no way alter the State's purported obligation to solely fund needed public school construction under article IX, section 1. Opening Br. at 34–35; *see id.* at 20–21. But this argument misunderstands the amendments. The Constitution has been repeatedly amended to ease the burden on local taxpayers in building and modernizing educational facilities needed by their students, not the other way around. *See supra* § III.A.

And, contrary to WSD's unsupported assertion, each constitutional amendment was adopted to enable school districts to raise funds for capital expenditures needed to educate its students—not merely to fund facility enrichments. *Compare* Opening Br. at 34 (characterizing the amendments as allowing voters to fund "extra school construction if they opt to do so")

with 1966 Voters Pamphlet at 10, 20, 22 (discussing the three companion measures presented to voters as "the 'building blocks' for a business-like program of school construction financing" and explaining they were "urgently required to meet the immediate needs of our enrollment explosion" and would allow Washington to "Build the schools we must have—and No New Taxes!") *and* 1986 Voters Pamphlet at 14 (explaining the amendment was needed because "[m]any school buildings across Washington are in disrepair due to a shortage of money to fix or replace them" and would offer "a less expensive option for school construction"). Ultimately, therefore, these constitutional amendments enshrine into our Constitution the shared responsibility between the State and local school districts for school construction and modernization.

c. Article IX, section 1 should be interpreted in light of its historical context

This history reflects how the Constitution's framers and voters understood and intended for school districts to have a responsibility to raise funds for necessary capital construction.

Instead of grappling with the history, WSD's principal response is that "always done it this way" is not a defense to allegations of unconstitutional conduct. *See* Opening Br. at 23–27. WSD is correct, in theory, that longstanding "practice" alone will not save an unconstitutional policy or program. *Id.* at 26. But, as discussed above, legal precedent, pertinent constitutional provisions, and the history and evolution of those provisions are certainly relevant, and all are inconsistent with WSD's theory that the State is solely responsible for funding the construction costs of the program of basic education under article IX, section 1.

In arguing otherwise, WSD attempts to draw an analogy between the State's position in this case (i.e., that public school construction is a shared responsibility between the State and local voters) and that of racial segregationists who sought to perpetuate racial segregation in schools. *Id.* at 24. But the State's argument is not that a shared responsibility for school construction is constitutional simply because "we've always

done it this way." *Cf.* Opening Br. at 24. Instead, the drafters and adopters of the Washington Constitution made an informed choice not to include school construction costs within the State's duties under article IX, section 1, but to instead create a system whereby the State funded the continual, regular expenditures of its program of basic education, and local school districts undertook the "unusual and extraordinary" expenditure of building their local schools. *See Sheldon*, 17 Wn. at 140–41.

This understanding has been confirmed by modern Washington voters who have, in turn, further enshrined this differential treatment of school construction costs (from the program of basic education), by repeatedly amending the Constitution to make it easier for local school districts to fund necessary school construction. *See* Wash. Const. art. VII, § 2(a), (b); art. VIII, §§ 1(e), 6; *see supra* § III.A.5. It also accords with this Court's own pronouncement that "full state funding of school capital costs is not part of the program of basic education

constitutionally required by article IX, section 1." *McCleary*, 2017 WL 11680212, at *15.

3. The Legislature has never included capital costs within the program of basic education under article IX, section 1

WSD's article IX, section 1 claim was properly dismissed for an additional reason: the Legislature has the constitutional responsibility to determine what falls within the State's program of basic education under article IX, section 1, and it has not included capital costs within that program.

The Supreme Court has defined the State's duty to provide an "education" for purposes of article IX, section 1, as the duty "to provide 'basic education' through a basic program of education." *McCleary*, 173 Wn.2d at 516 (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 519). While the Court has contemplated that an "education" under article IX, section 1 might include "programs, subjects, or services," it did not raise school facilities as being a necessary component of the program of basic education. *Id.* (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 519).

Instead, the program's content is left to the Legislature: "[w]hile the judiciary has the duty to construe and interpret the word 'education' by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that 'education' within the broad guidelines." *Id.* at 517 (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 518–19).

Having been given "broad discretion" in "selecting the means of discharging its duty under article IX, section 1, including deciding which programs are necessary to deliver the constitutionally required 'education,'" *id.* at 526, the Legislature has not included capital costs within that program. *See* RCW 28A.150.200–.260 (defining program of basic education). Nor has this Court required it to do so. *See McCleary*, 173 Wn.2d at 526–27 (generally approving of the Legislature's program of basic education); *id.* at 547 ("defer[ing] to the legislature's chosen means of discharging its article IX, section 1 duty," but retaining jurisdiction to monitor the State's funding).

Instead of including capital costs in its program of basic education, the Legislature—consistent with and in reliance on the Constitutional text—designed a system whereby local school districts raise capital funds by passing a capital tax levy or a bond and tax levy, which are then augmented by the State according to a statutory formula. School districts, in turn, retain ownership and control of these facilities. *See* RCW 28A.335.090.[9] Through this system, "the state supplies money for the construction of school buildings throughout the state and encourages the several school districts to raise money locally for school construction." *Martin*, 62 Wn.2d at 646–47. The Legislature's decision to place local school construction outside the "basic education program geared toward delivering the constitutionally required education" that it is required to "fully fund," *McCleary*, 173 Wn.2d at 546–47, and to require some local funding

[9]Antecedents of this statute have recognized local school district boards' control of school facilities since statehood. *See, e.g.*, Laws of 1889–90, ch. 12, §§ 25–32; Laws of 1897, ch. 118, § 44.

assistance for building and modernizing these local assets, is entitled to deference. *See id.* at 547.

If school construction costs were a required part of the program of basic education, this would necessitate significant statutory and possibly constitutional changes in the way the State and local jurisdictions collect revenue. As discussed above, the Supreme Court's *McCleary* decision prompted one of the largest changes in property tax collection in state history. *See supra* § IV.B.2. Requiring the State to fully fund the needed capital costs of education, with no requirement for local voter support and assistance, would require changes of a similar magnitude. Currently, the State provides about $850 million in school capital costs on a biennial basis, about ten percent of the capital budget.[10] Amicus Washington Association of School Administrators (WASA) estimates that Washington school districts spend about

[10] Washington State Fiscal Information, 2022 Supplemental Capital Budget Reports, http://www.fiscal.wa.gov/CapitalSummaryGraphicSupp.aspx.

$4 billion each year on school construction (or $8 billion on a biennial basis). Mem. of Amicus Curiae WASA at 9.

Assuming WASA is correct, requiring the State to fully fund the capital costs of public schools would require a *tenfold increase* in the amount of money appropriated by the State for school capital purposes each year, with public school construction occupying an amount nearly equivalent to the entire capital budget. This, in turn, would require the Legislature to appropriate $7 billion more per biennium in revenue or cut $7 billion from other governmental programs (or a combination of the two). Making determinations about whether to add billions of dollars of capital expenses to its program of basic education is precisely the type of legislative decision to which deference is warranted. *See McCleary*, 173 Wn.2d at 517 (recognizing that the Legislature's "'uniquely constituted fact-finding and opinion gathering processes' provide the best forum for addressing the difficult policy questions inherent in forming the details of an

education system'" (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 551)).

Further, adopting WSD's position would leave uncertain key policy and legal questions for state and local decisionmakers (and likely for the courts). Currently, school facilities are owned and controlled by local school districts, *see* RCW 28A.335.090, and under SCAP, local school districts generally control the design and construction of their schools. But this local ownership and control is premised on local funding support. If the State was required to assume full funding for school construction, questions would arise regarding whether local school districts should continue to own and control their facilities; what the State's role would be in specifying how schools are designed and built; and what the role of local voters would be.

While WSD may disagree with the Legislature's decisionmaking, this does not render the Legislature's "chosen means of discharging its article IX, section 1" obligation unconstitutional. *McCleary*, 173 Wn.2d at 517, 547. Because

capital expenditures are not a component of the program of education under article IX, section 1, WSD's claim fails as a matter of law.

C. The State Is Committed to Assisting Local School Districts with Their Construction and Modernization Efforts

The only question before the Court is whether article IX, section 1 requires the State to fully fund the building and modernizing of Washington's public schools. As set forth above, it does not.

WSD's use of inflammatory rhetoric and imagery (including pictures from tragedies in other countries and other states) does nothing to change this—nor does it suggest that the State does not take seriously the health and safety of Washington public school students. *See* Opening Br. at 43–56. As discussed above, Washington has an extensive capital program to assist local school districts with school building and modernization efforts and has additional funds available for urgent or emergency repairs.

This past legislative session, for instance, the Legislature appropriated $100 million for school seismic retrofitting and codified a new program to assist school districts to retrofit their schools for seismic safety purposes. Laws of 2022, ch. 296, § 5008. And almost $50 million was appropriated for small school districts, like WSD, to support school construction projects without any local contribution at all. *Id.* § 5005; RCW 28A.525.159.

While WSD is critical of Washington's method of assisting local school districts on their capital projects—wishing for the State to relieve WSD voters of any responsibility to assist with the $50 million dollar renovation of its local schools—Washington is not alone in its approach of working in conjunction with local school districts to fund school construction. A 2020 U.S. Government Accountability Office (GAO) report conducted a 50-state survey on school facilities and found that "state support for school facilities varied within and across states," with "school districts most commonly us[ing]

local funding to address school facility needs." GAO Report, K-12 Education: School Districts Frequently Identified Multiple Building Systems Needing Updates or Replacements at 39 (June 2020), https://www.gao.gov/assets/gao-20-494.pdf; *id.* at 34–35 (55% of surveyed school districts nationwide "used local funding as their primary source for school facilities"). Thirty-six states—including Washington—reported providing "some level of capital funding to school districts for school construction or renovation[]," whereas 12 states reported providing no capital funding (and three states did not respond). *Id.* at 39–40. Even among those states that provide some funding, the "amount and mechanisms" differed. *Id.* at 40. That is not surprising given the complexities of public school financing.

The Court should also reject WSD's reliance on out-of-state cases for the proposition that Washington's public education capital financing scheme is somehow infirm. *See* Opening Br. at 28–30. These cases are inapposite because they deal with different state constitutional texts, structures, and

histories—and, correspondingly, different obligations. *See, e.g.*, *King v. State*, 818 N.W.2d 1, 33 (Iowa 2012) ("Whatever the merits of these other judicial interventions in education, Iowa's constitution is different."); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 173 (Neb. 2007) (rejecting invitation to follow other state courts because plaintiffs in those cases based their claims on different constitutional provisions and because "their states' constitutional provisions are significantly different from ours"); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 405 (Fla. 1996) (declining to examine funding cases from other jurisdictions because "the dispute here must be resolved on the basis of Florida constitutional law and the relevant provisions of the Florida Constitution"). Article IX, section 1 of Washington's Constitution is likewise "unique among state constitutions," *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 498, making other states' constructions of their own constitutional provisions unpersuasive.

Nonetheless, the out-of-state school funding cases WSD cites, and the current funding statutes from those states, show that it is not uncommon for legislatures to require local voters to assist with funding capital costs in order to unlock state-provided funds. *See, e.g.*, *Robinson v. Cahill*, 303 A.2d 273, 293 (N.J. 1973) ("It seems clear that the [state constitution] has not been understood to prohibit the State's use of local government with local tax responsibility in the discharge of the constitutional mandate."); Ohio Rev. Code Ann. § 3318.032 (requiring a cost-sharing structure between the state and school districts and capping the district's share for classroom facilities at no more than 95%).

WSD's cited cases are further distinguishable because they challenged their respective states' mechanisms for funding both operation and capital costs. *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994), illustrates the point. There, the entirety of a school's funding was dependent on a statutory formula that provided $0, for both operations *and*

capital costs, if the assessed valuation of property in the district were high enough. *Id.* at 810. The Arizona Supreme Court never held that Arizona could not rely on school districts to raise at least a portion of the money required to fund the necessary capital costs of education. *See generally id.*

Washington, in contrast, fully funds the operational costs necessary to implement the constitutional program of education for all school districts in the State. *See McCleary v. State*, No. 84362-7, 2018 WL 11422996, at *2 (Wash. Sup. Ct. June 7, 2018) (concluding "the State has complied with the court's orders to fully implement its statutory program of basic education").[11] And SCAP, the primary means by which the State assists with school construction, always provides some assistance (at least 20% of eligible costs), but requires school

[11] In FY 2021-23, the Legislature appropriated $28.3 billion, or about 48%, of the state near-general fund for the support and operation of K-12 public schools. *See* A Citizen's Guide to Washington State K-12 Finance at 17 (2022), https://leg.wa.gov/LIC/Documents/EducationAndInformation/2022%20K-12%20Booklet.pdf.

districts raise some of the money themselves according to the value of assessed property in the district per pupil—adjusting the amount property-poor districts must raise in comparison with property-rich districts. RCW 28A.525.166.

WSD's claim is not that the State must appropriate *enough* money so that certain school districts do not fall below some unspecified threshold based on a school district voter base's willingness and practical ability to raise funds itself. Rather, its article IX, section 1 theory is that the State is constitutionally required to solely appropriate the money needed to fund the construction for its program of basic education: for WSD, for the Seattle School District, for the Mercer Island School District, and for each of the other 292 school districts in the State. Thus, the out-of-state cases addressing the adequacy of operational and capital costs provide no guidance in answering whether the State must fully fund capital costs too. Central tools of this Court's construction—the text of the Constitution, the history of its adoption, and the way that it has been amended time after time—

all show that school districts bear some responsibility to fund necessary capital costs, and that school construction costs are not included in the program of basic education under article IX, section 1.

V. CONCLUSION

Article IX, section 1 does not impose a duty on the State to fully fund school construction for the program of basic education under article IX, section 1. WSD's claims therefore fail as a matter of law, and the dismissal should be affirmed.

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