

**SUPREME COURT OF THE STATE OF WASHINGTON**

WAHKIAKUM SCHOOL  
DISTRICT NO. 200,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

NOTICE

It came to our attention this week that the State's Consolidated Answer to Briefs of Amicus Curiae contains an inaccurate factual statement. The State therefore asks the Court to strike or ignore the portion of its brief based on that misstatement, and attaches a revised brief here should the Court prefer a version that omits the erroneous statement.

The State's Consolidated Answer to Briefs of Amicus Curiae (Amicus Answer) asserted that Vermont is one of only two states (the other being Hawai'i) that provides full state funding for necessary school construction costs. Amicus Answer

at 32. As reflected in the 2020 U.S. Government Accountability Office (GAO) report cited in the State’s main response brief, however, Vermont does not provide capital funding for school construction projects. See GAO Report, K-12 Education: School Districts Frequently Identified Multiple Building Systems Needing Updates or Replacements at 40 (June 2020), <https://www.gao.gov/assets/gao-20-494.pdf> (cited in Resp’t’s Br. at 66–67). This is confirmed by other sources. *See, e.g.,* Kristin Blagg, et al., *Assessing the National Landscape of Capital Expenditures for Public School Districts*, Urban Institute at 47 (January 2023), <https://www.urban.org/sites/default/files/2023-01/Assessing%20the%20National%20Landscape%20of%20Capital%20Expenditures%20for%20Public%20School%20Districts.pdf>.

Upon discovering this error, the State began conducting additional research on out-of-state funding schemes for school capital costs to confirm with certainty that Hawai‘i, a one school-district state, is the only state that fully funds school

construction at the state level. But we discovered that given the complexity of school funding formulas in other states, we are not able to make this statement with the level of certainty we would like without extensive further research that would extend well past the date of argument. To ensure that counsel does not inadvertently mislead the Court given the complexities of school construction funding, the State hereby requests that the Court strike or ignore that portion of its amicus response brief discussing out-of-state school funding (pages 32–37) and instead rely on the GAO Report cited in its main response brief (pages 66–67) as the best evidence as to how other states fund school construction. A revised amicus response brief with the above pages stricken is attached for the Court’s convenience.

The State does not believe this information relating to other states’ funding systems affects the analysis of the Washington constitutional issue presented here. The State nonetheless apologizes to the Court for the error and respectfully requests that the Court accept the State’s corrected brief.

This document contains 398 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of March 2022.

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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**RESPONDENT'S REVISED CONSOLIDATED ANSWER  
TO BRIEFS OF *AMICUS CURIAE***

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## I. INTRODUCTION

Amici Washington State School Directors' Association (WSSDA) and Attorneys for Education Rights (AER) devote little of their briefing to the substantive legal issues that must guide this Court's constitutional analysis. They do not dispute the accuracy of the historical record compiled by the State, which demonstrates that article IX, section 1 has never required the State to fully fund the capital costs necessary to implement its program of basic education. And they ignore or mischaracterize this Court's 2017 Order during the period of retained jurisdiction in *McCleary*, which reached that same conclusion. WSSDA dismisses the Order in a footnote, and AER fails to mention it entirely.

Instead, Amici emphasize the public policy importance of school facilities. The State does not dispute that Washington students deserve safe, appropriate facilities in which to learn. That, however, does not answer the question before this Court: whether the State has the constitutional duty under article IX,

section 1 to fully fund all needed construction by local school districts, with all responsibility to assist in building those facilities removed from local school district voters. It does not.

In lieu of the radical expansion of article IX, section 1 urged by both Amici and Appellant, there are policy solutions available. The Legislature has and is continuing to develop solutions for and direct funding to small, rural districts (such as Wahkiakum), which may lack the property base or political will to raise needed capital funds. But the constitutional interpretation proposed by Amici and Appellant would be overly broad and counterproductive. It would require the State to fully fund *all* necessary capital costs for *all* school districts across the state—whether rich or poor, urban or rural. In arguing for such a solution, Amici ignore that Washington currently ranks *fourth* in the country for total money spent on public school construction, with school construction booming in many parts of the state. Instead, Amici and Appellant would have this Court declare that

the State and its taxpayers are now responsible for building and modernizing schools in all 295 local districts, regardless of need.

Not surprisingly, Amici do not cite a single case from any state requiring the outcome urged here: shifting the entire burden of school capital funding onto the State. Nor does this outcome find any support in our constitution's text, history, or structure. Moreover, it would damage the State's ability to target state tax-payer funded support at the school districts that need it most. This Court should reject Amici's flawed constitutional analysis and equally flawed one-size-fits-all answer to this policy problem, and instead allow pursuit of targeted solutions consistent with our constitution.

## II. ARGUMENT

### A. **Amicus WSSDA Mischaracterizes the Scope of This Court's 2017 *McCleary* Order**

Amicus WSSDA, like Appellant, attempts to downplay the importance of this Court's orders during its period of retained jurisdiction in *McCleary*, and in particular, this Court's ruling 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 v. State*, No. 84362-7, 2017 WL 11680212, at \*15 (Wash. Sup. Ct. Nov. 15, 2017) (2017 Order). WSSDA attempts to diminish the Court’s decision by relegating it to a footnote and characterizing it as a mere review of “the State’s tardy compliance with an order to fund operational costs.” WSSDA Br. at 3 n.1. But this characterization fundamentally misunderstands what the *McCleary* case was really about, as well as the nature and scope of this Court’s review during its period of retained jurisdiction.

As this Court explained in making its initial decision to retain jurisdiction following the issuance of its 2012 *McCleary* decision:

This court cannot idly stand by as the legislature makes unfulfilled promises for reform. . . . A better way forward is for the judiciary to retain jurisdiction over this case to monitor implementation of the reforms under ESHB 2261, and ***more generally, the State’s compliance with its paramount duty***. This option strikes the appropriate balance between deferring to the legislature to determine the precise means for discharging its article IX, section 1 duty,



while also recognizing this court’s constitutional obligation. This approach also has the benefit of fostering dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms. . . . ***Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1.***

*McCleary v. State*, 173 Wn.2d 477, 545–46, 269 P.3d 227 (2012)

(emphases added).

In the years following, this Court continued to emphasize that it retained jurisdiction to ensure the State’s compliance with its duty under article IX, section 1. *See, e.g., McCleary v. State*, No. 84362-7, 2015 WL 13935265, at \*1, \*4 (Wash. Sup. Ct. Aug. 13, 2015) (explaining that “[w]e have repeatedly ordered the State to provide its plan to fully comply with article IX, section 1 by the 2018 deadline”; holding the State in contempt “[g]iven the gravity of the State’s ongoing violation of its constitutional obligation to amply provide for public education”); *McCleary v. State*, No. 84362-7, 2016 WL 11783310, at \*1 (Wash. Sup. Ct. July 14, 2016) (“In our continuing jurisdiction . . . this court determined last year that

despite repeated directives to the State to provide a complete plan for fully complying with its paramount duty under Washington Constitution article IX, section 1, it failed to do so.”). Indeed, the import and broad scope of this Court’s inquiry during its period of retained jurisdiction is set forth in the 2017 Order itself: “The court’s constitutional responsibility is to the schoolchildren of this state who have an enforceable right under article IX, section 1 to an amply funded education. We cannot erode that constitutional right by saying that the State is now ‘close enough’ to constitutional compliance.” *McCleary*, 2017 WL 11680212, at \*1.

In addition to ensuring the State complied with its article IX, section 1 obligation, this Court also emphasized that “[o]ne reason we retained jurisdiction over this case was to foster dialogue and cooperation in reaching a goal shared by all Washingtonians.” *McCleary v. State*, No. 84362-7, 2014 WL 12978578, at \*3 (Wash. Sup. Ct. Jan. 9, 2014). Thus, throughout the six-year period of retained jurisdiction, the State and this

Court were in ongoing dialogue through briefing, oral argument, and orders, with the goal of bringing the State into compliance with its article IX, section 1 duties.

The 2017 Order itself came about after years of dialogue between the Legislature and this Court on whether the State was responsible for capital costs associated with certain aspects of its program of basic education. Some of this Court's initial orders had expressed significant concern over the State's failure to appropriate full capital funding for two programs the Legislature newly added to its program of basic education: reduced K-3 class sizes and all-day kindergarten. *E.g.*, *McCleary*, 2014 WL 12978578, at \*2 (explaining that OSPI had estimated additional capital expenditures of "\$105 million for full-day kindergarten and \$599 million for K-3 class size reduction" and then emphasizing that "the State must account for actual cost to schools of providing these components of basic education"); *McCleary*, 2015 WL 13935265, at \*3 ("The State has provided no plan for how it intends to pay for the facilities needed for

all-day kindergarten and reduced class sizes. As the Court emphasized during its 2014 order, the State needs to account for the actual cost to schools of providing all-day kindergarten and small K-3 class sizes.”).

These orders provide the crucial context for this Court’s subsequent directive to the State to submit briefing and to be prepared to answer questions on “reduced class sizes and all-day kindergarten[,]” including “the estimated capital costs necessary to fully implement those components.” *McCleary*, 2016 WL 11783310 at \*2. And it was in response to that 2016 order that the State submitted briefing explaining why full funding of capital costs was not part of its article IX, section 1 duty,<sup>1</sup> and

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<sup>1</sup> See State of Washington’s Brief Responding to Order Dated July 14, 2016 at 19–25, available at <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/625160822StatesRespToOrder.pdf> (explaining how “[t]he Washington Constitution treats capital construction differently from operating costs of education and contemplates a shared responsibility between school districts and the State” and that “[s]ince statehood, the Constitution has assumed that school district voters will incur debt to construct school facilities”).

was questioned by the Court on the issue during oral argument.<sup>2</sup>

It was against this backdrop of ongoing dialogue about school capital costs that this Court ultimately decided, in a 46-page order signed by all nine justices, that “the State is correct that full state funding of school capital costs are not part of the program of basic education constitutionally required by article IX, section 1.” *McCleary*, 2017 WL 11680212, at \*15. In turn, the State has relied on this decision in making policy, taxing, and resource allocation decisions. *See* State’s Resp. Br. at 39–41 (explaining how funding and taxing decisions were made in response to and based upon this Court’s *McCleary* Orders); *see also* Task Force on Improving State Funding for School

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<sup>2</sup> The Court questioned counsel for both parties on the issue of whether article IX, section 1 required the State to fully fund the capital costs of the program of basic education at the 2016 hearing, *see* Oral Argument at 51:20, 1:09:30, *McCleary v. State*, No. 84362-7 (Sept. 7, 2016), <https://www.tvw.org/watch/?clientID=9375922947&eventID=2016091039>, and counsel for the State on this issue at the 2017 hearing, *see* Oral Argument at 18:30, *McCleary v. State*, No. 84362-7 (Oct. 24, 2017), <https://www.tvw.org/watch/?clientID=9375922947&eventID=2017101066>.

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”).

WSSDA is correct, as far as it goes, that the Court in 2017 was not asked to rule on the “precise question” presented here. WSSDA Br. at 3 n.1. This is because the 2017 Order addressed whether the State was responsible for the capital costs of two specific elements the Legislature had added to its constitutionally-required program of basic education: reduced K-3 class sizes and all-day kindergarten. *McCleary*, 2017 WL 11680212, at \*14–16. Here, Appellant asks the Court to find that the State is responsible for the capital costs of *all* elements of the program of basic education.

But the constitutional analysis is the same. Even as the Legislature added something *new* to the program of basic education, as it did with reduced class sizes and all-day

kindergarten, the Court nonetheless held that the State did not have to fully fund those capital costs because capital costs are not part of the article IX, section 1 duty. This Court’s conclusion that “[t]hrough 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” applies with equal force here. *McCleary*, 2017 WL 11680212, at \*14. WSSDA’s efforts to minimize the import of that conclusion are baseless.<sup>3</sup>

**B. Amici Ignores the Legislature’s Work on Targeting School Construction Support to Small, Rural School Districts**

Instead of providing this Court with a legal argument as to why article IX, section 1 requires the State to fully fund school construction costs, Amici instead provide policy arguments regarding the importance of school facilities and why the State

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<sup>3</sup> Amicus AER does not acknowledge or address this Court’s 2017 *McCleary* Order.

should have to fully fund them. WSSDA Br. at 3–9; AER Br. at 9–12.<sup>4</sup>

As a threshold matter, the State does not dispute the importance of school facilities. Assisting local school districts with school construction and modernization projects is a major priority for the State. Indeed, the Legislature appropriated nearly one billion dollars for school capital costs in the most recently enacted capital budget,<sup>5</sup> including more than half a billion dollars

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<sup>4</sup> AER also contends that school facilities are particularly important for students with disabilities. AER Br. at 9–12. The State agrees, and has provided significant funding to help schools ensure equal access to students with disabilities. *See* Health and Safety ADA Access Grants, Washington Office of Superintendent of Public Instruction, <https://www.k12.wa.us/policy-funding/school-buildings-facilities/grants-funding-resources-non-scap/health-and-safety-ada-access-grants>. Moreover, school districts “that demonstrate a lack of capital resources” are given priority in distribution of these funds and “[t]here is no district-leveraged or matching funds requirement.” *Id.* The Legislature appropriated \$1 million for this program in the 2021-2023 biennium. Laws of 2022, ch. 296, § 5007(3).

<sup>5</sup> Washington State Fiscal Information, Supplemental Capital Budget, <https://fiscal.wa.gov/statebudgets/CapitalSingleVersionSupp> (“Nature of Appropriation” = “Reappropriations”, “Version” = “Governor Revised (01/16/2023)”, “Supplemental



to the School Construction Assistance Program (SCAP), the statutory program by which the State provides funding assistance to schools for their construction projects. RCW 28A.525. In addition to SCAP, the Legislature also funds numerous other capital grant programs, including for school seismic safety (\$100 million appropriated), Laws of 2022, ch. 296, § 5008, as well as emergency or urgent repairs affecting the health and safety of children in public schools (\$8.9 million appropriated), *id.* § 5007, and to improve children’s physical health including lead remediation, Laws of 2021, ch. 332, § 5016, among many others.

WSSDA acknowledges these contributions but contends that they are not enough. Specifically, WSSDA takes issue with SCAP’s requirement that local school districts secure bonds or levies for their portion of the construction costs in order to access SCAP funds. WSSDA Br. at 15–16; *see also* RCW 28A.525.162(2). In WSSDA’s opinion, SCAP is failing to

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Format” = “Biennial + Supp = Revised”, “Alternate Finance” = “Yes”).

“relieve the inequity among rural and urban school districts’ ability to fund appropriate education facilities” and is “lock[ing] out small, rural school districts who are unable to pass a bond.” WSSDA Br. at 16, 19.

It bears noting that SCAP was designed specifically to address this inequity by providing differing levels of state funding percentages based on assessed property value per pupil. *See* RCW 28A.525.166 (state assistance percentage is dependent, in part, on “school district’s adjusted valuation per pupil”). Thus, state funding percentages currently range from approximately 20% to 95% of eligible costs depending on how property-poor or property-rich a school district is. *See id.*; *see also infra* n.6. This means that a property-rich school district like Seattle will receive only 20% contribution from the State, while a property-poor school district could have up to 95% of its eligible costs paid for by the State.

WSSDA notes that for a property-poor school district to be able to “tap into” SCAP funds, the school district would

normally have to raise *some* funds via a capital bond or levy to cover their portion of the construction costs. WSSDA Br. at 16, 19. But WSSDA ignores the Legislature’s ongoing work to address this issue, such that small school districts now have at least one means to obtain SCAP funds without any local contribution.

Specifically, in 2020, based on its recognition that such school districts often have more difficulties raising capital funds, the Legislature created the Small School District Modernization Grant Program. *See* RCW 28A.525.159. This program funds school construction projects for small school districts and state tribal compact schools with total enrollment of one thousand students or less. *See id.* These grants, for up to \$5 million, do not require *any* local contribution. In the last biennium, the Legislature appropriated \$49.7 million to this program. Laws of 2022, ch. 296, § 5005. And small school districts can use the funds received from this program in lieu of local contributions for purposes of SCAP eligibility. RCW 28A.525.159(5)(b). This

means that a small school district that receives 80% of eligible costs from SCAP, and receives a \$5 million Small District Modernization Grant, could have a \$25 million capital project funded almost entirely by the State.<sup>6</sup>

The Legislature is also currently considering additional legislation aimed at further assisting small school districts with school construction. For example, one bill, which recently passed out of the Senate Ways and Means Committee,<sup>7</sup> would make the rural school districts served by the Small District Modernization Grant Program “the first priority of appropriations from the common school construction fund, after payment of principal and interest on the bonds authorized in RCW 28A.527.040.”<sup>8</sup>

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<sup>6</sup> SCAP funding is only available for “eligible” construction costs. *See generally* WAC 392-343. To the extent that a project also included non-eligible costs, those costs would have to be paid for by the local school district.

<sup>7</sup> *See* Bill Information, S.B. 5126, 68th Reg. Sess. (2023), <https://app.leg.wa.gov/bills/summary?billnumber=5126&year=2023&initiative=False>.

<sup>8</sup> S.S.B. 5126, 68th Leg., Reg. Sess. (2023), <https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Bills/Senate%20Bills/5126-S.pdf?q=20230217112446>.

This would create a guaranteed funding source for the capital projects of school districts with less than 1,000 students of no less than \$60 million in the 2025-2027 biennium, then increasing to no less than \$80 million by the 2029-2031 biennium, *id.* § 4, and it would do so from revenues dedicated by the Constitution to common school construction.

In addition, Representative Joel McEntire, who represents the 19th Legislative District (which includes Wahkiakum County), sponsored legislation creating a new grant program to fund the construction or remodeling of schools for “financially distressed school districts.” S.H.B. 1044, 68th Leg., Reg. Sess., § 2(1) (2023).<sup>9</sup> This bill would create a new grant program through which “small, financially distressed school districts that generally do not participate in the current school construction assistance program will be able to get the necessary funds to modernize or rebuild their school buildings.” *Id.* § 1. As with the

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<sup>9</sup> <https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1044-S.pdf?q=20230221134157>.

Small School District Modernization Grant Program, “[s]chool districts that receive grants under this section may use the grant to fund the required local funding equal to or greater than the difference between the total approved project cost and the amount of state funding assistance.” *Id.* § 2(11).

These legislative bills provide targeted policy solutions to the concerns raised in WSSDA’s brief—and to the issues raised in this case. They are solutions that the Legislature is uniquely qualified to formulate. As this Court recognized in *McCleary*, 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.” *See McCleary*, 173 Wn.2d at 517 (quoting *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 551, 585 P.2d 71 (1978)).

But both Amici and Appellant disregard the Legislature’s role in crafting such solutions. They likewise urge this Court to ignore its own prior determination that “school capital costs are

not part of the program of basic education constitutionally required by article IX, section 1,” *McCleary*, 2017 WL 11680212, at \*15, along with the State’s entire history of school construction funding and the numerous constitutional amendments that voters passed addressing school construction. In doing so, they ask this Court to provide a judicial answer to a policy problem by misinterpreting article IX, section 1 to require the State to fund the full capital costs of the program of basic education. *See* WSSDA Br. at 19. This Court should decline to do so.

It also bears noting that Amici’s proposed judicial outcome could have negative unintended consequences on school construction statewide. According to recent U.S. Census Bureau data, Washington ranks *fourth* in the country in terms of total amount of money spent on public school construction (behind California, Texas, and New York).<sup>10</sup> While the State

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<sup>10</sup> U.S. Census Bureau, 2020 Public Elementary-Secondary Education Finance Data (2022), Table 9: Capital

acknowledges that some small school districts are currently struggling to raise local money to participate in SCAP, this data indicates that many other school districts do not have this problem and are building at an impressive rate. But the only solution proposed by Amici and Appellant is inherently a statewide one. If their constitutional theory is adopted, and the State is now required to fully fund the construction needed for its program of basic education, the State would suddenly become responsible for building and modernizing the schools in all 295 school districts—not just those in small school districts which are unable to raise sufficient local funds themselves. This would leave the Legislature unable to define and fund targeted policy solutions that assist property-poor districts. Instead, the State would have to shoulder the cost of construction for *all* school districts, including property-rich school districts that consistently

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Outlay and Other Expenditure of Public Elementary-Secondary School Systems by State: Fiscal Year 2020, <https://www.census.gov/data/tables/2020/econ/school-finances/secondary-education-finance.html>.



pass capital levies and bonds, at the expense of billions of dollars' worth of other state programs.

**C. Washington's Constitutional Structure and History Show that Capital Costs, Unlike Operational Costs, Are Not Solely the State's Obligation**

Amici next argue—again, based largely on the inability or unwillingness of certain school districts to pass capital bonds or levies in recent years—that this Court should strike down the capital bond and capital levy systems that voters amended the constitution to create. In so arguing, they attempt to equate unconstitutional excess levies to fund public school operational costs (which this Court struck down in *Seattle School District No. 1*) with local levies and bonds for capital costs, arguing that capital bond measures are likewise an “unconstitutional method for the State and school districts to fund facilities necessary to provide a basic education program.” WSSDA Br. at 13–14, 19; *see also* AER Br. at 5. This argument, however, would require the Court to ignore the constitution's differing treatment of operational and capital costs.

School construction has been primarily a local obligation, approved in local elections, since before 1889. But the opposite is true for excess operational levies. When the constitution was first ratified, article IX, section 3 specifically designated the Common School Fund for school operational purposes, creating a “permanent and irreducible” source of state funds for operating public schools. *See* Wash. Const. art. IX, § 3 (1889); *see also Sheldon v. Purdy*, 17 Wn. 135, 139, 49 P. 228 (1897) (“Const. §§ 1–3, art. 9, created a common-school fund, which shall be exclusively applied to the support of common schools.”). Thus, the constitutional program of common schools has always included state funding for their operational costs.

This fundamental arrangement never changed over the course of Washington’s many constitutional amendments. The first amendment specifically about public school operational levies was Amendment 64 in 1976, permitting excess levies for a period of two years instead of one. Wash Const. art. VII, § 2(a) (amend. 64). The voters’ pamphlet “Statement For” specifically

argued that it was the Legislature’s responsibility to appropriate sufficient funds for schools to operate, but that this task was complicated by fluctuating amounts from levies that only lasted one year. Bruce K. Chapman, Official Voters Pamphlet at 8 (1976), <https://www2.sos.wa.gov/assets/elections/voters'%20pamphlet%201976.pdf> (1976 Voters Pamphlet). Thus, while emphasizing that “[t]he most necessary and immediate problem facing the legislature is how to provide stable revenue for schools,” it further argued that “local levies will still exist” but that “[t]hey should be for *only special purposes.*” *Id.* (emphasis in original). The proponents of this amendment did not conceive of excess levies as a means of providing “stable revenue for schools.” *Id.* Instead, voters amended the constitution to give local school district voters a means by which to provide extra money for “special purposes.” *Id.*

Amendment 90, in 1997, extended the excess levy period from two years to four years. Wash. Const. art. VII, § 2(a) (amend. 90). Proponents reiterated the arguments from twenty

years prior that schools needed predictability for budgeting, but did not challenge the expectation that excess levies were for only special purposes, instead emphasizing that “[a] four year levy option would provide greater stability for school districts to plan for a longer period of time.” Ralph Munro, State of Washington Voters Pamphlet: State General Election at 16 (1997), <https://www2.sos.wa.gov/assets/elections/voters%20pamphlet%201997.pdf>.

Finally, Amendment 101, in 2007, allowed excess levies for public schools by simple majority vote, instead of a three-fifths majority (and also eliminated the requirement that a minimum number of voters cast ballots). Wash. Const. art. VII, § 2(a) (amend. 101). This amendment, which applied to both capital and operational levies, did not change the underlying purpose of school operational levies. Instead, its goal was to allow “a much more common ‘simple majority’ of voters in a community to decide whether a school levy should pass.” Sam Reed, State of Washington Voters’ Pamphlet: General

Election at 21 (2007), <https://www2.sos.wa.gov/assets/elections/voters'%20pamphlet%202007.pdf>.

As these amendments demonstrate, voters have long recognized that school operational levies “should be for *only special purposes*,” 1976 Voters Pamphlet at 8 (emphasis in original), and that it is otherwise the State’s constitutional responsibility to fund school operational costs for its basic program of education under article IX, section 1. It was the *misuse* of the operational levy system—in which such levies were being used to fund the State’s program of basic education—that led this Court to crack down on the State’s improper reliance on local levy dollars in *Seattle School District No. 1* and *McCleary*. But this reasoning does not apply in equal force to the constitutional provisions addressing school capital costs.

As explained in the State’s response brief, the constitution’s text, structure, and history demonstrate that the State and school districts share responsibility for funding public school capital costs. *See* State’s Resp. Br. at 4–18, 44–59. At the

time article IX was ratified, school districts “alone and locally” funded school capital costs “in consonance with the constitution.” *Sheldon*, 17 Wn. at 141 (characterizing school construction costs as “unusual and extraordinary expenditures” and explaining that “[t]wo methods have been provided for building school houses . . . a special tax levied by the district . . . [and] the bond act”).

And since that time, Washington voters have repeatedly amended the constitution to specifically address school construction funding. *See* State’s Resp. Br. at 12–22, 51–56 (citing Wash Const. art. IX, § 3 (amend. 43); Wash Const. art. XVI, § 5 (amend. 44); Wash. Const. art. VII, § 2(a) (amend. 79); Wash. Const. art. VIII, § 1(e) (amend. 92); Wash. Const. art. VII, § 2(a) (amend. 101)). The history of these amendments—unlike the history of the school operational levy amendments—reflects the shared responsibility of State and school district voters to fund school construction costs. *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.”).

The amendment creating the modern “Common School Construction Fund,” Wash. Const. amend. 43, for example, was presented to the voters as part of a package “for a business-like program of school construction financing,” with the monies from the Fund “be[ing] distributed around the state to local school districts for needed building projects, helping to ease the tax burden of local property owners.” A. Ludlow Kramer, Official Voters Pamphlet at 20 (1966), [https://www2.sos.wa.gov/\\_assets/elections/voters'%20pamphlet%201966.pdf](https://www2.sos.wa.gov/_assets/elections/voters'%20pamphlet%201966.pdf). Similarly, in 1986, article VII was amended which gave school districts the option to raise money via six-year excess levies for capital purposes because “[m]any school buildings across Washington are in disrepair due to a shortage of money to fix or replace them,” and with the new levy funds, “districts would have the option of not waiting for state matching funds to complete their capital

projects.” Wash. Const. art. VII, § 2(a) (amend. 79); Ralph Munro, 1986 Voters & Candidates Pamphlet at 14, [https://www2.sos.wa.gov/\\_assets/elections/voters'%20pamphlet%201986.pdf](https://www2.sos.wa.gov/_assets/elections/voters'%20pamphlet%201986.pdf). And the 1999 amendment allowing the State to guarantee school district debt for school construction was also 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.” Wash. Const. art. VIII, § 1(e) (amend. 92); Ralph Munro, State of Washington Voters Pamphlet at 8 (1999), [https://www2.sos.wa.gov/\\_assets/elections/voters'%20pamphlet%201999.pdf](https://www2.sos.wa.gov/_assets/elections/voters'%20pamphlet%201999.pdf).

WSSDA gets it backwards when it characterizes the State’s argument as being that article IX, section 1 contains no duty to fully fund capital costs because “it’s always been that way.” WSSDA Br. at 1; *cf.* Opening Br. at 23. Instead, *because* article IX, section 1 has never included the duty to fully fund



school construction costs, state sources have never been used to fully fund such costs. The repeated amendments by modern Washington voters confirm the role of local school districts in assisting with school construction funding. WSSDA's attempts to sweep these amendments under the rug should be rejected.

**D. Amici's Out-of-State Cases Are Inapposite to Washington's Article IX, Section 1 Duty**

Amicus AER also urges this Court to require full state funding of capital costs because other state courts have included facilities as part of their constitutionally required school finance systems. AER Br. at 12–13. But as noted in the State's response brief, out-of-state cases are generally irrelevant to understanding Washington's constitutional duties under article IX, section 1, *see* State's Resp. Br. at 67–71, because article IX, section 1 is “unique among state constitutions.” *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 498. Thus, other states' constructions of their own constitutional provisions shed no light on whether school capital costs are a component of the State's program of basic education for purposes of the State's article IX, section 1 full funding duty.

Moreover, looking to pronouncements of what other courts have said is “constitutionally required” for their states’ school systems, AER Br. at 12, is particularly unhelpful given the highly state-specific nature of school funding. For instance, as a result of this Court’s rulings in *Seattle School District No. 1* and *McCleary*, which made clear the State’s duty to fully fund its program of basic education for all school districts in the State, nearly half of the State’s general fund—\$25.9 billion—was provided by the State for K-12 education in the last biennium (2021-2023). Washington State Fiscal Information, Prior Omnibus Operating Budgets, <https://fiscal.wa.gov/statebudgets/OperatingSingleVersionPrior>.<sup>11</sup> Approximately 71%<sup>12</sup> of all revenue funding Washington’s public schools comes from

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<sup>11</sup> (“Budget Session” = “2021-23 Omnibus Operating Budget – 2022 Supplemental” “Version” = “Enacted (03/31/2022)”, and “fund 1” = “General Fund – State (001-1)”).

<sup>12</sup> Unless otherwise noted, the percentages referenced in this brief will be rounded to the nearest one percent. Budgets measured in the billions of dollars will be rounded to the nearest one-hundred million dollars. Per pupil per year spending will be rounded to the nearest dollar.

statewide sources, far above the nationwide average of 47%. *See* U.S. Census Bureau, 2020 Public Elementary-Secondary Education Finance Data (2022), <https://www.census.gov/data/tables/2020/econ/school-finances/secondary-education-finance.html>. Only three states have a larger proportion of school revenue coming from state sources: Vermont (91%), Hawai‘i (90%), and Arkansas (75%). *Id.* And Washington spends more per pupil per year from state sources (\$12,481) than all but four states (Vermont, Hawai‘i, Delaware, and Arkansas), and far above the nationwide average of \$7,548. *Id.*

Notably, none of the out-of-state cases that AER relies upon affirmatively answers the question presented by Wahkiakum’s complaint: whether full funding for necessary school capital costs is *solely* the duty of the State. *See* AER Br. at 12–13. In *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 141 (Tenn. 1993), for instance, the Tennessee Supreme Court recognized that its education system could “include the imposition of funding and management

responsibilities upon counties, municipalities, and school districts, within their respective constitutional powers.” Similarly in *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 924, 801 N.E.2d 326 (2003), the New York Court of Appeals held that New York State could require New York City to maintain certain local taxes to support its schools.

**E. The Legislature Has Not Defined the Program of Basic Education to Include Particular Capital Components**

In an effort to establish that capital costs actually are part of the State’s program of basic education, AER quotes snippets of RCW 28A.150.260 out of context to argue that the Legislature has defined the program of basic education to include particular capital components, and that therefore the Legislature must fully fund *all* capital expenditures necessary to the program. *See* AER Br. at 5–9. But the Legislature has done no such thing. An honest reading of RCW 28A.150.260 shows that the Legislature included certain operational costs within its funding model, but not the capital expenditures of the land or the building.

Paragraph (4) of RCW 28A.150.260 is about class sizes, not classrooms. Although the statute does include the words “laboratory sciences classes”—which AER takes to mean that the Legislature included laboratory space in its program of basic education, AER Br. at 7—the context makes it clear that the Legislature is talking about student to teacher ratios. Specifically, the paragraph begins: “[t]he minimum allocation for each level of prototypical school shall be based . . . on the following general education average class size of full-time equivalent students per teacher . . . .” and goes on to specify a number of students per class per grade level. RCW 28A.150.260(4)(a)(i). And paragraph (4)(a)(ii), where the words “laboratory science classes” appear, specifies a different class size for these sorts of classes (using a “laboratory science course factor”). The Legislature was not specifying a particular kind of room in RCW 28A.150.260(4)(a)(ii), but a particular kind of instruction, which necessitated more teachers per student.

And while the prototypical school model certainly assumes that local districts will have a building and classrooms in which to operate (*e.g.*, RCW 28A.150.260(5) provides staffing ratios for custodians and RCW 28A.150.260(6)(a) provides for support for “[f]acilities, maintenance, and grounds”), nowhere does it specify what kind of building the school district has to supply, or imply anywhere that a particular capital component is required. *See generally* RCW 28A.150. Instead, that is left to the discretion of school districts’ boards of directors. RCW 28A.335.010.

As this Court previously recognized, “capital costs have never been part of the prototypical school allocation model.” 2017 Order at \*14. And the Legislature, as part of its article IX, section 1 duties, has not defined any capital component as part of its program of basic education.

### **III. CONCLUSION**

Article IX, section 1 does not contain a duty for the State to fully fund the capital costs necessary for its program of basic

education. Amici do not provide a persuasive reason to hold otherwise. The State therefore respectfully requests that this Court affirm the decision of the superior court dismissing this lawsuit.

This document contains 6,626 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of March 2023.

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