No. 101052-4

SUPREME COURT OF THE STATE OF WASHINGTON

WAHKIAKUM SCHOOL DISTRICT NO. 200
Appellant,

v.

STATE OF WASHINGTON,
Respondent.

WAHKIAKUM SCHOOL DISTRICT'S REPLY BRIEF

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I. INTRODUCTION

The State's Response presents a variety of rationalizations and excuses for why it thinks its paramount education duty under Article IX, §1 excludes the education facilities that are necessary to provide an education.

But its Response nowhere addresses what Article IX, §1 actually says. Paramount duty. State. Ample provision. All children. Caste.

Plaintiff's Complaint applied the established legal meaning of these words to the education facilities necessary to deliver a 21st century education to today's 21st century children. Education facilities that marginalized children in places like Wahkiakum are currently left abandoned to struggle without.

The plain wording of Article IX, §1 does not exclude education facilities:

> 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.
>
> *Article IX, §1*

Nor is that exclusion in this Court's corresponding promise to Washington children – a promise especially critical to those in underprivileged communities like Wahkiakum: "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education." *McCleary*, 173 Wn.2d at 483 (underline added), see also 485 & 518 (students' *paramount* right under our State Constitution) (quoting *Seattle School District*, 90 Wn.2d at 511-512) (italics in original, underline added).

And significantly, this Court assured Wahkiakum's children that the "education" to which they have this paramount and positive constitutional right is the 21st century education

they will need in today's world. *McCleary*, 173 Wn.2d at 483 ("The word 'education' under article IX, section 1 means the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this state's democracy.").

Plaintiff agrees with the State's point that requiring the State to amply fund the education facilities necessary to equitably provide all Washington children a 21st century education would be expensive. But as the following pages explain, none of the State's rationalizations and excuses refute the dispositive legal principle in this case: Washington law requires the judicial branch to uphold the wording of Article IX, §1 as written – not engraft an unwritten exclusion into it to save the State money. Opening Brief at 2. The State's failures in history do not excuse this Court's obligation today.

II. REPLY REGARDING THE ISSUE PRESENTED

The State's Response characterizes the issue presented and accepted for direct review as whether Article IX, §1 requires "full state funding of school capital costs". Response at 3.

But the Complaint did not claim that Article IX, §1 requires full state funding of all school capital costs.

Instead, the Complaint limited its claim to only those capital costs needed to safely provide Wahkiakum students the 21st century education to which this Court declared they have a paramount and positive constitutional right. Opening Brief at 9-15 and its Appendix One [the Complaint (CP 1-29)].

The Complaint did not claim the State must fund any enrichments above this floor of educational necessity. Opening Brief at 11-15 and its Appendix One. The Complaint did not claim any State duty above that educational necessity floor – e.g., facilities that public schools in other States have such as Olympic-sized swimming pool, flow cytometry lab for identifying and sorting cells, chain reaction thermocycler lab for

DNA amplification and sequencing, advanced electroencephalography lab for translating brain waves, or large "joy garden".[1]

In short: the question of law presented and accepted for direct review does not include enrichments. It is limited to whether Article IX, §1 excludes education necessities:

> Does the paramount education duty commanded by Article IX, §1 of our State Constitution exclude the education facilities needed to safely provide an education?

Statement Of Grounds For Direct Review at 9 & 29; *accord*, Opening Brief at Part II, Assignment of Error ("The lower court's Rule 12(b)(6) dismissal was error as a matter of

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[1] *These examples are from: Center Grove High School's pool: https://fhai.com/projects/center-grove-high-school-natatorium/; Thomas Jefferson High School's labs: https://www.washingtonpost.com/community-relations/thomas-jefferson-high-school-enhances-research-capabilities/2015/01/29/d6646892-a7f0-11e4-a7c2-03d37af98440_story.html; and Northside High School's "Joy Garden": https://web.archive.org/web/20130409013712/http://www.urbanhabitatchicago.org/projects/joy-garden-at-northside-prep/*

Washington law because the paramount education duty imposed upon the State by Article IX, §1 does not exclude the education facilities needed to safely provide an education.").

III. REPLY REGARDING THE FACTS

The State does not dispute that this Court's decision on whether to affirm or reverse the lower court's Rule 12(b)(6) dismissal must presume that the facts alleged in the Complaint are true.[2] These facts are summarized at Opening Brief pages 3-16. And the Complaint itself (CP 1-29) is the Opening Brief's Appendix One.

As for the State's reserving its right to dispute facts at trial, plaintiff agrees the State can contend at trial that some of the education facility costs and amounts plaintiff claims in this case are in fact enrichments above what is needed to safely provide a 21st century education. But resolving factual contentions is what a trial is for – not a Rule 12(b)(6) dismissal. This Court should

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[2] *Opening Brief at 3; Response Brief at 28 (Rule 12(b)(6) decision "accepts the factual allegations as true").*

accordingly reverse and remand for trial of any material facts the State believes it can in good faith dispute.

IV. REPLY REGARDING THE LAW

This Court assured Wahkiakum students that Article IX, §1 confers upon them a paramount and positive constitutional right to an amply funded education – with that education being not what was appropriate for their parents' generation, but rather the 21st century education that today's generation will need in today's world. *Supra*, pages 2-3.

Lack of State funding for the education facilities needed to provide that education is what precipitated the question of constitutional law in this case:

> Does the paramount education duty commanded by Article IX, §1 of our State Constitution exclude the education facilities needed to safely provide an education?

The State says the answer is "yes". But as the following pages explain, the State's legal arguments fail to refute the Opening Brief's showing that the answer under Washington law is "no".[3]

A. Ample Funding of *Necessary* Capital Costs Does Not Require Full Funding of *All* Capital Costs

The State's argument is based on its proposition that Wahkiakum's Complaint had to be dismissed because Article IX, §1 does not require the State to fully fund all school district capital costs. *See* Response at 3, Part II.

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[3] *In a footnote, the State says the district abandoned its monetary damages claim under Cowiche Canyon Conservatory v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992), asserting that the district has not challenged the lower court's dismissal of the Complaint's claims with prejudice. Response at 26 n.4. But the district has challenged the Complaint's dismissal with prejudice. E.g., Opening Brief at 3 (Assignment of Error). The State's assertion also ignores the distinction between Rule 12(b)(6) & 12(b)(1) with respect to the Complaint's damages claim. Opening Brief at 16 n.3 (citing Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962 (1998); Scott v. Goldman, 82 Wn.App. 1, 10, 917 P.2d 131, 135 (1996); Zarbell v. Bank of Am. Nat. Tr. & Sav. Ass'n, 52 Wn.2d 549, 554, 327 P.2d 436, 439 (1958)).*

But as noted earlier, the Complaint did not claim the State must fully fund all school district capital costs. It only claimed the State must fund the capital costs needed to safely provide Wahkiakum students the 21st century education to which this Court declared they have a paramount and positive constitutional right. Part II above; Part IV.A.1 below.

And while the State's Response dwells on other constitutional provisions, an unpublished 2017 order, the legislature's education role, and district ownership of buildings, none of those points amend the paramount duty imposed upon the State by Article IX, 1. Parts IV.A.2 - 5 below.

1. The Complaint did not claim Article IX, §1 requires full state funding of *all* capital costs

The Complaint is limited to only the education facility costs needed to provide the 21st century education to which this Court has assured Wahkiakum students they have a paramount and positive constitutional right.

That limitation makes sense because the State's duty under Article IX, §1 is, by its very terms, limited to making ample

provision for the 21st century "education" that this Court has declared is every Wahkiakum child's constitutional right under Article IX, §1. Thus, by its very terms, Article IX, §1 *does not* apply to school district costs incurred to provide enrichments above that constitutional floor. *McCleary*, 173 Wn.2d at 486 (citing *Seattle School District*, 90 Wn.2d at 526).

But the plain wording of Article IX, §1 *does* require the State to amply fund the costs necessary to provide the promised 21st century education to every Wahkiakum student. And those necessary costs are the capital costs at issue in the Complaint.

2. The other provisions cited by the State do not amend Article IX, §1 to exclude necessary capital costs

Although the State points to other constitutional provisions,[4] there are several reasons why those provisions do not rewrite the unequivocal command of Article IX, §1.

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[4] *Response at 13, 15-16, 20-21, 30, 58 (citing Articles VII, §2(a); VIII, §§1(e) & 6; and IX, §3, including some of the amendments thereto).*

First: When a Washington constitutional provision supersedes or amends another provision, it says so. *E.g.,* Article IV, §30(6) ("The provisions of this section shall supersede any conflicting provisions in prior sections of this article."); Article II, §41 ("These provisions supersede the provisions of subsection (c) of section 1 of this article as amended by the seventh amendment to the Constitution of this state."); Article XXVIII, §1 ("The salaries fixed pursuant to this section shall supersede any other provision for the salaries of members of the legislature"); Article XXVIII, §1 ("The provisions of [enumerated sections], insofar as they are inconsistent herewith, are hereby superseded.").

But none of the constitutional provisions invoked by the State say they amend or supersede any part of the State's education mandate under Article IX, §1. To the contrary, the unequivocal wording of Article IX, §1 makes the education mandate it imposes upon the State "paramount" – which means it is not superseded or amended by other provisions. *See*

McCleary, 173 Wn.2d at 520 (the word "paramount" in Article IX, §1 means "having the highest rank that is superior to all others, having the rank that is preeminent, supreme, and more important to all others.").

The 1897 *Sheldon* case that the State repeatedly invokes as the best reported decision in its favor did not hold otherwise. *Compare* Response at 9-11, 48-49, and 50 n.7 to Opening Brief at 32-33 (both discussing *Sheldon v. Purdy,* 17 Wash. 135, 49 P. 228 (1897)).

Second: Since constitutional law disfavors the implicit amendment of constitutional provisions, implicit amendment is found only when there is an "irreconcilable conflict ... where there exists no possible construction that could give both provisions effect." 16 Am.Jur.2d *Constitutional Law* § 51 (2022); *cf. Washington State Welfare Rights Org. v. State*, 82 Wn.2d 437, 439, 511 P.2d 990 (1973) (finding "absolutely no basis for repeal or amendment by implication" when two statutes are not inconsistent); *cf. also Osborn v. Nicholson*, 80 U.S. 654,

662, 20 L.Ed. 689 (1871) ("the destruction of vested rights by implication [is] unfavored in the law") and *compare McCleary*, 173 Wn.2d at 483 ("Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education.").

There is no irreconcilable conflict here between Article IX, §1 making it the paramount duty of the State to amply fund the education facilities necessary to provide an education, and other provisions enabling local voters to fund enrichments if they so choose.

For example, our constitution enables local voters to adopt **levies** to fund education services. Article VII, §2. And as the State points out, Washington voters amended that provision in 2007 to make it significantly easier for levies to fund school district costs. Response at 54 (amendment 101 eliminating the supermajority requirement that restricts bond approval).

But constitutional provisions allowing local voters to fund education services with levies do not diminish or amend the State's paramount duty under Article IX, §1 to amply fund the education services that are needed to provide a 21st century education. *See, e.g., McCleary*, 173 Wn.2d at 539 ("Reliance on levy funding to finance basic education was unconstitutional 30 years ago in *Seattle School District*, and it is unconstitutional now.").

That makes sense – for this Court's published decisions have repeatedly held that the availability of voter-approved **levy** funding does not diminish the State's Article IX, §1 ample funding duty. *McCleary*, 173 Wn.2d at 486; *Seattle School District*, 90 Wn.2d at 525. This Court's decisions have long declared:

> [W]e rejected special excess **levies** as "dependable and regular" not only because they are subject to the whim of the electorate, but also because they are too variable insofar as **levies** depend on the assessed valuation of taxable real property at the local level. This latter justification implicates both the equity and the adequacy of the K–12 funding system. Districts with high property values are able to raise

> more **levy** dollars than districts with low property values, thus affecting the equity of a statewide system. Conversely, property-poor districts, even if they maximize their local **levy** capacity, will often fall short of funding a constitutionally adequate education. All local-level funding, whether by **levy** or otherwise, suffers from this same infirmity. In short, the State's reliance on local dollars to support the basic education program fails to provide the "ample" funding article IX, section 1 requires.

McCleary, 173 Wn.2d at 486 (citing *Seattle School District*, 90 Wn.2d at 525) (bold font added; internal citations omitted).

This declaration of Washington law is why this Court's Article IX, §1 rulings limit the role of local voter-approved funding to enrichments above the 21st century education that this Court has promised every Washington child is their positive and paramount constitutional right. *McCleary*, 173 Wn.2d at 486 (citing *Seattle School District*, 90 Wn.2d at 526).

This same declaration of Washington law likewise confirms that constitutional provisions allowing voter-approved **bond** funding do not diminish the State's Article IX, §1 ample funding duty. Substituting "[bonds]" for the word "levies", this

Court's *McCleary* and *Seattle School District* rulings would read:

> We reject **[bonds]** as "dependable and regular" not only because they are subject to the whim of the electorate, but also because they are too variable insofar as **[bonds]** depend on the assessed valuation of taxable real property at the local level. This latter justification implicates both the equity and the adequacy of the K–12 funding system. Districts with high property values are able to raise more **[bond]** dollars than districts with low property values, thus affecting the equity of a statewide system. Conversely, property-poor districts, even if they maximize their local **[bond]** capacity, will often fall short of funding a constitutionally adequate education. All local-level funding, whether by **[bonds]** or otherwise, suffers from this same infirmity. In short, the State's reliance on local dollars to support the basic education program fails to provide the "ample" funding article IX, section 1 requires.

Paraphrasing of *McCleary* / *Seattle School District* rulings quoted *supra* at 14-15.

Plaintiff acknowledges that just as local **levies** can fund enrichments to *education services* above the constitutional floor needed to provide a 21st century education, local **bonds** can fund enrichments to *education facilities* above what's needed to provide that education.

But the Complaint does not claim that Article IX, §1 requires the State to fund enrichments.

Not fully.

Not even at all.

It merely claims that Article IX, §1 requires the State to amply fund the education facilities that are in fact needed to provide Wahkiakum students the 21st century education to which this Court has held they have a paramount and positive constitutional right under Article IX, §1.

The constitutional provisions and amendments that the State points to regarding voter-approved levies and bonds are not superfluous because those provisions allow local voters to fund enrichments that Article IX, §1 does not require the State to amply fund. Those provisions do not amend Article IX, §1 to say the State's ample education funding duty excludes education facilities that are in fact needed to provide Washington children a 21st century education.

Third: Case law continues to reaffirm that, as a straightforward matter of constitutional law, provisions that enable local financial assistance for education do not diminish or dilute a constitutional provision declaring education the State's duty. *E.g.*, the North Carolina Supreme Court's recent November 2022 decision in *Hoke County Board of Education v. State*, 879 S.E.2d 193, 221-222 (N.C. 2022).

Article I, §15 of the North Carolina Constitution says "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."

Like this Court in *McCleary*, the *Hoke* Court emphasized that this constitutional mandate

> is not suggestive, but obligatory. It does not declare that the State *may* guard and maintain the people's right to the privilege of education, but that it is the *duty* of the State to do so. Further, **the plain text of this provision places this affirmative duty on the shoulders of one entity: the State**.

Hoke Cnty. Bd. of Educ., 879 S.E.2d at 221 (italics in original; bold added).

The Court accordingly rejected the notion that other constitutional provisions for local financing of education diminished the State's duty. The Court held that while "subsequent constitutional provisions note that the State *may* involve local units of government in school operation", such provisions do not diminish the State's constitutional duty – emphasizing that North Carolina's Article I, §15 "makes clear that the ultimate responsibility lies with the State." *Id.* at 221-222.

The same is true here in Washington. The fact that our constitution provides ways that local voters *may* assist with education funding does not diminish or amend the unequivocal wording of Article IX, §1 making it clear that the ultimate responsibility lies with the State.

3. The unpublished 2017 order cited by the State did not create a preemptive capital costs exclusion

The State argues an unpublished 2017 order from when the *McCleary* Court retained jurisdiction to ensure the State kept its promise to finish funding the prototypical school model by

2018 requires this *Wahkiakum* suit to be dismissed as a matter of law. Response at 1, 33 et seq.

There are multiple reasons why the State is incorrect.

First: The State's Response does not refute that *McCleary* was an operating costs case, and the prototypical school model being funded in the *McCleary* Court's retention of jurisdiction was for the funding of basic education operating costs. Opening Brief at 35-40. Thus, as the 2017 order itself reiterated, *McCleary* accordingly "did not address capital costs". *Id*.

That 2017 order's expressly recognizing that the Court had not given an advisory opinion or suggestion about capital costs therefore made sense – for the *McCleary* operating cost case was devoid of evidence material to such education facilities, and it would not have been realistic to force the State to go back to the drawing board in November 2017 to develop, design, and fund a prototypical capital funding model for facilities by the September 2018 deadline in those proceedings.

Second: The State's Response also failed to establish its essential premise that the unpublished 2017 order is inconsistent with the *Wahkiakum* Complaint's claim that Article IX, §1 requires the State to amply fund the education facilities necessary to provide Wahkiakum students a 21st century education.

In response to the *McCleary* plaintiffs' 2017 objection that to finish funding the prototypical school model the State should also fund certain K-3 classroom construction, the 2017 order now invoked by the State said:

> [I]n *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, such that the State must fully fund capital costs attendant to the basic education program. Though classroom space is obviously needed to maintain all-day kindergarten and reduced class sizes, capital costs have never been part of the prototypical school model, and it is not solely a state obligation under the constitution.
>
> ****
>
> [T]he 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.

Unpublished 2017 order at 2017 WL 11680212, *14–15 (underline added).

Even if unpublished orders were binding precedent, the above still would not require a Rule 12(b)(6) dismissal here because the *Wahkiakum* Complaint is not inconsistent with the above. For example, reading that Complaint (Opening Brief's Appendix One) confirms that:

- Unlike the *McCleary* case, this *Wahkiakum* case does address capital costs.

- Plaintiff does not claim that Article IX, §1 requires the State to fully fund all capital costs attendant to the basic education program. The Complaint instead limits its claim to only those capital costs that are in fact needed to provide Wahkiakum students the 21st century education to which this Court assured them they have a paramount and positive constitutional right.

- Plaintiff does not claim that capital costs are part of the prototypical school model that the *McCleary* Court's retention of jurisdiction was requiring the State to finish funding by 2018.

- Plaintiff does not claim that all capital costs are solely a State obligation under the constitution. Plaintiff accepts that our constitution leaves the funding of capital costs for enrichments to a school district's wealth and voters rather than the State.

In short: the unpublished 2017 order invoked by the State is not inconsistent with the *Wahkiakum* Complaint.

Third: The *Wahkiakum* Complaint's constitutional claim regarding necessary education facilities is no surprise to the State – for this Court's other unpublished orders in that prototypical school model proceeding gave fair warning that the State was leaving itself open to a future facilities funding case like the one here. For example, the 2014, 2015, and 2016 unpublished orders stressed the need for adequate capital expenditures to ensure the delivery of an education to Washington children. 2016 WL

11783312, *1 (Oct. 6, 2016); 2015 WL 13935265, *2 (Aug. 13, 2015); 2014 WL 12978578, **2-3 (Jan. 9, 2014).

Consistent with those prior orders, the unpublished 2017 order expressly carved out the facilities cost issue now raised in this *Wahkiakum* case as being separate from the operating cost prototypical school model at issue in those proceedings. 2017 WL 11680212, *14 ("in *McCleary*, this court did not address capital costs"). Thus, when this Court terminated its retention of jurisdiction in *McCleary*, it concluded only that the State had purged its contempt by complying with the order to finish funding that statutory program of basic education by September 1, 2018. 2018 WL 11422996 at *2 (June 7, 2018).

This Court's 2018 termination order did not say the State had satisfied all of its constitutional obligations to amply fund education. That made sense since the State itself had acknowledged that terminating the Court's retention of jurisdiction would not mean the prototypical school model provided all the State funding Article IX, §1 requires – telling

students, school districts, the public, and this Court that if State funding should fail to meet the State's constitutional obligation, "the courthouse door will be open to plaintiffs."[5] Taking the State at its word, this Court's unpublished 2017 order accordingly concluded: "At this point, the court is willing to allow the State's program to operate and let experience be the judge of whether it proves adequate." 2017 WL 11680212, *17.

In short: The unpublished 2017 order cited by the State did not modify the wording of Article IX, §1 to categorically exclude education facilities that are proven to be necessary to provide an education. The *Wahkiakum* Complaint squarely presents this capital cost issue under Article IX, §1 – a capital cost issue this Court previously said it "did not address" in its *McCleary* decision. And an underfunding failure that the State

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[5] *State of Washington's Memorandum Transmitting the Legislature's 2017 Post-Budget Report (July 31, 2017) at 33 [https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/MemorandumTransmittingLegislatures2017PostBudgetReport.pdf].*

had insisted the courthouse door would be open for a plaintiff like Wahkiakum to remedy.

4. The legislature did not (and could not) amend "ample provision" to "no provision"

The State argues that since the legislature's prototypical school model for operating costs does not include capital costs, the legislature has defined the State's Article IX, §1 duty to exclude education facilities necessary to provide a 21st century education – and that it would therefore "usurp" and "erase" the legislature's role if this Court were to say otherwise. Response at 2-3, 30-31, 60; *see also* at 48-49 (under Article IX, §1 the State has "no role whatsoever in funding school capital costs"), and 50 n.7 (constitutional for the State to provide "*no* State funding for school capital expenses) (italics in original).

The State's argument fails for several reasons.

First: Claiming a school district doesn't need school buildings defies reality. A school district's education facilities are the foundation upon which the delivery of its education services is based. Thus, as noted earlier, the State does not deny

that education facilities are in fact necessary to provide students an education. Which, frankly, is why the plain language of Article IX, §1 does not exclude them.

Second: The legislature's basic education program did not say that education facilities are not required to provide a 21st century education. That's because the legislature developed the basic education program's prototypical school model to fund the operating cost portion of what the legislature considered to be the 21st century education mandated by Article IX, §1. Opening Brief at 37-38 (discussing this Court's *McCleary* decision and the legislature's prototypical model statute (RCW 28A.150.260(3)(a))). The education facility costs at issue in this *Wahkiakum* case, on the other hand, are capital costs not addressed in the prototypical school funding model's operating cost formulas.

Third: This Court has made clear that to be constitutionally valid, a legislative determination as to what should not be considered to be part of the 21st century education

promised by Article IX, §1 must be based on education-related reasons. *See*, *e.g.*, *McCleary*, 173 Wn.2d at 527 (legislative reductions in education programs or offerings must be based on an educational policy rationale – not reasons unrelated to education such as fiscal crisis or expediency). Thus, even if the legislature had determined that schools do not need school buildings, that determination would not be constitutionally valid because one cannot credibly claim that the legislature based that determination on education-related reasons.

Fourth: The legislature could not unilaterally amend Article IX, §1 even if it wanted to. Amending Article IX, §1 would require a 2/3 vote of the legislature, and then approval by Washington voters at the ballot box. Washington Constitution, Article XXIII, §1. But the legislature did not propose any amendment of Article IX, §1, and thus no amendment of Article IX, §1 was submitted to or approved by Washington voters.

5. A school district owning a school building does not amend "paramount duty" to say "shared duty"

The State argues that paramount duty of the State should mean shared duty with the local school district because the State doesn't own school buildings. Response at 12 n.2 and 61.

But shared duty with the local school district is not what Article IX, §1 says. It says paramount duty of the state.

A not-my-building / not-my-problem rationalization may have some superficial appeal in common everyday situations.[6] But not in this constitutional rights case – because such a rationalization ignores the plain and unequivocal wording of what Article IX, §1 actually says: paramount duty of the state. Opening Brief at 27-31.

B. The State's Paramount Duty is to *Amply* Fund – Not *Help* Fund

The State discusses various ways it voluntarily helps some school districts fund education facilities. *E.g.*, Response at 1

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[6] *Cf. the Polish phrases "Nie mój cyrk, nie moje malpy" and "Nie moje krowy, nie moje konie".*

("billions of dollars over the course of decades to assist school districts"), at 22 (large SCAP appropriations not available to school districts like Wahkiakum whose voters fail to pass bonds), at 23 ($8.9 million statewide for "emergency or urgent repairs affecting the health and safety of students"); at 65 (program to "assist local school districts").

But "help" fund is not what the plain and unequivocal wording of Article IX, §1 commands. The State does not dispute that Washington school districts cannot provide Washington students a 21st century education without the school facilities necessary to provide that education. And the facts upon which the lower court's Rule 12(b)(6) dismissal order is based confirm that the help-fund appropriations recited by the State do not actually fund the education facilities needed to provide Wahkiakum students that education. Opening Brief at 3-16.

Nor is "voluntary" provision what Article IX, §1 commands. The plaintiff school district is pleased that the State decided to voluntarily assist the Almira School District replace

the school building that burned down. Response at 23. Especially since Wahkiakum's elementary school has the same 1950s vintage wiring as the Almira school building inferno (Opening Brief at 54-56), plaintiff would hope that the State similarly volunteers to provide assistance if the Wahkiakum elementary school's 1950s wiring burned it down too (hopefully when no children were in school).

But hope, voluntary, and help are not the ample provision command of Article IX, §1. Nor are such words in the promise made to Wahkiakum students when this Court assured them that Article IX, §1 conferred upon them the paramount and positive constitutional right to an amply funded education. *Supra*, pages 2-3 (quoting *McCleary* and *Seattle School District*).

C. Failing to Amply Fund Necessary Education Facilities in the *Past* Does Not Make It Constitutional *Today*

The State extensively details its over 100 years of failing to amply fund education facilities needed in marginalized communities to argue that the State's current failure must therefore be constitutional. Response at 3-9, 12-23, 47-65.

But nowhere in its lengthy historical argument does the State address what Article IX, §1 actually says. Paramount duty of the state ... ample provision ... all children ... without preference on account of caste.

Nor does the State negate the fundamental point that reciting "what's always been" does not provide a free pass for the government's ongoing violation of a citizen's constitutional rights. If it did, cases like *Seattle School District*, *McCleary*, *Obergefell v. Hodges*, and *Brown v. Board of Education* would have instead declared the government's continuation of long-standing historical practices constitutional. Opening Brief at 23-27.

D. *Ample* Funding Being Expensive Does Not Make *Underfunding* Constitutional.

The State objects that it would be expensive for the State to amply fund the education facilities needed to provide all Washington students the 21st century education to which this Court held every Washington child has a paramount and positive constitutional right. Response at 62-63.

But "constitutional compliance would be expensive" is not a valid constitutional defense. If it were, cases like *Seattle School District*, *McCleary*, *Gideon v. Wainwright*, and *Brown v. Board of Education* would have all gone the other way – for the Courts in those cases were well aware that the constitutional compliance they ordered would be expensive.

As the U.S. Supreme Court reiterated when rejecting the defendant city's objection that ordering it to desegregate facilities would be very expensive: "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis*, 373 U.S. 526, 537, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963).[7]

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[7] *Accord, Tennessee v. Lane, 541 U.S. 509, 512, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) ("ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful [constitutional] right."); see also, e.g., Nina W. Chernoff, Black to the Future: The State Action Doctrine and the White Jury, 58 Washburn L.J. 103, 178-179 (2019) ("Even if it costs more money to produce a representative jury pool than an unrepresentative one, that expense cannot*

Plaintiff acknowledges the State's point that it would not be cheap to amply fund the education facilities needed to provide all Washington children the 21st century education to which this Court has held they have a paramount and positive constitutional right. But expense is not a legally valid excuse for the State to continue violating the constitutional rights of children in places like Wahkiakum.

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serve as an excuse for constitutional violations. It always costs money to protect constitutional rights. In particular, it costs money to deliver on the affirmative guarantees of the Sixth Amendment, such as the right to a lawyer, a speedy trial, and an impartial jury. Yet the Supreme Court has repeatedly rejected the idea that the expense of enforcing these rights can ever justify the failure to provide them. Instead, the Court's cases make clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful [constitutional] right.") (citations & internal quotation marks omitted); David A. Sklansky, Quasi-Affirmative Rights in Constitutional Criminal Procedure, 88 Va.L.Rev. 1229, 1239 (2002) ("Trials would be cheaper if they could be scheduled at the government's convenience, if prosecution and defense witnesses did not need to be brought to court, if juries could be empaneled more casually, and if defense attorneys did not need to be hired. ... All of these obligations cost the government money, and some of them cost a lot of money.").

E. The Plain Wording of Article IX, §1

As noted earlier, this Court has affirmed that Article IX, §1 confers on each and every Wahkiakum student the paramount and positive constitutional right to an amply funded education. *Supra*, pages 2-3. And the plain, unequivocal wording of Article IX, §1 does not leave the fulfillment of this right to the discretion or whim of legislators or local voters. Instead, the plain and unequivocal wording of Article IX, §1 makes fulfillment of this constitutional right **the** paramount duty of the defendant State.

The State's Response did not address the wording of Article IX, §1:

> 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.
>
> *Article IX, §1*

The State's Response accordingly did not disprove the Opening Brief's showing that as a matter of Washington law:

- "Paramount duty of the state" means what it says. *Not a "shared opportunity with others" or "partial duty that's triggered only if local voters vote to increase their property taxes."*[8]
- Duty "to make ample provision" means what it says. *Not "discretion to voluntarily make some provision" or "voluntarily help provide."*[9]
- "All children" means what it says. *Not just the "fortunate children living in wealthier zip codes."*[10]
- "Without" preference on account of caste means what it says. *Not "<u>with</u> preference for the upper income class".*[11]

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[8] *Opening Brief at 18-20 and 58-60 (<u>McCleary</u> affirmed that it's the duty of the State government – not local or federal governments – and is the State's first and foremost duty above all others).*

[9] *Opening Brief at 21-23 (<u>McCleary</u> affirmed that ample means "considerably more than just adequate or merely sufficient").*

[10] *Opening Brief at 43 (<u>McCleary</u> affirmed that all children means "each and every" child; "No child is excluded.").*

[11] *Opening Brief at 60-64 (Supreme Court case law affirming the meaning of caste).*

Nor did the State's Response disavow the fact that Wahkiakum students should be able to put their trust in this Court's assurance that Article IX, §1 confers on each and every one of them the paramount and positive constitutional right to an amply funded education. The constitutional right that, under the presumed-true facts in the Complaint, the State is currently violating.

The Wahkiakum School District fully appreciates that amending the wording of Article IX, §1 to exclude the education facilities needed to actually provide an education would save the State government in Olympia a lot of money. But for the reasons outlined above, none of the excuses or rationalizations asserted in the State's Response refute that Washington law requires the judicial branch to uphold the wording of Article IX, §1 as written – not engraft an unwritten exclusion into it to save the State money. Opening Brief at 2.

V. CONCLUSION:

President Harry Truman acknowledged his ultimate responsibility in plain words: "the buck stops here."[12]

The plain, unequivocal words of Article IX, §1 similarly acknowledge who has the ultimate responsibility in this case. The buck stops with the State.

There is no dispute in the record that safe education facilities are in fact necessary to provide today's kids the 21st century education they will need in today's world. Instead, the dispute in this appeal is whether, as a matter of Washington law, the paramount, ample education duty imposed on the State by the plain unequivocal wording of Article IX, §1 excludes these necessary education facilities.

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[12] *See, e.g., photograph at https://upload.wikimedia.org/wikipedia/commons/1/1f/Truman_pass-the-buck.jpg* .

The Wahkiakum School District respectfully submits that Article IX, §1 means what it says.

> 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.
>
> *Article IX, §1*

And as the preceding pages confirm, the State's Response did not prove that Article IX, §1 does not mean what it says.

This Court should accordingly reverse the lower court's Rule 12(b)(6) dismissal, and remand this case for trial of the facts alleged in the Complaint.

If the Governor and legislature want to immediately assemble a viable task force with all stakeholders represented to expeditiously develop a sound prototypical funding model for the education facilities necessary to safely provide Washington children the 21st century education promised by this Court and Article IX, §1, that could be a good start. But the State's ongoing denials and delays inequitably and irreparably hamstring the

education of the already marginalized children in areas like Wahkiakum. As one of the facts underlying the lower court's Rule 12(b)(6) dismissal confirms, the State's failure to fund needed education facilities "has caused (and continues to cause) actual, substantial, immediate, and irreparable loss, harm, and damage to the education that the Wahkiakum School District can provide to its students."[13]

As the plaintiff school district has accurately pointed out before: a second grader doesn't get a second chance at second grade, ample provision means ample provision, all children means all children, and without preference on account of caste means without preference on account of caste. Article IX, §1 does not dictate otherwise.

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[13] *Opening Brief at 15 & 42 (quoting Complaint ¶150). Unfortunately, the physical deterioration of Wahkiakum's education facilities continues to worsen. See, e.g., https://www.waheagle.com/story/2023/01/12/news/holiday-surprise-burst-water-lines-flood-elementary-school/21788.html*

RAP 18.17(c) & (c)(3) Word Limit Certification:

I certify that this Reply Brief, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits), contains 5725 words (not more than 6,000).

RESPECTFULLY SUBMITTED this 13th day of January, 2023.

Foster Garvey PC

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned been, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served copies of the attached document upon the counsel of record at the email addresses listed below:

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

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