No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Defendant/Appellant,

v.

MATHEW & STEPHANIE MCCLEARY, on their own behalf and on behalf of KELSEY & CARTER MCCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and **N**ETWORK FOR **E**XCELLENCE IN **W**ASHINGTON **S**CHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Plaintiffs/Respondents.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO STRIKE APPENDICES TO THE STATE'S REPLY BRIEF

[Oral argument not requested]

[Plaintiffs' Reply due 3 days after October 6 filing & service of State's Answer. RAP 17.4(e)]

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I. INTRODUCTION

Plaintiffs' motion detailed the history of leeway and deference that's been afforded the State to allow filings by the State, but not similar filings against the State. *Motion at 2-9*. The State does not (because it cannot) dispute the history of leeway and deference it has thus far enjoyed.

Nor does the State dispute plaintiffs' showing that the State's recent filing of the marked up appendices at issue is inconsistent with the State's previously blocking the filings of others in this case. *Motion at 9-11*. Instead, the State says this Court should just disregard that inconsistency (*Answer at 8-9*), or shrug it off as being no big deal since it's just "publicly available information" anyway. (*Answer at 5-8*). Plaintiffs do not agree that disregard or shrugging are appropriate responses. *Infra, Parts II.A & B*.

The State does not dispute that its waiting to file its marked up appendices until its September brief prevented plaintiffs from being able to respond in their August brief. *Motion at 11*. Nor does the State address plaintiffs' case law confirming that ambush tactics are inconsistent with the appellate rules. *Motion at 12-13*. Instead, the State defends its September filing as a "reply" to August filings that pointed out the State's failure to evidence the ample funding increase claim the State's July filing had made. *Answer at 1-8*. Plaintiffs do not agree that waiting to supply evidence in a reply is consistent with the appellate rules. *Infra, Part III*.

II. CONSISTENCY WITH RESPECT TO PRIOR FILINGS THE STATE DIDN'T LIKE

A. This Court Should Not *Disregard* The Inconsistent, Double-Standard Requested By The State.

The State does not dispute that the September filing of marked up appendices by the State is inconsistent with this suit's prior blocking of filings by others against the State. *Motion at 9-11*. Instead, it asserts this Court should simply disregard that inconsistency. *Answer at 8-9*.

Plaintiffs believe that justice in a court of law includes applying the law consistently to both sides in court – even when one side includes the two powerful political branches of government. Plaintiffs accordingly disagree with the State's premise that this Court should disregard the inconsistency of allowing this September filing by the State after prohibiting prior similar filings by others against the State.

B. This Court Should Not *Shrug Off* The Inconsistent, Double-Standard Requested By The State As No Big Deal.

Although the State does not dispute the double-standard it requests, it does argue this Court should just shrug it off as no big deal because the appendices the State waited until September to file are nothing more than a copy of "publicly available information provided for the Court's convenience." *Answer at 8*. Accepting the State's argument, however, requires one to ignore several facts:

- They're not just a copy. The State added red mark-ups to advance its ample funding argument.

- Being "publicly available" is not much of a distinction. Washington's Public Records Act (RCW 42.56) makes an incredibly broad array of government information "publicly available".
- Information being generally "available" does not mean these specific appendix printouts are. E.g., the State revises its website information, and State personnel had to manipulate various variables on the "multi-year comparison tool" to produce a document containing and omitting the information the State's appendices contain and omit.
- The State's "publicly available" shrug is disingenuous. Especially after it benefited from this Court striking the State website printouts which Special Education amici attached to their filings last year.
- The State does not even attempt to show that a single legislator even saw – never mind considered – the "publicly available information" the State waited to file with its September filing.

Plaintiffs accordingly disagree with the State's argument that this Court should simply shrug off the inconsistency of allowing this September appendix filing by the State after it prohibited prior filings by others against the State.

III. CONSISTENCY WITH RESPECT TO APPELLATE RULES AGAINST AMBUSH IN REPLY

The State's July 2017 Post-Budget Filing repeatedly insisted the Biennium Budget and EHB 2242 fully complied with the court orders in this case, alleging this legislation ensured "evidence-based" funding increases that fully fund the actual cost of each school district's full implementation of the State's basic education program.[1]

[1] *The State Of Washington's July 31 Memorandum Transmitting The Legislature's 2017 Post-Budget Report ("State's 2017 Post-Budget Filing") insisted, for example, that the 2017 legislature fully complied with the court orders in this case because its Biennium Budget made a "massive increase in funding" that provides "full state funding for staff compensation" (at 1, underline added); that the State's Post-Budget Filing and*

The only evidence the State cited for its "evidence-based" allegations were (1) powerpoint slides used by a Task Force consultant that the Task Force did not adopt, and (2) a person's 2012 submission to the ESHB 2261 Compensation Technical Working Group that was not adopted in the ensuing compensation Final Report.[2]

After plaintiffs' August response brief showed the State's evidence did not support the State's full compliance claim, the State attached 54 marked up pages of information to its September reply brief contending that its September "evidence" is really the basis for the full compliance claims it made in July.

That's too late. The State does not (because it cannot) dispute that its waiting until September to file this "evidence" to support its full

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legislature's 2017 Report "explain how the legislation enacted in 2017, together with ... increases in funding since 2012, now fully implement and fund the State's program of basic education" (at 8, underline added); "The legislation enacted in 2017 implements ... state funding to support the full cost of salaries" (at 8, underline added); that its funding conformed to the State's "information about the relative contributions of state and local funding to overall salaries" (at 11); that it used that information to follow this Court's direction to "realistically determine the appropriations necessary for full funding of basic education, including salaries" (at 12, underline added); that it used that information to resolve "interrelated issues concerning widely varying district compensation levels" (at 12); that "the 2017 Legislature established a compensation system for its program of basic education that funds market rate salaries" (at 13); that its funding appropriations are "evidence-based, market rate levels" (at 13); that its "new salary allocations are consistent with evidence-based research" (at 17); that the 2017 legislature's enactments "result in increased funding for all the programs" (at 20, underline added); that "state funding allocated to local districts is sufficient to pay market rate salaries for all staff providing the State's program of basic education" (at 30, underline added); that the 2017 legislature's enactments provide "the salary allocations needed to support the State's program of basic education" (at 31); and that the 2017 legislature's funding increase "is providing for funding that is sufficient to support the State's program of basic education" (at 34).

[2] *This is detailed in Plaintiffs' August 2017 Post-Budget Filing at 36-37.*

compliance claim prevented plaintiffs from being able to investigate and respond to that "evidence" in their August response brief. The State's waiting also enabled its September filing to allege full funding of school districts and categories of school employees after the State had successfully moved to prevent those school districts and school employees from filing any amicus briefing to show otherwise (e.g., the Tacoma School District and the State's largest Classified Staff ("CLS") union).

Nor does the State address plaintiffs' case law (e.g., *Fosbre* and *Nautilus Group*), which confirm that such ambush tactics are improper.[3]

In short, the State's opposition does not refute plaintiffs' point that if the State believed the information in its 54 pages of marked up appendices evidence the State's claim that the Biennium Budget and EHB 2242 fully comply with the ample funding mandate ordered in this case, the State had to say so in July so plaintiffs' August brief could respond. Plaintiffs acknowledge that ambush is an effective attack tactic in war. But they respectfully submit that ambush is not a permissible briefing tactic in court.

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[3] *Plaintiffs' Motion at 11-13 (Fosbre v. State, 70 Wn.2d 578, 583, 424 P.2d 901 (1967) ("We consider those points not argued and discussed in the opening brief abandoned and not open to consideration on their merits", and "In addition, a contention presented for the first time in the reply brief will not receive consideration on appeal" (citations to other cases omitted)); Nautilus Group, Inc. v. Icon Health & Fitness, Inc., 308 F.Supp.2d 1208, 1214 (W.D. Wash. 2003), aff'd, 372 F.3d 1330 (Fed. Cir. 2004) (striking declaration attached to reply brief because "declaration at issue contains new evidence ... to which Defendant is not able to respond within the briefing schedule. The Court will not consider this evidence"). The Dykstra and Port of Seattle cases cited in the State's opposition brief do not hold otherwise.*

IV. CONCLUSION

Compliance with the court orders in this case required the State's Post-Budget Filing to show the 2017-2019 Biennium Budget satisfies the six elements of that compliance – specifically, that it:

- ☐ amply funds
- ☐ the actual cost to school districts
- ☐ of fully implementing
- ☐ the ten components of the State's basic education program
- ☐ for all Washington school children
- ☐ by September 1, 2018.

Plaintiffs' 2017 Post-Budget Filing at 10.

There's a disagreement about whether the State's Biennium Budget does that.

But there shouldn't be a disagreement about whether it is permissible for the State to wait until its September reply to submit the 54 pages of marked up appendices at issue to "evidence" the full compliance claim the State's opening brief made in July. Consistency with respect to the blocking of prior filings in this case that the State didn't like, as well as consistency with respect to appellate rules against ambush in reply, require that the State's 54 pages of marked up September appendices be stricken instead of considered as "evidence" to support the State's full compliance claim.

RESPECTFULLY SUBMITTED this 11th day of October, 2017.

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DECLARATION OF SERVICE

Laura G. White declares:

I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years. I am not a party to this action, and I am competent to be a witness herein. On Wednesday, October 11, 2017, I caused PLAINTIFFS' REPLY RE: MOTION TO STRIKE APPENDICES TO STATE'S REPLY BRIEF to be served as follows:

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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.

EXECUTED in Seattle, Washington, this 11th day of October, 2017.

s/ Laura G. White
Laura G. White, Legal Assistant