

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 NETWORK FOR  
EXCELLENCE IN WASHINGTON  
SCHOOLS ("NEWS"), a  
state-wide coalition of  
community groups, public  
school districts, and education  
organizations,

Plaintiffs/Respondents.

**OBJECTION TO "INSTITUTE  
FOR JUSTICE" MOTION TO  
FILE AMICUS CURIAE BRIEF**

*[Pursuant to RAP 10.6(d), this  
Objection is being filed & served  
not later than 5 business days  
after receipt of the motion]*

**OBJECTION TO "INSTITUTE FOR JUSTICE"  
MOTION TO FILE AMICUS CURIAE BRIEF**

*Note: as with the undersigned's prior submissions in this case, this submission refers to the parties as "plaintiffs" and "defendant" to avoid confusion between the plaintiff "Petitioners" in the trial court who are the "Respondents" in this Court, and the defendant "Respondent" in the trial court that is the "Petitioner" in this Court. Cf. RAP 10.4(e).*

## I. INTRODUCTION

Four motions to file amicus curiae briefs are pending in this case.<sup>1</sup>

Three seek to submit additional arguments relating to issues presented, tried, and ruled upon in this suit's underlying trial court proceeding.<sup>2</sup> Although plaintiffs do not necessarily agree with everything those potential amici assert, plaintiffs do not object to the granting of those motions because they meet the requirements of RAP 10.6, and plaintiffs could reasonably be required to draft an Answer to address the arguments those potential amici make with respect to issues in this review.

The fourth pending amicus motion was filed by the "Institute for Justice". In contrast to the first three motion, this fourth motion seeks leave to submit "evidence" and arguments on an issue that was **not** presented, tried, or ruled upon in the underlying trial court proceeding.

Plaintiffs object to the Institute's motion for two reasons.

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<sup>1</sup> *Those four have been filed by (1) the League of Education Voters, (2) WASA, AWSP, & WASBO, (3) the ACLU, and (4) the Institute for Justice.*

<sup>2</sup> *The motions of (1) the League of Education Voters, (2) WASA, AWSP, & WASBO, and (3) the ACLU.*

First, as noted Part II below, the Institute’s proposed brief does not concern the issues raised in this review. That brief is improper under RAP 10.6 because it does not assist the resolution of the issues in this review.

Second, the fact that the Institute’s proposed amicus brief does not involve an issue presented, tried, or ruled upon in this case renders it unreasonable (and unrealistic) to at this late date require the several plaintiffs in this action to now formulate and draft a thorough response concerning the new and unrelated issue that the Institute seeks to now inject into this appeal for a ruling by this Court. If the Institute wants to raise its issue in a case filed by the Institute, it can. But this is not that case.

## **II. DISCUSSION**

The “Institute for Justice” (“Institute”) describes itself as nationwide organization that defends “parental choice” programs in other States which (apparently) use State money to help fund private schools, either non-religious or religious.<sup>3</sup>

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<sup>3</sup> *The Institute expressly notes its disagreement with the position that a State can constitutionally restrict its funding of private schools to non-religious schools. See Institute’s proposed brief at pages 7-8, footnote 3.*

The Institute seeks amicus status to submit “evidence” and legal arguments in order to secure a ruling from this Court that Washington law allows such “parental choice” programs in this State as well.<sup>4</sup>

The legality of a particular “parental choice” program under Washington law could be a very interesting issue for this Court to address if this Court reviews a case involving that issue.

But this is not that case. As the Institute’s own motion notes, the hypothetical “parental choice” program whose legality the Institute wants this Court to render an advisory opinion on was not raised or addressed by any of the parties in this case.<sup>5</sup> And thus, not surprisingly, it was not ruled upon by the trial court either. In short, the issue that the Institute wants amicus status to address simply is not an issue in this review.

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<sup>4</sup> *The Institute bases its demand upon its repeated claim that the trial court’s Article IX, §1 ruling was instead a “conflated” Article IX, §2 ruling. Simply reading the trial court’s decision, however, rebuffs that claim.*

<sup>5</sup> *Indeed, part of the “evidence” the Institute cites for the ruling it seeks is an article written by Robert M. Costrell on some program in Milwaukee. Institute’s proposed brief at page 19, lines 17-18. That same Robert M. Costrell was one of the State’s expert witnesses in this case. See the list of trial court witnesses attached as Exhibit A to the trial court’s decision in this appeal. Even though the defendant State had that witness on the stand at trial, the defendant State did not use him to raise the issue that the Institute now seeks to use him to inject.*

### III. CONCLUSION

The Institute clearly has strong beliefs about what it perceives to be the legality and merit of the specific “parental choice” programs it has defended in other States across the country. That is its right.

But that does not translate into a right to seek a ruling on those programs in this case.

This Court should not allow self-professed “friends of the Court” to distract focus and attention away from the significant issues actually presented in this case’s review by now allowing those “friends” to inject issues that are not. Plaintiffs accordingly object to the Institute For Justice’s Motion To File Amicus Curiae Brief.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of June, 2011.

FOSTER PEPPER, PLLC

*s/ Thomas F. Ahearne*

Thomas F. Ahearne, WSBA No. 14844  
Christopher G. Emch, WSBA No. 26457  
Attorneys for Plaintiffs/Respondents

## DECLARATION OF SERVICE

Thomas F. Ahearne 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. Today, I caused the attached **OBJECTION TO “INSTITUTE FOR JUSTICE” MOTION TO FILE AMICUS CURIAE BRIEF** to be served on the following parties/potential amici and counsel as follows:

Defendant State of Washington:

via email (cc to the same email sent to the Supreme Court for the filing of this Objection)

William G. Clark - billc2@atg.wa.gov

David A Stolier, Sr. – daves@atg.wa.gov

Amicus Applicant Institute For Justice

via email (cc to the same email sent to the Supreme Court for the filing of this Objection)

Michael E. Bindas - mbindas@ij.org

Amicus Applicant ACLU

via email (cc to the same email sent to the Supreme Court for the filing of this Objection)

Sarah A. Dunne - dunne@aclu-wa.org

Nancy L. Talner - talner@aclu-wa.org

Cynthia B. Jones – jones.cynthiab@gmail.com

Amicus Applicant WASA, AWSP, WABO

via email (cc to the same email sent to the Supreme Court for the filing of this Objection)

Lester “Buzz” Porter - buzz@dionne-rorick.com

Amicus Applicant League of Education Voters

via email (cc to the same email sent to the Supreme Court for the filing of this Objection)

Hozaifa Y. Cassubhai - HozaifaCassubhai@dwt.com

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 7<sup>th</sup> day of June, 2011.

**OBJECTION TO “INSTITUTE FOR JUSTICE”  
MOTION TO FILE AMICUS CURIAE BRIEF**

s/ Thomas F. Ahearne  
Thomas F. Ahearne

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