

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW & STEPHANIE MCCLEARY, on their own behalf and on behalf of KELSEY & CARTER MCCLEARY, their two children in Washington's public schools, et al.,

Plaintiff/Respondents,

v.

STATE OF WASHINGTON,

Defendant/Appellant.

PLAINTIFF/RESPONDENTS'
OBJECTION TO MOTION
FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

I. INTRODUCTION

This Court ordered the defendant State to appear on September 3, 2014, to address three specific issues:

- (1) why the State should not be held in contempt for violating the Court's January 9, 2014 Order;
- (2) why, if the State is found in contempt, any of the seven listed forms of relief should not be granted; and
- (3) the appropriate timing of any sanctions.

June 12, 2014 Order To Show Cause pp.3-4.

Pursuant to RAP 10.6, Mr. Eugster has requested leave to file an amicus brief on his own behalf as applicant. Motion For Leave To File Amicus Curiae Brief Re: Show Cause Order RAP 10.6 ("Motion") at p.1.

Plaintiffs do not consent to – and therefore file this objection – because the applicant's request does not satisfy RAP 10.6.

II. DISCUSSION

A. What RAP 10.6 Requires

RAP 10.6 allows an applicant to file an amicus brief “only if all parties consent or if the filing of the brief would assist the appellate court.”

RAP 10.6(a). To that end, RAP 10.6 requires the applicant’s motion to establish:

- (1) the applicant’s interest and the person or group the applicant represents;
- (2) the applicant’s familiarity with the issues involved in the review and with the scope of the argument presented or to be presented by the parties;
- (3) specific issues to which the amicus curiae brief will be directed; and
- (4) the applicant’s reason for believing that additional argument is necessary on these specific issues.

RAP 10.6(b).

Amicus counsel must also review all briefs on file in the case and avoid repetition of matters in other briefs. RAP 10.3(e).

B. The Applicant Failed To Establish What RAP 10.6 Requires

1. The Applicant Did Not Establish Any Direct Interest In The September 3 Show Cause Hearing.

As noted earlier, RAP 10.6(b)(1) requires the applicant to establish “the applicant’s interest and the person or group the applicant represents.”

This threshold point is important because, as the Task Force Comment to

RAP 10.6 explains, “Providing access to the appellate court by those persons or groups who will be *significantly affected* by the outcome of the issues on review can materially assist the court in the decision-making process” (italics added).

Here, the applicant does not seek to file on behalf of persons or groups who will be significantly affected by the outcome of the September 3, 2014 show cause hearing. The applicant did not identify any persons or groups he represents with a specific interest in the outcome of that hearing.

Instead, Mr. Eugster requests leave to file an amicus brief for the September 3 show cause hearing solely on his own behalf representing himself (Motion at p.1).

And he claims no direct interest affected by that September 3 hearing. Instead, the applicant states his interest is that he is a lawyer who “is particularly interested in the formulation and reformulation of the separation of powers and checks and balances concerning the interpretation and construction of the Washington Constitution, and in particular, the separation of powers of the Washington Supreme Court and the Washington Legislature.” Motion at p.2.

Plaintiffs do not wish to impugn this individual applicant in any way. But the simple fact remains that an individual lawyer's being particularly interested in an interesting constitutional issue such as the separation of powers between the Washington Supreme Court and the Washington Legislature does not rise to the level of having the type of significantly affected interest needed to become an amicus party in the September 3 show cause hearing under RAP 10.6.

2. The Applicant Did Not Establish Familiarity With The Issues Presented At The September 3 Hearing.

As noted earlier, RAP 10.6(b)(2) also requires the applicant to establish "the applicant's familiarity with the issues involved in the review and with the scope of the argument presented or to be presented by the parties."

The applicant's own filing, however, shows a lack of familiarity with Article IX, §1 and the issues and arguments in this case.

For example, the applicant bases his application on his claim that in reaching their decisions in this case, the members of this Court "did not apply or give consideration to the separation of powers doctrine." Motion at p.3. But that is not correct. Separation of powers was not only

addressed in this Court's January 2012 decision, but has been briefed extensively by the parties throughout this case.¹

As another example, the applicant contends that Washington law considers Article IX, §1 to be merely a meaningless "preamble". Motion's attached amicus brief at pp.5-6. But that too is not correct. This Court's Article IX, §1 decisions have long and unequivocally held that that Article IX, §1 is not a preamble:

We do not know from whence the title 'preamble' was derived; but, the mere decision of an editor to volunteer captions for an otherwise untitled constitution deserves no weight in interpreting the instrument. ...Const. art. 9, §1 does not merely seek to broadly declare policy, explain goals, or designate objectives to be accomplished. It is declarative of a constitutionally imposed Duty. Thus, we hold that Const. art. 9, §1 is not a 'preamble'.

Seattle School District No. 1 v. State, 90 Wn.2d 476, 499, 585 P.2d 71 (1978).

¹ E.g., *McCleary v. State*, 173 Wn.2d 477, 515-20, 269 P.3d 227 (2012) ("Notwithstanding these concerns, [w]e cannot abdicate our judicial duty to interpret and construe' article IX, section 1." (quoting *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 506, 585 P.2d 71 (1978))); *id.* at 540-46 ("The other reason that the remedy question proves elusive has to do with the delicate balancing of powers and responsibilities among coordinate branches of government. This court is appropriately sensitive to the legislature's role in reforming and funding education, and we must proceed cautiously. At the same time, the constitution requires the judiciary to determine compliance with article IX, section 1."); State's Opening Brief Addressing Order To Show Cause pp.9-12, 17-23; State's 2014 Post-Budget Filing Reply pp.10-25; Plaintiffs' 2014 Post-Budget Filing pp.38-42; State's 2014 Post-Budget Filing, Attached Report pp.10-11; Plaintiffs' 2013 Post-Budget Filing pp.39-48; State's 2013 Post-Budget Filing 1-5; Plaintiffs' 2012 Post-Budget Filing pp.38-47; State's 2012 Post-Budget Filing, Attached Report pp.1-4.

In short, the applicant's papers do not demonstrate the required familiarity with Article IX, §1 and the issues and arguments in this case to be granted amicus party status in this case.

3. The Applicant Did Not Establish That Additional Separation Of Powers Argument From Him Is Necessary.

As noted earlier, RAP 10.6(b)(3)&(4) also require the applicant to identify the "specific issues to which the amicus curiae brief will be directed" and establish "the applicant's reason for believing that additional argument is necessary on these specific issues."

The applicant identifies his issue as "the proper constitutional way in which the Court's decision should be or can be enforced." Motion at p.3. He then asserts that allowing a separation of powers argument from him is necessary because the members of this Court "did not apply or give consideration to the separation of powers doctrine" (Motion at p.3), and "the Court might desire to address the implication of the separation of powers doctrine in the context of the enforcement of the Court's Decision" (Motion's attached brief at p.4).

As noted above, however, this Court has carefully considered separation of powers in its rulings in this case, and the parties have been actively briefing that issue throughout these proceedings. *Supra*, footnote 1. Separation of powers in the specific context of this show cause

proceeding is also being addressed by the parties, with the defendant State being vigorously represented by the Attorney General's Office.² The applicant here does not establish why this Court's granting him amicus party status to present separation of powers argument is necessary under RAP 10.6. Cf., e.g., RAP 10.3(e) (amicus must ... avoid repetition of matters); *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997) (denying leave to file amicus brief where views and issues were already represented and sufficiently presented by the parties' counsel).

III. CONCLUSION

Applicant's Motion under RAP 10.6 should be denied because that applicant's motion does not satisfy RAP 10.6.

RESPECTFULLY SUBMITTED this 18th day of July, 2014.

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Washington Schools (NEWS)

² See *State's Opening Brief Addressing Order To Show Cause pp.9-12, 17-23.*

DECLARATION OF SERVICE

Christopher G. Emch 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 Friday, July 18, 2014, I caused PLAINTIFF/RESPONDENTS' OBJECTION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF to be served as follows:

William G. Clark Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 billc2@atg.wa.gov	<input checked="" type="checkbox"/> Via Electronic Mail (cc of the same email sent to the Supreme Court for the filing) <input checked="" type="checkbox"/> Via U.S. First Class Mail
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Defendant State of Washington

David A. Stoler, Sr. Alan D. Copsy Office of the Attorney General 1125 Washington Street SE Olympia, WA 98504-0100 daves@atg.wa.gov alanc@atg.wa.gov	<input checked="" type="checkbox"/> Via Electronic Mail (cc of the same email sent to the Supreme Court for the filing) <input checked="" type="checkbox"/> Via U.S. First Class Mail
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Defendant State of Washington

Stephen K. Eugster 2418 West Pacific Avenue Spokane, WA 99201-6422 eugster@eugsterlaw.com	<input checked="" type="checkbox"/> Via Electronic Mail (cc of the same email sent to the Supreme Court for the filing) <input checked="" type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via U.S. First Class Mail
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Applicant for Amicus Curiae

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 18th day of July, 2014.

s/ Christopher G. Emch
Christopher G. Emch