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.

PLAINTIFF/RESPONDENTS' **RESPONSE** TO DEFENDANT STATE'S MOTION FOR RECONSIDERATION

The undersigned counsel's July 26 letter informed this Court that plaintiffs would file a Response to the defendant State's July 26 Motion For Reconsideration by no later than this morning (July 27). *[As with their June 1st Motion For Accelerated Review currently pending before this Court, this Response 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.]*

This is plaintiffs' Response.

I. DISCUSSION

The State's Motion For Reconsideration demands an even longer delay in the filing of its Opening Brief than the one this Court has already granted, insisting that the extension granted by this Court is not enough.

Plaintiffs object to the State's being given a pass to now further delay the filing of its Opening Brief – especially if that briefing delay then serves as a basis to delay oral argument past the end of this Court's Fall 2010 Term.

As explained in their attached Response to the State's prior motion for more time, plaintiffs' pending June 1 Motion For Accelerated Review explained why oral argument during this Court's Fall 2010 Term is warranted in this case. The State has not objected to that Fall 2010

hearing request. To the contrary, the State has continually agreed that such a prompt and expeditious review is needed in this case.

In short: Plaintiffs believe no extension was warranted in the first place. *[See their attached Response to the State's first Motion for more time.]* Plaintiffs accordingly request that, at the very most, this Court simply confirm its original grant of more time to the State, instead of now granting the State even more time. Plaintiffs further respectfully request that whatever ruling this Court enters on the State's latest Motion be tailored so that any grants of extra time in this case not create a basis for denying plaintiffs' June 1 Motion requesting oral argument at the end of this Court's Fall 2010 Term.

RESPECTFULLY SUBMITTED this 22nd day of July, 2010.

FOSTER PEPPER, PLLC

Edmund W. Robb

Thomas F. Ahearne, WSBA No. 14844
Christopher G. Emch, WSBA No. 26457
Edmund W. Robb, WSBA No. 35948
Attorneys for Plaintiffs/Respondents

DECLARATION OF SERVICE

Edmund W. Robb 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 PLAINTIFF/RESPONDENTS' **RESPONSE** TO DEFENDANT STATE'S MOTION FOR RECONSIDERATION to be served on the following counsel as follows:

William G. Clark Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 Email: billc2@atg.wa.gov Phone: (206) 389-2794 Fax: (206) 587-4229	☒ Via Hand-Delivery by Legal Messenger ☒ Via Electronic Mail ☐ Via Fax ☐ Via U.S. Mail
David A. Stolier, Sr. Office of the Attorney General 1125 Washington Street S.E. Olympia, WA 98504-0100 Email: daves@atg.wa.gov Phone: (360) 586-0279 Fax: (360) 664-0662	☒ Via Hand-Delivery by Legal Messenger ☒ Via Electronic Mail ☐ Via Fax ☐ Via U.S. Mail
Maureen A. Hart Attorney at Law 1125 Washington St SE PO Box 40100 Olympia WA 98504-0100 Email: marnieh@atg.wa.gov Phone: 360-753-2536	☒ Via Hand-Delivery by Legal Messenger ☒ Via Electronic Mail ☐ Via Fax ☐ Via U.S. Mail

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 27th day of July, 2010.

Edmund W. Robb

ATTACHMENT TO:

Plaintiff/Respondents' Response To
Defendant's Motion For Reconsideration

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.

PLAINTIFF/RESPONDENTS' **RESPONSE** TO DEFENDANT STATE'S MOTION FOR EXTRA TIME AND EXTRA PAGES

The undersigned counsel's July 20 letter informed this Court that plaintiffs would file a Response to the defendant State's July 20 Motion by no later than this morning (July 22). This is that Response. *[Note: As with their June 1st Motion For Accelerated Review currently pending before this Court, this Response 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.]*

I. DISCUSSION

The State's motion makes four basic points. As the following explains, plaintiffs agree with two and disagree with two.

A. Plaintiffs Agree With The State's Point That This *McCleary* Case Is The Only One In 30 Years To Fully Examine & Rule Upon The State's "Paramount Duty" Under Article IX, §1.

The State's Motion acknowledges the importance of this *McCleary* case as the only one since the *Seattle School District* litigation 30 years ago to fully examine and rule upon the historical context, current meaning, importance to our democracy, and judicial enforcement, of the State's "paramount duty" under Article IX, §1 of the Washington Constitution.[1]

---

[1] *E.g., State's July 20 Motion For More Time/More Pages at 5:4-21; accord, the previously filed June 1 Motion For Accelerated Review at pages 7-10 and Plaintiffs' June 30 Reply To Defendant State's Response To Motion For Accelerated Review at pages 3-4.*

Indeed, the State's acknowledgment of this *McCleary* case's import is made by the very same attorney who represents the State in the recently argued Special Education Suit, which in sharp contrast merely nibbles at the edges of Article IX by addressing in isolation just one of the State's many education ***programs*** instead of examining the State's provision of K-12 education overall.[2]

Plaintiffs agree with the State on this point. Indeed, this undisputed point about the *McCleary* case's broad significance and public import is a foundation of the pending June 1 Motion For Accelerated Review.[3]

---

[2] *State's July 20 Motion For More Time/More Pages at 6:4-9 (confirming same counsel represented the State in that Special Education suit); Plaintiffs' June 30 Reply To Defendant State's Response To Motion For Accelerated Review at pages 6-7 (summarizing that Special Education suit – School District Alliance Fore Adequate Funding Of Special Education (alias) v. The State Of Washington, et al., Supreme Court No. 82961-6, argued June 22, 2010).*

[3] *June 1 Motion For Accelerated Review at pages 2-10 and Plaintiffs' June 30 Reply To Defendant State's Response To Motion For Accelerated Review at pages 2-8. As noted in that briefing, the McCleary trial court decision found that the State is not complying with its paramount duty to provide all children in Washington's public schools with the substantive education required by Article IX, §1. Other recent cases have addressed isolated issues related to a particular piece of the State's education* ***formulas*** *(e.g., the grandfathered salary levels for the Federal Way School District), or related to an isolated education* ***program*** *(e.g., the Special Education Program's multiplier at issue in the previously argued Alliance case). But this is the only case in the last 30 years to comprehensively examine and address the constitutional, historical, and educational reasons underlying the paramount duty imposed upon the State by Article IX, §1 of our State Constitution.*

B. Plaintiffs Agree With The State's Point That Oral Argument In This *McCleary* Appeal Should Be Held "As Expeditiously As Possible".

Invoking the 1 million public school children whose education awaits this Court affirming or reversing of the trial court decision in this case, the State stresses that oral argument and ultimate resolution of this appeal should be completed "as expeditiously as possible" – noting that the educational interests of those 1 million school children requires a "just and expeditious decision in this case,"[4] and emphasizing that the State does not want its Motion to cause any delay in this appeal, declaring that "to the contrary, the State wants this Court to schedule ... oral argument ... as expeditiously as possible."[5]

Plaintiffs agree with the State on this point as well. As both parties have explained in their prior briefing to this Court, there is no dispute that this case involves a fundamental and urgent issue of broad public importance that requires prompt determination by this Court.[6]

Indeed, this point is precisely why plaintiffs' pending Motion For Accelerated Review requests oral argument at the end of this Court's Fall 2010 term – a request to which the State's Response did not object.[7]

---

[4] *State's July 20 Motion For More Time/More Pages at 5:12-15.*

[5] *State's July 20 Motion For More Time/More Pages at 5:19-21.*

[6] *E.g., Defendant's Statement Of Grounds For Direct Review* at pages 10-11; *Plaintiffs' Motion For Accelerated Review* at page 2.

[7] *See State's June 18 Response To Motion For Accelerated Review and Plaintiffs' June 30 Reply at 2:18-3:5.*

Instead, the State's Response to plaintiffs' request for accelerated oral argument simply insisted that the Court nonetheless adhere to the Rules' ordinary briefing schedule requiring the State to file its Opening Brief on July 30. State's June 18 Response at page 2, lines 15-18 ("The Rules of Appellate Procedure prescribe the resulting briefing schedule, and the State requests that the Court allow the parties to adhere to that schedule. Under the Rules, the State's opening brief is now due on July 30.").

As noted below, plaintiffs agree with the State's June 13 demand that the parties adhere to the briefing schedule set forth in this Court's Rules, which requires the State to file its Opening Brief on July 30.

C. Plaintiffs Disagree With The State's Claim That The State Has A Legitimate Excuse For Now Wanting Extra Time.

The State cites the size of the record in this case as its excuse for now needing extra time, asserting that "the review of [the] exhaustive record to prepare Appellant's Opening Brief has consumed several weeks."[8]

But that excuse for now needing more time rings hollow.

The State has had over 5 months to review the trial court's detailed Findings Of Fact & Conclusions Of Law in light of the trial court record. The trial court first issued its detailed Findings & Conclusions on

[8] *State's July 20 Motion For More Time/More Pages at 3:2-3.*

February 4.[9] And on that February 4 date, the State's attorneys already had in their possession the "exhaustive" trial court record – all of the transcripts from the trial (which were delivered to counsel daily during trial), all the of the deposition transcripts submitted at trial, all the exhibits admitted at trial, and all the trial court briefing.

The State's legal team, moreover, is not suffering from any shortage of resources in this case – for despite the budget cuts the State made elsewhere this year, the State appropriated an extra $1 million this year to fund its legal team's appeal in this *McCleary* case.[10]

Plaintiffs nonetheless recognize that, as a practical matter, extensions of time are often routinely granted. Plaintiffs therefore respectfully request that if this Court grants any extension of time for briefing, that extension be tailored so that that extension does not create a basis for then delaying oral argument into next year – especially given the State's previously-noted acknowledgment that the importance of this appeal's determination to the education of our State's 1 million school children requires oral argument be scheduled "as expeditiously as possible."

---

[9] *The "Revised" Findings & Conclusions attached to the trial court's February 24 Final Judgment have only a few limited clarifications of the original Findings & Conclusions entered at the February 4 trial court hearing.*

[10] *Laws of 2010, ch. 37, §501(1)(t) (appropriating $950,000 "solely for office of the attorney general costs related to McCleary v. State of Washington").*

D. Plaintiffs Disagree With The State's Claim That It Has A Legitimate Reason For Demanding 40% More Pages.

The State cites its desire to employ a shotgun, 53-assignments-of-error strategy as its excuse for needing a 40% increase in the length of its Opening Brief (20 more pages on top of the 50 prescribed by the Rules).[11]

That 53 number is testament to the previously-noted fact that the State has already had plenty of time over the past 5 months to pour through this case's full written record in light of the trial court's original February 4 Findings & Conclusions.

But that 53 number is not a proper reason for demanding a 40% increase in pages – for one of the reasons underlying the 50-page limit for appellate briefs is to discourage proceedings in our State's appellate courts from becoming a "throw everything against the wall and see what sticks" exercise, or a "bury your less wealthy opponent with piles of paper to respond to" contest.

At the very least, if this Court grants the State's demand for a 70 page Opening Brief, then plaintiffs respectfully request that this Court's ruling at least maintain parity between the parties by simultaneously granting plaintiffs that same 70 page limit for their Response Brief (without forcing plaintiffs to incur the additional expense

---

[11] *State's July 20 Motion For More Time/More Pages at 4:9-11.*

and diversion of their limited resources by having to prepare more motion papers and briefing).

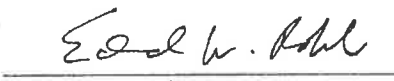
II. CONCLUSION

Plaintiffs agree with the State that the trial court's Article IX, §1 rulings and corresponding enforcement order in this *McCleary* case constitute the most important education decision presented to this Court in the past 30 years, and that the interests of the 1 million public school children whose education awaits this Court's affirmance or reversal of that trial court decision support this Court's proceeding to oral argument "as expeditiously as possible".

Plaintiffs do not agree that the excuses presented by the State justify the extra time and extra pages the State demands. But plaintiffs also recognize that the ordinary course is often to grant such requests. Plaintiffs therefore request that **if** the State's Motion is granted over their objection, then (1) this Court's ruling be tailored so that any grant of extra time for briefing not create a basis for denying plaintiffs' June 1 Motion requesting oral argument at the end of this Court's Fall 2010 term, and (2) this Court's ruling at least maintain parity between the parties by simultaneously granting plaintiffs the same 70 page limit for their Response Brief.

RESPECTFULLY SUBMITTED this 22nd day of July, 2010.

FOSTER PEPPER, PLLC



Thomas F. Ahearne, WSBA No. 14844
Christopher G. Emch, WSBA No. 26457
Edmund W. Robb, WSBA No. 35948
Attorneys for Plaintiffs/Respondents

DECLARATION OF SERVICE

Edmund W. Robb 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 PLAINTIFF/RESPONDENTS' **RESPONSE** TO DEFENDANT STATE'S MOTION FOR EXTRA TIME AND EXTRA PAGES to be served on the following counsel as follows:

William G. Clark Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 Email: billc2@atg.wa.gov Phone: (206) 389-2794 Fax: (206) 587-4229	☒ Via Hand-Delivery by Legal Messenger ☒ Via Electronic Mail ☐ Via Fax ☐ Via U.S. Mail
David A. Stolier, Sr. Office of the Attorney General 1125 Washington Street S.E. Olympia, WA 98504-0100 Email: daves@atg.wa.gov Phone: (360) 586-0279 Fax: (360) 664-0662	☒ Via Hand-Delivery by Legal Messenger ☒ Via Electronic Mail ☐ Via Fax ☐ Via U.S. Mail
Maureen A. Hart Attorney at Law 1125 Washington St SE PO Box 40100 Olympia WA 98504-0100 Email: marnieh@atg.wa.gov Phone: 360-753-2536	☒ Via Hand-Delivery by Legal Messenger ☒ Via Electronic Mail ☐ Via Fax ☐ Via U.S. Mail

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 22nd day of July, 2010.

Edmund W. Robb