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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'
2013
POST-BUDGET FILING**

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TABLE OF CONTENTS

	<u>Page</u>
Table Of Authorities	iv
I. INTRODUCTION	1
II. THE VIGILANCE THIS COURT PROMISED TO OUR STATE’S PUBLIC SCHOOL CHILDREN	3
A. The <i>Minimum</i> 2018 Finish Line: Fully Fund The Expansive Reforms Initiated By ESHB 2261.	5
B. Periodic Benchmarks: This Court Ordered The State To Lay Out A <i>Detailed Plan</i> For How It Will Cross The Article IX, §1 Finish Line By 2018.	7
C. Annual Progress: This Court Ordered The State To Demonstrate Steady, Real, & Measurable <i>Progress</i> To Crossing That Finish Line By 2018.	8
D. Vigilance Conclusion.....	10
III. THE STATE’S “ <i>DETAILED PLAN</i> ” & “ <i>PROGRESS</i> ” TOWARDS FULL CONSTITUTIONAL COMPLIANCE BY 2018.....	12
A. Defendant’s \$982 Million “Increase” Claim Falls Short Of Steady Progress To Full Article IX, §1 Compliance By 2018.....	12
1. The Overall Funding Finish Line Established By The State In This Case.	12
2. The State’s Overall Funding “Plan” and “Progress”.	13
(a) The State’s “Detailed Plan”.....	13
(b) The State’s “Progress”.....	13

- B. Defendant’s School Salary “Restoration” Claim Falls Short Of A Detailed Plan Or Steady Progress To Full Market Rate Funding By 2018 16
 - 1. The School Salary Funding Finish Line Established By The State In This Case. 17
 - 2. The State’s School Salary Funding “Plan” & “Progress”. 19
 - (a) The State’s “Detailed Plan” 19
 - (b) The State’s “Progress” 20
- C. Defendant’s Transportation “Full Funding” Claim Stops Short Of Steady Progress To Full Article IX, §1 Compliance By 2018..... 22
 - 1. The Transportation Funding Shortfall Established By The State In This Case. 22
 - 2. The State’s Transportation “Plan” and “Progress” 23
 - (a) The State’s “Detailed Plan” 23
 - (b) The State’s “Progress” 23
- D. Defendant’s MSOC Movement Falls Short Of Steady Progress To Full Article IX, §1 Compliance By 2018..... 26
 - 1. The MSOC Finish Line Established By The State In This Case..... 26
 - 2. The State’s MSOC “Plan” and “Progress”. 28
 - (a) The State’s “Detailed Plan” 28
 - (b) The State’s “Progress” 29
- E. Defendant’s Full-Day Kindergarten Claim Falls Short Of Steady Progress To Full Compliance By 2018 30
 - 1. The Full-Day Kindergarten Finish Line Established By The State. 30
 - 2. The State’s Full-Day Kindergarten “Plan” and “Progress”. 31
 - (a) The State’s “Detailed Plan” 31
 - (b) The State’s “Progress” 31

F. Defendant’s Class Size Reduction Claim Falls Short Of Steady Progress To Full Compliance By 2018	33
1. The K-3 Class Size Finish Line Established By The State.....	33
2. The State’s K-3 Class Size Reduction “Plan” and “Progress”	33
(a) The State’s “Detailed Plan”	33
(b) The State’s “Progress”	34
G. Defendant Submits <i>No</i> Plan Or Steady Progress For ESHB 2261’s “Highly Capable Program”	37
1. The “Highly Capable Program” Finish Line.	37
2. The State’s Highly Capable Program “Plan” & “Progress”	38
(a) The State’s “Detailed Plan”	38
(b) The State’s “Progress”	38
H. Elected Officials Cannot Escape Court Enforcement of a Citizen’s Constitutional Rights with “Separation of Powers” Innuendo	39
1. Powers Are Separated to <i>Stop</i> – Not <i>Shelter</i> – Elected Officials’ Violation of Constitutional Rights.....	39
2. Courts Have Thus Historically Recognized Their Duty to <i>Force</i> Elected Officials to Obey the Constitution.	43
3. This Court Should Take Action To <i>Stop</i> The State’s Ongoing Violation Of Constitutional Rights – Not <i>Shelter</i> That Violation.....	47
IV. CONCLUSION.....	49
GLOSSARY of State Budget Documents cited	Appendix A
Illustrative Chart.....	Appendix B
Declaration of Service.....	Appendix C

TABLE OF AUTHORITIES

WASHINGTON CONSTITUTION

Article IX, §1 passim

CASES

Abbott ex rel. Abbott v. Burke,
20 A.3d 1018 (N.J. 2011).....39, 46, 48

Arthur v. Nyquist,
547 F.Supp. 468 (W.D.N.Y. 1982), *aff'd*, 712 F.2d 809
(2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984)46

Baker v. City of Kissimmee,
645 F.Supp. 571 (M.D. Fla. 1986).....46

Belton v. Gebhart,
87 A.2d 862 (Del. Ch.), *aff'd*, 91 A.2d 137 (Del. 1952), *aff'd*
sub nom. Brown v. Board of Education, 349 U.S. 294 (1955)48

Blanchard v. Golden Age Brewing Co.,
126 Wn.2d 36, 891 P.2d 725 (1995).....44

Columbia Falls Elementary Sch. Dist. No. 6 v. Montana,
109 P.3d 257 (Mont. 2005).....40

Cooper v. Aaron,
358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958).....43

Delaware Valley Citizens' Council for Clean Air v. Pennsylvania,
678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982).....45

Dowdell v. City of Apopka,
511 F.Supp. 1375 (M.D. Fla. 1981), *aff'd in relevant*
part, 698 F.2d 1181 (11th Cir. 1983).....45

Edgewood Independent School District v. Kirby,
777 S.W.2d 391 (Tex. 1989).....44

<i>Griffin v. Prince Edward County School Board</i> , 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).....	46
<i>Hoke County Board of Education. v. North Carolina</i> , 731 S.E.2d 691 (N.C. Ct. App. 2012), <i>review allowed</i> , 738 S.E.2d 362 (N.C. 2013).....	46
<i>Hull v. Albrecht</i> , 960 P.2d 634 (Ariz. 1998).....	46
<i>Hutto v. Finney</i> , 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).....	45
<i>Inmates of Suffolk County Jail v. Kearney</i> , 573 F.2d 98 (1st Cir. 1978).....	47
<i>In re Detention of Young</i> , 163 Wn.2d 684, 185 P.3d 1180 (2008).....	44, 45, 48
<i>In re Estates of Smaldino</i> , 151 Wn.App. 356, 212 P.3d 579 (2009), <i>review denied</i> , 168 Wn.2d 1033 (2010)	47
<i>In re Juvenile Director</i> , 87 Wn.2d 232, 552 P.2d 163 (1976).....	40
<i>Keller v. Keller</i> , 52 Wn.2d 84, 323 P.2d 231 (1958).....	44
<i>Lake View School District No. 25 v. Huckabee</i> , 91 S.W.3d 472 (Ark. 2002), <i>cert. denied</i> , 538 U.S. 1035 (2003).....	39
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).....	40
<i>McCleary v. State</i> , 173 Wn.2d 477, 269 P.3d 227 (2012).....	passim
<i>Missouri v. Jenkins</i> , 495 U.S. 33, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990).....	46

<i>Montoy v. Kansas</i> , 112 P.3d 923 (Kan. 2005).....	42, 44, 46, 48
<i>Montoy v. Kansas</i> , No. 99-C-1738, Decision and Order Remedy (May 11, 2004), 2004 WL 1094555	44, 46
<i>Moreman v. Butcher</i> , 126 Wn.2d 36, 891 P.2d 725 (1995).....	44
<i>Reed v. Rhodes</i> , 472 F.Supp. 623 (N.D. Ohio 1979).....	46
<i>Robinson v. Cahill</i> , 358 A.2d 457 (N.J. 1976).....	44, 46
<i>Rose v. Council for Better Education</i> , 790 S.W.2d 186 (Ky. 1989).....	40
<i>Seattle School District v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978).....	passim
<i>Shillitani v. United States</i> , 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966)	44
<i>Spallone v. United States</i> , 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990).....	43
<i>State v. Rice</i> , 174 Wn.2d 884, 279 P.3d 849 (2012).....	40
<i>U.S. v. Yonkers Board of Education</i> , 837 F.2d 1181 (2d Cir. 1987), <i>cert. denied</i> , 486 U.S. 1055 (1988).....	45
<i>U.S. v. Nixon</i> , 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).....	40
<i>Vecchione v. Wohlgemuth</i> , 558 F.2d 150 (3d Cir.), <i>cert. denied</i> , 434 U.S. 943 (1977).....	45

STATUTES AND SESSION LAWS

Laws of 2009, ch. 548 (ESHB 2261).....15, 23, 48
Laws of 2010, ch. 236 (SHB 2776)23
RCW 7.21.01044, 47
RCW 7.21.03045, 48
RCW 28A.41.160.....23
RCW 28A.160.192.....23, 24

REGULATIONS

WAC 392-141-360.....24
WAC 392-170-012.....37
WAC 392-170-030.....37
WAC 392-170-078.....37
WAC 392-170-090.....37
WAC 392-170-095.....37

INITIATIVE TO THE PEOPLE

Initiative Measure 732.21

IT IS THE
PARAMOUNT DUTY OF THE STATE TO MAKE
AMPLE PROVISION FOR THE
EDUCATION OF
ALL CHILDREN RESIDING WITHIN ITS BORDERS....
Article IX, section 1, Washington State Constitution

I. INTRODUCTION

The February 2010 Final Judgment and January 2012 Supreme Court decision in this case both confirmed the legal meaning of the State’s constitutional duty under Article IX, §1:¹

- ***paramount duty*** means that “the State must amply provide for the education of all Washington children as the State’s first and highest priority before any other State programs or operations”.²
- ***ample provision*** means “considerably more than just adequate”.³

¹ *February 2010 Final Judgment [CP 2866-2971] at ¶¶151-212; McCleary v. State*, 173 Wn.2d 477, 539, 269 P.3d 227 (2012) (“We affirm the trial court’s declaratory ruling and hold that the State has not complied with its article IX, section 1 duty to make ample provision for the education of all children in Washington.”) & 547-548 (concurring in part/dissenting in part, Madsen, C.J.) (“I agree with Justice Stephens’ articulation of the State’s duty to fund education under article IX, section 1 of the Washington Constitution and the conclusion that the current system is not operating at its constitutionally mandated levels. ... [W]e have defined ‘education,’ ‘paramount,’ ‘all,’ and ‘ample’ and ordered the State to carry out its constitutional duty.”).

² *McCleary*, 173 Wn.2d at 520 (underline added) (internal quotation marks omitted); see also at 527 (reaffirming that the State may **not** make reductions “for reasons unrelated to education policy, such as fiscal crisis or mere expediency”).

³ *McCleary*, 173 Wn.2d at 484; see also at 527 (reiterating the *Seattle School District* Court’s holding that ample means “liberal, unrestrained, without parsimony, fully, sufficient”) and the Webster’s Third New International Dictionary cited by that *Seattle School District* Court (90 Wn.2d 476, 511, 512n.12, 585 P.2d 71 (1978)), which provides the following definitions (at pp.1302, 2508, & 1645): **liberal**: “marked by generosity.” & “ABUNDANT, BOUNTIFUL”; **unrestrained**: “not restrained” & “UNCONTROLLED”; **parsimony**: “carefulness in the expenditure of money or resources”.

- **education** means “the basic knowledge and skills needed to compete in today’s economy and meaningfully participate in this state’s democracy” – which are the knowledge and skills specified in the State’s academic learning standards.⁴
- **all children** means “each and every child” in Washington – “No child is excluded.”⁵

The February 2010 Final Judgment and January 2012 Supreme Court decision also confirmed the defendant’s longtime violation of our State Constitution:⁶

- “Article IX, section 1 confers on children in Washington a **positive constitutional right** to an **amply funded** education”;⁷
- this right to an amply funded education is each Washington child’s **paramount Constitutional right**;⁸ and
- the State has **consistently** failed to adequately fund the education required by Article IX, section 1.⁹

⁴ McCleary, 173 Wn.2d at 483 (the knowledge & skills specified in the State’s Essential Academic Learning Requirements (EALRs), the four numbered provisions from ESHB 1209, and the Seattle School District decision), & 522-524 & n.21 (holding this definition of “education” is the same as the definition of “basic education”); see also 173 Wn.2d at 523n.20 (quoting current version of the four numbered provisions from ESHB 1209, codified at RCW 28A.150.210). This Court accordingly rejected the State’s claim that the “education” required by Article IX, §1 is the same as the basic education program the legislature defines and funds. 173 Wn.2d at 531-532 (the State’s full funding argument “amounts to little more than a tautology”) & 526 (explaining that the program to provide the above basic “education” is a separate matter).

⁵ McCleary, 173 Wn.2d at 520.

⁶ *Supra* footnote 1.

⁷ McCleary, 173 Wn.2d at 483 & 518 (bold italics added).

⁸ McCleary, 173 Wn.2d at 485 & 518.

⁹ The February 2010 Final Judgment held the State’s K-12 funding level was so low it violated Article IX, §1. E.g., McCleary, 173 Wn.2d at 513 (quoting trial court’s conclusion that “State funding is not ample, it is not stable, and it is not dependable.”). This Court affirmed that declaratory judgment. 173 Wn.2d at 539 (“We affirm the trial court’s declaratory ruling and hold that the State has not complied with its article IX, section 1 duty to make ample provision for the education of all children in Washington.”). This Court held substantial evidence established the State “has failed to adequately fund the ‘education’ required by article IX, section 1”, “the State has consistently failed to provide adequate funding”, and this fact is so well known by the State that “[w]e do not believe this conclusion comes as a surprise.” 173 Wn.2d at

Pursuant to the procedure this Court established to enforce this positive constitutional right of all Washington children by 2018, this is the 2013 post-budget filing of plaintiffs.¹⁰

II. THE VIGILANCE THIS COURT PROMISED TO OUR STATE'S PUBLIC SCHOOL CHILDREN

“Some one has justly remarked, that ‘eternal vigilance is the price of liberty.’ Let the sentinels on the watch-tower sleep not, and slumber not.”

The Virginia Free Press & Farmers Repository
(May 2, 1833)¹¹

This Court’s January 2012 decision told the children in our State’s public schools that this Court will “remain vigilant in fulfilling the State’s constitutional responsibility under article IX, section 1”.¹² This Court assured them that “2018 remains a firm deadline for full constitutional

529-530 (underline added) & 539. This part of the Court’s McCleary decision was unanimous. *Supra* footnote 1.

¹⁰ The plaintiffs are the McCleary family, Venema family, and Network for Excellence in Washington Schools (“NEWS”). The 424 community groups, school districts, and education organizations in NEWS are listed at http://www.waschoolexcellence.org/about_us/news_members.

¹¹ May 2, 1833 edition of The Virginia Free Press & Farmers Repository, as quoted at <http://www.thisdayinquotes.com/2011/01/eternal-vigilance-is-price-of-liberty.html> (last viewed on September 30, 2013).

¹² McCleary, 173 Wn.2d at 547 (“A noted scholar in the area of school-finance litigation has observed that success depends on ‘continued vigilance on the part of courts.’ This court intends to remain vigilant in fulfilling the State’s constitutional responsibility under article IX, section 1.”) (citation omitted).

compliance.”¹³ And this Court reiterated: “Positive constitutional rights do not restrain government action; they require it.”¹⁴

Last year this Court declared that the State’s 2012 report “falls short”,¹⁵ and made it clear that falling short in 2013 was not constitutionally acceptable in light of the urgency at hand:

Each day there is a delay risks another school year in which Washington children are denied the constitutionally adequate education that is the State’s paramount duty to provide.

Year 2018 remains a firm deadline for full constitutional compliance. ...

Given the scale of the task at hand, 2018 is only a moment away—and by the time the 2013 legislature convenes a full year will have passed since the court issued its opinion in this case. ...

We cannot wait until “graduation” in 2018 to determine if the State has met minimum constitutional standards.

IT IS SO ORDERED.¹⁶

¹³ Wash. Supreme Court Order (December 20, 2012) at p.2 (underline added).

¹⁴ McCleary, 173 Wn.2d at 518-519 (underline added) (“This distinction between positive and negative constitutional rights is important because it informs the proper orientation for determining whether the State has complied with its article IX, section 1 duty in the present case. ... [A]nalyzing positive constitutional rights ... the court is concerned not with whether the State has done too much, but with whether the State has done enough. Positive constitutional rights do not restrain government action; they require it.”).

¹⁵ Wash. Supreme Court Order (December 20, 2012) at p.1.

¹⁶ Wash. Supreme Court Order (December 20, 2012) at pp.2-3 (underline added, footnote omitted); see also McCleary, 173 Wn.2d at 513-514 (noting direct review was sought because this “case presented ‘a fundamental and urgent issue of broad public import which requires a prompt and ultimate determination by this Court’”, and that “We agreed and accepted the case for direct review.”).

**A. The Minimum 2018 Finish Line:
Fully Fund The Expansive Reforms Initiated By ESHB 2261**

The State objected to the trial court’s remedy order in this case, insisting that the State had already done the studies it needed,¹⁷ and had already determined the *means* it will employ to address Article IX, §1 – i.e., fully fund the expansive reforms under ESHB 2261 by 2018.¹⁸

¹⁷ E.g., State’s 8/20/10 Corrected Brief at pp.58-59 (telling this Court that the State has already done “significant studies of existing and prospective education programs, practices and funding mechanisms, including Washington Learns, the proceedings of the [Basic Education Finance] Task Force as assisted by studies by the Washington Institute for Public Policy and the Task Force Report itself. ... No additional court-ordered studies are necessary”); State’s 10/20/10 Reply Brief And Response To Cross-Appeal at p.11 (“the State has already extensively studied education funding” – “Courts should not order a co-equal branch to do something that has already been accomplished”) & p.20 (“ESHB 2261 ha[s] mooted [the trial court] remedy”).

¹⁸ E.g., State’s 4/9/10 Statement Of Grounds For Direct Review at p.8 (ESHB 2261 is “implemented over a ten-year period, beginning in 2009 and concluding in 2018. When fully implemented, HB 2261 will increase state funding of basic education by billions of dollars.”); State’s 10/20/10 Reply Brief And Response To Cross-Appeal at p.10 (ESHB 2261 “was passed in 2009 and remains unchanged today, except for the further implementation of its provisions. It still calls for complete implementation by 2018”); State’s 8/20/10 Corrected Brief at p.17, heading E (“In 2009, the State Enacted ESHB 2261 to Implement K-12 Education Reforms, Including Substantially Increased State Funding.”); RP 3951:14-3953:2; 3965:10-3970:17; 4018:17-4021:11 & Tr.Ex.1483 (State’s trial testimony and evidence from legislature’s Senior K-12 Fiscal Analyst Ben Rarick, showing ESHB 2261 to increase K-12 funding to over \$9.6 billion/year (and at least \$9,710 per student/year) *before* adding any student enrollment increases, inflation, facilities, or market rate salaries); State’s 8/20/10 Corrected Brief at p.18 (increasing K-12 funding to pay 95% of school districts’ current pupil transportation costs “by 2012”); State’s 4/9/10 Statement Of Grounds For Direct Review at p.8 (increasing K-12 funding for school maintenance, supplies, and operating costs (MSOCs) “in the 2011-13 biennium”); *id.* (increasing K-12 funding to reduce class sizes “in the 2011-13 biennium”); *id.* (increasing K-12 funding for full-day kindergarten “in the 2011-13 biennium”); *id.* (increasing K-12 funding “by billions of dollars” through full implementation of ESHB 2261 no later than 2018).

This Court took the State at its word and vacated the remedy piece of the trial court order.¹⁹

This Court accepted defendant’s assurance that full funding of the “promising” reforms promised by ESHB 2261 constituted the *means* the legislature had in fact chosen towards compliance with its Article IX, §1 duty by no later than 2018.²⁰ Full funding of the reforms initiated by ESHB 2261 is therefore an established finish line in this case, which the State must cross by 2018.

¹⁹ *The trial court’s remedy was to order the State to (1) establish the actual cost of amply providing all Washington children with the education mandated by the court’s interpretation of Article IX, §1, and (2) establish how the defendant State will fully fund that actual cost with stable and dependable State sources. McCleary, 173 Wn.2d at 513. Based on the State’s previously noted representations about ESHB 2261’s promised funding reforms (supra footnote 18), this Court vacated the trial court’s remedy order, but retained jurisdiction to ensure that the State actually did what it had promised – noting that “What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education.” 173 Wn.2d at 541; see also infra footnote 71 (legislature’s longstanding failure to comply with its Basic Education Act promise to fully fund pupil transportation by the 1980-81 school year). This Court noted that while ESHB 2261 is “promising” legislation: “This court cannot idly stand by as the legislature makes unfulfilled promises. ... Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1.” 173 Wn.2d at 545-546 (underline added).*

²⁰ *McCleary, 173 Wn.2d at 484 (noting that the “legislature recently enacted a promising reform package under ESHB 2261 which, if fully funded, will remedy deficiencies in the K-12 funding system. This court defers to the legislature’s chosen means of discharging its article IX, section 1 duty” – but retains jurisdiction to ensure the State’s full implementation by 2018) (underline added and citation omitted).*

**B. Periodic Benchmarks:
This Court Ordered The State To Lay Out A Detailed Plan For How It Will Cross The Article IX, §1 Finish Line By 2018**

This Court noted the State’s first report identified committees in place and the Joint Task Force on Education Funding (JTFEF) assignment, but did “not sufficiently indicate how full compliance with article IX, section 1 will be achieved” by the 2018 deadline.²¹

True, this Court has noted its desire to defer to the legislature’s plan for how the legislature is going to cross the 2018 finish line previously promised with ESHB 2261.

“But, there must in fact be a plan.”²² This Court accordingly ordered the State’s 2013 filing to “lay out a detailed plan and then adhere to it.”²³

Given the State’s assurance in last year’s filing that a Task Force and committees were working on that plan for how the legislature was going to cross the ESHB 2261 finish line by 2018, this Court ordered that the State’s 2013 filing “must identify the fruits of these labors” and “must set out the State’s plan in sufficient detail to allow progress to be measured according to periodic benchmarks between now and 2018.”²⁴

²¹ Wash. Supreme Court Order (December 20, 2012) at pp.1-2 (underline added).

²² Wash. Supreme Court Order (December 20, 2012) at p.2.

²³ Wash. Supreme Court Order (December 20, 2012) at p.2 (underline added).

²⁴ Wash. Supreme Court Order (December 20, 2012) at p.2 (underline added) (“While the State’s first report to the court identified the standing committees that have been formed and the additional studies that have been undertaken, the second report must

C. **Annual Progress:**
This Court Ordered The State To Demonstrate Steady, Real, & Measurable Progress To Crossing That Finish Line By 2018

This Court has referenced ESHB 2261 as a “promising” reform program that the legislature had assured will be fully implemented by 2018.²⁵ Based on that “by 2018” schedule, this Court ordered that each of the State’s post-budget filings:

- must demonstrate *steady progress* completing implementation of ESHB 2261’s “promising” reforms by 2018;²⁶ and
- must show *real and measurable* progress towards achieving full compliance with Article IX, section 1 by 2018.²⁷

identify the fruits of these labors.”). This Court’s Order noted that the 2013 filing’s phase-in plan should accordingly address “all areas of K-12 education identified in ESHB 2261, including transportation, MSOCs (Materials, Supplies, [and] Operating Costs), full time kindergarten, and class size reduction.” Id. at p.3 (underline added). It did not say “some areas in ESHB 2261, limited to transportation, MSOCs, full time kindergarten, and class size reduction.”

²⁵ E.g., Wash. Supreme Court Order (July 18, 2012) at p.1 (“In its decision in this case, the court held that the State is not currently meeting its duty under article IX, section 1 of the Washington State Constitution to make ample provision for the education of all children in the State. The court recognized the legislature’s enactment of ‘a promising reform program in [Laws of 2009, ch. 548] ESHB 2261,’ designed to remedy the deficiencies in the prior funding system by 2018.”), citing McCleary, 173 W.2d at 539 & 543.

²⁶ E.g., Wash. Supreme Court Order (July 18, 2012) at p.3, ¶4 (“the State must demonstrate **steady progress** according to the schedule anticipated by the enactment of the program of reforms in ESHB 2261”) (bold added); Wash. Supreme Court Order (December 20, 2012) at p.1 (“demonstrate **steady progress**”) (bold added) & at p.2 (“Year 2018 remains a firm deadline for full constitutional compliance.”) (underline added).

²⁷ E.g., Wash. Supreme Court Order (July 18, 2012) at p.3, ¶4 (“the court’s review will focus on whether the actions taken by the legislature show **real and measurable** progress toward achieving full compliance with article IX, section 1 by 2018”) (bold added); Wash. Supreme Court Order (December 20, 2012) at p.1 (“progress must be both ‘**real and measurable**’ and must be designed to achieve ‘full compliance with article IX, section 1 by 2018’”) (bold added) & p.2 (“Year 2018 remains a firm deadline for full constitutional compliance.”) (underline added).

This Court's December 2012 Order accordingly summarized its "progress" review of the post-budget filings in this case as follows:

The question before us is whether, in remedying the constitutional violation of the State's paramount duty under article IX, section 1, current actions "demonstrate *steady progress* according to the schedule anticipated by the enactment of the program of reforms in ESHB 2261." Consistent with ESHB 2261, such progress must be both "*real and measurable*" and must be designed to achieve "full compliance with article IX, section 1 by 2018."²⁸

Steady progress requires both. It requires *progress* – which means "to move forward : to proceed or advance".²⁹ And it must be *steady* – which means "even development, movement, or action: not varying in quality, intensity, or direction", "UNIFORM", "CONTINUOUS", "consistent in performance or behavior: DEPENDABLE, RELIABLE".³⁰

²⁸ Wash. Supreme Court Order (December 20, 2012) at p.1 (bold italics added and citations omitted).

²⁹ WEBSTER'S THIRD NEW INT'L DICTIONARY (1993) at p.1813 (progress: "to move forward : to proceed or advance", "to develop to a higher, better, or more advanced stage : make continual improvements") [Same dictionary this Court used in Seattle School District, 90 Wn.2d at 511 & 512n.12; see also February 2010 Final Judgment [CP 2866-2971] at ¶¶156-157]; accord Wash. Supreme Court Order (December 20, 2012) at p.2 ("Steady progress requires forward movement.").

³⁰ WEBSTER'S THIRD NEW INT'L DICTIONARY (1993) at p.2231 (steady: "even development, movement, or action: not varying in quality, intensity, or direction", "UNIFORM", "CONTINUOUS", "consistent in performance or behavior: DEPENDABLE, RELIABLE") [Same dictionary court used in Seattle School District and this case. See supra footnote 29]; cf. Wash. Supreme Court Order (December 20, 2012) at p.2 ("constitutional compliance will never be achieved by making modest funding restorations") (underline added); McCleary, 173 Wn.2d at 505 (noting ESHB 2261's assurance of "bold reforms to the entire educational system") & 506 (ESHB 2261's promised "bold reforms to the K-12 funding system").

Real and measureable progress requires both. It must be *measurable* – which means not merely “capable” of being measured, but in fact “great enough to be worth consideration: SIGNIFICANT”.³¹ Cf. Wash. Supreme Court Order (December 20, 2012) at p.2 (“constitutional compliance will never be achieved by making modest funding restorations”) (underline added); *McCleary*, 173 Wn.2d at 545 (noting the 2012 Budget’s \$5 million transportation funding increase “will barely make a dent” in State’s underfunding of pupil transportation).

The progress must also be *real* – which means “AUTHENTIC”, “GENUINE”, “not illusory : INDUBITABLE, UNQUESTIONABLE”.³² Cf. *McCleary*, 173 Wn.2d at 545 (noting the 2012 Budget’s \$33.6 million “increase” in K-3 class size reduction funding was illusory because that same Budget’s \$214 million decrease in K-4 class size reduction funding resulted in “a significant net loss in K-3 class reductions”).

D. Vigilance Conclusion

As the following pages confirm, the State’s 2013 filing did not lay out a detailed plan for how the State will cross the Article IX, §1 finish

³¹ WEBSTER’S THIRD NEW INT’L DICTIONARY (1993) at p.1399 [Same dictionary court used in *Seattle School District* and this case. See *supra* footnote 29].

³² WEBSTER’S THIRD NEW INT’L DICTIONARY (1993) at p.1890 [Same dictionary court used in *Seattle School District* and this case. See *supra* footnote 29]; cf. Wash. Supreme Court Order (December 20, 2012) at p.2 (“constitutional compliance will never be achieved by making modest funding restorations”) (underline added).

line by 2018, and did not demonstrate *steady, real, and measurable progress* towards crossing that finish line by 2018. Instead, with a few exceptions, the State’s 2013 filing shows the “promising” reform of ESHB 2261 continues to be exactly that: lots of “promising”, but not much actual “doing”.

A cynic might say that, as a *political* matter, an elected official’s disregard of the Court Orders in this case is understandable. But plaintiffs respectfully submit that, as a *constitutional* matter, it is not acceptable.

This Court stated it will review the parties’ submissions and decide whether to “request additional information, direct further fact-finding by the trial court or a special master, or take other appropriate steps.”³³ The State’s longstanding violation of Washington children’s positive constitutional right to an amply funded education was established over 3½ years ago by the February 2010 Final Judgment in this case. This Court unanimously³⁴ affirmed that declaratory judgment over 20 months ago. As the last section of this filing explains, plaintiffs respectfully submit that vigilance requires this Court to begin taking some concrete actions to compel compliance with our Constitution, rather than resign itself to being a bystander who just stands on the sidelines “hoping” for a

³³ *Wash. Supreme Court Order (July 18, 2012) at p.3, ¶5.*

³⁴ *Supra footnote 1.*

better effort next year. As observed in the above quote on page 3, plaintiffs respectfully submit that this Court should “*sleep not, and slumber not*”.

**III. THE STATE’S “DETAILED PLAN” & “PROGRESS”
TOWARDS FULL CONSTITUTIONAL COMPLIANCE BY
2018**

**A. Defendant’s \$982 Million “Increase” Claim Falls Short Of
Steady Progress To Full Article IX, §1 Compliance By 2018**

*“Trust not too much to appearances.”
Virgil³⁵*

1. The Overall Funding Finish Line Established By The State In This Case.

The State testified in this case that ESHB 2261’s reforms will increase State funding to \$9,710 per pupil, *before* covering market rate salaries, inflation after 2007-08, or any capital construction needs.³⁶ ESHB 2261’s compensation work group then determined the increase needed to fund market rate salaries is approximately \$2.9 billion/year (about \$2,991/pupil for 1 million students).³⁷ $\$9,710 + \$2,991 = \mathbf{\$12,701}$.

The State has thus acknowledged that a *minimum* finish line for full funding of ESHB 2261’s “promising” reforms is at least that **\$12,701**

³⁵ *Virgil’s Eclogues*, Publi Vergili Maronis Ecloga (“nimium ne crede colori”)(circa 39 B.C.), available at <http://www.gutenberg.org/files/229/229-h/229-h.htm>.

³⁶ *RP 3951:14-3953:2; 3965:10-3970:17; 4018:17-4021:11 & Tr.Ex.1483 (State testimony and exhibit from Senior K-12 Fiscal Analyst for legislature).*

³⁷ *Infra Section III.B.1 of this filing (regarding Compensation Final Report).*

per pupil State funding total (*before* inflation or any capital construction needs).

2. The State’s Overall Funding “Plan” and “Progress”.

(a) The State’s “Detailed Plan”.

The State’s 2013 filing does not submit a detailed plan or periodic benchmarks for completing ESHB 2261’s promised increases in overall K-12 funding by 2018. Instead, it simply states the 2013-15 budget makes \$982 million in basic education “enhancements” spread out over two years, for a 6.7% increase above current maintenance level.³⁸

That is not the “detailed plan” this Court Ordered the State’s 2013 filing to provide.³⁹ (Nor, as noted below, is the claimed “\$982 million” what the State’s filing wants it to appear to be.)

(b) The State’s “Progress”.

The State’s 2013 filing shows some progress. But not the steady rate necessary to cross the previously noted *minimum* finish line of \$12,701 per pupil by 2018. The State reports its per pupil funding under

³⁸ *State’s 2013 Post-Budget Filing, attached report at p.2. “Maintenance level” is the baseline funding necessary to maintain the current level of services into the next biennium. See, e.g., Tr.Ex.347 at p.10 (OFM defining maintenance level as the “projected expenditure level representing the estimated cost of providing currently authorized services in the ensuing biennium”); accord OFM’s August 2013 edition, A Guide To The Washington State Budget Process at p.11, available at <http://www.ofm.wa.gov/reports/budgetprocess.pdf>.*

³⁹ *Supra Part II.B of this filing; cf. supra footnote 24.*

the 2013-15 budget will be \$7,279 in 2013-14 and \$7,646 in 2014-15.⁴⁰

At that under \$400/year rate of increase, the previously noted \$12,701 per pupil finish line will not be crossed until the 2028-29 school year (if there is no inflation or capital needs).

Moreover, the State's "\$982 million" increase is not what that simple statement makes it appear. For example, State budget documents acknowledge that after accounting for that budget's corresponding "savings" (non-euphemistically known as cuts), the net biennium increase was only \$649 million (under \$325 million each year).⁴¹

⁴⁰ 2013-15 Budget Overview (see Appx.A) at p.6. OSPI's per pupil data, however, paints an even bleaker picture, showing 2008-09 State funding (on which the trial in this case was based) at \$6,862/pupil, and estimated 2013-14 State allocations at even less: \$6,817/pupil. See 2013 OSPI Per Pupil Funding Chart (see Appx.A) at line "Per Pupil Funding (Grand Total)".

⁴¹ 2013-15 OPR Budget Detail (see Appx.A) at pp.183-184. That biennium budget has over \$381 million in K-12 funding shifts and cuts (euphemistically called "savings and reductions"). See State's 2013 Post-Budget Filing, attached report at p.10; see also 2013-15 K-12 Budget Overview (see Appx.A) at p.4. For example: Striking payment of the 2013-14 and 2014-15 cost-of-living adjustments for K-12 school staff mandated by I-732 (**\$295.5 million**) [2013-15 Budget Detail (see Appx.A) at p.202n.1; 2013-15 OPR Budget Detail (see Appx.A) at p.205n.1; 2013-15 K-12 Budget Overview (see Appx.A) at p.4]; Striking payment of the inflation adjustments required by RCW 28A.405.415 for bonuses to teachers and counselors who earn National Board certification (**\$3.0 million**) [2013-15 Budget Detail (see Appx.A) at p.197n.1; 2013-15 OPR Budget Detail (see Appx.A) at p.200n.1; 2013-15 K-12 Budget Overview (see Appx.A) at p.4]; Eliminating some prototypical school model "hold harmless" funding (**\$24.7 million**) [2013-15 Budget Detail (see Appx.A) at p.186n.3; 2013-15 OPR Budget Detail (see Appx.A) at p.189n.3; 2013-15 K-12 Budget Overview (see Appx.A) at 4]; Eliminating the State's Navigation 101 college & career readiness program (**\$5.0 million**) [2013-15 Budget Detail (see Appx.A) at pp.182 & 184n.15; 2013-15 OPR Budget Detail (see Appx.A) at 185 & 187n.15]; Reducing and consolidating State grants and programs, e.g., consolidation of Readiness to Learn into LAP (**\$6.5 million**) [ESHB 2261 broadened the program of basic education, including increasing instructional hours from 1,000 to 1,080 for grades 7-12 to accommodate the new "Core 24" requirements. McCleary, 173 Wn.2d at 506. The State increased funding for some programs, including

Moreover, even though part of ESHB 2261’s “promising” reform was its assurance that no new requirements would be imposed on school districts without an accompanying increase in resources,⁴² the State has done otherwise – imposing additional costs on its public schools without corresponding funding. For example:

- ESSB 5946 (“Educational Outcomes”): Over \$24 million of mandates on school districts; unfunded.⁴³

LAP. However, although LAP funding increased, school districts must now use LAP resources to fund other programs that the legislature cut. For example, the legislature eliminated funding for the Readiness to Learn Program, which served at-risk students through grade 8 and promoted early intervention and dropout reduction. See 2013-15 Budget Detail (see Appx.A) at pp.197-198n.11; 2013-15 OPR Budget Detail (see Appx.A) at pp.200-201n.11. Districts must now choose whether to implement LAP according to the legislature’s funded staffing ratios, or backfill the legislature’s cuts to programs that it calls “consolidated.” Id.].

⁴² *Laws of 2009, ch. 548, §112(1) (ESHB 2261).*

⁴³ *E.g., screening assessments for at-risk readers in grades K-4 (costs school districts \$1.9 million; \$0 funded) [2013 OSPI Fiscal Note for SB 5946 (SPI) (see Appx.A) at p.6 (Section 102) (\$8 per student, with estimate of 240,000 additional assessments not currently funded)]; professional development & teacher training (costs school districts \$5.7 million; \$0 funded) [2013 OSPI Fiscal Note for SB 5946 (SDF) (see Appx.A) at p.8 (Section 103)]; 4th grade placement conferences (costs school districts \$1.0 million; \$0 funded) [2013 OSPI Fiscal Note for SB 5946 (SDF) (see Appx.A) at p.6 (Section 105)]; professional training to identify and support students with behavioral problems (costs school districts \$2.0 million; \$0 funded) [2013 OSPI Fiscal Note for SB 5946 (SDF) (see Appx.A) at p.8 (Section 201)]; services and reengagement plans for expelled or suspended students (costs school districts \$14.0 million; \$0 funded) [2013 OSPI Fiscal Note for SB 5946 (SPI) (see Appx.A) at Table (SB 5946, Sections 301-309 – Student Discipline) (at last line, “Estimated Impact for Local School Districts”, OSPI identifies local costs ranging between \$4.4 million and \$29.9 million; using an estimate that all expelled students and 25% of long term suspended students require services, local cost would be \$14.0 million, with no funding provided)].*

- ESHB 1450 (“K-12 Education-Assessments”): Over \$11 million of mandates regarding alignment with common core standards; unfunded.⁴⁴
- E2SSB 6696 (“Education Reform”): Over \$30 million this upcoming biennium for teacher evaluations; only half funded.⁴⁵

In short, plaintiffs acknowledge the State has made some net progress moving in the general direction of the 2018 finish line for full compliance with the State’s ample funding mandate under Article IX, §1. But “some net progress moving in the general direction of” that finish line is not what this Court Ordered. This Court Ordered the State’s 2013 filing to demonstrate *steady, real, and measurable* progress crossing that finish line by 2018.⁴⁶ The State’s 2013 filing did not do that. *See also* Appx.B.

B. Defendant’s School Salary “Restoration” Claim Falls Short Of A Detailed Plan Or Steady Progress To Full Market Rate Funding By 2018

“I’ve tried to get principals to be a principal for what the state gives us but ... I can’t get anybody to do that.... It’s nowhere close to what the market value is for our principals, not even—it’s ridiculous.”

Colville School District Superintendent’s trial testimony [as quoted by this Court’s January 2012 decision]⁴⁷

⁴⁴ *Imposed implementation costs on districts of \$17.9 million, including \$11.4 million in the 2013-15 biennium; \$0 funded. 2011 OSPI Common Core Report (see Appx.A) at p.17.*

⁴⁵ *2013-15 Teacher Evaluation Costs (see Appx.A) at p.1; 2013-15 Budget Detail (see Appx.A) at pp.197-198n.5; 2013-15 OPR Budget Detail (see Appx.A) at pp.200-201n.5.*

⁴⁶ *Supra Part II.C of this filing; cf. supra footnotes 26 & 27.*

⁴⁷ McCleary, 173 Wn.2d at 536 (brackets omitted).

1. The School Salary Funding Finish Line Established By The State In This Case.

This Court's January 2012 decision emphasized that school salaries are one of the "major areas of underfunding" highlighted by the evidence in this case.⁴⁸

This Court held that substantial evidence shows the State has "consistently underfunded staff salaries and benefits" – providing "far short of the actual cost of recruiting and retaining competent teachers, administrators, and staff."⁴⁹ It reiterated "[t]his is the second time in recent years that we have noted that state funding does not approach the true cost of paying salaries for administrators and other staff."⁵⁰ And it cited State studies which have been confirming for decades that the State's salary funding levels are below market requirements.⁵¹

One of the "promising" parts of ESHB 2261 expressly called out by this Court's January 2012 decision was accordingly ESHB 2261's acknowledgment that attracting and retaining high quality educators required increased investments – and the legislature's corresponding

⁴⁸ McCleary, 173 Wn.2d at 533.

⁴⁹ McCleary, 173 Wn.2d at 535-536; see also at 514 ("We will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence" and "Unchallenged findings of fact are verities on appeal.") (internal quote marks omitted).

⁵⁰ McCleary, 173 Wn.2d at 536n.29 (underline added).

⁵¹ E.g., McCleary, 173 Wn.2d at 493-494 (noting the 1995 fiscal report's conclusion that the State provides "inadequate funding for administrative salaries"), at 508 (quoting QEC findings that "funding studies have already confirmed ... that our salary allocations are no longer consistent with market requirements") & at 532 (QEC findings that studies confirm State salary allocations are not consistent with market requirements).

declaration in ESHB 2261 that it would therefore “enhance the current salary allocation model” upon receipt of the compensation work group’s 2012 report.⁵²

ESHB 2261’s compensation work group submitted its Final Report in June 2012.⁵³ It concluded that State funding of market rate salaries in the State’s K-12 public schools will require an increased investment of over \$2 billion/year on top of the annual inflation increases put into law by the voters when they passed Initiative 732.⁵⁴ That ESHB 2261 Final Report concluded that “immediate implementation” of full salary funding was needed “in order to attract and retain the highest quality educators to Washington schools through full funding of competitive salaries.”⁵⁵ As a backstop for three of the more expensive salary funding elements, the Final Report also provided an alternative 5-year plan for those three

⁵² *McCleary*, 173 Wn.2d at 507; see also at 510 (noting SHB 2776 expedited report’s deadline to be sooner than its original December 2012 deadline).

⁵³ 2012 Compensation Final Report (see Appx.A) at p.1.

⁵⁴ 2012 Compensation Final Report (see Appx.A) at p.20 (Ex. 3: \$2,064,170,000 Additional Annual Cost with 2011-12 school year data) & at p.116 (all of the Final Report’s recommendations assume I-732 cost-of-living adjustment will be applied to K-12 salaries on an annual basis to maintain the comparable salary levels). Exhibit 23 (at p.48) shows that the increased staffing levels provided under ESHB 2261’s reforms result in an additional \$927,175,000/year cost in 2012 dollars [\$4,562,137,000 - \$3,634,962,000 = \$927,175,000], which makes the total school salary funding increase \$2,991,345,000 [\$2,064,170,000 + \$927,175,000 = \$2,991,345,000] plus the previously noted I-732 cost-of-living adjustments.

⁵⁵ 2012 Compensation Final Report (see Appx.A) at p.45; accord at p.44 (fully fund “immediately”) & p.50 (fully fund “immediately”).

elements commencing in the 2013-14 school year with full implementation by the 2017-18 school year.⁵⁶

In short, ESHB 2261's "promising" reform process studied and determined that the additional State funding amount needed to amply fund our State's K-12 school salaries is over \$2 billion/year (in 2012 dollars), plus the I-732 cost-of-living adjustments each year to maintain those salaries at market. This **over \$2 billion/year** amount confirms the very long distance State funding must travel by 2018 to cross the finish line for ESHB 2261's promised school salary funding.

2. The State's School Salary Funding "Plan" & "Progress".

(a) *The State's "Detailed Plan"*.

The State's 2013 filing does not submit any plan or any periodic benchmarks for completing ESHB 2261's promised enhancement of school salary funding by 2018.

Instead, defendant completely disregarded the "detailed plan" requirement in the Supreme Court Order.⁵⁷ With respect to the salary underfunding elephant in the room, the State's 2013 filing leaves the

⁵⁶ 2012 Compensation Final Report (see Appx.A) at pp.50, 57 (Ex. 30: 5-year phase-in plan ending with \$1.592 billion in the 2017-18 school year for the first three rows of Ex.3 (at p.20) (Certificated Administrative, Certificated Instructional, and Classified staff) – thus excluding the over \$638,000,000 cost (in 2012 dollars) for funding rows 4-8 of Ex.3).

⁵⁷ *Supra Part II.B of this filing; cf. supra footnote 24.*

“promising” reform of ESHB 2261 as exactly that: empty “promising” instead of actual “doing”.⁵⁸

(b) The State’s “Progress”.

The State’s 2013 filing acknowledges there was no progress increasing school salary funding above the level declared unconstitutional:

- **Restoration:** First, the 2013 legislature “restored” State salary funding to the level previously declared unconstitutionally low in this case. It did that by suspending the cut it made after the February 2010 Final Judgment (1.9% for employees other than administrators; 3.0% for administrators).⁵⁹ The State’s budget documents report this “restoration” cost \$166 million.⁶⁰
- **Cut:** Then the 2013 legislature struck payment of the 4.3% increase I-732 had mandated for the 2013-14 and 2014-15 school years.⁶¹ The State’s budget documents report this cut “saved” the State over \$295 million.⁶²

⁵⁸ As the ESHB 2261 workgroup’s Final Report accurately summarized about ESHB 2261, without full funding, “the promising reforms will be just that – a promise.” 2012 Compensation Final Report (see Appx.A) at p.22 (“the promising reforms [of ESHB 2261] will be just that – a promise – unless the Legislature fully funds the basic education program through the prototypical schools funding model and provides comparable wages as part of the state salary allocations”).

⁵⁹ State’s 2013 Post-Budget Filing, attached report at p.17 (“Compensation Restoration. The state restored the 1.9 percent salary reduction in state allocations for certificated instructional and classified salaries and the 3.0 percent reduction in state allocations for certificated administrator salaries. No additional policy increases were made to the existing salary allocation model in the 2013-15 operating budget.”).

⁶⁰ 2013-15 Budget Overview (see Appx.A) at p.12 (Employee Compensation Increases: Restore Salary Reductions for K-12 Public School Employees - \$166 Million).

⁶¹ 2013-15 Budget Detail (see Appx.A) at p.202 (Compensation Adjustments: \$295,467,000 reduction: “The Initiative 732 cost-of-living adjustments are suspended for the 2013-15 biennium. ... These cost-of-living increases are estimated at 2.5 percent for the 2013-14 school year and 1.8 percent for the 2014-15 school year.”). 2.5% + 1.8% = 4.3%. Accord 2013-15 OPR Budget Detail (Appx.A) at p.205n.1.

⁶² *Supra* footnote 61; accord State’s 2013 Post-Budget Filing, attached report at p.10 (2013-15 budget includes “K-12 savings from the suspension of I-732 total[ing] \$295.5 million”).

Washington voters adopted Initiative 732 by a 63% - 37% vote.⁶³

It enacted into Washington law a clear principle:

Providing quality education for all children in Washington requires well-qualified and experienced teachers and other school employees. However, salaries for educators have not kept up with the increased cost-of-living in the state. The failure to keep up with inflation threatens Washington's ability to compete with other states to attract first-rate teachers to Washington classrooms and to keep well-qualified educators from leaving for other professions. The state must provide a fair and reasonable cost-of-living increase to help ensure that the state attracts and keeps the best teachers and school employees for the children of Washington.

Initiative Measure 732, section 1.

Adding 1.9% (or 3.0%) at the same time you take 4.3% is not an increase. Giving \$166 (million) at the same time you take \$295 (million) is not an increase.

In short, the State's 2013 filing demonstrates no progress increasing K-12 school salary funding levels above those previously declared unconstitutionally low by the February 2010 Final Judgment in this case. That does not demonstrate the type of *steady, real, and measurable* progress this Court Ordered.⁶⁴

⁶³ Office of the Secretary of State, Elections & Voting: Initiatives to the People, available at http://www.sos.wa.gov/elections/initiatives/statistics_initiatives.aspx (Initiative 732 votes over 1.5 million for, 893,000 against).

⁶⁴ *Supra Part II.C of this filing; cf. supra footnotes 26 & 27.*

C. **Defendant’s Transportation “Full Funding” Claim Stops Short Of Steady Progress To Full Article IX, §1 Compliance By 2018**

*Suit the action to the word,
the word to the action.*
William Shakespeare⁶⁵

1. **The Transportation Funding Shortfall Established By The State In This Case.**

This Court’s January 2012 decision emphasized that student to/from transportation is another one of the “major areas of underfunding” highlighted by the evidence in this case⁶⁶ – and one which has “a tangible effect on student safety.”⁶⁷

This Court also noted the legislature created the Quality Education Council (QEC) to “oversee the phase-in of ESHB 2261”.⁶⁸ The QEC concluded that full funding of pupil transportation required a \$150 million increase for the 2011-12 school year, and an **over \$170 million** increase by the 2017-18 school year.⁶⁹ That additional \$170 million/year amount

⁶⁵ William Shakespeare, Hamlet, Act 3 Scene 2 (1604), available at <http://shakespeare.mit.edu/hamlet/full.html>.

⁶⁶ McCleary, 173 Wn.2d at 533; see also at 489-490, 496.

⁶⁷ McCleary, 173 Wn.2d at 535n.27.

⁶⁸ McCleary, 173 Wn.2d at 508.

⁶⁹ 2010 QEC Report (see Appx.A) at p.4 (2011-12 figure) & p.20 Cost Summary (2017-18 school year figure at Student Transportation, line 1). That rising cost is not surprising given the State’s own evidence at trial confirmed that, especially in light of fuel costs, the State’s transportation underfunding has been rapidly growing every year. E.g., underfunding of up to \$114 million per year in 2004-05 [McCleary, 173 Wn.2d at 502-503, citing Tr.Ex.357 at p.33 (State’s 2006 study relying on 2004-2005 data)], rising to \$125 million and \$127 million in 2006-07 and 2007-08 [McCleary, 173 Wn.2d at 535, citing Tr.Ex.68 at p.53 & Tr.Ex.1579 at p.80; see also Tr.Ex.356, at p.64 & pp.69-74 (underfunding by school district)], and \$130 million in 2009-10 [McCleary, 173 Wn.2d at 509 (citing 2010 QEC Report (see Appx.A) at pp.3-4)].

sets a minimum finish line for fully funding the actual cost of to/from pupil transportation under ESHB 2261 by 2018.

2. The State’s Transportation “Plan” and “Progress”.

(a) The State’s “Detailed Plan”.

The State’s 2013 filing does not submit any plan to cross that \$170 million/year finish line by 2018. Instead, it pulls back the finish line to \$109 million/year, and says the 2013-15 biennium budget will cross it.⁷⁰

Plaintiffs do not believe that is the type of “detailed plan” for full Article IX, §1 compliance this Court’s Order had in mind.⁷¹

(b) The State’s “Progress”.

The State asserts that its \$109 million transportation funding increase for the 2014-15 school year will constitute “full implementation”

⁷⁰ State’s 2013 Post-Budget Filing, attached report at pp.12-13 & p.21 (showing \$109.7 million for school year 2014-15).

⁷¹ *Supra Part II.B of this filing; cf. supra footnote 24. The State’s failure to sufficiently plan with respect to pupil transportation costs is, unfortunately, not entirely surprising – for its actions on transportation funding in the past have similarly fallen short. For example, the 1977 legislature promised in the Basic Education Act that full transportation funding would be implemented by the 1980-81 school year. Tr.Ex.357 at Summary (“Study Background”); RP:1375:4-1376:20; former RCW 28A.41.160. Thirty years of underfunding later, the legislature now points to ESHB 2261, wherein “a new transportation funding formula was adopted, with a phase-in deadline of 2013.” McCleary, 173 Wn.2d at 507; Laws of 2009, ch. 548, §§304-311 (ESHB 2261); RCW 28A.160.192; see also McCleary, 173 Wn.2d at 509; Laws of 2010, ch. 236, §8(1) (SHB 2776).*

of the State's Article IX, §1 ample funding obligation with respect to pupil transportation.⁷² The State's actions, however, do not match its words.

As the State knows, the funding formula upon which it bases its "full funding" assertion does not fund a school district's current transportation costs in any given school year. Instead, it's based on the past school year's fuel prices and costs.⁷³

Another aspect of that transportation formula is it funds the lesser of (1) a district's actual expense last year or (2) a Statewide average expense last year.⁷⁴ The State's own analysis shows the result of its regression/law of averages approach: for 113 districts this year's funding equals their transportation costs last year, for 56 districts it equals at least 90% of their transportation costs last year, and for 119 districts it equals less than 90% of their transportation costs last year.⁷⁵ In other words, the

⁷² *State's 2013 Post-Budget Filing, attached report at pp.12-13 & p.21 (\$109.7 million for school year 2014-15).*

⁷³ *RCW 28A.160.192(2)(a) (calculations based on previous year transportation costs). A payment system based on prior year expenditures underfunds districts because it does not account for current increasing costs, such as fuel prices. Instead, it forces districts to cut routes or rely on local money to fill State funding shortfalls. Those reductions then get locked in under the new formula, which only recognizes prior year expenditures.*

⁷⁴ *The State's "full funding" formula is even more restrictive in that it funds the lesser of a school district's previous year expenditures, or a district's allocation based on a regression analysis using previous year figures. RCW 28A.160.192(1)(b) & (2)(a) ("Annually, each school district shall receive the lesser of the previous school year's pupil transportation operations allocation, or the total of allowable pupil transportation expenditures identified on the previous school year's final expenditure report to the state plus district indirect expenses using the federal restricted indirect rate as calculated in the district annual financial report"); WAC 392-141-360 (allocation based on regression analysis).*

⁷⁵ *2013 OSPI Transportation Update (see Appx.A) at p.1.*

State's own analysis confirms that for the majority of Washington school districts, the "full funding" asserted by the State's filing would not even cover last year's pupil transportation costs.

Especially in light of the \$170 million/year shortfall forecast by the QEC, the State's position that \$109 million/year "fully funds" pupil transportation has the same tautological logic as the State's prior claim that it was fully funding basic education because the legislature enacted a bill (the Basic Education Act) that said it was. But this Court's January 2012 decision rejected that type of logic:

We agree with the trial court's conclusion that the legislature's definition of full funding amounts to little more than a tautology. If the State's funding formulas provide only a portion of what it actually costs a school to ... get kids to school, ... the legislature cannot maintain that it is fully funding basic education through its funding formulas.⁷⁶

The State's increasing transportation funding by \$109 million in the 2014-15 school year is progress. But declaring "mission accomplished" and stopping there does not constitute *steady, real, and measurable* progress to cross the previously noted \$170 million/year finish line by 2018.

When a punt returner catches the ball on the 5-yard line and runs it back across midfield to the 40, that's progress. But his calling the 40-yard

⁷⁶ McCleary, 173 Wn.2d at 532.

marker “the goal line” doesn’t make his progress a touchdown. Similarly here, the State’s increasing transportation funding by \$109 million in the 2014-15 school year is progress. But taking a knee on the 40 stops short of reaching full compliance with Article IX, §1 by 2018.

D. Defendant’s MSOC Movement Falls Short Of Steady Progress To Full Article IX, §1 Compliance By 2018

“woefully underfunded”

Jennifer Priddy, OSPI Assistant Superintendent of Financial Resources trial testimony [as quoted by this Court’s January 2012 decision]⁷⁷

1. The MSOC Finish Line Established By The State In This Case.

This Court’s January 2012 decision emphasized that school materials, supplies, and operating costs are another one of the “major areas of underfunding” highlighted by the evidence in this case (“MSOCs”, f/k/a “NERCs”).⁷⁸ “Massive underfunding” was this Court’s term.⁷⁹

Last year, the legislature assured this Court that it had established the Joint Task Force on Education Funding (JTFEF) to fulfill its

⁷⁷ *McCleary*, 173 Wn.2d at 534; see also at 534n.26 (“The chair of the Basic Education Finance Task Force said that Jennifer Priddy ‘would be, if not the foremost expert and most knowledgeable individual on state education finance matters, she would certainly be among the most—those with the most expertise and knowledge.’”).

⁷⁸ *McCleary*, 173 Wn.2d at 533.

⁷⁹ *McCleary*, 173 Wn.2d at 534 (“Massive underfunding of NERCs continued during the 2007-08 school year. [Tr.]Ex.616”). This Court reiterated that the State’s own studies confirm “operating costs are woefully underfunded” [173 Wn.2d at 508 and 532-33, referencing the 2010 QEC Report (see Appx.A)], and the State provides “inadequate funding for basic operational costs such as books and utilities” [173 Wn.2d at 494, citing Tr.Ex.1376 at pp.52-53].

fact-gathering function, inform legislative policy-setting, and “develop and recommend a permanent and reliable funding mechanism for implementing the basic education reforms of ESHB 2261 and SHB 2776 by 2018.”⁸⁰

The Task Force’s Final Report concluded that fully funding SHB 2776’s MSOC target would require the State to increase funding (above current maintenance levels) by over \$1.4 billion in the 2015-17 biennium (averaging more than **\$700 million/year**), and over \$1.5 billion in the 2017-19 biennium (averaging more than **\$750 million/year**).⁸¹ (The State’s own documents acknowledge, moreover, that those MSOC funding levels are based on what districts were able to spend six years ago with inadequate State funding, instead of what ample MSOC funding would be today.⁸²)

⁸⁰ *State’s 2012 Post-Budget Filing at p.8; see also at pp.32-33.*

⁸¹ *2012 Joint Task Force Final Report (see Appx.A) at p.3, Table 1; see also 2012 OPR SHB 2776 Cost Report (see Appx.A) (OPR’s fiscal year breakdowns for the proposed biennial increases in the JTFEF Final Report, listing estimated MSOC costs of over \$665 million/year in 2015-16, over \$745 million/year in 2016-17, and over \$766 million/year in 2017-18).*

⁸² *The QEC concluded that the 2015-16 deadline set by SHB 2776 requires State MSOC funding to be increased by over \$682 million/year by 2015-16. 2010 QEC Report (see Appx.A) at p.20. Even that higher MSOC figure, however, was based on what districts were able to spend in the 2007-08 school year with inadequate State funding, instead of what ample MSOC funding would be today. See, e.g., 2009 Funding Formula Final Report (see Appx.A) at p.56 (“The current analysis on the MSOC categories is based on a survey of school district expenditures in these areas. Because of funding pressures in districts, the current funding levels may not reflect what ought to be spent for these items.”); see also Tr.Ex.695 at slide 25 (State OSPI conclusion: over **\$754 million/year** necessary for State MSOC funding increase). [The State’s trial court testimony had established that despite inadequate State funding, school districts in*

In short, the Task Force invoked by the State’s 2012 filing concluded that a bare *minimum* finish line for funding ESHB 2261’s “promising” MSOC reform is over **\$750 million/year** for 2017-18.

2. The State’s MSOC “Plan” and “Progress”.

(a) *The State’s “Detailed Plan”.*

The State’s 2013 filing does not submit a detailed plan to provide constitutionally ample MSOC funding levels by 2018—or even to cross its Task Force’s *minimum* finish line of over **\$750 million/year** in 2017-18.

The 2013-15 budget increases MSOC funding levels **\$152 million** in fiscal year 2013-14, and **\$222 million** in 2014-15.⁸³ The State estimates that for the next biennium, the cost “is approximately \$857 million to reach full implementation of MSOC by school year 2015-2016”.⁸⁴ That’s about **\$428 million/year**.⁸⁵

2007-08 had to spend \$585 million/year more on MSOCs (NERCs) than the State funded. Tr.Ex.616. The Court’s January 2012 opinion mistakenly referred to that funding gap as approximately \$500 million biennial underfunding. 173 Wn.2d at 533 & 544. As noted, however, the State’s testimony (and Tr.Ex.616) stated an annual underfunding amount.]

⁸³ 2013-15 Budget Overview (see Appx.A) at p.6 (chart, line 1).

⁸⁴ State’s 2013 Post-Budget Filing, attached report at p.12. *The legislature’s MSOC estimate of \$857 million needed for the 2015-17 biennium can be interpreted in one of two ways: as about \$428 million/year above current annual maintenance (which would be significantly below the JTFEF’s target of more than \$700 million/year during the 2015-17 biennium), or about \$428 million above fiscal year 2014-15 maintenance (which may approach the JTFEF’s target). In either circumstance, no funding plan is presented to cross the JTFEF’s minimum finish line of over \$750 million/year in 2017-18.*

⁸⁵ *Estimating the size of the shortfall in the next biennium is not a plan. Moreover, as this Court previously held in this case, funding levels “based on a snapshot” of historic expenditures do not equal constitutionally ample funding. McCleary, 173 Wn.2d at 530. Unless the State’s MSOCs formula “correlates” to constitutionally “ample” funding, a*

The State, however, presents no plan in its 2013 filing to cross the Task Force's *minimum* finish line of over **\$750 million/year** in 2017-18. The State's 2013 filing does not lay out a "detailed plan" to provide constitutionally ample MSOC funding levels by 2018.⁸⁶

(b) The State's "Progress".

The State's 2013 filing shows some MSOC funding progress. But the State's aiming to hit a funding target based on what districts were able to spend six years ago with inadequate State funding is not steady progress towards providing ample MSOC funding levels by 2018.

Instead, the State's 2013 filing reports an increase to 28% of that expense-six-years-ago target in 2013-14, and another incremental 5% step to 33% in 2014-15.⁸⁷ This means the legislature has left itself a **67% gap** to fill in 2015-16. Kicking this can (a 67% shortfall) to the next year is not steady progress.⁸⁸ And even if the State funds this amount in

claim that fully funding the historic target used in SHB 2776 satisfies Article IX, §1 "amounts to little more than a tautology." 173 Wn.2d at 532 (also noting that "[e]ven assuming the funding formulas represented the actual costs of the basic education program when the legislature adopted them ... the same is simply not true today").

⁸⁶ *Supra Part II.B of this filing; cf. supra footnote 24.*

⁸⁷ *State's 2013 Post-Budget Filing, attached report at p.21.*

⁸⁸ *See, e.g., McCleary, 173 Wn.2d at 545 ("The operating budget provided some funding for the all-day kindergarten program, but it expanded the program to only 21 percent of school districts in 2011-12 and to only 22 percent of school districts in 2012-13. Needless to say, a one-percent per year increase does not put the State on the path to statewide implementation of all-day kindergarten by the 2017-18 school year.")*

2015-16, that expense-six-years-ago target is not constitutionally “ample” MSOC funding.⁸⁹

This Court Ordered the State’s 2013 filing to demonstrate *steady*, *real*, and *measurable* progress to amply fund MSOCs by 2018.⁹⁰ The State’s 2013 filing did not do that.

E. Defendant’s Full-Day Kindergarten Claim Falls Short Of Steady Progress To Full Compliance By 2018

“Our elementary schools are already overcrowded and one of the unfortunate consequences of overcrowding is that we simply don’t have the additional classrooms available to make full-day kindergarten happen.”

Mukilteo School District Superintendent
Marci Larsen⁹¹

1. The Full-Day Kindergarten Finish Line Established By The State.

One of the “promising” parts of ESHB 2261 that this Court called out in its January 2012 decision was the legislature’s designation of full-day kindergarten as part of a “basic education”,⁹² and the legislature’s corresponding mandate in SHB 2776 for “full-day kindergarten to reach statewide implementation by the 2017-18 school year.”⁹³

⁸⁹ See *supra* footnote 85.

⁹⁰ *Supra* Part II.C of this filing; cf. *supra* footnotes 26 & 27.

⁹¹ As quoted in The Herald: “State Boosts Funding For All-Day Kindergarten” (Aug. 6, 2013), available at <http://www.heraldnet.com/article/20130806/NEWS01/708069935>.

⁹² *McCleary*, 173 Wn.2d at 506 & 526n.22.

⁹³ *McCleary*, 173 Wn.2d at 510.

The legislature has thus drawn a clear basic education finish line: full-day kindergarten for all students by the 2017-18 school year.

2. The State’s Full-Day Kindergarten “Plan” and “Progress”.

(a) The State’s “Detailed Plan”.

The State’s 2013 filing did not submit any plan or any periodic benchmarks for completing ESHB 2261’s “promising” reform of full-day kindergarten for all children by 2018.

Instead, defendant simply disregarded the “detailed plan” requirement in the Supreme Court Order.⁹⁴

(b) The State’s “Progress”.

The State’s 2013 filing reports that the biennium budget’s almost \$90 million for full-day kindergarten increases full-day kindergarten enrollment from 22% to 43.75%.⁹⁵

Some eligible schools, however, do not have the additional classrooms required to hold additional kindergarteners.⁹⁶ Starting to phase in funding for this reform’s operating costs is good. But the capital

⁹⁴ *Supra Part II.B of this filing; cf. supra footnote 24.*

⁹⁵ *State’s 2013 Post-Budget Filing, attached report at p.14. (More specifically, that “almost \$90 million/biennium” is claimed to be \$89.8 million, or \$44.9 million/year.)*

⁹⁶ The Herald: “*State Boosts Funding For All-Day Kindergarten*” (Aug. 6, 2013), available at <http://www.heraldnet.com/article/20130806/NEWS01/708069935>; The Seattle Times: “*Extra state aid for kindergarten mixed blessing for districts*” (Sept. 2, 2013), available at http://seattletimes.com/html/localnews/2021743055_alldaykindergartenxml.html. Doubling the number of 5 and 6-year-olds in the schools for the full day not only requires additional classrooms, but also requires additional bathrooms, lunchroom space, library space, etc.

expenditures needed to provide these full-day kindergarten classes cannot be ignored. As the State knows, its corresponding facilities report concluded that providing full-day kindergarten to all eligible students by the 2017-18 school year will require over \$105 million of capital expenditures.⁹⁷

Thus, while the State's 2013 filing asserts it will take another \$316 million to fully implement full-day kindergarten,⁹⁸ the State's corresponding facilities report shows the cost is instead over \$420 million (\$316 million + \$105 million = over \$420 million). At the pace reported in the State's 2013 filing (\$90 million this biennium), the State will cross the full-day-kindergarten-for-all finish line in the 2023-2025 biennium (if there is zero inflation this coming decade).

That's not *steady*, *real*, and *measurable* progress towards crossing the finish line by 2018.⁹⁹

⁹⁷ 2013 OSPI Facilities Capacity Report (see Appx.A) at p.13.

⁹⁸ State's 2013 Post-Budget Filing, attached report at p.14.

⁹⁹ *Supra Part II.C of this filing; cf. supra footnotes 26 & 27.*

F. Defendant’s Class Size Reduction Claim Falls Short Of Steady Progress To Full Compliance By 2018

“The 1 million children in our state’s public schools can ill afford more delay. They get only one shot at their education.”

Mary Jean Ryan, Chair of the Washington State Board of Education¹⁰⁰

1. The K-3 Class Size Finish Line Established By The State.

Another “promising” part of ESHB 2261 called out by this Court’s January 2012 decision was the legislature’s acknowledgement that increased investments to reduce K-3 class sizes were required, and the legislature’s corresponding mandate in SHB 2776 that “reductions in K-3 class sizes begin during the 2011-13 biennium, with class sizes to be reduced to 17 students per classroom by the 2017-18 school year.”¹⁰¹

The legislature has thus drawn a clear finish line: 17-student classrooms for kindergarteners through third graders by the 2017-18 school year.

2. The State’s K-3 Class Size Reduction “Plan” and “Progress”.

(a) The State’s “Detailed Plan”.

The State’s 2013 filing did not submit any plan or any periodic benchmarks for completing ESHB 2261’s “promising” reform of

¹⁰⁰ *Tr.Ex.238, last paragraph; RP 2431:9-20.*

¹⁰¹ *McCleary, 173 Wn.2d at 510.*

17-student classrooms for all kindergarten through third grade students by 2018.

Instead, defendant simply disregarded the “detailed plan” requirement in the Supreme Court Order.¹⁰²

(b) The State’s “Progress”.

The State’s 2013 filing notes that the 2013-15 budget adds almost \$104 million for K-3 class size reductions.¹⁰³ \$104 million is better than nothing. But it does not fully restore the 2011-13 class size funding cuts called out in this Court’s January 2012 decision.¹⁰⁴

The effect of the 2013-15 budget’s failure to even fill the hole dug by the prior budget’s class size funding cuts is borne out in the narrow scope of class size reductions the State’s 2013 filing is left to claim. Although the class size finish line set by the legislature is a maximum of 17 students per teacher in all K-3 classes by the 2017-18 school year,¹⁰⁵

¹⁰² *Supra Part II.B of this filing; cf. supra footnote 24.*

¹⁰³ *State’s 2013 Post-Budget Filing, attached report at pp.13 & 21 (\$103.6 million/biennium total).*

¹⁰⁴ *McCleary, 173 Wn.2d at 545 (noting the 2011-13 operating budget “provided \$33.6 million in funding to reduce the class sizes in K-3, but at the same time it cut \$214 million from ... reducing class sizes in K-4, resulting in a significant net loss in K-3 class reductions”). Dividing the \$214 million by the five grades the funds were supposed to serve (K-4) provides \$42.8 million per grade for class size reductions. Multiplying the \$42.8 million by 4 (representing grades K-3), this means the State cut \$171.2 million from class size reductions for grades K-3 in the 2011-13 operating budget. The State’s allocations for K-3 class size reductions in the 2013-15 operating budget still result in a net loss of over \$30 million (\$33.6 million - \$171.2 million + \$103.6 million = -\$34 million).*

¹⁰⁵ *McCleary, 173 Wn.2d at 510.*

the State's 2013 filing admits the 2013-15 budget will only reduce class sizes from 20.85 students to 20.30 students; and *only* in high poverty schools; and *only* for kindergarteners and first graders in those schools.¹⁰⁶

There are approximately 591 "high poverty" elementary schools in Washington.¹⁰⁷ All low income kindergarteners and first graders in our State's other approximately 709 public elementary schools are excluded.¹⁰⁸

There are approximately 157,553 second and third graders in our State's public schools.¹⁰⁹ All of those second and third graders are excluded from the funding increase claimed in the State's 2013 filing.¹¹⁰

The State's 2013 filing acknowledges it will cost school districts at least another \$1.1 billion in operating costs to reach the 17-student class size finish line in the 2017-18 school year.¹¹¹ \$104 million/biennium is approximately 9% of that additional cost. At that \$104 million/biennium

¹⁰⁶ State's 2013 Post-Budget Filing, attached report at p.21.

¹⁰⁷ 2013 OSPI High Poverty Spreadsheet (see Appx.A) at cell E7.

¹⁰⁸ 2013 OSPI High Poverty Spreadsheet (see Appx.A) (calculated by adding all schools with numbers in column Y [schools with K-3 enrollment] and all schools with "no" in column E; to view column Y, select columns E and V, right click and select "unhide"). See also State's 2013 Post-Budget Filing, attached report at p.13.

¹⁰⁹ 2013 OSPI High Poverty Spreadsheet (see Appx.A) (sum of cells L7 and N7; to view columns L7 and N7, select columns E and V, right click and select "unhide").

¹¹⁰ State's 2013 Post-Budget Filing, attached report at p.21. The chart on p.21 shows that class sizes stay at the old 24.1 students per class for all 2nd and 3rd graders through the 2013-15 biennium.

¹¹¹ State's 2013 Post-Budget Filing, attached report at p.14.

pace, the State will not cross the K-3 class size finish line for operating costs until the 2035-37 biennium.

That rate of “progress” will leave some kindergartners today with kindergarteners of their own in classes of more than 17 students.

Smaller class sizes also require more classrooms. The State is well aware of this corresponding capital cost element of ESHB 2261’s K-3 class size reform. For example, the State’s 2012 survey of school building capacity limitations for 109 (of the State’s 295) school districts concluded that smaller K-3 class sizes require an additional 1,560 classrooms at a capital construction cost of at least \$599 million.¹¹² The State’s 2013 filing demonstrates no progress providing for any of the additional classrooms needed to provide this reform’s smaller K-3 class sizes by 2018.

In short, the State’s 2013 filing does not demonstrate *steady, real,* and *measurable* progress in crossing the K-3 class size finish line by 2018.¹¹³

¹¹² 2013 OSPI Facilities Capacity Report (see Appx.A) at pp.10, 15 & 17. According to OSPI estimates, a new classroom costs \$384,000. OSPI estimates a need for 1,560 additional classrooms to fully implement class size reductions in grades K-3 for just 109 (of the State’s 295) school districts. Multiplying the cost per classroom (\$384,000) by the expected number of new classrooms needed (1,560) = \$599 million.

¹¹³ *Supra Part II.C of this filing; cf. supra footnotes 26 & 27.*

G. Defendant Submits No Plan Or Steady Progress For ESHB 2261’s “Highly Capable Program”

“The current system isn’t designed well for those kinds of kids,... it bores them and they don’t learn very much, and they oftentimes more often than you would expect turn out to be the kids who drop out.”

Basic Education Finance Task Force member Senator Fred Jarrett’s trial court testimony explaining why the Task Force explicitly included a “fairly robust program” for gifted/advanced students¹¹⁴

1. The “Highly Capable Program” Finish Line.

This Court’s January 2012 decision expressly recognized that “ESHB 2261 broadened the instructional program of basic education by specifically adding ... the program for highly capable students.”¹¹⁵

The State has accordingly issued regulations requiring school districts to implement highly capable K-12 programs beginning this biennium.¹¹⁶

¹¹⁴ CP 4406:5-4407:22 (trial court designation of Jarrett Deposition).

¹¹⁵ McCleary, 173 Wn.2d at 506; again at 526n.22 (“ESHB 2261 expanded the program of basic education to include ... the highly capable program”).

¹¹⁶ E.g., WAC 392-170-012 (“For highly capable students, access to accelerated learning and enhanced instruction is access to a basic education”); WAC 392-170-030 (requiring school districts to submit a highly capable program report to the State every year); WAC 392-170-078 (mandating that “a continuum of services shall be provided to the student [in the district’s highly capable program] from K-12”); WAC 392-170-090 (requiring annual end of year reports to State); WAC 392-170-095 (highly capable program recordkeeping requirement).

2. The State’s Highly Capable Program “Plan” & “Progress”.

(a) The State’s “Detailed Plan”.

The State’s 2013 filing does not submit any plan or any periodic benchmarks for full funding of the highly capable program added by ESHB 2261.

Instead, defendant completely disregards the “detailed plan” requirement in the Supreme Court Order.¹¹⁷

(b) The State’s “Progress”.

The State’s 2013 filing does not claim any progress towards funding the highly capable program added by ESHB 2261.¹¹⁸

No progress is not the *steady*, *real*, and *measurable* progress this Court Ordered.¹¹⁹

¹¹⁷ *Supra Part II.B of this filing; cf. supra footnote 24.*

¹¹⁸ *Although Appendix D of the State’s 2013 filing implies prototypical school ratios have 2.16 hours of “additional time” for Highly Capable, the State’s filing does not claim it provided any funding for such “additional time”. (That’s because there was none. When the State did a funding-neutral translation of its pre-ESHB 2261 funding formula into a prototypical school model, the State simply used 2.16 hours to account for what its pre-ESHB 2261 formula paid for.) On a similar accounting classification note, while some State budget summaries list a \$149,000 “increase” for highly capable funding, that’s because they simply take \$149,000 of the “full-day kindergarten” amount claimed by the State’s court filing and account for it under a “highly capable” budget classification instead.*

¹¹⁹ *Supra Part II.C of this filing; cf. supra footnotes 26 & 27.*

H. **Elected Officials Cannot Escape Court Enforcement of a Citizen’s Constitutional Rights with “Separation of Powers” Innuendo**



“Like anyone else, the State is not free to walk away from judicial orders enforcing constitutional obligations.”

New Jersey Supreme Court¹²⁰

1. **Powers Are Separated to *Stop* – Not *Shelter* – Elected Officials’ Violation of Constitutional Rights.**

The American judiciary was made independent because it has the primary responsibility and duty to give force and effect to the Constitution.¹²¹ This Court’s January 2012 decision accordingly

¹²⁰ *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1024 (N.J. 2011) (ordering State to fully fund School Funding Reform Act of 2008 after noting that the State was “renegeing on the representations it made” to the court by cutting promised funding).

¹²¹ E.g., *Lake View School District No. 25 v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002), cert. denied, 538 U.S. 1035 (2003) (“This court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education. As Justice Hugo Black once sagely advised: ‘[T]he judiciary was made independent because it has ... the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches.’ Hugo L. Black, *The Bill of Rights*, 35 N.Y.U.L.REV. 865, 870 (1960)”); accord *McCleary*, 173 Wn.2d at 515 (“The judiciary has the primary responsibility for interpreting article IX, section 1 to

confirmed that one of the independent judiciary’s central roles is to serve as “a check on the activities of another branch” – even when the Court’s decision “is contrary to the view of the constitution taken by another branch.”¹²²

The February 2010 Final Judgment in this case held the defendant State’s perennial underfunding of its K-12 public schools is unconstitutional. Over 3½ years later, the State’s post-budget filing shows State officials have made little progress putting a halt to the State’s

give it meaning and legal effect”), at 544 (“As a coequal branch of state government we cannot ignore our constitutional responsibility to ensure compliance with article IX, section 1”), & at 546 (“Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1”); see also Columbia Falls Elementary Sch. Dist. No. 6 v. Montana, 109 P.3d 257, 261 (Mont. 2005) (“As the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right.”).

¹²² *McCleary*, 173 Wn.2d at 515 [citing Seattle School District, 90 Wn.2d at 496; *In re Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976); U.S. v. Nixon, 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)]; see also State v. Rice, 174 Wn.2d 884, 900-901, 279 P.3d 849 (2012) (the constitutional division of government into three branches is for the protection of individuals against centralized authority and abuses of power); Rose v. Council for Better Education, 790 S.W.2d 186, 208-209 (Ky. 1989) (“we must address a point made by the appellants with respect to our authority to enter this fray and to ‘stick our judicial noses’ into what is argued to be strictly the General Assembly’s business. ... To avoid deciding the case because of ‘legislative discretion,’ ‘legislative function,’ etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable. ... This [judicial branch] duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court’s view of the constitution is contrary to that of other branches, or even that of the public.”).

violation of Washington children’s affirmative constitutional right to an amply funded K-12 education.¹²³

This Court has reiterated the fundamental importance of this paramount constitutional right, unequivocally declaring: “Education plays a critical role in a free society.”¹²⁴ And the State did not challenge the Final Judgment’s detailed rulings with respect to public education’s critical role in our democracy, our economy, and our citizens’ civil rights.¹²⁵ Nor did the State challenge the Final Judgment’s rulings that:

- “A healthy democracy depends on educated citizens”.
- “Education also plays a critical civil rights role in promoting equality in our democracy. For example, amply provided, free public education operates as the great equalizer in our democracy, equipping citizens born into underprivileged segments of our society with the tools they need to compete on a level playing field with citizens born into wealth or privilege.”

¹²³ *As plaintiffs explained in last year’s filing, these children are not just faceless statistics – reiterating the trial testimony of one of the (now-former) State Legislators who served on both Washington Learns and the Basic Education Finance Task Force, who emphasized that every day, every week, every month, every year we delay means additional students drop out, and additional students who don’t drop out are left unable to meet the requirements of today’s society. It’s easy to talk about numbers. It’s easy to talk about statistics. But when it comes right down to it, every kid we lose is something that is very, very real. The great tragedy of the State’s long debate and delay is that we’re not talking about numbers. We’re talking about real world kids. See Plaintiffs’ 2012 Post-Budget Filing at pp.36-37.*

¹²⁴ *McCleary*, 173 Wn.2d at 516, quoting *Seattle School District*, 90 Wn.2d at 517-518 (also Tr.Ex.2); accord February 2010 Final Judgment [CP 2866-2971] at ¶¶174, 204 (quoting this Court’s *Seattle School District* decision).

¹²⁵ *February 2010 Final Judgment [CP 2866-2971] at ¶¶118-142. Such unchallenged findings are now verities in this case. McCleary*, 173 Wn.2d at 514 (“We will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence” and “Unchallenged findings of fact are verities on appeal.”) (citations and internal quotation marks omitted).

- “Education ... is the number one civil right of the 21st century.”

February 2010 Final Judgment [CP 2866-2971] at ¶¶119, 132, 134.¹²⁶

Yet the State continues to disregard the rulings of this Court. Contrary to this Court’s express Order, the State did not lay out a detailed plan for how it will fully comply with Article IX, §1 by 2018, and did not demonstrate *steady, real, and measurable* progress towards ample funding by 2018. Plaintiffs respectfully submit that the State’s continued violation of constitutional rights and Court Orders is unacceptable.

When the legislative branch violates the constitution, “judicial action is entirely consistent with separation of powers principles and the judicial role”.¹²⁷ As the U.S. Supreme Court has reiterated: if separation

¹²⁶ *The member entities of plaintiff NEWS accordingly include many civil rights organizations in our State, such as El Centro de la Raza, Urban League, Equitable Opportunity Caucus, Minority Executive Directors Coalition, Lutheran Public Policy Office, African-American professionals’ Seattle Breakfast Group, and the Vietnamese Friendship Association (each described in the February 2010 Final Judgment [CP 2866-2971] at ¶¶24-27 & 31-33). One of the Latino-American civil rights leaders at trial summarized this civil rights point when he explained, “the only way that you can be free is to be fully educated.” RP 2597:15-17 (Roberto Maestas, explaining why El Centro de la Raza had named its early learning program after the revolutionary who had emphasized that point (José Martí)); accord Epictetus, Discourses, Bk. II, ch. 1 (“Only the educated are free”) (cited in February 2010 Final Judgment [CP 2866-2971] at p.1n.1). Or, as the trial court noted with respect to the cost of complying with Article IX, §1: it may sound like a lot of money, but “you know the old adage: if you think education is expensive, try ignorance.” RP 5580:16-18. Cf. McCleary, 173 Wn.2d at 500 (noting the Washington Learns Final Report’s conclusion that “[e]ducation is the single most important investment we can make for the future of our children and our state”).*

¹²⁷ *Montoy v. Kansas*, 112 P.3d 923, 930-931 (Kan. 2005) (when the workings of the political process “lead to a continued constitutional violation, judicial action is entirely consistent with separation of powers principles and the judicial role. Although state constitutions may commit educational matters to the legislative and executive branches, if these branches fail to fulfill such duties in a constitutional manner, ‘the Court too must accept its continuing constitutional responsibility ... for overview ... of compliance with

of powers gave elected officials a free pass to disregard citizens' constitutional rights when politically expedient to do so, those rights "would be but impotent phrases", and "the constitution itself becomes a solemn mockery".¹²⁸

2. Courts Have Thus Historically Recognized Their Duty to Force Elected Officials to Obey the Constitution.

As the Kansas Supreme Court succinctly reminded recalcitrant legislators in another education funding case,

the constitutional imperative.' Moreover, unlike federal courts, state courts need not be constrained by federalism issues of comity or state sovereignty when exercising remedial power over a state legislature, for state courts operate within the system of a single sovereign") (internal quotation marks omitted).

¹²⁸ *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958) (explaining that if elected officials could, at will, annul the judgment of a court and destroy the rights acquired under that judgment, "the constitution itself becomes a solemn mockery" and the rights guaranteed by the constitution "would be but impotent phrases") (internal quotation marks omitted); accord *Spallone v. United States*, 493 U.S. 265, 281, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) ("If [elected officials] can defy the orders of a ... court in any case ... because compliance is unpopular, and if that situation is tolerated, then our constitutional system of government fails" (Brennan, J., dissenting) (internal quotation marks omitted)). The *Spallone* majority reversed sanctions against individual council members for failing to enact desegregation legislation, but left in place a \$1 million *per day* contempt sanction against the city, and noted that if that sanction failed, the court might then consider sanctioning individual council members. 493 U.S. at 280. Justice Brennan's dissent, joined by three other Justices, would have upheld the sanctions against individual council members immediately. *Id.* at 301-302 ("once a ... court has issued a valid order to remedy the effects of a prior, specific constitutional violation, the representatives are no longer 'acting in a field where legislators traditionally have power to act.' At this point, the Constitution itself imposes an overriding definition of the 'public good,' and a court's valid command to obey constitutional dictates is not subject to override by any countervailing preferences of the polity, no matter how widely and ardently shared. Local legislators, for example, may not frustrate valid remedial decrees merely because they or their constituents would rather allocate public funds for other uses. ... Defiance at this stage results, in essence, in a perpetuation of the very constitutional violation at which the remedy is aimed.") (citations omitted).

state courts consistently reaffirm their authority, indeed their duty, to engage in judicial review and, when necessary, **compel** the legislative and executive branches to conform their actions to that which the constitution requires.¹²⁹

As this Court has long recognized, if a court did not **enforce** its orders and judgments, “it would then be nothing more than a mere advisory body.”¹³⁰

And as this Court’s January 2012 decision reiterated (twice), Article IX, §1 “imposes a **judicially enforceable** affirmative duty on the State”.¹³¹

A **first step** some courts have taken when enforcing orders to stop school funding violations is to sternly **warn** of tough enforcement action if there is not full compliance.¹³²

¹²⁹ Montoy, 112 P.3d at 930 (bold italics added); see also, e.g., Robinson v. Cahill, 358 A.2d 457, 459 (N.J. 1976) (after observing that the “continuation of the existing unconstitutional system of financing the schools into yet another school year cannot be tolerated”, ordering that the State would be enjoined from any funding of the public school system if full funding not provided within two months).

¹³⁰ Keller v. Keller, 52 Wn.2d 84, 88, 323 P.2d 231 (1958), quoting Blanchard v. Golden Age Brewing Co., 188 W.2d 396, 423, 63 P.2d 397 (1936); see also Moreman v. Butcher, 126 Wn.2d 36, 42-43, 891 P.2d 725 (1995) (“Washington policy has long been that courts have the authority to coerce compliance with lawful court decisions and process by imposition of appropriate sanctions.”). The Court’s contempt power is both statutory and inherent. RCW 7.21.010; In re Detention of Young, 163 Wn.2d 684, 691, 185 P.3d 1180 (2008). The Court’s inherent contempt powers are “at least equal to its statutory contempt powers”. Keller, 52 Wn.2d at 90 (emphasis in original); see also Shillitani v. United States, 384 U.S. 364, 370, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) (“There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt.”).

¹³¹ McCleary, 173 Wn.2d at 485 & 514 (bold italics added).

¹³² E.g., Edgewood Independent School District v. Kirby, 777 S.W.2d 391, 399 (Tex. 1989) (“[L]et there be no misunderstanding. A remedy is long overdue. The legislature must take immediate action” or funding of public schools would be enjoined in seven months); Robinson, 358 A.2d at 459 (N.J.) (warning that State would be enjoined from funding public school system if funding not provided within two months); Montoy v. Kansas, No. 99-C-1738, Decision and Order Remedy (May 11, 2004), 2004 WL 1094555,

A **second step** courts have taken is to boldly *enforce* their orders through contempt findings, sanctions to coerce compliance¹³³ (e.g., fines), or orders that directly implement the court’s ruling (e.g., ordering a specific amount of funding). Examples include court orders that:

- hold the governmental body or elected officials in contempt of court;¹³⁴
- impose monetary or other contempt sanctions against the governmental body or elected officials;¹³⁵
- prohibit expenditures on certain other matters until the court’s constitutional ruling is complied with;¹³⁶

*at *11 (order enjoining use of unconstitutional education funding statutes “should not be a surprise” because the court warned of that remedy in a prior order).*

¹³³ *With a “remedial sanction” – a sanction intended to coerce compliance – the party in contempt “carries the keys of his prison in his own pocket.” In re Detention of Young, 163 Wn.2d at 693n.2 (internal quotation marks omitted); see also RCW 7.21.010(3).*

¹³⁴ *E.g., Delaware Valley Citizens’ Council for Clean Air v. Pennsylvania, 678 F.2d 470, 479 (3d Cir.) (affirming order holding Commonwealth in civil contempt for failing to comply with consent decree), cert. denied, 459 U.S. 969 (1982); see also Vecchione v. Wohlgemuth, 558 F.2d 150, 158 (3d Cir.) (court injunctions against state officials who violate constitutionally protected rights are not “mere precatory admonitions. They are enforceable by coercive contempt proceedings, which act upon the persons of the defendants”) (citations omitted), cert. denied, 434 U.S. 943 (1977).*

¹³⁵ *E.g., U.S. v. City of Yonkers, 856 F.2d 444, 460 (2d Cir. 1988) (approving of contempt fines against city of up to \$1 million per day), cert. denied, 489 U.S. 1065 (1989) (certiorari separately granted only as to sanctions against individual council members, as addressed in Spallone, 493 U.S. 265); see also Hutto v. Finney, 437 U.S. 678, 690-691, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) (acknowledging that appropriate contempt penalties against state officials failing to cure unconstitutional prison conditions can include monetary fines and jail terms); Delaware Valley Citizens’ Council for Clean Air, 678 F.2d at 478 (“Civil contempt proceedings against state officers may justifiably result in the fining or even the conditional jailing of those officials.”).*

¹³⁶ *E.g., Dowdell v. City of Apopka, 511 F.Supp. 1375, 1384-1386 (M.D. Fla. 1981) (retaining jurisdiction and enjoining defendant city from spending “any funds on the construction or improvement of municipal services in the white community until such time as the street paving, storm water drainage and water distribution systems in the*

- order the legislature to pass legislation to fund specific amounts or remedies;¹³⁷
- prohibit the State from limiting an education program to less than all eligible students in a given grade level;¹³⁸
- order the sale of State property to fund constitutional compliance;¹³⁹
- invalidate education funding cuts to the budget;¹⁴⁰ and
- prohibit any funding of an unconstitutional education system (put bluntly: shut down the school system unless the constitutional violation is stopped).¹⁴¹

black community are on par with that of the white sections”, and further impounding and escrowing all federal revenue sharing funds to be used only to improve municipal services in the black community), aff’d in relevant part, 698 F.2d 1181 (11th Cir. 1983); Baker v. City of Kissimmee, 645 F.Supp. 571 (M.D. Fla. 1986) (same and citing other similar cases); Griffin v. Prince Edward County School Board, 377 U.S. 218, 232-233, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) (enjoining county officials from paying grants or giving tax exemptions as long as they failed to comply with court’s order regarding public schools).

¹³⁷ E.g., Montoy, 112 P.3d at 940-941 (Kan.) (ordering legislature to fund at least \$285 million for upcoming school year based on state cost study); Arthur v. Nyquist, 547 F.Supp. 468, 484 (W.D.N.Y. 1982) (ordering mayor and city council to appropriate \$7.4 million to comply with desegregation remedy), aff’d, 712 F.2d 809 (2d Cir. 1983), cert. denied, 466 U.S. 936 (1984); Missouri v. Jenkins, 495 U.S. 33, 55, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990) (while federal court could not impose property tax increase directly, it could require local school district to levy taxes at a rate adequate to fund desegregation remedy); Griffin, 377 U.S. at 233 (court could order local government to levy taxes to raise funds to reopen public school system without discrimination).

¹³⁸ Hoke County Board of Education v. North Carolina, 731 S.E.2d 691 (N.C. Ct. App. 2012) (prohibiting State from denying any eligible at-risk four year old admission to pre-kindergarten program, after State limited funding to only 20% of pre-kindergarten students), review allowed, 738 S.E.2d 362 (N.C. 2013).

¹³⁹ Reed v. Rhodes, 472 F.Supp. 623 (N.D. Ohio 1979) (ordering sale of land and buildings to fund desegregation remedy, with bimonthly financial accounting to court).

¹⁴⁰ Abbott, 20 A.3d at 1024, 1045 & n.23 (after New Jersey reneged on its representation that it would fully fund plaintiff school districts under new legislation, court ordered full funding, thereby restoring approximately \$500 million in funding cuts).

¹⁴¹ E.g., Montoy, No. 99-C-1738, Decision and Order Remedy (May 11, 2004), 2004 WL 1094555, at *11 (Kan.) (enjoining use of unconstitutional education funding statutes and putting the school system on “pause” until funding defects remedied); Hull v. Albrecht, 960 P.2d 634, 640 (Ariz. 1998) (affirming order enjoining use of

3. This Court Should Take Action To Stop The State’s Ongoing Violation Of Constitutional Rights – Not Shelter That Violation.

This Court’s January 2012 decision unequivocally told the defendant that “Positive constitutional rights do not restrain government action; they *require* it” – and that in turn “require[s] the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty.”¹⁴² This Court accordingly assured every child in our State’s public schools that this Court will not just “stand on the sidelines and *hope* the State meets its constitutional mandate to amply fund education.”¹⁴³

That was during the 2011-12 school year. It’s now two school years later. And “hope” that the State will take the bold actions required to fulfill its constitutional duty by 2018 is rapidly dwindling.

To be blunt: the defendant State’s frequent disregard of the Court Orders in this case is contempt.¹⁴⁴ Contempt is sanctionable.¹⁴⁵ Plaintiffs

unconstitutional education funding statutes); Robinson, 358 A.2d 457 (N.J.) (*enjoining State from expending any funds for the support of schools under unconstitutional system, including the payment of debts, contractual obligations, pension contributions, insurance premiums, and facilities maintenance unless the State fully funded education statute within two months*); see also Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cir. 1978) (*ordering closure of jail in six months, citing unconscionable delay by city officials in remedying known unconstitutional conditions*).

¹⁴² McCleary, 173 Wn.2d at 519 (*bold italics added*).

¹⁴³ McCleary, 173 Wn.2d at 541 (*italics added*).

¹⁴⁴ RCW 7.21.010 (“Contempt of court” means the intentional “disobedience of any lawful judgment, decree, order, or process of the court”); see In re Estates of Smaldino, 151 Wn.App. 356, 366, 212 P.3d 579 (2009) (*a party who has knowledge of an order and*

therefore submit that – *at a minimum* – this Court should issue a clear, firm, unequivocal warning to the defendant State that leaves recalcitrant elected officials no doubt that the State’s continued failure to comply with this Court’s Orders will result in a holding of contempt, sanctions, or other appropriate judicial enforcement. This Court should also – *at a minimum* – enjoin the State from digging the unconstitutional underfunding hole even deeper by imposing any unfunded mandates on its schools.¹⁴⁶

The State has been given years (in fact, decades) to follow court rulings telling the State that it must amply fund its K-12 public schools. Telling alone clearly does not work. Plaintiffs respectfully submit that in response to the State’s 2013 post-budget filing, this Court must do more than stand on the sidelines and cheer for a better result next year.¹⁴⁷

intentionally commits an act that disobeys the order acts in contempt of court), review denied, 168 Wn.2d 1033 (2010).

¹⁴⁵ RCW 7.21.030; *In re Detention of Young*, 163 Wn.2d at 691, 693 (a corollary to the power to hold a party in contempt is the authority to impose a sanction for the contempt).

¹⁴⁶ *Supra* footnote 42 (ESHB 2261) & pp. 15-16 of this filing.

¹⁴⁷ As the one State court whose judgment was affirmed in the consolidated *Brown v. Board of Education* case aptly held: delay is like telling the plaintiffs, “Yes, your Constitutional rights are being invaded, but be patient, we will see whether in time they are still being violated”, and that to postpone relief “is to deny relief, in whole or in part, and to say that the protective provisions of the Constitution offer no immediate protection”. *Belton v. Gebhart*, 87 A.2d 862, 870 (Del. Ch.), aff’d, 91 A.2d 137 (Del. 1952), aff’d sub nom. *Brown v. Board of Education*, 349 U.S. 294 (1955); accord *Montoy*, 112 P.3d at 940 (“we cannot continue to ask current Kansas students to ‘be patient.’ The time for their education is now”); see *Abbott*, 20 A.3d at 1038 (N.J.) (“To state the question is to present its answer: how is it that children of the plaintiff class of Abbott schoolchildren, who have been designated victims of constitutional deprivation and who have secured judicial orders granting them specific, definite, and certain relief, must now come begging to the Governor and Legislature for the full measure of their

IV. CONCLUSION

As this Court noted in its January 2012 decision, “this case concerns the overall funding adequacy of K-12 education”.¹⁴⁸

But it also concerns education in another, perhaps even more important way. What this Court does in this case will indelibly stamp the 1 million students in our K-12 public schools with an education on whether a constitution actually matters. Is a constitutional right a real right, or just a nice sounding platitude? Must elected officials obey the constitution, or are they above it? Are court orders a mandate, or just a suggestion? And do our courts hold all citizens accountable to obey the law, or just those citizens who don’t have an official government title?

The assurance of vigilance¹⁴⁹ this Court’s January 2012 decision gave to each public school student in our State can be summed up in four words:

“I’ve got your back.”

Plaintiffs respectfully submit the time has come for this Court to do that. The Class of 2018 was in 1st grade when this suit was filed. They

education funding? And, how can it be acceptable that we come to that state of affairs because the State abandoned its promise? The State’s position is simply untenable.”).

¹⁴⁸ McCleary, 173 Wn.2d at 483.

¹⁴⁹ *Supra Part II of this filing; see also McCleary*, 173 Wn.2d at 547 (“This court intends to remain vigilant in fulfilling the State’s constitutional responsibility under article IX, section 1”) & 546 (“Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1”).

were in 4th grade when the Final Judgment was entered against the State in this case. They were in 6th grade when this Court issued its January 2012 decision. Another year of State procrastination and delay might not be that important to most adults. But each year is crucial to a child traveling through our State’s public schools today – for to him or her, each year of amply funded education delayed is a year of amply funded education forever lost. As the State Board of Education’s Mary Jean Ryan succinctly put it: “They get only one shot at their education.”¹⁵⁰

For the reasons outlined in this filing, plaintiffs humbly request that – *at a minimum* – this Court stop the defendant State from digging its unconstitutional underfunding hole even deeper with any unfunded mandates and issue a clear, firm, unequivocal warning to the defendant State that leaves recalcitrant elected officials no doubt that the State’s continued failure to comply with this Court’s Orders will result in a holding of contempt, sanctions, or other appropriate judicial enforcement which, frankly, makes compliance their far preferable option.

¹⁵⁰ *Tr.Ex.238, last paragraph; RP 2431:9-20.*

RESPECTFULLY SUBMITTED this 30th day of September, 2013.

Foster Pepper PLLC

s/ Thomas F. Ahearne

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Appendix A

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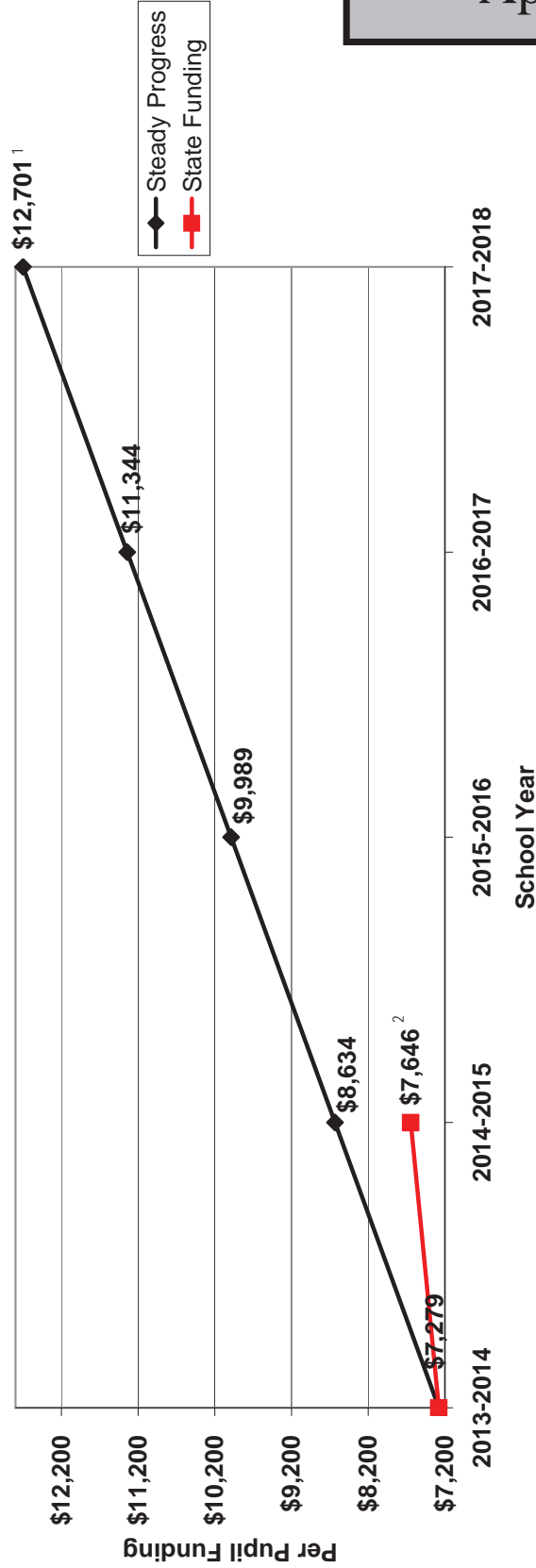
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Appendix B

Appendix B
Overall Funding "Steady Progress"
Per Pupil State Funding



¹ The 2013-14 per pupil State funding levels of \$7,279 is stated in the 2013-15 Budget Overview (see Appx.A) at p.6. The 2017-18 level of \$12,701 (before inflation or any capital construction needs) is calculated from the State's testimony and compensation study, as described in Plaintiffs' 2013 Post-Budget Filing at Section III.A.1, pp.12-13. For "steady progress" between the current 2013-14 level to the minimum finish line of \$12,701 in 2017-18, per pupil State funding would need to increase by at least \$1,355 per year.

² The per pupil funding levels of \$7,279 (2013-14) and \$7,646 (2014-15) are stated in the 2013-15 Budget Overview (see Appx.A) at p.6. OSPI's per pupil data, however, paints an even bleaker picture, showing 2008-09 State funding (on which the trial in this case was based) at \$6,862/pupil, and estimated 2013-14 State allocations at even less: \$6,817/pupil. See 2013 OSPI Per Pupil Funding Chart (see Appx.A) at line "Per Pupil Funding (Grand Total)".

Appendix C

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 Monday, September 30, 2013, I caused PLAINTIFF/RESPONDENTS' 2013 POST-BUDGET FILING 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

Via Electronic Mail (cc of the same email sent to the Supreme Court for the filing of this 2013 POST-BUDGET FILING)
 Via U.S. First Class Mail

Defendant State of Washington

David A. Stoler, Sr.
Office of the Attorney General
1125 Washington Street SE
Olympia, WA 98504-0100
daves@atg.wa.gov

Via Electronic Mail (cc of the same email sent to the Supreme Court for the filing of this 2013 POST-BUDGET FILING)
 Via U.S. First Class Mail

Defendant State of Washington

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 30th day of September, 2013.

s/ Christopher G. Emch
Christopher G. Emch