No. 89714-0

SUPREME COURT
OF THE STATE OF WASHINGTON

LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington nonprofit corporation; EL CENTRO DE LA RAZA, a Washington nonprofit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington nonprofit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington nonprofit corporation; WAYNE AU, PhD, on his own behalf; PAT BRAMAN, on her own behalf; DONNA BOYER, on her own behalf and on behalf of her minor children; and SARAH LUCAS, on her own behalf and on behalf of her minor children,

Appellants,

v.

STATE OF WASHINGTON,

Respondent,

and

WASHINGTON STATE CHARTER SCHOOLS ASSOCATION; LEAGUE OF EDUCATION VOTERS; DUCERE GROUP; CESAR CHAVEZ CHARTER SCHOOL; INITIATIVE 1240 SPONSOR TANIA DE SA CAMPOS; and MATT ELISARA,

Respondents/Intervenors.

RAP 12.4(i) MEMORANDUM OF AMICI LEGISLATORS

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A. INTRODUCTION

In addition to the reasons advanced by the State and the Washington State Charter Schools Association, et al. in their respective motions for reconsideration, the amici legislators believe the Court's opinion should be reconsidered because the Court overlooks the plenary responsibility of the Legislature under article II, § 1, article VII, § 5, and article VIII, § 4 to enact budgetary legislation, and specifically fails to give meaning to the Legislature's validly enacted law that provided no constitutionally-protected common school levy revenues were used for the operation or administration of public charter schools.

The amici legislators are also concerned that the Court's decision overlooks the plenary responsibility of the Legislature, or the people acting in their legislative capacity, under article IX, § 2, to organize Washington's public school system.

B. IDENTITY AND INTEREST OF AMICI CURIAE

As explained in their motion for leave to submit this amicus memorandum, the amici legislators are bicameral and bipartisan elected members of the Washington State Legislature concerned about the education of Washington's children. They are interested in a proper interpretation of legislative authority under our Constitution to make

budgetary decisions and to define, organize, and fund the public school system in Washington.

C. STATEMENT OF THE CASE

The amici legislators acknowledge the parties' statements of the case in their briefing before this Court.

D. ARGUMENT WHY THE COURT'S OPINION SHOULD BE RECONSIDERED

(1) The Court's Decision Intrudes Upon the Budgetary Responsibility of the Legislature and the Legislature's Express Determination that No Common School Funds Were Used to Support Public Charter Schools

Our Constitution confers virtually plenary authority upon the Legislature to enact laws, article II, § 1, to levy taxes, article VII, § 5, and to appropriate funds, article VIII, § 4. In these provisions, the framers saw fit to make the enactment of budgets a thoroughly legislative function.

But this Court's opinion in this case, *League of Women Voters of Wash. v. State*, ___ Wn.2d ___, 355 P.3d 1131 (2015), states that the Legislature improperly appropriated constitutionally-restricted article IX, §§ 2, 3 funds dedicated to common school funding to public charter schools that it determined were not common schools. The Court decried the Legislature's failure to segregate common school revenues from general fund revenues. *Id.* at 1139. In effect, as the dissent notes, *id.* at 1144-45, the majority essentially tells the Legislature how it is to organize

public school funding and to apparently treat all public school funding as a restricted fund. But article VIII, § 4 confers exclusive authority upon the Legislature to appropriate money and, by implication, to enact budgets for such expenditures. The Court's majority opinion purports to tell the Legislature, a coordinate branch of state government, how to conduct its business. Op. at 11-18. As the dissent rightly points out, public charter schools do not operate with any of the constitutionally-restricted funding sources. Dissent at 3-13.

As further documentation that the Court's dissent here was correct, the Court overlooked the fact that the Legislature itself determined that *any support for public charter schools did not come from funds dedicated to common schools.*[1] The moneys supporting public education and common schools were not co-mingled, contrary to the Court's majority opinion. The operating 2015-17 budget expressly stated:

> State general fund appropriations distributed through Part V of this act for the operation and administration of charter schools as provided in chapter 28A.710 RCW shall not include state common school levy revenues collected under RCW 84.52.065.

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[1] This legislative determination is entitled to deference by this Court given the Legislature's plenary authority over budgets referenced above. This Court has historically deferred to the Legislature over matters of legislative procedure based on the Legislature's coordinate constitutional role. *See, e.g., Citizens Council Against Crime v. Bjork*, 84 Wn.2d 891, 897-98 n.1, 529 P.2d 1072 (1975) (under enrolled bill doctrine, courts will not go behind the face of the statute to examine the process by which the Legislature enacted a bill).

Laws of 2015, 3d ex. sess., ch. 4, § 516(5) (ESSB 6052).

Thus, one of the key bases for the Court's majority opinion is incorrect. Public charter schools, like many other public school programs, may be funded by sources other than those specially dedicated by the Constitution to support Washington's common schools. This Court should defer to the Legislature's determination in the 2015-17 operating budget and thereby permit public charter schools to proceed,[2] particularly given the fact that this case involves a *facial challenge* to Initiative 1240.

Because this case involves a facial challenge to Initiative 1240, as such, it must be rejected if there are *any* circumstances in which the statute at issue can be applied constitutionally. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 258, 241 P.3d 1220 (2010) (quoting *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000)). In order to conclude that the initiative is facially unconstitutional, this Court must determine that public charter schools are invariably supported with dedicated common school revenue when the Legislature itself has determined that is not true in the 2015-17 biennial operating budget. As this Court knows, the enactment of an initiative

[2] The legislator amici expressly join the argument advanced by the State and the intervenors in their respective motions for reconsideration regarding the severability clause in Initiative 1240. Such interpretive directives by the Legislature, or the people, are entitled to deference by this Court. *See, e.g., CLEAN v. State*, 130 Wn.2d 782, 807-13, 928 P.2d 1054 (1996) (emergency clauses in legislation).

generally does not result in the making of an appropriation; as here, that generally awaits a formal appropriation. *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 366-68, 70 P.3d 920 (2003) (instruction to Legislature to appropriate is not an appropriation).

Because Initiative 1240 makes no appropriation specifically, makes no mention of the specific funding source for public charter schools, and certainly does not earmark dedicated common school funds to support public charter schools, the subsequent general fund operating budget legislation controls this question. That legislation specifically declared that general fund revenues other than dedicated common school funds supported public charter schools, defeating a *facial* challenge to Initiative 1240.

(2) The Court's Decision Overlooks the Legislature's Authority to Define, Organize, and Fund Washington's Public Schools and Mis-Defines a Common School

A second reason the Court's opinion should be reconsidered is because it has overlooked the language of article IX, § 2 of the Washington Constitution that confers plenary authority upon the Legislature, or the people acting in a legislative capacity, to define, organize, and fund Washington's public school system. Article IX, § 2 provides:

> The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established.

Under the specific language of article IX, § 2, the plenary responsibility for defining and organizing the public school system rests with the Legislature. Under this plenary authority over the organization of Washington's public school system, the Legislature has the authority to establish and fund programs in that system, and it has exercised that authority over the years.

Historically, this Court has understood this critical aspect of separation of powers. For example, in *Seattle School Dist. No. 1*, in writing for the Court, Justice Charles Stafford offered a clear and sensible delineation of respective roles of the Court and the Legislature:

> Although the mandatory duties of Const. art. 9, s 1 are imposed upon the State, the organization, administration, and operational details of the "general and uniform system" required by Const. art. 9, s 2 are the province of the Legislature. In the latter area the judiciary is primarily concerned with whether the Legislature acts pursuant to the mandate and, having acted, whether it has done so constitutionally. Within these parameters, then, the system devised is within the domain of the Legislature.
>
> While the judiciary has the duty to construe and interpret the word "education" by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that "education"

> within the broad guidelines. However, the broad guidelines which we have provided do not contemplate that the State must furnish "total education" in the sense of All knowledge or the offering of All programs, subjects, or service which are attractive but only tangentially related to the central thrust of our guidelines. Specifically, then, we shall refer to the Legislature's obligation as one to provide "basic education" through a basic program of education as distinguished from total "education" or all other "educational" programs, subjects, or services which might be offered.

90 Wn.2d 476, 518-19, 585 P.2d 71 (1978).[4]

The specific constitutional language at issue here is important.[5] First, the framers gave the authority over the public school system generally to the Legislature in article IX, § 2. Second, the framers

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[4] The concurrence in *Tunstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000) made a similar point:

> Our case law clearly confirms the broad power of the Legislature to define educational opportunity for Washington students by giving meaning to a "common school education." Moreover, the Legislature has broad discretion to define the means of providing educational opportunity to children. As early as 1935, we held the state can meet its duty under Article IX by selecting any method it sees fit to organize the educational system. ... The judiciary cannot, and should not, "constitutionalize" education in Washington so as to place the administration and funding of education beyond the responsibility of the executive and legislative branches to whom that responsibility was expressly entrusted by the framers.

Id. at 235-37.

[5] This Court looks to the plain language of the Constitution, in rendering a reasonable interpretation of that language, giving the textual words their common and ordinary meaning as understood when they were drafted in 1889; the Court may also look to the historical context for the words in the Constitution. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004); *League of Education Voters v. State*, 176 Wn.2d 808, 821, 295 P.3d 743 (2013).

understood "common schools" to be a subset of the public school system in Washington when addressing article IX, § 1. High schools were not common schools, but were added to the public school system by the Legislature.[6] Thus, the Legislature was to have, and has had, a primal role in the evolution of Washington's public school system under article IX, § 2.

In addressing the authority of the Legislature over the public school system in Washington, the Court's majority potentially conflates public schools with common schools, and provides a far too narrow concept of what constitutes a common school in any event.

The view expressed in *School District No. 20, Spokane County v. Bryan*, 51 Wash. 498, 99 Pac. 28 (1909) and reaffirmed by this Court that a "common school" is one that is subject to a locally elected school board and is open to all children flies in the face of this Court's own precedents and risks invasion of the authority of the Legislature under article IX, § 2.

Subsequent to *Bryan*, this Court addressed the definition of a common school in *Litchman v. Shannon*, 90 Wash. 186, 155 Pac. 783

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[6] This is not surprising. There were only 6 high schools in the entire state in 1889. Kindergartens, for example, did not exist in significant numbers, if at all, in 1889; the first kindergarten in Seattle opened in 1914. *See generally*, Mary Jane Honegger, *Washington State Historic Schools Status 2002* at 10, 28 (compiled for the Washington Trust for Historic Preservation). Certainly school programs like bilingual education (RCW 28A.180), special education (RCW 28A.155), highly capable student education (RCW 28A.185), or Running Start (RCW 28A.600.300, *et seq.*), just to name a few, did not exist in 1889.

(1916). The Court was far less absolute there in its definition of a common school than in *Bryan*, where it rejected the proposition that the University of Washington was part of the public school system under article IX, § 2, and students could not be charged tuition or building fees; the Court stated at 191:

> Public schools are usually defined as schools established under the laws of the state, usually regulated in matters of detail by local authorities in the various districts, towns, or counties, and maintained at the public expense by taxation, and open without charge to the children of all the residents of the town or district.

This definition was also applied in *Newman v. Schlarb*, 184 Wash. 147, 153-54, 50 P.2d 36 (1956), a case that upheld a county tax in support of public schools.[7]

Further, in *Northshore School District No. 417 v. Kinnear*, 84 Wn.2d 685, 530 P.2d 178 (1974), *overruled on other grounds*, *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), this Court observed that:

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[7] This Court's assertion that common schools must invariably be run by local school districts is contradicted by the definition of public schools in *Litchman* and *Newman,* and by the fact that other local governments have a role in the public schools. Indeed, Seattle has for several years enacted local city levies in support of schools. Nothing *in the Constitution* requires local districts to supervise the administration of public schools; the Legislature could provide for alternative forms of organization for local schools. For example, it might decide to allow a city council, for example, to run schools within a city. The Legislature has already allowed programs like Running Start, College in the High School, Tech Prep, and online programs, to name a few, to be run by organizations other local school districts. The Court's decision stifles such decisions and "constitutionalizes" the present organizational structure of Washington schools.

> A general and uniform system...is...one in which every child has free access to certain minimum and reasonably standardized educational and instructional facilities and opportunities to at least the 12th grade – a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without a substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and a basic to a sound education.

Id. at 729. *See also, Federal Way School District No. 210 v. State*, 167 Wn.2d 514, 524, 219 P.3d 941 (2009) (adopting *Northshore's* definition of uniformity in rejecting necessity of uniform state teacher salary schedule).

As recently as *Tunstall*, this Court differentiated between the public school system and common schools, noting that local school districts were not the only constitutional providers of public education services. That case involved a challenge to a program run by contractor selected by OSPI to provide education services to incarcerated youth. The incarcerated youth sued the State, arguing that only their local school district could serve them. The Court rejected this argument, stating: "Nothing in this provision, however, mandates that the education must be identical." *Id.* at 221-23. The Court also specifically recognized that school districts alone do not supervise education in Washington, stating: "...as we have seen in many instances, the Legislature has found entities other than school districts qualified to educate our youth." *Id.* at 232.

The Court's definition of a "common school" within the public school system is too restrictive and contradicts its own precedents. The Legislature, not this Court, defines a common school and articulates what constitutes the organization structure and programmatic content for the public school system in our state under article IX, § 2, properly analyzed.[9]

The Court's opinion potentially undercuts legislative authority on the organization of Washington's public school system and creates needless confusion by conflating public schools and the various programs in the public school system with common schools. Many of the public education programs referenced above, such as bilingual, remedial, special education, or gifted programs, like public charter schools, have eligibility criteria and are not open to "all" in a technical sense. Some, like Running Start or College in the High School, are not operated by local school districts. Our Constitution requires the Legislature to provide a public school system open to all, but nowhere restricts its ability to offer specialized programs within that system for which eligibility standards apply. The Court's opinion seemingly calls that point into question, and raises what are serious constitutional questions about the many public

[9] In fact, the Legislature has already defined public schools in RCW 28A.150.010 and common schools in RCW 28A.150.020 as "schools maintained at public expense in each school district and carrying on a program from kindergarten through the twelfth grade or any party thereof including vocational educational courses otherwise permitted by law."

educational programs referenced above that do not meet the Court's restrictive definition of a "common school."

As a final note, the legislator amici are particularly concerned about the disparate impact of the Court's decision on children from low income backgrounds and children of color. This disparate impact is documented in the declarations of Joshua Halsey, the executive director of the Washington State Charter School Commission, and Steven Gering, the chief academic officer of the Spokane School District, submitted to this Court by the State in connection with its stay motion. Public charter schools disproportionately serve these children as compared to school districts generally. It is both within the Legislature's authority and duty to support policies targeted toward closing any gaps in opportunities for children from low income backgrounds and children of color. This Court should not lose sight of these facts.

E. CONCLUSION

This Court should reconsider its opinion in this facial challenge because there are circumstances in which public charter schools are either a separately-funded part of public school system, or, are a part of the common schools, if properly defined. Reconsideration will allow for the necessary attention to the constitutionally-mandated role of the Legislature, or the people acting in a legislative capacity, in its budgetary

decisions on public charter schools and in the organization and funding of Washington's public school system under article IX, § 2.

DATED this 26th day of October, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the RAP 12.4(i) Memorandum of Amici Legislators in Supreme Court Cause No. 89714-0 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 26th, 2015, at Seattle, Washington.

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