NO. 94269-2

SUPREME COURT OF THE STATE OF WASHINGTON

EL CENTRO DE LA RAZA, a Washington non-profit corporation; LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington non-profit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; INTERNATIONAL UNION OF OPERATING ENGINEERS 609; AEROSPACE MACHINISTS UNION, IAM&AW DL 751; WASHINGTON STATE LABOR COUNCIL, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS UNION 21; WASHINGTON FEDERATION OF STATE EMPLOYEES; AMERICAN FEDERATION OF TEACHERS WASHINGTON; TEAMSTERS JOINT COUNCIL NO. 28; WAYNE AU, Ph.D., on his own behalf and on behalf of his minor child; PAT BRAMAN, on her own behalf; and DONNA BOYER, on her own behalf and on behalf of her minor children,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

Thousands of Washington families have enrolled their children in charter public schools over the last three years, primarily low-income families and families of color. For many of these families, their charter schools are the first public schools where their children have excelled. Plaintiffs now ask this Court to shutter these schools, but their arguments ignore the facts, misrepresent the law, and largely refute themselves. The Court should reject Plaintiffs' request because they have failed to show the Charter Schools Act is facially invalid beyond a reasonable doubt.

Plaintiffs' primary argument is that charter schools violate article IX, section 2's requirement that the State create "a general and uniform system of public schools." Plaintiffs concede that, since statehood, the Legislature has created a wide variety of public schools. But they claim that the only schools the Legislature may create beyond common schools are schools that serve narrow student populations with special needs. This novel claim runs directly contrary to the constitutional text (which allows, for example, "high schools"), to our State's established practice of creating new school programs open to all (like Running Start), and to longstanding precedent approving the operation of non-common public schools that serve the general population of children, *see, e.g., Sch. Dist. 20, Spokane County v. Bryan*, 51 Wash. 498, 99 P. 28 (1909) (approving "normal schools" that served the typical population of children, so long as they were funded with unrestricted general fund dollars). Plaintiffs' claim is also utterly illogical. In their view, a specialized school open only to select students—like the

University of Washington program for highly capable students—is perfectly consistent with a general and uniform system, but charter schools, which are open to all and are required to meet the same basic education requirements as common schools, are not. The argument refutes itself.

Plaintiffs also get the facts and the law wrong in arguing that charter schools are too different from common schools to satisfy the uniformity requirement. It is just false that charter schools are exempt from providing statutory components of the program of basic education, and there is no evidence that they impose materially different discipline than common schools. Moreover, Washington's public school system has long included public school programs operated by nonprofit and private entities that are under contract with school districts (like the Spokane District charter schools) or by approval of the Superintendent of Public Instruction.

Plaintiffs also admit that charter schools receive only lottery funds, not general fund dollars. But they claim that charter schools may *eventually* reduce common school funding. This claim is not only unripe, it is absurd in light of the Legislature's recent infusion of billions of new tax dollars for common schools and for the general fund. Plaintiffs' speculative funding challenge fails, as do their remaining claims. This Court should affirm.

II. STATEMENT OF THE CASE

A. Charter Schools Are One Small Piece of a Widely Varied Public School System

The Legislature has committed "to provide for a public school system that is able to evolve and adapt in order to better focus on

strengthening the educational achievement of all students." RCW 28A.150.210. We have advanced from one-room schoolhouses that served grade-school students, to the modern system offering Kindergarten through high school to every student. *See* Laws of 1889-90, ch. XIV, § 64, p. 379. Since soon after statehood, the public school system has included a wide spectrum of non-common, public school alternatives not limited to special populations or special curricula. Laws of 1909, ch. 97, § 1 (public school system embraced common schools, "technical schools, . . . normal schools, . . . training schools . . . and such other educational institutions as may be established by law and maintained at public expense."). Washington now serves more than one million students, in more than 2,000 public schools statewide. CP 868.

While many public school students attend the traditional public school closest to their home, Washington offers several flexible and innovative public programs targeted at satisfying modern needs and a diverse student population.[1] *See* CP 873-75, 975-81. The Spokane School District, for example, recognizes that "children learn in different ways and the best fit for a child may be their neighborhood school, but could also include an option with a different focus or different method of delivering curriculum." CP 975. The Spokane District offers two charter public schools, alternative schools, online learning with individualized student learning plans, schools within mental health facilities and treatment centers,

[1] *Learning by Choice, Student Enrollment Options in Washington* (rev. July 2014), http://www.k12.wa.us/GeneralInfo/pubdocs/LearningByChoice2014.pdf.

and a Montessori school, to name a few options. CP 973-74, 976-81. Some of these schools, including but not limited to the District's two charter public schools, are operated by nonprofit or other private entities under contract with the school district. CP 974, 976.

Similarly, Washington's broader public education system offers a wide range of public school programs that are not operated by school districts or school boards. CP 873-75, 974. Examples include:

- Tribal compact schools run by tribes. RCW 28A.715; CP 873.
- Running Start and the high schools operated at the Lake Washington Institute of Technology, Bates Technical College, and Clover Park Technical College, where professors and instruction are governed by the college boards of trustees. RCW 28A.600.310, .350; RCW 28B.50.140; CP 873. These programs are not limited to a distinct population of students. Some Running Start students attend border community colleges in Idaho and Oregon. RCW 28A.600.385; CP 873.
- Private education service programs for special education students operated by multiple nonprofit organizations.[2] WAC 392-172A-04080 to -04110; CP 873-74, 974.
- Alternative Learning Experience and online learning programs[3] operated by non-profit or private entities. All students can seek these alternatives. RCW 28A.232;RCW 28A.250; CP 873.

[2] http://www.k12.wa.us/SpecialEd/NonPublicAgency.aspx. All of these entities are available to public school students but are operated by private entities.

[3] An OPSI-approved list of privately-operated, publicly-funded online programs can be found at http://digitallearning.k12.wa.us/approval/providers/.

- Alternative education services operated under contracts by numerous entities, including private organizations. RCW 28A.150.305; CP 873.

Not only does Washington offer a broad array of public education options, but many non-district public education providers receive their funding directly from OSPI. CP 873-75. Directly-funded programs like the Washington Youth Academy and the high schools within Bates and Clover Park Technical Colleges served more than 2,500 students in the 2015-16 school year. CP 873-75. Like the Spokane District, many districts contract with non-profit or other private entities to operate a variety of public education programs, including many alternative learning and online learning programs for public school students. *See* RCW 28A.232; RCW 28A.250. In addition, as of 2016, OSPI had approved 20 publicly-funded, private education service providers located in Washington and 13 located outside of Washington. CP 873-74, 974, 981.

All of these programs, including charter schools, are part of Washington's multifaceted public school system. It is not unusual for private non-profit entities to provide publicly-funded education to Washington's public school students, either unconnected to a school district or under a contract with one.

B. Washington's Public Charter Schools Act Created Another Innovative Public School Option, Focused on Serving At-Risk Students and Subject to Rigorous Accountability

Washington was the forty-second state to adopt a charter school law. Charter schools in Washington are "public school[s]," "open to all children free of charge and by choice," and are public schools "operated separately

from the common school system as an alternative to traditional common schools." RCW 28A.710.020(1). The Act allows up to 40 charter public schools statewide with a focus on serving at-risk students, and imposes strict accountability to monitor outcomes. RCW 28A.710.140-.210. Charter public schools must be operated by non-profit, non-sectarian organizations, selected on a competitive basis. RCW 28A.710.010(1), .140. Where interest exceeds capacity, spaces are allotted by lottery. RCW 28A.710.050(3).

Charter school teachers must be state certificated. RCW 28A.710.040(2)(c). They must provide "a program of basic education" that meets the minimum components of RCW 28A.150.220 and conforms to the essential learning goals the Legislature has adopted in RCW 28A.150.210. RCW 28A.710.040(2)(b). They must provide a minimum number of instructional hours and credits; a curriculum of instruction that ensures students will meet the Essential Academic Learning Requirements (EALRs),[4] the detailed statement of what every child should know in each subject at each grade level;[5] supplemental instruction for English language learners and for students needing learning assistance; special education programs; and programs for highly capable children. RCW 28A.710.040(2)(b); RCW 28A.150.220.[6] Charter schools must comply with local, state, and federal health, safety, parents' rights, civil

[4] http://www.k12.wa.us/CurriculumInstruct/LearningStandards.aspx.

[5] For example, the math EALRs span 92 pages, providing generous detail. CP 879-971.

[6] "Instructional program of basic education" is also defined in RCW 28A.150.203(8) to mean: "the minimum program required to be provided by school districts and includes instructional hour requirements and other components under RCW 28A.150.220."

rights, and nondiscrimination laws to the same extent as school districts. RCW 28A.710.040(2)(a).

The Washington Charter School Commission authorizes charter schools throughout the state. RCW 28A.710.080. School districts, like the Spokane School District, may apply to become authorizers of charter schools within their boundaries. RCW 28A.710.080, .090; CP 973.

The Charter Schools Act includes a vigorous application process to open a charter school. RCW 28A.710.130(2); WAC 108-20-070. Applications are hundreds of pages long and must address every aspect of the school's operation, including whether the school is designed to serve at-risk students. CP 982, 1118-1120; 1421-2002 (Summit Sierra Application); RCW 28A.710.140. As of the fall of 2016, there had been a total of 31 charter school applications, but only 12 were approved. CP 981, 1118.

Approved charter schools must enter into a contract with the authorizer. RCW 28A.710.160; WAC 108-20-090. The contracts impose additional requirements including compliance with certain laws. RCW 28A.710.040(3). For example, state regulations and the charter school contracts reiterate that charter schools must provide the program of basic education. CP 1212 ("Standards that must be met by the school include, but are not limited to: a. Basic education, as defined in RCW 28A.150.200, .210, and .220.") The contracts also require compliance with *all* laws related to student discipline. *See* CP 973, 1120 (discipline policy must satisfy due process and comply with all applicable law relating to student discipline).

Within these standards, charter public schools are allowed to innovate as to "scheduling, personnel, funding, and educational programs" to improve student outcomes. RCW 28A.710.040(3). While the EALRs identify *what* a student should know in great detail, charter schools have flexibility in determining *how* to effectively deliver that information to students. *See* RCW 28A.710.040(3); *see also* CP 883 ("Standards define what students should understand and be able to do"; they "do not dictate curriculum or teaching methods."). This flexibility is not limited to charter schools. Traditional common schools and nontraditional schools other than charter schools also develop their curricula and choose the texts and materials they will use to teach the knowledge and skills covered in the EALRs. RCW 28A.710.040(2)(b); RCW 28A.320.230; *see also* CP 883. In order to allow innovation in these areas, charter schools are exempt from statutes and rules applicable to school districts and school boards where compliance is not required by the Act or the schools' contracts. RCW 28A.710.040(3). For example, charter schools are not bound by RCW 28A.315 (concerning district reorganization), RCW 28A.170 (grants to fund substance abuse awareness programs), or RCW 28A.188 (specialized STEM programs designated by OSPI).

Charter public schools are expressly "subject to the supervision of the superintendent of public instruction and the state board of education, including accountability measures, to the same extent as other public schools, except as otherwise provided in [RCW 28A.710]." RCW 28A.710.040(5). Accountability measures evaluate all public schools,

including charter schools, on: (1) annual progress toward math and reading standards, and (2) performance according to the Washington Achievement Index, which provides a "snapshot of each school's performance by comparing how students perform in reading, writing, math, science, reading and math growth, and graduation rates." CP 877. Charter public schools are required to participate in statewide student assessment tests and annual school performance reviews. RCW 28A.710.040(2). Persistently low achieving schools are required to "adopt action plans for how they will improve student achievement." CP 877. Unlike traditional common schools, charter public schools must obtain independent performance audits. RCW 28A.710.030(2).

Complaints to a charter school authorizer about a particular charter school can result in sanctions. WAC 108-30-040(2). As with all public schools, the Superintendent of Public Instruction can withhold funds for non-compliance and pending investigation of non-compliance. WAC 392-123-065. Charter school authorizers can require a corrective action plan at any time. RCW 28A.710.180(4). Charter schools can be closed for noncompliance with state or federal laws, as well as failure to meet performance expectations. RCW 28A.710.200. While traditional public schools are given at least three years to implement a corrective plan if they fall into the bottom *five* percent of public schools, RCW 28A.657.20, 030, .050(2)(a), charter schools must remain above the bottom quartile of public schools to be eligible to renew their contract, absent extraordinary circumstances. RCW 28A.710.200.

Finally, the Act emphasizes transparency. Authorizers and charter public schools are subject to the Public Records Act and the Open Public Meetings Act. RCW 28A.710.040(2)(h). Members of the charter school commission and charter school boards must file personal financial affairs statements with the public disclosure commission. RCW 28A.710.290.

In the 2016-17 school year, charter schools served 1,654 students in eight charter schools, six commission-authorized and two authorized by the Spokane School District. CP 1126; 973-74. There are ten charter schools operating for the 2017-18 school year, which began in mid-August for most schools. CP 973-74, 1096-97.[7] Commission-authorized charter schools serve a diverse student population that, depending on the school, has ranged from 64 to 94 percent students of color, 31 to 79 percent low income students, and eight to 20 percent special education students. CP 1126-27. The Spokane District's charter schools serve between 25 and 30 percent students of color; 40 to 54 percent low income; and 8.7 to 19 percent special education students. CP 973-74. The Spokane District explicitly solicited its schools to address needs of at-risk students. CP 981-82. Two of the charter school operators have successfully served at-risk students in charter public schools in California. CP 1096-97. For example, 96 percent of Summit Public School's California students are accepted to at least one four-year college or university, with the number of graduates on track to complete college at double the national average. CP 1097.

[7] http://charterschool.wa.gov/what-are-charter-schools/upcoming-commission-authorized-charter-schools/.

C. The Legislature Changed the Funding Source for Charter Schools and Expressly Required Charter Schools to Provide a "Program of Basic Education"

Three years after the voters approved the creation of a limited number of charter public schools in I-1240, this Court declared the funding source that voters had adopted unconstitutional and invalidated I-1240 in its entirety. *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 398, 355 P.3d 1131 (2015) (*LWV*). This Court held I-1240 was unconstitutional because it improperly designated charter schools as common schools. *Id.* Further, the Act unconstitutionally allowed the Superintendent to allocate to charter schools restricted funds that had been "designated for the exclusive use of the common schools" because they had been "made available by the legislature for the current use of the common schools." *Id.* at 408 (internal quotation marks omitted). The voters intended "to use common school funding allocations as [the] source" for charter school funding, and the definition of charter schools as common schools with access to common school appropriations was not severable. *Id.* at 412.

In the 2016 legislative session, the Legislature responded by adopting RCW 28A.710, the Charter Schools Act. The Legislature remedied the constitutional deficiencies this Court identified. Laws of 2016, ch. 241 (codified at RCW 28A.710). The Legislature: (1) removed charter schools from the common school system and defined them only as public schools (RCW 28A.710.020, RCW 28A.150.010; RCW 28A.315.005); (2) funded charter schools out of the Opportunity Pathways Account, which is funded solely from lottery revenue (RCW 28B.76.526); and

(3) eliminated charter schools' access to local levy funds and the common school construction fund (RCW 28A.710.220, .230; RCW 28B.76.526); *see also* Supplemental Operating Budget, Laws of 2016, Spec. Sess., ch. 36, §§ 516, 517; 2017-19 Operating Budget, Laws of 2017, 3d Spec. Sess., ch. 1, §§ 519, 520. Plaintiffs do not dispute that charter schools receive no state general funds, no revenue from state property tax for common schools, and no money that the Legislature has previously appropriated to common schools. Op. Br. at 15.

In the 2017 legislative session, the Legislature imposed an additional state property tax to support the common schools that will generate more than $4 billion in state revenue dedicated to common schools in the next four years. *2017 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* (*Legislature's Report*) at 51-52 (July 31, 2017); Laws of 2017, 3d. Spec. Sess., ch. 13 §§ 301-302. Other significant tax legislation will generate undedicated new revenue of more than $1.2 billion in the next four years for the general fund. *Legislature's Report* at 51-52, Laws of 2017, 3d Spec. Sess., ch. 28.

The current operating budget for the 2017-19 biennium increases K-12 public education appropriations by $3.8 *billion* as compared with the 2015-17 budget. *Legislature's Report* at 10. Thus, funding charter schools from the Opportunity Pathways Account has not resulted in *any* reduction in funds expended for traditional common schools.

The Legislature made two other significant changes. First, it amended RCW 28A.710.040(2)(b), to expressly require that charter

schools must provide "a program of basic education, that meets the goals in RCW 28A.150.210 . . . ." Laws of 2016, ch. 241, § 104. While all of the charter schools' contracts have always required them to provide the program of basic education, including compliance with RCW 28A.150.200, .210, and the minimum components of the instructional program of basic education under RCW 28A.150.220, CP 1212, this amendment clarified that these are also statutory requirements by inserting the statutorily defined term "program of basic education." *See* RCW 28A.150.203(9). Second, the Legislature aligned the Charter School Commission's structure with that of the State Board of Education and the Professional Educator Standards Board by placing the Commission under the Superintendent of Public Instruction for administrative purposes and adding the Superintendent, as well as a member of the State Board of Education, to the Charter School Commission. RCW 28A.710.070; RCW 28A.410.200(1)(a), (7); RCW 28A.305.011(1)(a)(iii), .130(7).

D. Procedural History

Plaintiffs raised seven challenges to the constitutionality of the new Charter Schools Act. Parents, students, and charter public schools intervened as defendants. The State filed a motion to dismiss two of Plaintiffs' claims for lack of justiciability: Plaintiffs' *McCleary*-based "ample funding" claim and a second claim that Plaintiffs have now abandoned. CP 68-69; Plaintiffs' Op. Br. at 3-4. The Court dismissed Plaintiffs' ample funding claim with prejudice, concluding that it is not justiciable because it is predicated on an argument about whether charter

schools will prevent the State from meeting its September 2018 deadline in the *McCleary* case, something that is speculative and theoretical until the deadline occurs. CP 203-06. The trial court found Plaintiffs were also speculating that the charter schools would someday outgrow lottery revenue and this would result in a diversion of common school funds. CP 204.

The parties filed cross motions for summary judgment on the remaining claims. CP 272, 655, 813. The trial court granted summary judgment on behalf of the State and Intervenors, rejecting all of the Plaintiffs' remaining arguments. CP 3744-45. The trial court recognized that Plaintiffs brought a facial challenge to the Charter Schools Act, and thus they had to prove unconstitutionality beyond a reasonable doubt in all circumstances. CP 3750. The trial court found charter schools to be part of the uniform public school system under article IX, section 2, reasoning as this Court has that common schools are one part of the broader public school system. Charter schools need not be *common* schools to be part of a uniform *public* school system. CP 3745. While some non-common, public schools serve special populations, others are open to all students as alternatives to traditional public schools. CP 3752-53. Charter schools are open to all students and provide the same program of basic education as all other public schools, sufficient to allow students to transfer among schools without loss of credit. CP 3754-59. Moreover direct, local school board control is required for a school to be a common school and access common school funds, but not for it to be a public school. CP 3761-62.

The trial court also found it undisputed that lottery revenue from the Opportunity Pathways Account is the only funding source for charter schools, and protected common school funds were not being expended to operate charter schools. CP 3745, 3762-63. In addition, the Act did not improperly delegate the Legislature's authority to define basic education. Nor did the Act displace the Superintendent's supervisory authority. CP 3765-66. Nowhere does the Act make the Superintendent subordinate to the Charter School Commission. In fact, the Act assigns the Superintendent additional supervisory duties, and he maintains the power of the purse controlling payments to charter schools. CP 3766. Finally, the Act does not violate article II, section 37 because it is a complete act. CP 3768. Thus, Plaintiffs failed to demonstrate that the Charter Schools Act is unconstitutional beyond a reasonable doubt.

III. ISSUES

1. Where the Constitution does not require local school board governance of all public school programs, just common schools, and where charter schools must provide a program of basic education like every other public school, was the trial court correct to conclude that charter schools do not destroy the uniformity of Washington's public school system under article IX, section 2?

2. Where charter schools are now funded entirely with lottery revenue through the Opportunity Pathways Account, not with any money that was previously appropriated to common schools, does this funding scheme

violate article IX, section 2? Does Plaintiffs' speculation about future funding create a ripe claim?

3. Where the Legislature has adopted tax increases and a funding scheme that adds billions of dollars to public school funding, is Plaintiffs' "ample funding" claim now moot and was it properly dismissed for lack of justiciability in this case?

4. Where this Court has already held that the Legislature has appropriately defined "basic education" and where appropriate safeguards are in place to ensure charter schools meet their obligation to provide a program of basic education, did the Charter Schools Act improperly delegate the definition of basic education to charter schools?

5. Where the Superintendent of Public Instruction oversees charter schools in the same manner as other public schools, and he sits on the board of the charter school commission, does the Superintendent supervise charter schools as article III, section 22 requires?

6. Where the Charter Schools Act is a complete act, did the trial court properly dismiss Plaintiffs' article II, section 37 claim?

IV. ARGUMENT

A. Plaintiffs Must Prove Beyond a Reasonable Doubt That the Charter Schools Act is Unconstitutional in All Circumstances

The Charter Schools Act, RCW 28A.710, is presumed constitutional, and Plaintiffs must prove unconstitutionality beyond a reasonable doubt. *See Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000). Given that Plaintiffs' challenge is facial—

they seek an order declaring the entire Act unconstitutional in all circumstances—it must be rejected unless this Court is convinced that there is no set of facts or circumstances under which the statute can constitutionally be applied. *Id.* at 221. To the extent that Plaintiffs try to bring an as-applied challenge, they must prove current specific facts that establish an unconstitutional application. *Id. at 223-24; In re Detention of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999).

This Court has long recognized that the state constitution is not a grant, but a restriction on the Legislature's lawmaking power. *State ex. rel. O'Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969). The Legislature's discretion is particularly broad in the area of education. *See Moses Lake Sch. Dist. 161 v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 555-56, 503 P.2d 86 (1972). This Court has firmly left it to the legislative branch to "address[ ] the difficult policy questions inherent in forming the details of an education system," giving " 'the greatest possible latitude to participate in the full implementation of the constitutional mandate.' " *McCleary v. State*, 173 Wn.2d 477, 516-17, 269 P.3d 227 (2012) (quoting *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 515, 585 P.2d 71 (1978). So long as an educational program fits within article IX's broad constitutional guidelines, it is up to the Legislature to determine what options should be available to Washington students. *See Tunstall*, 141 Wn.2d at 223.

Here, Plaintiffs' facial challenge must fail because it is based primarily on speculation about what *may* happen with regard to charter school funding and operations. Failing to present any proof of current

unconstitutional operations, Plaintiffs claim instead that *eventually* there may not be enough lottery revenue, or students may be prevented from maintaining credits when transferring between charter and other public schools. As in *Tunstall*, Plaintiffs "fail to provide any specific facts demonstrating" that the actual application of the Charter Schools Act violates the constitution. *Id*. Instead, Plaintiffs "merely speculate about constitutional problems that *could result* from" the statute's application. *Id*. Plaintiffs fail to show that there is no set of circumstances under which charter schools can be operated constitutionally.

B. Charter Public Schools Do Not Destroy the General and Uniform Character of the Public School System

Article IX, section 2 of the Washington Constitution 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." This Court long ago recognized that the Legislature has enacted laws providing for a general and uniform system of public education. *Seattle Sch. Dist. 1*, 90 Wn.2d at 519. The Legislature has flexibility under its broad lawmaking power to customize education programs within this public school system to meet the current needs of Washington's children. *See Tunstall*, 141 Wn.2d at 223 (citing *Tommy P. v. Bd. of County Comm'rs*, 97 Wn.2d 385, 398, 645 P.2d 697 (1982)). "The program of basic education is not etched in constitutional stone," and the Legislature must periodically modernize the public education system and

the basic education program "as the needs of students and the demands of society evolve." *McCleary*, 173 Wn.2d at 484; *Seattle Sch. Dist. 1*, 90 Wn.2d at 516-17. Article IX must be flexible enough to support a system that prepares all of Washington's children " 'for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas.' " *McCleary*, 173 Wn.2d at 516 (quoting *Seattle Sch. Dist. 1*, 90 Wn.2d at 517).

Despite Plaintiffs' attempts to conflate "common schools" with "public schools," the plain language of article IX establishes that " '[c]ommon schools' are but one part of the entire public school system." *Moses Lake Sch. Dist. 161*, 81 Wn.2d at 559; Const., art. IX, § 2. "The general and uniform system contemplated by the constitution is neither limited to common schools nor is it synonymous therewith." *Seattle Sch. Dist. 1*, 90 Wn.2d at 522. Thus, even where a school is not a "common school," it can validly be part of the "general and uniform system of public schools" under article IX.

This Court has defined a "general and uniform system" as:

> [O]ne in which every child in the state 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 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 basic to a sound education.

Federal Way Sch. Dist. 210 v. State, 167 Wn.2d 514, 524, 219 P.3d 941 (2009) (quoting *Northshore Sch. Dist. 417 v. Kinnear*, 84 Wn.2d 685, 729, 530 P.2d 178 (1974)).

Plaintiffs advance three conflicting theories as to why charter schools supposedly destroy the uniformity of the public school system, claiming that: (1) charter schools are too much like other public schools, including common schools, because they will "supplant" or "replace" common schools by providing a basic program of education; (2) charter schools are too different from other public schools because they offer innovative educational opportunities; and (3) charter schools have "non-uniform governance." Op. Br. at 21, 26, 27. Plaintiffs are wrong on all counts.

1. Constitutional text, case law, and historical practice refute Plaintiffs' novel argument that non-common public schools must serve only special populations

Plaintiffs assert that because charter schools are open to all and provide a broad education aimed at "the same educational goals" as common schools, they are somehow non-uniform. Op. Br. at 22. This argument turns the concept of uniformity upside down by essentially arguing that charter schools are too similar to traditional common schools to properly be part of the general and uniform public school system. Op. Br. at 21-22. This theory is unhinged from any legal definition of the general and uniform public school system that appears in the case law. *See Federal Way Sch. Dist. 210*, 167 Wn.2d at 524. Plaintiffs may, as a matter of policy,

disagree with the idea that charter schools offer families an alternative, but that policy debate is for the Legislature to resolve.

Plaintiffs misrepresent the facts when they say the Legislature created charter schools "to replace" common schools. Op. Br. at 21, 25. The Legislature's authorization of a maximum of 40 charter schools statewide is not intended to "replace" the 2,000+ common schools in Washington. But setting factual exaggerations aside, Plaintiffs are wrong when they assert that the Washington Constitution requires that *only* common schools can provide a general basic education, and non-common schools can *only* serve discrete populations or offer specialized programs. *See* Op. Br. at 22-24.

Article IX, section 2 says: "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." (Emphases added). Common schools are the only category of public schools that the Legislature cannot abolish, and the framers were certainly concerned with giving every child access to the common schools. But nothing in this text supports the notion that *only* common schools may provide a general education open to all; the framers expressly contemplated other types of public schools. Thus, the "general and uniform" requirement applies to the "system of *public* schools," not just common schools.

Similarly, Plaintiffs' description of "high schools, normal schools, and technical schools," and indeed all non-common schools, as schools that have *not* historically provided a "general" education is untenable. Op. Br.

at 20-21. While normal schools were created to educate teachers-in-training, public school children also attended the mandatory, embedded model training schools at which teachers-in-training gained practical experience. Laws of 1897, ch. 118, §§ 219, 224; Frederick E. Bolton, *History of Education in Washington* 282 (1935); *Sch. Dist. 20, Spokane County v. Bryan*, 51 Wash. 498, 500, 99 P.28 (1909). The model training schools educated the general population of students with a typical curriculum. Laws of 1897, ch. 118, §§ 219, 224; Bolton at 282; *Bryan*, 51 Wash. at 500 (model training school students chosen for *lack of* special needs). The *Bryan* Court allowed these schools to exist as public schools, if not common schools, holding that they could be funded from the general fund, just not from common school funds. *Bryan*, 51 Wash. at 506-07.

It is also indisputable that high schools have always been open to all, even before statehood. *E.g*., Laws of 1897, ch. 118, § 64. Plaintiffs do not dispute that their curriculum was general, not specialized. Bolton at 181 (listing courses including arithmetic, literature, history, grammar, civil government, algebra). Thus, there is no historical basis for Plaintiffs' novel claim that non-common, public schools can serve only discrete student populations with special needs. Op. Br. at 22-23. And it would be disturbing to adopt Plaintiffs' reasoning that a school providing an elite opportunity (as they characterize high schools at statehood) would be acceptable only if it is restricted to a chosen few.

Moreover, since soon after statehood, the Legislature has defined the public school system to include a wide spectrum of non-common, public

school alternatives not limited to special populations or special curricula. Laws of 1909, ch. 97, § 1 (public school system embraced, in addition to common schools, "technical schools . . . normal schools . . . training schools . . . and such other educational institutions as may be established by law and maintained at public expense"). The modern definition of "public school" similarly includes common schools, charter schools, and "those schools and institutions of learning having a curriculum below the college or university level as now or may be established by law and maintained at public expense." RCW 28A.150.010. Neither the Legislature nor this Court has ever endorsed the limitation Plaintiffs suggest. Instead, as the trial court pointed out, the public school system includes numerous types of schools not specifically listed in article IX, and while some serve discrete populations, others are open to all. CP 3752 (listing, for example, high schools operated at community and technical colleges under RCW 28B.50.533-.535, tribal compact schools under RCW 28A.715, Running Start under RCW 28A.600.300-.400, Alternative Learning Experience and online learning programs operated by non-profit and private entities under RCW 28A.232.010, RCW 28A.250.). Surely all of these schools fall within the public school system contemplated under article IX, section 2. There is no historical or modern basis for Plaintiffs' claim that non-common, public schools can only exist if they admit discrete student populations with special needs.

Plaintiffs can also cite no case supporting their interpretation of article IX. Indeed, Plaintiffs' vision that the Legislature can comply with

article IX only by offering specialized educational opportunities to a limited student population is in enormous tension with this Court's definition of a general and uniform system. How can the hallmark of acceptable uniformity be "specialized educational opportunities" open "to a limited student population" when the system must include "reasonably standardized educational and instructional facilities and opportunities" and allow students to transfer "without substantial loss of credit"? *Federal Way Sch. Dist. 210*, 167 Wn.2d at 524. Plaintiffs cannot reconcile their position with precedent.

It is true that this Court has recognized that within a constitutionally valid public school system, there must be programs that will satisfy the special needs of discrete populations given the rights conferred under article IX, section 1. *Tunstall*, 141 Wn.2d at 221-22. But it would be deeply troubling to *require* that a public school program restrict admission to be constitutionally valid. The *Tunstall* Court did not limit "general" basic education under the basic education act to common schools only, nor did it hold that non-common, public schools violate article IX if they are open to all students who choose them. *Id.* at 221-23. No Washington court has ever done that, and this Court would be hard-pressed to draw a principled line between "general" and "specialized" basic education.

Finally, even if non-common public schools were required to focus on specialized student populations, Plaintiffs have not shown that charter schools fail to meet this standard. Charter schools are focused on youth who have "an academic or economic disadvantage that requires assistance or

special services to succeed in educational programs." RCW 28A.710.010(2), .050(3), .140(2). The authorized schools are located in areas with high concentrations of low-income households and offer specific services for at-risk students. CP 973-82, 1116-17, 1126-27, 3185, 3189. Charter school applicants are evaluated on how well they will serve special populations and at-risk youth. CP 1129, 1142, 1144, 1147-49. Successful applicants must specifically describe a plan for outreach targeting at risk students. CP 1150. And all of the existing charter school programs are "designed to enroll and serve at-risk student populations." CP 2048-49, 2050, 3189-3212. The charter schools have between 31 percent and 79 percent low income students, with five schools at more than 50 percent. CP 1126-27, 2048-49. Charter schools are designed to meet, and are meeting, the special needs of their at risk students. Thus, charter schools would not destroy the general and uniform system of public schools, even if Plaintiffs' novel theory were correct, which it is not.

2. Charter schools are part of the general and uniform system of public schools and they provide a "program of basic education"

Plaintiffs never adequately explain how the Charter Schools Act actually undermines the "general and uniform system" as defined in *Federal Way School District 210*. To begin, the Act does not deny any child free access to reasonably standardized educational opportunities fundamental to a basic education. *See Federal Way Sch. Dist. 210*, 167 Wn.2d at 524. Charter schools and common schools are free and open to all children. RCW 28A.710.020(1)(a).

The *Federal Way* Court held that the basic education statute's (1) uniform educational content, (2) statewide teacher certification, (3) instructional hour requirements, and 4) statewide assessment system satisfy the *Federal Way* standard for uniformity. *Id*. at 524-25. Plaintiffs do not dispute, nor could they, that charter school teachers must be state certificated, that charter schools exceed instructional hour minimums, and that they fully participate in the state assessment system and are subject to statewide public school accountability measures. Op. Br. at 27-29; RCW 28A.710.040(2)(b), (c); CP 2210-11.

Charter schools also provide their students with the constitutionally-required "uniform educational content" that is reasonably standardized, through compliance with the four learning goals in RCW 28A.150.210 and instruction in the EALRs. RCW 28A.710.040(2)(b); *see also McCleary*, 173 Wn.2d at 523. As the trial court noted, these alone satisfy this court's definition of constitutionally sufficient "education." *McCleary*, 173 Wn.2d at 525-26; *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005).

Nevertheless, charter schools are now expressly required by statute to provide a "program of basic education" like every other public school. RCW 28A.710.040(2)(b). The term "program of basic education" is defined in RCW 28A.150.203(9) to mean "the overall program under RCW 28A.150.200 . . . ." RCW 28A.150.200(2), in turn, "defines the program of basic education under this chapter as that which is necessary" to meet statewide graduation requirements; "[b]asic education . . . includes . . . (a) The instructional program of basic education the minimum components

of which are described in RCW 28A.150.220[.]" RCW 28A.150.200(2). These components include meeting or exceeding the minimum instructional hours, as well as providing highly capable programs, learning assistance, transitional bilingual, and special education. RCW 28A.150.220.

Plaintiffs assert that the Legislature meant something other than its previously defined "program of basic education" when it used this term in the Charter Schools Act. But legislative definitions of terms of art reveal the Legislature's intent as to the meaning of the term. *See State v. Sullivan*, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). Plaintiffs contend that the definition of "program of basic education" does not apply outside of RCW 28A.150, but RCW 28A.900.040 requires that all of the provisions in RCW Title 28A be construed in pari materia even if they were enacted separately. *See also, e.g., AllianceOne Receivables Mgmt., Inc. v. Lewis,* 180 Wn.2d 389, 393, 325 P.3d 904 (2014) (courts must consider a provision within the context of the entire statutory scheme to determine its plain meaning). As the trial court reasoned, applying existing definitions to later-adopted provisions provides a unified reading of the laws applicable to the public school system. CP 3757. Plaintiffs offer no credible alternative for what the Legislature would have meant when it inserted "a program of basic education," a term of art, into the charter school statute.

Plaintiffs also steadfastly ignore the express requirements of the charter contracts. In practice, the charter authorizers have always required compliance with RCW 28A.150.220, even before the Act's amendment. CP 992 (clause 6.B.3), 1120, 1212, 3186; http://charterschool.wa.gov/

operating/contract/ (all Commission-authorized contracts). State regulation requires district authorizers to ensure compliance with RCW 28A.150.220. WAC 180-19-030(4). And it is undisputed that the Office of the Superintendent of Public Instruction requires charter schools to provide the state's program of basic education and the categorical services like special education listed under RCW 28A.150.220. CP 2408. In the face of undisputed evidence that charter schools do provide the state's program of basic education, Plaintiffs absurdly ask this court to declare charter schools facially unconstitutional because, under their strained reading of the statute, charter schools are not required to do so. That makes no sense.

Plaintiffs lament the flexibility in instructional methods afforded to charter schools, but even in traditional public schools, educational instruction provided to each student need not be and is not identical; variations in coursework, teaching methods, or instruction time above the statutory minimum, for example, are common and are by no means fatal to an innovative public school program. *Tunstall*, 141 Wn.2d at 220, 222. This type of flexibility is also available to traditional common schools, which develop their own curricula and choose textbooks at the local level. RCW 28A.320.230. The Legislature has also authorized waivers of some requirements for traditional common schools to develop innovations or otherwise provide "all students in the district an effective education system that is designed to enhance the educational program for each student." RCW 28A.305.140(1)(a); RCW 28A.630.083. The concept of waiving some instructional requirements to nurture innovation was a part of the general

and uniform system long before charter public schools. This Court has declined to declare public school programs unconstitutional even when they significantly depart from traditional instruction. *Tunstall*, 141 Wn.2d at 220, 222.

Charter public schools must also comply with *all* state and federal laws governing student discipline. Charter school applicants must detail their discipline plan and agree to comply with state and federal laws (including laws regarding parents' rights, privacy, civil rights,[8] student homelessness, nondiscrimination, and due process), and charter school contracts explicitly require compliance with federal, state, and local school discipline laws. RCW 28A.710.130(2)(p), .040(2)(a), .040(3). CP 1207 ("The School shall comply with the School's discipline policy and *all* Applicable Law relating to student discipline including, but not limited to, RCW 28A.150.300,[9] 28A.600.015[10] and 28A.600.022[11]." (emphasis added)); CP 1151, 3214. Plaintiffs claim that charter schools do not have to comply with RCW 28A.600.410-.490 (for example, encouraging alternatives to suspension, providing for expulsion for firearms but allowing case-by-case exceptions, and addressing classroom restraint). But Plaintiffs fail to explain how the contract requirements fail to cover these statutes, nor have they provided *any* evidence that charter schools fail to comply with

[8] *See also* U.S. Dep't of Educ., Office for Civil Rights, *May 14, 2014 Guidance Letter*, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf (requiring charter school compliance with civil rights laws).

[9] RCW 28A.150.300 prohibits corporal punishment.

[10] RCW 28A.600.015 requires adherence to substantive and procedural due process in the context of discipline.

[11] RCW 28A.600.022 requires a reengagement plan.

these statutes in practice. Op. Br. at 29. Nor do Plaintiffs offer any concrete evidence that any charter school's discipline practices violate any law or deviate so far from traditional schools that they destroy uniformity. *Id.*

Plaintiffs broadly claim that charter schools are exempt from most others laws governing common schools, Op. Br. at 27, without specifically identifying any exemption that destroys uniformity. It makes sense that charter schools are not bound by statutes governing school district structure and specific programs. RCW 28A.315-.343 (concerning, for example, district structure and organization), RCW 28A.170 (grants to fund substance abuse awareness programs), or RCW 28A.188 (specialized STEM programs designated by OSPI).

Finally, charter public school students who transfer to another public school must receive credits "in the same manner and according to the same criteria that credits are accepted from other public schools." RCW 28A.710.060(2). While Plaintiffs assert charter schools could somehow refuse to accept credits presented by students transferring in, they have presented no evidence that this has ever happened. Op. Br. at 29. As the trial court found, charter schools provide the same basic education that other schools provide and other non-traditional schools do not have statutes expressly governing credit transfers. CP 3760. Should a charter school refuse to accept credit from a traditional public school, Plaintiffs can bring an as applied challenge.

It is Plaintiffs' burden to show that charter schools are non-uniform in operation. Plaintiffs have provided no evidence, much less evidence

beyond a reasonable doubt, that charter school students will not be able to transfer within the system or that charter schools are non-uniform.

3. Article IX, section 2 does not mandate local school board governance of all public school programs, and even so, some charter schools are governed by a school board

Plaintiffs finally assert that charter schools violate article IX, section 2 because, they say, the uniformity clause mandates that all public schools must be subject to voter control through local school board governance. Op. Br. at 26-27. Unlike other states (for example Florida), Washington's article IX does not mention school boards at all, much less mandate that they govern every *public* school program. School boards and school districts are certainly long-established creatures of statute, but the Legislature can validly expand and limit their responsibilities. *Moses Lake Sch. Dist. 161 v. Big Bend Cmyt. Coll.*, 81 Wn.2d 551, 556, 503 P.2d 86 (1972) ("[I]t must be remembered that a school district is a creature of the legislature."). In *League of Women Voters*, this Court held only that school board governance was necessary for a school to be a *common* school. 184 Wn.2d at 405. This Court has never held that school board governance is required for all *public* schools.

Instead, in *Bryan*, this Court addressed whether a normal school (a training school for teachers that enrolled public school students in its embedded model training school) was a *common* school that could be funded from the common school fund. *Bryan*, 51 Wash. at 500. Ultimately, the *Bryan* Court did not say that *public* schools must be directly governed by school boards to operate within the constitution. The school at issue in

Bryan was not governed by a school board. *Id.* at 500, 502. Yet the Court concluded that non-traditional schools like it could be *public* schools, funded with public dollars; they just could not be "common schools" funded out of the common school fund. *Id.* at 505-06 ("[A]ll experiments in education must be indulged, if at all, at the expense of the general fund [instead of the common school fund]. . . . It is not that the Legislature cannot make provision for the support of a model training school, but in its attempt to do so, it has made provision for it out of the wrong fund."). If the normal school's governance violated the uniformity of the *public* school system, then it could not have continued to be a public and publicly-funded school at all, but that is not what the *Bryan* Court held.

In the more modern *Moses Lake School District 161* and *Seattle School District 1* cases, this Court confirmed that the "general and uniform system of public schools" is broader than "common schools." *Seattle Sch. Dist. 1*, 90 Wn.2d at 522; *Moses Lake Sch. Dist. 161*, 81 Wn.2d at 559 (" 'Common schools' are but one part of the entire public school system."). Thus, a public school can be a valid part of the public school system, even if it is not a common school because it is not governed by a school board.

Plaintiffs suggest that *Federal Way* requires "structural uniformity" and "uniform governance," Op. Br. at 26, but that case says no such thing. It simply states that the general and uniform system must enable a child to transfer from one district to another without substantial loss of credit. *Federal Way Sch. Dist. 210*, 167 Wn.2d at 524. This is a far cry from requiring school board governance of every public school.

In modern times, there is a wide range of public school programs that are not controlled by elected school boards, from tribal compact schools to high school programs run by community and technical colleges (governed by trustees the Governor has appointed), to the University of Washington's public school program for highly capable students (same), to public school ALE and online programs run by nonprofit entities. CP 873-75; RCW 28A.715; RCW 28A.600.310, .350, .385; RCW 28B.50.140; RCW 28A.185.040. The courts have never before held that these public schools violate article IX uniformity. Charter public schools are simply another public school program like these.

Plaintiffs also ignore that two charter public schools *are* under the control of an elected school board, perhaps because they concede that school districts can contract with private organizations to establish schools offering innovative programs. Op. Br. at 24-25 (endorsing Raisbeck Aviation High School). The Spokane District is a charter school authorizer and it governs two of the ten operating charter schools. CP 973. These schools were authorized as part of the Spokane District's commitment to cultivate "Excellence for Everyone," with an explicit focus on schools that serve "at-risk students." CP 975-82. The Spokane District's charter schools are subject to district oversight and Superintendent supervision and accountability, including the ability to withhold and recover payments. CP 870-71, 986-1012 (contract). If Plaintiffs assert contractual and monetary control is not enough to amount to school board control, they call into question all public school programs operated by third parties on behalf of

school districts, including OSPI-approved non-public entities such as Excelsior Youth Center, and on-line and ALE programs, to name a few. CP 873-75, 976-81.

Finally, to the extent that Plaintiffs assert that public schools must be held accountable to some elected public official, Commission-authorized charter schools are accountable to the elected Superintendent of Public Instruction who holds the purse strings (RCW 28A.710.040(5) and CP 871-72) and to the Commission, whose members are appointed by the Governor and House and Senate leadership (RCW 28A.710.180-.900). There is accountability to voters through these elected officials. RCW 28A.710.070. Charter schools are also accountable to the Legislature, which could abolish them at any time, unlike common schools.

C. Charter Schools Are Constitutionally Funded From the Opportunity Pathways Account, Which Receives Revenue Only From Lottery Sales

Article IX, section 2 provides, in part, that "the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools." Over Washington's history, common school operations have been funded from varied sources, for example, income from lands and other property devoted to the permanent common school fund before that fund was dedicated to school construction. Const. art. IX, § 3 (1889); Const. art. IX, § 3 (amend. 43). Currently, common schools are funded from the state property taxes for common schools, unrestricted dollars from the general fund, and other sources. RCW 84.52.065; Laws of 2017, 3d Spec. Sess., ch. 1, pt. 5. In *LWV*,

this Court held I-1240 unconstitutional because it incorrectly designated charter schools as "common schools" and funded them with money that had been appropriated for common schools. *LWV*, 184 Wn.2d at 408-10.

In response to the *LWV* ruling, the Legislature cured the constitutional defects of the Charter Schools Act. In part to avoid a significant reduction in the State's debt limit, the Legislature has not segregated common school funds by removing them from the general fund. *See* Const., art. VIII, § 1 (limiting the debt that the State can incur to a certain percentage of "general state revenues," defined generally as revenues deposited into the general fund, with exceptions). Instead, the Legislature chose to ensure that charter schools do not receive any constitutionally restricted funds by ensuring they no longer receive any money at all from the general fund.

Charter school appropriations are now expressly authorized under separate legal authority from appropriations for common schools. RCW 28A.710.270; RCW 28A.150.380. Charter schools are now funded entirely from the Opportunity Pathways Account. RCW 28A.710.270; RCW 67.70.240(1)(c). It is undisputed that the Opportunity Pathways Account, in turn, is funded solely with lottery revenue. RCW 28A.710.270; RCW 28B.76.526; RCW 67.70.240(1)(c); CP 1109-11. Thus, appropriations to charter schools come solely from lottery revenue. Laws of 2016, 1st Spec. Sess., ch. 36, §§ 516-17; Laws of 2017, 3d Spec. Sess., ch. 1, §§ 519-20.

Unable to dispute this dispositive point, Plaintiffs offer two tangential arguments. Both fail.

Plaintiffs first speculate that at some point general funds or constitutionally restricted common school funds[12] might be used to fund charter schools in the future. *See* Op. Br. at 33, 35 (alleging an eventual, "inevitable" deficiency in the Opportunity Pathways Account). Plaintiffs' argument reveals that their funding claim is grounded solely in speculation, so their claim is unripe and cannot justify the declaratory or injunctive relief they seek.[13] Plaintiffs ask this Court to conclude it is inevitable that the more than $256 million biennially available in the Opportunity Pathways Account will be insufficient to fund charter schools at some point in the future. Op. Br. at 31-33; CP 1111-12. But the State is spending roughly $64 million this biennium on charter schools, $192 million less than the $256 million biennially available in the Opportunity Pathways Account. Laws of 2017, 3d Spec. Sess., ch. 1, §§ 501, 519-20; Washington Economic and Revenue Forecast (June 2017) at 57-58. Charter school spending would have to quadruple before coming close to using the account's entire income. Plaintiffs offer nothing approaching proof beyond a reasonable doubt that their predicted outcome is inevitable; indeed, current charter funding and the limitations on charter expansion demonstrate that the Opportunity Pathways

[12] The Permanent Common School Fund is not relevant to the funding issues raised in this case. The principal of that fund cannot be spent, and article IX, section 3 provides that interest and investment income from the permanent fund must now be used for common school construction. Neither the principal nor the interest is currently used for the operation of *any* public school. Const, art IX, §3. In addition, there is currently no "common school fund." Common schools are now funded from the general fund.

[13] *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001); *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 796, 638 P.2d 1213 (1982); *see also Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994) (declaratory judgment is not appropriate when a dispute is hypothetical and speculative).

Account will be more than adequate to cover charter school funding for the currently-authorized schools. CP 1118 (ten charter schools currently operating; decline of applications from 19 in first round to two in last round); CP 1112; Laws of 2017, 3d Spec. Sess., ch. 1, §§ 519-20. Yet Plaintiffs ask this Court to assume, based on a series of hypothetical intervening events, that charter school funding needs will soon exceed the Opportunity Pathways Account.

Plaintiffs then ask this Court to assume that the Legislature will choose an unconstitutional funding alternative if charter school need exceeds the Opportunity Pathways Account. The Legislature has several options to further fund charter schools, however, should Opportunity Pathways funding become insufficient, as Plaintiffs have expressly acknowledged: increasing an existing tax or fee, imposing a new tax or fee, cutting other programs, developing efficiencies, cutting expenditures, or further limiting the number of permitted charter schools. *E.g.*, Op. Br. at 32, CP 3100, 3108. The Legislature could exercise any of these options, and this Court should not assume that the Legislature will instead adopt an unconstitutional alternative.

Charter schools currently receive no revenue from the general fund. Nor do they receive funding from the common school construction fund, or the state property taxes for common schools. CP 1108. Plaintiffs cannot show that a single dollar from any common-school-restricted fund will be spent on charter schools under the amended Act.

Second, Plaintiffs complain that funding charter schools out of

Opportunity Pathways still unconstitutionally "diverts" funds from common schools because, they claim, the Legislature has to shift other expenditures to the general fund. Op. Br. at 34. They are wrong on the law and the facts.

On the law, this argument ignores this Court's reasoning in *League of Women Voters.* This Court did not hold that the general fund, which funds most of the State's general operations, can fund nothing but common schools. That would be absurd. Instead, this Court held that the constitutionally protected common school funds are revenue from the current state property tax, the common school construction fund, and general fund dollars that the Legislature has appropriated in that biennium for the common schools. *LWV*, 184 Wn.2d at 408-10. While unnecessary given this holding, this Court further noted in dicta that "the State does not segregate constitutionally restricted [common school] moneys from other state funds," rejecting the State's argument that charter schools could be constitutionally funded out of the remainder of the general fund. *Id.* at 409. But unless a state officer must take money appropriated for common schools and spend it on a non-common school program—like the Superintendent was required to do under the prior charter school law—a general fund expenditure is not an unconstitutional diversion of common school funding. *See id.* at 408-10. Plaintiffs are wrong to assume that *any* increase in general fund expenditures diverts common school funding.

More broadly, Plaintiffs have cited no authority, and none exists, holding that it is unconstitutional for the Legislature to increase general fund

support for programs other than common schools. A finding to the contrary would call into question the Legislature's ability to increase general fund spending for anything that is not a common school program, including, for example, Washington's mental health care system.

Turning to the facts, there is just no evidence that the Legislature is diverting funds from common schools. The 2017-2019 operating budget increases K-12 public education appropriations by $3.8 *billion* compared with the prior budget. *Legislature's Report* at 10. Appropriations from the Education Legacy Trust Account for general apportionment for public schools have more than tripled. Laws of 2017, 3d Spec. Sess., ch. 1, § 502. And the Legislature has raised significant new revenue for common schools through an additional property tax, raising more than $4 billion in the next four years. *Legislature's Report* at 51-52; Laws of 2017, 3d Spec. Sess., ch. 13, §§ 301-302. Another piece of significant tax legislation will generate unrestricted revenue of more than $1.2 billion for the general fund in the next four years. 2017 *Legislature's Report* at 51-52; Laws of 2017, 3d. Spec. Sess., ch. 28.

Plaintiffs ignore all of this and instead focus on alleged "diversion" of money from the general fund to support programs previously funded by the Opportunity Pathways Account. But even this narrow, tangential claim is false. In the 2015-17 biennium, the Legislature used the Opportunity Pathways Account to fund higher education financial aid, early childhood education, and charter schools. In the 2017-2019 biennium, early learning funding from the Opportunity Pathways Account has remained essentially

unchanged. Laws of 2017, 3d Spec. Sess., ch. 1, §§ 223, 615, (early learning). And while Plaintiffs assert that the State has had to increase higher education financial assistance from the general fund because of charter schools, general fund expenditures on financial assistance are actually lower than they were in 2016. *Id.* To argue otherwise, Plaintiffs misleadingly point to a chart prepared by Senate staff describing one option that the Legislature considered in 2016 but never adopted. *See* Op. Br., Appendix A-3; CP 1110; CP 345 (dated January 19, 2016, early in the legislative session).

In short, funding charter schools from the Opportunity Pathways Account has not even tangentially resulted in any reduction in funds expended for the traditional common schools. Plaintiffs' "diversion" theory is based on speculation.

D. Plaintiffs' Ample Funding Claim is Not Justiciable in This Lawsuit

Plaintiffs make a half-hearted attempt to argue that the trial court improperly dismissed their claim that charter schools hinder the ample funding of the entire public school system. Plaintiffs ask this Court to conclude that the Legislature cannot possibly fund both charter schools and the rest of the public school system.

The proper avenue for resolving any asserted lack of ample funding for any portion of Washington's public school system is through the *McCleary* case. In retaining jurisdiction in that case, this Court recognized that judicially monitoring statewide reform poses a "delicate" and

"complex" challenge, in part, because the Court appreciates that "'the general authority to select the *means* of discharging [the State's constitutional] duty should be left to the Legislature.'" *McCleary*, 173 Wn.2d at 540-42, 546 (quoting *Seattle Sch. Dist. 1*, 90 Wn.2d at 520). All ample funding decisions should be made in the context of *McCleary*, not piecemeal in response to program-specific challenges brought by various plaintiffs against one legislative appropriation decision or another. Indeed, if Plaintiffs can claim that an expenditure to fund charter schools somehow unconstitutionally "diverts" money away from the funding stream necessary to amply fund basic education, anyone dissatisfied with *any* expenditure of state funds would be able to sue, arguing a violation of the ample funding provision. For example, someone who believes that the Legislature has appropriated too much for the State's mental healthcare system, public safety, or anything else could, under Plaintiffs' reasoning, bring a lawsuit alleging those funds would be better spent on schools. Piecemeal litigation of ample funding issues would undoubtedly waste judicial resources. All such arguments should instead be resolved in the single *McCleary* litigation, where the Court is comprehensively addressing ample funding, rather than risking multiple, potentially contradictory decisions.

Further, for the reasons explained in the State's *McCleary* briefing, the State has achieved compliance with Article IX, section 1 by doubling education funding since 2012. *Legislature's Report* at 8. In the 2017 session, the Legislature added another $8.3 billion in dedicated state funding for K-12 education over the next two biennia, increasing funding

from $13.4 billion in 2011-13 to $26.6 billion by 2019-21. *Id.* at 8, 12-13. While this Court has yet to rule on the sufficiency of these increases brought about by *McCleary*, if the State is on track to fully fund *all* public schools, as the State believes it is, Plaintiffs' ample funding claim in this case is moot.

E. The Charter Schools Act Does Not Delegate the Task of Defining the "Program of Basic Education" and There Are Substantial Safeguards to Protect Against Arbitrary Action

The Charter Schools Act does not delegate the State's paramount duty to define "basic education," and any lesser delegation that does exist is subject to appropriate safeguards. This Court has held that sufficient standards are in place when the Legislature "define[s] in general terms what is to be done and the instrumentality or administrative body which is to accomplish it;" and where "[p]rocedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power." *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972); *see also City of Auburn v. King County*, 114 Wn.2d 447, 452, 788 P.2d 534 (1990). Requiring the Legislature to articulate "exact and precise standards" for every exercise of administrative authority "destroys needed flexibility." *Barry & Barry, Inc.*, 81 Wn.2d at 160; *see also United Chiropractors of Wash., Inc. v. State*, 90 Wn.2d 1, 6, 578 P.2d 38 (1978) (same test for delegation to a private entity).

This Court held in *McCleary* that the Legislature has already met its duty to define basic education by adopting the four learning goals in RCW 28A.150.210 and requiring the EALRs. *McCleary*, 173 Wn.2d at 523-24;

RCW 28A.710.040(2)(b) (goals and EALRs apply to charter schools). The Court later explained that the *program* necessary to provide that education is not etched in constitutional stone. *Id.* at 526. The Legislature is free to select the *means* of providing education, and those means can vary. *McCleary*, 173 Wn.2d at 486; *Tunstall*, 141 Wn.2d at 223. Like all other public schools, charter schools must comply with RCW 28A.150.210 and .220 under the Act and their contracts. *See*, *supra* at 26-28.

Both public and private entities can deliver educational programs and fill in the details of *how* the components of RCW 28A.150.220 and instruction of the EALRs will be provided to each student. *E.g.*, CP 2051-56. Nothing in the state constitution prohibits the Legislature from delegating operation of charter schools to non-profit entities, so long as sufficient safeguards are in place. *See United Chiropractors*, 90 Wn.2d at 6. Indeed, school districts have long had authority to contract with non-sectarian, private entities to provide instruction to public school students. *E.g.*, RCW 28A.150.305; RCW 28A.300.165 (National Guard); RCW 28A.193 (incarcerated students); WAC 392-172A-04080 to -04110 (special education).

If only the Legislature can fill in these details, then that would prevent the Superintendent, the State Board of Education, and school districts, from playing their expert role the public school system. That would be unworkable. Plaintiffs also suggest that only the State, and not nonprofit organizations, can *deliver* the program of basic education, Op. Br. at 38, but the Constitution does not say that. The State can fulfill its

constitutional duty by offering a variety of programs, many of which are operated under contract with the State or school districts. CP 2207-08.

Moreover, procedural safeguards exist to control arbitrary action and any abuse of discretionary power. *Barry & Barry*, 81 Wn.2d at 159; *see also United Chiropractors*, 90 Wn.2d at 6 (same test). Charter schools are subject to strict oversight. Charter authorizers must approve a charter school's education plan, discipline plan, instructional hours, and all other elements of the charter school's extensive application. RCW 28A.710.130. Charter schools must comply with the terms of their contracts, which incorporate statutory and regulatory requirements not specifically addressed in the Act. RCW 28A.710.040(3). They are subject to an extensive performance framework. RCW 28A.710.170. Authorizers must continually monitor their performance and can impose corrective action and sanctions. RCW 28A.710.180. And authorizers "may revoke a charter contract *at any time*, or may refuse to renew," if the school fails to comply with requirements. RCW 28A.710.200(1) (emphasis added). Finally funds can be withheld or recouped for charter school noncompliance. RCW 28A.710.040(5); RCW 28A.710.220; RCW 28A.150.290(2); CP 2205-06. Plaintiffs point to no instance in the case law where similar oversight and safeguards have been held insufficient. Thus, this Court should reject Plaintiffs' argument that the Act improperly delegates a task the Legislature must perform.

F. The Superintendent Supervises Charter Public Schools in Compliance with Article III, Section 22

The Superintendent has at least the same level of supervisory authority over charter schools that he has over traditional public schools and it is undisputed that he fully exercises that authority. Article III, section 22 provides: "The superintendent of public instruction shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law." The Charter Schools Act maintains this authority while properly exercising the Legislature's authority "to design the organizational structure under which the public education system is administered." Op. Att'y Gen. 8 (2009), at 15; Op. Att'y Gen. 6 (1998), at 2. The Act provides that "[c]harter schools are subject to the supervision of the superintendent of public instruction and the state board of education, including accountability measures, to the same extent as other public schools, except as otherwise provided in [the Act]." RCW 28A.710.040(5).

The Office of the Superintendent has explained that it works with both traditional and charter schools to administer basic education programs and implement education reform on behalf of more than one million public school students. CP 2202-03, 2205. The Superintendent manages statewide student assessments and collects data about schools and operations. CP 2202-03. The Superintendent ensures participation in and compliance with school accountability measures, including the Washington Achievement Index, which allows comparison with other public schools. *See* CP 2202-03, 2211; *see also* CP 1122. The Superintendent also sets statewide learning goals that are aligned with research-based performance indicators. CP 2202,

2210. While the Superintendent provides technical assistance to schools and school districts, he does not engage in day-to-day operations. CP 2202-11.

Most importantly, the Superintendent maintains the power of the purse. Plaintiffs deny that the Superintendent can withhold or delay payments to charter schools, Op. Br. at 43, but this argument runs contrary to the Act, the Superintendent's rules, and the Superintendent's actual practice.[14] *See* RCW 28A.710.220(1), (3) (requiring charter schools to report in the same manner as other public schools to receive funding, and requiring the Superintendent to reconcile distributions); RCW 28A.710.280(2), (3) (requiring the Superintendent to distribute funding and adopt reporting and distribution rules).

The Superintendent can withhold and recapture funds from charter schools if they fail to "provide the State's program of basic education, and programmatic education services required by categorical programs (such as special education)." CP 2205. The Superintendent has adopted "fiscal and reporting rules that regulate [charter] schools' obligations when receiving public funds . . . ." CP 2205. These extensive rules allow for withholding, delay, or recovery of funds for multiple reasons, including noncompliance with instructional requirements or audit resolution procedures.[15] If the

[14] Use of the term "shall" in the funding distribution provision of the Charter Schools Act is no different from the apportionment statute that governs the Superintendent's authority to allocate funds to school districts. *Cf.* RCW 28A.510.250(1) (Superintendent "shall apportion" to educational service districts and school districts); RCW 28A.710.220(2).

[15] *See* WAC 392-115-015, -090, -115 (audit and resolution); WAC 392-117, WAC 392-121-011, -021, WAC 392-140-068 (data reporting and documentation of compliance); WAC 392-121-001, WAC 392-122-005, WAC 392-123-003 (apportionment rules and budget and accounting rules); WAC 392-121-021, -500, -540; WAC 392-123-

Superintendent suspects noncompliance, he can withhold funds pending investigation. WAC 392-123-065. The Superintendent has withheld and recaptured funding from charter schools. CP 2205-06. All of these regulations show Superintendent control over payments to charter schools.

Plaintiffs do not dispute that charter schools must satisfy the same requirements as school districts to receive general apportionment and categorical funding. CP 2204-05. The Superintendent also enforces substantive legal obligations, for example, in special education, and he oversees the assessment of learning standards for state and federal accountability purposes. CP 2206-07, 2210-11. Plaintiffs have offered no evidence to dispute that the Superintendent supervises traditional public schools and charter schools at least equally. CP 2202-07, 2210-11, CP 3765.

Plaintiffs point only to the existence of the Charter School Commission as an implied divestiture of Superintendent authority, but the Commission's status as an independent state agency does not erode the Superintendent's role. The Legislature has authority to create an agency to *administer* programs under the Superintendent's supervision so long as the Superintendent is not himself "supervised" by the other agency. Op. Att'y Gen. 6 (1998), at 4; Op. Att'y Gen. 8 (2009), at 15. The Legislature has made the Commission's role to administer the "charter schools it authorizes in the same manner as a school district board of directors administers other schools." RCW 28A.710.070(2); CP 2202, 2205-07. Like the Commission,

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065 (withholding of basic education allocations); WAC 392-121-122 (apportionment depends on instructional compliance).

local school boards are responsible for developing staff performance evaluation criteria, developing curricula that meet state standards, and evaluating instructional materials. RCW 28A.150.230. Such local oversight has never encroached on the Superintendent's authority. If anything, the Superintendent plays a more direct role in supervising charter schools because he or his designee serves on the Commission, but not on school boards. *See* RCW 28A.710.070(3)(a)(ii).

The Commission is no different from the State Board of Education or the Professional Educators Standards Board, independent boards charged with addressing certain aspects of the education system, and neither of which defeats the Superintendent's authority. *See* RCW 28A.305; RCW 28A.410.010. The Legislature can assign specific tasks to the Commission, just as it has for these other entities within the education system.

Nowhere in the Act is the Superintendent made subordinate to the Commission. RCW 28A.300.040; Op. Att'y Gen. 6 (1998), at 2. And it is undisputed that the Superintendent exercises full authority over charter schools in the same way he supervises other public schools. CP 2202-07, 2210-11. Plaintiffs have failed to meet their burden of proving beyond a reasonable doubt a violation of article III, section 22.

G. The Charter Schools Act is a Complete Act That Complies with Article II, Section 37

Article II, section 37 provides that no act shall be "revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." The purpose of this provision is

to ensure that lawmakers and the public understand the proposed legislation, but it should not invalidate laws that simply enlarge or restrict the operation of existing statutes where the ultimate effect is apparent. *Washington Educ. Ass'n v. State*, 97 Wn.2d 899, 906, 652 P.2d 1347 (1982). As a result, the focus of the analysis is whether the scope of the rights or duties affected can be determined without referring to any other law, and whether the new law renders a determination of rights under the preexisting acts erroneous. *See State v. Manussier*, 129 Wn.2d 652, 663, 921 P.2d 473 (1996).

The trial court was correct to conclude that the Charter Schools Act is a complete act that had no impact on preexisting collective bargaining rights. *See* CP 3768. It simply added charter school employees to the many sets of public employees covered by RCW 41.56 and RCW 41.59. RCW 41.56.0251; RCW 41.59.031. Plaintiffs are wrong to suggest that either public employees or public school employees are broad unified bargaining units that charter employees would otherwise have automatically joined. RCW 41.59 governs the collective bargaining of certificated "educational employees" *of school districts*, but charter employees work for a different employer. In fact, it is common for the Legislature to add bargaining units for particular categories of employees. For example, RCW 41.56 separately identifies at least fifteen categories of public employees that may choose to organize in separate units to bargain with their employers. *See* RCW 41.56.020-.029. The Act did not alter or impact collective bargaining rights of any other public employees working for other employers.

Similarly, the Charter Schools Act did not surreptitiously amend any

portion of the Basic Education Act. The current Charter Schools Act specifically requires charter schools to provide the legislatively-defined "program of basic education," cross referencing the Basic Education Act, but it does not modify those statutes. *Supra* 26-28. The limited flexibility afforded charter schools in order to improve student outcomes simply reflects the decision not to apply some existing law in a new circumstance, which does not violate article II, section 37. *See Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 640-42, 71 P.3d 644 (2003). "Nearly every legislative act of a general nature changes or modifies some existing statute, either directly or by implication but this, alone, does not inexorably violate the purposes of [article II,] section 37." *Id.* at 640 (internal quotation marks omitted). Accordingly, Plaintiffs' article II, section 37 claim fails.

V. CONCLUSION

This Court should affirm the trial court's well-reasoned analysis and hold that all of Plaintiffs' constitutional challenges fail.

RESPECTFULLY SUBMITTED this 18th day of August 2017.

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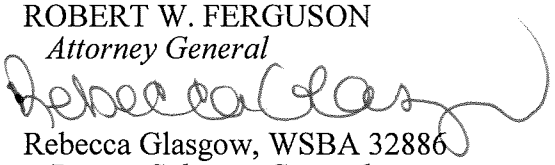

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I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, by agreement of the parties, a true and correct copy of the foregoing document, upon the following:

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