No. 94269-2

IN THE 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.

REPLY OF APPELLANTS

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I. INTRODUCTION

The Constitution uniquely constrains the Legislature's discretion in establishing and funding a public school system. At its core, the Constitution requires a single general and uniform public school system consisting of mandatory common schools that provide the uniform general education to all children and are adequately funded from restricted funding sources, and optional specialized schools for students with unique needs or for teacher training. Const. art. IX, §§ 1, 2. In the field of public education, the Legislature cannot exercise its otherwise broad discretion to modify the public school system however it see fits.

The Charter School Act, Laws of 2016, Ch. 241 ("Charter School Act" or "Act") violates these constraints. Unlike any other public school since the State's founding, charter schools are designed to supplant, not supplement, the uniform general education provided by the common schools. But the Constitution does not allow the Legislature to replace common schools with private charter schools. Moreover, charter schools do not offer specialized programs to supplement the common schools like the non-common school alternatives identified in the Constitution.

Further, the Act's funding mechanism does not remedy the constitutional problem found in *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 355 P.3d 1131 (2015), *as amended on denial of*

reconsideration (Nov. 19, 2015) ("*LWV*"), namely, that restricted common school funds cannot pay for charter schools. The mechanism of funding via the Opportunity Pathways Account ("OPA") is a cosmetic fix to hide that the Act ultimately uses the General Fund to pay for charter schools. The State of Washington ("State") and Intervenors (collectively, "Charter Supporters") offer no evidence to rebut the substantial record showing the Act's intended and current operation pays for exponentially growing charter school costs by relying, albeit indirectly, on the General Fund.

Finally, the Act violates the Constitution by impeding the State's progress toward fully funding basic education, delegating to private organizations the State's paramount duty to define a basic education, abrogating the Superintendent of Public Instruction's ("Superintendent's") supervisory role, and amending collective bargaining laws and the Basic Education Act without setting forth the amended provisions in full.

Although the Legislature had the opportunity to properly address these constitutional concerns, it did not do so. Accordingly, the Act should be declared unconstitutional and invalidated in its entirety.

II. ARGUMENT

A. Appellants' Constitutional Claims Are Ripe and Should Be Reviewed in Context to Protect the Paramount Right of All Children to a Public Education.

Appellants' constitutional claims are ripe for review. *See First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996) (ripeness "requires an evaluation of the fitness of the issues for judicial decision and the hardship to the parties of withholding consideration" (quotation omitted)). Under the Act, private organizations receive five-year contracts to operate charter schools using public funds that are required to be paid by the State on the same basis as common schools, i.e., according to the same formulas driven by student enrollment. RCW 28A.710.160(5), .190(1), .240, .270. Charter contracts are perpetual; renewal is guaranteed every five years upon request by the private organization except under limited circumstances that do not include insufficient state funds. RCW 28A.710.190, .200. Despite the Act's anticipated enrollment growth for up to 40 charter schools, the Act is silent on how the Legislature will meet these funding obligations. The only funding scheme the Legislature has contemplated relies on the General Fund. *See* Sect. II.C.2.b, *infra*.

The Act is operating as intended. Currently, there are ten charter schools controlled by private organizations under renewable five-year

contracts that are receiving public funds on the same basis as common schools to provide their own conception of general education (as opposed to the uniform basic education provided by common schools). *See* Sect. II.B.3, *infra*. As planned, the recently enacted budget, Laws of 2017, 3rd Spec. Sess., Operating Budget (SSB 5883) ("2017-19 Budget") diverts at least $20 million from the General Fund to pay for these new, permanent fixtures in the public school system. *See* Sect. II.C.2, *infra*. Thus, irremediable harm is occurring right now and will persist unless and until this Court intervenes. *See McCleary v. State*, 173 Wn.2d 477, 546, 269 P.3d 227 (2012) ("Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1.").

In reviewing Appellants' claims, this Court should take into account how the Act, in operation, impacts children's constitutional right to an education. As explained in *McCleary*, in the rare cases where positive constitutional rights are at stake, the Court "ask[s] whether the state action achieves or is reasonably likely to achieve 'the constitutionally prescribed end." 173 Wn.2d at 519; *see also Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 526, 219 P.3d 941 (2009) ("*Federal Way*") (constitutionally guaranteed education must be provided via a general and uniform public school system). Consistent with this approach, the Court has regularly looked beyond the four concerns of a statue where, as here, the

statute's intended operation diverted restricted common school funds or otherwise threatened public education. *See* Sect. II.C.1, *infra*. Although the Legislature has discretion within constitutional constraints in the field of education, cases addressing negative constitutional rights—including "facial challenge" cases cited by the Charter Supporters[1]— "provide[] the wrong lens for analyzing positive constitutional rights, where the court is concerned not with whether the State has done too much, but with whether the State has done enough." *McCleary*, 173 Wn.2d at 519.

Regardless, all parties rely in part on a factual record regarding the actual programs being offered by existing charter schools and the actual funding used to support the Act, so characterizing this as a strictly facial challenge is not accurate. Existing charter schools fail to provide the uniform basic education program, *see* Sect. II.B.3, *infra*, and the current budget diverts money from the General Fund, *see* Sect. II.C.2.c, *infra*. Speculation that a private organization might design a charter school that meets constitutional requirements (assuming that would even be possible)

[1] *See, e.g.*, *In re A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015); *Wash. Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 234, 290 P.3d 954 (2012); *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2009); *Asarco Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 759, 43 P.3d 471 (2002), *amended on denial of reconsideration*, 49 P.3d 128 (2002); *State v. Shawn P.*, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993); *State ex. rel. O'Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969). The only "facial challenge" case the Charter Supporters cite implicating positive rights, *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220-21, 5 P.3d 691 (2000), did not involve diversion of restricted common school funds and pre-dates *McCleary*. Regardless, the Act is unconstitutional under any standard.

or that the Legislature might levy a new tax to pay for charter schools does not make this case unripe. Under any standard of review, the Court should strike down the Act in its entirety.

B. The Act Creates a Parallel System of Publicly Funded, Privately Run General Education Schools to Supplant Common Schools In Violation of Article IX, Section 2.

1. The Legislature cannot redefine the public school system's fundamental structure mandated by Article IX, Section 2.

The Charter Supporters do not dispute the preeminent role of common schools as the only mandatory component of the public education system. State's Br. at 21; Intervenors' Br. at 3. Instead, they dedicate significant portions of their Briefs to the unremarkable observation that the public school system encompasses more than common schools. Charter schools, however, are not simply another component of the public school system. Unlike other public schools identified in the Constitution, *see* Sect. II.A.2, *infra*, charter schools purportedly provide a general education to the general student population. RCW 28A.710.020(1)(b). But the framers drafted Article IX, Section 2 to ensure that common schools alone—open to all and subject to local voter control—provide the uniform general education. Op. Br. at 6-8. The Act violates Article IX, Section 2 by establishing privately controlled non-common schools designed to fill this same role.

Intervenors misapply the *ejusdem generis* rule of construction to argue that the optional specialized schools in Article IX, Section 2 give the Legislature free rein to establish publicly funded schools of any kind without constraint. Intervenors' Br. at 17. Under *ejusdem generis*, a general term (public school system) is **restricted** to things of the same kind and nature as specific listed terms (high schools, normal schools, technical schools). *See City of Seattle v. State, Dep't of Labor & Indus.*, 136 Wn.2d 693, 699, 965 P.2d 619 (1998) (*ejusdem generis* applies to provisions structured as: "[general], including [specific] and [specific]" (notations in original)).[2] The drafters identified optional schools that provided specialized programs to limited student populations with unique needs to supplement common schools (and to allow for teacher training). Op. Br. at 5. Charter schools that are open to all children and provide a general (albeit experimental) education are not of the same kind or nature.

The Charter Supporters erroneously equate charter schools with high schools. State's Br. at 22; Intervenors' Br. at 18 n.2. The term "high schools" in Article IX, Section 2, as understood by the drafters, referred to an advanced education that was then not considered necessary for the

[2] This doctrine may not apply where the statue uses general terms such as "or otherwise" that (unlike the conjunction "including") were intended to expand the reach of the statute. *See Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007) (cited in Intervenors' Br. at 17).

majority of children at statehood. Op. Br. at 21.[3] Today, all children need this higher level education to "compete adequately in our open political system, in the labor market, [and] in the marketplace of ideas." *McCleary*, 173 Wn.2d at 516 (quotation omitted). High schools, while optional when the Constitution was drafted, quickly became recognized as an element of the common schools, publicly run, available to all, and funded with restricted common school funds. Laws of 1897, ch. 118, § 1. By contrast, privately run charter schools compete with common schools to deliver a basic general education to all children.

Charter schools are also unlike the model training schools addressed in *School District No. 20, Spokane County v. Bryan*, 51 Wash. 498, 501, 99 P. 28, 29 (1909) ("*Bryan*"). State's Br. at 22. The specialized schools in *Bryan* were attached to normal schools, which are specifically permitted by Article IX, Section 2. 51 Wash. at 500. The model schools also had limited enrollment, while charter schools are open to all children. *Id.* at 500-01; RCW 28A.710.020.

The Charter Supporters reprise their failed argument from *LWV* that the Act is constitutional because the "description of 'general and uniform' is dynamic and subject to change." Intervenors' Br. at 23; *see* State's Br. at 2-

[3] At the time the Constitution was drafted, only about 0.05% of students attended high school. Frederick E. Bolton, *History of Education in Washington* 149 (U.S. Gov't Printing Office 1935).

3. But this Court has repeatedly rejected similar attempts to modify the meaning of Article IX by legislation. *See LWV*, 184 Wn.2d at 404; *Bryan*, 51 Wash. at 502-03; *see also Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 518, 585 P.2d 71, 94 (1978) ("duty to construe or interpret words or phrases in the constitution and to give them meaning and effect by construction [is] a judicial issue"). Nor are charter schools exempt from Article IX, Section 2 because, according to the State, charter schools allegedly deliver better "outcomes" than common schools. State's Br. at 8. This policy rationale has no bearing on the constitutionality of the Act. *LWV*, 184 Wn.2d at 401. And the effectiveness of charter schools is a matter of significant debate.[4]

The State attempts to downplay the Act's significance by arguing that the "Legislature's authorization to build 40 charter schools statewide" does not mean it aims "to 'replace' the 2,000+ common schools in Washington." State's Br. at 21. The Act begins with 40 charter schools, but where does it stop? The Court need only look to the experience of other states, where initial caps on the total number of charter schools were later eliminated and resulting charter expansion had negative financial impacts

[4] CP 3439-3621. In fact, last year, the NAACP ratified a resolution calling for a "moratorium" on charter schools, objecting to the diversion of funds from public schools and the "de facto segregation" perpetuated by charter schools. CP 3445-46, 3615-16.

on public school districts.[5] This Court should not engage in the arbitrary line drawing proposed by the State. Any displacement of common schools with charter schools violates the Constitution.

2. Charter schools are not comparable to existing specialized schools and supplemental programs.

The specialized stand-alone schools and supplemental educational programs identified by the Charter Supporters are a red herring. State's Br. at 3-5, 23-24; Intervenors' Br. at 5-7, 19. Striking down the unconstitutional Act would not jeopardize these programs because their constitutionality is not in dispute and, more importantly, charter schools are unlike anything we have seen in public education in Washington.

Charter schools are not the same as stand-alone schools that provide specialized educational programs to discrete student populations. Many of these specialized schools are contemplated by Article XIII, Section 1 (state educational, reformatory, and penal institutions), including schools for blind

[5] *See* Julie Davis Bell, *Charter School Caps*, Nat's Conference of State Legs. (Dec. 2011), *at* https://www.ncsl.org/documents/educ/CharterSchoolCaps.pdf ("the first states to allow charters—including Colorado and Minnesota—included caps in their charter laws" but "caps were [later] eliminated in both states"); David Lapp, Joshua Lin, Erik Dolson, & Della Moran, *The Fiscal Impact of Charter School Expansion: Calculations in Six Pennsylvania School Districts*, Research for Action, 29 (Sept. 2017), *at* https://8rri53pm0cs22jk3vvqna1ub-wpengine.netdna-ssl.com/wp-content/uploads/2017/09/RFA-Fiscal-Impact-of-Charter-Expansion-September-2017.pdf ("Pennsylvania school districts with growing charter enrollments require substantial additional revenues…to continue providing roughly the same level of services to their remaining students.").

and deaf children, RCW 72.40.040;[6] programs for incarcerated juveniles, ch. 28A.193 RCW, ch. 28A.194 RCW; alternative "specialized programs" for students with disciplinary or academic issues, RCW 28A.150.305; and Washington Youth Academy for high school expellees and drop outs, RCW 28A.150.310.[7] Similarly, the University of Washington offers a special advanced program exclusively to highly capable students. RCW 28A.185.040. Running Start is only available to those students admitted to designated higher education programs. RCW 28A.600.320. These schools and programs fit within the constitutional concepts of specialized high schools or technical schools and fill the unique needs of a subset of students as part of the State's paramount duty to provide an education to all children. By contrast, charter schools are open to all children and serve a general student population in grades K-12. RCW 28A.710.020(1), .050(1).

Hoping to make charter schools appear similar to these specialized schools, the Charter Supporters claim charter schools serve a discrete population of at-risk students. State's Br. at 6; Intervenors' Br. at 13. This is incorrect. Although the Act allows for the establishment of charter schools "offer[ing] a specialized learning environmental and service for particular groups of students," RCW 28A.710.050(5), not a single

[6] Enrollment is limited to students with visual or hearing disabilities, contrary to Intervenors' contention. RCW 72.40.040; Intervenors' Br. at 20.

[7] *See* http://mil.wa.gov/youth-academy (last visited Sept. 12, 2017).

Commission-authorized charter school gives enrollment preferences to at-risk students, *see* CP 2930-45, 3046-64. The State touts the diversity of existing charter schools' student population, but fails to acknowledge that charter schools aim to serve a student population with demographics like their neighborhood—the same general population served by common schools. State's Br. at 10; CP 2931, 3060-61.

The Charter Supporters highlight tribal compact schools but ignore tribal schools' singular qualities. State's Br. at 23; Intervenors' Br. at 20. Tribal schools operate under a compact between the State and a sovereign nation. RCW 28A.715.020(1). Thus, they operate outside the bounds of the Washington Constitution, including the uniform public school system requirement. Further, tribal schools are supervised by the Superintendent and specifically required to offer the same basic education program as common schools, including RCW 28A.150.220. *See* ch. 28A.715 RCW.

The remainder of the programs identified by the Charter Supporters supplement the uniform common school program, including Running Start, RCW 28A.600.300-.400; Alternative Learning Experiences and online learning programs, ch. 28A.250 RCW; and occupational and academic programs operated at community and technical colleges, RCW 28B.50.533-535. These supplemental programs are in addition to common school

programs, not a wholesale replacement like charter schools. In short, the myriad other programs are not like charter schools.

3. Charter schools do not offer a uniform education program as contemplated by Article IX, Section 2.

Non-uniform education program. The Charter Supporters' assertion that charter schools offer the same basic education program as common schools (including RCW 28A.150.220) conflicts with the plain language of the Charter School Act and the Basic Education Act ("BEA") and the Act's actual practice. The Charter Supporters rely on the insertion of the words "a program of" into the Act's waiver provision, but do not dispute that the Act's substantive definition of the program offered by charter schools and the broad waiver of school laws (including "in areas such as…educational programs") remain the same as under I-1240. RCW 28A.710.040(3). They also do not dispute that the BEA's definition of a basic education program is limited to a separate chapter. RCW 28A.150.200(2), 28A.150.203.[8] And, contrary to Intervenors' contention, their proposed interpretation would render the EALRs requirement superfluous because RCW 28A.710.040(2)(b) and RCW 28A.150.220 have

[8] In *Henry v. Lind*, 76 Wn.2d 199, 200-01, 455 P.2d 927 (1969), the Court applied *in pari materia* only because the statue was ambiguous. Intervenors' suggestion otherwise appears to be typo. Intervenors' Br. at 26 ("clear and ambiguous"). Here, there is no ambiguity and, thus, *in pari materia* does not apply. *See Henry*, 76 Wn.2d at 200-01.

"literally identical" language (both require "instruction in the essential academic learning requirements"). Intervenors' Br. at 26.[9]

The contention that charter schools offer the same basic education program as common schools is belied by the hodge-podge of experimental programs authorized by the Charter Commission. *See State Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 461-62, 645 P.2d 1076 (1982) (rejecting interpretation of statute advanced by state agency where inconsistent with the agency's practice); State's Br. at 28 (erroneously claiming there is no evidence that current charter schools fail to provide the same basic education program). For example, Excel Charter School identifies "English language learners" in the same manner as common schools, but "[a]ll instruction at Excel is in English[.]" CP 2962-65. As a result, students will not be offered transitional bilingual instruction and services that are required components of the basic education program. *See* RCW 28A.150.220(3), 28A.180.030(4)(a).

Charter schools also are exempt from compulsory coursework, ch. 28A.230 RCW. Contrary to the State's argument, these requirements differ

[9] Intervenors' reliance on *Condon Bros v. Simpson Timber Co.*, 92 Wn. App. 275, 284 n.20, 966 P.2d 355 (1998), is misplaced. The court noted that ER 801 departed from "the usual rule of construction that, whenever possible, a statute must be interpreted so as to avoid surplusage" where, based on the drafters' comment, "[i]t affirmatively appear[ed] that the drafters intended [two sections in the rule] to have the same meaning." Here, the Charter Supporters do not rebut the only legislative history on this point, confirming this change was not intended to narrow the scope of I-1240's waiver. CP 2979 (Senate committee materials stating waiver of state laws is the "[s]ame as I-1240").

from the EALRs in significant ways. State's Br. at 8. For instance, common schools are required to incorporate curricula about the history, culture, and government of the nearest federally recognized tribes, but charter schools are not. RCW 28A.320.170. Other examples include career and technical high school courses, RCW 28A.230.097, programs to help students meet minimum entrance requirements at baccalaureate-granting institutions or pursue career opportunities, RCW 28A.230.130, and disability month programs, RCW 28A.230.158.

Under-compensated teachers. Charter schools receive state funds as if they were paying their certificated instructional staff on the same basis as public schools, but they are not required to meet the same minimum compensation requirements as public schools that the Legislature recently enacted in response to *McCleary* as necessary to hire qualified teachers. *See* 2017-19 Budget, § 103(1), (2)(c)(i) (minimum salary based on years of experience); RCW 28A.710.240 (years of service in a charter school is used "for purposes of the statewide salary allocation schedule" but this "section does not require a charter school to pay a particular salary to its staff").

Non-uniform discipline. Intervenors concede "the Act does not expressly require charter public school contracts to include…compliance" with state discipline laws. Intervenors' Br. at 27. Although current contracts require compliance with certain procedural laws and prohibit

corporal punishment, charter schools are not required to comply with uniform laws for imposition of disciplinary action, including suspension, expulsion, and classroom exclusion, RCW 28A.600.410-.490. Contrary to the State's assertion that "there is no evidence [charter schools] impose materially different discipline than common schools," State's Br. at 2, existing charter schools' policies deviate from uniform state laws in troubling ways. For instance, Excel describes itself as a "no expulsion school, meaning that students will never be expelled," CP 2862, even when a student possessed a weapon and "intended to use the weapon in a violent way[,]" CP 2873. By contrast, common schools utilize a range of disciplinary tools, including expulsion and short- and long-term suspension. RCW 28A.600.010-.020. These differences conflict with the Court's precedent requiring uniformity in how children are disciplined, not just the ways parents and guardians may challenge disciplinary actions after the fact. *See Federal Way*, 167 Wn.2d at 524.

Barriers to transfer. The Charter Supporters fail to address the barriers to transfer raised by the deliberate differences in charter schools' curriculum and course offerings. Worse, Intervenors concede charter schools can institute a "no-transfer [credit] policy" in violation of the uniformity requirement. Intervenors at 28. Their fallback position—wait until a child is denied credit transfer—is unacceptable given the stakes.

Devoid of local control. Appellants have never taken the position that "the uniformity clause mandates that all public schools must be subject to voter control through local school board governance," as the State suggests. State's Br. at 31. Although "[a]t the time of the constitution, and since, … local control has been assured through locally elected school board[s]," *Federal Way*, 167 Wn.2d at 523, Appellants agree that local voter control could be accomplished via other local government entities operating public schools within their boundaries (e.g., cities, towns, or counties). But this Court emphasized in *Federal Way* (and many other cases) that local control is a critical feature of the public school system. *Id.* at 523; *Bryan*, 51 Wash. at 504; Op. Wash. Att'y Gen. 1978 No. 19 (Legislature's "intent to control," even "indirectly," a "school district['s] hiring decisions over staffing" would be an "intrusion into 'local control'"); *see also Milliken v. Bradley*, 418 U.S. 717, 741-42, 94 S. Ct. 3112, 3125-26, 41 L. Ed. 2d 1069 (1974) (**"**No single tradition in public education is more deeply rooted than local control over the operation of schools[.]"). Privately operated charter schools—many of which are not even subject to the elected Superintendent's supervision—do not share this essential feature.

In short, the Act violates the single, uniform public school system required by Article IX, Section 2 by creating a parallel non-uniform system of private charter schools to fill the same role as common schools.

C. The Act Diverts Restricted Common School Funds to Pay for Charter Schools in Violation of Article IX, Section 2.

1. The Court should look beyond the Act's four corners to determine its impact on restricted common school funds.

Intervenors wrongly contend this Court cannot look beyond the language in the Act providing that the Legislature will appropriate money for charter schools from the OPA. Intervenors' Br. at 34. This Court has consistently rejected such a short-sighted and formalistic approach. Constitutional protection "is not dependent on the source of the revenue (i.e., the type of tax or other funding source) or the account in which the funds are held (i.e., the general fund or other state fund)." *LWV*, 184 Wn.2d at 407 (citing *State ex rel. State Bd. for Vocational Educ. v. Yelle*, 199 Wash. 312, 316, 91 P.2d 573 (1939)). Nor does constitutional protection depend on whether a statute "make[s] any appropriation" of protected common school funds. *LWV*, 184 Wn.2d at 408 (citing *Mitchell v. Consol. Sch. Dist. No. 201*, 17 Wn.2d 61, 66, 135 P.2d 79 (1943)). Instead, the constitutional question is whether a statute's "intended operation would 'necessitate[] the use of common school funds for other than common school purposes[.]'" *Id.* (quoting *Mitchell*, 17 Wn.2d at 66).

Importantly, this Court has looked beyond a statute's text to evaluate its impact on restricted funds based on, for example, the statute's projected fiscal impact, legislative history, and existing state and local school funding

schemes—even though there was no dispute about the meaning of the words or phrases in the statute. *See, e.g.*, *LWV*, 184 Wn.2d at 409, 411 (considering comingling of restricted common school dollars in General Fund under current funding scheme and I-1240's legislative history); *Mitchell*, 17 Wn.2d at 66 (considering statute's aggregate impact based on cost per pupil and funding sources available to school districts); *see also Bryan*, 51 Wash. at 505 (invalidating law that "by indirect methods" took funds away from common schools). Thus, this Court should determine the Act's actual effect on the General Fund and, in doing so, should consider all relevant evidence. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2304, 2310, 195 L. Ed. 2d 665 (2015); *see also* Sect. II.A, *supra*.

The State attempts to limit *LWV*'s holding to the basic education appropriation made by the Legislature each biennium, but *LWV* cannot be read so narrowly. State's Br. at 38. There, the Court rejected the argument that charter schools could be funded out of the unrestricted dollars in the General Fund because "the State does not segregate constitutionally restricted moneys from other state funds." *LWV*, 184 Wn.2d at 409. This does not mean that any increase in General Fund expenditures violates Article IX, Section 2, as the State claims. State's Br. at 38. The State ignores that charter schools compete for the same dollars otherwise available to common schools. *See LWV*, 184 Wn.2d at 410 (noting

common school funding follows the student). As a result, there is a direct link between the Act and decreased funding for common schools.

2. The Act's intended and actual operation uses the General Fund to pay for charter schools.

The Legislature had valid options to pay for charter schools consistent with *LWV*, namely, create and fully fund a segregated restricted account to pay for common schools, raise new revenue, or reduce spending for other programs.[10] The Legislature opted against these politically unfavorable options and, instead, merely added charter schools to the programs already funded by the OPA. RCW 28A.710.270. The Legislature did so understanding that the General Fund would have to be used to pay for existing OPA programs as charter school enrollment and funding requirements expanded. Indeed, that is exactly what happened.

a.) Undisputed evidence shows inevitable funding shortfall.

The Charter Supporters do not rebut the substantial record demonstrating (1) OPA revenue will not be sufficient to pay for up to 40 charter schools for perpetual five-year terms, and (2) the Legislature was aware of this inevitable shortfall when it passed the Act. Op. Br. at 32-34 (citing official state projections, declarations, and other records showing

[10] The State cites no evidence to support its claim that the Legislature has not segregated common school funds to avoid reduction in the State's debt limit. State's Br. at 35. Even if the State's claim is true, the inclusion of constitutionally protected common school funds in the debt limit cannot be reconciled with the drafters' intent to protect these funds with the full force of the Constitution. Op. Br. at 20. Regardless, the debt limit is irrelevant to the constitutionality of the Act's funding mechanism.

that OPA revenues are expected to remain around $127 million per year, but the cost of 40 charter school would be hundreds of millions of dollars).

Intervenors waived their evidentiary objections to the admissibility of Appellants' unrebutted evidence by failing to obtain a final ruling from the trial court. *See State v. Noltie,* 116 Wn.2d 831, 844, 809 P.2d 190 (1991) (finding that after a trial court has made a tentative ruling on a matter or has refused to rule entirely, the party requesting the ruling is obligated to raise the motion again to ensure that there is an adequate record on appeal); CP 3768 n.10 (trial court opinion assuming admissibility). Further, Intervenors' objections are without merit.

- Intervenors question the accuracy of the State's own fiscal and case load forecasts without citing any authority, Intervenors' Br. at 35, but the Legislature and the Governor rely upon these official reports in balancing the budget as required by law. Ch. 43.88 RCW. The reports also demonstrate the Legislature's knowledge of the foreseeable funding shortfall under the Act.

- Intervenors challenge Julie Salvi's sworn declaration on charter schools' fiscal impact under the current funding scheme because she currently serves as a lobbyist. Intervenors' Br. at 33-34. Yet, as the Governor's former Senior Budget Assistant for Education, Ms. Salvi testified on behalf of the State regarding the K-12 funding scheme in *McCleary*. CP 3066, ¶ 2.

Appellants' evidence is admissible and demonstrates that OPA revenue will not be sufficient to pay for the charter schools authorized by the Act.

b.) The Act's intended operation relies on a funding swap.

The Charter Supporters do not dispute that the only evidence of how the Legislature intends to pay for charter schools shows money and/or programs being swapped between the OPA and the General Fund. Op. Br. at 33-34 (summarizing legislative history), App'x 3 (Senate staff's Fiscal Impact Report). The State ignores this evidence, while Intervenors argue legislative history should be disregarded because the Act is unambiguous. Intervenors' Br. at 34. But Appellants do not rely on this evidence to change the Act's plain terms. Rather, the Act is silent as to where the money will come from to pay for the significant anticipated growth in charter school enrollment. RCW 28A.710.150(1), 28A.710.160(8), (9). The answer is found in the committee materials and testimony by legislators and legislative staff that identify the Act's impact on restricted funds, as well as the funding options, revenue forecasts, and legislative materials considered by the Legislature. As explained in Section II.B.1, *supra*, this evidence is relevant under the Court's Article IX, Section 2 precedent. *See also Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 451, 536 P.2d 157 (1975) (legislator debate, floor comments, and committee notes can be used to interpret an act).

c.) 2017-19 Budget diverts General Fund dollars to cover growth in charter school costs.

The Act's reliance on the General Fund is not hypothetical. State's Br. at 36; Intervenors' Br. at 35. It is happening right now. The Charter Supporters do not oppose Appellants' request that the Court take judicial notice of official forecasts and the 2017-19 Budget showing the Legislature swapped funds. Nor do Charter Supporters rebut critical facts:

- Charter schools' share of OPA revenue grew from 9% to 24% in the 2017-19 Budget. Op. Br., App'x 2.

- Because charter school costs **increased** by $20 million (from $12 million to $32 million), OPA funding for all non-charter programs **decreased** by $20 million. Op. Br., App'x 4.

- The Legislature **backfilled** funding for these other programs with $20 million from the General Fund and the Education Legacy Trust Account (which, like the General Fund, is used to pay for common schools and thus also constitutionally restricted). *Id*. (illustrating funding swap in 2017-18 Budget, §§ 613(1), (7), 615(1), 1609(1), (7), 1611(1)).

This funding swap is consistent with the Legislature's treatment of the General Fund and the OPA as one pot of money in setting education funding levels for the 2017-19 Budget. CP 349 ¶ 5, 351 ¶ 12. In fact, the Legislature's recent report to this Court in *McCleary* combines the General Fund and the OPA for purposes of illustrating basic education funding. 2017 Report to the Wash. State Supreme Ct. by the Joint Select Committee on Article IX Litigation at 8 n.13 (July 31, 2017).

That OPA funding for a single program (early learning) remained constant is beside the point, given that OPA funding for all other programs (higher education) decreased by $20 million. State's Br. at 39-40.[11] Similarly, that several of these programs received money from the General Fund prior to the Act is irrelevant. Intervenors' Br. at 37. The question is how funding levels changed to cover growth in charter school costs since the Act went into effect. Although the 2017 Legislature raised "new revenue for common schools" in response to *McCleary*, these funds address historic state funding deficiencies. State's Br. at 39. The State does not, and cannot, identify any new revenues to pay for charter schools.

In sum, the Act's intended and actual operation diverts restricted funds to pay for charter schools in violation of Article IX, Section 2.

D. The Act Impedes the State's Progress Toward Full Funding for Basic Education in Violation of Article IX, Section 1.

The State suggests the Court should take up the question whether the Act violates the State's paramount duty by diverting basic education funds to pay for charter schools in *McCleary*, but the constitutionality of the Act is not at issue in *McCleary*. State's Br. at 40-42. This case is the only forum for resolving Appellants' ample funding claim. Appellants' claim is

[11] The State's reference to total funding levels for higher education in the 2015-17 biennium is misleading because the Act was not in effect in FY 2015-16. *Id.* Annual General Fund appropriations for higher education have increased since the Act went into effect. 2017-19 Budget, §§ 613, 1609; Op. Br. at 16 n.5.

ripe because the State has been in violation of its paramount duty for years, and the Act is currently diverting money from public schools. Order, *McCleary v. State*, No. 84362-7 (Oct. 16, 2016). The Charter Supporters' speculation that the State has remedied the ongoing violation of its paramount duty is both incorrect for the reasons identified by the *McCleary* Plaintiffs and Amici, and premature because this Court has yet to rule. As explained in Appellants' Brief at 36, this claim is justiciable.

E. The Charter School Act Improperly Delegates the State's Paramount Duty.

This Court's precedent is clear that the State cannot delegate its paramount duty at all, let alone to private organizations. In the attempt to remedy this critical constitutional infirmity, the Charter Supporters claim the Act does not delegate the State's paramount duty because charter schools deliver a basic education program. State's Br. at 41; Intervenors' Br. at 40. As stated above, this argument ignores the Act's plain language and how charter schools operate in practice. *See* Sect. II.B.3, *supra.*

To support their argument, the Charter Supporters rely on strained interpretations of this Court's precedent. The Intervenors incorrectly cite *Parents Involved in Community Schools*, 149 Wn.2d 660, 673, 72 P.3d 151, 158 (2003), to argue that the State's paramount duty is limited to providing "ample funding, not the defining of a basic education program."

Intervenors' Br. at 41. But this Court characterized the duty at issue as "impo[sing] upon this State the mandatory and paramount duty to provide a general and uniform education[.]" *Parents Involved in Cmty. Schs.*, 149 Wn.2d at 673. Moreover, the case *Parents Involved in Community Schools* relies on, *Seattle School District No. 1*, determined that the Legislature had failed to fully implement the State's paramount duty under Article IX, Sections 1 and 2, because it had failed to define or give "substantive content to 'basic education' or a basic program of education." 90 Wn.2d at 519.

The Charter Supporters also incorrectly claim that "any lesser delegation" of the State's paramount duty is permissible because the Act has "appropriate safeguards," State's Br. at 42; Intervenors' Br. at 43-44. But the charter application process does not satisfy constitutional requirements. The Act does not replace the minimum components of a basic education program approved in *McCleary* with any other program or provide standards by which an authorizer could determine whether the program passes constitutional muster. *See* Sect. II.B.3, *supra*. Rather, the Act intentionally allows private organizations to define the basic education program. That is one of the Act's stated purposes. RCW 28A.710.040(3).

Finally, the Charter Supporters argue the Act's delegation of the State's paramount duty is "not per se unconstitutional." Intervenors' Br. at 44; State's Br. at 42. But the Act's delegation of the State's paramount duty

is not a delegation of administrative authority, as occurred in the cases the Charter Supporters cite. *See, e.g.*, *United Chiropractors of Wash., Inc. v. State*, 90 Wn.2d 1, 5, 578 P.2d 38 (1978); *Water Dist. No. 105, King v. State*, 79 Wn.2d 337, 342 (1971); *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). Here, the Act delegates the State's paramount constitutional duty. *See In re Powell*, 92 Wn.2d 882, 892, 602 P.2d 711 (1979) ("[I]t is imperative to consider the magnitude of the interest which are affected by the legislative grant of authority."). Thus, the Act is unconstitutional.

F. The Act Unconstitutionally Places Commission-Authorized Charter Schools Outside the Superintendent's Supervision.

The Constitution is clear: the Superintendent "shall have supervision over all matters pertaining to public schools[.]" Const. art. III, § 22. The Charter Supporters claim the Superintendent has "the same level of supervisory authority over charter schools that he has over traditional public schools[.]" State's Br. at 41, 45; Intervenors' Br. at 36. This is not true. The only entity that supervises Commission-authorized charter schools is the Commission, *see, e.g.*, RCW 28A.710.070(1), (2), and, even then, only to the extent it does not "unduly inhibit the autonomy granted to charter schools," *see* RCW 28A.710.180(2), (4).

The Charter Supporters contend that the Legislature may "create an agency to *administer* programs under the Superintendent's supervision," State's Br. at 47, but that is not the case with the Commission. The Commission is an "independent state agency," not subject to the supervision of the Superintendent. *See* RCW 28A.710.070(1), (2), 28A.315.005(1). The Charter Supporters also argue the Commission operates like a school district, but there are numerous statutory provisions confirming the Superintendent's supervisory authority over school districts, unlike the Commission. Op. Br. at 41-42.

The State also disingenuously suggests that the only limitation under Article III, Section 22, is that the Legislature cannot create an agency that "supervise[s]" the Superintendent. State's Br. at 47 (citing Op. Wash. Att'y Gen. 1998 No. 6, at 4; Op. Wash. Att'y Gen. 2009 No. 8, at 15). But the authority relied on by the State makes clear that the Legislature also may not "shift[] so many responsibilities to other officers or agencies that the Superintendent no longer 'supervises' the public school system" or "the proposal is probably unconstitutional." Op. Wash. Att'y Gen. 1998 No. 6; *see also* Op. Wash. Att'y Gen. 2009 No. 8, at 15. This is precisely what has occurred with the Commission. Likewise, the Intervenors' claim that the Superintendent and the Commission have "*coordinate* authority," Intervenors Br. at 46 (emphasis in original), is without merit. One seat on

an 11-member, majority pro-charter Commission does not equate to coordinate authority, let alone the constitutionally mandated supervision.

The State cites to certain supervisory authority retained by the Superintendent under the Act as evidence that the Superintendent's supervisory authority has not been usurped. State's Br. at 45. But the fact that the Superintendent continues to supervise statewide assessments and the Washington Achievement Index does not equate to supervision of **all** matters pertaining to public schools as required by Article III, Section 22. Likewise, although the Superintendent is tasked with distributing funds to charter schools, the Act does not provide for any discretion to withhold or delay distribution of funds. [12] *Cf.* RCW 28A.150.250(3) (authorizing State Board of Education ("BOE") and Superintendent to withhold funds from school districts if they fail to provide the constitutionally mandatory program of basic education).[13] Thus, the Act is unconstitutional because it usurps the Superintendent's supervisory power.

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[12] The State incorrectly cites RCW 28A.710.220(1),(2), .280(2),(3), the Meierbachtol Declaration (CP 2205-06), and various WACs for the proposition that the Superintendent may withhold funds from charter schools. State's Br. at 46-47. These authorities stand only for the proposition that the Superintendent administers disbursements to charter schools, not that Superintendent can withhold funding for failure to provide a basic education as can occur with school districts. In fact, WAC 392-123-065 only confirms that the Commission has usurped the Superintendent's supervisory authority. WAC 392-123-065 (Superintendent may withhold funds from school districts for failure to comply with binding restrictions, but can withhold from charter schools only if the "**authorizer** deems the charter school has failed to comply[.]") (emphasis added).

[13] Contrary to the State's assertions, the Commission is not the same as the BOE or Professional Educator Standards Board ("PESB"), which work with the Superintendent to

G. The Act Amends Collective Bargaining Laws and the Basic Education Act in Violation of Article II, Section 37.

Although they repeatedly assert that charter schools are "public schools," the Charter Supporters unsuccessfully attempt to avoid a constitutional violation by arguing—only in the context of Article II, Section 37—that charter schools are not really public schools. For example, the State incorrectly argues that the Act does not amend collective bargaining laws that apply to all other public school employees because charter employees work for "a different employer." State's Br. at 49. But the plain language of the Act amends the collective bargaining statutes with respect to public employees working at charter schools, by severely restricting the basis on which they can organize into bargaining units. *See* RCW 41.56.0251, RCW 41.59.031. Worse, the Act fails to set forth these amendments to collective bargaining laws in full,[14] thus requiring examination of existing law to understand the effect of the Act's restriction, in violation of Article II, Section 37. *See Wash. Educ. Ass'n v. State*, 93 Wn.2d 37, 40-41, 604 P.2d 950 (1980) (restriction on salary increases failed to set forth change to existing law in violation of Article II, Section 37).

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set education standards. RCW 28A.305.130(4)(b)(i), (c) (BOE consults with and reports to Superintendent), 28A.410.010(1)(a), (2) (PESB authorized to establish and enforce eligibility rules for common school personnel, but Superintendent administers rules).

[14] By contrast, when the Legislature restricted the bargaining units for education providers to juveniles in correctional facilities, it set forth that amendment in the context of existing provisions regarding bargaining units. *See* Laws of 1998, ch. 244, § 11(8).

Likewise, the Charter Supporters' contention that the Charter School Act did not change the basic education requirements of the BEA, State's Br. at 48-50; Intervenors' Br. at 50, ignores the indisputable fact that the Act waives the basic education **program** required by the Constitution, including the minimum instructional requirements identified in RCW 28A.150.220, *see* Sect. II.D, *supra* (Legislature cannot delegate away its paramount duty). This amendment was accomplished through subterfuge: the Act purports to require charter schools to offer a "basic education," but does not specify the components of the basic education program that are waived. *Compare* RCW 28A.710.040(2)(b), *with, e.g.*, RCW 28A.150.220. There is no way the public or lawmakers could have understood the impact of the Act without devoting hours to a careful comparison between the Charter School Act and the BEA. Thus, the Act violates Article II, Section 37.

H. Appellants Have Representational Standing Based on Their Taxpayer Members.

The Charter Supporters do not assign error to the trial court's ruling that all Appellants have standing on at least one ground. Nor do the Charter Supporters deny that the organizational plaintiffs have representational standing based on their taxpayer members. Taxpayers should be permitted to join together to challenge the constitutionality of state laws, and this Court should so hold to ensure taxpayers' access to justice. Op. Br. at 49.

III. CONCLUSION

The purpose of the charter school movement is to take public education decision-making out of the hands of elected government officials and place it in the hands of private entities using public funding. That purpose is only served when those private entities have control over all aspects of running a school, from designing its educational program to deciding how to spend public funds to teacher compensation, hiring, and firing. The Charter School Act is designed to and does achieve that purpose despite the protestations of the State and Intervenors that the private organizations that run charter schools in Washington are carefully and tightly constrained. But the Act's vision of privately run and publicly funded schools is completely contrary to the vision of the State's founders who adopted the distinct education provisions of the Washington Constitution.

Article IX uniquely identifies public education as the paramount duty of the State. Article IX envisions a public school system consisting of common schools that deliver the basic education to the State's children, supplemented by specialized schools that serve discreet educational needs. Article IX places the public education system under the control and supervision of elected officials—from the Legislature that defines the elements of a basic education, to the Superintendent who exercises

supervisory authority over public education, to local elected officials who oversee the day-to-day operations of the schools—that are accountable to the Washingtonians who pay billions of dollars to support public education. And Article IX requires that funds raised to support the common schools be spent only on the common schools and not on any other schools.

In short, Article IX's concept of public education does not include the privately run, publicly funded schools that are created under the Act. Accordingly, the Act is unconstitutional and should be struck down.

RESPECTFULLY SUBMITTED this 22nd day of September 2017.

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