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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

EL CENTRO DE LA RAZA, a Washington
non-profit corporation, *et al.*,

Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant.

No. 16-2-18527-4 SEA

MEMORANDUM OF
AMICI CURIAE
LEGISLATORS

A. INTRODUCTION

The amici legislators are concerned that the parties here may offer the Court a perception of the Legislature’s appropriation of funds from the General Fund and other non-General Fund sources that is simply incorrect and is inconsistent with traditional legislative budget efforts. The amici legislators believe this Court will benefit from their perspective on the plenary responsibility of the Legislature under article II, § 1, article VII, § 5, and article VIII, § 4 to enact budgetary legislation, and the Legislature’s budgetary responsibilities generally.

B. IDENTITY AND INTEREST OF AMICI CURIAE

As explained in their motion for leave to submit this amicus memorandum, the amici legislators are bicameral and bipartisan elected and former members of the Washington State Legislature concerned about the education of Washington’s children. They are interested in a

1 proper interpretation of legislative authority under our Constitution to make budgetary decisions
2 and to define, organize, and fund the public school system in Washington. They also want this
3 Court to have a proper understanding of the Legislature’s budget process.

4 C. STATEMENT OF THE CASE

5 The amici legislators acknowledge the parties’ statements of the case in their motion
6 briefing before this Court to date.

7 Most pertinent to the amici legislators’ analysis are the following undisputed facts. In
8 2016, following the Supreme Court’s decision on charter public schools in *League of Women*
9 *Voters of Washington v. State*, 184 Wn.2d 393, 355 P.2d 1131 (2015) (“LWV”), the Legislature
10 enacted Second Substitute Senate Bill 6194 into law. Ch. 241, Laws of 2016. In that legislation,
11 the Legislature made clear that charter public schools are not common schools, but are public
12 schools operated separately from the common school system. RCW 28A.710.020(1)(b). Such
13 schools are funded by legislative appropriations from the Washington opportunity pathways
14 account (“OPA”). RCW 28A.710.270. That account is created in the State Treasury by RCW
15 28B.76.526, as a non-General Fund account, and supports a number of educational programs; the
16 account is funded by lottery proceeds. RCW 67.70.240.

17 Various plaintiffs filed suit against the State on August 3, 2016, alleging that charter public
18 schools, as provided for in Ch. 241, Laws of 2016, were unconstitutional under a variety of
19 theories. The plaintiffs’ core argument on the funding of charter public schools under article IX,
20 §§ 2, 3 is found in ¶ 43 of their complaint (and essentially repeated in ¶ 61) and is as follows:

21 The Charter School Act directs the legislature to appropriate certain operational and
22 construction funds to charter schools from the Washington Education Pathways
23 Fund, in an effort to sidestep the Court’s ruling in *League of Women Voters*. Charter
24 School Act, §§ 127, 128. The Act, however, does not change the substantive effect
of charter schools on restricted basic education funding. The Act specifically states
that the “legislature intends that state funding for charter schools be distributed

1 equitably with state funding provided for other public schools.” *Id.*, § 128(1). The
2 Act did not establish a new revenue source or eliminate any existing expenditures.
3 Instead, as confirmed by the legislative history, the legislature intends merely to
4 move existing moneys and/or existing programs between the general fund and the
5 Washington Education Pathways Fund as needed to continue the diversion of public
6 funds to charter schools. The constitutional defects in I-1240’s funding provisions
7 identified by the Court cannot be overcome by this type of shell game. Additionally,
8 as permitted under the Act, certain administrative costs continue to be funded
9 directly from the general fund during fiscal year 2016.

6 The plaintiffs recently moved for summary judgment asking this Court to rule as a matter
7 of law that the funding of charter public schools violates article IX, §§ 2, 3 of the Washington
8 Constitution. In making this argument, the plaintiffs assert that the Legislature’s decision to fund
9 charter public schools from the OPA, a non-General Fund source supported by lottery revenues,
10 somehow is “an accounting trick designed to obscure the Act’s (Charter School Act) continued
11 diversion of these constitutionally protected funds to charter schools.” Motion at 2. They assert
12 that charter schools are funded on the same basis as common schools. *Id.* Although they concede
13 the OPA is a “separate account,” they nevertheless assert “the Legislature did not raise new
14 revenue or decrease funding for other programs as would be necessary to cut off the diversion of
15 protected funds.” *Id. See generally*, motion at 20-30.

16 D. ARGUMENT

17 A central contention of the plaintiffs’ complaint is that charter public schools are
18 unconstitutional under article IX of the Washington Constitution because they allegedly “divert”
19 public funds from support of common schools to charter public schools. Such a contention betrays
20 a fundamentally simplistic understanding of the Legislature’s budgetary process generally, and the
21 difference between the General Fund and other public revenue accounts specifically. This Court
22 should reject it.

23 Simply put, the Legislature is obligated to support common schools from the common
24 school fund. But it may also create non-General Fund accounts and support other public education

1 programs from those accounts. It has routinely done this in the past. Under the Legislature's
2 plenary constitutional budgetary power, this is no more a "diversion" of support for common
3 schools than is a legislative decision to support other, non-educational programs from the General
4 Fund, or to support other programs, including educational programs, from non-General Fund
5 sources.

6 That the plaintiffs do not like charter public schools is manifest, but a majority of their
7 fellow citizens, and the Legislature, disagreed. The Legislature's decision in 2016 on how to fund
8 charter public schools from a non-General Fund account did not "divert" funds in any fashion from
9 the entirely separate common school fund. Such a decision was within the Legislature's plenary
10 constitutional budgetary authority and consistent with legislative budget practice.

11 (1) The Legislature's Constitutional Power Over General Fund and Other Non-General
12 Fund Accounts

13 First, with regard to the legislative budget process, the State does not have but one budget
14 and that budget is not funded only from the General Fund. Although plaintiffs assert that if the
15 Legislature creates a separate account and appropriates money from it to support charter public
16 schools, such an action has "detracted" from the Legislature's obligation to fund common schools
17 from the common school fund as required by article IX, § 2 of the Constitution, that analysis is
18 erroneous.¹

19 The Legislature actually enacts three biennial budgets, not one. As noted in the seminal
20

21 ¹ The plaintiffs' mistaken understanding about the Legislature's budget process may flow from the Supreme
22 Court majority's discussion of a "state tax for common schools." The *LWV* majority opinion states: "All money
23 allocated to the support of the common schools ... constitutes a 'state tax for the common schools' in contemplation
24 of art. IX, sec. 2, of the constitution ... Once appropriated to the support of the common schools, funds cannot
subsequently be diverted to other purposes." *LWV*, 184 Wn.2d at 407-08. But the Legislature has not designated a
"state tax for the common schools," as such. Rather, as will be noted *infra*, article IX, § 2 creates a common school
fund in the State Treasury from which common schools must be funded, and the Legislature has supported that fund
from a number of funding sources, both discretionary and constitutionally-mandated.

1 book on the legislative process, Edward D. Seeberger, *A Guide to the Washington State Legislative*
2 *Process* (UW Press 1989) at 114-25,² the Legislature adopts an operating budget, a capital budget,
3 and a transportation operating/capital budget. Each is supported from a variety of revenue sources
4 including state taxes, federal funds, and fees, and those revenues are then placed in a variety of
5 funds and accounts. State budgetary practice is contrary to the plaintiffs' conception that there is
6 but a single budget or that there is a single fund in the State Treasury to fund it.

7 Critical to this Court's understanding of the State budgetary process and the revenues
8 supporting it generally, and the common school fund specifically, is the fact that our Constitution
9 does not mandate that there be a single fund, supported by a single revenue source, from which
10 the Legislature appropriates money for public purposes, including public schools. While all
11 moneys levied or collected for state purposes must be deposited in the State Treasury, art. VII, §
12 6,³ the plaintiffs seem to believe that there is only a single fund in the State Treasury. That is a
13 *false* assumption.

14 Our Constitution mandates that there must be certain funds maintained in the Treasury for
15 specific budgetary purposes. In actual budget practice, although the General Fund is the largest,
16 there are other Treasury funds. The common school fund is one. These funds receive revenue
17 from various sources including state taxes, fees, and federal funds. Moreover, the creation of
18 separate funds in the State Treasury to receive particular state revenues is not only permissible, it
19 is constitutionally mandated. For example, the transportation budget is largely funded by fuel tax
20 revenues that are *mandatorily* placed in the highway fund of article II, § 40. School construction

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22 ² Although written in 1989, Seeberger's description of the process is still largely accurate. Seeberger was a
former legislator and Senate staff director. Appendix A.

23 ³ As is documented in the Office of Financial Management's *Guide to the Washington State Budget Process*
24 (Appendix B), those moneys are derived from a variety of revenue sources, and expended for a variety of purposes as
well.

1 in the capital budget is funded from the common school construction fund. Wash. Const. art. IX,
2 § 3. Common schools are funded from the common school fund. The Constitution creates that
3 fund in article IX, § 3, and defines its *specific revenue sources*:⁴

4 Appropriations and donations by the state to this fund; donations and bequests by
5 individuals to the state or public for common schools; the proceeds of lands and
6 other property which revert to the state by escheat and forfeiture; the proceeds of
7 all property granted to the state when the purpose of the grant is not specified, or is
8 uncertain; funds accumulated in the treasury of the state for the disbursement of
9 which provision has not been made by law; the proceeds of the sale of stone,
10 minerals, or property other than timber and other crops from school and state lands,
11 other than those granted for specific purposes; all moneys received from persons
12 appropriating stone, minerals or property other than timber and other crops from
13 school and state lands other than those granted for specific purposes, and all moneys
14 other than rental recovered from persons trespassing on said lands; five per centum
15 of the proceeds of the sale of public lands lying within the state, which shall be sold
16 by the United States subsequent to the admission of the state into the Union as
17 approved by section 13 of the act of congress enabling the admission of the state
18 into the Union; the principal of all funds arising from the sale of lands and other
19 property which have been, and hereafter may be granted to the state for the support
20 of common schools. The legislature may make further provisions for enlarging said
21 fund.

22 Plainly, the common school fund is not synonymous with the State Treasury, or even the General
23 Fund; it does not receive *all* state revenue. It is more limited in scope than the General Fund.⁵
24 However, article IX, § 2 makes clear that once revenues are placed in the common school fund
those revenues may *only* be used for common school purposes (“the entire revenue derived from
the common school fund and the state tax for common schools shall be exclusively applied to the

20 ⁴ The plaintiffs nowhere point out this constitutional discussion of the common school fund’s actual revenue sources.

21 ⁵ The Legislature made a choice, for example, to dedicate the State portion of property tax levy revenues to
22 the common school fund. RCW 84.52.067 (“All property taxes levied by the state for the support of common schools
23 shall be paid into the general fund of the state treasury...”). As the *LWV* dissent noted, in 2015, the State budgeted
24 \$7.1 billion from the General Fund to public education; only about \$2 billion (or 28% of that overall public education
budget) was from the common school fund. 184 Wn.2d at 416, 420 (Fairhurst, J. dissenting). The common school
fund in 2015-17 represented only a *small fraction* of the more than \$18 billion appropriated by the Legislature to
support K-12 education. This state portion of the property tax levy is about as close as there is to a “state tax for
common schools.”

1 support of the common schools”).

2 In addition to the constitutionally-prescribed Treasury funds noted above, the Legislature
3 has *plenary authority* over those funds under article II, § 1 (vesting the legislative power) and is
4 empowered by article VIII, § 4 to establish funds and appropriate moneys from them.⁶ Article
5 VIII, § 4 states:

6 No moneys shall ever be paid out of the treasury of this state, or any of its funds,
7 or any of the funds under its management, except in pursuance of an appropriation
8 by law; nor unless such payment be made within one calendar month after the end
9 of the next ensuing fiscal biennium, and every such law making a new
appropriation, or continuing or reviving an appropriation, shall distinctly specify
the sum appropriated, and the object to which it is to be applied, and it shall not be
sufficient for such law to refer to any other law to fix such sum.

10 *See State ex rel. Decker v. Yelle*, 191 Wash. 397, 400, 71 P.2d 379 (1937) (Legislature has
11 exclusive power to decide how, when, and for what purpose public moneys should be used by
12 agencies for state business); *State ex rel. State Employees’ Retirement Bd. v. Yelle*, 31 Wn.2d 87,
13 105, 201 P.2d 172 (1948) (“It is accepted doctrine in this jurisdiction that the state, in the exercise
14 of its police powers, can provide by legislative act that all funds coming into the hands of the state
15 treasurer shall become and be *state funds*, but, on the other hand, the Legislature may, in its
16 discretion, also provide for the collection and administration of certain funds without making them
17 *state or public funds*.” (Court’s emphasis)).

18 Under this authority, the Legislature has created various funds in the Treasury, as the Office
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20 ⁶ In some instances, large amounts of revenue are deposited in the Treasury, but the Legislature need not
21 appropriate them. *E.g.*, *State ex rel. Johnson v. Clausen*, 51 Wash. 548, 99 Pac. 743 (1909) (student fees, rents received
22 by WSU Board of Regents); *State ex rel. Sherman v. Pape*, 103 Wash. 319, 174 Pac. 468 (1918) (assessments on
23 private forest lands for fire protection); *State ex rel. Trenholm v. Yelle*, 174 Wash. 547, 25 P.2d 569 (1933) (worker
24 compensation premiums deposited in the accident and medical funds); *Ajax v. Gregory*, 177 Wash. 465, 32 P.2d 560
(1934) (liquor license fees, permits, and revenues from the Liquor Control Board retail stores); *State ex rel.
Washington Toll Bridge Auth. v. Clausen*, 195 Wash. 636, 82 P.2d 120 (1938) (toll moneys used to pay bonds); *State
Emp’t Retirement Bd.*, *supra* (pension moneys); *Municipality of Metropolitan Seattle v. O’Brien*, 86 Wn.2d 339, 544
P.2d 729 (1976) (local motor vehicle excise taxes collected by state for METRO).

1 of Financial Management documents on its website; the Legislature has also created numerous
2 accounts within those funds, including the General Fund, to address specific purposes. *See*
3 Appendix C.⁷ Indeed, according to the Legislature’s LEAP (Legislative Evaluation and
4 Accountability Program), the Legislature appropriated from nearly 600 funds or accounts in
5 budgets over the last decade. Appendix D. Thus, the establishment of funds or accounts and
6 appropriating from them is hardly an “accounting trick,” as plaintiffs assert, but rather represents
7 routine budget practice.

8 With regard to common school funds, as noted *supra*, however, revenues received for the
9 common school funds may not be diverted from that fund to any other purpose than supporting
10 common schools, even if the purpose is an educational one. *Sheldon v. Purdy*, 17 Wash. 135, 49
11 Pac. 228 (1897) (payment of interest on school district bonds); *State ex rel. State Bd. of Vocational*
12 *Educ. v. Yelle*, 199 Wn.2d 312, 91 P.2d 573 (1939) (support of vocational rehabilitation); *Mitchell*
13 *v. Consol. Sch. Dist. No. 201*, 17 Wn.2d 61, 135 P.2d 79 (1943) (support of transportation of
14 parochial school students); *Leonard v. City of Spokane*, 127 Wn.2d 194, 897 P.2d 358 (1995)
15 (vocational education). But nothing in these cases suggests or requires that *all revenues* the State
16 receives be placed in the common school fund or that the Legislature cannot appropriate money
17 for other educational programs from funds or accounts separate from the common school fund.

18 Nothing in *LWV* detracted from the principles set forth in the authorities referenced above.⁸

20 ⁷ The Legislature has plenary authority to transfer moneys between funds and accounts as an aspect of its
21 plenary legislative and budgetary authority under the Constitution. *Wall v. State ex rel. Wash. State Legislature*, 189
Wn. App. 1046, 2015 WL 5090741 (2015), *review denied*, 185 Wn.2d 1015 (2016).

22 ⁸ The Supreme Court’s opinion in *LWV* may have contained an important factual error when it stated that
23 the Legislature improperly appropriated constitutionally-restricted article IX, §§ 2, 3 funds dedicated to common
24 school funding to charter public schools. The Court decried the Legislature’s failure to segregate common school
revenues from general fund revenues. 184 Wn.2d at 409. The Court overlooked the fact that the Legislature itself
determined that *any support for charter public schools did not come from funds dedicated to common schools*. The
moneys supporting public education and common schools were not co-mingled, as the operating 2015-17 budget
expressly stated:

1 They remain good law in Washington, not overruled by our Supreme Court.

2 As noted *supra*, a part of the problem inherent in plaintiffs' argument here is their reliance
3 on the passage in the *LWV* majority opinion discussing a "state tax for common schools." Article
4 IX, § 2 creates a common school *fund*, supported from identified revenue sources. Those identified
5 funding sources mandatorily are part of the common school fund. But article IX, § 2 explicitly
6 gave the Legislature discretion to add other moneys to that fund. Once the Legislature appropriates
7 money to that fund from other sources, the revenues so appropriated become part of the common
8 school fund and may not be diverted from the purpose of funding common schools. However, the
9 Legislature's decision to appropriate additional money to the common school fund from other
10 funds than the common school fund itself (with its constitutionally-prescribed funding sources) is
11 not a *permanent* decision. Rather, as is noted in Kristen L. Fraser, *Method, Procedure, Means,*
12 *and Manner: Washington's Law of Law-Making*, 39 *Gonz. L. Rev.* 447, 469 (2003-04), such a
13 budgetary decision, like all budgetary decisions is good for only *two years* at most. *See*
14 *Washington State Legislature v. State*, 139 *Wn.2d* 129, 145, 965 *P.2d* 353, (1999). To hold
15 otherwise would "constitutionalize" all appropriations for public education in Washington when
16 such a result was never the Framers' intention. Indeed, such a notion is entirely contrary to
17 legislative budgetary practice for more than a century.

18 The *LWV* majority cited *State ex rel. State Bd. for Vocat. Educat. v. Yelle*, 199 *Wash.* 312,

19
20 _____
21 State general fund appropriations distributed through Part V of this act for the operation and
22 administration of charter schools as provided in chapter 28A.710 RCW shall not include state
23 common school levy revenues collected under RCW 84.52.065.

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

Thus, one of the key bases for the Supreme Court's decision was incorrect. Charter public schools, like many
other public school programs, may be funded by revenue sources other than those specially dedicated by the
Constitution to support Washington's common schools.

1 316, 91 P.2d 573 (1939) as support for its concept of a “state tax for common schools” that is
2 broader than the actual common school construction fund. But the holding in that case is far
3 narrower, and comports with the concept of a common school fund set forth here. The 1939
4 Legislature appropriated money “from the current school fund” for a state match to obtain federal
5 vocational rehabilitation funds. The auditor refused to disburse the funds because he believed they
6 were a diversion of money from the common school fund. The state board for vocational education
7 agreed the vocational education expenses incurred were not for common school purposes. *Id.* at
8 314. But the board argued that the “current school fund” was not the common school fund of
9 article IX, § 2. In examining the appropriations at issue, the Supreme Court concluded, consistent
10 with the specific funding sources of the common school fund in article IX, § 2 that included
11 appropriations to it, that the Legislature had, in effect, appropriated the moneys at issue to the
12 common school fund, although they derived from excise tax sources,⁹ and therefore the funds
13 could not be devoted to purposes other than funding the common schools.¹⁰

14 *Nothing* in that case suggests that the Legislature was prohibited from creating funds apart
15 from the General Fund or funds distinct from the common school fund to support educational
16 programs that are not related to the common schools.¹¹

17 Thus, with regard to the General Fund, other funds in the State Treasury, and the common
18 school fund of article IX, § 2, the critical points for this Court are:

- 19 • the State Treasury or General Fund are not the equivalent of the common school
20 fund; rather, constitutionally and legislatively, the Legislature creates distinct funds

21 ⁹ In fact, as the *Yelle* court noted at 316, the appropriation at issue constituted the *entire* legislative
appropriation for common schools for the 1939-41 biennium in satisfaction of the State’s article IX, § 1 duty.

22 ¹⁰ As the *LWV* dissent cogently pointed out, budgetary practices from 1939 are no longer in place; the
“current school fund” is “extinct.” 184 Wn.2d at 421 (Fairhurst, J. dissenting).

23 ¹¹ After *Yelle*, the Legislature appropriated money from the General Fund (and not the “current school fund”)
24 for vocational education, 184 Wn.2d at 421 (Fairhurst, J. dissenting).

1 and accounts in the Treasury from which it appropriates money; and

- 2 • the common school fund and the OPA are *distinct*, so that an appropriation from
3 the latter does not “divert” a cent from the former.¹²

4 (2) The Legislature’s Authority to Define, Organize, and Fund Washington’s Public
5 Schools Is Plenary

6 An additional critical point for this Court is that article IX, § 2 of the Washington
7 Constitution confers plenary authority upon the Legislature, or the people acting in a legislative
8 capacity, to define, organize, and fund Washington’s public school system. Article IX, § 2 states:

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

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

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

20 Although the mandatory duties of Const. art. 9, s 1 are imposed upon the
21 State, the organization, administration, and operational details of the “general and
22 uniform system” required by Const. art. 9, s 2 are the province of the Legislature.
23 In the latter area the judiciary is primarily concerned with whether the Legislature
24 acts pursuant to the mandate and, having acted, whether it has done so
constitutionally. Within these parameters, then, the system devised is within the
domain of the Legislature.

¹² The plaintiffs’ concept that all moneys in the General Fund, or the State Treasury generally, are effectively
the “common school fund,” if taken to its most absurd extreme would mean that *any* appropriation from the General
Fund to a program other than the common schools would be an unconstitutional diversion. Obviously, that is
unsupportable.

1 While the judiciary has the duty to construe and interpret the word
2 “education” by providing broad constitutional guidelines, the Legislature is
3 obligated to give specific substantive content to the word and to the program it
4 deems necessary to provide that “education” within the broad guidelines. However,
5 the broad guidelines which we have provided do not contemplate that the State must
6 furnish “total education” in the sense of All knowledge or the offering of All
7 programs, subjects, or service which are attractive but only tangentially related to
8 the central thrust of our guidelines. Specifically, then, we shall refer to the
9 Legislature’s obligation as one to provide “basic education” through a basic
10 program of education as distinguished from total “education” or all other
11 “educational” programs, subjects, or services which might be offered.

12 90 Wn.2d 476, 518-19, 585 P.2d 71 (1978).¹³

13 The specific constitutional language at issue here is important.¹⁴ First, the Framers gave
14 the authority over the public school system generally to the Legislature in article IX, § 2. Second,
15 the Framers understood “common schools” to be a subset of the public school system in
16 Washington when addressing article IX, § 2 (“The public school system shall include common
17 schools, and such high schools, normal schools, and technical schools as may hereafter be
18 established”). High schools were not common schools, but were added to the public school system
19 by the Legislature.¹⁵ Thus, the Legislature was to have, and has had, a primal role in the evolution
20 of Washington’s public school system under article IX, § 2.

21 ¹³ The concurrence in *Tunstall v. Bergeson*, 141 Wn.2d 201, 235-37, 5 P.3d 691 (2000) made a similar point
22 when it stated that the court should not “constitutionalize” how public schools are administered and funded.

23 ¹⁴ Courts must look to the plain language of the Constitution, in rendering a reasonable interpretation of that
24 language, giving the textual words their common and ordinary meaning as understood when they were drafted in 1889;
courts may also look to the historical context for the words in the Constitution. *Wash. Water Jet Workers Ass’n v.*
Yarbrough, 151 Wn.2d 470, 477, 90 P.3d 42 (2004); *League of Education Voters v. State*, 176 Wn.2d 808, 821, 295
P.3d 743 (2013).

¹⁵ This is not surprising. There were only 6 high schools in the entire state in 1889. Kindergartens, for
example, did not exist in significant numbers, if at all, in 1889; the first kindergarten in Seattle opened in 1914. *See*
generally, Mary Jane Honegger, *Washington State Historic Schools Status 2002* at 10, 28 (compiled for the
Washington Trust for Historic Preservation). Certainly school programs like bilingual education (RCW 28A.180),
special education (RCW 28A.155), learning assistance for underachieving students (RCW 28A.165), highly capable
student education (RCW 28A.185), or Running Start (RCW 28A.600.300, *et seq.*), just to name a few, did not exist in
1889.

1 In Washington, government may provide funds from non-General Fund sources to support
2 school programs. In *Newman v. Schlarb*, 184 Wash. 147, 50 P.2d 36 (1956), for example, our
3 Supreme Court held that the Legislature could require local governments¹⁶ like Pierce County to
4 impose property taxes to pay for common schools, in satisfaction of its article IX, § 1 duty to fund
5 such schools, stating:

6 The state, being engaged in the exercise of a paramount duty, could, of course,
7 select any method it saw fit in order to discharge that duty.

8 *Id.* at 153. In *Tunstall*, the Supreme Court differentiated between the public school system and
9 common schools, noting that local school districts were not the only constitutional providers of
10 public education services. That case involved a challenge to a program run by contractor selected
11 by OSPI to provide education services to incarcerated youth. The incarcerated youth sued the
12 State, arguing that only their local school district could serve them. The Court rejected this
13 argument, stating: “Nothing in this provision, however, mandates that the education must be
14 identical.” *Id.* at 221-23. The Court also specifically recognized that school districts alone do not
15 supervise education in Washington, stating: “...as we have seen in many instances, the Legislature
16 has found entities other than school districts qualified to educate our youth.” *Id.* at 232.

17 The Legislature retains authority over the organization of Washington’s public school
18 system. Many public education programs are supported by appropriations from General Fund
19 accounts that are not a part of the constitutional common school fund and from non-General Fund
20 sources. Indeed, the statute creating OPA itself, a non-General Fund account, outlines some of

21
22 ¹⁶ Local governments often take a role in the public school program funding. Indeed, Seattle has for several
23 years enacted local city levies in support of schools. Nothing *in the Constitution* requires local districts to supervise
24 the administration of public schools; the Legislature could provide for alternative forms of organization for local
schools. For example, it might decide to allow a city council, for example, to run schools within a city. The Legislature
has already allowed programs like Running Start, College in the High School, Tech Prep, and online programs, to
name a few, to be run by organizations other local school districts.

1 them. RCW 28B.76.526. Appendix E. Our Constitution requires the Legislature to provide a
2 school system open to all, but nowhere restricts its ability to offer specialized educational programs
3 supported by appropriations from funds or accounts apart from the common school fund.

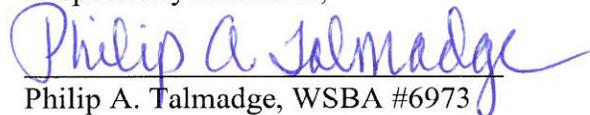
4 E. CONCLUSION

5 After *LWV*, the Legislature chose to appropriate from an account receiving lottery revenues
6 to support charter public schools. It was entitled to do this. Simply put, the General Fund is not
7 synonymous with the common school fund. Appropriations from the General Fund or non-General
8 Fund sources (that are not a part of the constitutional common school fund) do not “divert” support
9 for the common schools. This is why the Legislature’s decision to support numerous educational
10 programs from various non-common school fund sources is perfectly legitimate. The same is true
11 for the support of charter public schools from the OPA.

12 The Legislature may fund charter public schools from OPA, a non-General Fund source,
13 so long as that source is not the common school fund.

14 DATED this 20th day of December, 2016.

15 Respectfully submitted,

16 

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