HONORABLE JOHN H. CHUN
Motion to Dismiss
Noted with Argument: November 4, 2016 at 11:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

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,

Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant.

No. 16-2-18527-4 SEA

PLAINTIFFS' RESPONSE TO DEFENDANT STATE OF WASHINGTON'S PARTIAL MOTION TO DISMISS PLAINTIFFS' AMPLE FUNDING AND ALTERNATIVE LEARNING EXPERIENCE CLAIMS AND INTERVENORS' MOTION TO DISMISS ORGANIZATIONAL PLAINTIFFS

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I. INTRODUCTION

Plaintiffs are a coalition of individuals and organizations who share a commitment to ensuring that the State meets its paramount constitutional duty to provide a basic education through common schools. This coalition challenges the Charter School Act, Engrossed Second Substitute Senate Bill 6194, Laws of 2016, ch. 241 ("Act"), because it violates the Constitution and diverts already scarce funding from common schools to charter schools. Many of the Plaintiffs in this case participated in the previous challenge to Initiative 1240 ("I-1240") regarding charter schools, in which the Washington Supreme Court determined that the funding mechanism for I-1240 was unconstitutional and invalidated the initiative as a whole. Yet immediately following the Court's decision, the State continued unconstitutionally funding charter schools by improperly diverting funds through the Alternative Learning Experience ("ALE") system. Shortly thereafter, the legislature enacted the Act, which simply substitutes another unconstitutional funding mechanism for the prior one. Accordingly, Plaintiffs brought this action to ensure these continuing violations of the Constitution cease.

Intervenors and the State now seek to dismiss certain Plaintiffs and claims from this case, primarily on justiciability grounds, including standing. Intervenors' and the State's motions should be denied. The organizational Plaintiffs participating in this challenge to the unconstitutional Act have both taxpayer and representative standing to bring this case. Plaintiffs' ample provision claim is ripe for review by this Court because the State already is violating its constitutional duty to fund amply basic education, this Court has jurisdiction to hear that claim, and Plaintiffs have standing to bring the claim. Finally, Plaintiffs have standing to challenge the use of the ALE scheme to divert funds to charter schools and the improper use of that system is not moot because it is an important public issue capable of repetition.

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Accordingly, this Court should deny the State's and Intervenors' motions to dismiss and proceed with deciding the important constitutional issues in this case.

II. FACTUAL BACKGROUND

A. The Charter Schools Act Diverts Already Scarce Public Funding from Common Schools to Charter Schools.

In 2012, the Washington Supreme Court in *McCleary v. State* found that the Legislature had failed to provide school districts with adequate financial support. *McCleary v. State*, 173 Wn.2d 477, 537, 269 P.3d 227 (2012). The Court directed the Legislature to fund fully basic education no later than 2018, and retained jurisdiction over the case to ensure compliance. *Id*. at 545-46 ("This Court cannot idly stand by as the legislature makes unfulfilled promises for reform."); Order, *McCleary v. State*, No. 84362-7, at 1-3 (Wash. July 18, 2012). To date, the State has not fully funded basic education or shown measurable progress toward meeting the 2018 deadline. Order, *McCleary v. State*, No. 84362-7, at 10-13 (Wash. Oct. 6, 2016).

In November 2012, less than a year after *McCleary* was decided, a narrow majority of voters approved I-1240. Declared entirely unconstitutional in *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 413, 355 P.3d 1131 (2015), I-1240 sought to allow private organizations to establish and operate charter schools without following many of the statutes and rules applicable to the uniform common school system. *Id*. at 388-389. "[D]evoid of local control," I-1240 aimed to take state and local money away from underfunded public schools to support private endeavors. *Id*. at 399.

A near-identical iteration of I-1240, the Act is another unconstitutional attempt to fund a privately run school system as an alternative to the common schools system. The Act, like I-1240, provides for the establishment of forty charter schools by private organizations in the next five years. *See* RCW 28A.710.150(1). Charter school authorizers, as they did under I-

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1240, have limited authority to monitor performance and legal compliance of charter schools. RCW 28A.710.180. Indeed, the Act provides that oversight cannot "unduly inhibit the autonomy granted to charter schools," RCW 28A.710.180(2), and must be consistent with the principles and standards developed by yet another private organization, the National Association of Charter School Authorizers, RCW 28A.710.100(3). Charter schools, like in I-1240, are not governed by elected local school boards like all other common schools. Instead, charter schools, like in I-1240, are operated by a "charter school board," RCW 28A.710.020(3), which is a "board of directors appointed or selected under the terms of a charter application to manage and operate the charter school," RCW 28A.710.010(6). The board is responsible for functions typically handled by the elected school board, including hiring, managing, and discharging employees; receiving and disbursing funds; entering contracts; and determining enrollment numbers. RCW 28A.710.030(1).

Charter schools, like under I-1240, are also exempt from the vast majority of Common School Provisions, Title 28A RCW ("Common School Provisions"), including (but by no means limited to) laws governing curriculum, discipline, and facilities. *See, e.g.*, ch. 28A.230 RCW (compulsory coursework and activities), ch. 28A.600 RCW (student conduct and discipline), ch. 28A.336 RCW (property). The Act suggests that charter schools must provide a basic education (*i.e.*, the four educational goals identified in RCW 28A.150.210), but limits the program requirements to instruction in the EALRs and participation in the state student assessment system, RCW 28A.710.040(2)(b).

The Act, like I-1240, diverts state funds from common schools to private charter schools. The Superintendent must allocate common school funds—including constitutionally restricted funds—to each charter school on the same basis as public school districts. *See* RCW

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28A.710.220, .230(1). Although the Act purports to fund charter schools through a separate account, the Act neither provides a new revenue source for that account nor cuts programs currently funded under that account. The attached chart demonstrates that, absent extraordinary lottery collections, the legislature intends to transfer funds from the general fund to fund charter schools. *See* Declaration of Jessica A. Skelton in Support of Response to Motions to Dismiss ("Skelton Decl."), Ex A. Private charter school boards also exercise significant control over any public funding tied to student enrollment because the board determines the number of students the charter school will admit. *See* RCW 28A.710.050.

On December 18, 2015, shortly after the Supreme Court determined I-1240 was unconstitutional in *League of Women Voters*, 184 Wn.2d at 398, the Superintendent promulgated emergency rules ("Emergency Rules") to perpetuate the diversion of public funds to charter schools through sponsorship of charter schools as ALEs by non-resident school districts. The Emergency Rules were intended to "allow former charter school students in Washington to expeditiously transition to alternative learning experiences (ALE) offered by nonresident public school districts[.]" Wash. State Reg. 16-01-130. Unlike charter schools, ALEs are "not primarily based on full-time, daily contact between teachers and students." RCW 28A.232.005(2). Thus, as described below, the Emergency Rules served to further the unconstitutional diversion of funds from common schools to charter schools.

B. A Coalition of Plaintiffs Comes Together to Challenge the Charter School Act.

Following the enactment of the Act, a coalition of Plaintiffs, many of whom participated in the challenge to I-1240, came together to challenge the constitutionality of the Act and the misuse of the ALE statutory scheme to continue the unconstitutional diversion of public funds from common schools to charter schools. The Plaintiffs include the following taxpayers:

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- Plaintiff Wayne Au, Ph.D., an educator and education advocate and a parent of a child in a Washington public school;
- Pat Braman, a former public school teacher and school board member; and
- Donna Boyer, a parent of children in Spokane Public Schools.

The Plaintiffs also include the following taxpayer organizations, whose members are comprised of taxpayers and parents of public school children:

- El Centro de la Raza, whose mission seeks to ensure that every child in the state is offered an equal and adequate education;
- The League of Women Voters of Washington, whose mission includes promoting legislation that is consistent with the Washington Constitution;
- The Washington Association of School Administrators ("WASA"), whose mission includes holding the legislature accountable for delivering on the State's paramount duty to provide ample funding for all K-12 children;
- The Washington Education Association ("WEA"), whose mission includes increasing support for the State's public school system;
- International Union of Operating Engineers 609 ("IUOE"), whose mission includes advocating for employees of the Seattle School District; and
- American Federation of Teachers Washington ("AFT-WA"); Aerospace Machinists Union, IAM&AW DL 751 ("IAM"); Washington State Labor Council, AFL-CIO ("WSLC"); United Food and Commercial Workers Union 21 ("UFCW 21"); Washington Federation of State Employees ("WFSE"); and Teamsters Joint Council No. 28 ("Council No. 28"), whose missions include creating a stronger public education system in the state.

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Intervenors' Motion to Dismiss ("Intervenors' Motion") seeks dismissal of the organizational Plaintiffs identified above. The State's Motion to Dismiss ("State's Motion") seeks dismissal of Plaintiffs' claims for declaratory and injunctive relief relating to article IX, section 1 of the Washington Constitution, which requires the State to make ample provision for the education of children ("ample provision claim"), and relating to the State's misuse of the ALE statutory scheme to continue the unconstitutional diversion of public fund from common schools to charter schools ("ALE claim").

III. ISSUES

A. Whether Intervenors' motion to dismiss the organizational Plaintiffs should be denied because Plaintiffs have standing as both taxpayers and in a representative capacity, and Intervenors have not challenged the standing of the individual Plaintiffs.

B. Whether the State's motion to dismiss Plaintiffs' ample provision claim should be denied because the claim is ripe, the Washington Supreme Court does not have exclusive jurisdiction over that claim, and Plaintiffs have standing to bring the claim.

C. Whether the State's motion to dismiss Plaintiffs' ALE claim should be denied because Plaintiffs have standing to bring the claim and because the use of ALEs to unconstitutionally divert funds to charter schools is capable of repetition.

IV. EVIDENCE RELIED UPON

This Motion relies on the Declaration of Jessica A. Skelton, the exhibit attached thereto, and the other papers and pleadings on file in this matter.

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V. ARGUMENT

A. The Organizational Plaintiffs Have Standing.

There is no dispute that the individual Plaintiffs, Dr. Wayne Au, Donna Boyer, and Pat Braman, have standing to bring this lawsuit. *See* Intervenors' Motion at 5 n.2 ("Intervenor-Defendants do not challenge the individual plaintiffs' standing[.]"). Nevertheless, Intervenors challenge the standing of organizational Plaintiffs El Centro de la Raza, the League of Women Voters, WEA, WASA, IUOE, AFT-WA, Council No. 28, IAM, WSLC, UFCW 21, and WFSE. Given that the case will proceed regardless of the outcome, this Court can and should decline to address Intervenors' motion to dismiss some (but not all) plaintiffs. *See Lee v. State*, 185 Wn.2d 608, 615-16 and n.3, 616, 374 P.3d 157 (2016) (where individual plaintiffs have taxpayer standing, the Court "need not reach" issues of personal and representational standing of plaintiffs, including the League of Women Voters). To the extent the Court is inclined to address Intervenors' motion, however, the organizational Plaintiffs have standing on two independent grounds, specifically, taxpayer standing and representational standing.

1. Legal standard for standing.

There are at least three ways to demonstrate standing in a lawsuit, specifically, taxpayer standing, representational standing, or personal standing. The requirements for each are as follows:

Taxpayer standing. "Washington courts have long recognized the right of an individual or entity to challenge governmental acts based solely upon the litigant's status as a taxpayer." *Friends of N. Spokane Cnty. Parks*, 184 Wn. App. 105, 116, 336 P.3d 632 (2014) (emphasis added). In order to allege "taxpayer" standing, the individual or organization must pay taxes, challenge an unlawful government act, and request the attorney general take action (and have the

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request denied) before commencing the lawsuit. *Lee*, 185 Wn.2d at 614-15. The taxpayer need not allege any direct, special, or pecuniary interest in the outcome of the lawsuit. *Friends of N. Spokane Cnty. Parks*, 184 Wn. App. at 122 ("[A]ll taxpayers are presumed harmed where a government entity acts unlawfully."); *Robinson v. City of Seattle*, 102 Wn. App. 795, 805, 10 P.3d 452 (2000) (citing *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975)). Nor does the taxpayer need to allege any nexus between the type of taxes paid and the subject matter of the lawsuit. *Friends of N. Spokane Cnty. Parks*, 184 Wn. App. at 119-20.

Representational standing. An organization has "representational" standing to bring suit on behalf of its members when the following criteria are satisfied: (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires participation of the organization's individual members. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002), *as amended*, 50 P.3d 618 (2002).

Personal standing. Individuals and organizations may have standing in their personal capacity. To have "personal" standing, first, the individual or entity must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quotation omitted). Second, the individual or entity must suffer "injury in fact," *i.e.*, a particularized injury, economic or otherwise, resulting from the challenged action that would be redressed by the remedy sought. *See id.*; *see also Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 494, 585 P.2d 71 (1978) ("*Seattle School District*"). Although the organizational

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Plaintiffs do not assert personal standing in their own right, their members have personal standing, as explained in Section V(A)(3)(a), *infra*.

2. Taxpayer standing.

The organizational Plaintiffs meet the requirements for taxpayer standing in their own right. In particular, the organizational Plaintiffs have taxpayer status because the organizations pay state sales taxes. *See Robinson*, 102 Wn. App. at 804-05 (ACLU had taxpayer standing based on payment of local sales and use taxes); *Friends of N. Spokane Cnty. Parks*, 184 Wn. App. at 113, 116, 124 (taxpayer status of nonprofit, "in its own right…as the result of payment of Washington and Spokane County sales taxes"); *see also* Compl., ¶¶ 6-9, 13-19; ch. 82.08 RCW (state sales tax). Plaintiffs challenge the constitutionality of the Act, and, prior to filing this lawsuit, requested the attorney general take action to challenge the Act, which request was denied. *See* Compl., ¶ 24 and Ex. A, B. Nothing more is required. *See Friends of N. Spokane Cnty. Parks*, 184 Wn. App. at 124 (holding nonprofit qualified for taxpayer standing "based solely upon…status as a taxpayer and…prior demand on the attorney general"); *see also Lee*, 185 Wn.2d at 616 (League of Women Voters); *Robinson*, 102 Wn. App. at 804-05 (ACLU); *City of Tacoma*, 85 Wn.2d at 269 (county and municipality).[1] The Court should deny Intervenors' Motion on this basis alone.

3. Representational standing.

In addition to taxpayer standing, the organizational Plaintiffs meet the three requirements to sue on behalf of their members in a representational capacity because (1) their members would otherwise have standing to sue in their own right based on taxpayer standing and personal

[1] Contrary to Intervenors' contention, the organizational Plaintiffs alleged standing in their personal capacity. *See* Compl., ¶¶ 23-24. But to the extent further allegations are required, Plaintiffs should be granted leave to amend the Complaint. CR 15(a); *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 484, 209 P.3d 863 (2009), *as corrected* (Sept. 22, 2009).

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standing; (2) the interests they seek to protect are germane to their respective purposes; and (3) their claims for declaratory and injunctive relief do not require the participation of individual members. *See Int'l Ass'n of Firefighters, Local 1789*, 146 Wn.2d at 214. Intervenors' arguments to the contrary are without merit.

a. The organizational Plaintiffs' members would have standing.

The organizational Plaintiffs satisfy the first requirement for representational standing because their members would have taxpayer standing in their own right. *See* Compl., ¶¶ 6-9, 13-19, 24 and Ex. A, B. Intervenors concede these members have taxpayer standing but erroneously contend that an organization cannot represent the rights of its taxpayer members unless the members would have personal standing as well. *See* Intervenors' Motion at 11, n.5. Intervenors identify no authority supporting this limitation. To the contrary, in the only case cited by Intervenors on this issue, the Supreme Court noted that the League of Women Voters "likely" had representational standing to challenge the constitutionality of an initiative on behalf of its taxpayer members. *Lee*, 185 Wn.2d at 616 n.3; *see also Robinson*, 102 Wn. App. at 805 (holding that "a taxpayer need not allege a personal stake…[or] a direct, special, or pecuniary interest in the outcome of the lawsuit" to have standing based on taxpayer status (quotation omitted)).

Nor is there any reason for this Court to limit the ability of taxpayers to assert their rights via an organization. Representational standing on behalf of taxpayers does not mean that "any organization with a taxpayer member would always have standing," as Intervenors contend. Intervenors' Motion at 11 n.5. Representational standing requires that the interests at stake are germane to the organization's purpose (as discussed in Section V(A)(3)(b), *infra*) and that participation of an individual is not necessary (as discussed in Section V(A)(3)(c), *infra*). Where (as here) these requirements are met, taxpayers may join together through an association or

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organization to challenge the legality of the government's actions. *See Lee*, 185 Wn.2d at 615 n.3.

Further, the organizational Plaintiffs' members include parents of public school students, who would have personal standing to challenge the constitutionality of the Charter School Act on behalf of their children.[2] *See* Section V(A)(1), *supra* (personal standing requires claimant was within the "zone of interest" and suffered "injury in fact"). The Supreme Court addressed personal standing of public school students to raise constitutional challenges to the State's statutory system of school funding in *Seattle School District*, 90 Wn.2d at 494. In particular, the Court determined that (1) public school students were within the zone to be protected by article IX of the Constitution and public school laws as "the intended and immediate objects" of the public school system, and (2) students suffered injury in fact as a result of the "adverse impact of insufficient revenue…to educational programs[.]" *Id.* at 495. Indeed, the plaintiffs in *McCleary* are parents and students.

Like the students in *Seattle School District*, the parent members (acting on behalf of their children) fall within the zone of interest of the constitutional guarantees in question and the Charter School Act. Public school students have an affirmative right to enforce the State's duties under article IX of the Constitution. *Seattle Sch. Dist.*, 90 Wn.2d at 494-95. Intervenors argue that the "zone of interest" is limited to the statute at issue and does not extend to interests protected by the constitutional guarantees allegedly violated. *See* Intervenors' Motion at 9-10. Intervenors point to the dissent in *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 423, 27 P.3d 1149 (2001) (Sanders, J., dissenting), in which the dissenting justice argued the majority had failed to consider the interests implicated by the constitutional protection in question.

[2] The organizational plaintiffs representing parents of public school students include El Centro de la Raza, WEA, IUOE, IAM, WSLC, WFSE, and Council No. 28. *See* Compl., ¶¶ 6, 9, 13-15, 17, 19.

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Intervenors' Motion at 9. But the majority did not address this point. And, in fact, the Washington Supreme Court specifically has relied on the constitutional protections at issue in holding the zone of interest requirement was satisfied. *See, e.g.*, *Seattle Sch. Dist.*, 90 Wn.2d at 494-95 (school district and students were "within the zone of interested protected by Const. art. 9, ss 1 and 2"); *City of Seattle v. State*, 103 Wn.2d 663, 667-68, 694 P.2d 641 (1985) (plaintiff's interest "falls directly within the zone of interests protected by Const. art. 11, § 10").[3]

The parent members are within the zone of interest of the Charter School Act itself, in any event. The Act applies to all "child[ren] eligible to attend a public school in the state." RCW 28A.710.010(9). In fact, the Act requires public school districts to advertise on behalf of charter schools within their boundaries to parents of current public school students. RCW 28A.710.060(1) ("School districts must provide information to parents and the general public about charter schools located within the district as an enrollment option for students."). It is immaterial whether these parents choose to enroll their children in charter schools. *See City of Seattle*, 103 Wn.2d at 669 (holding the City had standing to challenge constitutionality of annexation statute despite "[t]he fact that the City may choose not to annex territory"); *Blondheim v. State*, 84 Wn.2d 874, 876, 529 P.2d 1096 (1975) (petitioner had standing to challenge the constitutionality of legislation providing for the incarceration of incorrigible dependents even though petitioner was not then incarcerated).

The injury in fact requirement is also met. There is no dispute that the State is currently failing to meet its constitutional duty to provide full funding for basic education and that this failure has resulted in substantial and irreparable harm to public school students. *See* Order,

[3] Intervenors also inexplicably rely on *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008). Intervenors' Motion at 9. In that case, however, because there was no dispute the plaintiff fell within the zone of injury of the challenged statute, the Court had no reason to address the constitutional protections in question. *Am. Legion Post* #149, 164 Wn.2d at 594. The Court did not endorse, or even address, the sweeping limitation on standing proposed by Intervenors. *See id.*

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McCleary v. State, No. 84362-7, at 13 (Oct. 6, 2016). The Charter School Act further injures public school students by changing school funding laws to take away money that would otherwise have gone to the students' underfunded public schools and, instead, to give the money to charter schools in violation of the Constitution. *See* Compl., ¶ 61; *see also* RCW 28A.710.280(1) ("The legislature intends that state funding for charter schools be distributed equitably with state funding provided for other public schools."). This lawsuit would remedy the ongoing harm to public school students by enjoining further diversion of state funds to charter schools. *See Seattle Sch. Dist.*, 90 Wn.2d at 494-95.

Intervenors' reliance on *Trepanier v. City of Everett*, 64 Wn. App. 380, 824 P.2d 524 (1992) is misplaced. *See* Intervenors' Motion at 7. In *Trepanier*, the plaintiff alleged "only threatened injury" that the new county zoning code's reduction of densities in some areas would necessarily force development out of the county altogether into unincorporated areas. 64 Wn. App. at 383-84. By contrast, the Act's ongoing diversion of funds from public schools has caused an existing and ongoing injury to the students at these schools. *See* Compl., ¶ 23 ("Under the Supplemental Operating Budget enacted by the legislature earlier this year, the state will divert more than $19.4 million to charter schools during fiscal year 2015-2017.").

Additionally, teachers, administrators, and other public school employees represented by WEA, WASA, IUOE, AFT-WA, and Council No. 28 are suffering actual injury as a result of the Charter School Act's unconstitutional restrictions on collective bargaining. In particular, the Act prohibits public school employees from associating with charter school employees in the same bargaining unit. RCW 41.56.0251 ("Any bargaining unit or units established at the charter school must be limited to employees working in the charter school and must be separate from other bargaining units in school districts, educational service districts, or institutions of higher

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education."); RCW 41.59.031 (same). As alleged in the Complaint, this restriction violates article II, section 37 of the Constitution by revising and amending the scope of public school employees' rights and duties under state collective bargaining laws without setting forth those revisions and amendments in full. Compl., ¶¶ 114-19. In doing so, the Act undermines recognized collective bargaining rights. *See* RCW 41.56.0251, 41.59.031. This lawsuit would prevent the injury to public school employees (as well as charter school employees) by declaring the restriction unconstitutional and enjoining its enforcement. Compl., ¶ 44.

Finally, the members of El Centro de la Raza, the League of Women Voters, WEA, and WASA—all plaintiffs in *League of Women Voters*—have suffered specific injury as a result of the State's efforts to make an end run around the Supreme Court's ruling that the diversion of common school funds to charter schools violates the Constitution. These organizations and their members invested substantial time and resources challenging the constitutionality of I-1240, which provided for a charter school system operated by private organizations but funded by taxpayers. The lawsuit was successful, resulting in invalidation of I-1240 in its entirety. *See League of Women Voters*, 184 Wn.2d at 413. Yet, shortly after the Supreme Court's decision, the Superintendent unlawfully adopted "Emergency Rules" to perpetuate the diversion of public funds to charter schools through sponsorship of charter schools as ALEs. *See* Compl., ¶¶ 45-51; *see also* Section V(C), *infra*. And, a few months later, the legislature enacted the Act, which is nearly identical to I-1240 and does not address the constitutional defects identified by the Court. *See id.*, ¶¶ 29-44, 54-62. These unlawful actions uniquely harm the participants of *League of Women Voters* by undermining the fully favorable ruling they obtained from the Supreme Court.

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Thus, the first requirement for representational standing—that the members would have standing—is satisfied by the plaintiff organizations' members' standing as taxpayers and in their personal capacity.

b. The interests at stake are germane to the organizational Plaintiffs' purposes.

Intervenors incorrectly challenge the organizations' standing on the basis that funding of education is not germane to their interests, an element that is clearly satisfied. In this lawsuit, Plaintiffs seek to protect the State's public school system guaranteed by the Constitution and to stop (for the second time) the unconstitutional diversion of public funds to a parallel school system operated by private organizations that are not subject to local voter control. *See League of Women Voters*, 184 Wn.2d at 404. Plaintiffs also seek to ensure the continued vitality of collective bargaining in Washington by challenging an undisclosed amendment to the state collective bargaining statutes. *See* Compl., ¶¶ 114-19. These interests are germane to the organizational Plaintiffs' missions and purposes, thus satisfying the second requirement for representational standing. *See Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 46, 272 P.3d 227 (2012) (challenge to red-light cameras germane to "a stated organizational purpose" of public safety).

For example, a core mission of El Centro de la Raza, a Washington organization that advocates on behalf of the Latino community, is to ensure that every child in Washington is offered an equal and adequate education. Compl., ¶ 6. In furtherance of this mission, El Centro de la Raza joined this lawsuit to stop the Charter School Act's depletion of state funds that are restricted to benefit the common schools and to prevent the creation of separate educational systems that provide unequal educations, rather than strengthening the existing public school system. *Id.* Likewise, the League of Women Voters is a statewide, nonpartisan organization that

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encourages informed and active participation of citizens in government. *Id.*, ¶ 7. The League promotes legislation and policy that is consistent with the Washington Constitution and that ensures representative government. *Id.* The Charter School Act is antithetical to the League's mission and purposes because it deprives its taxpayer members of their right to elect representatives to oversee the spending of their taxes on public education and continues the expenditure of taxpayer money to implement an unconstitutional charter school law. *Id.*

Intervenors do not seriously dispute that the interests at stake in this case are germane to El Centro de la Raza's and the League of Women Voters' purposes. *See* Intervenors' Motion at 14. Instead, Intervenors assert (without citing any authority) that El Centro de la Raza and the League should not be permitted to represent their members because their missions are too "broad." *Id.* But representational standing is not the exclusive domain of single-issue organizations. *See, e.g.*, *Lee*, 185 Wn.2d at 615 (allowing League of Women Voters' constitutional challenge to tax initiative). Nor is this lawsuit an improper "second shot" at the legislative process. Intervenors' Motion at 14. As the Supreme Court has explained, judicial review of a facial constitutional challenge does not improperly inject the courts in the legislative process. *Lee*, 185 Wn.2d at 615-16.

Participation in this lawsuit also is germane to the mission and goals of Plaintiffs WEA, WASA, IUOE, AFT-WA, and Council No. 28, which represent teachers, administrators, and other public school employees. *See* Compl., ¶¶ 8, 9, 13, 18, 19. These organizations advance their members' professional interests by taking steps to build confidence in public education and increase support for the public school system. *See id.* For example, WASA adopted several goals and action steps to advance the interests of its members, including to "in a unified, persistent voice hold the Legislature accountable for delivering on the State's 'paramount duty'

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to provide ample funding for all K-12 children consistent with the Supreme Court's *McCleary* ruling." *Id*., ¶ 8. This lawsuit furthers the objectives of WEA, WASA, IUOE, AFT-WA, and Council No. 28 by challenging the diversion of public school funds to a "separate[]" charter school system operated by private organizations as an "alternative" to the public school system, RCW 28A.710.020(1)(b).

The purpose of these organizations is not confined to wages and working conditions, as Intervenors' contend. *See* Intervenors' Br. at 12. That Intervenors disagree with Plaintiffs about whether charter schools are good or bad policy does not diminish the commitment of teachers, administrators, and other public school employees to improving the public schools where they work. *See* Compl., ¶¶ 8, 9, 13, 18, 19. This challenge to an unconstitutional education law by organizations that represent public school employees cannot be equated with a veteran's organization attempting to reverse a smoking ban. *See Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 596, 192 P.3d 306 (2008) (local chapter of American Legion whose purpose was to provide services and benefits to veterans and their families).

WFSE (state public employees), UFCW 21 (food and commercial employees in Washington), IAM (active, retired, and laid-off workers at The Boeing Company), and WSLC have a vested interest in ensuring an educated workforce. *See* Compl., ¶¶ 14-17. To that end, these organizations take steps to promote quality public school schools throughout the state. *See id.* The Charter School Act threatens their interests in fostering the basic education of future workers by taking money away from underfunded public schools. *See id.*

In addition, WEA, WASA, IUOE, AFT-WA, and Council No. 28 are protecting their members' rights by challenging the Charter School Act's prohibition on public school employees forming bargaining units with any charter school employees. *See* Compl., ¶¶ 8, 9, 13, 18, 19; *see*

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also RCW 41.56.0251, 41.59.031. Further, the effort to chip away at labor rights adversely impacts their members, as well as the 42,000 state public employees represented by WFSE, the 44,000 food and commercial employees in Washington represented by UFCW 21, the 45,000 active, retired, and laid-off workers at The Boeing Company represented by IAM, and the 400,000 taxpayer members of unions affiliated with WSLC. *See* Compl., ¶¶ 14-17. It is within the core mission of all of these organizations to ensure the ongoing vitality of collective bargaining and labor rights in Washington. *See id.*, ¶¶ 8, 9, 13-19.

All of the organizational Plaintiffs have a history prior to this litigation of advocacy regarding public education, elected representative democracy, or unionization. Thus, the "germane" requirement is satisfied as to all organizational Plaintiffs.

c. Participation of individual members is not necessary.

Intervenors do not dispute that the third representational standing requirement (that participation of individual members is not necessary) is met, nor could they. The relief requested—invalidation of the Charter School Act, Compl., ¶¶ 127-41—does not require the participation of individual members. *See Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 894, 337 P.3d 1076 (2014); *Mukilteo Citizens for Simple Gov't*, 174 Wn.2d at 46.

For these reasons, the organizational Plaintiffs have both taxpayer and representational standing. Thus, this Court should reject Intervenors' attempt to limit participation in this lawsuit to charter school supporters and silence those organizations committed to strengthening the public school system.[4] *See* CR 24; *Columbia Gorge Audubon Soc'y v. Klickitat County*, 98 Wn. App. 618, 623-24, 989 P.2d 1260 (1999) (stating that "the requirements of CR 24(a) are liberally

[4] For example, Intervenor Washington State Charter Schools Association's stated purpose is to "provid[e] accurate and timely information about charter public schools to Washington parents and students." Dkt. # 10, Declaration of Thomas Franta, ¶ 2. At a minimum, the organizational Plaintiffs should be permitted to continue as intervenors. *See* CR 24.

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construed to favor intervention" and "[t]o interpret CR 24 as permitting intervention only by those with a perfected or perfectible independent cause of action is to render the rule meaningless").

B. Plaintiffs' Ample Provision Claim Is Justiciable.

Plaintiffs contend that the Charter School Act violates the requirement in article IX, section 1 of the Constitution to make ample provision for the education of all children in the state. The Act does so by, *inter alia*, diverting funds from public schools to charter schools without providing any mechanism to ensure that diverting these funds will not interfere with the State's paramount duty to make ample provision for education. Compl., ¶¶ 87-93. Plaintiffs' ample provision claim is justiciable and should be resolved on its merits by this Court. This claim is ripe and not moot; it does not fall within the Supreme Court's exclusive jurisdiction; and Plaintiffs have standing to raise it.

1. Justiciability standard.

Justiciability is a threshold requirement that asks whether the issue for adjudication is appropriate for the Court to address. *Huff v. Wyman*, 184 Wn.2d 643, 650, 361 P.3d 727 (2015). In general, under the Uniform Declaratory Judgments Act ("UDJA"), chapter 7.24 RCW, there must be a justiciable controversy:

> (1) which is an actual, present, and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Lee, 185 Wn.2d at 616. Traditional requirements of standing, ripeness, and mootness are inherent in the justiciability requirements. *Benton County v. Zink*, 191 Wn. App. 269, 278, 361

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P.3d 801 (2015). Similarly, to obtain injunctive relief, a plaintiff must establish (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) the acts complained of either result in or will result in actual and substantial injury. *Northwest Gas Ass'n v. Wash. Utilities and Transp. Com'n.*, 141 Wn. App. 98, 115, 168 P.3d 443 (2007). Courts evaluate these factors "in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public." *Tyler Pipe Indus., Inc. v. State*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

Significantly, even if a claim does not satisfy all of the justiciability requirements, the Court still may grant declaratory relief where the "real merits of the controversy are unsettled and the continuing question of great public importance exists." *Ackerly Commc'ns, Inc. v. City of Seattle*, 92 Wn.2d 905, 912, 602 P.2d 1177 (1979) (citing *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). Whether an issue is one of major public importance depends on "the extent to which public interest would be enhanced by reviewing the case." *Snohomish County v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994).[5]

2. Plaintiffs' ample provision claim is ripe and not moot.

The State contends that Plaintiffs' ample provision claim is not ripe because Plaintiffs "present[] nothing more than a speculative and theoretical claim that the State will not be able to fully fund all public schools, including charter schools" by 2018. State's Motion at 15. But the State's argument cannot be reconciled with the Washington Supreme Court's Orders in *McCleary*. These Orders establish and confirm the State's current violation of the State's paramount duty to make ample provision for public education:

[5] The dispute must be ripe for the public importance exception to apply. *League of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743(2013)

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- On January 5, 2012, the Supreme Court ruled that the State was not meeting its paramount duty to make ample provision for public education. *McCleary*, 173 Wn.2d at 484. The Court directed the legislature to adopt a plan to fund fully basic education by 2018, which is the compliance date chosen by the legislature. *Id.* at 484, 508.
- Since the 2012 *McCleary* decision, the Supreme Court has repeatedly found that the State's violation of its paramount duty continues, that the legislature is not making made steady and measurable progress toward full constitutional compliance, and that the legislature has offered no plan for achieving compliance by its self-imposed 2018 deadline. Order, *McCleary v. State*, No. 85362-7, at 2-3 (Wash. Dec. 20, 2012); Order, *McCleary v. State*, No. 85362-7, at 6-8 (Wash. Jan. 9, 2014); Order, *McCleary v. State*, No. 85362-7, at 9-10 (Wash. Aug. 13, 2015); Order, *McCleary v. State*, No. 85362-7, at 12-13 (Wash. Oct. 6, 2016).
- On August 13, 2015, the Court found the State in contempt for its continued violation of its paramount duty and the Court's Order imposed a $100,000 per day penalty. Order, *McCleary v. State*, No. 85362-7, at 9 (Wash. Aug. 13, 2015).
- And, on October 6, 2016, the Court reaffirmed the $100,000 per day penalty, noting that "the State continues to provide a promise—'we'll get there next year'—rather than a concrete plan for how it will meet its paramount duty." Order, *McCleary v. State*, No. 85362-7, at 10 (Wash. Oct. 6, 2016).

The Charter School Act's diversion of public school funds away from the public school system to a separate charter school system violates the Constitution's ample funding requirement and that claim is buttressed by the State's ongoing failure to meet its paramount duty under article

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IX, section 1. The claim is not based on "speculation" about what may or may not happen at a future date.

The Supreme Court's decision in *First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 916 P.2d 374 (1996) is instructive. There, the Supreme Court held that a constitutional challenge to a landmark preservation ordinance was justiciable when the plaintiff's property had been nominated, but not yet designated, as a landmark. *Id*. at 241-244. The Court explained that the challenge was ripe because the nomination itself prevented the plaintiff from either remodeling or selling the property under the challenged ordinance. *Id.* at 245. Similarly, the State's ongoing failure to meet its paramount duty has immediate and dire consequences for public schools that are exacerbated by the Act.

The State argues that review of Plaintiffs' ample provision claim would mean that "anyone dissatisfied with an expenditure of the state" could argue that the measure takes money away from public schools in violation of article IX, section 1. State's Motion at 14. But the State ignores that, by design, charter schools compete for the same dollars that would otherwise be available to support public common schools. In an attempt to sidestep the Court's ruling in *League of Women Voters*, the Act directs the legislature to appropriate funds to charter schools from the Washington Opportunity Pathways Account. RCW 28A.710.127, 128. But the legislature intends merely to move existing monies and/or existing programs between the general fund and the Washington Opportunity Pathways Account as needed to continue the diversion of public funds to charter schools. *See* Skelton Decl., Ex. A. Because "[t]here is no way to track the restricted common school funds or to ensure that these dollars are used exclusively to support the common schools," the constitutional defects identified in *League of Women Voters* cannot be

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remedied by swapping funds in this way. 184 Wn.2d at 409. As a result, there is a direct link between the Act and decreased funding for common schools.

The State also incorrectly speculates that Plaintiffs' claim could become moot if the State remedies its current constitutional violation at some future date. *See* State's Motion at 13. Importantly, the State does not contend the claim is, in fact, moot. The mere possibility of future undefined acts does not deprive the court of jurisdiction today. *Cf. DeFunis v. Odegaard*, 84 Wn.2d 617, 628, 529 P.2d 438 (1974) (court not divested of jurisdiction even if issue is moot). Plaintiffs' ample provision claim is justiciable.

3. The Supreme Court's continuing jurisdiction in *McCleary* does not preclude Plaintiffs' ample provision claim.

The State contends Plaintiffs' ample provision claim should be dismissed given the Supreme Court's retention of jurisdiction in *McCleary*. State's Motion at 13. The State relies on the priority of action doctrine, under which the first court to gain jurisdiction over a cause retains exclusive authority to address the action until the controversy is resolved. *See Civil Serv. Comm'n of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 177, 969 P.2d 474 (1999). In general, however, the priority of action doctrine applies only when there are two separate actions involving identical subject matter, parties, and relief. *Matter of 13811 Highway 99, Lynnwood, Wash.*, 194 Wn. App. 365, 374, 378 P.3d 568 (2016).[6] There is no identity of subject matter and relief here.

The subject matter of this lawsuit and *McCleary* are not the same. Identity of subject matter does not arise simply because the same constitutional provision is at issue or the claims involve overlapping issues. *See Matter of 13811 Highway 99, Lynnwood, Wash.*, 194 Wn. App.

[6] Courts may look beyond these elements to consider the doctrine's underlying purpose, specifically, whether a decision in one court would bar proceedings in the other because of res judicata (claim preclusion). *Id.* As demonstrated by the multiple orders from the Washington Supreme Court in *McCleary*, that would not occur here.

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365, 374 (no identity of subject matter even though claims required resolution of the "same issue" where second case involved "additional questions"). Plaintiffs' ample provision claim asks whether the Charter School Act's diversion of public school funds away from the public school system violates the State's paramount duty. This question is not before the Court in *McCleary*. The Supreme Court retained jurisdiction over the *McCleary* case only "to monitor the State's progress in implementing by 2018 the reforms that the legislature had recently adopted." Order, *McCleary v. State*, No. 85362-7, at 1 (Wash. Sept. 11, 2014).

The requested relief also differs. Plaintiffs ask the Court to declare the Charter School Act unconstitutional and enjoin further diversion of funds to charter schools. Plaintiffs do not ask this Court to address the State's failure to fund fully basic education, which is the relief requested by the plaintiffs in *McCleary*. *See* 173 Wn.2d at 482. Accordingly, because no identity of subject matter or relief exists, the priority of action doctrine does not apply.

4. Plaintiffs have standing to assert their ample provision claim.

The State also asserts that Plaintiffs lack standing to bring their ample provision claim "because [the claim] is premised on potential or theoretical harm." State's Motion at 15. This is simply a recitation of the State's ripeness argument and should be rejected for the reasons stated above. *See* Section V(B)(2), *supra*. The State's current failure to meet its constitutional duty creates a real and actual harm, that is worsened by the diversion of more than $19.4 million to charter schools during the 2015-17 biennium. Compl., ¶ 23.

Regardless, Plaintiffs have standing to bring their ample provision claim. As explained in Section V(A)(2), *supra*, Plaintiffs meet the requirements for taxpayer standing: (1) Plaintiffs are Washington taxpayers; (2) Plaintiffs raise facial constitutional challenges to the Charter School Act; and (3) Plaintiffs made a written request to the attorney general to act. *See supra* at

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9-10; *see also Lee*, 185 Wn.2d at 615. Although the State contends Plaintiffs cannot demonstrate any actual and existing harm, State's Motion at 16, "all taxpayers are presumed harmed where a government entity acts unlawfully." *Friends of N. Spokane Cnty. Parks*, 184 Wn. App. at 122. No unique harm is required for taxpayer standing. *See* Section V(C)(1), *infra* (compiling authority).

The State argues Plaintiffs lack standing because they do not have a "'personal claim to education funding allocations.'" State's Motion at 16 (quoting *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009)). In *Federal Way School District No. 210*, the Court held that parents and teachers could not "claim standing as taxpayers because they were unable to pay higher taxes" to their public school district. 167 Wn.2d at 529 (emphasis added) (noting plaintiffs could donate money voluntarily). The Court clarified, however, that "taxpayers may have standing to protest high taxes or improper expenditures[.]" *Id.* at 530 (emphasis added). Here, Plaintiffs properly protest the State's unconstitutional expenditure of taxpayer dollars to support charter schools as a competitive alternative to the public schools.

Accordingly, Plaintiffs' challenge to the Act based on the State's paramount duty to make ample provision for public education is justiciable. Further, given the great public importance of this issue, this Court should address Plaintiffs' ample provision claim on the merits even if all of the justiciability requirements are not satisfied (which they are). *See Ackerly Commc'ns, Inc.*, 92 Wn.2d at 912. By requiring that common schools compete with private charter schools for funding, the Act unconstitutionally diverts funds away from the public education it is required to give its first and highest priority. As the Supreme Court emphasized in *McCleary*: "Ultimately, it is [the judiciary's] responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1." 173 Wn.2d at 546.

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C. Plaintiff's ALE Claim Is Justiciable.

1. Plaintiffs have standing to bring their ALE claim.

To support its standing argument, the State mischaracterizes Plaintiffs' request for relief regarding the use of the ALE statutory scheme to divert funds to charter schools. Specifically, the State characterizes the claim as relating to "when a student is enrolled in an ALE program," "when an ALE Program serves a student who needs an alternative to the traditional public school to succeed," or "when a district contracts with an entity to provide an ALE program." *See* State's Motion at 17, 19. Contrary to the State's argument, however, Plaintiffs do not challenge the ALE system itself. Rather, they challenge the misuse of that system to continue the unconstitutional diversion of public funds from common schools to charter schools, which are not ALEs.

Accordingly, the State's assertion that Plaintiffs must be "ALE students, parents of ALE students, school districts, or former charter schools" to have standing is without merit. *See* State's Motion at 17. Plaintiffs have standing to pursue their ALE claim for the same reasons discussed in Sections V(A) and (B)(4), *supra*. As taxpayers and organizations representing taxpayers, Plaintiffs have standing to pursue their claim to ensure that public funds are not unconstitutionally diverted from common schools to charter schools through the ALE scheme. The State incorrectly argues that in order to establish taxpayer standing, Plaintiffs must show "'a *unique right or interest* that is being violated, in a manner *special and different* from the rights of other taxpayers,'" quoting the lead opinion (with one concurring justice) of the plurality decision in *Greater Harbor 2000 v. Seattle*, 132 Wn.2d 267, 270, 937 P.2d 1082 (1997).[7] *See* State's Motion at 19. Subsequent Washington court decisions, however, specifically reject this

[7] *See Friends of N. Spokane Cnty. Parks*, 184 Wn. App. at 123 (describing the lead, concurring, and dissenting opinions in *Greater Harbor 2000*).

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departure from past precedent and confirm that a unique right is not a requirement for taxpayer standing. *See Robinson*, 102 Wn. App. at 805 n.12; *Kightlinger v. Pub. Util. Dist. No. 1 of Clark Cnty.*, 119 Wn. App. 501, 508, 81 P.3d 876 (2003); *Friends of N. Spokane Cnty. Parks*, 184 Wn. App. at 123; *see also Lee*, 185 Wn.2d at 615.

Nor do Plaintiffs merely "disagree with a discretionary decision," as the State claims. State's Motion at 19. Rather, Plaintiffs challenge a concerted effort to divert funds from common schools to charter schools using the ALE system, after the Washington Supreme Court determined that the diversion of such funding was unconstitutional. Taxpayer standing exists to raise a facial challenge to these unlawful acts. *See Huff*, 184 Wn.2d at 649 (recognizing taxpayer standing for constitutional challenge to secretary of state's act in placing an initiative on the ballot).

Regardless, Plaintiffs have a unique interest in their ALE claim, which challenges the State's improper use of the ALE scheme to continue the unconstitutional diversion of funds from common schools to charter schools. As the parties who challenged I-1240 and prevailed in obtaining the ruling that the funding of charter schools was unconstitutional, Plaintiffs were uniquely harmed when the State made an end-run around the Washington Supreme Court's decision and continued the unconstitutional diversion of funds to charter schools. This Court should hold that Plaintiffs have standing to bring their ALE claim.

2. The APA does not apply to Plaintiffs' ALE claim.

The State incorrectly asserts both that Plaintiffs lack standing to bring their ALE claim under the Administrative Procedure Act ("APA") and that Plaintiffs were obligated to bring their claim under the APA. The State is wrong on both counts because the APA does not apply to Plaintiffs' ALE claim.

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Initially, to support their argument that Plaintiffs lack standing under the APA, the State again mischaracterizes the nature of Plaintiffs' ALE claim. *See* Motion at 18 ("Plaintiffs cannot establish that they are harmed or prejudiced when a student is enrolled in ALE programs[.]"). Plaintiffs do not claim they are harmed by the ALE system itself, but rather that they are harmed by the unlawful determination by the State to continue funding charter schools through the ALE system when charter schools do not qualify as ALEs. Calling charter schools ALEs was simply the State's method to continue the unconstitutional diversion of funds to charter schools. Specifically, Plaintiffs' ALE claim seeks a declaration "that charter schools do not constitute ALEs, that any diversion of public funds to charter schools through operation as ALEs is unconstitutional and unlawful, and that the Emergency Rules requiring resident districts to release charter school students to enroll in ALEs sponsored by other districts are invalid, as well as such other and further relief as may follow from the entry of such a declaratory judgment." Complaint, ¶ 135. In its Motion, the State argues only that Plaintiffs' challenge to the Emergency Rules must be brought pursuant to the APA. But the crux of Plaintiffs' ALE claim depends on whether charter schools qualify as an ALE program under existing state statutes. The illegal Emergency Rules were just a means for the State to facilitate its effort to make an end run around the Supreme Court's decision declaring I-1240 unconstitutional.

Even if Plaintiffs could have challenged the Emergency Rules under the APA, however, they were not required to do so in the context of their overall ALE claim. The State asserts that the APA provides the exclusive means of judicial review of agency action and the UDJA "does not apply to 'agency action reviewable under chapter 34.05 RCW.'" State's Motion at 20 (quoting RCW 7.24.146). This carve-out under the UDJA expressly applies only to "agency action," which the State concedes means, in this context, the "adoption or application of an

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agency rule."[8] *Id*. But Plaintiffs are not challenging the State's rulemaking or application of the Emergency Rules and they do not claim "that a state agency rule interferes with or impairs" their "legal rights or privileges." *See* State's Motion at 20. Rather, Plaintiffs are challenging the State's misuse of the ALE system, as facilitated by the Emergency Rules, to violate state law and the Constitution.

Notably, the State cites no authority that a constitutional challenge to an agency rule must be brought under the APA and that is because there is no such requirement. Rather, the requirement first to pursue administrative remedies, including under the APA, "is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges." *S. Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety & Env't v. King Cnty.*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984). No such deference is required when determining the constitutionality of an agency rule under an existing statutory scheme, because the agency has no expertise in making that determination. *Bare v. Gorton*, 84 Wn. 2d 380, 383, 526 P.2d 379 (1974) ("An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power."). Thus, this Court has jurisdiction to hear Plaintiffs' ALE claim because courts possess "constitutional and inherent power to review illegal or manifestly arbitrary and capricious action violative of fundamental rights." *State ex rel. DuPont-Fort Lewis Sch. Dist. No. 7, Pierce Cnty. v. Bruno*, 62 Wn.2d 790, 794, 384 P.2d 608 (1963) (footnote omitted); *Pierce Cnty. Sheriff v. Civil Serv. Comm'n of Pierce Cnty.*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983) ("The courts' inherent power of review extends to administrative action which is contrary to law as well as that which is arbitrary and capricious.").

[8] For purposes of the APA, "'agency action' means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits." RCW 34.05.010(3).

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Moreover, even if the APA applies to the Emergency Rules component of Plaintiffs' ALE claim (which it does not), Plaintiffs were not obligated to bring that claim under the APA because doing so would have been futile and the relief available inadequate. *S. Hollywood Hills Citizens Ass'n*, 101 Wn.2d at 74 ("if resort to the administrative procedures would be futile, exhaustion is not required") (citing *Zylstra v. Piva*, 85 Wn.2d 743, 539 P.2d 823 (1975)); *Ackerley Commc'ns, Inc. v. City of Seattle*, 92 Wn.2d 905, 909, 602 P.2d 1177 (1979) ("where no administrative remedy is available, or where such remedy is patently inadequate, a party may be allowed to raise constitutional issues in a declaratory judgment proceeding without being required to exhaust administrative channels needlessly or to the party's injury."). As the State argues, Plaintiffs likely lack standing under the APA and would have been unable to have their claim heard. Additionally, at most, Plaintiffs would have been able to obtain APA review of the Emergency Rules, but would not have been to obtain a legal determination that charter schools are not ALEs or that the continued diversion of public funds to charter schools through the ALE scheme was unconstitutional. Accordingly, the relief available in an administrative forum, if any, was inadequate and Plaintiffs were not obligated to pursue that relief.

Additionally, because the APA does not apply, Plaintiffs were not required to bring their ALE claim in Thurston County. *See* State's Motion at 20-21. Regardless, the statutory language on which Plaintiffs rely for this proposition is permissive, not mandatory. *See* RCW 34.05.570(2)(b)(i) ("The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county . . ." (emphasis added)). Likewise, because Plaintiffs are pursuing constitutional claims, not challenging "agency action" as the State contends, they also were not required separately to name the Superintendent of Public Instruction. Regardless, the Superintendent of Public Instruction is a division of the State, a

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named party to this action. *See, e.g., Edmonds School Dist. No. 15 v. City of Mountlake Terrace*, 77 Wn.2d 609, 611, 465 P.2d 177 (1970) ("The state exercises its sovereign powers and fulfills its duties of providing education largely by means of a public school system under the direction and administration of the State Superintendent of Public Instruction, State Board of Education, school districts and county school boards.").

In sum, the APA does not apply to Plaintiffs' ALE claim. Accordingly, Plaintiffs need not establish standing under the APA, and the APA does not provide the exclusive means of review of Plaintiffs' ALE claim.

3. Plaintiffs' ALE claim is ripe and not moot.

Based on the fact that the Emergency Rules have expired, the State incorrectly asserts that Plaintiffs' ALE claim is not ripe or, alternatively, that the claim is moot. State's Motion at 21. The State again ignores, however, that Plaintiffs' ALE claim seeks relief not only with respect to the Emergency Rules, but also seeks a declaration "that charter schools do not constitute ALEs" and "that any diversion of public funds to charter schools through operation as ALEs is unconstitutional and unlawful." Complaint, ¶ 135.

Plaintiffs' request for a declaration that charter schools do not constitute ALEs is unquestionably ripe. The Complaint alleges facts to support the legal determination that charter schools do not constitute ALEs. *See* Complaint, ¶¶ 47-48; *see also* RCW 28A.232.005(2), .010(1)(a). The State clearly disputes this proposition, *see* State's Motion at 19,[9] rendering this a dispute that is ripe for determination by this Court. Similarly, it cannot reasonably be disputed

[9] The State mischaracterizes the definition of an "ALE," suggesting it can be "on-line, remote, or site-based." State's Motion at 19 (citing RCW 28A.232.010(1)(d)-(f)). To the contrary, the ALE statutes define a "site-based course" as "an alternative learning experience course where the student has in-person instructional contact time for at least twenty percent of the total weekly time for the course." RCW 28A.232.010(1)(f). Unlike charter schools, ALEs are "not primarily based on full-time, daily contact between teachers and students and [do] not primarily occur[] on-site in a classroom," but rather occur "outside the classroom using an individual student learning plan." RCW 28A.232.005(2).

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that the State continued to divert public funds to charter school through the ALE statutory scheme, assisted by the Emergency Rules, even after the Washington Supreme Court invalidated I-1240. *See* Complaint, ¶¶ 45-46, 49, 51. This is by no means an abstract disagreement. Plaintiffs have an actual dispute with the State and Intervenors that this Court's decision will conclusively resolve. *See Lee*, 185 Wn.2d at 616.

Unable to establish that Plaintiffs' ALE claim is not ripe, the State resorts to the assertion that Plaintiffs' claim is moot because the Emergency Rules have expired and the diversion of funding to charter schools through the ALE scheme during the 2015-16 school year has ended. State's Motion at 21. Again, this assertion does not address the crux of Plaintiffs' ALE claim, that charters schools are not ALEs, which issue is not moot and can be determined by this Court. Additionally, although enactment of the Act may have temporarily halted the diversion of funds using the ALE scheme, nothing prevents the State from continuing to misuse this scheme in the future. In fact, there is a grave risk the State will continue to misuse the ALE scheme in the event this Court declares the Act unconstitutional.

Washington courts consistently have recognized an exception to the mootness doctrine, "which allows a reviewing court to consider issues that have been raised and briefed 'when the court discerns a likelihood of recurrence of the same issue, generally in the framework of a continuing or recurring controversy, and public interest in the controversy.'" *In re Dependency of H.*, 71 Wn. App. 524, 527-28, 859 P.2d 1258 (1993) (quoting *DeFunis*, 84 Wn.2d at 627). Courts will "decide issues, even though moot, if they present matters of substantial public interest, particularly where final determination of the issue is essential in guiding the conduct of public officials." *DeFunis*, 84 Wn.2d at 628. "Criteria to be considered in determining the requisite degree of public interest are the public or private nature of the question presented, the

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desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question." *Sorenson*, 80 Wn.2d at 558 (citations omitted).

Here, Plaintiffs' ALE claim presents an issue of public interest and constitutional magnitude. There is an imminent risk that the State will continue to misuse the ALE scheme to continue the diversion of public funds to charter schools, particularly if the Court determines the Act is unconstitutional. A judicial determination on this issue would guide the conduct of public officials. Accordingly, given the great public importance of the issue, this Court should address Plaintiffs' ALE claim on the merits even if all of the justiciability requirements are not satisfied (which they are). *See Ackerly Commc'ns, Inc.*, 92 Wn.2d at 912.

D. Plaintiffs Are Entitled to Injunctive Relief.

The State incorrectly challenges Plaintiffs' entitlement to injunctive relief with respect to their ample provision and ALE claims on precisely the same grounds it challenges Plaintiffs' entitlement to declaratory relief. *See* State's Motion at 23. Accordingly, to the extent Plaintiffs prevail in defeating the State's Motion to Dismiss their request for declaratory relief in conjunction with their ample provision and ALE claims, the Court also should deny the State's Motion with respect to the request for injunctive relief on those claims.

VI. CONCLUSION

The State's and Intervenors' Motions are an unmeritorious effort to delay adjudication of the merits of Plaintiffs' claims. There is no dispute that the individual Plaintiffs have taxpayer standing. Further, many of the same organizational Plaintiffs participated in the successful challenge to I-1240, and the organizational Plaintiffs have both taxpayer and representational standing and a history of advocating on issues raised by this litigation. Moreover, the diversion of funds from common schools that are currently underfunded raises a meritorious ample

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funding claim. And Plaintiffs have standing to challenge the State's illegal use of the ALE scheme to continue unconstitutional funding of charter schools, actions that are capable of repetition. Plaintiffs respectfully request that the Court deny the State's and Intervenors' Motions to Dismiss.

Word-Count Certification

I certify that this memorandum contains 10,322 words, in compliance with the Local Civil Rules and the Court's Stipulated Order for Overlength Response to Motions to Dismiss dated October 24, 2016.

DATED this 24th day of October, 2016.

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 24th day of October, 2016 I caused to be served a true copy of the foregoing document upon:

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

DATED this 24th day of October, 2016.

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