No. 94269-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANTS

PACIFICA LAW GROUP LLP
Paul J. Lawrence, WSBA # 13557
Jessica A. Skelton, WSBA # 36748
Jamie L. Lisagor, WSBA # 39946
Athan P. Papailiou, WSBA #47591
1191 Second Avenue, Suite 2000
Seattle, WA 98101
(206) 245-1700
Attorneys for Appellants

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 3

III. STATEMENT OF THE CASE 4

A. Washington's Founders Develop a Uniform System of Common Schools Supplemented by Specialized Schools. 5

B. The Delegates Draft a Constitution Establishing Common Schools as the Centerpiece of a Single, Uniform Public School System. 6

C. The Legislature Establishes a Public School System, But Fails to Provide Adequate Funding 8

D. The State Funds Common Schools from the General Fund. 11

E. This Court Holds Private Charter Schools Under I-1240 Violate the Constitution. 11

F. The Legislature Attempts to Resurrect I-1240 in the Charter School Act. 12

G. The Trial Court Erroneously Upholds the Act as Valid. 17

IV. ARGUMENT 19

A. The Act Creates a Parallel System of Publicly Funded, Privately Operated General Education Schools in Violation of Article IX, Section 2. 19

1. The Constitution Requires that Common Schools Provide the General Basic Education to All Children. 19

2. Charter Schools Are Not a Uniform Replacement for Common Schools. 25

a.) Non-uniform governance 26

b.) Non-uniform education program 27

B. The Act Diverts Restricted Common School Funds in Violation of Article IX, Sections 2 and 3. 30

1. The Legislature Cannot Rely on the General Fund to Pay for Charters Under the Current School Funding Scheme. 30

2. The Legislature Uses the General Fund, Albeit Indirectly, to Pay for Charter Schools. 32

C. The Act Impedes the State's Paramount Duty to Provide Amply for Basic Education Under Article IX, Section 1. 36

D. The Act Unconstitutionally Delegates the State's Paramount Duty Under Article IX, Section 1. 37

1. The Act Unconstitutionally Delegates the State's Paramount Duty to Private Organizations..... 37

2. The Act Is Unconstitutional Because It Fails to Provide Sufficient Procedural Safeguards..... 39

E. The Act Creates a Separate System of Charter Schools Outside the Superintendent's Supervision in Violation of Article III, Section 22. 41

F. The Act Violates Article II, Section 37 by Amending State Collective Bargaining Laws and the Basic Education Act. ..44

1. The Act Unconstitutionally Amends State Collective Bargaining Laws. 45

2. The Act Unconstitutionally Amends The Basic Education Act. 46

G. Organizational Plaintiffs Have Representational Standing Based on the Taxpayer Status of Their Members. 48

V. CONCLUSION.....49

VI. APPENDIX.....51

TABLE OF AUTHORITIES[1]

WASHINGTON CASES

Barry & Barry, Inc. v. State Dep't of Motor Vehicles,
81 Wn.2d 155, 500 P.2d 540 (1972) 39

City of Tacoma v. O'Brien,
85 Wn.2d 266, 534 P.2d 114 (1975) 49

Fed. Way Sch. Dist. No. 210 v. State,
167 Wn.2d 514, 219 P.3d 941 (2009) 25, 26, 29

Great Northern Ry. Co. v. Snohomish County,
48 Wash. 478, 93 P. 924 (1908) 44

Henry v. Lind,
76 Wn.2d 199, 455 P.2d 927 (1969) 28

In re Powell,
92 Wn.2d 882, 602 P.2d 711 (1979) 39, 41

Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports,
146 Wn.2d 207, 45 P.3d 186 (2002),
as amended, 50 P.3d 618 (2002) 49

League of Women Voters v. State,
184 Wn.2d 393, 355 P.3d 1131 (2015) ..... passim

Lee v. State,
185 Wn.2d 608, 374 P.3d 157 (2016) 48, 49

McCleary v. State,
173 Wn.2d 477, 269 P.3d 227 (2012) ..... passim

McCleary v. State, No. 85362-7, Order (Wash. Oct. 6, 2016)..... 36

Mitchell v. Consol. Sch. Dist. No. 201,
17 Wn.2d 61, 135 P.2d 79 (1943) 31, 35

[1] For the convenience of the Court and the parties, Appellants have submitted an Appendix of Authorities with session laws and secondary authorities.

Naccarato v. Sullivan,
46 Wn.2d 67, 278 P.2d 641 (1955) 47

Northshore Sch. Dist. No. 417 v. Kinnear,
84 Wn.2d 685, 530 P.2d 178 (1974) 19, 25

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1,
149 Wn.2d 660, 72 P.3d 151 (2003) 23, 37, 38

Sch. Dist. No. 20, Spokane Cty. v. Bryan,
51 Wash. 498, 99 P. 28 (1909) ..... passim

Seattle Sch. Dist. No. 1. v. State,
90 Wn.2d 476, 585 P.2d 71 (1978) ..... passim

State ex rel. Helm v. Kramer,
82 Wn.2d 307, 510 P.2d 1110 (1973) 17

State v. Preston,
84 Wash. 79, 146 P. 175 (1915) 43

State, Dep't of Ecology v. City of Spokane Valley,
167 Wn. App. 952, 275 P.3d 367 (2012) 20

Tunstall ex rel. Tunstall v. Bergeson,
141 Wn.2d 201, 227, 5 P.3d 691 (2000) 24

United Chiropractors of Wash., Inc. v. State,
90 Wn.2d 1, 578 P.2d 38 (1978) 38, 39

Wagner v. Royal,
36 Wash. 428, 78 P. 1094 (1904) 28

Wash. Educ. Ass'n v. State,
93 Wn.2d 37, 604 P.2d 950 (1980) 46

Yelle v. Bishop,
55 Wn.2d 286, 347 P.2d 1081 (1959) 34, 45

CONSTITIONAL PROVISIONS

Wash. Const. art. II, § 37 ..... passim

Wash. Const. art. III, § 22 ..... passim

Wash. Const. art. IX ..... passim

Wash. Const. art. IX, § 1 ..... passim

Wash. Const. art. IX, § 2 ..... passim

Wash. Const. art. IX, § 3 30

Wash. Const. art. XIII, § 1 7

Wash. Const. art. XIII, § 1 (1889) 7, 21

WASHINGTON STATUTES

Ch. 28A.150 RCW 10, 28, 41

Ch. 28A.193 RCW 23

Ch. 28A.300 RCW 41

Ch. 41.56 RCW 45

Ch. 41.59 RCW 45

Laws of 1854, ch. 1 5

Laws of 1854, ch. 2 5

Laws of 1854, ch. 3 5

Laws of 1854, ch. 4 5

Laws of 1865 5

Laws of 1885 5

Laws of 1889, ch. 12 § 25 8

Laws of 1889, ch. 12 § 26 8

Laws of 1889, ch. 12 § 44 8

Laws of 1889, ch. 12 § 45 8
Laws of 1889, ch. 12 § 46 8
Laws of 1889, ch. 12 § 47 8
Laws of 1889, ch. 12 § 48 8
Laws of 1889, ch. 12 § 49 8
Laws of 1897, ch. 3 § 212 9
Laws of 1897, ch. 3 § 222 9
Laws of 1897, ch. 4 § 190 9
Laws of 1897, ch. 4 § 228 9
Laws of 1897, ch. 4 § 229 9
Laws of 1967, ch. 133 § 2 31
Laws of 1977, 1st Ex. Sess., ch. 359 ..... passim
Laws of 2009, ch. 548 ..... passim
Laws of 2013, ch. 323 47
Laws of 2016, Ch. 241 ..... 1, 3
Laws of 2017, 3rd Spec. Sess., Operating Budget (SSB 5883) ..... passim
RCW 28A.150.020 ..... 22, 26
RCW 28A.150.070 26
RCW 28A.150.200 28
RCW 28A.150.203 28
RCW 28A.150.210 ..... 10, 22, 28, 40
RCW 28A.150.220 ..... passim

RCW 28A.150.380..... 11
RCW 28A.250.220..... 47
RCW 28A.315.175..... 41
RCW 28A.600.300 through RCW 28A.600.400 23
RCW 28A.600.410 through RCW 28A.600.490 29
RCW 28A.655.180..... 24
RCW 28A.710.010..... 14
RCW 28A.710.020..... passim
RCW 28A.710.030..... 14, 26
RCW 28A.710.040..... passim
RCW 28A.710.050..... 22
RCW 28A.710.060..... 29
RCW 28A.710.070..... 13, 42, 43
RCW 28A.710.080..... 13, 14, 42
RCW 28A.710.100..... 14
RCW 28A.710.130..... 38, 40
RCW 28A.710.150..... 13, 33
RCW 28A.710.180..... 14, 40, 42
RCW 28A.710.200..... 14, 41
RCW 28A.710.220..... 15, 43, 47
RCW 28A.710.230..... 15
RCW 28A.710.270..... 15, 32

RCW 28A.710.280 22

RCW 28B.50.535 24

RCW 28B.76.526 15

RCW 41.56.025 45

RCW 41.56.0251 46

RCW 41.56.040 45

RCW 41.56.060 ..... 45, 46

RCW 41.59.031 46

RCW 41.59.060 45

RCW 41.59.080 ..... 45, 46

RCW 43.88C.020 34

RCW 67.70.240 15

Title 28A RCW 26, 27

OTHER AUTHORITIES

Dennis C. Troth, *History and Development of Common School Legislation in Washington* 159 (Univ. of Wash. Pubs. in Social Sciences 1929 ..... 5, 6, 21

Greg Copeland, *McCleary plaintiffs say state budget for education falls short*, King 5, July 7, 2017 11

Louis Lerado, *Public Schools and the Convention, No. 2*, Tacoma Daily Ledger, July 3, 1889 ..... 7, 20

Op. Wash. Att'y Gen. 1975 No. 1 44

Op. Wash. Att'y Gen. 1998, No. 6 21

Op. Wash. Att'y Gen. 2009, No. 8 44

Quentin Shipley Smith,
Analytical Index to The Journal of the Washington State Constitutional Convention 1889 (Beverly Paulik Rosenow ed., 1999)..... 8

Thomas William Bibb,
History of Early Common School Education in Washington (Univ. of Wash. Pubs. in Social Sciences 1929)..... 6, 7, 9, 21

I. INTRODUCTION

For more than 125 years, the Washington Constitution has provided for a single general and uniform public school system, at the center of which are common schools that provide a general education to the State's children and that are adequately funded from restricted funding sources. In 2012, Initiative Measure No. 1240 ("I-1240") attempted to add charter schools to the State's common school system and to pay for charter schools from state funds restricted to common schools under of Article IX of the Constitution. In *League of Women Voters v. State*, 184 Wn.2d 393, 405, 355 P.3d 1131 (2015) ("*LWV*"), the Court held that charter schools are not common schools within the meaning of Article IX because "charter schools under I-1240 are run by an appointed board or nonprofit organization and thus are not subject to local voter control[.]" The Court further held that I-1240 diverted restricted common school funds from the State's General Fund to charter schools on the same basis as common schools in violation of Article IX. Thus, the Court ruled I-1240's privately operated but publicly funded charter school system was unconstitutional.

Following *LWV*, the Legislature tweaked the charter school system established by I-1240 by enacting the Charter School Act, Laws of 2016, Ch. 241 ("Charter School Act" or "Act"). But these tweaks are mere artifice, not substantive changes, that fail to fix the constitutional problems

of charter schools. Like I-1240, the Act creates a parallel system of publicly funded, privately operated charter schools that are not uniform with the common schools but play the same role in the State's public school system. The Constitution does not allow the Legislature to create an alternative set of privately run schools to supplant common schools.

Further, the Legislature relied on an accounting trick to obscure the Act's continued diversion of constitutionally protected funds to support charter schools. Charter schools continue to be funded on the same basis as common schools. Although the Act purports to fund charter schools directly from an account separate from the General Fund, the Legislature did not raise new revenue or decrease funding for other programs as would be necessary to prevent the diversion of protected funds. Instead, as confirmed by the legislative history and the recent budget, the Legislature is paying for the exponentially growing costs of charter schools by indirectly relying on the General Fund.

Finally, the Act repeats the other constitutional violations raised, but not addressed by this Court, in *LWV*. The Act violates the constitutional provision requiring the Superintendent of Public Instruction ("Superintendent") to have supervision over public schools. In addition, the Act impedes the State's paramount duty to fund fully public schools,

unconstitutionally delegates authority to set education standards to private entities, and violates Article II, Section 37.

For these reasons, this Court should declare the Charter School Act unconstitutional in its entirety.

II. ASSIGNMENTS OF ERROR

A. Whether the Act violates article IX, section 2's requirement that the Legislature provide a "general and uniform" public school system because it establishes a parallel system of publicly funded schools serving the same general population of common school students, but controlled by private organizations and exempt from uniform common school laws.

B. Whether the Act violates article IX, section 2, because funding for up to 40 charter schools over the five-year term provided for under the Act requires the unconstitutional diversion of restricted state funds to support charter schools.

C. Whether the Act violates the State's paramount duty to make ample provision for education under article IX, section 1, by diverting money from inadequately funded public schools.

D. Whether the Act unconstitutionally delegates the State's paramount duty under article IX, section 1, because it allows private organizations to define the components of a constitutionally adequate program of basic education.

E. Whether the Act violates article III, section 22, because it provides that a Charter Commission, rather than the Superintendent, supervises certain charter schools.

F. Whether the Act violates article II, section 37, by revising the state collective bargaining laws and the Basic Education Act without setting forth those revisions and amendments in full.

G. Whether the organizational plaintiffs have representational standing based on the taxpayer status of the organizations' members (in addition to the other bases for standing acknowledged by the trial court).

III. STATEMENT OF THE CASE

Most fundamentally, this case raises the issue of whether the Legislature can adopt non-substantive fixes to address the substantive constitutional problems with the charter school system established under I-1240. Does changing the characterization of charter schools from "common schools" to an "alternative" to common schools and changing the funding for charter schools from direct payments out of the General Fund to indirect payments from the General Fund cure I-1240's constitutional defects? The text and undisputed history of the Constitution's education provisions demonstrates that the answer is no.

A. Washington's Founders Develop a Uniform System of Common Schools Supplemented by Specialized Schools.

Since territorial times, the common schools have been at the heart of Washington's public education system. During its first session, the territorial legislature established a system of common schools to provide a basic education to the general student population. *See* Laws of 1854, ch. 1-4. They were open to all children and controlled by the local voters through an elected board of directors. *Id*. During subsequent sessions, the territorial legislature supplemented the common schools with various specialized public schools. *See, e.g.*, Laws of 1865, Memorials at 222-23 (agricultural college); Laws of 1885, at 136-41 (school for deaf, mute, blind, and feeble-minded youth); Dennis C. Troth, *History and Development of Common School Legislation in Washington* 159 (Univ. of Wash. Pubs. in Social Sciences 1929 ("Troth") (high schools offering an advanced education that during territorial times was not considered necessary for the majority of citizens). These specialized schools were publicly funded but, unlike common schools, did not offer a general basic education program to all students. *See id.* Instead, the schools provided specialized programs to meet the needs of discrete populations. *Id.*

The early common schools floundered due to the lack of reliable funding and inconsistency in course offerings, teacher qualifications, and

discipline. *See* Thomas William Bibb, *History of Early Common School Education in Washington* 73-79 (Univ. of Wash. Pubs. in Social Sciences 1929) ("Bibb"); Troth at 88. The territorial legislature enacted a series of reforms that established the hallmark features of common schools as we know them today, including uniform laws and rules establishing a minimum educational program; centralized supervision of the schools by an elected Superintendent; and local voter control (through elected school boards) over the day-to-day management of common schools. *See* Bibb at 145.

B. The Delegates Draft a Constitution Establishing Common Schools as the Centerpiece of a Single, Uniform Public School System.

By the time the constitutional convention convened in 1889, the framework of Washington's public education system was "well molded[.]" Bibb at 144. Convention leaders believed a well-organized uniform public school system with common schools under local voter control was essential to ensure that an adequate education was offered to all children across the state. Troth at 115. Rejecting vague laudatory language found in most state constitutions, the delegates drafted an education article declaring: "It is the paramount duty of the state to make ample provision for the education of all children residing within its

borders[.]" Const. art. IX, § 1; *Seattle Sch. Dist. No. 1. v. State*, 90 Wn.2d 476, 498, 585 P.2d 71 (1978) (surveying state constitutions).

The delegates wrote into the Constitution a uniform public school system mirroring the structure developed by the territorial legislature. The framers required the Legislature to establish common schools as the mandatory component of the public education system. Const. art. IX, § 2. Further, the delegates authorized the Legislature to supplement the common schools with "high schools, normal schools, and technical schools[.]" *Id*. They also specifically provided for state institutions for "blind, deaf, dumb, or otherwise defective youth" and for "the insane or idiotic[.]" Const. art. XIII, § 1 (1889).[2] The delegates placed "all matters pertaining to public schools" under the supervision of an elected Superintendent, Const. art. III, § 22, finding the risks inherent in local experimentation far outweighed the drawbacks of centralized control, *see* Louis Lerado, *Public Schools and the Convention, No. 2*, Tacoma Daily Ledger, July 3, 1889, at 3; Bibb at 74, 114, 144-45.

Well aware of the funding problems that plagued the territorial schools and the public schools in many other states, the delegates created a permanent fund to exclusively support common schools. Const. art. IX, §

[2] Article XIII, Section 1 was amended in 1988 to specify that these specialized state institutions serve "youth who are blind or deaf or otherwise disabled" and "persons who are mentally ill or developmentally disabled[.]"

2.[3] The delegates were "careful to emphasize the importance, as well as the distinct character, of the common school." *Sch. Dist. No. 20, Spokane Cty. v. Bryan*, 51 Wash. 498, 502, 99 P. 28 (1909) ("*Bryan*"). They rejected a motion that would have permitted use of common school funds to support any "public schools," and instead restricted those moneys to support exclusively "common schools." Quentin Shipley Smith, *Analytical Index to The Journal of the Washington State Constitutional Convention 1889*, at 686 (Beverly Paulik Rosenow ed., 1999).

C. The Legislature Establishes a Public School System, But Fails to Provide Adequate Funding.

During its first session in 1889, the Legislature established uniform common schools as part of the State's public school system. A common school was "defined to be a school that is maintained at the public expense in each school district, and under the supervision of boards of directors." Laws of 1889, ch. 12 § 44. The board of directors was elected by the local electorate, received and disbursed state common school funds, and controlled the day-to-day operations of the common schools. *See id*., ch. 12 §§ 25-26. The Legislature adopted uniform laws related to course instruction and discipline, among other things. *See id*., ch. 12 §§ 45-49.

[3] Article IX was amended in 1966 to create a separate permanent construction fund for the exclusive use of common schools.

About eight years later, the Legislature supplemented the common schools with "Higher and Special Institutions," specifically, normal schools, an agricultural college, and the School for Defective Youth. *See* Laws of 1897, ch. 3 §§ 212, 222, ch. 4 §§ 190, 228-29. These schools offered specialized courses designed to serve students with particular needs. *See id*. Six high schools (out of about 1,000 schoolhouses) offered an advanced education also existed around that time. Bibb at 105.

In 1978, this Court concluded that the State was failing to meet its paramount constitutional duty to make ample provision for public education. *Seattle Sch. Dist.*, 90 Wn.2d at 536-37. The Court articulated broad guidelines for a constitutionally adequate education: the word "education" in Article IX, Section 1 means the basic knowledge and skills necessary to compete in today's economy and meaningfully participate in the State's democracy. *See id*. at 517-18. The Court explained that it was the Legislature's duty to provide "substantive content" to meaning of the term "education" and the "program it deems necessary to provide that 'education'" (generally referred to as the "basic education program"). *Id*. at 518-19. The Court ordered the Legislature to define these terms and to fund fully the basic education program. *Id*. at 537-38.

During the next three decades, the Legislature adopted significant education reforms to meet the guarantee of Article IX. *See, e.g.*, ch.

28A.150 RCW. In *McCleary v. State*, the Court endorsed these reforms as meeting the "education" and "basic education program" requirements of Article IX. 173 Wn.2d 477, 523-24, 269 P.3d 227 (2012). First, "education" means the four goals of learning, as set forth in RCW 28A.150.210, and the Essential Academic Learning Requirements ("EALRs"), which define what children should know and be able to do at each grade level. *Id.* at 523. Second, the "basic education program" includes the offerings outlined in the Basic Education Act of 1977, *see* Laws of 1977, 1st Ex. Sess., ch. 359 and Laws of 2009, ch. 548 (together, "Basic Education Act"), such as the minimum instructional requirements identified in RCW 28A.150.220. *McCleary*, 173 Wn.2d at 526. The Court found, however, the Legislature had failed to provide the school districts with adequate financial support and directed the Legislature to adopt a plan and provide full funding by 2018. *Id.* at 537. Although the recently enacted biennial operating budget, Laws of 2017, 3rd Spec. Sess., Operating Budget (SSB 5883) ("2017-19 Budget"), purports to provide full funding, the *McCleary* plaintiffs contend it falls short of the State's paramount duty.[4] *See* Sect. III.F, *infra* (asking the Court to take judicial notice of the 2017-19 Budget).

[4] Greg Copeland, *McCleary plaintiffs say state budget for education falls short*, King 5, July 7, 2017, *at* http://www.king5.com/news/local/mccleary-family-attorney-says-

D. The State Funds Common Schools from the General Fund.

Currently, the Legislature funds the common schools by allocating basic education dollars primarily from the State's General Fund, in which revenues from various sources are deposited (e.g., state common school property tax, state sales and use taxes, business and occupation taxes, among others). *See* RCW 28A.150.380(1); CP 327 ¶ 6, 350-51 ¶ 8. The basic education allocation includes general apportionment, categorical funding for mandatory components of the basic education program (e.g., special education, bilingual instruction), and transportation funding. *See id.* The Legislature sets allocation formulas that are largely tied to student enrollment; as a result, student enrollment projections are a significant driver of the total amount of basic education funds. *See id*.

E. This Court Holds Private Charter Schools Under I-1240 Violate the Constitution.

I-1240 established charter schools as part of the common school system but operated by private organizations and funded from the General Fund on the same basis as common schools. *See LWV*, 184 Wn.2d at 408-09. The Court declared I-1240 unconstitutional. The Court first held that charter schools "are run by an appointed board or nonprofit organization and thus are not subject to local voter control," and as a result, "they

---

lawmakers-package-falls-way-short-of-fully-funding-education/455139423 (last visited on July 10, 2017).

cannot qualify as 'common schools' within the meaning of article IX." *Id*. at 405. The Court further held that I-1240 diverted funds that were restricted to the support of common schools to charter schools in violation of Article IX of the Constitution. *Id*. at 406. The Court specifically noted that restricted funds were comingled in the General Fund and held: "Given this absence of segregation and accountability, we find unconvincing the State's view that charter schools may be constitutionally funded through the general fund." *Id*. at 409. The Court determined that I-1240 "designate[d] and relie[d] on common school funds as its funding source" and that "[w]ithout those funds, [I-1240 cannot] function as intended." *Id*. at 411. Accordingly, the Court held that I-1240 was unconstitutional in its entirety. *Id*. at 413.

F. The Legislature Attempts to Resurrect I-1240 in the Charter School Act.

In March 2016, the Legislature passed the Charter School Act. Governor Jay Inslee let the Act pass into law without his signature, explaining that the bill "would ultimately allow unelected boards to make decisions about how to spend public money…. I can think of no other situation where the Legislature or the people would condone that, especially when we are fighting to meet the needs of the almost one million children in our public schools." CP 391.

Containing only small tweaks to I-1240, the Act is another unconstitutional attempt to supplant the common school system. *See* App'x A (identifying differences between I-1240 and the Act). The Act provides for the establishment of 40 charter schools run by private organizations over the next five years. *See* RCW 28A.710.150(1), 28A.710.160(5); CP 338. Although the Act deleted the characterization of charter schools as "common schools," charter schools under the Act remain functionally the same as under I-1240. Instead of being characterized as "common schools," the Act describes charters "as an alternative to traditional common schools[.]" RCW 28A.710.020(b).

New charter schools can be approved by the same methods as under I-1240. First, the Washington Charter School Commission ("Charter Commission" or "Commission"), which is an "independent state agency," RCW 28A.710.070(1), has the power to establish charter schools anywhere in the state, RCW 28A.710.080(1). The Commission is comprised of nine appointed members, all of whom must demonstrate a "commitment to charter schooling as a strategy for strengthening public education," plus the Superintendent and Chair of the Board of Education ("BOE"). RCW 28A.710.070(3)(a), .070(4). The Commission is not subject to Superintendent oversight. RCW 28A.710.070(1). Second, school districts may apply to the BOE for permission to authorize charter

schools within their jurisdiction. RCW 28A.710.080(2). The Commission and school districts ("charter authorizers") solicit charter applications from private organizations, approve or deny applications, and negotiate and execute charter contracts for five-year terms. RCW 28A.710.100(1).

Like I-1240, charter authorizers have limited authority to monitor charter schools' performance and legal compliance. RCW 28A.710.180. Oversight cannot "unduly inhibit the autonomy granted to charter schools" and must be consistent with the principles and standards developed by yet another private organization, the National Association of Charter School Authorizers. RCW 28A.710.180(2), 28A.710.100(3). Authorizers are only allowed to revoke or decline to renew charter contracts under certain circumstances and a lengthy administrative process. RCW 28A.710.200.

As in I-1240, charter schools 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 firing employees; receiving and disbursing funds; entering contracts; and determining enrollment numbers. RCW 28A.710.030(1). Also like I-1240, the Act exempts charter schools from all but a small subset of state laws applicable to common schools, including components

of the basic education program provided by common schools, as well uniform laws governing curriculum, discipline, and academic accountability. *See* Sect. IV.A.2.b, *infra*.

The Act specifies that the Legislature allocates public funds for charter schools from the Opportunity Pathways Account ("OPA"), which holds certain state lottery revenues. RCW 28A.710.270, 28B.76.526, 67.70.240; CP 350 ¶ 7. OPA funds are disbursed to charter schools to pay for operations on the same basis as common schools, using the same statutory formulas based on enrollment. RCW 28A.710.220, .230(1) . Public funds also pay for state agencies' administrative costs, including mandatory audits and charter school enrollment forecasts. *See, e.g.*, 2017-19 Budget, §§ 501(2)(b), (8), 124(3), 127, 520.

The Act does not, however, raise new revenue or lower funding for other state programs. CP 328 ¶ 11, 351-52 ¶ 12. As confirmed by the Act's legislative history, *see* Sect. IV.B.2, *infra*, the Legislature intends to rely—and already has relied—on the General Fund and other restricted funds to pay for the exponentially growing expense of up to 40 charter schools over the five-year period provided for under the Act. Last fiscal year, the Legislature spent about $12 million for eight charter schools. 2017-19 Budget, §§ 1501(3), (8), 1515, 1516; CP 973 ¶ 3, 1097-98 ¶ 5. For this coming fiscal year, the Legislature appropriated more than $32

million from the OPA to pay for eight existing and two new charter schools—a 267% increase in funding.[5] 2017-19 Budget, §§ 501(3)(b), (8), 519, 520; CP 1098 ¶ 6. Significantly, charter schools' share of OPA revenue grew from 9% to 24%. App'x B. To make up for that hit, the Legislature diverted monies from the General Fund and the Education Legacy Trust Account ("ELTA") to cover the costs of other programs eligible for OPA funds. *See* App'x D. Like the General Fund, the ELTA is used in part to pay for common schools and, thus, contains protected comingled funds. *See* 2017-19 Budget, § 502 ($346 million from ELTA to common schools); *LWV*, 184 Wn.2d at 409.

The Legislature's sleight of hand avoids the appearance of using common school funds for charter schools. Absent charter funding, however, common school funds would not have to be diverted to pay for the other OPA programs. Worse, going forward, the State does not dispute that the hundreds of millions of dollars needed to pay for up to 30 additional charter schools and expanded grade coverage at the 10 existing charter schools will inevitably exceed the capacity of the OPA, which is projected to remain around $127 million per year through FY 2020-21. CP 329 ¶ 13, 352-53 ¶¶ 13-14; *see also* CP 768, 3034 (2016 forecasts);

[5] The 2016 Supplemental Budget appropriated funds to charter schools from the OPA only for one year (FY 2016-17). To allow meaningful comparison, biennial appropriations are divided equally between each year, unless set forth in the budget.

Wash. State Caseload Forecast Council, *Charter School Enrollment* (June 2017); Wash. State Econ. & Rev. Forecast Council, *Economic and Revenue Forecast* 57-58, 73 (June 2017).[6]

Appellants request that the Court take judicial notice of the 2017-19 Budget and the State's latest official revenue and enrollment forecasts. *See State ex rel. Helm v. Kramer*, 82 Wn.2d 307, 319, 510 P.2d 1110 (1973) (taking judicial notice of Governor's budget message and agency reports). These new developments confirm that, in practical effect, the Legislature is diverting restricted funds to charter schools.

G. The Trial Court Erroneously Upholds the Act as Valid.

Appellants filed this lawsuit seeking to declare the Charter School Act unconstitutional and to prevent further implementation of the Act. Several supporters of the Act (collectively, "Intervenors") intervened.

Initially, the State moved to dismiss Appellants' claim that the Act interferes with the State's duty to fund fully public education pursuant to *McCleary* in violation of Article IX, Section 1 (the "ample provision" claim). CP 67-82. The trial court granted the State's motion, holding the ample funding claim "lacks ripeness because it speculates that the [Act] inhibits the State from meeting its 2018 public school funding obligations

[6] Available at http://www.cfc.wa.gov/Handouts/Charter_Schools_Enrollment.pdf and http://www.erfc.wa.gov/publications/documents/jun17pub.pdf (last visited on July 7, 2017).

under [*McCleary*], and theorizes that the State cannot properly fund both charter schools and traditional public schools." CP 196.

Further, although there is no dispute the three individual plaintiffs have standing to bring this lawsuit, Intervenors twice moved to dismiss the organizational plaintiffs. CP 48-66, 525-37. The trial court erroneously held that the organizational plaintiffs cannot assert representational standing based on their members' taxpayer status, but ultimately held that they have standing on other grounds. CP 196-203, 3727-28.

After considering cross motions for summary judgment, the trial court upheld the Act as facially valid. CP 3744-69. The trial court held that the Act's accounting trick and undisputed need to rely on the General Fund to pay for charter schools did not form the basis of a ripe claim for a violation of article IX, section 2's prohibition on the diversion of common school funds. CP 3762-64. The trial court also held that the Act does not violate article IX, section 2's general and uniform requirement. CP 3751-62. Further, while acknowledging the Act creates "an eleven-member independent state agency that is charged with authorizing and overseeing charter schools," the trial court held that the Act does not displace the Superintendent's supervisory powers. CP 3765-66. The trial court also held that the Act does not improperly delegate to private organizations the

State's paramount duty to provide a basic education, CP 3764, and does not improperly amend existing law, CP 3767-68.

Appellants appealed and requested direct review by this Court.

IV. ARGUMENT

A. The Act Creates a Parallel System of Publicly Funded, Privately Operated General Education Schools in Violation of Article IX, Section 2.

Article IX, Section 2 provides for one uniform public school system with common schools providing a general education to all children, supplemented with optional specialized schools. Contrary to this design, the Act creates a parallel system of privately operated non-uniform public schools designed to supplant, not supplement, the general education provided by the common schools. The Act is therefore unconstitutional.

1. The Constitution Requires that Common Schools Provide the General Basic Education to All Children.

Article IX, Section 2 states:

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

Section 2 mandates a single public school system. *Northshore Sch. Dist. No. 417 v. Kinnear*, 84 Wn.2d 685, 728, 530 P.2d 178 (1974), *overruled on other grounds by Seattle Sch. Dist.*, 90 Wn.2d at 514. Section 2's reference to "a" system followed by "the" system confirms the drafters'

intent to require one unitary system, not multiple competing systems. *See State, Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 965, 275 P.3d 367 (2012) ("'[T]he'…is used before nouns of which there is only one or which are considered as one." (quotations omitted)).

The primacy of "common schools" in the State's unitary public school system is undisputed. *See Bryan*, 51 Wash. at 502 ("In [Article IX, the drafters] were careful to emphasize the importance, as well as the distinct character, of the common school."). Within the meaning of the Constitution, a "common school" is "one that is common to all children of proper age and capacity, free, and subject to, and under the control of, the qualified voters[.]" *Bryan*, 51 Wash. at 504. Before the Act, common schools were the only schools to provide a general education to the State's children. The drafters deliberately restricted the use of certain funds to the common schools, rejecting an amendment that allowed the Legislature to use restricted funds for public schools. *See* Sect. III.B, *supra*. These common school provisions ensure not only universal access to common schools, as noted by the trial court, CP 3754, but also uniformity in the general education program provided across the state. *See* Lerado at 3.

The drafters also allowed for supplementation of the common schools through three optional classes of schools (high schools, normal schools, and technical schools), as deemed appropriate by the Legislature.

Const., art. IX, § 2. These optional schools were understood to offer specialized programs for a subset of students. For example, as this Court has noted, "normal schools" were intended "for the training of teachers for all the common schools." *Bryan*, 51 Wash. at 504. Similarly, during the territorial period, "high schools" offered an advanced education that was then not considered necessary for the majority of the State's citizens. *See* Troth at 159; Bibb at 125. Although the State has never had "technical schools," the drafters may have been referring to schools like the state agriculture college. *See* Op. Wash. Att'y Gen. 1998, No. 6, at 5. The term "technical schools" itself indicates these schools provide a specialized technical education distinct from common schools. *See id*. The framers also provided for state educational, reformatory, and penal institutions for students with special needs. Const. art. XIII, § 1 (1889). Thus, the Constitution establishes a system of mandatory common schools for general public education and schools providing specialized education to supplement the common schools.

The Act, however, establishes an alternative system of non-common schools that replaces a common school education. *See* RCW 28A.710.020(1)(b) (defining "charter school" as an "alternative to traditional common schools" operated "separately from the common school system"). Like common schools, charter schools are open to all

children and serve the same general student population in kindergarten to twelfth grade. RCW 28A.710.050(1), 28A.150.020(2). Charter schools are required to meet the same educational goals as common schools, albeit through privately designed non-uniform programs. *See* RCW 28A.710.040(2)(b), 28A.150.210. Charter schools also are funded on the same basis as common schools. RCW 28A.710.280(1). Yet, charter schools are not common schools. RCW 28A.710.020(1)(b). The Constitution does not allow the Legislature to provide basic education to the State's children through a separate privatized system not subject to local voter control, a key feature of common schools, *Bryan*, 51 Wash. at 504.

The trial court improperly relied on the Legislature's "evolving definition of 'public school'" to sidestep the uniformity requirement. CP 3753. This Court rejected a similar argument in *LWV*, reaffirming that the Legislature cannot by legislative fiat qualify or enlarge Article IX's constitutional constraints. 184 Wn.2d at 404 (refusing to recognize an "evolving common school system" (citing *Bryan*, 51 Wash. at 503)) (internal quotations omitted). Further, although Article IX, Section 2 does not explicitly "state that the public school system includes only the listed schools," CP 3752, it establishes the framework for a single public school system consisting of common schools and optional specialized schools.

See Bryan, 51 Wash. at 502. The optional schools specified by the drafters provided specialized educational opportunities to students with unique needs to supplement common schools, consistent with the drafters' intent to protect common schools while meeting the needs of all children. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 672, 72 P.3d 151 (2003) ("*Parents Involved*"); *see also Bryan*, 51 Wash. at 502 (Section 2's terms "must be considered in connection with the general scheme of education outlined in the Constitution"). Unlike charter schools, the optional specialized schools do not purport to serve the general student population as an alternative to common schools. And the State does not argue that charter schools constitute "high schools, normal schools, [or] technical schools" as those terms are used in the Constitution. The listing of specialized schools is not an open license for the Legislature to supplant common schools.

Charter schools cannot be equated with existing supplemental and specialized programs, as suggested by the trial court. CP 3752-53. Charter schools are not comparable to these other programs. For example, the stand-alone schools identified by the trial court provide specialized educational programs to discrete student populations, including education programs for incarcerated juveniles, ch. 28A.193 RCW; accelerated learners, Running Start, RCW 28A.600.300-.400; and technical high

school diploma programs, RCW 28B.50.535. Unlike charter schools, these programs fill the unique needs of a subset of students, and are not intended as an "alternative" to common schools. This Court has acknowledged the flexibility of schools that serve student populations who have "different educational needs and may require different training programs more appropriate to their circumstances." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 227, 5 P.3d 691 (2000) (upholding non-uniform program for children in adult prison given "the circumstances in which [incarcerated youth] are found").

Within constitutional constraints, Appellants do not dispute that innovation and private enterprise can participate in Washington's public education system. *See Seattle Sch. Dist.*, 90 Wn.2d at 504. For example, the Legislature potentially could empower school districts to partner with private organizations to establish schools offering innovative programs; provided, however, the schools remain subject to the school district's control and the Superintendent's supervision. Uniform school laws would apply to such schools (i.e., no blanket waiver), but the Superintendent would have discretion to waive specific requirements to allow for innovation by the school district. *See, e.g.*, RCW 28A.655.180 (authorizing superintendent to grant waivers to implement an innovation school). Raisbeck Aviation High School in Highline School District is an

example of such an innovative school run by the school district in partnership with Boeing. CP 3098. Here, however, the Legislature relies on state funds to pay for general education schools without the governance and program restrictions applicable to common schools.

Put another way, could the Legislature fund only charter schools and no common schools? A fifty-fifty split? The answer is no and the same answer applies to the Act, which begins by funding up to 40 charter schools.

2. Charter Schools Are Not a Uniform Replacement for Common Schools.

Even if Article IX, Section 2 permits general education schools that are not common schools (which it does not), the uniformity requirement does not permit the stark differences between charter schools and common schools. Section 2 requires a single public school system with unity of governance and educational offerings. *See Northshore Sch. Dist. No. 417,* 84 Wn.2d at 728; *see also Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 524, 219 P.3d 941 (2009) ("access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education"); *Bryan*, 51 Wash. at 504 ("every child shall have the same advantages and be subject to the same discipline").

This Court has held Title 28A RCW's Common School Provisions, which includes the Basic Education Act, meet the "general and uniform" requirements for common schools. *Fed. Way Sch. Dist.*, 167 Wn.2d at 525. The Common School Provisions establish structural uniformity, through an integrated system under Superintendent and local school district control, and uniformity in the basic education program provided to all children. *See* RCW 28A.150.070, .020. But charter schools do not have to conform to the Common School Provisions.

The Act establishes a parallel system of privately operated schools providing a different educational program to compete with the mandated common schools. Allowing this second non-uniform system guts the uniform requirement and defeats the drafter's intent to ensure all children receive a uniform basic education regardless of geographic happenstance.

a.) Non-uniform governance

Charter schools (unlike common schools) are controlled by private organizations, rather than the taxpayers who pay for public education. RCW 28A.710.030. The private charter board—wholly unaccountable to voters—is charged with hiring, managing, and firing charter school employees, receives and disburses state funds, and maintains charter school facilities. RCW 28A.710.030(1). Charter schools authorized by the appointed Charter Commission have no oversight by an elected

official, including the Superintendent. *See* Sect. IV.E, *infra*. And the limited oversight by local school district authorizers is not an adequate substitute for voter control of day-to-day management, including decisions about the expenditure of public funds. *See LWV*, 184 Wn.2d at 399; *see also* RCW 28A.710.030(1), RCW 28A.710.180(2) (oversight cannot "unduly inhibit the autonomy granted to charter schools").

b.) Non-uniform education program

Charter schools are not subject to the vast majority of the uniform common school laws that ensure all children receive a uniform general education. *See* Title 28A RCW; RCW 28A.710.040(3). The Act waives all state laws and rules that are not specifically identified in RCW 28A.710.040(2) or the contract.

Charter schools are not required to offer uniform instruction and services for English language learners, highly capable students, and underachieving students. *See* RCW 28A.150.220(2). Instead, the private organizations that operate charter schools are authorized to design and implement experimental general education programs as an alternative to common schools. The Act only requires that charter schools "provide a program of basic education, that meets the goals in RCW 28A.150.210, including instruction in the essential academic learning requirements, and participate in the statewide student assessment system as developed under

RCW 28A.655.070[.]" RCW 28A.710.040(2)(b) (emphasis added). This Court has made clear that Article IX requires more than just shared goals—the specific program of basic education must also be the same. *See McCleary*, 173 Wn.2d at 521; *see also Wagner v. Royal*, 36 Wash. 428, 433-34, 78 P. 1094 (1904) (a common school's adoption and enforcement of a different course of study would violate uniformity required by Constitution).

The trial court erroneously determined that charter schools and common schools offer the same basic education program, invoking *in pari materia* to import the Basic Education Act's definition of "the program of basic education" applicable to common schools into the Charter School Act. CP 3757. But the Basic Education Act's definition is limited by its own terms to a separate chapter, ch. 28A.150. *See* RCW 28A.150.200(2) ("The legislature defines the program of basic education under this chapter…" (emphasis added)), 28A.150.203 ("The definitions in this section apply throughout this chapter…" (emphasis added)). Moreover, this method of statutory interpretation does not apply where (as here) the statute's plain and ordinary meaning is unambiguous. *Henry v. Lind*, 76 Wn.2d 199, 201, 455 P.2d 927 (1969). The Act separately defines a charter school's "program of basic education" as a program "that meets the basic education goals in RCW 28A.150.210, including instruction in

the essential academic learning requirements" ("EALRs"). RCW 28A.710.040(2)(b). To hold otherwise would improperly render the Act's language requiring instruction in the EALRs superfluous because the same requirement is included in RCW 28A.150.220(3)(a).

Further, charter school students are not subject to the same discipline as common school students. Although the current contracts require compliance with certain procedural laws and prohibit corporal punishment, CP 3759 n.9, charter schools are not required to comply with uniform laws for imposition of disciplinary action, including suspension, expulsion, and exclusion from the classroom, RCW 28A.600.410-.490. Under the Court's precedent, Section 2 requires uniformity in how children are disciplined. *See Fed. Way Sch. Dist.*, 167 Wn.2d at 524.

Additionally, the Act interferes with the ability of students to transfer between public common schools and charter schools, as required by Article IX, Section 2. *See Fed. Way Sch. Dist.*, 167 Wn.2d at 524. As the trial court acknowledged, the Act provides no guarantee that credit will be awarded to public school students transferring into a charter school. CP 3760 (citing RCW 28A.710.060(2)). It is not enough, as the trial court suggested, that charter schools might accept some transfer credits. The critical problem is that the deliberate differences in charter schools' curriculum and course offerings raises barriers to transfer.

Article IX, Section 2's uniform system requirement constrains the Legislature's discretion. The Act violates these constraints by establishing a parallel system of schools that fundamentally differ from the common schools they are designed to supplant.

B. The Act Diverts Restricted Common School Funds in Violation of Article IX, Sections 2 and 3.

The Constitution requires the Legislature to establish "common schools" and fully fund them with dedicated funds to be used solely for their support. Const. art. IX, § 2. This Court struck down I-1240 because it diverted state funds away from common schools to support charter schools. The Act does not remedy the constitutional defects identified by the Court, but instead relies on an accounting trick to make it look like the Act has fixed the problem. The Act ultimately relies on money from the State's General Fund, which the Court has recognized contains restricted common school funding. The Act is thus unconstitutional.

1. The Legislature Cannot Rely on the General Fund to Pay for Charters Under the Current School Funding Scheme.

Article IX contemplates that the Legislature will set aside sufficient state funds in a dedicated account to fund fully common schools. *See* Const. art. IX, §§ 1-3; *LWV*, 184 Wn.2d at 409-10. While the common school property tax may once have sufficed for that purpose, common school funding requirements have long exceeded that dedicated

tax revenue. Since 1967, the Legislature has deposited that dedicated tax revenue into the General Fund, commingled it with other state revenue, and relied principally on the General Fund (as well as, in recent years, the ELTF) to support the common schools. *See* Laws of 1967, ch. 133 § 2.

Because of this practice, in *LWV*, this Court held that the Legislature cannot use the General Fund to pay for charter schools. *See LWV*, 184 Wn.2d at 409. As the Court explained, a statute violates the exclusivity requirement where "its intended operation would 'necessitate[] the use of common school funds for other than common school purposes[.]'" *Id*. at 408 (quoting *Mitchell v. Consol. Sch. Dist. No. 201*, 17 Wn.2d 61, 66, 135 P.2d 79 (1943)). The Court held that because "the State does not segregate constitutionally restricted moneys from other state funds[,] … it [cannot] demonstrate that these restricted moneys are protected from being spent on charter schools." *Id*. at 409. Thus, the Court rejected the argument that "charter schools could be funded out of the state general fund." *Id*. at 410.

As a result, a law's constitutionality does not depend on whether it "make[s] any appropriation" of protected common school funds. *Id.* at 408 (citing *Mitchell*, 17 Wn.2d at 66). Instead, the constitutional question is whether the law's intended operation will have the effective of utilizing

common schools funds. *Id.* As in I-1240, the Act's funding mechanism violates the constitutional restrictions for common school funds.

2. The Legislature Uses the General Fund, Albeit Indirectly, to Pay for Charter Schools.

The Legislature had several options for funding charter schools consistent with *LWV*. The Legislature could have created and fully funded a segregated restricted account to pay for common schools. *See* CP 3029 at 61:2-5, 3025 at 26:14-27:2. The Legislature also could have raised new revenue or cut existing programs not funded by the General Fund. CP 328 ¶ 10, 3028 at 52:8-14. But the Legislature chose not to do so. CP 351-52 ¶ 12, 328 ¶ 11; *see also* CP 413-15 (withdrawn amendment to levy a new tax). Instead, the Legislature added charter schools to the list of programs funded by the OPA, recognized that General Fund revenue would be necessary to pay for the non-charter programs supported by the OPA, and called it a day. *See* RCW 28A.710.270; CP 351-53 ¶¶ 12-13, 328 ¶¶ 9-11.

Specifically, in enacting the Act, the Legislature was aware that the OPA will not have sufficient funds to cover the hundreds of millions of dollars per year necessary to pay for up to 30 new charter schools, as well as substantial growth in student populations in the ten charter schools

operating this school year.[7] *See* RCW 28A.710.150(1); CP 329 ¶ 13, 330 ¶ 16, 353 ¶ 14. In fact, the State's forecasts show the OPA's revenues decreasing from $139 million in FY 2015-16 to $127 million per year through FY 2020-21. CP 768. There is no conceivable way charter schools' rising costs over the five years authorized under the Act can be funded through the stagnant OPA. CP 329 ¶ 13, 353 ¶ 14.

The only evidence of how the Legislature will pay for escalating charter school costs shows money coming out of the General Fund to supplement the OPA. *See* CP 345 (Fiscal Impact Report, attached as App'x C), 329-331 ¶¶ 14-16. Senate staff, describing how money and/or programs would flow between the General Fund and the OPA, explained that charter schools will be funded through "just a switch of funds. Moving them from one fund to another." CP 329-30 ¶ 15.[8] Senate staff acknowledged "unobligated" funds in the OPA could be used in FY 2017, but testified there was "an expectation" the Legislature would necessarily resort to the General Fund down the road. CP 309, 389 ¶ 9. This explanation of how the funding shortfall would be addressed is consistent

[7] For example, seven Commission-authorized charter schools budgeted for their state funding to triple by their fifth year. CP 394-411, 2611-2860. And the State projects that charter school enrollment will more than double by 2018-19. CP 3034-35.

[8] At a public hearing, then-Representative Chris Reykdal described the Act's funding mechanism as "laundering lottery money and then backfilling that with general funds, instead of going straight from general fund to [charter] schools." CP 308, 387 ¶ 10.

with the Legislature's undisputed practice of treating the General Fund and OPA as a single pot of money. CP 349 ¶ 5, 351-53 ¶ 12.

The Act's indirect diversion of restricted funds is apparent in the recent budget. Funding for charter schools increased by 267%—from $12 million for eight charter schools in FY 2016-17 to $32 million for 10 charter schools in FY 2017-18. *See* Sect. III.F, *supra*. Charter school operations now account for 24% of OPA revenue. App'x B. As a result, the Legislature dipped into the restricted General Fund (as well as the ELTA, which contains restricted common school funds, *see* Sect. III.F, *supra*) to pay for the other programs that previously received OPA funds. *See* App'x D. The new budget also requires use of restricted General Fund dollars to prepare official projections of charter school enrollment three times each year. 2017-19 Budget, § 127; RCW 43.88C.020(2).

Simply swapping funds and/or other programs between accounts does not resolve the constitutional infirmity identified in *LWV*. Constitutional protection for common school moneys "is not dependent on the source of the revenue (i.e., the type of tax or other funding source) or the account in which the funds are held (i.e., the general fund or other state fund)." *LWV*, 184 Wn.2d at 407 (citing *Yelle v. Bishop*, 55 Wn.2d 286, 316, 347 P.2d 1081 (1959)). The Constitution prohibits the use of restricted common school funds, whether accomplished directly or by

"'subterfuge[.]'" *Id.* at 405 (quoting *Bryan*, 51 Wash. at 503); *see also Bryan*, 51 Wash. at 505) (invalidating law that "by indirect methods" took funds from common schools to support experimental schools).

The trial court failed to address the inevitable deficiency of the OPA to pay for charter schools and other programs without resorting to the General Fund. Instead, the trial court erroneously dismissed Appellants' diversion claim as not ripe. CP 3762-63. But, consistent with the evidence produced below, the newly enacted budget diverts money from the General Fund to maintain funding for non-charter OPA programs while increased OPA funds are used to pay for charter schools. *See* App'x D. Further, the six-justice majority in *LWV* rejected a similar wait-and-see approach to how the Legislature might fund an educational experiment. *See LWV*, 184 Wn.2d at 423-24 (Fairhurst, J., concurring in part, dissenting in part) (arguing I-1240 was not susceptible to facial challenge because the Legislature might fund charter schools in a constitutional manner in future budgets); *see also Mitchell*, 17 Wn.2d at 66 (invalidating statue based on the expected impact of its implementation on restricted common school funds). Waiting puts even more children at risk of having their schools closed because the Legislature enacted the Act without a constitutionally viable funding source during the minimum five-year period of the Act, RCW 28A.710.020(3). No child deserves that outcome.

Unless and until the Legislature funds fully basic education through a dedicated funding source that is placed into a restricted account, the Legislature must either raise new revenues or cut other existing programs to fund charter schools. The Legislature failed to do so here. Thus, the Act is unconstitutional.

C. The Act Impedes the State's Paramount Duty to Provide Amply for Basic Education Under Article IX, Section 1.

The Act hinders the State's ability to provide constitutionally adequate funding for basic education. In *McCleary*, the Court found that state funding has "consistently fallen short of the actual cost" of implementation. 173 Wn.2d at 537; *see also* Order, *McCleary v. State*, No. 85362-7, at 10 (Wash. Oct. 6, 2016) ("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"). The 2017-19 Budget may or may not solve the underfunding problem, but until the State meets its full funding obligations, diverting money to charter schools is not consistent with this Court's contempt findings. Thus, contrary to the trial court's dismissal of the ample funding claim as not ripe, CP 204-05, the Legislature's failure to meet its paramount duty is current and ongoing.

D. The Act Unconstitutionally Delegates the State's Paramount Duty Under Article IX, Section 1.

The Act unconstitutionally delegates the State's paramount duty to define a basic education program to private charter organizations. *Cf. Parents Involved*, 149 Wn.2d at 673 (State's paramount duty cannot be discharged through delegation, even to school districts). Even if the State's paramount duty could be delegated (which it cannot), the Act fails to provide sufficient standards and procedural safeguards to ensure the duty will be satisfied.

1. The Act Unconstitutionally Delegates the State's Paramount Duty to Private Organizations.

This Court repeatedly has held that the State may not delegate its constitutional paramount duty to define a basic education program. In *Seattle School District*, the Court held that the paramount duty "is imposed upon the 'State' rather than upon any one of the three coordinate branches of government[,]" and that "the State may discharge its 'duty' only by performance unless that performance is prevented by" the children of the state. 90 Wn.2d at 512-13. The Court further recognized that although the paramount duty is imposed on the State, the Legislature must determine "the organization, administration, and operational details of the 'general and uniform system' required by" the Constitution. *Id*. at 518. The Court then determined the Legislature had failed to fully implement the State's

duty because it had failed to define or give "substantive content to 'basic education' or a basic program of education." *Id*. at 519. Nearly 25 years later, in *Parents Involved*, the Court reaffirmed that the State may not delegate this duty. *See* 149 Wn.2d at 673.

In violation of this precedent and the Constitution, the Act improperly delegates the State's paramount duty to define a basic education program to private charter organizations. *See, e.g.*, RCW 28A.710.040(3), .130(1)(n) (charters define their own educational program). As discussed above, the Act exempts charter schools from the requirements of the legislatively adopted basic education program. *See* Sect. IV.A.2.b, *supra*. Instead, private charter organizations design the basic education program at each charter school.

The Act's delegation of the duty to define a basic education program is especially problematic because the delegation is made to private organizations. *See United Chiropractors of Wash., Inc. v. State*, 90 Wn.2d 1, 5, 578 P.2d 38 (1978) ("Delegation to a private organization raises concerns not present in the ordinary delegation of authority to a governmental administrative agency."). Unlike government agencies, private organizations are not subject to public oversight. The impropriety is even more problematic here because the Act implicates the State's most important duty. *See In re Powell*, 92 Wn.2d 882, 892, 602 P.2d 711

(1979) ("[I]t is imperative to consider the magnitude of the interests which are affected by the legislative grant of authority.").

The Constitution's assignment of legislative responsibility to define the components of a basic education program under Article IX cannot be modified through legislation such as the Act. *See McCleary*, 173 Wn.2d at 516-17. The Act is therefore unconstitutional.

2. The Act Is Unconstitutional Because It Fails to Provide Sufficient Procedural Safeguards.

Even if the State's duty to define a basic education program could be delegated (which it cannot), the Act still violates the Constitution because it fails to provide sufficient procedural safeguards to control arbitrary action and abuse of discretionary power. To properly delegate, the Legislature must provide standards to indicate what is to be done and establish procedural safeguards to control arbitrary action and abuse of discretionary power. *United Chiropractors of Wash.*, 90 Wn.2d at 4; *see also Barry & Barry, Inc. v. State Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972) (even delegation to state agency requires standards and procedural safeguards).

Despite the requirement that the Legislature provide substantive content to the components of the "basic education program," the trial court incorrectly concluded that the Act "provides standards and guidelines for

authorizing and operating a charter school," citing one statutory section that specifies only the required elements of a charter school application. CP 3764 (citing RCW 28A.710.130). Application requirements are, however, distinct from a program of basic education program. The Act provides that charter schools may develop their own "program of basic education," which only must meet the "goals" identified in RCW 28A.150.210, "including instruction in the essential academic learning requirements[.]" RCW 28A.710.040(2)(b). By contrast, the Basic Education Act approved by the Court in *McCleary* defines a basic education program as including certain minimum components set out in RCW 28A.150.220, most of which charter schools are not required to provide. *See* RCW 28A.710.040(3) (charter schools are exempt from all state laws except as specifically provided in the Act).

The Commission's limited oversight does not provide sufficient procedural safeguards. In reality, once a charter school's education program is in place, authorizers have limited tools to compel charter schools to comply with the few standards that do exist. The Act does not allow authorizers to intervene in the day-to-day management of a charter school, to limit enrollment, to control resource allocation, to revoke the Act's general waiver of the laws applicable to common schools, or to withhold public funds. *See* RCW 28A.710.180(2) (Commission oversight

cannot "unduly inhibit the autonomy granted to charter schools"). The Act also limits the bases for revoking a charter contract and requires an extensive, time-consuming process prior to closure. RCW 28A.710.200.

Given the magnitude of the constitutional duty at stake, the Act's delegation of that duty without sufficient standards and safeguards is particularly troubling. *Cf. In re Powell*, 92 Wn.2d at 892 (1979) (imposing the "procedural safeguard" requirement with regard to the execution of *statutory* duties). The Act's delegation of the State's paramount duty to define a basic education program to private entities violates the Constitution and should be invalidated on that basis alone.

E. The Act Creates a Separate System of Charter Schools Outside the Superintendent's Supervision in Violation of Article III, Section 22.

Washington's Constitution provides that the Superintendent "shall have supervision over all matters pertaining to public schools[.]" Const. art. III, § 22 (emphasis added). The Superintendent's constitutional authority over public schools is codified by statute. *See, e.g.,* RCW 28A.315.175(2) (Superintendent authorized to "[c]arry out powers and duties of the superintendent of public instruction relating to the organization and reorganization of school districts."); *see also generally* ch. 28A.150 RCW (providing for reporting by districts to Superintendent); ch. 28A.300 RCW (providing for Superintendent oversight of school

districts). In violation of Article III, Section 22, the Act unconstitutionally usurps the Superintendent's supervisory authority over public education by placing all meaningful supervisory authority over charter schools with the Charter Commission. *See, e.g.*, RCW 28A.710.070(1), (2).

The Commission is an "independent state agency" of which nine of 11 members must be pro-charter. The Commission administers, manages, and supervises the charter schools it authorizes, RCW 28A.710.070(1), (2), .080(1), so long as it does not "unduly inhibit the autonomy granted to charter schools," RCW 28A.710.180(2). At the same time, the Act purports to place charter schools under the supervision of the Superintendent to the extent "not otherwise provided" by the Act. RCW 28A.710.040(5). Although the trial court correctly interpreted this clause to mean that "any displacement of the Superintendent's supervisory authority would have to be provided in the Act," it inexplicably concluded that "[n]owhere in the [Act] is the Superintendent made subordinate to the Commission." CP 3765-66. To the contrary, the Act expressly grants supervision over charter schools to the Commission, not the Superintendent. *See* RCW 28A.710.070(2), .040(5).

The fact that the Act confers certain limited powers and duties to the Superintendent does not remedy this constitutional violation. The Act merely allocates the Superintendent one vote on the eleven-member,

super-majority pro-charter Commission, *see* RCW 28A.710.070(3)(ii), and situates the Commission's offices within the Superintendent's offices for "administrative purposes only," RCW 28A.710.070(8). These remedial gestures fall short of conferring the Superintendent supervisory authority on all matters pertaining to charter schools. *See State v. Preston*, 84 Wash. 79, 86-87, 146 P. 175 (1915) ("[G]eneral supervision means something more than the power merely to confer with and advise, or to receive reports, or file papers; in other words, … the power of supervision is not granted to an officer as a mere formality."), *aff'd sub nom., State ex rel. Seattle Sch. Dist. No. 1 v. Preston*, 84 Wash. 79, 149 P. 352 (1915).

The "supervision" required by Article III, Section 22 is not merely the right to oversee teacher certification and student assessments as the trial court claims. *See* CP 3766. Rather, supervision over "all matters pertaining to public schools" necessarily includes the powers to authorize, manage, and correct the actions of the public schools, which are powers the Act delegates to the Commission, not the Superintendent. RCW 28A.710.070(1). And contrary to the trial court's conclusion that the Superintendent has supervisory authority by maintaining the "power of the purse," CP 3766, the Act does not afford the Superintendent any discretion to withhold or delay distributions of funds, RCW 28A.710.220(2) (Superintendent "shall distribute state funding") (emphasis added).

As this Court and the Attorney General have recognized, "supervision" includes, at a minimum, "'the power to review all the acts of the local officers, and to correct, or direct a correction of, any errors committed by them. Any less power than this would make the supervision an idle act—a mere overlooking without power of correction or suggestion.'" Op. Wash. Att'y Gen. 1975 No. 1 (quoting *Great Northern Ry. Co. v. Snohomish County*, 48 Wash. 478, 484-85, 93 P. 924 (1908) (citations omitted)); *see also* Op. Wash. Att'y Gen. 2009, No. 8 (no legislative authority to vest supervision over basic education program "in any other officer not under the Superintendent['s] supervision."). Thus, by creating a separate system of charter schools under the supervision of the independent Charter Commission, the Act strips the Superintendent of the constitutional supervisory authority over <u>all</u> matters pertaining to public schools, in violation of Article III, Section 22.

F. The Act Violates Article II, Section 37 by Amending State Collective Bargaining Laws and the Basic Education Act.

Article II, Section 37 requires that all proposed laws set forth in full amendments to existing law.[9] As this Court has explained, Article II, Section 37 was designed to avoid the "mischief" caused by new enactments that require examination and comparison to be understood.

[9] "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." Const. Art. II, § 37.

Yelle, 55 Wn.2d at 299. Here, the Charter School Act violates Section 37 by failing to disclose significant amendments to state collective bargaining laws and the Basic Education Act. As a result, the Act's true impacts cannot be fully understood without carefully comparing the Act with existing law.

1. The Act Unconstitutionally Amends State Collective Bargaining Laws.

To restrict the power and influence of public employee unions at charter schools, the Act amends state collective bargaining laws to prohibit unionization at charter schools beyond the individual school level. Under state collective bargaining laws, ch. 41.56 and 41.59 RCW, public employees have the right to organize and designate representatives of their own choosing. *See* RCW 41.56.040, 41.59.060. Public school employees generally can organize district-wide based on different factors such as employee type (e.g., principals, supervisors, nonsupervisory employees) and employer type (e.g., vocational-technical institutes, programs for incarcerated juveniles). *See, e.g.*, RCW 41.59.080, 41.56.060, 41.56.025.

The Act purports to extend the coverage of the existing collective bargaining laws to charter school employees, but provides that bargaining units at charter schools are limited to employees working in each charter school and must be separate from other bargaining units in school districts.

RCW 41.56.0251, .59.031. The impact of the Act's restrictions on bargaining units cannot be fully understood without reference to existing state collective bargaining laws, particularly RCW 41.56.060 (determination of bargaining units) and RCW 41.59.080 (same), which afford public employees much greater bargaining rights.[10]

This Court encountered a similar problem in *Wash. Educ. Ass'n v. State*, 93 Wn.2d 37, 41, 604 P.2d 950 (1980), where the Court invalidated a new law establishing statewide limitations on public school salaries under Section 37. The law capped school district salary increases but failed to specify that, under prior law, "districts ha[d] the power to spend funds, from whatever source, as they choose on teacher salaries." *Id.* Similarly, here, the Act greatly restricts charter employees' rights to organize into bargaining units, without setting forth those rights under existing law as required by Article II, Section 37.

2. The Act Unconstitutionally Amends The Basic Education Act.

To give private organizations operating charter schools unfettered control over the education program offered, the Act amends the Basic Education Act by granting authorizers and the private charter operators the authority to alter elements of the State's basic education program. That is, the Act waives the basic education program required by the Constitution,

[10] For this reason, the trial court erred in determining that Act merely extends collective bargaining rights to charter employees without amending existing labor laws. CP 3768.

including the minimum instructional requirements identified in RCW 28A.250.220. *See* Sect. IV.A.2.b, *supra*.[11] The Act, however, fails to set forth the components of the basic education program that are waived. *Compare* RCW 28A.710.040(2)(b) *with, e.g.*, RCW 28A.710.220. Thus, there is no way that lawmakers could have understood the impact of the Act to the basic education program without devoting hours to a careful comparison between the Charter School Act and the Basic Education Act.

Given the paramount importance of basic education, it is no surprise that the Legislature has meticulously followed Article II, Section 37 when revising the minimum instructional requirements in the past. *See, e.g.*, Laws of 2013, ch. 323 § 2 (amending RCW 28A.150.220 to allow Kindergarten programs to use three of the minimum instructional school days for family conferences); *see also Naccarato v. Sullivan*, 46 Wn.2d 67, 76, 278 P.2d 641 (1955) (relying on the fact that the Legislature previously complied with Section 37 when amending the same provisions as basis to require compliance for new amendments). The Legislature violated Article II, Section 37 by failing to set forth these instructional requirements in enacting the Charter School Act.

[11] The trial court incorrectly determined that the Act merely "cross-references" the Basic Education Act, but "does not modify the statute." CP 3768. But allowing charter school operators to eliminate constitutionally required elements of the basic education program is clearly a modification of the Basic Education Act, not a mere cross-reference.

G. Organizational Plaintiffs Have Representational Standing Based on the Taxpayer Status of Their Members.

All parties agree that the three individual plaintiffs have standing to bring this lawsuit. CP 195. Further, the trial court correctly held that all of the organizational plaintiffs have standing on one or more grounds. CP 195, 327-28. Under these circumstances, the Court need not address standing. *See Lee v. State*, 185 Wn.2d 608, 615 n.3, 616, 374 P.3d 157 (2016) (where individual plaintiffs have taxpayer standing, the Court "need not reach" standing of organizations). To the extent Intervenors again challenge organizational plaintiffs' standing on appeal, the Court should reverse the trial court's erroneous ruling that representational standing cannot be based on their members' taxpayer status.

The organizational plaintiffs meet the three requirements for "representational" standing to bring suit on behalf of their taxpayer members: (1) the members would have standing to sue in their own right as taxpayers;[12] (2) the interests the organizations seek to protect are germane to their purposes (e.g., protecting the constitutionally guaranteed public school system, stopping for the second time the unconstitutional diversion of restricted public funds, and ensuring continued vitality of collective bargaining); and (3) the requested relief of invalidating the Act does not require participation of individual members. *See Int'l Ass'n of*

[12] *See* CP 210-13 ¶¶ 6-9, 214-18 ¶¶ 13-19, 219 ¶ 23; *see also* CP 42-45, 47.

Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002), *as amended*, 50 P.3d 618 (2002).

Contrary to the trial court's ruling, this Court has held that an individual may have standing based on taxpayer standing and that an organization has representational standing based on its members' standing. *See City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114, 115 (1975); *Int'l Ass'n of Firefighters, Local 1789*, 146 Wn.2d at 213-14. There is no reason to prohibit taxpayers from collectively challenging an unconstitutional expenditure of public funds where (as here) the other two representational standing criteria are met. Indeed, the Court noted in *Lee* that an organization "likely" had representational standing to challenge the constitutionality of an initiative on behalf of its taxpayer members. 185 Wn.2d at 615 n.3. Thus, the organizational plaintiffs have representational standing based on their members' taxpayer status, in addition to the other bases approved by the trial court.

V. CONCLUSION

The proponents of I-1240 and the Act share the common goal of creating charter schools as a replacement for the State's common schools and funding charters schools on the same basis as the common schools. I-1240 accomplished this goal in a straight-forward manner, and the Court properly held I-1240 unconstitutional. The Act merely changes the

characterization of charter school from a "common school" to an "alternative to a common school." And the Act concocts a funding scheme that avoids direct funding from the General Fund but still relies on diversion of General Fund money to other Opportunity Pathway Account programs to indirectly fund charter schools using restricted General Fund dollars. This Court should not allow such transparent game playing to trump the substance of the Act, which does exactly what this Court held unconstitutional in *LWV*.

RESPECTFULLY SUBMITTED this 10th day of July, 2017.

PACIFICA LAW GROUP LLP

By *s/ Paul J. Lawrence*
Paul J. Lawrence, WSBA # 13557
Jessica A. Skelton, WSBA # 36748
Jamie L. Lisagor, WSBA # 39946
Athan P. Papailiou, WSBA #47591

Attorneys for Appellants

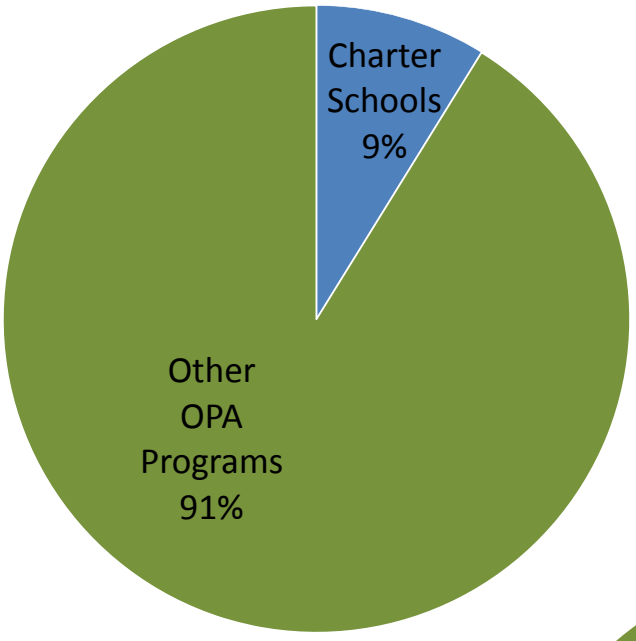
APPENDIX 1

"Differences" Between I-1240 and Charter School Act

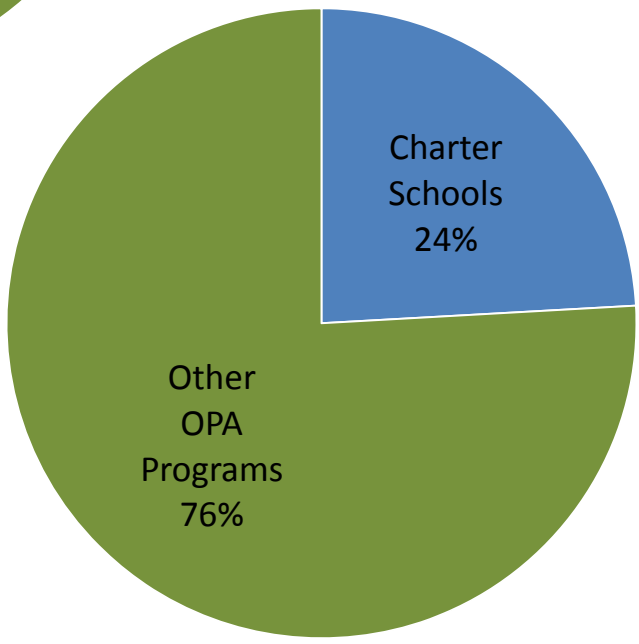
I-1240	Charter School Act
• Charter schools defined as "common schools" § 202(1)	• Charter schools defined as "alternative to traditional common schools" RCW 28A.710.020(1)(b)
• Charter schools paid for directly from General Fund (primary account used to fund common schools) § 222	• OPA used to pay for charter schools, but General Fund used to replace funding for other non-charter OPA programs RCW 28A.710.270
• Private organizations design "basic education" § 204(2)(b)	• Private organizations design "program of basic education" RCW 28A.710.040(b)
• 9-member pro-charter Charter Commission § 208(2), (3)	• 11-member Commission with 9 pro-charter members, Superintendent, and Board of Education President RCW 28A.710.070(3), (4)

APPENDIX 2

New Budget Appropriates Substantial Portion of OPA to Pay for Escalating Charter School Costs



FY 2016-17



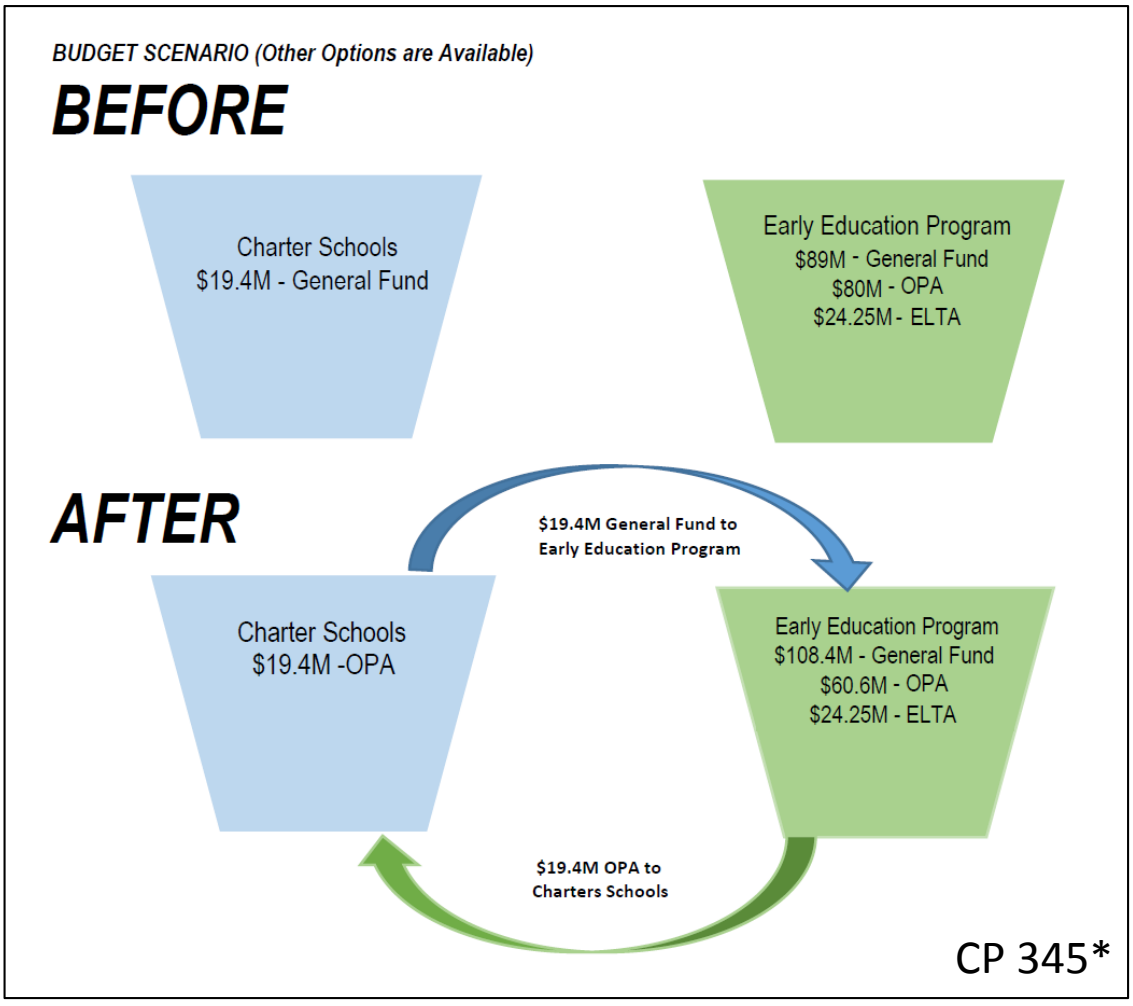
FY 2017-18

See 2016 Supp. Budget, §§ 501(3), (8), 516, 517, 610(1), (7), 612(1); 2017-19 Budget, §§ 501(3)(b), (8), 519, 520, 613(1), (7), 615(1), 1515, 1516, 1609(1), (7), 1611(1); *see also* n.4, *supra*.

APPENDIX 3

Legislature Plans to Use General Fund to Replace Funding for Non-Charter OPA Programs

Senate staff presented this "Fiscal Impact Report" comparing I-1240 ("Before") with the Charter School Act ("After"):

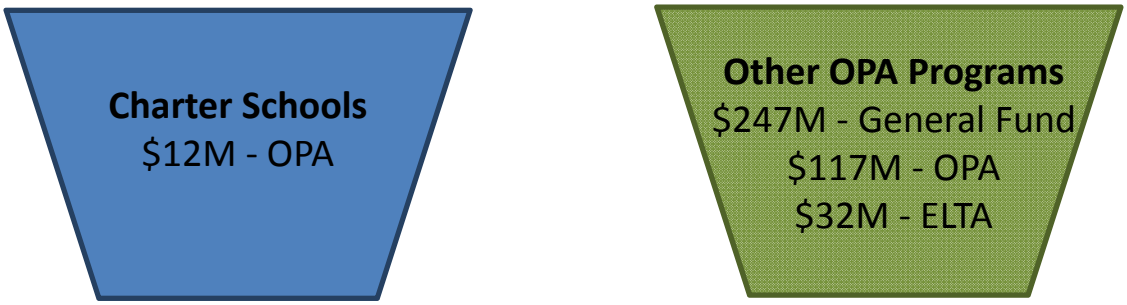


** Acronyms in the original Fiscal Impact Report have been revised for the convenience of the Court and the parties. An unaltered copy as presented to the Senate Ways and Means Committee is available at CP 345.*

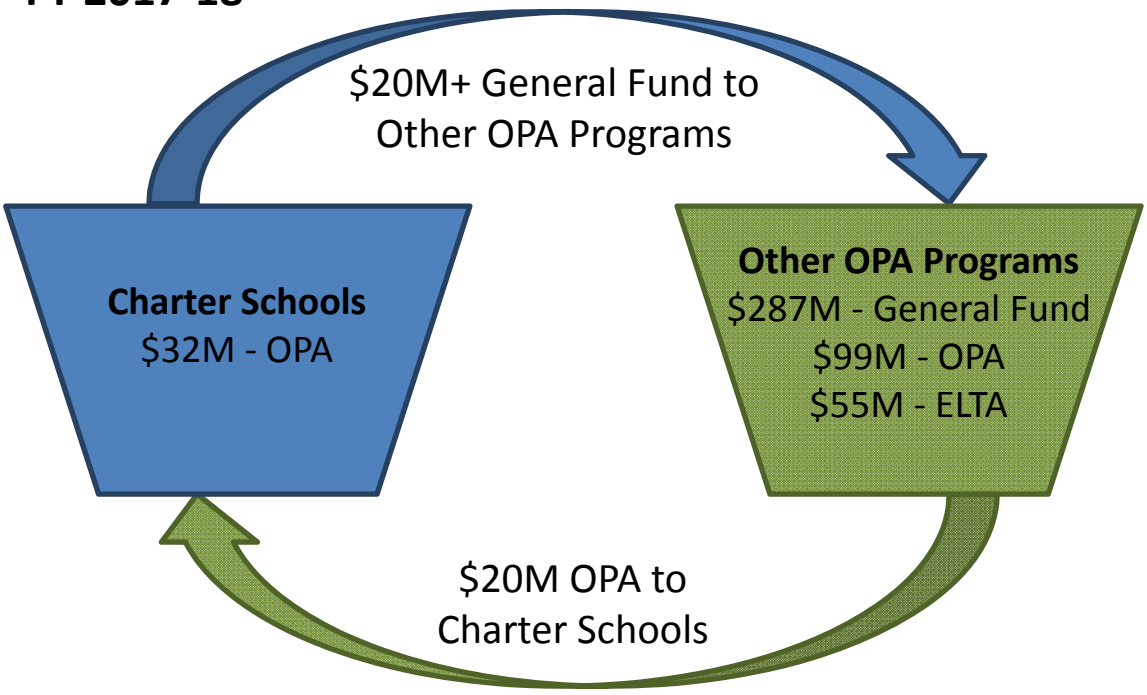
APPENDIX 4

New Budget Uses General Fund to Replace Funding for Non-Charter OPA Programs as Planned

FY 2016-17



FY 2017-18



See 2016 Supp. Budget, §§ 610(1), (7), 612(1); 2017-18 Budget, §§ 613(1), (7), 615(1), 1609(1), (7), 1611(1); *see also* n.4, *supra*.

PACIFICA LAW GROUP LLP

July 10, 2017 - 3:38 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94269-2
Appellate Court Case Title:	El Centro De La Raza, et al. v. State of Washington
Superior Court Case Number:	16-2-18527-4

The following documents have been uploaded:

- 942692_Briefs_20170710153607SC324361_3747.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Brief of Appellants.pdf
- 942692_Other_20170710153607SC324361_2604.pdf
  This File Contains:
  Other - Appendix of Authorities to Brief of Appellants
  The Original File Name was Appendix of Authorities to Brief of Appellants.pdf

A copy of the uploaded files will be sent to:

- EduLitigation@ATG.WA.GOV
- Jessica.skelton@pacificalawgroup.com
- aileenm@atg.wa.gov
- atabor@orrick.com
- brian.moran@orrick.com
- daves@atg.wa.gov
- jamie.lisagor@pacificalawgroup.com
- mphillips@orrick.com
- rebeccag@atg.wa.gov
- rmckenna@orrick.com
- sea_wa_appellatefilings@orrick.com
- sydney.henderson@pacificalawgroup.com

Comments:

Sender Name: Paul Lawrence - Email: Paul.lawrence@pacificalawgroup.com
Address:
1191 2ND AVE STE 2000
SEATTLE, WA, 98101-3404
Phone: 206-245-1700

Note: The Filing Id is 20170710153607SC324361