NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

SUPERINTENDENT OF PUBLIC INSTRUCTION'S AMICUS BRIEF ADDRESSING 2016 LEGISLATURE'S COMPLIANCE WITH MCCLEARY

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INTEREST OF AMICUS CURIAE

Randy Dorn is Washington's Superintendent of Public Instruction, a nonpartisan elected state officer whose constitutional duty is to "have supervision over all matters pertaining to public schools." Const. art. III, § 22. As the State's chief school officer, the Superintendent plays a unique role. He is the sole statewide elected official constitutionally responsible for supervising public education, and he heads up Washington's state education agency, the Office of Superintendent of Public Instruction ("OSPI").

By letter dated March 2, 2016, Deputy Commissioner Walter Burton informed the Superintendent that the Chief Justice granted his motion to file this brief.

ISSUES

1. This Court held the State in contempt for failure to comply with the Court's Order dated January 9, 2014. Were the actions of the 2016 Legislature sufficient to purge the contempt?

2. If the actions of the 2016 Legislature were not sufficient to purge the contempt, what sanctions or other remedial measures should the Court order?

I. ARGUMENT

A. The 2016 Legislature's Action To Address *McCleary* Did Not Purge This Court's Order of Contempt

The first issue is whether the 2016 Legislature's actions to address *McCleary* were sufficient to purge the order of contempt entered against the State of Washington and vacate the one hundred thousand dollar ($100,000) per day remedial penalty imposed by the Court. The answer is no.

The State points to the Legislature's accomplishments in the areas of student transportation, materials, supplies, and operating costs, all-day kindergarten, and K–3 class size. *See State of Washington's Memorandum Transmitting the Legislature's 2016 Post-Budget Report and Requesting the Lifting Of Contempt and the End Of Sanctions* at 17-18 (May 18, 2016). However, these were the accomplishments of the 2015 Legislature. Despite the progress in 2015, the Legislature did not address significant staffing needs, compensation needs, excess levy reform, and basic education funding from a regular and dependable source. *See Amicus Br. of Supt. Of Publ. Inst.* at 4-15 (July 28, 2015) ("2015 Amicus Br."). And this Court found the actions of the 2015 Legislature insufficient and imposed the $100,000 a day remedial penalty. Order, *McCleary v. State*, No. 84362-7 at 9 (Wash. Aug. 13, 2015) ("2015 Order").

The 2016 Legislature made no progress to address the deficiencies identified by the Court in 2015. The 2016 Legislature's main accomplishment was the passage of E2SSB 6195 (Laws of 2016, ch. 3), which is nothing more than a plan to plan. E2SSB 6195 establishes an education funding task force. E2SSB 6195 § 2. The purpose of the task force is to "continue the work of the governor's informal working group to review data and analysis provided the consultant [and] make recommendations to the Legislature on implementing the program of basic education as defined in statute." E2SSB § 2(1).

The problem is that when the Legislature defined basic education in ESHB 2261(Laws of 2009, ch. 548), it recognized the need to provide students with "world-class educators[.]" ESHB 2261 § 601(1). And so the Legislature directed the Office of Financial Management ("OFM") to "convene a technical working group to recommend the details of an enhanced salary allocation[.]" The Compensation Technical Working Group Final Report was issued on June 30, 2012. The problem is not a lack of information; it is the lack of political will to use the information. Instead of solving the problem, the 2016 Legislature kicked the can down the road and appointed another task force. The Court should not purge the order of contempt against the state or vacate the remedial penalty.

B. The Remedial Penalty Is Insufficient To Coerce The Legislature Into Complying With *McCleary*

"Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers of America,* 330 U.S. 258, 303-04, 67 S. Ct. 677 (1947). When the purpose of the sanction is to coerce compliance, the Court "must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *Id.* at 304. The remedial penalty imposed on the State is completely ineffective.

In the usual situation, an individual held in contempt is subject to a monetary penalty or imprisonment to coerce compliance. This kind of pressure on an individual is usually effective. The situation is completely different when the Court holds the State of Washington in contempt. To comply with this Court's order in *McCleary,* a majority of the members of the House and Senate must agree. To coerce compliance, a penalty must put pressure on individual legislators, and/or motivate the legislators' constituents to demand that legislators solve the problem.

A remedial penalty of $100,000 a day sounds like a lot of money. But the Legislature does not take it seriously. The Court's 2015 Order imposing the penalty provided if "the legislature hold[s] a special session and during that session fully compl[ies] with the court's order, the court will vacate any penalties accruing during the session." 2015 Order at 9. The Legislature did not hold a special session in 2015 and did not make progress in the 2016 regular session.

The order provides that the "penalty shall be payable daily to be held in a segregated account for the benefit of basic education." 2015 Order at 9-10. But the Legislature has not bothered to appropriate the funds to pay the penalty. *See 2016 Report to the Washington Supreme Court by the Joint Select Committee on Article IX Litigation*, 64th Wash. Leg., at 27 . So the only coercive power of the penalty is that OFM "is computing the accumulated amount of the sanction on a daily basis and submitting weekly reports to the Legislature and the State Treasurer." *Id.*

In E2SSB 6195, the Legislature promises to solve the problem—stating its intent that the "state is fully committed to funding its program of basic education as defined in the statute[.]" E2SSB 6195 § 1. In considering the Court's power to fashion conditions to purge contempt, the Court of Appeals observed that a "contemnor's promise of compliance is the first step. But where that promise is demonstrably unreliable, the court

can insist on more than mere words of promise as a means of purging contempt. To conclude otherwise would render the statutes unenforceable and *reduce the court to the level of beggar*." *In re M.B.*, 101 Wn. App. 425, 448, 3 P.3d 780 (2000) (emphasis added).

Fully funding basic education is a very complex political and policy problem that the Legislature must treat with real urgency. The Court cannot simply rely on the Legislature's promise. The Legislature must act. More effective sanctions are required for the Legislature to have the political will to solve the problem.

C. The Court Should Impose One Or More Of the Following Sanctions To Coerce Compliance With *McCleary*

1. Individual Legislators Could Be Held In Contempt And Subject To A Remedial Penalty

RCW 7.21.030(1) provides in part that the "court may initiate a proceeding to impose a remedial sanction on its own motion [and] after notice and hearing, may impose a remedial sanction authorized by this chapter." Contempt of court includes "[d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b). The statute authorizes a remedial sanction "not to exceed two thousand dollars for each day the contempt of court continues." RCW 7.21.030(2)(b). A coercive contempt order "must contain a purging clause." *State v. Boatman*, 104 Wn.2d 44, 48, 700 P.2d 1152 (1985). The Court has

"inherent power ... to hold a person in contempt ... to enforce orders or judgments[.]" *Id.* "Before the inherent power of the court can be used, the court must determine that reliance on the statutory basis would be inadequate." *Id.*

The contempt order issued by the Court in 2014 was against the State of Washington, not the Legislature or individual legislators. The Court should consider such a sanction now.

The fact that the defendant in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), is the State of Washington, not the Legislature, does not matter. The Court's contempt power is not limited to the named defendants in a case.

For example, in *Delorme v. Int. Bartenders' Union*, 18 Wn.2d 444, 446, 139 P.2d 619 (1943), the trial court enjoined the "International Bartenders' Union Local 624 together with all their members, officers and agents ... from picketing, boycotting, or in any manner interfering with the plaintiff's place of business[.]" Later, the plaintiff moved for contempt sanctions against the Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, Yakima, Washington, Local No. 524, for picketing the business.

The Teamsters argued "that, because neither they, individually, nor the union to which they belonged were parties to the original suit, [they] may not be brought into the case subsequent to the entry of the decree by an

order to show cause[.]" *Delorme*, 18 Wn.2d at 453. The Court rejected this argument. The Teamsters "demonstrated that they [were] motivated by a unity of purpose with the . . . bartenders local union, one of the defendants in the action." *Delorme*, 48 Wn.2d at 454. The Teamsters were "so tied in with the acts of the original defendants in the action as to demonstrate that they have been carried on in connection with a plan to interfere with the conduct of respondent's business, to his detriment." *Id.* "[T]he trial court properly held that they had intentionally and knowingly violated the decree, and stood in contempt of court." *Id.*

Similarly, the Legislature is at the heart of complying with the Court's *McCleary* order. The Court has the authority to find individual legislators in contempt. If the Court chooses this sanction, it should require every individual legislator to pay periodic penalties, subject to receiving a refund if the Legislature purges the contempt order by satisfactorily addressing *McCleary*.[1]

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[1] A remedial penalty imposed against members of the Legislature must be narrowly designed to compel members to take the necessary actions to ensure that K–12 education is fully funded by 2018. To that end, the penalty could be temporarily stayed when members are taking meaningful steps to solve the problem. For example, if the Legislature goes into a special session before the November election for the purpose of meeting its constitutional obligations under *McCleary*, individual remedial sanctions should not be imposed while the members meet. Alternatively, individual sanctions should be stayed during any period in which newly elected members participate in work sessions with key legislators and staff educating them on their *McCleary* duties. The contempt of an individual legislator would be purged once he or she left office. *State v. Wallace*, 96 Wash. 107, 109, 164 P. 741 (1917).

It does little good to have OFM simply total up the amount of such penalties.[2]

2. The Court Could Enjoin The Payment Of Special Levy Funds To School Districts

Holding legislators in contempt and imposing a remedial penalty is a remedy designed to coerce individual legislators directly. The next four options are designed to coerce legislators, through political pressure from their voters, to comply with the Court's order in *McCleary*.

One option is to enjoin the payment of special levy funds to school districts.

Special levies are authorized by the voters of the local school districts. RCW 84.52.053. However, RCW 28A.510.270 provides that the "county treasurer of each county of this state shall be ex officio treasurer of the several school districts of their respective counties[.]" "One of the duties of the county treasurer is to "receive and hold all moneys belonging to such school districts, and to pay them only for legally authorized obligations of the district." RCW 28A.510.270(1). The county treasurers collect tax levies, and then allocate and distribute the taxes to the respective school districts. *See* RCW 84.56.230.

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[2] If the Court elects this sanction, it might consider a limited remand to the trial court so that the penalties could be paid into the registry of the superior court pursuant to CR 67. *Cf.* RAP 7.2(e) (the trial court has the authority to enforce judgments); RAP 8.3 (authorizing appellate courts to issue orders to ensure effective and equitable review).

If the Legislature does not purge the contempt against the State by a certain date (*e.g.*, January 1, 2017), the Court could enjoin county treasurers from making those special levy distributions to the local school districts.[3]

Such an injunction has a direct nexus to the case. In *McCleary*, this Court stated that: "The trial court concluded that the State has failed to adequately fund the education required by article IX, section 1." Substantial evidence supports this conclusion. *McCleary*, 173 Wn.2d at 529. The Court concluded that the "the State has consistently failed to provide adequate funding for the program of basic education, including funding for essential operational costs such as utilities and transportation [and that], local districts have been forced to turn increasingly to excess levies[.]" *Id.*

The State violated article IX, § 1 by failing to fund basic education; but local school districts also acted improperly by using special levies to pay for basic education. Because districts are using special excess levies to pay for basic education, and because the use of levies for basic education violates the constitution, the Court should enjoin the distribution of excess levy dollars until the Legislature has a plan in place to fully fund K–12 education with state dollars. Such an order would cause school districts

[3] The injunction would only prohibit the treasurer from distributing the levy proceeds. It would not prohibit school districts from putting a special levy on the ballot or counties from collecting the levy. That way, if the contempt is purged, school districts will have access to their special levy taxes.

and the public to *immediately* demand legislators to provide adequate state funding.

The Court has the authority to issue an injunction to county treasurers. Under RCW 7.21.030(2)(d), the Court may impose "[a]ny other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the Court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court." In addition, "the courts retain all the equitable powers inherent in them, and may still exercise them when the occasion demands it." *O'Brien v. Johnson*, 32 Wn.2d 404, 407, 202 P.2d 248 (1949) (citation and internal punctuation omitted). As with contempt, the Court's injunctive power is not limited to parties. "'To render a person amenable to an injunction it is not necessary that they should have been a party to the suit, so long as they had actual notice of the contents of such injunction." *State v. Wallace*, 114 Wash. 692, 693-4, 195 P. 1049 (1921) (citation and internal punctuation omitted).

3. The Court Could Enjoin The Operation Of Certain State Tax Credits And Exemptions

Another option to put pressure on the Legislature is to enjoin the operation of certain state tax exemptions, credits, and preferential tax rates. *McCleary* was decided in January 2012. During the legislative sessions in 2013, 2014, and 2015, the Legislature enacted 39 tax exemptions, credits,

and preferential rates. *2016 Tax Exemption Study, Introduction and Summary of Findings*, Table 5, at 1-8.[4] Enjoining tax exemptions, credits, and preferential rates will put a different kind of pressure on the Legislature than cutting off special levy funds, and the pressure would likely come from both large and small taxpayers.

For example, in 2013 the Legislature enacted ESSB 5952 (Laws of 2013, 3rd Spec. Sess, ch. 2). This law purported to "[i]ncentiviz[e] a long-term commitment to maintain and grow jobs in the aerospace industry in Washington state by extending the expiration date of aerospace tax preferences and expanding the sales and use tax exemptions for the construction of new facilities used to manufacture superefficient airplanes[.]" Final Bill Report on ESSB 5952 at 1, 63rd Spec. Sess. (2013).

Among other things, ESSB 5952 reduced the business and occupation tax ("B&O") for the manufacture of commercial airplanes from 0.484 percent to 0.2904 percent, and it reduced the service and other activities B&O tax for taxpayers with qualified aerospace product development for other entities from 1.5 percent to 0.9 percent. *See* Department of Revenue Fiscal Note to S.B. 5952 at 2 (Nov. 7, 2013).

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[4] *See* http://dor.wa.gov/content/aboutus/statisticsandreports/2016/Tax_Exemptions_2016/Default.aspx (last visited June 6, 2016).

The Department of Revenue estimated that the impact of SB 5952 would be greater than $50,000 per fiscal year in that biennium. *Id.* at 1. It was no doubt substantially higher than that.

Sometimes the Legislature enacts a single law that contains a number of small exemptions or credits. For example, in 2013, the Legislature passed ESSB 5882 (Laws of 2013, 2nd Spec. Sess. ch. 13), which set a number of B&O tax and sales and use tax exemptions. Among many other things, the law exempted from the state sales tax "clay targets purchased by a nonprofit gun club for use in providing the activity of clay target shooting for a fee." ESSB 5882 § 402. The clay targets were also exempted from the state use tax. *Id.* at § 403. While the fiscal impact of the clay target exemption may have been small, the aggregate impact of ESSB 5882's individual exemptions has surely been significant.

If the Court chooses this option, it is important to know which tax exemptions, credits, and preferential rates to enjoin. The injunction should have some nexus to the case. Prior to the Court's *McCleary* decision in January 2012, the case was on appeal and it was not certain that this Court would conclude the State was violating article IX, § 1. However, after the Court issued its July 18, 2012, order maintaining continuing jurisdiction, the Legislature was on notice that complying with *McCleary* took priority over new tax exemptions, credits, and preferential rates. The Legislature

nevertheless enacted new tax breaks. *See 2013 Final Legislative Report* at 298-303 (Wash. July 23, 2013), *2014 Final Legislative Report* at 193-196 (Wash. Apr. 22, 2014), and *2015 Final Legislative Report* at 311-317 (Wash. Sept. 28, 2015).

The Court can enjoin the operation of B&O and state sales and use tax exemptions, credits, and preferential rates enacted after 2013, and order the Department of Revenue to disallow any of the enjoined tax breaks that appear on tax returns filed with the Department.[5]

The order should also require the Department to identify all B&O and state sales and use tax exemptions, and preferential rates enacted after 2013. The Court has the authority to issue "mandatory injunctions [that] compel[] the performance of some affirmative act." 15 Karl B. Tegland, Washington Practice: Civil Procedure § 44:3, at 236 (2nd ed. 2009). Of course, if the injunction succeeds in getting large and small taxpayers to put pressure on the Legislature to comply with *McCleary*, it would be dissolved

[5] If the Court chooses this option it should focus on the B&O and state sales and use tax. Those two taxes, along with the state property tax, form the largest dollar amount of exemptions. *See 2016 Tax Exemption Study, Introduction and Summary of Findings*, Chart 1, at 1-3; http://dor.wa.gov/docs/reports/2016/Tax_Exemption_Study_2016/01_Intro_and_Summary_of_Findings.pdf. Since the property tax is collected by county treasurer, not the Department, of Revenue, it would be much more difficult to enjoin property tax exemptions.

and taxpayers could then file amended tax returns to take advantage of the exemptions and credits provided under statute.

4. The Court Could Enjoin The Expenditure Of Non-Education State Funds That Are Not Constitutionally Required Or Otherwise Necessary

The Superintendent's prior amicus curiae briefs urged the Court to enjoin state spending of non-education state funds that are not constitutionally required or necessary to preserve the health and safety of the citizens of Washington. *See Amicus Br. of Supt. Of Publ. Inst.* at 11-12 (Aug., 4 2014) ("2014 Amicus Br."); 2015 Amicus Br. at 19-20.

The question is how to identify the spending to be enjoined. In 2015, OFM issued a directive requiring agencies to conduct contingency planning for a partial shutdown of state government in case the Legislature failed to adopt an operating budget. Agencies were directed to divide their spending into categories. Two of the categories were: services that must be continued based on certain constitutional mandates and federal law, with the caveat that agencies will consult their assigned Assistant Attorney General for clarification; and services necessary for the immediate response to issues of public safety, or to avoid catastrophic loss of state property. Based on the contingency plans already developed, an injunction could be issued enjoining spending that does not fall into these two categories.

This could be done by issuing an injunction directed to the Governor. Under RCW 43.88.110(7), if "the governor projects a cash deficit in a particular fund or account as defined by RCW 43.88.050, the governor shall make across-the-board reductions in allotments for that particular fund or account so as to prevent a cash deficit[.]" Of course, RCW 43.88.050(7) would not apply directly to a writ issued by the Court. But it does identify the Governor as the appropriate official to enforce the Court's injunction.

Cutting off special levy funds would bring pressure from parents and local school districts. Enjoining tax credits and exemptions would bring pressure from large and small taxpayers. Shutting down the State, except for essential service, would seem to bring the most pressure to coerce the Legislature to comply with *McCleary*.

5. The Court Could Enjoin The Operation Of The Public Schools

One option that the respondents have argued for is shutting down the public schools. *Plaintiff/Respondents' 2013 Post-Budget Filing* at 46-47, n. 141 (Sept. 30, 2013). The most relevant case appears to be *Robinson v. Cahill*, 358 70 N.J. 155, 160, A.2d 457 (1976). In *Robinson,* the New Jersey Supreme Court issued an order that stated: "On and after July 1, 1976, every public officer, state, county or municipal, is hereby enjoined

from expending any funds for the support of any free public school." *Robinson*, 70 N.J. at 160. The injunction did not apply to some expenditures such as the "payment of principal, interest and redemption of existing school bonds, anticipation notes and like obligations." *Id.* The order also provided that the injunction would not go into effect if "legislative action is taken providing for the funding of the 1975 Act for the school year 1976-1977, effective July 1, 1976, or upon any other legislative action effective by that date providing for a system of financing the schools in compliance with the Education Clause of the Constitution." *Robinson*, 70 N.J. at 161.

This order was issued on May 13, 1976. On July 9, 1976, the Court issued another order stating: "In view of the enactment of legislation which will permit full funding of the Public School Education Act of 1975, the injunction issued by this Court on May 13, 1976, . . . is dissolved." *Robinson v. Cahill*, 79 N.J. 464, 360 A.2d 400 (1976). Based on these two orders, it appears that closing the schools did coerce the Legislature in New Jersey to enact school funding that complied with the state constitution.

The Superintendent has opposed closing the schools as a remedy for *McCleary*. *See* 2014 Amicus Br. at 4, n.1. Closing schools is harmful to the students, and the other remedies suggested in this brief are more narrowly designed to put effective individual and political pressure on the Legislature to address *McCleary*. However, given the apparent success of

the remedy in *Robinson*, closing the schools cannot be ruled out as a possible final remedy.

If the Court chooses this remedy, it would enjoin the funding of the public schools. State funding of public schools is a two-step process. Under RCW 28A.510.250, the Superintendent apportions funds from the state general fund to the educational service districts, and, under RCW 28A.510.260, the educational service districts apportion those funds to the school districts. Thus, the Court would issue an injunction prohibiting the Superintendent from apportioning funds to the educational service districts. To cut off funding completely, the Court would also enjoin the county treasurers from paying out special levy proceeds to school districts.

II. CONCLUSION

The 2016 Legislature failed to address *McCleary*. The remedial penalty imposed by the Court is completely ineffective. To motivate the Legislature to seriously address the problem, the Court must impose tougher sanctions.

RESPECTFULLY SUBMITTED this 7th day of June 2016.

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