NO. 89714-0

SUPREME COURT OF THE STATE OF WASHINGTON

LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington non-profit corporation; EL CENTRO DE LA RAZA, a Washington non-profit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; WAYNE AU, PH.D., on his own behalf; PAT BRAMAN, on her own behalf; DONNA BOYER, on her own behalf and on behalf of her minor children; and SARAH LUCAS, on her own behalf and on behalf of her minor children,

Appellants,

v.

STATE OF WASHINGTON,

Respondent,

and

WASHINGTON STATE CHARTER SCHOOLS ASSOCIATION; LEAGUE OF EDUCATION VOTERS; DUCERE GROUP; CESAR CHAVEZ SCHOOL; TANIA DE SA CAMPOS; and MATT ELISARA,

Intervenors.

STATE OF WASHINGTON'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION AND IDENTITY OF MOVING PARTY

The State does not lightly ask this Court to reconsider one of its decisions. It respectfully does so here, however. The State's goal is to alert the Court to places where the opinion goes beyond what is necessary to resolve this case, creates tension with other decisions of this Court, and calls into question programs far beyond charter schools, from Running Start to tribal compact schools. Ultimately, the State urges the Court to reconsider its decision to set aside the entirety of Initiative 1240, as adopted by the people. But even if the Court rejects that request, it should narrow and clarify its opinion.

The Court's opinion turns on three conclusions. First, the Court held that charter schools are not "common schools" under our constitution because they are not controlled by school boards. Second, the Court held that I-1240's system for funding charter schools unconstitutionally diverts funds that may only be spent on common schools. Finally, the Court held that because it had struck down I-1240's funding provisions, the entire initiative was unconstitutional, because the people would not have passed it without a funding source (i.e., the funding system was not "severable").

As the Court recognized, holding that charter schools are not common schools is not the end of the matter because our constitution allows "public schools" that are not "common schools." Const. art. IX, § 2

("The public school system shall *include* common schools, and such high schools, normal schools, and technical schools as may hereafter be established.") (emphasis added). Because many of the State's innovative educational programs fall into this category, the Court should take care to preserve this distinction. Unfortunately, the majority at times does not, instead using "public schools" and "common schools" interchangeably. The result is that the Court, perhaps unintentionally, casts doubt on a wide range of public, non-common school programs. The State's motion raises four points, most of which center around this underlying problem.

First, the Court should reconsider footnote 10 of its opinion. There, the Court notes that the constitution requires "a general and uniform system of *public* schools." Const. art. IX, § 2 (emphasis added). The Court then says that charter schools violate this requirement because, unlike other *common* schools, they are not controlled by school boards. But there are a wide range of *public* school programs that are not controlled by school boards, from tribal compact schools to high school programs run by technical colleges. The Court has never before held that such schools violate the uniformity requirement in article IX. In fact, the Court held exactly the opposite in *Bryan*, *Moses Lake*, and *Seattle School District*.[1]

[1] *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 522, 585 P.2d 71 (1978); *Moses Lake Sch. Dist. v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 559, 503 P.2d 86 (1972); *Sch. Dist. No. 20, Spokane Cnty. v. Bryan*, 51 Wash. 498, 506, 99 P. 28 (1909).

The Court should eliminate footnote 10. It is unnecessary to the Court's holding, contrary to precedent, and opens a Pandora's Box of questions.

Second, in describing what qualifies as a "common school," the Court quoted dicta in *Bryan* stating that common schools must be under the "complete control" of school boards. That statement is unnecessary to the Court's decision, was likewise unnecessary in *Bryan*, ignores the constitutional powers of other entities like the Superintendent of Public Instruction, and is untenable as a description of our state's education system. The Court can rely instead on the *Bryan* Court's actual holding to conclude that some measure of school board control is required. And under that standard, the Court should hold that charter schools authorized and overseen by school districts, as in Spokane, are constitutional.

Third, the Court's discussion of school funding repeatedly conflates the rules for funding common schools with the rules for funding public schools more generally. The Court has never before held that the constitutional restrictions on common school funds apply to all money used to fund public schools. Such a ruling casts doubt on the funding mechanisms for a wide range of public, non-common school programs. And in reaching its conclusion, the Court shifted the burden of proof to the State, contrary to its own longstanding rule that challengers have the

burden to prove that an initiative cannot be implemented in a constitutional manner.

Finally, the Court held that because it had invalidated the system specified in I-1240 for funding charter schools, the entire initiative was invalid, because the funding provisions were not "severable." The Court's rationale was that the public would not have passed I-1240 without a funding source. But the public has a right to pass initiatives without specifying how they will be funded, and it routinely does so. In fact, just last year the public passed Initiative 1351 to decrease class sizes, a measure far more expensive than I-1240, without any indication in the initiative of how it would be funded. *See also, e.g.*, Initiative 732. The Court's holding that the people would never do what they have repeatedly done is troubling. The Court should reconsider its severability analysis.

Ultimately, the Court should reconsider its opinion whether it allows charter schools to proceed or not. Even if the bottom line remains the same, clarifying the Court's reasoning will avoid needless conflict with other cases and uncertainty about the State's ability to create innovative public education programs.

II. STATEMENT OF RELIEF SOUGHT

The State respectfully requests that the Court reconsider and clarify its decision in four ways. The Court should (1) remove footnote 10

to avoid unnecessary doubt about the continuing validity of public education programs not controlled by school boards; (2) hold that common schools must be subject to *some measure* of local school board control, rather than "complete control," in order to align the court's holding with our state constitution and practical realities; (3) remove language that equates the basic education appropriation with restricted common school funding, and instead reiterate that the legislature can appropriate unrestricted funds for public school programs; and (4) hold that I-1240's funding provisions are severable from the rest of the initiative. Although some of these changes would not change the ultimate result of the Court's opinion, the Court should still make them to reduce the impact of its analysis on existing non-charter school programs and allow education policy-makers the flexibility to develop new public school programs as "the needs of students and the demands of society evolve." *McCleary v. State*, 173 Wn.2d 477, 526, 269 P.3d 227 (2012).

III. GROUNDS FOR RELIEF AND ARGUMENT

State and local policymakers across Washington rely on the precise language of this Court's opinions. Already, school boards, legislators, the Superintendent of Public Instruction, the State Board of Education, and other education policy-makers are analyzing what the opinion in this case means for the programs they oversee. Unfortunately, they are left with a

number of substantial questions about the ongoing viability of a wide range of education programs and of past precedent from this Court. Of course, this Court need not and should not rule on the constitutionality of programs not before it, and that is not what the State requests. Instead, the State asks the Court to remove language and reasoning that needlessly calls those programs into question, especially when such language is unnecessary to the Court's holding or contrary to precedent.

A. The Court Should Remove Footnote 10: It Is Unnecessary and Raises Questions About the Validity of Existing Public School Programs Not Controlled by School Districts

Footnote 10 is unnecessary to the Court's ultimate holding and creates needless uncertainty about a wide range of public education programs. The Court should remove it.

Footnote 10 is a constitutional ruling entirely unnecessary to the Court's resolution of the case. As the Court notes, "we find the invalidity of [I-1240's] funding provisions . . . to be dispositive." *League of Women Voters v. State*, No. 89714-0, Majority Op. at 11 n.10. (Majority Op.). Nonetheless, in footnote 10 the Court also opines that I-1240's "governance provisions for charter schools violate the 'uniform system' requirement of article IX, section 2." *Id*. Setting aside the problems with that conclusion, described below, this unnecessary pronouncement goes against longstanding principles of judicial restraint espoused by this Court:

"A reviewing court should not pass on constitutional issues unless absolutely necessary to the determination of the case." *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981); *see also Cary v. Mason Cnty.*, 173 Wn.2d 697, 703, 272 P.3d 194 (2012) (same); *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 208 n.10, 189 P.3d 139 (2008) (same); *State v. Martin*, 137 Wn.2d 774, 788, 975 P.2d 1020 (1999) (same). As footnote 10 itself acknowledges, its conclusion is not "necessary to the determination of the case." *Hall*, 95 Wn.2d at 539. The Court should remove it.

Footnote 10 is also problematic for other reasons. It addresses the "uniformity" requirement in article IX, section 2: "The legislature shall provide for a general and uniform system of *public* schools." Footnote 10 says that charter schools violate this requirement because "the Charter School Act eliminates the local voter control that is the hallmark of the *common* schools, thereby resulting in different (nonuniform) governance for charter schools as compared to common schools." Majority Op. at 11 n.10 (emphasis added). In other words, the Court says that because charter schools are not governed like other *common* schools, they destroy the required uniformity of *public* schools. But this reasoning conflates the concepts of "common schools" and "public schools," is contrary to

precedent, and calls into question the many public school programs not run by school districts.

Taken literally, footnote 10 suggests that every *public* school must be controlled by local voters. But the Court has never held that before; in fact, it has held the opposite. Local voter control under *Bryan* is only a requirement for a school to be a "common school." By taking a common school requirement and making it a public school requirement, this Court has said something new and extraordinary in a footnote. It has said something contrary to the *Bryan* Court's recognition that non-common school programs can exist within Washington's school system. *Bryan*, 51 Wash. at 506 ("It is not that the Legislature cannot make provision for the support of [nontraditional schools], but in its attempt to do so, it has made provision for it out of the wrong fund."). And it has said something contrary to this Court's more recent conclusions that "[c]ommon schools are but one part of the entire public school system." *Moses Lake Sch. Dist. v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 559-60, 503 P.2d 86 (1972) (internal quotation marks omitted); *see also Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 522, 585 P.2d 71 (1978) ("The general and uniform system contemplated by the constitution is neither limited to common schools nor is it synonymous therewith."). Footnote 10 appears to call all of these prior

decisions into question, and the State respectfully suggests that there is no good reason to do so.

Footnote 10 also jeopardizes a wide range of existing *public* school programs that are not run by school districts:

- Tribal compact schools are run solely by tribes. RCW 28A.715.
- In Running Start and the high school programs at the Lake Washington Institute of Technology, Bates Technical College, and Clover Park Technical College, professors and instruction are governed by the college boards of trustees. RCW 28A.600.310, .350; RCW 28B.50.140.
- Some Running Start students attend border community colleges in Idaho and Oregon, not controlled by Washington voters or school boards. RCW 28A.600.385.
- The University of Washington Transition School and Early Entrance Program for highly capable students is operated solely by the University of Washington. RCW 28A.185.040.
- The Washington Youth Academy is operated solely by the state's Department of the Military. RCW 28A.300.165; RCW 28A.150.310.
- The Youth Offender Program is operated by the Department of Corrections, which contracts with an educational provider who

may be a school district or may be a non-school district entity. RCW 28A.193.020. Currently, the provider is Centralia College.

These represent only some examples. The State has understood these programs to be, at the very least, the type contemplated by the *Moses Lake* Court—programs that are legitimately part of the public school system if not common schools. *Moses Lake*, 81 Wn.2d at 559-60. If "the absence of local control by voters would . . . violate the article IX uniformity requirement" that applies to "public schools," as footnote 10 suggests, policymakers have every reason to be concerned about the ongoing validity of these programs.

In short, footnote 10 is unnecessary, contrary to precedent, and concerning for many public school programs. The Court should remove it.

B. The Court's Definition of Common Schools Is Far More Restrictive Than Necessary and Will Cause Real Harm

In *Bryan*, this Court held that "a common school, within the meaning of our Constitution, 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 of the school district." *Bryan*, 51 Wash. at 504. The Court then went beyond that holding, in a sentence unnecessary to its decision, to say: "The *complete control* of the schools is a most important feature, for it carries with it the right of voters, through their chosen agents, to

select qualified teachers, with powers to discharge them if they are incompetent." *Id.* (emphasis added). For 100 years, this Court never cited this "complete control" language, and with good reason: it was untenable when *Bryan* was decided, and is even more clearly wrong today.[2] But the majority opinion resurrects this dicta from *Bryan* in reaching its conclusion. Majority Op. at 10. The Court should reconsider its use of this principle and instead stick to the fundamental holding of *Bryan*: that to be eligible for restricted common school funding, a program must be under the ultimate control of an elected school board. Applying that principle, the Court should reconsider whether charter schools overseen by school districts, as in Spokane, are unconstitutional.

Resurrecting *Bryan*'s "complete control" dicta is problematic for four reasons: it is contrary to the constitution, would require overturning many of this Court's decisions, would invalidate countless state laws, and would needlessly call into question whether school districts can use what the Court has now defined as restricted common school funding to pay for educational services provided to students by contract.

Under our constitution, local school boards have never had "complete control" over the schools. Since statehood, our constitution has specified that: "The Superintendent of Public Instruction shall have

[2] This Court last used the "complete control" language in *State v. Preston*, 79 Wash. 286, 289, 140 P. 350 (1914).

supervision over all matters pertaining to public schools." *See* Const. art. III, § 22; *see also* RCW 28A.300.040. The constitution also gives the legislature specific powers and obligations in regulating schools. *See, e.g.*, *Seattle Sch. Dist.*, 90 Wn.2d at 518 (holding that creating a "general and uniform" system of public education "is within the domain of the Legislature"). *Bryan*'s dicta ignored these constitutional principles.

Moreover, the notion that school districts must have "complete control" of the schools is irreconcilable with other, more recent holdings of this Court. This Court has repeatedly held that "school districts are 'creatures of statute' and have only those powers and rights specifically granted to them by statute." *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 232, 5 P.3d 691 (2000) (citing *Moses Lake*, 81 Wn.2d at 556). If school districts have only those powers granted by the legislature or the people, how can they have "complete control" of the schools?

In reality, state law has never given school districts unfettered control over schools or even unfettered authority to hire and fire teachers. For example, all school directors must comply with state laws governing education. RCW 28A.150.230. State law has long required that all public school teachers be certificated, and the State, not local districts, sets the standards for certification. RCW 28A.410; RCW 28A.150.100, .203. There are state constitutional and statutory limits to a school board's

ability to fire certificated employees. *See* RCW 28A.405.310. And school districts, like other employers, are required to comply with state anti-discrimination laws, and may not hire or fire teachers for prohibited reasons. *See, e.g., Stieler v. Spokane Sch. Dist. No. 81*, 88 Wn.2d 68, 73, 558 P.2d 198 (1977) (applying state anti-discrimination law to school district). Are all of these laws invalid under *Bryan*?

A final reason not to resurrect *Bryan*'s dicta is that there are many important educational programs funded from what this Court has now characterized as constitutionally restricted common school funds, but that may not be under the "complete control" of an elected school board. Yet these programs should be acceptable under *Bryan*'s actual holding because they are ultimately accountable to school boards, through contract or otherwise. These programs include the following:

- Aviation High School is a school district-authorized program in the Highline School District run by a private board under contract with the school district. CP at 348-65.
- Washington Skills Centers are collaboratively operated under contracts signed by multiple school districts and governed by a separate administrative council, but not under the direct or complete control of all of the participating districts' boards. RCW 28A.245.010; WAC 392-600.

- Under the Learning Assistance Program, school districts may enter into partnerships with local organizations for educational supports for at-risk students. RCW 28A.165.035; WAC 392-121-188; WAC 392-172A-04080 through 392-172A-04110.
- School districts sometimes place (and sometimes may be required by federal law to place) students in programs operated by nonpublic agencies to receive special education services. Such programs require state approval but are not under complete control of school districts. WAC 392-172A-04080 through 392-172A--04110.
- School districts are authorized to contract with a variety of alternative education providers for services to at-risk students. RCW 28A.150.305. The statute authorizes a range of providers, from other public schools to specific dropout prevention programs to private organizations. While all are under contract with a school district, the providers present a variety of governance models that do not amount to "complete control" by the home school district.
- Online learning programs are operated by private entities under contract with school districts. RCW 28A.250.

In short, reiterating *Bryan*'s dicta requiring "complete control" of an elected school board creates countless legal and practical difficulties.

The Court should remove this language and instead rely on the prior sentence in *Bryan* expressing its holding: "a common school, within the meaning of our Constitution, is one that is . . . under the control of the qualified voters of the school district." *Bryan*, 51 Wash. at 504. This step removed from "complete control" would provide the room needed to allow for the role that entities like the Superintendent, the legislature, and the State Board of Education play in oversight over common schools. It would also provide the room needed to allow programs operated under contract with a school district to survive and to continue to receive the funds that this court has determined are constitutionally protected.

If the Court adopts this approach, it should also revisit whether charter schools authorized and overseen by school districts can receive common school funding. I-1240 created two separate systems for the authorization and oversight of charter schools. Charter schools can either be authorized and overseen by the state Charter School Commission, or they can be authorized and overseen by local school districts. RCW 28A.710.080. The Court's opinion does not specifically address district-authorized charter schools, but it should do so because they warrant a different result under the Court's rationale.

Two district-authorized charter schools are operating in the Spokane School District, and the District is actively seeking to keep these

schools open. Gering Decl. at 3 (attached to the State's Motion to Stay the Mandate). The Spokane School District's contractual relationships with its charter schools give the District at least as much control over the charter schools as districts have over the other public school programs described above. For example, the contract between the Spokane School District and its charter schools contains 13 pages of provisions governing educational programs, performance standards, operational requirements, facilities, and financing and budget requirements. Gering Decl, Ex. B at 6-19. And the contract provides: "a material violation of any provision of the Contract may be grounds for District intervention, termination, or revocation of the Contract pursuant to the terms of the Contract and provisions of the law." *Id*. at 19. In other words, the Spokane charter schools are ultimately "subject to, and under the control of, the qualified voters of the school district." *Bryan*, 51 Wash. at 504. This Court should hold that these schools can receive funds the Court has deemed constitutionally restricted.

This Court should also hold that the sections of I-1240 authorizing school districts to approve and oversee charter schools are severable. I-1240 contains a severability clause, which this Court should presume is effective unless it is "obviously false." Initiative 1240, § 402; *League of Education Voters v. State*, 176 Wn.2d 808, 827, 295 P.3d 743 (2013). This test is a high bar for disregarding a severability clause, grounded largely in

deference to the people's initiative power. *See McGowan v. State*, 148 Wn.2d 278, 296, 60 P.3d 67 (2002); *State v. Anderson*, 81 Wn.2d 234, 239, 501 P.2d 184 (1972). District-authorized charter schools are distinct, and they do not suffer the same flaw the majority identified with the rest of the act. Here, the Spokane School District has affirmatively authorized these charter schools and wishes to retain them. It is far from "obviously false" that the voters would have approved district-authorized charter schools without commission-authorized charter schools. Put another way, district-authorized charter schools serve the voters' intent even absent commission-authorized charter schools. *See League of Education Voters*, 176 Wn.2d at 828. This Court should conclude that district-authorized charter schools are constitutional and severable.[3]

C. The Court Should Reconsider Its Holding That I-1240's System for Funding Charter Schools is Unconstitutional

The State also respectfully asks the Court to reconsider its analysis of the system the people chose to fund charter schools under I-1240. That analysis is troubling for two primary reasons. First, the opinion relies on factually and legally incorrect assertions made by the Plaintiffs as to how

[3] Recognizing that schools ultimately overseen by school districts may receive constitutionally-restricted funds would be useful even if the Court concludes that the portions of I-1240 allowing district-authorized charter schools are not severable. This is because it would aid the Spokane School District's efforts to develop options for students to remain in their current schools. Gering Decl. at 3. A holding that a contracted program can receive restricted funds provides the District with workable options for allowing students to remain in their schools, even if those schools are not charter schools.

the State funds public education, and the Court then bases its reasoning on those false premises; in doing so, the Court, perhaps inadvertently, calls into question the State's method of funding a wide range of public school programs not controlled by school districts. And second, the Court put the burden on the State to prove the constitutionality of I-1240's funding mechanism, rather than putting the burden on those challenging the initiative as the Court has always done in the past. This combination of problems threatens the State's ability to defend a wide range of educational programs important to the people of this State.

Unfortunately, the Court's discussion of the funding of charter schools relies on a number of factually and legally erroneous claims made by Plaintiffs. In doing so, the Court conflates the funding of common schools with the funding of public schools more generally. Under I-1240, charter schools receive allocations from the State basic education appropriation based on student enrollment, just like many other public school programs. RCW 28A.710.220(2). Adopting Plaintiffs' reasoning, the Court finds this problematic because, the Court says: "the source of funds for the operation of charter schools is the basic education moneys *that are otherwise dedicated to the operation of common schools*." Majority Op. at 13 (emphasis added). But this statement is factually and legally incorrect.

As a factual matter, the State does not restrict the "basic education" appropriation only to common schools. Basic education funds follow the student to a wide range of public school programs not controlled by school districts, from tribal compact schools to the Washington Youth Academy, the University of Washington Transition School, and Running Start. RCW 28A.715.040; WAC 392-124-100; RCW 28A.185.040(7); RCW 28A.600.310. In finding to the contrary, the Court relied on Plaintiffs' citation to RCW 28A.150.380(1), which says that the legislature will make appropriations for common schools in every biennial budget. Majority Op. at 15. But as the dissent correctly points out, the very next sentence of that statute says that the legislature may also appropriate funds for other programs. Dissent at 9-10 (citing RCW 28A.150.380(2)).

Moreover, as a legal matter, this Court has never before held that the constitutional restrictions on common school funds apply more broadly to the money used to fund basic education. In fact, the Court has repeatedly held the opposite. In *Bryan*, the Court explicitly recognized that the legislature is entitled to fund non-common school, public education programs through unrestricted funds: "It is not that the Legislature cannot make provision for the support of a model training school, but in its attempt to do so, it has made provision for it out of the wrong fund." *Bryan*, 51 Wash. at 506; *see also Pacific Mfg. Co. v. Sch. Dist. No. 7*, 6

Wash. 121, 122, 33 P. 68 (1893). In *State ex rel. State Bd. for Vocational Educ. v. Yelle*, 199 Wash. 312, 91 P.2d 573 (1939), as the dissent points out, Dissent at 11, after the Court held that the State was improperly using common school funds to support vocational education, the State simply funded the same programs through general fund expenditures, as it does to this day and as it should be allowed to do for charter schools.

In more modern times, this Court has repeatedly concluded that funding for public schools certainly exceeds the funding for common schools. In *Moses Lake*, this Court recognized that the funds at issue there were public school funds but not common school funds. *Moses Lake*, 81 Wn.2d at 558-60 ("While the instant funds may have been public school funds, none were 'common school funds.' "). Then in *Seattle School District*, this Court explained that "the constitutional draftsman must have contemplated that funds, [o]ther than common school funds, were available for [a]nd used to educate our resident children." *Seattle Sch. Dist.*, 90 Wn.2d at 521-22.

As a practical matter, because the "paramount duty" created by article IX, section 1 is a duty to "make ample provision for the education of all children," not just a duty to make ample provision for "common schools," the constitution itself requires "basic education funding" to be more than just "common school funding."

By adopting Plaintiffs' argument conflating the legislature's appropriation for public education with common school funds, this Court also does real harm to students in public education programs that are not controlled by school districts. As noted above, several are currently funded through per-student allocations under the basic education appropriation, including tribal compact schools, the Washington Youth Academy, the University of Washington Transition School, high school programs in technical colleges, and Running Start. RCW 28A.715.040; WAC 392-124--100; RCW 28A.185.040(7); RCW 28A.150.275; RCW 28A.600.310. These educational programs are certainly proper recipients of public education funds, but the majority's analysis calls their current funding into serious question. The Court's reasoning also limits the legislature's future flexibility in funding the overall public school system.

Instead of hamstringing the legislature by creating a restriction on how it can appropriate funds for public education at a time when maximum flexibility is needed, this Court should reconsider its approach to the funding section of the opinion. The Court should hold what it has repeatedly held: that public school funding is necessarily broader than just common school funding, and that the State can use money not restricted to the common schools to fund programs not run by school districts.

The majority should also reconsider its approach to the burden of proof in this case. In every prior facial challenge to an initiative, the Court has placed the burden of proof on the initiative's challengers to show that it cannot be implemented in a constitutional manner. *See, e.g., Citizens for Responsible Wildlife Mgmt. v. State,* 149 Wn.2d 622, 631, 71 P.3d 644 (2003); *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000). Here, however, the Court required the State to "demonstrate that . . . restricted moneys are protected from being spent on charter schools." Majority Op. at 15.

This approach is troubling not only because it deviates from precedent without explanation, but also because it potentially undermines a wide range of educational programs beyond charter schools. Plaintiffs' only evidence that charter schools will receive restricted funds is that charter schools are funded on a per-student basis from the basic education appropriation, and a small share of that appropriation comes from funds restricted to common schools. But as noted above, the same could be said of countless other important education programs, from tribal compact schools to skill centers to Running Start. Until this opinion, the State could rest assured that those programs could never be undermined, because no challenger could show that the tiny share of the basic education allocation those programs use would necessarily require the use of restricted

common school funds. If Plaintiffs no longer need to make such a showing, then such programs may be subject to challenge.

In short, the Court should reconsider its funding analysis. As it had always done previously, the Court should require Plaintiffs to prove that I-1240 cannot be constitutionally implemented, and the Court should hold that Plaintiffs have failed to make that showing.

D. The Court Should Also Reconsider Its Severability Analysis

Even if the Court declines to revisit its holding about I-1240's funding mechanism, it should reconsider whether striking down that funding system requires invalidating the entirety of I-1240. Under this Court's precedent, it does not.

Whether invalidating I-1240's funding system requires invalidating the entire act of the people is essentially a question of voters' intent: would the voters have passed I-1240 without the funding mechanism, and would such an enactment have been pointless? *See, e.g., League of Education Voters*, 176 Wn.2d at 827 (citing *State v. Abrams*, 163 Wn.2d 277, 285-86, 178 P.3d 1021 (2008)).

Here, the voters approved a severability clause stating that even if one portion of I-1240 was invalidated, they wanted the remainder to take effect. Initiative 1240, § 402. In the past, this Court has honored such

clauses unless they were "obviously false." *League of Education Voters*, 176 Wn.2d at 827. Here, the majority opinion never recites this standard.

Instead, the majority asserts that it cannot "be believed that voters would have approved [I-1240] without its funding mechanism." Majority Op. at 19. But the voters themselves have disproved that claim. In recent years, voters passed at least four major education initiatives: Initiative 728, Initiative 732, Initiative 1351, and Initiative 1240.[4] Two of those—I-732 and I-1351—made no attempt to specify how they would be funded, and both were vastly more expensive than I-1240.[5] But the voters passed them anyway. This is not to say that the people did anything wrong in passing these initiatives; under current law, the people have every right to pass policy measures and leave it to the legislature to decide how to fund them. But it is unfair to penalize initiative sponsors who specify how their policies would be funded. Put another way: I-1240's drafters could easily have done what many other successful initiative sponsors have done: omit any discussion of how to fund the policy. The majority says that obviously would have failed; the people have repeatedly disagreed.

[4] Laws of 2001, ch. 3-4; Laws of 2013, ch. 2; Laws of 2015, ch. 2.

[5] Voters were informed that I-1240 was projected to cost the State roughly $3 million in the first five years of implementation. 2012 Voters' Pamphlet, Fiscal Impact Statement. Meanwhile, voters were informed that I-1351 was projected to cost the State roughly $4.7 *billion* in the first five years of implementation. 2014 Voters' Pamphlet, Fiscal Impact Statement.

The Court should hold that even if I-1240's funding mechanism is invalid, the remainder is severable. It is not "obviously false" that the people would have passed I-1240 without its funding source.

IV. CONCLUSION

For the reasons above, this Court should reconsider its opinion and: (1) remove footnote 10; (2) hold that "common schools" must be subject to some measure of local school board control, but not "complete control"; (3) hold that Plaintiffs have failed to meet their burden of proving that charter schools under I-1240 will necessarily use restricted common school funds; and (4) hold that even if I-1240's funding provisions are invalid, the remainder of the initiative is severable.

RESPECTFULLY SUBMITTED this 24th day of September, 2015.

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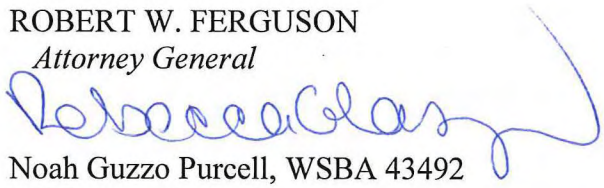

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