IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 89714-0

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 CHARTER SCHOOL, INITIATIVE 1240 SPONSOR TAINA DE SÁ CAMPOS, and MATT ELISARA,

Respondents/Intervenors.

FORMER ATTORNEYS GENERAL AMICI CURIAE BRIEF IN SUPPORT OF RECONSIDERATION

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INTEREST OF AMICI

The amici are the four living former Attorneys General of Washington: Slade Gorton, Kenneth O. Eikenberry, Christine O. Gregoire, and Robert M. McKenna. One of the Attorney General's primary duties is to defend state laws enacted by the legislature and by the people. The amici have a combined 44 years of experience, from 1969 to 2013, doing just that.

This brief does not concern the merits of charter schools. Nor does it concern the validity of the charter schools act per se. Rather, the amici are deeply concerned about the potential unintended consequences of the reasoning in the Majority's opinion. The opinion will make it very difficult for the current and future Attorneys General to defend challenges to non-common school education funding that is appropriated from the state general fund. The Majority's opinion also puts at risk other appropriations from the general fund that pay for programs such as children and family services, mental health, developmental disabilities, and aging and adult service, to name just a few. Challenges to these programs based on the reasoning of the Majority's opinion may not be successful, and amici do not believe that the Majority wishes to put these programs at risk, but that is the opinion's potential effect.

Amici have unique experience and share a perspective on the job of defending state laws; it is important for the Court to have that perspective.

ARGUMENT

1. The Majority's Opinion's Reasoning Calls Into Question The Legislature's Ability To Make Appropriations From The General Fund For Any Purpose Save The Common Schools

Under the Majority's reasoning, commingling revenues from the constitutionally protected common school levy with other general fund revenues limits use of the general fund to the common schools. The Majority's conclusion is based on four statutes. *League of Women Voters of Washington v. State of Washington*, No. 89714-0 (Wash. Sept. 4, 2015), Slip Op. at 12-13.

The first statute, RCW 28A.710.220(2), requires the superintendent of public instruction to allocate funding for approved charter schools, and cross-references RCW 28A.710.220(2) which provides that "[c]ategorical funding must be allocated to a charter school based on the same *funding criteria* used for noncharter public schools." (Emphasis added.) The second statute, RCW 28A.510.250, directs the superintendent of public instruction to "*apportion from the state general fund*...the proportional share of the total annual amount due and apportionable" for the school districts. (Emphasis added.)

The third and fourth statutes concern the state property tax levy. RCW 84.52.065 provides that "the state shall levy for collection in the following year *for the support of common schools of the state a tax* of

three dollars and sixty cents per thousand dollars of assessed value[.]" (Emphasis added.) And RCW 84.52.067 states: "All property taxes levied by the state for the support of common schools shall be paid into the general fund of the state treasury as provided in RCW 84.56.280."

From these four statutes the Majority concludes that "under the terms of the Act's provisions 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. *See RCW 28A.510.250; RCW 28A.710.220(2); RCW 84.52.065, .067.*" Slip. Op. at 12-13 (emphasis added) (footnote omitted). In other words, the Majority reasons that by commingling state property tax revenues with other general fund revenues, the legislature has contaminated the general fund. The Majority explains that the State cannot "demonstrate that these restricted moneys are protected from being spent on charter schools." Slip Op. at 15.

The Majority's opinion may be summed up in this syllogism:

- The general fund contains funds constitutionally dedicated to common schools by Art. IX, sec. 2 and 3 (RCW 84.52.065, .067).
- The law requires that charter schools be funded from the general fund (RCW 28A.710.220(2), RCW 28A.510.250).
- Therefore the charter school law violates Art. IX, sec. 2 and 3.

The problem is that there is no logical way to limit the Majority's holding to charter schools. For example, state law authorizes the

superintendent of public instruction to enter into state-tribal education compacts. RCW 28A.715.005(3). Under the Court's decision, tribal compact schools are not common schools. State-tribal compact schools receive state general fund appropriations. RCW 28A.715.040(2) provides that "[f]unding for a school that is the subject of a state-tribal education compact shall be apportioned by the superintendent of public instruction according to the schedule established under RCW 28A.510.250, including general apportionment, special education, categorical, and other nonbasic education moneys." This language is similar to the charter schools language in RCW 28A.710.220(2) upon which the Majority's opinion relies, with the same cross-reference to RCW 28A.510.250.

Another example is the program for highly capable students to attend the University of Washington. RCW 28A.185.040(1) authorizes the superintendent of public instruction to contract with the University for the education of highly capable students below age eighteen. Regarding funding, RCW 28A.185.040(2) provides that the "superintendent of public instruction shall allocate directly to the University of Washington all of the state basic education allocation moneys, state categorical moneys...generated by a student while attending an early entrance program or transition school at the University of Washington." RCW 28A.185.040(2) requires the use of basic education allocation moneys to fund the highly capable student program.

Applying the Majority's syllogism, there is no distinction between charter schools and schools established by state-tribal education compacts or the highly capable students program at the University of Washington:

- The general fund contains funds constitutionally dedicated to common schools by Art. IX, sec. 2 and 3 (RCW 84.52.065, .067).
- State-tribal compact schools and the highly capable student program at the University of Washington are required to be funded from the general fund.
- Therefore state-tribal compact schools and the highly capable student program violates Art. IX, sec. 2 and 3.

Amici are deeply concerned that the rationale of the Majority's opinion may be used to disrupt many facets of the state's public education system that have grown up outside the common school model. And their concern does not end there. Once the general fund has been contaminated by commingling the general fund with common school funds, a good argument can be made that no expenditures from the general fund may be made except for the common schools.

The thrust of the Majority's decision is that the state cannot track the constitutionally protected state property tax levy within the general fund to ensure that it is does not fund charter schools. The Majority's opinion points out that the "[s]tate does not segregate constitutionally restricted moneys from other state funds. Nor can it demonstrate that

these restricted moneys are protected from being spent on charter schools." Slip Op. at 15. The legislature appropriates general fund dollars to support critical programs such as children and family services, mental health, developmental disabilities, and aging and adult service, just to name a few. Laws of 2015, 3d Spec. Sess., ch. 4, §§ 202, 204, 205, 206. As with the charter schools, the state does not segregate constitutionally restricted money and cannot demonstrate that restricted common school funds are not being used to meet other critical state needs. The Majority's opinion raises the specter of serious unintended consequences.

2. The Court Should Reconsider Its Decision That Charter School Funding Violates Article IX, Sections 2 and 3

The Court should reconsider its decision. Reconsideration is appropriate because commingling common school funds with the general fund does not in fact contaminate the general fund. Amendment 107 to the Washington Constitution, adopted in 2012, requires that the state property tax for the common schools be deposited in the general fund. Amendment 107 amended Article VIII, section 1, which governs the state debt limit. Amendment 107 expanded the definition of "general state revenue" to include "moneys received from ad valorem taxes levied by the state and deposited in the general fund in each fiscal year[.]" According to the explanatory statement in the Voters Pamphlet, "the amendment would change the definition of 'general state revenues" to include the state property tax, starting July 1, 2014. This change would allow the state

property tax to be included in "general state revenues" when calculating the debt limit."[1] Office of Secretary of State of Washington, 2012 General Election Voters' Guide, *available at* https://wei.sos.wa.gov/agency/osos / en/press_and_research/PreviousElections/2012/General-Election/Pages/ Online-Voters-Guide.aspx. It is unreasonable to conclude that the people intended to restrict the use of the general fund to common schools when they enacted Amendment 107.

In addition, the Majority's opinion is out of step with the decisions of other courts that have dealt with similar accounting issues. In *Montanans For The Responsible Use Of The School Trust v. Darkenwald*, 119 P.3d 27, 328 Mont. 105 (2005) the issue was: "Whether the State's commingling of the interest earned on school trust income...into the State General Fund (General Fund) constitutes a breach of the State's duties under the Montana Constitution and the Enabling Act." *Montanans*, 119 P.3d at 30. In Montana the "Constitution and the Enabling Act impose a

[1] The explanatory statement also explained that "The state property tax is dedicated by statute to the support of common schools, and that dedication to schools would not be changed by the amendment." Office of Secretary of State of Washington, 2012 General Election Voters' Guide, *available at* https://wei.sos.wa.gov/agency/osos/en /press_and_research/PreviousElections/2012/General-Election/Pages/Online -Voters-Guide.aspx. The Arguments For the measure in the Voters Pamphlet also assured voters that the amendment: "Doesn't take property taxes away from schools – these taxes must be spent on schools under current law." *Id.*

trust duty on the State regarding school trust lands." *Id.* The "Legislature appropriated $440 million in K-12 base aid, approximately ten times more money for public schools than the $45.2 million generated from school trust lands. The State also has kept accounting records that allow beneficiaries to determine the revenues received from any particular tract of school trust land. *Id.* at 32. The plaintiffs claimed that the "statutory scheme fails to earmark and keep separate the interest income produced from school trust revenues because the State pools all funds and accounts, including the General Fund, and credits the interest accumulated to the General Fund and not to any special account." *Id.* at 33.

The Montana Supreme Court rejected this argument. According to the Court, the "State's commingling, however, does not translate necessarily into a violation of its trust duties to distribute funds deriving from school lands to public schools pursuant to Section 11 of the Enabling Act[.]" *Montanans*, 119 P.3d at 33. In fact, "Land Board accounted for the exact amount of interest...deposited into the General Fund and [the plaintiffs] also can ascertain the legislative appropriation to public schools from the General Fund. This amount, as the District Court pointed out, far exceeds any interest earned...derived from the school trust corpus." *Id.* at 34. The district court found that the legislature "appropriated $440 million in K-12 base aid, approximately ten times more money for public schools than the $45.2 million generated from school trust lands." *Id.* at 32.

The same is true in this case. As the dissent explained, the appropriation for public schools in fiscal year 2015 was about $7.09 billion from the general fund. Of this amount, only $2.003 billion was from the state property tax for common schools. Dissent Slip Op. at 5.

Another decision that found no constitutional violation in commingling restricted school funds with general fund dollars is *Teachers' Retirement System Of Idaho v. Williams*, 374 P.2d 406, 84 Idaho 467 (1962). Under the Idaho constitution, the state school fund and interest thereon "only shall be expended in the maintenance of the schools of the state." The legislature appropriated $200,000 from the general fund to the public school fund, earmarked for the teachers' retirement system. *Williams*, 374 P.2d at 469. The legislature then appropriated $200,000 from the public school fund to the teachers' retirement system. *Id.* at 470. The case arose when the teachers' retirement system requested the transfer of $100,000 from the public school fund. The challenge was based on the theory that "moneys placed in the 'public school income fund' become commingled with income from the 'public school fund' and that any withdrawal therefrom would include income from the 'public school fund,' which under Constitution…can only be withdrawn and expended in the support and maintenance of the schools of the state." *Id.* at 471.

The Idaho Supreme Court rejected this theory because the appropriation was "earmarked for the Teachers' retirement system, and

thus prevented from becoming commingled with other moneys in that fund." *Williams*, 374 P.2d at 408. The court stated: "It involves no more than mere bookkeeping entries: first, the recording of a transfer of the requested $100,000 from the general fund to the public school income fund; and second, the recording of a transfer of that same $100,000 from the public school income fund to the teachers' retirement system." *Id.* at 409.

The same is true in this case. By law, the state levy is earmarked for the common schools. There is no requirement that each individual dollar be tracked.

CONCLUSION

For the foregoing reasons, the Court should reconsider its conclusion that commingling restricted commons school funds with the general fund renders funding for charter schools unconstitutional.

RESPECTFULLY SUBMITTED this 28th day of October, 2015

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NO. 89714-0

SUPREME COURT OF THE STATE OF WASHINGTON

LEAGUE OF WOMEN VOTERS OF WASHINGTON, et al., Respondents, v. STATE OF WASHINGTON, Appellant.	FORMER ATTORNEYS GENERAL MOTION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF RECONSIDERATION

Pursuant to RAP 12.4(i), the four living former Attorneys General of Washington respectfully request permission to file an amici curiae brief in support of the State of Washington's motion for reconsideration.

I. INTEREST OF THE APPLICANTS

Amici are the four living former Attorneys General of the State of Washington: Slade Gorton, Kenneth O. Eikenberry, Christine O. Gregoire, and Robert M. McKenna. Their interest in this case simple. One of the Attorney General's primary duties is to defend state laws enacted by the legislature and by the people. The amici have a combined 44 years of experience, from 1969 to 2013, doing just that.

The amici brief does not concern the merits of charter schools. Nor does it concern the validity of the charter schools act per se. Rather, the amici are deeply concerned about unintended consequences of the

Majority opinion's reasoning. The opinion will make it very difficult for the current Attorney General and future Attorneys General to defend challenges to non-common school education funding that is appropriated from the state general fund. The Majority opinion also puts at risk other appropriations from the general fund that pay for programs such as children and family services, mental health, developmental disabilities, and aging and adult service, to name just a few. Challenges to these programs based on the Majority opinion's reasoning may not be successful, and amici do not believe that the Majority wishes to put these programs at risk, but that is the Majority opinion's potential effect.

Pursuant to RAP 10.6(a), counsel for the former Attorneys General requested consent of the parties to file the amici brief. Counsel for the Respondent State of Washington and counsel for the Respondent/ Intervenors gave their consent. Counsel for the Appellant did not. Nevertheless, the Court should grant the motion because the brief will assist the Court.

II. APPLICANTS' FAMILIARITY WITH THE ISSUES

Amici have reviewed the Majority opinion in this case and have come to the conclusion that it will lead to unintended consequences that could potentially be very damaging to the State of Washington.

III. ISSUES THE AMICI CURIAE WILL ADDRESS

1. Whether the reasoning in the Majority opinion could invalidate the Legislative appropriations from the general fund for non-common school public education and other programs critical to the State.

2. Whether the Court should reconsider its holding that the funding of charter schools violates Article IX, section 2 and 3, of the Washington Constitution.

IV. REASONS ADDITIONAL ARGUMENT IS NECESSARY

Additional argument is necessary because the motion of the State of Washington necessarily focuses on education and charter schools. The amici brief looks more broadly at the impact the Majority's reasoning may have on general fund spending beyond charter schools. The Majority's rationale could result in additional litigation and could threaten other critical state programs. It is important that the Court understand the potential impact of the Majority decision.

RESPECTFULLY SUBMITTED

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