



## Washington State Senate

August 21, 2015

The Honorable Speaker Frank Chopp  
PO Box 40600  
Olympia, WA 98504

The Honorable Senator Sharon Nelson  
PO Box 40434  
Olympia, WA 98504

The Honorable Representative Dan Kristiansen  
PO Box 40600  
Olympia, WA 98504

RE: Open letter from members of the Majority Coalition Caucus

VIA HAND DELIVERY

Dear Speaker Chopp, Representative Kristiansen and Senator Nelson,

We trust that you have had an opportunity to review the recent order from the Washington State Supreme Court ("the court") in the McCleary v. State case. The order attempts to enforce a fine against the state of Washington and its citizens in the amount of \$100,000 a day as a contempt sanction. The court also purports to create a new account for basic education to receive the funds from the sanction. The order notes that the sanction could be vacated if the governor calls a special session and the legislature meets to provide a "plan" for funding education. This extraordinary order presents a clear threat to our state legislature as an institution. It demands a frank and open discussion among members and the constituents we represent regarding a proportional response.

We have made great progress in meeting our constitutional obligation to amply fund education through bipartisan agreement and the legislative process. As noted in a brief filed by the attorney general on the state's behalf,

*Since 2012 the State has increased biennial operating funding for K-12 education by nearly \$5 billion—from \$13.4 billion to \$18.2 billion . . . This amounts to an increase of nearly \$2,500 per pupil per year. The 2015 Legislature not only increased K-12 funding by approximately \$2.9 billion over the prior biennium, but also appropriated \$811 million for capital construction supporting K-12 education.*

Legislative members will continue to debate differing ideas on the best way to improve education via reforms, prioritizing existing resources, and finding sources of new funding. These differences will be resolved through the legislative process which is the most effective means of harmonizing various geographic, economic, and philosophic divisions within a political body.

However, our concerns with the order have nothing to do with the surface issue of education funding. It is because the court's order circumvents this process, that it represents a direct challenge to the legislative role within our state constitutional system.

To date, the legislature has worked to address the court's demands by showing deference. When the court issued its initial opinion in McCleary in 2012, members in both chambers and parties privately and publicly expressed concerns, but subsequently formed a joint task force and authorized reports on its progress in meeting the court's demands. In the most recent budget, in compliance with the four year balanced budget statute, the legislature is scheduled to fully fund all the elements of HB 2776 (2010) by the statutorily imposed 2018 deadline. Our purpose in taking these actions was to avoid a direct confrontation with the court and a constitutional crisis. However, in light of the court's most recent order, it appears that this forbearance was misinterpreted as weakness or acquiescence to the court's actions.

The court's order directly contravenes state and federal constitutional provisions, politicizes the judiciary, and demonstrates disdain for other co-equal branches of government. Indeed, it is significant that the governor and legislature have never been served as parties to the case. While the positions outlined below are not exhaustive, they demonstrate the uncharted legal waters into which the court has so fecklessly wandered. It is worth noting that no prior court in our state's 126 year history has seen fit to issue such an order.

### **The Court's Order Violates the State Constitution**

The court's order arguably violates at least five separate provisions of the state constitution. Article II, Section 1 of the state constitution vests legislative power in the legislature. This power includes the power of taxation which is prohibited from being "suspended, surrendered, or contracted away" under Article VII, section 1. Article VIII, section 4 provides that "[n]o moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law . . . "

In order to ensure that legislators are able to execute their constitutional duties unfettered by civil or criminal sanction, two constitutional provisions explicitly exempt them from civil or criminal process for statements in debate or while the legislature is in session. Article II, sections 17 and 16. These constitutional provisions outlining the legislative authority of taxation, appropriation, and immunity from judicial process are at the core of the functioning of this branch of government.

The court's sanctions are directly aimed at legislative actions. However, the court has absolutely no authority to force the legislature to tax or appropriate state funds in a particular manner- anymore than the legislature could pass a law requiring the court to rule a certain way in a particular case. Its ability to gain jurisdiction over legislators through civil and criminal process is limited for this precise purpose- to prohibit the court or those who would use its procedures from commandeering legislative power.

The court's direction for \$100,000 a day to be deposited in an account for basic education clearly constitutes an appropriation. This runs afoul of the state constitution which provides that appropriation must be by law. In sanctioning the state, the court has effectively hijacked the appropriation authority of the state legislature. In the face of these clear constitutional provisions, the court is without power to hold the state in contempt for what amounts to a policy disagreement over the Legislature's exercise of legislative power.

## The Court's Order Violates the Federal Constitution

The court's order also violates at least two provisions of the federal constitution. Article IV, Sec 4 of the United States Constitution provides that "the United States shall guarantee to every State in this Union a Republican Form of Government..." That free exercise of legislative power is central to a republican form of government was reinforced by the United States Supreme Court in Duncan v. McCall. The essence of the republican form of government is the sovereign authority of the people over their government. Duncan v. McCall, 139 U.S. 449 (1891). In Duncan, the Court further noted "...the people are the source of all political power, but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people. Duncan at 461. (citing Luther v. Borden, 48 U.S. 1, 7 How. 1, 12 L. Ed. 581 (1849). Duncan continued,

*By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.* 11 S.Ct. 573, 139 U.S. 449, Duncan v. McCall, (U.S.Tex. 1891)(emphasis added)

Since Washington recognizes the federal Constitution as supreme, and Article IV, section 4 of that document requires the national government to ensure a "republican form of government for each state," the state must ensure the proper separation of powers articulated in its constitution and required by the federal document. As described in the section above, the court's order violates several clear provisions of the state constitution and undermines the legislative power reposed by the people in the state legislature. Without a republican form of government, inalienable rights guaranteed by the U.S. Constitution cannot be protected from autocratic rule.

The court's order also runs afoul of Article IV, section 1 of the United States Constitution. That clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." The court is currently sanctioning the legislature for failing to debate and enact laws and appropriate funds in amounts it deems necessary. Such sanctions implicate the federal privileges and immunities clause because the legislative immunity of legislators from compulsion to debate and discuss, and pass laws within the legislative sphere is inherent in the legislative power and necessarily implied by Washington State constitution's separation of powers doctrine.

The source of the privileges and immunities are longstanding precepts of the common law which are indivisibly embodied in the separation of powers. For example, in Tenney v. Brandhove, 341 U.S. 367, 372 (1951), Justice Frankfurter described the immunity as "the privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings...." See Tenney, 341 U.S. 367, 372. Frankfurter stated:

*Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution.*

...  
*The reason for the privilege is clear. . . . 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.' The [Speech and Debate clause] was a reflection of political principles already firmly established in the States. Tenney, 341 U.S. at 372-74 (quoting II Works of James Wilson (Andrews ed. 1896), p. 38) (citations omitted)*

These political principles are inherent in the legislative power vested by Article II of the Washington State Constitution. Our doctrine of separation of powers means that neither the governor nor a judge may interfere with legislative business. Legislators may not be made answerable in any other forum but are answerable only to the voters at the polls. If judges may summon or sanction legislators any time that any party disagrees with legislation, or if legislators may be held liable for injuries that arise from the passage of laws (bad or good) then the judges of Washington State can effectively suspend the legislature by a flurry of subpoenas, injunctions, and sanctions. While a court has the inherent authority under its mandamus power to compel a subordinate public official to fulfill a clear legal duty or rule on legislation after it has undergone the legislative process, there is no reason to sanction state legislators about legislative actions except to harass, intimidate and assert the supremacy of the judiciary over the representative branch.

### **The Court's Order Involves the Court in a Political Question**

Under the "political question" doctrine the United States Supreme Court has refused to decide cases in two kinds of circumstances: first, if a power has been consigned exclusively to another branch of government; or secondly, if there are no manageable standards by which a court could decide the case. This basic and fundamental tenant of judicial review should be employed by the court in this case. The purpose of the doctrine is to avoid involving the court in purely political matters.

There can be no more political product of legislative work than a state budget. The weighing and balancing of priorities reflected in the state budget is a difficult exercise. To date the court has only heard from one stakeholder group (advocates for education) in reaching its opinion. Is the court going to entertain amicus briefs from all the other stakeholders seeking funding for their interest groups whose funding is now potentially jeopardized by the court's sanction? Is the court going to order the legislature to raise taxes or make other cuts in its budget to reach the funding level it has dictated? The easy part of budgeting is to decide to spend more money on a politically popular budget item. The hard part is figuring out how to do it. Via its sanction, the court finds itself in a purely political sphere without the procedures expertise or resources necessary to accomplish this complex task.

## The Court's Order Demands a Legislative Response

In sum, the court attempts to coerce compliance with its interpretation of one provision of the state constitution while shredding others. In a similar dispute with United States Supreme Court in 1861, Abraham Lincoln questioned "[a]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" We must also guard against a similar myopic approach from our court.

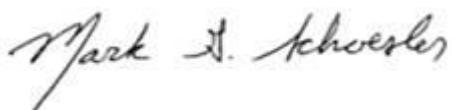
The constitutional crises that we and the court were warned about is here. We have all taken oaths to uphold the state constitution. We owe to our constituents and their children not only amply-funded schools but a functioning republic in this state. It is now time for us to explore the range of political, legal, and constitutional responses that we have at our disposal. Please let us know at your earliest convenience how you and your respective caucuses intend to proceed.

Sincerely,

Undersigned members of the Senate Majority Coalition Caucus



Senator Mike Padden



Senator Mark Schoesler



Senator Michael Baumgartner



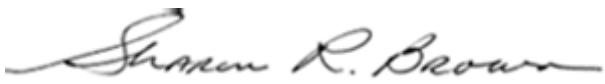
Senator Curtis King



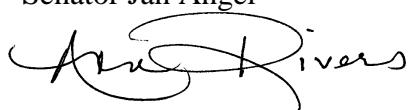
Senator Doug Erickson



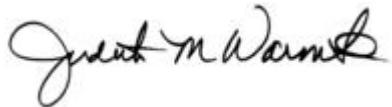
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Senator Ann Rivers



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*Tim Sheldon*

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