EDUCATION — CHARTER SCHOOLS — WASHINGTON SUPREME COURT HOLDS CHARTER SCHOOL ACT VIOLATES STATE CONSTITUTION. — *League of Women Voters of Washington v. State*, 355 P.3d 1131 (Wash. 2015).

As its "paramount" constitutional duty, Washington State must amply fund a "general and uniform system of public schools."[1] This system must include common schools with dedicated funding.[2] In 2012, voters passed Initiative 1240[3] ("the Act"). The Act authorized the creation of forty charter schools, which it defined and funded as common schools.[4] Last fall, in *League of Women Voters of Washington v. State*,[5] the Washington Supreme Court struck down the Act.[6] The court held that charters were not common schools because local voters did not control them; therefore, they could not receive common school funds.[7]

Dictum in the court's original opinion offered an additional ground for the Act's invalidity: charters breached the constitution's "uniform system" requirement.[8] The court later ordered this discussion deleted.[9] Instead, the court should have emphasized and expanded upon it. Stressing the Act's creation of heterogeneous charter schools paralleling and competing with the common schools of the uniform public system would have explained the legislature's inability to implement the Act by appropriating alternative funds. Moreover, it would have clarified Washington's continued authority to support non-common school enrichment programs as part of the public education system.

Washington had traditionally provided education through school dis tricts overseen by the State Board of Education and the Superintendent of Public Instruction (SPI).[10] The Act established an alternative

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[1] WASH. CONST. art. IX, §§ 1–2; *see* Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 96 (Wash. 1978).

[2] WASH. CONST. art IX, §§ 2–3 (dedicating a common school fund, common school construction fund, and state tax for common schools "exclusively" to common schools, *id.* § 3).

[3] Initiative Measure No. 1240 (approved Nov. 6, 2012), https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2012/General-Election/Documents/I-1240_complete_text.pdf [http://perma.cc/NJ4N-FYYH] (codified in scattered sections of WASH. REV. CODE § 28A (2014)); *see also* WASH. REV. CODE § 28A.710.

[4] Initiative Measure No. 1240, §§ 202(1), 215(1), 220, 223(1) (codified at WASH. REV. CODE §§ 28A.710.020(1), 28A.710.150(1), 28A.710.220, 28A.710.230(1)).

[5] 355 P.3d 1131 (Wash. 2015).

[6] *Id.* at 1133.

[7] *Id.* at 1137.

[8] League of Women Voters of Wash. v. State, No. 89714-0, slip op. at 11 n.10 (Wash. Sept. 4, 2015).

[9] Order Changing Opinion and Denying Further Reconsideration, *League of Women Voters*, 355 P.3d 131 (No. 89714-0).

[10] *See* T.J. KELLY & CALVIN W. BRODIE, OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, ORGANIZATION AND FINANCING OF WASHINGTON PUBLIC SCHOOLS 27–35 (2011), http://www.k12.wa.us/safs/PUB/ORG/13/Final%20Edition%202013.pdf

educational scheme. It permitted private nonprofits to operate state-funded schools[11] and defined these charter schools as "public, common school[s]."[12] Charters did need to comply with the state's basic education goals, essential academic learning requirements (EALRs), and testing regime.[13] Yet the Act "free[d]" them from "many regulations" imposed on other common schools, including those governing curricula, personnel, and instructional requirements.[14]

Under the Act, either a statewide charter school commission or host school districts would authorize and monitor charters.[15] The appointed commission was an independent agency, exempt from oversight by the Board of Education or SPI.[16] Though authorizers would specify "performance expectations,"[17] these had to conform to standards of the pro-charter National Association of Charter School Authorizers.[18] Moreover, oversight could "not unduly inhibit" charters' "autonomy."[19]

The SPI would allocate funds to charter schools based on enrollment using "the same funding criteria used for noncharter public schools."[20] Charters would receive a share of local levies.[21] They could "apply for state grants on the same basis as a school district"[22] and obtain "matching funds for common school construction."[23]

Parents, educators, and educational and civic organizations sued in King County Superior Court for a declaratory judgment of the Act's unconstitutionality and an injunction against its implementation.[24] Ruling on cross-motions for summary judgment, Judge Rietschel found

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[http://perma.cc/QXF2-X33A] The SPI has "supervision over all matters pertaining to public schools." WASH. CONST. art. III, § 22.

[11] WASH. REV. CODE § 28A.710.010(1) (2014).

[12] *Id.* § 28A.710.020(1); *accord id.* § 28A.710.020(2).

[13] *Id.* § 28A.710.040(2)(b). The basic education goals require "opportunities . . . to develop" general competencies such as critical thinking. *Id.* § 28A.150.210. EALRs outline subject-specific goals. *E.g.*, MARY MCCLELLAN & CARY SNEIDER, OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, WASHINGTON STATE K-12 SCIENCE LEARNING STANDARDS (version 1.2 2010) (describing what "students are expected to know . . . in the area of science" but not "*prescrib[ing] teaching methods*" or "*curriculum*," *id.* at 1).

[14] WASH. REV. CODE § 28A.710.005(1)(n)(viii); *see also id.* § 28A.710.040(3).

[15] *Id.* §§ 28A.710.080, 28A.710.100. "[E]xcept as otherwise provided," charters remained "subject to the supervision" of the SPI and State Board of Education. *Id.* § 28A.710.040(5).

[16] *See id.* §§ 28A.710.070(1)–(2), 28A.710.070(8). Significantly, all prospective commissioners needed to demonstrate "commitment to charter schooling." *Id.* § 28A.710.070(3).

[17] *Id.* § 28A.710.160(2); *see also id.* § 28A.710.170.

[18] *Id.* § 28A.710.100(3).

[19] *Id.* § 28A.710.180(2).

[20] *Id.* § 28A.710.220(2).

[21] *Id.* § 28A.710.220(5)–(8).

[22] *Id.* § 28A.710.220(2).

[23] *Id.* § 28A.710.230(1).

[24] Complaint for Declaratory Judgment & Injunctive Relief at 3–8, League of Women Voters of Wash. v. State, No. 13-2-24997-4 SEA, 2013 WL 11109512 (Wash. Super. Ct. Dec. 12, 2013).

the Act's funding provisions unconstitutional but severable.[25] She held that the charters met the constitution's uniformity requirement but were impermissibly designated common schools in light of a lack of local control.[26] Thus, the Act impermissibly diverted revenue from the dedicated common school construction fund to charters.[27]

The Washington Supreme Court heard *League of Women Voters* on direct appeal. Writing for the court, Chief Justice Madsen agreed that the Act misdesignated charters as common schools and illegally granted them access to the common school construction fund; however, she also held the Act's other funding mechanisms invalid.[28] Reversing the superior court's conclusion that the void provisions were severable, she declared "the entire Act unconstitutional."[29]

For Chief Justice Madsen, the case hinged on *School District No. 20 v. Bryan*,[30] which defined common schools as falling under local voter control.[31] Charters failed this requirement because "appointed board[s] or nonprofit organization[s]" ran them.[32] Therefore, the court found charters constitutionally barred from using *any* fund dedicated to common schools: the common school fund, common school construction fund, and state tax for common schools.[33] The court placed in the final category "all money '*allocated* to the support of the common schools'" regardless of its source.[34] The legislature had appropriated the basic education allocation for common schools, a portion of which the Act unconstitutionally redirected to charters.[35] Alternatively, even had the state tax for common schools consisted only of the common school property levy, the court would have prohibited funding charters out of the portion of the education allocation derived from unrestricted revenue.[36] Commingling the state's general fund with its property levy made it impossible to ensure that only common schools drew from the latter.[37] Finally, the Act impermissibly granted charters

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[25] *League of Women Voters*, 2013 WL 11109512, at *4–5.

[26] *See id.* at *3.

[27] *Id.* at *4. As a facial challenge, the trial court avoided other constitutional concerns. *Id.*

[28] *See League of Women Voters*, 355 P.3d at 1133–34. Justices Johnson, Owens, Stephens, Wiggins, and Yu concurred.

[29] *Id.* at 1141.

[30] 99 P. 28 (Wash. 1909).

[31] *League of Women Voters*, 355 P.3d at 1137 (citing *Bryan*, 99 P. at 30).

[32] *Id.* The court had also noted that the appointed statewide commission could establish charters anywhere in the state. *Id.* at 1134.

[33] *Id.* at 1138–39.

[34] *Id.* at 1138 (emphasis added) (quoting State *ex rel.* State Bd. for Vocational Educ. v. Yelle, 91 P.2d 573, 575 (Wash. 1939)).

[35] *Id.* at 1139 (citing WASH. REV. CODE §§ 28A.710.220(2), 28A.150.200, 28A.150.250(1), 28A.150.380(1) (2014)).

[36] *See id.*

[37] *See id.* The property levy is a statewide tax collected for common schools and deposited into the general fund. *See* WASH. REV. CODE §§ 84.52.065, 84.52.067.

restricted common school construction funds.[38] Because these funds were central to the Act's approval and necessary for its operation, the court invalidated the entire Act.[39]

Prior to the opinion's amendment, dictum tucked in footnote ten provided an additional ground for the Act's unconstitutionality: lack of voter control ruptured the requisite *uniformity* of the common school system.[40] *Bryan* required that a uniform system give each child "the same advantages" and subject him "to the same discipline."[41] It highlighted "control through school boards and county superintendents" and a regular procedure for hiring "efficient teachers" as undergirding this uniformity.[42] The legislation in *Bryan* breached uniformity by shifting resources and pupils from common schools under districts' control to academies under the direction of normal schools.[43] Likewise, the Act would "eliminate[] the local voter control that [was] a hallmark of common schools, thereby resulting in different (nonuniform) governance for charter schools."[44] Yet the court declined to elaborate on this observation, preferring to ground its holding on the unconstitutional diversion of common school funds.[45] In fact, it ultimately struck footnote ten following a motion for reconsideration.[46]

Justice Fairhurst concurred in part and dissented in part.[47] Despite agreeing that charters were not common schools, she rejected the facial challenge because the Act did not "expressly require[] the use of restricted funds."[48] She identified the state tax for common schools as the common school property levy. Because this levy "constitute[d] only a fraction of the total appropriation" for public schools, the State could

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[38] *League of Women Voters*, 355 P.3d at 1140 (citing WASH. REV. CODE § 28A.710.230(1)).

[39] *Id.* at 1140–41. Severability was impermissible if an invalid provision was "so connected to the remaining provisions that it [could not] be reasonably believed that" voters would have passed only the valid remainder *or* if that remainder was "useless" to achieve the Act's purpose. *Id.* at 1140. The Act failed both prongs: proponents had sold the Act as a costless shift of revenue from common to charter schools, and the consequent lack of funding rendered charters unviable. *Id.* at 1141. Justice Fairhurst reached the opposite conclusion. First, neither the bill nor the voters' guide stated that charters would use restricted funds. Thus, voters had not presumed their use. *Id.* at 1147 (Fairhurst, J., concurring in part and dissenting in part). Second, the Act still permitted creation of forty charters within five years if the legislature appropriated funds. *Id.* at 1148.

[40] League of Women Voters of Wash. v. State, No. 89714-0, slip op. at 11 n.10 (Wash. Sept. 4, 2015).

[41] Sch. Dist. No. 20 v. Bryan, 99 P. 28, 29 (Wash. 1909).

[42] *League of Women Voters*, slip op. at 11 n.10 (quoting *Bryan*, 99 P. at 29).

[43] *See Bryan*, 99 P. at 29–30.

[44] *League of Women Voters*, slip op. at 11 n.10.

[45] *Id.*

[46] Order Changing Opinion and Denying Further Reconsideration, *supra* note 9; *see also* State of Washington's Motion for Reconsideration at 7–10, *League of Women Voters*, 355 P.3d 1131 (No. 89714-0).

[47] Justices González and McCloud joined Justice Fairhurst's opinion.

[48] *League of Women Voters*, 355 P.3d at 1141 (Fairhurst, J., concurring in part and dissenting in part).

fund charters out of the rest.[49] Not only did Justice Fairhurst deny that education appropriations became, *ipso facto*, the protected tax, but she also noted that a statute used by the majority to establish the allegedly restricted appropriation did not itself appropriate funds.[50] Yet the statute did authorize support of "additional, noncommon school educational programs."[51] Thus, appropriations under the statute could fund any educational program — including charters.[52] Finally, even were current appropriations restricted, she suggested that the next budget could fund the Act with a line item for charters.[53]

By relying solely on the Act's misappropriation of restricted funds, the court failed to dispose of two questions raised by Justice Fairhurst: First, what prevented the legislature from fulfilling the Act's mandate by appropriating separate, unrestricted funds for charters in the next budget?[54] Second, why could the State fund other non-common-school education programs but not charters?[55] Footnote ten suggested the basis for one response: charters violate the uniformity clause. Not only do charters not qualify as common schools, but — as heterogeneous alternatives to the parallel system of common schools — their support also conflicts with the State's paramount duty to provide a uniform education system. In contrast, supplemental programs that do not fill the same niche as common schools do not implicate the uniformity clause and are permissible components of the public education system.

Article IX of the constitution commands the State to provide amply for public education.[56] The legislature must "discharge[]" this paramount duty "by means of a 'general and uniform system of *public schools*,'"[57] to which children possess a positive right.[58] This uniform

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[49] *Id.* at 1143. The onus lay on plaintiffs to prove that an act could not be "applied under any circumstances." *Id.* at 1146. In arguing that commingling precluded the State from showing use of unrestricted funds, the majority had reversed this burden. *Id.* Justice Fairhurst also rejected the theory that commingling the property levy and general fund rendered both restricted, as this would forbid "*any* expenditure" from the latter unless it supported common schools. *Id.* at 1144.

[50] *Id.* at 1144. It required future appropriations. WASH. REV. CODE § 28A.150.380(1) (2014).

[51] *League of Women Voters*, 355 P.3d at 1144 (Fairhurst, J., concurring in part and dissenting in part); *see id.* at 1144–45; *see also* WASH. REV. CODE § 28A.150.380(2).

[52] *League of Women Voters*, 355 P.3d at 1146 (Fairhurst, J., concurring in part and dissenting in part).

[53] *Id.* at 1147. Justice Fairhurst also argued that, although the Act made charters eligible for "matching funds for common school construction," it did not stipulate payment from the common school construction fund. *Id.* at 1143 (quoting WASH. REV. CODE § 28A.710.230(1)). Just as most basic education financing came from sources other than the property levy, unrestricted funds covered most public school construction. *Id.*

[54] *See id.* at 1147.

[55] *See id.* at 1144–45.

[56] WASH. CONST. art. IX, § 1.

[57] Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 96 (Wash. 1978) (quoting WASH. CONST. art. IX, § 2).

[58] *Id.* at 76; McCleary v. State, 269 P.3d 227, 247–48 (Wash. 2012).

system must have a "unity of purpose as well as an entirety of operation,"[59] which requires regularity of educational opportunity and governance. Within the common school framework, the legislature has defined the former by specifying "uniform educational content, teacher certification, and instructional hour requirements . . . with access to substantially the same educational opportunities" in all schools.[60] The State has provided for common schools' structural uniformity by "promulgat[ing] an integrated system of agencies for the acquisition, construction, financing, administration, supervision, maintenance and operation of public schools."[61] That hierarchical system has made educational organs from the SPI down to local districts "[a]dministratively and functionally . . . interdependent."[62] They have collectively delivered a comprehensive educational program.

Charters disrupt this uniform system. First, they undermine uniformity of educational opportunity. For example, the Act did not bind charters to the "educational content" or "instructional hour requirements" that the court has emphasized as uniform aspects of common schools.[63] Contrary to *Bryan*'s explicit dictate, charters' students are not "subject to the same discipline as every other child."[64] Though pupils can transfer from charters to other public schools without losing credit — another judicially imposed proxy for uniformity[65] — the Act accomplishes this by fiat, rather than by ensuring uniform training.[66]

Secondly, charters disrupt the coherence of common-school governance. Substituting private boards for local voters "result[s] in different (nonuniform) governance for charter schools as compared to common schools."[67] The court might also have noted that charters offend the integrated and interdependent structure of educational oversight.

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[59] Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178, 202 (Wash. 1974) (quoting Serrano v. Priest, 487 P.2d 1241, 1248 (Cal. 1971)), *overruled on other grounds by Seattle Sch. Dist.*, 585 P.2d 71. The State must provide "minimum and reasonably standardized educational and instructional facilities and opportunities"; it must administer the system with enough uniformity for children to acquire basic skills and to change schools without losing credit. Fed. Way Sch. Dist. No. 210 v. State, 219 P.3d 941, 946–47 (Wash. 2009) (quoting *Northshore Sch. Dist.*, 530 P.2d at 202).

[60] *Fed. Way Sch. Dist.*, 219 P.3d at 947 (citing WASH. REV. CODE §§ 28A.150.200, 28A.410 (2014)).

[61] State *ex rel.* DuPont-Fort Lewis Sch. Dist. No. 7 v. Bruno, 384 P.2d 608, 612 (Wash. 1963).

[62] *Id.*

[63] *Fed. Way Sch. Dist.*, 219 P.3d at 947 (citing WASH. REV. CODE §§ 28A.150.200, 28A.410); *see* WASH. REV. CODE § 28A.710.040.

[64] Sch. Dist. No. 20 v. Bryan, 99 P. 28, 29 (Wash. 1909). *Compare* WASH. REV. CODE § 28A.710.040, *with, e.g.*, *id.* § 28A.150.300.

[65] *Fed. Way Sch. Dist.*, 219 P.3d at 946–47 (citing Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178, 202 (Wash. 1974)).

[66] *See* WASH. REV. CODE § 28A.710.060(2). Moreover, the Act does not guarantee that a student transferring *into* a charter will not lose standing.

[67] League of Women Voters of Wash. v. State, No. 89714-0, slip op. at 11 n.10 (Wash. Sept. 4, 2015).

Whereas common schools answer in turn to school districts, the State Board of Education, and the SPI, charters may answer only to their authorizers,[68] which may not "unduly inhibit" charters' "autonomy."[69]

Because charters disrupt the public school system, the State cannot fund them. Article IX requires the legislature to amply fund the public system through "dependable and regular tax sources."[70] This is "the State's first and highest priority before any other state programs."[71] Yet, because funding follows students, the Act diverts funds from common schools within the constitutionally required public system and directs them to discretionary charters.[72] The current inadequacy of public school funding only accentuates this breach. In 2012, *McCleary v. State*[73] declared this funding deficient.[74] In August 2015, the court imposed monetary sanctions in the face of continued default.[75] Because charters are not part of the public system, funding them directly contravenes *McCleary*'s command to amply fund the public system before *any other program*.[76] The State may not simply appropriate less for common schools and reallocate the savings to charters.

In addition to withdrawing financing from the constitutionally required public system, supporting charters compounds the injury by undercutting the system's mandated uniformity. As noted above, the uniform system provides the sole means for the legislature to discharge its duty to "provi[de] for the education of all children."[77] Yet, the Act

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[68] *See, e.g.*, WASH. REV. CODE §§ 28A.710.100, 28A.710.070.

[69] *Id.* § 28A.710.180(2).

[70] *See* Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 97 (1978); *id.* at 96–97.

[71] McCleary v. State, 269 P.3d 227, 249 (Wash. 2012) (quoting McCleary v. State, No. 07-2-02323-2 SEA, 2010 WL 9073395, at *21 (Wash. Super. Ct. Feb. 4, 2010)).

[72] WASH. REV. CODE § 28A.710.220; *see, e.g.*, OFFICE OF THE SEC'Y OF STATE, STATE OF WASHINGTON & CLARK COUNTY VOTERS' PAMPHLET: NOVEMBER 6, 2012 GENERAL ELECTION 14–18 (2012), https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2012/General-Election/Documents/14-%20Clark.pdf [http://perma.cc/9HFS-5UVG]. In shifting revenue to charters on a per pupil basis, the Act follows the practice in all states with charters. YILAN SHEN & ALEXANDER BERGER, CHARTER SCHOOL FINANCE 1–2 (2011), http://www.ncsl.org/documents/educ/charterschoolfinance.pdf [http://perma.cc/BCQ3-33KX].

Similar reasoning drove Florida's Supreme Court to invalidate that state's voucher program in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). *Id.* at 398, 408–09. Florida's constitution declared an adequately funded, uniform system of public schools a "paramount duty of the state." FLA. CONST. art. IX, § 1. Yet, like Washington's Act, Florida's program diverted funds from the mandated system to nonuniform schools on a per-pupil basis. *Holmes*, 919 So. 2d at 408–09. (Although the vouchers were doubly odious because they funded private schools, the court principally objected to their funding schools that were nonuniform. *Id.* at 398.) This impermissibly reduced money available to the uniform public system that provided "the exclusive means set out in the Constitution . . . to make adequate provision for the education of children." *Id.* at 408–09.

[73] 269 P.3d 277.

[74] *Id.* at 231.

[75] Order, McCleary v. State, No. 07-2-02323-2 SEA (Wash. Aug. 13, 2015).

[76] *Id.* at 2; *McCleary*, 269 P.3d at 249.

[77] WASH. CONST. art. IX, § 1.

seeks to transfer children out of the uniform system and into a parallel system of heterogeneous academies. Supporting charters in direct competition with the uniform system's common schools works at cross-purposes with the legislature's primary obligation.[78]

The State and Justice Fairhurst wrongly argued that footnote ten's approach to the uniformity clause not only banned charters, but also threatened supplemental educational programs.[79] Unlike charters, which *replace* common schools, permitted programs "enrich the program of basic education."[80] Like *Bryan*, footnote ten demanded local control not as a per se requirement of uniformity, but rather as a "hallmark of common schools" *within* the public system.[81] *Bryan* did not require that all aspects of the public system operate under the control of local school boards and county superintendents.[82] Rather, *Bryan* objected to model schools' masquerading as common schools while they avoided the latter's governance structure by operating under the aegis of normal schools.[83] In contrast, supplemental programs like the Youth Offender Program and University of Washington's Early Entrance Program do not fill the same niche as common schools.[84] Respectively, these serve prisoners unable to attend common schools[85] and gifted students, whose needs go unmet in common schools.[86] By serving distinct populations, they do nothing to break the uniformity of common schools or, therefore, of the larger public school system.[87]

The majority provided one reason why Washington could not fund charters. Had it elevated its discussion of uniformity, it might have explained two more points: The State may not fund charters from any source because they undermine the uniformity of the public school system. It may, however, fund programs to supplement basic education.

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[78] The Florida Supreme Court likewise objected that the Florida voucher program "foster[ed] plural, nonuniform systems of education in direct violation of the constitutional mandate for a uniform system" and "in competition with the free public schools that are the sole means set out in the Constitution for the State to provide for" education. Bush v. Holmes, 919 So. 2d 392, 398 (Fla. 2006).

[79] *See* State of Washington's Motion for Reconsideration, *supra* note 46, at 7–10.

[80] WASH. REV. CODE § 28A.150.380 (2014).

[81] League of Women Voters of Wash. v. State, No. 89714-0, slip op. at 11 n.10 (Wash. Sept. 4, 2015).

[82] Sch. Dist. No. 20 v. Bryan, 99 P. 28 (Wash. 1909). The legislature eliminated county superintendents in 1969. 1969 Wash. Sess. Laws 1271.

[83] *Bryan* permitted funding normal schools if they did not receive dedicated funds. *Bryan*, 99 P. at 30–31. Unlike common schools, normal schools were "not intended for the education of the children . . . but for the training of teachers." *Id.* at 30 (quoting Gordon v. Cornes, 47 N.Y. 608, 616 (1872)). Likewise, model schools' "main purpose" was "to benefit the normal pupil." *Id.*

[84] *See* Reply Brief of Appellants at 18, *League of Women Voters*, 355 P.3d 1131 (No. 89714-0).

[85] WASH. REV. CODE § 28A.193.005–901.

[86] *Id.* § 28A.185.040.

[87] Florida's Supreme Court similarly concluded that banning vouchers did not endanger enrichment programs. Bush v. Holmes, 919 So. 2d 392, 411–12 (Fla. 2006).