IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN KERR EUGSTER, Petitioner, vs. JUSTICES OF SUPREME COURT OF THE STATE OF WASHINGTON; NAMELY, CHIEF JUSTICE MARY E. FAIRHURST AND JUSTICES, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, DEBRA L. STEPHENS, CHARLES K. WIGGINS, STEVEN C. GONZÁLEZ, SHERYL GORDON McCLOUD, and MARY I. YU; Respondents, Mathew and Stephanie McCLEARY; Robert and Patty VENEMA; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS; and, STATE OF WASHINGTON Additional Respondents (Under CR 19).	No. PETITION FOR WRITS OF MANDAMUS TO JUSTICES OF THE SUPREME COURT Washington Const. Art. IV, Section 4

Stephen Kerr Eugster, alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Petitioner, Stephen Kerr Eugster, is a resident of the City of Spokane, Spokane County,

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State of Washington.

2. Defendant, Supreme Court of the State of Washington, is the court created by Wash. Const. Art. IV, Section 2.

3. Respondents are Chief Justice Mary E. Fairhurst and Justices, Charles W. Johnson, Barbara A. Madsen, Susan Owens, Debra L. Stephens, Charles K. Wiggins, Steven C. González, Sheryl Gordon McCloud, and Mary I. Yu are the judges of the Supreme Court pursuant to Wash. Const. Art. IV, Section 3.

4. Defendant Justices, individually, are currently implementing and enforcing the unlawful conduct described herein.

5. Defendants Mathew and Stephanie McCleary, Robert and Patty Venema and Network for Excellence in Washington Schools, are the plaintiffs in *McCleary v. State*, 269 P.3d 227, 173 Wash.2d 477 (2012) (*McCleary*). These Defendants are necessary parties to this action under CR 19 (a).

6. Defendant State of Washington is the defendant in *McCleary* and a necessary party to this action under CR 19 (a).

7. Venue of the action is proper in the Temple of Justice, Thurston County, Washington.

8. The Supreme Court has original jurisdiction of this proceeding under Wash. Const. Art. IV, Section 4, and Section 2(a).

TAXPAYER STANDING OF Petitioner

9. Eugster is a state of Washington taxpayer. He pays taxes to the City of Spokane, Spokane County, and the state of Washington.

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10. Eugster asked the Attorney General of the State of Washington to take action in these matters. Appendix 1.

11. The Attorney General by Jeffrey T. Even, Deputy Solicitor General declined to take action. Appendix 7.

12. On January 25, 2017, Eugster sent a letter to Jeffrey Even, asking that the Attorney General take action regarding Eugster's concerns that the Supreme Court in is acting unconstitutionally regarding its "retained jurisdiction" in *McCleary*. Appendix 8.

13. On January 27, 2017, Eugster sent a letter to Attorney General Bob Ferguson. Appendix 18.

14. The Attorney General declined, once again, to take action. Appendix 19 and Appendix 20.

STANDING OF EUGSTER AS AN OFFICER OF THE COURT

15. Eugster is a member of the bar of the Washington Supreme Court and a member of the Washington State Bar Association.

16. Eugster, like all other lawyers in the state of Washington, is an officer of the court.

17. The preamble to the Washington Rules of Professional Conduct provides:

> PREAMBLE: A LAWYER'S RESPONSIBILITIES
>
> [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice. [Emphasis added.]

18. Because of his "special responsibility," Petitioner Eugster has standing. *Compare Wounded Knee Legal Defense/Offense Committee v. Federal Bureau of Investigation*, 507 F.2d

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1281 (8th Cir. 1974); *Court of Appeals in Silver v. Queen's Hospital*, 518 F.2d 555 (1975); and *Keker v. Procunier*, 398 F. Supp. 756 (E.D. Cal., 1975).

19. Petitioner, as an "officer of the court" has an affirmative duty to act to prevent unlawful conduct by justices of the Washington State Supreme Court as herein described.

20. Petitioner as a lawyer has an mandatory duty to act. Compare, RPC 8.3.

> RPC 8.3 REPORTING PROFESSIONAL MISCONDUCT
>
> (a) A lawyer who knows that another lawyer or LLLT has committed a violation of the applicable Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLLT's honesty, trustworthiness or fitness as a lawyer or LLLT in other respects, should inform the appropriate professional authority.
>
> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.
>
> (c) This Rule does not permit a lawyer to report the professional misconduct of another lawyer, judge or LLLT to the appropriate authority if doing so would require the lawyer to disclose information otherwise protected by Rule 1.6.

21. Eugster's duty is of high importance in this case because it is of utmost public importance and consequence that the highest court of the state of Washington act within bounds of the Washington State Constitution jurisdictional limits and not violation of separation of powers, violation of inherent powers.

GENERAL FACTS

22. On January 5, 2012, the Supreme Court rendered its decision in *McCleary v. State* , 173 Wash. 2d 477, 269 P.3d 227 (2012).

23. The case began in Superior Court for King County when two families, the McClearys

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and the Venemas, on behalf of themselves and their children, on January 11, 2007, filed a petition for declaratory judgment in the Superior Court for King County.

24. The case "eventually proceeded to a "bench trial" before Judge John P. Erlick commencing on August 31, 2009 in Superior Court for King County Washington.

25. The case concluded on November 25, 2009.

26. Judge Erlick entered Findings Fact and Conclusions on or about February 24, 2010.

27. His Decision was entered about the same time.

28. Defendant "The State of Washington" filed notice of appeal seeking direct review by the Supreme Court.

29. The Supreme Court granted direct review.

30. In rendering its decision in *McCleary*, the Court said the "judiciary will retain jurisdiction." The court opined:

> The State has failed to meet its duty under article IX, section 1 by consistently providing school districts with a level of resources that falls short of the actual costs of the basic education program. The legislature recently enacted sweeping reforms to remedy the deficiencies in the funding system, and it is currently making progress toward phasing in those reforms. <u>We defer to the legislature's chosen means of discharging its article IX, section 1 duty, but the judiciary will retain jurisdiction over the case to help ensure progress in the State's plan to fully implement education reforms by 2018</u>.

McCleary at 547 (emphasis added.)

31. At the end of the opinion, the Court asked the parties to provide briefing so as to help the Court develop "the preferred method for retaining jurisdiction."

32. The Court did not cite any authority for its "retention of jurisdiction."

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33. It did cite a "noted scholar."

> A noted scholar in the area of school-finance litigation has observed that success depends on "continued vigilance on the part of courts." James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1260 (2008). This court intends to remain vigilant in fulfilling the State's constitutional responsibility under article IX, section 1.

Id.

34. The Supreme Court issued its first retention of jurisdiction Order on July 18, 2012. In the Order the Court said:

> [t]he court recognized the legislature's enactment of "a promising reform program in [Laws of 2009, ch. 548] ESHB 2261," id. at 543, designed to remedy the deficiencies in the prior funding system by 2018. The court retained jurisdiction "to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty."
>
> a. The court retained jurisdiction "to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty." The court directed the parties to provide further briefing addressing the preferred method for retaining jurisdiction. Having considered the parties' arguments, and being fully advised in this matter, the court enters the following order:

35. The orders contained in the Order are as follows:

> 1. The State, through the Legislative Joint Select Committee on Article IX Litigation or through legal counsel, shall file periodic reports in this case summarizing its actions taken towards implementing the reforms initiated by Laws of 2009, ch. 548 (ESHB 2261) and achieving compliance with Washington Constitution article IX, section 1, as directed by this court in *McCleary v. State*, 173 Wash. 2d 477,269 P.3d 227 (2012).
>
> 2. The first report shall be filed no later than 60 days following entry of this order. Thereafter, reports shall be submitted (a) at the conclusion of each legislative session from 2013 through 2018 inclusive, within 60 days after the final biennial or supplemental operating budget is signed by the governor, and (b) at such other times as the court may order. After the

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> filing of the initial report, subsequent reports should summarize legislative actions taken since the filing of the previous report.
>
> 3. A copy of each report shall be filed with the court and served on the respondents' counsel. The report shall be a public document and may be published on the legislature's web page. Within 30 days after receiving a copy of the report, the respondents may file and serve written comments addressing the adequacy of the State's implementation of reforms and its progress toward compliance with article IX, section 1.
>
> 4. In deference to ESHB 2261 and its implementation schedule, the court's review will focus on whether the actions taken by the legislature show real and measurable progress toward achieving full compliance with article IX, section 1 by 2018. While it is not realistic to measure the steps taken in each legislative session between 2012 and 2018 against full constitutional compliance, the State must demonstrate steady progress according to the schedule anticipated by the enactment of the program of reforms in ESHB 2261.
>
> 5. Upon reviewing the parties' submissions, the court will determine whether to request additional information, direct further fact-finding by the trial court or a special master, or take other appropriate steps.

Id. [Emphasis added.]

36. Thus, began a series of hearings, orders, and orders of contempt.

37. On June 12, 2014, a unanimous Supreme Court entered an Order to Show Cause which provided in part as follows:

> This matter came before the Court on its June 5, 2014, En Banc Conference for consideration of the legislature's 2014 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation (corrected version) and the responses to the report. After consideration of the matter, the Court unanimously determined that a show cause hearing should be held. Now, therefore, it is
>
> ORDERED
>
> That the State is hereby summoned to appear before the Supreme Court to address why the State should not be held in contempt for violation of

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> this Court's order dated January 9, 2014, that directed the State to submit by April 30, 2014, a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year. The State should also address why, if it is found in contempt, any of the following forms of relief requested by the plaintiffs, Mathew and Stephanie McCleary, et al., should not be granted: 1[1]
>
> 1. Imposing monetary or other contempt sanctions;
> 2. Prohibiting expenditures on certain other matters until the Court's constitutional ruling is complied with;
> 3. Ordering the legislature to pass legislation to fund specific amounts or remedies;
> 4. Ordering the sale of State property to fund constitutional compliance;
> 5. Invalidating education funding cuts to the budget;
> 6. Prohibiting any funding of an unconstitutional education system; and
> 7. Any other appropriate relief.
>
> The State should also address the appropriate timing of any sanctions. The show cause hearing with oral argument by the parties shall be heard by the Washington Supreme Court on Wednesday, September 3, 2014, at 2:00 p.m. . . .

38. This breathtaking listing of what the Court and Justices might do is in obvious excess of the authority of the Court under the Washington Constitution.

39. On August 13, 2015, the Court ordered:

> Effective immediately, the State of Washington is assessed a remedial penalty of one hundred thousand dollars ($100,000) per day until it adopts a complete plan for complying with article IX, section 1 by the 2018 school year.

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[1] [Footnote 1 - In listing the forms of possible relief identified by the plaintiffs, the Court takes no position on the appropriateness of any of the possible sanctions.]

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40. As of November 3, 2017, the total owing by the State is $ 82,300,000.00: $100,000.00 times 823 (days between August 13, 2015 and November 3, 2017).

Supreme Court Jurisdiction is Limited to Appellate Jurisdiction

41. The jurisdiction of the Supreme Court in *McCleary* is limited to appellate jurisdiction.

42. The Washington Constitution Art. IV, Section 4 provides:

> ARTICLE IV SECTION 4 JURISDICTION. The supreme Court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

43. In *Wesley v. Schneckloth*, 55 Wash. 2d 90, 93-94, 346 P.2d 658 (1959), the court said:

> The word 'jurisdiction' is derived from the Latin 'juris' and 'dico.' It means 'I speak by the law.' 50 C.J.S. p. 1089.
>
> 'Jurisdiction does not relate to the rights of the parties, as between each other, but to the power of the court.' *People v. Sturtevant*, 1853, 9 N.Y. 263, 269, 59 Am.Dec. 536.
>
> A constitutional court cannot acquire jurisdiction by agreement or stipulation. Either it has or has not jurisdiction. If it does not have jurisdiction, any judgment entered is void ab initio and is, in legal effect, no judgment at all. Jurisdiction should not be sustained upon the doctrine of estoppel, especially where personal liberties are involved.

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> It is our considered opinion that lack of original jurisdiction to hear and determine a case meets the 'exceptional circumstance' rule, and that evidence of lack of jurisdiction may be received for the first time and considered in an application for writ of habeas corpus.

Id.

44. This section limits the power of the Supreme Court to appellate jurisdiction, revisory jurisdiction. Nothing more is permitted in the context of "appellate jurisdiction." The Supreme Court only has "appellate jurisdiction."

45. The Court's "retention of jurisdiction" in *McCleary* violates the Constitution and all orders rendered by the Court after the decision are in excess of its jurisdiction and therefore they are void. The Court had a duty to remand the case to the trial court.

Power Being Exercised Court Violates Separation of Powers

46. The orders rendered by the Court essentially called for legislation by the Legislature.

47. If the Court did not like what the State came back to it with, it essentially vetoed the State's response.

48. The Court, time and time again, entered orders in violation of the Separation of Powers Doctrine embodied in the Constitution.

49. The Court and the Justices of the Court, Defendants all, do not have the power of appropriation under the Washington Constitution.

50. This is another reason why its orders are void, especially its ongoing contempt order of $100,000 per day.

Power Being Exercised Court Is in Excess of Any Inherent Power of the Court

51. The foregoing paragraphs and the following paragraphs in the Counts set out below

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are incorporated herein by this reference and are thus restated here.

52. The power exercised by the Justices is beyond inherent power of the Court.

PRAYER FOR RELIEF

Petitioner, Stephen Kerr Eugster asks the court to do the following:

1. Issue writs of mandamus against each Justice (including Chief Justice) of the Supreme Court:

a. Directing each to rescind the Contempt Order of August 13, 2015, *nunc pro tunct*,

b. Directing each to act immediately to remand *McCleary* to the Trial Court in King County for further proceedings.

2. Award Petitioner statutory attorney fees and costs.

3. Award such further relief as just and equitable.

November 4, 2017.

EUGSTER LAW OFFICE PSC

s/ Stephen Kerr Eugster
Stephen K. Eugster, WSBA #2003
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Stephen Kerr Eugster
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September 19, 2016

Bob Ferguson
Attorney General
The State of Washington
1125 Washington St SE
Olympia, WA 98504-0100
judyg@atg.wa.gov

Re: Washington State Supreme Court, Separation of Powers

Dear Attorney General Ferguson:

My name is Stephen Kerr Eugster. I am a member of the Washington State Bar Association # 2003. I am admitted to the bar of the Washington State Supreme Court (Supreme Court).[1]

Along with my fellow members of the bar of the Supreme Court, I have special responsibilities:

> **A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.**

Rules of Professional Conduct, *Preamble: A Lawyer's Responsibilities* (emphasis added).

I have practiced law in the State of Washington since the fall of 1970. I am a graduate of the University of Washington School of Law, J.D. 1969, where I was

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My first cases before the Supreme Court involved the constitutionality of Initiative 276 *circa* 1973-74. Richard A. Derham, and I, of Davis, Wright, Todd, Riese & Jones, Seattle, represented William J. Fritz, a lobbyist, and others in several cases. *Fritz v. Gorton*, 83 Wash.2d 275, 517 P.2d 911 (1974) and *Bare v. Gorton*, 84 Wash.2d 380,526 P.2d 379, (1974) (Mrs. Mildred E. Bare was a school board member).

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I am a taxpayer of State of Washington and have been so since 1966, the year of my residency in the state. For the last thirty-nine years, since my residence in Spokane County, I have paid sales taxes, use taxes, and property taxes, etc., to the State of Washington. I am paying such taxes now and will do so in the future.

Over the past several years I have been studying what we refer to today as the Washington School Funding Cases. I have expended much time and energy studying and considering *McCleary v. State*, 269 P.3d 227, 173 Wash.2d 477, 276 Ed. Law Rep. 1011 (Wash., 2012). I have followed the activities and actions of the Legislature and the Supreme Court concerning the "enforcement the *McCleary* decision."

A major concern of mine over the years since the *McCleary* decision is the question of whether the Justices of the Supreme Court have violated, or are presently violating, the basic constitutional premise of the Washington State Constitution – separation of powers.

> **Our system of checks and balances incorporates the important concept of the separation of powers. *Hale v. Wellpinit Sch. Dist. No.* 49, 165 Wash.2d 494, 503, 506, 198 P.3d 1021 (2009). The doctrine "preserves the constitutional division between the three branches of government, ensuring that the activity of one does not threaten or invade the prerogatives of another." *State v. Elmore*, 154 Wash.App. 885, 905, 228 P.3d 760 (2010). The legislature violates separation of powers principles when it infringes on a judicial function. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 143, 744 P.2d 1032, 750 P.2d 254 (1987). The function of the judiciary is to say what the**

> **law is, whereas the legislature's function is to set policy and draft and enact law. *Hale*, 165 Wash.2d at 506, 198 P.3d 1021. It is important to note that although the separate and coequal branches fill different roles, the branches "must remain partially intertwined to maintain an effective system of checks and balances. The art of good government requires cooperation and flexibility among the branches." *Id.* at 507, 198 P.3d 1021.**

Hambleton v. State (In re Estate of Hambleton), 181 Wash.2d 802, ¶ 27, 335 P.3d 398 (Wash., 2014).

At first, I was sure the decision itself was a violation of separation of powers. The more I studied the matter, I came to respect what Justice Tom Chambers, deceased, said about the decision on his internet website. He said:

> **[1] In 2005, the legislature initiated a new study called Washington Learns. Washington Learns noted that "[t]oday, the K-12 education system is still financed by the thirty-year-old statutory formula of the Basic Education Act." *McCleary v. State*, 173 Wn.2d 477 (2012).**
>
> **[2] The report found that, despite the shift to a performance-based system more than a decade earlier, "the funding model for K-12 education has not been updated to reflect the new expectations and has not addressed the question of how to use resources most effectively in order to improve student outcomes." Id. The report further surmised that "[s]table and significantly increased funding is required to support the evolving needs of our education system." Washington Learns concluded that the State was not meeting its duty to provide adequate funding in many areas. In response to Washington Learns, the legislature adopted ESHB 2261, a comprehensive approach to adopting reforms and to provide adequate funding for basic education. The plan was to phase in funding so that basic education would be fully funded by 2018.http://apps.leg.wa.gov/documents/billdocs/200910/Pdf/Bills/-Session%20Laws/House/2261-S.SL.pdf. But instead of funding the improvements the legislature had adopted to provide adequate funding of education in ESHB 2261, the legislature began reducing funding to schools.**
>
> **[3] A group of school districts, individuals, and community members brought the *McCleary* lawsuit claiming the State was not fulfilling its constitutional mandate. The lawsuit proceeded to trial and, as in the 1978 case, the trial judge found that the State was not meeting its duty to adequately fund basic education. The Washington Supreme Court agreed and has given the State until 2018 to fully fund basic education. It is not the court's role to decide how to adequately fund basic education. But it is the court's role to interpret the state constitution. From a constitutional analysis point of view, this is not rocket science. It is fundamental that the legislature must first fund all constitutionally required functions before funding non-mandated**

> programs. **The paramount duty clause means education must be the State's highest priority. The founders used the word "ample" which has reasonably been interpreted to mean the State must adequately fund education over all other state funded programs. Inasmuch as it was the legislature's plan to adequately fund basic education by adopting ESHB 2261, the court is using the legislature's own plan as a benchmark to measure progress. [Emphasis added.]**[2]

See ESHB 2261.

In essence, Justice Chambers did not believe the Court, in deciding *McCleary*, was violating the separation of powers doctrine -- was legislating, because the "court [was] using the legislature's own plan as a benchmark to measure progress." Id.

Over the past four years, the Supreme Court has tried to enforce its decision against the State.[3] During this time, Court never worked from a decision which was objectively quantified. The court did not say what would satisfy its desire to fund education adequately. The essence of the various contempt orders was that the Legislature was not doing what the Court wanted the State to do to; not any time did the Court issue a contempt order which was based on a specific, quantifiable object the State was to fulfill.

The Court wanted to have the legislature come up with legislation satisfying the unquantified demands of the Court. The Court was legislating in that it wanted the State to legislate. It held the power to determine whether the State's legislation was the legislation the Court wanted. The Court created in itself an **ultimate plenary power to veto** legislation of the State which did not fulfill the ever-shifting and unquantified desires of the Court.[4]

In my opinion, this was, and is, a violation of the separation of powers doctrine:

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[2] http://tomchambers.com/the-states-duty-to-pay-for-education/.

[3] The State is the only defendant in the case. The Governor and the Legislature are not parties. The individual members of the Legislature are not parties.

[4] The state would be well on its way now to better school funding had private individuals with standing commenced a writ of mandamus action in a Supreme Court case naming the individual state legislators and the governor as party defendants -- individuals over whom the Court had jurisdiction over (personal jurisdiction). If such a case had been brought at the time *McCleary* was decided in December 1982, the Court would have quantified the amount of money needed to be appropriated by the Legislature and approved by the Governor to fund ESHB 2261 the legislation the Court determined would take care of the problem. (See discussion of Justice Tom Chambers view above.) This case would have been brought directly in the Supreme Court. The Court has original jurisdiction over mandamus cases against state officers. WASH. CONST. Art IV, Section 4. ("The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, . . . "). I presume members of the house of representatives, and senators are "state officers." *See* WASH. CONST. Art. II, Section 4, and Section 6.

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Stephen Kerr Eugster
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September 19, 2016

Bob Ferguson
Attorney General
The State of Washington
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judyg@atg.wa.gov

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> programs. **The paramount duty clause means education must be the State's highest priority. The founders used the word "ample" which has reasonably been interpreted to mean the State must adequately fund education over all other state funded programs. Inasmuch as it was the legislature's plan to adequately fund basic education by adopting ESHB 2261, the court is using the legislature's own plan as a benchmark to measure progress. [Emphasis added.]**[2]

See ESHB 2261.

In essence, Justice Chambers did not believe the Court, in deciding *McCleary*, was violating the separation of powers doctrine -- was legislating, because the "court [was] using the legislature's own plan as a benchmark to measure progress." Id.

Over the past four years, the Supreme Court has tried to enforce its decision against the State.[3] During this time, Court never worked from a decision which was objectively quantified. The court did not say what would satisfy its desire to fund education adequately. The essence of the various contempt orders was that the Legislature was not doing what the Court wanted the State to do to; not any time did the Court issue a contempt order which was based on a specific, quantifiable object the State was to fulfill.

The Court wanted to have the legislature come up with legislation satisfying the unquantified demands of the Court. The Court was legislating in that it wanted the State to legislate. It held the power to determine whether the State's legislation was the legislation the Court wanted. The Court created in itself an **ultimate plenary power to veto** legislation of the State which did not fulfill the ever-shifting and unquantified desires of the Court.[4]

In my opinion, this was, and is, a violation of the separation of powers doctrine:

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[3] The State is the only defendant in the case. The Governor and the Legislature are not parties. The individual members of the Legislature are not parties.

[4] The state would be well on its way now to better school funding had private individuals with standing commenced a writ of mandamus action in a Supreme Court case naming the individual state legislators and the governor as party defendants -- individuals over whom the Court had jurisdiction over (personal jurisdiction). If such a case had been brought at the time *McCleary* was decided in December 1982, the Court would have quantified the amount of money needed to be appropriated by the Legislature and approved by the Governor to fund ESHB 2261 the legislation the Court determined would take care of the problem. (See discussion of Justice Tom Chambers view above.) This case would have been brought directly in the Supreme Court. The Court has original jurisdiction over mandamus cases against state officers. WASH. CONST. Art IV, Section 4. ("The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, . . . "). I presume members of the house of representatives, and senators are "state officers." *See* WASH. CONST. Art. II, Section 4, and Section 6.

the court is clearly legislating.

The actions by the justices of the court are unconstitutional.

By this letter, I request that you and your office take immediate steps to ensure that the Justices of the Supreme Court are not acting in violation of the separation of powers doctrine.

I make this request because I am a citizen of the state. I have taxpayer standing to litigate the issues if you do not. And, as a member of the bar of the Washington State Supreme Court, I am "an officer of the court and a public citizen, having special responsibility for the quality of justice." [Emphasis added.] [5]

Some may say "what is the point, the Supreme Court is going to make its own decision on the matters. The Supreme Court is going to make the decision; that is certain. But, as we know, in circumstances like this, qualified persons will be selected to act as justices of the Court in the cases.[6]

As you know, your response decision not to respond, or your failure to respond is a step which precedes my power to act in these matters on my own.[7]

Respectfully,

/s/ Stephen Kerr Eugster

Stephen Kerr Eugster

---

[5] Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities [1].

[6] WASH. CONST. Art. IV, Section 2(a):

> TEMPORARY PERFORMANCE OF JUDICIAL DUTIES. When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state.

See, e.g., In the Matter of the Disciplinary Proceeding Against Richard B. Sanders, Justice of the Supreme Court of the State of Washington, 135 Wash.2d 175, 955 P.2d 369 (1998).

[7] See *Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wash.App. 105, 336 P.3d 632 (Wash. App., 2014); *State ex rel. Boyles v. Whatcom County Superior Court*, 694 P.2d 27, 103 Wn.2d 610 (Wash., 1985).

cc: Justices of the Washington Supreme Court, namely; Chief Justice Barbara A. Madsen, and Justices Charles W. Johnson, Susan Owens, Mary E. Fairhurst, Debra L. Stephens, Charles K. Wiggins, Steven C. González, Sheryl Gordon McCloud and Mary I. Yu,

Jay Inslee, Governor, and

Members of the Legislature

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

September 27, 2016

Stephen K. Eugster
Eugster Law Office
2418 West Pacific Ave
Spokane, WA 99201-6422

Re: Proposed Lawsuit Against Washington Supreme Court

Dear Mr. Eugster:

I write in response to your letter of September 19, 2016. Your letter requests that our office "take immediate steps to ensure that the Justices of the Supreme Court are not acting in violation of the separation of powers doctrine" in the currently pending case of *McCleary v. State*, Washington Supreme Court No. 84362-7.

We consider commencing actions at the request of a taxpayer in appropriate situations. Commencing a new action regarding the court's rulings in an existing case clearly does not present such a situation. We therefore decline your request, except to the extent that we are already doing as you ask in *McCleary*. Given that the State is already a party to *McCleary* and has raised separation of powers arguments directly there, and given that you have appeared as amicus in that case to raise separation of powers arguments and other arguments, we fail to see the basis for or purpose of a separate lawsuit addressing the same issue. To the extent that your letter is offered as a prelude to asserting taxpayer standing, please understand that we do not agree that it is sufficient to do so under these circumstances.

I trust that this information will be helpful.

Sincerely,

JEFFREY T. EVEN
Deputy Solicitor General

EUGSTER LAW OFFICE PSC
2418 West Pacific Avenue
Spokane, Washington 99201-6422
(509) 624-5566

Stephen Kerr Eugster
eugster@eugsterlaw.com

[January 25, 2017]

Jeffrey T. Even
Deputy Solicitor General
Office of the Attorney General
PO Box 40100
Olympia WA 98504-0100
e-mail: jeff.even@atg.wa.gov

Re: **Proposed Lawsuit Against Washington Supreme Court**

Dear Mr. Even:

You wrote to me in the fall regarding a lawsuit I proposed against the Washington Supreme Court regarding the *McCleary Case*.[1]

I would like to re-awaken my concern about *McCleary*. My additional study concerning the power the Supreme Court is exercising in the case has led me another issue.

In *McCleary*, Justice Stephens, in her majority opinion said:

> The court The State has failed to meet its duty under article IX, section 1 by consistently providing school districts with a level of resources that falls short of the actual costs of the basic education program. The legislature recently enacted sweeping reforms to remedy the deficiencies in the funding system, and it is currently making progress toward phasing in those reforms. We defer to the legislature's chosen means of discharging its article IX, section 1 duty, but the judiciary will retain jurisdiction over the case to help ensure progress in the State's plan to fully implement education reforms by 2018.

[1] A copy of my letter to Attorney General Bob Ferguson dated September 19, 2016, and a copy of your letter to me of September 27, 2016 are enclosed.

McCleary v. State, 173 Wash.2d 477, 547 548, 269 P.3d 227 (2012) (emphasis added).

The Majority Opinion of the Court does not address authority of the Court to retain jurisdiction of a case appealed to the Court. All the court does is to cite a law review article:

> A noted scholar in the area of school-finance litigation has observed that success depends on "continued vigilance on the part of courts." James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1260 (2008). This court intends to remain vigilant in fulfilling the State's constitutional responsibility under article IX, section 1.

Id. In researching this article, I find nothing in it which says that the Washington Supreme Court has the power to exercise its jurisdiction regarding a case which has been appealed to it.

I have researched the opinions of the Supreme Court going back to Territory Days and can find no case in which the Court has retained jurisdiction of case which has been appealed to the court.

The Constitution of the State of Washington specifically addresses the issue of the jurisdiction of the Supreme Court. Wash. Const. Art. IV, Section 4 provides:

> Article IV Section 4 SECTION 4 JURISDICTION. The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof. [Emphasis added.]

As I read the constitution, the Court does not have jurisdiction to retain jurisdiction.

If I am wrong please tell me so. If I am not, it would be greatly appreciated if you would rethink your letter to me of September 27, 2016 and get back to me as soon as possible.

I look forward to hearing from you.

Sincerely,

EUGSTER LAW OFFICE PSC

Stephen Kerr Eugster

Stephen Kerr Eugster

EUGSTER LAW OFFICE
Professional Service Corporation
2418 West Pacific Avenue
Spokane, Washington 99201-6422
(509) 624-5566 / Mobile (509) 990-9115

Stephen Kerr Eugster
eugster@eugsterlaw.com

September 19, 2016

Bob Ferguson
Attorney General
The State of Washington
1125 Washington St SE
Olympia, WA 98504-0100
judyg@atg.wa.gov

Re: Washington State Supreme Court, Separation of Powers

Dear Attorney General Ferguson:

My name is Stephen Kerr Eugster. I am a member of the Washington State Bar Association # 2003. I am admitted to the bar of the Washington State Supreme Court (Supreme Court).[1]

Along with my fellow members of the bar of the Supreme Court, I have special responsibilities:

> **A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.**

Rules of Professional Conduct, *Preamble: A Lawyer's Responsibilities* (emphasis added).

I have practiced law in the State of Washington since the fall of 1970. I am a graduate of the University of Washington School of Law, J.D. 1969, where I was

[1] I am proud of having been sworn into the bar of the Supreme Court at the United States Supreme Court in January 1970 by United States Supreme Court Associate Justice William O. Douglas, of Yakima, Washington.

on the Washington Law Review, and for a year, the Review's Managing Editor. I graduated with honors and as a member of the Order of the Coif.

I have appeared before the Washington Supreme Court and the Washington Court of Appeals in numerous cases.

My first cases before the Supreme Court involved the constitutionality of Initiative 276 *circa* 1973-74. Richard A. Derham, and I, of Davis, Wright, Todd, Riese & Jones, Seattle, represented William J. Fritz, a lobbyist, and others in several cases. *Fritz v. Gorton*, 83 Wash.2d 275, 517 P.2d 911 (1974) and *Bare v. Gorton*, 84 Wash.2d 380,526 P.2d 379, (1974) (Mrs. Mildred E. Bare was a school board member).

Since then, many my cases before the Supreme Court and the Court of Appeals have involved the meaning and application of the Washington State Constitution.

I am a taxpayer of State of Washington and have been so since 1966, the year of my residency in the state. For the last thirty-nine years, since my residence in Spokane County, I have paid sales taxes, use taxes, and property taxes, etc., to the State of Washington. I am paying such taxes now and will do so in the future.

Over the past several years I have been studying what we refer to today as the Washington School Funding Cases. I have expended much time and energy studying and considering *McCleary v. State*, 269 P.3d 227, 173 Wash.2d 477, 276 Ed. Law Rep. 1011 (Wash., 2012). I have followed the activities and actions of the Legislature and the Supreme Court concerning the "enforcement the *McCleary* decision."

A major concern of mine over the years since the *McCleary* decision is the question of whether the Justices of the Supreme Court have violated, or are presently violating, the basic constitutional premise of the Washington State Constitution – separation of powers.

> **Our system of checks and balances incorporates the important concept of the separation of powers. *Hale v. Wellpinit Sch. Dist. No.* 49, 165 Wash.2d 494, 503, 506, 198 P.3d 1021 (2009). The doctrine "preserves the constitutional division between the three branches of government, ensuring that the activity of one does not threaten or invade the prerogatives of another." *State v. Elmore*, 154 Wash.App. 885, 905, 228 P.3d 760 (2010). The legislature violates separation of powers principles when it infringes on a judicial function. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 143, 744 P.2d 1032, 750 P.2d 254 (1987). The function of the judiciary is to say what the**

> **law is, whereas the legislature's function is to set policy and draft and enact law. *Hale*, 165 Wash.2d at 506, 198 P.3d 1021. It is important to note that although the separate and coequal branches fill different roles, the branches "must remain partially intertwined to maintain an effective system of checks and balances. The art of good government requires cooperation and flexibility among the branches." *Id.* at 507, 198 P.3d 1021.**

Hambleton v. State (In re Estate of Hambleton), 181 Wash.2d 802, ¶ 27, 335 P.3d 398 (Wash., 2014).

At first, I was sure the decision itself was a violation of separation of powers. The more I studied the matter, I came to respect what Justice Tom Chambers, deceased, said about the decision on his internet website. He said:

> **[1] In 2005, the legislature initiated a new study called Washington Learns. Washington Learns noted that "[t]oday, the K-12 education system is still financed by the thirty-year-old statutory formula of the Basic Education Act." *McCleary v. State*, 173 Wn.2d 477 (2012).**
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> programs. **The paramount duty clause means education must be the State's highest priority. The founders used the word "ample" which has reasonably been interpreted to mean the State must adequately fund education over all other state funded programs. Inasmuch as it was the legislature's plan to adequately fund basic education by adopting ESHB 2261, the court is using the legislature's own plan as a benchmark to measure progress. [Emphasis added.]**[2]

See ESHB 2261.

In essence, Justice Chambers did not believe the Court, in deciding *McCleary*, was violating the separation of powers doctrine -- was legislating, because the "court [was] using the legislature's own plan as a benchmark to measure progress." Id.

Over the past four years, the Supreme Court has tried to enforce its decision against the State.[3] During this time, Court never worked from a decision which was objectively quantified. The court did not say what would satisfy its desire to fund education adequately. The essence of the various contempt orders was that the Legislature was not doing what the Court wanted the State to do to; not any time did the Court issue a contempt order which was based on a specific, quantifiable object the State was to fulfill.

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In my opinion, this was, and is, a violation of the separation of powers doctrine:

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the court is clearly legislating.

The actions by the justices of the court are unconstitutional.

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I make this request because I am a citizen of the state. I have taxpayer standing to litigate the issues if you do not. And, as a member of the bar of the Washington State Supreme Court, I am "an officer of the court and a public citizen, having special responsibility for the quality of justice." [Emphasis added.] [5]

Some may say "what is the point, the Supreme Court is going to make its own decision on the matters. The Supreme Court is going to make the decision; that is certain. But, as we know, in circumstances like this, qualified persons will be selected to act as justices of the Court in the cases.[6]

As you know, your response decision not to respond, or your failure to respond is a step which precedes my power to act in these matters on my own.[7]

Respectfully,

/s/ Stephen Kerr Eugster

Stephen Kerr Eugster

---

[5] Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities [1].

[6] WASH. CONST. Art. IV, Section 2(a):

> TEMPORARY PERFORMANCE OF JUDICIAL DUTIES. When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state.

See, e.g., In the Matter of the Disciplinary Proceeding Against Richard B. Sanders, Justice of the Supreme Court of the State of Washington, 135 Wash.2d 175, 955 P.2d 369 (1998).

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cc: Justices of the Washington Supreme Court, namely; Chief Justice Barbara A. Madsen, and Justices Charles W. Johnson, Susan Owens, Mary E. Fairhurst, Debra L. Stephens, Charles K. Wiggins, Steven C. González, Sheryl Gordon McCloud and Mary I. Yu,

Jay Inslee, Governor, and

Members of the Legislature

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

September 27, 2016

Stephen K. Eugster
Eugster Law Office
2418 West Pacific Ave
Spokane, WA 99201-6422

Re: Proposed Lawsuit Against Washington Supreme Court

Dear Mr. Eugster:

I write in response to your letter of September 19, 2016. Your letter requests that our office "take immediate steps to ensure that the Justices of the Supreme Court are not acting in violation of the separation of powers doctrine" in the currently pending case of *McCleary v. State*, Washington Supreme Court No. 84362-7.

We consider commencing actions at the request of a taxpayer in appropriate situations. Commencing a new action regarding the court's rulings in an existing case clearly does not present such a situation. We therefore decline your request, except to the extent that we are already doing as you ask in *McCleary*. Given that the State is already a party to *McCleary* and has raised separation of powers arguments directly there, and given that you have appeared as amicus in that case to raise separation of powers arguments and other arguments, we fail to see the basis for or purpose of a separate lawsuit addressing the same issue. To the extent that your letter is offered as a prelude to asserting taxpayer standing, please understand that we do not agree that it is sufficient to do so under these circumstances.

I trust that this information will be helpful.

Sincerely,

JEFFREY T. EVEN
Deputy Solicitor General

EUGSTER LAW OFFICE PSC
2418 West Pacific Avenue
Spokane, Washington 99201-6422
(509) 624-5566 / Mobile (509) 990-9115

Stephen Kerr Eugster
eugster@eugsterlaw.com

January 27, 2017

Bob Ferguson
Office of the Attorney General
Washington State
PO Box 40100
Olympia WA 98504-0100

Re: **Proposed Lawsuit Against Washington Supreme Court Concerning *McCleary v. State*, 173 Wash.2d 477, 269 P.3d 227 (2012)**

Dear Attorney General Ferguson:

The day before yesterday, I mailed (and e-mailed) the enclosed letter to Jeffrey T. Even, Deputy Solicitor General.

I have dealt your office before concerning *McCleary v. State* and whether the Court was overstepping its bounds under the State Constitution. See my letter to your office on September 19, 2016, and Mr. Even's response of September __, 2016 (in the enclosure).

As I read the Washington State Constitution, the Court does not have jurisdiction to "retain jurisdiction" in the *McCleary* appeal. The only jurisdiction the court had in the case was appellate jurisdiction over the appeal of King County Superior Court Trial Judge John P. Erlick's Decision and Findings and Conclusions of February 24, 2010.

The situation must be decided and especially in a published opinion of the Supreme Court (in this case the "Supreme Court" of Wash. Const. Art. IV, Section 2a). This will prevent future unconstitutional overreaching by the Supreme Court.

I look forward to hearing from Mr. Even and, of course, you.

Sincerely,

EUGSTER LAW OFFICE PSC

Stephen Kerr Eugster

cc: Jeffrey Even

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

January 27, 2017

Stephen K. Eugster
Eugster Law Office
2418 West Pacific Ave
Spokane, WA 99201-6422

Re: Proposed Lawsuit Against Washington Supreme Court

Dear Mr. Eugster:

I write in response to your letter of January 25, 2017. Your letter offers an argument regarding the jurisdiction of the Washington Supreme Court to retain jurisdiction in *McCleary v. State*, Washington Supreme Court No. 84362-7. You then ask whether this argument would change the view set forth in my letter to you of September 27, 2016.

It does not.

I trust that this information will be helpful.

Sincerely,

Jeff T. Even

JEFFREY T. EVEN
Deputy Solicitor General

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

January 27, 2017

Stephen K. Eugster
Eugster Law Office
2418 West Pacific Ave
Spokane, WA 99201-6422

Re: Proposed Lawsuit Against Washington Supreme Court

Dear Mr. Eugster:

I write in response to your letter of January 27, 2017. Your letter references your earlier letter of January 25, 2017, to which I responded by letter dated January 27, 2017. As with our prior letters, and including your letter of September 19, 2017, to which I responded on September 27, 2017, your most recent letter argues that the Washington Supreme Court lacks jurisdiction to hear, or render decisions in, *McCleary v. State*, Washington Supreme Court No. 84362-7.

Your most recent letter seems to suggest that our office should take some unspecified action regarding your concerns. As I have explained in prior correspondence, we fail to see any merit in your position. Accordingly, as previously explained, we will not take any action regarding your correspondence. To the extent that any of your letters may be offered as a prelude to asserting taxpayer standing, please understand that we do not agree that any of your letters are sufficient to do so.

I trust that this information will be helpful.

Sincerely,

Jeffrey T. Even

JEFFREY T. EVEN
Deputy Solicitor General

EUGSTER LAW OFFICE PSC

November 04, 2017 - 6:35 AM

Filing Original Action Against State Officer

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation

The following documents have been uploaded:

- OAS_Orig_Act_Against_State_Officer_20171104062922SC282002_3799.pdf
  This File Contains:
  Original Action Against State Officer
  The Original File Name was 2017_11_04_petition_appendix.pdf
- OAS_Other_20171104062922SC282002_0889.pdf
  This File Contains:
  Other - Summons
  The Original File Name was 2017_11_03_summons.pdf

A copy of the uploaded files will be sent to:

- eugster@eugsterlaw.com
- eugster@steveeugster.com

Comments:

Sender Name: Stephen Eugster - Email: eugster@eugsterlaw.com
Address:
2418 W PACIFIC AVE
SPOKANE, WA, 99201-6422
Phone: 509-624-5566

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