No. 82961-6

SANDERS, J. (dissenting)—The State's "paramount duty" is "to make ample provision for the education of all children" in Washington. Const. art. IX, § 1. Because the State does not fully fund special education, I dissent.

I. The "beyond a reasonable doubt" standard provides an unwarranted presumption in favor of legislation that is constitutionally challenged

The majority applies a misguided and unwarranted evidentiary standard of proof that bestows a presumption of constitutionality on legislative acts unless proved otherwise "beyond a reasonable doubt." The issue in this case is whether the legislature's special education funding scheme, provided by statute, is constitutional, or, to put it another way, whether it meets the State's "paramount duty . . . to make ample provision for the education of all children . . . ." Const. art. IX, § 1. The correct standard of review is "[w]e presume statutes are constitutional and review challenges to them de novo." *Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 668, 174 P.3d 43 (2007). Similarly, whether the State has fulfilled its constitutional mandate is a question

of law once the facts are established.

Once a statute is challenged, any presumption in favor of its constitutionality is inappropriate. Presumptions create probabilities; "[e]videntiary presumptions exist because the establishment of an intermediate fact more probably than not establishes the ultimate fact, and the intermediate fact is more capable of proof." *Garland v. Cox*, 472 F.2d 875, 878-79 (4th Cir. 1973) (citing Edward W. Cleary, McCormick's Handbook on the Law of Evidence § 343 (2d ed. 1972)). A presumption "is merely a procedural device dictating a particular result only in the absence of contradictory evidence." *Id*. at 879.

"Presumptions . . . may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." *Mackowick v. Kansas City, St. J&C.B.R. Co.*, 196 Mo. 550, 94 S.W. 256, 262 (1906) (internal quotation marks omitted). Once there is contrary evidence, the presumption disappears—with the facts established, there is no need for a procedural device that makes a fact more probable or not. *Garland*, 472 F.2d at 879 ("The moment that contravening evidence is presented from any source, the presumption vanishes completely—as if it had never existed."). Then, "the case is in the judge's hands, free from any rule." *Stumpf v. Montgomery*, 101 Okla. 257, 226 P. 65, 69 (1924). To continue to apply the presumption is "but to play

with shadows and reject substance." *Mackowick*, 94 S.W. at 263. The correct and substantive standard of review of a challenge to a statute's constitutionality is de novo.

Instead, the majority asserts, "it is well established that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt." Majority at 6.[1] The majority claims it applies the "beyond a reasonable doubt" standard of proof not as an evidentiary threshold, but as a means of showing "respect for the legislature." *Id*. at 8. However, proper "respect" for the legislature does not require abdication of judicial review. That would come at the expense of the independence of the judiciary, our system of checks and balances, the individual challenger, and, in this case, the children of our State.

The majority claims it imposes a "demanding standard" on challengers because it presumes the legislature "'considered the constitutionality of its enactments . . . '." *Id*. at 7 (quoting *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000); *see id.* ("'The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of

[1] The majority cites *Parrott & Co. v. Benson*, 114 Wash. 117, 194 P. 986 (1921), to support this standard's longevity. Majority 6. The court in that case applied the "beyond a reasonable doubt" standard to a question of statutory constitutionality, but the court did not cite any support for the "settled" standard. *Benson*, 114 Wash. at 122.

government, which, like the court, is sworn to uphold the constitution.'"

(quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998))).

But this is at odds with bedrock American jurisprudence.

Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803), held:

> The powers of the legislature are defined and limited ; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained ?

The Founders were not so naïve as to rely on the legislature to judge the constitutionality of its own enactments.[2] As James Madison envisioned, it is the judiciary's responsibility to be "an impenetrable bulwark against every assumption of power in the legislative or executive" branches. *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 83-84

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[2] Alexander Hamilton considered this problem:

> If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.

The Federalist No. 78, at 438-39 (Alexander Hamilton) (Isaac Kramnick ed., Penguin Books 1987) (1788).

(Helen E. Veit et al. eds., 1991) (quoting 1 Annals of Cong. 439 (Joseph Gales ed., 1789)). The judiciary cannot protect against an overreaching legislature if every enactment is presumed constitutional unless proved otherwise "beyond a reasonable doubt," giving the legislature, simply because it is the legislature, an advantage against any challenger's assertion to the contrary. *See also Island County*, 135 Wn.2d at 158 (Sanders, J., concurring) ("By necessity any form of deference to the legislative branch, however slight, is a corresponding burden to the citizen who relies upon an independent and impartial judiciary to vindicate and protect his legal rights.").

Concern that the legislature might overstep its constitutional authority is certainly not unfounded. In the midst of the Great Depression, President Franklin D. Roosevelt pressed Congress to pass the Bituminous Coal Conservation Act of 1935 without concern for possible constitutional restrictions. Writing to the chairman of the House Ways and Means Committee, President Roosevelt stated, "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." Letter from Franklin D. Roosevelt to Samuel B. Hill (July 6, 1935), *in* 4 The Public Papers and Addresses of Franklin D. Roosevelt 298 (Samuel I. Rosenman ed., 1938). Roosevelt urged, "[A]ll doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the

ultimate question of constitutionality." *Id.* at 297. Thus even President Roosevelt acknowledged the courts have a truly independent, and ultimate, role to play in matters of judicial review. The legislature may test the limits of its constitutional authority, but it remains the responsibility of the judiciary to determine them. *See Marbury*, 5 U.S. at 176 ("It is, emphatically, the province and duty of the judicial department, to say what the law is."). Obviously, deference to the legislature in matters of constitutional interpretation weakens the judiciary's ability to check the legislature's unconstitutional exercise of power, and it defeats the very separation of powers to which the majority's lips pay service.

A continuing presumption of statutory constitutionality favors the legislature at the expense of the individual who comes before the court to protect his constitutional rights. *See* Robert F. Utter*, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 507 (1984) (explaining the "beyond a reasonable doubt" standard, "founded on . . . a presumption of the honorable intent of executive and legislative officials who have also sworn to uphold the constitution, makes it difficult to apply the Declaration [of Rights] at all, let alone in an independent manner"). Such a standard is warranted in the criminal context where the "beyond a reasonable doubt" standard properly

applies to rigorously protect the presumption of innocence. But when applied to a question of statutory constitutionality, the standard serves no such imperative function. *See id.* at 508 ("Rather, [the standard] serves to undercut the fundamental rights of Washington citizens, and should therefore be discarded.").

Moreover, any presumption in favor of legislative constitutionality is particularly inappropriate when applied to challenges of education statutes. It is this State's "paramount duty" to provide education to all Washington children. Const. art. IX, § 1. All three co-equal branches of government owe this duty:

> [I]n the context employed by Const. art. 9, § 1, the *paramount duty* is imposed upon the sovereign body politic or governmental entity which comprises the "State." While the Legislature is an essential element thereof, it is only one segment of that intricate governmental body politic upon which has been placed the *paramount duty*.

Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 512, 585 P.2d 71 (1978) (footnote omitted). The majority quotes *Seattle School District* for the proposition that "'[w]hile the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature.'" Majority at 9 (alteration in original) (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 520). I agree, but the legislature's authority to select the means does not preclude judicial

authority to review the selected means for compliance with the constitution. *See Seattle Sch. Dist.*, 90 Wn.2d at 516 ("[I]t is not seriously argued that this places the State's duty to make such provision beyond all judicial scrutiny."). To fulfill the "paramount duty" imposed by article IX, section 1, shared by all three branches of government, the judiciary must retain its role as the independent arbiter of constitutional and statutory interpretation to ensure education legislation makes "ample provision" for the state's students.

II. The State underfunds special education

Accepting the funding scheme at face value, the State has underfunded education in violation of article IX, section 1 on its face.

The very legislative scheme at issue for funding for special education students in Washington begins with each student's Basic Education Allocation (BEA) distributed to school districts based on enrollment of "full time equivalent" students. RCW 28A.150.250. This includes special education students. Moreover, "[s]chool districts shall ensure that special education students as a class receive their full share of the general apportionment allocation . . . ." Laws of 2005, ch. 518, § 507(1). The BEA funds basic education. *See* RCW 28A.150.250 (providing "[b]asic education shall be considered . . . fully funded" by the basic education allocation).

Special education is funded *in addition to* basic education. The special

education funding statute directs:

> Funding for programs operated by local school districts shall be on an *excess cost* basis from appropriations provided by the legislature for special education programs for students with disabilities and shall take account of state funds accruing through RCW 28A.150.250, 28A.150.260, federal medical assistance and private funds . . . , and other state and local funds, excluding special excess levies.

RCW 28A.150.390 (emphasis added). The 2005 education appropriations act provides, "[t]o the extent a school district cannot provide an appropriate education for special education students . . . through the general apportionment allocation, it shall provide services through the special education excess cost allocation funded in this section." Laws of 2005, ch. 518, § 507(1). The section provides 0.9309 of the BEA for every special education student in the district in addition to the BEA for every enrolled full-time equivalent student. *Id.* § 507(5)(a)(ii).

The additional 0.9309 is an average cost funding formula similar to the BEA—the lower special education costs of one student offset the higher costs for providing special education to another student. However, it does not purport to cover the full amount of special education costs. To help reduce the deficit, districts may also apply for "safety net awards." *Id*. § 507(8). The safety net oversight committee considers awarding funds when a district demonstrates "that all legitimate expenditures for special education exceed all

available revenues from state funding formulas." *Id.* § 507(8)(a). After a district demonstrates need, the committee "shall then consider the extraordinary high cost needs of one or more individual special education students." *Id.* § 507(8)(b). The current threshold for state funding for an "extraordinary high cost" student is $15,000. *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 149 Wn. App. 241, 251, 202 P.3d 990 (2009).

If a student's special education costs are above the 0.9309 of BEA average but are not offset by another student's lower costs, the district can recover the deficit from the State only if the student has *extraordinarily* high costs, i.e., above $15,000. In 2005-2006, eligible school districts recovered only $35 million from the safety net funds (out of a demonstrated need for $147 million). *Id.* at 265. The underfunded gap was therefore $112 million. *Id.*

The district must provide an "appropriate" special education with the general apportionment allocation (the BEA), and only when a district exhausts the BEA will the State provide an "excess cost allocation" under the appropriations law. *See* Laws of 2005, ch. 518, § 507(1). This appears to support the majority's position that the BEA for each special education student counts toward a district's special education funding. Majority at 12.

However, the majority disregards the very premise of the BEA. The BEA provides basic education services, services the special education student

may, to some degree, use every day and throughout the day. *See* Laws of 2005, ch. 518, § 507(2)(a)(i), (iii) ("Special education students are basic education students first; . . . and . . . [s]pecial education students are basic education students for the entire school day."). A district exhausts a special education student's share of the BEA when it provides the student's basic education services. To the extent a district cannot provide the appropriate education to any student through basic education services and curriculum, the district must provide adequate and "ample" special education services. *See id.* § 507(1). All special education services are additional to a basic education—an "excess cost" the State must fund. *See* RCW 28A.150.390; Laws of 2005, ch. 518, § 507(1). The BEA is simply not a source of State funding for special education and cannot be as a matter of law.

The majority claims, "[f]or us to conclude the BEA should not be included in calculations of how much funding goes to special education, we would have to agree with the Alliance's contention that basic education and special education are in entirely separate realms." Majority at 11. Basic education and special education are not in separate realms—a student often receives basic education with additional special education services—but they are funded separately.

Excluding the BEA from special education funds acknowledges a special

education student receives a fully funded basic education throughout the day as required by law. *See* Laws of 2005, ch. 518, § 507(2)(a)(i), (iii). A basic education student's share of the BEA is expended on his or her basic education. Accordingly, a special education student can only receive his or her "full share of the general apportionment allocation" as required by section 507(1) if the school district expends his or her share on basic education services and *only* basic education services. *See id*. § 507(1).

Instead, the majority asserts, "[t]he BEA need not be used only for the basic education of special education students." Majority at 13. But that is exactly what the BEA is—it is the amount it costs to provide the average student a basic education. Leftover funding from educating a cheaper student offsets the more expensive basic education of another student. The BEA "fully fund[s]" basic education. *See* RCW 28A.150.250. In a formula based on averages, there is no leftover pot of BEA funds to pay for nonbasic education services such as special education.

"[F]or special education students, special education and basic education are inextricably linked. When special education students are receiving special education services, they are also receiving basic education." Majority at 17. Although a special education student may receive some basic education, the special education is in *addition* to the basic education as a matter of law. But

the majority does not allow for the legislative scheme that the student's basic education is funded by the BEA, and his or her special education is an "excess cost" the State must fund additionally. A school district exhausts a special education student's BEA share on basic education. *See* Laws of 2005, ch. 518, § 507(1), (2)(a)(i), (iii). When the BEA is excluded, eligible school districts faced a funding deficit of $112 million for special education in the 2005-2006 school year. *Sch. Dists.' Alliance*, 149 Wn. App. at 254-55.

This court's role is not to "micromanage education" but rather to provide broad constitutional guidelines in which the legislature may operate to fulfill the mandate of article IX, section 1. *See Tunstall*, 141 Wn.2d at 223; *Seattle Sch. Dist.*, 90 Wn.2d at 518. Only arithmetic, not micromanagement, is needed to determine that a deficit of $112 million in special education funding is a violation of this State's "paramount duty" by application of the very statutes the State claims are constitutionally adequate.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: