

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue, Denver, CO 80203

Appeal from the Colorado Court of Appeals, Case No.
06CA733

PETITIONERS: **Anthony Lobato**, as an individual and as parent and natural guardian of **Taylor Lobato** and **Alexa Lobato**; **Denise Lobato**, as an individual and as parent and natural guardian of **Taylor Lobato** and **Alexa Lobato**; **Jaime Hurtado** and **Coralee Hurtado**, as individuals and as parents and natural guardians of **Maria Hurtado** and **Evan Hurtado**; **Janet L. Kuntz**, as an individual and as parent and natural guardian of **Daniel Kuntz** and **Stacey Kuntz**; **Pantaleón Villagomez** and **Maria Villagomez**, as individuals and as parents and natural guardians of **Chris Villagomez**, **Monique Villagomez** and **Angel Villagomez**; **Linda Warsh**, as an individual and as parents and natural guardian of **Adam Warsh**, **Karen Warsh** and **Ashley Warsh**; **Elaine Gerdin**, as an individual and as parent and natural guardian of **N.T.**, **J.G.** and **N.G.**; **Dawn Hartung**, as an individual and as parent and natural guardian of **Q.H.**; **Paul Lastrella**, as an individual and as parent and natural guardian of **B.L.**; **Woodrow Longmire**, as an individual and as parent and natural guardian of **Tianna Longmire**; **Steve Seibert** and **Dana Seibert**, as individuals and as parents and natural guardians of **Rebecca Seibert** and **Andrew Seibert**; **Olivia Wright**, as an individual and as parent and natural guardian of **A.E.** and **M.E.**; **Herbert Conboy** and **Victoria Conboy**, as individuals and as parents and natural guardians of **Tabitha Conboy** and **Timothy Conboy**; **Terry Hart**, as an individual and as parent and natural guardian of **Katherine Hart**; **Larry Howe-Kerr** and **Kathy Howe-Kerr**, as individuals and as parents and natural guardians of **Lauren Howe-Kerr** and **Luke Howe-Kerr**; **John T. Lane**, as an individual; **Jennifer Pate**, as an individual and as parent and natural guardian of **Ethan Pate** and **Evelyn Pate**; **Robert L. Podio** and **Blanche J. Podio**, as individuals and as parents and natural guardians of **Robert Podio** and **Samantha Podio**; **Tami Quandt**, as an individual and as parent and natural guardian of **Brianna Quandt**, **Cody Quandt** and **Levi Quandt**; **Brenda Christian**, as an individual and as

parent and natural guardian of **Ryan Christian**; **Toni L. McPeek**, as an individual and as parent and natural guardian of **M.J. McPeek**, **Cassie McPeek** and **Michael McPeek**; **Christine Tiemann**, as an individual and as parent and natural guardian of **Emily Tiemann** and **Zachary Tiemann**; **Paula VanBeek**, as an individual and as parent and natural guardian of **Kara VanBeek** and **Antonius VanBeek**; **Larry Haller** and **Pennie Haller**, as individuals and as parents and natural guardians of **Kelly Haller** and **Brandy Haller**; **Tim Hunt** and **Sabrina Hunt**, as individuals and as parents and natural guardians of **Shannon Moore-Hiner**, **Eris Moore**, **Darean Hunt** and **Jeffrey Hunt**; **Mike McCaleb** and **Julie McCaleb**, as individuals and as parents and natural guardians **Rebekka McCaleb**, **Layne McCaleb** and **Lynde McCaleb**; **Todd Thompson** and **Judy Thompson**, as individuals and as parents and natural guardians of **Garson Thompson** and **Tarek Thompson**; **Doug Vondy** and **Denise Vondy**, as individuals and as parents and natural guardians of **Kyle Leaf** and **Hannah Vondy**; **Brad Weisensee** and **Traci Weisensee**, as individuals and as parents and natural guardians of **Joseph Weisensee**, **Anna Weisensee**, **Amy Weisensee** and **Elijah Weisensee**; **Stephen Topping**, as an individual and as parent and natural guardian of **Michael Topping**; **Donna Wilson**, as an individual and as parent and natural guardian of **Ari Wilson**, **Sarah Patterson**, **Madelyn Patterson** and **Taren Wilson-Patterson**; **David Maes**, as an individual and as parent and natural guardian of **Cherie Maes**; **Debbie Gould**, as an individual and as parent and natural guardian of **Hannah Gould**, **Ben Gould** and **Daniel Gould**; **Lillian Leroux**, as an individual and natural guardian of **Ari Leroux**, **Lillian Leroux**, **Ashley Leroux**, **Alexandria Leroux** and **Amber Leroux**; **Theresa Wrangham**, as an individual and natural guardian of **Rachel Wrangham** and **Deanna Wrangham**

and

Alamosa School District, No. RE-11J; Centennial School District No. R-1; Center Consolidated School District No. 26 JT, of the Counties of Saguache and Rio Grande and Alamosa; Creede Consolidated School District No. 1 in the County of Mineral and State of Colorado; Del Norte Consolidated School District No. C-7; Moffat, School District No. 2, in the County of Saguache and State of Colorado; Monte Vista School District No. C-8; Mountain Valley School District No.

RE 1; North Conejos School District No. RE1J; Sanford, School District No. 6, in the County of Conejos and State of Colorado; Sangre de Cristo School District, No. RE-22J; Sargent School District No. RE-33J; Sierra Grande School District No. R-30; and South Conejos School District No. RE10.

RESPONDENTS: The State of Colorado; the Colorado State Board of Education; Dwight Jones, in his official capacity as Commissioner of Education of the State of Colorado; and **Bill Ritter**, in his official capacity as Governor of the State of Colorado.

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**BRIEF OF AMICUS CURIAE EDUCATION JUSTICE AT
EDUCATION LAW CENTER**

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STATEMENT OF AMICUS CURIAE

Education Law Center (ELC) is a non-profit organization in New Jersey established in 1973 to advocate on behalf of public school children for access to an equal and adequate educational opportunity under state and federal laws through policy initiatives, research, public education, and legal action. ELC represented the plaintiff schoolchildren in *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), and continues to advocate on their behalf to ensure effective implementation of the *Abbott* remedies, which have “enabled children in [‘]Abbott districts[’] to show measurable educational improvement.” *Abbott v. Burke*, No. M-969/1372-07 (N.J. Nov. 18, 2008), slip op. at 5. Because of its expertise in education law and policy, ELC has recently established Education Justice at Education Law Center (Education Justice), a national program to advance children’s opportunities to learn. Education Justice provides advocates seeking better educational opportunities in states across the nation with analyses and assistance on: relevant litigation; high quality preschool and other proven educational programs; education cost studies; resource gaps; and policies that help schools build the know-how to narrow and close achievement gaps. Education Justice has participated as amicus curiae in state educational opportunity cases in South Carolina, Connecticut, Indiana, and Maryland.

PRELIMINARY STATEMENT

The Colorado courts play a crucial role in the state's tripartite system of government. The courts' duties include interpreting state constitutional clauses and adjudicating claims of violations of the Colorado Constitution. While the separation of powers doctrine requires each branch of government to respect the others' roles, it also compels each branch to shoulder its particular responsibilities. Accordingly, courts are reluctant to decline to determine the meaning of constitutional provisions on grounds of nonjusticiability, and have invoked the "political question" doctrine in only the rarest of instances. The question of the meaning of the Colorado Constitution's mandate that the state provide a "thorough and uniform system of free public schools" is the particular responsibility of the judiciary as ultimate interpreter of the Colorado Constitution. The General Assembly undoubtedly has a critical constitutional role as well.

The Court of Appeals erred when it concluded that plaintiffs' claims are nonjusticiable because their resolution would require the courts to interfere with the legislative and executive branches by hearing the constitutional claims raised here. To the contrary, it is the role of the judiciary to interpret the Colorado Constitution, and the Colorado Supreme Court is uniquely experienced in adjudicating constitutional matters. Amicus curiae Education Justice respectfully

submits that venerable Colorado precedents support a finding that plaintiffs' claims are justiciable. This Court has a long history of engaging in constitutional interpretation, even if the determination may affect other branches of government, and is fully capable of discerning and applying "judicially manageable standards" in this case. Numerous courts in similar cases across the country have managed to discern standards, and this Court has a duty and ability to do so as well. Further, state courts throughout the country routinely interpret Education Clauses and define the rights and duties that these clauses impose. Finally, proper separation of powers concerns compel the judiciary to interpret the constitution and determine whether defendants are in compliance.

ISSUE PRESENTED FOR REVIEW

Amicus curiae will address the following issue presented in the Joint Petition for Writ of Certiorari filed by plaintiffs and defendants:

Whether the Court of Appeals erred in holding that claims regarding educational quality and adequacy of school funding brought pursuant to Article IX, Section 2 of the Colorado Constitution (the Education Clause) present nonjusticiable political questions.

STATEMENT OF THE CASE

Amicus curiae Education Justice adopts the statement of the case presented in the Joint Petition for Writ of Certiorari filed by plaintiffs and defendants.

ARGUMENT

POINT I

COLORADO'S JUDICIARY HAS PREVIOUSLY DECLINED TO ALLOW CLAIMS OF THE EXISTENCE OF POLITICAL QUESTIONS TO PREVENT IT FROM FULFILLING ITS DUTY TO INTERPRET THE CONSTITUTION

This Court has a long history of shouldering its duty to interpret difficult and complete constitutional provisions in the face of claims of nonjusticiability. Indeed, time and again, this Court has recognized that the judiciary has a duty to decide issues concerning how to correctly construe the State Constitution and laws of the State, even if the determination may affect other branches of government. The Court has repeatedly considered and rejected claims that it should refrain from deciding legal issues that supposedly presented nonjusticiable “political questions.” For example, in *Colorado Common Cause v. Bledsoe*, 810 P.2d 201 (Colo. 1991), *reh'g denied*, No. 895C465, 1991 Colo. LEXIS 324 (Colo. May 20, 1991), plaintiffs petitioned the Court to determine

whether members of the State's House of Representatives violated an amendment to the Colorado Constitution prohibiting members from committing themselves to a vote at a party caucus. *Id.* at 203. The Court determined that constitutional interpretation was necessary to resolve the issue and that doing so

in no way infringes on the powers and duties of the coequal departments of our government; moreover, we do not find present any of the political-question characteristics identified by the United States Supreme Court. *On the contrary, the issue before us is one traditionally within the role of the judiciary to resolve, for it is peculiarly the province of the judiciary to interpret the constitution and say what the law is.* We have decided numerous other cases that have raised issues of whether legislative actions violated statutory or constitutional provisions, and we have not held that the nature of such questions automatically renders them nonjusticiable political questions. We decline to find that the constitutional issues presented in this case constitute nonjusticiable political questions.

Id. at 206 (internal quotation marks and citations omitted) (emphasis added).

In *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (en banc), *cert. denied*, 541 U.S. 1093 (2004), the Colorado Attorney General presented a constitutional challenge to a Congressional redistricting bill enacted by the General Assembly. *Id.* at 1224-25. The Colorado Secretary of State and the General Assembly argued that the Assembly was empowered with the sole authority over redistricting issues, because the United States Constitution stated

that election issues are to be prescribed in each state “by the *legislature* thereof.”

U.S. Const. art. I, § 4, cl. 1 (emphasis added). This Court, however, held that

the word “legislature,” as used in Article I of the federal Constitution, encompasses court orders. State courts have the authority to evaluate the constitutionality of redistricting laws and to enact their own redistricting plans when a state legislature fails to replace unconstitutional districts with valid ones. . . . In such a case, a court cannot be characterized as “usurping” the legislature’s authority.

People ex rel. Salazar, 79 P.3d at 1232.

As set forth above, when squarely presented with the need to interpret the meaning of constitutional provisions in cases such as *Bledsoe* and *People ex rel. Salazar*, this Court has refused to defer to the legislature on nonjusticiability grounds. Education Justice respectfully submits that it should do the same thing in this case.

POINT II

THE COURT IS CAPABLE OF DISCERNING AND APPLYING “JUDICIALLY MANAGEABLE STANDARDS” IN THIS CASE, AS COURTS IN OTHER STATES HAVE DONE IN SIMILAR CASES.

State supreme courts across the country have fully accepted their duty to ensure constitutionality. These high courts have routinely interpreted their

states' Education Clauses and discerned judicially manageable standards. Specifically, numerous states' courts have been asked to adjudicate whether their school funding systems violate the Education Clauses of their state constitutions. Their decisions make clear that questions concerning the interpretation of a state constitution's Education Clause and the constitutionality of a state's education finance system are fully justiciable. The vast majority of these courts have responded by denying defendants' motion to dismiss and remanding the case for trial on its merits. This Court is urged to do the same.

Notably, Colorado courts have looked to decisions from courts in sister states for insight into issues they are considering. *See, e.g., People ex rel. Salazar*, 79 P.3d at 1240. As set forth above, other states' courts have interpreted their own Education Clauses, finding plentiful guidance for interpreting the clauses' eighteenth, nineteenth and twentieth century terminology.¹ The principal

¹ *Columbia Falls Elem. Sch. Dist. 6 v. Mont.*, 109 P.3d 257 (Mont. 2005); *Montoy v. Kan.*, 102 P.3d 1160 (Kan. 2005); *Neeley v. West Orange-Cove Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472 (Ark. 2002), cert. denied, 538 U.S. 1035 (2003); *Campaign for Fiscal Equity v. N.Y. (CFE II)*, 801 N.E.2d 326 (N.Y. 2003); *Kasayulie v. Alaska*, 3AN-97-3782 Civ. (Sup. Ct. of Alaska, Sept. 1, 1999); *Abbeville County Sch. Dist. v. S.C.*, 515 S.E.2d 535 (S.C. 1999); *Zuni Sch. Dist. v. N.M.*, District Court of McKinley County, Case No. CV-98-14-II (Dist. Ct. of New Mexico 1998); *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Leandro v. N.C.*, 488 S.E.2d 249, 255 (N.C. 1997); *DeRolph v. Ohio*, 677 N.E.2d 733 (Ohio 1997); *Brigham v. Vt.*, 692 A.2d 384 (Vt. 1997); *Bradford v. Md. State Bd. of Educ.* (Cir. Ct. for Balt. City, Md. 1996); *Campbell County Sch. Dist. v. Wyo. (Campbell County Sch. Dist. I)*, 907 P.2d 1238 (Wyo. 1995); *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516 (Ma. 1993); *Comm. for Educ. Equality v. Mo.*, No.

belief of the framers of these provisions was that in order to preserve a republican form of government and individual freedoms, the people must be educated to be capable citizens. *See generally* Lawrence Cremin, *American Education: The National Experience 1782-1876* (1980); C. Kastle, *Pillars of the Republic: Common Schools and American Society 1780-1860* (1983); *see, e.g., McDuffy v. Sec’y of Educ.*, 615 N.E.2d 516 (Mass. 1993) (explaining colonial history and eighteenth century principles, especially freedom, incorporated in the education clause). Compared to the language in many other states’ education clauses,² Colorado’s Constitution contains expansive language to inform judicial consideration of the constitutional mandate.³ Other states’ courts have had no

CV190-1371CC (Mo. Circuit Ct. 1993); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Id. 1993); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Seattle Sch. Dist. No. 1 v. Wash.*, 585 P.2d 71, 92 (Wash. 1978).

² *See, e.g.,* Ky. Const. § 183 (“The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”); N.C. Const. art. IX, § 2 (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”); N.Y. Const. art. X, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”); S.C. Const. art. XI § 3 (“The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning as may be desirable.”).

³ The Colorado Education Clause states “The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public

difficulty interpreting the terms within their Education Clauses to ensure the right to an “adequate,” “suitable,” “efficient,” or “thorough and uniform” education.

Likewise, this Court is fully capable of interpreting the terms of Colorado's Education Clause and then discerning and applying “judicially manageable standards” in this case. As the highest court in Colorado, it is this Court's obligation to do so. Like its sister courts, this Court can ascertain the applicable standards from (1) constitutional text and/or (2) state-implemented academic standards and assessment systems.

First, courts in at least twenty-two states have rejected nonjusticiability claims by ruling that neutral, manageable standards on this important constitutional issue could be discerned from constitutional text.⁴ Specifically, those courts explicated judicially manageable standards by interpreting the Education Clause of their respective state’s constitution, and then provided guidance to the remand court for its determination of whether the constitutional standard is being met.

schools throughout the state wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.” Colo. Const. art. IX, § 2.

⁴ See Footnote 1.

For example, when presented with a school construction financing issue, the Wyoming Supreme Court not only found the issue to be justiciable, but specifically and forcefully expressed its disagreement with a dissenting judge who argued that Wyoming's Constitution did not provide judicially manageable standards. *Wyo. v. Campbell County Sch. Dist. (Campbell County Sch. Dist. II)*, 32 P.3d 325, 335-36 (Wyo. 2001). Wyoming's Education Clause, which is very similar to that of Colorado, requires the legislature to provide "a complete and uniform system of public instruction." Wyo. Const. art. 7, § 1. The Court stated:

One need only examine the litany of case law, state and federal, interpreting the broad language of such constitutional provisions as the due process and equal protection provisions and establishing standards on which to invoke the rights enshrined in those fundamental laws to reject the disingenuousness of the "absence-of-standards" rationale. If one were to take seriously this rationale, a huge portion of judicial constitutional review would be without basis.

Campbell County Sch. Dist. II, 32 P.3d at 335-36.

In addition, when faced with a funding adequacy issue similar to that in this case, New York's highest court tackled the issue directly, finding that it was justiciable. *See Campaign for Fiscal Equity, Inc. v. N.Y. (CFE I)*, 655 N.E.2d 661, 665 (N.Y. 1995). In *CFE I*, the New York Court of Appeals reversed the granting of defendants' motion to dismiss a claim of inadequate educational opportunities

and inadequate funding by addressing New York’s Education Clause, which states: “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” *Id.* The court “examined the Education Article’s language and history” and held that “[i]n order to satisfy the Education Article’s mandate, the system in place must at least make available an ‘education’, a term we interpreted to connote ‘a sound basic education’.” *Id.*

Specifically, the court discerned standards that it found should be applied:

Th[e Education] Article requires the State to offer all children the opportunity of a sound basic education. Such an education should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury. If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation.

Id. at 666 (citations omitted).

The court further elaborated on the standards to be applied by providing guidance as to

what the trier of fact must consider in determining whether defendants have met their constitutional

obligation. The trial court will have to evaluate whether the children in plaintiffs' districts are in fact being provided the opportunity to acquire the . . . skills necessary to enable them to function as civic participants capable of voting and serving as jurors. A relevant issue at this point is whether plaintiffs can establish a correlation between funding and educational opportunity. In order to succeed in the specific context of this case, plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children.

Id. at 666-67.

Following the standards that were set forth by the New York Court of Appeals, the *CFE I* parties presented evidence to the trial court on: teaching quality, facilities, and other "inputs," such as availability of textbooks and computers; student "outcomes," such as test scores and graduation rates; the state system of education finance; and the alleged causal link. *Campaign for Fiscal Equity, Inc. v. N.Y.*, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. Jan. 10, 2001). The trial court ruled in plaintiffs' favor, and the decision was affirmed on appeal. *Campaign for Fiscal Equity, Inc. v. N.Y. (CFE II)*, 801 N.E.2d 326 (N.Y. 2003).

Courts have also discerned judicially manageable standards from other constitutional language. For example, the Texas Supreme Court adjudicated a case involving an educational funding issue by interpreting the State's Constitutional Education Clause. *Neeley v. W. Orange-Cove Consol. Ind. Sch.*

Dist., 176 S.W.3d 746 (Tex. 2005). Specifically, several school districts brought the action claiming that the public school finance system had become an unconstitutional state *ad valorem* tax. Other districts intervened, opposing that claim, but also asserting that the public school finance system was constitutionally inefficient. *Id.* at 751-52. The Texas Education Clause states: “A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.” Tex. Const. art. VII, § 1.

The court specifically held that the issues raised were not nonjusticiable political questions:

This is not an area in which the Constitution vests exclusive discretion in the legislature; rather the language of [A]rticle VII, [S]ection 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. This duty is not committed unconditionally to the legislature’s discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make “suitable” provision for an “efficient” system for the “essential” purpose of a “general diffusion of knowledge.” While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature’s actions.

Neeley, 176 S.W.3d at 776-77.

Accordingly, the court found that the Educational Clause:

sets three standards central to this case. One is that the public school system be efficient Another standard set by the constitutional provision is that public education achieve “[a] general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people” A third constitutional standard is that the provision made for public education be “suitable.”

Id. at 752-53 (internal citations omitted). The court then analyzed each standard, and applied them in adjudicating the case.

Likewise, the New Hampshire Supreme Court discerned judicially manageable standards from the education mandate in its State Constitution. *See Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (1997). The New Hampshire Constitution states:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools

N.H. Const. pt. 2, art. 83.

In finding the issue justiciable, the *Claremont* court defined a constitutionally adequate education as one that “includes broad educational

opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas." *Claremont*, 703 A.2d at 1359 (internal citations and quotations omitted). The *Claremont* court first looked to the seven criteria articulated by the Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212 (Ky. 1989), which had established general, aspirational guidelines for defining educational adequacy. The court then promulgated manageable standards of its own. Specifically, the court determined that "[a] constitutionally adequate public education should reflect consideration of the following:

- (i) sufficient oral and written communication skills...
- (ii) sufficient knowledge of economic, social, and political systems...
- (iii) sufficient understanding of governmental processes...
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts...
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields...;
- and (vii) sufficient levels of academic or vocational skills to...compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. at 1359.

After issuing those standards and guidelines, the New Hampshire Supreme Court found that the existing education finance system was incapable of supporting the standards it had articulated and thereby violated the Education

Article in the State Constitution. As a result, instead of deferring to the legislature, the court *directed* the legislature to cure the constitutional deficiency, stating: “Without intending to intrude upon prerogatives of other branches of government, *see* N.H. Const. pt. I, art. 37, we anticipate that they will promptly develop and adopt specific criteria implementing these guidelines and, in completing this task, will appeal to a broad constituency.” *Id.*

This Court now faces a very similar issue to that addressed by the courts in Wyoming, New York, Texas, and New Hampshire. As set forth above, those courts, as well as courts in at least nineteen other states, performed their judicial duty of interpreting their constitutions and discerning judicially manageable standards from them. Notably, the language used in Colorado’s Education Clause is arguably even more direct than the language in some of the clauses discussed above in that it imposes an obligation on the State to provide “for the establishment and maintenance of a thorough and uniform system of free public schools” to its schoolchildren. Colo. Const. art. IX, § 2.

In its decision below, the Court of Appeals made little effort to analyze the language of the Education Clause. Although the court clearly defined the terms “thorough” and “uniform,” it inexplicably found that these terms could not be used to discern standards. Instead of interpreting the constitution, as is its

duty and responsibility, the Court of Appeals deferred to the legislature. Like courts in at least twenty-two other states -- some with constitutional language providing less direction -- this Court is clearly capable of discerning judicially manageable standards.

Second, as state education departments and legislatures have implemented academic standards and assessment systems, many trial courts have examined their respective state's standards as part of the evidence of a constitutionally sound system of education.⁵ In Wyoming, for example, after a trial on the merits, the Supreme Court wrote approvingly of

[t]rial testimony [that] indicated aspects of a quality education will include:

....

⁵ See, e.g., *Hull v. Albrecht (Albrecht I)*, 950 P.2d 1141, 1145 (Ariz. 1997) (“[A] constitutionally adequate system will make available to all districts financing sufficient to provide facilities and equipment necessary and appropriate to enable students to master the educational goals set by the legislature.”); *Montoy v. Kan.*, 102 P.3d 1160, 1164 (Kan. 2005) (noting that the state's school performance accreditation system, which is “based upon improvement in performance that reflects high academic standards and is measurable,” and its standards for individual and school performance levels, comprise the legislature’s determination of a constitutionally “suitable” education system) (quoting Kan. Stat. Ann. § 72-6539(a)); *Columbia Falls v. Mont.*, 109 P.3d 257, 312 (Mont. 2005) (“Unless funding relates to needs such as academic standards . . . and performance standards, then the funding is not related to the cornerstones of a quality education.”); *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 432 (N.J. 1997) (noting that the state’s curriculum standards “embody the substantive content of a thorough and efficient education”); *Neeley v. W. Orange-Cove*, 176 S.W.3d 746, 787 (Tex. 2005) (an adequate public education system is one that is “reasonably able to provide” students with a “meaningful opportunity to acquire the essential knowledge and skills reflected in . . . curriculum requirements”) (emphasis in original) (citing district court decision).

2. Integrated, substantially uniform substantive curriculum decided by the legislature through the State Superintendent of Public Instruction and the State Board of Education with input from local school boards.

....

4. Setting of meaningful standards for course content and knowledge attainment [and] . . .

5. Timely and meaningful assessment

Campbell County Sch. Dist. v. Wyo. (Campbell County Sch. Dist. I), 907 P.2d 1238 (Wyo. 1995) ((footnotes omitted).

Here, this Court can look to the comprehensive K-12 Colorado Academic Standards that have been developed by the State Board of Education and the Colorado General Assembly. Specifically, the State has provided model content standards in a variety of subject areas from civics to mathematics to physical education. Accordingly, in addition to its interpretation of the constitutional text, this Court can look to those standards as part of the evidence at trial in this case.

Put simply, it is the duty and responsibility of the Colorado judiciary to interpret the State Constitution. Accordingly, it is respectfully submitted that this Court is fully capable of discerning standards from Colorado's Education Clause. More importantly, it is the judiciary's duty to interpret the Education

Clause, and this constitutional issue should therefore not be deferred to the legislature.

POINT III

PROPER SEPARATION OF POWERS CONCERNS COMPEL THE JUDICIARY TO INTERPRET THE CONSTITUTION AND DETERMINE WHETHER DEFENDANTS ARE IN COMPLIANCE.

The separation of powers doctrine, properly applied, acknowledges the respective duties of all three branches of government. *Pena v. Dist. Ct.*, 681 P.2d 953, 955-56 (Colo. 1984). In a complex administrative environment, courts, legislatures, and administrative agencies operating alone cannot successfully resolve major social problems. Although one of the branches may initiate a reform or take primary responsibility, successful policy making in a complex regulatory environment requires the extensive, complementary involvement of all three branches of government. *See Smith v. Miller*, 384 P.2d 738, 741 (Colo. 1963) (“It is an ingrained principle in our government that the three departments of government are coordinate and shall co-operate with and complement, and at the same time act as checks and balances against one another but shall not interfere with or encroach on the authority or within the province of the other.”) (internal quotations omitted); *People ex rel. R.W.V.*, 942 P.2d 1317, 1320 (Colo. Ct. App.

1997) (“The powers exercised by different branches of government necessarily overlap, and an absolute separation of government functions among the co-equal branches is neither required nor desirable to achieve the constitution’s ultimate goal of effective and efficient government.”), *cert. denied*, No. 975C242, 1997 Colo. LEXIS 751 (Colo. Sept. 2, 1997).

High courts in many states have held not only that separation of powers presents no bar to judicial review, but that the principle actually compels these courts to act. In fact, experience with successful education adequacy cases has shown that if constitutional rights in this area are to be vindicated, it will be through the combined efforts of all three branches of government. These courts have held that in order to fulfill their responsibilities as a co-equal branch of state government, they must hear challenges -- equivalent to plaintiffs’ claims here -- to the constitutional adequacy of their states’ education finance systems. The high courts in at least twenty-two states have rejected separation of powers and political question arguments, concluding it was the court’s duty to declare the meaning of the Constitution and adjudicate the claims presented.⁶

For example, in 2001, the Wyoming Supreme Court defended its involvement in a constitutional challenge to the state’s educational system.

⁶ See cases cited at n.1, *supra*.

Campbell County Sch. Dist. II, 32 P.3d at 332. The court held that “[i]f the executive and legislative branches fail to fulfill their duties in a constitutional manner, the Court too must accept its continuing constitutional responsibility . . . for overview . . . of compliance with the constitutional imperative.” *Id.* (quoting *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 Harv. L. Rev. 1088 (1991)). The court further warned that “staying the judicial hand in the face of continued violation of constitutional rights makes the courts vulnerable to becoming complicit actors in the deprivation of those rights.” *Id.* at 333.⁷

This Court is now presented with the opportunity to fulfill its constitutional duty and avoid becoming complicit in the deprivation of the children of Colorado’s constitutional right to a “thorough and uniform” education. The Court of Appeals’ refusal to classify plaintiffs’ claims as justiciable was based on its aspiration to follow the principle of judicial restraint. *Lobato v. State*, No. 06CA0733, 2008 Colo. App. LEXIS 69, at *17. The court sought to exercise this principle after being “cautioned by the experience of other courts that have held

⁷ Significantly, the Wyoming Supreme Court held that *Baker v. Carr*, 369 U.S. 186 (1962) – the case relied upon by the Court of Appeals in this litigation – “is clearly irrelevant and inapplicable for purposes of state constitutional analysis.” *Campbell County Sch. Dist. II*, 32 P.3d at 333. In support of this position, the court cited the writings of Justice Brennan, author of *Baker*: “state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts.” *Id.* (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977)).

such challenges to be justiciable but then been unable to achieve prompt resolution.” *Id.* at *33. Specifically recognized as an example of such a cautionary tale was the New Jersey Supreme Court, characterized as having “struggled for more than two decades to define what constitutes a ‘thorough and efficient’ education under its constitution.” *Id.* Instead, the Court of Appeals subscribed to the minority approach announced by the Nebraska Supreme Court: “The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states’ school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.” *Id.* at *34.

That approach was in error. While the Court of Appeals’ desire to avoid a long and arduous engagement is understandable, it cannot justify the judiciary’s inaction in the face of the deprivation of the rights of the children of Colorado. A refusal to address a constitutional question so crucial to the citizens of this State would make the Colorado judiciary “vulnerable to becoming complicit actors in the deprivation of those rights.” *See Campbell County Sch. Dist. II*, 32 P.3d at 332.

Other states’ highest courts have recognized that determining that any aspect of a funding system violates constitutional standards entails no greater usurpation of the authority of the coordinate branches than any other constitutional

determination. *See, e.g., Seymour v. Region One Bd. of Educ.*, 803 A.2d 318, 326 (Conn. 2002). As New Hampshire’s Supreme Court demonstrated in *Claremont School District* more than a decade ago, this Court can respect the separation of powers doctrine and the authority of the other branches of government in education adequacy cases by interpreting the Constitution’s educational mandates, directing the Legislature to take action on any constitutional deficiencies the Court identifies, and allowing the political branches to correct these deficiencies by replacing the current financial model for education funding with one that “passes constitutional muster.” *Claremont Sch. Dist.*, 703 A.2d at 1360. *See also, Seymour*, 803 A.2d at 324; *Hoke County Bd. of Educ. v. N.C.*, 599 S.E.2d 365, 390-91 (N.C. 2004); *Roosevelt Elem. Sch. Dist.*, 877 P.2d at 815-16. If the constitutionality of that rehabilitated funding system is in turn challenged, this Court will again be called to fulfill its “sole function . . . to rule on the constitutionality” of that system to identify any constitutional deficiencies and direct the political branches to again reform the system. *Lujan v. State Bd. of Educ.*, 649 P.2d 1005, 1025 (Colo. 1982). *See Claremont Sch. Dist.*, 703 A.2d at 1360. The Court must continue its involvement with the process until the constitutional mandate that each child in Colorado receive a “thorough and uniform” education is realized.

Discussions of judicial remedial capabilities often emphasize the judiciary's deficiencies without considering whether the task at hand can be better performed by a legislature, a state education department, or another governmental or private agency. Contrarily, Wisconsin Law Professor Neil Komesar has argued that courts must analyze the actions of other government branches. He has spent twenty-five years exploring a comparative institutional approach to the separation of powers doctrine. See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 149 (1994); Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 Mich. L. Rev. 657 (1988); Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. Chi. L. Rev. 366 (1983).

Komesar argues that courts' principled approach to issues and their institutional stability are essential for providing continuing guidance on constitutional requirements and sustained commitment to meeting constitutional goals. The system of checks and balances that is central to the separation of powers doctrine is thus best upheld when the courts engage in analyses of the other branches' acts to ensure constitutionality. See *Mistretta v. United States*, 488 U.S. 361, 381 (1989) ("the greatest security against tyranny -- the accumulation of

excessive authority in a single Branch -- lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch”). Responsibility for deciding how to implement the constitutional mandate still rests with the political branches, who are both equipped to make the necessary policy choices and trade-offs, so long as the result conforms to what the Constitution requires. Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 149 (1994) (“courts may be called upon to consider issues for which they are ill equipped in some absolute sense because they are better equipped to do so in a relative sense.”).

From this comparative institutional perspective, it is clear that the courts’ principled approach to issues and their institutional stability are essential for providing continuing guidance on constitutional requirements and sustained commitment to meeting constitutional goals. Legislatures, meanwhile, are better equipped to develop specific reform policies, and executive agencies are most effective in undertaking the day to day implementation tasks of explaining what is required, and then ensuring that districts and schools can and do carry out those requirements. Successful resolution of litigation and meaningful vindication of children’s constitutional rights can only be achieved through state courts’ issuance of guidance as to the meaning of the Education Clause’s mandate to the State that

promotes an effective use of the comparative strengths of each of the branches of government.

Students of the comparative institutional perspective would applaud the actions taken by this Court five years ago in *People ex rel. Salazar*:

State courts have the authority to evaluate the constitutionality of redistricting laws and to enact their own redistricting plans when a state legislature fails to replace unconstitutional districts with valid ones. *See generally Growe[v. Emison]*, 507 U.S. 25, 122 L. Ed. 2d 388, 113 S. Ct. 1075 [1993]; *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982). In fact, courts are constitutionally required to draw constitutional congressional districts when the legislature fails to do so. *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 1441, 155 L. Ed. 2d 407 (2003). *In such a case, a court cannot be characterized as “usurping” the legislature’s authority*; rather, the court order fulfills the state’s obligation to provide constitutional districts for congressional elections in the absence of legislative action.

79 P.3d at 1232 (emphasis added). Indeed, the instant dispute presents precisely the type of case anticipated by the *Salazar* court in this passage. Just as Colorado’s courts have the authority to evaluate congressional districting, they have the power and the duty to evaluate school financing and determine whether constitutional mandates are being fulfilled.

The outcome of this case should be determined by whether plaintiffs adduce evidence proving that the current system of education finance in Colorado

is not providing students with the educational opportunities that are designed to prepare them “to participate meaningfully in the civic, political, economic, social and other activities of our society and the world.” Pl. Compl. ¶ 5. Plaintiffs should be afforded the opportunity to present their evidence at a trial on the merits of the case.

CONCLUSION

For all of the foregoing reasons, amicus curiae respectfully urges the Court to reverse the decision of the Court of Appeals and remand this case for further proceedings.

Respectfully submitted,

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