

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>District Court, City and County of Denver, CO Trial Court Judge: Hon. Michael A. Martinez Trial Court Case No. 05 CV 4794</p>	
<p>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</p>	<p>Case No.: 08SC185</p>

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**

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<p>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</p> <p>and</p> <p>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.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case No.: 08SC185</p>
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<p>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, Jr., in his official capacity as Governor of the State of Colorado.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Respondents:</p> <p>John W. Suthers, Attorney General Daniel D. Domenico, Solicitor General* Registration Number: 32038 John R. Sleeman, Deputy Attorney General* Registration Number: 16207 Antony B. Dyl, Senior Assistant Attorney General* Registration Number: 15968 Office of the Colorado Attorney General 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5498 (303) 866-5671 (fax) * Counsel of Record</p>	<p>Case No.: 08SC185</p>
<p>ANSWER BRIEF</p>	

Defendants/Respondents, the State of Colorado, the Colorado State Board of Education, Dwight Jones, in his official capacity as Commissioner of Education, and Bill Ritter, in his official capacity as Governor of the State of Colorado (collectively, the “Defendants” or “State”), hereby submit their Answer Brief.

STATEMENT OF THE CASE

The Plaintiffs/Petitioners (“Plaintiffs”) filed this action in June, 2005, seeking declaratory and injunctive relief, alleging that the statutory system enacted by the General Assembly to fund public schools in Colorado violates article IX, sections 2 and 15, and article X, section 3,¹ of the Colorado Constitution . (Compl., ¶ 1, R. at p. 4.)

Article IX, section 2 (the “Education Clause”), states, in relevant part, “The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty one years, may be educated gratuitously.”

The gravamen of Plaintiffs’ action is that these provisions contain a substantive mandate and that what constitutes a “constitutionally adequate, quality

¹ Plaintiffs’ article IX, section 15, and article X, section 3, claims are not before this Court.

education” be determined by a judge through litigation rather than through the democratic processes that have traditionally controlled the established educational goals and standards, including local and statewide legislative efforts, and initiatives by the people of the state. (*See* Compl., ¶ 4, R. at p. 4). Specifically, Plaintiffs argue that a court must deem an education inadequate unless it is convinced after a trial that the education “prepare[s] residents to participate meaningfully in the civic, political, economic, social and other activities of our society and the world, and to exercise the basic civil and other rights of a citizen of the State of Colorado and the United States of America.” (Compl., ¶ 5, R. at p. 4).

Plaintiffs allege that virtually every aspect of public education in Colorado falls short of their proposed standard for “quality” and “adequacy.” Plaintiffs asked the trial court to declare the entire system of public school finance in Colorado unconstitutional, to enter interim and permanent injunctions compelling the State to design, enact, and fund an entirely new system of public school finance, and to retain continuing jurisdiction over the matter. (Compl., ¶¶ 224 – 231, R. at pp. 48 – 49).

The State moved to dismiss all claims on August 24, 2005, arguing that Plaintiffs’ claims presented nonjusticiable political questions, that by adopting Amendment 23, *see* Colo. Const. art. IX, § 17, the people of Colorado had set the

minimum level of state funding for education, and that Plaintiff school districts lacked standing to bring these claims. On March 2, 2006, the trial court granted the motion to dismiss.

Plaintiffs appealed and on January 24, 2008, the Court of Appeals affirmed. Applying this Court's decision in *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982), and the factors set forth by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962), the Court of Appeals determined that Plaintiffs' claims based on educational adequacy were nonjusticiable political questions. *Lobato v. Colorado*, No. 06CA733, ___ P.3d ___, 2008 WL 194019 at *7 – 13 (Colo. App. Jan. 24, 2008). The Court of Appeals also held that school districts, as political subdivisions of the state, lacked standing to challenge the constitutionality of a statute concerning their performance. *Id.* at *4.

On March 12, 2008, the parties filed a Joint Petition for Writ of Certiorari, which this Court granted. Although the Court of Appeals' opinion was correct and well-written, Defendants joined the Petition because this case involves important questions of substance that should definitively be resolved by the Supreme Court.

STATEMENT OF THE FACTS

Because this case is before the Court following a grant of a motion to dismiss under C.R.C.P. 12(b)(5), the Court must accept all well-pled, relevant allegations as true. *Public Serv. Co. v. Van Wyk*, 27 P.3d 377, 385 – 386 (Colo. 2001).

At this point, however, this case presents purely legal issues of constitutional interpretation. No “facts” or even allegations are relevant to the resolution of the questions presented.² Thus, the bulk of Plaintiffs’ Statement of Facts (along with their Amici’s), need not, and should not, be considered as fact or as relevant by this Court. Plaintiffs’ “Statement of Facts” and the General Allegations in the Complaint are mainly legal conclusions mingled with policy arguments about what public education should include and that the State should spend more tax money on education.³ These are conclusions, arguments, and opinions, not relevant facts. *See*

² The only possible exceptions relate to Defendants’ argument in part II, below, that article IX, section 17, (“Amendment 23”) sets the constitutional minimum state spending for public education. It is not contested, however, that the funding levels required under that section have been met; that in 2005 – 2006, per year per pupil public education spending was \$6,164, of which the state contributed 62.4 percent, R. at p. 7; and that the state is constitutionally required to increase that amount by at least the rate of inflation plus one percent each year until 2011, and at the rate of inflation thereafter.

³ *See e.g.*, (Compl. ¶¶4, 6-8, 15, 16, 19, 20, 26, 194, R. at pp. 4-9, 43).

Stauffer v. Stegmann, 165 P.3d 713, 716 (Colo. App. 2006) (a trial court is not required to accept legal conclusions or factual claims at variance with the express terms of documents attached to the complaint); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (court need not accept as true legal conclusions or unwarranted factual inferences).

Equally irrelevant are the allegations and “evidence” submitted by the Amici. Even to the limited extent the Amici have presented material that could be considered relevant to a motion to dismiss in the abstract, this Court is limited to considering the material allegations that were properly before the district court. *Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766 (Colo. App. 2000) (whether a claim is stated must be determined solely from the complaint); *Denver U.S. Nat’l Bank v. People ex rel. Dunbar*, 29 Colo. App. 93, 480 P.2d 849 (1970) (Amicus limited to questions raised by appealing parties). None of the information submitted by the Amici satisfies this fundamental requirement.

Though it is irrelevant to the questions before this Court, it is worth noting that if Plaintiffs were to prevail at this stage, volumes of studies, white papers, analyses, and policy arguments – much of which has been presented previously to

the legislature in some form⁴ – and much more, may well be relevant to a trial court forced to decide what constitutes a “quality education” and how to require the General Assembly to properly subsidize it.

SUMMARY OF THE ARGUMENT

This case is about how public education is structured, funded, and delivered in Colorado. Plaintiffs’ position would have courts and litigants, rather than the people and their elected state and local representatives, create the qualitative and financial standards for public education and oversee the public school system to ensure that it meets the court-established qualitative standards.

Nothing in the text, context, or history of the Education Clause suggests that its direction to the General Assembly to establish and maintain “a thorough and uniform system of free public schools” was intended to empower the courts to define what education should be provided in those schools or the level at which it should be funded. Indeed, review of the Education Clause and its development demonstrates that the framers of the constitution recognized that the legislature and school boards should decide issues of educational quality and funding.

⁴ See Testimony of Amici Colorado Association of School Boards, Colorado Association of School Executives, and Padres Unidos in favor of Senate Bill 08-212, House Committee on Education, April 24, 2008; Senate Committee on Education, March 27, 2008.

What Plaintiffs and Amici have presented to this Court (and the lower courts) is essentially a policy briefing that would be entirely proper before a legislative committee but is ill-suited for the courtroom (as has been the experience in the states Plaintiffs urge this Court to follow). If the Plaintiffs were allowed to proceed, the trial judge would be presented with reams of position papers; studies; test score data; demographics; past, current, and future trends in educational theory and technology; and academic literature. The court would then have to settle what constitutes an “adequate” or “quality” modern education; whether the individual Plaintiffs’ children are receiving one; and, if not, how much funding is necessary to provide it.

Plaintiffs would have the court force the General Assembly to increase funding and make whatever legislative changes would be required to satisfy the court’s definition of an adequate quality education.⁵ This would entangle the judicial branch in just the sort of social and political controversies that this Court in *Lujan* wisely held cannot be resolved through litigation. It is worth noting that although this case is styled as a widespread attack on the entire public education

⁵ Perhaps not coincidentally, the one notable difference in this process from the traditional representative process is that in litigation, competing interests, priorities, and needs would not be present, and the judge would not be constrained by other budgetary priorities.

system, there is no limiting principle in the rule the Plaintiffs urge this Court to adopt that would prevent any parent who is dissatisfied with his or her child's education – or even any particular aspect of that education – from bringing a case that will require the same analysis.

The district court and the unanimous Court of Appeals correctly held that Plaintiffs' claims present a nonjusticiable political question. The Colorado Constitution commits the determination of what constitutes an adequate education to the legislative branch and school boards, and, as Plaintiffs at times appear to concede, there are no judicially-discoverable standards for defining or measuring educational quality or resolving how much funding is required to achieve it. Contrary to Plaintiffs' assertions, the Defendants do not argue, and the Court of Appeals did not hold, that the entire Education Clause is beyond the reach of the courts. Certainly the courts can, and have, interpreted the Education Clause when appropriate. The decision below simply held that there are *some* types of claims that cannot be resolved through litigation, a well-established proposition that has been upheld by the U.S. Supreme Court and this Court. Plaintiffs' claims here are precisely the kinds of claims that those precedents leave to the democratic process.

Furthermore, Plaintiffs would have this Court render irrelevant Amendment 23, in which the voters explicitly set a minimum level of state-level education

funding in Colorado. Finally, the Petitioner school districts were properly dismissed for lack of standing because they are political subdivisions and cannot challenge statutes that direct the performance of their duties.

STANDARD OF REVIEW

This Court reviews the decision to grant the State’s motion to dismiss *de novo*. *Walker v. Van Laningham*, 148 P.3d 391, 394 (Colo. App. 2006). The Court must accept as true any well-pled allegations of material fact. *Public Serv. Co. v. Van Wyk*, 27 P.3d at 385 – 386. Because they assert that the Public School Finance Act of 1994, section § 22-54-101, *et seq.*, C.R.S., is unconstitutional, Plaintiffs bear the heavy burden of overcoming the presumption that statutes are constitutional unless they can prove its unconstitutionality beyond a reasonable doubt. *Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933, 942 (Colo. 2004).

ARGUMENT

The main question presented by the Complaint is whether the framers of the Education Clause intended to impose a “qualitative mandate” that empowers *courts* both to decide what constitutes a “quality education” that adequately prepares students “to participate meaningfully in the civic, political, economic,

social, and other activities of our society and the world” and also exercise continuing jurisdiction over the State’s education funding system until it meets the court’s qualitative standards. (See Compl., ¶¶222 and 229-231, R. at pp. 48-49).

The role of the Court when interpreting the Constitution is to give effect to intent, starting with the text. *Colorado State Civil Service Employees Association v. Love*, 167 Colo. 436, 448 P.2d 624 (1968), see also *Dodge v. Department of Social Services*, 657 P.2d 969, 975 (Colo. App. 1982). There is nothing in the text of the constitution that suggests – much less establishes beyond a reasonable doubt – that the framers intended for courts to play this role, and in fact the constitutional system commits these questions to other government entities. The decision below should therefore be affirmed.

I. Plaintiffs’ complaint is not justiciable because setting and meeting educational standards are decisions committed to the legislature and school boards and because judicial intervention would involve the court in making policy in an area lacking judicially manageable standards.

The trial court and Court of Appeals correctly held that Plaintiffs’ efforts to have the courts take control of the state’s education system present precisely the sort of political question that is inappropriate for resolution through litigation. (See Order at 2-3, R. at pp. 189 – 90). To rule in Plaintiffs’ favor would require the

courts to step outside their proper role and intrude upon the General Assembly’s constitutionally delegated authority to define the substance of the terms “thorough” and “uniform” as used in the Education Clause. *Id.*

The district court noted that despite inclusion of the Education Clause in the constitution since 1876 and decades of litigation involving article IX, “no Colorado court has defined” those terms. *Id.*

Likewise, the Court of Appeals correctly held that determining what constitutes an education of sufficient quality at a given time and how to provide it are decisions laden with “policy choices and value determinations” that are inconsistent with the principle of judicial restraint; that the Education Clause does not provide a standard to determine whether there is a qualitative educational guarantee; and that a determination of educational adequacy is impossible without making policy determinations requiring nonjudicial discretion. *Lobato*, 2008 WL 194019 at *7 – *10.

The Court of Appeals applied the United States Supreme Court’s discussion of political questions in *Baker v. Carr*, which has been adopted in Colorado:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the

impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962) (quoted in *Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 205 (Colo. 1991)). While any one of these characteristics is sufficient to render a case nonjusticiable, see *Baker*, 369 U.S. at 217, a review of Plaintiffs' Complaint, particularly the Prayer for Relief, reveals that the Court of Appeals was correct in determining that Plaintiffs' case is nonjusticiable for at least four of these reasons.

Plaintiffs and Amici seek to avoid this conclusion by resorting to the inarguable (at least since *Marbury v. Madison*) truism that it is the role of the judiciary "to interpret the constitution and say what the law is." Opening Br. at 39 (quoting *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1378 (Colo. 1985), itself quoting *Marbury*, 5 U.S. (1 Cranch) 137, 175 (1803)). They argue, therefore, that by declining to second-guess the General Assembly's decisions about how to

fund education, the Court of Appeals' decision represents "no less than a complete judicial abandonment of the field." Opening Br. at 40.

The Court of Appeals, however, correctly recognized that one may fully appreciate the important concept of judicial review and still understand that certain decisions are left to the representative branches of government. This Court has already said the same thing:

While it is clearly the province and duty of the judiciary to determine what the law is, the fashioning of a constitutional system for financing elementary and secondary public education in Colorado is not only the proper function of the General Assembly, but this function is expressly mandated by the Colorado Constitution. Colo. Const. Art. IX, Sec. 2.

Lujan, 649 P.2d at 1025 (internal citation omitted).

To accept Plaintiffs' argument would be to reject this observation and the political question doctrine completely, despite clear direction from this Court and the United States Supreme Court that some cases present "political question[s] the resolution of which should be eschewed by the courts." *Lamm*, 704 P.2d at 1378.

The Defendants do not argue, and the decisions below did not hold, that the Education Clause is entirely beyond the purview of the courts. Undoubtedly, some types of claims in addition to those considered in *Lujan* are properly litigated under

that clause.⁶ However, none of those cases resolved the issue raised here, namely, whether the courts are empowered to establish standards for educational quality and adequacy.⁷

Defendants do ask the Court to recognize that the never-ending controversy over what constitutes a quality education at a particular time and place, and how to best ensure that students receive one must be left to the General Assembly and state and local school boards. Nothing in the constitution suggests, much less establishes beyond a reasonable doubt, that this is a field onto which the courts are required, or even authorized, to march.

⁶ See *Lujan v. Colorado State Board of Education*, 649 P.2d at 1024-25 & fn.22 (citing cases).

⁷ Amicus League of Charter Schools cites *Hafer v. State Bd. of Educ.*, Denver District Court, Case No. 87CV02216, and *Giardino v. State Bd. of Educ.*, Denver District Court, Case No. 98CV02216, (Br. at 21) as examples of adequacy cases that survived motions to dismiss and were addressed by the courts. However, those cases settled and never reached the appellate courts. In addition, the League omits *Haley v. State Bd. of Educ.*, Denver District Court, Case No. 2002CV5149, which was dismissed on precisely the grounds of the trial court's ruling in this case and not appealed. (Order, R. at pp. 110-113).

A. Determining what constitutes a “quality education” and how to provide it is constitutionally committed to other government departments.

The 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 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.

From this simple directive, the Plaintiffs would have the courts declare the existence and perpetually oversee the enforcement of a new “qualitative mandate” that creates a fundamental right to a “quality education” and that guarantees to each student “the right to an education that will permit him or her to participate meaningfully in the civic, political, economic, social, and other activities of our society and the world, and to exercise the basic civil and other rights of a citizen of the State of Colorado and the United States of America.” (Compl. ¶222, R. at p. 48).

While such a general aspiration for public education may be given “a heartfelt recognition and endorsement,” *Lujan*, 649 P.2d at 1018, the constitution itself does not make it enforceable through litigation. Indeed, the Education

Clause’s text, context, and history suggest that it was not intended to give courts oversight over educational goals, standards, and funding. The constitution instead commits the creation and achievement of educational goals and quality to other government departments, including the General Assembly and state and local school boards. Defendants certainly share the Plaintiffs’ desire to improve the education every student receives in Colorado. The Plaintiffs’ recourse, however, is to work *with* the Defendants to reach their goals through the democratic process, not against them through litigation.

1. Neither the text nor the history of the Education Clause provides support for reading a qualitative standard into the constitution.

As this Court held in *Lujan*, the text of the Education Clause is properly read as mandating only that the General Assembly create a system that provides “to each school age child the opportunity to receive a free education, and to establish guidelines for a thorough and uniform system of public schools.” 649 P.2d at 1018-19. To the extent there is any ambiguity about a qualitative mandate in the clause, which is arguable at best, the Court must defer to the General Assembly’s interpretation. *Id.* at 1025.

Moreover, the history of the clause unmistakably supports the conclusion that it was not intended to create a judicially-enforceable qualitative mandate. As initially proposed, the language of the Education Clause read: “The Legislature shall provide for the establishment and maintenance of a thorough and efficient system of free schools, whereby all children of the State between the ages of six and twenty-one years, . . . shall be afforded a good common school education.”⁸ In contrast, the language that was enacted simply requires “a thorough and uniform system of free public schools wherein [those children] may be educated gratuitously.” The ultimately adopted version deleted the modifiers “efficient” and “good” used to describe the public schools. Thus the framers specifically rejected any suggestion of the sort of “qualitative mandate” Plaintiffs here ask the Court to read back into the clause.⁹ See *Salazar v. Davidson*, 79 P.3d 1221, 1225 (Colo.

⁸ See *Proceedings of the Constitutional Convention: Colorado 1875 – 1876*, at 43 (emphasis added).

⁹ The original draft was apparently based on the Illinois Constitution, which often was a model for Colorado. See fn. 8, *supra*. See also Hensel, Donald W., *A History of the Colorado Constitution in the Nineteenth Century* at 193, 292 (1957); *Heinssen v. State*, 14 Colo. 228, 23 P. 995 (1890). Even if the constitution had retained the arguably qualitative language, it would still be inappropriate for the courts to decide what constitutes a “good” education, as argued below. Cf. Ill. Const. 1870, Art. VIII, § 1, discussed in part I.B.1, below.

2003) (language deleted by framers from previous drafts of constitutional provision indicative of original intent).

The conclusion that the Education Clause does not impose qualitative standards (or require any state general funding at all) is supported not only by the text and its history, but by longstanding practice. When the Colorado Constitution was adopted, and for a considerable time thereafter, local property taxes made up almost all of the revenues for schools. (*See Revenues for Colorado Public Schools 1877 – 1979*, R. at pp. 184 - 87). The only state source of funds was income from state lands, and its use was limited. *Id.* Under the *General Laws of the State of Colorado*, 1877, the primary source of money for public schools was a countywide property tax to be levied in an amount determined by local county commissioners. The other main source was the “special school tax,” a district-wide property tax not subject to specific statutory limits and levied by the county commissioners in an amount specified by the district’s school board. *See General Laws of the State of Colorado*, 1877, §§ 63, 66.

Thus, when the “thorough and uniform” language was adopted and initially applied by the framers, local officials, not the state, determined the amount of school funding. Indeed, until 1939, over 95% of school funds came from local property taxes. The share of state funds gradually grew, but even as recently as

1979, 54% of all school funds were locally raised. (See *Revenues for Colorado Public Schools 1877 – 1979*, R. at pp. 184 - 187). These initial laws and practices are relevant in interpreting the meaning of the Education Clause. See *Bowsher v. Synar*, 478 U.S. 714, 723-724, (1986) (early enactments “provid[e] ‘contemporaneous and weighty evidence’ of the Constitution's meaning,” (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983))). See also *Salazar v. Davidson*, 79 P. 3d at 1239 – 1240 (longstanding practice of General Assembly supports interpretation of state constitutional provision). Given this history, it is not possible to read into the 1876 “thorough and uniform” language a qualitative standard that could give courts the authority to order the General Assembly to adopt specific funding measures.

2. The constitution commits to other government departments the tasks of setting goals and standards for public education and deciding how to achieve them.

The conclusion that the Education Clause was intended simply to require that the General Assembly ensure that each child have the “opportunity to receive a free education”— not to create constitutional standards for the *content* or *outcome* of that education that are subject to continuing judicial oversight – is buttressed by the explicit treatment of that question in the constitution. The various provisions

amount to a “textually demonstrable constitutional commitment of the issue,” *see Baker*, 369 U.S. at 217, to the General Assembly and the state and local boards of education.

Though it did not cite *Baker*, *Lujan* recognized the same principle: “[T]he fashioning of a constitutional system for financing elementary and secondary public education in Colorado is not only the proper function of the General Assembly, but this function is expressly mandated by the Colorado Constitution.” *Lujan*, 649 P.2d at 1025 (internal citation omitted).

In addition to this explicit role, the General Assembly of course has plenary authority over education matters. *School Dist. No. 1 of Morgan County v. School Planning Committee of Morgan County*, 164 Colo. 541, 546, 437 P.2d 787, 790 (Colo. 1968). *See Lujan*, 649 P.2d at 1026 (Erickson, J., concurring) (“the legislature is granted plenary power in the field of public education”). Article IX of the constitution also contains a number of provisions giving important roles in setting standards for, providing, and paying for public education to other government departments. Section 1 creates an elected state board of education which has “general supervision of the public schools of the state.” Section 2 requires that there be at least one school in every school district. Section 15 requires the creation of those districts and of locally-elected boards that “shall have control of

instruction” in the district’s schools of their jurisdiction. Section 16 forbids the general assembly or state board from controlling the selection of textbooks.

Sections 3, 4, and 9 govern the use of the public school trust fund.

Plaintiffs in this case, if successful, would discard this intricate constitutional system and replace it with one in which the courts would resolve the constantly evolving and controversial questions about the standards and content of public education, and the proper funding system required to meet those standards. *Cf. Lujan. see also Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1*, 188 Colo. 310, 535 P.2d 200, 204 (1975) (state board of education and local boards of education instruments of the state government chosen to effectuate its policy in relation to public schools); *Florman v. School Dist. No. 11*, 6 Colo.App. 319, 322, 40 P. 469, 470 (1895) (“Article 9 of the constitution provides for a general system of public schools, the details to be supplied by legislation”). Few restrictions are placed upon the legislative power in school affairs. *See Hazlet v. Gaunt*, 126 Colo. 385, 397, 250 P.2d 188, 194 (1952).

Lujan is not the only case holding that the issue of substantive educational quality is left for other branches of government. In *Denver Parents Assn. v. Denver Bd. of Educ.*, 10 P.3d 662 (Colo.App. 2000), parents of children enrolled in the Denver Public Schools brought suit for breach of contract based on the alleged

substandard quality of the district's education. In upholding dismissal of the complaint, the Court of Appeals held:

Plaintiffs cannot hold a public school district to the implementation of its educational objectives in a judicial setting. This matter is of a political nature, inasmuch as the school district is a political entity and, therefore, such policy issues should be addressed at the ballot box, not presented as a judicially enforceable contract claim.

Id. at 665.

Ironically, adoption of Plaintiffs' argument would also intrude upon the constitutional delegation of authority to local school boards (including the authority of Plaintiff school districts). Indeed, acceptance of Plaintiffs' position would necessarily mean the elimination of local control as that doctrine has been understood in Colorado. Colorado is one of only six states with an express constitutional local control requirement. *Owens*, 92 P.3d at 939. Through the Local Control Clause, the framers of the Colorado Constitution created a representative body – local school boards – to govern instruction in public schools. Colo. Const. art. IX, § 15. As recognized by this Court, the principle of local control has deep roots in Colorado's constitutional history. The Colorado Constitution was adopted in an atmosphere of deep distrust for centralized authority. *Owens*, 92 P.3d at 938

(quoting Dale A. Oesterle and Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 1 (2002)).

This Court in *Lujan* recognized that district control over funding provides “the link connecting the local citizenry to their school district,” *Lujan*, 649 P.2d at 1022, including the constitutional mandate that each district be enabled to determine for itself its own educational policy: “The use of local taxes ... enables the local citizenry greater influence and participation in the decision making process as to how these local tax dollars are spent. Some communities might place heavy emphasis on schools, while others may desire greater police or fire protection, or improved streets or public transportation.” *Id.* at 1023. In sum, local control allows each locality to tailor local programs to local needs, to engage in experimentation, innovation, and a healthy competition for educational excellence. *Id.* (citing *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 – 50 (1973)). Both *Lujan* and *Owens* recognize the mandate of the Local Control Clause to be that district residents be able to tailor educational policy to meet the needs of the individual district. *Owens*, 92 P.3d at 941.

True to these principles, this Court has interpreted the Local Control Clause as vesting in the local school boards “power and authority to guide and manage both the action and practice of instruction *as well as the quality and state of*

instruction.” Board of Educ. of Sch. Dist. No. 1 v. Booth, 984 P.2d 639, 648 (Colo. 1999) (emphasis added). Control of instruction requires that school boards retain substantial discretion regarding the character of instruction and the ability to implement, guide, or manage the educational programs for which school boards have constitutional responsibility. *Id.* at 648 – 49. Adoption of Plaintiffs’ arguments would take control over educational policy, educational funding, and local resource allocation from the school districts, where it is constitutionally vested, and give such control to the state courts. Thus, the Plaintiffs urge this Court to remove authority over educational policy from the local districts by constitutionalizing specific policy areas such as oral and written communication skills, knowledge of economic, social, and political systems, and curricula regarding government processes, the arts, and “self-knowledge.” Opening Br., p. 66.

Whether they intend to do so or not, Plaintiffs would thus subject every aspect of education to resolution through litigation, and not the processes constitutionally delegated to the legislature and local school boards. If Plaintiffs prevail, anyone who believes the state’s education system is not adequately preparing any student for modern life will have a right to have that question resolved in court. All decisions regarding physical facilities and classrooms,

classroom space and lighting, the adequacy of desks, chairs, pencils, and textbooks, as well as all decisions regarding curricular content and teacher qualifications and training would be subject to constitutional challenge. *Cf. id.* at 66 – 67. All questions which are, under the various provisions of Article IX, committed to the General Assembly, the State Board of Education, or to local electorates through democratically elected school boards, would instead be reserved for a state court judge.

Plaintiffs’ efforts to refute the Court of Appeals’ holding that the constitution commits creation and oversight of the public schools to the General Assembly are unavailing. First, they note that other provisions of the constitution direct the legislature to take action but have been adjudicated. Opening Br. at 57, n. 32. Review of these sections shows that each is a specific directive to take particular action, not a broad grant of authority.¹⁰ As shown above, Defendants’

¹⁰Colo. Const. art. V, section 7 (directive as to convening the General Assembly and length of session and committees); section 25a (establishing an eight-hour workday), section 27 (establishment of number, duties, and compensation of employees of the legislature), and section 48 (revision and alteration of senatorial and representative districts); art. VIII, section 2 (legislature has no power to change seat of government from Denver); art. IX, section 9(4) (establishment and funding of State board of land commissioners) and section 16 (neither legislature nor State Board of Education has power to prescribe textbooks used in public schools); and art. X, section 20 (TABOR).

argument on this point is not simply that because the Education Clause directs the legislature to do something, the courts are forbidden from hearing any cases on the subject. Certainly, the courts are entitled to, and should, adjudicate cases alleging denial of access to an “opportunity to receive a free education.” *Lujan*, 649 P.2d at 1018-19. However, the examples cited by Plaintiffs are similar to that limited directive and stand in sharp contrast to the alleged boundless “qualitative mandate” Plaintiffs suggest is impliedly contained in the Education Clause.

This is also the import of *Fangman v. Moyers*, 90 Colo. 308, 8 P.2d 762 (1932), and *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610 (1927), cited by Plaintiffs. Opening Br., pp. 18, 42 – 43. In *Fangman*, the issue was whether a child could attend school at all. Similarly, in *Vollmar*, the Court upheld a school board rule requiring Bible reading in public schools. To the extent they are relevant at all, the Court of Appeals properly recognized that the issue was *access* to free public education, not the quality of free public education. *Lobato* at *9. Defendants do not deny that courts can hear claims alleging actual deprivation of an opportunity to attend a free public school. Beyond creating that opportunity, however, the General Assembly is entitled to decide for itself the contours of its role in education. *See Lujan*, 649 P.2d at 1025.

This Court’s decision in *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #21 and #22 (“English Language Education”)*, 44 P.3d 213, 217 (Colo. 2002), cited by Plaintiffs for the (uncontested) proposition that some claims under the Education Clause are justiciable, is no more helpful to them. *See* Opening Br. at p. 18, 45. That case concerned an objection to a ballot title on the ground that the initiatives in question contained multiple subjects, including the argument that the proposed language “all Colorado children have a right to be provided at their public school of choice with an English language education” contained a new constitutional right to school choice. *Id.* at 217. The Court rejected this allegation, finding that the language at issue did not create any new constitutional right to educational choice. In so doing, the Court affirmed its holding in *Lujan* that education is not a fundamental right, as well as the propositions that the Education Clause mandates only the opportunity to receive a free education and that the General Assembly establish guidelines. *Id.* This can in no way be interpreted as holding that issues of educational adequacy and quality are justiciable, only that the *availability* of a free education is mandated.

Plaintiffs cite *Owens* for the proposition that courts may decide whether the legislature’s education policy choices comport with constitutional requirements. Opening Br. at pp. 47, 49 - 50. To the extent it has any relevance here, the actual

holding of *Owens* undermines the core assumption of Plaintiffs’ case. In *Owens*, this Court held that control over locally-raised funds is essential to effectuating the constitutional requirement of local control over instruction. *Owens*, 92 P.3d at 939. This is irrelevant to whether the courts should issue injunctions requiring the State to meet certain court-mandated qualitative and funding standards. Moreover, Plaintiffs fail to explain how the Education Clause can, as they suggest, simultaneously mandate a state-level substantive guarantee of an adequate, quality education that authorizes courts to enter an injunction dictating the kind of education required “to exercise the basic civil and other rights of a citizen,” while at the same time delegating control over education to each individual school district. (Compl., ¶222, R. at p. 48).¹¹

In sum, Plaintiffs’ argument that the Education Clause contains a “qualitative mandate” requiring the courts to oversee the content and funding of the state’s public schools finds no support in the text, history, or precedents

¹¹ Finally, Plaintiffs argue that education is a “fundamental right” in Colorado. *See* Opening Br., pp. 6, 68. This Court, however, has repeatedly rejected that assertion. *Lujan*, 649 P.2d at 1016; *See also Owens*, 92 P.3d at 941, fn. 7. Moreover, that proposition is irrelevant to this case, which is not about whether any child is being denied access to education, but whether children are learning what Plaintiffs think they should.

interpreting it. In fact, Plaintiffs’ argument contradicts other provisions of Article IX that give the General Assembly and other entities control over those aspects of public education. The Court of Appeals was correct to hold that the constitution commits the question of educational adequacy to “coordinate government departments,” and can be affirmed for that reason alone.

B. The Education Clause contains no judicially discoverable or manageable standards for determining educational quality or adequacy and it would be impossible for a Court to decide the issues raised by Plaintiffs without making legislative policy determinations.

If the Court goes beyond the first *Baker* factor, it will find that this case also falls squarely within the second and third: “a lack of judicially discoverable and manageable standards for resolving” the case and “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.” *Baker*, 369 U.S. at 217. What constitutes an “adequate” or “quality” (or decent, poor, good, terrific, or average) education is an inherently subjective policy decision that changes with the times and circumstances. How children should be educated and what resources should be allocated to education, in the face of competing demands statewide for scarce resources, are subjects of hot debate. *See*

Lujan, 649 P.2d at 1018, 1022. Such decisions are precisely what the political process, at the state and local level, was intended to address. *Id.* at 1025.

1. Courts cannot establish manageable standards to govern what amounts to a “quality education” or to govern how much funding is required to provide such an education.

The Court of Appeals recognized the lack of judicially manageable standards in the Education Clause:

we consider the meaning of ‘thorough and uniform,’ on which the parents base their claims, but discern in this language no such “manageable standards” for determining a qualitative educational guarantee, as the parents assert, with which a trial court could measure the constitutional adequacy of funding for education.

Lobato, at *8 (quoting *Nixon v. United States*, 506 U.S. 224, 228-229 (1993)).

This Court reached a similar conclusion in *Lujan*, recognizing that the courts are “ill-suited” to determine the adequacy of educational opportunities, particularly because of the controversy regarding a demonstrable correlation between

educational expenditures and educational quality. *Id.* at 1018.¹²

Plaintiffs acknowledge that *Lujan* rejected the plea for judicially-mandated equalized spending because it would have entangled the Court in making educational policy. Opening Br., p. 44. Plaintiffs are wrong, however, to claim that *Lujan*'s clear rejection of judicial management of the state's education funding system should not apply to their case. Plaintiffs' complaint does not seek the precise remedy sought in *Lujan*, but the fundamental issue here is the same: "The method Colorado has chosen for funding public school education is the real focal point of the challenge here." *Lujan*, 649 P.2d at 1018.

This case is even less susceptible to judicial resolution than *Lujan*. Though the Court correctly refused to step into that policy controversy, *Lujan* involved only a request for equity of funding, an issue surely more susceptible to judicial

¹² This "raging controversy" continues, as was recognized in a Colorado School Finance Project study of the 2001-02 school year, which appears to be the one referenced in the Complaint (Compl., ¶ 22, R. at p. 8) and Opening Br. at 72: "...no research exists that demonstrates a straightforward relationship between how much is spent to provide education services and student performance...." Augenblick and Meyers "Calculation of the Cost of an Adequate Education in Colorado Using the Professional Judgment and the Successful School Approaches" (January, 2003), p. II-1, . See also Hanushek and Rebell, *infra.* at 43-44. Plaintiffs ignore this -- and *Lujan*'s recognition of the controversy -- and instead assert, "There is no controversy over the relation between school funding and the quality of public education." Opening Br. at 67.

determination and management than the relief sought here, which would impose an amorphous “qualitative” standard developed and overseen by the courts. (Compl. ¶¶221-22, R. at p. 48).

Plaintiffs ask the Court (among other things), to identify and define a “qualitative mandate” in the Education Clause (Compl. ¶¶221-22, R. at p. 48); find that the current system fails to provide enough money to reach this mandated quality of education (Compl. ¶224, R. at p. 48); grant injunctive relief compelling the State to “establish, fund, and maintain” a public school system satisfying the mandate it creates (Compl. ¶¶228 and 229, R. at p. 48-49), and retain continuing jurisdiction over the case (Compl. ¶231, R. at p. 49).

To provide this relief, a court would have to decide what constitutes an “adequate” modern education under the Colorado Constitution, decide how much such an education would cost (essentially taking sides in the “raging controversy” already identified in *Lujan* and the study referenced by Plaintiffs regarding the connection between funding and educational performance), decide how much funding is being made available under the current system, declare the current system “inadequate” if not enough funding was available, and issue an injunction requiring the General Assembly to adopt and fund another system. (Compl., ¶¶ 221, 223, 227, 228, R. p. 48).

There are no judicially manageable standards to guide these decisions, all of which turn on the determination of what kind of education “will permit [students] to participate meaningfully in the civic, political, economic, social and other activities in our society and the world . . .” (Compl., ¶ 222, R. 48) and how much such an education would cost. The “standards” from other courts suggested by the Plaintiffs and Amici, while laudable aspirational declarations, are hardly the sort of legal rule that provides meaningful guidance to the Court or is susceptible of consistent application. Opening Br. at 62-67.

As noted above, whatever their textual source in the states that have imposed them, the “standards” offered by Plaintiffs and Amici cannot be plausibly drawn from the Colorado Constitution’s simple phrase “thorough and uniform system of public schools.” See part I.A., above. Moreover, even if the Court were to pick one of these standards and direct the General Assembly to meet it, the moment it went into effect any person dissatisfied with some aspect of education in a public school could bring suit and require the state to prove why, for example, the history textbook being used in the plaintiff’s school was “adequate” or why one computer class (or art class or geography class) would “provide sufficient knowledge of economic, social, and political systems to enable the student to make informed

choices”¹³ or why offering Spanish but not Russian or Chinese was adequate to prepare students for ““useful and happy occupations, recreation and citizenship.””¹⁴ Thus would the new system of judicially-created standards place the education of Colorado’s children under the perpetual control and oversight of the litigation process.

The *Lujan* Court recognized that “[w]hile our representative form of government and democratic society may benefit to a greater degree from a public school system in which each school district spends the exact dollar amount per student . . . these are considerations and goals which properly lie within the legislative domain.” *Lujan*, 649 P.2d at 1018. This is at least as true when applied to the quest to provide an adequate, quality education: “Judicial intrusion to weigh such considerations and achieve such goals must be avoided. This is especially so in this case where the controversy, as we perceive it, is essentially directed toward *what is the best public policy which can be adopted to attain quality schooling and equal educational opportunity for all children who attend our public schools.*” *Id.* (emphasis added).

¹³ Opening Br. at 66 (quoting *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (KY 1989)).

¹⁴ Opening Br. at 65 (quoting *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859, 877 (1979)).

Plaintiffs seek to avoid the obvious conclusion of this analysis by disputing the Court of Appeals' characterization of the "search as one for workable standards to define an 'adequate *quality* public education' against which to measure the 'adequacy of funding for education.'" Opening Br. at 61 (*quoting Lobato*, at p. *9) (emphasis in brief). Instead, they contend "[t]he issue in this case is the adequacy of school funding, and the search for manageable standards must focus there, not the more general question of 'adequate public education.'"¹⁵ *Id.*

Plaintiffs cannot explain, however, how the court can resolve whether school funding is adequate without first resolving what constitutes an adequate education. Indeed, the seven pages following Plaintiffs' characterization of the issue advance various proposed definitions of the elements of an adequate public education.¹⁶ Opening Br. at pp 62-67. This illustrates both why the Court of Appeals was correct and why this case is not justiciable: even if the Court accepts Plaintiffs' incorrect assertion that the constitution contains a qualitative mandate, it cannot

¹⁵ Amicus Great Education Colorado ("GEC") is more ingenuous: "This case is not simply about money. It is about constitutional adequacy of an existing school system." GEC Brief, p. 6.

¹⁶ Among these is the standard announced in *Rose v. Council for Better Educ.*, 790 S.W.2d at 212, about which one scholar commented: "[i]f this standard is taken literally, there is not a public school system in America that meets it." Thro, William, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 548 (1998).

decide the adequacy of state funding of education without first deciding what an adequate education entails.

The Plaintiffs themselves recognize that the question can never be answered definitively and the requirements “change with the expectations and demands of society.” *Id.* at 63 n. 34. The framers of the constitution were therefore wise to commit it to the elected representatives of the people at the legislature, the State Board of Education, and local district school boards.

Moreover, even if there was a manageable, agreed upon standard of what constitutes an adequate education, deciding the cost of funding education is a process that offers no standards to guide the courts. To make such decisions would require the courts to take sides (conceivably opposing the General Assembly) in the ongoing controversy about the connection between spending and performance.

The Supreme Court of Illinois, interpreting a constitutional provision that, unlike Colorado’s, at least arguably contains some language suggesting a qualitative mandate,¹⁷ nevertheless recognized the unmanageability of defining and requiring a “good” education through litigation. The first such case was *Richards v. Raymond*, 92 Ill. 612, 1879 WL 8569 (1879), where the Illinois court refrained

¹⁷ See discussion in part I.A.1, above.

from defining a “good common education” because the court considered the question of what constituted a “good and common education” as a question to be determined by the legislature and not the judiciary. 92 Ill. at 618, 1879 WL at *4.

Illinois has faced similar challenges more recently. In *Committee for Educational Rights v. Edgar*, 174 Ill.2d 1, 672 N.E.2d 1178, 1191 (1996), the Court held that the state constitution provided no definition of a “high quality” education and thus there were no judicially discoverable or manageable standards for measuring a “high quality” education. The court properly held that the question of educational quality is a policy issue involving philosophical and practical considerations intended for legislative and administrative determination rather than that of the judiciary:

It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary’s field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.

Id. The court noted that judicial determination of educational quality would violate the fundamental concepts of democracy. *Id.*

The Illinois Supreme Court recently reaffirmed this approach in *Lewis E. v. Spagnolo*, 186 Ill.2d 198, 710 N.E.2d 798 (1999). Similar to the Plaintiffs here, the plaintiffs in *Lewis E.* alleged that school officials had violated the plaintiffs’ right to a “safe, adequate education” under the Illinois Constitution. *Id.* at 801. Again reaffirming *Richards* (and echoing *Lujan*), the court held that the issue of educational quality was a matter for the legislature, not the judiciary, to decide. *Id.* at 804.

a. Cost studies cannot provide a judicially manageable standard for determining educational funding.

Plaintiffs seek to minimize the difficulty – if not impossibility – of settling this debate in court by asserting that the current system is irrational and asking the Court to require that the state fund the “actual costs” to provide a constitutionally adequate education, whatever they might be. (Compl. ¶19, R. at p. 7). Amicus Colorado Education Association asserts that there are “sound research methodologies” available to determine whether funding is adequate. Colorado Education Association, Brief at 12. At the outset, such contentions are based on a false assumption: that the actual costs of providing a “quality” education can, in fact be determined with sufficient precision to permit a court to require the legislature to fund education at that level.

Such an approach does not actually offer a manageable standard, as found by consultants in New York’s school finance litigation, who were asked to determine “What does it actually cost to provide the resources that each school needs to allow its students to meet the achievement levels specified in the Regents Learning Standards.” They stated:

It must be recognized that the success of schools also depends on other individuals and institutions to provide the health, intellectual stimulus, and family support upon which public school systems can build. Schools cannot and do not perform their role in a vacuum, and this is an important qualification of the conclusions reached in any study of adequacy in education. Also, success of schools depends on effective allocation of resources and implementation of programs in school districts.

Hanushek, Eric, A., *The Alchemy of “Costing Out” an Adequate Education*, in *School Money Trials*, p. 82 (Martin R. West and Paul E. Peterson, ed., 2007) (“Hanushek”) (*quoting* American Institutes for Research and Management Analysis and Planning, *The New York Adequacy Study: Determining the Cost of Providing All Children in New York an Adequate Education*, 2004). Another consultant identified the disadvantages of the “professional judgment” approach (one of a number of possible approaches, and the one used in the Colorado School Finance Project Study *supra*):

the disadvantages are that resource allocation tends to reflect current practice and there is only an assumption, with little evidence, that the provisions of money at the designated level will produce the anticipated outcomes.

Id. at 83 (quoting Augenblick, Palaich & Associates, Inc., *Calculation of the Cost of an Adequate Education in North Dakota in 2002-2003 Using the Professional Judgment Approach*, II-3).

While it is true that “costing out” studies have been done across the country,¹⁸ they have been subject to criticism by both sides of the debate over school adequacy cases. Eric Hanushek, who has been critical of such litigation, wrote:

The overarching problem stems from the nonexistence of empirical evidence on which to base estimates of the costs of adequate student proficiency...Research has not shown a clear causal relationship between the amount that schools spend and student achievement. (fn. omitted). After hundreds of studies, it is now generally recognized that *how* money is spent is much more important than *how much* is spent. This finding is particularly important in considering judicially ordered changes in school finances because such alterations offer little control over how any new moneys are spent.

¹⁸ See for a map indicating where such studies have been undertaken.

Id. at 80. Michael Rebell, a proponent of adequacy litigation,¹⁹ reaches a similar conclusion:

Nevertheless, the aura of “scientific” decision-making that is associated with these studies can be misleading. It is not, in fact, possible to definitively identify the precise amount of money that is needed for an adequate education. (fn. omitted). Although these studies use a variety of complex statistical and analytic techniques, all of them are premised on a number of critical judgments which strongly influence their ultimate outcomes.

Rebell, Michael A., *Professional Rigor, Public Engagement and Judicial Review:*

A Proposal for Enhancing the Validity of Education Adequacy Studies, p. 3

(2006).²⁰ *See also* Augenblick and Meyers, *supra.* at 12, fn. 12 (“...no research exists that demonstrates a straightforward relationship between how much is spent to provide education services and student performance....”). Determining a “target foundation level of per pupil revenue...is extremely difficult, and the state of the art for performing such calculations is still controversial and based more on theory than on firm knowledge of what expenditures and methods will result in what

¹⁹ Rebell was co-counsel for the plaintiffs in *Campaign for Fiscal Equity v. New York*, the New York City school finance case.

²⁰ This article contains an extensive discussion of methodologies, use of cost studies in litigation, criticism of the studies, and proposals for future analysis.

degree and type of student achievement.” Augenblick, John, *et al.*, *Equity and Adequacy in School Funding*, 7 *The Future of Children* 63, 74 (Winter, 1997).

The Massachusetts Supreme Court rejected a trial court’s recommendation to follow this approach, recognizing that “What ails our failing schools cannot be cured by a study.” *Hancock v. Comm’r. of Educ.*, 822 N.E.2d 1134, 1157 (Mass. 2005). The court went on to say that a cost study “is likely to retard rather than advance the progress of educational reform...,” “is rife with policy choices that are properly the Legislature’s domain,” and “[f]inally, and most significantly, the study would not be a final order, but a starting point for what inevitably must mean judicial directives concerning appropriations.” *Id.*

One need not necessarily agree with the Massachusetts court’s analysis (which admittedly ventures into the realm of policy analysis) to recognize that the Plaintiffs’ suggested remedy in this case is simply one alternative among a number of ways one could seek to improve educational achievement – in other words, a classic policy choice. In short, to entertain such claims inevitably requires courts to pick and choose among various policy models. And if a Plaintiff ever prevails in such litigation, it will be, by definition, because the courts choose a model the General Assembly and other policy-makers have not chosen.

2. Other states' experience with similar litigation shows the wisdom of the *Lujan* approach and why litigation cannot resolve how much funding a state should provide to public schools.

A number of other states have faced litigation similar to this, and the results are revealing. Some states' courts recognized, as did the Illinois and the *Lujan* Court, that the questions these cases present are inappropriate for resolution through litigation. See *Nebraska Coalition for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 169 (Neb. 2007); *Oklahoma Educ. Ass'n. v. State*, 158 P.3d 1058, 1062 (Okla. 2007); *Marrero ex rel. Tabalas v. Commonwealth*, 559 Pa. 14, 739 A.2d 110, 111-13 (1999); *Coalition for Adequacy and Fairness, Inc. v. Chiles*, 680 So.2d 400, 406-07 (Fla. 1996); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58-59 (R.I. 1995).

In Pennsylvania, the constitutionality of the state's system of school finance was unsuccessfully challenged. *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d at 111-12. Pennsylvania's Education Clause is almost identical to Colorado's, obligating the legislature to "provide for the maintenance and support of a thorough and efficient system of Public education." See Penn. Const., Art. III, § 14. In *Marrero*, the court held that the plaintiffs' claim that the system was inadequate presented a nonjusticiable political question, finding that the case

involved a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” the General Assembly. *Id.* at 113. The court noted the lack of judicially manageable standards for resolving the plaintiffs’ claim and the impossibility of resolving the claim “without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion.” *Id.* at 111.

The Florida Supreme Court dismissed its school finance lawsuit for the same reasons. *See Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d at 408 (“Appellants have failed to demonstrate ... an appropriate standard for determining ‘adequacy’ that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both generally (in determining appropriations) and specifically (in providing *by law* for an adequate and uniform system of education)”).

The Rhode Island Supreme Court has also held that issues related to educational adequacy and learner outcomes are inherently issues for which there were no judicially manageable standards:

Faced with this absence of standards, the trial justice adopted one: the right to receive an “equal, adequate, and meaningful education,” a standard that is not susceptible of judicial management. What constitutes an appropriate education or even an “equal, adequate, and meaningful”

one, “is not likely to be divined for all time even by the scholars who now so earnestly debate the issues.” (citation omitted). Because we believe the proper forum for this deliberation is the General Assembly, not the courtroom, we decline to endorse the trial justice’s plan that requires the people of this state “to turn over to a tribunal against which they have little if any recourse, a matter of such grave concern to them and upon which they hold so many strong, though conflicting views...”

City of Pawtucket v. Sundlun, 662 A.2d at 58 (quoting *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. at 43). The court added an additional caveat: the absence of justiciable standards could engage the court in a morass comparable to the decades-long struggle of the Supreme Court of New Jersey, in “the thickets that can entrap a court that takes on the duties of a Legislature.” *Id.* at 59.

This has been borne out by the experience in states Plaintiffs would have Colorado follow. For example, in 1989, the Texas Supreme Court ruled the state’s system of school finance unconstitutional. For six years, the legislature repeatedly attempted to remedy the system’s alleged constitutional defects, but these attempts were in turn successfully challenged. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 488 (Tex. 1992). The legislature finally enacted a system that the courts upheld, but the court cautioned that the

constitutional challenge to the school financing system failed only because of an evidentiary void, raising the possibility of further litigation. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 725 (Tex. 1995). In 2001, a new round of litigation was filed, this time by high wealth districts challenging the tax structure of education funding. This case was first addressed by the Texas Supreme Court in *West Orange-Cove Consolidated I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003), which remanded the case for trial. *Id.* In 2005, the Texas Supreme Court reversed the trial court's order holding the school finance system unconstitutional but held that the system violated another constitutional provision prohibiting a statewide property tax. *Neeley v. West Orange-Cove Consolidated I.S.D.*, 176 S.W.3d 746 (Tex. 2005).

In 1973, the New Jersey Supreme Court held the school finance system unconstitutional. *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973); *Robinson v. Cahill*, 63 N.J. 196, 306 A.2d 65 (1973). The matter came before the state's high court five times before a solution was reached. *See Robinson v. Cahill*, 67 N.J. 35, 335 A.2d 6 (1975); *Robinson v. Cahill*, 67 N.J. 333, 339 A.2d 193 (1975); *Robinson v. Cahill*, 69 N.J. 449, 355 A.2d 129 (1976). In 1985, New Jersey's school finance system was again challenged and the courts again held the state's education system unconstitutional. *Abbott v. Burke*, 100 N.J. 269, 495 A.2d 376

(1985); *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359, 395 (1990). Over the next eight years, the legislature made repeated unsuccessful attempts to devise a constitutional system of school finance before implementing a system that the court held to be constitutional. *Abbott v. Burke*, 153 N.J. 480, 710 A.2d 450, 456 (1998). Such quagmires are precisely what the political question doctrine requires the courts to avoid.

As Plaintiffs and Amici point out at some length, the majority of states that have considered educational adequacy cases have decided them. However, as the Court of Appeals discussed, education clauses vary from state to state and some states have determined (as Colorado has not) that education is a fundamental right. *Lobato* at *6-*7. Importantly, Illinois, the state whose education clause formed the basis for this state's education clause, found the case nonjusticiable even though, as discussed in part I.A.1, that constitution includes more support for a "qualitative mandate" that Colorado's framers rejected. *See Lewis E. v. Spagnolo*, 710 N.E.2d at 804. This Court should reject the invitation to wander into the thicket of policy required to entertain Plaintiffs' claims.

3. Statutes enacted by the General Assembly cannot and do not establish constitutional minimums or provide judicially manageable standards.

Plaintiffs also claim that the General Assembly has, through the passage of various educational accountability statutes, recognized in the Education Clause a fundamental right to a certain standard of educational quality and adequacy. Plaintiffs suggest these statutes could also provide the standards for this Court to adopt as a definition of educational adequacy. *See* Opening Br., pp. 6 – 10, 20 – 21, and 68 - 72.

To begin with, Plaintiffs cite no support for the odd proposition that the legislature can define a constitutional provision, but the courts can then decide that the legislature is violating its own definition. Moreover, even by their own terms, none of the statutes in question supports Plaintiffs' argument. For instance, Plaintiffs identify a legislative standard of educational adequacy in section 22-30.5-301(1), C.R.S. Opening Brief, p. 6. This statute, however, is the legislative declaration to a provision authorizing the conversion of failing local schools into independent charter schools for a four year term. This aspirational declaration provides no guidance to the educational system as a whole. Plaintiffs also cite to the Public School Finance Act for the proposition that the Education Clause

imposes a financial responsibility upon the state. Opening Br., p. 6. However, this is not the proposition at issue here. Plaintiffs argue not that the state has a duty to fund a system of public schools,²¹ but that the constitution demands a particular level of educational quality or adequacy for the school system as a whole.

Plaintiffs also cite to the state's compliance with the federal No Child Left Behind Act of 2001 as identifying a certain constitutional level of educational quality or adequacy. Opening Br., pp. 9 – 10. Suffice it to say that the state's efforts to comply with federal law in no way imply that the General Assembly endorses any particular interpretation of the state constitution.

Finally, Plaintiffs rely on legislation enacted by the General Assembly in 2008 to argue that the Education Clause contains a quality component, and thus constitutes legislative interpretation of the meaning and content of the Education Clause as well as standards for the court to measure educational adequacy. *See* Opening Br. at pp. 7, 21, and 68-71. However, if anything, an examination of the intent behind this legislation spotlights the error of Plaintiffs' approach. The

²¹ Such an assertion contravenes the first sixty years of practice under the constitution, as discussed above in Part I.A.1. Moreover, even if it were correct, it is irrelevant at this point, given the massive funding the state provides to public education, which is the largest single item in the state budget. *See* 2008 Colo. Sess. Laws, v. 3, Ch. 474 at pp. 2785-91.

legislation in question, now sections 22-7-1001 - 1019, C.R.S., focused on updating the goals of public education from the previous generation of standards-based education created in 1993. *See* § 22-7-1002(1)(a) and (2)(b), C.R.S. To that end, the legislation mandated that the entire area of standards-based education be updated and revised, with different standards developed and aligned from preschool through postsecondary or workforce readiness. *See* § 22-7-1002(4), C.R.S.

It is clear from the face of the statute that the General Assembly, in passing these laws, did not believe that it was putting forth a binding constitutional interpretation of the Education Clause. The statute does not mention the Education Clause, but it does, however, reference Article IX, section 17 – the only provision in the constitution to expressly discuss school funding. Thus, Plaintiffs’ assertion that aspirational language included in a portion of the statute somehow expresses a binding constitutional obligation is without support.

Moreover, to accept Plaintiffs’ argument would transform every aspirational declaration by the legislature into a constitutional minimum that must, as a matter of law, be satisfied for every student statewide regardless of the resources available or the desires of the local school board. If the Court accepts Plaintiffs’ invitation to enforce legislative declarations as constitutional minimums, later legislatures

could simply adjust the standards downward or abolish them altogether.

Discouraging innovation and accountability is hardly the way to promote quality education. The very fact that the General Assembly engages in such periodic updating of public education standards is persuasive evidence as to why such policy matters should be left to that branch of government, and not frozen in time through litigation as Plaintiffs suggest.

It is a quintessentially legislative function to adapt the state's goals and means to changing circumstances and priorities. The passage of sections § 22-7-1001, *et seq.*, C.R.S., represents just such a revision and adaptation of public educational standards to the needs of the time. The authority to adapt Colorado's laws to changing circumstances should continue to be committed to the legislative branch of government.

C. Plaintiffs ask the Court to violate the fundamental separation of powers of the state government.

The relief requested by the Plaintiffs would require the Court to order the General Assembly to amend the Public School Finance Act of 1994 and to increase the appropriation for every area of public school finance. Specifically, Plaintiffs request this Court to declare the statutory funding scheme for public education

unconstitutional²² and retain jurisdiction to compel the General Assembly to amend the statutory funding scheme.²³ Granting Plaintiffs’ requested relief would violate the separation of powers doctrine and thus also violate the fourth *Baker* factor by “expressing lack of the respect due coordinate branches of government.” *Baker v. Carr*, 369 U.S. at 217.

Article III prohibits the judiciary from exercising those powers constitutionally conferred upon the legislature, *People v. Herrera*, 183 Colo. 155, 161, 516 P.2d 626, 628 (1973), or from ordering the legislative branch either to adopt, or not to adopt, specific legislation, *Lucchesi v. State*, 807 P.2d 1185, 1190 (Colo.App. 1990). Courts are prohibited from ordering an appropriation by the General Assembly. *State for Use of Dept. of Corrections v. Pena*, 855 P.2d 805, 809 (Colo. 1993). The General Assembly’s absolute power over appropriations includes not only determinations of which projects to support with funding, but also the level of funding for each project. *Barber v. Ritter*, 196 P.3d 238, 253-54 (Colo. 2008); *Colorado General Assembly v. Lamm*, 700 P.2d 508, 520 (Colo. 1985). For example, the Governor’s transfer of funds between separate executive

²² Compl., ¶ 224, R. at p. 48.

²³ Compl., ¶ 231, R. at p. 49.

departments impermissibly infringes upon the General Assembly's authority. *Id.* at 522.

Under this system, the representative branches (as well as local districts) annually reexamine and adjust appropriations and expenditures for all demands on state funds, including education, taking into account not only the sort of information submitted by Plaintiffs and Amici to this Court about education, but the State's limited resources and competing needs. This gives effect to both the Education Clause's requirement of a statewide system of public schools and to the fundamental recognition that spending decisions must be resolved democratically.

Even outside the area of education funding policy, this Court has repeatedly warned that "the judiciary's authority to coerce legislators to comply with constitutional provisions governing the enactment of legislation is exceedingly limited." *Colorado Common Cause v. Bledsoe*, 810 P.2d at 210–11. As the Court long ago said:

When laws have been passed, no doubt in a proper case the inquiry can then be made as to whether or not the requirements of the fundamental law in their passage or in their provisions have been observed; but in the first instance the body to which has been delegated the power to pass laws must be left untrammelled, to act in such matters as its wisdom may dictate.

People ex rel. O'Reilly v. Mills, 30 Colo. 262, 265, 70 P. 322, 323 (1902); *see also Gresh v. Balink*, 148 P.3d 419, 423 (Colo.App. 2006) (judicial “interpretation cannot solve the lack of clarity or definition in the constitutional provision itself. Instead, that uncertainty is for the General Assembly to elucidate with implementing language or, ultimately, for the voting public to ameliorate by amending the constitutional provision”).

For all of these reasons, the Court of Appeals was correct that the Plaintiffs cannot show beyond any reasonable doubt that the Education Clause requires or allows courts to impose a qualitative and financial mandate on the state’s public education system.

II. The constitutional mandate of a minimum state contribution for funding public education is in section 17 of article IX, not section 2.

Even if the Court agreed with Plaintiffs that the 1876 constitution was intended to impose a minimum financial obligation for support of public education on the General Assembly, in 2000 the people of Colorado superseded it. By enacting Amendment 23 (codified as Colo. Const. art. IX, section 17), the people explicitly set the constitutional minimum state contribution for funding public

education and there is no dispute that the state has provided that contribution. This is yet another, independent reason Plaintiffs' Complaint was properly dismissed.²⁴

In passing Amendment 23, the people of Colorado have already done what Plaintiffs now ask this Court to do. Article IX, section 17, now sets the constitutional minimum level of state funding for public education. It requires increases in per pupil funding for public schools and special purpose education programs of at least the rate of inflation plus one percentage point through fiscal year 2011, and by at least the rate of inflation thereafter. Section 17 also sets aside a portion of the state's income tax revenue to establish the State Education Fund and exempts this money from the state and school district revenue and spending limits contained in art. X, section 20, of the Colorado Constitution ("TABOR"). These funds are then used in combination with general fund appropriations to meet the constitutional provision's school finance requirements. The State Education Fund cannot be used to supplant the general fund disbursements under the School Finance Act, but can be used to comply with the mandated increases in public

²⁴ The trial court dismissed the case on that basis as well as on its holding that the Plaintiffs' claims regarding adequacy were nonjusticiable. (R at pp. 199-201). The Court of Appeals did not reach the issue of Amendment 23. This Court may affirm a district court decision for any reason supported by the record. *Farmers Group v. Williams*, 805 P.2d 419, 428 (Colo. 1991).

education funding, as well as for accountable education reform, for accountable programs to meet state academic standards, for class size reduction, expanding technology education, improving students' safety, expanding the availability of preschool and kindergarten programs, and capital construction. Colo. Const. art. IX, § 17(5). The State Education Fund is exempt from the statutory and constitutional limitations on General Fund appropriations growth or fiscal year spending. All revenues generated from the fund, as well as principal, remain in the fund and do not revert to the General Fund. Colo. Const. art. IX, § 17(4)(a).

Plainly, the text and operation of section 17 set a minimum level of state funding for education. Plaintiffs do not allege the state is failing to meet it. Plaintiffs instead ask the Court to find a different constitutional minimum in the Education Clause. To do so would render Amendment 23 irrelevant. Fundamental canons of constitutional interpretation do not allow such a reading of these two provisions.

First, Plaintiffs' argument violates the rule that, whenever possible, two constitutional provisions should be read so each can be effective. *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). Under Plaintiffs' theory, a judge would be required to give effect either to Amendment 23 *or* to what Plaintiffs argue are

the much greater requirements of the Education Clause. By contrast, Defendant's interpretation gives effect to both the Education Clause and Amendment 23.

Even if there is a conflict, however, Amendment 23 prevails because its provisions are more specific than the Education Clause's general statements. *See Colorado Common Cause v. Bledsoe*, 810 P.2d at 207. Amendment 23 also would take precedence as a recent enactment over the much older Education Clause. *See Ortega v. Industrial Comm'n of Colorado*, 682 P.2d 511, 512 (Colo.App. 1984). Moreover, the rules of construction favor construing an initiated constitutional amendment to supersede conflicting state constitutional provisions to the extent necessary. *Zaner*, 917 P.2d at 283. The Court need go no further than applying these rules to the plain text of the constitution to recognize that Amendment 23 sets the constitutional standard for education funding and affirming dismissal of the case.

Furthermore, the history of the adoption of Amendment 23 supports the conclusion that the public intended to do through the democratic process exactly what Plaintiffs seek to do here through litigation. In interpreting a constitutional amendment passed through initiative, courts may consider information put in front of the voting public, such as the ballot title and the explanatory publication of the Legislative Council of the Colorado General Assembly known as the "Blue Book."

This is because it is the intent of the voters, not the proponents, that is relevant.²⁵

See Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1, 8 (Colo. 1993); *Urbish v. Lamm*, 761 P.2d 756, 760 (Colo. 1988) (“Because [the amendment] was adopted by popular vote, we must seek to determine what the people believed the amendment to mean when they accepted it as their fundamental law”); *Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004) (Blue Book provides important insight into the electorate’s understanding of the amendment when it was passed and also shows the public's intentions in adopting the amendment).

The Blue Book described Amendment 23 as follows: “Under current law, the legislature determines any increase or decrease in funding provided through two mechanisms [*i.e.*, the Public School Finance Act and state aid for special

²⁵ The various attachments to the Amicus brief submitted by Great Education Colorado are not relevant. They are not part of the record on appeal. *Hinshaw v. Dyer*, 166 Colo. 394, 397, 443 P.2d 992, 993 (1968); *Laessig v. May D&F*, 157 Colo. 260, 262, 402 P.2d 183, 185 (1965); *McCall v. Meyers*, 94 P.3d 1271, 1272 (Colo.App. 2004). Moreover, post-enactment affidavits from proponents or supporters of the initiative as to their understanding of the purpose of the initiative; newspaper editorials and articles; television commercials; and comments from Office of Legislative Legal Services and Colorado Legislative Legal Council seeking to clarify the language of the initiative are not relevant and cannot be considered. *See Colorado Department of Social Services v. Board of County Commissioners*, 697 P.2d 1, 20 (Colo. 1985) (where legislative history available, post-passage comments of legislators as to intent of the statute properly excluded).

purpose programs]. *Under this proposal, the state constitution sets the minimum increase in funding.*” *An Analysis of the 2000 Statewide Ballot Proposals and Recommendations on Retention of Judges*, Research Publication No. 475-6, Legislative Council of the Colorado General Assembly (2000) (“Blue Book”), p. 9 (R. at p. 104) (emphasis added). Thus, in passing Amendment 23, the people of Colorado understood that they were setting the constitutionally mandated minimum level of funding for public schools.

The voters also were told that Amendment 23 would address the problems Plaintiffs want this Court to address through the Education Clause. Plaintiffs argue that increased funding for education is necessary for Colorado students to be competitive in a global environment. (Compl., ¶ 208, R. at pp. 45 - 46). Amendment 23 has this same purpose: “An increased investment in education is necessary for Colorado students to be competitive in a global environment.” (Blue Book, p. 12, R. at p. 107). Plaintiffs claim that the state-level contribution to school funding is inadequate. (Compl., ¶ 196, R. at p. 43). Amendment 23, however, expressly sets the constitutionally-mandated amount of the increase in General Fund funding to at least five percent annually for the next ten years. (Blue Book, p. 10; Colo. Const. art. IX, § 17(5), R. at p. 105).

Plaintiffs allege that funding for special education students, English-language learners, gifted and talented students, and transportation is inadequate. (Compl., ¶¶ 142 – 159, 205 – 206, R. at pp. 30 – 35, 45). Again, however, Amendment 23 sets the constitutionally-mandated amount of the increase in funding for such programs, requiring annual increases in total funding of inflation plus one percentage point through fiscal year 2010-11 and by inflation thereafter. (Blue Book, p. 11, R. at p. 106).

Plaintiffs argue that funding for public schools had been eroding since the late 1980s and that this erosion has had a negative impact on per pupil funding. (Compl., ¶ 120 – 128, R. at pp. 26 - 27). Amendment 23, however, was specifically adopted, in part, to stop this erosion by requiring an additional one percentage point increase. (Blue Book, p. 11-12, R. at pp. 106 - 07).

Plaintiffs also argue that TABOR has reduced funding for public schools, (Compl. ¶¶ 177 – 186, R. at pp. 39 - 41), and ask the Court to retain jurisdiction to force the General Assembly to increase funding for virtually every educational program.²⁶ Given that public education already comprises the largest line item in the state budget, such a massive increase in spending would require either raising

²⁶ Plaintiffs' Brief suggests that the alleged "shortfall" in funding is anywhere from \$500 million to \$3.4 billion. Opening Br., pp. 12 - 13.

taxes and spending limits, in conflict with TABOR, or a judicial takeover of not only the education system, but the state budgetary process itself. This illustrates acutely why this case presents a question that must continue to be addressed through the democratic process rather than litigation, as discussed above.

Moreover, Amendment 23, which was adopted with TABOR in mind, already deals with this issue by dedicating a stream of revenue to fund education that is largely exempt from the TABOR limits. It accomplishes this by providing that some of the excess state revenues that would otherwise be refunded to the taxpayers under TABOR are instead placed in the State Education Fund for the use of public schools. (Blue Book, p. 10, R. at p. 106). Finally, as discussed above, as a later-enacted, more specific constitutional provision, TABOR must take precedence over the Education Clause. *See Ortega and Bledsoe, supra.*

The people of the State of Colorado, by placing Section 17 into the constitution, specifically determined what they intended to be the constitutionally-mandated level of the state contribution to public education funding. It is without dispute that the General Assembly is in compliance with the terms of Section 17.

Thus, the Plaintiffs' claims for relief were properly dismissed on this ground as well.²⁷

III. The School Districts are political subdivisions of the state and cannot challenge how the general assembly chooses to finance them.

The Court of Appeals correctly held that as political subdivisions of the state, Petitioner school districts (the "Districts") lack standing to challenge the Public School Finance Act. Since standing is a jurisdictional issue, the Districts must be dismissed from the case. *Wimberly v. Ettenberg*, 194 Colo. 163, 167, 570 P.2d 535, 539 (1977).

As the Court of Appeals recognized, it is well established that subdivisions of the state may not sue to overturn state laws concerning their performance. *Lobato* at *4 (citing *Denver Ass'n for Retarded Children, Inc. v. Sch. Dist. No. 1*, 188 Colo. at 316, 535 P.2d at 204). It is equally well established that school districts, despite their independent constitutional authorization under the Local

²⁷ Moreover, the people of the State of Colorado recently rejected an opportunity to increase the constitutionally-mandated level of public education funding. Amendment 59 would have eliminated taxpayer rebates under TABOR and directed these monies instead into the State Education Fund. *See* 2008 State Ballot Information Booklet, Research Publication No. 576-1, Legislative Council of the Colorado General Assembly (2008). By rejecting this initiative, the people of Colorado rejected further constitutional specifications, leaving the question instead to the General Assembly and to the people.

Control Clause, remain subdivisions of the state subject to this rule. *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374, 1380 (Colo. 1980) (the “long-standing bar preventing political subdivisions and the officers thereof from challenging the validity of state statutes has been expressly applied to school districts”); *Denver Ass’n for Retarded Children, Inc.*, 188 Colo. at 317, 535 P.2d at 204 (“the several officers charged with the supervision of the schools, from the state board of education down to the directors of the school district, are merely the instruments of the state government chosen for the purpose of effectuating its policy in relation to schools.” (internal quotation omitted); *Clear Creek School Dist. RE-1 v. Holmes*, 628 P.2d 154, 155 (Colo.App. 1981) (school district lacks standing to challenge constitutional validity of eminent domain statute).

Plaintiffs seek to evade this rule by arguing that school districts have their own legal interest in controlling the instruction in the public schools they preside over. *See* Opening Br., pp. 28 – 31. This appears to be based on a misreading of a statement in *Byrne* noting that there is an exception to the subdivision standing rule when “there has been conferred upon [the subdivision] a legally protected interest by either statute [citation omitted] or constitutional provision.” 618 P.2d at 1380.

Plaintiffs’ reading of this statement would render the subdivision standing inquiry entirely superfluous and without effect. Alleging an injury to a

particularized legal interest is nothing more than a restatement of the fundamental standing inquiry. *See Wimberly*, 570 P.2d at 539. A subdivision must establish that it has a legal interest in the case, as must any plaintiff, but under the political subdivision doctrine, it must also do more. It must also point to a provision in statute or the constitution that “plain[ly] and unmistakabl[y],” *Romer v. Board of County Comm’rs of County of Pueblo*, 956 P.2d 566, 573 (Colo. 1998), or “expressly confer[s]” not only a legal interest in the matter, but an authorization to bring suit against the state. *Maurer v. Young Life*, 779 P.2d 1317, 1325 (Colo. 1989).

Like the plaintiffs in *Byrne* and *Denver Ass’n*, the Districts here cannot point to any such authorization. Moreover, in both those cases, the Court either expressly (*Denver Ass’n.*) or impliedly (*Byrne*) rejected the argument that such authorization to sue the State was expressly conferred by the Local Control Clause.

Even if Plaintiffs’ remarkably broad reading of the Local Control Clause and the Education Clause is correct, neither contains anything that could be read as an explicit or unmistakable authorization for local school boards to demand that the State provide districts with state-raised funds. At best, Plaintiffs’ arguments could be said to show that they have an independent interest in controlling how locally-raised funds are spent. For purposes of this case, there is no need for Defendants

to dispute that proposition, or even to dispute that it gives districts standing to sue the State to prevent it from taking control of local funds.²⁸

The Complaint, however, does not seek to prevent the State from directing local schools' use of local funds; it seeks to invalidate the State's School Finance Act on the grounds that the General Fund contribution to public school finance is too low. This issue has nothing to do with local district control over instruction paid for with locally-raised funds. *See* Compl., ¶ 196, R. at p.43. The laws the Plaintiffs seek to invalidate simply provide state funds to supplement the traditional funding sources of public schools, which were historically local. *See* Section I.A.1, *supra*.

Whatever independent interest districts may have in spending their own funds, the districts have no legal interest independent of the State's when it comes to spending state general revenues. *See Owens*, 92 P.3d at 940 (use of funds drawn exclusively from state sources does not implicate the Local Control Clause), *citing Craig v. People*, 89 Colo. 139, 299 P. 1064, 1067 (1931). The Court of Appeals therefore properly held that the districts lack standing to challenge the state laws that provide those funds.

²⁸ *See Owens*, 92 P.3d at 940 (recognizing constitutional status of district control over locally-raised funds without resolving issue of district standing).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated this 16th day of January, 2009.

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