

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80203</p> <p>Court of Appeals No. 06CA733 Judges Webb, Casebolt, and Terry</p> <p>Denver District Court No. 05 CV 4794 Judge Michael A. Martinez</p>	
<p>Petitioners: ANTHONY LOBATO, as an individual and as a parent and natural guardian of TAYLOR LOBATO, <i>et al.</i></p> <p>v.</p> <p>Respondents: THE STATE OF COLORADO, <i>et al.</i></p>	
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<p>BRIEF OF <i>AMICUS CURIAE</i> GREAT EDUCATION COLORADO IN SUPPORT OF PETITIONERS</p>	

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Great Education Colorado (“GEC”) submits this brief as *amicus curiae* in support of the position of Petitioners, urging reversal of the decisions of the Court of Appeals and trial court dismissing all claims. Pursuant to C.A.R. 29, GEC submits herewith a separate motion for leave to file this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

GEC is a nonpartisan, statewide, grassroots organization of public school supporters that advocates for adequate funding and resources for K-12 education in Colorado. Through its website, newsletters, and network, GEC informs public school supporters about critical school funding issues and empowers them to be vocal and effective advocates for our schools. GEC works closely with other advocates for education funding, and GEC includes or works with many of the persons who were involved with the passage of Amendment 23. *See* Colorado Constitution art. IX, § 17. Public education funding is the primary issue for GEC, and therefore, GEC takes a close interest in cases which concern education resources and funding for public schools in Colorado.

STATEMENT OF ISSUES PRESENTED

GEC submits its arguments related to the following issue:

(1) Whether the Court of Appeals erred in holding that claims challenging the adequacy of the state public school system brought pursuant to article IX,

section 2 of the Colorado Constitution (the “Education Clause”) present nonjusticiable political questions.¹

SUMMARY OF POSITION OF *AMICUS CURIAE*

Public education is the paramount public service of the state of Colorado. This case arises from a constitutional challenge to the Colorado system of public schools brought by Petitioners, who are students, parents, school districts, and other educational interests (collectively, “Education Plaintiffs”). These Education Plaintiffs seek, in part, to enforce their rights under the Education Clause of the Colorado Constitution which guarantees adequate educational opportunities.

Undermining the authority and role of the judiciary, the Court of Appeals erred in holding that this case presents a nonjusticiable political question. Note that the Court of Appeals correctly did not rely upon the District Court’s primary basis for its dismissal of Education Plaintiffs’ claims; namely, that Amendment 23 sets the minimal level of state education funding, and that such funding is the only requirement of the Education Clause. However, the Court of Appeals wrongly affirmed the dismissal holding that state constitutional education adequacy claims

¹ GEC does not address the second issue before this Court, namely, whether the Court of Appeals erred in holding that the school districts do not have standing to bring suit under article IX, section 15, of the Colorado Constitution (the Local Control Clause) challenging the constitutionality of the Colorado system of public school finance.

cannot be addressed by the judiciary, which is a position contrary to the vast majority of other states that have addressed this issue. Unless the court's decision is reversed: (1) the constitutional right to adequate educational opportunities will be ignored; (2) society will incur significant economic and human costs as students bear the brunt of an inadequate education system; and (3) the authority of the judiciary to interpret and enforce any constitutional provision will be severely undermined.

In this brief, GEC explores in greater depth three points² touched upon in the Education Plaintiffs' brief:

1. The Education Clause of the Colorado Constitution mandates that the State of Colorado shall provide "for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state," thereby guaranteeing an enforceable and substantive right to adequate educational opportunities to all school-aged children of Colorado.

2. The Colorado judiciary has the ability, authority, and duty to address claims based upon the constitutional right to adequate educational opportunities. The vast majority of other states have similarly held that this issue is not a

² While GEC supports the other positions in Education Plaintiffs' Opening Brief, GEC does not address those other issues.

nonjusticiable political question and demonstrated the judiciary's capability to resolve these claims.

3. Amendment 23 does not define the funding required for a constitutionally adequate education, nor does it satisfy the Education Clause, the mandates of which create substantive rights that implicate much more than simply funding. Rather, Amendment 23 was created as a response to a decade-long decline in education funding; its mandated minimum increases were designed only to bring education funding back to 1988 levels, adjusted for inflation. Amendment 23 addresses neither a "thorough" nor a "uniform" education system. Amendment 23, a funding mechanism, cannot be read to limit all of the substantive rights set forth in the Education Clause of the Colorado Constitution.

ARGUMENT

I. APPLICABLE STANDARDS OF CONSTITUTIONAL INTERPRETATION.

A C.R.C.P. 12(b)(5) motion tests the sufficiency of the complaint, and a reviewing court must accept all matters of material fact in the complaint as true and view the allegations in the light most favorable to the Plaintiffs. *See Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995). A C.R.C.P. 12(b)(5) motion should be granted only if it appears beyond doubt that the Education Plaintiffs could prove no set of facts in support of their claims which

would entitle them to relief. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992). Accordingly, this Court need not – and indeed should not – make any determination regarding the adequacy of Colorado’s current school finance system. Instead, the preliminary question before this Court is whether *any* court has the authority to interpret the Education Clause.

This Court applies a *de novo* standard of review in interpreting the Colorado Constitution and reviewing the trial court’s dismissal. *See Rocky Mountain Animal Defense v. Colorado Division of Wildlife*, 100 P.3d 508, 514 (Colo. App. 2004). This Court “afford[s] the language of the Constitution its ordinary and common meaning to give effect to every word and term contained therein, whenever possible.” *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005). The Court also may consider the intent of the Framers of the Constitution by looking to the records of the proceedings of the Constitutional Convention. *Id.* at 699.

Similarly, the Colorado Supreme Court has mandated the applicable standard when construing a constitutional amendment:

When construing a constitutional amendment courts must ascertain and give effect to the intent of the electorate adopting the amendment. To determine intent, courts first examine the language of the amendment and give words their plain and commonly understood meaning. . . . Courts should consider the amendment as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions rather than an interpretation which would create a conflict between such provisions.

Zaner v. City of Brighton, 917 P.2d 280, 283 (Colo. 1996) (internal citations omitted). Finally, the Court should avoid an unreasonable interpretation or one that produces an absurd result. *See Rocky Mountain Animal Defense*, 100 P.3d at 514.

II. THE EDUCATION CLAUSE GUARANTEES AN ENFORCEABLE RIGHT TO ADEQUATE EDUCATIONAL OPPORTUNITIES PURSUANT TO THE “THOROUGH AND UNIFORM” MANDATE.

The plain terms of the Education Clause guarantee to school-aged residents in Colorado adequate educational opportunities which – as the Legislature has recognized – includes, but is not limited to, adequate facilities, adequate instruction, and adequate funding. The Court of Appeals properly chose to disregard the District Court’s erroneous ruling that the funding mechanism of Amendment 23 completely satisfies *all* of the mandates of the Education Clause. *Lobato v. State*, ___ P.3d ___, 2008 WL 194019 at *5 (Colo. App. September 15, 2008) (“We conclude that the parents’ claims are barred by the political question doctrine, but unlike the trial court, we do not rely on Amendment 23.”). However, by inappropriately focusing only on school funding in its political question analysis, the Court of Appeals misapprehended the scope of the Plaintiffs’ claims. This case is not simply about money. It is about the constitutional adequacy of an existing school system. The lower courts simply failed to view the allegations in the light most favorable to Education Plaintiffs. Education Plaintiffs properly

alleged that the Education Clause guarantees to each and every school-aged resident of Colorado the substantive right to constitutionally adequate educational opportunities, which includes, but are not limited to, adequate funding for this education (Complaint at ¶¶ 3-6 [Record at 4]), as well as a qualitative mandate of adequate educational opportunities (Complaint at ¶ 194 [Record at 43]).³ See *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 816 (Ariz. 1994) (to cure constitutional defects in school funding system, “it is up to the legislature to choose the methods and combinations of methods from among the many that are available. Other states have already done so.” (footnote omitted)). This view of Plaintiffs’ claims is consistent with the language of the Education Clause, which mandates a “thorough and uniform” school system, not “thorough and uniform” funding.

³ Even if funding was the focal point of Plaintiffs’ claims, that alone would not put their claims beyond judicial review. In reviewing such a claim, the Court would be making fiscal policy no more than if it struck down a financing system that purposefully funded religion-based education, and no more than if the Governor vetoed a fiscal bill. Because the Court has been mandated by the people in the same document giving rise to the “separation of powers” doctrine, the exercise of these checks and balances is *within* the intended limits of that doctrine.

A. The Education Clause Guarantees More Than Simply Funding to School-Aged Children – the Clause Guarantees Adequate Educational Opportunities.

The plain language of the Colorado Constitution confirms that the Education Clause guarantees more than simply adequate funding. The Education Clause reads in part:

Establishment and maintenance of public schools. “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 plain terms of the Education Clause guarantee to school-aged residents in Colorado adequate educational opportunities which – as the Legislature has recognized – includes, but is not limited to, adequate facilities, adequate instruction, and adequate funding.

The Supreme Court of Colorado previously relied upon the Education Clause in holding that the “General Assembly has the constitutional authority and **obligation** to ‘provide for the establishment and maintenance of a thorough and uniform system of free public schools.’” *Board of Education v. Booth*, 984 P.2d 639, 650 (Colo. 1999) (emphasis added); *see also Zavilla v. Masse*, 147 P.2d 823,

825 (Colo. 1944) (Education Clause guarantees parent’s substantive “constitutional right” to have children educated in the public schools).⁴

Additionally, the history of the Education Clause and subsequent legislative actions support the substantive and enforceable right to adequate educational opportunities. Colorado’s and other states’ very admission into the Union was conditioned upon their promises to constitutionally secure education to their citizens. *See Pauley v. Kelly*, 255 S.E.2d 859, 864, 878 (W. Va. 1979)⁵; *see also* The Institute for Education Equity and Opportunity, Education in the 50 States: A Deskbook of the History of State Constitutions and Laws About Education, at 55 (July 2008). In 1876, the Framers of the Colorado Constitution mandated a thorough and uniform system of free public schools, which reflected the people’s will that public schools were essential to democracy. In a petition to the

⁴ This is consistent with the clear and plain language of the Education Clause which mandates a “thorough and uniform system of free public schools throughout the state,” thereby guaranteeing every school-aged Colorado resident an enforceable right to an adequate education. *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2381 (2002) (meaning of “thorough” is “marked by completeness”); *cf. Booth*, 984 P.2d at 647 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY stating that Court will enforce plain constitutional language as written).

⁵ The Colorado Supreme Court previously referred to *Pauley* and the West Virginia Supreme Court’s analysis of other states’ education clauses which are similar or identical to Colorado’s “thorough and uniform” requirement. *See Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1025 n.23 (Colo. 1982).

Constitutional Convention, a citizen’s group expressed the “belief that free, non-sectarian common schools are essential to the life and perpetuity of our form of government and constitute the only security for a free, untrammelled ballot”⁶ Secretary of State T. O’Connor, *Proceedings of the Constitutional Convention*, at 277 (1907).

Further, the General Assembly consistently acknowledges its obligations under the Education Clause and affirms the enforceable right to adequate educational opportunities. For example, the General Assembly stated:

[S]ection 2 of article IX of the state constitution requires the general assembly to provide for the establishment and maintenance of a thorough and uniform system of free public schools. The state therefore has an obligation to ensure that every student has a chance to attend a school that will provide an opportunity for a *quality education*.

C.R.S. § 22-30.5-301 (2006) (emphasis added); *see also* C.R.S. § 22-7-601 (with regard to accountability reports, Education Clause directs the general assembly to establish and maintain a thorough and uniform system of free public schools);

⁶ The constitutional history is supportive of the right for adequate educational opportunities, although this Court has noted that the precise history behind Colorado’s Education Clause is unclear. *See Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1025 (Colo. 1982). Moreover, the Colorado State Constitution was modeled on the state constitutions of Missouri, Pennsylvania, and Illinois. *See* D. Oesterle and R. Collins, *THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE* at 1 (2002); *People v. Rodriguez*, 112 P.3d 693, 699-700 (Colo. 2005). However, the applicable constitutional language is different, and there is no agreement in those other states as to the right to an adequate education as explained below.

C.R.S. § 22-30-102 (School District Organization Act intended to provide for thorough and uniform system); C.R.S. § 22-43.7-101 (School District Capital Construction Assistance Program recognizes that Education Clause requires a thorough and uniform system); C.R.S. § 22-54-102(1) (Public School Finance Act “is enacted in furtherance of the general assembly’s duty under section 2 of article IX of the state constitution to provide for a thorough and uniform system of public schools throughout the state”); Complaint at ¶¶ 8-9 [Record at 5]. Accordingly, the Legislature not only recognizes the constitutional right to adequate educational opportunities; but also recognizes that an adequate education includes various components including adequate instruction and adequate facilities, in addition to adequate funding.

Contrary to the Court of Appeals’ analysis, the Colorado Supreme Court’s decision in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982), supports the Education Plaintiffs’ claims for adequate educational opportunities. In *Lujan*, the Colorado Supreme Court rejected the argument that the “thorough and uniform” clause requires that the State provide *equal* educational opportunity and concluded that the Education Clause is satisfied “*if thorough and uniform educational opportunities are available*” *Id.* at 1024-25 (emphasis added) (per Hodges, C.J., with one Justice specially concurring, two justices dissenting, and one Justice not participating). This exact issue is the crux of

the matter here, namely, whether there are thorough and uniform educational opportunities available to the parents and their children who assert claims in this matter.

Although the holding of *Lujan* is limited to the issue of equal funding for education – not minimal adequacy that goes beyond funding – the Court did emphasize the importance of education:

We recognize unequivocally that public education plays a vital role in our free society. It can be a major factor in an individual's chances for economic and social success as well as a unique influence on a child's development as a good citizen and on his future participation in political and community life.

Id. at 1017 (internal citations omitted). Accordingly, as it relates to the claims in this matter, *Lujan* stands for the propositions that (1) public education is a vital component of our society; (2) the “thorough and uniform” language of the Education Clause can be interpreted by the judiciary; and (3) the Education Clause requires the availability of adequate educational opportunities through state action.

Id. at 1025 (citing cases interpreting the meaning of “thorough and uniform”).

B. A Vast Majority of Other States Guarantees the Right to Adequate Educational Opportunities.

The conclusion in *Lujan* that the Education Clause requires adequate, but not necessarily equal, educational opportunities is consistent with various other states that have affirmed the constitutional right to an adequate education while denying

equal protection claims based on disparate education funding. *See, e.g., Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 538-40 (S.C. 1999) (concluding that constitutional education clause requires minimally adequate education, while affirming dismissal of equal protection claims); *DeRolph v. State*, 677 N.E.2d 733, 746-47 (Ohio 1997) (school financing system violated education clause but equal educational opportunities are not required); *Leandro v. State*, 488 S.E.2d 249, 257 (N.C. 1997) (constitutional education clause requires children to have the opportunity for a sound basic education, but does not require that equal educational opportunities be afforded students in all of the school districts in the state); *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 86 N.Y.2d 307, 314-15, 319-20 (N.Y. Ct. App. 1995) (allowing claims based on constitutional education clause to survive motion to dismiss while acknowledging prior ruling that rejected equal protection claims); *Roosevelt*, 877 P.2d at 815-16 (holding that financing scheme for public education violated constitutional education clause, but such clause does not require equality).

Indeed, the vast majority of courts in other states with similar constitutionally mandated requirements for a minimal level of public education have protected and enforced the right to an adequate or quality public school education for children. *See Bonner v. Daniels*, 885 N.E.2d 673, 692 (Ind. App. 2008) (“The vast majority of these [sister state] courts have exercised their **judicial**

responsibility to interpret their state constitutional provision. . . . Specifically, during the past ten years, only eight states have refused to consider [constitutional education adequacy] challenges . . . whereas, seventeen states have adjudicated the claims.” (emphasis added)) (transfer granted and opinion vacated). The following chart lists some of the illustrative cases enforcing students’ rights under state constitutional education clauses.⁷

CASE	STATE CONSTITUTION EDUCATION CLAUSE	RULING
<i>Idaho Sch. for Equal Educ. Opportunity v. State</i> , 129 P.3d 1199, 1208-09 (Idaho 2005)	“It shall be the duty of the Legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.” IDAHO CONST. art. IX, § 1.	Affirmed trial court ruling that funding was unconstitutional, and deferred to legislature to address funding problem.
<i>Montoy v. State</i> , 112 P.3d 923, 941 (Kan. 2005)	“The legislature shall make suitable provision for finance of the educational interests of the state.” KAN. CONST. art. XI, § 6.	Noting constitutionally enforceable right to adequate education.
<i>Abbeville County Sch. Dist. v. State</i> , 515 S.E.2d 535, 539-540 (S.C. 1999)	“The General Assembly shall provide for the maintenance and support of a system of free public schools” S.C. CONST. art. XI, § 3.	Affirming dismissal of equal protection claims, but holding that constitutional education clause requires the opportunity for each child to receive a minimally adequate education.
<i>DeRolph v. State</i> , 677 N.E.2d 733, 746-47 (Ohio 1997)	“The general assembly shall . . . secure a thorough and efficient system of common schools through the State” OHIO CONST. art. VI, § 2.	Determining a failure to provide for a thorough and efficient system of common schools in violation of constitutional education clause.

⁷ The cases below relied, at least in part, on state constitutional education clauses. Some of these courts also may have relied upon other constitutional provisions.

CASE	STATE CONSTITUTION EDUCATION CLAUSE	RULING
<i>Leandro v. State</i> , 488 S.E.2d 249, 257 (N.C. 1997)	“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools” N.C. CONST. art. IX, § 2(1).	Education clause requires children to have the opportunity for a sound basic education, but it does not require equal educational opportunities.
<i>Campaign for Fiscal Equity v. State</i> , 655 N.E.2d 661, 86 N.Y.2d 307, 319 (N.Y. Ct. App. 1995)	“[T]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. CONST. art. XI, § 1.	Plaintiffs’ claims that they were not provided a minimally adequate educational opportunity were enforceable and survived motion to dismiss.
<i>Campbell County Sch. Dist. v. State</i> , 907 P.2d 1238, 1244 (Wyo. 1995)	“The legislature shall . . . create and maintain a thorough and efficient system of public schools” WYO. CONST. art. 7, § 9.	Enforcing rights under the education clause holding that Wyoming’s public school finance system is unconstitutional.
<i>Comm. for Educ. Equal. v. State</i> , 878 S.W.2d 446, 448-49 (Mo. 1994) (dismissing appeal for lack of standing)	“[T]he general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state” MO. CONST. art. IX, § 1(a).	Noting trial court’s order that the general assembly must provide “adequate funds” to establish and maintain a system of public education.
<i>Roosevelt Elementary Sch. Dist. No. 66 v. Bishop</i> , 877 P.2d 806, 814-16 (Ariz. 1994)	“The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system” ARIZ. CONST. art. XI, § 1.	Holding that financing scheme for public education violated constitutional requirement to provide general and uniform public school system.
<i>McDuffy v. Secretary</i> , 615 N.E.2d 516, 545-47 (Mass. 1993)	“[I]t shall be the duty of legislatures . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns” MASS. CONST. Part II, C. 5, § 2.	State has constitutional duty to provide proper education to children who have enforceable rights under the education clause.

CASE	STATE CONSTITUTION EDUCATION CLAUSE	RULING
<i>Edgewood Indep. Sch. Dist. v. Kirby</i> , 777 S.W.2d 391, 397 (Tex. 1989)	“[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.” TEX. CONST. Art. VII, § 1.	State’s school financing system violates constitutional education clause.
<i>Rose v. Council for Better Educ.</i> , 790 S.W.2d 186, 211-13 (Ken. 1989)	“The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state.” KY. CONST. § 183.	Constitutional education clause requires legislature to provide adequate education system.
<i>Abbott by Abbott v. Burke</i> , 495 A.2d 376, 388 (N.J. 1985)	“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State” N.J. CONST., art. VIII, § 4.	Constitutional education clause requires the state to provide an adequate education.

The constitutional mandate requiring the provision of minimally adequate educational opportunities resonates with the history of each of our fifty states. As the Institute for Education Equity and Opportunity writes:

Throughout the history of the United States, from colonial times onward, this pressing need for providing a public education has been articulated in remarkably consistent terms: an educated citizenry is essential to a vital democratic community. Education ensures that citizens can perform useful work to sustain themselves. An educated citizen is essential in a democracy not only to ensure an informed electorate, but also to create the succeeding generation of leaders. Education offers a means for people with widely dissimilar cultures to form a national identity and cohesiveness.

Education in the 50 States at 2.

For example, in *Idaho Schools For Equal Educational Opportunity v. State*, 129 P.3d 1199, 1208-09 (Idaho 2005), the Idaho Supreme Court affirmed the district court's holding that the educational funding system did not satisfy the Legislature's duty under the constitution that it shall maintain "a general, uniform and thorough system of public, free common schools."

Similarly, the Wyoming Supreme Court looked to Wyoming history stating that the Framers of the Education Clause of the Wyoming Constitution (which requires in part a "thorough and efficient system of public schools") intended this article as a mandate to the legislature to provide an education system that provides an opportunity for students to "become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually." *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1257-59 (Wyo. 1995); see generally, Steve Smith, *Education Adequacy Litigation: History, Trends, and Research*, 27 U. ARK. LITTLE ROCK L. REV. 107 (2004); Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. Rev. 2241 (2003).

Contrary to this majority of jurisdictions, a few courts have held that a right to an adequate education does not exist. In the District Court here, Respondents relied heavily upon *Lewis v. Spagnolo*, 710 N.E.2d 798 (Ill. 1999), wherein the Illinois Supreme Court held that the state constitutional education clause did not

provide a basis for adequate education claims. Section 1 of Article X of the Illinois Constitution of 1970 states in part, “The State shall provide for an efficient system of high quality public educational institutions and services.” *Id.* at 802. The Court reasoned that this was not a question for the judiciary. *Id.* at 804. Thus, the Illinois Supreme Court abrogated its constitutional duty, and its reasoning would lead to the absurd conclusion that the court could not intervene even if the legislature appropriated one dollar (\$1) of funding per pupil.⁸ *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400 (Fla. 1996) suffers from the same reasoning that leads to absurd results. *See id.* at 406-07.

The only other cases holding that challenges to state education systems raise nonjusticiable political questions are not on point here because they, like *Lujan*, focus solely on education *funding*, not *adequacy*. *Ex parte James*, 836 So. 2d 813, 815-17 (Ala. 2002) (dismissing the “Equity Funding Case”); *Nebraska Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 169 (Neb. 2007) (“This appeal presents a constitutional challenge to Nebraska’s education funding system.”); *Oklahoma Educ. Ass’n v. State*, 158 P.3d 1058, 1062 (Okla. 2007)

⁸ Even further, under the reasoning of *Lewis* that holds a legislative determination regarding education inviolate, the Illinois Supreme Court would decline to review a challenge to a school system based on the legislative determination that an “efficient system of high quality” educational services is best achieved through the racial segregation of schools – even under a rational basis standard of review.

(“The plaintiffs challenge the current level of funding for common education.”); *Marrero v. Commonwealth*, 739 A.2d 110, 111-113 (Pa. 1999) (rejecting claim that, “in substance, ... the General Assembly violated the Pennsylvania Constitution by failing to provide adequate funding”); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 55-59 (R.I. 1995) (reversing trial court ruling that “public school financing system” was unconstitutional). Note that the Court of Appeals frequently cited the *Heineman* case; however, *Heineman* is actually supportive of the Education Plaintiffs’ position. The *Heineman* court specifically relied upon Nebraska Constitutional Framers’ rejection of the “thorough and efficient” and “uniform” education language found in many other states’ constitutions. *Heineman*, 731 N.W.2d at 179. In holding that the education claims were nonjusticiable, the *Heineman* court relied upon this constitutional history that “intentionally omitted any language that would have placed restrictions or qualitative standards on the Legislature’s duties regarding education.” *Id.* at 180.

The Court of Appeals attached to its opinion a detailed chart of other state rulings on the justiciability of constitutional education adequacy claims. A simpler chart, attached to this brief as Appendix A, lists those various cases and is supplemented to show that the vast majority of states hold that such issues should be addressed by the judiciary.

Additionally, for the convenience of the Court, attached as Exhibit 1 is The Institute for Education Equity and Opportunity, Education in the 50 States: A Deskbook of the History of State Constitutions and Laws About Education (July 2008), which provides the history and constitutional education provisions from each of the fifty states.

The flawed reasoning behind *Lewis*, and the other minority of cases holding that constitutional education clauses do not provide for an adequate education, simply ignores the plain language of the constitutional wording, as well as the historical emphasis on the importance of education. Other courts have recognized that they have the ability to resolve this issue, and cannot ignore their constitutional duty. In *DeRolph*, 677 N.E.2d 733, the Ohio Supreme Court stated:

The judiciary was created as part of a system of checks and balances. We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable.

Id. at 737.

Colorado's Education Clause requires that the General Assembly establish and maintain a "thorough and uniform system of free public schools" in this state; that is a mandate that all of our school children receive adequate educational opportunities. Such mandate – imposed by the Framers – guarantees the success of countless generations of Coloradoans, and cannot be denied.

The alternative would be devastating. In stating that “education has a fundamental role in maintaining the fabric of our society,” the United States Supreme Court recognized that the deprivation of an education has an “inestimable toll . . . on the social economic, intellectual, and psychological well-being of the individual” and that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” *Plyler v. Doe*, 457 U.S. 202, 221-23 (1982) (quoting, in part, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

C. Claims for a “Thorough and Uniform” System of Education Are Justiciable.

The Court of Appeals and District Court mistakenly held that the judiciary cannot address education adequacy claims because they raise political questions. This holding is contrary to the powers of the court and its precedent. As shown above, this Court in *Lujan* addressed certain claims pursuant to the Education Clause. *See supra* Part II.A.; *see also Owens v. Colorado Congress of Parents, Teachers, and Students*, 92 P.3d 933, 940 (Colo. 2004) (the *Lujan* court considered claims under “thorough and uniform” requirements of Education Clause).

1. Constitutional History.

The language of the Education Clause is mandatory, and its history is consistent with the constitutional goal of restricting the legislature’s powers. *See*

supra Part II.A. The Colorado Constitution is not a grant of power, but an additional limitation upon all forms of state power, including the authority of the General Assembly. *See People v. Davidson*, 79 P.3d 1221, 1235 (Colo. 2003). By adopting the Education Clause, the Framers explicitly stripped the General Assembly of any discretion to establish and maintain a school system that fails to meet the minimum threshold requirement of “thorough and uniform.”

That the Framers would strip the General Assembly of the power to establish any school system that it alone deems adequate is unsurprising given the circumstances surrounding the adoption of article IX. “The Colorado Constitution was adopted in 1876 in an atmosphere of deep distrust of centralized authority.” *Owens*, 92 P.3d at 938. The Framers particularly distrusted the legislative branch and, accordingly, “assiduously wrote provisions that took away much of [the General Assembly’s] discretionary authority.” *Id.* (quoting Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 1-2 (2002)). Indeed, it was the delegates’ ambivalence about legislative power that led them to adopt the Education Clause. *See Owens*, 92 P.3d at 938.

Further, given that Constitutional protections were designed primarily to restrict the General Assembly, the Court of Appeals’ decision effectively rendered the “thorough and uniform” phrase a meaningless suggestion to the General Assembly that it provide something it already had the power to provide; namely

what *it* deemed to be a “thorough and uniform” school system. This holding is even more troublesome because the class of individuals that the Education Clause was meant to protect from the political interests of the General Assembly primarily consists of school-age children who do not elect state legislators. *See* Art. IX, § 2. By its very existence, the Education Clause demonstrates the Framers’ concern that the General Assembly could one day find it politically expedient to enact legislation at the expense of an adequate education for residents to which the legislators were not politically accountable. Constitutional provisions adopted to protect politically vulnerable classes like property owners, religious and racial minorities, and the criminally accused utilize similarly flexible language that the judiciary routinely interprets and enforces without hesitation.⁹

Thus, the analysis whether the issue here is justiciable must begin by acknowledging that (1) the language of the Education Clause explicitly removes discretion that the General Assembly would otherwise enjoy; (2) the adoption of the Education Clause was motivated by a distrust of the General Assembly; (3) the

⁹ Cases are legion where this Court has protected litigants against legislative and executive action under facially elusive constitutional language such as “*due process of law*,” “*just compensation*,” and “*unreasonable searches and seizures*.” The issues raised in these cases require the application of complex doctrines that are difficult to manage. However, even at the time the Education Clause was adopted, it was nearly axiomatic in American jurisprudence that it was “*emphatically*” the judiciary’s duty to define these constitutional terms – even when difficult. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Education clause explicitly protects a politically vulnerable class of individuals; and (4) a construction that gives meaning to the words “through and uniform” is demonstrably possible.

2. None of the *Baker* Factors Renders the Claim for Education Adequacy Nonjusticiable.

Conscious of the foregoing, the analysis of the *Baker* factors, *see Baker v. Carr*, 369 U.S. 186, 217 (1962), supports the judicial role and responsibility as to claims regarding adequate educational opportunities.

a. No Textually Demonstrable Constitutional Commitment of Issue to Coordinate Political Department.

While the Constitution directs the General Assembly to establish a school system, the system must be “thorough and uniform.” The Court of Appeals restricted its discussion of a constitutional commitment to the General Assembly to fiscal matters, quoting *Lujan*. Again, this case is not only about funding – this case is not *Lujan*. The issue here is which branch determines what constitutes a “thorough and uniform” school system; and the answer is that it is the judiciary’s role to make this determination. *See DeRolph*, 677 N.E.2d at 737. Moreover, even if this case were simply about funding, the General Assembly’s discretion in regard to funding is not without restriction. Analogously, while the General Assembly has great discretion in formulating the budget, it is subject to various constitutional

limitations which are to be interpreted by the judiciary. *See Colorado General Assembly v. Owens*, 136 P.3d 262, 265 (Colo. 2006) (addressing separation of powers dispute regarding Governor’s veto of appropriation in educational task force bill).

b. The Other *Baker* Factors Are Inapplicable.

As to the other *Baker* factors, they are inapplicable as shown by the vast majority of other courts’ decisions in cases regarding the adequacy of school systems. These decisions show that there are judicially discoverable and manageable standards. Ten different states require some form of a “thorough” education system. Education in the 50 States, at 7; *see also Campbell County*, 907 P.2d at 1243-44, 1257, 1264. This “thorough” requirement for education has been judicially examined by six states: Idaho, Montana, New Jersey, Ohio, West Virginia, Wyoming. *See* Appendix A. The only state with a “thorough” requirement that has found claims brought pursuant to it to be nonjusticiable is Pennsylvania, which was a case that focused solely on the funding system. *See id.*

Similarly, the “uniform” requirement for education exists in ten states. Education in the 50 States, at 8. Five of these states, Arizona, Idaho, Washington, Wisconsin, and Wyoming, have found claims invoking this requirement to be justiciable, and only one, Florida (which requires “complete and uniform”), has not. *See* Appendix A. These cases shed light on the meaning of the appropriate

standards for resolving the issue presented here. By their very existence, the cases also prove that the standards are manageable.

Moreover, by addressing these claims, this Court does not need to make policy decisions nor disregard the General Assembly's authority. "This question, the key to the resolution of the dispute between the parties, requires interpretation of the constitution, a function at the very core of the judicial role." *Colorado General Assembly v. Lamm*, 704 P.2d 1371 (Colo. 1985) (validity of a veto is not a political question) (citing *Marbury v. Madison*, 5 U.S. 137 (1803) (it is peculiarly the province of the judiciary to interpret the constitution and say what the law is)). The Education Plaintiffs are not asking the judiciary to establish and maintain a school system. Rather, they are asking the judiciary to pass on the constitutionality of the current system. It is up to the legislature to cure inadequacies, if any. *Roosevelt*, 877 P.2d at 816; *see also Meyer v. Lamm*, 846 P.2d 862, 873 (Colo. 1993) (holding that recounting of votes dispute was judiciable even though the House of Representatives retains the ultimate power to judge the elections and qualifications of its members). Most importantly, the primary question before this Court is not whether the current school system meets the thorough and uniform standard, but instead, whether any Colorado court has the authority to review that issue.

3. Immediate Resolution Is Not Necessary.

While not a *Baker* factor, the Court of Appeals inappropriately relies upon its predicted inability to achieve a “prompt resolution.” *Lobato* at *13. First, this Court should not abdicate its responsibility simply because the issues are complicated and cannot be instantly solved. Courts have addressed equally perplexing issues regarding prisoners and due process, *e.g. Bell v. Wolfish*, 441 U.S. 520, 535 (1979), as well as racial desegregation and equal protection. *E.g. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751-68 & n.10 (2007) (addressing constitutionality of race-based decisions in school districts’ desegregation plans). Further, the Court of Appeals disregards the vast majority of other state courts which have addressed such claims and fails to appreciate that the Education Plaintiffs have not been given the opportunity to develop and present evidence that will relate to issues of whether they are receiving adequate educational opportunities.

III. AMENDMENT 23 DOES NOT IMPLICATE THE EDUCATION CLAUSE.

The Court of Appeals correctly did not rely upon Amendment 23. However, GEC sets forth the reasons why Amendment 23 does not affect these claims in the event that Respondents resurrect the erroneous Amendment 23 argument.

In 2000, the voters adopted Amendment 23 intending to increase funding to Colorado's public schools which had been eroding steadily since the late 1980s, and to exempt revenue for this purpose from the spending limits of the Taxpayer's Bill of Rights ("TABOR"), article X, section 20 of the Colorado Constitution. *See* D. Oesterle and R. Collins, *THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE* at 10, 221-22 (2002). By that time, as a result of TABOR and other spending restrictions, the state had not been able to increase per pupil spending by even the rate of inflation during the previous several years, resulting in budget cuts that were having a detrimental impact upon Colorado children. *See* Affidavit of proponent of Amendment 23 Julie Phillips ("Phillips Aff."), attached as Ex. A to GEC Amicus Brief at the Court of Appeals, at ¶ 3.¹⁰ Under TABOR, the state was simultaneously going to have to return money to the voters, because state revenues were going to exceed the TABOR limit. *Id.* Amendment 23 was simply meant to stop the steep decline in education funding and to exempt such funding from TABOR, and was designed to return per pupil funding to 1988 levels after adjusting for inflation. The voters never intended that Amendment 23 would affect the Education Clause.

¹⁰ GEC refers to the exhibits attached to its *amicus* brief at the Colorado Court of Appeals. The brief and exhibits were accepted by the Colorado Court of Appeals on February 12, 2007.

A. The Plain Terms of Amendment 23 Do Not Address “Thorough and Uniform” Requirements of the Education Clause.

Amendment 23, which became article IX, section 17 of the Colorado Constitution, does not satisfy the mandate of a “thorough and uniform” education. By its plain terms, Amendment 23 requires that educational funding increase, and exempts such funding from certain constitutional spending limits. Colorado Const. Art. IX, § 17. The Colorado voters were not asked and did not intend to set the educational funding of 1988 levels as a substitute for all of the substantive constitutional “thorough and uniform” requirements of the Education Clause. Nowhere in the plain language of Amendment 23 are the terms “thorough,” “uniform,” or “adequate.” There is no reference to the Education Clause or article IX, section 2. Therefore, there is no support for the District Court’s conclusion that the spending levels in Amendment 23 completely define an adequate education, and satisfy the “thorough and uniform” requirement of the Education Clause. Rather, this Court should enforce the plain and unambiguous terms of Amendment 23 and hold that it does not in any way limit or affect the Education Clause. *See Zaner*, 917 P.2d at 283 (court should enforce the plain and commonly understood meaning of a constitutional amendment).

Most importantly, the requirements of a “thorough and uniform” education are more than simply adequate financing. *See Lujan*, 649 P.2d at 1024-25

(thorough and uniform educational opportunities must be available); *see, e.g., Campaign for Fiscal Equity v. State*, 86 N.Y.2d at 317 (for sound basic education, state must assure adequate physical facilities and instrumentalities, as well as adequate teaching of reasonably up-to-date basic curricula by adequately trained personnel); *Rose*, 790 S.W.2d at 212-13 (education system requires efficient schools and adequate education in the development of various specific capacities, as well as sufficient funding). The South Carolina Supreme Court held:

We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to acquire:

- 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science;
- 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and
- 3) academic and vocational skills.

Abbeville, 515 S.E.2d at 541 (setting broad parameters and deferring to the legislature to determine specifics of providing an adequate education). Here, the financing mechanism of Amendment 23 does not, by its plain terms, affect the enforceable and substantive right to adequate educational opportunities.

An evaluation of the “thorough and uniform” requirement and whether adequate educational opportunities exist encompasses more than simply funding. The District Court’s ruling, however, eliminates the qualitative component

regarding an adequate education and is contrary to a majority of other state cases cited earlier. The District Court incorrectly held that Amendment 23 – a funding mechanism – forever prevents any court from evaluating whether a “thorough and uniform” system of public schools exists in Colorado.

Rather, the proper interpretation is that Amendment 23’s funding mechanism does not affect the substantive rights set forth in the Education Clause. To hold otherwise, would result in a funding mechanism completely defining a “thorough and uniform” system of education, which would be absurd.

B. If Amendment 23 is Ambiguous, Other Materials Show That Amendment 23 Does Not Affect the Education Clause.

GEC submits that the intent and plain language of Amendment 23 is unambiguous and does not affect the Education Clause. The analysis should stop here. The District Court, however, found that Amendment 23 either implicitly repealed or somehow satisfies all of the Education Clause mandates (funding and otherwise), and prohibits all of Education Plaintiffs’ claims. As established above, the District Court’s holding is not supported by Amendment 23’s plain terms, which neither reference the Education Clause nor incorporate any of its terms. Therefore, the District Court failed to presume as true Education Plaintiffs’ allegations, and improperly considered materials outside of the Complaint and the

plain language of Amendment 23 without properly giving the parties an opportunity to present other materials. *See* Colo. R. Civ. P. 12(b).

The District Court ignored Education Plaintiffs' well-pled allegations including that starting in 2000-01, Colorado public schools were under-funded by a minimum of \$500 million. *See* Complaint at ¶ 22 [Record at 8]. In 2004, Colorado ranked 49th among the fifty states in expenditures per personal income. *Id.* at ¶ 23 [Record at 8]. The Colorado public school finance system fails to provide sufficient funding to school districts to assure constitutionally adequate educational opportunities. *Id.* at ¶ 196 [Record at 43]. As a result, school districts have been forced to reduce instructional and support staff, programs, services, and materials. *Id.* at ¶ 200 [Record at 44]. Amendment 23 does not define the constitutionally mandated level of adequate funding, and certainly does not address the broader qualitative mandate of the Education Clause. *See* Complaint at ¶ 194 [Record at 43].¹¹

Despite these well-pled allegations and the plain terms of Amendment 23, the District Court simply held that Amendment 23 funding levels were “consistent

¹¹ GEC does not recite these facts for purposes of convincing the court of the inadequacy of the current system, an issue that is not currently before this Court. Instead, these facts are set forth only to demonstrate that no determination that Amendment 23 implicitly repealed or defined the Education Clause should be made without a hearing of extrinsic evidence that shows the vast difference between the funding mandates of Amendment 23 and the substantive mandates of “thorough and uniform.”

with the goals of the Education Clause.” *See* Order at 2 [Record at 189]. Because Amendment 23 neither references the Education Clause nor incorporates any of its terms, the District must have relied upon materials beyond the plain terms of Amendment 23 and the Complaint. Therefore, the District Court should have, at a minimum, provided Education Plaintiffs the opportunity to present outside materials. *See* Colo. R. Civ. P. 12(b). As shown below, those materials support the Education Plaintiff’s allegations, which this Court must presume as true, that Amendment 23 was never intended to implicate the Education Clause.

1. The Bluebook and Legislative Council Materials Regarding Amendment 23 Show That It Was Never Intended By Voters to Implicate the Education Clause.

Materials outside the plain language of Amendment 23 show that the voters did not intend to affect the Education Clause. Only if the intent and plain language of Amendment 23 is ambiguous, a court may discern that intent by considering other materials such as the ballot title, Bluebook, and materials concerning the Legislative Council’s interpretation. *See Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004) (considering comments from Legislative Council and stating that “the history of an amendment’s drafting may be relevant because legislative council’s interpretation, while not binding, provides important insight into the electorate’s understanding of the amendment when it was passed”).

The Legislative Council's Analysis of the 2000 Statewide Ballot Proposals ("Bluebook"), relevant excerpts attached as Ex. B to GEC Amicus Brief at the Court of Appeals, states as follows:

The proposed amendment to the Colorado Constitution:

- * increases per pupil funding for public schools and total state funding for special purpose education programs by at least the rate of inflation plus one percentage point for the next ten years and by at least the rate of inflation thereafter;
- * sets aside a portion of the state's income tax revenue to establish the State Education Fund and exempts this money from state and school district revenue and spending limits, thereby decreasing tax refunds when excess revenue exists;
- * allows moneys from the State Education Fund to be used to meet the funding requirements of the proposal; and
- * requires state aid under the school finance act to increase by at least five percent annually.

Bluebook at 9. The Bluebook does not refer to the Education Clause and does not use the term "thorough," "uniform," or "adequate." The Bluebook did note that Amendment 23 "sets a minimum increase in funding," which was true.¹² The

¹² Note that a prior August 2000 draft of the Bluebook language had "the state constitution sets the minimum increase in funding," which is substantively different from the final Bluebook language which stated that Amendment 23 "sets a minimum increase in funding." See Final Draft, attached as Ex. C to GEC Amicus Brief at the Court of Appeals, at 2 lines 3-4. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "a" as a function word to indicate the following noun refers to something that is unspecified or undetermined, as opposed to defining "the" as a function word to indicate the following noun refers to

Bluebook did not, however, state that such a funding level relates to the amount of funding required by the Education Clause for a “thorough and uniform” system of public schools. More significantly, there was no discussion in the Bluebook of what adequate educational opportunities (more than just funding) would require. Amendment 23 was only intended to stop the steep decline of education funding in Colorado and raise levels back to 1988 despite TABOR, not that such funding satisfied all of the mandates of the Education Clause.

Similarly, the Colorado Legislative Council Staff and Office of Legislative Legal Services provided numerous comments on various drafts of initiatives which eventually became Amendment 23, and never referenced the Education Clause, “thorough and uniform,” or an “adequate” education.¹³ Throughout the “review and comment” process, Colorado Legislative Council Staff and Office of Legislative Legal Service raised numerous issues. *See, e.g.*, December 21, 1999 Memo on #238; December 21, 1999 Memo on #236; February 7, 2000 Memo on #236(C); February 28, 2000 Memo on #236(F); April 19, 2000 Memo on #262

something that is clearly understood or unique. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1, 2368 (2002).

¹³ The Colorado Legislative Council Staff and Office of Legislative Legal Services is required to “review and comment” on initiative petitions for proposed laws and amendment to the Colorado Constitution. *See* C.R.S. § 1-40-105(1).

(collectively, “Memos”), attached as Ex. D, E, F, G, and H, respectively, to GEC Amicus Brief at the Court of Appeals.¹⁴

In each of these Memos, Colorado Legislative Council Staff and Office of Legislative Legal Services noted that the “review and comment” requirement helped avail the public of knowledge of the contents of the proposal. In each Memo, Colorado Legislative Council Staff and Office of Legislative Legal Services listed what they believed to be the purposes of Amendment 23, and provided numerous comments and substantive questions. In these Memos, however, Colorado Legislative Council Staff and Office of Legislative Legal Services never referenced the Education Clause and never used the terms “thorough,” “uniform,” or “adequate.” *See also* April 28, 2000 Letter from Colorado Office of State Planning and Budgeting to Secretary of State, attached as Ex. I to GEC Amicus Brief at Court of Appeals (no reference to Education Clause or its requirements); Phillips Aff. at ¶¶ 6, 9 (never any discussion of the Education Clause or its “thorough and uniform requirements in all the hearings of Legislative Counsel and the Title Board).

¹⁴ These various memorandums ultimately became the basis of the language of Amendment 23. The referenced list of memorandums is not exclusive.

2. Other Materials Show that Amendment 23 and the Education Clause Are Separate.

Other materials, which the District Court prevented the Education Plaintiffs from developing and presenting, also support that Amendment 23 does not implicate the Education Clause. Julie Phillips, the former President of the Boulder Valley Board of Education and one of the two primary proponents of Amendment 23, states that Amendment 23 was never intended to affect the Education Clause. *See Phillips Aff.*, at ¶¶ 2, 5, 11. The intent of Amendment 23 was to protect school funding from the impact of TABOR, and restore funding to 1988 inflation-adjusted levels. *See Phillips Aff.* at ¶ 4; Affidavit of proponent of Amendment 23, Lisa Weil, (“Weil Aff.”), attached as Ex. N to GEC Amicus Brief at the Court of Appeals, at ¶ 3. At that time, John Myers was engaged in beginning efforts regarding separate research concerning education adequacy and he predicted that Colorado would likely need substantially more than Amendment 23’s funding increases to allow Colorado schools and districts to meet all state standards and requirements. *See Phillips Aff.* at ¶ 7; Affidavit of John L. Meyers (“Meyers Aff.”), attached as Ex. L to GEC Amicus Brief at the Court of Appeals, at ¶ 4. These two issues, Amendment 23 and the adequacy study, were separate issues. *See Meyers Aff.* at ¶ 4. Rather than wait for the results of the adequacy study, the proponents of Amendment 23 proceeded in order to “stop the

hemorrhaging” of declining funding, not to affect the Education Clause. *See* Meyers Aff. at ¶ 6; Phillips Aff. at ¶ 7. Amendment 23 was never intended to address adequate funding, and certainly was never intended to address the broader issue of an adequate education including programming and facilities. *See* Phillips Aff. at ¶ 8; Weil Aff. at ¶ 5; Meyers Aff. at ¶¶ 4, 5.

Similarly, the television advertisement from Amendment 23 proponents (transcript and CD of ad attached as Ex. J to GEC Amicus Brief at the Court of Appeals), and the various newspaper articles and editorials for and against Amendment 23 (attached as Ex. K to GEC Amicus Brief at the Court of Appeals) concerned stopping the decline of education funding and never mentioned the “through and uniform” requirements of the Education Clause. *See* Weil Aff. at ¶ 4; Phillips Aff. at ¶ 10.

Further evidence to be developed in discovery and presented to the Court includes Colorado schools that cannot provide adequate instruction materials or facilities, including one school which uses a former shower room as a teacher’s lounge and workroom. *See* Weil Aff. at ¶¶ 10-12. In fact, the deficit between the current education funding levels and those required by the Education Clause is approximately \$2 billion. *See* Meyers Aff. at ¶ 8.

Dave Van Sant, the superintendent of Strasburg School District, has been in education administration for 32 years in Colorado. He describes inadequate

facilities and inadequate funding due, in part, to the costs of special needs students and increased mandates from the Colorado and federal governments. *See* Affidavit of Dave Van Sant (“Van Sant Aff.”), attached as Ex. M to GEC Amicus Brief at the Court of Appeals, at ¶¶ 2, 3, 6, 8, 9. Mr. Van Sant describes the difference between the per pupil assessed valuation (“PPAV”) in Cherry Creek at over \$85,000 compared to the rural school district of Kim where the PPAV is less than \$9,000. *See* Van Sant Aff. at ¶¶ 4, 5. Amendment 23 has not met the increased financial demands in some districts due to the above-mentioned factors, as well as increased transportation and health costs. *See* Van Sant Aff. at ¶ 10.

It would be absurd to hold that, despite these grave deficiencies in public school funding, Amendment 23 (which was designed to stop the funding slide from 1988) forever prohibits any court from evaluating whether such funding levels provide for adequate educational opportunities as required by the Education Clause. *See Rocky Mountain Animal Defense*, 100 P.3d at 516 (rejecting narrow and technical interpretation of Constitutional amendment that would lead to an unreasonable and absurd result); *see also* Phillips Aff. at ¶ 11 (voters’ intent was only to stop TABOR from causing irreversible harm to the Colorado public school system, and return education financing to levels from 1988; not that Amendment 23 would affect the Education Clause).

It is even more absurd to hold that a financing mechanism either implicitly repeals or completely defines the entire “thorough and uniform” system of education which is much more than simply dollars. This Court should harmonize Amendment 23 and the Education Clause so that each retains meaning, not so that Amendment 23 completely defines the Education Clause. *See Zaner*, 917 P.2d at 283 (courts should consider the amendment as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions rather than an interpretation which would create a conflict between such provisions).

In sum, Amendment 23’s history shows that it does not fulfill the mandates of the Education Clause. Rather, Colorado voters intended Amendment 23 to eliminate the decline in education funding, not to eliminate the Education Clause. This Court must not read Amendment 23’s funding mechanism as somehow limiting the Constitutional right to adequate educational opportunities.

CONCLUSION

In our system of checks and balances, it is the judiciary’s role to ensure that the legislature is held accountable for its awesome responsibility and obligation to provide adequate educational opportunities for Colorado’s children. For the reasons set forth above and in the brief submitted by Education Plaintiffs, the

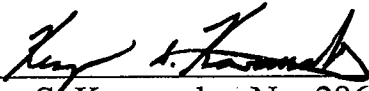
decision of the District Court, affirmed by the Court of Appeals, should be reversed.

Certificate of Compliance With Word Limit

Pursuant to C.A.R. 28(g), undersigned counsel certifies that this brief (excluding the caption, table of contents, table of authorities, certificate of compliance with word limit, certificate of service, appendix, and exhibits) is 9,492 words using the word count of the word processing system used to prepare the brief.

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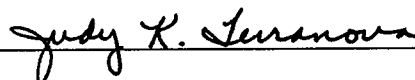
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF *AMICUS CURIAE* GREAT EDUCATION COLORADO IN SUPPORT OF PETITIONERS was served by depositing same in the United States mail, first-class postage prepaid, on the 24th day of November, 2008, addressed to the following:

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Appendix A to Brief of *Amicus Curiae* Great Education Colorado

Justiciable	Not Justiciable
<p>Arkansas <i>Lake View School No. 25 v. Huckabee</i>, 91 S.W.3d 472, 484-85 (Ark. 2002)</p>	<p>Alabama <i>Ex parte James</i>, 836 So. 2d 813, 817, 819 (Ala. 2002)</p>
<p>Arizona <i>Roosevelt Elementary Sch. Dist. No. 66 v. Bishop</i>, 877 P.2d 806, 814-16 (Ariz. 1994)</p>	<p>Florida <i>Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles</i>, 680 So.2d 400, 402, 406-07 (Fla. 1996).</p>
<p>Idaho <i>Idaho Schools for Equal Educational Opportunity, Inc. v. Evans</i>, 850 P.2d 724, 728, 734 (Idaho 1993); <i>Idaho Schools For Equal Educational Opportunity v. State of Idaho</i>, 129 P.3d 1199, 1208-09 (Idaho 2005)</p>	<p>Illinois <i>Lewis E. v. Spagnolo</i>, 710 N.E.2d 798, 802 (Ill. 1999)</p>
<p>Indiana <i>Bonner v. Daniels</i>, 885 N.E.2d 673 (Ind. 2008) (transfer granted and opinion vacated)</p>	<p>Nebraska <i>Nebraska Coalition for Educational Equity & Adequacy v. Heineman</i>, 731 N.W.2d 164, 169, 171, 180, 183 (Neb. 2007).</p>
<p>Kansas <i>Unified School Dist. No. 229 v. State</i>, 885 P.2d 1170, 1172-73. 1186 (Kan. 1994); <i>Montoy v. State of Kansas</i>, 112 P.3d 923, 941 (Kan. 2005)</p>	<p>Oklahoma <i>Oklahoma Education Assn v. State</i>, 158 P.3d 1058, 1062, 1066 (Okla. 2007)</p>
<p>Kentucky <i>Rose v. Council for Better Education, Inc.</i>, 790 S.W.2d 186, 189, 209 (Ky. 1989)</p>	<p>Pennsylvania <i>Marrero v. Commonwealth</i>, 739 A.2d 110, 111-113 (Pa. 1999)</p>
<p>Massachusetts <i>McDuffy v. Secretary</i>, 615 N.E.2d 516, 517, 550, 553, 555 (Mass. 1993)</p>	<p>Rhode Island <i>City of Pawtucket v. Sundlun</i>, 662 A.2d 40, 58-59 (R.I. 1995)</p>
<p>Missouri <i>Committee for Educational Equality v. State of Missouri</i>, 878 S.W.2d 446, 448-49 (Mo. 1994) (dismissing appeal for lack of standing)</p>	

