

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203</p> <hr/> <p>On Certiorari to the Colorado Court of Appeals, Case No. 06CA0733, Opinion by Judge Webb; Denver District Court No. 05CV09794; Honorable Michael A. Martinez.</p>	
<p>Petitioners: ANTHONY LOBATO, as an individual and as parent and natural guardian of Taylor Lobato and Alexa Lobato, et al., v. Respondents: THE STATE OF COLORADO, et al.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>William P. Bethke KUTZ & BETHKE LLC 363 S. Harlan, Ste. 104 Lakewood, CO 80226</p> <p>Phone No.: 303 922-2003 E-mail: wpbethke@lawkb.com FAX No.: 303 922-2878 Atty. Reg. #: 11802</p>	<p>Case Number: 08SC185</p>
<p>BRIEF OF THE COLORADO LEAGUE OF CHARTER SCHOOLS AS <i>AMICUS CURIAE</i></p>	

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
CASES.....	iii
CONSTITUTION, STATUTES & COURT RULES.....	vi
OTHER.....	vi
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
I. NATURE OF THE CASE, FACTS & PROCEEDINGS	1
II. INTEREST OF THE AMICUS.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	5
I. ARTICLE IX, § 2 IS JUDICIALLY ENFORCEABLE.....	5
II. THE ORIGINAL INTENT AND PLAIN MEANING OF THE THOROUGH-AND-UNIFORM CLAUSE CREATES ENFORCEABLE LAW.....	9
A. Original Intent.....	9
B. Plain Meaning.....	17
III. COLORADO CASE LAW SUPPORTS FINDING THE THOROUGH-AND-UNIFORM CLAUSE JUSTICIABLE.....	18

	Page
A. <i>Vollmar</i>	18
B. <i>Lujan</i>	19
C. Post- <i>Lujan</i> Cases.....	21
IV. THE COURTS SHOULD REMAIN OPEN TO THOROUGH-AND-UNIFORM CLAIMS.....	23
V. PERSUASIVE AUTHORITY SUPPORTS REAL, THOUGH DEFERENTIAL, REVIEW OF THOROUGH-AND- UNIFORM ISSUES	27
CONCLUSION.....	29
CERTIFICATE OF WORD COUNT.....	30
CERTIFICATE OF SERVICE.....	30

TABLE OF AUTHORITIES

	Page(s)
CASES:	
<i>Abbott v. Burke</i> , 495 A.2d 376 (N.J. 1985), <i>later proceedings at</i> 575 A.2d 359; 643 A.2d 575; 693 A.2d 417; 710 A.2d 450 (1998)....	29
<i>Alexander v. Choate</i> , 469 U.S. 287 (1985).....	20
<i>Baltimore City Board v. City Neighbors Charter School</i> , 929 A.2d 113 (2007).....	25
<i>Baxstrom v. Herold</i> , 383 U.S. 107 (1966).....	9
<i>Board of County Comm’rs v. Dunn</i> , 21 Colo. 185, 40 P. 357 (1895)..	9
<i>Clark v. Board of Directors</i> , 24 Iowa 266 (1868).....	26
<i>Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985).....	22
<i>Colorado Dept. of Soc. Srv. v. Bd. of County Comm’rs</i> , 697 P.2d 1 (Colo. 1985).....	23
<i>Colorado General Assembly v. Lamm</i> , 704 P.2d 1371 (Colo. 1985)...	6
<i>Department of Agriculture v. Moreno</i> , 413 U.S. 528 (1973).....	22
<i>F. S. Royster Guano v. Commonwealth</i> , 253 U.S. 412 (1920).....	20
<i>Giardino v. Colorado State Bd. Of Educ.</i> , Civil Action No. 98CV0246 (Denver District Court).....	20
<i>Guardians Ass’n v. Civil Service Comm’n</i> , 463 U.S. 582 (1983).....	20

	Page(s)
<i>Gulf, Colorado & Sante Fe Ry. v. Ellis</i> , 165 U.S. 150 (1897).....	23
<i>Hafer v. Colorado State Bd. Of Educ.</i> , 87CV02216 (Denver Dist. Court).....	20
<i>Hartford Steam Boiler Inspection & Ins. v. Harrison</i> , 301 U.S. 459 (1937).....	22
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	9
<i>Hooper v. Bernalillo County Assessor</i> , 472 U.S. 612 (1985).....	22
<i>Idaho Schools for Equal Educ. Opportunity v. Evans</i> , 123 Idaho 573, 850 P.2d 724 (1993).....	28
<i>James v. Strange</i> , 407 U.S. 128 (1972).....	22
<i>Kinsey v. Preeson</i> , 746 P.2d 542 (Colo. 1987).....	22
<i>Louisville Gas & Elec. v. Coleman</i> , 277 U.S. 32 (1928).....	11,22-3
<i>Lujan v. Colorado State Board of Education</i> , 649 P.2d 1005 (Colo. 1982).....	3,5,19-22,29
<i>Marbury v. Madison</i> , 5 U.S. 137, 1 Cranch 137 (1803).....	6,10
<i>Nebraska Coalition v. Heineman</i> , 273 Neb. 531, 731 N.W.2d 164, 2007 Neb. LEXIS 65 (2007).....	28
<i>Ochs v. Hot Sulphur Springs</i> , 158 Colo. 456, 407 P.2d 677 (1965).....	9
<i>Owens v. Colorado Congress of Parents</i> , 92 P.3d 933 (Colo. 2004)...	11,22

	Page(s)
<i>People ex rel Vollmar v. Stanley</i> 81 Colo. 276, 255 P. 610 (1927), <i>overruled in part, Conrad v. Denver</i> , 656 P.2d 662, 670 (Colo. 1982).....	18
<i>Petre v. Cardiovascular Consultants</i> , 871 N.E.2d 780 (Ill. App), <i>appeal denied</i> , 879 N.E.2d 938 (Ill. 2007).....	20
<i>Pueblo Junior College Dist. v. Donner</i> , 154 Colo. 26, 387 P.2d 727 (1963).....	9
<i>Railway Labor Executives v. Gibbons</i> , 455 U.S. 457 (1982).....	9
<i>Robinson v. Cahill</i> , 303 A.2d 273 (N.J. 1973), <i>cert denied</i> , 414 U.S. 976, <i>later proceedings at</i> 335 A.2d 6; 351 A.2d 713; 355 A.2d 129; 358 A.2d 457 (1976).....	28-9
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	22
<i>Roosevelt Elem. Sch. Dist. v. Arizona</i> , 205 Ariz. 584, 74 P.3d 258 (Ariz. App. 2003), <i>review denied</i> , 2004 Ariz. LEXIS 8.....	28
<i>In re Senate Bill</i> , 9, 26 Colo. 136, 56 P. 173 (1899).....	9
<i>Skeen v. Minnesota</i> , 505 N.W.2d 299 (Minn. 1993).....	28
<i>Southern Ry. v. Greene</i> , 216 U.S. 400 (1910).....	23
<i>State ex rel Stoutmeyer v. Duffy</i> , 7 Nev. 342 (1872).....	9
<i>Ex Parte Stout</i> , 5 Colo. 509 (1881).....	9
<i>In the Matter of the Title</i> , 44 P.3d 213 (Colo. 2002).....	21

	Page(s)
<i>United States v. Carolene Products</i> , 304 U.S. 144 (1938).....	27
<i>United States v. Ptasynski</i> , 462 U.S. 74 (1983).....	9
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	26
<i>Washington County Board v. Petron</i> , 109 P.3d 146 (2005).....	9
<i>Wheeling Steel v. Glander</i> , 337 U.S. 562 (1949).....	22
<i>Whitney v. California</i> , 274 U.S. 357 (1927), <i>overruled</i> , <i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969).....	16
<i>Williamson v. Lee Optical</i> , 348 U.S. 483 (1955).....	11
<i>Zobel v. Williams</i> , 457 U.S. 55 (1982).....	22

CONSTITUTION, STATUTES & COURT RULES

U.S. Const., art. 1, § 8, cl. 1.....	9
U.S. Const., art. 1, § 8, cl. 4.....	9
Colo. Const., art. VI, § 19.....	9
Colo. Const., art. IX, § 2.....	passim
Colo. Const., art. IX, § 15.....	1
Colo. Const., art. X, § 3.....	9
Colo. Const., art. XV, § 13.....	9

OTHER:

Abraham Lincoln, <i>Cooper Union Address</i> (February 27, 1860), http://showcase.netins.net/web/creative/lincoln/speeches/ cooper.htm (accessed 4/15/2008).....	17
Abraham Lincoln, <i>Speech on the Dred Scott Decision</i> (June 26, 1857) http://afroamhistory.about.com/library/bllincoln_dred_ scott.htm (accessed 11/18/2008).....	13
<i>The Colorado Supreme Court & School Finance: What Guidance Has the Court Provided?</i> , Presentation to Joint Meeting of the Interim Committee on School Finance & Task Force (Legis. Legal Srv. July 21, 2005).....	20
<i>Denver Daily Tribune</i> (1876).....	14,16
Daniel Farber, <i>LINCOLN’S CONSTITUTION</i> (2003).....	6
<i>The Federalist</i> (1961).....	10,25
FIRST BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF COLORADO (1872).....	15
Chauncey Goodrich and Noah Porter, <i>AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE BY NOAH WEBSTER</i> (1865).....	10,17
Hans Linde, <i>Dual Enforcement of Constitutional Norms: the State and the Federal Courts in Governance: Vive La Difference!</i> 46 Wm and Mary L. Rev. 1273 (2005).....	6

	Page(s)
PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875, TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO, TOGETHER WITH THE ENABLING ACT PASSED BY THE CONGRESS OF THE UNITED STATES AND APPROVED MARCH 3, 1875, THE ADDRESS TO THE PEOPLE ISSUED BY THE CONVENTION, THE CONSTITUTION AS ADOPTED AND THE PRESIDENT’S PROCLAMATION (1907)	15,17
J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1873).....	10,25
G. Alan Tarr, <i>series ed.</i> , REFERENCE GUIDES TO THE STATES CONSTITUTIONS OF THE UNITED STATES, Number 35, Dale Oesterle & Richard Collins, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE (2002).....	16
William Dwight Whitney, <i>series ed.</i> , THE CENTURY DICTIONARY: AN ENCYCLOPEDIA LEXICON OF THE ENGLISH LANGUAGE (1889-91).....	10,17,18

STATEMENT OF THE ISSUES

This court granted certiorari on the following issues:

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

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.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, FACTS AND PROCEEDINGS

Amicus accepts the respective statements of the nature of the case, facts and proceedings below of the principal parties.

II. INTEREST OF THE AMICUS

Amicus curiae, the Colorado League of Charter Schools (“League”) is a membership organization of Colorado’s approximately 150 charter schools. The League advocates for its member schools before local schools boards, the State Board of Education, the General Assembly, and in court. The League’s member schools are keenly aware of the respects in which Colorado public school finance does not fully or routinely fund or thoughtfully distribute funds for certain public school needs or required functions. Colorado charter schools commonly lack day-

to-day school transportation, in part due to such funding limitations. Many charter schools are either housed in substandard facilities or commit substantial portions of their operating funds, often for decades, to acquire better facilities. The unreimbursed cost of special education — that is, the portion drawn from general revenue — is often fully and directly passed on to charter schools and consumes a large and visible part of annual school budgets.

At the same time, charter schools are acutely aware of the moving goal line in expectations for school performance — in relation to both its appropriate purpose of improving education and reducing questionable achievement gaps, and the many difficulties of comparison, fairness and accuracy that such efforts present. League members are also highly attuned to the ways in which finance and performance sometime do — and sometimes do not — meaningfully relate to each other.

In all these respect, the League is interested in the substance of this litigation, whether viewed as a proper matter for legislative policy-making or as rising to the level of a constitutional question. For immediate purposes, however, the League's interest is in assuring that our court system, while maintaining ample room for innovation and policy development, remains open for the litigation and

resolution of *bona fide* constitutional questions.

Amicus will only address the first question on which certiorari was granted.

SUMMARY OF ARGUMENT

Article IX, Section 2, is judicially enforceable. While the League takes no position on the merits of this action, the claims made should be resolved on their merits. Characterizing the claims as concerning “adequacy” or “quality” is beside the point: either a violation of the command of the Thorough-and-Uniform Clause has or has not been alleged.

The original intent and plain meaning of Article IX, Section 2, supports finding these claims justiciable. The Framers of 1876 unmistakably intended Article IX, Section 2, to cabin legislative discretion and result in enforceable rights. This is clearly expressed in the constitutional debates and the *Address to the People*. That understanding, ratified by the People, is only respected by finding the claims here, whatever their ultimate merit, justiciable.

Colorado precedent supports finding these claims justiciable. This Court in *Lujan*¹, and in several cases construing *Lujan*, clearly expressed that

¹ *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982) (“*Lujan*”).

while it accorded statutes examined under the Thorough-and-Uniform Clause a rebuttable presumption of constitutionality, this deference was an analytic tool applied in reaching a decision on the merits — not a jurisdictional bar. The decision below fails to properly interpret and respect this precedent.

A rebuttable presumption of constitutionality permits attention to abusive circumstances. A nonjusticiability holding communicates to the General Assembly, potential litigants and lower courts that Article IX, Section 2, has no boundaries and creates no law. With education, as with other aspects of *constitutional* governance, critical individual interests or vulnerable parties may call for greater judicial protection. A presumption of constitutionality permits proper attention to such cases where a jurisdictional bar does not.

Persuasive authority supports finding these claims justiciable. Some courts have found perhaps-analogous provisions of their state constitutions to be not “justiciable.” Other courts have engaged in active, repeated intrusion on legislative functions in the name of enforcing a perhaps-analogous constitutional clause. But the largest body of similar decisions has addressed cases under state constitutional education clauses of various forms on their merits, with deference to the political branches, but an acknowledgment that American courts should

exercise the traditional function of judicial review. That authority is consonant with *Lujan* and with requiring a review on the merits — with whatever result that entails — in this case.

ARGUMENT

I. ARTICLE IX, SECTION 2, IS JUDICIALLY ENFORCEABLE

To begin: we take no position on merits of this matter and understand judicial discomfort with the complaint. But rather than work through the complaint on its merits — perhaps using rational-relation deference or similar tools to quickly separate any wheat from considerable chaff — the Court of Appeals held that judges have *no* role under the Thorough-and-Uniform Clause. The vices of this approach include: negating constitutional text; reversing the intent of the Framers of 1876; and distorting precedent. This ruling also misapplies federal law and disrespects American traditions of judicial review.

The decision below relies on recent federal “justiciability” holdings. But federal “justiciability” doctrine should not be imported wholesale into state law:

... [R]igid tests of “justiciability” breed evasions and legal fictions.... It is not prudent to link a decision declining adjudication to non-textual, self-created constitutional barriers, [I]nterpretations are elevated into supposedly essential doctrines of “justiciability.” The word itself is superfluous, and the doctrines are unnecessary. Nothing ... calls for reading

the formulas used by the United States Supreme Court into a state's constitution.²

“Justiciability” is a poor ground for ignoring State constitutional text and history — and precedent.

Further, the Framers of the Colorado Constitution of 1876 knew *Marbury v. Madison*.³ Then as now, in Colorado as in America, judicial review was an essential check on abuse of political power.⁴ And our Constitution was ratified by the People, acting upon the Framers' text and commentary, making the flaw of “justiciability” patent: “To bind the ratifiers to esoteric deductions made long after the fact would make the Constitution an exercise in bait-and-switch, not in the consent of the governed.”⁵

We understand that this Court has qualified its grant of certiorari on the “justiciability” issue to claims of “educational quality and adequacy.” In other

² Hans Linde, *Dual Enforcement of Constitutional Norms: the State and the Federal Courts in Governance: Vive La Difference!* 46 Wm and Mary L. Rev. 1273, 1287-88 (2005).

³ 5 U.S. 137, 1 Cranch. 137, 176-77 (1803).

⁴ *Colorado General Assembly v. Lamm*, 704 P.2d 1371 (Colo. 1985).

⁵ Daniel Farber, *LINCOLN'S CONSTITUTION*, 125 (2003).

words, claims that don't concern "educational quality and adequacy" — but that do have, presumably, some other extra-constitutional feature — are not necessarily in jeopardy here. We will return the question of what "other" kinds of claims may be swept into a justiciability dustbin. Here, we respectfully suggest that it is curious that language with no transparent anchor in the Constitutional text ("quality" and "adequacy") is used to corral some set of claims destined for oblivion. Either a claim asserts that Colorado's educational system fails to meet the constitutional command that it be "thorough and uniform," or it does not. A claim that fails to make this assertion (whether it concerns "quality" or any other descriptive qualifier) is no constitutional claim at all. And this is not an issue of "justiciability," but a garden-variety Rule 12 failure to state a claim. Conversely, a claim that makes a *bona fide* thorough-and-uniform assertion should be tested for its merit, not its susceptibility to description with some extra-constitutional moniker.

We are, of course, mindful that commentators have tried to classify the many different cases brought under many different state constitutional education clauses into manageable analytic categories — resulting in a widely-discussed dichotomy between "adequacy" and "equity" claims. Whatever the usefulness of

this classification — and we would not be the first to doubt its utility — it is inapposite to the task that faces this Court. It is not at all clear, for example, that “quality” and “adequacy” capture the features only of meritless claims under Article IX, Section 2, as opposed to a grab-bag of the well-and-ill considered. Thus, it is unclear why these categories merit special distinction or disfavor in applying Article IX, Section 2.

Our constitution does not say that we are to have a “adequate” education system (but that is not to be judicially enforced) and a separate “equitable” education system (which may, perhaps, be so enforced). It expresses a unitary concept: Colorado’s education system is to be “thorough *and* uniform.” It clearly gives the Legislature pride-of-place in establishing the system. And it equally clearly *constitutionalizes* this as a duty, not an option.

Once the unitary, constitutional nature of the Education Clause is accepted there are, as discussed below, no sound reasons for disposing of the tradition of judicial review with claims under Article IX, Section 2. On “justiciability” that should be the end of the matter. The bar for demonstrating a violation of the Thorough-and-Uniform Clause may be high. The Complaint filed in this case may not clear that bar. But the bar has not been and should not be beyond all reach.

II. THE ORIGINAL INTENT AND PLAIN MEANING OF THE THOROUGH-AND-UNIFORM CLAUSE CREATES ENFORCEABLE LAW

A. Original Intent

The word “uniform” appears three times in the Constitution of the United States; four in the original Colorado constitution.⁶ Both the United States Supreme Court and this Court have struck down “non-uniform” statutes — from early days to the present.⁷ A nearby 1872 decision struck down a state *education* statute due to nonuniformity.⁸ And both Justice Story and Alexander Hamilton

⁶ U.S. Const., art. 1, § 8, cl. 1 (taxation) & 4 (naturalization and bankruptcy); Colo. Const., art. VI, § 19 (courts); art. IX, § 2 (public education); art. X, § 3 (taxation); art. XV, § 13 (telegraph regulation).

⁷ See, e.g., *Railway Labor Executives v. Gibbons*, 455 U.S. 457 (1982) (bankruptcy law non-uniform); *Washington County Board v. Petron*, 109 P.3d 146 (2005) (county’s application of tax non-uniform); *Ochs v. Hot Sulphur Springs*, 158 Colo. 456, 407 P.2d 677 (1965) (tax non-uniform); *Pueblo Junior College Dist. v. Donner*, 154 Colo. 26, 387 P.2d 727 (1963) (same); *Board of Comm’rs v. Dunn*, 21 Colo. 185, 40 P. 357 (1895) (same); *Ex Parte Stout*, 5 Colo. 509 (1881) (act organizing courts non-uniform). See also, *United States v. Ptasynski*, 462 U.S. 74 (1983) (federal tax upheld, on the merits, as uniform); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (state law pre-empted to preserve uniform naturalization law); *In re Senate Bill 9*, 26 Colo. 136, 56 P. 173 (1899) (school district consolidation bill improper special legislation).

⁸ *State ex rel Stoutmeyer v. Duffy*, 7 Nev. 342 (1872) (exclusion of African-Americans not “uniform”). See also, *Clark v. Board of Directors*, 24 Iowa 266, 277(1868) (school segregation not “uniform [and] equally operative upon all”).

saw “uniformity” as a limit on legislation; an enforceable *constitutional* law.⁹ The case for “justiciability” of claims regarding “uniformity” is as old as our Republic and as clear as *Marbury v. Madison*.

“Thorough” — which is, no doubt, the hook for so-called “adequacy” claims — has less of a constitutional pedigree. But its Nineteenth Century meaning (what would have been meant in 1876) is tolerably clear: A *thorough* system is one that is “[f]ully executed; having no deficiencies; hence, complete in all respects; unqualified: perfect.”¹⁰

Now, a readily-imagined concern is that “thorough” is a standard so demanding that it should be left to Legislative grace — how could the judiciary ever judge the proper degree of “perfection” of a school system? There is a core

⁹ 1 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 957 (1873) (“*Story’s Commentaries*”) (“Unless ... excises were uniform, the grossest and most oppressive inequalities ... might exist...”); *The Federalist*, No. 36 (Hamilton) 220 (1961) (tax clauses “shut[] the door to partiality or oppression”).

¹⁰ William Dwight Whitney, series ed., THE CENTURY DICTIONARY OF THE ENGLISH LANGUAGE: AN ENCYCLOPEDIA LEXICON (1889-91) (“CENTURY DICTIONARY”), Part XXII, 6301 def. 2(c) (also: “[l]eaving nothing undone; slighting nothing; not superficial,” def. 2.b; and “[g]oing through, as to the end or bottom of anything; thoroughgoing” def. 2). *See, also* Chauncey Goodrich and Noah Porter, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE BY NOAH WEBSTER (1865) (“WEBSTER’S”) 1377, def. 2.

problem with this thought: the same could be said — has often *been* said — of claims to equality or uniformity. For example, *Williamson v. Lee Optical*, stated:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think...¹¹

But the recognition that there is ample room for debate over what is “thorough” (as there is over what is “uniform”) at worst suggests a generous standard of deference to the political branches — something akin to the “rational relation” test. In short, there is no more reason to read “thorough” out of a constitution enforceable by judges than is the case with “uniform.”

There are, of course, valid reasons to put the Plaintiffs to a stern test on the merits. Public education is not a topic neglected by the legislature in recent years. Rather, the development and ferment in education policy has been substantial and sustained. And while novel laws may trip over constitutional barriers,¹² a quest to

¹¹ 348 U.S. 483, 489 (1955).

¹² *See, e.g., Owens v. Colorado Congress of Parents*, 92 P.3d 933 (Colo. 2004). *Compare Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928). (“discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision”).

eliminate all *deficiencies*, or achieve *perfection* in education unquestionably calls for the ongoing application of legislative ingenuity. In short, there is every reason to defer to the legislature, unless Plaintiffs make a showing, on the merits, that the solemn commitment to a “thorough and uniform” system of public schools has been violated.

Now, an element of this case arises from political forces that have — in substantial part through the voter-approved initiative process — whipsawed Colorado’s fiscal policy. It is open and notorious that TABOR hobbled tax collections. Amendment 23 then siphoned the lion’s share of those collections into public education. And this left many aspects of government starved for funding. The onset, in the past months, of a global financial reckoning of still-unknown depth threatens to make this situation more challenging.

What is remarkable here is that the portion of government given the greatest shelter from these unfavorable developments — K-12 education — is the one pursuing a constitutional claim to enhanced funding. At the present moment, in particular, it seems likely that success on such a claim could only drive cuts in other functions of government near or past the breaking point.

It is, we suspect, the hydraulic force of such informal reflections on

Colorado’s current fiscal climate that makes this litigation appear a candidate for judges simply washing their hands of the entire enterprise by declaring the subject not “justiciable.” Whatever temptation that presents deserves resistance. It is reasonable — it is, we submit, the best part of our tradition of judicial review — to expect that courts will *both* insist on fidelity to constitutional language *and* respect the challenges faced and efforts exerted by co-ordinate branches of government. The language of “justiciability” suggests that such exercises should be swept aside in favor of something like the (former) British practice of leaving all ultimate issues to Parliament. We think the better practice is to assume that Framers who adopt lofty constitutional language never:

mean to assert the obvious untruth, that all were then actually enjoying that [perfection], nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit....¹³

In short, the Plaintiffs have properly asked that the courts render a judgment on whether the Legislature has, in various particulars, acted to provide a

¹³ Abraham Lincoln, *Speech on the Dred Scott Decision* (June 26, 1857) (referring to the Declaration of Independence’s statement that “all men are created equal”) See http://afroamhistory.about.com/library/bllincoln_dred_scott.htm (accessed 11/18/2008).

“thorough-and-uniform” system of public education — or not — given current circumstances. The constraints of TABOR and commands of Amendment 23 are prominent among the relevant circumstances and should inform what it is reasonable to expect the Legislature to have done in the recent past. The limits voters have placed on the General Assembly are real. And the tensions between what is arguably most “thorough” and what may be most nearly “uniform” are surely another source of legislative discretion. But the question posed is a proper one and the judiciary should not purport to answer by refusing to answer. Candor is also a prudential value.

We submit that any real respect for the original purpose of this clause requires that “thorough-and-uniform” be no less subject to judicial application — nor more to legislative monopoly — with education than are the “uniformity” clauses courts have applied with taxes, bankrupts and court organization itself. Clearly, the Framers thought so. They:

1. Considered free public schools an essential part of republican government;¹⁴

¹⁴ See, e.g., *Denver Daily Tribune*, February 14, 1876, 4 (“[T]he most powerful stay of our free government is the spread of intelligence. Free speech, free press, free education are the names of those means by which it is best

2. Believed, and told the People, they were creating educational rights;¹⁵
and
3. Disapproved unfettered legislative discretion, intending the

effected; and perhaps the most important of all of them is the proper education of our youth.... I want to see our public schools become the best of the land. I want to see them brought to such a perfection that no father or guardian, whatever may be his position in society, will hesitate a moment to send his children to the public schools. It is not enough, indeed, to make reading and writing machines of our children to whom we must leave some day the difficult management of our government, but we must make well informed, moral and self-thinking beings of [our children] who ... will be able to appreciate their inherited free institutions, and feel themselves impelled to maintain and preserve them....”) (remarks of delegate F.J. Ebert). *See also*, FIRST BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF COLORADO 25-26 (1872) (“No one familiar with the history of our Republic can doubt that the free school system is the safeguard of our liberties. ... The common school is the child’s republic, all classes are here, as in after life, thrown together, they see each other’s good and evil, and must learn to respect each other’s rights, to manage and conciliate amid this daily conflict....”).

¹⁵ *See, e.g.*, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875, TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO, TOGETHER WITH THE ENABLING ACT PASSED BY THE CONGRESS OF THE UNITED STATES AND APPROVED MARCH 3, 1875, THE ADDRESS TO THE PEOPLE ISSUED BY THE CONVENTION, THE CONSTITUTION AS ADOPTED AND THE PRESIDENT’S PROCLAMATION at 727 (1907) (“PROCEEDINGS”)(“The maintenance of free public schools ... is forever guaranteed”) (*Address to the People*) (emphasis added).

Constitution — on education — to impose real limits.¹⁶

Review of the constitutional debates leaves no doubt our Constitution created an enforceable right to thorough-and-uniform public education. To paraphrase Justice Brandeis,

Those who ... [framed our Constitution] believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued... [free public education] both as an end and as a means.¹⁷

The Thorough-and-Uniform Clause did not create unfettered discretion, it created guarantees the Framers considered basic to republican existence — even as it charged the General Assembly with realizing those guarantees. To be sure, a

¹⁶ G. Alan Tarr, *series ed.*, REFERENCE GUIDES TO THE STATES CONSTITUTIONS OF THE UNITED STATES, Number 35, Dale Oesterle & Richard Collins, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE 2 (2002) (when the Framers “empower[ed] the legislature with discretionary authority,” they limited “how it should exercise its authority, particularly in matters related to education, mining and irrigation”); *Denver Daily Tribune*, March 6, 1876 p. 4. (In a debate on legislative powers in education: “Mr. Bromwell said the argument of the last gentleman amounted to an assertion that the convention ... should leave everything to the Legislature. There was no danger that they would be honeyfuggled or whiskyfuggled.... The members of the convention might ... as well go home to their constituents, and say that they had finally concluded not to ... protect any of their rights....”).

¹⁷ *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion), *overruled*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

constitution is more than what its framers apprehend at the moment of its conception. But “if we would supplant the opinions and policy of our fathers ... we should do so upon evidence so conclusive, and argument so clear, that even their great authority, fairly considered and weighed, cannot stand.”¹⁸

B. Plain Meaning

The original proposal brought to the convention called for “thorough and *efficient*” public education operating “irrespective of color, birthplace or religion.”¹⁹ The replacement of both “efficient” and a non-discrimination clause with “uniform” was one of the few amendments to the original text.

We briefly surveyed relevant definitions of *thorough* above. *Uniform* connotes not just nondiscrimination, but similarity in the opportunity provided to students. A system of education is *uniform* when it has the “same character, course, plan, laws, etc.; sameness; consistency;”²⁰ does not “vary ...in degree or

¹⁸ Abraham Lincoln, *Cooper Union Address* (February 27, 1860), <http://showcase.netins.net/web/creative/lincoln/speeches/cooper.htm> (accessed 4/15/2008).

¹⁹P ROCEEDINGS, 43.

²⁰C ENTURY DICTIONARY, Part XXIII, 6616 (“uniformity”). *Accord*: WEBSTER’S 1444 (“[o]f the same form with others; agreeing with each other; conforming to one rule or mode. Consonant.”).

rate”; and is “applicable to all places, or to all divisions.”²¹ Plainly, the “uniform” schools called into being by the Constitution of 1876 must be open to all and provide educational opportunities with consistency.

In short, the plain meaning of the Thorough-and-Uniform Clause confirms the Framers’ original intent: a strong, enforceable commitment to the right of each young Coloradan to a publicly-provided, even-handed and complete preparation for life. This plain meaning cannot be squared with discarding constitutional text through “nonjusticiability.”

III. COLORADO CASE LAW SUPPORTS FINDING THE THOROUGH-AND-UNIFORM CLAUSE JUSTICIABLE

A. Vollmar

In 1927, a group of parents litigated their right to exempt their children from reading of the King James Bible in the local public schools. In the course of upholding the parents’ claims, the Supreme Court held: “The parent has a constitutional right to have his children educated in the public schools of the state. *Colo. Const. art. IX, sec. 2.*”²² This statement of the enforceability of Article IX,

²¹C ENTURY DICTIONARY, Part XXIII, 6616.

²² 81 Colo. at 282, 255 P. 614.

Section 2 has never been disapproved. Indeed, *Lujan* cited *Vollmar* with approval for the “inherent civil right” it recognized.²³

B. *Lujan*

In *Lujan* the Court ruled that the right to education was not violated by failure of the then-current system of school finance to attach a precisely equal amount of money to each student in the State. Despite *Lujan*’s easily-described result, the justices were badly split: 3-1-2-1. Justice Quinn had ruled against the state in *Lujan* as a trial judge, and recused himself. Justices Dubovsky and Lohr dissented. Chief Justice Hodges wrote an opinion finding the state system constitutional. This plurality opinion was joined by two other justices. Thus, the balance, in *Lujan*, lay with Justice Erickson. Justice Erickson’s “specially concurring” opinion stated:

The findings and conclusion of the trial judge ... arguably support his conclusion that Colorado’s present school financing system does not pass constitutional muster.... *In concurring ... I do no more than to express my opinion that the statutes in issue, when granted a presumption of constitutionality, barely meet constitutional standards.*²⁴

Since Justice Erickson’s vote was essential to a majority, the *Lujan*

²³ 649 P.2d at 1023.

²⁴ 649 P.2d at 1026 (emphasis added).

precedent is limited by his qualifier: *Lujan* does “no more” than hold that Colorado school finance, as challenged there, “barely [met] constitutional standards.”²⁵ For absent Justice Erickson’s specially concurring opinion, there was no majority. How this translates into the markedly different circumstances and claims here is debatable; but by no stretch of *legal* imagination is *Lujan* other than a holding that thorough-and-uniform issues call for judicial review on the merits. *Lujan* upheld the school finance system on its merits — “barely.”

The legislature understood *Lujan* as a shot across the bow — and promptly reformed school finance. To claim a quarter-century later that a completely different school finance issue can be easily resolved through reliance on scattered quotes from Chief Justice Hodges’ plurality opinion — and these mutated into jurisdictional bar — is not an application of this precedent, but its abuse. Even the *Lujan* plurality repeatedly states that the Thorough-and-Uniform Clause creates a

²⁵ Compare, *Alexander v. Choate*, 469 U.S. 287, 293 and nn. 8 & 9 (1985) (describing the precedential effect of multiple opinions concurring in the judgment and dissenting in *Guardians Ass’n v. Civil Service Comm’n*, 463 U.S. 582 (1983)); *Petre v. Cardiovascular Consultants*, 871 N.E.2d 780, 792 (Ill. App), *appeal denied*, 879 N.E.2d 938 (Ill. 2007)*27 (applicable precedent drawn from “specially concurring and dissenting opinions”).

legal “mandate.”²⁶ “Mandate” is not the language of non-justiciability — it describes enforceable rights²⁷ — and expresses how Justice Erickson “specially” joined this opinion.

C. Post-*Lujan* Cases

Most cases since *Lujan* recognize that it made a limited, closely divided decision — on the merits. For example, dismissal was refused in two school finance actions brought after *Lujan* — and those cases proceeded to the merits (and were settled).²⁸ Most important, this Court has expressly found *Lujan* recognized a constitutional right,²⁹ and twice found *Lujan* applied “rational

²⁶ 649 P.2d at 1017, 1018-19 & 1024-25.

²⁷ *The Colorado Supreme Court & School Finance: What Guidance Has the Court Provided?*, Presentation to Joint Meeting of the Interim Committee on School Finance & Task Force 3 (Legis. Legal Srv. July 21, 2005)(per *Lujan* the thorough-and-uniform “mandate” imposes enforceable duties).

²⁸ *Hafer v. Colorado State Bd. Of Educ.*, 87CV02216 (Denver Dist. Court) & *Giardino v. Colorado State Bd. Of Educ.*, 98CV0246 (Denver District Court).

²⁹ *In the Matter of the Title*, 44 P.3d 213, 217 (Colo. 2002) (“*Lujan* did not hold that Colo. Const. art. IX, § 2 created no constitutional right ...; in fact, the case stated that article IX, § 2 ‘mandates the General Assembly to ...to establish ... a thorough and uniform system of public schools’”).

relation” review.³⁰

It may be thought that something like rational-relation deference is as much a death-knell for this litigation as “nonjusticiability.” In the event, that may even be true. We do not suggest that a judgment on the pleadings or with a record appropriate to summary judgment should be beyond reach in this case — simply reciting the words “thorough and uniform” should not turn a poor pleading into policy-making leverage. But even if a summary and adverse judgment is how this matter plays out, there is nonetheless a critical difference between that course and the Court of Appeals’ holding.

First, rational relation review has often resulted in a decision that a statute or practice is irrational.³¹ At a minimum, a “rational relation” or similar inquiry

³⁰ *Owens*, 92 P.3d at 941 (In *Lujan* “[a]pplying rational basis review, we held”) (emphasis added); *Colorado Dept. of Soc. Srv. v. Bd. of County Comm’rs*, 697 P.2d 1, 38 (Colo. 1985) (same). See also *Kinsey v. Preeson*, 746 P.2d 542, 547 (Colo. 1987) (distinguishing *Lujan*’s rebuttable “presumption” of constitutionality).

³¹ United States Supreme Court decisions finding enactments irrational include: *Romer v. Evans*, 517 U.S. 620 (1996); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *James v. Strange*, 407 U.S. 128 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Wheeling Steel v. Glander*, 337 U.S. 562 (1949); *Hartford Steam Boiler Inspection & Ins. v. Harrison*, 301 U.S. 459 (1937); *Louisville Gas & Elec. v. Coleman*, 277 U.S. 32

requires the judiciary to assure that legislative efforts have remained within the generous bounds appropriate to the deference accorded. Thus, unlike the doctrine of “nonjusticiability,” real departures from the constitutional order can be identified, while exaggerated or inopportune claims meet their deserved fate.

Second, should this matter be heard on its merits with a prompt conclusion that the Plaintiffs have (for example) *failed* to identify a violation of the Thorough-and-Uniform Clause, that conclusion will place a more emphatic imprimatur on some range of legislative efforts. In contrast, the announcement that no matter how terrible legislation may be, judges simply won’t bother to look inspires something other than resounding confidence.

IV. THE COURTS SHOULD REMAIN OPEN TO THOROUGH-AND-UNIFORM CLAIMS

The great vice of “nonjusticiability” is that it removes any opportunity for a court to address any deficiency in actions by the political branches, no matter the circumstance. To be sure, future litigants may claim that a particular matter is distinguishable from in some fashion (that it does not, for example, concern

(1928); *F. S. Royster Guano v. Commonwealth*, 253 U.S. 412 (1920); *Southern Ry. v. Greene*, 216 U.S. 400 (1910); *Gulf, Colorado & Sante Fe Ry. v. Ellis*, 165 U.S. 150 (1897).

“adequacy” or “quality”). But the formal barrier of nonjusticiability is an unqualified absolute — in a lower court, especially, it will apply its own hydraulic force. Granting real but measured deference to the political branches, on the other hand, preserves the judiciary’s traditional role as the last backstop for constitutional integrity and for minority or basic interests.

Again, there has been significant recent legislative activity in educational “reform.” Such efforts may have little precedent in practice and such attentions are not always tender. For both reasons, a need for judicial intervention may arise in some wholly unforeseen form. But the League is keenly aware of one area in which judicial protection may well be needed. The Thorough-and-Uniform Clause should, among other things, be available to assure that the vulnerable are not steam-rolled by ill-considered and temporary majorities. Colorado charter schools have been the targets of such attempts.

Charter schools have spawned a broad range of legitimate debate, with the heat in these debates often far exceeding the light. Charter schools “created obvious areas of conflict with ... school boards, administrators, teacher unions, and local fiscal authorities — *which mostly and often vehemently opposed the*

effort.”³² Such opposition takes many forms: from brazen attempts to close nascent or even established, good schools; to unfavorable and differential finance; to selectively “steering” students to and from charters; to selectively enforcing rules against particular schools; to casting schools in an unfavorable and biased light. Simply, creating schools that compete with a system they also depend upon combines an authentic need for public oversight with opportunities for invidious action (especially at the local level).³³ Yet making “uniformity” or “thoroughness” out of judicial bounds with schools vulnerable to “the grossest and most oppressive inequalities”³⁴ disdains not an issue peripheral to the judicial function, but one at its core. Whether judicial solicitude for especially sensitive interests or comparatively powerless claimants should be seen as simply one

³² *Baltimore City Board v. City Neighbors Charter School*, 929 A.2d 113, 115 (2007) (emphasis added).

³³ *The Federalist*, No. 10, 83 (Madison) (“the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression”).

³⁴ *Story’s Commentaries*, § 957.

aspect of rationality (so-called “rational relation with bite”)³⁵ or as a more searching inquiry triggered by prescribed circumstance,³⁶ may be left for another day. Simply, the Thorough-and-Uniform Clause embraces concerns that may be given short-shrift in the day-to-day practice of political horse-trading and that were legitimately elevated by the Framers to a different status.

To be sure, with charter schools the General Assembly anticipated this problem, and various forms of appeal and dispute resolution directed to the State Board of Education have acted as a healthy corrective to the worst of these abuses. But the partial success of a quasi-judicial process hardly counts as proof against the potential need for judicial intervention.

Simply, whatever the Court’s ruling here — and whatever the fate of this action on any remand — this Court should remain a guardian of the Thorough-and-Uniform Clause for the same reason it patrols other constitutional boundaries. The *legitimate* consent of the governed emerges, in a variety of institutional contexts, from deliberations that are required to respect critical individual rights,

³⁵ See, e.g., *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 451-54 (1985) (Stevens, J., concurring).

³⁶ See, e.g., *United States v. Virginia*, 518 U.S. 515, 531-33 (1996).

that do not unduly burden the most vulnerable among us — those too easily made “discrete and insular”³⁷ — and that act against a background of custom and established practice. And this is the case whether the currently-active forces seek fundamental change or reinforcement of real or imagined traditions. This process does not take place primarily *in* the judicial system — but it calls with some frequency for a referee.

Plainly, the Thorough-and-Uniform clause is the locus of such debates and recourse, with sufficient justification, to judicial intervention is a legitimate aspect of making that constitutional promise more of a reality.

V. PERSUASIVE AUTHORITY SUPPORTS REAL, THOUGH DEFERENTIAL, REVIEW OF THOROUGH-AND-UNIFORM ISSUES

Colorado law is sufficient to decide this case, but a comment on other jurisdictions is in order. The decision below classifies the case law in stark terms — wise courts refuse to consider school finance issues; foolish courts find themselves hopelessly enmeshed in the business of a super-legislature.

This view substitutes caricature for analysis. To be sure, some courts have found such issues non-justiciable. And a few courts have jumped into ongoing

³⁷ *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938).

supervision of school finance with both feet. But there is a middle ground. Many courts have ruled for or against school finance plaintiffs on the merits (or *both* for *and* against) *and* exercised authentic, albeit not mechanical, deference. These courts often issue one school finance decision per decade — or less — hardly the “quagmire” imagined by those who disdain constitutional enforcement. As we see it, the case law is more thoughtfully divided into four parts: (1) courts that did not consider school finance issues justiciable;³⁸ (2) courts that found in favor of the state on the merits;³⁹ (3) courts that found against the state, but on discrete grounds, leaving much to legislative judgment;⁴⁰ and (4) courts that found against the state on broad grounds and undertook comprehensive — and often repeated — efforts to force detailed re-writing of the state’s school finance code.⁴¹

³⁸ See, e.g., *Nebraska Coalition v. Heineman*, 273 Neb. 531, 731 N.W.2d 164, 2007 Neb. LEXIS 65, ** 48-49 (2007).

³⁹ See, e.g., *Skeen v. Minnesota*, 505 N.W.2d 299, 318 (Minn. 1993).

⁴⁰ See, e.g., *Roosevelt Elem. Sch. Dist. v. Arizona*, 205 Ariz. 584, 74 P.3d 258 (Ariz. App. 2003), *review denied*, 2004 Ariz. LEXIS 8 (discussing precedent); *Idaho Schools for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993) (deferring to State Board of Education standards while maintaining ultimate judicial authority over constitutional issues).

⁴¹ See, e.g., *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), *cert denied*, 414 U.S. 976, *later proceedings at* 335 A.2d 6; 351 A.2d 713; 355 A.2d 129; 358 A.2d

We urge fidelity to Colorado law. And we submit such fidelity will result in precisely the middle course suggested by most cases — those falling in both our second and third categories — from other jurisdictions. Neither extreme is desirable, and the unhealthy way in which each extreme feeds the other is entirely avoidable for sound reasons grounded in Colorado law.

The Court of Appeals' decision unwisely discards the middle course that most jurisdictions follows and that this Court clearly signaled in *Lujan*.

CONCLUSION

The Colorado Constitution of 1876 was unmistakably adopted with an active intent to place enforceable limits on the powers of the General Assembly. It was written in terms that plainly express that intent. At the same time, the Thorough-and-Uniform Clause charges the General Assembly with a task that has called forth a complex, evolving effort. The many legitimate policy-making challenges in realizing a thorough-and-uniform system of free public education certainly suggest respect for the General Assembly's efforts and deference to its reasonable judgments. But none of this justifies a supine judiciary. The courts

457 (1976) and *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985), *later proceedings at* 575 A.2d 359; 643 A.2d 575; 693 A.2d 417; 710 A.2d 450 (1998).

should remain open to Thorough-and-Uniform claims, and proper litigants who make such claims should be given a resolution stating whether their claims have, or do not have, merit.

CERTIFICATE OF WORD COUNT

By my signature below, I certify that the number of words in the body of the final form of this petition (excluding caption, signature block and certifications), as counted by WordPerfect 12, is correctly stated in the caption.

RESPECTFULLY SUBMITTED,

William P. Bethke # 11802
KUTZ & BETHKE LLC
363 S. Harlan Street, Suite 104
Lakewood, CO 80226
(303) 922-2003 (v)
(303) 922-2878 (fax)
wpbethke@lawkb.com

CERTIFICATE OF SERVICE

This is to certify that the foregoing OPENING BRIEF was served by being emailed and placed in United States Mail, First Class, postage pre-paid this 8th day of September, 2008, addressed as follows:

John Suthers & Anthony B. Dyl, Assistant Attorney General, Education Unit,
State Services Division, 1525 Sherman Street, 5th Floor Denver, CO 80203
tony.dyl@state.co.us
