SUPREME COURT, STATE OF COLORADO **101 West Colfax Avenue, Suite 800** **Denver, Colorado 80203**	
Appeal from the District Court **City and County of Denver, 2005CV4794**	▲ COURT USE ONLY ▲
Plaintiffs-Appellees: Anthony Lobato, as an individual and as parent and natural guardian of Taylor Lobato and Alexa Lobato; Denise Lobato, as an individual and as parent and natural guardian of Taylor Lobato and Alexa Lobato; Miguel Cendejas and Yuri Cendejas, individually and as parents and natural guardians of Natalia Cendejas and Salina Cendejas, Pantaleón Villagomez and Maria Villagomez, as individuals and as parents and natural guardians of Chris Villagomez, Monique Villagomez and Angel Villagomez; Linda Warsh as an individual and as parent and natural guardian of Adam Warsh, Karen Warsh and Ashley Warsh; Herbert Conboy and Victoria Conboy, as individuals and as parents and natural guardians of Tabitha Conboy, Timothy Conboy and Keila Barish; Terry Hart, as an individual and as parent and natural guardian of Katherine Hart; Larry Howe-Kerr and Anne Kathleen Howe-Kerr, as individuals and as parents and natural guardians of Lauren Howe-Kerr and Luke Howe-Kerr; Jennifer Pate, as an individual and as parent and natural guardian of Ethan Pate, Evelyn Pate and Adeline Pate; Robert L. Podio and Blanche J. Podio, as individuals and as parents and natural guardians of Robert T. Podio and Samantha Podio; Tim Hunt and Sabrina Hunt, as individuals and as parents and natural guardians of Darean Hunt and Jeffrey Hunt; Doug Vondy, as an individual and as parent and natural guardian of Hannah Vondy; Denise Vondy, as an individual and as parent and natural guardian of Hannah	**Supreme Court Case No: 2012SA25**

Vondy and Kyle Leaf; Brad Weisensee and Traci Weisensee, as individuals and as parents and natural guardians of Joseph Weisensee, Anna Weisensee, Amy Weisensee and Elijah Weisensee; Stephen Topping, as an individual and as parent and natural guardian of Michael Topping; Debbie Gould, as an individual and as parent and natural guardian of Hannah Gould, Ben Gould and Daniel Gould; Lillian Leroux Sr., as an individual and as parent and natural guardian of Lillian Leroux III, Ashley Leroux, Alixandra Leroux and Amber Leroux; Theresa Wrangham, as an individual and as parent and natural guardian of Rachel Wrangham; Lisa Calderon, as an individual and as parent and natural guardian of Savannah Smith; Jessica Spangler, as an individual and as parent and natural guardian of Rider Donovan Spangler; Jefferson County School District No. R-1; Colorado Springs School District No. 11, in the County of El Paso; Bethune School District No. R-5; Alamosa School District, No. RE-11J; Centennial School District No. R-1; Center Consolidated School District No. 26 JT, of the Counties of Saguache and Rio Grande and Alamosa; Creede Consolidated School District No. 1 in the County of Mineral and State of Colorado; Del Norte Consolidated School District No. C-7; Moffat, School District No. 2, in the County of Saguache and State of Colorado; Monte Vista School District No. C-8; Mountain Valley School District No. RE 1; North Conejos School District No. RE 1J; Sanford, School District No. 6, in the County of Conejos and State of Colorado; Sangre de Cristo School District, No. RE-22J; Sargent School District No. RE-33J; Sierra Grande School District No. R-30; South Conejos School District No. RE10; Aurora, Joint District No. 28 of the Counties of Adams and Arapahoe; Moffat County School District Re: No. 1; Montezuma-Cortez School District No. RE-1; and Pueblo, School District No. 60 in the County	

of Pueblo and State of Colorado; and **Plaintiffs-Intervenors-Appellees**: Armandina Ortega, individually and as next friend for her minor children S. Ortega and B. Ortega; Gabriel Guzman, individually and as next friend for his minor children G. Guzman, Al. Guzman, and Ar. Guzman; Robert Pizano, individually and as next friend for his minor children Ar. Pizano and An. Pizano; Maria Pina, individually and as next friend for her minor children Ma. Pina and Mo. Pina; Martha Lopez, individually and as next friend for her minor children S. Lopez and L. Lopez; M. Payan, individually and as next friend for her minor children C. Payan, I. Payan, G. Payan, and K. Payan; Celia Leyva, individually and as next friend for her minor children Je. Leyva and Ja. Leyva; and Abigail Diaz, individually and as next friend for her minor children K. Saavedra and A. Saavedra; v. **Defendants-Appellants**: The State of Colorado; the Colorado State Board of Education; Robert K. Hammond, in his official capacity as Commissioner of Education of the State of Colorado; and John Hickenlooper, in his official capacity as Governor of the State of Colorado.	

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BRIEF OF AMICUS CURIAE EDUCATION JUSTICE AT EDUCATION LAW CENTER

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 6,904 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

☐ It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☐ It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

[x] Filing party is neither raising an issue on appeal nor responding to an issue within the meaning of C.A.R. 28(k).

[x] I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.AR. 32.

Signature of Attorney or Party

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE

Education Law Center ("ELC") is a non-profit organization in New Jersey established in 1973 to advocate on behalf of public school children for access to an equal and adequate educational opportunity under state and federal laws through policy initiatives, research, public education, and legal action. ELC represented the plaintiff schoolchildren in *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), and continues to advocate on their behalf to ensure effective implementation of the *Abbott* remedies, which have "enabled children in Abbott districts to show measurable educational improvement." *Abbott v. Burke*, 971 A.2d 989, 995 (N.J. 2009). Because of its expertise in education law and policy, ELC established Education Justice at Education Law Center ("Education Justice"), a national program to advance children's opportunities to learn. Education Justice provides advocates seeking better educational opportunities in states across the nation with analyses and assistance on: relevant litigation; high quality preschool and other proven educational programs; resource gaps; education cost studies; and policies that help states and school districts build the know-how to narrow and close achievement gaps. Education Justice has participated as *amicus curiae* in state educational opportunity cases in Connecticut, Indiana, Maryland and South Carolina.

PRELIMINARY STATEMENT

Education Justice submits this brief to provide the Court with a national perspective on a few issues raised by this appeal. First, despite the arguments of the State and various *amici* that the "thorough and uniform education" clause is non-justiciable because there are no judicially manageable standards, the rise of standards-based education reform and decades of experience in other state courts make clear that the judiciary has an important and manageable role in protecting the constitutional right of Colorado's children to a thorough and uniform education.

Second, contrary to the argument of *amicus* Colorado Concern, the judicial trend toward enforcing state constitutional education clauses has not "reversed" in recent years. On the contrary, with tightened budgets and reduced funding of school systems in recent years, the state courts' determined action to protect constitutional rights has been on an upswing.

Last, despite arguments of the State and *amicus* Colorado Concern that there is no correlation between education funding and academic results, numerous studies, including many that the District Court relied upon to make its wholly supportable findings, show that improved funding to provide better resources to

educators and students results in higher student achievement. Many other state courts in similar cases have expressly recognized this correlation.

ARGUMENT

POINT 1

THIS COURT HAS THE INSTITUTIONAL RESPONSIBILITY TO INTERPRET AND ENFORCE THE COLORADO CONSTITUTION UNDER JUDICIALLY MANAGEABLE STANDARDS.

In its 2009 decision in this case, this Court held that it has "never applied the political question doctrine to avoid deciding a constitutional question, and we decline to do so now." *Lobato v. State*, 218 P.3d 358, 363 (Colo. 2009) (*Lobato I*). Despite this Court's holding in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982), and then again in *Lobato I,* that "it is the responsibility of the judiciary to determine whether the state's public school financing system is rationally related to the constitutional mandate that the General Assembly provide a 'thorough and uniform' system of public education," *id.*, the State is asking this Court, yet again, to declare that Plaintiffs' claims under the Education Clause are "non-justiciable political questions." The State's main argument in support of its request that this Court overrule its 2009 decision is that the trial below somehow demonstrated that there are no judicially manageable standards for determining

violations of the "thorough and uniform education" clause. This Court already articulated reasons in *Lobato I* why the State's arguments lack merit under Colorado law. Moreover, other states' courts have successfully adjudicated educational adequacy claims under state constitutions, and have implemented judicially manageable, deferential remedies that properly respect the coordinate branches of government.

A. The Court Has the Institutional Obligation To Interpret the Education Clause of the State Constitution and Protect the Rights this Clause Guarantees to Colorado's Children.

The State's argument that the Court should overrule its decision in *Lobato I* and decline any further involvement in ensuring the State's compliance with the Education Clause ignores the proper role of this Court as one of three co-equal branches of Colorado state government. As this Court made clear in *Lobato I*, the Colorado Constitution "equally divides the powers of the government between the executive, legislative and judicial branches," and accordingly, all three branches are required to "co-operate with and complement and at the same time act *as checks and balances against one another*." *Lobato I*, 218 P.3d at 372 (emphasis in original; citation omitted). The failure of this Court to perform its constitutional obligations "would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility to fashion and fund a

'thorough and uniform' system of public education." *Id.*; *see also Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 39 (Ct. App. 1982) ("it is . . . the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the Executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches"). The Constitution vests this Court with the duty to interpret the Constitution and remedy any violations thereof; to abstain from performing this role would be an abdication of the Court's constitutional obligations to (1) determine what the law is, and (2) ensure that the other two branches of government are fulfilling their own constitutional obligations.

It is no answer to state, as *amicus curiae* former Governors of Colorado argue, that the Court need not involve itself in disputes under the Education Clause because the Governor will police the actions of the Legislature. This argument essentially writes the judiciary out of the constitutional balance of governmental powers. Each of the three branches of government plays an important role under the Constitution that cannot be left to the other branches to fill. There is no merit to the arguments of the State and *amici* Colorado Concern and the former Governors that the judiciary should stay out of the education issue because such "intrusion" will "obstruct executive policy-making responsibilities," Former

Governors' Br. at 6, and interfere with the Legislature's need to make hard budget choices in the current economic climate. It is precisely *because* the give-and-take in the budgeting process makes it a "political process" (as the former Governors admit at page 5 of their brief) that the judiciary must serve as a non-political bulwark to ensure that children's constitutional right to a thorough and uniform education not fall victim to political compromise. The pressures of difficult economic conditions heighten, not lessen, the temptation of the political branches to reduce education funding for reasons of short-term expediency, and elevate the importance of the Court's role in protecting children's constitutional rights.

In a recent decision, the New York Court of Appeals, the state's highest court, summarily rejected the state's argument that claims under the Education Article of the New York Constitution were non-justiciable. New York had urged the court to overturn one of its earlier decisions, dismiss the case as non-justiciable, and leave all further issues of educational adequacy to the other two branches of government. There, as here, the state's argument depended on overruling an earlier precedent. Concurring in the summary affirmance that the claims were justiciable, one of the high court's Judges observed:

> If we declare that a sound basic education consists only of what the Legislature and Executive dictate, the scope of the State's constitutional duty under the Educational Article and, conversely, the scope of the constitutional rights of our schoolchildren, is limited to

> what those branches say it is. Abandoning [an earlier precedent] would not only entrust the Legislature and Executive with the decidedly judicial task of interpreting the meaning of the Education Article but cast them in the role of being their own constitutional watchdogs. . . . Our system of separation of powers does not contemplate or permit such self-policing, nor does it allow us to abdicate our function as 'the ultimate arbiters of our State constitution' . . . simply because public funds are at stake. *In short, parsing out what the Education Article actually requires . . . not only enables the Legislature and Executive to fulfill their constitutional mandate but ensures that we in the judiciary do the same.*

Hussein v. State, ____ N.E.2d ___, 19 N.Y.3d 899, 903-04 (N.Y. 2012) (Ciparick, J., concurring) (emphasis added) (citations omitted).

In a decision earlier this year, the Washington Supreme Court explained that although there is a "delicate balancing of powers and responsibilities among coordinate branches of government," which requires the court to "proceed cautiously" and be "appropriately sensitive to the legislature's role in reforming and funding education," nevertheless, "the constitution requires the judiciary to determine compliance with [the Education] article." *McCleary v. State*, 269 P.3d 227, 258 (Wash. 2012). The court observed that "the long term result" of its previous hands-off approach to questions of educational adequacy under its constitution "was 30 years of an education system that fell short of the promise of

Article IX, section 1, and that ultimately produced this lawsuit." *Id.* at 259.[1] The court further elaborated that "[w]hat we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education." *Id.* Thus, the Washington Supreme Court, declining to leave education adequacy to other branches of government, held that:

> While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all. Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1.

Id. at 261.

The courts' neutral approach to issues, and their institutional long-term stability relative to the other branches of government, make them essential for providing continuing guidance on constitutional requirements and sustaining a commitment to meeting constitutional goals. Legislatures are better equipped to develop specific reform policies, and executive agencies are most effective in undertaking the day-to-day implementation and monitoring of the details of education laws and policies. The types of remedial guidelines that have been issued by courts in many other states effectively use the comparative strengths of

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[1] In the thirty years since this Court declined to find a constitutional violation on equal protection grounds in *Lujan*, problems with educational and funding adequacy in Colorado's education system have progressively worsened.

each of the branches and have led to meaningful vindications of children's constitutional rights.[2]

B. The District Court Properly Looked to State Education Statutes for Guidance in Establishing Judicially Manageable Standards Under the Education Clause.

The State's claim that there are no judicially manageable standards for adjudicating claims under the Education Clause is belied not only by the District Court's decision in this case, but by decades of litigation experience in dozens of other states. Numerous state supreme courts have successfully adjudicated claims under their state constitutions' respective education clauses, often relying on educational standards adopted into law to give content to these constitutional provisions. *See Connecticut Coal. for Justice in Educ. Funding v. Rell*, 990 A.2d 206, 250 n.55 (Conn. 2010) (collecting cases).

Many state courts have enforced the constitutional right to an adequate education in recent years both because the need to do so became urgent and because the means to do so has been made easier by the standards-based reform

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[2] *Amicus* Colorado Concern advocates that this Court do nothing about the current state of Colorado's education system in part based on a fear that in response to a Court order, the Legislature "could just drag its feet" and refuse to do anything to improve education. Colorado Concern Br. at 25-26. This pessimistic view of government ignores that state legislatures by and large perform their constitutional obligations. Though some legislatures have taken longer than others, ultimately, in cases where education adequacy claims are found justiciable, court involvement has resulted in education system reform and improvement.

movement. In response to increasing recognition of the need to improve and address inequities in school systems throughout the United States, the nation's governors, business leaders, and educators began to work to articulate specific national academic goals necessary to prepare our country's children for citizenship in the 21st century. This effort commenced with the 1989 National Education Summit convened by President George H.W. Bush, which was attended by all fifty governors. *See* Marc S. Tucker & Judy B. Codding, *Standards for Our Schools* 40-43 (1998). This effort helped to propel the development of an extensive standards-based education reform approach in virtually all of the fifty states, including Colorado. *See* Findings of Fact and Conclusions of Law (Dec. 9, 2011) at 10-29, 172 (hereafter, "Court Findings").

State standards-based reforms are built around substantive content standards in major subject areas such as English and mathematics. These content standards typically assume that all students can meet high expectations if given sufficient opportunities and resources.[3] Once such standards are established, other

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[3] Standards-based reform addresses the reality that United States student populations are becoming increasingly heterogeneous and that populations of socio-economically disadvantaged children are rapidly increasing; the United States will be at a serious competitive disadvantage in an increasingly "flat world" if these students are not well-educated. Thomas Bailey, *Implications of Educational Inequality in a Global Economy,* in THE PRICE WE PAY:

aspects of the education system – including teacher training and certification, curriculum frameworks, instructional materials, and student assessments – are refocused to achieve these standards, with the goal of creating a coherent system of teacher preparation, curriculum implementation, and student testing designed to improve achievement for all students. *See Design of Coherent Education Policy: Improving the System* (Susan H. Fuhrman ed., 1993).

Such content-based standards can also provide judges with workable criteria for applying the state constitutional concepts of education that had originally been articulated in the 18th and 19th centuries to contemporary needs. Further, they give judges objective, legislatively created baselines that can inform "judicially manageable standards" for crafting practical constitutional remedies. As the Idaho Supreme Court stated:

> Balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 § 1 with the political difficulties of that task has been made simpler for this Court because the executive branch of the government has already promulgated educational standards pursuant to the legislature's directive in I.C. § 33-118.

Idaho Schs. for Equal Educ. Opportunity v. State, 976 P.2d 913, 919 (Idaho 1998) (citation omitted).

ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 89 (Clive R. Belfield & Henry M. Levin eds., 2008).

Similarly, the Supreme Court of North Carolina explicitly directed the trial court to consider the "[e]ducational goals and standards adopted by the legislature" to determine "whether any of the state's children are being denied their right to a sound basic education." *Leandro v. State,* 488 S.E.2d 249, 259 (N.C. 1997). The trial judge concluded that the standards provided students a reasonable opportunity to acquire the skills that constituted a sound basic education as defined by the Supreme Court. *Hoke County Bd. of Educ. v. State,* 599 S.E.2d 365 (N.C. 2004). Statutory and regulatory standards and related assessments developed by legislatures and state education departments thus can provide a basis for determining whether children are being afforded a constitutionally adequate education. Students' performance under these standards may in turn show whether schools receive sufficient resources to offer an education in line with constitutional norms.[4]

Consistent with the national trend among courts to look to legislative standards to help flesh out constitutional standards for educational adequacy, this Court directed the District Court to "appropriately rely on the legislature's own

[4] While statutory standards provide courts with extremely valuable input, courts have the authority to independently assess, in a deferential manner, whether standards adopted by the legislature constitute a good faith effort to achieve constitutionally adequate education for all children. *See Campaign for Fiscal Equity v. State of New York,* 719 N.Y.S. 2d 475, 484 (N.Y. Sup. Ct. 2001), *aff'd,* 801 N.E.2d 326, (N.Y. 2003); *McCleary,* 269 P.3d at 251-52.

pronouncements concerning the meaning of a 'thorough and uniform' system of education," and then determine whether there was a rational relationship between the state's current public school financing system and achievement of a "thorough and uniform system of public education." *Lobato I*, 218 P.3d at 374-75.

Following this Court's guidance and showing deference to the Legislature, the District Court drew on Colorado statutes in determining the content of a thorough and uniform education: the court reviewed statutes setting the broad goals of such an education, *see* Court Findings at 172 (citing C.R.S. § 22-7-403(2)), as well as those establishing standards for assessing whether such goals were met, *id.* (citing C.R.S. § 22-11-102(1)(d), C.R.S. § 22-7-1001 *et seq.* (CAP4K), C.R.S. § 22-11-101 *et seq.* (the Education Accountability Act of 2009), and SB 10-191 (teacher effectiveness legislation)); *see also id.* at 10-29. Arguments by the State and various *amici* that issues of educational adequacy lack judicially manageable standards ring hollow in view of the District Court's reliance on specific standards adopted by the Legislature and enacted into law defining the meaning of a thorough and uniform education.

Having given meaning to the constitutional provision by reference to statutes that the Legislature explicitly stated were intended to implement this provision, the District Court then considered whether the State funds schools in a manner

calculated to achieve its express educational goals and targets. The Court found no rational relationship between the educational standards set by law and the methodology by which funding is appropriated to the schools. Indeed, the Court found that the Legislature never even attempted to quantify the resources that might be needed to achieve its own standards. This finding is supported by a vast record and stands uncontradicted by the State. Court Findings at 174-79.

C. The District Court Devised a Constitutional Remedy That Properly Deferred to the Legislature.

On the issue of remedy, the District Court did exactly what this Court instructed it to do in the event it found the funding system unconstitutional: it "permit[ted] the legislature a reasonable period of time to change the funding system so as to bring the system in compliance with the Colorado Constitution," *Lobato I*, 218 P.3d at 364, without telling the State how to do so and without ordering any specific level of funding. As *amicus* Colorado Concern concedes, "the District Court did not expressly order a specific level of education funding." Col. Concern Br. at 19.[5] Although the State decries the District Court's "lack of deference" to the Legislature, the District Court's remedy could not have been

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[5] Despite this concession, Colorado Concern and the State elsewhere repeatedly argue that the District Court ordered the State to spend an additional $4 billion per year, based on one of several estimates provided by the Plaintiffs at trial. The Court entered no such order.

more deferential. Although the District Court found the existing funding system unconstitutionally irrational and ordered the State to devise a system that complies with the constitution, it left entirely to the State the task of fixing the broken funding system and did not constrain the State's ability to implement innovative strategies to achieve constitutional adequacy, as efficiently as it can devise.

POINT II

COURTS NATIONALLY HAVE CONTINUED TO ENFORCE CONSTITUTIONAL RIGHTS IN EDUCATIONAL ADEQUACY CASES.

Citing two 10-year-old cases and two articles from several years ago, including one by the State's expert Eric Hanushek, *amicus* Colorado Concern contends that "the trend in recent years of court-ordered increases in education funding under constitutional adequacy provisions has reversed," suggesting that there is a nationwide trend against court involvement in constitutional issues of educational adequacy. Colorado Concern Br. at 13-14. Recent decisions from a number of state high courts, however, have continued to reaffirm the place of the judiciary in vindicating children's constitutional rights to an adequate education, including by ordering the Legislature to ensure constitutionally adequate levels of school funding. *See McCleary*, 269 P.3d at 258 (affirming trial court judgment finding that state education funding system violated state constitution and retaining

jurisdiction to ensure legislative compliance with court's order); *Hussein v. State*, ___ N.E.2d ___, 19 N.Y.3d 899 (N.Y. 2012) (summarily affirming lower court ruling that claims under education provision of state constitution are justiciable and could proceed to trial); *Rell*, 990 A.2d 206 (holding that claims under education provision of Connecticut Constitution are justiciable and guarantee a minimum qualitative level of education); *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011) (ordering state to provide education funding at levels required by funding statute that court held constitutional in 2009 based in part on state's promise of full funding); *Brigham v. State*, 889 A.2d 715 (Vt. 2005) (reversing lower court dismissal of state constitutional educational adequacy claims based on non-justiciability and remanding for further proceedings); *Columbia Falls Elementary Sch. Dist.t v. State*, 109 P.3d 257 (Mt. 2005) (holding that claims under education provision of state constitution are justiciable and concluding that education funding system violated state constitution); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004) (affirming post-trial finding that state failed to provide adequate education or sufficient funding); *see also Hoke Cty. Bd. of Educ. v. State*, ___ S.E.2d ___, 2012 WL 3568549 (N.C. App. August 21, 2012) (affirming order barring state from de-funding education program previously enacted to comply with supreme court's order under the state constitution's "sound basic education"

provision). Like the District Court in this case, these other courts have continued to be involved in ensuring that Legislatures devise adequate funding formulas sufficient to meet constitutional standards. As these cases exemplify, courts continue to play a vital and important role in ensuring that states fulfill their constitutional obligations to provide adequate education to children.

POINT III

THE LITERATURE SHOWS, AND THE TRIAL COURT PROPERLY FOUND, THAT INCREASED FUNDING IMPROVES EDUCATIONAL OUTCOMES.

Both the State and *amicus* Colorado Concern suggest that providing additional funding to Colorado's schools would do little to improve educational achievement by the children of Colorado. *See* Colorado Concern Br. at 26 (increased funding yields "no appreciable gains in student achievement"); State Br. at 34-36 ("lack of a consistent relationship between education funding and student performance"). This argument ignores many studies that have been performed in a number of states to measure educational improvement as a result of court-ordered constitutional remedies.[6] Evidence to this effect was presented at trial and found credible by the District Court. *See* Court Findings at 49-54 ("School Funding

[6] The State's argument is also inconsistent with its admission that increased spending in the Mapleton School District resulted in "better student achievement, among other positive effects." State Br. at 47.

Levels Have a Significant Effect on Educational Quality"). The State's argument also ignores the writings of its own expert, Dr. Hanushek, who, in a book on the subject, wrote that "there is mounting evidence that money, if spent appropriately, can have a significant effect" on student achievement. Trial Tr. 5031:21-5032:19.

A. Academic Studies of Other States Show That Increased School Funding Leads to Improved Academic Performance.

Studies conducted in states other than Colorado that have undertaken significant school finance reforms pursuant to court orders demonstrate "a strong relationship between resources and achievement." *See* Court Findings at 50; *see also* Trial Tr. 3927:21-3928:23; Bruce D. Baker, *Revisiting the Age-Old Question: Does Money Matter in Education*, THE ALBERT SHANKER INST., 14 (2012), http://www.shankerinstitute.org/images/doesmoneymatter_final.pdf ("On balance, it is safe to say that a sizeable and growing body of rigorous empirical literature validates that state school finance reforms can have substantial positive effects on student outcomes, including reductions in both the levels and disparities in these outcomes."). In addition to the District Court, at least twenty-nine state courts have examined the evidence and determined that education funding levels are an important factor in academic achievement. *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of Courts*, 85 N.C. L. Rev. 1467, 1484-85 (2007) (hereafter "Rebell").

New Jersey, in particular, serves as an example of a state in which reforms implemented as a result of school finance litigation raised the level of academic achievement to one of the highest in the country. Court Findings at 50; *see also* Trial Tr. 3929:15-3930:15, Aug. 19, 2011. Plaintiffs' expert testified at trial that New Jersey presently ranks in the top five states in every measure on the National Assessment of Education Progress ("NAEP"). Trial Tr. 5742:20-5743:9, Aug. 29, 2011. One particular study, which focused on eleventh grade assessment test scores, found that the increased funding and spending in the affected school districts improved the students' test scores by one-fifth to one-quarter of a standard deviation. Alexandra M. Resch, *Three Essays on Resources in Education*, U. MICH. DEP'T OF PUB. POL'Y & ECON., 1 (2008), http://deepblue.lib.umich.edu/bitstream/2027.42/61592/1/aresch_1.pdf. The study, which was recently praised for its rigorous and detailed methodology,[7] concluded that the dramatic improvements, which took place over a short time period, clearly demonstrated a correlation between increased funding and academic improvement. *Id.* at 99.

Before New Jersey implemented school funding reform, its fourth and eighth grade reading scores were "neck and neck" with Colorado's fourth and eighth

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[7] *See* Bruce D. Baker & Kevin G. Welner, *School Finance and Courts: Does Reform Matter, and How Can We Tell?* 113 Tchrs. C. Rec. 8, 10 (2011). The Baker and Welner article was Trial Exhibit 7718.

grade reading scores. Trial Tr. 5742:10-19, Aug. 29, 2011; *id.* at 5744:13-21. By 2009 and 2010, however, following New Jersey's 1998 reform, New Jersey's fourth and eighth grade reading scores had pulled substantially ahead of Colorado's, and rose to among the highest in the nation.[8] *See id.* at 5742:10-19 and 5744:13-21; *see also* Margaret E. Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey,* Symposium on "Equal Educational Opportunity: What Now?" Teachers College, Columbia University, November 12-13, 2007 (Working Paper), *available at* www.tc.edu/symposium/ symposium07/resource.asp (following court-ordered reform, mean scale scores rose 19 points in 4th grade mathematics, with largest increases in poor urban (*Abbott*) districts that were focus of judicial remedies, and achievement gaps between *Abbott* districts and rest of state decreased by almost 50%).

Massachusetts is another example of a state in which school finance reform litigation has yielded substantial improvements in academic achievement. *See, e.g.*,

[8] Despite measurable educational improvement for low-income children achieved through the *Abbott* lawsuit, *amicus* Colorado Concern claims, based solely on the number of opinions rendered by the court, that the *Abbott* litigation yielded "no appreciable gains in student achievement but creat[ed] significant uncertainty to the state's economy and harm to it." Colorado Concern Br. at 26. The fully supported record below belies this assertion, however, showing that the economic benefits from improved education programs "far exceed the costs to taxpayers." Court Findings at 67-68.

Rebell, 85 N.C. L. Rev. at 1527 (percentage of students achieving proficiency on state tests increased dramatically following the legislature's response to the adequacy litigation); *see also* Paul Reville, *The Massachusetts Case: A Personal Account,* Symposium on "Equal Educational Opportunity: What Now?" Teachers College, Columbia University, Nov. 12-13, 2007 (Working Paper), *available at* www.tc.edu/symposium/symposium07/resource.asp (between 1998 and 2004, following court-ordered funding reform, failure rate of 10th graders taking the Massachusetts Comprehensive Assessment System exams dropped from 45% to 15% in math and 34% to 11% in English). One study found that increased funding raised fourth grade math, reading, science, and social studies test scores by approximately half of one standard deviation. *See* Jonathan Guryan, *Does Money Matter? Regression-Discontinuity Estimates from Education Finance Reform in Massachusetts* 24 (Nat'l Bureau of Econ. Res., Working Paper No. 8269, May 2001); *see also* Bruce D. Baker & Kevin G. Welner, *School Finance and Courts: Does Reform Matter, and How Can We Tell?* 113 Tchrs. C. Rec. 8, 10 (2011) (praising Guryan's study).

Furthermore, Guryan's study found that the increased test scores resulted largely from increased academic performances by students formerly at the bottom of the distribution. *See* Jonathan Guryan, *Does Money Matter? Regression-*

Discontinuity Estimates from Education Finance Reform in Massachusetts at 25. More recently, and in accord with that finding, another study found that Massachusetts' education reform successfully raised the achievement levels of students in the previously low-spending school districts. Thomas Downes, Jefferey Zabel, & Dana Ansel, *Incomplete Grade: Massachusetts Education Reform at 15*, MASSINC, 5-6 (May 2009) (available at http://www.massinc.org/Research/Incomplete-Grade.aspx). Presently, like New Jersey, Massachusetts ranks at the top of the nation on the NAEP standardized test. *Id.* at 5.[9]

In addition to state-specific studies on New Jersey and Massachusetts, other researchers have found positive student outcomes resulting from court-ordered funding reform. A study of Kansas schools found that a 1992 court order directing the legislature to devise a new funding system resulted in a twenty percent increase in spending in a low-wealth district, which in turn increased the probability that students would go on to postsecondary education by "a conservative estimate" of

[9] NAEP rankings can be a useful measure to assess aggregate state educational achievement levels, but they do not tell the entire story. Although the State, based on the testimony of its expert Dr. Hanushek, argues that Colorado student performance falls within the nationwide average as measured by NAEP, drilling down into specific student groups makes clear that, despite overall average NAEP scores, Colorado has perhaps the worst achievement gap in the United States between its minority students and non-minority students. Tr. Day 21 5694:8-24. Moreover, NAEP applies national standards and was not designed to, and does not, test whether students are meeting Colorado's curriculum standards. Tr. Day 19, 5129:5-12.

five percent. *See* Bruce D. Baker & Kevin G. Welner, *School Finance and Courts: Does Reform Matter, and How Can We Tell?* 113 Tchrs. C. Rec. 9 (2011) (discussing John Deke's 2003 study). Another study, of Vermont, found that 1998 finance reforms "dramatically reduced dispersion in education spending" and "student performance has become more equal in the post-Act 60 period." *See id.* (discussing Thomas Downes' 2004 study). Yet another study, of Kentucky, found that following the Court's decision in *Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989), free and reduced-price lunch students outscored students from similar backgrounds nationally by seven points in 4th grade reading and five points in 8th grade reading on the 2007 National Assessment of Educational Progress (NAEP) tests. Susan Perkins Weston & Robert F. Sexton, *Substantial and Yet Not Sufficient: Kentucky's Effort to Build Proficiency for Each and Every Child,* Symposium on "Equal Educational Opportunity: What Now?" Teachers College, Columbia University, November 12-13, 2007 (Working Paper), *available at* www.tc.edu/symposium/symposium07/resource.asp.

B. Increased Funding Has Improved Educational Results in Colorado.

Evidence introduced at trial also proved that within Colorado increased funding has improved educational achievement. The trial court below credited a

2010 report that found students' reading and math performance on the Colorado Student Assessment Program (CSAP) was positively related to instructional per-pupil spending. Court Findings at 50. Dr. Baker testified at trial that he found a strong correlation between funding gaps among Colorado school districts and the reading and math CSAP scores. Trial Tr. 1417:14- 1419:6.

A more recent example showing increases in achievement as a result of funding increases is in Plaintiff Center School District. Both the Plaintiffs and the trial court below noted the significant academic improvements that resulted from Center's receipt of a three-year federal grant for its elementary schools in 2010. Court Findings at 50-51. In addition, the Colorado Department of Education recently released the 2012 third grade reading scores, revealing a ***thirty-five percent increase*** in advanced and proficient performance in the Center School District compared to the 2011 results, on top of an increase of eleven percent in the prior year. *See* George Welsh, *Haskin 3rd Grade Reading TCAP Results Show Huge Growth!* KEEPING OUR FOCUS, http://keepingourfocus.weebly.com/3rd-grade-tcap-release.html; Court Findings at 51. George Welsh, superintendent of Center School District, attributes his students' success to the "significant infusion of dollars, spent wisely in targeted areas." *Id.*

Similarly, as a result of a three-year federal grant that allowed it to hire more than a dozen part-time teachers to assist in reading and math instruction, Sheridan Elementary School was able to improve student performance sufficiently to be taken off of the State's list of failing "turnaround" schools. *See* http://www.denverpost.com/breakingnews/ci_21545460/sheridan-pep-rally-cheers-academic-gains-at-elementary (September 14, 2012) (hereafter "*Sheridan Pep Rally*"). As a result of the increased funding, from 2010 to 2012, Sheridan Elementary School raised its students' math scores from 27th to 48th percentile, reading scores from 42nd to 55th percentile, and writing scores from 37th to 50th percentile. *Id.*

Unfortunately, Center and other Colorado districts are concerned that they will be unable to maintain their academic gains after increased funding runs out and is not replaced. *See generally* Court Findings at 51-54; *see also Sheridan pep Rally* ("Sheridan will pay a price for its success, though. The federal grant money it got for being an underperforming school will go away, taking with it some of those additional part-time teachers, among other things."). During the time period in which the North Conejos School District was able to afford writing teachers, elementary CSAP writing scores were at their highest. Now that such teachers are unaffordable, the district's elementary writing scores have dropped to some of the lowest ever seen. *Id.* at 51. Other school districts regret that insufficient funding

exists to offer successful but limited pilot programs to all students who could benefit from them. For example, Aurora Public School District's Superintendent testified that the district cannot afford to extend successful programs and initiatives that have yielded positive achievement gains (which he called "islands of success") to all students, due to budget cuts. *Id.* at 52. As the District Court found, school districts know how to improve student performance, but simply lack the funding and resources to implement the needed changes. Court Findings at 178-79.

C. Courts Uniformly Recognize That Increased Funding Improves Educational Results.

As a matter both of fact and common sense, courts throughout the nation have recognized a strong correlation between the level of educational funding and student achievement. This correlation has been recognized by many other courts, in a number of cases. For example, the New Jersey Supreme Court found based on the record before it that:

> under the present [school funding] system the evidence compels but one conclusion: the poorer the district and the greater its need, the less the money available, and the worse the education.

Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990). Addressing an argument similar to that made here by the State, the court went on to reject:

> the argument . . . that funding should not be supplied because it may be mismanaged and wasted. Money can make a difference if effectively used; it can provide the students with an equal educational

> opportunity, a chance to succeed. They are entitled to that chance, constitutionally entitled. They have the right to the same educational opportunity that money buys for others.

Id. Similarly, the Arkansas Supreme Court rejected as "implausible" the state's argument:

> that more money spent on education does not correlate to better student performance. This position is contrary to Judge Imber's finding in her 1994 order and to the Tennessee Supreme Court [in *McWherter*]. The State's argument is farfetched in this court's opinion. We are convinced that motivated teachers, sufficient equipment to supplement instruction, and learning in facilities that are not crumbling or overcrowded, all combine to enhance educational performance. . . . All of that takes money.

Lake View Sch. Dist. v. Huckabee, 91 S.W.3d 472, 498-99 (Ark. 2002).

In a concurring opinion, the Chief Justice of the Arizona Supreme Court summarized the issue as follows:

> Moreover, logic and experience also tell us that children have a better opportunity to learn biology or chemistry, and are more likely to do so, if provided with laboratory equipment for experiments and demonstrations; that children have a better opportunity to learn English literature if given access to books; that children have a better opportunity to learn computer science if they can use computers, and so on through the entire state-prescribed curriculum. . . . It seems apparent to me, however, that these are inarguable principles. If they are not, then we are wasting an abundance of our taxpayers' money in school districts that maintain libraries and buy textbooks, laboratory equipment, and computers.

Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 822 (Ariz. 1994) (C.J. Feldman, concurring); *see also Campaign for Fiscal Equity v. State*, 801

N.E.2d 326, 340 (N.Y. 2003) (finding plaintiffs established "the necessary 'causal link' between the present funding system and the poor performance of City schools . . . by a showing that increased funding can provide better teachers, facilities and instrumentalities of learning"); *Edgewood Independent Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1994) ("The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student . . . The differences in the quality of educational programs offered [by districts that spend more money] are dramatic"); *Brigham v. State*, 692 A.2d. 384, 390 (Vt. 1997) ("there is no reasonable doubt that substantial funding differences significantly affect opportunities to learn"); *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 141 (Tenn. 1993) ("there is a direct correlation between dollars expended and the quality of education a student receives"); *Serrano v. Priest*, 5 Cal.3d 584, 601 n.16 (Cal. 1971) (citing cases rejecting the argument that "money doesn't matter" to educational achievement). As one state court judge succinctly summarized after hearing evidence on this issue: "[o]nly a fool would find that money does not matter." Rebell, 85 N.C. L. Rev. at 1479.

D. Colorado Has the Financial Capacity to Improve Its Education Funding System.

The findings below make apparent Colorado's need to reform its education funding system. Notwithstanding the State's arguments and the arguments of

various *amici*, a report introduced at trial demonstrates that Colorado has the financial ability to improve its education system.

In its findings of fact, the trial court credited a 2010 "national report card" study, co-authored by the Plaintiffs' expert witness Dr. Bruce Baker, which was designed to measure the fairness of the school finance systems in all fifty states. Court Findings at 100-101. In the report, Colorado scored a "D" in the category of "funding distribution," and an "F" in the category of "state effort." *See id.* In a recently published second edition of Dr. Baker's national report card, Colorado fared no better in these categories two years later. *See* Bruce Baker, Danielle Farrie, & David Sciarra, *Is School Funding Fair? A National Report Card*, EDUC. L. CENTER at 14, 22 (June 2012), available at http://www.edlawcenter.org/assets/files/pdfs/publications/NationalReportCard_2012.pdf. Colorado's grade of "D" reflects the poor extent to which Colorado's education funding is distributed to districts within the State relative to student poverty. *Id.* at 13. Colorado's "F" grade for state effort reflects the low extent to which the State funds its public school system relative to the State's gross domestic product. *Id.* at 23. By measuring funding relative to state GDP, the national report card takes into consideration the fact that the less wealthy a state is, the scarcer the financial

resources for its education systems, while, conversely, the more wealthy a state is, the more it can afford to spend to educate its children. *Id.*

The report card characterizes these two measures, funding distribution and state effort, as "the areas over which states exert the most control," and singled out Colorado and several other states for their particularly poor performance in these two categories. *Id.* at 26. As the national report card summarizes:

> Not only do these states dedicate a low proportion of their fiscal capacity toward their education systems, they also have allocated that money in a way that does not systematically ensure that districts with higher poverty levels get more funding.

Id.

Colorado ranks 13th in the country among the states in GDP per capita. See *Gross Domestic Product by State* (U.S. Dept. of Commerce Bureau of Economic Analysis July 2012) at 113 (available at www.bea.gov/scb/pdf/2012/07%20July/0712_gdp_state_tables.pdf). Yet it ranks 29th among the states in per-student public educational spending, and 42nd in state and local revenue for public schools per $1,000 of personal income. *Rankings & Estimates: Rankings of the States 2011 and Estimates of School Statistics 2012*, NEA Research (Dec. 2011) at 54, 40 (available at www.nea.org/assets/docs/NEA_Rankings_And_Estimates_FINAL_20120209.pdf). The fact that many less wealthy states have managed to find ways to spend more per student than Colorado to educate their children

without harming their economies demonstrates that, contrary to the argument of *amicus* Colorado Concern, increased educational spending will not cause "devastation" to Colorado's economy.

Indeed, the more appropriate question to ask may not be whether Colorado can afford to properly educate its children, but rather, whether it can afford *not* to do so. Each inadequately educated child who drops out of high school costs our economy hundreds of thousands of dollars in lost tax payments, health and welfare costs, criminal justice expenses, and welfare payments. Cecilia Elena Rouse, *Consequences for the Labor Market*, in THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 99-124. The District Court made fact findings to the same effect. *See* Court Findings at 9-10.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* Education Law Center respectfully urges the Court to affirm the decision of the trial court.

Respectfully submitted,

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DATED: September 26, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2012, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE EDUCATION JUSTICE AT EDUCATION LAW CENTER** was served via email and U.S. mail, postage prepaid, to the following:

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