SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, Denver, Colorado 80203	
Appeal from the Colorado Court of Appeals, Case No. 06CA733	
Petitioners: ANTHONY LOBATO, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF TAYLOR LOBATO AND ALEXA LOBATO; DENISE LOBATO, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF TAYLOR LOBATO AND ALEXA LOBATO; JAIME HURTADO AND CORALEE HURTADO, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF MARIA HURTADO AND EVAN HURTADO; JANET L. KUNTZ, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF DANIEL KUNTZ AND STACEY KUNTZ; PANTALEÓN VILLAGOMEZ AND MARIA VILLAGOMEZ, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF CHRIS VILLAGOMEZ, MONIQUE VILLAGOMEZ AND ANGEL VILLAGOMEZ; LINDA WARSH, AS AN INDIVIDUAL AND AS PARENTS AND NATURAL GUARDIAN OF ADAM WARSH, KAREN WARSH AND ASHLEY WARSH; ELAINE GERDIN, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF N.T., J.G. AND N.G.; DAWN HARTUNG, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF Q.H.; PAUL LASTRELLA, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF B.L.; WOODROW LONGMIRE, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF TIANNA LONGMIRE; STEVE SEIBERT AND DANA SEIBERT, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF REBECCA SEIBERT AND ANDREW SEIBERT; OLIVIA WRIGHT, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF A.E. AND M.E.; HERBERT CONBOY AND VICTORIA	

CONBOY, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF TABITHA CONBOY AND TIMOTHY CONBOY; TERRY HART, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF KATHERINE HART; LARRY HOWE-KERR AND KATHY HOWE-KERR, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF LAUREN HOWE-KERR AND LUKE HOWE-KERR; JOHN T. LANE, AS AN INDIVIDUAL; JENNIFER PATE, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF ETHAN PATE AND EVELYN PATE; ROBERT L. PODIO AND BLANCHE J. PODIO, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF ROBERT PODIO AND SAMANTHA PODIO; TAMI QUANDT, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF BRIANNA QUANDT, CODY QUANDT AND LEVI QUANDT; BRENDA CHRISTIAN, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF RYAN CHRISTIAN; TONI L. MCPEEK, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF M.J. MCPEEK, CASSIE MCPEEK AND MICHAEL MCPEEK; CHRISTINE TIEMANN, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF EMILY TIEMANN AND ZACHARY TIEMANN; PAULA VANBEEK, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF KARA VANBEEK AND ANTONIUS VANBEEK; LARRY HALLER AND PENNIE HALLER, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF KELLY HALLER AND BRANDY HALLER; TIM HUNT AND SABRINA HUNT, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF SHANNON MOORE-HINER, ERIS MOORE, DAREAN HUNT AND JEFFREY HUNT; MIKE MCCALEB AND JULIE MCCALEB, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS REBEKKA MCCALEB, LAYNE MCCALEB AND LYNDE MCCALEB; TODD THOMPSON AND JUDY THOMPSON, AS	

INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF GARSON THOMPSON AND TAREK THOMPSON; DOUG VONDY AND DENISE VONDY, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF KYLE LEAF AND HANNAH VONDY; BRAD WEISENSEE AND TRACI WEISENSEE, AS INDIVIDUALS AND AS PARENTS AND NATURAL GUARDIANS OF JOSEPH WEISENSEE, ANNA WEISENSEE, AMY WEISENSEE AND ELIJAH WEISENSEE; STEPHEN TOPPING, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF MICHAEL TOPPING; DONNA WILSON, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF ARI WILSON, SARAH PATTERSON, MADELYN PATTERSON AND TAREN WILSON-PATTERSON; DAVID MAES, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF CHERIE MAES; DEBBIE GOULD, AS AN INDIVIDUAL AND AS PARENT AND NATURAL GUARDIAN OF HANNAH GOULD, BEN GOULD AND DANIEL GOULD; LILLIAN LEROUX, AS AN INDIVIDUAL AND NATURAL GUARDIAN OF ARI LEROUX, LILLIAN LEROUX, ASHLEY LEROUX, ALEXANDRIA LEROUX AND AMBER LEROUX; THERESA WRANGHAM, AS AN INDIVIDUAL AND NATURAL GUARDIAN OF RACHEL WRANGHAM AND DEANNA WRANGHAM **AND** **ALAMOSA SCHOOL DISTRICT, NO. RE-11J; CENTENNIAL SCHOOL DISTRICT NO. R-1; CENTER CONSOLIDATED SCHOOL DISTRICT NO. 26 JT, OF THE COUNTIES OF SAGUACHE AND RIO GRANDE AND ALAMOSA; CREEDE CONSOLIDATED SCHOOL DISTRICT NO. 1 IN THE COUNTY OF MINERAL AND STATE OF COLORADO; DEL NORTE CONSOLIDATED SCHOOL DISTRICT NO. C-7; MOFFAT, SCHOOL DISTRICT NO. 2, IN THE COUNTY OF SAGUACHE AND STATE OF COLORADO;**	

MONTE VISTA SCHOOL DISTRICT NO. C-8; MOUNTAIN VALLEY SCHOOL DISTRICT NO. RE 1; NORTH CONEJOS SCHOOL DISTRICT NO. RE1J; SANFORD, SCHOOL DISTRICT NO. 6, IN THE COUNTY OF CONEJOS AND STATE OF COLORADO; SANGRE DE CRISTO SCHOOL DISTRICT, NO. RE-22J; SARGENT SCHOOL DISTRICT NO. RE-33J; SIERRA GRANDE SCHOOL DISTRICT NO. R-30; AND SOUTH CONEJOS SCHOOL DISTRICT NO. RE10. **Respondents: THE STATE OF COLORADO; THE COLORADO STATE BOARD OF EDUCATION; DWIGHT JONES, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF EDUCATION OF THE STATE OF COLORADO; AND BILL RITTER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF COLORADO.**	**▲ COURT USE ONLY ▲**
MARTHA M. TIERNEY KELLY GARNSEY HUBBELL + LASS LLC 1441 Eighteenth Street, Suite 300 Denver, Colorado 80202-1255 Phone: (303) 296-9412 E-mail: mtierney@kghllaw.com Atty. Reg. #: 27521 ATTORNEYS FOR AMICUS CURIAE EDUCATION LAW CENTER	Case No. _____
BRIEF OF AMICUS CURIAE EDUCATION LAW CENTER	

I. ISSUE PRESENTED FOR REVIEW

Amicus will address the following issue presented in the joint petition:

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

II. STATEMENT OF AMICUS CURIAE

Education Law Center (ELC) is a non-profit advocacy organization in New Jersey established in 1973 to advocate on behalf of public school children for access to an equal and adequate education under state and federal laws. ELC works to improve educational opportunities through policy initiatives, research, public engagement, communications, and legal action. ELC represents the plaintiff school children in the New Jersey educational opportunity and school finance litigation, *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994), and has been a close observer of other school funding cases across the country. ELC recently established Education Justice (EdJustice), a national program to advance education equity, through which it provides information and technical assistance to attorneys and advocates seeking to: improve K-12 school funding and opportunity; expand access to preschool education for disadvantaged children; and/or, reform special

education programs for children with disabilities. EdJustice also collects and disseminates research, develops strategies, and assists policymakers and advocates seeking to narrow and close achievement gaps and improve public schools, especially those schools serving concentrations of low-income students and students of color.

III. STATEMENT OF THE CASE

Amicus curiae ELC adopts the statement of the case in the Joint Petition for Writ of Certiorari filed by Plaintiffs and Defendants.

IV. REASONS FOR GRANTING THE WRIT

The Colorado Courts play a crucial role in the State's tripartite system of government. The Courts' duties include interpreting state constitutional clauses and adjudicating claims of violations of the state constitution. While the separation of powers doctrine requires each branch of government to respect the others' roles, it also compels each branch to shoulder its particular responsibilities. This Court will not interfere with the legislative and executive branches by hearing the constitutional claims raised here. It is the role of the courts to interpret the Colorado Constitution, and the Colorado Supreme Court is uniquely experienced in adjudicating constitutional matters. *Amicus curiae* ELC submits this brief to assist

the Court by providing context as to how courts in other states have concluded in similar cases.

A. PLAINTIFFS' CLAIMS ARE JUSTICIABLE, AS ARE SIMILAR CLAIMS UNDER THE CONSTITUTIONS AND SEPARATION OF POWERS DOCTRINES IN OTHER STATES.

In Colorado, the Constitution's Education Clause imposes an obligation on the State to provide "for the establishment and maintenance of a thorough and uniform system of free public schools" to its schoolchildren. Colo. Const. Art. IX, Sec. 2. In other states, courts have interpreted similar constitutional language and adjudicated claims alleging constitutional violations. *See, e.g., Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806, 815-16 (Ariz. 1994); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 92 (Wash. 1978). An overwhelming majority of state courts have declared that adequate educational opportunities must be provided to all schoolchildren to prepare them for citizenship and employment in contemporary society. *See, e.g., Vincent v. Voight*, 614 N.W.2d 388, 396-97 (Wis. 2000); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Campaign for Fiscal Equity (CFE) v. State*, 655 N.E.2d 661, 665 (N.Y. 1995); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995). This Court should do the same here.

The Court of Appeals in this case engaged in an extensive review of other states' court decisions before deciding to adopt the distinctly minority view of non-justiciability. *Lobato v. State*, 2008 WL 194019, App. A (Colo. App.). Other states' courts have conducted similar analyses, specifically as to justiciability and the separation of powers in education adequacy cases like this one, and the majority of those courts reached the well-reasoned conclusion that such cases are justiciable. *See, Lake View Sch. Dist. V. Huckabee,* 91 S.W.3d 472, 483 (Ark. 2002) (quoting *Serrano v. Priest*, 557 P.2d 929, 946 (Cal. 1976); *Campbell County Sch. Dist. v. State*, 907 P.2d at 1264, (quoting *Seattle Sch. Dist. v. State*, 585 P.2d at 86-87).

Colorado's current system of education finance fails to provide the Constitutionally mandated educational opportunity. (Tr. pp. 26-38). Persuasive case law from sister states makes clear that questions concerning both the interpretation of the education clauses of state constitutions and the constitutionality of a state's system of education finance are fully justiciable and are part of the essence of the courts' role under the separation of powers doctrine.

1. STATE COURTS ROUTINELY INTERPRET EDUCATION CLAUSES AND DEFINE THE RIGHTS AND DUTIES THESE CLAUSES IMPOSE.

Under article VI, section 1 of the Colorado Constitution, the judicial branch is empowered to construe the constitution's meaning. *Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1272 (Colo.2001). Declaring what constitutional duties and rights are – defining and clarifying what constitutional articles mean – is one of the judiciary's prime constitutional responsibilities. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) (duty of the judicial department is to say what the law is.). The Colorado Supreme Court fulfills its role leading the judicial branch of Colorado State government when it interprets the State Constitution and says what the Constitution means.

Other state courts have interpreted their state's education clauses when called upon to do so.[1] Indeed, other states have found plentiful guidance for

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[1] *Columbia Falls Elem. Sch. Dist. 6 v. State*, 109 P.3d 257 (Mont. 2005); *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472 (Ark. 2002), *cert. denied*, 538 U.S. 1035 (2003); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326 (N.Y. 2003); *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Zuni Sch. Dist. v. State, District Court of McKinley County*, Case No. CV-98-14-II (Dist. Ct. of New Mexico 1998); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Bradford v. Maryland State Bd. of Educ.*, Case Nos. 94340058/CE189672 and 95258055/CL202151 (Cir. Ct. for Balt. City, Md. 1996), rev'd, in part, on other grounds, (Ct. of Appeals June 9, 2005) ; *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995); *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Unified School District No. 229 v. State*, 885 P.2d 1170 (Kan. 1994); *Committee for Educ. Equal. v. State*, No. CV190-1371CC, slip op. (Cir. Ct. Cole County Jan. 1993)

interpreting the 18th, 19th, and 20th century terminology in most of their education clauses.[2] Compared to many state education clauses,[3] the Colorado Constitution's Education Clause offers more expansive language providing more information for the Court's delineation of the constitutional standard.[4] Other state courts have had no difficulty interpreting a variety of terms in their education clauses to ensure the right to an "adequate" or "suitable" or "efficient" or "thorough and uniform" education.[5]

(unappealed lower court ruling); *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Idaho Sch. for Equal Educ. Opportunity v. Evans,* 850 P.2d 724 (Idaho 1993); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989*); Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 92 (Wash.1978).

[2] *See generally* Lawrence Cremin, American Education: The National Experience 1783-1876 (1980); C. Kastle, Pillars of the Republic: Common Schools and American Society 1780-1860 (1983). ; *See, e.g. McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516 (Mass. 1993) (explaining colonial history and 18th century principles, especially freedom, incorporated into the education clause).

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

[4] The Colorado Education Clause states "The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." Colo. Const. art. IX, § 2.

[5] State constitutions in other states use a variety of terms in referencing the obligation to provide an enforceable and substantive education consistent with constitutional standards, including:

Notably, defendants cite to no Colorado case or authority that finds any other language in the Colorado Constitution non-justiciable. To let stand the Court of Appeals ruling would virtually eliminate the proper role of the courts as the ultimate interpreters of the Constitution, and could eliminate valuable Constitutional protections through unreviewable legislative fiat.

2. PROPER SEPARATION OF POWERS CONCERNS COMPEL THE COURT TO INTERPRET THE CONSTITUION AND DETERMINE WHETHER DEFENDANTS ARE IN COMPLIANCE.

The separation of powers doctrine, properly applied, acknowledges the respective duties of all three branches of government. *Pena v. Dist. Court,* 681 P.2d 953, 955-56 (Colo. 1984). High courts in many states have found not only

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North Carolina: right to "privilege of education" deemed to give rise to right to "sound basic" education with qualitative standards. *Leandro v. State*, 488 S.E.2d at 254-55.

New York: constitutional mandate that "[t]he legislature shall provide for a system of free Common Schools, wherein all the children of this state may be educated," creates state obligation to ensure "sound basic education" for all children. *Campaign for Fiscal Equity, Inc. v. State,* 801 N.E.2d at 328.

Arkansas: "a general, suitable, and efficient system of free public schools." *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d at 484.

Kansas: "the legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools." *Montoy v. State*, 102 P.3d 1160, 1163 (Kan. 2005).

South Carolina: requirement that "the General Assembly shall provide for the maintenance and support of a system of free public education" deemed to guarantee a "minimally adequate education" that meets certain broad substantive academic and vocational standards. *Abbeville County Sch. District v. State*, 515 S.E.2d at 540.

Tennessee: requirement that "[t]he General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 148 (Tenn. 1993).

that separation of powers is no bar to judicial review, but also that it compels them to fulfill their responsibilities and authority, as a co-equal branch of state government, to hear challenges – equivalent to plaintiffs' claims here – to the constitutional adequacy of their States' education finance systems. At least twenty-two state high courts have rejected separation of powers and political question arguments, concluding it is their duty to declare the meaning of the Constitution and adjudicate plaintiffs' claims.[6]

Defendants argued in the court below that the separation of powers doctrine commands that the legislature's educational policy-making role is paramount and does not honor the courts' role and responsibilities to determine whether state statutes, and systems implemented by state agencies with delegated authority, are in compliance. (Tr. pp. 90-92; Appellees Answer Brief, pp. 23-25). Defendants claim that separation of powers requires that all education finance considerations must be left only to the legislative branch, and that the courts would "infringe" on the powers delegated to the legislative branch should the court construe the education clause. (Tr. p. 21).

To the contrary and not surprisingly, the Colorado Supreme Court has recognized that the courts have a duty to decide issues involving the constitution

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[6] See cases cited at footnote 1, *supra.*

and laws of the state, even if the determination may affect other branches of the government. *See People ex. rel. Salazar v. Davidson*, 79 P.3d 1221 (2003)(en banc), *cert denied,* 541 U.S. 1093 (2004). Similarly, the United States Supreme Court has long adhered to the classic holding of *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. at 177.

Defendants indicated to the court below that only a few aberrant state courts have found school funding systems unconstitutional in recent years. (Tr. pp. 90-92; Appellees' Answer Brief, pp. 27-33) In fact, a significant number of courts in other states have considered whether their school funding systems pass constitutional muster, and most of these decisions have addressed the constitutional "adequacy" of school funding systems.[7] During the past ten years, plaintiffs have prevailed in decisions of the highest courts in education adequacy cases in fourteen states, while defendants have prevailed in only five.[8]

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[7] See cases cited at footnote 1 *supra.*

[8] There have been many cases over the past 25-30 years that addressed education clauses in state constitutions. Not all of these cases address similar claims for relief as the Lobato case. The cases cited below are only those which address "adequacy" claims, similar to those asserted in the Lobato case. Specifically, since 1997, plaintiffs have prevailed in: *Montoy v. State*, 102 P.3d 1160 (Kan. 2005); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005); *Campaign for Fiscal Equity, Inc. v. State,* 801N.E.2d 326 (N.Y. 2003); *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472 (Ark. 2002);

Also, as other states' highest courts have recognized, a determination that any aspect of a funding system violates constitutional standards entails no greater usurpation of the authority of the coordinate branches than any other constitutional determination. *See, e.g., Seymour v. Region One Bd. of Educ.*, 803 A.2d 318, 326 (Conn. 2002). Courts accord proper respect to the other branches in education adequacy cases not by concluding that their state constitutions are unenforceable, but rather by deferring to the political branches to correct constitutional deficiencies if such a determination is made. *See, e.g., id.* at 324; *Hoke County Bd. of Educ. v. State*, 599 S.E.2d at 390-91; *Roosevelt v. Bishop*, 877 P.2d at 815-16.

The outcome of this case should be determined by whether plaintiffs adduce evidence proving that the current system of education finance is not providing students educational opportunities that are designed to prepare them "to participate meaningfully in the civic, political, economic, social and other activities of our

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Tennessee Small Sch. *Systems v. McWherter*, 91 S.W.3d 232 (Tenn. 2002); *Campbell County Sch. Dist. v. State*, 19 P.3d 518 (Wyo. 2001); *Abbeville County Sch. Dist. v. State,* 515 S.E.2d 535 (S.C. 1999); *Idaho Schs. for Equal Educ. Opportunity v. State,* 976 P.2d 913 (Idaho 1998); *Hull v. Albrecht*, 960 P.2d 634 (Ariz. 1998); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Claremont Sch. Dist. V. State*, 703 A.2d 1353 (N.H. 1997); *DeRolph v. State,* 677 N.E.2d 733 (Ohio 1997). Defendants have prevailed in: *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 731 N.W.2d 164 (Neb. 2007); *Oklahoma Education Association v. State*, 158 P.3d 1058 (Okla. 2007); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000); *Lewis E. v. Spagnolo,* 710 N.E.2d 798 (Ill. 1999); and *Pennsylvania Assn. of Rural & Small Schs. v. Ridge,* 737 A.2d 246 (Pa. 1999).

society and the world." (Plaintiffs' Complaint, Tr. p. 4). That evidentiary burden is for a trial on the merits.

B. THIS COURT IS CAPABLE OF DISCERNING AND APPLYING "JUSTICIALLY MANAGEABLE STANDARDS" IN THIS CASE, AS COURTS IN SIMILAR CASES HAVE DONE IN OTHER STATES.

Defendants, in briefs below, cited seven states where the court challenges and results are similar to this case. (Tr. pp 20-22; Appellees Answer Brief, pp. 27-33, Appellees Supplemental Authority). The court in one of those states, Alabama, actually adjudicated the case, including a trial on the merits and a trial court decision affirmed by the state supreme court.[9] Defendants claim that the remaining six courts cited by defendants feared a lack of "judicially manageable standards" and urge this Court to succumb to the same fear. *Id.*

These few exceptions are minor and unpersuasive in light of courts in at least 22 states that have adjudicated these cases, undeterred by this chimera.[10] A few examples are illustrative. When New York's highest court reversed the granting of defendants' motion to dismiss an education adequacy case similar to

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[9] *See Ex parte James* (*In re Alabama Coalition for Equity (ACE) v. James*, 836 So.2d 813 (Ala. 2002); *Ex parte James* (*ACE v. James*), 713 So.2d 869 (Ala. 1997); *Opinion of the Justices*, No. 338, 624 So.2d 107 (Ala. 1993); *ACE v. Hunt*, 1993 WL 204083 (Ala. Cir. Ct. Montgomery Cty. 1993) (Appendix to *Opinion of the Justices*, No. 338, 624 So.2d at 157). Long after its appellate jurisdiction had expired, the court, *sua sponte*, reopened and then closed the case. *Ex parte James*, 836 So.2d at 877 (Johnstone, J., dissenting).

[10] See cases cited at footnote 1, above.

Lobato v. State of Colorado, it addressed an education clause that said, "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." *CFE v. State*, 655 N.E.2d at 665. The court "examined the Education Article's language and history" and held that "[i]n order to satisfy the Education Article's mandate, the system in place must at least make available an 'education', a term we interpreted to connote 'a sound basic education'." *Id.* The court wrote:

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

Id. at 666.

In *Leandro v. State*, the North Carolina Supreme Court held "[t]his Court has long recognized that there is a qualitative standard inherent in the right to education guaranteed by this state's constitution." 488 S.E.2d at 255.

Similarly, in *Vincent v. Voight*, the Wisconsin Supreme Court interpreted the constitution's education clause, which states that:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such

> schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years...

Wisc. Const. art. X, § 3. The court held this language to mean that Wisconsin students have the right to "an equal opportunity for a sound basic education [which] will equip students for their roles as citizens and enable them to succeed economically and personally" and defined that right to include "the opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and . . . receive instruction in the arts and music, vocational training, social sciences, health, physical education and foreign language." 614 N.W.2d at 396-97. On this basis, the court also concluded that the plaintiffs had not presented convincing evidence that students were being denied this opportunity. *Id.* at 413.

The courts in these cases began explicating judicially manageable standards by interpreting the Education Clause of their State's Constitution, and proceeded by providing guidance to the remand court for its determination of whether the constitutional standard is being met.

V. CONCLUSION

For all of these reasons, *amicus curiae* ELC supports the joint request that the Court issue a Writ of Certiorari to the court of appeals in order to review its decision in this case.

Respectfully submitted this 12th day of March, 2008.

MARTHA M. TIERNEY

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2008, I have caused to be sent via United States mail, first class mail, postage prepaid, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE EDUCATION LAW CENTER** addressed to the following:

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