IN THE
SUPREME COURT OF MISSOURI

No. SC89010

COMMITTEE FOR EDUCATIONAL EQUALITY, ET AL., COALITION TO FUND EXCELLENT SCHOOLS, ET AL., BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, AND THE SPECIAL ADMINISTRATIVE BOARD OF THE CITY OF ST. LOUIS

Plaintiffs and Plaintiff-Intervenors–Appellants

v.

STATE OF MISSOURI, ET AL., REX SINQUEFIELD, BEVIS SCHOCK AND MENLO SMITH,

Defendants and Defendant-Intervenors-Respondents.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL CIRCUIT
HONORABLE RICHARD G. CALLAHAN, JUDGE

BRIEF OF AMICI CURIAE MISSOURI SCHOOL BOARDS' ASSOCIATION, EDUCATION JUSTICE AT EDUCATION LAW CENTER, THE NATIONAL SCHOOL BOARDS ASSOCIATION, AND THE RURAL SCHOOL AND COMMUNITY TRUST IN SUPPORT OF APPELLANTS

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STATEMENT OF JURISDICTION

Amici Curiae Missouri School Boards' Association, Education Justice at Education Law Center, National School Boards Association, and Rural School and Community Trust adopt the jurisdictional statement submitted by Appellants, Committee for Educational Equality, et al. in its brief to this Court.

STATEMENT OF FACTS

Amici Curiae Missouri School Boards' Association, Education Justice at Education Law Center, National School Boards Association, and Rural School and Community Trust adopt the statement of facts submitted by Appellants, Committee for Educational Equality, et al. in its brief to this Court.

INTEREST OF AMICI

The Missouri School Boards' Association (MSBA) is a nonprofit organization representing publicly elected school board members and public school districts in Missouri. MSBA has 391 member districts educating over 90% of the student population in Missouri. Representing the governors of public education who are accountable for individual school districts' budgets and the success of Missouri's public school students, MSBA is keenly interested in matters impacting public school funding.

Education Justice at Education Law Center (ELC) is a non-profit organization in Newark, 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 for low-income students and students with disabilities through policy initiatives, research, public education, and legal action. ELC represents the plaintiff school children in the *Abbott v. Burke* litigation and continues to advocate on their behalf to assure effective and timely implementation of the educational programs and reforms ordered by the New Jersey Supreme Court.

Because of its nationwide expertise in school finance, preschool, facilities, and other areas of education law and policy, ELC in January 2008 established Education Justice, a national program to advance educational equity and opportunity and narrow achievement gaps. Education Justice conducts and disseminates research, develops policy positions and strategies, and provides

analyses and technical assistance to advocates in states across the nation on matters such as equity and adequacy litigation, high quality preschool and other proven educational reforms, and policies that help schools build the know-how to narrow and close achievement gaps. In its first year, Education Justice also participated as amicus curiae in state funding adequacy cases in Indiana, Colorado, South Carolina, Oregon, and Connecticut.

The National School Boards Association (NSBA) is a nonprofit federation of state school boards associations, including the Missouri School Boards' Association, as well as the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. The members of the NSBA federation together represent the over 95,000 school board members who govern some 14,000 local school districts. Recognizing that adequacy of funding is arguably the most important issue confronting public education today, because it unavoidably is fundamental to virtually every other issue, NSBA has participated as amicus curiae in state funding adequacy cases in Ohio, New York, Maryland, and South Carolina.

The Rural School and Community Trust, Inc. (Rural Trust) is a national non-profit organization dedicated to promoting equal educational opportunity and improving learning for students who attend public schools, especially students who attend rural schools. The Rural Trust has particular expertise in the field of school finance policy and law. The Rural Trust also operates the Rural Education Finance Center, which: (1) sponsors rigorous scholarly legal and education research on school finance issues; (2) maintains expertise on current legal and policy

developments involving school finance systems; (3) provides technical assistance to lawyers and policy makers in the field of school finance policy and law; and (4) files *amicus curiae* briefs in state litigation involving school finance.

POINTS RELIED ON

I. The trial court erred in holding that the Missouri Constitution does not require adequate state funding for free public schools beyond the 25% "minimum" of Article IX, § 3(b), because the Article IX, § 1(a) requirement of a "general diffusion of knowledge and intelligence … essential to the preservation of the rights and liberties of the people" is a paramount duty of the state, in that the words of § 1(a), as used in American state constitutions since the founding of the Republic, and as interpreted by high courts across the nation, embody a fundamental mandate for state government to provide a system of school funding sufficient to provide all school children a substantive opportunity to learn that meets quality standards.

Bonner v. Daniels, 885 N.E.2d 673 (Ind.App. 2008)

Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989)

McDuffy v. Sec'y of the Executive Office of Educ., 415 Mass. 545, 615 N.E.2d 516 (1993)

West Orange-Cove Consolidated Independent School District v. Alanis, 107 S.W.3d 558 (2003)

Ind. Const., art. VIII, § 1

Mo. Const., art. IX, § 1(a)

Mass. Const., pt. 2, ch. V, § 2

Tex. Const., art. VII, § 1

II. The trial court erred in holding that the Missouri Constitution does not require adequate state funding for free public schools beyond the 25% "minimum" of § 3(b), because § 1(a) requires that the General Assembly provide a system of school funding sufficient to provide all school children a substantive opportunity to learn that meets quality standards, and the courts of Missouri are empowered to establish explicit standards and parameters to guide the General Assembly in enacting appropriate legislation to remedy the constitutional defects, a scheme that has often led to successful educational reforms and academic improvement in other states.

Mo. Const., art. IX, § 1(a)

Mo. Const., art. IX, § 3(b)

III. The trial court erred in refusing to recognize that clear standards have been key to the successful resolution of "adequacy" cases by courts in sister states.

Abbeville County School District v. State, 515 S.E.2d 535 (S.C. 1999)

Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989)

Hull v. Albrecht, 524, 950 P.2d 1141, 1145 (Ariz. 1997) (*Albrecht I*)

Margaret E. Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey* (2007, Working Paper) *available at* www.tc.edu/symposium/symposium07/resource.asp

ARGUMENT

I. The trial court erred in holding that the Missouri Constitution does not require adequate state funding for free public schools beyond the 25% "minimum" of Article IX, § 3(b), because the Article IX, § 1(a) requirement of a "general diffusion of knowledge and intelligence … essential to the preservation of the rights and liberties of the people" is a paramount duty of the state, in that the words of § 1(a), as used in American state constitutions since the founding of the Republic, and as interpreted by high courts across the nation, embody a fundamental mandate for state government to provide a system of school funding sufficient to provide all school children a substantive opportunity to learn that meets quality standards.

A. The Need for a Well-Educated Populace to Preserve a Republican Form of Government Has Been a Cornerstone of American Democracy.

Article IX, § 1(a) of the Missouri Constitution requires the state to establish, maintain, and fund free public schools that provide all Missouri children an adequate education. The Founding Fathers of the American Republic strongly emphasized the importance of education in building the new nation. A new, broad-based approach to schooling was needed in order to develop "a new republican

character, rooted in the American soil … and committed to the promise of an American culture." Lawrence A. Cremin, *American Education: The National Experience 1783-1876*, 3 (1980). This "new republican character" was to have two primary components. First was the implanting of "virtue," as defined by the classical notion that citizenship required a commitment to a shared public life of civic duty. *See* Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969). Second was the notion that all citizens must obtain the knowledge and skills needed to make intelligent decisions. As John Adams put it:

> [A] memorable change must be made in the system of education and knowledge must become so general as to raise the lower ranks of society nearer to the higher. The education of a nation instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many.

David McCullough, *John Adams* 364 (2001).

Similarly, Thomas Jefferson wrote extensively on the need for free public schools for all people:

> I think by far the most important bill in our whole code is that for the ***diffusion of knowledge*** among the people. No other sure foundation can be devised for the preservation of freedom and happiness.

Letter to George Whyte (1786) (emphasis added).

Missouri has "accepted the Jeffersonian concept that education is fundamental to democracy and that the state should assume the primary educational role."[1]

This history of educational philosophy and laws in the United States since the Eighteenth Century underlies and informs the development of constitutional mandates for free public schools and equal educational opportunities in every state. In 1787, the First Congress ratified the Northwest Ordinance, affirming that "[r]eligion, morality, and knowledge … being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Through the enabling acts of all subsequent states, Congress ensured that any new lands joining the union would continue to promote education.[2] The federal government not only required each new state to create a system of public schools, it transferred land to the states with one sixteenth of each township designated for public education. Acceptance by the states was "an irrevocable

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[1] *Concerned Parents v. Caruthersville School District*, 548 S.W.2d 554, 558 (Mo. Banc 1977).

[2] Institute for Educational Equity and Opportunity, *Education in the 50 States: A Deskbook of the History of State Constitutions and Laws About Education* 24 (July 2008) ("*Education in the 50 States*").

compact … creating a trust for the use of schools."[3] Similarly, when the $28 million federal surplus of 1836 (an enormous sum at that time) was distributed to the 26 states then in the union, most states used portions for education and eight states, including Missouri, used the entire amount to fund their schools.[4]

B. Every State High Court That Has Examined the Issue Has Held That Students Have a Constitutional Right to an Adequate Education That Affords Them a Substantive Educational Opportunity.

More than thirty years ago, in a case involving the lack of educational opportunities available to children in property-poor Texas school districts, the United States Supreme Court held that education is not a right under the federal constitution, where education is not even mentioned. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Education is, however, a positive right written into all state constitutions,[5] including that of Missouri. Accordingly, over

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[3] *Governor v. State Treasurer*, 203 N.W.2d 457 (Mich. 1972) (Brennan, J. dissenting) (*citing Minn. Mining Co. v. Nat'l Mining Co.*, 11 Mich. 186 (1863)).

[4] *Education in the 50 States* at 30.

[5] *See* Ala. Const., art. XIV, § 256; Alaska Const., art. VII, § 1; Ariz. Const., art. XI, § 1; Cal. Const., art. IX, § 1; Colo. Const., art. IX, § 2; Conn. Const., art. VIII, § 1; Del. Const., art. X, § 1; Fla. Const., art. IX, § 1; Ga. Const., art. VIII, § 1, para. (1); Haw. Const., art. X, § 1; Idaho Const., art. IX, § 1; Ill Const., art. X, § 1; Ind. Const., art. VIII, § 1; Iowa Const., art. IX 2d, § 3; Kan. Const., art. VI, § 1; Ky.

the past three decades, in what has been described as the most dynamic demonstration of independent state court constitutional development in American history,[6] litigants have filed constitutional challenges to the inequitable and inadequate funding of public education in the state courts of 45 states.[7] In the early years, most of these cases were "equity" claims that challenged the disparities in the

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Const., § 183; La. Const., art. VIII, § 1; Me. Const., art. VIII, part 1, § 1; Md. Const., art. VIII § 1; Mass. Const., pt. 2, ch. V, § 2; Mich. Const, art. VIII, § 2; Minn. Const., art. XIII, § 1; Mo. Const., art. IX § 1, cl. a; Mont. Const., art. X, § 1; Neb. Const., art. VII, § 1; Nev. Const., art. XI, § 2; N.H. Const., part 2, art. 83; N.J. Const., art. VIII, § 4, para. (1); N.M. Const., art. XII, § 1; N.Y. Const., art. XI, § 1; N.C. Const., art. IX, § 2; N.D. Const., art. VIII, § 1; Ohio Const., art. VI § 3; Okla. Const., art. XIII, § 1; Ore. Const., art. VIII, § 3; Pa. Const., art. III, § 14; R.I. Const., art. XII, § 1; S.C. Const., art. XI, § 3, S.D. Const., art. VIII, § 1; Tenn. Const., art. XI, § 12; Tex. Const., art. VII, § 1; Utah Const., art. X, § 1; Vt. Const., ch. II, § 68; Va. Const., art. VIII, § 1; Wash. Const., art. IX, § 1; W. Va. Const., art. XII, § 1; Wis. Const., art. X, § 3; Wyo. Const., art. VII, § 1.

[6] *See, e.g.*, Paul D. Kahn, State Constitutionalism and the Problems of Fairness, 30 Val. U. L. Rev. 459, 464-70, (1996).

[7] See chart at http://www.schoolfunding.info/litigation/equityandadequacytable.pdf. (Cases have been filed in Indiana and Iowa, without a final court decision.)

levels of expenditure among different school districts in the state on equal protection grounds. Since 1989, most of the cases have been "adequate education" claims stemming from clauses in state constitutions that guarantee students some basic or "adequate" level of public education. Since the current wave of adequacy litigations began, the courts have upheld plaintiffs' claims in about two-thirds (19 of 28) of the state court liability decisions.[8] In addition to Missouri, seven states have

[8] Specifically, plaintiffs have prevailed in major liability decisions of the highest state courts or final trial court actions in the following 19 states: Alaska (*Kasayulie v. State*, No. 3AN-97-3782 (Alaska Super. Ct. Sept. 1, 1999)); Arizona (*Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994)); Arkansas (*Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2000)); Idaho (*Idaho Schs. for Equal Educ. Opportunity*, 976 P.2d 913 (Idaho 1998); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Idaho 1993)); Kansas (*Montoy v. State*, 120 P.3d 306 (Kan. 2005)); Kentucky (*Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989)); Maryland (*Bradford v. Md. State Bd. of Educ.*, No. 94340058/CE189672 (Baltimore City Cir. Ct. 2000)); Massachusetts (*McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993)); Montana (*Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005)); Missouri (*Comm. for Educ. Equal. v. State*, 878 S.W.2d 446 (Mo. 1994) (final trial court decision; appeal dismissed on procedural grounds)); New Hampshire (*Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997)); New

constitutional provisions with language identical or substantially similar to Missouri's "general diffusion of knowledge" requirement,[9] and adequacy cases have been brought in five of those states.[10]

Mexico (*Zuni Sch. Dist. v. State*, No. CV-98-14-II (McKinley County Dist. Ct. Oct. 14, 1999)); New Jersey (*Abbott v. Burke*, 575 A.2d 359 (N.J. 1990)); New York (*Campaign for Fiscal Equity, Inc. (CFE) v. State*, 801 N.E. 2d 326 (N.Y. 2003) (*CFE II*)); North Carolina (*Leandro v. State*, 488 S.E.2d 249 (N.C. 1997)); Ohio (*DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997)); Texas (*Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989)); Vermont (*Brigham v. State*, 692 A.2d 384 (Vt. 1997)); and Wyoming (*Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995)).

[9] Cal. Const., art. IX, § 1; Ind. Const., art. VIII, § 1; Me. Const., art. VIII, part 1, § 1; Mass. Const., pt. 2, ch. V, § 2; Mo. Const., art. IX § 1, cl. A; N.H. Const., part 2, art. 83; R.I. Const., art. XII, § 1; Tex. Const., art. VII, § 1.

[10] See *Bonner v. Daniels*, 885 N.E.2d 673 (Ind.App. 2008); *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Comm. for Educ. Equal. v. State*, 878 S.W.2d 446 (Mo. 1994) (final trial court decision; appeal dismissed on procedural grounds); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

Plaintiffs' extraordinary success rate in these cases is even more remarkable when one realizes that defendants have *never* prevailed in any case in which the courts fully examined the evidence as to whether the states were providing their school children with an adequate education. Defendant victories occurred only when the courts in a particular state ruled that the issue was not "justiciable" or that because of separation of powers reasons a trial should not be held and the evidence of inadequacy should not even be considered.[11]

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[11] *See, e.g., Marrero v. Commonwealth*, 739 A.2d 110, 113-14 (Pa. 1999) (issue is nonjusticiable because the court is "unable to judicially define what constitutes an 'adequate' education or what funds are 'adequate' to support such a program"); *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) (same).

The state courts that have reviewed the evidence found constitutional violations and viewed separation of powers and justiciability differently. *See, e.g., Columbia Falls Elementary Sch. Dist. v. State*, 109 P.3d 257, 261 (Mont. 2005) ("As the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right. We conclude this issue is justiciable."); *Rose v. Council for Better Education*, 790 S.W.2d. 186, 209 (Ky. 1989) (same).

C. **Missouri's Constitution Guarantees All School Children an Adequate Education.**

The chief public school education provision of the Missouri Constitution is Article IX, § 1(a):

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools in this state within ages not excess of twenty-one years as prescribed by law.

In the trial court's view, the only mandate set forth in § 1(a) is contained in the second part: the legislature must merely "establish and maintain free public schools[.]" The first part (the "diffusion of knowledge and intelligence" and "preservation of rights and liberties" clause) was characterized by the court almost as surplusage, merely describing *why* free public schools are required, but imposing no standards on schools or the state's system of funding schools.[12]

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[12] "Considering these constitutional sections together, the Court finds that section 1(a) describes *what* the General Assembly is to do ('establish and maintain free public schools for ... all persons in this state within ages not in excess of twenty-one years as prescribed by law') and *why* (because '[a] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people')." Slip op. at 10.

It was, however, fundamentally erroneous to give short shrift to the "diffusion of knowledge and intelligence … preservation of rights and liberties" clause, especially since the framers of Missouri's constitution deemed these educational outcomes "*essential*." Identical or similar "diffusion" and "preservation" language has been included in state constitutions since colonial times,[13] and states have imbued such clauses with substance and standards, deeming them to require a system of schools and educational funding from the state that will provide an adequate level of education, sufficient to afford every child in the state the opportunity to learn and become a capable citizen.

> In Massachusetts, the state constitution has provided as follows since 1780:
>
> ***Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties***; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns …

Mass. Const., pt. 2, ch. V, § 2 (emphasis added).

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[13] *See* notes 9 & 10, *supra*.

In *McDuffy v. Sec'y of the Executive Office of Educ.*, 415 Mass. 545, 560, 615 N.E.2d 516, 524 (1993), defendants asserted that "the language of the entire section is 'aspirational' and a 'noble expression of the high esteem in which the framers held education,' but that it is not 'mandatory.'" The Supreme Judicial Court disagreed, and emphasized the strong connection between the Commonwealth's duty[14] and the reasons for establishing that duty:

> The two statements at the beginning of Part II, C. 5, § 2, state plainly the premises on which the duty is established: First, the protection of rights and liberties requires the diffusion of wisdom, knowledge, and virtue throughout the people. Second, the means of diffusing these qualities and attributes among the people is to spread the opportunities and advantages of education throughout the Commonwealth. In the statement of these two premises for which the duty is established it is revealed that: *The duty is established so that the rights and liberties of the people will be preserved. The immediate purpose of the establishment of the duty is the spreading of the opportunities and advantages of education throughout the people; the ultimate end is the preservation of rights and liberties.* Put otherwise, an educated

[14] " … to cherish the interests of literature and the sciences, and all seminaries of them; especially … public schools and grammar schools in the towns … "

> people is viewed as essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional democratic State.

McDuffy, 415 Mass. at 560-561, 615 N.E.2d at 524 (emphasis added).

Likewise, in Missouri, the "immediate purpose" of the duty to "establish and maintain free public schools" is to "preserve[e] the rights and liberties of the people" through the "general diffusion of knowledge and intelligence" to all children in Missouri 21 years of age or younger. And as an *essential* goal of schools, a general diffusion of knowledge sufficient to preserve the rights and liberties of the people *must* be achieved by the legislature, superseding any other apparent constitutional or statutory limitations.

The constitution of Indiana is even closer in language to Missouri's:

> ***Knowledge and learning, general diffused throughout a community, being essential to the preservation of a free government***; it should be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall without charge, and equally open to all.

Ind. Const., art. VIII, § 1 (emphasis added).

The Court of Appeals in Indiana also recognized the interrelation of clauses in this section, and the importance of the "introductory" clause in giving substance to the state's duty to establish schools:

> All parts of this article are clearly interrelated. The "knowledge and learning" refers to the "moral, intellectual, scientific and agricultural improvement," and one of the "suitable means" by which to "encourage" such "improvement" is a "general and uniform system of Common Schools." The purpose of these schools is so "essential to the preservation of a free government" that the General Assembly will provide "tuition without charge and equally open to all."

Bonner v. Daniels, 885 N.E.2d 673 (Ind. App. 2008)

The *Bonner* court construed this section as a whole to require a particular level of education, holding that it "imposes a duty on the State to provide an education that equips students with the skill and knowledge enabling them to become productive members of society." The court outlined further specific parameters as standards to be met by any constitutional school funding formula:

> Given the complexities of our society today, the State's constitutional duty necessarily must extend beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas. As such, a constitutionally-mandated public education is not a static concept removed from the demands of an evolving world. Mere competence in the basics—reading, writing, and mathematics—is insufficient in the beginning days of the Twenty-First Century to insure that this State's

> public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in Indiana's economy.

See also *Claremont School District v. Governor* (Claremont I), 138 N.H. 183, 635 A.2d 1375 (1993), similarly interpreting New Hampshire's colonial-era "diffusion of learning" provision.

Texas also has an education provision that is an analogue of Missouri's:

> ***A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people***, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Tex. Const., art. VII, § 1 (emphasis added).

The Texas Supreme Court deemed it prudent to look to the "diffusion" clause to determine whether the state's education finance scheme met the constitutional standards for "efficiency":

> [The constitutional framers and ratifiers] stated clearly that the purpose of an efficient system was to provide for a "*general* diffusion of knowledge." The present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced.

Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989) (Edgewood I) (Emphasis in original).

The same deficiencies can be found as a result Missouri's school funding scheme: a "limited and unbalanced" diffusion of knowledge that violates the state constitution's mandate for *general* diffusion.

In Texas, the "general diffusion of knowledge" clause is far from merely aspirational, but supports the existence of an affirmative obligation of the state's school financing system: to provide for the general diffusion of knowledge. *See Edgewood I*, 777 S.W.2d at 397. The Court in Texas has read this section as embodying an adequacy standard:

> [T]he provision also requires the Legislature to meet three standards. First, the education provided must be adequate; that is, the public school system must accomplish that "general diffusion of knowledge … essential to the preservation of the liberties and rights of the people".

West Orange-Cove Consolidated Independent School District v. Alanis, 107 S.W.3d 558 (2003).

The Supreme Court of Texas has reiterated that "general diffusion" sets the minimum standard for the state's educational funding scheme: "[T]he accomplishment of 'a general diffusion of knowledge' is the standard by which the adequacy of the public education system is to be judged." *Neeley v. West Orange-*

Cove Consolidated Independent School District, 176 S.W.3d 746 (2005) (West Orange-Cove II).

This Court cannot turn its back on the "general diffusion" clause and the legacy of this country's founders' demands for excellence in education as an essential means for preserving republican ideals, rights, and liberties. In light of its history and the consistent interpretations of analogous constitutional provisions across the country, Missouri's education clause establishes that the paramount goal of the state's system of school funding must be to provide an adequate education that meets standards sufficient to preserve rights and liberties and "includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas." *Claremont I*, 138 N.H. at 192, 635 A.2d at 1381. Missouri's General Assembly recognized and embraced similar goals by requiring the State Board of Education to adopt comprehensive, high level academic performance standards that will "prepare students for postsecondary education or the workplace or both; and are necessary in this era to preserve the rights and liberties of the people."[15] Such goals are unattainable without a guarantee of educational adequacy.

II. The trial court erred in holding that the Missouri Constitution does not require adequate state funding for free public schools beyond the

[15] Section 160.514(1), RSMo.

25% "minimum" of § 3(b), because § 1(a) requires that the General Assembly provide a system of school funding sufficient to provide all school children a substantive opportunity to learn that meets quality standards, and the courts of Missouri are empowered to establish explicit standards and parameters to guide the General Assembly in enacting appropriate legislation to remedy the constitutional defects, a scheme that has often led to successful educational reforms and academic improvement in other states.

The decision of the trial judge relied heavily on the twenty-five percent "requirement" embodied in Article IX, § 3(b) as providing some kind of ceiling for constitutionally sufficient state funding for public education in Missouri, and opined that any state funding from the General Assembly above and beyond the Article IX, § 3(b) limitation would be entirely discretionary. That conclusion was in error.

As set forth above, § 1(a) establishes a mandatory constitutional adequacy standard that the framers of the Missouri Constitution intended as fundamental, paramount, essential, and supersessory. No other constitutional or statutory provision can weaken that mandate. In a concurrence in the 1993 decision discussed by the court below, two Supreme Court judges characterized the § 3(b) limitation as merely a *presumptively* adequate funding obligation. *Comm. for Educational Equality v. State of Missouri*, 878 S.W.2d 446, 458 (Mo. Banc 1994) (Robertson and Limbaugh, JJ, concurring). The presumption of adequacy, however, is

rebuttable where the funding is insufficient to meet the standards of § 1(a). While the concurrence (and the trial court decision in this case) argue that the General Assembly has the discretion to supplement the § 3(b) limitation when the presumptive amount is "insufficient to sustain free schools," § 1(a) transforms that discretion into a mandate. There is legislative discretion inherent in § 3(b), but it goes to *how* the General Assembly is to implement funding to overcome deficiencies, not *whether* additional funding will be supplied beyond the twenty-five percent.

III. The trial court erred in refusing to recognize that clear standards have been key to the successful resolution of "adequacy" cases by courts in sister states.

"Adequacy" cases in sister states have been resolved through judicial intervention that respects the constitutional duties of the various branches of government, and establishes explicit standards and parameters as guidance for the state. The non-judicial branches then fashion and implement laws and regulations that remedy the constitutional defects found by the courts.

A. Contemporary State Educational Standards Have Provided Courts Substantive Content for the Constitutional Right to an Adequate Education.

One of the reasons why so many of the state courts have enforced the constitutional right to an adequate education in recent years is that both the need to do so and the means to do so have been brought to the fore by "standards-based reform." Commencing with the 1989 National Education Summit convened by President George H.W. Bush, the governors of all 50 states, business leaders, and educators began to work to articulate specific state academic goals.[16] All 50 states have developed extensive, comprehensive curriculum standards.

State standards are built on substantive curriculum standards in English, mathematics, social studies, and other major subject areas. These curriculum standards are usually set at the cognitive levels that prepare students for their responsibilities as citizens and meet the competitive standards of the global economy.[17] Further, they are premised on the assumption that almost all students can meet these expectations, if given sufficient opportunities. Once the curriculum standards have been established, all other aspects of the education system—including teacher training, teacher certification, and student assessments—are aligned with these standards. The aim is to create a seamless web of teacher preparation, curriculum implementation, and student testing, all coming together to

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[16] Marc S. Tucker & Judy B. Codding, *Standards for Our Schools* 40-43 (1998).

[17] *Design of Coherent Education Policy: Improving the System* (Susan H. Fuhrman ed., 1993).

create a coherent, integrated system that will result in significant improvements in achievement for all students.[18]

These standards also provide judges workable criteria for defining the constitutional parameters of the concept of educational opportunity, and they provide significant input for "judicially manageable standards" and practical resolution of these litigations. 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

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[18] The standards approach responds to the reality that by 2020, more than half of the students in the nation's public schools will be from "minority backgrounds." If these students are not well-educated, the United States will be at a severe competitive disadvantage in maintaining its standard of living in an increasingly "flat world." *See* Thomas Bailey, *Implications of Educational Inequality in a Global Economy*, in *The Price We Pay: Economic and Social Consequences of Inadequate Education* 89 (Clive R. Belfield & Henry M. Levin eds., 2008). Moreover, the cost to the nation of inadequately educating our young people is approximately $219,000 for each of the approximately 600,000 students who drop out of high school each year in terms of lost tax revenues, health and welfare costs, criminal justice expenses, and welfare payments. *Id.* at 189, 117.

branch of the government has already promulgated educational standards pursuant to the legislature's directive in I.C. § 33-118.

Idaho Schools for Equal Educational Opportunity v. State (*ISEEO III*), 976 P.2d 913, 919 (Idaho 1998) (citation omitted).

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 then reviewed the standards in a number of subject areas and concluded that, if implemented, they would provide 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).

Across the country, curriculum standards developed by legislatures or state departments of education provide clear articulations of what children need to learn and important data on whether they have, in fact, learned this material. These standards also provide practical benchmarks for determining whether all schools have been provided with sufficient resources to provide their students with a reasonable opportunity to meet the standards that the states themselves have established.

The curriculum standards also put into focus the fundamental goals and purposes of our system of public education. The overwhelming majority of state high courts that have defined an adequate education have focused on the importance

of preparing students to be effective citizens and competitive participants in the economy. For example, the Supreme Court of South Carolina defined minimum adequacy, *inter alia*, in terms of "fundamental knowledge of economic, social, and political systems and of history and governmental processes … and vocational skills." *Abbeville County School District v. State*, 515 S.E.2d 535 (S.C. 1999). And in Texas, the Supreme Court found that it was the intent of the framers of the constitution's education clause to diffuse knowledge "for the preservation of democracy … and for the growth of the economy." *Edgewood Indep. Sch. Dist v. Kirby*, 777 S.W.2d 391, 395-96 (Tex. 1989).[19]

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[19] *See also Serrano v. Priest*, 487 P.2d. 1241, 1258-59 (Cal. 1971) (education is "crucial to . . . the functioning of a democracy [and to] an individual's opportunity to compete successfully in the economic marketplace"); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (defining constitutional duty in terms of preparing "citizens for their role as participants and as potential competitors in today's marketplace of ideas"); *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (interpreting the constitutional requirement as "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market"); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E. 2d 326, 331-32 (N.Y. 2003) (defining "sound basic education" in terms of the "opportunity for a meaningful high school education, one which prepares them to function productively as civic participants . . . . [and] to

In this case, the trial court should have looked to the Missouri state board of education's detailed and comprehensive academic performance standards and curriculum frameworks to help articulate the parameters of the constitutional right to an adequate education. See § 160.514, RSMo:

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compete for jobs that enable them to support themselves"); *Brigham v. State*, 692 A.2d 384, 390, 397 (Vt. 1997) (declaring that the state's right to education clause "guarantees . . . political and civil rights" and preparation "to live in today's global marketplace"); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) (defining the state constitution's mandate in terms of the "educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas"); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (defining the core adequacy requirement in terms of preparation for "useful and happy occupations, recreation and citizenship"); *Campbell Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995) (defining the core constitutional requirement in terms of providing students with "a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually"). *See also Bonner v. Daniels*, 885 N.E.2d 673 (Ind.App. 2008) ("A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in Indiana's economy").

1. [T]he state board of education shall adopt no more than seventy-five academic performance standards which establish the knowledge, skills and competencies necessary for students to successfully advance through the public elementary and secondary education system of this state; lead to or qualify a student for high school graduation; prepare students for postsecondary education or the workplace or both; and are necessary in this era to preserve the rights and liberties of the people.[20] …

3. The state board of education shall develop written curriculum frameworks that may be used by school districts. Such curriculum frameworks shall incorporate the academic performance standards adopted by the state board of education pursuant to subsection 1 of this section. The curriculum frameworks shall provide guidance to school districts but shall not be mandates for local school boards in the adoption or development of written curricula …

B. <u>Sister State Courts Have Devised Workable and Effective Solutions in Adequacy Cases.</u>

The successes of the remedies implemented in adequacy cases brought in other states are evident from the long-term gains in student achievement scores and

[20] These are set forth in State Board of Education regulations at 5 CSR 50-375.100 (Academic Standards).

other academic outcomes. In Kentucky, where the legislature instituted extensive reforms immediately after the Court's decision in *Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989), free and reduced 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 NAEP tests.[21] In Massachusetts, where the Supreme Judicial Court issued an extensive education adequacy decision in 1993,[22] between 1998 and 2004 the failure rate of 10th graders taking the highly

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[21] Susan Perkins Weston & Robert F. Sexton, *Substantial and Yet Not Sufficient: Kentucky's Effort to Build Proficiency for Each and Every Child* (2007, Working Paper) *available at* www.tc.edu/symposium/symposium07/resource.asp. The legislative reforms in Kentucky included State-funded preschool for four-year-olds from low-income families and three- and four-year-olds with disabilities; after-school, weekend, and summer support; a statewide technology system for classroom instruction, accountability, and communication; and Family Resource Centers and Youth Service Centers to address home challenges. Id. at 4.

[22] *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993). Legislative reforms implemented in Massachusetts in 1993 included implementation of curriculum standards, revised teacher certification standards, student assessments and remediation programs for low-performing students, accountability safeguards for schools and school districts, and a new school funding formula with increased state contributions. *See* Paul Reville, *The Massachusetts*

challenging Massachusetts Comprehensive Assessment System (MCAS) exams dropped dramatically from 45% to 15% in math and from 34% to 11% in English language arts, and Massachusetts became the highest scoring state on NAEP.[23] Improvements in student achievement in state assessments in New Jersey in the wake of the Supreme Court's decision in *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), have also been dramatic. From 1999 to 2005, for example, mean scale scores rose nineteen points in 4th grade mathematics, with the greatest increases occurring in the thirty low-wealth districts that were the focus of the *Abbott* litigation, and almost halving the mathematics achievement gaps between the lowest wealth districts and the rest of the state.[24]

Case: A Personal Account (2007, Working Paper) *available at* www.tc.edu/symposium/symposium07/resource.asp.

[23] *See* Reville, *supra* n.34, *The Massachusetts Case.*

[24] Margaret E. Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey* (2007, Working Paper) *available at* www.tc.edu/symposium/symposium07/resource.asp. In addition to increasing funding for the low-wealth districts in New Jersey, the Abbott reforms included: whole school reform for elementary schools; full-day kindergarten; half-day preschool programs for 3 and 4 year-olds; referral for social and health services; security, technology, alternative school, and school-to-work programs; supplemental funding (based on need) for summer school, added security, and

Successful results have also been demonstrated in Maryland, another state where an adequacy case on behalf of school children was necessary in order to compel the state to provide sufficient funding and resources for public education.[25] In response to the *Bradford* case, initiated in 1994, the state implemented the "Bridge to Excellence in Public Schools Act" in 2002, which brought an additional $1.3 billion in state aid to public schools between 2002 and 2008. According to research released in January 2009, this increased funding resulted in improved student proficiency levels on the reading and math assessments among all ethnic groups of elementary and middle school students.[26]

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school-based health and social service programs; funding to address facilities deficiencies and the construction of additional classrooms; early literacy programs; smaller class sizes; family support teams in elementary schools; secondary school reforms and technology personnel. Id.

[25] *See Maryland State Bd. of Educ. v. Bradford*, 387 Md. 353, 875 A.2d 703 (2005).

[26] "The gaps in the percentages of Maryland students who needed to demonstrate proficiency to meet the NCLB goal of 100 percent proficiency by 2014 were closed by 51 percent in reading and 49 percent in math for the statewide aggregate of students in elementary school grades (3 to 5) and 36 percent in reading and 39 percent in mathematics for the aggregate of students in the middle school grades (6 to 8)." MGT of America, Inc., *An Evaluation of the Effect of Increased*

Legislatures and governors have responded positively (albeit with varying levels of promptness and enthusiasm) to judicial decrees in almost all of the adequacy cases. Arizona is one example of the successful implementation of a remedy in an educational adequacy case in response to a judicial mandate. In *Roosevelt Elementary School District No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994), the state Supreme Court held that Arizona's system of providing capital funding for education did not meet the constitutional requirements of a "general and uniform" system of common schools. The Court ordered the state to enact a new capital funding system that would provide "adequate" school facilities, defined by the court as "financing sufficient to provide facilities and equipment necessary and appropriate to enable students to master the educational goals set by the legislature." *Hull v. Albrecht*, 524, 950 P.2d 1141, 1145 (Ariz. 1997) (*Albrecht I*).[27] In response, the state created a new capital funding system in 1998 that has successfully built and renovated schools throughout Arizona ever since, including in rural, predominantly minority school districts similar to the Plaintiff Districts in this case.[28]

State Aid to Local School Systems Through the Bridge to Excellence Act Final Report (Volume I) (2008) at v.

[27] See Hunter, M.A., *Building on Judicial Intervention: The Redesign of School Facilities Funding in Arizona*, 34 J. L. & Educ. 173 (2005).

[28] See *id.* at 196-197.

Another successful solution is found in Arkansas in the *Lake View* cases. Beginning with *Lake View School District No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002) (*Lake View III*), *cert. denied*, 538 U.S. 1035 (2003), the state Supreme Court defined educational adequacy and gave the legislature a deadline by which to remedy the constitutional deficiencies. The court reviewed the legislature's actions and praised its progress in bringing the funding system into compliance with the state constitution. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 189 S.W.3d 1 (Ark. 2004) (*Lake View IV*).[29]

Experience with successful education adequacy cases has shown that constitutional rights in this area can be vindicated through the efforts of a state court fulfilling its prime responsibility to interpret the state constitution and determine whether the state's education finance system passes constitutional muster. For

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[29] *See also Lake View Sch. Dist. No. 25 v. Huckabee*, 220 S.W.3d 645 (Ark. 2005); *Lake View Sch. Dist. No. 25 v. Huckabee*, 370 Ark. 139 (2007). Reforms implemented in Arkansas included a thorough assessment of school facilities needs; appropriations for facilities repairs and construction; increases in foundation aid; increases in categorical aid for districts educating ELL students, students from low-income families, and other at-risk students; increases in minimum teacher salaries; continuous assessment and evaluation; and a comprehensive system of accounting and accountability. Id.

example, in Arkansas, the state Supreme Court delineated the respective roles of the complementary branches of government:

> Development of the necessary educational programs and the implementation of the same falls more within the bailiwick of the General Assembly and the Department of Education. … The trial court's role and this court's role, as previously discussed in this opinion, are limited to a determination of whether the existing school-funding system satisfies constitutional dictates and, if not, why not.

Lake View III, 91 S.W.3d at 507-08. A similar process was undertaken in Arizona:

> There are doubtless many ways to create a school financing system that complies with the constitution. As the representatives of the people, it is up to the legislature to choose the methods and combinations of methods from among the many that are available. Other states have already done so.

Roosevelt, 877 P.2d at 816.

In New York as well, the Court of Appeals in *CFE II* took an approach that afforded the state flexibility and discretion to determine the actual cost of providing a constitutional education, without intruding upon the other branches by specifying class sizes, teacher quality characteristics, or other specific criteria that would inform such a judgment. *CFE II, 801 N.E.2d at 348.*

Courts play a critical part in repairing defects in our public institutional systems. They take a principled approach to issues, and their long term "staying

power" is essential for providing continuing guidance on constitutional requirements and sustained commitment to meeting constitutional goals. The types of remedial orders that have been issued by state courts in these school funding cases demonstrate an effective use of judicial power and lead to successful resolution of litigations and meaningful vindication of children's constitutional rights.[30]

This Court now has an opportunity to carry out its obligation to determine whether Missouri's educational system conforms to the state constitution. Plaintiffs at trial provided ample details of the State's constitutional violations in many of the Plaintiff Districts. This Court should exercise its authority to direct the State to carry out *its* duty to legislate a public school system that conforms to constitutional mandates.

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[30] Wisconsin Law Professor Neil Komesar has explored a comparative institutional approach to the separation of powers doctrine and argued that courts must analyze the actions of other government branches. *See* Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 149 (1994); Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 Mich. L. Rev. 657 (1988); Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. Chi. L. Rev. 366 (1983).

CONCLUSION

We join in the Plaintiffs' request that this Court declare the current state education finance system unconstitutional and require the Defendants to devise a constitutionally sound system.

Respectfully Submitted,

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RULE 84.06 CERTIFICATION

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b) and contains 11,855 words. The disk submitted with this brief has been scanned for viruses and to the best of my knowledge is virus-free.

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