SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 18032

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING, et al.
Plaintiffs-Appellants

v.

GOVERNOR M. JODI RELL, et al.
Defendants-Appellees

BRIEF OF DEFENDANTS-APPELLEES WITH SEPARATE APPENDIX

For the Defendants-Appellees

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INTRODUCTION

In claims that reach far beyond this Court's holdings in Horton and Sheff, plaintiffs seek to have the Court act as a super-legislature over all of the State's public schools in 169 municipalities, deciding matters ranging from the qualification of teachers to appropriate class sizes. They not only seek to constitutionalize specific educational requirements traditionally left to the legislature and municipalities, they also ask this Court to interpret the state constitution as requiring specific educational outcomes. Entertaining plaintiffs' claim would represent an improper and unprecedented interference by the courts with core legislative functions, and entanglement in this State's education policy-making. This Court should hold -- as have many sister-state courts faced with similar claims -- that this case presents a political question outside this Court's jurisdiction.

Even if this Court has jurisdiction, the Connecticut constitution does not contain a judicially-cognizable guarantee of a "suitable" education. Article eighth, §1's history, this Court's decisions and the text of other constitutional provisions make clear that the lack of such a textual basis was intentional. As the trial court correctly recognized, Connecticut could have chosen to write a suitability standard into its constitution, as other states have, but chose not to do so. This Court should decline plaintiffs' invitation to re-write the state constitution to create a sweeping affirmative constitutional obligation that is contrary to the framers' intent and would make this Court -- rather than elected officials -- the primary decision-maker for the education policies of this State.

Plaintiffs and the amici claim that affirming the trial court's decision will place Connecticut alone among the states that have considered the issue. These arguments do not withstand scrutiny. No other state has done what plaintiffs have asked this Court to do, namely, without explicit language, engraft a suitability requirement into the state

constitution that, when invoked, wrests control of the state's education system from the other co-equal branches of state government. The handful of states with comparable constitutional educational provisions have either rejected such claims on justiciablity grounds, or have only found a right to a minimum qualitative level, a claim not asserted by plaintiffs below.

Moreover, Connecticut's well-established right to equal educational opportunity -- a claim which remains in this case -- fully protects the interests of Connecticut's children simultaneously allowing the people and their elected officials to run the schools, and permitting educators the flexibility necessary for educational innovation. This Court should affirm the trial court's decision.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Plaintiffs are a non-profit advocacy group and parents of public school students in various towns and cities, who brought this putative class action against the Governor, the members of the State Board of Education, the Commissioner of Education, the State Treasurer and the State Comptroller (collectively the "State"). Amended Complaint ("AC") ¶¶5-37. The amended complaint alleges that article eighth, §1 of Connecticut's constitution guarantees a "suitable" public school education, that the state defendants have an "affirmative duty to provide suitable educational opportunities," and that the State must "fulfill its constitutional duty through appropriate legislation." AC ¶¶45, 47. Nowhere do plaintiffs allege that any state educational statute is unconstitutional.

Plaintiffs define a "suitable educational opportunity" as one that results in the following outcomes:

a. All students must receive an educational experience that prepares them to function as responsible citizens and enables them to fully participate in democratic institutions;

b. All students must receive an opportunity to complete a meaningful high school education that enables them to advance through institutions of higher learning, or that enables them to compete on equal footing to find productive employment and contribute to the state's economy;

c. all students must receive a suitable opportunity to meet standards which the state has set based on its estimation of what students must learn in order to achieve the goals of paragraphs 46a-42b [sic].

AC ¶¶46, 81-83. Plaintiffs further allege that article eighth, §1 requires the following "essential inputs of a suitable educational opportunity:" (a) high quality preschool; (b) appropriate class size; (c) programs and services for at-risk students; (d) highly qualified administrators; (e) highly qualified teachers; (f) modern and adequate libraries; (g) modern technology and appropriate instruction; (h) adequate number of hours of instruction; (i) rigorous curriculum with wide breadth of courses; (j) modern and appropriate textbooks; (k) school environment that is healthy, safe, well-maintained, and conducive to learning; (l) adequate special needs services as set forth in the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq.; (m) appropriate career and academic counseling; [and] (n) adequate array of and suitably run extracurricular activities." AC ¶53.

Plaintiffs further ask, among other things, that the Court to decide and order the "appropriate" number and quality of personal computers, the "appropriate" number of advanced placement (AP) courses that must be offered, whether world languages must be offered in elementary school, the type and quantity of library materials, and how many counselors a school must employ. AC ¶¶56; 60(b); 60(h); 60(i); 62(c); 64(c), (d).

Plaintiffs further seek judicial determinations regarding what "essential courses" should be provided to public school students, AC ¶107, whether students were "advanced

but not prepared," AC ¶ 99, and whether students were inappropriately promoted to the next grade, AC ¶101. Plaintiffs further urge the Court to (i) determine "appropriate" class size, textbooks, technology and counseling, AC ¶¶ 53, 56(b), 60(b), (c), 64(d); (ii) evaluate the "rigor" of the curriculum and the "breadth" of offered courses, id.; (iii) estimate the "adequate" hours of instruction and special needs instruction, AC ¶¶ 53, 56(c), 58(d); (iv) judge the sufficiency of the library facilities, and selection of extracurricular activities, id.; (v) determine the qualifications for "highly-qualified" preschools, teachers and administrators, AC ¶¶ 53, 56(d); (vi) evaluate whether schools are "healthy, safe, well-maintained, and conducive to learning" as a constitutional matter, AC ¶¶ 53, 62(d); and (vii) assess the physical conditions of offices and all-purpose rooms, id.

Plaintiffs would moreover have the Court assess whether special education students should be "pulled-out" of their classes or co-taught in their classrooms, AC ¶¶ 56(e), 58(b), 62(a), (b), 64(a), (b), and whether that a public school is constitutionally deficient because it lacks a gifted and talented program, or has "insufficient" students in a gifted and talented program. AC ¶¶ 9, 11, 12, 14, 16, 18, 20, 21, 23, 25, 27, 29, 30. Plaintiffs further invite the court to establish teacher qualification standards, and the mandatory hours of instruction necessary in a given school year, even though these matters are already governed by state statute. Compare AC ¶¶ 56(d), 58(d) with Conn. Gen. Stat. §§ 10-144o, 10-16. Plaintiffs appear to seek an order mandating public preschool. AC ¶¶ 56(a), 58(a), 60(a).

Wrongly assuming there exists a judicially-cognizable constitutional right to a "suitable" education, plaintiffs request the court to evaluate "low levels of education outputs." AC ¶¶ 81-83. Relying upon the statutory mandates of the federal No Child Left Behind ("NCLB") Act, 20 U.S.C. § 6301 et seq., plaintiffs ask the Court to assess whether

free and public education, as guaranteed by the state constitution, is being provided by evaluating test scores, retention rates, what types of courses are offered and graduation rates. AC ¶¶ 89-114.

Amidst these allegations, plaintiffs fail to acknowledge, much less challenge as unconstitutional, the extensive body of state education statutes that govern many, if not most, of the specifics that form the foundation for their claims. The General Statutes are replete with laws governing the duration, scope and content of public elementary and secondary education in this state. Striking a careful balance between local control and input and state direction and regulation, Connecticut statutes mandate universal availability and attendance, Conn. Gen. Stat. §§10-15, 10-15c, 10-184; a minimum length of school year, Conn. Gen. Stat. §10-16; mandatory attendance in a school program or home schooling, Conn. Gen. Stat. §10-184; prescribed courses of study, e.g., Conn. Gen. Stat. §§ 10-16b, 10-18, 10-18a, 10-18b, 10-19, 10-27; school readiness programs, Conn. Gen. Stat. §10-16o et seq.; English as the language of instruction, along with bilingual programs, Conn. Gen. Stat. §§10-17 et seq.; mandated mastery testing, Conn. Gen. Stat. §§10-14n et seq., 10-239i; ethnic and racial diversity, Conn. Gen. Stat. §§10-65a, 10-226h; textbooks, Conn. Gen. Stat. §10-229; special education services, Conn. Gen. Stat. §§10-76 et seq.; school discipline, Conn. Gen. Stat. §§10-233 et seq.; qualifications of teachers and administrators, Conn. Gen. Stat. Title 10, Chapter 166; school transportation, Conn. Gen. Stat. §10-186; truancy and drop out prevention, Conn. Gen. Stat. §§10-198a et seq.; as well as laws governing the myriad details of school structure and governance, Conn. Gen. Stat. §§10-218 et seq. Notably, this is only a partial list of the many and varied statutes governing this State's education policies.

Plaintiffs' action consists of four counts, three of which assert a state constitutional right to a "suitable" education. In none of the counts do plaintiffs seek to establish a constitutional right to a "minimally adequate" education.

As the trial court observed, plaintiffs' prayers for relief are "ambitious." Memo. of Decision of Sept. 17, 2007 ("MOD"), 7 (State app. at A1-A41). They ask the Court to declare that: (i) there is a state constitutional right to a suitable education, as they define it; (ii) the State has failed to provide such suitable education; and (iii) the existing school funding system is unconstitutional. The plaintiffs further seek Court orders (a) enjoining the State from operating the current public education system; (b) directing the State to create and maintain a suitable public education system; (c) appointing a Special Master to evaluate whether the State's proposed new system of education properly meets plaintiffs' suitability requirements; (d) awarding attorneys' fees pursuant to 42 U.S.C. § 1983; and (e) retaining jurisdiction and award such other relief as necessary. AC ¶ 172.

The State moved to strike the three counts of the complaint that alleged that the Connecticut constitution guaranteed a "suitable" education, and left the Third Count, which alleged only that the "plaintiffs have been denied 'substantially equal' educational opportunities, without reference to whether those opportunities are suitable." MOD, 2 n.4. After a lengthy oral argument, on September 17, 2007, the trial court granted the State's motion to strike, holding that plaintiffs' claims were justiciable, but concluding, after applying the legal analysis set forth in State v. Geisler, 222 Conn. 672 (1992), that plaintiffs could not state a claim upon which relief could be granted. MOD, 41. On October 12, 2007, the trial court granted plaintiffs' Practice Book § 61-4 motion for permission to appeal. On October 31, 2007, the Chief Justice Chase T. Rogers granted plaintiffs' application for

certification of immediate expedited appeal pursuant to Conn. Gen. Stat. § 52-265a. This appeal followed.

STANDARD OF REVIEW

Whether the Connecticut constitution creates a judicially cognizable right to a suitable education presents a question of law that is subject to plenary review. See Batte-Holmgren v. Comm'r of Pub. Health, 281 Conn. 277, 294 (2007). A motion to strike challenges "the legal sufficiency of a pleading . . . and, consequently, requires no factual findings by the trial court. As a result, [this Court's] review of the court's ruling is plenary." Id., citing Greco v. United Techs. Corp., 277 Conn. 337, 347 (2006).

ARGUMENT

Although the breathtaking scope of plaintiffs' stricken claims clearly presented a nonjusticiable political question, the trial court correctly determined that the state constitution does not create a judicially cognizable right a "suitable" education, and the trial court properly addressed that threshold legal issue via the State's motion to strike.

I. THIS CASE PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

Relying on Sheff v. O'Neill, 238 Conn. 1, 18 (1996), plaintiffs contend that this Court has already "conclusively determined" that their claims are justiciable, and that the doctrine of separation of powers does not preclude this Court from considering their suitability claim. Pl. br., 29. Plaintiffs' reliance on Sheff, which did not consider or decide plaintiffs' suitability claim, is misplaced. Both before Sheff and since, this Court has made clear that "[w]hether a controversy so directly implicates the primary authority of the legislative or executive branch, such that a court is not the proper forum for its resolution, is a determination that must be made on a case-by-case inquiry." Seymour v. Region One Bd. of Educ., 261 Conn. 475, 482 (2002) (quoting Nielsen v. Kezer, 232 Conn. 65, 74-75 (1995)). Therefore,

this Court must determine whether plaintiffs' claims -- which they acknowledge are distinct from those this Court has previously addressed -- cross the "uneasy line that distinguishes between cases that are justiciable and cases that are not." Sheff, 238 Conn. at 13.[1]

This Court's precedents establish both that the line between judicial and political questions has meaning -- even in the realm of education -- and that plaintiffs' claims have crossed to the political side of that line. The political question doctrine is grounded firmly in the constitutional mandate of separation of powers. "It is well settled that certain political questions cannot be resolved by judicial authority without violating the constitutional principle of separation of powers." Kezer, 232 Conn. at 74. See Conn. Const., Art. II. In determining whether a question is political, and therefore nonjusticiable, this Court examines the "specific forms of relief that the plaintiffs seek" and considers whether:

> (1) the text of the constitution demonstrates that the issue is committed to another branch of government; (2) there are no judicially discoverable and manageable standards for resolving the issue; (3) in order to decide the case, the court would be required to make an initial policy determination of the kind that clearly involves nonjudicial discretion; (4) the court would be required to express a lack of due respect to a coordinate branch of government; (5) there is an unusual need for unquestioning adherence to a preexisting political decision; or (6) there is a potential of embarrassment from multifarious pronouncements by various other governmental departments on one question.

Seymour, 261 Conn. at 484 (citing Nielsen v. State, 236 Conn. 1, 7 (1996)). If any one of these six circumstances are inextricably present, the Court must defer to the legislature because "'[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on

[1] Although plaintiffs object to the trial court's resolution of their claims on a motion to strike, they do not challenge the trial court's decision to address the State's justiciablity argument in that motion. MOD, 3 n.6. As the trial court correctly recognized, justiciablity impacts subject matter jurisdiction and thus the court must address it whenever, and however, it is raised. Office of the Governor v. Select Comm. of Inquiry, 271 Conn. 540, 569 (2004).

the vigilance of the people in exercising their political rights.'" Pellegrino v. O'Neill, 193 Conn. 670, 679 (1984) (quoting Colegrove v. Green, 328 U.S. 549, 556 (1946)). "Although it is widely assumed that the judiciary, as the ultimate arbiter of the meaning of constitutional provisions, must determine every constitutional claim presented and provide appropriate relief, some constitutional commands fall outside the conditions and purposes that circumscribe judicial action." Pellegrino, 193 Conn. at 679.

The first factor -- whether the text commits the issue to another branch of government -- makes clear that education policy is solidly within the legislature's purview. Article eighth, §1 expressly provides that "[t]here shall always be free public elementary and secondary schools in this state" and that "[t]he general assembly shall implement this principle by appropriate legislation" (emphasis added). The plaintiffs fail to challenge any of the State's extensive array of educational statutes, nor attack the constitutionality of a particular statute -- rather, the Court is asked to establish educational policy.

Plaintiffs seek to convince this Court that "[a]lthough plaintiffs in this case presented the trial court with a constitutional claim that requires the court to examine various elements of an educational system, plaintiffs are not seeking a judicial determination different in kind from the determination in Horton I." Pl. br., 30; Horton v. Meskill, 172 Conn. 615 (1977). This assertion ignores the fundamental differences between Horton I and Sheff -- which involved educational equality -- and this case, which involves educational suitability.[2] Equality is something courts are both equipped and adept at measuring (though it can be

[2] Adequacy cases such as this one are fundamentally different from equity cases such as Horton and Sheff, and this critical distinction is recognized throughout the scholarship on education reform litigation. See, e.g., Richard E. Levy, Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation, 54 Kan. L. Rev. 1021, 1026 (May 2006).

difficult and complex at times), while suitability requires the courts to usurp innumerable policy judgments properly left to the legislature. As one scholar has noted,

> Defining levels of adequacy requires that courts become involved in determining educational policies—the goals and the methods of delivering education—in a way that equity litigation does not. Likewise, fashioning remedies for violations of adequacy requirements is more problematic because legislatures may be reluctant to provide sufficient funding and because judicial enforcement of remedies against the legislature presents practical difficulties and raises serious separation-of-powers concerns.

Richard E. Levy, Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation, 54 Kan. L. Rev. 1021, 1033-34 (May 2006). Entertaining plaintiffs' suitability claims would require the Court to establish education policy, a responsibility entrusted to the co-equal branches of state government.

This Court's prior education rulings respect the legislature's primacy in establishing education policy. For example, in Seymour, the Court analyzed whether an educational funding issue presented a political question and held that "[t]here was no textual commitment [in the constitution] of the question presented" to a coordinate branch. Id. at 485. It nonetheless assessed whether any of the other circumstances creating a political question were present, and, although the Court ultimately concluded the claims were justiciable, it noted that "we would have grave doubts about the justiciablity of the claim" at issue in that case to the extent it would require the courts to "set the taxing powers and standards suggested by plaintiffs." Id. at 483. Thus, this Court has made clear that not all education cases are per se justiciable, as plaintiffs appear to argue. If courts are asked to establish standards, as plaintiffs do here, such claims are not justiciable.

Even if the text is not dispositive, the Court must analyze the remaining political question factors to determine whether they are required to defer to the legislature's primary

role. See Seymour, 261 Conn. at 483-84; cf. Office of the Governor, 271 Conn. at 574. The second factor -- the lack of judicially discoverable and manageable standards for resolving the claim -- is "'a hallmark of nonjusticiability.'" Nielsen, 236 Conn. at 12 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). Plaintiffs' claim is a textbook example of the lack of such standards. As the trial court correctly recognized, to entertain such claims, the court "would have to receive evidence concerning and determine" several questions that lack judicially discoverable and manageable standards, including inter alia what class sizes are "appropriate," what textbooks are "appropriate" and what extracurricular activities are "adequate." MOD, 35-36. In this regard, Nielsen is instructive. There, this Court held that deferring to the legislature was appropriate because the constitutional terms "increase in personal income," "increase in inflation" and "general budgetary expenditures" "have no inherent meanings that are readily discernable through judicial processes" and their definition "requires the exercise of political judgment rather than the application of judicial scrutiny." Id., 236 Conn. at 12.

Such reasoning applies with even greater force here. The constitutional text of article eighth, §1 contains none of the terms plaintiffs attribute to it. The term "suitable" does not appear and the text is similarly silent on such issues as "appropriate" class sizes, "modern" textbooks, or an "adequate array of and suitably run extracurricular activities." In this vein, plaintiffs present a laundry list of policy decisions, ranging from the appropriate number of advanced placement courses to the type and quantity of library materials they claim must be enshrined in the state constitution. None of these terms has a readily ascertainable inherent meaning. In an area that the constitutional text expressly delegates to the legislature, plaintiffs are asking the courts to make policy judgments on the running of

schools. As the Florida Supreme Court noted in holding that similar claims present political questions, plaintiffs "have failed to demonstrate in their allegations . . . an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both generally (in determining appropriations) and specifically (in providing by law for an adequate and uniform system of education)." Coalition for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 408 (Fla. 1996).

Similarly, the third political question factor -- whether ruling on plaintiffs' claims would require the court "to make an initial policy determination of that kind that clearly involves nonjudicial discretion" -- likewise militates against justiciablity. Seymour, 261 Conn. at 484. As the trial court correctly recognized, "it is not the function of the courts to establish the public policy of the state, absent a constitutional foundation for such a policy." MOD, 34 (emphasis in original). Moreover, this Court has already warned against judicial intervention in education policy though constitutional interpretation, holding -- in construing article eighth, § 2, which provides that the University of Connecticut shall be dedicated to educational "excellence" -- "that the constitutional standard of 'excellence' was not meant to be a wedge for penetration of the educational establishment by judicial intervention in policy decisions." Simmons v. Budds, 165 Conn. 507, 514 (1973). Plaintiffs nonetheless seek to have the Court make a large number of "initial policy determinations of the kind that clearly involve[s] nonjudicial discretion." See Seymour, 261 Conn. at 484. One example amply illustrates this. Although the state statutes already require regional and local boards of educations to purchase and offer free of charge all books, supplies, materials and equipment as they deem "necessary to meet the needs of instruction in its schools,"

plaintiffs seek to have the courts make the "initial policy determination," as a constitutional matter, regarding the quality of those textbooks and equipment. See Conn. Gen. Stat. §10-228, AC ¶¶ 53(g), 53(j), 56(d), 64(d). Similarly, although the state statutes already require career education, plaintiffs seek to have the courts make the "initial policy determination," as a constitutional matter, that career counseling is required and to have the courts determine the "appropriateness" of that counseling. See Conn. Gen. Stat. §10-16, AC ¶ 53(m). Again, although the state statutes are silent regarding class sizes, plaintiffs ask this Court to establish "appropriate" class sizes by judicial fiat. See AC ¶¶ 53(b), 60(b), (c).

Notably, educational policies and standards evolve over time. Class sizes, textbooks and library materials that were appropriate and acceptable even ten years ago may not be appropriate today. Is a particular district's public educational system constitutionally deficient because its computers have a Pentium® 2 rather than a Pentium® 4 CPU? Compare AC ¶¶ 53(g), 56(b), 64(d). Ten years from now, will a public school library be constitutionally deficient for failing to maintain a specific number of print materials in a world overtaken by electronic media? Compare AC ¶¶ 58(c), 60(d). Teachers' qualifications likewise have evolved over time. See, e.g., Conn. Gen. Stat. §10-144o et seq. Can a particular district's public educational system be constitutionally deficient when its teachers are licensed by the State? Compare AC ¶¶ 56(d) with Conn. Gen. Stat. §10-144o. Should the courts be in a position to judge a public school system constitutionally deficient notwithstanding it offers substantially more hours of instruction than are required by the standards established by the legislature? Compare AC ¶ 58(d) (provided 966 hours of instruction) and ¶ 53(h) (need "adequate number of hours of instruction") with Conn. Gen. Stat. § 10-16 (900 hours of instruction required). Should the courts determine which

courses are offered? Compare, e.g., AC ¶ 53(i) (suitable education requires "rigorous curriculum with wide breadth of courses") with Conn. Gen. Stat. §§10-16b, 10-18, 10-18a, 10-18b, 10-19, 10-27 (extensive list of prescribed courses of study).

For much the same reasons, the fourth factor in the justiciablity analysis -- a lack of due respect for a coordinate branch of government -- similarly mitigates against the court's jurisdiction. In their zeal to improve education, plaintiffs expressly seek to have the Court act as a super-legislature, overriding the state legislature's educational policies. To rule on plaintiffs' claims would reflect such a lack of due respect.

The fifth factor -- "an unusual need for unquestioning adherence to a preexisting political decision" -- is also present here. In light of article eighth, § 1's history and other states' constitutional provisions, the lack of any constitutional language supporting a judicially cognizable right to suitable educational opportunities reflects a considered policy judgment that educational policy should be determined by elected officials and that equality is the proper benchmark by which Connecticut's children are assured of a meaningful education See Moore v. Ganim, 233 Conn. 557, 596 (1995) ("The text of our constitution makes evident the fact that its drafters have been explicit when choosing to impose affirmative obligations on the state."). That political decision, which impacts the lives of everyone in the state and a substantial part of both state and local budgets, is entitled to adherence.

Finally, the sixth justiciablity factor likewise militates against entertaining plaintiffs' claims because there clearly exists "a potential of embarrassment from multifarious pronouncements by various other governmental departments on one question." See, e.g., Seymour, 261 Conn. at 484. Local school boards, the state department of education, the

state legislature and the courts would all be weighing in on myriad educational issues, from textbooks and computers, to teachers' qualifications and class sizes. Giving the courts -- which have the least expertise -- veto power over these policy issues would surely violate this principle

In sum, each of the established political question factors weighs against the courts hearing this case. Plaintiffs present no cogent arguments to the contrary. Instead, they wrongly argue that Sheff, which addressed a very different claim, "conclusively determined" that their claims are justiciable. Pl. br., 29. This Court has consistently held that the political question inquiry must be made on a case-by-case basis. Seymour, 261 Conn. at 482. This case is very different from Sheff and the application of the political question factors -- which Seymour establishes is required in education cases even after Sheff -- demonstrates that this case is not justiciable.

Contrary to plaintiffs' assertions, to conclude that this case presents a nonjusticiable political question would not be an abdication of judicial responsibility. Rather, it would be "a recognition that the tools with which a court can work, the data which it can fairly appraise, the conclusions which it can reach as a basis for entering judgments, have limits." See Office of the Governor, 271 Conn. at 573-74 (internal quotes omitted); Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion) ("Sometimes … the law is that the judicial department has no business entertaining the claim of unlawfulness -- because the question is entrusted to one of the political branches or involves no judicially enforceable rights.") Education is a core local and state political issue. The largest portion of every town's budget is for education, and each town struggles with how to spend its education dollars. These struggles leave to political engagement on the local level and serve the critical

purpose of giving parents a true say in their children's education, all of which would be lost if the Court ruled in plaintiffs' favor. Holding plaintiffs' claims nonjusticiable would be a recognition that for the courts "to express . . . due respect to" the General Assembly and, by extension, the State's electors and citizens, the courts must be "extremely hesitant to choose sides in the policy debate and to enshrine one policy choice as a matter of constitutional law." Moore, 233 Conn. at 614. "This is, after all, a democracy." MOD, 34.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFFS HAD FAILED TO STATE A JUDICIALLY COGNIZABLE CLAIM.

In interpreting the state constitution, this Court has established six factors that should be "considered to the extent applicable." State v. Geisler, 222 Conn. 672, 685 (1992). These factors are: "(1) the textual approach; (2) holdings and dicta of [the State Supreme Court] and the Appellate Court; (3) federal precedent; (4) sister state decisions or sibling approach; (5) the historical approach, including the historical constitutional setting and debates of the framers; and (6) economic/sociological" or policy considerations. Id. at 685 (citations and italics omitted); Contractor's Supply v. Comm'r, 283 Conn. 86, 98-99, 105-106 (2007). These factors compel the trial court's conclusion that the plaintiffs failed to state a judicially cognizable claim that article eighth, §1, includes the right to a "suitable" education.

A. Plaintiffs' Claim to a "Suitable" Education is Missing from the Constitution's Text.

The first Geisler factor directs the Court to the constitutional text. Article eighth, §1 provides: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." As the trial court correctly recognized, "[t]here is nothing in the text [of the constitution] that guarantees a 'suitable' educational opportunity." MOD, 17.

The absence of any such language wholly undermines plaintiffs' claims. If the framers intended to include a qualitative standard, they certainly knew how to do so, for they included one in the very next constitutional provision. Article eighth, §2 provides that the University of Connecticut "shall be dedicated to **excellence** in higher education." Thus the framers of the education provision were perfectly capable of writing into the constitution the suitability standard plaintiffs seek. They deliberately chose not to do so. Although plaintiffs may devoutly wish otherwise, "[i]t is not . . . the function of this court to rewrite the constitution." Bratsenis v. Rice, 183 Conn. 7, 10 (1981).

The framers' decision not to include an explicit suitability standard in article eighth, §1, when they included a suitability standard in article eighth, §2, is particularly compelling evidence that the right plaintiffs claim does not exist. "This court, unlike our federal counterpart, has not, to date, recognized a fundamental right under our state constitution that was not either expressly enumerated or implied by virtue of the due process guarantee of article first, §9." Moore v. Ganim, 233 Conn. 557, 593-94 (1995). "We are especially hesitant to read into the constitution unenumerated affirmative governmental obligations" because "[t]he text of our constitution makes evident the fact that its drafters have been explicit when choosing to impose affirmative obligations on the state." Id. at 595-96.

This Court has recognized that "[i]n dealing with constitutional provisions we must assume that infinite care was employed to couch in scrupulously fitting language a proposal aimed at establishing or changing the organic law of the state." Stolberg v. Caldwell, 175 Conn. 586, 597 (1978). Thus, this Court must assume that the framers intentionally chose not to include the suitability standard the plaintiffs now ask this Court to establish in §1, and intentionally chose to include such a standard in §2. Cf. Iovieno v. Comm'r of Corr., 242

Conn. 689 (1997) (based in part on the maxim expressio unius est exclusio alterius, "[t]he fact that the legislature specifically declined to include" discretionary language in one provision that is included in another "is strong evidence" for concluding that the lack of such language was intentional). The comparison between those provisions -- the public education provision containing no suitability standard and the higher education provision referring to excellence -- removes any doubt that the framers intentionally declined to impose a suitability requirement.

Plaintiffs make no effort to explain the absence of any explicit suitability language in article eighth, §1 or its presence in article eighth, §2. Instead, they layer one dictionary definition upon another in an effort to engraft a suitability component onto the word "schools," arguing -- after consulting two dictionaries and four definitions -- that to be "schools" for constitutional purposes, educational facilities must provide "'intellectual, moral and social,' or 'systematic instruction.'" Pl. br., 13. Yet these multi-layered definitions still do not support plaintiffs' argument because they impose no suitability component on the systematic intellectual, moral and social instruction plaintiffs claim schools must provide.

Plaintiffs concede as much, arguing only that their "definitions necessarily imply that article eighth, §1 includes a qualitative component." Pl. br., 13 (emphasis added). Even if that were true (which it is not), this Court's decisions establish that implications derived by logical leaps from a stack of dictionaries are not enough to establish an affirmative constitutional obligation, particularly one as sweeping as the one plaintiffs ask this Court to create in this case. See Moore, 233 Conn. at 596.[3]

[3] This Court's decisions interpreting the term "school" in other contexts do not indicate a qualitative component. See State v. Gager, 28 Conn. 232, 235 (1859) ("school" defined as "the collective body of pupils in any place of instruction, and under the direction and

In this regard, Sheff is instructive. The Sheff Court held that the scope of the constitutional guarantee of a substantially equal educational opportunity "permit[ted] a state constitutional challenge to substantial disparities in educational opportunities resulting from racially and ethnically segregated public schools." Sheff, 238 Conn. at 34. In so doing, this Court placed heavy emphasis on the explicit textual support for the claimed right, finding, inter alia, that article eighth, §1's educational guarantee "is informed and amplified by the highly unusual provision in article first, § 20, that prohibits segregation." Id. at 26-27; see also Horton v. Meskill, 172 Conn. 615 (1977) (finding constitutional right to "a substantially equal educational opportunity" grounded in article first §§ 1 and 20 and article eighth §§ 1 and 4). Such linked textual support is wholly lacking here. Indeed, this Court recognized in Sheff that a claim based on educational inadequacy -- akin, but not equal to the one plaintiffs now raise -- "does not implicate the constitutional right to a substantially equal educational opportunity." *Id*. at 36. [4]

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discipline of one or more instructors"); Am. Asylum v. Phoenix Bank, 4 Conn. 172 (1822) ("school" "is a generic term, denoting an institution for instruction or education.")

[4] Although their appeal brief is replete with references to a judicially cognizable right to minimally-adequate educational opportunities, plaintiffs made no such claim in their complaint, their amended complaint, their § 52-265a Application for an expedited review by this Court or their preliminary statement of the issues. Until this late stage, plaintiffs had pursued only a judicially cognizable right to suitable educational opportunities, which they acknowledge is distinct from the "minimum qualitative standard" they now ask this Court to establish. Pl. br., 4. Plaintiffs could have pled a minimal adequacy claim and given the trial court the opportunity to address it, but they chose not to do so. Nor did they make any effort to call such a claim to the trial court's attention after its decision, to clarify that they intended to raise it. Thus, it appears that this is an effort by plaintiffs to recast their theory of this case on appeal and raise claims not presented below. That is always improper, but is particularly so here given that this is an appeal brought pursuant to § 52-265a. See Practice Book § 83-1(1) (requiring that § 52-265a application shall "stat[e] the question of law on which the appeal is to be based"). This Court has ruled that "our well settled rules of practice requiring that a claim be raised distinctly in the trial court in order to preserve it for appeal" and that "as a general rule, a party cannot present a case to the trial court on one theory and then ask a reversal in the [S]upreme [C]ourt on another." A & M Towing &

Article eighth, §1, establishes that the General Assembly has the primary duty to "implement" the constitutional education guarantee "by appropriate legislation," indicating an intent that the legislature, not the courts, to establish the particular policies governing the day-to-day operations of Connecticut's schools. Cf. Stolberg, 175 Conn. at 603 ("It is the province of the legislative department of our government . . . to determine the general public policy in the area of higher education.") Indeed, the legislature has enacted an abundance of education statutes in accord with their constitutional obligation, none of which have been challenged here. Anointing the court as a super-legislature overseeing all things related to public education is the antithesis of that principle.

The lack of a suitability requirement in the text is reinforced by the circumstances surrounding article eighth, §1's enactment and the text of other states' constitutional provisions. At the time that article eighth, §1, was adopted, "'practically all Constitutions in the States of our nation'" contained education provisions. *Id*. at 596 n.51 (quoting 3 Proceedings of the Conn. Constitutional Convention, 1039-40 (1965) (remarks of delegate Simon J. Bernstein)). In fact, "[t]he primary motivation for the addition of article eighth, §1, to the constitution in 1965 appears to have been the realization that Connecticut was the only state in the nation that did not provide any express right to public elementary and secondary education in its constitution." Sheff, 238 Conn. at 30. Therefore, the differences between Connecticut's education provision and those of other states are highly probative of the framers' intent.

Several provisions from other states include language explicitly imposing some qualitative requirement. (The text of sister states' constitutional provisions are in the State's

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Recovery, Inc. v. Guay, 282 Conn. 434, 439 n.3 (2007) (quotation marks and citation omitted); see also Practice Book § 60-5.

appendix at A42-A50.) For example, article VIII, section I, part I of the Georgia Constitution provides, in pertinent part, that "[t]he provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia" (emphasis added). Other states have similar, explicit language. See e.g. Ark. Const., art. 14, § 1 (suitable); Fla. Const., art. IX, § 1(a) (adequate, efficient and high quality); Ill. Const. Art. X, § 1 (efficient and high quality); Minn. Const. Art. XIII, § 1 (thorough and efficient); N.J. Const. Art. IV, § 1 (same); Ohio Const. Art. VI, § 2 (same). Massachusetts and New Hampshire -- which amici argue "shared [Connecticut's] . . . tradition of quality education," Amici Collier br., 3 -- expressly required their respective states to "cherish", or support, their public schools because "'wisdom and knowledge, as well as virtue, diffused generally among the body of the people, [is] necessary for the preservation of their rights and liberties.'" Id. at 4-5 (quoting Mass. Const. of 1780, art. V). Moreover, the constitutions of Massachusetts and New Hampshire expressly provide that "it shall be the duty of the legislators and magistrates" to cherish all public schools, thus expressly providing the judiciary a role in educational matters, in language that is conspicuously absent here. See Mass. Const., Part II, c. 5, § 2; N.H. Const., Part II, article 83 (emphasis added to both).

The language of Connecticut's constitution reflects a considered decision not to establish the affirmative obligation of a suitable education and plaintiffs' claims must, therefore, fail. As the trial court correctly noted, if the framers had intended "to guarantee some minimum level of educational content as part of the constitutional right, the[y] . . . could have required public elementary and secondary education that is not just 'free' but also 'adequate' or, even, 'suitable,' as do some other state constitutions." MOD, 23-28; see also Stolberg, 175 Conn. at 597; Moore, 233 Conn. at 596. The framers chose not to do

so, and this Court should not accept plaintiffs' invitation to re-write the constitution to reach a different result.

Given how clearly the constitutional text reflects the framers' intent not to include the suitability requirement underlying the plaintiffs' claims, the Court need not address the remaining Geisler factors. See State v. Morales, 232 Conn. 707, 716 n.10 (1995) (noting that "not every Geisler factor is relevant in all cases"). Nonetheless, analysis of the remaining factors dictates that plaintiffs' claims fail as a matter of law.

B. This Court's Holdings and Dicta Support the Trial Court's Conclusion.

The second Geisler factor requires the Court to consider its own case law. Although plaintiffs correctly note that this Court has not directly addressed whether the Connecticut constitution guarantees a judicially-cognizable right to a suitable education, this Court's decisions strongly support the conclusion that no such right exists.

First, this Court has established that affirmative constitutional obligations, such as the one plaintiffs seek to create here, must be grounded in the constitution's text. Moore v. Ganim, 233 Conn. 557, 593-94 (1995). This Court's holdings on the need for such textual foundational support are detailed in section A above. In short, those decisions establish that this Court is "especially hesitant to read into the constitution unenumerated affirmative governmental obligations" because "[t]he text of our constitution makes evident the fact that its drafters have been explicit when choosing to impose affirmative obligations on the state." Moore v. Ganim, 233 Conn. 557, 595 (1995). There is no textual support for the right plaintiffs claim, and both Horton and Sheff, on which the plaintiffs rely, illustrate and reinforce the need for such constitutional grounding. See Sheff v. O'Neill, 238 Conn. 1, 25-30 (1996) (finding that "the provisions of article eighth, § 1, as informed by article first, § 20, permit a state constitutional challenge to substantial disparities in educational opportunities

resulting from racially and ethnically segregated schools"); Horton v. Meskill, 172 Conn. 615 (1977) (finding constitutional right to "a substantially equal educational opportunity" grounded in article first §§1 and 20 and article eighth §§1 and 4).[5]

Second, this Court has made clear that article eighth, §1 does not grant students a judicially cognizable right to an education that will allow them to "progress effectively," even where the need for such a program is recognized in legislation. Broadley v. Bd. of Educ., 229 Conn. 1, 5 (1994) (quoting Conn. Gen. Stat. §10-76a(c)). In Broadley, the plaintiff -- a gifted child -- claimed "that his fundamental right to a free public education includes the right to a program of special education that enables him to 'progress effectively.'" Broadley, 229 Conn. at 6. Acknowledging that there was no such express constitutional right, the Broadley plaintiff nonetheless claimed that "because the legislature has acknowledged that gifted children cannot achieve effective progress without a program of special education" but failed to provide such programs, his claimed right came within the contours of his "fundamental right to a free public education" guaranteed by article eighth, § 1. Id.; see Conn. Gen. Stat. § 10-76a(3) (defining an "exceptional child" as one "who deviates either intellectually, physically or emotionally so markedly from normally expected growth and development patterns that he or she is or will be unable to progress effectively in a regular

[5] Plaintiffs acknowledge that in Horton, this Court found the right to substantially equal educational opportunities by "[r]eading article eighth, §1 in conjunction with the equal protection clause," Pl. br., 14, noting that the Horton court identified certain factors to review in assessing whether given schools were providing such substantial equal educational opportunities. Id. at 15. As the trial court in this case correctly recognized, that list of factors does not support plaintiffs' claims here. MOD, 17-18. Using criteria to measure the equality of schools is fundamentally different from balancing new textbooks versus new computers, or requiring a specific class size, which the plaintiffs ask the courts to do here. The former involves an assessment of equality that is within the power and capability of judges, the latter involves the setting of policy, which is constitutionally the province of the other co-equal branches of government.

school program and needs a special class, special instruction or special services.") (emphasis added).

This Court rejected the Broadley plaintiff's claim, holding that "when neither the legislature nor the framers of our constitution have vested in gifted children any right to an individualized education program, we cannot conclude that the plaintiff's right to a free public education under article eighth §1 . . . includes a right to a special education program." Id. 229 Conn. at 8. Thus, Broadley stands for the proposition that the Connecticut constitution does not provide a judicially-cognizable constitutional right to a specific education program, even where the legislature has acknowledged the need for such programs but has declined to provide them. This conclusion finds additional support in Savage v. Aronson, 214 Conn. 256, 287 (1990), in which this Court held inter alia that the constitutional right to equal educational opportunities "did not include any guaranty that children are entitled to a particular school." It is virtually impossible to reconcile these bedrock principles with the right plaintiffs claim here.

Plaintiffs seek to minimize Broadley as "turn[ing] on statutory interpretation" and "fail[ing] to implicate article eighth, § 1." Pl. br., 16. Such assertions are both untrue and wholly inconsistent with plaintiffs' own argument.[6] The plaintiff in Broadley sought to do precisely what plaintiffs seek to do here -- to use the constitution to fill in perceived gaps in legislation where a need is statutorily recognized but, in plaintiffs' view, not met through legislative action. The Broadley Court rejected such an attempt as improper, and expressly held "that the plaintiff's right to a free education under article eighth, §1 of the Connecticut

[6] Given that Plaintiffs rely on the trial court's decision in Broadley as an example of how "the contours of article eighth, § 1" should be examined, they can scarcely claim that this Court's decision in Broadley "fails to implicate article eighth, §1." Pl. br., 7, 16.

constitution" did not encompass the right to gifted programs. Broadley, 229 Conn. at 8 (emphasis added); see also Sheff, 238 Conn. at 30 n. 32 (noting that "[i]n Broadley, we concluded that the state's special education statutes . . . had not established a constitutional right to an individualized education program for gifted children." (citation omitted, emphasis added)).[7]

Like the plaintiff in Broadley, plaintiffs claim that the constitution recognizes a right -- here, the right "'to receive a suitable program of educational experiences,'" Pl. br., 15 (quoting Conn. Gen. Stat. § 10-4(a); emphasis in plaintiffs' brief) -- and that the state has failed to provide sufficient resources to support that right. Like Broadley, plaintiffs claim that the legislature's failure to provide those resources gives rise to a constitutional violation. The plaintiff's claim failed in Broadley, and plaintiffs' claim here must likewise fail.

Stated succinctly, no decision of this Court supports the creation of a sweeping affirmative constitutional obligation absent a textual foundation for such an obligation, especially when recognition of such an obligation would require the courts to act as super-legislators, assessing the constitutional viability of innumerable, and unspecified, statutes governing education policy.

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[7] Plaintiffs erroneously characterize as dicta this Court's holding in Broadley that the plaintiff did not have a constitutional right to a gifted program. Pl. br., 16. The plaintiff in Broadley raised a constitutional claim. Broadley, 229 Conn. at 6. The Court assessed whether the statutes' failure to grant the requested programs rendered the statutes unconstitutional. Id. at 8 (concluding that "neither the legislature nor the framers of our constitution have vested in gifted children any right to an individualized education program" (emphasis added)). It recognized as much in Sheff, distinguishing Broadley not because it was a statutory ruling but because it did not "deal[] with the particular combination of constitutional provisions on which the present plaintiffs rely." Sheff, 238 Conn. at 30 n.32 (emphasis added). Indeed, under plaintiffs' reading of Broadley, the State could dispose of this case simply by saying the plaintiffs have been given all the education to which they are statutorily entitled. Even if this Court's analysis in Broadley was dicta, Geisler expressly allows consideration of dicta in its analysis. State v. Geisler, 222 Conn. 672, 685 (1992).

C. Federal Precedent Supports the State.

With respect to the third Geisler factor -- federal precedent -- the trial court correctly identified San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), as the key federal decision related to this case. However, both the trial court and plaintiffs incorrectly concluded that Rodriguez "sheds no light" on the issues this case. MOD, 21-22; Pl. br., 27. Although Rodriguez -- which addressed equal protection claims under the United States Constitution -- is not dispositive of plaintiffs' state constitutional claims, in Rodriguez the United States Supreme Court spoke presciently of the complexity of educational issues and opined that judicial intrusion into the educational process under the guise of constitutional interpretation would lead to chaos and stifle educational innovation. Those concerns apply with even greater force to this case.

Like plaintiffs here, the Rodriguez plaintiffs relied on the Court's overarching statements about the importance of education, including its statement that "'it is doubtful that any child may reasonably be expected to succeed in life if he is deprived the opportunity of an education.'" Rodriguez, 411 U.S. at 30 (quoting Brown v. Bd. of Educ., 347 U.S. 483 (1954)). The Rodriguez Court acknowledged its "historic dedication to public education" but concluded that judicial restraint was warranted because to grant the relief the plaintiffs requested would lead to "making this Court a 'super-legislature'" and would have required the Court to "assum[e] a legislative role . . . for which the Court lacks both authority and competence." Id. at 31 (quoting Shapiro v. Thompson, 394 U.S. 618, 665, 661 (1969) (Harlan, J., dissenting) (emphasis added).)

The Rodriguez Court determined that judicial restraint was particularly applicable because "[e]ducation, perhaps even more than welfare assistance, presents a myriad of

intractable economic, social and even philosophical problems." Id. 411 U.S. at 42 (quotation marks omitted).[8] The Court went on to note that:

> The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect. On even the most basic questions in this area the scholars and education experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education – an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

Id. 411 U.S. at 42-43 (quotation marks and footnotes omitted, emphasis added). Each of these concerns identified by the Rodriguez court apply with equal or greater force here. The issues involved remain just as complex and unsettled. Plaintiffs' suitability claims threaten far greater judicial entanglement than did the equal protection claims at issue in Rodriguez, or, for that matter, than the issues confronting the Court in Horton and Sheff.

Most notably, the Rodriguez court's concerns about judicial intervention under the guise of constitutional interpretation and its potential to harm innovation and progress were not limited to the relationship between the federal government and the states. The Court

[8] The U.S. Supreme Court's reference to education in Rodriguez as arguably presenting more difficult problems than welfare assistance is particularly noteworthy. In Moore, this Court held that the Connecticut constitution did not guarantee a right to minimal subsistence benefits. The Court declined the plaintiff's invitation to define the right "by ascertaining the lowest common denominator and making that the constitutional obligation," -- similar to the new request the plaintiffs make on appeal here -- concluding that "[a]n attempt by this court to choose a minimal standard would be an act of judicial conjecture, and not constitutional interpretation." Moore v. Ganim, 233 Conn. 557, 609 (1995).

underscored the importance and purpose of local control in educational decision-making, noting that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society" and that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." Id., 411 U.S. at 49 (quotation marks omitted). In the Court's words, that is because of:

> the opportunity it offers for participation in the decision making process that determines how . . . local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely important. Mr. Justice Brandeis identified as one of the particular strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments." No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

Id. at 49-50 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)). Rodriguez eloquently addresses both the inherent inability of courts to properly operate an educational system and, perhaps more importantly, to what the people -- and the children -- of Connecticut could lose should such ultimate decision-making become the province of the judicial branch.

D. The Trial Court Properly Determined that Decisions from Sister States Were Inconclusive and of Limited Utility.

With respect to the fourth Geisler factor of sister state experience, the trial court properly determined that sister state cases were "a decidedly mixed bag and of limited utility," as each was based on that state's distinct constitutional language, history and context. MOD, 22-29. Not surprisingly, the plaintiffs disagree, contending, incorrectly, that "every state supreme court that has considered the merits" has ruled in their favor. Pl. br., 18-20; CEE amici br. 1-25. First, Connecticut's constitutional language and history differ

significantly from most of the other states that have faced educational adequacy claims and thus those States' decisions are not of "material aid." See Horton v. Meskill, 172 Conn. 615, 644 (1977), State v. Michael J., 274 Conn. 321, 357, 360 (2005). In addition, several sister state supreme courts have ruled that there is no affirmative and judicially enforceable right to a "suitable" education, and many of those that ruled to the contrary have since reconsidered their role in such matters. The trial court properly determined that other states' experiences do not support plaintiffs' claims.

1. No state with a similar constitutional provision has recognized a judicially cognizable right to a "suitable" education as sought by plaintiffs.

By the State's estimation, forty states have addressed adequacy, minimum adequacy, or equal protection education claims. (A list of these cases is included in the State's appendix at A50-A54). States with express constitutional language have split -- some attempting to define quality, and others rejecting the claims as nonjusticiable.

Only a handful of states have constitutional provisions similar to Connecticut's article eighth, § 1, namely Alaska, Nebraska, New York, Oklahoma, and South Carolina. See A42-A50. Although plaintiffs omit Alaska and Nebraska from their list, and include North Carolina (at Pl. br., 18), Alaska's and Nebraska's constitutional provisions are quite similar to Connecticut's, whereas North Carolina's language referring to a "general and uniform system of free public schools" is more akin to Arizona's and Washington's provisions than Connecticut's. See N.C. Const. Art. IX, §2; Ariz. Const. Art. XI, §1(a); Wash. Const. Art. IX, §2. See generally John Dinan, The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates, 70 Alb. L. Rev. 927 (2007).

None of the five sister states with constitutional provisions comparable to Connecticut's has recognized the plaintiffs' claims for a "suitable" or adequate education.

Alaska, New York and South Carolina were presented with a **minimum required** educational quality claim. Nebraska and Oklahoma, invited to find a right to an "adequate" education, declined to address the issue at all, finding that suitability or adequacy claims were non-justiciable. All five states accorded deference to the legislature's primary role.

In Oklahoma Ed. Ass'n v. State, 158 P.3d 1058 (Okla. 2007), the Oklahoma Supreme Court did not address the issue of whether Oklahoma's constitution provides a right to an adequate education. Rather, the Oklahoma Ed. Ass'n Court flatly refused to "circumvent the legislative process" or "to invade the Legislature's power to determine policy." Id. at 1066. The court took "judicial notice" of the "immeasurable social psychological and economic value" of education, but noted that "the important role of education in our society does not allow us to override the constitutional restrictions placed on our judicial authority." Id.[9]

In Nebraska Coalition for Educational Equity and Adequacy v. Heineman, 731 N.W.2d 164 (Neb. 2007), the Nebraska supreme court determined that the political question doctrine required dismissal. 731 N.W.2d at 174-181, citing Baker v. Carr, 369 U.S. 186 (1962). The court held that the "free instruction 'provision is clearly directed to the Legislature" and declined to read a quality component into the text of the constitutional

[9] The Oklahoma Supreme Court had previously ruled that Oklahoma's school financing laws did not violate its constitution's equal protection provisions. Fair School Finance Council v. State, 746 P.2d 1135, 1137, 1149 (Okla. 1987). Citing Fair Sch. Finance Council, the plaintiffs contend that the Oklahoma Supreme Court "recognized" the right to a "basic, adequate education." Pl. br. 19. The Fair Sch. Finance Council plaintiffs did "not allege that … they are not receiving an adequate" education, or "that the education they are able to provide or receive is in any way an inadequate one." 746 P.2d at 1146, 1151. Rather, the case was brought and decided on equal protection grounds, not on adequacy. The dicta cited by plaintiffs states in full that the right guaranteed is a "basic adequate education according to the standards that may be established by the State Board of Education." 746 P.2d 1149 (emphasis in original).

provision. Id. at 178. The Nebraska Coalition court also noted that at the time Nebraska's constitution was being enacted in 1875 and then reconfirmed in 1972, other states had constitutional provisions with "thorough and efficient" language, but that Nebraska framers had rejected that language. Id. at 179-80. Finally, the Nebraska Coalition court determined that any "judicial standard effectively imposing constitutional requirements for education would be subjective and unreviewable policymaking by this court." Id. at 180-81. The Nebraska Court adopted the rationale articulated by the Illinois Supreme Court that to "hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals" in the state. Id. at 181, citing Committee for Educational Rights v. Edgar, 174 Ill.2d 1, 28-29, 672 N.E.2d 1178, 1191 (1996).

After extensive consideration of its constitutional education clause, the Alaska Supreme Court rejected the claim that the state constitution required local high schools in rural areas. Hootch v. Alaska State-Operated School System, 536 P.2d 793 (Alaska 1975). The Alaska Supreme Court also found no right to equal protection for school funding. Matanuska-Susitna Borough School District v. State, 931 P.2d 391 (Alaska 1997).

The amici, Campaign for Education Equity et al. ("CEE"), report that "plaintiffs prevailed" in an unreported trial court decision funding for school buildings. Kasayulie v. State, No. 3AN97-3782 (Alaska Super. Ct. Sept. 1, 1999) CEE br., 3 n.5; case at CEE App. at A27. However, they overlook a more recent trial court decision in which the court held that "it is the court's responsibility to determine a constitutional floor with respect to educational adequacy and to determine if that constitutional floor is currently being met." Moore v. Alaska, Case No. 3AN-04-9756 civil at 8 (Alaska superior court, third judicial

district at Anchorage, June 21, 2007) (State's app. at A56). After 21 days of a bifurcated trial on liability only, live and deposition testimony from 51 witnesses and over 800 exhibits, the Moore trial court found that the current Alaskan school funding system did not violate its education clause. Moore, supra.

In a similar fashion, South Carolina only addressed a "minimally adequate" education claim. Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999). While finding that its constitution required a minimally adequate education, the South Carolina Supreme Court emphasized the primary role of the legislature, noting that:

> the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government. We do not intend by this opinion to suggest to any party that we will usurp the authority of that branch to determine the way in which educational opportunities are delivered to the children of our State. We do not intend the courts of this State to become super-legislatures or super-school boards.

515 S.E.2d at 541. The South Carolina Supreme Court defined a "minimally adequate" education as requiring adequate and safe facilities, the ability to read, write and speak English, knowledge of math, physical science, economic, social and political systems, of history and governmental processes, and academic and vocational skills. Id. at 540. Despite a remand, there are no other reported decisions in the case. Thus, decisions from several of the states with constitutional provisions most similar to Connecticut's not only fail to support plaintiffs' claim, they undercut it.

2. New York addressed a constitutional-minimum standard and in the end, deferred to its legislature.

In New York, a state heavily relied upon by plaintiffs and amici, the New York Courts were asked to address a minimally-adequate education claim, not a "suitability" claim. Moreover, by the end of the New York litigation, the pitfalls of judicial intrusion into such

policy decisions were cast in bold relief, and the New York Court ultimately deferred to its legislature. The course of the New York litigation is instructive.

In New York, the plaintiffs asserted that "minimally acceptable educational services and facilities are not being provided in plaintiffs' school district." Campaign for Fiscal Equity v. State ("CFE I"), 86 N.Y.2d 307, 655 N.E.2d 661, 665-67 (1995). In CFE I, the New York Court of Appeals held that plaintiffs had stated a viable cause of action regarding the "constitutional floor with respect to educational adequacy". Id., 655 N.E.2d at 665, 666. The CFE I court cautioned that the State's standards and statutes were probably above the constitutional minimum, and thus the court should be cautious about applying those standards as a constitutional benchmark. Id., 655 N.E.2d at 665-667. The CFE I court also ruled that to prevail, the plaintiffs had to establish "a correlation between funding and educational opportunity." Id., 655 N.E.2d at 667.

After seven months of trial, with 72 witnesses and 4300 exhibits, the CFE plaintiffs prevailed before the trial court, but the trial court's decision was reversed by New York's intermediate appellate courts. In Campaign for Fiscal Equity v. State ("CFE II"), 100 N.Y.2d 893, 801 N.E.2d 326, 328 (2003), the New York Court of Appeals (the state's highest court) largely reinstated the trial court's decision. The "minimally-adequate" inquiry of CFE I had morphed into a judicial definition of a "sound, basic" education, with the court determining that a "meaningful high school education" was now required. CFE II, 801 N.E.2d at 337. The CFE II court upheld the trial court's findings about a wide-range of educational inputs, such as teacher qualifications and numbers of library books, and educational outputs, such as graduation rates and test score. CFE II, 801 N.E.2d at 333-340. The court then struggled with a remedy, noting that it had "neither the authority, nor the ability, nor the will,

to micromanage education financing." CFE II, 801 N.E.2d at 345. The court provided the State a year to fund the New York City schools to a level "necessary to provide City students with the opportunity for a sound basic education," and once done, to determine "whether the inputs and outputs improve[d] to a constitutionally acceptable level." Id., 801 N.E.2d at 348.

The Governor quickly convened a commission to address the CFE II court's directive. Campaign for Fiscal Equity v. State ("CFE III"), 8 N.Y.3d 14, 861 N.E.2d 50, 54-55 (2006). The Governor and the state senate endorsed the Commission's estimate of $1.93 billion, and the Governor proposed additional educational support of approximately $4.7 billion. Id., 861 N.E.2d at 55. The legislature nonetheless only appropriated an additional $300 million. Id.

Rejecting the legislative and executive response, the trial court then established a "blue-ribbon panel of referees" to determine the proper level of funding. CFE III, 861 N.E.2d at 55-56. The panel calculated that New York City schools required an additional $5.63 billion in operating funds, an additional $9.179 billion for capital improvements over a five year period, cost studies every four years, and a plan to ensure accountability. Id. By contrast, the State contended that $1.93 billion in additional funding was appropriate. Id.

Both levels of New York's appellate courts substantially retrenched from the trial court's approach. The New York Appellate Division reversed the trial court, holding that it should have deferred to the Governor's estimate, as long as it remained "within the range" of acceptable cost estimates, and then directed the Governor and Legislature to appropriate at least $4.7 billion in additional operating funds and to expend $9.179 billion in capital improvements over the next five years. CFE III, 861 N.E.2d at 56-57.

The New York Court of Appeals retrenched even further. Emphasizing the role of separation of powers and judicial deference to the legislature for budgetary matters, the court reduced the operating funds amount to the State's estimate of $1.93 billion, eliminated the capital investment requirement entirely, eliminated the periodic cost study requirement, and deferred to the state implementation of the No Child Left Behind Act for accountability standards. CFE III, 861 N.E.2d at 57, 61. The CFE III court reiterated that its inquiry addressed only the constitutional floor. Id., 861 N.E.2d at 60, 61. The court declined to "intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." Id., 861 N.E.2d at 58 (internal citations omitted). It rebuked the trial court for calculating an amount, rather than determining whether the state plan was appropriate, and it upheld the state's plan as appropriate. Id., 861 N.E.2d at 59.

3. Even states with express constitutional language are cautious about educational adequacy claims.

The remainder of the states that have addressed these qualitative educational issues, unlike Connecticut, have state constitutional language that expressly guarantee an "adequate," "thorough," "efficient," "suitable," or even "high quality" education. See, e.g., Ark. Const. Art. 14, §1 (suitable); Fla. Const. Art. IX, §1(a) (adequate, efficient and high quality); Ill. Const. Art. X, §1 (efficient and high quality); Minn. Const. Art. XIII, §1 (thorough and efficient); N.J. Const. Art. IV, §1 (same); Ohio Const. Art. VI, §2 (same); Penn. Const. Art. III, §14 (same); WV Const., Art. XII, §1 (same); Wy. Const. Art. VII, §9 (thorough, efficient and adequate) (State app. at A42-A50). Because the constitutional language is so materially different from Connecticut's, decisions from these jurisdictions are not of "material aid" in determining the contours of article eighth, §1. See Horton v. Meskill, 172 Conn. 615, 644 (1977).

Nonetheless, a substantial number of the states with express quality guarantees in their constitutional provisions have declined to entertain educational adequacy claims. For example, the Appellate Courts of Alabama, Colorado, Florida, Illinois, Minnesota, Pennsylvania, and Rhode Island all ruled that plaintiffs' adequacy or suitability claims are non-justiciable. *See* Ex parte James, 836 So.2d 813 (Ala. 2002); Lobato v. State, 2008 Colo. App. LEXIS 69 (Jan. 24, 2008) (State app. at A252); Coalition for Adequacy and Fairness v. Chiles, 680 So.2d 400 (Fl. 1996); Lewis v. Spagnolo, 186 Ill.2d 198, 710 N.E.2d 798 (1999); Committee for Educational Rights v. Edgar, 174 Ill.2d 1, 672 N.E.2d 1178 (1996); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Marrero v. Commonwealth, 559 Pa. 14 (1999); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995). See Comm. For Educ. Quality v. State, case no. 04cv323022 (Mo. Cir. Ct. Aug. 29, 2007) (State's app. at A331). See also Charlet v. Legis. of State, 713 So. 2d 1199 (La. App. 1998) (rejected on merits); Md. State Bd. v. Bradford, 875 A.2d 703 (Md. 2005).

4. The sister state cases tell a cautionary tale.

At least two state supreme courts have taken judicial notice of the quagmire that has engulfed other states that have concluded that their respective constitutions guarantee an adequate education, and then have attempted to judicially address such issues. In Nebraska Coalition for Educational Equity and Adequacy v. Heineman, 273 Neb. 531, 731 N.W.2d 164, 182 (2007), the Nebraska supreme court noted that Arkansas had "entertained continuous appeals and ordered appropriations from state legislatures as judicial remedies," spending decades attempting to address the issues. 731 N.W.2d at 182-183. The Nebraska supreme court noted that a "similar history occurred" in Kansas, Texas, Alabama and New Jersey with respect to educational adequacy claims. 731 N.W.2d at 182-183. The Nebraska court concluded that:

> [t]he landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.

731 N.W.2d at 183. Accord, Lobato, supra at *34. The Rhode Island Supreme Court had previously reached the same conclusion, observing that:

> the absence of justiciable standards could engage the court in a morass comparable to the decades-long struggle of the Supreme Court of New Jersey that has attempted to define what constitutes the "thorough and efficient" education specified in that state's constitution. … the New Jersey Supreme Court has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention. The volume of litigation and extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.

Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995) (internal citations to 11 New Jersey supreme court decisions, from 1973 to 1994, omitted).[10]

The experiences in Wyoming, Massachusetts and Ohio are also instructive. Through a series of judicial proceedings, the Wyoming courts evaluated all aspects of educational policy, from teacher salaries and benefits and appropriate class sizes, to levels of vocational education and technical training. Campbell County Sch. Dist. v. State, 2008 WY 2, 2008 Wyo. LEXIS 2 (Jan. 8, 2008) (State app. at A363). The Wyoming Supreme Court observed that the "enormous undertaking was necessitated by the unique provisions of Wyoming's state constitution, which directs the legislature to provide a thorough and efficient education to every Wyoming student." 2008 WY 2, p1, p136-p138. The Wyoming court determined, over objection, that after three trials and thirty-six years of litigation, its legislature had done enough, even if not everything desirable, and that the court's role was

[10] Since the 1995 Pawtucket decision, the New Jersey Supreme court has issued seventeen additional decisions in Abbott v. Burke. See Board of Ed. v. New Jersey Dept. of Ed., 183 N.J. 264, 872 A.2d 1052 (2005); State app. at A53-A54. **Thirty years** after it issued its first decision, the N.J. Supreme Court still retains jurisdiction and supervises the state's school system. See Abbott v. Burke, 193 N.J. 34, 935 A.2d 1152 (2007).

concluded, releasing its jurisdiction. Id. See also Hancock v. Commissioner of Education, 443 Mass. 428, 822 N.E.2d 1134 (2005) (court rejected designated judge's conclusion that state was not meeting obligation and terminated jurisdiction); Larry Obhof, *Derolph v. State* and Ohio's Long Road to an Adequate Education, 2005 B.Y.U. Educ. & L.J. 83 (2005) (extensive discussion of Ohio's experience with education adequacy litigation).

The experiences of sister states tell a cautionary tale. Of the five states with constitutional provisions most similar to ours, the two most recent cases have dismissed education adequacy claims on separation of powers grounds. The other three solely addressed minimal constitutional standard claims, not suitability claims. Many of the courts that have become embroiled with suitability or adequacy claims have, after trials that last months and multiple forays through the judicial system lasting decades, deferred to their respective legislatures. Other states' experiences illuminate the troubling constitutional problems that arise when the courts are, in effect, asked to run the schools.

E. Article Eighth, § 1's Historical Background Supports the Conclusion that Plaintiffs Have Not Alleged a Cause of Action on Which a Court Can Grant Relief.

The "historical approach, including the historical constitutional setting and debates of the framers" required by the fifth Geisler factor strongly supports the State. No one disputes that Connecticut had a longstanding commitment to a quality public education system, but there is no historical support for plaintiffs' claim that article eighth, §1, transformed the State's long history of striving to provide quality public education for its citizens into an affirmative constitutional obligation requiring a court to measure the "suitability" of the State's schools that plaintiffs. See Pl. br., 21 -25; Collier br., 11-13.

As discussed above, the lack of any constitutional language imposing a suitability requirement reflects a conscious decision by the framers not to impose the affirmative

obligation upon which plaintiffs' claims rely. On appeal, plaintiffs ignore the clear language of the constitution and recite Connecticut's statutory commitment to education, going back as far as the Ludlow Code in 1650. This Court has made clear, however, that:

> although the framers of the education provision looked to the historical statutory tradition of free public education in this state to support its explicit inclusion in the state constitution, they did not consider this tradition in and of itself to create a state constitutional obligation. To the contrary, they found it appropriate to amend the constitution in order to give public education constitutional status.

Moore, 233 Conn. at 596 (citing 3 Proceedings of the Conn. Constitutional Convention, 1039-40 (1965)). It necessarily follows that the framers' clear decision not to include explicit language establishing the suitability standard plaintiffs seek, or, indeed, any language at all that could impose a qualitative standard, is fatal to plaintiffs' claim in so far as it is predicated on Connecticut's history of good schools. Id. 233 Conn. at 595. As this Court recognized, the framers of the education provision did not choose their language "simply for reasons of . . . codification," they made a considered decision -- conscious of the provisions in other states' constitutions, many of which included qualitative requirements -- to adopt article eighth, §1, as it stands, with no suitability or adequacy requirement. Id. at 596 n. 51 (citing Delegate Bernstein's remarks noting inter alia that "practically all Constitutions in the States of our nation" included education provisions).[11]

To the extent there may be any doubt on this question, article eighth § 2 removes it. That provision -- adopted at the same convention by the same framers -- requires the State to "maintain a system of higher education, including the University of Connecticut, which

[11] In their amici brief, CEE contends that the constitutional history of the states supports the overall importance of education, and by implication, a constitutional right to a quality or suitable education, as the plaintiffs herein define it. See CEE amici br. 6-8. Current legal research does not support the amici's claim. See John Dinan, The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates, 70 Alb. L. Rev. 927 (2007) (comprehensive review of state constitutional debates).

shall be dedicated to excellence in higher education." Conn. Const., art. eighth, §1 (emphasis added). Given the background of article eighth, §1 and assuming, as the Court must, that the framers exercised "infinite care" to word the text of article eighth "in scrupulously fitting language," it is impossible to conclude that the framers intended sub silencio to impose a constitutional suitability requirement on Connecticut's public education system. See State v. Lamme, 216 Conn. 172, 177 (1990) (quotation marks omitted).[12]

This is particularly true given that Connecticut's historical commitment to good schools exists along side its long tradition of local control of education. Had the framers intended to fundamentally alter this tradition of local control and have the courts, rather than boards of education, establish educational standards and oversee every aspect of public education, it is inconceivable that article eighth, §1 would have been seen as a "perfunctory addition" to the Constitution. W. Horton, Connecticut Constitutional History, 64 Conn. B.J. 355, 380 (1990). Indeed, Delegate Bernstein, who "offered and explained the resolution that became article eighth, § 1," noted that the concept for the resolution arose out of his school board experience and that the resolution was "'not anything revolutionary'" and thus he could not "'possibly see any dispute over the principle involved.'" Moore, 233 Conn. at 596 n. 51 (quoting 3 Proceedings of the Connecticut Constitutional Convention, 1939-40.) Even assuming, arguendo, that Delegate Bernstein personally intended to impose a suitability standard, a proposition notably without factual support, there is no indication that the full convention intended to impose such a standard and thereby

[12] Indeed, this Court has declined to read a judicially enforceable qualitative standard into article eighth, § 2 even though its express reference to "excellence" could arguably support such a standard, holding that "that the constitutional standard of 'excellence' was not meant to be a wedge for penetration of the educational establishment by judicial intervention in policy decisions." Simmons v. Budds, 165 Conn. 507, 514 (1973).

fundamentally change Connecticut's education system. The trial court correctly held that the history upon which plaintiffs rely is "far too slender a reed to support a conclusion that there exists a constitutional right to a 'suitable' educational opportunity." MOD, 31.

F. Public Policy Considerations Support the State.

The final Geisler factor involves a review of public policy considerations, including economic and sociological considerations. See, e.g., Contractor's Supply v. Comm'r, 283 Conn. 86, 98-99, 105-106 (2007) (sixth Geisler factor reflects "relevant public policies"); State v. McKenzie-Adams, 281 Conn. 486, 509-510 (2007) (same); Washington v. Meachum, 238 Conn. 692, 724 (1996) (the court looked to "legislative determinations of other states for guidance pertaining to the current social mores nationwide" for sixth Geisler factor). Like the other Geisler factors, this weighs in the State's favor.

No one disputes that education is important or that this Court has spoken eloquently on the subject. See, e.g., MOD, 33. Although no educational system is perfect, Connecticut has historically made education a high priority and has shown outstanding educational leadership by any measure. Twenty years before the NCLB Act required assessments of public school children, Connecticut required state-wide standardized assessments. See Conn. Gen. Stat. §10-14n. Under the current state budget, education receives the second highest appropriation, with over $3 billion dedicated to elementary education alone. See Office of Fiscal Analysis, Connecticut State Budget 2007-2009, 11 (Dec. 2007) (State app. at A397).

For purposes of suitability, a review of the most current National Assessment of Educational Progress ("NAEP") results is informative in evaluating the policy "necessity" of judicial intervention into the State's public school system. NAEP assessments are national,

uniform tests administered by the U.S. Department of Education. U.S. Dept. of Ed., National Center for Education Statistics, Nation's Report Card, Reading 2007 ("Reading Report") at 2 (State app. at A398); U.S. Dept. of Ed., National Center for Education Statistics, Nation's Report Card, Mathematics 2007 ("Math Report") at 2 (State app. at A454). Connecticut uniformly performs above the national average on the NAEP assessments, and in some areas, significantly above. Reading Report at A413, A426; Math Report at A469, A482. In 2007, Connecticut was ranked as second in the country on its Chances-for-Success Index, meaning that Connecticut's children have "a better-than-average chance for success at every stage" of their educational trajectory. See Editorial Projects in Education Research Center, *Education Week Supplement*, From Cradle to Career: Connecting American Education from Birth Through Adulthood, Connecticut State Highlights, 1 (Jan. 2007) (State app. at A510).

There is a sense in plaintiffs' submissions that because a first-rate public education can go a long way toward addressing numerous social ills, article eighth, §1 offers the Court the means to remedy a plethora of problems. As this Court has recognized, however, article eighth, §1, does not create a legally cognizable right to demand that the State alleviate – or that the Court measure the State's progress in alleviating -- every "undoubted hardship" that could conceivably relate to education where those hardships "result[] from the difficult financial circumstances [individuals] . . . face, not from anything the state has done to deprive them of the right to equal educational opportunity." Savage v. Aronson, 214 Conn. 256, 287 (1990).[13] Thus plaintiffs' concerns regarding unemployment, drop-out rates, and voter apathy do not justify a judicial coup d'état over the operations of

[13] A public school student spends only 14% of the year in school (180 school days x 7 hours a day for 1260 hours during a school year, compared to 8760 hours in a year.)

our public schools. See Pl. br., 25.[14] Ultimately, although Connecticut's education system, like that of every other state, is imperfect there is no indication that the right the plaintiffs seek will remedy those imperfections. See, e.g., Sonja Ralston Elder, School Financing Lawsuits: The Way out of the Fog or Just Blowing Smoke?, 3 Educ. L. & Pol'y F., 2 (2007) (State app. at A533) (concluding that "having an adjudicated right to education is not a statistically significant predictor" of student achievement or narrowing of the achievement gap.)

By contrast, there can be little doubt that a ruling in plaintiffs' favor would result in the upheaval of Connecticut's education system and place Connecticut's courts in control of broad areas of education policy, thereby limiting flexibility and local control and stifling educational innovation. The State and its citizens have already committed to providing their children with equal educational opportunities, and have devoted substantial financial and other resources to fulfill that commitment. This Court already has the authority to enforce that commitment. See Sheff. Within those bounds of equality, educational policies should be created and carried out by the co-equal branches of government. See MOD, 34.

It bears repeating that the trial court struck only the suitability counts, and left the equal protection claim intact. Thus amici NAACP's concerns with the "achievement gap" between rich and poor, minority and non-minority (amici NAACP br. 1-10) remain pending before the trial court.[15] Moreover, as the NAEP Report Cards amply demonstrate, the

[14] For example, low levels of adults with college degrees in a given municipality is more likely to reflect the economic conditions in that municipality than the qualities of the public school system. See id.

[15] To the extent plaintiffs seek to assert poverty as a protected class, such a claim is unavailing. Compare Pl. br., 11 (at-risk, poor students lack necessary resources) with Sheff v. O'Neil, 238 Conn. 1, 39 (1996) ("It is well established, under prevailing principles governing the law of equal protection, that poverty is not a suspect classification.")

achievement gap is a national problem, not just a Connecticut phenomenon. See, e.g., Reading Report at A439-44, A447-52; Math Report at A495-500, A503-08. Public policy and academic debates regarding the achievement gap continue to rage across the country as educators on the local, state and national level all struggle with how best to address this persistent and troubling issue. There are literally hundreds of articles on the achievement gap, and extensive debate as to how best address it. See, e.g., P. Papierno, S. Ceci, Promoting Equity or Inducing Disparity: The Costs and Benefits of Widening Achievement Gaps Through Universalized Interventions, 10 Geo. Public Pol'y Rev. 1 (2005).[16] Some Connecticut schools have been more effective than others in closing the achievement gap, and it is clear that experimentation and innovation, rather than judicial constitutional mandates, are necessary to confront the problem.[17] See Rodriguez, 411 U.S. at 42-43.

Unable to muster substantial support for their claim, plaintiffs also mount a procedural attack, contending that the trial court should not have considered "prudential" concerns as part of the sixth Geisler factor. Pl. br. 29-35. As discussed in section III infra, the trial court's methodology was procedurally sound.

Prudential concerns are properly considered in the policy prong of the Geisler analysis. This Court has consistently held that even where a case is justiciable, "prudential cautions" concerning the judiciary's proper role "may shed light on the proper definition of constitutional rights and remedies." Sheff v. O'Neill, 238 Conn. 1, 15 (1996) (citing Fonfara

[16] Searches for articles containing both "education" and "achievement gap" result in over-the-limit results for LEXIS news, 363 law review articles after 2001, and 868 articles on the Education Resources Information Center (ERIC).

[17] See ConnCAN, The State of Connecticut Public Education (2007), at pp.11-20 for examples of successful Connecticut urban schools. These portions of the ConnCAN report were omitted from the amici NAACP appendix and thus are included in the State's appendix at A518.

v. Reapportionment Comm'n, 222 Conn. 166 (1992)).[18] Severe damage to the constitutional separation of powers is one of "the 'real world' consequences of" the constitutional right plaintiffs ask this Court to create. Pl. br., 28.

It is difficult to imagine a ruling that would have greater public policy significance and pose greater risk of negative outcomes, or an outcome unintended by Connecticut's citizens who ratified the constitutional provision at issue. Plaintiffs seek to fundamentally restructure Connecticut's system of public education and replace the elected and accountable legislature with the appointed judiciary as the primary policy-making body. This Court has previously found that judicial control of educational policy should be avoided. Simmons v. Budds, 165 Conn. 507, 514 (1973). See also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 43 (1973). Both controlling precedent and prudent policy dictate that this Court decline plaintiffs' invitation to drastically reorder this State's educational system by constitutional fiat.

III. THE TRIAL COURT USED THE PROPER PROCEDURES IN EVALUATING THE LEGAL SUFFICIENCY OF PLAINTIFFS' CLAIMS.

Plaintiffs' procedural arguments similarly have no merit. In their attack on the trial court's procedure, plaintiffs assert that constitutional claims as a general rule, and educational constitutional claims in particular, can never be evaluated on their legal merits, but instead require a full trial before the threshold issue of whether such a constitutional

[18] Plaintiffs seek to dismiss this language as dicta. Pl. br., 28 n.14. It was not. Prudential cautions motivated this Court not to grant the specific relief the plaintiffs requested in Sheff, noting that "[p]rudence and sensitivity to the constitutional duty of coordinate branches of government counsel . . . caution in this case." Sheff, 238 Conn. at 46. Moreover, plaintiffs make no effort to distinguish other cases where this Court has considered prudential cautions while exercising its jurisdiction. See, e.g., Fonfara, 222 Conn. at 185 ("Prudential and functional considerations are relevant to the classical enterprise of constitutional interpretation . . ."); Simmons v. Budds, 165 Conn. 507, 514 (1973) (affirming trial court decision "that the constitutional standard of 'excellence' was not meant to be a wedge for penetration of the educational establishment by judicial intervention in policy decisions").

right even exists may be considered by the court. Pl. br. 5-12. Plaintiffs further contend the Geisler analysis is a fact-based analysis requiring a full trial prior to its application. Id. Plaintiffs also take issue with the trial court's broad view of their entire complaint, rather than limiting itself to a specific section. Id. Each of these procedural challenges lack merit.

State rules of practice require that any pleading "contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved." Practice Book §§ 10-1, 10-2. A complaint must contain "a concise statement of the facts constituting the cause of action." Practice Book § 10-20. See Nizzardo v. State Traffic Comm'n, 259 Conn. 131, 162-164 (2002); Dreier v. Upjohn Co., 196 Conn. 242, 246 (1985). Plaintiffs' unsupported assertion that the "practice in Connecticut is to allow plaintiffs in Geisler cases to present facts beyond those alleged in the complaint" is incorrect and contrary to long-established state practice. Cf. Pl. br., 6.

Under Connecticut state practice, a motion to strike is the proper procedure to test the legal sufficiency of a pleading, without the need for an evidentiary hearing. Practice Book § 10-39; Sullivan v. Lake Compounce Theme Park, Inc., 277 Conn. 113, 117-18 (2006). State constitutional claims are not exempt from the normal rules of practice and the courts have repeatedly granted motions to strike on state constitutional claims. For example, in a constitutional challenge on equal protection grounds to the State's indoor smoking ban, the trial court granted the State's motion to strike, and this Court affirmed. Batte-Holmgren v. Comm'r of Pub. Health, 281 Conn. 277, 294 (2007). See also Alexander v. Comm'r of Admin. Servs., 86 Conn. App. 677, 678, 685-686 (2004) (upheld trial court decision to grant motion to strike equal protection claim).

Plaintiffs repeatedly assert that the trial court "inappropriately incorporated justiciablity considerations into its Geisler analysis in striking plaintiffs' claims" and that the court could not address justiciablity issues until "after discovery and at trial." Pl. br. 9, 27-31. That simply is not the law. [19] None of the Geisler factors require any factual findings by the trial court, and plaintiffs fail to cite to a single case that holds otherwise. Each of these factors -- constitutional text, the history of its enactment, case law and policy considerations -- are purely legal inquiries. See, e.g., State v. Ledbetter, 275 Conn. 534, 568 (2005), cert. denied, 547 U.S. 1082 (2006) (over State's objection, holding that defendant could submit research studies in support of sixth Geisler factor because review of such studies "does not amount to fact-finding by this court.")[20] Indeed, this Court has applied the Geisler analysis to Golding claims, which, by definition, are appellate claims that were not even raised before the trial court. See, e.g., McKenzie-Adams, supra, 281 Conn. at 498, 509-510; In re Christina M, 90 Conn. App. 565, 575-577, 580 (2005); State v. Griffin, 251 Conn. 671, 701-

[19] Of course, justiciablity issues clearly can, and should, be raised by motions. See Pellegrino v. O'Neill, 193 Conn. 670 (1984) (affirmed dismissal of complaint as raising a non-justiciable political question); Nielsen v. State, 236 Conn. 1, 2 (1996) (same).

[20] None of this Court's decisions on which plaintiffs rely undermine this conclusion. As noted above, Ledbetter holds that this Court can consider evidence on the sixth Geisler factor that was not presented below. Ledbetter, 275 Conn. at 568. Ramos and Trine stand for the unremarkable proposition that an individual seeking to establish an independent state constitutional right must provide some legal basis for that right by inter alia briefing how Connecticut's legal history supports a distinct right. See Ramos v. Town of Vernon, 254 Conn. 799 (2005) (holding—on a legal question certified by the district court—that plaintiff could not assert independent state constitutional right where she "provided no historical evidence of any constitutional or quasi-constitutional rights maintained by parents that were recognized at common law in this state prior to 1818"); State v. Trine, 236 Conn. 216, 230 n.12 (1996) (declining to find independent state constitutional right where court was "unable to discern any textual or historical basis for assigning independent meaning to our state constitutional provision"). Moore likewise does not support plaintiffs' argument, as the "evidence" the Court reviewed in assessing the plaintiffs' Geisler claim was purely legal, such as the decisions of sister states and Connecticut's history. Moore v. Ganim, 233 Conn. 557, 581-641 (1995).

702 (1999) (for sixth Geisler factor, although evidence not presented at trial regarding "death qualified juries," court took judicial notice of body of scientific literature.)

Plaintiffs rely solely upon two 1990 Superior Court decisions in Broadley and Sheff for their proposition that article eighth, §1 claims are per se not amenable to motions to strike. Pl. br. 7. Both trial court decisions were issued years prior to this Court's decision in Geisler -- which plaintiffs acknowledge provides "the established method for determining the contours of the state constitution," Pl. br., 5 -- and therefore shed no light on Geisler's application and do nothing to undermine this Court's subsequent decisions establishing that no factual hearing is required. See, e.g., Ledbetter, 275 Conn. at 568. Neither are controlling nor establish that a motion to strike was an improper procedural vehicle here.[21]

Plaintiffs' reliance on out-of-state cases is similarly unavailing. See Pl. br., 8-9; CEE amici br. 9-12. The New York court first evaluated the legal constitutional claim in a motion to dismiss. Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 655 N.E.2d 661 (1995). See also Paynter v. State, 100 N.Y.2d 434, 797 N.E.2d 1225 (2003); New York State Ass'n v. New York, 840 N.Y.S.2d 179, 42 A.D.3d. 648 (2007). The New York rulings were on the legal merits, and did not hold that an initial legal determination was inappropriate. Moreover, several state courts have rejected claims akin to plaintiffs' as a matter of law, and judicial economy militates in favor of adjudicating the legal sufficiency of an adequacy claim before trial, as such trials have required months, and such cases have entailed decades of judicial involvement. See section II. D. supra.

[21] In Broadley, the superior court simply determined that the claim was legally sufficient. Broadley v. Meriden Bd. of Educ., 1990 WL 269168 (July 20, 1990) at Pl. app. A3-A4. In the Superior Court decision in Sheff, the State did not move to strike based upon the contours of article eighth, §1; rather it moved to strike on political question doctrine, lack of state action, lack of causation and equal protection grounds. Sheff v. O'Neill, 1990 WL 269168 (July 20, 1990) at Pl. app. A3-A4. Both decisions are inapposite.

Plaintiffs seek discovery and a trial to demonstrate to the court that it is not difficult to make educational policy decisions. Pl. br., 9. That is not the relevant question. Rather, the trial court properly focused on the issues what does the state constitution actually requires and which branch of government is tasked with making such educational policy decisions -- the judiciary or the legislature. See MOD, 33-40. This is wholly consistent with this Court's precedents. See Nielsen, 236 Conn. at 12.[22]

Plaintiffs further complain that the trial court read their entire complaint, and contend that only one paragraph of their complaint is controlling on this issue. See Pl. br. 10 (only ¶ 46 is "relevant"). Such an assertion is patently nonsensical -- the trial court was not only correct in reading the entire complaint, but was obligated to do so. See, e.g., Boone v. William W. Backus Hosp., 272 Conn. 551, 559-60 (2005) (providing inter alia that "[t]he interpretation of pleadings is always a question of law for the" trial court and that "[t]he complaint must be read in its entirety" (quotation marks omitted)).

Plaintiffs' final, last-ditch challenge to the trial court's decision is to claim that it is logically inconsistent. Pl. br. 11. It is not. The trial court noted, in dicta, that it could "imagine situations" in which authorities could effectively deprive a plaintiff of any education by, for example, "abolishing all 'English as a second language' (ESL) programs" in a system that served "students with limited proficiency in English." MOD, 40. The trial court believed that such a scenario would be the functional equivalent of "'herd[ing] children in an open field to hear lectures by illiterates.'" Id. at 39 (quoting Horton v. Meskill, 172 Conn.

[22] Plaintiffs rely heavily upon the trial court's decision in Sheff, which adopted the rationale of Justice Peters' dissent in Pellegrino. Trial court decisions and dissenting opinions are, of course, not binding on this Court. Moreover, then-Chief Justice Peters subsequently drafted the majority decision in Nielsen, which affirmed the dismissal of claims on political question grounds without requiring an evidentiary showing. Nielsen, 236 Conn. at 2, 6.

615, 659 (1977) (Loiselle, J., dissenting)). Leaving aside whether the trial court was correct on this point or whether established constitutional rights (such as equal protection) would grant a remedy in such a situation without raising the same justiciablity concerns, the fact is, that is not this case and the trial court properly recognized as much.

CONCLUSION

In claims that reach far beyond this Court's holdings in Horton and Sheff, plaintiffs seek to impose their policy judgments on the public school system statewide, including areas where the state legislature has already established state policy. In short, plaintiffs seek to have this Court act as a super-legislature on the issue of education, an issue expressly delegated to the legislature. Plaintiffs' claims are not justiciable. Properly considering these threshold legal issues via a motion to strike, the trial court correctly held that the Connecticut constitution does not create a judicially-cognizable right to a suitable education as defined by plaintiffs. For the foregoing reasons, the reasons articulated by the trial court, and such further reasons as may be presented at argument, the State respectfully urges this Court to affirm the trial court's decision.

Respectfully submitted,

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CERTIFICATION

The undersigned attorney hereby certifies that this brief and appendix complies with all provisions of Connecticut Rules of Appellate Procedure 67-2 and that true and accurate copies of the Brief and Appendix of Defendants-Appellees were mailed, first class postage prepaid, this 21st day of February, 2008, to:

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