

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

CAMPAIGN FOR QUALITY EDUCATION, *et al.*

*Plaintiffs and Appellants*

vs.

STATE OF CALIFORNIA, *et al.*

*Defendants and Respondents*

A134423

(Alameda Superior Court  
Case No. RG10524770)

MAYA ROBLES-WONG, *et al.*

*Plaintiffs and Appellants*

vs.

STATE OF CALIFORNIA, *et al.*

*Defendants and Respondents.*

A134424

(Alameda Superior Court  
Case No. RG10515768)

CALIFORNIA TEACHER ASSOCIATION,  
*Intervener and Appellant.*

Appeals From the Superior Court of California, County of Alameda,  
Honorable Judge Steven A. Brick

**APPELLANTS' OPENING BRIEF**

John T. Affeldt (SBN 154430)  
Tara Kini (SBN 239093)  
Sophia Lai (SBN 267077)  
PUBLIC ADVOCATES, INC.  
131 Steuart Street, Suite 300  
San Francisco, California 94105  
Telephone: 415.431.7430  
Facsimile: 415.431.1048

*Counsel for Appellants/Plaintiffs  
Campaign for Quality Education, et al.*

William F. Abrams (SBN 88805)  
Sandra Z. Nierenberg (SBN 250881)  
Gretchen E. Groggel (SBN 267036)  
Bingham MCCUTCHEN LLP  
1117 S. California Avenue  
Palo Alto, California 94304-1106  
Telephone: 650.849.4400  
Facsimile: 650.849.4800

*Counsel for Robles-Wong  
Individual Plaintiffs/Appellants*

(Additional counsel listed on the following page)

(Counsel continued)

Deborah B. Caplan (SBN 196606)  
Joshua R. Daniels (SBN 259676)  
Matthew R. Cody (SBN 267191)  
OLSON, HAGEL & FISHBURN, LLP  
555 Capitol Mall, Suite 1425  
Sacramento, California 95814  
Telephone: 916.442.2952  
Facsimile: 916.442.1280

*Counsel for Robles-Wong Plaintiffs/Appellants*  
*CSBA, ACSA, STATE PTA, and SCHOOL DISTRICTS*

William S. Koski (SBN 166061)  
Carly J. Munson (SBN 254598)  
YOUTH AND EDUCATION LAW PROJECT  
MILLS LEGAL CLINIC, STANFORD LAW SCHOOL  
559 Nathan Abbott Way  
Stanford, California 94305  
Telephone: 650.724.3718  
Facsimile: 650.723.4426

*Counsel for Robles-Wong Individual Plaintiffs/Appellants*

Abe Hajela (SBN 173155)  
1201 K Street, Suite 710  
Sacramento, California 95814  
Telephone: 916.669.5404  
Facsimile: 877.842.3453

*Counsel for Robles-Wong Plaintiffs/Appellants*  
*CSBA, ACSA, and CALIFORNIA STATE PTA*

Martin R. Glick (SBN 40187)  
Deborah S. Schlosberg (SBN 254624)  
Sara J. Eisenberg (SBN 269303)  
ARNOLD & PORTER LLP  
Three Embarcadero Center, 7th Floor  
San Francisco, California 94111-4024  
Telephone: 415.434.1600  
Facsimile: 415.677.6262

*Counsel for CQE Plaintiffs/Appellants*

Rohit K. Singla (SBN 213057)  
MUNGER, TOLLES & OLSON LLP  
560 Mission Street  
San Francisco, California 94105  
Telephone: 415.512.4018  
Facsimile: 415.644.6918

*Counsel for CQE Plaintiffs/Appellants*

Leo Goldbard (SBN 254528)  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue, 35th Floor  
Los Angeles, California 90071-1560  
Telephone: 213.683.9216  
Facsimile: 213.683.4016

*Counsel for CQE Plaintiffs/Appellants*

Laura P. Juran (SBN 199978)  
Jean Shin (SBN 228423)  
CALIFORNIA TEACHERS ASSOCIATION  
1705 Murchison Drive  
Burlingame, California 94010  
Telephone: 650.552.5425  
Facsimile: 650.552.5019

*Counsel for Appellant-Intervener CTA in Robles Wong*

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## INTRODUCTION

There are more than six million public school children in California today. The State is failing to provide far too many of them the opportunity for an education they need to succeed in the 21st century. That failure not only threatens the future of those children, it endangers the economic, civic, and social well-being of the State. The State's failure is not merely a public policy issue, it is a denial of the fundamental right to an education guaranteed by the California Constitution.

Even in dismissing these cases, the Superior Court acknowledged the truly woeful and alarming state of the public school system in California today. (RT 29:17-19 [12/10/10].) In nevertheless refusing to allow these cases to go forward, the Superior Court read the Education Clauses of the California Constitution to have no substantive effect, gave no weight to over 125 years of California decisions that affirm the paramount and fundamental right all Californians have to a public education that prepares them for civic and economic success, and placed California at odds with the courts in nearly two dozen states that have concluded that the right to a quality education is enforceable.

The following pages demonstrate just how far below any reasonable standard California public education has fallen. Per pupil spending *even before the recent fiscal crisis* ranked in the bottom five states (47th) in the country. As a consequence, our State, which educates one in eight of the nation's public school students, scrapes the bottom in virtually every category measured—including achievement (48th in 4th grade reading and 47th in math), oversized classrooms/teacher-pupil ratios (49th), overall staffing levels (50th), ratio of principals and assistant principals (49th), guidance counselors (51st), and librarians (51st). Low funding levels and ineffective finance policies deny California students access to these essential educational resources, as well as to sufficient instructional time, instructional resources, and intervention programs. Millions of students fail to achieve proficiency in learning the State's academic content standards, and California students, collectively and in every socio-economic and ethnic group, lag far behind students in other states in terms of academic achievement. Nearly a third

of California's students fail to graduate from high school, and most of those students who do graduate are unprepared for college or a career.

Plaintiffs' Complaints detail the absolute lack of rationality or coherency underlying the allocation of funds to districts (and ultimately to schools), and the complete lack of alignment of the finance system to the State's academic content standards that all students are expected to learn. A 2007 report by the Governor's Committee on Education Excellence, based on more than 20 independent state-commissioned studies, concluded that education funding in California "is based on anachronistic formulas, neither tied to the needs of individual students nor to intended academic outcomes" and that the current system "[d]oes not ensure that sufficient resources reach students according to their needs."

This result has all too obvious effects on the State's students, but also on the cost of social services, on the increased numbers of job opportunities lost to other states and off-shore, on the incidence of crime and the cost of keeping up the prison system and, fundamentally, on the preservation of essential liberties and participatory democracy. The State has long been on notice of the harm caused by its dysfunctional public education system. In his 2005 State of the State address, former Governor Schwarzenegger referred to the California school system as an "educational disaster," an "institutional disaster," and even "a human disaster." Yet, year after year, the State has failed to act. Can it be that the courts are powerless to provide a forum on this critical constitutional issue?

The resounding answer is no. California's founders made education the State's highest priority as the Constitution's sole affirmative benefit conferred on all citizens. Article IX, section 5 of the State Constitution states that "[t]he Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district . . . ." At the State's inception in 1849, the founders required, in Article IX, section 1, that the "Legislature shall encourage, by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement" followed by language creating a state school fund that was to be "inviolably appropriated for the support of the public schools." Section 1 was amended in 1878-

79 to add a preamble explaining why education was so important to the framers: “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people . . . .”

The meaning and force of these provisions do not come before this Court on a blank slate. Over a century of precedent establishes that Article IX operates to endow Californians with the fundamental right to an education and, further, that the right is enforceable. From *Flood* in 1874 (black children may not be excluded from the public schools) to *Piper* in 1924 (exclusion of Indian child violated section 5) to *Serrano I* in 1971 (distinctive and priceless function of education compels treating education as a “fundamental interest” that was violated by the then-existing school finance system) to *Hartzell* in 1984 (fees violate Article IX free school guarantee) to *Butt* in 1992 (curtailed school schedule violates “well settled” fundamental education right), the right to seek redress for denial of educational opportunity—whatever its cause—has been provided by the courts.

Plaintiffs in these cases assert two claims under Article IX that flow from the plain language of these provisions and the precedents applying them. First, Plaintiffs assert that California students possess a fundamental right to an opportunity to obtain an education that meets a qualitative standard, one described in *Serrano* and *Hartzell* as an education that prepares students to participate fully in our society’s economic and civic life. The State violates that right by operating a school finance system that prevents schools and school districts from providing all students, including Plaintiff students, access to an education that satisfies their fundamental interest in being prepared to obtain economic security and participate in our democratic institutions.

Second, as an independent basis of liability, Plaintiffs assert that the State is violating its duty to “provide for” a system of common schools and to “ke[ep] up and support[.]” the system it has established. This claim is not premised on a constitutional right to an education that meets a qualitative standard. Instead, it recognizes that while the State may have discretion in how it chooses to construct the common schools system, it has a constitutional duty to keep up and

support the system it has constructed. Specifically, in failing to ensure that its finance system provides the funding necessary to keep up and support delivery of the State's standards-based education program to all students in all schools, the State violates its constitutional duty to maintain the system of common schools.

These constitutional principles are well-recognized elsewhere. The courts of at least 22 states have sustained claims similar to those at bar arising under similar education articles—most recently in Washington and Colorado, but also in Massachusetts, New Jersey, New York, Arizona, Ohio, New Hampshire, Connecticut, Wisconsin, Texas, Vermont, Arkansas, Idaho, Kansas, Kentucky, Montana, North Carolina, South Carolina, West Virginia, South Dakota and Wyoming. Indeed, courts in almost all of those states have found the educational rights of their students violated under facts less dire than those alleged here, declaring their school finance systems unconstitutional and providing the catalyst for legislatively-enacted reforms and remedies.

Defendants (as well as the trial court) have inaccurately characterized Plaintiffs as asking the courts to order a specific finance system or a precise level of funding. This is incorrect. Plaintiffs—an unprecedented statewide coalition of school children, parent groups, community-based organizations, school districts, teachers and administrators—seek a declaration that the present system violates the education rights guaranteed by Article IX and an order remitting the matter to the legislative and executive branches to take appropriate action under court supervision. Where such relief was granted in these other states, the result was critical reform to school financing to the educational benefit of their students. Plaintiffs in this case seek no more and no less.

### **QUESTIONS PRESENTED**

1) Does the fundamental right to an education under Article IX of the California Constitution entitle students to an education of a qualitative level, i.e., an education that provides them an opportunity for economic, civic, and social success, and, if so, is a cause of action stated

where the complaints allege that the State's school finance system is denying many students, including Plaintiffs, an education that meets this constitutional standard?

2) Does the State's obligation under Article IX to provide for a system of common schools that is kept up and supported require the State to provide the funding necessary to deliver the standards-based educational program it has established?

### STATEMENT OF FACTS

On almost any measure of performance—ranging from statewide academic proficiency tests to national assessments of educational performance to high school graduation and college matriculation rates—many of California's students are failing. That failure is caused by the State's denial of the educational resources necessary for all children to have the opportunity to achieve success. And that denial of resources is the result of the State's irrational and insufficient school finance system that is neither designed to meet the needs of California's students nor tied to the State's own educational goals.

Numerous studies and reports over the last decade have confirmed that California operates a dysfunctional and insufficient school funding system. (AA I:48-50 [¶¶158-166].)<sup>1</sup> In 2005, former Governor Schwarzenegger established the Governor's Committee on Education Excellence "to analyze current impediments to excellence, to explore ideas and best practices relevant to California, and to recommend changes and reforms . . . ." (AA I:23 [¶70].) The Committee reviewed over 20 state-commissioned studies, collectively known as the "Getting Down to Facts" project, that brought together an array of scholars from 32 institutions with diverse expertise and policy orientations to analyze the State's current school finance and governance system. The Committee's 2007 Report described public education in California as follows:

California's K through 12 education system is fundamentally flawed. It is not close to helping each student become proficient in mastering the state's clear

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<sup>1</sup>References to the Appellants' Appendix, which include both *Robles-Wong* and *CQE* pleadings are denoted as "AA".

curricular standards . . . Our current system is simply not preparing every student to be successful in college or work; it is not producing the results that taxpayers and citizens are counting on and that our children deserve.

(AA I:24 [¶70].) The Report concluded that California's public school funding system has no coherent connection to the State's academic goals and is insufficient to meet the needs of the State's students. (AA V:1049-50 [¶01].) Despite such dire assessments, the legislative and executive branches have failed to adequately address, let alone reform the State's school finance system. (AA VII:1504-05 [¶¶214-220].)

**Far Too Many California Students Fail To Learn The Skills And Knowledge  
Necessary For Success In The Workforce, For Admission To College,  
And For Meaningful Civic Engagement**

Each spring, California students are tested for proficiency on the State's own educational standards in English-Language Arts, Mathematics, Science, and History-Social Science (AA VII:1473 [¶80].) The results have been dismal. In 2009, only 50% of public school students demonstrated proficiency in Science and in English Language Arts. (*Id.* [¶81].)<sup>2</sup> Even fewer (46%) demonstrated proficiency in Mathematics. (*Ibid.*) And just 41% of public school students in California were proficient in History-Social Science. (*Ibid.*)

The numbers for certain subgroups of students are even worse. The achievement gap between African-American students and white students has remained essentially stagnant in California for well over a decade. In English-Language Arts, just 37% of African-American and Latino students scored proficient or above, compared to 68% of White students. Only 30% of African-American students and 36% of Latino students achieved proficiency on Mathematics, compared to 57% of white students. (AA VII:1474 [¶83].) Economically disadvantaged students and English learners are also significantly less likely to achieve proficiency on content standards. On English-Language Arts, 64% of economically disadvantaged students and 80% of English Learners failed to achieve proficiency. Similarly, 63% of economically disadvantaged

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<sup>2</sup>"Proficiency" requires a score of 350 out of 600.  
([http://star.cde.ca.gov/star2011/help\\_scoreexplanations.aspx](http://star.cde.ca.gov/star2011/help_scoreexplanations.aspx).)



students and 68% of English learners failed to reach proficiency in Mathematics. (AA VII:1475 [¶84].)

Dropout rates in California's public schools are shocking—nearly one-third of students who began high school in 2004 failed to graduate four years later. (AA I:26-27 [¶80].) Even more startling, more than half of all African-American males in California fail to graduate from high school. (*Ibid.*) Failure to receive a high school diploma has serious consequences for individual students and for the State as a whole. More than two-thirds of all high school dropouts will use food stamps during their lifetime. High school dropouts are far more likely to commit crimes than their peers with a high school degree. High school graduation reduces crimes by 20% for murder, rape and other violent crimes; by 11% for property crime; and by 12% for drug related offenses. (AA VII:1477 [¶92].) In addition, high school dropouts are also far less likely to vote. (AA VII:1477 [¶94].) For example, among native born U.S. citizens, just 5% of high school dropouts aged 18-24 voted in 2010, compared to 35% of college graduates of the same age.<sup>3</sup>

Of those California students who do graduate from high school, approximately 75% fail to successfully complete the course requirements needed to even apply for admission to a California four-year college or university. (AA VII:1476 [¶88].) Moreover, 60% of freshman in the California State University system cannot meet proficiency requirements in either Math or English, or both, and beginning in 2012, will be required to take remedial courses in these subjects before they can begin college. (*Id.* [¶89].) If current trends persist, California will have one million fewer college graduates than its economy needs in 2025.<sup>4</sup>

California also ranks among the lowest in the nation on the National Assessment of Educational Progress (NAEP), the national report card for education. According to the most recent NAEP results at the time the Complaints were filed, California was 47th in fourth grade

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<sup>3</sup>Richard J. Coley & Andrew Sum, Education Testing Service, "Fault Lines in Our Democracy: Civic Knowledge, Voting Behavior, and Civic Engagement in the United States" (2012) p. 16.

<sup>4</sup>Hans Johnson & Ria Sengupta, Pub. Policy Inst. of Cal., Closing the Gap: Meeting California's Need for College Graduates (2009) p. 1.

reading and 46th in eighth grade math. (AA I:25 [¶68].) In 2009, only Mississippi, Alabama and the District of Columbia had statistically significant lower average Math scores than California 4th graders. (AA VII:1478 [¶97].)

Academic performance is low for all California subgroups of students. For example, California's economically disadvantaged students rank 49th in fourth grade reading and 48th in eighth grade math when compared to economically disadvantaged students in other states. (AA I:26 [¶77].) Children of white, affluent and college-educated parents lag significantly behind their peers from other states too: California's middle-class 8th grade students rank 43rd in comparison to middle-class students in other states. (AA VII:1478 [¶98].)

Whether compared to the State's own educational standards or to their peers nationwide, measurements of student achievement demonstrate that large numbers of California students are not receiving an opportunity to obtain an education that prepares them to succeed in learning the content standards, compete successfully in our national economy, and meaningfully participate in civic life. (*Id.* [¶99]; I:26 [¶78].) The academic failure of so many of California's students and schools is the predictable result of an arbitrary and insufficient school funding system that denies children the resources they need to succeed in school.

### **The California School System Suffers From Severe Resource Deficiencies**

California's per-pupil funding is among the very lowest in the nation. In 2005-2006—before the State's ongoing economic crisis began—California ranked 47th in per-pupil funding, spending over \$2000 less per pupil than states such as Louisiana and Arkansas, over \$5000 less per pupil than states such as New York and New Jersey, and only half of what is spent for each student in Rhode Island and Vermont. (AA VII:1485 [¶121].) In 2008-09, California's spending as a percentage of its economy was 20% less than the national average. Its education spending as a share of its over-all economy is at its lowest level in 40 years compared to the rest of the US, and has declined sharply since 2006-07, while that of the rest of the U.S. has increased.<sup>5</sup>

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<sup>5</sup>California Budget Project, *Race to the Bottom? California's Support for Schools Lags the Nation* (June 2010) p. 2.

Low funding deprives California students of access to critical educational resources including sufficient staffing levels and manageable and effective class sizes. (AA I:34 [¶¶108-109]; VII:1451, 1489-88 [¶¶5-6, 123-125, 127-132].) School districts cannot provide all students with opportunities to learn the content standards and graduate prepared for college or the workforce without sufficient funds to attract, retain and develop appropriate numbers of qualified teachers and administrators and to maintain student-teacher ratios that allow students to learn. Indeed, California as a whole ranks at the very bottom in the nation in staffing ratios. At the time the Complaints were filed, the most recent available data showed that, among the 50 states and the District of Columbia, California ranked:

- 50th in total school staff to student ratio, with 70 staff members per 1,000 students (compared to a national average of 124.7 per 1,000);
- 49th in teacher-student staffing ratio;
- 49th in principals and assistant principals to students ratio (63% of the national average);
- 51st in guidance counselors to students ratio; and
- 51st in librarians to student ratio.

(VII:1487 [¶128].)

These resource deficiencies translate into class sizes that are so large that teachers are unable to provide adequate amounts of one-on-one-attention or differentiated instruction to meet the widely varying needs and skills present among their students. (AA VII:1488 [¶130].) Despite a Class Size Reduction program designed to cap kindergarten-third grade (K-3) class sizes at 20 students, Alameda's K-3 classes have increased to 28 (AA III:571 [¶96]), while Redwood City's are at 30. (AA V:998 [¶181].) Class sizes have grown even more dramatically in higher grade levels: Santa Ana's secondary school classes are between 35 and 40; Folsom-Cordova's advanced placements ("AP") courses have 35 students and waiting lists; Del Norte will either have to increase the size of its AP History class to roughly 40 students or limit

enrollment in the class, denying some students this important educational opportunity. (AA III:571 [¶97].)

Staffing deficiencies are just as troubling outside of the classroom. There are 600 middle school students for every counselor and 700 high schoolers per counselor in Riverside; 700 high schoolers per counselor in Folsom-Cordova; and 800 high schoolers per counselor in Alameda. This shortage of counselors denies students necessary college, career, and mental health counseling services. Porterville, Alameda and Alpine can only provide mental health services to special education students, leaving all other students with no access to mental health services at school. (AA III:582-83 [¶130].)

Most of the Plaintiff Districts have had to significantly limit access to school libraries or close them entirely, with Alpine reducing librarian hours to 5-8 hours per week at elementary schools and 15 hours per week at the middle school. (AA III:574 [¶¶105-106].) Student access to school nurses is virtually non-existent in most of the nine plaintiff Districts, meaning most schools do not have a school nurse regularly on-site for provision of health and nutrition instruction, required health and vision screenings, management of medication administration and special needs and first-response medical attention. Riverside can only employ eight nurses for the entire district—more than 5,000 students per nurse. Alameda can employ only one nurse to meet the health and safety needs of the entire district, including the District's special needs population. (AA III:582 [¶129].) Redwood City has eliminated its International Baccalaureate program, and reduced its music program by 50% such that there are now only two music teachers to teach music to over 1,000 middle school students.

Students are also denied sufficient instructional time to learn the standards-based educational program. State experts have examined the curriculum and teaching methodologies and determined the amount of instructional time necessary to reach proficiency on the material in the Math and English Language Arts textbooks approved by the State for grades K-8. (AA I:35 [¶112].) For the early primary grades, the recommended minimum instructional time in Math and English alone accounts for nearly all the instructional time the State pays to provide—

leaving little or no instructional time for Science, Social Studies, Physical Education and other courses required by state law. (*Ibid.*) For example, Hemet focuses its elementary school instructional time on math, English language arts and physical education, but cannot provide appropriate instruction in science, social science and other academic subjects within the available time in school. (AA III:569 [¶92].)

For English Learners—a quarter of California’s student population—the State recommends *additional* instructional time to learn the required material. In early primary grades, the recommended minimum instructional time for English Learners for Math and English Language Arts alone exceeds the amount of instructional time the State pays to provide to students in all subjects. [AA I:35 [¶113].] English Learners then, on average, are not only provided with insufficient instructional time in Math and English Language Arts, they are effectively denied access to the rest of the State’s required course of study, including core academic courses such as science and social science.

Funding cuts have forced districts to decrease already inadequate instructional time, with many districts also reducing the number of instructional days in the year. (*Id.* [¶115]; VII:1489 [¶135].)<sup>6</sup> In 2008, California lowered the required number of school days from 180 to 175. Only 11 states in the nation allow 175 days or less of instruction.<sup>7</sup> The lack of instructional time is particularly deleterious for English learners, as districts cannot provide the extended learning time required for those students. (AA I:34-36 [¶¶112-117].)

Lack of funds also prevents school districts from providing critical supplemental and intervention programs to meet the needs of their students, particularly at-risk students, and has even forced districts to eliminate programs that have proven successful in moving students toward proficiency. (AA III:572-580 [¶¶100-122].) Districts cannot fully serve English learner

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<sup>6</sup>“In 2008-09, almost all districts (98%) provided at least 180 instructional days per year. By 2010-11, that proportion dropped to only 61 percent. . .”

<sup>6</sup>(Legislative Analyst’s Office, Year-Three Survey: Update on School District Finance in California (May 2, 2012), available at <http://www.lao.ca.gov/reports/2012/edu/year-three-survey/year-three-survey-050212.pdf> at p. 9.)

<sup>7</sup>Recent proposals would reduce the school year to 160 days—tied for the lowest in the nation. ([www.sacbee.com/2012/06/24/v-print/4583221/shorter-school-year-is-a-nonstarter.html](http://www.sacbee.com/2012/06/24/v-print/4583221/shorter-school-year-is-a-nonstarter.html).)

students because the State's funding system prevents them from providing the interpretation assistance and instructional materials necessary to communicate with English learner students and their families. (*Id.* [¶108-117].) They cannot provide effective preschool opportunities for most low-income students that are essential to ensuring these students enter kindergarten ready to learn (AA VII:1491 [¶¶142-144]), and cannot provide support services—such as food and nutrition programs, transportation, and health and mental health services—that are essential to ensuring that all students have an adequate and equal educational opportunity to learn the State's core educational program. (AA I:38-41 [¶¶123-135].)

Districts also cannot provide critical summer and after-school programs for those students who need additional instruction to reach proficiency in learning the State's standards. (AA I:37 [¶¶118-121].) Folsom-Cordova and Porterville have eliminated K-8 summer school altogether, despite many students' need for additional instructional time to reach grade-level proficiency. (AA III:579 [¶120].) Alpine offers summer school only to failing middle school students, and cannot provide additional instruction for any other District students, regardless of need. (*Id.*) Riverside has eliminated almost all summer intervention programs for elementary and middle schools and has reduced the number of high school campuses offering summer school programs from six to two. (*Id.*)

School districts also cannot provide sufficient instructional materials, equipment and facilities to meet students' needs. The State does not even cover the cost of basic textbooks. Although the State previously required school districts to adopt and purchase new textbooks every six years in core academic subjects and every eight years in other subjects (Ed. Code, §60200),<sup>8</sup> the program has been consistently underfunded (AA I:36-37 [¶117]) and, as a cost saving measure, the State recently suspended new textbook adoptions. (§60200.7.) As a consequence, no California student will be able to read in a state-approved textbook that the U.S. elected its first African-American President until 2020.

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<sup>8</sup>All Code references herein are to the Education Code unless otherwise indicated.

California also lags behind most other states in access to computers and other education technology resources. (AA I:39, 52 [¶¶126, 172].) And lack of funding has caused all nine District-Appellants to eliminate or severely restrict structured professional training and support for California teachers and principals. (AA III:572-73 [¶¶99-100].)<sup>2</sup>

Not only is education funding in California insufficient, it is delivered in an inefficient and ineffective manner. The instability, unpredictability and arbitrary nature of state education funding effectively prevent school districts and schools from implementing the comprehensive educational program adopted by the State with any continuity from year-to-year and grade-to-grade.

The State's annual budget process contains irrational timelines that are themselves a chronic source of instability. Because of numerous statutory requirements, districts must prepare their budgets in the Spring of each year without having a reliable idea of what funds they will actually receive from the State or what restrictions may be imposed on those funds. Unpredictable funding forces districts to replace long-term employees with a series of short-term contract employees, often at a higher over-all cost. This makes coherent planning for on-going programs and services impossible. (AA I:43 [¶143].)

Even when timely, the State's budget is often overly optimistic, resulting in mid-year cuts and/or promised payments to districts that are deferred many months into subsequent fiscal years. (AA I:43-44, 46 [¶¶144, 151].) Delays in State funding routinely require short-term borrowing, forcing districts to use funding to pay for the cost of financing loans instead of educating students. (AA III:587 [¶143].) These problems interfere with educators' ability to focus on delivery of the academic program and create instability and uncertainty for programs, staff and students. (AA I:43-45 [¶¶142-149].)

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<sup>2</sup>As with doctors in the medical profession, teachers require ongoing professional training to keep pace with the demands of their profession. For example, teachers need to familiarize themselves with emerging research and best practices, on new instructional techniques to better teach the content standards or to better address the needs of English Learners, and to understand changes in the standards and assessment practices.

## **California's School Finance System Is Irrational, Unrelated To Student Needs, And Disconnected From California's Education Program**

The present school finance system developed independently of the State's current educational goals and objectives and is unrelated to the actual cost of providing an educational program that reflects the State's own academic content standards and the varying educational needs of California students. (AA I:27-43 [¶¶81-141]; VII:1478-1484 [¶¶100-118].) In one of the "Getting Down to Facts" studies, the current Chair of the State Board of Education described the finance system as "one that has been cobbled together in response to various pressures over the past thirty-some years" and that "is extraordinarily complex and has no coherent conceptual basis. That is, it is not intentionally designed for meeting State educational goals or meeting student needs." (AA I:49 [¶162].)

Prior to 1971, education funding largely relied on local property taxes, often supplemented by state aid. School districts had substantial authority to determine their budgets and the amount of property taxes to be raised. (*See* former Cal. Const., former art. IX, § 6.) The heavy dependence on local taxation, and significant variations in local tax bases, created substantial disparities among districts in the amount of funding and the educational opportunities afforded to students. In *Serrano v. Priest* (1971) 5 Cal.3d 584, the California Supreme Court held that an education funding system that produced such disparities violated the constitutional right of all California students to equal opportunity within the State's public education system.

In response to *Serrano*, the State enacted a system of "revenue limit" controls that limited the maximum amount of general purpose state aid and local property tax revenue that a district could receive, based on the 1972-73 figures (adjusted periodically for inflation). (AA I:28-30 [¶¶88-93]; §§42238 *et seq.*) The revenue limits were unrelated to the actual cost of the educational program in each district (*id.* [¶88]) but, at the time, overall per pupil spending in California was among the highest in the nation. Revenue limits were designed to narrow inter-district revenue disparity by "leveling up" lower-revenue districts over time and restricting spending by higher-revenue districts. (AA I:29 [¶89].) The practical effect of the "revenue



limits” was to enshrine the 1972-73 relative spending levels as the basis for each district’s educational allotment from the State regardless of a district’s student needs, the actual costs of educating the district’s students, or changes to a district’s demographics over time. (*Id.* [¶90].) As a result, today’s funding is distributed to districts arbitrarily and inequitably, such that similarly sized districts with similar student demographics and student need receive widely different levels of per pupil funding for no rational reason. (AA VII:1482 [¶¶111-112].)

In 1978, California voters adopted Proposition 13, which severely limited the ability of local governments, including school districts, to levy and collect property taxes. (Cal. Const., art. XIII A.) Proposition 13 dramatically decreased state and local tax revenues available to fund state and local programs, including education. (*Ibid.*) It also transferred authority over local property tax revenues to the State and significantly limited the ability of local school districts to raise revenues. (*Ibid.*)

In the 1980’s, California spending per-pupil fell behind the national average for the first time, and at a rate that was alarming. In an attempt to stop the decline, concerned educators and citizens sponsored a ballot measure and the voters passed Proposition 98 in November 1988. The Proposition amended the State Constitution to set a minimum level (or percentage) of General Fund support of K-14 education. (Cal. Const., art. XVI, § 8(b).) The Proposition 98 funding formulas are not and never were tied to any education standards, goals, or outcomes and, indeed, the Proposition 98 ballot materials make no reference whatsoever to Article IX. (AA III:376-85.) The only function of Proposition 98 is to set a minimum educational apportionment *from the California General Fund*. That minimum level varies based upon changes in enrollment and in the cost of living. The amount determined by the formulas can be temporarily suspended by the Legislature and it has been suspended on several occasions over the years.

Although revenue limit funding accounts for approximately sixty percent of K-12 state education spending, approximately one-third of State funding comes from restricted categorical program funding. Historically, as set forth in the Getting Down to Facts studies and the report of the Governor’s Committee on Education Excellence, the increase in categorical programs has

been accompanied by excessive regulation, overly burdensome restrictions on spending, and complex compliance requirements, resulting in increased administrative costs and inefficient use of public school funding. (AA VII:1480-81 [¶¶105-106]; I:23-24 [¶¶70-71].) In addition, the increase in categorical programs has resulted in a related decrease in the percentage of “unrestricted” funds used to provide the general education program. (AA I:40-43 [¶¶132-141].)

Many of the largest categorical programs (such as class size reduction, special education, instructional materials, transportation, food services and deferred facilities maintenance) actually reduce a district’s general purpose revenues available for the general education program because they are chronically underfunded and require district matching funds or otherwise divert district general fund expenditures away from local needs. (*Ibid.*) Further, the cost of providing these programs has far outpaced the funding available, required districts to use their general funds to bridge the shortfall. (*Ibid.*)

California’s school funding system also fails to take into account the additional challenges faced by low-income students, English learners, and students in schools with high concentrations of poverty and/or English learners as they attempt to meet the State’s educational goals. (AA III:575-588 [¶¶109-149]; VII:1483 [¶¶114-118].) The supplemental amounts currently provided through California’s categorical programs are insufficient to offset the adverse effects of poverty on learning and inadequate to meet the challenge of teaching English and academic content to English learners. (*Id.* [¶¶113-114]; [¶¶117-118].)

Moreover, for the second time in the last decade, public education has suffered deep and sustained cuts in funding. The cumulative impact of the most recent cuts has been approximately \$20 billion to education statewide (AA I:42, 46 [¶¶139, 152]), and those cuts weigh most heavily on low-income districts that rely most on state general fund revenues. As a consequence of recent cuts, California’s teacher workforce dropped by approximately 32,000 (11%) between 2007-08 (when it was almost last in the nation) and 2010-11.<sup>10</sup> Districts were also forced to

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<sup>10</sup>Legislative Analyst’s Office, Year-Three Survey: Update on School District Finance in California (May 2012), available at <http://www.lao.ca.gov/reports/2012/edu/year-three-survey/year-three-survey-050212.pdf>, at 7-8.

eliminate summer school and other critical remedial programs, reduce the school year and increase class sizes. (AA III:569-79, 586 [¶¶91-120, 140].) Many districts have attempted to levy parcel taxes just to provide basic education programs and services to students, but the amounts raised are relatively small and the attempts are often unsuccessful. (AA I:45 [¶149].) Districts increasingly rely on parental support and donations to cover aspects of the core educational program, leaving poor districts with fewer resources (and fewer options) than wealthy districts, and forcing the elimination of programs such as music, art, and athletics, as well as badly needed intervention and academic assistance programs. (AA VII:1482-83, 1503-04 [¶¶113, 212-13].)

In 2011-12, the financial status of almost 20% of the districts in the State was rated as “negative” or “qualified,” both signaling significant danger of insolvency.<sup>11</sup> Continuous budget cuts, instability and irrational funding policies force districts to design and implement their educational programs based on concerns for fiscal solvency rather than focusing on successful intervention and learning programs and the pedagogical needs of students.

### **California’s Core Educational Program**

California’s school finance system not only denies California students the resources they need for success, it is not even designed to support the State’s own educational program. California’s current educational program has its genesis in the Legislature’s 1995 decision to develop “academic content standards” that “shall be based on the knowledge and skills that pupils will need in order to succeed in the information-based, global economy of the 21st century.” (§60602.) These content standards define “the specific academic knowledge, skills, and abilities that all public schools in this state are expected to teach and all pupils expected to learn in each of the core curriculum areas, at each grade level tested.” (§60603.)

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<sup>11</sup>See [www.cde.ca.gov/fg/fi/ir/interimstatus.asp](http://www.cde.ca.gov/fg/fi/ir/interimstatus.asp).

Since that time, the State has focused its entire educational program around the content standards.<sup>12</sup> Curriculum “frameworks” have been developed from the content standards that guide instruction in each core subject; state funding for instructional materials can only be used to purchase materials aligned to the standards; all candidates for a California teaching credential must demonstrate proficiency in teaching to the content standards; and state funding for professional development is limited to standards-aligned training. (§§60207, 60605, 60119-60200, 60422, 44259(b)(3), 44472(c), 99237(a)(4); *see also* §60204(f).)

Significantly, the content standards also serve as the foundation for California’s comprehensive assessment and accountability programs—*i.e.*, as the basis for “assessing the academic achievement of individual pupils, as well as for schools, school districts, and for the California educational system as a whole.” (§§60602(a)(2), 60603.) Proficiency in meeting each set of content standards is measured by “performance standards,” which “gauge the degree to which a pupil has met the content standards and the degree to which a school or school district has met the content standards.” (§60603(n).)

Every year, students in grades 2-11 take a battery of standardized tests aligned to the content standards. (*See* §§52050 *et seq.*) By grade 12, every student is expected to pass a cumulative, standards-based high school exit exam; failure to pass means the student does not receive a diploma. (§60851).

Schools and districts are also “graded” according to the percentage of their students achieving proficiency on these tests, and the State raises the required percentage each year. Schools and districts whose students fail to meet the State-dictated levels of proficiency on the tests are subject to increasingly stringent sanctions, including removal of administrators and, ultimately, school closure. (§52055(b).) The State also relies on these test scores to meet federal

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<sup>12</sup>In August 2010, the State Board of Education modified the academic content standards for English-Language Arts and Mathematics. (AA VII:1471-72 [¶¶73-74].) Known as the “Common Core Standards,” these standards have been adopted by 46 states. California is currently in the process of aligning its teacher preparation, instructional materials, professional development, and assessment system with these new standards, with implementation scheduled for the 2014-15 school year. (*See* §§60605.7-60605.8.) The Common Core standards are designed to maintain the rigor of the current standards. (AA VII:1472 [¶74].)

accountability requirements. Schools and districts that fail to make annual performance targets for two consecutive years are identified for “program improvement.” (20 U.S.C. §6316(b).) A school or district in program improvement for three years is identified for corrective action, *i.e.*, sanctions. (*Id.*) As of 2011-12, approximately 40% of California’s schools and school districts were in program improvement, with those numbers rising each year.<sup>13</sup> In sum, although the State holds districts, schools, and students accountable for their performance on the state standards, the State at the same time denies them the educational resources necessary to ensure the opportunity to achieve success on those very same standards.

### **Plaintiffs-Appellants Represent A Broad Coalition Of Stakeholders In The California Education System**

Plaintiffs-Appellants in *Robles-Wong* represent a coalition of students, parents, and school districts from throughout the state, as well as the California School Boards Association, the Association of California School Administrators, the State PTA, and intervenor California Teachers Association. Plaintiffs-Appellants in *Campaign for Quality Education* include the Campaign for Quality Education, Alliance of Californians for Community Empowerment, Californians for Justice, San Francisco Organizing Project, and PICO California (the statewide operation of the PICO National Network)—a diverse cross-section of nearly half a million low- and moderate-income students and families across the State.

The individual and organizational Plaintiffs-Appellants in these two cases represent every aspect of the education community with varied and sometimes divergent self-interests, but nevertheless have combined here for the first time to seek judicial review of the important constitutional rights at issue in these cases.

### **PROCEDURAL HISTORY AND STATEMENT OF APPEALABILITY**

On May 20, 2010, Plaintiffs in *Robles-Wong v. California* filed suit in Alameda County Superior Court against the State of California and the Governor seeking declaratory and injunctive relief on the following causes of action: (1) violation of sections 1 and 5 of Article IX

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<sup>13</sup>[www.cde.ca.gov/ta/ac/ay/tidatafiles.asp](http://www.cde.ca.gov/ta/ac/ay/tidatafiles.asp).

of the California Constitution for failing to provide for, keep up and support the system of common schools; (2) violation of sections 1 and 5 of Article IX of the California Constitution for denial of students' fundamental right to education; (3) violation of section 8(a) of Article XVI of the California Constitution; and (4) violations of sections 7(a) and 7(b) of Article I and section 16(a) of Article IV of the California Constitution (Equal Protection of the Laws). (AA I:1-59.) In July 2010, the California Teachers Association ("CTA") intervened as a plaintiff in the *Robles-Wong* action.<sup>14</sup> (AA I:60-105.)

On July 12, 2010, Plaintiffs in *Campaign for Quality Education v. California* ("CQE") filed suit in the same court against the State and the Governor seeking declaratory and injunctive relief on the following causes of action: (1) violations of sections 1, 5, and 6 of Article IX and section 8(a) of Article XVI; (2) violations of section 7(a) and 7(b) of Article I, section 16(a) of Article IV, and section 8(a) of Article XVI; and (3) the unlawful expenditure of public funds in violation of section 526a of the California Code of Civil Procedure. (AA V:951-1006.) On July 19, 2010, the Hon. Steven Brick issued an order deeming the cases related. (AA I:110-117, V:1011-1017.)

The CQE Plaintiffs subsequently filed a First Amended Complaint. (AA V:1018-1077.) The State filed a demurrer to the *Robles-Wong* and CTA Complaints. (AA I:118-231.) It answered the CQE First Amended Complaint, but subsequently filed a motion for judgment on the pleadings. (AA V:1078-1191.) After hearing a consolidated oral argument, on January 14, 2011, the trial court sustained the State's demurrer in *Robles-Wong* and granted the State's motion for judgment on the pleadings in CQE. (AA II:445-503, VII:1410-1445.) These orders were without leave to amend with respect to the Article IX and Article XVI, section 8(a) claims; the court granted leave to amend only for the equal protection claims and for CQE's unlawful expenditure claim. (*Id.*)

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<sup>14</sup>All references hereafter to *Robles-Wong* Plaintiffs and their Complaint include Plaintiff-Intervenor California Teachers Association and its Complaint-in-Intervention.

On March 16, 2011, *Robles-Wong* Plaintiffs filed their First Amended Complaints while *CQE* Plaintiffs filed their Second Amended Complaint. (AA III:537-639, VII:1446-1514.) The Amended Complaints added the State Controller and Director of Finance as defendants and asserted amended equal protection claims. (*Id.*) *CQE's* Amended Complaint re-asserted its Article IX claims as well for purposes of preserving them on appeal. (*Id.*) The State filed a demurrer to both Amended Complaints (AA III:640-769, VII:1515-1616), which the trial court sustained on July 26, 2011. (AA IV:867-883, VIII:1714-1751.)

The trial court's order sustaining the demurrers once again allowed leave to amend the equal protection claims. (*Id.*) Plaintiffs in both cases declined to amend their complaints and final judgments were entered in both cases on November 3, 2011. (AA IV:884-897, VIII:1752-1757.) Notices of entry of judgment in both cases were served on November 28, 2011. (AA IV:898-906, VIII:1758-1764.) On January 25, 2012, Plaintiff-Appellants in each case filed a notice of appeal and now seek review of the Superior Court's determination solely as to their causes of action under Article IX of the California Constitution.<sup>15</sup> (AA IV:907-916, VIII:1765-1771.)

#### STANDARD OF REVIEW

The standard of review on appeal from a demurrer or a judgment on the pleadings is *de novo*. (*Betancourt v. Storke Housing Investors* (2003) 31 Cal.4th 1157, 1162-63; *Int'l Assn. of Firefighters Local Union 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1196.) In applying this standard, the court of appeal considers the matter anew, without deference to the trial court's ruling or the reasons therefore. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-80.)

It is reversible error for a trial court to sustain a demurrer or judgment on the pleadings where, as here, the Plaintiffs have stated a cause of action under a possible legal theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103, 125.) The complaint is granted a "reasonable interpretation, reading it as a whole and its parts in their context." (*Stearn v.*

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<sup>15</sup>The *CQE* Plaintiffs maintain a taxpayer claim that rises and falls with the viability of their Article IX claim.

*County of San Bernardino* (2009) 170 Cal.App.4th 434, 439.) The court accepts all material facts properly pleaded, and then determines whether the complaint states facts sufficient to constitute a cause of action. (*Ibid.*)

## ARGUMENT

Plaintiffs seek a declaration that the State’s educational finance system is unconstitutional based on two separate and independent claims. Part I, below, details their claim that the State has denied California students their fundamental right to an education under Article IX of the California Constitution because the education finance system fails to provide students the resources necessary to give them an opportunity to learn the skills and knowledge necessary for economic, civic, and social success (the “qualitative right” claim). Part II presents Plaintiffs’ alternative claim that, whether or not Article IX creates a qualitative right, the State has failed under Article IX to “provide for” and ke[ep] up and support[.]” the “system of common schools” it has established because the State’s education finance system is neither designed to enable districts and schools to deliver its current standards-based program to all students, nor funded at a level or in a way that ensures that all students will receive that education (the “common schools claim”). Part III demonstrates that Proposition 98 does not act as a bar to those claims, while Part IV establishes that the claims are justiciable and the relief requested appropriate.

### **I. THE STATE HAS VIOLATED CALIFORNIA STUDENTS’ RIGHT TO AN EDUCATION UNDER ARTICLE IX OF THE CONSTITUTION BY DENYING THEM AN OPPORTUNITY TO LEARN THE SKILLS AND KNOWLEDGE NECESSARY FOR ECONOMIC, CIVIC, AND SOCIAL SUCCESS.**

California courts have repeatedly held that Article IX provides schoolchildren a “fundamental” right to an education and that the purpose of the State’s education system is to teach students the skills they need to succeed as productive members of modern society. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 608-09 (*Serrano I*); *Hartzell v. Connell* (1984) 35 Cal.3d 899, 906-09 (*Hartzell*); *Butt v. State* (1992) 4 Cal.4th 668, 681 (*Butt*); *O’Connell v. Superior Ct.* (2006) 141 Cal.App.4th 1452, 1482 (*O’Connell*); *Piper v. Big Pine Sch. Dist.* (1924) 193 Cal. 664, 670 (*Piper*)). This “right to an education today means more than access to a classroom”—



the education provided to students must be of sufficient quality to provide them with the knowledge and skills necessary to “participate in the social, cultural and political activity of our society.” (*Serrano I*, 5 Cal.3d at 606, citations omitted.)

The State is denying students their fundamental right to an education under Article IX by failing to provide many students—including Plaintiff students and students in Plaintiff Districts—an education that provides them the opportunity to participate successfully in the economic, civic, and social life of the state. (AA I:23-27, 50-53 [¶¶69-80, 167-173]; VII:1506-07 [¶¶226, 230].) The State has promulgated academic standards that identify the skills and capacities necessary for economic, civic, and social success in the 21st century, but the State operates a school finance system that denies many students the opportunity to learn those essential skills and capacities. The factual allegations in Plaintiffs’ Complaints amply support these claims. (AA I:20-23, 33-50 [¶¶61-68, 106-166]; VII:1467-1503 [¶¶65-213].)

The trial court erred in two ways. First, the court failed to address whether the fundamental right to an education under Article IX ensures students an education of a qualitative level. Second, the court erred in denying Plaintiffs an opportunity to prove that the State’s funding system is violating that qualitative right to an education. The trial court improperly dismissed Plaintiffs’ Article IX claim as a matter of law because it misread the *Serrano* decision as dictating that Article IX rights can never be violated by operation of the State’s school finance system no matter how seriously that system undermines educational quality across California. (AA II:452, 454-455.) Plaintiffs assert that, as a matter of law, Article IX provides a legal right to challenge the quality of education provided to California students. Whether that right is being denied by operation of the school finance system is a question of fact that cannot be decided by demurrer. Therefore, the trial court decision must be reversed.

**A. All California Schoolchildren Are Entitled to an Education of Sufficient Quality to Safeguard the Fundamental Right to An Education Guaranteed by Article IX.**

The language and history of Article IX, and the seminal judicial decisions construing the fundamental right to a public education, lead to the inexorable conclusion that California students are entitled to receive an education that prepares them to participate in civic institutions and provides them an opportunity for economic and social success.<sup>16</sup> Failing to recognize such an enforceable right under Article IX would render the fundamental right to an education virtually meaningless—the right to an education has no substance at all if it is not a right to an education of *some* quality. Such a narrow reading of Article IX would also leave California among the small minority of states that have narrowly interpreted their Education Articles to deny any legal challenge to the quality of the education provided to students.

1. The California Constitution Establishes the Paramount Importance of Public Education Among the Rights Granted to the People and the Obligations Placed Upon the State.

Since the adoption of the California Constitution in 1849, Californians have declared the paramount importance of education to our State and its economic, social, and civic future. As one delegate to the 1849 Convention declared, “[n]othing will have a greater tendency to secure prosperity to the State and stability to our institutions than by providing for the education of our posterity.” (Browne, Rep. of Debates in Convention of Cal. on Formation of State Const. (1850) p. 204.) The California Supreme Court has observed that the framers viewed education as a foundational right just as essential to a functioning democracy as the right to vote, and a prerequisite to preserve the other basic civil and political rights granted in the Constitution. (*Serrano I*, 5 Cal.3d at 607-08; *Hartzell*, 35 Cal.3d at 906.)<sup>17</sup>

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<sup>16</sup>Plaintiffs do not take the position that every California student is *guaranteed* economic and social success, but rather that every student must at least be provided an *opportunity* to learn the skills and capacities necessary for such success. (See *McCleary v. State* (Wash. 2012) 269 P.3d 227, 250-252.)

<sup>17</sup>In determining the meaning and scope of sections 1 and 5 of article IX, the court’s objective must be “to discern the true intent of [the constitutional provisions’] authors, and when that intent has been ascertained, it becomes the duty of the Court to give effect to it.” (*Bourland v. Hildreth* (1864) 26 Cal. 161, 180.) Constitutional provisions must not “be interpreted according to narrow or super-technical principles, but liberally and on broad general lines so that it may accomplish in full measure the objects of its establishment and so carry out the great principles of government.” (*People v. Giordano* (2007) 42 Cal.4th 644, 655.) The plain language of Sections 1 and

Recognizing public education as a critical priority for the new state, the framers enacted language in Article IX that would ensure its provision. Sections 1 and 5 provide:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement. (Cal. Const. art IX, § 1.)

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The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district . . .

(*Id.*, § 5.)

The centrality of public education in California’s constitutional scheme is obvious—apart from the three branches of government, the only public institutions required by the original Constitution were education and the state militia. (*See* Cal. Const. of 1849, arts. VII (militia), IX (education).) The explicit command to the Legislature to affirmatively establish a system for provision of education is unique in the Constitution. All other constitutional provisions concerning public welfare or social services are couched in permissive terms.

The current language of sections 1 and 5 was adopted at the Constitutional Convention of 1879. As the drafters of the 1879 Constitution made clear, the common schools were “for the education of American youth; to train them in the use of the American language; to prepare them to be American citizens, and to perform the duties of such; and so far as the common school system [could], confer a general education upon the people.” (2 Willis & Stockton, Debates and Proceedings, Cal. Const. Convention 1878-89, p. 1412.) The “common school system” prepared children “for the conflicts of life, or to go forward and achieve a higher education.” (*Id.* at 1413.) The phrase “common schools” captured all of these ideals; by imposing a duty upon the Legislature to provide for a system of common schools, section 5 confers upon all the children of the State the right to an education that will enable them “to carry on intelligently and

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5 preclude the need to look further into the constitutional history to ascertain the intent of the framers in obligating the State to financially support the public school system. (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269; *Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304.) But, a court may properly consider legislative history where to do so buttresses the plain meaning of a statute, as the constitutional history of sections 1 and 5 does here. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120–1121.)

successfully the ordinary labors of life.” (*Id.* at 1102 [the Secretary quoting the Governor of N.Y.].)<sup>18</sup>

Read together, sections 1 and 5 provide a qualitative right to an education and impose an affirmative duty upon the State to establish and support a common school system that makes that right available to all school-aged children.<sup>19</sup> Both sections employ the term “shall,” which connotes a mandatory or directory duty. (*See Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 435-36.) Furthermore, the terms “provide for” and “kept up and supported” in section 5 unambiguously place an obligation upon the State to fund the school system to further the purpose of the Education Article. Underscoring the importance of this obligation, in section 1 the Legislature is directed to use “all suitable means” at its disposal to promote the goals of Article IX.

Implicit in Article IX is a requirement that the diffusion of knowledge and intelligence be of *sufficient quality* to preserve the rights and liberties of the people, which are specified in detail in the Constitution.<sup>20</sup> (*See Serrano I*, 5 Cal.3d at 607-10; *Cal. Statewide Cmty. Dev. Auth. v. All Persons Interested in the Matter of the Validity of a Purchase Agreement* (2007) 40 Cal.4th 788, 792 [constitutional convention included section 1 because it “[r]ecogniz[ed] that an educated citizenry and workforce are vital to the preservation of the rights and liberties of the people”].) The State’s obligation to keep up and support the school system must be understood in this

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<sup>18</sup>In adopting section 1 and resisting an amendment that would eliminate it, several delegates rejected the notion that the language found in Article IX has no force and was merely “a glimmering generality” that “imposed no obligation upon the state.” These delegates emphasized that the language of section 1 “means something,” “makes it the duty of the Legislature to forward this matter in every way the Legislature may have the power to do,” and “does involve the expenditure of public funds. (Debates and Proceedings, *supra*, at 1087, 1089.)

<sup>19</sup>California courts have consistently read sections 1 and 5 together when construing the overall purpose of Article IX and the specific rights and duties contained therein. (*See, e.g. Hartzell*, 35 Cal.3d at 906; *Slayton v. Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 547 [“California has extended the right to an education by virtue of two constitutional provisions. . .”], emphasis omitted.)

<sup>20</sup>Those rights include the right of “pursuing and obtaining safety, happiness, and privacy,” and of “acquiring, possessing and protecting property,” (Cal. Const., art. I, §1); the right to “freely speak, write and publish,” (*Id.*, §2(a)); the right to “instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good,” (*Id.*, §3(a)); and the right to vote. (*Id.*, art. II, §2.)

light—there is a necessary connection between the right granted to students and the financial responsibility placed upon the State.<sup>21</sup>

Taken as a whole, the language and history of Article IX make clear that the fundamental right to an education must have some qualitative meaning, and it is the duty of the State to keep up and support an educational system that provides all California school children that fundamental right. Defendants' position that the California Constitution contains no enforceable rights to *any* level of education or *any* level of support is incompatible with the language and history of Article IX.

2. California Judicial Decisions Demonstrate that Students Must Be Provided an Education that Prepares Them for Civic and Political Participation and Provides Them an Opportunity for Economic and Social Success.

More than one hundred years of California case law supports finding an enforceable, substantive right to an education under sections 1 and 5 of Article IX. There can be no doubt that Article IX is the source of “enforceable” rights. (*See Piper*, 193 Cal. at 669; *see also Ward v. Flood* (1874) 48 Cal. 36, 50-51; *Hartzell*, 35 Cal.3d at 911.) The Supreme Court looked specifically to the directives of Article IX, sections 1 and 5, to conclude that “[t]he education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution,” and *Piper* makes clear that the public education guaranteed by Article IX is an “enforceable right[] vouchsafed to all” California children. (*Piper*, 193 Cal. at 669; *see also Ward*, 48 Cal. at 50 [precursor to section 5 granted each child “a legal right”].)

Education is also a *fundamental* right that “[lies] at the core of our free and representative form of government.” (*Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768 (*Serrano II*); *see also Serrano I*, 5 Cal.3d at 608-609 [“We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a ‘fundamental interest’”];

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<sup>21</sup>In 1910, the Constitution was amended to impose the requirement that from each year’s state revenues, “there shall *first be set apart* the moneys to be applied by the state for support of the public school system.” (Cal. Const., former art. XIII, §15; now art. XVI, §8(a), *emphasis added*.) This amendment expanded the funding source for education from a finite set of revenues — education was originally funded from proceeds from federal lands (Cal. Const. of 1849, art. IX, §2) — to funding from all state revenues, and reaffirmed that funding for public education takes priority over all other financial obligations imposed upon the State by the Constitution.

*Butt*, 4 Cal.4th at 683, 685 [education enjoys a “unique importance” in the California Constitution; fundamental right to education in California is “well settled”].-)

This longstanding precedent makes clear that the right to an education encompasses a qualitative standard—the State must do more to satisfy its obligations under Article IX than simply provide students free access to schools. In *Serrano I*, the court specifically emphasized the “right to an education means more than access to a classroom.” (*Serrano I*, 5 Cal.3d at 607.) Rather, the education right guaranteed to students is a qualitative one that provides all students substantive opportunities to gain the skills necessary to enter “the chambers of science, art and the learned professions, as well as into fields of industrial and commercial activities.” (*Ibid.*) The education provided must be of sufficient quality to provide students with the skills necessary to “participate in the social, cultural and political activity of our society.” (*Id.* at 606; *see also O’Connell*, 141 Cal.App.4th at 1478 [California’s public school system exists “not [simply] to endow students with diplomas, but to equip [students] with the substantive knowledge and skills they need to succeed in life”].)

This qualitative component is essential to the right to an education under Article IX because “education is the lifeline of both the individual and society:”

[F]irst, education is a major determinant of an individual’s chances for economic and social success in our competitive society; second, education is a unique influence on a child’s development as a citizen and his participation in political and community life.

(*Serrano I*, 5 Cal.3d at 605.)

The Supreme Court has recognized that education has an unparalleled influence both on the economic vitality of the State and on opportunities for individual success. (*Id.* at 608-610.) Public education “plays an indispensable role in the modern industrial state.” (*Id.* at 605.) It significantly affects economic success because the “opportunities for securing employment are dependent upon the rating that a youth has received in his school work.” (*Piper*, 193 Cal. at 673.) Furthermore, education “prepares individuals to participate in the institutional structures—

such as labor unions and business enterprises—that distribute economic opportunities and exercise economic power.” (*Hartzell*, 35 Cal.3d at 908.)

Education is not only essential to the economic well-being of the State and its people, it also “forms the basis of self-government and constitutes the very cornerstone of republican institutions.” (*Id.* at 906 [quoting the Constitutional Convention].) Education “provide[s] the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities” (*Serrano I*, 5 Cal.3d at 608) and “provides the intellectual and practical tools necessary for political action:”

Without high quality education, the populace will lack the knowledge, self-confidence, and critical skills to evaluate independently the pronouncements of pundits and political leaders. Moreover, education provides more than intellectual skills; it also supplies the practical training and experience—from communicative skills to experience in group activities—necessary for full participation in the ‘uninhibited, robust, and wide-open’ debate that is central to our democracy.

(*Hartzell*, 35 Cal.3d at 908, internal citations omitted.)

These various skills are key to the “preservation of other basic civil and political rights” because without an education people cannot fully understand the public issues at stake when they vote. (*Serrano I*, 5 Cal.3d at 608.) Moreover, public education is the “most powerful agency for promoting cohesion among a heterogeneous democratic people” (*ibid*) because it “bring[s] together members of different racial and cultural groups and help[s] them to live together in harmony and mutual respect.” (*Hartzell*, 35 Cal.3d at 908.)

The Court’s description of the Article IX fundamental right in *Serrano* and *Hartzell* and the centrality of that right to the holdings of both cases make it clear that the Court recognizes the underlying qualitative nature of the Article IX education right. In *Serrano I*, the Court needed to examine the contours of Article IX to ascertain whether the right granted thereunder and its role in the State’s constitutional framework warranted treating it as a *fundamental* right for equal protection purposes and application of strict scrutiny. The Court found the Article IX right to be a fundamental interest precisely because it guarantees students an education of *sufficient quality* to prepare them to engage as active participants in the political and economic

life of their communities and to nurture and protect their ability to exercise other guaranteed liberties like voting, free expression, owning property and privacy. (*Serrano*, 5 Cal.3d at 614.)<sup>22</sup> In *Hartzell*, a majority of the justices again affirmed the qualitative aspect of the Article IX education right in holding that extracurriculars, as an “integral component” of a public education, must also be offered free of charge precisely because extracurriculars also fulfill the *qualitative* purposes of Article IX. (*Hartzell*, 35 Cal.3d at 909-911.)<sup>23</sup>

These judicial decisions make clear that: education is a fundamental right that is essential to preserving other rights and liberties granted by the Constitution; California students are entitled to receive an education that prepares them to participate in civic and political life and provides them an opportunity for economic and social success; and the common school system must be “provided for” and “kept up and supported” so that the education guaranteed by the Constitution is available to students throughout the public school system. (*Serrano I*, 5 Cal.3d at 595.) It is also settled that the State’s obligations to educate students under Article IX are plenary and cannot be delegated to any other entities. (*See Hall v. City of Taft* (1956) 47 Cal.2d 177, 179 [ “The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the state Legislature is given comprehensive powers in relation thereto”].)<sup>24</sup> If the right to an education is divorced from any qualitative standard it simply cannot fulfill the purposes of Article IX as consistently articulated by the Supreme Court.

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<sup>22</sup>See also *Butt*, 4 Cal.4th at 683 [“education is a fundamental interest under the California equal protection guarantees and [] the unique importance of public education in California’s constitutional scheme requires careful scrutiny of state interference with basic educational rights”], citing *Hartzell*, 35 Cal.3d at 906-909.)

<sup>23</sup>See, e.g., *Hartzell*, 35 Cal.3d at 909 (extracurricular activities are “[no] less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens physically, mentally, and morally, than the study of algebra and Latin . . .”), internal quotation marks and citations omitted; see also *id.* at 911 (“In addition to the particular skills taught, group activities encourage active participation in community affairs, promote the development of leadership qualities, and instill a spirit of collective endeavor. These results are directly linked to the constitutional role of education in preserving democracy, as set forth in article IX, section 1, and elaborated in *Serrano I*, 5 Cal.3d at pages 607-609.”)

<sup>24</sup>See also *Kennedy v. Miller* (1893) 97 Cal. 429, 431 [“Article IX of the constitution makes education and the management and control of the public schools a matter of state care and supervision”]; *Piper*, 193 Cal. at 669 [public schooling “is in a sense exclusively the function of the state which cannot be delegated to any other agency”].)



3. Decisions From Other States Find Qualitative, Enforceable Rights in Education Articles Similar to Article IX

California courts may look to the decisions of other state courts that have interpreted similar constitutional provisions because where “words are used which are employed in a certain sense in the constitutions or statutes of other States . . . it is proper to consider them as employed in the same sense in our Constitution.” (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 850, italics omitted; *see also Arcadia Unified Sch. Dist. v. State Dept. of Ed.* (1992) 2 Cal.4th 251, 261.) In fact, the framers of the Education Article took the language for Article IX, section 1 directly from a half dozen other constitutions. (*See Debates and Proceedings, supra*, at 1087 [statement of Mr. Winans].)

The State’s briefing below called the trial court’s attention solely to the eight states that have found school funding claims non-justiciable under their state constitutions. [Demurrer to RW8/10/10 at 13-19.] In fact, at least 22 state supreme courts have held that their state’s education article guarantees students substantive educational opportunities, and have allowed plaintiffs to bring challenges to state funding policies alleged to violate those substantive rights.<sup>25</sup> Many of those cases interpreted constitutional provisions with language similar to that of California’s Article IX, and found those provisions to confer a qualitative right to an education consistent with the right described in *Serrano I* and the right Plaintiffs assert here—the right to an education that prepares students for engagement in the civic and economic life of society.<sup>26</sup>

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<sup>25</sup>**Arizona:** *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop* (Ariz. 1994) 877 P.2d 806; **Arkansas:** *Tucker v. Lake View Sch. Dist. No. 25* (Ark. 1996) 917 S.W.2d 530; **Colorado:** *Lobato v. State* (Colo. 2009) 218 P.3d 358; **Connecticut:** *Connecticut Coalition for Justice in Ed. Funding, Inc. v. Rell* (Conn. 2010) 990 A.2d 206; **Idaho:** *Idaho Schs. For Equal Ed. Opportunity* (Idaho 1998) 976 P.2d 913; **Kansas:** *Montoy v. State* (Kan. 2005) 120 P.3d 306; **Kentucky:** *Rose v. Council for Better Ed., Inc.* (Ky. 1989) 790 S.W.2d 186; **Massachusetts:** *McDuffy v. Sect. of Exec. Office of Ed.* (Mass. 1993) 615 N.E.2d 516; **Montana:** *Columbia Falls Elementary Sch. Dist. No. 6 v. State* (Mont. 2005) 109 P.3d 257; **New Hampshire:** *Claremont Sch. Dist. v. Governor* (N.H. 1997) 703 A.2d 1353; **New Jersey:** *Abbott v. Burke* (N.J. 1990) 575 A.2d 359; **New York:** *Campaign for Fiscal Equity, Inc. v. State* (N.Y. 2003) 801 N.E. 2d 326; **North Carolina:** *Leandro v. State* (N.C. 1997) 488 S.E.2d 249; **Ohio:** *DeRolph v. State* (Ohio 1997) 677 N.E.2d 733; **South Carolina:** *Abbeville County Sch. Dist. v. State* (S.C. 1999) 515 S.E.2d 535; **South Dakota:** *Davis v. State* (S.D. 2011) 804 N.W.2d 618, 624; **Texas:** *Edgewood Indep. Sch. Dist. v. Kirby* (Tex. 1989) 777 S.W.2d 391; **Vermont:** *Brigham v. State* (Vt. 1997) 692 A.2d 384; **Wisconsin:** *Vincent v. Voight* (Wis. 2000) 614 N.W.2d 388; **Washington:** *Seattle Sch. Dist. No. 1 v. State* (1978) 90 Wash.2d 476; *McCleary v. State* (Wash. 2012), 269 P.3d 227, 230-31 (Wash. 2012); **West Virginia:** *Pauley v. Kelly* (W.Va. 1979) 255 S.E.2d 859, 870; **Wyoming:** *Campbell County Sch. Dist. v. State* (Wyo. 1995) 907 P.2d 1238.

<sup>26</sup>

For example, in *Leandro v. State* (N.C. 1997) 488 S.E.2d 249, the North Carolina Supreme Court interpreted Article IX, sections 1 and 2 of the North Carolina Constitution: “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged” and “the General Assembly shall provide . . . for a general and uniform system of free public schools.” The issue before the court was “whether the people’s constitutional right to education has any qualitative content . . .” and the court answered affirmatively that “the right to education provided in the state constitution is a right to a sound basic education.” (*Id.* at 345.) The court held that “[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.” (*Ibid.*) The *Leandro* court observed that its earlier decisions articulating the purpose of the North Carolina education provisions—including a 1917 case with language similar to that found in *Piper* and *Serrano*—“recognized that there is a qualitative standard inherent in the right to an education guaranteed by [the] constitution.” (*Id.* at 346.)

Similarly, in 1995, the New York Court of Appeals interpreted Article XI, section 1 of the New York Constitution, which provides that the “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” The court held that this language, echoing Article IX, section 5 of the California Constitution, was not “hortatory” but instead “require[d] the State to offer all children the opportunity of a sound basic education . . . consist[ing] of the basic literacy, calculating, and

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<sup>26</sup>*See, e.g., New Jersey: Robinson v. Cahill* (N.J. 1973) 303 A.2d 273, 295 [“The Constitution’s guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market”]; **Washington: Seattle Sch. Dist.**, 585 P.2d 71 at 94 [“State’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the market place of ideas”]; **Wyoming: Campbell Cty. Sch. Dist.**, 907 P.2d at 1259 [“framers intended the education article as a mandate to the state legislature to provide an education system of a character which provides Wyoming students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually”]; *see also Connecticut: Connecticut Coalition*, 990 A.2d at 215; **Kentucky: Rose**, 790 S.W.2d at 212; **Massachusetts: McDuffy**, 615 N.E.2d at 554; **New Hampshire: Claremont Sch. Dist.**, 703 A.2d at 1359; **New York: Campaign for Fiscal Equity**, 801 N.E.2d at 331; **North Carolina: Leandro**, 488 S.E.2d at 255; **South Dakota: Davis**, 804 N.W.2d at 627; **West Virginia: Pauley**, 255 S.E.2d at 877.)

verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.” (*Campaign for Fiscal Equity*, 655 N.E.2d at 666.)<sup>27</sup>

Likewise, in *Claremont Sch. Dist.*, 635 A.2d 1375, the New Hampshire Supreme Court interpreted an education clause that provides: “Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government...it shall be the duty of the legislators and magistrates, in all future periods of this government...to encourage the promotion of agriculture, arts, sciences, commerce, trades, and natural history of the country.” (N.H. Const. Pt. 2, art. 83.) The court rejected assertions that the language of Part 2, article 83 is simply “hortatory, and not mandatory,” and held that the provision “imposes a duty on the State to provide an education that extends beyond mere reading, writing and arithmetic, but also prepares citizens for their role in the marketplace of ideas.” (*Claremont*, 635 A.2d at 1376, 1378.) The court further held that “[h]aving identified that a duty exists and having suggested the nature of that duty, we emphasize the corresponding right of the citizens to its enforcement.” (*Id.* at 1381.)

The Education Article of the California Constitution should be accorded no less weight than similar provisions from other states, particularly where the California Supreme Court has declared that Article IX bestows a fundamental right. Like most of their peers nationwide, California students should be entitled to receive an education of sufficient quality to prepare them for economic, civic and social success.

**B. The Court May Look to the State’s Academic Standards, Which Reflect the Skills and Knowledge Necessary for Economic, Civic, and Social Success in the 21st Century, in Assessing Whether as a Factual Matter the State Has Violated Students’ Article IX Right to an Education.**

The quality of education required to satisfy the State’s constitutional obligation means something different today than it did in 1879 or 1971. (*See Driving Sch. Assn. of California v. San Mateo Union High School District* (1992) 11 Cal.App.4th 1513, 1524 [“The demands of

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<sup>27</sup>New York’s highest court recently affirmed the continued viability of its holding in the *Campaign for Fiscal Equity* case in permitting a new school funding challenge to proceed to trial. (*Hussein v. State of New York*, No. 69 (N.Y. Jun. 26, 2012) slip op. at 1 (mem.) (Available on Non-California Authorities CD.)

citizenship have changed from those that could have been envisioned at the... Constitutional Convention of 1878-1879”]; *see also Hartzell*, 35 Cal.3d at 908 [“with the rise of the electronic media and the development of sophisticated techniques of political propaganda and mass marketing, education plays an increasingly critical role in fostering ‘those habits of open-mindedness and critical inquiry which alone make for responsible citizens....’”]; *Serrano I*, 5 Cal.3d at 608 [“The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex”]; *accord McCleary*, 269 P.3d at 231, 251 [education program is “not etched in constitutional stone. The legislature has an obligation to review the basic education program as the needs of students and the demands of society evolve”].)

We know what knowledge, skills and abilities California students must develop in order to succeed in today’s global economy and participate as informed citizens in our democracy because the State has told us what they are. The academic content standards developed by the State represent the State’s current articulation of the skills and knowledge that must be taught and learned in public schools today. While these standards do not create the constitutional right to a qualitative education, they do provide the Court with a manageable means by which to assess whether that qualitative right is being fulfilled. As such, the Court may properly rely on the State’s academic standards in determining the factual question of whether students are being provided an education of sufficient quality to satisfy the Article IX right.

1. The State’s Standards-Based Educational Program Reflects the Skills and Knowledge Necessary for Economic, Civic, and Social Success in the 21st Century.

Consistent with the purpose of Article IX, section 1, the Legislature has directed the development of academic content standards that “shall be based on the knowledge and skills that pupils will need in order to succeed in the information-based, global economy of the 21st century.” (§60602.) The State Board of Education described the adopted content standards as designed to enable students to “succeed academically, pursue higher education, find challenging

and rewarding work, participate in our democracy as informed citizens, appreciate and contribute to our culture, and pursue their own goals and interests throughout their lives.” (California State Board of Education, English-Language Arts Content Standards for California Public Schools, Kindergarten Through Grade Twelve (Dec. 1997) p. iv.)

2. The Court May Rely upon the State’s Academic Content Standards In Determining Whether The State is Denying Students Their Right to an Education Under Article IX.

Courts may use these legislatively determined standards (and the State’s assessment program, which measures proficiency in meeting the standards) as guidelines for determining as a factual matter whether or not the State is meeting its article IX obligations and providing California students sufficient opportunities to learn the skills and knowledge they need to participate in the civic and economic life of our State. (*See, e.g.*, §60602 [standards designed to “serve as the basis for assessing . . . the California education system].)

The recent *McCleary* decision in Washington is instructive. In that case, the Washington Supreme Court held that the State’s “essential academic learning requirements”—similar to California’s academic content standards—identify “the knowledge and skills specifically tailored to help students succeed as active citizens in contemporary society” and “specify ‘what all students should know and be able to do at each grade level’” in nine separate content areas. (*McCleary*, 269 P.3d at 250.) The Court found that the academic learning requirements, along with more general statutory education goals and “broad educational concepts” set forth in prior judicial decisions construing Washington’s education article, give “substantive content” to the word “education” in the education article. (*Id.* at 48, 50.)

In addition to Washington, California’s academic standards and the assessment and accountability systems aligned to those standards are similar to those relied on by the Supreme Courts in Idaho, Kansas, New Jersey, and North Carolina for determining whether the education provided to students was of sufficient quality to meet constitutional requirements. (*See, e.g., Idaho Schs. for Equal Educational Opportunity v. Evans* (Idaho 1993) 850 P.2d 724, 734-35

[“We believe that our acknowledgement of these [legislatively-mandated academic] standards appropriately involves the other branches of government while allowing the judiciary to hold fast to its independent duty of interpreting the constitution when and as required.”]; *Unified Sch. Dist. No. 229 v. State*, 256 (Kan. 1994) 885 P.2d 1170, 1175 [“By utilizing as a base the standards enunciated by the legislature, the court will fulfill its obligations of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people.”]; *Abbott v. Burke* (N.J. 1997) 693 A.2d 417 (*Abbott IV*) [state standards “spell out and explain the meaning of a constitutional education”]; *Leandro*, 488 S.E.2d at 259 [relying on “educational goals and standards adopted by the legislature” allows court to fulfill its “duty to determine meaning of requirements of state constitution”].)

**C. Plaintiffs Have Sufficiently Alleged that the State’s School Finance System Is Denying Students the Opportunity to Become Proficient in the Academic Standards and to Receive an Education that Meets Constitutional Standards.**

The factual allegations in Plaintiffs’ complaints demonstrate that: (1) a substantial number of students, including Plaintiff students, are failing to receive an education that provides them an opportunity to learn the content standards and that prepares them for civic and political participation and for economic and social success, and (2) the State’s school finance system is causing the educational deprivation.

As detailed in the Statement of Facts, *supra*, Plaintiffs allege:

- Millions of students fail to achieve proficiency in the State’s academic content standards, and fail to acquire the skills and knowledge that the State deems essential for success in the 21st century global economy.
- California students, collectively and in every socio-economic and ethnic subgroup, lag far behind students in other states in terms of academic achievement.
- Nearly a third of California’s students fail to graduate from high school, and most of those that do graduate are unprepared for college or a career.
- Low funding levels and ineffective finance policies deny California students access to essential educational resources – California ranks 49th out of the 50

states in teacher-student ratios and cannot provide sufficient instructional time, instructional resources or intervention programs.

- The school finance system directly impedes the ability of school districts to provide their students opportunities to learn the academic content standards and acquire the skills and knowledge necessary for civic engagement and social and economic success.

These allegations, reasonably construed, must be accepted as true (*Stearn*, 170 Cal.App.4th at 439) and, if accepted, are sufficient to state a cause of action for violation of Article IX of the Constitution. The trial court's dismissal without leave to amend concluded not only that these facts were insufficient, but that no set of facts can be asserted that would be sufficient to show a violation of Article IX.

**D. The Trial Court Erred In Failing to Address Whether There is a Qualitative Right to an Education Under Article IX and By Concluding that Serrano I Bars Any Article IX Claim Related to the School Finance System.**

In its Order sustaining the demurrer to Plaintiffs' Article IX claims, the trial court did not distinguish between Plaintiffs' two Article IX claims – the “qualitative right” claim discussed here and the “common schools” claim discussed below – and mischaracterized both claims as asserting a “constitutional right to a particular level of funding.” (AA II:455; VII:1413.) Having mischaracterized Plaintiffs' claims, the court failed to address the core legal question of whether the California Constitution provides students the right to an education that meets some quality.

As discussed above, the language and history of Article IX, California judicial decisions construing the fundamental right to education, and the weight of authority from other states demonstrate that California students are entitled to receive an education of some qualitative level — specifically, an education that prepares them to participate in civic institutions and provides them an opportunity for economic and social success. The trial court erred in failing to recognize this qualitative right to an education under Article IX.

Contrary to the trial court's characterization, Plaintiffs do not assert an Article IX right to a specific level of education funding anymore than a prisoner denied healthcare claims a right to a constitutionally fixed dollar amount of prison funding. The State's obligation with respect to

its school finance system flows from the qualitative right to an education afforded to all students under Article IX.<sup>28</sup>

The Article IX right to an education that meets some qualitative standard exists independently of the school finance system, but it is a right that can be violated by operation of the school finance system. If the State acts or fails to act in a manner that denies students their qualitative right to an education under Article IX, no California case provides a special legal exemption for State actions related to school finance or requires the courts to close their eyes to otherwise justiciable and enforceable Article IX claims solely because they touch on matters of finance. To the contrary, Plaintiffs are entitled to demonstrate that the State is operating its school finance system in a manner that violates their Article IX right to an education. Whether or not the State's school finance system is actually denying students their qualitative right to an education is a question of fact that cannot be decided by demurrer.

Despite interpreting Plaintiffs' qualitative right claim as a claim for a specific level of funding, the trial court noted that "[i]f the Court were writing on a clean slate, plaintiffs' reliance on [section 5] might carry the day." (AA II:454.) The trial court, however, concluded that *Serrano I* "considered and rejected the argument that section 5 of article IX included any particular financing requirement." (*Id.*) Although the court appears to have interpreted *Serrano I* to bar any Article IX claim related to school finance, the Supreme Court never considered such a far-reaching restriction on Article IX rights in *Serrano I*, nor has it done so in any other case.

In *Serrano I*, plaintiffs challenged a school finance system that made the educational resources available to students dependent on the tax wealth of the students' school districts. The section 5 claim in that case asserted that the State's finance policies created separate "systems" (based on a district's tax wealth) rather than the "common system" required by section 5. While agreeing with plaintiffs that a funding system that results in wealth-based differences would violate

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<sup>28</sup>See *Serrano II, supra*, 18 Cal.3d at 748 ["There is a distinct relationship between cost and quality of educational opportunities afforded . . . differences in dollars do produce differences in pupil achievement"]; see also, *Campbell Cty. Sch. Dist.*, 907 P.2d at 1272 ["Nothing in the Education Clause of our constitution suggests that the fundamental right to an education applies only to the education itself, not to the money needed to fund that education. Education does not occur in a vacuum; it is achieved as a result of public expenditures."]]



other constitutional provisions guaranteeing equal protection, the Supreme Court determined that it “must reject plaintiffs’ argument that the provision in section 5 for a ‘system of common schools’ requires *uniform* educational expenditures.” (*Serrano I*, 5 Cal.3d at 596, emphasis added.) The Court characterized plaintiffs’ claims as seeking “*equal school spending*” and noted that the “common schools” provision had never been interpreted to require completely *equal* spending. (*Id.*, emphasis added.) In fact, the language from *Serrano I* relied upon by the trial court here likewise focuses on equal spending and does not provide support for the trial court’s conclusion that Plaintiffs’ Article IX claim is barred:

[We] have never interpreted the constitutional provision [section 5] to require *equal* school spending; we have ruled only that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade . . .

(AA II:454, quoting *Serrano I*, 5 Cal.3d at 596, emphasis added.)

Furthermore, the *Serrano* Court upheld the demurrer to the section 5 claim in large part to avoid a direct conflict with the text of former section 6. (*Id.* at 595-96.) At that time, section 6 expressly allowed for some variation in district expenditures on education, as it directed the Legislature to “provide for the levying annually by the governing board of each county . . . of such school district taxes, at rates . . . as will produce in each fiscal year such revenue as the governing board thereof shall determine is required . . . .” (Cal. Const., former art. IX, § 6.) In *Serrano II*, the Court concisely explained the reason why the section 5 claim brought by plaintiffs in that case had to be rejected:

At pages 595 and 596 of our opinion in *Serrano I*, in rejecting plaintiffs’ contention that the system there alleged to exist was violative of the provisions of article IX, section 5 (requiring “a system of common schools”), we observed that former article IX, section 6, paragraph 6, the provision here at issue, “specifically authorizes the very element [variation in school district expenditures] of which plaintiffs’ complain.”

(*Serrano II*, 8 Cal.3d at 770-71, citations omitted.)

There are only two sentences in *Serrano I* that address section 5 and school finance, and both sentences make clear that any limitations imposed by the Court were related to the Court's concern with the conflict between a section 5 claim for *equal spending* and the language of section 6 that existed in 1971:

While article IX, section 5 makes no reference to school financing, *section 6 of that same article specifically authorizes the very element of the fiscal system of which plaintiffs complain.*

\* \* \*

This maxim [referring to principle of conflict among constitutional provisions] suggests that section 5 should not be construed to apply to school financing *otherwise it would clash with section 6.*

(*Serrano I*, 5 Cal.3d at 596, emphasis added.)

These two sentences are limited in their reach and provide no support for the proposition that Article IX rights can never implicate the State's school finance system.<sup>29</sup> Rather, the decision in *Serrano I* was focused on the claim that section 5 required equal spending, a claim at odds with the specific variations provided by section 6. In rejecting that claim, the Supreme Court did not consider – let alone decide – the broader question of whether the school finance system can be challenged if it denies rights granted to students under Article IX. (See *Santisas v. Goodin* (1988) 17 Cal.4th 599, 620 [“An appellate decision is not authority for everything said in the court's opinion but only ‘for the points actually involved and actually decided’”], quoting *Childers v. Childers* (1946) 74 Cal.App.2d 56, 61; see also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 [“An opinion is not authority for propositions not considered”].) The trial court's conclusion that *Serrano I* bars Plaintiffs' Article IX claim because it bars any claim related to finance is therefore erroneous; if there is a qualitative right to

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<sup>29</sup>Not only do Plaintiffs' claims in this case *not* clash with any other constitutional provision—including the former section 6 and its authorization for local revenue raising—but the specific concern that animated the Court in *Serrano I* is no longer a practical one. The authorization for local property tax variations contained in former section 6 (now located in article XIII, section 21) has been rendered inoperative by Proposition 13, which superseded that provision, limits property tax rates to 1%, and gives the State the authority to allocate those revenues among local governments and school districts. (Cal. Const., art. XIII A, §1.)

an education under Article IX, Plaintiffs are entitled to prove at trial that the right is being violated by operation of the school finance system.

**II. THE STATE HAS ALSO VIOLATED ARTICLE IX BY FAILING TO PROVIDE FOR, KEEP UP AND SUPPORT THE STANDARDS-BASED SYSTEM OF COMMON SCHOOLS IT HAS ESTABLISHED.**

Section 1 of Article IX requires that the Legislature “*shall encourage by all suitable means* the promotion of intellectual, scientific, moral, and agricultural improvement.” Section 5 states: “The Legislature *shall provide for a system of common schools by which a free school shall be kept up and supported* in each district at least six months in every year . . . .” (Cal. Const., art. IX, §§ 1, 5.) Plaintiffs’ second claim asserts that *whatever* education program the State chooses to place at the core of the common schools system, the Constitution imposes an enforceable obligation on the State to ensure that funding is sufficient to “provide for,” “keep up and support” the delivery of that program throughout its “system of common schools.”<sup>30</sup> In other words, the State must provide funding that is sufficient to fund the educational program it has chosen, and must provide it in a way that allows all schools to deliver that program to all students. Because the California Supreme Court has made it clear that at the heart of the constitutionally mandated “system of common schools” is the system’s “uniform . . . course of study and educational progression from grade to grade” (*Serrano I*, 5 Cal.3d at 596), it follows that the Legislature’s duty to “*provide for a system of common schools*” requires the provision of funding sufficient to support the delivery of the uniform course of study and grade-to-grade progression that the Legislature has established.<sup>31</sup>

The specific content of the system’s uniform course of study is subject to legislative discretion and has changed over time. Today, the State’s academic content and performance standards—which detail the specific knowledge and skills the State expects children to learn in

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<sup>30</sup>The Robles-Wong Complaint states this claim as a separate cause of action (AA I:53-54), while the CQE Complaint presents the claim as an alternative theory under Article IX of the California Constitution. (AA VII:1506 [¶¶ 221, 225-26].)

<sup>31</sup>Unlike Plaintiffs’ preceding Article IX claim, the common schools claim does not assert that Article IX requires the State to provide an education to all students that meets a qualitative standard.

each core subject in each grade—are the core of the State’s educational program. However, the State’s educational finance system is not designed to ensure and does not ensure that districts and schools can systematically deliver that standards-based educational program – in fact, it more often frustrates the delivery of that program. This failure violates the State’s constitutional duty to “provide for” and “keep up and support” the system of common schools it has established.

**A. Article IX’s Requirement that the State “Provide For” a System of Schools that Are “Kept Up And Supported” Requires the State to Provide the Funding Necessary to Deliver the Educational Program.**

**1. Section 5 Requires the Legislature to Provide For, Keep Up, and Support the Common Schools System by Providing Necessary Funding.**

Section 5, like section 1, imposes a mandatory duty on the Legislature: the Legislature “shall provide for” the public school system. (Emphasis added.) The plain meaning of “provide for” is to “make arrangements for supplying means of support, money, etc.”<sup>32</sup> The requirement that the State provide a system by which its public schools “shall be kept up and supported” likewise includes a direct requirement for financial support. The plain meaning of “keep up”—to “maintain the good condition of”<sup>33</sup>—is to require schools to meet both substantive criteria (i.e., “kept up” to an educational standard) and temporal criteria (i.e., be “kept up” over time). “Support,” synonymous with “provide for,” means “to pay the costs of” or “maintain . . . by supplying with things necessary to existence.”<sup>34</sup>

The framers of California’s Constitution, through their words and actions, imposed an affirmative duty on the Legislature to provide a free, uniform public education system and to provide funding commensurate with the obligation being undertaken. During the 1849 convention, Delegate Semple declared that California should have a “well-regulated system of education,” which he defined as “uniform throughout the State,” such that “the aggregate fund from all the districts” should be “distributed equally throughout the State.” (Browne, Rep. of

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<sup>32</sup>See <http://dictionary.reference.com/browse/provide+for> (last visited 6/28/12).

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<sup>33</sup>See <http://dictionary.reference.com/browse/keep+up> (last visited 6/28/12).

<sup>34</sup>See <http://www.merriam-webster.com/dictionary/support> (last visited 6/28/12) and <http://dictionary.reference.com/browse/support> (last visited 6/28/12).

Debates, *supra*, at 202.)<sup>35</sup> Similarly, the 1879 convention delegates compelled the Legislature to increase “consistency” across the state’s common schools by combining the “system” language with the minimum school year length requirement, which they simultaneously doubled.

(Debates and Proceedings, *supra*, at 1087.) Delegate Winans noted: “It is very proper that where the declaration is made that the Legislature shall provide for a system of common schools, it shall be followed by an enactment that a school shall be kept up and supported in each district.” (*Ibid.*) The delegates also demonstrated their commitment to a cohesive and well-appointed system by their strong opposition to eliminating the state Superintendent of Public Instruction post because they considered the Superintendent and a centralized state office “necessary” “to see that the laws passed by the Legislature are executed uniformly throughout the State.” (*Id.* at 1091-97.)

2. As Interpreted by the Courts, the Constitutional Right to an Education Provided Through a “System of Common Schools” Requires the Provision of a Uniform Course of Study and the Funding Necessary to Deliver that Educational Program.

Shortly after the adoption of the Constitution, the Supreme Court observed in *Kennedy v. Miller* (1893) 97 Cal. 429 (*Kennedy*):

The term “system” itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide “a” system of common schools means *one* system which shall be applicable to all common schools within the state.

(*Id.* at 432, emphasis in original; see also *Coulter v. Pool* (1921) 187 Cal. 181 192 (*Coulter*) [“The word ‘system,’ as employed in the constitution, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole, and it necessarily imports both a unity of purpose and entirety of operation.”])

The contours of the common school system have been further defined by the courts over the past century to require “uniform[ity] in terms of the prescribed course of study and

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<sup>35</sup>Delegate Semple used this argument to defeat a proviso that would have allowed the Legislature, under exigent circumstances, to redirect to other uses land grant revenue designated for education.

educational progression from grade to grade.” (*Serrano I*, 5 Cal.3d at 596.) In *Piper*, the California Supreme Court explained that:

The California Constitution provide[s] for a uniform system and course of study as adopted and provided by the authority of the state. Under this uniform system pupils advance progressively from one grade to another and, upon the record made, are admitted from one school into another pursuant to a uniform system of educational progression . . . . *The enjoyment of these privileges are enforceable rights vouchsafed to all . . . .*

(*Piper*, 193 Cal. at 669, emphasis added.)

While the State may possess latitude in choosing the content of the course of study and the manner of the grade-to-grade progression, the important point is that the State must establish and provide for a system of common schools and that it must be *one, unified* system that delivers a uniform course of study and grade-to-grade progression to all students in the state. The constituent parts—including the core educational program and the finance scheme—must be “connected” and combined into a “harmonious whole” in furtherance of that “unity of purpose” and “entirety of operation.” (*Kennedy*, 97 Cal. at 432.)

The *Kennedy* Court confirmed that the provisions that govern education finance are a critical aspect of that “system” and have been from early on:

In pursuance of this direction [i.e., to provide a system of common schools], the legislature has enacted [certain Political Code provisions]<sup>36</sup> wherein the system outlined in the constitution is amplified, and provision made for the organization of school districts . . . and also providing for the proper application of the revenue from the state school fund, and for the raising of additional money by taxation for the support of the common schools.

(*Id.* at 431.)

Courts have acknowledged the connection between the State’s Article IX obligations and its duty to fund those obligations, and have enforced Article IX rights even when doing so results in added expense to the State. Most notably, *Butt*, 4 Cal.4th 668, required affirmative state financial intervention to remedy a local deprivation of educational opportunity. Suffering a

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<sup>36</sup>The Political Code provisions referenced in *Kennedy* were the precursors to today’s Education Code. (See *California Teachers Assn. v. Bd of Trustees* (1978) 82 Cal.App.3d 249, 254.)

substantial budget shortfall, the Richmond School District faced the early closure of its schools six weeks earlier than the prevailing statewide standard. In affirming the entry of injunctive relief requiring the State to intervene with the financial support needed to keep the district's schools open for six more weeks, the Supreme Court noted that the Constitution makes education "uniquely a fundamental concern" of the State:

Since its admission to the Union, California has assumed specific responsibility for a statewide public education system open on equal terms to all. The Constitution of 1849 directed the Legislature to "provide for a system of common schools, by which a school shall be kept up and supported in each district. . . ." (Cal. Const. of 1849, art. IX, § 3.) . . . That constitutional command . . . has persisted to the present day. (Cal. Const., art. IX, § 5.)

(*Butt*, 4 Cal.4th at 680.)

Because the Court held that state financial assistance was required by the Equal Protection Clause of the Constitution, it concluded it was "unnecessary to address claims that a state duty of intervention may also have arisen under the "free school" clause or the fourteenth amendment. (*Id.* at 692, fn. 20.) But the Court's reasoning — and its affirmation of required state assistance — leaves little doubt that financial responsibility is one aspect of the State's ultimate responsibility to provide for a system of common schools.

Similarly, *Piper* established that the right of all California children to be educated in schools that are part of California's common schools *system* is an absolute right that exists regardless of cost implications. Rejecting defendants' contentions that to admit Indian children to the district's schools would be too costly, the *Piper* court stated:

The economic question is no doubt an important matter to the district, but it may very properly be addressed to the legislative department of the state government. *The constitutional guarantees involved in this case are imperative and must be given effect.*

(*Piper*, 193 Cal. at 674, emphasis added.)

The "free school" cases also recognize that the State's Article IX responsibilities include a financial duty to support the necessary elements of the educational program and to maintain a complete, unified system of public schools which delivers an educational program to all students

consistent with prevailing statewide standards. “The concept of a ‘common’ school is linked directly to that of a ‘free school,’ which must be ‘kept up and supported’ in each district for a prescribed annual duration.” (*Wilson v. State Bd. of Education* (1999) 75 Cal.App.4th 1125, 1136 (*Wilson*)). The free school guarantee extends to “the cost and upkeep of the school itself and its physical facilities; districts cannot charge for such expenses as teachers’ salaries, school furniture, or the use of school buildings for educational activities.” (*Arcadia Unified Sch. Dist.*, 2 Cal.4th at 264, fn.10; *see also Driving School Assn.*, 11 Cal.App.4th 1513 [district not permitted to charge for driver training]; *Hartzell*, 35 Cal.3d at 909-11.)

A long line of cases from *Kennedy* to *Piper* to *Serrano* to *Butt* have recognized the State’s non-delegable duty to ensure the proper functioning of its “system of common schools.” (*See, e.g., Butt*, 4 Cal.4th at 681.) It follows that the State’s constitutional duty to provide for, and to keep up and support, the system of free, common schools also means that the State is obligated to pay for the concrete delivery of the uniform course of study and the educational program on which the State has based its system of common schools.<sup>37</sup>

**B. The Core of the State’s “Common Schools System” that Must be Kept Up and Supported Is Currently Its Uniform Statewide Academic Content and Performance Standards.**

The specific content of the system’s uniform course of study and the precise grade-to-grade progression have changed over time. At the time of the Constitutional Convention in 1879, for example, orthography, reading, writing, arithmetic, and geography were among the subjects required to be taught in all public schools.<sup>38</sup> By the time of *Piper* in 1921, the course of study had been further modified and expanded to include, *inter alia*, the history of the constitution of the United States, the duties of citizenship, elements of physiology and hygiene.<sup>39</sup>

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<sup>37</sup>Local districts no longer have the ability to raise their own revenues; they have only the limited options of asking voters to impose a nominal parcel tax or relying on parent and community support, both of which present challenges for districts with the most needy students. As *Butt* recognizes, this reality places final financial responsibility on the State.

<sup>38</sup>*See, e.g.,* former Political Code section 1665 (as amended by Code Amendments, 1873-74, § 65, pp. 111-12.

<sup>39</sup>*See, e.g.,* former Political Code section 1665 (as amended by Stats. 1921, ch. 486, §, pp. 739-40.



To this day, the State has continued to require that certain subjects be taught at the different grade levels. (*See, e.g.*, §§51210; 51220; 51225.3.)

The “system of common schools” advanced significantly, however, with the Legislature’s 1995 decision to adopt uniform statewide academic content and performance standards — standards that now further define the educational core of the common schools system. (AA VII:1506 [¶¶225-26]; I:20-23 [¶¶61-68].) As noted earlier, the content standards detail the specific knowledge and skills that the State expects students to learn in each core subject in each grade, and content standards have been adopted for each subject required for study by the Legislature.

Mastery of the content standards — and sanctions for failure — have now become the central unifying force for California’s K-12 educational system. In the words of the legislature, the standards “serve as the basis for assessing . . . the California educational system as a whole.” (§60602(a)(2).) As detailed above, textbooks, teacher training, professional development, curriculum frameworks, assessments, accountability and interventions are all built around the content standards. The content standards articulate the superstructure for California’s current common school system.<sup>40</sup>

Each California student is held individually accountable for meeting the content standards through the requirement that each student must pass the cumulative standards-based California High School Exit Exam in order to graduate from high school. (§60851.) Students who are unable to pass this assessment—approximately 45,000 high school seniors a year—are ineligible to receive a high school diploma and to graduate. (AA VII:1475 [¶¶85-86].) Learning the standards at lower grades is thus essential for successfully progressing through the higher grades and, eventually, for graduation. For example, the Mathematics Framework states that “a foundation for the mastery of later standards must be built at each grade level.”<sup>41</sup>

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<sup>40</sup>As previously noted, Plaintiffs do not assert that the current academic content standards are constitutionally required. What is constitutionally required is that the State provide for, keep up and support whatever core educational program it establishes.

<sup>41</sup><http://www.cde.ca.gov/ci/cr/cf/documents/mathfrwk.pdf> (last visited 6/29/12) p. 10. Also, “Instructional resources are organized in a sequential, logical way” to be “coordinated from level to level.” (*Id.*)

The standards, thus, inescapably articulate the uniform “prescribed course of study and educational progression from grade to grade.” (*Piper*, 193 Cal. at 669; *Serrano I*, 5 Cal.3d at 596.) They provide the “unity of purpose as well as [] entirety of operation” that has repeatedly been held to be the hallmark of the “system of common schools.” (*See, e.g., Wilson*, 75 Cal.App.4th at 1137, citing *Kennedy* and *Serrano*.)

It was the high degree of uniformity supplied by the content standards and standards-aligned assessments that allowed the *Wilson* court to say with confidence that charter schools were part of the “system of common schools.” (*Id.* at 1137-38 [creation of charter schools did not violate the State’s section 5 duty to maintain a single, uniform system of common schools].) The court concluded that charter schools are part of the common schools system because, *inter alia*, “their education programs must be geared to meet the same state standards . . . and student progress will be measured by the same assessments required of all public school students.” (*Id.* at 1138.) For the *Wilson* court, the academic content standards and mandatory standards-aligned assessments brought charter schools under the umbrella of the common schools system, “ensur[ing] a constitutional level of cohesion within the curriculum and course of study at each grade level in all schools.” (*Id.* at 1137-1138, fn. 9, emphasis added.)<sup>42</sup>

Other state courts have held that academic content and accountability standards are a defining element of the state’s “uniform system” of public schools in which all children are entitled to be educated. (*See, e.g., Lobato*, 218 P.3d 358; *McCleary*, 249 P.3d 227.) They have accordingly held that, where the state fails to fund schools sufficiently to provide all students with the opportunity to meet the standards, the state’s school finance system is unconstitutional. (*Ibid.*)

The recent *Lobato* decision in Colorado is on point. Similar to California’s, the Colorado Constitution mandates that “the general assembly shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools . . . .” (Colo. Const. art.

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<sup>42</sup>The content standards have taken on an even greater role in California since *Wilson* with the introduction of the high school exit exam and sanctions on schools and school districts that fail to meet proficiency requirements.

IX, emphases added.) On review of the trial court's dismissal of plaintiffs' complaint, the Colorado Supreme Court recognized that it "is the constitutional responsibility of the legislature to establish guidelines for a thorough and uniform system of public schools." (*Lobato*, 218 P.3d at 372, citing *Lujan v. Colo. State Bd. of Ed.* (Colo. 1982), 649 P.2d 1005, 1018-19.) The Court directed that "[t]he trial court may appropriately rely on the legislature's own pronouncements to develop the meaning of a 'thorough and uniform' system of education." (*Id.* at 375.) Accordingly, the Court noted, the state's "education reform statutes with proficiency targets and content standards" may be used to evaluate whether or not the state has complied with its constitutional duty to provide for and maintain a thorough and uniform system. (*Id.* at 372, fn.17.) The Court thus held that plaintiffs could proceed on their claims that Colorado's school financing system violated the "thorough and uniform system" clause of the Colorado Constitution "because it is underfunded and disburses funds on an irrational and arbitrary basis" such that "current funding levels do not allow students the opportunity to meet the standards and objectives established in education reform legislation." (*Id.* at 374.) The Colorado Supreme Court thus permitted the *Lobato* plaintiffs to proceed on a claim similar to that presented by plaintiffs here: that the school finance system must be designed and funded in such a way as to ensure that districts and schools are able to uniformly deliver to all students the academic content standards around which the entire public education system is based.<sup>43</sup>

In numerous other school funding challenges — whether the claim be that the state finance system fails to deliver a qualitative standard aligned to a fundamental right or, as in *Lobato*, whether it fails to support a uniform system — courts have held that constitutional compliance means *the state's funding system must be aligned or "visibly geared" to deliver the constitutional standard.* (*Robinson*, 303 A.2d at 295; *see also Neeley v. West Orange-Cove Consolidated Ind. Sch. Dist.* (Tex. 2005) 176 S.W.3d 746 [Legislature's choices in financing its

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<sup>43</sup>Upon remand, the *Lobato* trial court found that Colorado was, in fact, failing to provide for and fund the state's standards-based system in violation of the state constitution. (*Lobato v. State* (Dist. Ct., Denver County, No. 2005CV4794) Findings of Fact and Conclusions of Law (12/09/11).) (Available on Non-California Authorities CD.)

adopted educational program must be “informed by guiding rules and principles properly related to public education”). In the modern era of state standards and accountability systems, the courts have consistently held that such constitutional guarantees for education mean that the finance system must be designed and implemented to deliver the state’s adopted academic standards. (See, e.g., *McCleary*, 269 P.3d at 253 [“The basic education funding formulas . . . did not correlate to the level of resources needed to provide all students with an opportunity to meet the State’s education standards”]; *Abbott*, 693 A.2d at 429 [“Because [the state education standards and funding statute] does not in any concrete way attempt to link the content standards to the actual funding needed to deliver that content, we conclude that this strategy, as implemented by [the statute], is clearly inadequate and thus unconstitutional as applied to the special needs districts”]; *Montoy*, 120 P.3d 306 at 308-09 [“we need look no further than the legislature’s own definition of suitable education (incorporating academic content and performance standards) to determine that the standard is not being met under the current financing formula”]; *Idaho Schs. for Equal Educational Opportunity*, 850 P.2d at 735 [“Should the plaintiffs be able prove that they cannot meet the standards established by the State Board of Education, noted above, with the money provided under the current funding system they will have presented an apparent prima facie case that the State has not established and maintained a system of thorough education”]; *Hull v. Albrecht* (Ariz. 1997) 950 P.2d 1141, 1145 [“[a] constitutionally adequate system will make available to all districts financing sufficient to provide facilities and equipment necessary and appropriate to enable students to master the educational goals set by the legislature or by the State Board of Education pursuant to the power delegated by the legislature”]; *Campbell County Sch. Dist.*, 181 P.3d at 67 [recognizing “the constitutional directive that it is the legislature’s duty and prerogative to determine the appropriate standards for our public schools and to assure sufficient funding is provided to allow the districts to achieve those standards”]; see also *Pauley*, 324 S.E.2d at 134-35.)

**C. Plaintiffs Have Sufficiently Alleged that the State Is Failing to Provide the Financial Support Necessary to Deliver Its Standards-Based Education Program to All Students.**

The Complaints detail not only the absence of any coherent relationship between the funding system and the standards-based educational program, but also the many ways in which the State's school funding policies and practices prevent districts and schools from delivering the standards to all of their students. As detailed in the Statement of Facts, *supra*, Plaintiffs allege:

- Funding is based on arbitrary formulas that are unrelated to the actual cost of the required education program or to student need.
- Funding is insufficient to provide the staff time and instructional time necessary to learn the standards, and this systemic failure is exacerbated for California's large population of English learners and low-income students.
- State funding policies and practices make it virtually impossible for districts and schools to engage in the long-term planning and resource allocation necessary to deliver the State's education program to all students, or to provide the consistent focused intervention and remedial resources needed by millions of the State's students.
- As a result of the State's failure to provide necessary funding, millions of students fail to achieve proficiency in the State's academic content standards, and fail to acquire the skills and knowledge that the State itself deems essential for success in the 21st century global economy.
- The State demands that schools and districts meet annually increasing goals of student proficiency, but continues to reduce educational resources and ignores all evidence demonstrating that additional resources are necessary to meet those goals.

In dismissing this claim without leave to amend, the trial court concluded that — even assuming Plaintiffs' allegations are true — no amount of “disconnect” between the State's standards-based education program and the funding system is actionable and that the State has no obligation under Article IX to support its chosen program. If affirmed, the ruling of the trial court would mean that the State can hold students, teachers, schools and districts accountable for the widespread failure of California students to reach proficiency on its academic standards, but the State itself cannot be held accountable if the cause of such failure is its own funding system.

The trial court's interpretation of the State's obligation under Article IX to provide for a system of common schools was erroneous and must be rejected.<sup>44</sup>

### III. PROPOSITION 98 DOES NOT PRECLUDE PLAINTIFFS' CLAIMS.

The State will likely argue, as it did below, that the relatively recent adoption by the voters of Proposition 98 completely fulfills whatever obligations Article IX imposes on the State. According to the State, Proposition 98 did this by setting a minimum amount of state general fund monies that should be allocated for public education.<sup>45</sup> This argument overlooks the fact that neither the ballot measure materials nor the text of the Proposition itself, which is contained in Article XVI, section 8 of the California Constitution, ever even mentioned or referred to Article IX, its mandate, or its language in any way. Thus the minimums set by Proposition 98 cannot be construed as a deliberate measure to implement Article IX.

Proposition 98's purposes and the history that led to its adoption are not subject to debate. The voters approved Proposition 98 in 1988, in response to declining revenues resulting from the passage of Proposition 13 in 1978.<sup>46</sup> Proposition 98 sets forth a complex series of formulas that each year calculate the *minimum* portion of *general fund* revenues that should be designated for K-12 schools and community colleges *based on the State's economic conditions*. (See generally Cal. Const., art. XVI, § 8(b).) Specifically, Proposition 98 states that "the moneys to be applied by the State for the support of school districts and community college districts shall be not less than" the amount yielded by one of three tests. (*Id.*) Those tests are keyed to changes in the State's economic conditions, including general fund revenues and the amount of funding received by schools in the previous year adjusted to pay for new students and inflation. (Cal. Const. art. XVI, §8(b)(1) & (2); AA I:85 [¶¶86, 87].) Proposition 98 was intended to require that a minimum percentage of the State's general fund revenue would be allocated for public schools

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<sup>44</sup>For the reasons discussed in Section I(D), above, *Serrano I* does not preclude Plaintiffs' common schools claim, as that case addressed equal expenditures and did not address the State's duty to keep up and support its system of common schools.

<sup>45</sup>The trial court declined to reach the Proposition 98 issue. (AA II:458-459.)

<sup>46</sup>Proposition 98 was amended in 1990 by Proposition 111 but those changes make no difference to any issue in this case.

and community colleges in light of dwindling resources and the fact that, after passage of Proposition 13, schools were forced to compete in the political arena with many other public services for general funds. Proposition 98 designates a portion of tax revenues for public schools, much like gas tax revenues are required by other law to be spent for roads and highways without regard to whether they are sufficient to keep all the roads in good repair.

If, as the State contends, voters had intended to use Proposition 98 to define the amount of funding the State was required to spend to satisfy its duties under Article IX, one would expect to find a reference to Article IX in Proposition 98. Yet there is no such reference, either explicit or implicit. Nowhere in Proposition 98 is there any reference to the Education Clauses, which appear in Article IX. Indeed, the leading California case interpreting Proposition 98 listed the provisions of law amended by Proposition 98, and notably missing from that list is Article IX. (*Cal. Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1517, fn. 1.) Nor does Proposition 98 use any of the key terms or concepts used in Article IX, such as the obligation to encourage education “by all suitable means” or the obligation to “provide for . . . , ke[ep] up and support[.]” a “system of common schools.”

Under the State’s theory, these omissions are no small matter. If the State were correct that Proposition 98 established an outer limit on the State’s duty to provide for, keep up and support its system of common schools, then Proposition 98 amended Article IX. Under state law, any initiative measure that amends another legislative enactment or constitutional provision must expressly set forth the text of the provisions that it would revise. (*See Elec. Code § 9084(b)* [“The ballot pamphlet shall contain . . . the specific constitutional or statutory provision, if any, that each state measure would repeal or revise.”]; *Gov. Code §88001(b)* [similar].) Yet Proposition 98 did not even refer to the Education Clauses, let alone set forth their text, providing further evidence that Proposition 98 did not intend to redefine, implement, or supersede the Education Clauses.<sup>47</sup>

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<sup>47</sup>The adoption of the State’s theory would imply that Proposition 98 violated this so-called “reenactment rule,” calling into question the validity of Proposition 98. By itself, this implication provides sufficient reason to

Proposition 98's ballot pamphlet materials are equally silent with respect to the Education Clauses of Article IX, and similarly suggestive of duties that differ from those that Article IX imposes. The ballot pamphlet materials focus on the political gridlock that had prevented the State from addressing a decade of declining per pupil revenue, and the need to address that gridlock by "tak[ing] school financing out of politics by ensuring a minimum funding level for schools." (AA II:376.) The proponents framed Proposition 98 as a tool "to tell[] the politicians how to spend state funds to make our schools better" and to give Californians "a chance" to reverse the decline in funding for public education. (*Ibid.*) The ballot materials pointed out the decline in tax dollars used to support public education and described the measure as a catch-up provision. (*Ibid.*)

In *Lobato v. Colorado* (Colo. 2009) 218 P.3d 358, the Colorado Supreme Court rejected an argument almost identical to the State's argument here. The *Lobato* plaintiffs alleged that Colorado's school funding system violated the education clause of the Colorado Constitution, which states that its general assembly "shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state. . . ." In 2000, a Colorado voter initiative called Amendment 23 increased per pupil funding and funding for categorical programs by a formula that called for at least a 5% increase annually in state aid plus per-pupil and categorical program increases tied to inflation. To accomplish this objective, the initiative diverts a portion of tax collections to a state education fund, much like Proposition 98 in California. (*Id.* at 375.) The State of Colorado argued that this action by the voters set the minimum level of education funding required by its constitution for its free public schools. The trial court agreed, but the Colorado Supreme Court reversed, looking to the contents of the ballot proposition "Blue Book" that went to Colorado voters and provided an analysis of the measure. The court stated:

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reject the State's theory. Courts must "resolve any reasonable doubts" concerning the validity of an initiative in favor of the exercise of the initiative power, including indulging "all presumptions [that] favor the validity of initiative measures." (*Cal. Assn. of Retail Tobacconists v. State of Cal.* (2003) 109 Cal.App.4th 792, 808, quoting *Legislature v. Eu* (1991) 54 Cal.3d 492, 500-01.)



While the Blue Book accurately explains that Amendment 23 “sets a minimum increase in funding,” nowhere does it refer to the education clause, or the terms “thorough,” “uniform,” or “adequate.” The Blue Book summarized proponents’ arguments in favor of Amendment 23 as seeking to reverse the decline of funding for education, which began after the adoption of constitutional limitations on state revenue and spending. Proponents did not suggest that the amendment would suffice to fund the minimum level of educational opportunities to all students as required by the education clause.

(*Id.* at 375-76, internal footnote omitted.) The Colorado Supreme Court therefore concluded that the minimum funding mandate neither related to nor concerned the mandates of the education clause, and thus did not preclude Plaintiffs’ claims. (*Id.*) The same result should be reached here regarding Proposition 98.

#### **IV. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE AND SEEK APPROPRIATE RELIEF.**

Plaintiffs claim that the State is failing to comply with its constitutional obligations related to the provision of public education and the operation of the school finance system. The trial court correctly ruled that Plaintiffs’ claims are justiciable and are not precluded by the separation of powers doctrine. (AA II:449-51, VII:1412.) Relying on *Serrano* and *Butt*, the trial court held that courts are “empowered and indeed, obligated, to intervene in an appropriate fashion to correct failures to comply with the Constitution.” (AA II:450.)

The trial court could not have reached any other conclusion consistent with California law. The California Supreme Court has repeatedly found that legal challenges asserting violations of article IX are justiciable. (*See Hartzell*, 35 Cal.3d at 913 [requiring a fee for extracurricular activities violates the free school guarantee of article IX, section 5]; *Piper*, 193 Cal. at 669 [article IX creates “enforceable rights vouchsafed to all who have a legal right to attend the public schools”].) Similarly, the Court has not hesitated to adjudicate constitutional challenges to the State’s public school financing system. (*See Serrano I* and *Butt.*) Plaintiffs’ claims alleging violations of the California Constitution must also be adjudicated by the courts and cannot be precluded as non-justiciable.

Moreover, the relief sought by Plaintiffs is appropriate and may be granted by the courts. Contrary to the assertions of Defendants, Plaintiffs do not ask the courts to order an appropriation of funds or to redesign the school finance system. Plaintiffs seek only a declaration that the school finance system fails to comply with the requirements of Article IX and an injunction ordering the State to comply with its constitutional obligations by implementing, within a reasonable period of time, a school finance system that is consistent with Article IX. This is precisely the type of relief authorized by the Supreme Court in *Serrano II*, which affirmed both the trial court's declaration that the school finance system "was violative of our state constitutional standard" and its order directing the Legislature to bring the system into compliance with that standard. (*Serrano II*, 18 Cal.3d at 750.) This is also the same type of relief ordered by other California courts finding constitutional violations arising from the public school system, which have been "limited to directing the legislative and executive branches to find a way to redress the particular constitutional violation identified by the judicial branch." (*O'Connell*, 141 Cal.App.4th at 1475.)

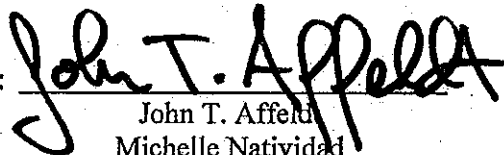
Plaintiffs' claims are justiciable and the remedies sought may properly be granted by the courts.

#### CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the order and judgment of the trial court sustaining the demurrer on the Article IX claims in *Robles-Wong* and granting judgment on the pleadings on the Article IX claims in *CQE* be reversed and that both matters be remanded to the trial court for further proceedings on the merits of these claims.

DATED: July 6, 2012

By:



John T. Affeld  
Michelle Natividad

Tara Kini

Public Advocates, Inc.  
Attorneys for Appellant  
Campaign for Quality Education

By: William F. Abrams

William F. Abrams  
Sandra Zuniga Nierenberg  
Gretchen E. Groggel  
Bingham McCutchen LLP  
Attorneys for  
Appellants/Individual Plaintiffs

William S. Koski  
Youth and Education Law Project  
Mills Legal Clinic, Stanford Law  
School  
Attorneys for Appellants/Individual  
Plaintiffs

By: \_\_\_\_\_

Deborah B. Caplan  
Joshua R. Daniels  
Olson Hagel & Fishburn LLP  
Attorneys for Appellants/Plaintiffs  
CSBA/ELA, ACSA, California State  
PTA, and Districts


Abhas Hajela  
Attorneys for Appellants/Plaintiffs  
CSBA, ACSA, and California State  
PTA

By: \_\_\_\_\_

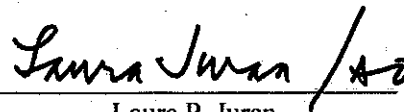
Laura P. Juran  
Jean Shin  
Attorneys for Appellant/  
Plaintiff Intervener  
California Teachers Association

By: \_\_\_\_\_  
William F. Abrams  
Sandra Zuniga Nierenberg  
Gretchen E. Groggel  
Bingham McCutchen LLP  
Attorneys for  
Appellants/Individual Plaintiffs

William S. Koski  
Youth and Education Law Project  
Mills Legal Clinic, Stanford Law  
School  
Attorneys for Appellants/Individual  
Plaintiffs

By:  \_\_\_\_\_  
Deborah B. Caplan  
Joshua R. Daniels  
Olson Hagel & Fishburn LLP  
Attorneys for Appellants/Plaintiffs  
CSBA/ELA, ACSA, California State  
PTA, and Districts

Abhas Hajela  
Attorneys for Appellants/Plaintiffs  
CSBA, ACSA, and California State  
PTA

By:  \_\_\_\_\_  
Laura P. Juran  
Jean Shin  
Attorneys for Appellant/  
Plaintiff Intervener  
California Teachers Association

By: Martin R. Glick / m

Martin R. Glick  
Sara Eisenberg  
Deborah Schlosberg  
Arnold & Porter LLP  
Attorneys for Appellant/  
Campaign for Quality Education

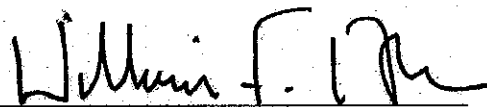
Rohit Singla  
Munger, Tolles & Olson LLP  
Attorneys for Appellant  
Campaign for Quality Education

**CERTIFICATE OF COMPLIANCE OF WORD COUNT**

I hereby certify that *Appellants' Opening Brief* is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 20,918 words including all the footnotes but not including the Tables of Contents and Authorities, this Certificate, the caption page, signature blocks, or attachments. Accordingly, the brief complies with the Court's order of June 20, 2012 attached hereto.

DATED: July 6, 2012

Respectfully submitted,  
BINGHAM MCCUTCHEN LLP

By: 

William F. Abrams  
Sandra Z. Nierenberg  
Gretchen E. Groggel

*Counsel for Robles-Wong Individual Plaintiffs/Appellants*

John T. Affeldt  
Tara Kini  
Sophia Lai  
Public Advocates, Inc.  
*Counsel for Appellant  
Campaign for Quality Education*

Deborah B. Caplan  
Joshua R. Daniels  
Matthew R. Cody  
Olson, Hagel & Fishburn LLP  
*Counsel for Appellants/Plaintiffs  
CSBA/ELA, ACSA, California State  
PTA, and Districts*

William S. Koski  
Carly Munson  
Youth and Education Law Project  
Mills Legal Clinic,  
Stanford Law School  
*Counsel for Robles-Wong  
Individual Plaintiffs/Appellants*

Laura P. Juran  
Jean Shin  
*Counsel for Appellant/Plaintiff  
Intervener  
California Teachers Association*

Deborah B. Caplan  
Joshua R. Daniels  
Olson, Hagel & Fishburn LLP  
*Counsel for Appellants/Plaintiffs  
CSBA/ELA, ACSA, California State  
PTA, and Districts*

Martin Glick  
Sara Eisenberg  
Deborah Schlosberg  
Arnold & Porter LLP  
*Counsel for Appellant/Campaign  
for Quality Education*

Rohit Singla  
Kimberly A. Morris  
Leo Goldbard  
Munger, Tolles & Olson LLP  
*Counsel for Appellant  
Campaign for Quality Education*

Abe Hajela  
*Counsel for Robles-Wong  
Plaintiffs/Appellants, CSBA, ACSA  
and California State PTA*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

Court of Appeal First Appellate District	
<b>FILED</b>	
JUN 20 2012	
Diana Herbert, Clerk	
by _____	Deputy Clerk

CAMPAIGN FOR QUALITY  
EDUCATION,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA et al.,

Defendants and Respondents.

A134423

(Alameda Superior Court  
Case No. RG10524770)

MAYA ROBLES-WONG et al.,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA et al.,

Defendants and Respondents;

CALIFORNIA TEACHERS  
ASSOCIATION,

Intervener and Appellant.

A134424

(Alameda Superior Court  
Case No. RG10515768)

BY THE COURT:

On the court's own motion, the above-referenced appeals are consolidated for purposes of briefing, oral argument, if any, and decision. Both case numbers shall appear on all documents filed in this court.

Upon due consideration, the parties' application to submit joint briefs in excess of the allowable word limit is granted as follows: Appellants shall file a single, joint opening brief in the consolidated appeals in a length not to exceed 21,000 words. Respondents shall file a single, joint respondents' brief in the consolidated appeals in a length not to exceed 21,000 words. Appellants shall file a single, joint reply brief in the consolidated appeals not to exceed 14,000 words.

Dated: JUN 20 2012

McGuinness, P.J.

P.J.



## PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in the County of San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for next business day delivery by FedEx, and correspondence is deposited with FedEx that same day in the ordinary course of business.

Today I served the attached:

### **APPELLANTS' OPENING BRIEF**

by causing a true and correct copy of the above to be delivered by FedEx from San Francisco, California in sealed envelope(s) with fees prepaid, addressed as follows:

Attorneys for Defendants and Respondents State of California; Edmund G. Brown, Jr., Governor of the State of California; Ana Matosantos, Director of Finance of the State of California; and John Chiang, Controller of the State of California:

---

Kamala D. Harris, Attorney General  
Ismael A. Castro (SBN 85452)  
Pauline Gee (SBN 74447)  
1300 I Street, Suite 125  
Sacramento, CA 94244-2550  
Telephone: 916.323.0335  
Facsimile: 916.324.5567  
Email: pauline.gee@doj.ca.gov

### **Attorneys for Plaintiff Intervener and Appellant California Teachers Association:**

---

Laura P. Juran (SBN 199978)  
Jean Shin (SBN 228423)  
California Teachers Association  
1705 Murchison Drive  
Burlingame, CA 94010  
Telephone: 650.552.5440  
Facsimile: 650.552.5019  
Email: ljuran@cta.org; jshin@cta.org

**Attorneys for Plaintiffs and Appellants in Campaign for Quality Education**

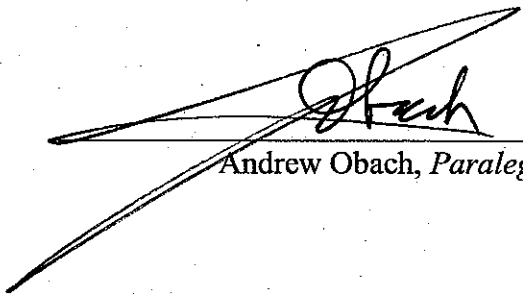
Martin R. Glick, Esq.  
Deborah S. Schlosberg (SBN 254624)  
Sara J. Eisenberg (SBN 269303)  
Arnold Porter LLP  
3 Embarcadero Center  
San Francisco, CA 94111  
Telephone: 415.471.3153  
Facsimile: 415.471.3400  
Email: Martin.Glick@aporter.com

John T. Affeldt, Esq..  
Tara Kini, Esq.  
Deborah S. Schlosberg  
Public Advocates, Inc.  
131 Steuart Street, Suite 300  
San Francisco, CA 94105  
Telephone: 415.431.7430  
Facsimile: 415.431.1048  
Email: jaffeldt@publicadvocates.org

Rohit K. Singla, Esq.  
Kimberley A. Morris  
Munger, Tolles & Olson LLP  
560 Mission St., 27th Floor  
San Francisco, CA 94105-2907  
Telephone: 415.512.4032  
Facsimile: 415.644.6932  
Email: rohit.singla@mto.com

Leo Goldbard (SBN 254528)  
Munger, Tolles & Olson LLP  
355 South Grand Avenue, 35th Floor  
Los Angeles, California 90071-1560  
Telephone: 213.683.9216  
Facsimile: 213.683.4016

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made and that this declaration was executed on July 6, 2012.

  
Andrew Obach, *Paralegal*