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NO. 80943-7

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SUPREME COURT OF THE STATE OF WASHINGTON  
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The State of Washington; CHRISTINE O. GREGOIRE, in her capacity as Governor of the State of Washington; TERRY BERGESON, in her capacity as Superintendent of Public Instruction; BRAD OWEN, in his capacity as President of the Senate and principal legislative authority of the State of Washington; FRANK CHOPP, in his capacity as Speaker of the House of Representatives and principal legislative authority of the State of Washington,

Appellants,

v.

Federal Way School District No. 210, a municipal corp.; ED BARNEY; CYNTHIA BLACK; EVELYN CASTELLAR; GINGER CORNWELL; CHARLES HOFF; DAVID LARSON; individually and as guardian for ANDREW LARSON; THOMAS MADDEN, individually and as guardian for BRYCE MADDEN; SHANNON RASMUSSEN; SANDRA RENGSTORFF, individually and as guardian for TAYLOR RENGSTORFF and KALI RENSTORFF,

Respondents.

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REPLY BRIEF OF APPELLANT STATE OF WASHINGTON

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## I. INTRODUCTION

In the State's Brief of Appellants (State Br.), we made three principal arguments. First, we argued that the trial court correctly concluded that the evidence presented by the District<sup>1</sup> on summary judgment is insufficient to prove a lack of ample funding under article IX, section 1. We offered a brief explanation of the State's ample provision for basic education and contrasted it with the lack of evidence provided by the District, particularly in light of the District's burden of proof.

Second, we provided a comprehensive and consistent history of this Court's interpretation of article IX, section 2 which requires a "general and uniform system of public schools." We demonstrated that under the clause, if students are educated within a system that provides uniform educational opportunities, then the fact that various school districts receive different salary allocations is of no constitutional moment.

Third, we demonstrated that the State salary allocations classify school districts (entities that are not within the reach of article I, section 12) rather than individuals. Nonetheless, we detailed the history and context for the salary allocations in the school funding formula and

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<sup>1</sup> The Respondents include the Federal Way School District and various individuals, including a teacher, and board members who are also parents and taxpayers. Hereinafter, they will be referred to collectively as "the District."

identified legitimate state interests that they reflect. The conclusion that the allocations are rationally related to these legitimate state interests is consistent with the latitude granted to legislatures under equal protection analysis when engaging in complex economic and social regulation.

In response, the District argues a lack of ample funding under article IX, section 1. It further maintains that both article IX, sections 1 and 2 contain a spending uniformity requirement. Although the District posits five separate legal causes of action in support of summary judgment, its arguments are built upon three principal and erroneous themes: (1) that the State does not provide ample funding for basic education with respect to Federal Way School District; (2) that the State's duty under article IX to make ample provision for the education of children within a general and uniform system of public schools compels equal State spending from district to district; and (3) that the classifications created by the State's salary allocation schedule are not rationally related to a legitimate state interest.

## **II. SUMMARY OF ARGUMENT**

The District supplied insufficient factual evidence to support its claim of a lack of ample funding for basic education, and its claim that a general and uniform system of public schools compels equal State funding from district to district lacks support. Neither article IX, section

1 nor section 2 have an equal spending component. Therefore, the District's claim that the State fails to amply provide for basic education within a general and uniform system of public schools fails. In the absence of proof of a lack of ample funding and in the face of a general and uniform system of public schools, the District cannot state an "undue favor" claim under article I, section 12 and is not entitled to strict scrutiny under equal protection analysis.

Article I, section 12, by its express terms, contains no barrier to treating school districts differently. Nonetheless, the salary allocation schedules are reasonably related to a legitimate state interest in preserving resources for other vitally important programs and priorities while providing ample funding for basic education. Therefore, the salary allocation schedules do not violate equal protection or substantive due process guarantees. Similarly, under the trial court's and the District's conception that article IX allows State spending differences if they are rational, the salary allocations to school districts pass constitutional muster. The issues at bar are primarily political rather than constitutional and are more appropriately left to the legislative branch.

Finally, the individual Respondents in this case fail to establish a justiciable controversy under the Uniform Declaratory Judgment Act.

The cases cited by the District fail to undermine the authorities cited by the State.

### III. ARGUMENT IN REPLY

#### A. **The State Amply Provides for the Education of All Children Residing Within the State As Required by Article IX, Section 1.**

Our opening brief provided the Court with an overview of how the State fully funds basic education and cited to evidence of the ever-increasing volume of funding allocated by the State. State Br. at 20; CP 252-59. In response, the District brushes aside the suggestion that it needed to provide evidence of actual underfunding to prove a violation of article IX, section 1.<sup>2</sup>

Instead, the District simply asserts that the State fails to amply fund basic education whenever it does not fund all districts at the highest salary allocation. Resp. Br. at 17. Thus, the District assumes that the highest allocation provides the minimum funding necessary to amply provide for the State's program of basic education. There is no basis in fact or law for this claim. The District argues that this Court prescribed one level of funding for all districts in the *Seattle School District* case.

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<sup>2</sup> The *Seattle School District* case involved nine weeks of trial to establish findings of fact related to whether the school district was provided sufficient state revenue and whether the quality of education in the district suffered as a result of failure to pass an excess levy. The findings, conclusions of law and order then came to this Court on direct review. *Seattle School Dist. v. State*, 90 Wn.2d 476, 485-86, 585 P.2d 71 (1978).

Resp. Br. at 18-19. Of course, the court did no such thing in *Seattle School District*.<sup>3</sup>

Under the legal principle urged by the District, any variation in funding allocations is a per se violation of article IX, section 1. Following that principle to its logical conclusion, even a doubling of the state contribution to basic education would be constitutionally suspect under article IX, section 1 if one school district received more money (or less) than the others.<sup>4</sup> This Court has never adopted such a rule and would certainly subject education policy to much greater court oversight if it did.

Secondarily, the District argues that salary allocations are assigned in an arbitrary and irrational manner. Resp. Br. at 18. This argument implies that some differences in allocations would be constitutionally ample. The District does not explain what allocations would be “equal enough” to be ample under their theory. However, that argument is taken up under the equal protection analysis pursuant to article I, section 12.

Neither of the District’s arguments speaks to the quantum of funding sufficient to provide a basic education. Both arguments import into article IX, section 1 a new requirement to spend equally on all school

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<sup>3</sup> The case itself does not address equity of allocations to school districts and the issue was never brought before the court. Rather, the case held that the State must define a basic education and fund it sufficiently.

<sup>4</sup> This extreme example simply illustrates one difficulty with the District’s argument that article IX, section 1 requires the highest salary allocation to be provided to all districts.

districts. No such requirement has been held to exist by any court. The District cannot meet its burden of proving a lack of ample provision for basic education under article IX, section 1 on either basis, and it has not otherwise provided evidence of failure to provide ample funding for basic education through the State salary allocations that the District receives.<sup>5</sup>

**B. The State Maintains a General and Uniform System of Public Schools Consistent with Article IX, Section 2.**

The parties agree that the State's obligation to amply provide for education must be achieved through a general and uniform system of public schools. However, the District is incorrect when it contends that this Court has ever announced a "uniformity in state spending" requirement under article IX, section 2. Even the District is not consistent on this theory. On the one hand, the District appears to argue that there is a strict uniform spending requirement in article IX, section 2. Resp. Br. at 20-23. On the other, the District endorses the Superior Court's adoption of a reasonableness standard for differences in funding allocations. Resp. Br. at 24.<sup>6</sup>

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<sup>5</sup> At the very least, there are substantial material facts at issue, including evidence of revenues, expenditures, and the ability of the District to provide basic education services to its students. The need to develop and weigh such factual issues precludes summary judgment on article IX, section 1.

<sup>6</sup> This standard turns every resource allocation debate into a constitutional question. The courts will be asked to resolve these disputes.

Article IX, section 2 does not prescribe how school districts are organized, funded, or supported. Indeed, the Legislature has expressed an understanding that as a constitutional matter, districts themselves may be abolished as governmental units for delivery of educational services. RCW 28A.315.005. Rather, as argued in the Brief of Appellants the clause ensures minimum uniform educational services delivered to students across the state.

In none of the three cases cited by the District was the scope of article IX, section 2 before the Court.<sup>7</sup> Therefore, those cases contain no analysis of any claim that article IX, section 2 requires equal State spending across all school districts.<sup>8</sup> In *Northshore School Dist. No. 417 v. Kinnear*, 84 Wn.2d 685, 729, 530 P.2d 178 (1974), the Court was specifically asked to address the scope of article IX, section 2 with regard to uniformity of spending on school districts. The court answered that “[i]t is the System that must be kept general and uniform under that

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<sup>7</sup> Respondents rely on *Brown v. State*, 155 Wn.2d 254, 119 P.3d 341 (2005); *McGowan v. State*, 148 Wn.2d 278, 60 P.3d 67 (2002); and *Seattle School Dist.* 90 Wn.2d at 481 (“appeal from judgment declaring unconstitutional the State’s reliance upon special excess levy funding for discharging its paramount duty to make ample provision for the education of its resident children as required by Const. art. IX, section 1.”).

<sup>8</sup> The *Seattle School District* case did link the State’s duty to define a basic education to article IX, section 2 as well as section 1. *Seattle School District*, 90 Wn.2d at 522, 537. However, the link was not an equal spending requirement. Rather, it was ample funding for a legislatively defined uniform program of basic education. This makes sense because the basic program of education is the core component of the educational services that students can expect to receive at any school in the State in a general and uniform system.

provision and not the 320 school districts.” *Northshore*, 84 Wn.2d at 728. That question was not re-litigated in *Seattle School District* and that portion of *Northshore* is still good law.

Although the Respondents cite to the *Northshore* case, they also claim it was overruled *in toto* by *Seattle School District*. To be sure, the court in *Seattle School District* specifically overruled the *Northshore* case to the extent it was inconsistent with sections VII, VIII, IX, XI, and XII of its opinion. *Seattle School District*, 90 Wn. 2d at 514, 520, 522, 527, and 537.<sup>9</sup> Only section IX of the opinion discusses article IX, section 2 and nothing therein conflicts with the analysis or holding of *Northshore* regarding the scope of article IX, section 2 and spending on school districts.

**C. Washington’s Salary Allocation Schedules Do Not Violate Article I, Section 12.**

**1. The claim of unequal salary allocations to school districts falls outside the scope of article I, section 12.**

Article I, section 12 explicitly exempts municipalities from its reach.<sup>10</sup> The District’s effort to frame the salary allocations to school

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<sup>9</sup> Those sections may be summarized as providing that the State’s paramount duty is a “supreme” duty, creating a correlative right, to make ample provision for funding basic education from dependable and regular tax sources. Such sources are not limited to those derived from Const. art. IX, sections 2 and 5 or article 16 and may not include special excess tax levies.

<sup>10</sup> “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens, or corporations.”

districts as *differential treatment of students (or staff)* is unsound and is a slippery slope. The State funds school districts for purposes of providing education services to students, just as it funds other government institutions, such as courts, to serve citizens. By characterizing the differential treatment of governmental entities as treatment of the citizens who receive the municipality's services, the District (and any plaintiff) can effectively read the municipality exemption out of article I, section 12.

This Court recognized this distinction between the municipality and its citizens in the *Grant County II* case when it observed that the Legislature has power to adjust the boundaries of municipal corporations and citizens have no fundamental right to seek or prevent annexation. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 814, 83 P.3d 419 (2004). Similarly, the Legislature has wide latitude to organize and fund school districts. Citizens have no fundamental right to direct how the State allocates its funding among school districts as long as the State amply provides for a basic education.

Accordingly, the inquiry under article I, section 12 should end here.

**2. The District fails to state a claim for undue favor (positive favoritism) under article I, section 12.**

The District claims “undue favor” under article I, section 12. This claim is simply another way to state its unsound ample funding claim. It argues the State “bestows a privileged funding level upon students in certain school districts” and therefore violates article I, section 12. Resp. Br. at 27.

This Court recently reiterated that “not every statute authorizing a particular class to do or obtain something involves a privilege subject to article I, section 12. Rather, privileges and immunities pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship.” *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 103, 178 P.3d 960, 966 (2008).

In *Ventenbergs*, a hauler of solid waste challenged the City of Seattle’s granting of solid waste hauling contracts to two other solid waste companies. The plaintiffs argued that among the “fundamental rights of citizenship” protected by article I, section 12, was a “right to hold specific private employment.” 163 Wn.2d at 103. The Court rejected this “right” as among those within the scope of article I, section 12 because the “employment” was “not private.” Rather, “it is in a realm belonging to the State and delegated to local governments.” *Id.*

Similarly, in this case, students have no “fundamental right” to any specific or relative level of salary allocations to the schools or districts they attend. As in *Ventenbergs*, such salary allocations are “in the realm belonging to the State.” Further, if there were such a right, the courts would be asked to weigh in on an endless variety of perceived funding inequalities from school to school and district to district. Rather than a right to specific salary allocations, students in Washington have a fundamental right to an amply provided education. Unless this Court determines that the mere existence of disparities in the salary allocations per se renders the funding inadequate under article IX, section 1 regardless of the level of funding, there is no privilege at issue under article I, section 12.

**3. Under equal protection analysis, the correct standard is rational basis review.**

The District argues for application of strict scrutiny with one conclusory statement that the salary allocations infringe on students’ fundamental right to be amply provided with education within a general and uniform system of public schools. While the District correctly characterizes the right held by students, it is wrong in concluding that the salary allocations infringe on that right. The District’s argument is simply

a reiteration of its erroneous argument that the allocation system directly infringes article IX, sections 1 and 2.

Unless this Court somehow agrees that salary allocation disparities among school districts establish a *per se* lack of ample funding, or render the system of public schools constitutionally non-uniform, no fundamental right can be implicated. Consequently, the proper test for review of the allocations is whether there is any conceivable rational basis to justify the existing disparities. *Caughey v. Employment Sec. Dept.*, 81 Wn.2d 597, 599, 503 P.2d 460 (1972).

**4. The salary allocations satisfy rational basis review.**

The State has legitimate interests in most effectively and efficiently shifting spending and allocation patterns within finite resources to meet its duty to amply provide a basic education. To achieve its goals, the State must balance a variety of considerations, including, legitimate expectancy and reliance interests, implementation of more effective programs, conservation of resources, and gradual reform measures in the face of complex problems. In our opening brief we cited cases recognizing the legitimacy of each of these considerations pursuing complex social and economic legislation. The current salary allocations, as they have evolved over time, are a rational means to accommodate all of the aforementioned considerations.

**a. The District cannot undermine the State's rational basis through its ample funding claim.**

The District's principal argument in response to our demonstration of rational bases for the salary allocations as they now exist is that there is no rational justification for maintaining a system that was unconstitutional to begin with. But, the constitutional flaw identified in *Seattle School District* was not in differing State salary allocation schedules; it was in the lack of a uniform basic program of education and a reliable mechanism for funding such a program. The District once again attempts to resolve the question of whether the salary allocations have a rational basis simply with an erroneous assertion that they unconstitutionally violate article IX, section 1.

The District apparently maintains that the Basic Education Act never was a constitutional remedy to the defect identified by the trial court and this Court in the *Seattle School District* case. Therefore, it concludes that the current allocations are "rooted in an unconstitutional system." Resp. Br. at 36. However, this argument does not hold up to scrutiny in light of the fact that the State took on its responsibility to define and fully fund basic education as a remedy in response to the *Seattle School District* case. See Brief of Appellants at 5-12, 20. Indeed, through both legislation and the initiative process, the State often increased levels of overall

funding as a priority over continuing to move closer to district-to-district equalization of salary allocations.

The defects identified by the court in *Seattle School District* were a failure to define a basic education and over-reliance by the State on special excess tax levies to discharge its ample funding obligation. The State remedied the latter by implementing a formula to increase the level of state funding that, for reasons explained in our opening brief, carried with it differences in funding allocations.<sup>11</sup> The existence of the different funding levels does not render the State's ample funding remedy unconstitutional.

In short, Federal Way School District's ability to pass a levy prior to 1977 does not determine whether its funding is ample today. It does determine that, for the time being, the District stands in the same shoes as the other districts that have not been grandfathered into more favorable allocations. For reasons previously stated, this is permissible under article IX and under article I, section 12.

The District asks this Court to analogize to *Hunter v. North Mason High School*, 85 Wn.2d 810, 539 P.2d 845 (1975). However, it is difficult to see the analogy. The court in that case simply recognized that the State

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<sup>11</sup> The Legislature adopted average salaries as a multiplier to implement a formula toward full funding. The decision to use average salaries reflected a political compromise over competing policies. State Br. At 6-8.

had waived sovereign immunity, thus proclaiming a policy that allowed the government to be sued on the same basis as private parties. Therefore, it was not thereafter rational for the State to claim protection from lawsuits as a basis to justify notice of claims statutes.

In contrast, in this case, the Legislature provided a constitutional remedy to the ample funding problem identified in *Seattle School District* and thereafter has, as a permissible policy choice, acted to lessen school district funding differences. The Legislature thus has endeavored to balance political, market, governance, and expectation interests of school districts and others, with efforts to further close remaining funding gaps, while responding to other exceedingly worthy, complex, and challenging public policy choices.

School funding, even considered alone, has built-in challenges with respect to funding equity in many dimensions. The Legislature must balance equity between schools, between districts, between different classes of employees, and between programs, including federally funded programs. Here, the Legislature has balanced interests based on legitimate public policy interests and choices, as detailed above and in the Brief of Appellants. Nothing more is required under article I, section 12 in this case.

**b. The multitude of policy considerations needed to resolve the issues in this case are best left to the legislative branch.**

Although the State's articulation of a rational basis above should end the case, the Court may also consider the principle articulated by the United States Supreme Court, that the legislative process is appropriate to remedy some instances of differential treatment. *Nordlinger v. Hahn*, 505 U.S. 1, 17-18, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992); State Br. at 45.

Letting the legislative process take its course seems particularly appropriate in this case for two reasons. First, if the salary allocation process is unfair, the District is not without potential legislative allies. Of the State's 295 school districts, 283 receive the same teacher allocation as Federal Way. It is hard to fathom that collectively these 283 districts, and their elected representatives, need to resort to the courts to remedy any unfairness in the allocation.<sup>12</sup>

Second, the salary allocation decision is complicated, if for no other reason than moving *all* districts up to the highest allocation in each of the three categories would consume resources that the Legislature would have to reallocate from other important education or non-education program needs. Again, the United States Supreme Court has recognized that these problems are appropriately left to the legislative branch. As

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<sup>12</sup> Likewise, Federal Way shares a common allocation of classified salary dollars with 224 other districts and with 88 districts on administrative salary allocations.

stated in *New Orleans v. Dukes*, 427 U.S. 297, 303-04, 96 S. Ct. 2513, 49 L. Ed.2d 511 (1976), “States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.”

In *Assoc. Grocers, Inc. v. State*, 114 Wn.2d 182, 787 P.2d 22 (1990), this court held unconstitutional as a denial of equal protection an exemption from the business and occupation tax to “distributors” of certain goods, but not to “wholesalers.” However, rather than extend the favorable treatment of the exemption to the businesses challenging the disparate treatment, the Court determined that the proper remedy was to eliminate the exemption. *Id.* at 190.

Likewise, here, it would be constitutionally acceptable to eliminate favorable treatment for the few districts receiving higher allocations. However, the whole issue currently sits before the Joint Task Force on Basic Education Finance, pursuant to recent legislation. Laws of 2008, ch. 177. That task force and the Legislature are the appropriate forums for debating and resolving the issue of salary allocations within the context of the larger debate over basic education finance policy.

The District’s claims of disparate treatment are not constitutionally based, and this Court should defer to the Legislature where Federal Way

and the hundreds of districts similarly situated should make their case through their elected representatives.

**D. The Salary Funding Allocations Comport With Substantive Due Process Rights Under Const. Article I, Section 3.**

The District argues that the salary allocations violate the substantive due process rights of students as an alternative basis for upholding the trial court's summary judgment order. It first argues for strict scrutiny by renewing its erroneous assertion that the State fails to amply provide for basic education. The State has rebutted that argument earlier in this brief. Second, the District renews its argument that the allocations lack any rational basis. As demonstrated under the arguments pertaining to the article I, section 12 equal protection analysis, the State has demonstrated that the allocations are rationally related to legitimate State interests.

Fundamentally, however, the salary allocations do not act upon students. Thus, as with article I, section 12, the Court need not engage in any further substantive due process analysis. That same fact also informs the analysis that students, teachers, and taxpayers fail to meet judiciability and standing requirements.

**E. The District Has Failed to Successfully Rebut the State's Arguments That the Individual Litigants Lack Standing.**

The District cites several racial preference and set-aside cases in support of its argument that the individual Plaintiffs need not show direct harm to state a justiciable claim under article I, section 12. And again, the District relies on its erroneous claim that the State salary allocation schedules violate article IX, sections 1 and 2 as the basis for allegedly impermissible treatment. In doing so, it also simply ignores the substantial body of cases cited by the State, including the relatively recent *Grant County II* case in which this Court applied the justiciability principles to a claim under article I, section 12. None of the cases cited by the District is a declaratory judgment action under the Washington Constitution. For reasons previously stated in the Brief of Appellants, the individual Plaintiffs in this case fail to establish that the challenged action—the different salary allocations to school districts—have caused injury in fact to any of the individual Respondents.

The fact that there could be more money available to Federal Way School District if the Legislature determined to fund all districts at the higher allocated districts is not enough to establish such injury. In this respect, the preference cases cited by the District are readily distinguishable from the instant case. *DeFunis v. Odegaard*, 82 Wn.2d 11,

507 P.2d 1169 (1973) concerned a student who was denied admission to the University of Washington law school. On the question of standing, the court concluded that while there was no way of knowing whether Mr. DeFunis would have been admitted had certain minority students not been admitted, Mr. DeFunis had a sufficient personal stake in the matter. That is, even though the causation was uncertain, the alleged harm was directly personal and peculiar to him. "A litigant who challenges the constitutionality of a statute, must claim infringement of an interest peculiar and personal to himself, as distinguished from a cause of dissatisfaction with the general framework of the statute." *DeFunis*, 82 Wn.2d at 84. The individual litigants in this case do not show any such direct and personal injury in fact.

In *Gratz v. Bollinger*, 539 U.S. 244, 262, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) and *Assoc. Gen. Contractors v. Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L. Ed. 2d 586 (1993), the U.S. Supreme Court did not negate the injury in fact requirement for article III standing. Sufficient injury may be stated when an individual is personally denied the opportunity to compete for a public contract, admissions to a public institution, or candidacy for public office due to preference or set-aside programs. "And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the

bidding process, not the loss of contract.” *Jacksonville*, 508 U.S. at 666. However, each of these cases involved an injury personal to and directly affecting the plaintiff. The District can make no convincing analogy to the instant case where the issue concerns salary allocations to school districts, rather than race based set-asides that impose barriers for students or employees to compete for positions.

#### IV. CONCLUSION

The salary allocation disparities complained of by the District are not of constitutional magnitude. The fact that the Legislature has in the past stated a desire to eliminate them, but has not yet achieved that goal, does not turn a political issue into a constitutional one. The existence of the disparities does not call into question the sufficiency of funding for basic education, nor do any such disparities undermine the general and uniform system of public schools under article IX. The District cannot claim protection under article I, section 12, which does not prohibit the State from treating municipalities differently. Nonetheless, under equal protection or substantive due process analysis, the District has failed to negate the rational bases demonstrated by the State to be sufficient to maintain the salary allocations.

The appropriate arena for this dispute is the political arena. The State asks this Court to reverse the judgment of the Superior Court.

RESPECTFULLY SUBMITTED this 28 day of July, 2008.

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A handwritten signature in black ink, appearing to read "David A. Stoler", with a long horizontal flourish extending to the right.

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