IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

ZUNI PUBLIC SCHOOL DISTRICT and
GALLUP-MCKINLEY SCHOOL DISTRICT NO. 1,

Plaintiffs-Appellees,

v. **Case No. A-1-CA-39902**

STATE OF NEW MEXICO and PUBLIC
SCHOOL CAPITAL OUTLAY COUNCIL,

Defendants-Appellants.

On appeal from the Eleventh Judicial District Court
The Honorable Louis E. DePauli, Jr., District Judge
Case No. D-1113-CV-98-00014

PLAINTIFFS-APPELLEES' ANSWER BRIEF

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Oral Argument Requested

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CITATIONS TO THE RECORD

The record in this case includes the record proper and stenographic transcripts of the hearing on the motion for summary judgment. When citing these sources, this brief generally follows the conventions of Rule 23-112 NMRA and its appendix.

The district court adopted all of the Districts' proposed findings of fact, which are found at 11 RP 2591-2654. Citations to **[FOF]** refer to the individual findings in this part of the record. Because all but one of the 414 findings include citations to the transcript or exhibits that support it, citations to **[FOF]** are also meant to incorporate the corresponding citations to the transcript or exhibits.

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I. INTRODUCTION

Article XII, Section 1 of the New Mexico Constitution (the "Education Clause") requires the State to provide a "uniform" and "sufficient" education to students:

> A *uniform system* of free public schools *sufficient* for the education of, and open to, all the children of school age in the state shall be established and maintained.

(Emphases added). In 1998, the Zuni and Gallup-McKinley School Districts (the "Districts") filed this lawsuit alleging that the property-wealth-based system of funding education was neither. The district court agreed, granting summary judgment that the old system was unconstitutional. In response, the Legislature created a new system in 2002 and 2003.

The new system was still based largely on local property taxes. As a result, poor districts continued to struggle to build and maintain even basic facilities while wealthy districts built schools that their poor neighbors could "only dream about." **[RP 2724]** The Districts re-opened this lawsuit and, in 2019, the court once again ruled that New Mexico's system of laws for funding education capital outlay was neither uniform nor sufficient. The decision was correct and should be affirmed.

II. SUMMARY OF FACTS AND PROCEEDINGS

To fully appreciate the issues in this case requires an understanding of (1) the evolution of school funding legislation in New Mexico from a property-wealth-

based system to a more equitable system and (2) the extensive findings and evidence below showing the disparities that the current capital outlay system has created over the years. As the State acknowledges, it is not feasible to include a full summary of the voluminous evidence below. **[BIC 20]** The Districts deem the following additional material necessary to provide information and context not included in the Brief in Chief. *See* Rule 12-318(B) NMRA.

A. A brief[1] history of education funding in New Mexico

Public education finance in New Mexico is divided into two parts: operating expenses (the costs of running schools) and capital outlay (the costs of building school facilities). **[FOF 4-7]** Operating expense funding was reformed in the 1970s and is not at issue in this appeal. As a result of this lawsuit, capital outlay funding was reformed in the 2000s. The district court retained jurisdiction to monitor those reforms and recently ruled them unconstitutional, finding they created significant disparities between rich and poor districts.

1. The Legislature made operational funding uniform and sufficient in 1974

By the end of the nineteenth century, most public schools, including those in New Mexico, were funded mainly through local property taxes.[2] **[FOF 5]** In the

[1] For a more thorough discussion of this history, see Lynn Carillo Cruz, *No Cake for Zuni: The Constitutionality of New Mexico's Public School Capital Finance System*, 37 N.M.L.R. 307, 316 (2007). *No Cake for Zuni*, a law review article about this very case, provides an in-depth analysis of the history of education finance reform in New Mexico and more generally in the United States, all in the context of this lawsuit.

[2] *See* Cruz, 37 N.M.L.R. at 316.

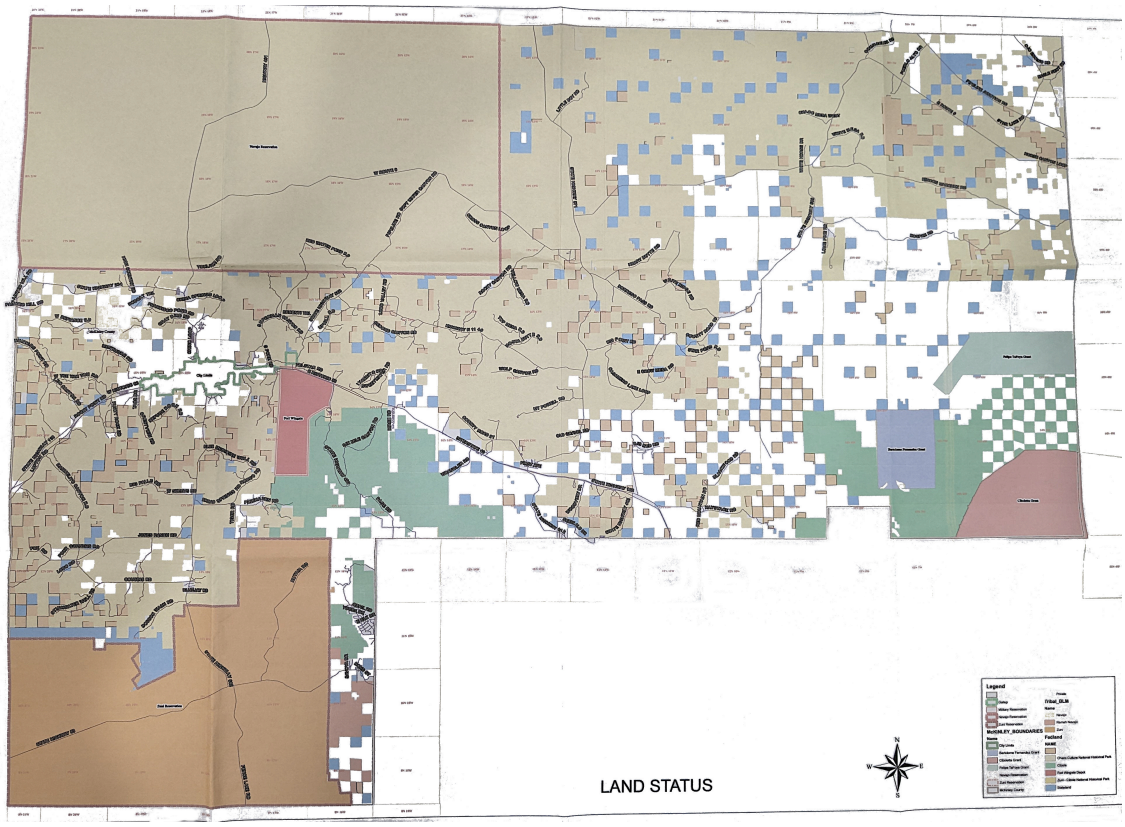
1960s and1970s, people began to see that this system created widely disparate levels of funding based on variations in local property wealth.[3] Lawsuits began to move through different state and federal courts, including New Mexico courts, and in 1973, New Mexico began to investigate reforms to its funding system.[4] **[FOF 6]**

In 1974, New Mexico became one of the first states in the nation to adopt a school financing system for operating expenses that funded public education according to an equalized formula rather than local property wealth.[5] The move became a national model of equitable school finance. Today, operational funding does not depend on the property wealth of a district—nearly all operational funding for New Mexico schools comes from statewide sources. **[FOF 8-15]**

2. In 1998, a state of emergency forced the Districts to file this lawsuit

Between 1974 and 2002, the Districts suffered because of how funds were allocated for capital outlay. **[FOF 368]** Although operational funding had been equalized, capital outlay was still funded primarily based on property taxes. **[FOF 16-25]** The Districts have very small tax bases—only 22% of McKinley County is taxable, and there is no tax base in the Zuni school district. **[FOF 373-77]** Plaintiffs' Exhibit 1 shows just how little land is taxable in the Districts:

[3] Cruz, 37 N.M.L.R. at 317.
[4] Cruz, 37 N.M.L.R. at 319-20.
[5] *See* Cruz, 37 N.M.L.R. at 307.



[Pl. Ex. 1] In the above graphic, the white areas depict land that is taxable. The dark orange area is the Zuni district; above it lies the McKinley County district. The large white rectangular area in the lower right is not part of the Districts.

Much of the non-taxable land consists of federal military installations, Indian lands, or national forests. Recognizing that such land is not subject to taxation, the federal government provides "Impact Aid" funds. **[FOF 205, 51-53]** Impact Aid is meant to take the place of revenues that are lost because the land is nontaxable because it is used by the federal government. **[FOF 212, 226]** However, there is a critical difference. While a district keeps all of the taxes it raises, the State allows a

district to keep only 25% of the Impact Aid it receives.[6] **[FOF 203, 216]** The remaining 75% is taken and used to fund statewide operational funds. **[FOF 217]** Gallup McKinley County School District ("GMCSD") typically receives between $20 and $29 million per year in Impact Aid. **[FOF 218]** Zuni receives on average $6.2 million in Impact Aid. **[FOF 224]** From 1979 to 2019, the State has taken nearly $900,000,000.00 in Impact Aid funds from GMCSD. **[FOF 220]** As a result, during the 28-year period between 1974 and 2002, GMCSD was only able to build one school. **[FOF 369]** By 1998, this situation had become untenable, and the Districts filed this lawsuit.

3. As a result of this lawsuit, the Legislature created the PSCOA System

In 1999, the district court granted partial summary judgment that the then-existing system for funding capital improvements for public schools violated the Education Clause. **[RP 361]** The court found that capital funding was tied to property wealth and that this created inequality in the ability to fund capital improvements. **[RP 361-62]** It therefore ordered the State "to establish a uniform funding system for capital improvements for New Mexico school districts and for correcting existing past inequities" consistent with the Education Clause. **[RP 363 ¶ 5]**

[6] After the final order in this case, the legislature changed the way Impact Aid funds are treated. **[BIC 29]** The changes do nothing to make up for the nearly $900,000,000.00 of Impact Aid funds taken from the Districts over the last four decades and were not at issue in the trial.

In response, the Legislature passed a series of new laws.[7] **[FOF 26]** The most important of these was S.B. 167, the Public School Capital Outlay Act[8] ("PSCOA"), which created much of the system at issue in this appeal. **[FOF 27]** The Legislature also amended the Public School Capital Improvements Act[9] ("PSCIA") to provide a state match for certain local tax revenue. **[FOF 44-46]** Because the capital outlay laws are spread throughout many bills and codified in various places, this brief refers to them collectively as the "PSCOA System."

The most visible effect of the PSCOA System was to create a sprawling new bureaucracy for funding capital outlay. The laws created a Public School Capital Outlay Task Force ("PSCOOTF"), *see* NMSA 1978, § 22-24-7 (2001), which was charged with monitoring capital outlay expenditures. NMSA 1978, § 22-24-8 (2001). The laws also created the Public School Facilities Authority ("PSFA") to handle the day-to-day work of implementing the PSCOA System. *See* NMSA 1978, § 22-4-9 (2003).**[FOF 32]**. Extensive regulations regarding all of these entities can be found in Title 6, Chapter 27 of the NMAC, Parts 1 through 43.

Under the PSCOA System, capital funding is both a state and a local responsibility. **[FOF 33-41]** Districts that elect to use state funds must match a

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[7] *See* Cruz, 37 N.M.L.R. at 330-36.
[8] The PSCOA is currently codified at NMSA 1978, §§ 22-24-1 to -12 (1975, as amended through 2022).
[9] The PSCIA is currently codified at NMSA 1978, §§ 22-25-1 to -11 (1975, as amended through 2022).

percentage of those funds with local funds. **[*Id.*]** State funds come mainly from a new system of supplemental severance tax bonds. **[FOF 36-39]** District matching funds come mainly from bonds backed by property taxes.[10] **[FOF 36, 42-50, 54-57]** But the ability to raise funds based on property taxes varies dramatically from district to district. **[FOF 59-65, 72-74, 78, 82-88]** Poor districts that charge the highest tax rates allowed by law often generate much less money than wealthy districts charging much lower tax rates. **[FOF 89-100]**

Although the court had ordered the Legislature to create a system that was *uniform*, the PSCOA System is focused entirely on achieving *adequacy* in capital outlay.[11] **[FOF 27-28; RP 639-41]** Districts that want or need to use state funds must apply for PSCOA grants, which are awarded based on a complicated ranking system **[FOF 28-32, Ex. 42 at 5-6]** through a process that the district court described as "utterly complex and tortuous." **[RP 2724]** Importantly, participation in this bureaucracy is not mandatory—wealthy districts can opt to build outside of the system, bypassing the arduous and lengthy process the poorer districts have no choice but to endure. **[FOF 111-26]**

The adequacy-based PSCOA System has been controversial since its creation, with some people believing adequacy standards would lead to non-uniform results,

[10] District matching funds can also come from Impact Aid funds; however, as discussed above, for decades most of those funds have been taken from the Districts.
[11] *See* Cruz, 37 N.M.L.R. at 330-34.

while others believed such standards would create uniformity. **[BIC 5-7]** In the first review of the system, Justice McKinnon tended towards the latter belief, **[RP 639-40]** though he was wary that direct appropriations—pork, in his words—would contribute to non-uniformity. **[RP 642, 644]** Ultimately, however, he recognized that it was too soon to judge whether the system complied with the court's order, **[RP 635]** and therefore recommended that the district court require the State to periodically update the court on the status of its efforts to comply with the Education Clause. **[RP 644]**

4. The PSCOA System increased the disparities between poor and wealthy districts

In the years after the creation of the PSCOA System, evidence mounted that the system was creating disparities. Even after the reforms, the ability to finance capital outlay still depended on the property wealth of the district. **[FOF 72]** For example, GMCSD and Santa Fe are similarly sized, but GMCSD can raise $50,198,847 per year while Santa Fe can raise $399,259,688. **[FOF 85-86]** Jal (which has oil and gas wealth) can raise double the amount as GMCSD despite having fewer students and schools. **[FOF 87-88]** And Zuni can only raise $133,627 per year—nowhere near enough to build a school. **[FOF 85,95]** The result is not only that the wealthy districts can afford better facilities, but also that they are able to do so while charging lower tax rates. **[FOF 89-100]**

Disparities were also caused by direct appropriations—the "pork" that Justice McKinnon was worried about. The Legislature makes direct appropriations outside of the PSCOA System. **[FOF 101]** In the years leading up to the trial, wealthy districts received millions of dollars of direct appropriations, while the Districts received nothing. **[FOF 102-09]** Because the system only partially offsets direct appropriations, districts that receive them enjoy a net benefit. **[FOF 110]** For example, from 2003 to 2018 APS received $144,165,404 in direct appropriations, of which only $65,624,125 was offset. **[*Id.*]** The result was that Albuquerque enjoyed $78,541,279 in additional funding versus poorer districts that did not benefit from direct appropriations. **[*Id.*]** As the special master noted long ago, "poor school districts lack the political clout" to obtain direct appropriations. **[RP 635]**

Another result of the PSCOA System was that, while poor districts could not reach adequacy even when they charged the maximum tax rates allowed under law, wealthy districts could build well above adequacy while charging lower taxes. **[FOF 127-83]** Working within the system can add 4-5 years to the process. **[FOF 123]**. The funds available, as well as the definition of what is "adequate," have decreased over time. **[FOF 342-67; 294-338]** Of course, wealthy districts also have the ability to bypass the "utterly complex and tortuous" system entirely. **[RP 2724; FOF 111-26]**

As it turned out, the State was aware of these problems. Exhibit 18, a 2012 draft report of the PSCOOTF Capital Outlay Work Group, provides an "executive summary" discussing them in detail. The summary noted that schools in urban areas enjoy "facility scale advantages" that the PSCOA funding formula does not consider, allowing them to build above state adequacy guidelines. Conversely, small rural districts "have insufficient local match in certain instances to build to adequacy." **[Ex. 18 at 3]** It also observed that direct legislative appropriations were "not uniformly allocated." **[*Id.* at 5]** And it explained in detail the advantages wealthy districts had over poor districts under the PSCOA System. **[*Id.* at 6-8]**

The problems were particularly acute in the Districts. The Districts had a higher need for capital outlay because they had been neglected between 1974 and 2002, when the PSCOA System was adopted. **[FOF 368]** Only one school had been built in GMCSD during that time. **[FOF 369]** The Districts struggle to match state funds due to their low tax bases. **[FOF 373-78]** And, because the adequacy standards do not take into account rural conditions such as the need to extend utilities or to pay tribal taxes, PSCOA funds are not enough to build up to adequacy. **[FOF 229-84]** A lack of funding for teacherages also makes it difficult or impossible to provide teachers in rural schools, and the Districts have had to raid operational funds to finance these capital improvements. **[FOF 399-406]** Also, because GMCSD lacks the funds to do both new construction and maintenance, it has had to prioritize

maintenance and safety needs; even so, it cannot afford all of the necessary maintenance. **[FOF 379-83]** As was the case when the Districts originally sued in 1998, the situation was still untenable, and the Districts asked the court to reopen the case.

B. The district court's 2020 decision that the PSCOA System is unconstitutional

The district court entered its decision and order on December 29, 2020 (the "*Order*"). **[RP 2717-25]** The *Order* was not styled as a series of numbered findings followed by a series of numbered conclusions; instead, it was more in the style of a judicial opinion. As a result, identifying some of its findings and conclusions requires careful reading.

It is clear from the *Order* that the court understood the parties' arguments. The court explained that the Districts sought to show that the PSCOA System failed to provide a uniform and adequate system of funding—in particular, that the system was not uniform because it was directly tied to property wealth. **[RP 2717]** The court understood the State to argue that the court lacked authority to decide the political question of how funds should be distributed and that the uniformity requirement did not prohibit wealthy districts from using bond funds to build significantly better schools outside of the system. **[RP 2718, 2723]**

The *Order* contains findings and conclusions as to each of these arguments. First, the court repeatedly stated that the Districts had proven "beyond all reasonable

doubt" that the PSCOA System violated the uniformity requirement. **[RP 2718, 2722, 2723]** Second, the court also concluded that "the New Mexico Constitution provides a fundamental right to a uniform and sufficient education," a conclusion the State does not appeal. **[RP 2721]** Third, the court concluded that the Districts had proven that the system violated the sufficiency requirement. **[RP 2719, 2725]**

The *Order* also contains findings of fact. Generally, the court found that "property-poor districts pay more in taxes to receive less." **[RP 2719]** In particular, it explained that the Districts had "established the effect of the gross disparity in funding on" their school districts. **[RP 2724]** It found that

> The trial evidence established that property-wealthy districts can spend millions and millions of dollars to build physical facilities over and above the PSCOA adequacy standards for physical facilities that property-poor districts can only dream about, all the while bypassing the utterly complex and tortuous process of applying for and receiving "grant assistance" under NMSA 1978[, Section] 22-24-5 … .

[RP 2724] And it found that "the gross disparities in funding among school districts caused by the PSCOA and the PSCIA have resulted in the Plaintiffs' school districts receiving insufficient funds to adequately educate their school children on substantially equal terms to children in property-wealthy districts." **[RP 2725]** In addition to these specific findings, the court "accept[ed] and f[ound] as proven the Plaintiff's Proposed Findings of Fact, numbers 1 to 412." **[RP 2720]**

The *Order* ties these findings to the conclusions the court reached about the meaning of the Education Clause. Because the court's conclusions are supported by

its findings, which are in turn supported by substantial evidence, the *Order* must be affirmed.

III. ARGUMENT

Article XII, Section 1 of the New Mexico Constitution requires the State to provide a "uniform" and "sufficient" education. The meaning of both terms, as well as the burden of proof, was disputed below.

Perhaps the most important issue in this appeal is the meaning of the "uniformity" and "sufficiency" requirements of the Education Clause. No New Mexico appellate court has yet construed either of those two requirements. Frustratingly, the State chose not to brief the issue, observing only that the district court adopted the standard from *Bishop*. **[BIC 33]** But this Court must construe those terms to decide this appeal. And, since the district court has retained jurisdiction to ensure compliance with its order, those definitions will be critical on remand.

The State's decision not to brief this issue deprives this Court of the benefits of adversarial briefing and invites error. *See Pirtle v. Legislative Council Comm.*, 2021-NMSC-026, ¶¶ 58-59, 492 P.3d 586 (deciding constitutional questions without adversarial briefing invites error and risks the parties being blind-sided by the appellate court's decision). As explained below, however, the district court construed the terms correctly, and its conclusion that the PSCOA System is unconstitutional is supported by substantial evidence.

A. The standard of review for an Education Clause challenge is a matter of first impression

At trial, the burden of proof was disputed. The Districts argued that because education was a fundamental right, they needed only to show by a preponderance of the evidence that the PSCOA System was either not uniform or not adequate. **[RP 2664-65]** The State contended that the system was presumptively valid and should be upheld unless the court found beyond a reasonable doubt that it was unconstitutional. **[RP 2698]** The standard of review depends on which of these burdens applies.

The district court concluded that the "beyond all reasonable doubt" standard was not the applicable standard. **[RP 2722]** However, as to uniformity, the court ruled that "whatever the burden of proof is, and whatever party has it," the Districts had "proven beyond all reasonable doubt[] that New Mexico's statutory capital outlay funding system is not 'uniform' as required by" the Education Clause. **[*Id.*]** The court also concluded that education was a fundamental right. **[RP 2721]** Employing a fundamental rights analysis, the court found that the Districts had proven that the PSCOA System did not meet the sufficiency standard **[RP 2725]** and that the State had not met its burden to justify that shortcoming. **[RP 2721]**

The burden of proof for a claim arising under the Education Clause is a matter of first impression in New Mexico, and one that different jurisdictions have handled differently. On one hand, some states have employed a presumption of validity and

required plaintiffs to show that there is no reasonable doubt that the challenged law violates fundamental constitutional principles. *See Davis v. State*, 804 N.W.2d 618, 628 (S.D. 2011); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989). The State advocates for that standard here. Under this standard, the courts apply a de novo standard of review, *see Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 10, 458 P.3d 406, and legislation enjoys a presumption of validity but may be found unconstitutional if the court is "satisfied beyond all reasonable doubt that the Legislature went outside the bounds fixed by the Constitution in enacting the challenged legislation." *State ex rel. Udall v. Public Employees Ret. Bd.*, 1995-NMSC-078, ¶ 7, 120 N.M. 786. New Mexico has applied this standard where fundamental rights are not at issue. *See id.*

On the other hand, many states analyze their own education clauses as a fundamental right and apply strict scrutiny. *See, e.g.*, *Serrano v. Priest*, 487 P.2d 1241, 1263 (Cal. 1971); *State v. Campbell* (*Campbell II*), 2001 WY 19, ¶ 42, 19 P.3d 518 (Wyo. 2001); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977). Strict scrutiny applies to laws that impact the exercise of a fundamental right. *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734. When it applies, the State must show that the challenged laws are narrowly tailored to achieve a compelling government purpose. *Id.* The Districts took that position below, and

the district court agreed. **[RP 2664-65, 2721-22]** This is the better approach. While the "beyond reasonable doubt" standard makes sense in the context of a case like *Moses*, which did *not* involve fundamental rights,[12] it is not appropriate in a case such as this involving violations of the Education Clause, which *does* involve fundamental rights.

A third approach was taken in *McCleary v. State*, 269 P.3d 227 (Wash. 2012) (en banc). *McCleary* considers the difference between prohibitions (such as those at issue in *Moses*) and positive rights (such as those at issue here). The *McCleary* court observed that a typical constitutional analysis involves a negative limitation, *e.g.*, whether the state has overstepped its authority. *Id.* ¶ 101. A state's education clause, however, creates a positive right, and the question is not whether the State has gone too far, but whether it has gone far enough. *Id.* ¶ 102. "[In] a positive rights context we must ask whether the state action achieves or is reasonably likely to achieve the constitutionally prescribed end." *Id.* ¶ 102. Whether the funding system achieved or was reasonably likely to achieve the constitutional end was a fact question that the *McCleary* court reviewed for substantial evidence. *See id.* ¶ 154. The State argues against this standard. **[BIC 46-47]**

Because the district court was correct that the Districts had proven beyond a reasonable doubt that the PSCOA System was not uniform, the Court may not need

[12] *Moses* considered a prohibition on using public funds to support private schools.

to decide the issue. However, as explained in Part III.C.1 below, the district court was also correct that education is a fundamental right and that the PSCOA System cannot survive strict scrutiny.

B. The PSCOA System is not uniform because it creates substantial disparities between rich and poor districts

The first of the Education Clause's two requirements is that the State must provide students with a "uniform" education. Below, the Districts contended that a system that created gross disparities was not uniform. **[RP 2675-76 ¶¶ 94-103]** The State did not offer a definition, but argued that the Education Clause did not prohibit school districts from raising their own funds to build or maintain schools. **[RP 2701]** The district court concluded that the PSCOA System did not meet the uniformity requirement because it created disparities between wealthy and poor districts. That conclusion is correct and the findings it depends on are supported by substantial evidence.

1. The uniformity requirement of the Education Clause prohibits funding systems that create substantial disparities

In concluding that the PSCOA System was unconstitutional, the district court carefully considered the meaning of "uniform." Observing that the Districts had devoted 32 paragraphs of proposed conclusions of law to the term's meaning, the court focused on one case in particular, *Roosevelt Elem. Sch. Dist. v. Bishop*, 877 P.2d 906 (Ariz. 1994), which it found persuasive. **[RP 2722-24]**

In *Bishop*, the Arizona Supreme Court asked "whether a statutory financing scheme for public education that is itself the cause of gross disparities in school facilities" complied with Arizona's constitution, which required the state to establish and maintain "a general and uniform public school system." *Id.* at 808. Looking at cases from other states, the Arizona court discerned two themes. First, while districts need not be perfectly equal or identical, a funding system should not create gross disparities between them. *Id.* at 814. Second, the court noted the tension "between the competing values of local control and statewide standards," *i.e.*, that many localities will wish to go "above and beyond" the statewide system. *Id.* at 814-15. The court saw no problem with this—indeed, saw it as desirable—so long as the statewide system was "not itself the cause of substantial disparities." *Id.*

The *Bishop* court concluded that the disparities in Arizona did not result from districts going above and beyond the state's financing scheme—they were created by the system itself. *Id.* at 815. Arizona's financing relied heavily on local property taxation and made only partial attempts at equalization. *Id.* The state "knew of the profound differences in property value among the districts, yet selected a funding mechanism" that depended heavily on property value. *Id.* In the court's view, such a system "could do nothing but produce disparities," and was "inherently incapable of achieving [its] constitutional purpose." *Id.*

Most jurisdictions that have examined the issue have reached the same conclusion: financing public education mainly through local property taxes causes disparate funding based on disparate property wealth. *See generally* Cruz, 37 N.M.L.R. at 346-47. For example, in the seminal case of *Serrano v. Priest*, California rejected a system that made "the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbooks of his parents." 487 P.2d at 1263. Wyoming, which has a similar uniformity requirement, has concluded that any system based mainly on property values will produce unconstitutional disparities in educational opportunity. *Campbell II*, 2001 WY 19, ¶ 120.

The district court's choice of the *Bishop* standard—that legislation that creates substantial disparities is unconstitutional—was an appropriate interpretation of the uniformity requirement. It is also consistent with the results most other jurisdictions have reached. And, as discussed next, for much the same reasons that were present in *Bishop*, the PSCOA System creates substantial disparities between districts.

2. Substantial evidence supports the district court's finding that the PSCOA System creates disparities between districts

The district court found that the PSCOA System "guarantees" disparities in funding between districts and that it "create[d] substantial disparities instead of remedying them." **[RP 2723-24]** Although the State frames this issue as a question of law, **[BIC 30]** it argues it as one of fact.

When constitutionality depends on factual evidence, the findings are reviewed for substantial evidence and the application of law to the facts is reviewed de novo. *See Schuster v. N.M. Dep't of Taxation & Revenue*, 2012-NMSC-025, ¶ 23, 283 P.3d 288. The standard is well known:

> [W]hen considering a claim of insufficiency of the evidence, the appellate court resolves all disputes of facts in favor of the successful party and indulges all reasonable inferences in support of the prevailing party. Additionally we will not reweigh the evidence nor substitute our judgment for that of the fact finder. *The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached.*

Las Cruces Prof'l Fire Fighters v. City of Las Cruces, 1997-NMCA-044, ¶ 12, 123 N.M. 329 (citations omitted and emphasis added). Here, the court's findings are supported by substantial evidence—indeed, the State does not directly contend otherwise[13]—and the court correctly applied the law to the undisputed facts.

As explained in Section II.A.4 above, substantial evidence shows that the PSCOA System created and exacerbated the disparities between poor and wealthy districts. Testimony from Mike Hyatt, Martin Romine, Rachel Gudgel, Jonathan Chamblin, and Jvanna Hanks established that, even after the reforms, the ability to finance capital outlay depends on the property wealth of the district. **[FOF 72-100]**

[13] A substantial evidence challenge is waived where, as here, the appellant fails to identify "with particularity the fact or facts that are not supported by substantial evidence." Rule 12-318(A)(4) NMRA. Nothing in this part of the State's brief identifies a finding that it contends is not supported by substantial evidence.

Wealthy districts are able to build well above adequacy, **[FOF 127-83]**, while poor districts may not be able to build schools at all. **[FOF 372, 379-83]** Meanwhile, direct appropriations overwhelmingly favor the wealthy districts that do not need them. **[FOF 101-10, 285-93]** On top of all of that, for decades (until after the December 2020 *Opinion*) the State took from the Districts 75% of the Impact Aid funds meant to offset the lack of property taxes. **[FOF 203-28]**

Rather than meet the difficult burden of showing that these findings are not supported by substantial evidence, the State takes the impermissible approach of identifying evidence that might have supported a different result, had the district court not rejected it. The State contends that "[t]o the contrary" of the court's finding, "the evidence at trial established that the PSCOA and PSCIA reduced inequities in capital outlay … ." **[BIC 31]** It argues that the court's findings "cannot be squared with" and cannot "be reconciled with" evidence that the Districts receive more money than other districts, and that they have dramatically improved facilities. **[BIC 31-32]** These arguments ignore the standard of review, which asks not whether there was evidence that might have supported some other finding, but whether the evidence supports the findings the district court actually made. *Las Cruces Prof'l Fire Fighters*, 1997-NMCA-044, ¶ 12.

3. The State cannot use Article IX, § 11 to justify a system that creates substantial disparities between districts

The State's main legal (as opposed to factual) argument appears to be that a lack of uniformity between districts is not unconstitutional if it can be traced to bonding allowed by Article IX, Section 11. **[BIC 34-37]** Article IX, Section 11 allows school districts to borrow money to build or improve schools. Essentially, the State contends that the gross disparities between school districts are acceptable so long as they can be traced to local funds—i.e., property wealth—and not to the PSCOA System. This legal question is reviewed de novo.

The State's position evokes the tension between statewide standards and local control that the *Bishop* court grappled with:

> Local control in these matters is an important part of our culture. Thus, school houses, school districts, and counties will not always be the same because some districts may either attach greater importance to education or have more wherewithal to fund it. Nothing in our constitution prohibits this. Factors such as parental influence, family involvement, a free market economy, and housing patterns are beyond the reach of the "uniformity" required by [the constitution]. Indeed, if citizens were not free to go above and beyond the state financed system to produce a school system that meets their needs, public education statewide would suffer.

Bishop, 877 P.2d at 815. The *Bishop* court resolved this tension by holding that districts were free to create disparities by going "above and beyond" so long as the disparities were not caused by the financing scheme the state chose. *Id.* The district court reached the same conclusion here:

> While Article IX, Section 11 allows taxation by districts to fund capital improvements, it does not follow [that] it allows the legislature to pass funding schemes that cause and create gross capital funding disparities among school districts.

[RP 2724]

The State contends that because article IX, section 11 was adopted after the Education Clause, and because in the State's view it is more specific, it "governs in a conflict" between the two provisions. **[BIC 36]** This argument fails for two reasons. First, both clauses were present when the N.M. Constitution was adopted.[14] Second, as the district court recognized, the Education Clause "is not in irreconcilable conflict with Article IX, Section 11." **[RP 2724]** The former asks whether the system is uniform, while the latter allows districts to raise money through bonds. *See also Rose*, 790 S.W.2d at 212 (rejecting a similar argument and explaining that the ability to raise additional funds through local taxes "may not be used … as a substitute for providing an adequate, equal and substantially uniform educational system … .").

Bishop's holding resolves the tension between the Education Clause and local control in a way that allows wealthy districts pay for more without fear that their actions will be considered unconstitutional. So long as the PSCOA System does not

[14] Article IX, section 11 originally provided: "No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds … ." It was amended in 1933, 1965, 1996, and 2005 in ways not material to this appeal. The Education Clause was present at adoption and has never been amended.

create the disparities, there is no problem. But when, as here, it does, then the courts must step in to ensure that the State keeps the constitution's promise of a uniform and sufficient education.

C. The PSCOA System is not sufficient because it does not ensure that students are prepared to participate in and contribute to society

The State's second argument is that the district court erred in ruling that the PSCOA System fails to provide a "sufficient" education. The State contends that (1) the findings are not supported by substantial evidence, **[BIC 39-40]** or (2) if they are, they show only that the PSCOA System is unconstitutional as applied. **[BIC 41-42]**

Once again, the State does not explain what it believes the Education Clause requires. The district court devoted little analysis to this question, employing a standard of whether the scheme was "sufficient to meet their student's educational needs and requirements under law." **[RP 2724-25]** Treating sufficiency under a fundamental rights analysis, it concluded that the Districts had shown by a preponderance of evidence that the PSCOA System was not sufficient. That conclusion was correct and the findings that support it are supported by substantial evidence.

1. Education is a fundamental right in New Mexico

The district court concluded that the Education Clause "provides a fundamental right to a uniform and sufficient education." **[RP 2721]** The State does

not contend otherwise, nor can it, for education is undoubtedly a fundamental right in New Mexico.

"A fundamental right is that which the Constitution explicitly or implicitly guarantees." *Richardson v. Carnegie Library Rest. Inc.*,1988-NMSC-084, ¶ 28, 107 N.M. 688. The New Mexico Constitution, like most state constitutions,[15] expressly guarantees the right to education in the Education Clause. *See* N.M. CONST. art. XII, § 1. In fact, Article XII is devoted to education, comprising fifteen sections covering such topics as funding, compulsory attendance, administration, and nondiscrimination. So far, however, New Mexico's appellate courts[16] have not yet had to decide whether education is a fundamental right.

Courts that have examined the issue under analogous state constitutional provisions have concluded that education is a fundamental right. For example, *Bishop*, although not decided on a fundamental rights theory,[17] acknowledged that education is a fundamental right in Arizona. 877 P.2d at 811. The Wyoming Supreme Court has observed that "[i]n light of the emphasis which the Wyoming

[15] Cruz, 37 N.M.L.R. at 314 & n.64.

[16] Judge Singleton of the First Judicial District has concluded that education is a fundamental right. *See* Court's Findings of Facts and Conclusions of Law and Order re Final Judgment, *Martinez v. State*, No. D-101-CV-2014-00793, ¶¶ 2929-2937 (filed Dec. 20, 2018). That litigation is ongoing.

[17] *Bishop* relied on the more specific constitutional provision directly, noting that it is only when the more specific provision fails that the court turns to the more general fundamental rights analysis. *See* 877 P.2d at 811. Consistent with that approach, the district court only applied a fundamental rights analysis to sufficiency, which it ruled the Districts had not proven beyond a reasonable doubt.

Constitution places on education, there is no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest." *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980); *see also Campbell II*, 2001 WY 19, ¶ 42 ("Because education is a fundamental right …, all aspects of the school finance system are subject to strict scrutiny, and statutes establishing the school financing system are not entitled to any presumption of validity."); *Serrano*, 487 P.2d at 1244 (education is "a fundamental interest which cannot be conditioned on wealth"); *id.* at 1258 ("[T]he distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"); *Rose*, 790 S.W.2d at 215 ("[E]ducation is a basic, fundamental constitutional right that is available to all children within this Commonwealth."); *Claremont Sch. Dist. v. Governor*, 703 A.2d at 1358-59 (same).

Even under federal law, where education is *not* recognized as a fundamental interest,[18] the U.S. Supreme Court recognizes its critical importance to society:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in

[18] *See San Antonio Indep. Sch. District v. Rodriguez*, 411 U.S. 1, 35-37 (1973) (education is not a fundamental right under federal law because the U.S. Constitution does not address education).

> preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

The Wyoming Supreme Court was correct: there is no room for any conclusion other than that education is a fundamental right. The New Mexico constitution not only guarantees education, it makes it compulsory. N.M. CONST. art. XII, § 5. The district court did not err in concluding that education is a fundamental right in New Mexico.

2. The sufficiency requirement of the Education Clause requires the State to provide an education sufficient to enable students to participate in and contribute to society

To evaluate the district court's conclusion that the PSCOA System is not sufficient, the Court must first define the term. The State offers no definition, arguing instead that the district court's holding is not supported by substantial evidence. **[BIC 38-40]** Below, the Districts offered several possible meanings of "sufficiency" based on decisions from states with constitutions requiring the provision of an "adequate" education.[19] **[RP 2665-71]**

[19] The Districts explained that adequacy and sufficiency are synonymous in state education clauses. **[RP 2665-66]**

In perhaps the most prominent decision about adequacy, the Kentucky Supreme Court observed that

> Each child, every child, … must be provided with an equal opportunity to have an adequate education. … the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education. This obligation cannot be shifted to local counties and local school districts.

Rose, 790 S.W.2d at 211. The *Rose* court explained that an adequate education must provide every child with at least seven things:

1. Sufficient communication skills to function in a complex and rapidly changing civilization;
2. Sufficient knowledge to make informed choices;
3. Sufficient civics knowledge to understand the issues affecting their communities;
4. Sufficient self-knowledge of their own physical and mental wellness;
5. Sufficient grounding in the arts to appreciate their cultural and historical heritage;
6. Sufficient training to choose and pursue life work intelligently; and
7. Sufficient skills to compete favorably with their counterparts in surrounding states, academics, or the job market.

See id. at 212. The *Rose* standard has been adopted in whole or in part by many states. *See, e.g.*, *Gannon v. State*, 319 P.3d 1196, 1236 (Kan. 2014); *McDuffy v. Sec.*

of Exec. Office of Educ.,615 N.E.2d 516, 555 (Mass. 1993); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997).

Other states have crafted their own standards. Wyoming has construed its adequacy requirement to mean "reasonably sufficient for the appropriate or suitable teaching/education/learning of the state's school age children." *Campbell v. State* (*Campbell I*), 907 P.2d 1238, 1258-59 (Wyo. 1995). New Jersey defines constitutional adequacy as "an education that will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities." *Abbot by Abbot v. Burke*, 693 A.2d 417, 428 (N.J. 1997).

Here, the district court chose an approach similar to that of Wyoming, applying a broad standard requiring the State to "meet their student's educational needs and requirements under law." **[RP 2725]** The court did not define "educational needs." But its meaning, at least in a general sense, has been clear and consistent in the opinions from other jurisdictions: a "sufficient" education is one that prepares students to participate in and contribute to society. The standard employed by the district court below aligns with that theme. Under any articulation of that standard, there was substantial evidence to support the district court's conclusion that the PSCOA System does not provide students with a sufficient education.

3. The findings supporting the district court's conclusion that the PSCOA System does not satisfy the Education Clause's sufficiency requirement are supported by substantial evidence

The State acknowledges that the Districts offered evidence that the adequacy standards often did not allow them to build adequate facilities. **[BIC 40]** That evidence was overwhelming. **[FOF 229-84]** Accordingly, the State tries to frame the argument more narrowly, contending that there is not substantial evidence to support a finding that "the adequacy standards are unrelated to facility needs or educational needs." **[BIC 39]** That argument is incorrect for three reasons.

First, the State's conclusory claim that the district court's finding was not supported by substantial evidence does not negate the voluminous testimony showing the shortcomings of the PSCOA System. *See Salazar v. DBWH, Inc.*, 2008-NMSC-054, ¶ 6, 144 N.M. 828 ("Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion."). Instead, it points to the evidence that it introduced—and that the district court rejected—that might have supported a different result. **[BIC 39-40]** But this Court does not reweigh the evidence or substitute its judgment for that of the district court, it reviews whether there is support for the findings that the district court actually made. *See, e.g.*, *Las Cruces Prof'l Fire Fighters*, 1997-NMCA-044, ¶ 12; *see also Zemke v. Zemke*, 1993-NMCA-067, ¶ 15, 116 N.M. 114 ("When there is conflicting evidence, on review the appellate court considers the evidence in the light most favorable to the

prevailing party and indulges in all reasonable inferences that can be drawn from the evidence in support of the judgment.").

Second, the State frames the challenged findings more narrowly than the district court did. The State frames the finding narrowly as whether "the adequacy standards are unrelated to facility needs or educational needs." **[BIC 39]** To be sure, the court did note parenthetically that it believed that to be true. **[RP 2719]** But it did so in the context of concluding that the Districts had proven that the PSCOA System "is insufficient, not only to provide adequate physical facilities, but also an adequate education" to students in the Districts **[*id.*]** and that "facilities built or maintained under the adequacy standards are not sufficient to meet their student's educational needs and requirements under law." **[RP 2725]** Those are the relevant conclusions.

Third, the court's conclusions are supported by extensive findings of fact which are in turn supported by substantial evidence. For example, the system does not fund teacherages (housing for teachers). **[FOF 232-50]**. Teacherages are necessary in rural districts where it would be difficult or impossible to recruit teachers. **[FOF 235, 238, 246]** The districts cannot staff some schools without them. **[FOF 238, 246, 248-49]** Because the system will not pay for teacherages, **[FOF 232, 236, 250]** the Districts have had to raise tens of millions of dollars in bond funding to build them. **[FOF 240]**. GMCSD has had to divert money from operational funds

to repay those bonds. **[FOF 243]** As our courts have noted, where a district is so large that children cannot make the trip to school and back each day, students are "denied a free school just as effectively as if no school existed." *Strawn v. Russell*, 1950-NMSC-028, ¶ 11, 54 N.M. 221. The same is true where *teachers* cannot make the trip to school and back each day.

Another necessary expense that adequacy standards do not cover is offsite utilities. The PSCOA System will not pay for utility extensions beyond school boundaries. **[FOF 252-53, 256]** But rural schools often are not located near utilities such as water or electricity. **[FOF 254-55]** The districts cannot build new schools unless they are able to find non-PSCOA money to extend water or electricity to the schools. **[FOF 254]** The PSCOA System fails to provide for adequate facilities if it does not pay for electricity or water service to facilities.

Another uncovered requirement unique to the Districts is the Navajo Nation business tax. This five percent tax applies to schools built on the Navajo Nation. **[FOF 266-69]** The PSCOA System does not cover it. **[FOF 270]** GMCSD devotes all of its excess funds to this tax and to offsite utilities; as a result, it cannot afford to build any other "above adequacy" features. **[FOF 271]**

The Districts also put on testimony that the PSCOA System does not provide the funds necessary to meet certain legal requirements. For example, inability to build adequate athletic facilities has left GMCSD in violation of Title IX. **[FOF 275]**

GMCSD lacks sufficient space to provide required pre-K parent education. **[FOF 276-77]** And schools built under the recent standards lack sufficient square footage to provide services required by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, such as speech language pathologists, occupational therapists, physical therapists, and social workers, among others. **[FOF 278-84]** In one school, the space for such services is located in a storage closet. **[FOF 280]**

There was ample evidence to support the district court's conclusion that the PSCOA System does not meet the "sufficiency" requirement. The Court should reject the State's invitation to overturn those findings because of contrary evidence that the district court rejected or a parenthetical observation not critical to its ruling.

4. There is no compelling reason to excuse the PSCOA System's failure to provide a sufficient education

Because the Districts proved that the PSCOA System impacts a fundamental right, the State was required to show that it survives strict scrutiny. Under strict scrutiny, an otherwise unconstitutional law may be upheld if it is narrowly tailored to a compelling interest. *Wagner*, 2005-NMSC-016, ¶ 12. Because the State did not address the fundamental rights part of the judgment in its brief in chief, it has offered no compelling interest to justify the PSCOA System's failure to provide a sufficient

education. And because at trial it contended that strict scrutiny did not apply, it offered no compelling interest below either.[20] **[RP 2698]**

Perhaps the best argument any state has made that there is a compelling interest to justify wealth-based education funding came in *Serrano*. There, the state contended that the compelling interest was a policy "to strengthen and encourage local responsibility for control of public education." 487 P.2d at 1260. This is similar to the State's argument here that Article IX, § 11 gives wealthy districts more local control. This argument is almost always raised when a property-based funding scheme is challenged.

The California Supreme Court easily rejected this argument. First, "[n]o matter how the state decides to finance its system of public education, it can still leave th[e] decision-making power in the hands of local districts." *Id.* Second, the court rejected the argument that local control includes the choice to spend more on education, calling it a "cruel illusion for the poor school districts." *Id.*

> [S]o long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide.

[20] If the Court agrees with the State that the fundamental rights argument was not properly before the district court, it may nonetheless affirm that portion of the decision under the right for any reason doctrine because it depends on no fact issues that were not decided by the district court. *See, e.g.*, *Wild Horse Observers Ass'n v. N.M. Livestock Bd.*, 2016-NMCA-001, ¶ 29, 363 P.3d 1222.

Id. For decades, the Districts have experienced the exact situation the *Serrano* court described—being property poor, they cannot tax themselves to excellence, or even to adequacy. There is no compelling interest to support such a system.

5. The State did not preserve its "as applied" argument

The State argues that the Districts have established only that the PSCOA System is unconstitutional as applied, not that it is facially unconstitutional. The State first made this argument in the reply in support of its motion for post-judgment relief. **[RP 2805]** In rejecting that argument, the court noted that the State itself had treated the case as a facial challenge. **[RP 2826]** By failing to raise it earlier, the State waived any claim of error. *See Cockrell v. Cockrell*, 1994-NMSC-026, ¶¶ 6-8, 117 N.M. 321; *see also State v. Handa*, 1995-NMCA-042, ¶ 35, 120 N.M. 38 ("[T]o allow a defendant to invite error and to subsequently complain about that very error would subvert the orderly and equitable administration of justice.").

On the merits, it is unclear whether the State intends this argument to apply to the court's conclusion that the PSCOA System is not uniform. But the "as applied" standard cannot meaningfully be used in the context of a statewide guarantee of uniformity—if the Districts are not uniform to the rest of the state, then the entire system is not uniform. More generally, a property-wealth based system that creates disparities between rich and poor districts is facially non-uniform no matter which districts are parties to the lawsuit.

The State's argument might make sense in the context of sufficiency. However, because the State did not preserve it below, there are no findings—actual or proposed—to give meaning to the State's request that this Court limit the ruling "to the particular provisions of the adequacy standards that are insufficient." **[BIC 41]** This may be a distinction without a difference—any opinion will likely clarify the scope of the district court's ruling requiring the state to revise the laws to satisfy the Education Clause.

D. The adoption of the Districts' findings and conclusions was not reversible error

The State contends that the district court erred by adopting all of Plaintiffs' proposed findings of fact and rejecting all of the State's. **[BIC 42-47]** Although recognizing that there is nothing inherently improper with this approach, the State nonetheless contends that doing so demonstrated an "absence of independent review." **[BIC 44]** As relief for this supposed error, the State argues that "the case should be remanded if any factfinding is needed." **[BIC 47]** But the State does not identify a single incorrect finding that, if changed, would have caused the district court to reach a different result.

The district court did not err and no additional factfinding is needed. The Court must indulge "in every reasonable presumption to sustain the judgment." *Sheraden v. Black*, 1988-NMCA-016, ¶ 10, 107 N.M. 76. A decision is sufficient so long as when examining "the findings, taken together with the pleadings, the

reviewing court can see enough, upon a fair construction, to justify the judgment of the court notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law." *Watson Land Co. v. Lucero*, 1974-NMSC-003, ¶ 5, 85 N.M. 776; *see also Sheraden*, 1988-NMCA-016, ¶¶ 10-14 (harmless errors are not reversible so long as the court's decision is clear). Even an erroneous conclusion of law is not reversible error so long as the judgment is correct in light of the findings of fact, especially where the appellant does not explain how they affect the ultimate ruling. *See Tartaglia v. Hodges*, 2000-NMCA-080, ¶¶ 62-65, 129 N.M. 497.

Here, the *Order* reflects the district court's careful reasoning, supported by extensive findings, which are in turn supported by substantial evidence. The State's argument that the decision is not the product of independent review is without merit.

1. The district court's independent reasoning is clearly explained in its decision

The clearest indication that the district court exercised independent judgment is the *Order* itself. **[RP 2717-25]** Notably, the Court did not adopt either party's conclusions of law. Instead, it crafted its own opinion. The State therefore cannot claim that the conclusions reached by the Court were indiscriminate or that they reflect the court's failure to make the independent judgment. To the contrary—the court gave the questions the serious consideration that they deserved.

The State's analysis relies largely on *Mora v. Martinez*, 1969-NMSC-030, 80 N.M. 88. In *Mora*, the district court adopted the plaintiff's findings of fact and conclusions of law. *Id.* ¶ 5. But those findings and conclusions were contained in "a lengthy and substantially unnumbered instrument" that was "more like a summarization following the trial rather than findings of fact and conclusions of law." *Id.* ¶ 2. A subsequent opinion described these findings as "a rambling set of findings … which were so obscure that this Court found the case difficult to review." *Sisneros v. Garcia*, 1980-NMSC-077, ¶ 13, 94 N.M. 552. Here, the Districts submitted numbered findings, each[21] supported by citations to the transcript. Importantly, *Mora* has since been replaced; now, the "test as to the adequacy of findings [is] whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence." *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, ¶ 206, 96 N.M. 155; *accord Coulter v. Stewart*, 1982-NMSC-035, ¶ 3, 97 N.M. 616.

The *Order* lays out the Court's reasoning in evaluating the evidence and in concluding that the PSCOA System is unconstitutional. It summarizes both parties' arguments. **[RP 2717-18]** It decides the applicable burden of proof. **[RP 2721-22]** It analyzes and decides the parties' competing interpretations of the Education Clause.

[21] Only one finding lacks a citation. **[FOF 121]**

[RP 2722-24] And it explains how the evidence showed that the system violated the Education Clause under the burden and definitions it had adopted. **[RP 2724-25]**

The *Order* bears little resemblance to the proposed findings and conclusions submitted by either party. It shows that the court considered the arguments, authority, and evidence, and came to a decision. That is all that is required.

2. The findings of fact do not show that the court failed to exercise its own independent judgment

The State also claims that some of the district court's findings were contradictory or outdated and that this shows a lack of independent review. **[BIC 44-45]** The only authority it cites for this claim is *Coulter*, 1982-NMSC-035, ¶ 3, which it correctly notes stands for the proposition that a trial court does not abdicate its judicial responsibilities by adopting one party's proposed findings.

As support for this argument, the State offers a "compare" cite that identifies various findings that the court made and rejected. **[BIC 45]** The State does not explain any of these findings, nor does it explain how a different finding would have changed the result. This undeveloped argument appears to once again ask this Court to reweigh the evidence and reach a different conclusion than the district court reached.

In addition, the State implies, in a single sentence without citation to authority, that the court's procedural and evidentiary rulings "undermine the suggestion that the district court exercised an independent factfinding role … ." **[BIC 45]** But it does

not appeal those rulings, does not contend that any of these actions were an abuse of discretion, and has not explained how it was prejudiced by them. The Court need not address this undeveloped, unsupported argument.

3. The district court applied the correct burdens of proof

The State argues that the court erred in deciding that the State had not met its burden of proof before it made findings of fact. **[BIC 46]** To make this argument, it takes out of context a sentence in the order denying the State's motion to reconsider. **[BIC 46, RP 2847-48]** But the *Order* itself repeatedly explains that the Districts carried their burden of proof. **[RP 2718 ("Plaintiffs have proven beyond all reasonable doubt…"); 2719 ("Plaintiffs have proven by a preponderance of evidence …"); 2720 ("Plaintiffs have met their burden of proof"); 2722 ("Whatever the burden of proof is, and whatever party has it, the Plaintiffs have proven beyond all reasonable doubt … ."); 2723 ("Plaintiffs have proven beyond all reasonable doubt … ."); RP 2725 ("The Plaintiffs hav[e] proven" that the PSCOA System is unconstitutional")]** True, the *Order* also explains that the State must show that the PSCOA System achieves or is reasonably related to satisfying the Education Clause. **[RP 2721-22]** However, in the fundamental rights context, that is correct: once the Districts established that the system infringed on a fundamental right, the burden shifted to the State. *See Morris v. Brandenburg*, 2015-NMCA-100, ¶ 50, 356 P.3d 564, *aff'd*, 2016-NMSC-027; *see also Wagner*, 2005-

NMSC-016, ¶ 13 (scrutiny applies once plaintiff has shown a fundamental right has been impacted).

E. Post-judgment legislative developments do not render this appeal moot

Finally, the State argues that the district court abused its discretion by not re-opening this case in light of legislation passed *after* the trial. **[BIC 47-51]** The State contends that the new legislation is less harmful to the Districts than the prior laws—a contention that has not been subject to the adversarial process and for which there is no record support—and that this appeal is moot or that the Districts have lost their standing.

The State's sole authority for this argument is *Mowrer v. Rusk*, 1980-NMSC-113, ¶ 13, 95 N.M. 48, which holds that cases which have become moot should be dismissed. But *Mowrer* also explains why the State's argument here must fail. A case will not be dismissed as moot if (1) it involves a question of substantial public interest; or (2) it is capable of repetition, yet evading review. *Id.* Even if this case were moot, both exceptions apply: a uniform and sufficient education is undoubtedly a question of substantial public interest, and the PSCOA System will continue to deny it to rural districts until it is reformed—a task that, as the State acknowledged below, requires a court to explain what is required by the Education Clause. **[RP 2731]**.

In any event, this case is not moot. Even taking everything the State says as true, many of the deficiencies identified by the district court remain. Capital outlay is still based on property wealth. And the State has not remedied the nearly $900 million in unconstitutionally withheld Impact Aid funding it took from the Districts. As Justice McKinnon observed in 2002, it can take years before it is clear whether reforms have worked. **[RP 635]** Indeed, the district court once again retained jurisdiction to evaluate whether future changes bring the PSCOA System into compliance. **[RP 2725]**

The district court did not abuse its discretion in denying the request to reopen this decision. After more than 20 years, the time has come for an appellate court to explain what the Education Clause requires. There will be ample opportunity to evaluate any new legislative developments with the benefit of this Court's opinion on remand.

IV. CONCLUSION

The district court did not err in concluding that the PSCOA System was unconstitutional. And while any individual part of that system may, by itself, be fine, it is the system as a whole and the interrelationship of its many laws and regulations that creates the unconstitutional disparities. The Kentucky Supreme Court aptly described the situation New Mexico now finds itself in:

> Just as the bricks and mortar used in the construction of a schoolhouse, while contributing to the building's facade, do not ensure the overall

> structural adequacy of the schoolhouse, particular statutes drafted by the legislature in crafting and designing the current school system are not unconstitutional in and of themselves. Like the crumbling schoolhouse which must be redesigned and revitalized for more efficient use, with some component parts found to be adequate, some found to be less than adequate, statutes relating to education may be reenacted as components of a constitutional system if they combine with other component statutes to form an efficient and thereby constitutional system.

Rose at 215.

The *Rose* court and the district court also recognized that revitalizing our schools is a job for the Legislature. The courts can only explain what rights the Education Clause gives to students; it is up to the Legislature to fulfill those promises. The district court correctly ordered the Legislature to do so, and that order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 11, 2022, a true copy of this pleading was delivered via the Court's electronic filing and service system to opposing counsel of record.

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STATEMENT OF COMPLIANCE

This brief complies with Rule 12-318(F)(3) NMRA because it uses a proportionally-spaced typeface and its body contains 10928 words. This word count was obtained with Microsoft Word for Mac version 16.66.1.

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