COURT OF APPEALS, STATE OF COLORADO 101 W. Colfax Ave., Room 800, Denver, CO 80203 _____ Appeal from District Court, Denver County Colorado The Honorable Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427 _____ **Defendants-Appellants:** DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION, and **Defendants-Appellants**: COLORADO STATE BOARD OF EDUCATION; AND COLORADO DEPARTMENT OF EDUCATION, and **Intervenors-Appellants:** FLORENCE and DERRICK DOYLE, on their own behalf and as next friends of their children, ALEXANDRA and DONOVAN; DIANA AND MARK OAKLEY, on their own behalf and as next friends of their child, NATHANIEL; and JEANETTE STROHM-ANDERSON AND MARK ANDERSON, on their own behalf and as next friends of their child, MAX, **vs.** **Plaintiffs-Appellees:** JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON and **Plaintiffs-Appellees:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child.	**^COURT USE ONLY^** Case Nos.: 11CA1856 11CA1857

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ANSWER BRIEF OF PLAINTIFF-APPELLEES TAXPAYERS FOR PUBLIC EDUCATION, CINDRA S. BARNARD, AND MASON S. BARNARD

CERTIFICATE OF COMPLIANCE

I hereby certify, subject to the statement below regarding the pendency of a motion to exceed the word limit imposed by C.A.R. 28(g), that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

- This Answer Brief exceeds the 9,500 word limit for principal briefs under the Colorado Rules of Appellate Procedure. *See* C.A.R. 28(g). Plaintiffs have filed an Amended and Renewed Joint Motion for Expansion of Word Limit along with this Answer Brief.
- This Answer Brief contains 12,687 words, including headings, footnotes, and quotations;
- This Answer Brief complies with C.A.R. 28(k);
- This Answer Brief contains under a separate heading a statement of whether Plaintiff-Appellees agree with Defendant-Appellants' statements concerning the standard of review and preservation for appeal, and if not, why not.
- I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/*Michael S. McCarthy*
Michael S. McCarthy

TABLE OF CONTENTS

Table of Contents (con't) **Page**

Table of Contents (con't) **Page**

TABLE OF AUTHORITIES

Page(s)

COLORADO SUPREME COURT CASES

Table of Authorities (cont'd) **Page(s)**

COLORADO COURT OF APPEALS CASES

Table of Authorities (cont'd) **Page(s)**

COLORADO STATUTES

Table of Authorities (cont'd) **Page(s)**

COLORADO RULES

COLORADO REGULATIONS

COLORADO CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

Table of Authorities (cont'd) **Page(s)**

STATEMENT OF ISSUES

Plaintiff-Appellees Taxpayers for Public Education, Cindra S. Barnard, and Mason S. Barnard ("Taxpayer Plaintiffs") address in this Answer Brief the issues denominated I, II, IV, and V in the brief filed by the Colorado State Board of Education and the Colorado Department of Education ("State Appellants" or "State"). Taxpayer Plaintiffs disagree with the Statement of Issues as formulated by the State Appellants, and have set forth their own Statement of Issues below. Plaintiff-Appellees LaRue et al. ("LaRue Plaintiffs"), whose arguments are incorporated herein by reference, address the remaining issues raised in the State Appellants' brief. The issues addressed by Taxpayer Plaintiffs are:

I. Plaintiffs are students who attend Douglas County School District (the "District") schools, those students' parents, and taxpayers whose taxes support state public schools. Do Plaintiffs have standing to assert that the District violated the Public School Finance Act?

II. To eliminate spending disparities between school districts with different tax bases, the Public School Finance Act, COLO. REV. STAT. § 22-54-101 *et seq.* ("the Act") bases a district's funding on the number of pupils enrolled and attending public schools in the district. Under the Choice Scholarship

Program ("Voucher Program" or the "Program"), the District includes in this count 500 students "enrolled" in an illusory Charter School who actually attend private schools—mostly in other districts. Does the Voucher Program violate the Public School Finance Act?

III. Colorado's Contracting Statute allows school districts to contract with outside parties for services that the district is authorized by law to provide itself. Private schools contracting under the Voucher Program provide religious training and impose religious requirements that public schools may not legally provide. Does the Contracting Statute authorize the Voucher Program?

IV. Article IX, Section 3 of the Colorado Constitution requires that money from the Public School Fund be expended *only* for maintenance of the State's public schools. Money from the Public School Fund provides part of the State's funding of the District, which in turn supports private schools through the Voucher Program. Does the Voucher Program violate Article IX, Section 3?

V. Article IX, Section 2 of the Colorado Constitution requires the establishment of "a thorough and uniform system of free public schools" where students "may be educated gratuitously." The Voucher Program permits

non-uniform standards and requirements and requires students to pay portions of their own private school tuition. Does the Voucher Program violate Article IX, Section 2?

VI. Article IX, Section 15 of the Colorado Constitution requires school districts to have "control of instruction" in their local districts. The Voucher Program transfers the District's control of both instruction and spending to private schools. Does the Voucher Program violate the Local Control Clause of Article IX, Section 15 of the Colorado Constitution?

STATEMENT OF THE CASE

Taxpayer Plaintiffs incorporate by reference the Statement of the Case in the LaRue Plaintiffs' brief. In addition, Taxpayer Plaintiffs present the following Statement of the Case concerning the Statement of Issues set forth above.

The District's Voucher Program constitutes an illegal transfer of public funds to private schools. The Program permits students to attend private, often religious, schools at the expense of every other public school student both in Douglas County and throughout Colorado. The Program's aim was to allow the District to "count" students enrolled in the Voucher Program as public school students for purposes of obtaining State funding. Thus, the District would receive

funding under the Public School Finance Act for 500 students who are not enrolled in its public schools.

After consolidating Taxpayer Plaintiffs' action with the LaRue Plaintiffs' action (Order Granting Mot. to Consolidate, Jul. 11, 2011), the District Court conducted a three-day evidentiary hearing. The District Court held that the Voucher Program violates the Public School Finance Act and Article IX, Section 3 of the Colorado Constitution because it transfers monies that are constitutionally required to be used *only for public schools* to private schools where only select children can attend. The District Court also agreed with Taxpayer Plaintiffs that the Contracting Statute, COLO. REV. STAT. § 22-32-122, does not authorize the Voucher Program. The District Court declined to find that Taxpayer Plaintiffs were also entitled to a permanent injunction based on the Voucher Program's violation of Article IX, Sections 2 and 15. The District Court issued a permanent injunction against the Voucher Program. This appeal followed.

STATEMENT OF FACTS

Taxpayer Plaintiffs incorporate by reference the fact statements in the LaRue Plaintiffs' Answer Brief, and provide the following Statement of Facts with respect to the statutory and constitutional school finance issues addressed in this Brief. The District Court made extensive findings of fact in its Order following the

evidentiary hearing. Those findings of fact are binding on appeal and "shall not be set aside unless clearly erroneous." COLO. R. CIV. P. 52. The State's Brief does not assert that any of the District Court's findings were clearly erroneous.

A. The Plaintiffs

Plaintiffs are taxpayers, students, parents, and two nonprofit organizations that include parents of Douglas County students. Plaintiff Cindy Barnard lives in Douglas County and pays taxes on property she owns in Douglas County, taxes that go in part to Douglas County Public Schools (Tr. Vol. I, 70:3-16). Her son, Plaintiff Mason Barnard, is a senior at Highlands Ranch High School in Douglas County. (*Id.*, 69:21-25; 70:25-71:10.) Plaintiff Taxpayers for Public Education is an organization that counts Douglas County taxpayers and parents of Douglas County students as members, including Cindy Barnard. (Order at 21–23.)

The LaRue Plaintiffs are similarly situated. Plaintiffs Kevin Leung, James and Suzanne LaRue, Christian Moreau, Maritza Carrera, and Susan McMahon all own property in and pay taxes to Douglas County, and all have children in the Douglas County Public Schools. (Record at 4-5 (LaRue Compl. ¶¶ 6–7, ¶¶ 13–15).) Plaintiffs Rabbi Joel Schwartzman and Reverend Malcolm Himschoot are Douglas County homeowners and taxpayers. (*Id.* at 4 (LaRue Compl. ¶¶ 10–11).) Finally, Interfaith Alliance is a nonprofit corporation that consists of 850 clergy

and lay members from different faith traditions (including many Douglas County residents and taxpayers) that is "dedicated to promoting the positive role of faith in civic life, challenging intolerance and extremism, safeguarding religious liberty, and strengthening public education." (*Id.* at 4 (LaRue Compl. ¶ 9).)

B. Public School Funding in Colorado

Under the Public School Finance Act, Colorado's public schools are funded through a combination of local and State revenues. The local share is funded through local property taxes and specific ownership taxes. The State's share comes from personal income, corporate, sales, and use taxes and from the Public School Fund established by Article IX, Section 3 of the Colorado Constitution. COLO. REV. STAT. § 22-54-106. The money each school district receives from the State is determined by multiplying the district's per-pupil funding amount by the number of students enrolled in public schools in each district. *Id.* § 22-54-104. The District estimated that it would receive $6,100 in per-pupil revenue from the State for the 2011-2012 school year. (Order at 55.)

C. Creation of the Voucher Program

In December 2010, the District presented its plans for the Voucher Program to the Colorado State Board of Education ("State Board"). (*See* Pls.' Ex. 76, Oversight Comm. Mtg., Feb. 10, 2011; Order at 2 ¶ 3.) In internal discussions before that presentation, State Board Chairman Bob Schaffer said that he wanted to "pave the way" for the Voucher Program "right away within CDE [Colorado Department of Education]," and instructed his staff to "identify any barriers at CDE regarding funding or anything else." (Pls.' Ex. 65; Tr. Vol. I, 136:25 – 137:1-16.)

CDE and District staff met on multiple occasions in early 2011 to strategize about the Voucher Program's structure. (*See* Pls.' Exs. 69, 76, 90; Order at 2 ¶¶ 4-5.) CDE staff advised District officials on how to design the Program to receive per-pupil funding from the State for participating students, and on other legal issues. (*See, e.g.*, Order at 2 ¶ 6; Pls.' Ex. 69 (discussing "church/state" and "excessive entanglement" problems, and charter school formation); Pls.' Ex. 90.)

On March 15, 2011, the Douglas County School Board approved the Voucher Program as a "pilot program" for the 2011-2012 school year. (*See* Order at 4 ¶ 4; Pls.' Ex. 1 at 1.) The District began implementing the Program the following day. (Order at 3 ¶ 7.)

D. Voucher Program Funding Scheme & the Choice Scholarship Charter School

Under the Voucher Program, the District offers up to 500 "scholarships" per year to District students to pay tuition at designated private schools. (Pls.' Ex. 1; Order at 4 ¶ 12.) The District counts "scholarship students" attending these private schools as being enrolled in its public schools to receive State per-pupil funding (Order at 6 ¶ 26.), and it created a sham charter school, the "Choice Scholarship Charter School," for that very purpose, to make it appear as if those students are enrolled in a District school. (*See* Pls.' Ex. 6 at 10, § 8.1.A, B.)

The District transfers 100% of the State per-pupil funding it receives for "scholarship students" to the Charter School, less overhead expenses. (*See* Pls.' Ex. 006 at 11; Tr. Vol. II, 499:9-11.) Once a "scholarship student" is accepted at a private school, the Charter School gives the student's parents a restrictively-endorsed check for 75% of the per-pupil funding it receives or the private school's actual tuition fee, whichever is less (Order at 3 ¶ 9); and retains the remaining 25% to cover "administrative costs" (Order at 3 ¶ 9). The Choice Scholarship School has no buildings, employs no teachers, requires no supplies, has no curriculum, and does not instruct a single Douglas County student. (*Id.* at 6 ¶ 25.) The "School" is

"merely the name given to the person(s) within the Douglas County School District who will administer the Scholarship Program." (*Id.*)[1]

The District has experienced millions of dollars in budget reductions in recent years (*id.* at 16 ¶ 65; Tr. Vol. I, 82:14-16), and the Voucher Program will divert to private schools another $3 million in public education funding each year (*see* Tr. Vol. I, 82:19-22; 83:5-8; Pls.' Ex. 15 at 3). The District also hopes to expand the Voucher Program to more students, which would divert even more State funds from its public schools. (Order at 16 ¶ 64 (citing Ex. 126); Tr. Vol. II, 615:6-11.)

SUMMARY OF THE ARGUMENT

Colorado's Constitution mandates a "thorough and uniform system of free public schools." Although the method of funding our State's public schools has grown more complicated since statehood, this Constitutional underpinning has remained inviolate. The Colorado Constitution requires that our public schools be *free* and open to all residents (Art. IX, Sec. 2), that the public school fund established at statehood be expended *only* for the maintenance of our public schools (Art. IX, Sec. 3), that the General Assembly and local school districts be

[1] For ease of reference, Taxpayer Plaintiffs have attached a chart depicting the flow of money under the Voucher Program within the Act's funding scheme. *See* Addendum 1.

forbidden from paying *any* public monies to support private schools (Art. IX, Sec. 7), and that Colorado's public schools be controlled by a board of education elected by the citizens of each district (Art. IX, Sec. 15). These constitutional requirements ensure that public monies set aside to educate *all* Colorado children are not diverted to support private schools that only select students can attend.

These core constitutional mandates are reflected in the Public School Finance Act and other state education laws. *See, e.g.*, COLO. REV. STAT. § 22-54-102(1). Monies authorized under the Act are to be used only for "public schools" and for "public education." Similarly, when the General Assembly enacted the Charter School Act in the 1990s, it reinforced the Constitution's mandate by defining a charter school as a "public, nonsectarian, nonreligious, non-home based school which operates within a public school district." COLO. REV. STAT. § 22-30.5-104(1).

The Taxpayer Plaintiffs have standing to challenge the Voucher Program; they have been injured both as taxpayers and as the intended beneficiaries of public education. The case is ripe for decision as the District has already sent monies to private schools and intended to send more.

The Voucher Program constitutes an illegal transfer of public funds to private, religious schools. The Program violates the Act's funding scheme and

improperly drains resources from other Colorado school districts. The Program also violates the School Contracting Statute, COLO. REV. STAT. § 22-32-122(1), because it authorizes private schools to both take actions public schools may not take and impose requirements that public schools may not impose.

The Program also violates multiple clauses of the Colorado Constitution. First, its distribution of public funds to private and religious schools violates Article IX, Section 3's requirements that the State's Public School Fund "forever remain inviolate" and be disbursed only to "schools of the state." Second, the Program denies participating students a free education and places them in schools with widely divergent curricula and policies, in violation of Article IX, Section 2's requirement of "a through and uniform system of free public schools." Third, the Program's shift of both educational and financial decisions to private schools violates Article IX, Section 15's mandate that local public officials "shall have control of instruction in the public schools of their respective districts." For these reasons, the trial court's judgment enjoining the Voucher Program should be affirmed.

ARGUMENT

I. The Plaintiffs have standing to bring a statutory claim under the Public School Finance Act.

A. Standard of Review and Preservation of Issue.

Plaintiffs agree that standing is reviewed de novo. *See Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). The issue of standing cannot be waived and thus is properly preserved.

B. Introduction.

Plaintiffs have standing to pursue their claims that the District violated the Act by transferring public funds to private, largely religious schools.[2] Standing requires that a plaintiff assert an "injury in fact" to a "legally protected interest." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977).

Plaintiffs are Douglas County taxpayers, students, parents, and two nonprofit organizations that include taxpayers and parents of Douglas County students. *See* pp. 5-6, *supra*. Plaintiffs have standing to assert their statutory claims because: (1) the District is spending their tax dollars in violation of Colorado law; and (2) that expenditure directly undermines the public education received by several Plaintiffs and their children. As the District Court correctly held:

[2] Defendants do not dispute that Plaintiffs have standing to assert their claims under the Colorado Constitution.

> The prospect of having millions of dollars of public school funding diverted to private schools, many of which are religious and lie outside of the Douglas County School District, creates a sufficient basis to establish standing for taxpayers seeking to ensure lawful spending of these funds, in accordance with the Public School Finance Act. Similarly, these circumstances are sufficient to establish standing for students, and the parents of students, seeking to protect public school education.

(Order at 21.) This Court should affirm the District Court.

C. Plaintiffs have standing as students and parents.

Plaintiffs have standing as students and parents to ensure that Defendants do not unlawfully divert funds from public education. It is well-established that private parties, including parents, are entitled to sue school districts for unlawful financial decisions. *See Bd. of County Comm'rs v. Bainbridge, Inc.*, 929 P.2d 691, 708-13 (Colo. 1996) (allowing third-party statutory claims against Douglas County School District); *Lobato v. State*, 216 P.3d 29, 35 (Colo. App. 2008), *rev'd on other grounds*, 218 P.3d 358, 368 (Colo. 2009); *Boulder Valley Sch. Dist. RE-2 v. Colo. State Bd. of Educ.*, 217 P.3d 918, 923 (Colo. App. 2009).

1. Plaintiffs have legally protected interests as students and parents.

Plaintiffs have established that they have a legally protected interest—one that "emanates from a constitutional, statutory, or judicially created rule of law that entitles the plaintiff to some form of judicial relief"—under the Act. *See Bd. of*

County Comm. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1053 (Colo. 1992). The Act does not expressly provide for a private right of action, but one may be fairly and reasonably implied:

> When a statute does not expressly provide for a private civil remedy, a court must consider three factors in determining whether a particular plaintiff has available a private cause of action: whether the plaintiff is within a class of persons intended to be benefited by the legislative enactment; whether the legislature intended to create, albeit implicitly, a private right of action; and whether an implied civil remedy would be consistent with the purposes of the legislative scheme.

Colo. Ins. Guar. Ass'n v. Menor, 166 P.3d 205, 210 (Colo. App. 2007).

Schoolchildren and their parents fit squarely within the "class of persons intended to be benefited" by the Act. The Act furthers Colorado's constitutional obligation "to provide for a thorough and uniform system of public schools throughout the state," a standard that "requires that all school districts and institute charter schools operate under the same finance formula." COLO. REV. STAT. § 22-54-102(1). As the consumers of the public education provided under the Act, students and parents are not only *within* the "class of persons intended to be benefited," they *are* that class.

As to the second and third factors, absent a private right of action, the statute lacks any mechanism to hold an offending school district accountable, particularly where, as here, the State Board has essentially colluded with the offending district.

(Record at 1090-92, 1098-1112; (Order at 3) (citing Pls.' Exs. 69, 76, 90).) Plaintiffs' rights under the Act to receive the equitable, quality, and public education "would be substantially frustrated if [they] were without a civil remedy to enforce [their] rights under the statute." *Menor*, 166 P.3d at 211. Recognizing a private right of enforcement is thus crucial to achieving the Act's policies.

The State seriously mischaracterizes the Act when it asserts that the Act "commits to the State Board of Education the 'administration and enforcement' of the Act, § 22-54-120(1), C.R.S." (State Br. 19.) Section 22-54-120(1) *actually* states: "The state board shall make reasonable rules and regulations necessary for the administration and enforcement of this article." The authority to make rules—which is entirely consistent with a private right of action—does not, without more, preclude taxpayers from bringing claims for violations of this Act. *See Bainbridge*, 929 P.2d at 708–13 (allowing private right of action under the Public School Finance Act). *Compare Allstate Ins. Co. v. Parfrey*, 830 P.2d 905, 910–11 (Colo. 1992) (finding implied private right of action in insurance context), *and Menor*, 166 P.3d at 210–11 (same), *with* COLO. REV. STAT. § 10-1-103 (stating that the Division of Insurance is "charged with the execution of the laws relating to insurance, and has a supervising authority over the business of insurance in this state"), *and* COLO. REV. STAT. § 10-1-109(1) ("The commissioner may establish . .

. such reasonable rules as are necessary to enable the commissioner to carry out the commissioner's duties under the law[.]"). Indeed, in *Parfrey*, the Colorado Supreme Court *rejected* the precise argument the State advances here:

> Allstate argues that the legislative silence in [the act] on the matter of civil liability manifests a legislative intent to relegate the exclusive responsibility for redressing breaches of an insurer's statutory duty to the administrative process. We are unpersuaded by Allstate's argument.

830 P.2d at 910.

A private cause of action is not only consistent with the Act; it is the only way students and parents can assert their legally protected interests under the Act.

2. The Plaintiffs have established injury in fact as students and parents.

As Douglas County students and parents, Plaintiffs have established the required "injury in fact." *Wimberly*, 570 P.2d at 539. Plaintiffs have suffered both a "direct economic injury," *Dodge v. Dep't. of Soc. Servs.*, 600 P.2d 70, 71 (Colo. 1979), and a "harm to intangible values," *Friends of the Black Forest Reg'l Park, Inc. v. Bd. of County Comm'rs*, 80 P.3d 871, 877 (Colo. App. 2003). Plaintiffs also have standing to prevent potential future injury—such as the diversion of money intended to fund public education—and to enjoin any action that "threatens to cause" an injury. *Bd. of County Comm'rs v. Colo. Oil and Gas Conservation Comm'n*, 81 P.3d 1119, 1122 (Colo. App. 2003).

a. Economic injury.

Plaintiffs will suffer a "direct economic injury" from the Voucher Program because it threatens to immediately remove over $3 million in public funding from the District each year,[3] with even more to come in the future. As District School Board President John Carson confirmed:

> Q. So if you're able to attract more students, because this is a popular program -- right? -- and you choose to expand it, you could increase the amount of money that comes to you from the state. Isn't that right?
> A. That's correct.

(Tr. Vol. II, 615:6–11.)

The State argues that because the District retains 25% of Program funds "for the benefit of students who do not take part in the Program," students and parents experience a "net financial benefit" instead of an injury. (*See* State Br. 21–24.) The State is mistaken. Of the $3 million, 75% of the money funds scholarships, and the District earmarks 25% for "administrative expenses" to operate a sham "charter school"—which has no building, instructors, or curriculum, and is merely a subdivision of the District—that oversees the Program. (*See* Pls.' Ex. 001 at 2.) But this 25% benefits only private school students, not Plaintiffs here. Indeed, in

[3] At $6,100 per student, and with the 500 students that will be part of the Program, this amounts to $3,050,000 taken out of public education. (See Tr. Vol. I, 82:19-22; 83:5-8 (testimony of Cindy Barnard); Pls.' Ex. 015 at 3 (District PowerPoint presentation describing $3 million in funding that would go to Program).)

its contract with the "charter school," the District states that it "shall provide *100% of PPR* to the [sham charter] School," less any funds needed for administrative overhead. (*See* Pls.' Ex. 006 at 11 (emphasis added).) Plaintiffs have shown an economic injury in fact sufficient to secure standing.

b. Noneconomic injury.

The Plaintiffs have also established noneconomic ("intangible") injury in fact. If Defendants divert money from District schools to the Voucher Program (as they intend), the education of Plaintiffs and Plaintiffs' children who attend District schools will suffer. Defendants acknowledge that, because of the Program, they will devote fewer resources to "build[ing] more schools, hir[ing] more teachers, and buy[ing] more supplies." (Record at 1610 (Opp'n to Prelim. Inj. Mot. at 9).) For students and concerned parents, this type of injury is very real. (*See* Tr. Vol. I, 118:19-23 (discussing larger class sizes, fewer teachers, and increased fees).)

Plaintiffs have standing as parents and students to assert their statutory claims.

D. Plaintiffs have standing as taxpayers.

The Plaintiffs also have standing as taxpayers whose taxes support both the District and all other Colorado school districts. Colorado law provides for broad taxpayer standing, and the required injury-in-fact may be based either on economic

or noneconomic injury. *See Ainscough*, 90 P.3d at 856 (taxpayers may sue to protect a "great public concern" regarding a law's constitutionality); *Colo. State Civ. Serv. Emps. Assoc. v. Love*, 448 P.2d 624, 627 (Colo. 1968).

1. The Plaintiffs have legally protected interests as taxpayers.

Plaintiffs have the legally protected interest required for taxpayer standing. *See* Section I.C.1, *supra*. As long as a taxpayer challenges the use of taxpayer funds, the statute allegedly violated establishes the requisite interest and secures standing. *See, e.g.*, *Dodge*, 600 P.2d at 71 (finding standing to assert claim that state has "no statutory authority, with or without specific appropriation by the legislature, to use public funds for abortion").

As discussed in Section I.C.1, *supra*, the Act impliedly recognizes a private cause of action. The Colorado Supreme Court recognized this in *Bainbridge*, 929 P.2d at 694-97; there, the court addressed homebuilders' claims that Douglas and Boulder County Commissioners and school districts exceeded their authority under the Act in assessing new development school impact fees to offset increased enrollment costs. *Id.* at 694–97. Because standing is a threshold issue, *see Ainscough*, 90 P.3d at 855, the Court implicitly, but necessarily, recognized the homebuilders' standing to challenge the counties' authority under the Act by adjudicating their claims on the merits.

Likewise here, Plaintiffs seek to prevent the District from exceeding its authority under the Act, specifically its unconstitutional and unlawful disbursement of public funds to private and religious schools.

2. The Plaintiffs have established injury in fact as taxpayers.

Plaintiffs have demonstrated both economic and noneconomic injury in fact as taxpayers. The economic injury is undeniable: the District is diverting tax proceeds obtained from Plaintiffs and others to private and religious schools in direct violation of the Act. *See* Section I.C.2.a, *supra*. The noneconomic injury is equally clear: the Voucher Program undermines the substantial public interest in public education, as reflected in the Act and in the constitutional provisions that the Act aims to further. *See* Section I.C.2.b, *supra*.

Contrary to the State's assertion, a plaintiff may invoke taxpayer standing to assert claims of statutory violations as well as constitutional violations. The Colorado Supreme Court "has held on several occasions that a taxpayer has standing to seek to enjoin an *unlawful* expenditure of public funds." *Dodge*, 600 P.2d at 71 (emphasis added). For example, the *Dodge* plaintiffs had standing not only to bring constitutional claims, but also to challenge "whether [Defendants] [had] the *statutory* authority to use public funds for nontherapeutic abortions." *Id.* at 72 (emphasis added); *see also Johnson-Olmsted Realty Co. v. City and County*

of Denver, 1 P.2d 928, 930 (Colo. 1931) (taxpayer had standing to challenge city's expenditure of money in violation of city charter).

The State relies on *Olson v. City of Golden*, 53 P.3d 747 (Colo. App. 2002), to argue that taxpayer standing cannot exist here. But in *Olson*, the court's decision turned on the fact that the claim did not involve the city's use of tax dollars. *See id.* at 752 (noting that claim challenged a transaction conveying public lands to a private entity at allegedly "less than fair value"). The taxpayers thus lacked standing because they were not financially injured *as taxpayers*. *See id.* at 753. Here, no one disputes that the Voucher Program is financed through tax dollars, including those paid by Plaintiffs.[4] Plaintiffs have thus shown injury in fact as both Douglas County and Colorado taxpayers.

[4] The State is mistaken in arguing that Plaintiffs lacked taxpayer standing until the school year began, or until all Program spending had occurred. (State Br. 25.) First, as discussed in detail in Section II.D.1, *infra*, spending had already begun when the suit was commenced, meaning that Plaintiffs had already been harmed. Second, assuming *arguendo* that the injury in fact were only threatened at the time Plaintiffs brought suit, that threat was sufficiently definite to justify standing, particularly where Plaintiffs seek to *enjoin* further conduct that has not yet occurred. Contrary to the State's assertion (*see id.*), courts recognize "threat of injury" as a basis for standing beyond cases involving administrative agencies. *See, e.g., Cmty. Tele-Comm'ns, Inc. v. Heather Corp.*, 677 P.2d 330, 335 (Colo. 1984); *Wimberly*, 570 P.2d at 538.

E. Affirming the District Court will not enable more lawsuits by "disgruntled parents."

Defendants' "floodgates" argument (State Br. 20-21), that permitting this case to proceed will permit *any* group of "disgruntled parents" to sue based on *any* district funding decision, is baseless, alarmist speculation.

This case neither involves nor implicates the multitude of daily spending decisions districts make to further their constitutional and statutory missions—decisions enumerated by the State as "constructing or closing schools; hiring or firing administrators and teachers; negotiating with unions; or buying textbooks." (State Br. 20-21.) Plaintiffs' claims have *nothing* to do with expenditures for *public* schools. Instead, Plaintiffs' claims address the narrow and unique issue of whether the text and structure of the Act allows Defendants to divert public school funds to *private* schools. Put another way, Defendants' examples involve actions undertaken to provide students and parents with school services *consistent* with the mandate to afford quality public education; Plaintiffs are challenging actions *contrary* to that mandate (diverting public funds toward private education). Enforcing compliance with the "public education" requirements of the Act does not threaten a flood of litigation.

II. The Voucher Program Violates the Public School Finance Act.

A. Standard of Review and Preservation of Issue.

Taxpayer Plaintiffs agree that this Court reviews the legal question of the proper interpretation of the Public School Finance Act de novo. *See Sperry v. Field*, 205 P.3d 365, 367 (Colo. 2009). The Court reviews the District Court's findings of fact underlying application of that statute under the "clearly erroneous" standard. *Joseph v. Equity Edge, LLC*, 192 P.3d 573, 577 (Colo. App. 2008). Taxpayer Plaintiffs agree that the issue of the interpretation of the Act is properly preserved.

B. Introduction.

As the District Court concluded, "overwhelming evidence in the record" establishes that the Voucher Program "effectively results in an increased share of public funds to the Douglas County School District rather than to other state school districts," in violation of the Act's provisions for "uniform" funding of education across the state. (Order at 56.) Despite the State's efforts to raise false procedural obstacles like ripeness and judicial authority, the District Court had both the power and the cause to enjoin the Voucher Program.

C. The Voucher Program Violates the Public School Finance Act.

The District Court correctly concluded that the Voucher Program violates the Public School Finance Act. (*See id.* at 51-56.) The Act recognizes that "a thorough and uniform system requires that all school districts . . . operate under the same finance formula," and to that end aims primarily at eliminating education spending disparities between school districts with different tax bases. COLO. REV. STAT. § 22-54-102. Under the Act, a school district's funding is determined by multiplying the district's per-pupil funding amount by the district's funded pupil count, and adjusting by specific statutory factors. State Board regulations provide that "[a] district's pupil membership shall include only pupils enrolled in the district and in attendance in the district." 1 COLO. CODE REGS. § 301-39:2254-R-5.00. A school district's funding under the Act is therefore a function of its pupil enrollment, which furthers the Act's goal of allocating State education funds equitably according to each school district's actual needs. COLO. REV. STAT. §§ 22-54-104 (total program funding formula); 22-54-103(7)(e) (funded pupil count), (10)(a)(I) (pupil enrollment).

Here, the undisputed evidence and testimony of education officials demonstrate that the District devised its "Choice Scholarship Charter School" as a device to take unfair advantage of this State funding system. (*See* Order at 56.)

The District counts all 500 students "enrolled" at the Charter School as part of its "pupil enrollment" for purposes of the total per-pupil revenue it receives under the Act. (*Id.* at 3 ¶¶ 9-10; Tr. Vol. I, 240:14-21.) The District provides 100% of this revenue to the Choice Scholarship Charter School, less overhead expenses (*see* Pls.' Ex. 006 at 11; Tr. Vol. II, 499:9-11); the Charter School then distributes 75% to Voucher Program students for tuition at participating private schools, and retains the remaining 25 percent (*see* Pls.' Ex. 001 at 2; Tr. Vol. I, 155:3-12).

The 25% in per-pupil revenue that the Charter School retains violates the Act's and the regulations' provisions for funding based on the actual costs of educating students in each district. The District tries to justify this retention as covering the costs of "administering" the Voucher Program. (Order at 3 ¶9.) But the Charter School has no building, no teachers, no curriculum, and no books, and educates no students; it is a transparent fiction that, as school officials admit, exists only on paper. (*Id.* at 6 ¶ 25, 56.) The District Court correctly concluded that, by retaining money for a school that neither educates nor benefits a single District public school student and does not in any real sense even exist, the Voucher Program "effectively results in an increased share of public funds to the Douglas County School District rather than to other state school districts." (*Id*. at 56.)

With respect to the portion of the per-pupil funds the Voucher Program pays out to "scholarship students," the Program violates the Act by diverting monies that the legislature intended for public education to private and religious schools. Under the Act, a "district's total program shall be available to the district to fund the costs of providing *public* education." COLO. REV. STAT. § 22-54-104(1)(a) (emphasis added). Here, *none* of the Voucher Program dollars go to public schools; every one of the schools participating in the Program is a private school. (Order at 7-8.) Nothing in the Act permits such a diversion of State funds from public education to private schools.

Accordingly, both aspects of the Voucher Program—the 75% pay-out to private schools, and the 25% retention—violate the Act.

The State tries to avoid these conclusions by arguing that the Voucher Program is just another so-called "public-private" educational partnership. (*See* State Br. 29-30.) This argument fails for several reasons. Most importantly, there is no public-private partnership in the Voucher Program. As the evidence demonstrated, the "public" part of the supposed partnership, the "Choice Scholarship Charter School," is an artifice created only to funnel public funds to private and religious schools. (Order at 56.) The private schools are in charge; they set their own tuition, select their own teachers and administrators, control

their own curricula, and may admit, exclude, or expel whomever they wish using whatever criteria they wish, including religious criteria. (*Id.* at 6 ¶ 30.) The State ignores the reality of the Program by analogizing a complete abdication of public school money and authority to private and religious schools to other permissible public-private partnerships.

The State argues that the School Contracting Statute, COLO. REV. STAT. § 22-30.5-104(7)(b), permits a public charter school to "contract with private corporations to provide a complete package of educational services." (State Br. 29.) But that statute also contains significant *limitations* on such contracts that the Voucher Program here does not impose, requiring (for example) that the services "carry out the educational program described in [the charter school's] charter contract." COLO. REV. STAT. § 22-30.5-104(7)(b). And, of course, such charter contracts must conform to the statutory requirement that "[a] charter school shall be a public, nonsectarian, nonreligious, non-home-based school which operates within a public school district," *id. §* 22-30.5-104(1), which the Charter School here plainly does not. *See also id.* § 22-32-122(1) (cited at State Br. 29) (permitting school districts to contract with third parties "for the performance of any service, including educational service, activity, or undertaking *which any school may be authorized by law to perform or undertake*") (emphasis added).

Finally, none of these third-party contracts involve a school district receiving an effective financial "kickback" that the District here obtains at the expense of other school districts—the retention of 25% of the per-pupil revenue it receives for students it does not educate in a school that does not exist. (Order at 16 ¶ 65; Tr. Vol. II, 612:17-25 – 613:1-7; 379:6-25.) These funds do not benefit the children in the District's public schools; they are dedicated to administering a program that benefits only private school students. However broad a school district's contracting discretion may be under the Act, the Act certainly does not permit a school district to employ that authority to the broader detriment of the state public school system.

D. The District Court Properly Addressed the Public School Finance Act Issue.

Contrary to the specious procedural obstacles the State attempts to raise (State Br. 27-28), the District Court acted well within its authority in deciding that the Voucher Program violates the Act.

1. This Dispute is Ripe for Review.

In determining ripeness, courts look to the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Stell v. Boulder Dept. of Soc. Servs.*, 92 P.3d 910, 914-15 (Colo. 2004) (en banc) (citation

omitted). Here, both factors compel the conclusion that the Voucher Program issue is ripe.

First, the issues raised here—the validity of the Voucher Program under the Act and under the Colorado and federal constitutions—are entirely fit for judicial resolution now. The legal and factual issues are joined, and the District Court conducted a detailed three-day evidentiary hearing. (*See* Order at 1.) Injury to the Taxpayer Plaintiffs is ongoing: the Douglas County School Board approved the Voucher Program before this case commenced (*id.* at 2 ¶ 4), and at the time of the injunction hearing, the District had already mailed 184 checks totaling over $200,000 to private schools participating in the Program (*id.* at 15 ¶ 59). Because the injury Plaintiffs seek to prevent is already underway, the ripeness of the dispute is not reasonably subject to question.

The State Board's lack of a formal determination that it will fund the Voucher Program does not undercut ripeness here. (*See* State Br. 27-28.) The record contains ample evidence that the District and the State Board effectively colluded before the School Board instituted the Voucher Program, and that the State Board gave the District tacit approval to move forward. (*See* Tr. Vol. I, 136:16-25 – 137:1-16; 139:2-7; 144:9-22; 144-62.) The State cannot endorse the Voucher Program with a wink and a nod, authorize the District to begin spending

public funds to implement the Program, and then disingenuously rely on the lack of a formal funding determination to insulate the Program from judicial review. As the record shows, the State Board's decision to approve and fund the Voucher Program has, as a practical matter, already been made.

Second, Taxpayer Plaintiffs will suffer substantial hardship if judicial review is delayed. The 184 checks described above have already been distributed. The District has also foregone investments in its public schools—investments necessary to keep pace with increased student enrollment—on the assumption that the State Board will approve the Voucher Program, which will in turn alleviate any potential enrollment increase. (Order at 16 ¶ 63.) In sum, Taxpayer Plaintiffs are suffering real, immediate hardship that will only worsen if judicial review of the Voucher Program is delayed.

2. The District Court Acted Within its Authority in Deciding that the Voucher Program Violates the Act.

The State also argues that Colorado Department of Education ("CDE") funding decisions under the Act are immune from judicial review. (State Br. 28.) However, as the Colorado Supreme recently recognized:

> [O]ur courts have the responsibility to review the state's public school funding scheme to determine whether this system is rationally related to the General Assembly's constitutional mandate to provide a "thorough and uniform" system of public education.

Lobato v. People, 218 P.3d 358, 374 (Colo. 2009).

Moreover, nothing in the Act indicates that the legislature intended to give CDE final, unreviewable authority regarding funding decisions, and the sections of the Act cited by the State do not support its argument. Colorado Revised Statute § 22-54-120(1) (cited at State Br. 28) merely authorizes CDE to "make reasonable rules and regulations necessary for the administration and enforcement of this article," a clearly executive function that in no way suggests that courts cannot review CDE's actions under the Act. The State's reliance on an incomplete (and therefore misleading) quotation of Colorado Revised Statute § 22-54-104(1)(a) (State Br. 29) fares no better. That provision does not give the District unfettered discretion to divert public money for private schools; rather, as stated in the earlier portion of the sentence that the State elected not to quote, "[t]he district's *total* program shall be available to the district to fund the costs of providing *public education*." COLO. REV. STAT. § 22-54-104(1)(a) (emphasis added).

The District Court was well within its authority in deciding that the Voucher Program violates the Act.

III. The Contracting Statute Does Not Provide Douglas County School District with Authority to Implement the Voucher Program.

A. Standard of Review and Preservation of Issue.

Taxpayer Plaintiffs agree that this Court reviews the legal question of the application of the Contracting Statute de novo. *See Nat'l Farmers Union Prop. & Cas. Co. v. Estate of Mosher*, 22 P.3d 531, 533 (Colo. App. 2000). The Court reviews the District Court's findings of fact underlying application of that statute under the "clearly erroneous" standard. *Joseph*, 192 P.3d at 577. Taxpayer Plaintiffs agree that the issue of the interpretation of the applicability of the Contracting Statute is properly preserved.

B. Introduction.

The State cannot cure the District's violations of the Act by invoking Colorado's Contracting Statute. The Contracting Statute does not grant the District authority to contract with private schools to provide services or impose requirements that the District could not itself legally undertake.

C. The Plain Language of the Contracting Statute Does Not Authorize the Voucher Program.

Colorado's Contracting Statute does not authorize the Voucher Program. The statute provides:

> Any school district has the power to contract with another district or with the governing body of a state college or university, with the tribal corporation of any Indian tribe or nation, with any federal agency or officer or any county, city, or city and county, or with any natural person, body corporate, or association for the performance of any service, including educational service, activity, or undertaking *which any school may be authorized by law to perform or undertake*. Such contract shall set forth fully the purposes, powers, rights, obligations, and responsibilities, financial or otherwise, of the parties so contracting and *shall provide that the service, including educational service, activity, or undertaking be of comparable quality and meet the same requirements and standards as would be necessary if performed by the school district*.

COLO. REV. STAT. § 22-32-122(1) (emphasis added). Under this statute, a school district may contract *only* for an "educational service" that a public school "may be authorized by law to perform or undertake." *Id.* The statute thus does not expand the *type* of education a school district can provide, or authorize a school district to accomplish indirectly through contract what it cannot accomplish directly through its own employees. It merely allows a district to provide legally authorized modes of education *indirectly* through contracts with third parties as well as *directly* through its own employees.

Under the laws and Constitution of Colorado, the only kind of education the District may provide is a free, public education. However, the education provided through the Voucher Program is neither "free" nor "public"—and therefore is not the kind of education that any public school "may be authorized by law to perform

or undertake." It is not "free" because parents are required to pay out of their own pocket all tuition costs not covered by the voucher (see *infra* pp. 47-48). And it is not "public," because the Program is not open to every student in the district; on the contrary, in order to be "enrolled" at the Charter School, a student must first be admitted to one of the private school partners, many of which use admission criteria, such as religious beliefs (Order at 10 ¶ 42), that are illegal in Colorado's public schools. Because the District is not authorized by law to provide a non-free, non-public education in its own schools, the Contracting Statute does not allow the District to provide a non-free, non-public education through contracts with others. The Contracting Statute does not save the Voucher Program, and the District Court was correct in rejecting the State's argument.

D. The Legislative History of the Contracting Statute Does Not Validate the Voucher Program.

The Contracting Statute's legislative history likewise provides no support for the Voucher Program. The State reads far too much into the mere fact that the final version of the statute omitted an earlier provision providing that districts were not permitted to enroll students at any independent school and then contract for the provision of educational services. (*See, e.g.*, Record at 1755 (H.B. 93-1118, House 3rd Reading (Feb. 23, 1993).) Taken as whole, the legislative history of the

Contracting Statute demonstrates that the General Assembly did not intend to permit the wholesale outsourcing of public education to private, religious schools.[5]

Senator Dottie Wham, one of the bill's sponsors, noted that contracting out for *particular services* had always been permissible and "is very different from this situation that gave rise to the bill initially." (Record at 1744 (H.B. 93-1118, Trans. of Senate Second Reading, 47:13 (Mar. 25, 1993).) The impetus for the Contracting Statute arose when a school district contracted with a private school for educational services, but continued to count students at the private school as "enrolled" in the school district. (*Id.* at 47:15-20.) As noted by Senator Wham, "the language in the law does not allow that." (*Id.* at 47:22-23; *see also* Record at 1755 (H.B. 93-1118, House 3rd Reading (Feb. 23, 1993)) (text of bill including language regarding intent of the General Assembly).)

Although the bill underwent several revisions, the legislature's intent is clear: the Contracting Statute does not permit the wholesale outsourcing of public education to private schools, and does not permit a school district to contract with a private entity while still counting private school students as "enrolled" in the district. The Statute therefore does not support the Voucher Program here.

[5]Moreover, reading affirmative intent into legislative *omission* is always a questionable approach to statutory interpretation. For example, the language at issue may have been deleted because the legislature deemed it redundant and unnecessary in light of the clear intent of the remainder of statute. *See, e.g., Schubert v. People*, 698 P.2d 788, 793 (Colo. 1985).

E. Other Programs Enacted Under the Contracting Statute Are Distinguishable from the Voucher Program.

The other state programs that the State offers as analogies to the Voucher Program, including the College Opportunity Fund and the Concurrent Enrollment Program (State Br. 51), are readily distinguishable and do not support the State's attempted reliance on the Contracting Statute here. (*See id.*)

First, unlike the Voucher Program, these programs rest on a specific statutory grant of authority. *See, e.g.*, COLO. REV. STAT. § 23-18-101 *et seq.* (authorizing College Opportunity Fund); COLO. REV. STAT. § 22-35-101 *et seq.* (authorizing Concurrent Enrollment Program).

Second, as the District Court recognized, these programs are "limited in scope and narrowly tailored to a specific educational issue or concern thereby comporting with the Contracting Statute." (Order at 67.) For example, despite the State's assertion that contract schools "provide *all* education services to students" (State Br. 51), Senator Keith King's testimony confirmed that contract schools typically provide a particular type of educational service:

> Q. And could you give some examples of some contract schools?
> A. Well, typically contract schools are in the district where it might be a special district as far as a contract school to accomplish a certain type of activity. They're typically not charter schools, but *they might be a particular service*, like a preschool service that they might want to fulfill."

(Tr. Vol. III, 757:17-25.)

Finally, unlike the Voucher Program, which expressly exempts private school participants from state requirements, the contract programs that the State cites may not receive state per-pupil funding if they deviate from the requirements of the statutory program. *See, e.g.*, COLO. REV. STAT. § 22-28-104(3),(5)(b) (children enrolled in preschool programs not specifically approved may not be counted in district's pupil enrollment for Colorado Preschool Program funding); (*see also* Tr. Vol. II, 486:5-12 (testimony confirming that faith-based instruction at preschools funded under Colorado Preschool Program is impermissible).)

The District Court correctly recognized that the statutorily enacted programs on which the State relies are "factually and legally dissimilar to the Scholarship Program at issue here." (Order at 67.) This Court should affirm the District Court's conclusion that "the Contracting Statute does not permit school districts the broad authority to contract with private schools" under the proposed Program. (*Id.* at 68.)

IV. The Voucher Program Violates the Colorado Constitution.

A. Standard of Review and Preservation of Issue.

Taxpayer Plaintiffs agree that this Court reviews the legal question of the constitutionality of the Voucher Program de novo. The Court reviews the District

Court's findings of fact underlying application of that statute under the "clearly erroneous" standard. *Joseph*, 192 P.3d at 577. Taxpayer Plaintiffs agree that the issue of the constitutionality of the Voucher Program under Article IX, Section 3 is properly preserved.

B. Article IX, Section 3 Forbids the Appropriation of Public School Fund Monies to Non-Public Schools.

The Voucher Program uses funds designated solely for public schools to subsidize private school tuition in violation of Article IX, Section 3 of the Colorado Constitution. That section provides in relevant part:

> **School fund inviolate.** The public school fund of the state shall, except as provided in this article IX, forever remain inviolate and intact and the interest and other income thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law. No part of this fund, principal, interest, or other income shall ever be transferred to any other fund, or used or appropriated, except as provided in this article IX.

The term "schools of the state" in this section means public schools. *Colo. State Bd. of Land Comm'rs v. Colo. Mined Land Reclamation Bd.*, 809 P.2d 974, 976 (Colo. 1991) (describing creation of Public School Fund "for the benefit of Colorado public schools").

The District Court found that the Voucher Program improperly uses monies from the Public School Fund. The Act specifically includes monies from the

restricted Public School Fund in per- pupil funding to further ensure that all public education monies earmarked under the Act will not be diverted to private schools. *See, e.g.*, COLO. REV. STAT. § 22-41-101(2) (statute creating a "public school fund" which, among other things, consists of public school lands proceeds); COLO. REV. STAT. § 22-54-114(1) (income held in public school fund is transferred to "state public school fund" together with, *inter alia*, monies appropriated by the General Assembly from general fund to meet state's share of total program funding of all school districts under the Act). Witnesses from the State Department of Education conceded this fact. (*See* Tr. Vol. I, 207:13-17 (testimony of Robert Hammond, state Commissioner of Education); *see also* State Br. 32 (conceding that public school funding comes from Public School Fund).) This Public School Fund money is commingled with the total amount of public school finance dollars and redistributed to all of the school districts in Colorado, including Douglas County. (Tr. Vol. II, 474:13-17 (testimony of Leann Emm); *see also* Record at 1328 (State Def. Resp. to Mot. for Preliminary Injunction at 20) (conceding that Public School Fund is "one component" of total public school funding distributed to all Colorado school districts).)

Based on this undisputed factual finding, the District Court properly enjoined the Program. Under the Program, the District planned to use State

monies, including monies from the Public School Fund, to subsidize private school tuition. But Article IX, Section 3 clearly forbids the District's use of those restricted funds for that purpose. The State's assertion that only "a tiny fraction of public school funding" comes from the Public School Fund (State Br. 32) misses the point. Nothing in Article IX, Section 3 suggests that it has a *de minimis* exception; on the contrary, the language of the provision is unambiguously strict. Art. IX, § 3 ("No part of this fund …").

The State ignores this clear constitutional violation, attempting instead to justify the Program's use of restricted money by invoking principles of private trust law to artificially segregate "infected" from "uninfected" assets (State Br. 33-34.) The State cites no authority for this argument, and Taxpayer Plaintiffs are unaware of any. Indeed, the differences between this clear constitutional mandate and the terms of a private trust are both obvious and legion. In a trust, a trustee merely holds legal title to an asset with a fiduciary responsibility to others with an equitable interest. *See* BLACK'S LAW DICTIONARY 1513 (7th ed. 1999); *Vinton v. Virzi*, 269 P.3d 1242, 1247 (Colo. 2012). The Public School Fund and its proceeds are the property of the state of Colorado, and school districts hold no equitable interests or rights in them. *Craig v. People*, 299 P. 1064, 1066 (Colo. 1931) ("The income from the public school fund is owned by the state, and is distributed *as a*

gratuity to the various counties and school districts to supplement local taxation for school purposes, thereby decreasing the school tax burden of the residents thereof.") (emphasis added). The relative powers and duties of the State here and those of a private trustee have no relation to each other, either logically or as a matter of law. Trust law has no bearing on the application of Article IX, Section 3 and does not excuse the Voucher Program's violation of that section.

1. The Voucher Program is Not Entitled to a Presumption of Constitutionality.

The State argues that the District Court should have assumed that restricted Public School Fund monies would be used to cover "administrative costs" of the Program and therefore would not be diverted to private schools. (State Br. 35-37.) The State cites no factual basis for this contention, nor is there any. And as a threshold matter, the State's argument fails because "administrative costs" will not be used for public schools, but rather for the sham Charter School. (*See* Order at 3 ¶ 9; Tr. Vol. I, 155:3-12.)

Moreover, the State's argument that the Voucher Program is entitled to a presumption of constitutionality is simply incorrect. That principle of construction applies to legislation such as statutes, COLO. REV. STAT. § 2-4-201(1)(a) ("In enacting a statute, it is presumed that: (a) Compliance with the constitutions of the

state of Colorado and the United States is intended . . ."), and municipal ordinances, *cf. Am. Respiratory Care Servs. v. Manager of Revenue, City and County of Denver*, 835 P.2d 623, 625 (Colo. App. 1992). To be considered a statute or legislation, an order must change or modify an act. *Sears v. Romer*, 928 P.2d 745, 752 (Colo. App. 1996). The Voucher Program was not enacted by legislation, *see Denver Pub. Co. v. City of Aurora*, 896 P.2d 306, 318 (Colo. 1995); nor is it an "ordinance," *see Trinen v. City and County of Denver*, 53 P.3d 754, 757 (Colo. App. 2002); nor is it a "regulatory scheme," *see Orsinger Outdoor Adver. Inc., v. Dep't of Highways*, 752 P.2d 55, 61 (Colo. 1988) (discussing statewide regulatory scheme). The presumption of constitutionality rests on considerations of deference to the legislature and executive branch in the enactment of laws. *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427 (Colo. 2000). The Voucher Program is not entitled to the same deference and presumption of constitutionality.

The State's suggested "presumption" would also require the Court to ignore the established facts and to force a result unsupported by those facts and plain common sense. *See Concerned Parents of Pueblo, Inc. v. Gilmore*, 47 P.3d 311, 313 (Colo. 2002) ("We must avoid adopting a forced or strained construction …"); *see also Higgins v. People*, 868 P.2d 371, 373 (Colo. 1994). The Record here

demonstrates that money from the Public School Fund is commingled with other state funds *before* it is sent to individual school districts. (*E.g.*, Tr. Vol. II, 474:13-17.) This financing mechanism was established by the Colorado legislature because all of these monies were earmarked for public schools. The entire concept of "commingled" funds means that they are inseparably merged. *See* BLACK'S LAW DICTIONARY 264 (7th ed. 1999) (defining "commingle" as "[t]o put together in one mass, as when one mixes separate funds or properties into a common fund"). The idea that the District could somehow disaggregate or otherwise artificially segregate the Public School Fund monies from the other state monies after it received them – much less that the District Court was required to *assume* that the District somehow accomplished this – is specious. *See Bestway Concrete v. Indus. Claim Appeals Office of State of Colo.*, 984 P.2d 680, 685 (Colo. App. 1999) ("[A]n interpretation that would cause an absurd result should be avoided.").

The trial court was not required to assume that monies from the Public School Fund were solely used to cover "administrative costs" of the sham Charter School. And even if they were so used, those monies were still not used for public education, as required by Article IX, Section 3.

2. The State's "Domino Effect" Argument is Unfounded.

The State seeks to excuse the Voucher Program's violation of Article IX, Section 3 by arguing that invalidating the Program would jeopardize numerous statutory programs that involve "public-private educational partnerships." (State Br. 34.) This alarmist approach overlooks important differences between the Voucher Program and these other statutory programs.

Most importantly, the State's arguments are entirely hypothetical because these other programs are not at issue. No one has challenged the constitutionality of the funding arrangements of contract schools, facility schools, or charter schools, and the details of those programs were not litigated or otherwise developed in the District Court. There is no adequate record regarding these programs that could serve as a basis for appellate review. The State's implication that the Court must validate the Voucher Program in order to "protect" these other programs is merely a distraction from the issue that *is* before the Court: the unconstitutionality of the Voucher Program. *See Lyons v. Nasby*, 770 P.2d 1250, 1256 (Colo. 1989) (rejecting argument that allowing claim to go forward would "open the floodgates of litigation" and refusing to allow defendant to avoid consequences of imposed duty).

These other programs involve different legal underpinnings and different circumstances. Indeed, some of these programs do not even involve the Public School Fund. For example, the State argues that the trial court's interpretation of Article IX, Section 3 would prohibit funding to facility schools—schools where certain special education students can be placed. (State Br. 34.) However, Leanne Emm, Assistant Commissioner for Public School Finance at CDE, conceded that none of the funding for the special education placement program at facility schools comes from the Public School Fund. (Tr. Vol. II, 458:15-19; 480:20-25; 481:1-2); *see also* COLO. REV. STAT. §§ 22-2-408; 22-54-129(7); (Pl. Ex. 119 at 5-6.)

In addition, many of the programs cited by the State must meet specific authorizations and requirements, whereas the private schools under the Voucher Program are not similarly restricted. For example, the State argues that the trial court's injunction jeopardizes various funding arrangements under which charter schools pay education service providers like Edison Learning. (State Br. 34.) These charter schools, however, are still subject to specific statutory requirements, including the requirement that the schools are public and that instruction cannot be faith-based. *See* COLO. REV. STAT. § 22-30.5-104(1) (providing that "[a] charter school shall be a *public, nonsectarian, nonreligious*, non-home-based school which operates within a public school district") (emphasis added); COLO. REV. STAT. §

22-30.5-104(6)(a) (a charter school "shall not, by contract or otherwise, operate free of the requirements contained in the 'Public School Finance Act of 1994'"); (Tr. Vol. III, 778:13-22 (testimony by Senator King agreeing that Edison and Mosaic cannot provide faith-based online instruction).)

Finally, unlike the Voucher Program, the programs the State argues are jeopardized by the District Court's injunction are actually statutory programs. For example, the Colorado Preschool Program (COLO. REV. STAT. § 22-28-104 *et seq.*), the Concurrent Enrollment Program (COLO. REV. STAT. §§ 22-35-101 *et seq.*, and the College Opportunity Fund (COLO. REV. STAT. § 23-18-101 *et seq.*) were all created by the Colorado legislature. (*See also* Tr. Vol. II, 481:6-9 (testimony of Leann Emm); Tr. Vol. III, 763:6-9, 764:11-14.)

C. The Voucher Program Violates Article IX, Section 2 of the Colorado Constitution.

This Court should also affirm the District Court's judgment and injunction on the ground that the Voucher Program violates the "thorough and uniform" clause of Article IX, Section 2 of the Colorado Constitution.[6] This provision states in relevant part:

> **Establishment and maintenance of public schools.** The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.

Contrary to this provision, students enrolled in the Program are not educated "gratuitously," nor are the private schools funded by the Program "thorough and uniform." In addition, by retaining 25% of the per-pupil funding received from the state for "administrative" costs of the sham Charter School, the District seeks to benefit the Voucher Program at the expense of Colorado's public school children, also in violation of Article IX, Section 2.

[6] Although the District Court denied Plaintiffs relief on this ground (Order at 53), this Court may affirm the judgment of the District Court on any ground supported by the record, even if the District Court did not rely on that ground. *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 23 (Colo. App. 2010); *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 254 (Colo. App. 2006).

1. The Voucher Program Denies Students a "Free" Education.

The Voucher Program violates Article IX, Section 2's mandate that students "be educated gratuitously" because the education provided to students enrolled in the Voucher Program is undisputedly *not* free. Article IX, Section 2 mandates that each child of school age has the opportunity to receive a free education in a free public school. *See, e.g., Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982). Despite receipt of a voucher, parents of students enrolled in the Voucher Program must cover the balance of the private school tuition, an amount that can often be substantial. (*See* Record at 361 (Pl. Ex. 107, § D, ¶ 7(h).)

In the District Court, Christian Cutter, Assistant Superintendent for Elementary Education for the District, acknowledged that students in the Voucher Program do not receive a "free" education, noting that "[f]or the schools that have tuition that exceed the scholarship payment, the parent is responsible for paying the rest. So if that's how you are characterizing free, then, no, it isn't." (Tr. Vol. I, 249:14-17.) John Carson, President of the School Board, conceded this point, as well:

> Q. And it is, in fact, the policy of the Douglas County school board, as you adopted it in -- we call it Exhibit 107, but it's JCB -- that it is the financial responsibility of the students' families to make up the difference between the voucher payment and the tuition charge by a private partner school, correct?

A. That's correct.

Q. And so to that extent, the education that those Choice Scholarship recipients, those participants in the program receive -- the education they receive is not free, is it, sir?

A. No. It's -- they do make up the difference, yes.

(Tr. Vol. II, 619:4-17.) These undisputed factual admissions establish that the District has violated Article IX, Section 2 by providing an education that is not free.

The District Court addressed this issue only briefly, ruling that the Voucher Program did not violate Article IX, Section 2 because it does not "prevent" students from obtaining a free public education in the District. (Order at 53.) In essence, this ruling holds that the Voucher Program permits a student to obtain a free education as long as that student does not actually *participate* in the Voucher Program. However, the point is not whether an individual student can receive a free education in the District while the Voucher Program exists, but whether the educational system created by the Voucher Program is a "free public school." Here, the Program creates a system of state-subsidized private education for those students who can afford to pay, but denies that opportunity to those who cannot.

2. The Voucher Program Does Not Provide a "Thorough and Uniform" System of Schools.

The Voucher Program also violates Article IX, Section 2's mandate that students be provided with a "thorough and uniform" system of schooling. The education provided to students enrolled in private schools under the Voucher Program is neither "thorough" nor "uniform." Students in the Voucher Program must satisfy all criteria of the private schools, which may include instructional requirements, "be they religious or nonreligious," that vary both from District requirements and from those of other private schools. (*See* Record at 360 (Pl. Ex. 107, § D, ¶ 2).) The education that Program students receive diverges widely in terms of the instruction, enrollment, employment, and discipline policies. (*See id.* at 360-65 (Pl. Ex. 107 ¶¶ D, E).) Employment and enrollment policies at the schools may discriminate based on religious beliefs (*id.* at 363 (Pl. Ex. 107, § E, ¶ 3(f)), and private school partners need not modify their educational programs to mirror District requirements in order to participate in the Voucher Program (Tr. Vol. II, 538:23-25; 539:1-13).

For example, a private school that incorporates religious teachings in its programs is not required to modify to modify those programs to participate in the Voucher Program. (*See* Tr. Vol. I, 237:1-7.) Dr. Cutter testified that private

school partners are not required to remove religious or sectarian teachings from their instructional content:

> Q. And, in fact, there was a recognition, was there not, Dr. Cutter, that frequently the private partner schools, which are religious or sectarian in nature, embed in their program of education religious teachings. And those schools are nevertheless permitted to participate in Douglas County's CSP; isn't that right, sir?
>
> A. That's correct.

(Tr. Vol. I, 238:18-25; *see also* Pls.' Ex. 19 at 11 (contract with Cherry Hills Christian School) (application includes school's educational goal of "[d]evelop[ing] the child spiritually with a deeper understanding of Christ").)

The District Court's decision did not address the widely divergent educational instruction and school policies implemented by the private school partners, but only observed that it is the "system of free public education" that must be "thorough and uniform." (Order at 53.) This conclusion, however, fails to consider the undisputed facts in the present case. The Voucher Program's student participants are purportedly a *part* of the "system of free public education." That conclusion is compelled because the School Board established the Charter School for these students, and applied for and accepted the State's per-pupil funding for these students. Nevertheless, this group of students that the District counts as part of its "system of free public education" will be receiving education and instruction

that is not uniform and diverges dramatically from the education that District students otherwise receive. This aspect of the Voucher Program violates Article IX, Section 2, and this Court should affirm the District Court's judgment.

3. The District's Retention of 25 Percent of Per-Pupil Payments Violates Article IX, Section 2.

The Voucher Program violates Article IX, Section 2 by permitting the District to retain 25% of the funds raised and distributed as per-pupil funding and benefiting itself at the expense of all other Colorado public schools. Mr. Hammond acknowledged that funding for the Program would come out of the pockets of other school districts. (Tr. Vol. I, 179:9-25; 180:1-3 (discussing state "concerns [regarding] tak[ing] money from other districts").) Dr. Cutter also confirmed that the District would receive a net surplus for the Voucher Program. (*See id.* Vol. II, 376:8-13.) Thus, through the Voucher Program, the District realizes a financial benefit at the expense of other districts, thereby creating a system that is not uniform.

D. The Voucher Program Violates the "Local Control" Provision of Article IX, Section 15 of the Colorado Constitution.

This Court should also affirm the District Court's injunction and judgment because the Voucher Program violates Article IX, Section 15 of the Colorado Constitution, commonly called the "Local Control Clause."[7] That provision states:

> **School districts - board of education.** The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.

This clause invests the directors of local boards of education with the control of instruction in their districts. Control of instruction by locally elected school boards is a necessary element in meeting the substantive mandate of the Thorough and Uniform Clause of the Colorado Constitution. *Lobato v. Colorado*, No. 2005CV4794, at 170 (Den. Dist. Ct. Dec. 9, 2011); *Owens v. Colo. Cong. of Parents*, 92 P.3d 933, 938-39 (Colo. 2004). The Voucher Program violates the Local Control Clause because it abdicates the District's constitutionally mandated obligation to control instruction of students in its district and to control locally-raised education funding.

[7] Again, although the District Court found against the Taxpayer Plaintiffs on this issue (Order at 65), the issue was fully developed below, and this Court may nevertheless affirm on this ground based on the existing record. *Barnett*, 252 P.3d at 23 (Colo. App. 2010); *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 254 (Colo. App. 2006).

1. The Voucher Program Violates Article IX, Section 15 by Abdicating Local Control Over Student Instruction.

By diverting public school funds to private schools, the District abdicates control over instruction of students ostensibly enrolled in the public schools in violation of Article IX, Section 15. Such control is not optional; as the Clause states, the local directors "shall have control." As the Colorado Supreme Court stated, the Local Control Clause is a grant of "undeniable constitutional authority" to local boards of education to control instruction in the public schools in their district. *Bd. of Ed. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 646 (Colo. 1999). "Control of instruction requires power or authority to guide and manage both the action and practice of instruction as well as the quality and state of instruction." *Id.* at 648. Because this authority is constitutionally mandated, a school district may not delegate its instructional control to a third party. *See* COLO. CONST. Art. IX, sec. 15; *City and County of Denver v. Sweet*, 138 Colo. 41, 53 (1958) (constitutionally mandated taxation power granted to General Assembly cannot be delegated to any other body).

In adopting the Voucher Program, the District has delegated all control over the instruction of Program students to private schools whose curricula and instructional policies diverge widely both from the District's and from each other.

Although the School Board attempted to "validate" the Voucher Program by creating a sham charter school where Program students would be "enrolled," this pretense failed to retain either the appearance or reality of local control. Indeed, in ceding power to its "Choice Scholarship Charter School," the District did not even require the charter school to meet state standards for content and instruction. *See* COLO. REV. STAT. § 22-30.5-106(1)(e) (all charter school applications must include descriptions of proposed educational program, student performance standards, and measurable annual targets); (Record at 451 (Choice Scholarship School Application).) Senator King confirmed the effect of this omission in his testimony:

> Q: And that educational methodology should be described in the charter school application, right?
> A: It should . . .
> . . .
> Q: And the charter school application is also supposed to contain a description of the content standards for the school to use, which are specific statements of what a student should know or be able to do relative to a particular academic area?
> A: Correct. I think, specifically, they have to meet state standards.
> Q: And are you aware that the charter school application at issue in this case did not contain that?
> A: I did not read that portion of it.
> Q: And if it did not, that would be inconsistent with the Charter School Act?
> A: Yes.

(Tr. Vol. III, 776:2-24.) Rather than a charter school designed to operate as a public school under the control of the District, Mr. Hammond confirmed that the Charter School was "simply a mechanism to count . . . private school students as public school students for purposes of state funding." (Tr. Vol. I, 217:21-23.)

Although the District Court found that the Voucher Program did not violate Article IX, Section 15, its decision rests on case law that it acknowledged addresses only *state* encroachment into local control. The District Court recognized that the issue presented here—the District's abdication of its own control over instruction—is one of first impression in Colorado. (Order at 64.)

The Colorado Constitution is clear: local boards of education "*shall* have control of instruction in the public schools . . . ." COLO. CONST. Art. IX, Sec. 15. Here, the District surrendered its control of instruction of the 500 Program students to private schools, in direct violation of this constitutional mandate. This Court should affirm the District Court's injunction on that basis.

2. The Voucher Program Violates Article IX, Section 15 Because It Abdicates Local Control Over Locally-Raised Funds.

The Voucher Program also violates Article IX, Section 15 of the Colorado Constitution because the District fails to exercise control over locally-raised funds, which provide a portion of the funding for the Program. Under Colorado Supreme

Court precedent, local control must be exercised over locally-raised funds. *See Owens*, 92 P.3d at 943. A long line of decisions by the Colorado Supreme Court has recognized that "control over locally-raised funds is essential to effectuating the constitutional requirement of local control over instruction." *Id.* at 939; *see also Sch. Dist. No. 16 v. Union High Sch. No. 1*, 152 P. 1149, 1149 (Colo. 1915) (the school district must retain discretion over "the character of . . . instruction the pupils [of the district] shall receive at the cost of the district").

In *Owens*, the Colorado Supreme Court equated control of locally-raised funds with local control of instruction. *Owens*, 92 P.3d at 943. The Court held that control over instruction "is meaningless without control over local funding because local funding provides 'the link connecting the local citizenry to their school district.'" *Id.* at 941 (quoting *Lujan v. Colo. State Bd. of Ed.*, 649 P.2d 1005, 1022 (Colo. 1982)). Thus, local control over locally-raised funds "gives substance to the constitutional requirement that local boards 'shall have control of instruction in the public schools of their respective districts.'" *Owens*, 92 P.3d at 943 (quoting COLO. CONST. Art. IX, Section 15).

Here, the Record established that the Voucher Program is funded in part by monies from local taxes that are earmarked for public schools. (Tr. Vol. I, 240:14-21.) By giving these locally-raised funds to private schools, the District does not

retain control over the locally-raised funds and, under *Owens*, this failure to exercise control over locally-raised funds (and through such funds the instruction of its students) violates Article IX, Section 15.

Significantly, the District Court made no findings addressing the substance of Plaintiffs' argument on this issue. The court did not reject the principle that control of locally-raised funds is essential to local control of instruction. (*See* Order at 64.) Although the existing case-law applying Article IX, Section 15 arises from different factual scenarios, the legal principles are the same. *Owens* requires the District to maintain control over locally-raised funds, and such control is inextricably linked to control over local instruction. The District's failure to exercise control over locally-raised funds is an abdication of its responsibility to maintain local control over instruction, and a violation of Article IX, Section 15.

CONCLUSION

Using a "charter school" that even they admit does not really exist, the Defendants have tried to circumvent both the Colorado Constitution and the Colorado Public School Finance Act to redirect both State and local funds intended for public education to private and religious schools, and to divert a material unearned financial benefit to the District's Voucher Program at the expense of its own students and other school districts. The District Court saw the Voucher

Program for what it was and properly enjoined its operation. The Taxpayer Plaintiffs urge this Court to affirm.

Respectfully submitted this 13th day of July, 2012.

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