SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80203	
District Court of the City and County of Denver Honorable Sheila A. Rappaport Case No. 05CV4794	▲ COURT USE ONLY ▲
PLAINTIFFS-APPELLEES: **Anthony Lobato**, as an individual and as parent and natural guardian of **Taylor Lobato** and **Alexa Lobato**; **Denise Lobato**, as an individual and as parent and natural guardian of **Taylor Lobato** and **Alexa Lobato**; **Miguel Cendejas** and **Yuri Cendejas**, individually and as parents and natural guardians of **Natalia Cendejas** and **Salma Cendejas**; **Pantaleón Villagomez** and **Maria Villagomez**, as individuals and as parents and natural guardians of **Chris Villagomez**, **Monique Villagomez** and **Angel Villagomez**; **Linda Warsh**, as an individual and as parent and natural guardian of **Adam Warsh**, **Karen Warsh** and **Ashley Warsh**; **Herbert Conboy** and **Victoria Conboy**, as individuals and as parents and natural guardians of **Tabitha Conboy**, **Timothy Conboy** and **Keila Barish**; **Terry Hart**, as an individual and as parent and natural guardian of **Katherine Hart**; **Larry Howe-Kerr** and **Anne Kathleen Howe-Kerr**, as individuals and as parents and natural guardians of **Lauren Howe-Kerr** and **Luke Howe-Kerr**; **Jennifer Pate**, as an individual and as parent and natural guardian of **Ethan Pate**, **Evelyn Pate** and **Adeline Pate**; **Robert L. Podio** and **Blanche J. Podio**, as individuals and as parents and natural guardians of **Robert T. Podio** and **Samantha Podio**; **Tim Hunt** and **Sabrina Hunt**, as individuals and as parents and natural guardians of **Darean Hunt** and **Jeffrey Hunt**; **Doug Vondy**, as an individual and as parent and	Case No. 2012SA25

natural guardian of **Hannah Vondy**; **Denise Vondy**, as an individual and as parent and natural guardian of **Hannah Vondy** and **Kyle Leaf**; **Brad Weisensee** and **Traci Weisensee**, as individuals and as parents and natural guardians of **Joseph Weisensee**, **Anna Weisensee**, **Amy Weisensee** and **Elijah Weisensee**; **Stephen Topping**, as an individual and as parent and natural guardian of **Michael Topping**; **Debbie Gould**, as an individual and as parent and natural guardian of **Hannah Gould**, **Ben Gould** and **Daniel Gould**; **Lillian Leroux Snr.**, as an individual and natural guardian of **Lillian Leroux III**, **Ashley Leroux**, **Alixandra Leroux** and **Amber Leroux**; **Theresa Wrangham**, as an individual and natural guardian of **Rachel Wrangham**; **Lisa Calderon**, as an individual and natural guardian of **Savannah Smith**; **Jessica Spangler**, as an individual and natural guardian of **Rider Donovan Spangler**; **Jefferson County School District No. R-1**; **Colorado Springs School District No. 11, in the County of El Paso**; **Bethune School District No. R-5**; **Alamosa School District, No. RE-11J**; **Centennial School District No. R-1**; **Center Consolidated School District No. 26JT, of the Counties of Saguache and Rio Grande and Alamosa**; **Creede Consolidated School District No. 1 in the County of Mineral and State of Colorado**; **Del Norte Consolidated School District No. C-7**; **Moffat, School District No. 2, in the County of Saguache and State of Colorado**; **Monte Vista School District No. C-8**; **Mountain Valley School District No. RE 1**; **North Conejos School District No. RE1J**; **Sanford, School District No. 6, in the County of Conejos and State of Colorado**; **Sangre de Cristo School District, No. RE-22J**; **Sargent School District No. RE-33J**; **Sierra Grande School District No. R-30**; **South Conejos School District No. RE10**; **Aurora, Joint School District No. 28**	

of the Counties of Adams and Arapahoe; Moffat County School District Re: No. 1; Montezuma-Cortez School District No. RE-1; and Pueblo, School District No. 60 in the County of Pueblo and State of Colorado; and PLAINTIFFS-INTERVENORS-APPELLEES: **Armandina Ortega**, individually and as next friend for her minor children **S. Ortega** and **B. Ortega**; **Gabriel Guzman**, individually and as next friend for his minor children **G. Guzman**, **Al. Guzman** and **Ar. Guzman**; **Robert Pizano**, individually and as next friend for his minor children **Ar. Pizano** and **An. Pizano**; **Maria Pina**, individually and as next friend for her minor children **Ma. Pina** and **Mo. Pina**; **Martha Lopez**, individually and as next friend for her minor children **S. Lopez** and **L. Lopez**; **M. Payan**, individually and as next friend for her minor children **C. Payan**, **I. Payan**, **G. Payan** and **K. Payan**; **Celia Leyva**, individually and as next friend for her minor children **Je. Leyva** and **Ja. Leyva**; and **Abigail Diaz**, individually and as next friend for her minor children **K. Saavedra** and **A. Saavedra**; vs. DEFENDANTS-APPELLANTS: **The State of Colorado**; the **Colorado State Board of Education**; **Robert K. Hammond**, in his official capacity as Commissioner of Education of the State of Colorado; and **John Hickenlooper**, in his official capacity as Governor of the State of Colorado.	

Attorneys for Defendants-Appellants:

JOHN W. SUTHERS, Attorney General
DANIEL D. DOMENICO, Solicitor General
FREDERICK R. YARGER, Assistant Solicitor General

JONATHAN P. FERO, 35754*
Assistant Solicitor General
E-mail: jon.fero@state.co.us

JOHN T. LEE, 38141*
Assistant Attorney General
E-mail: jtlee@state.co.us

ERICA WESTON, 35581*
Assistant Attorney General
E-mail: erica.weston@state.co.us

CAREY TAYLOR MARKEL, 32987*
Special Assistant Attorney General
E-mail: markel_c@cde.state.co.us

Office of the Colorado Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203
Telephone: (303) 866-2383
Fax: (303) 866-5671
* Counsel of Record

DEFENDANTS-APPELLANTS' REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Defendants share the goal of improving K–12 education. Each year, the elected branches spend countless hours working to improve outcomes for all students. But the proceedings below were fundamentally different from what this Court directed, and the result was an order installing the judiciary as arbiter of Colorado's budget. In the end, while Plaintiffs' ultimate policy goals are unassailable, their chosen methods are unconstitutional.

ARGUMENT

I. The Trial Proved Plaintiffs Present a Political Question.

On remand, Plaintiffs demonstrated the relief they seek is available only from a court that crosses the boundaries of the elected branches. By dismissing this case, this Court will extract the judiciary from a debate about education policy and budget priorities it has previously avoided. And contrary to Plaintiffs' arguments, neither law of the case nor stare decisis requires a different result. Indeed, overturning the trial court's order will honor the purposes these prudential doctrines are meant to serve.

A. The questions actually litigated below were not justiciable.

In the opening brief, Defendants explained why the claims presented at trial are inappropriate for judicial resolution. (Defs.' Op. Br. at 12–26.)

Plaintiffs responded "[t]he trial in this case looked like any other trial on complex constitutional questions." (Pls.' Answ. Br. at 33.) But the trial court did not, as it would have in "any other trial," interpret a constitutional provision and measure current legislation against it, while affording the legislature due deference. Here, that would have meant first "develop[ing] the meaning of [] 'thorough and uniform'" and then determining whether Colorado's school finance system "passes constitutional muster," as this Court directed. *Lobato v. State*, 218 P.3d 358, 374–75 (Colo. 2009).

Instead, the trial court began by adopting current education statutes as constitutional requirements. (Ct. Order, Dec. 9, 2011, at 174 ("[T]he standards-based education system . . . constitute[s] the current *legislative specification* of the thorough and uniform system . . . ." (emphasis added)).) The court then relied on Plaintiffs' cost study to conclude state funding is inadequate for all students in every district. (*Id.* at 177, 181.) In doing so, the trial court necessarily compelled a singular remedy for Plaintiffs' claims—increased state funding sufficient to result in universally perfect student achievement. Rather than leaving the legislature any meaningful discretion to "accomplish the purposes of the Education Clause and the Local Control Clause" (*id.* at 182), the trial court committed the judiciary to a future of

enforcing Plaintiffs' preferred school finance system through iterative litigation.[1]

This approach, which Plaintiffs seek to embed in this Court's jurisprudence, upends judicial review. Under the trial court's order, the *legislature* interprets constitutional law, and the *courts* determine how best to implement it. This is not a process of "evaluat[ing] the constitutionality of the public school system," as this Court commanded in 2009, *Lobato*, 218 P.3d at 374; it is a judicial decree that "a better financing system [must] be devised." *Id.* (quoting *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1025 (Colo. 1982)).

The divergence between the proceedings authorized by *Lobato* and the actual proceedings below began with Plaintiffs' own framing of the case. Plaintiffs' original complaint prayed for a declaration "that the Education Clause . . . includes a qualitative mandate." (Pls.' Compl., ¶¶221–22, at 48.)

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[1] Plaintiffs imply the legislature could hire any expert or employ any methodology it wishes, but they will no doubt return to court if the General Assembly accepts an estimate appreciably lower than the $4 billion annual shortfall estimated by their expert. Moreover, the trial court's order invites legal challenges to every new education policy the legislature might adopt. This will slow education reform to the pace of litigation, even as Plaintiffs demand bold action to improve Colorado's schools.

At the time, Plaintiffs asked for a court "to articulate" the constitutional standard of educational quality. (*Lobato v. State*, No. 08SC185, Pls.' Reply Br. at 15.)

On remand, however, Plaintiffs dropped their request for an interpretation of the Education Clause (*compare* Pls.' Am. Compl. at 34–35, *with* Pls.' Compl. at 47–49), instead maintaining the constitutional mandate is synonymous with the General Assembly's education reform statutes. (*E.g.*, Pls.' Proposed Findings & Conclusions at 183.) The trial court adopted this view nearly verbatim (Ct. Order, Dec. 9, 2011 at 174), effectively replacing the Education Clause with statutory standards but refusing to defer to the legislature's "fiscal and policy judgments" about how to meet its own statutory directives. *Lobato*, 218 P.3d at 375.

Plaintiffs have been given "the opportunity to prove their allegations." *Id.* at 374. The trial demonstrated, however, that they seek not a judicial remedy, but to "substitute[] the trial court for the General Assembly." *Id.* at 381 (Rice, J., dissenting).[2]

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[2] Defendants have never asserted *no* Education Clause claim is justiciable. But Plaintiffs seem to embrace the opposite extreme that such claims must *always* be heard. No case law supports this position. That this Court resolved the claims in *Lujan* says little about the justiciability of Plaintiffs' claims

B. The trial court's order decides social policy questions and installs the judiciary as the arbiter of the State's budget.

Plaintiffs seek to assure this Court that "[t]he trial court decided no education policy issues." (Pls.' Answ. Br. at 31.) Yet whether or not it acknowledged doing so, the trial court "venture[d] into the realm of social policy" by picking a side in a debate about the "correlation between school financing and educational quality and opportunity." *Lujan*, 649 P.2d at 1018.

The General Assembly alone must determine, through the political process, what means to employ in establishing and maintaining a thorough and uniform school system.[3] Colo. Const. Art. IX, § 2; *Lujan*, 649 P.2d at

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here; the *Lujan* plaintiffs' narrow equal funding claim did not seek a determination of the adequacy of statewide funding for all students.

[3] And it has done so. For example, SB 08-212, §§ 22-7-1001 *et seq.*, C.R.S. (2012), SB 09-163, §§ 22-11-101 *et seq.*, C.R.S. (2012), SB 10-191, §§ 22-9-102 to -106, §§ 22-11-302, -402, §§ 22-63-103, -202 to -203.5, -206, C.R.S. (2012), and the Public School Finance Act, §§ 22-54-101 *et seq.*, C.R.S. (2012), are all efforts to satisfy the constitutional mandate. In addition to providing equalization funding, the State has created an accountability system that sets high expectations and grades districts on the performance of their students. *See, e.g.*, § 22-7-401, C.R.S. (2012) ("[B]ecause children can learn at higher levels than are currently required of them, it is the obligation of the general assembly, the department of education, school districts, educators, and parents to provide children with schools that reflect high expectations and create conditions where these expectations can be met."); *see also* § 22-7-1002(4)(a) ("To educate students to their full potential, the state must align

1025. Plaintiffs' case, however, depends upon the debatable position that only massive amounts of additional funding will improve performance. (*See generally* Tr. 4969:14–19; 5006:6–5011:13; *see also* Tr. 2904:16–20, 6022:4–7, 21–24; Depo. Desig. Dwight Jones 50:18–20, 163:19–21.) *Cf. Horne v. Flores*, 129 S. Ct. 2579, 2603 (2009) (recognizing "growing consensus in education research that increased funding alone does not improve student achievement"); *see also Lujan*, 649 P.2d at 1018 ("[F]undamental disagreement exists concerning the extent to which there is a demonstrable correlation between educational expenditures and the quality of education.").

By embracing Plaintiffs' view, the trial court required the General Assembly to assume the only way to meet its constitutional obligation is to increase the education budget—even at the expense of other state services. But whether to fund education to the exclusion of other state priorities is a policy choice reserved for the elected branches; it is not a legal question for the courts. The trial court relied on Plaintiffs' estimated $4 billion annual

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the public education system from preschool through postsecondary and workforce readiness."). The trial court ignored that the General Assembly has created and funded a school system that by its own terms provides constitutionally adequate educational opportunities. *See* § 22-54-102(1); § 22-58-101(1)(a), C.R.S. (2012).

shortfall to find that funding is inadequate for *all* students in *every* district.[4] In doing so, the court installed itself as the arbiter of the State's budget but insulated itself from the realities of limited revenue and competing state priorities.[5] Indeed, if the legislature chooses a smaller amount of school funding than Plaintiffs demand—and there is no evidence the legislature *can* allocate more money to K–12 education[6]—the trial court's order will pave the way for a renewed Education Clause challenge.

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[4] The trial court made this finding even though the witnesses at trial represented just 19 percent of districts.

[5] Had the trial court not granted Plaintiffs' motion *in limine*, Defendants would have presented extensive evidence of state financial realities, including disclosed expert testimony about the impossibility of finding significant additional dollars within the current general fund for K–12 education. (*E.g.*, Defs.' 5th Supp. Expert Witness Discls. at 2–4.) Because the court ruled on the motion after full briefing, Defendants cannot understand why Plaintiffs assert that an "offer of proof" was required to preserve arguments about the trial court's erroneous treatment of the *in limine* motion. (Pls.' Answ. Br. at 53.) *See* CRE 103(a)(2) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

[6] Plaintiffs can only speculate that billions more per year can be allocated to public education, and in doing so they ignore stipulated state budget data, constitutional taxing and spending limitations, and the failure last year of a ballot measure to increase revenue for schools. The suggestion that Defendants must prove the impossibility of complying with the trial court's order (Pls.' Answ. Br. at 35) ignores that it is Plaintiffs who brought this case.

This Court recognized early in its existence that "[i]t is the peculiar and exclusive province of the legislature, so far, at least, as the judiciary is concerned, to judge of the necessity or desirability from a political or economic stand-point of each and every act proposed." *In re S. Res. Relating to SB 65*, 21 P. 478, 479 (Colo. 1889). During early statehood, the General Assembly often over-appropriated the revenue it actually received; the resulting "scramble for public funds was becoming so fierce that . . . the revenues of the state might be exhausted in advance of appropriations for the penitentiary, insane asylum, reform school, etc." *Parks v. Comm'rs of Soldiers' & Sailors' Home*, 43 P. 542, 547 (Colo. 1896). But this Court refused to grant budgetary priority to any one state institution; doing so would be "entirely beyond the province of the courts." *Id.*

Plaintiffs acknowledge their desire for increased educational spending faces "[c]ompeting non-education-related fiscal concerns." (Pls.' Answ. Br. at 53.) And they admit that when courts attempt to balance competing budgetary needs, they intrude into legislative policy. (*See id.*; Pls.' Mot. *in Limine* at 6 (requesting exclusion of evidence regarding non-education appropriations).) But the solution is not to measure the General Assembly's real-world policies against a hypothetical world of unlimited resources. The

solution is to defer to a distribution of governmental responsibilities "expressly mandated by the Colorado Constitution." *Lujan*, 649 P.2d at 1025.

"[B]udget formulation and appropriations for public education develop from a collaborative and complementary political process between the two governmental branches constitutionally charged with that task." (*Amicus Curiae* Former Colo. Gov'rs Br. at 6.) Rejecting the school finance system based on Plaintiffs' theory—which ignores "fiscal constraints"—will affect appropriations throughout the state budget. The courts, however, "possess neither the expertise nor the prerogative to make policy judgments." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). Those judgments must instead be entrusted to the politically accountable representatives of the People.

C. Neither law of the case nor stare decisis prevent dismissal.

Plaintiffs understandably hope this Court will invoke the prudential doctrines of stare decisis and law of the case to avoid fully examining the justiciability of the claims litigated below. (Pls.' Answ. Br. at 17–23; Pls.-Intervs.' Answ. Br. at 7–11.) But these doctrines, while important, do not require or even favor upholding the trial court's order.

As an initial matter, neither doctrine applies in light of the posture of this appeal. As explained above, on remand Plaintiffs amended their complaint and litigated questions not yet addressed by this Court. Because stare decisis and law of the case apply only to "actual determinations," those doctrines are inapposite. *People v. Caro*, 753 P.2d 196, 201 n.7 (Colo. 1988) ("Stare decisis 'is limited to actual determinations in respect to litigated and necessarily decided questions.'"); *see also Super Valu Stores, Inc. v. Dist. Ct.*, 906 P.2d 72, 79 (Colo. 1995) (explaining law of the case avoids "reargument of settled issues.").

Moreover, stare decisis applies only to judgments made in *prior* litigation. *See, e.g., People v. Blehm*, 983 P.2d 779, 788 (Colo. 1999) ("[S]tare decisis provides that a court will follow the rule of law it has established in *earlier cases* . . . ." (emphasis added)). This appeal is the latest and perhaps final step in an ongoing case. Stare decisis does not prevent the Court from addressing the justiciability of the claims tried below.[7]

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[7] Law of the case is even less on point. Defendants do not wish to "reargue" this Court's 2009 decision; they wish to apply it. As demonstrated below, Plaintiffs seek an education budget set without regard to the "fiscal constraints" that affect the remainder of the State's spending. (Pls.' Answ. Br. at 39.) If law of the case means that Colorado's elected officials must ignore financial reality, the doctrine must yield to prudence. *See Giampapa v. Am.*

More importantly, however, ignoring what has happened since this Court's 2009 decision would not serve the underlying purposes of stare decisis or law of the case. Stare decisis is meant to "promote[] uniformity, certainty, and stability of the law," *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 644 (Colo. 2005), and law of the case promotes similar interests, *e.g.*, *People v. Roybal*, 672 P. 2d 1003, 1005 (Colo. 1983). But these interests would in fact be undermined if the Court avoided examining the justiciability issues implicated by the proceedings below.

First, Plaintiffs seek to create a novel standard of judicial review for this case and for all future cases challenging state education funding: the "*Lobato* test." (*See* Pls.' Answ. Br. at 37.) Upholding this test will upset this Court's uniform approach to reviewing government actions that do not implicate fundamental rights. *See Lujan*, 649 P.2d at 1022 ("[U]nder the rational basis test, we are obligated to uphold any classification based on facts which can reasonably be conceived as supporting the action."); *see also Lobato*, 218 P.3d at 374 ("We see no reason to devise a different standard of review . . . .").

Family Mut. Ins., 64 P.3d 230, 243 (Colo. 2003) (emphasizing law of the case "neither requires nor encourages courts to support erroneous judgments.").

Second, the trial court's order would invalidate the entirety of the State's education financing system. (Ct. Order, Dec. 9, 2011 at 182.) This system was developed through a combination of state, federal, and local law, and was designed based on the policies chosen by the legislature and the voting public. The court's order, if upheld, will leave these entities and individuals scrambling to find the billions of dollars the court deems necessary to "revise" the State's education funding system. (*Id.*) Far from promoting certainty, the court's order creates immense confusion.[8]

Finally, by discarding the State's school financing system—and, indeed, the entire state budget—the court's order will destabilize state law for decades to come. Plaintiffs and the trial court view *Lobato* as creating perpetual court oversight of the state education system.[9] Under their view,

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[8] It is true that this lawsuit has consumed significant resources. (Pls.' Answ. Br. at 20.) But if relative costs are a consideration, the costs of trial are trifling compared to what has been spent developing the current education finance system and what would have to be spent to conform to a decision in Plaintiffs' favor.

[9] Some states that initially embraced oversight have since abandoned it. *See, e.g., Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002) ("[W]e now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.").

every state budget should be subject to constitutional challenges, month-long trials, and multiple appeals. A less stable arrangement is hard to conceive.

Honoring settled expectations does not mean cementing into this State's jurisprudence a trial court order decided in December of last year. Here, honoring settled expectations means adhering to this Court's historical practice, which defers to the General Assembly's efforts to "fashion[] . . . a constitutional system for financing elementary and secondary public education." *Lujan*, 649 P.2d at 1025. The rules of stare decisis and law of the case do not require upholding the trial court's deeply flawed order.

II. The Trial Court Should Have Applied the Rational Basis Test Directed by this Court, Not a "Single Basis Test" as Plaintiffs Advocate.

Although Plaintiffs maintain the proceedings below were indistinguishable from any other constitutional litigation, Plaintiffs recognize their claims fail under normal standards of review. They therefore argue at length that this Court invented a special "*Lobato* test." This argument ignores the text of *Lobato*, settled law, and economic reality. Under the proper rational basis standard, Plaintiffs' claims fail.

A. This Court affirmed *Lujan*; it did not invent a new test incompatible with *Lujan*.

How much public money is available and what other services the State must fund are questions inseparable from the underlying issue of whether the State's education spending is rational. Given that the General Assembly spends nearly half of its seven-billion-dollar general fund on K–12 education—more than almost all other state services combined—it is unsurprising that Plaintiffs stake their case on the idea that this Court invented a new level of judicial review.[10]

Plaintiffs contend the "*Lobato* test" excuses them from the burden of proving the school financing system is not rationally related to any "legitimate government interest." (Pls.' Answ. Br. at 41.) But this Court held the same test it applied in *Lujan* applies here: "[t]he *Lujan* court engaged in rational basis review of whether the state's system . . . violated the 'thorough

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[10] While Plaintiffs paint Defendants' view of the rational basis test as extreme (Pls.' Answ. Br. at 40), they all but concede they cannot prevail if the State's education funding is considered in light of constitutional taxing and spending limitations and competing state interests. They urge this Court to ignore various corollaries to the law of limited resources: that the legislature must heed "fiscal constraints," that the State must "spend[] on services unrelated to schools," and that "political compromise" necessarily informs democratic budgetary choices. (*See* Pls.' Answ. Br. at 39, 40, 44–45, 54.)

and uniform' mandate. We see no reason to devise a different standard of review in this case . . . ." *Lobato*, 218 P.3d at 374 (internal citation omitted). Plaintiffs also suggest *Lujan* employed different tests for the Equal Protection Clause and the Education Clause. (Pls.' Answ. Br. at 43 n.14.) As this Court said in 2009, however, *Lujan* consistently applied the same "minimally-intrusive standard of rational basis review." *Lobato*, 218 P.3d at 373. Indeed, this Court emphasized in 2009 that "[t]his *rational basis* review satisfies the judiciary's obligation to evaluate the constitutionality of the public school system without *unduly infringing* on the legislature's policymaking authority." *Id.* (emphasis added).

B. A "single basis" test is irreconcilable with rational basis.

According to Plaintiffs, "[c]ompeting non-education-related fiscal concerns are irrelevant under the *Lobato* test." (Pls.' Answ. Br. at 53.) The only rational education funding system, according to Plaintiffs and the trial court, is one that ignores the State's competing funding needs. By its own terms, however, what Plaintiffs call the "*Lobato* test" is both unworkable and unwise; moreover, it violates the holding of *Lobato* itself.

Plaintiffs contend they proved their case because education funding is informed by "available funds" and "political compromise." (Pls.' Answ. Br. at 45.)[11] Tax revenue, however, is limited. The General Assembly must use the political process to determine how much money to spend on the State's competing needs, many of which are in the Constitution. This is not a contemptible activity; it is the very aim of the democratic process. *See, e.g.*, *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 520 (Colo. 1985) (recognizing "the legislature's plenary power to determine the objects and level of support to which the public revenues may be put"); *In re SB 65*, 21 P. at 479 (declaring only the legislature may "judge of the necessity or desirability" of state policy "from a political or economic stand-point"). By creating a test that

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[11] Plaintiffs ignore, however, that the base amount in prior iterations of the school finance act was established by examining what school districts were spending in prior years. *See Lujan*, 649 P.2d at 1012 ("The [authorized revenue base] amount was first established for each district in 1974, and was based in part on the amount each district was then spending per pupil. This spending figure was used by the General Assembly as an estimate of what the educational costs were for each district. However, the [Authorized Revenue Base] has been adjusted upwards, especially in the low spending districts, to more accurately reflect the educational needs of the districts."); *see also* (Tr. 623:1–2). In addition, Dr. Steinbrecher, who helped develop the 1994 Act, explained the legislature was always concerned "that if districts had too much money provided in a new act that it wouldn't be spent wisely, and if they had too little there, there'd be other political considerations." (Tr. 623:3–8.)

ignores how much money is available and what other needs the State must fund, Plaintiffs demand a form of judicial review divorced from the reality of how a legislature does its job. Nothing could be further from "giv[ing] significant deference to the legislature's fiscal and policy judgments." *Lobato*, 218 P.3d at 374–75.

C. Labeling education an "affirmative right" does not place it above all other policy considerations.

To justify a legal test that ignores economic reality and political constraints, Plaintiffs label education an "affirmative right." (Pls.' Answ. Br. at 28.) But the Education Clause is not the only constitutional provision that arguably sets forth affirmative rights.[12] The Colorado Bill of Rights, for example, sets forth numerous affirmative rights, such as open and speedy access to the Courts (Section 6). And an entire article of the Colorado Constitution is devoted to State Institutions, directing that they "shall be

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[12] Nor is the right to a "thorough and uniform" education the only right in the Constitution that has a "qualitative aspect," as Plaintiffs have argued. *See* Colo. Const. Art. XVIII, § 6 ("The general assembly shall enact laws in order to . . . *keep in good preservation*, the forests upon the lands of the state . . . ." (emphasis added); Art. XVI, § 2 ("The general assembly shall provide by law for the *proper* ventilation of mines . . . and such other appliances as may be *necessary* to protect the health and secure the safety of the workmen therein . . . ." (emphasis added)).

established and supported by the state." Art. VIII, § 1. Plaintiffs' vision of affirmative rights ignores the inherent conflict the General Assembly and the Governor face in funding multiple constitutional directives with limited revenue. *See Parks*, 43 P. at 547.

Plaintiffs' "*Lobato* test" trumps not only other affirmative rights; it trumps even fundamental rights. Education is not a fundamental right in Colorado or under the United States Constitution. *Lujan*, 649 P.2d at 1016–17 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 40 (1973)).[13] Under Plaintiffs' test, however, the legislature's decision to spend public money on the many worthy "services unrelated to schools" (Pls.' Answ. Br. at 40), and to allocate more than 45 cents of every state dollar to K–12 education, can never be justified, no matter the reasons. (Tr. 6759:12–15.)

There is simply no basis in the Constitution to hold public education is insulated from real-world constraints. As a textual matter, another category of spending comes closer: Article X, Section 16 exempts from the balanced

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[13] Contrary to Plaintiffs' passing argument to the contrary, *Lujan* did not limit its conclusion to "equal protection purposes." (Pls.' Answer Br. at 42 n.13.) Expressly construing the Education Clause, this Court stated, "On its face, Article IX, Section 2 . . . does not establish education as a fundamental right." *Lujan*, 649 P.2d at 1017.

budget requirement "expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war." And in limiting revenue through TABOR and the Gallagher Amendment, the People of Colorado have necessarily directed the legislature to carefully balance competing constitutional concerns in enacting public policy.

Public education is undoubtedly one of the State's highest priorities. State budgets of the past many years prove this. (*See, e.g.*, Exs. 30119–36.) But education is not constitutionally insulated from fiscal reality, and the rational basis test of *Lujan* and *Lobato* does not demand such unrealistic treatment.

D. Even under Plaintiffs' faulty test, the finance system is rational.

Even if it were the proper legal standard, Plaintiffs' *Lobato* test would require upholding the school finance system on its own terms. The trial court held "the General Assembly has fundamentally linked the Education Clause mandate to the standards-based education system and specifically to student attainment of the academic standards . . . ." (Ct. Order, Dec. 9, 2011, at 173.) Under this test, the school finance system must stand or fall on what the state requires and whether those requirements are being met.

As to the first part of the equation, the state requires accreditation—not absolute achievement. The State Board of Education accredits districts based on the Colorado Department of Education's annual determination of whether schools and districts meet various performance indicators. (Tr. 4636:18–22; Ex. 1003.) *See generally* §§ 22-11-103(1), -206 to -207, C.R.S. (2012). Numerical cut-offs determine whether a school or district is "Accredited with Distinction," "Accredited," "Accredited with Improvement Plan," "Accredited with Priority Improvement Plan," and "Accredited with Turnaround Plan." (Tr. 4658:14–4659:16; Ex. 1003.) Even to receive the maximum score under this framework, schools and districts are not required to attain 100 percent student proficiency on the CSAP exam or universal postsecondary and workforce readiness. (Tr. 4661:15–20, 4662:9–15, 4671:7–8, 6409:22–6410:3, 6413:15–25.)

Second, and most important, the state's public education system is, in fact, meeting the standards the General Assembly has set. The vast majority of Colorado's nearly 2,000 schools and 178 districts (Tr. 4659:17–4661; Ex. 30089 at CDE 050265), including many Plaintiff districts (Tr. 1172:18–1173:9 (Jefferson County); Depo. Desig. Rick Ivers 182:24–183:1 (North Conejos); Exs. 1508 (Sargent), 2605 (Creede), 2701 (Del Norte), 2503 (Moffat 2), 10125

(Sanford)), meet state requirements and are rated as accredited or accredited with distinction.

Rather than evaluating the state's education policy on its own terms, as their "*Lobato* test" purports to do, Plaintiffs urge the Court to adopt a standard of perfection the legislature has not adopted.[14] At the same time, they seek to ignore methods the State has chosen to meet the standards it has actually set. But if Plaintiffs and the trial court are correct that a "thorough and uniform" education equates to current statutory requirements, this Court must conclude that the General Assembly is in fact meeting its constitutional obligation.

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[14] Plaintiffs' assurances that they seek uniform educational *opportunity*, consistent with this Court's interpretation of the Education Clause, *Lujan*, 649 P.2d at 1025, are contrary to the record. The trial court relied on Plaintiffs' estimate of an annual statewide funding shortfall of over four billion dollars to find that *no district* in Colorado is sufficiently funded. (Ct. Order, Dec. 9, at 45 ¶8, 174, 177, 181–82.) To arrive at this number, Plaintiffs instructed their expert to estimate the amount of money needed for every student to meet every state achievement expectation, even though the state does not have this requirement. (Ex. 8303 at 14 & App. A.) Under the proper standard of educational *opportunity*, Plaintiffs cannot prove their case. It is undisputed that in every school district, students are graduating ready for postsecondary education and the workforce.

III. The Guarantee of Local Control Does Not Prohibit the State's Chosen School Finance System.

To further their argument that the State must dramatically increase its funding to districts because the achievement of the State's education goals is the constitutional "minimum" (Pls.' Proposed Findings & Conclusions at 183), Plaintiffs claim the Local Control Clause imbues every state education mandate with a judicially-enforceable price tag (*see* Pls.' Answ. Br. at 57). By accepting this view, the trial court transformed the Local Control Clause from a limit on state involvement in district affairs to a provision that further centralizes funding and instructional control.

The Local Control Clause protects school districts' "discretion over the character of instruction participating students will receive at district expense." *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 943 (Colo. 2004). If the State imposes an obligation that "strips local districts" of that discretion, the district can challenge the obligation. *See id.* But Plaintiffs here have not challenged a State-imposed obligation—indeed, their case depends on constitutionalizing statutory education standards. Instead, they assert a new type of claim: that the State can control local instruction as long as it pays local districts enough.

This Court has held local control permits the State to set education goals while at the same time allowing districts to determine how best to employ state and local funds to meet them. *See State Bd. of Educ. v. Booth*, 984 P.2d 639, 645 & n.9 (Colo. 1999) (upholding a decision by the State ordering a district to approve a charter school application, although the local school board raised "resource concerns," i.e., how much the charter school would receive in per-pupil funding). And while some of Plaintiffs' *amici* seem to argue that the legislature lacks *any* authority to impose educational mandates on local districts (*Amici Curiae* Colo. Assoc. of Sch. Bds. & Colo. Assoc. of Sch. Execs. Br. at 15 n.13 ("[T]he Colorado Constitution does not allow the State to direct local school districts' funds to a specific purpose, no matter how laudable.")), this erroneously presupposes the state has no role in supervising the public education system. *Booth,* 984 P.2d at 646 (the balance between "the local board[s'] interest in exercising control over instruction [and] the State Board's interest in asserting its general supervisory authority . . . must be struck by the legislature").

Moreover, the Constitution expressly authorizes the State "to impose unfunded mandates on local districts to accomplish th[e] goal" of providing a thorough and uniform school system. *Mesa County v. State*, 203 P.3d 519,

528 (Colo. 2009); *see also* Colo. Const. Art. X, § 20(1) (declaring "[a]ll provisions are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or local provisions"). Plaintiffs seek to strike this language from the Constitution by asserting it is "theoretical[]" and "irrelevant." (Pls.' Answ. Br. at 59.) Plaintiffs-Intervenors, meanwhile, assert "[m]andates *may* be constitutional when adequately funded." (Pls.-Intervs.' Answ. Br. at 42 (emphasis added).) But unless this provision of TABOR is rendered superfluous, the State must have power to set education standards while allowing districts to determine how best to meet them, using a combination of state and local funds.

With local control comes local responsibility. The State cannot directly order districts to educate their students in a specific manner. But the State's decision to set high goals and challenge districts to meet them does not "strip" districts of "any discretion over the character of instruction." *Owens*, 92 P.3d at 943. Under Plaintiffs' "*Lobato* test," however, the failure to achieve state standards would always be chargeable to the State and could only be remedied by more funding. It is a rigged test: according to Plaintiffs, the State cannot gain more deference by increasing funding, yet it must continue to increase funding to satisfy the requirement of local control.

It also is a test beyond judicial reckoning. A total of $800 million can still be raised in the 108 districts with mill levy overrides (Tr. 5519:2–13), and this does not include the available taxing capacity of the 70 school districts that have no mill levy overrides. Plaintiffs thus cannot prove local school districts are unable to pursue local priorities after exhausting their local funds, including those available through mill levy overrides. (Tr. 5530:8–10; *see, e.g.*, Tr. 2207:19–25; 2209:11–17.)[15] To avoid this evidentiary gap, Plaintiffs now argue "[t]he correct question is whether there is *enough* local control." (Pls.' Answ. Br. at 57.) It is one thing to ask the judiciary to determine whether a particular education statute strikes a constitutionally impermissible balance between the state's general supervision and local control over instruction. It is quite another to make a political judgment call about whether a given amount of state funding enables "enough" local control under the Constitution.

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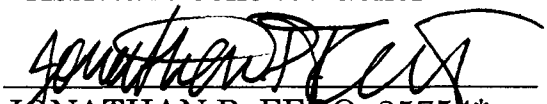
[15] "Thirty-one Colorado school districts are seeking voter approval this year for a combined total of just over $1 billion . . . ." Todd Engdahl, *Colorado districts seeking $1 billion*, EdNews Colo., Sep 7th, 2012, *available at* http://www.ednewscolorado.org/2012/09/07/46563-colorado-districts-seeking-1-billion.

CONCLUSION

The trial proved that whatever the merits of Plaintiffs' policy goals, their legal claims are unfit for judicial resolution. To reach the result Plaintiffs' seek, the trial court was forced to ignore the financial reality confronting the entities Plaintiffs accuse of unconscionable failures, create a new standard of review that lacks a legal foundation, and choose a side in a policy dispute this Court long ago recognized could not be solved in Colorado's courts. The trial court's order should be reversed and the case dismissed.

DATED: November 2, 2012

JOHN W. SUTHERS
Attorney General
DANIEL D. DOMENICO
Solicitor General
FREDERICK R. YARGER
Assistant Solicitor General



JONATHAN P. FERO, 35754*
Assistant Solicitor General
JOHN T. LEE, 38141*
Assistant Attorney General
ERICA WESTON, 35581*
Assistant Attorney General
CAREY TAYLOR MARKEL, 32987*
Special Assistant Attorney General

ATTORNEYS FOR DEFENDANTS-APPELLANTS
*Counsel of Record

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable 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: it contains 5,695 words.

Jonathan P. Fero

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFENDANTS-APPELLANTS' REPLY BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 2nd day of NOVEMBER, 2012 addressed as follows:

David Hinojosa, Esq.
Marisa Bono, Esq.
Rebecca M. Couto, Esq.
Mexican American Legal Defense and Education Fund (MALDEF)
110 Broadway, Ste. 300
San Antonio, Texas 78205

Henry Solano, Esq.
DEWEY & LeBOEUF
4121 Bryant St.
Denver, Colorado 80211

Jennifer Weiser Bezoza, Esq.
345 Eudora St.
Denver, Colorado 80220

Alexander Halpern , Esq.
HALPERN MEACHAM
1790 30th Street, Suite 280
Boulder, Colorado 80301

Kathleen J. Gebhardt, Esq.
KATHLEEN J. GEBHARDT LLC
1900 Stony Hill Road
Boulder, Colorado 80305

Kenzo Kawanabe, Esq.
Terry R. Miller, Esq.
DAVIS, GRAHAM & STUBBS, LLP
1550 Seventeenth Street, Suite 500
Denver, Colorado 80202

Jess A. Dance, Esq.
Zane Gilmer, Esq.
PERKINS COIE, LLP
1900 16th Street, Suite 1400
Denver, Colorado 80202

Rebecca Sopkin, Esq.
2945 Parfet Drive
Lakewood, Colorado 80215

Alyssa K. Yatsko, Esq.
HOLLAND & HART, LLP
555 Seventeenth Sreet, Suite 3200
Denver, Colorado 80201-8749

Jessica E. Yates, Esq.
SNELL & WILMER LLP
One Tabor Center
1200 17th Street, Suite 1900
Denver, Colorado 80202

Manuel L. Martinez, Esq.
Steven J. Perfrement, Esq.
BRYAN CAVE LLP
1700 Lincoln Street, Suite 4100
Denver, Colorado 80203

Mark B. Wiletsky, Esq.
HOLLAND & HART, LLP
One Boulder Plaza
1800 Broadway St., Ste. 300
Boulder, Colorado 80302

Marcy G. Glenn, Esq.
Craig Stewart, Esq.
Clarissa M. Raney, Esq.
HOLLAND & HART, LLP
555 17th Street, Suite 3200
Denver, Colorado 80202

Kyle C. Velte, Esq.
University of Denver
Sturm College of Law
2255 East Evans Ave., Room 365L
Denver, Colorado 80208

Chip G. Schoenberger, Esq.
David Wm. Foster, Esq.
FOSTER GRAHAM MILSTEIN & CALISHER, LLP
360 South Garfield Street, 6th Floor
Denver, Colorado 80209

Jason R. Dunn, Esq.
Michael D. Hoke, Esq.
BROWNSTEIN HYATT FARBER SCHRECK
410 17th Street, Ste. 2200
Denver, Colorado 80202

Patrick T. O'Rourke, Esq.
Jeremy Hueth, Esq.
Office of University Counsel
1800 Grant Street, Suite 700
Denver, Colorado 80203

Walter L. Torres, Esq.
Padres Unidos, Inc.
3025 W. 37th Ave., Ste. 206
Denver, Colorado 80211

James W. Hubbell, Esq.
1822 W. 33rd Ave., No. 105
Denver, Colorado 80211

Alicia L. Bannon, Esq.
Matthew Menendez, Esq.
Brennan Center for Justice
161 Ave. of the Americas, 12th Flr.
New York, New York 10013

John E. Putnam, Esq.
Lala T. Wu, Esq.
KAPLAN KIRSCH & ROCKWELL, LLP
1675 Broadway, Ste. 2300
Denver, Colorado 80202

Jessica Johnson, Esq.
Colorado League of Charter Schools
725 S. Broadway
Denver, Colorado 80209

Michael A. Rebell, Esq.
525 W. 120th St., Box 219
New York, New York 10027

Richard A. Westfall, Esq.
Peter J. Krumholz, Esq.
Matthew W. Spengler, Esq.
HALE WESTFALL, LLP
1430 Market Street, Suite 300
Denver, Colorado 80202

Roger L. Rice, Esq.
META
240A Elm St., Ste. 22
Summerville, Massachusetts 02144

Melissa Hart, Esq.
University of Colorado Law School
425 Wolf Law Building
401 UCB
Boulder, Colorado 80309

Martha R. Houser, Esq.
Bradley Bartels, Esq.
1500 Grant St.
Denver, Colorado 80203

Dustin R. Sparks, Esq.
Law Offices of Brad A. Miller
P.O. Box 2661
Monument, Colorado 80132

William P. Bethke, Esq.
KUTZ & BETHKE LLC
363 S. Harlan, Ste. 104
Lakewood, Colorado 80226

Blaine Myhre, Esq.
BLAIN MYHRE LLC
P.O. Box 3600
Englewood, Colorado 80155

Kathleen Sullivan, Esq.
Elizabeth R. Friel, Esq.
CASB
1200 Grant St.
Denver, Colorado 80203

Martha M. Tierney, Esq.
HEIZER PAUL GRUESKIN LLP
2401 15th St., Ste. 300
Denver, Colorado 80202

Edward T. Ramey, Esq.
Lila M. Bateman, Esq.
HEIZER PAUL GRUESKIN LLP
2401 15th St., Ste. 300
Denver, Colorado 80202

Patricia M. Jarzobski, Esq.
PATRICIA M. JARZOBSKI, P.C.
501 S. Cherry Creek St., Ste. 610
Denver, Colorado 80246

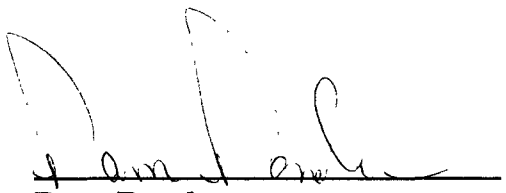
Nancy Elkind, Esq.
ELKIND ALTERMAN HARSTON, P.C.
1860 Blake St., Ste. 420
Denver, Colorado 80202

John H. Tatlock, Esq.
THE HARRIS LAW FIRM, P.C.
1125 17th St., Ste. 1820
Denver, Colorado 80202

Stephen R. Buckingham, Esq.
LOWENSTEIN SANDLER PC
65 Livingston Ave.
Roseland, New Jersey 07068

David W. Stark, Esq.
FAEGRE BAKER DANIELS LLP
1700 Lincoln St., Ste. 3200
Denver, Colorado 80203

Winter L. Torres, Esq.
3025 W. 37th Ave., #206
Denver, Colorado 80211



Pam Ponder