Colorado Supreme Court 2 East 14th Ave. Denver, CO 80203	
Court of Appeals Nos. 11CA1856, 11CA1857 Appeal from District Court, City and County of Denver, Case No. 2011CV4424 *consolidated with* 2011CV4427; Hon. Michael A. Martinez, Judge	⏏ Court Use Only ⏏ Case No. 13SC233
Petitioners: TAXPAYERS FOR PUBLIC EDUCATION, *et al.* vs. **Respondents**: DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION; And **Respondents**: COLORADO STATE BOARD OF EDUCATION and COLORADO DEPARTMENT OF EDUCATION; And **Intervenors-Respondents**: FLORENCE and DERRICK DOYLE, *et al.* *Attorney for Amicus Curiae Colorado Association of School Boards:* Kathleen A. Sullivan, #39223 Elizabeth Friel, #42979 Colorado Association of School Boards 1200 Grant Street Denver, CO 80203 Telephone: (303) 832-1000 Fax: (303) 832-1936 ksullivan@casb.org	

BRIEF OF *AMICUS CURIAE*
COLORADO ASSOCIATION OF SCHOOL BOARDS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

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/s/ Kathleen A. Sullivan

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Amicus Curiae Colorado Association of School Boards ("CASB"), through its undersigned counsel, respectfully submits this Brief of *Amicus Curiae* In Support of Respondents' Douglas County School District and Douglas County Board of Education ("Board of Education"), conditionally tendered with its Motion for Leave to Participate as *Amicus Curiae*.

I. Issues Presented for Review

CASB adopts the statement of the issues in the Court's Order on the Writ of Certiorari and directs this Brief only to those issues directly related to the authority of local boards of education under the Local Control Clause in article IX, section 15, of the Colorado Constitution. Specifically, CASB submits the Local Control Clause deprives Plaintiffs of standing to challenge a local board of education's discrete decisions under the Public School Finance Act (PSFA) (Reframed Issue 1), authorizes local boards to spend monies allocated to and raised by local boards of education (Reframed Issue 2), and reinforces the legislative decision-making authority of local boards of education and entitlement to a presumption of constitutionality (Reframed Issue 3).

II. Statement of the Case

CASB adopts the Statement of the Case as set forth in the Board of Education's Answer Brief.

III. Statement of Facts

For efficiency, CASB adopts the Statement of Facts as set forth in the Board of Education's Answer Brief, drawing focus to the facts describing the local board's extensive public input process that included a taskforce of seven subcommittees and a series of public meetings culminating in the adoption of a voucher program (the Choice Scholarship Program or CSP) serving the School District's resident students as one of approximately thirty educational programming strategies included in the Board of Education's *Blueprint for Choice*.

IV. Summary of Argument

Woven through this case is the constitutional thread of local control. By its original and plain language, the Colorado Constitution entrusts control of instruction to local boards of education. While local control definitively provides local boards of education financial control, local control is about more than just money. Local control ensures educational policy responsive to the local electorate. It guarantees local boards of education policy-making authority free from state intrusion and creates opportunities for innovation.

In Colorado, the State has been pursuing the use of choice as a strategy to improve elementary and secondary education since 1990. Despite the strong state interest in education, this Court enjoined a state-wide voucher program because it

violated the local control authority of boards of education. Here, the Douglas County Board of Education corrected the constitutional infirmities under the Local Control Clause identified in the Court's analysis of the state-wide program. CASB takes no position on the merits of the policy adopted by Douglas County Board of Education and believes that determination rests with the Board and the local voters.

Instead, CASB submits this brief in support of the Douglas County School District and Board of Education for the limited purpose of defending the doctrine of local control that is strongly implicated in this case. Finding that taxpayers, parents and students have standing to challenge a local board's actions under the Public School Finance Act is unsupported by all pertinent authority and would undermine local boards of educations' ability to fulfill their constitutional obligations. Further, local control preserves to local boards of education the control to make expenditures, including in pursuit of innovation. Finally, local control reinforces the legislative decision-making authority of local boards of education and entitlement to the accompanying presumption of constitutionality. Accordingly, CASB urges this Court to follow its 100 years of precedent and ensure local control remains a vital and abiding authority for local boards of education and the communities they serve.

V. Argument

THE LOCAL CONTROL CLAUSE VESTS SCHOOL BOARDS WITH CONSTITUTIONAL AUTHORITY TO DISPENSE MONEYS FOR EDUCATIONAL PURPOSES, INCLUDING THROUGH OPERATION OF INNOVATIVE LOCAL PROGRAMS.

The Colorado Constitution entrusts to local school boards undeniable authority to devise educational programs that meet the needs of their local communities. Colorado Constitution, article IX, section 15 provides:

> 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.*

(emphasis added). While providing the State the general supervisory authority for public schools, the framers crafted the Local Control Clause in an "atmosphere of deep distrust of centralized authority" expressly to "to place control 'as near the people as possible' by creating a representative government in miniature [through locally elected school boards] to govern instruction." *Owens v. Colorado Congress of Parents, Teachers, and Students*, 92 P.3d at 933, 938-939 (Colo. 2004).

The Local Control Clause's core purpose is to ensure that local school boards can tailor local educational programs to local needs without state intrusion. *Owens,*

92 P.3d at 941. In so doing, local control provides school boards "...'with the opportunity for experimentation [and] innovation' in using limited resources to achieve educational excellence." *Lobato v. State*, 304 P.3d 1132, 1144 (2013)(*quoting Lujan v. Colorado State Board of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982)).

1. Local control deprives Plaintiffs of standing under the PSFA to challenge a local board of education's discrete decisions.

Plaintiffs ask this Court to take a dangerous deviation from Colorado's well-established standing jurisprudence and authorize courts to be the administrators of a direct democracy, functioning as the arm of state intrusion at the behest of individual voters to manage allegations of favoritism and unfair funding decisions. Plaintiffs seek standing as taxpayers or as parents and students to challenge a local board of education's decisions under the Public School Finance Act (PSFA), a state statute that distributes monies to school districts and charter schools.[1] To establish standing, plaintiffs must satisfy a two-prong test: 1) that the plaintiffs have suffered an injury in fact caused by the challenged conduct; and 2) that the injury is to a legally protected interest. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004); *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). Because

[1] CASB understands Plaintiffs' standing to bring constitutional claims is not contested.

Plaintiffs fail to establish either prong of the standing analysis as taxpayers or parents and students, their claims made pursuant to the PSFA are not proper for judicial review.

a) Plaintiffs establish no injury in fact.

Plaintiffs seeking judicial review must assert an actual injury. *Wimberly*, 570 P.2d at 539. Such injury cannot be incidental or indirect; the injury (or threatened injury) must result from the conduct of which plaintiffs complain. *Id.*

First, never using the term injury, Plaintiffs assert standing as taxpayers "because the District is spending Plaintiff's tax dollars in violation of Colorado law…." Opening Brief, p. 20. Colorado's permissive taxpayer standing doctrine permits enforcement of matters of "great public concern" such as enforcing civil rights and constitutional duties—the breach of which can be seen to cause non-economic harm to taxpayers' interests to live under a government operating in accord with the constitution. *Colo. State Civil Serv. Employees Ass'n v. Love*, 448 P.2d 624, 627 (1968). Such a civil or constitutional right is simply not at stake in Plaintiffs' claim that the Board of Education violated a statute—the PSFA.

No authority has equated a state finance act with the rights enshrined in the federal or state constitution. Plaintiffs' only authority for the proposition that taxpayers can also challenge a public body's statutory compliance is a single

statement in the final paragraph of one case. Opening Brief, pp. 27-28 (*quoting Dodge v. Department of Social Services,* 600 P.2d 70 (1979)). Yet, Plaintiffs fundamentally construe the authority. The entire *Dodge* decision considers and discusses only plaintiffs' standing to challenge a state agency's actions as violating the constitution. The *Dodge* plaintiffs' claim was not that the agency was violating its authorizing statute, but that the agency was acting outside of the statutory authorization required by the constitution.[2] The Court's thin reference in the closing paragraph of the case does not expand the constitutional concept of injury as matters of "great public concern" to draw courts into policing a public agency's statutory compliance.

While Plaintiffs would have this Court believe that they are asserting a well-established right—that "private parties are entitled to sue school districts for unlawful financial decisions", the remainder of Plaintiffs' cited authority is equally problematic. Opening Brief, at p. 21 (*citing Bd. of Cnty Comm'rs v. Bainbridge,* 929 P.2d 691, 708-713 (Colo. 1996); *Lobato v. State,* 216 P.3d 29, 35 (Colo. Ct. App. 2008) *rev'd on other grounds*; *and Boulder Valley Sch. Dist. v. Colo. State Bd of Educ.*, 217 P.3d 918, 924 (Colo. App. 2009). In *Bainbridge,* the claim

[2] Specifically, plaintiffs' claim was rooted in Colorado Constitution, article V, section 33 that provides, "No moneys in the state treasury shall be disbursed therefrom by the treasurer except upon appropriations made by law, or otherwise authorized by law...."

alleged the school district was receiving improper funds under the funding statute, not that the local board of education was wrongfully expending funds. *Lobato* did feature parent and student plaintiffs but joined with plaintiff school districts, not suing school district defendants. And in *Boulder Valley Sch. Dist.*, the Court of Appeals rejected standing for the individual plaintiffs to challenge state board of education action under the Charter Schools Act, but granted standing to the school district to challenge the Act's constitutionality. 217 P.3d 924-25. Absent any pertinent authority or persuasive policy arguments for expansion of taxpayer standing beyond constitutional claims, Plaintiffs have not carried the burden of establishing standing as taxpayers to bring claims under the PSFA.

Second, Plaintiffs assert an injury as students and parents in ensuring a school district does not unlawfully divert funds. Outside of the more permissive context of taxpayer standing, plaintiffs have the burden of proving an actual injury in fact and establishing that the injury results from the challenged conduct. *See Wimberly*, 570 P.2d 535. In the trial court's two cited cases endorsing parent and student standing (both in constitutional challenges), the plaintiffs alleged an injury from conduct that would result in less revenue being received by the school district in which the plaintiffs resided. *Branson School District RE-82 v. Romer*, 958 F.Supp. 1501 (D.Colo. 1997); *Brotman v. East Lake Creek Ranch, LLP*, 31 P.3d

886 (2001). In *Branson,* plaintiffs challenged a constitutional amendment that would modify distributions from the constitutional state land trust to school districts. Assuming the amendment threatened to result in the school district receiving less money, the Court granted standing to the plaintiff school district to challenge that diminishment and permitted the parent and student plaintiffs to sue also as the intended beneficiaries of the land trust.

Again, in *Brotman,* the Court recognized the appropriateness of parent and student standing as beneficiaries to challenge a real estate transaction by the state land trust if they alleged it would diminish the value of the state land trust. 31 P.3d at 892. However, an adjacent landowner's threatened injury, that the new property owner might seek right of way through the adjacent property, was too indirect and incidental to the land transaction to confer standing to the adjacent landowner. *Id. at* 890-891. Similarly, in *Wimberly,* the plaintiff bail bondsmen's threatened injury of reduced business was too indirect and incidental to constitute an injury conferring standing to enjoin a judge from permitting defendants pre-trial release without full bail. 570 P.2d at 539.

Likewise, Plaintiffs allege only indirect and incidental injuries as their claims relate to the PSFA. Here, unlike the parents and students in *Branson* and *Brotman,* Plaintiffs do not complain that their school district will receive less

revenue as a result of the local board's actions under the PSFA, only that the local board's expenditures violate the statute. Yet, as this Court has recognized, the PSFA sets forth the funding formulas and distribution of those monies, but does not itself require any particular allocation of funds. *Lobato*, 304 P.3d at 1143; C.R.S. §22-54-104(1)(a)("…the amounts and purposes for which [the district's total program] moneys are budgeted and expended shall be in the discretion of the district."). In other words, Plaintiffs allege no conduct by the Board of Education under the PSFA that compromises the revenues the school district will receive.

Instead, Plaintiffs complain about the local board of education's expenditures once the money is received. To allege an actual injury from a local board's expenditures, Plaintiffs must necessarily allege that they have suffered a direct economic loss because of the local board of education's allocation of its funds. Under Plaintiffs' theory, parents and students prove an actual injury merely by asserting that a local board of education's expenditures are not sufficiently in the parents and students' individual interests. Such expansion of the standing doctrine would permit one student or family to sue the school district because they thought the local board of education was spending more money on another student—perhaps a student with disabilities receiving costly comprehensive services in a private facility. Or, the chess club could challenge the local board's

decision to buy the football team new uniforms. Parents of students in one school could challenge the local board's decision to fund a laminating machine for their school, while another school gets a copier. Opening the door to this kind of litigation would supplant local school boards and paralyze both schools and the state courts.

Precisely to avoid converting courts into legislative bodies, the actual injury element of the standing analysis is essential to maintaining the separation of powers. *Ainscough*, 90 P.3d at 855. Without plaintiffs who have suffered an actual injury, the judiciary is drawn into nebulous policy decisions. *Lobato*, 304 P.3d at 1143-44 (*quoting Town of Telluride v. Lot Thirty-Four Venture, LLC.,* 3 P.3d 30, 38 (Colo. 2000)("…courts must avoid making decisions that are intrinsically legislative. It is not up to the court to make policy or to weigh policy."); *see also* Section 3, *infra* (discussing local board's legislative decision making authority). Instead, the standing requirement ensures policy-grounded deliberations are left to elected officials who can be either reelected or replaced and can refine, modify, throw out, or expand such policies consistent with the will of the voters. Plaintiffs have alleged insufficient direct injury as taxpayers or as parents and students to draw the courts into their complaints about the PSFA; they must pursue their remedies at the ballot box.

b) Plaintiffs prove no cognizable legal interest under the PSFA.

To pursue the claim under the PSFA, Plaintiffs also must show a legally cognizable interest created by the PSFA. As they concede PSFA has no express provision creating an interest for parents and students, Plaintiffs have the burden to establish an implied legal interest. Opening Brief, ¶15. To find an actionable implied legal interest under the PSFA, Plaintiffs must establish three factors: 1) they are within the class of persons intended to be benefitted by the PSFA; 2) the legislature intended to create a private right of action under the PSFA; and, 3) an implied private right of action would be consistent with the purposes of the PSFA. *Allstate Ins. Co. v. Palfrey*, 830 P.2d 905, 911 (Colo. 1992). As referenced above, the PSFA creates no such cognizable legal interest for parents and student.

First, the PSFA benefits local boards of education.[3] As this Court specifically found, the school finance system effectuates local control. *Lobato*, 304 P.3d at 1142-43; *Mesa Cnty. Bd. of Cnty. Comm'rs v. State*, 203 P.3d 519, 527-30 (Colo. 2009); *Lujan*, 49 P.2d at 1022-24. Unlike the insurance case cited by Plaintiffs, the PSFA imposes no standards or duties for local school boards' expenditures, so there is no implied intent to benefit parents and students. Instead,

[3] Arguably the State Board of Education benefits from the PSFA also, but as this point does not alter the outcome of this case, CASB does not address it in this brief.

the PSFA specifies that "…the amounts and purposes for which [the district's total program] moneys are budgeted and expended shall be in the discretion of the district." C.R.S. §22-54-104(1)(a). By its terms and this Court's precedent, the PSFA limits those intended to benefit from the Act to include local boards of education and exclude individual parent and student plaintiffs.

Second, by providing an administrative remedy, the legislature has indicated its intent to preclude private rights of action. *Gerrity Oil & Gas Corp. v. Magness,* 946 P.2d 913, 924 (Colo. 1997). Under the PSFA, the legislature conveyed oversight authority—including the ability to revoke funding—to the State Board of Education. C.R.S. § 22-54-115(4).

Third, allowing a private right of action is inconsistent with the purpose of the PSFA and public policy. As discussed above, this Court has recognized the basic rationale of the state-wide school finance system: effectuating local control over public schools. *Owens*, 92 P.3d at 943 (*citing Lujan*, 649 P.2d at 1011). To allow the PSFA then to be converted into a conduit for every parent and student grievance would undermine local boards' ability to make decisions and move forward to keep school districts operating. Plaintiffs' bare assertion that giving parents and students standing to challenge a local board's line-item budgetary decisions is inconsequential to local boards ignores the constitution and 100 years

of case law. As a practical matter, in a school district like Douglas County, affording parent and student standing under this theory—with approximately 58,000 students and a budget of hundreds of pages and thousands of line items[4]—results in staggering numbers of potential plaintiffs and issues. Public policy provides no justification to gut the Local Control Clause from the Colorado Constitution or abandon well-established precedent and every reason to deny standing on Plaintiffs' statutory claim.

2. Local control authorizes local boards to spend monies allocated to and raised by local boards of education, including the right to implement innovative educational programs.

Colorado's constitutional commitment to local control has been unwavering since the birth of this State and represents one of our core and distinguishing values. Since the earliest cases, this Court has ruled consistently that local school boards' right of local control is distinct, superseding even the state's interest in promulgating policy initiatives under the general supervision provision. *Owens*, 92 P.3d at 940 ("stressing the importance of district control of locally-raised funds

[4] The Douglas County School District's Comprehensive Annual Financial Report alone for the 2011-2012 school year was 159 pages and referenced additional individual site based budgets of hundreds of pages. *See* Douglas County School District's website: www.dcsdk12.org/sites/default/files/BusinessServices/cafr/FY%202011-12%20CAFR.pdf.

over and above the legislature's power to guide and implement educational policy."). Control over instruction requires that local boards retain "substantial discretion regarding the character of instruction that students will receive at the district's expense." *Board of Education v. Booth*, 984 P.2d 639, 648 (Colo. 1999). Thus, local control embraces two distinct concepts: control over the finances of the school district and control over the character of the educational programming offered by the school district.

a) Local control ensures local boards make decisions about the cost and character of instruction.

Perhaps unsurprising given the serious deficiencies in current school funding, the more recent cases have highlighted the financial aspect of local control. Clearly, local boards of education have the constitutional right to determine exactly how to allocate funds. *Lobato*, 304 P.3d at 1143; *Lujan*, 649 P.2d at 1023; *Owens*, 92 P.3d at 943; *Booth*, 984 P.2d at 648; *Belier v. Wilson*, 147 P. 355, 356 (Colo. 1915).

But local control is more than just money; it is the real ability of local boards of education to identify the needs of each community and put together programs that address the heart of the issues leading to student achievement. *School Dist. No. 16 v. Union High Sch. No. 1*, 152 P. 1149 (Colo. 1915)(statute requiring a district to pay tuition to another violated local control because "no discretion [was] left in

the board of directors of the district…as to the character of high school instruction the pupils thereof shall receive at the cost of the district."); *Booth*, 984 P.2d at 648 ("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.").

In the only voucher program this Court has considered, the state-wide system violated both the cost and character aspects of the Local Control Clause: 1) the state statute denied local boards of education discretion to allocate funds by mandating local boards spend money supporting student vouchers; and 2) local school boards had no control over the quality and nature of instruction because they had no ability to select or regulate the schools or students eligible for the voucher. *Owens*, 92 P.3d at 937. The Douglas County Board of Education's Choice Scholarship Program (CSP) corrects both of the constitutionally problematic aspects identified in *Owens*.

First, the Board of Education made the determination that it could allocate funds to the CSP program and still meet the school district's overall budgetary needs. In fact, the Board of Education believes it will have sufficient resources to administer the oversight costs of the program and, if necessary, diminish the

program's impact on neighborhood schools."[5] Second, the Board of Education developed specific criteria for the schools eligible to partner for purposes of the CSP and will monitor those schools through administering and scoring student assessments and adhering to financial accounting and federal and state reporting requirements. Here, the School Board has exercised the control missing in *Owens* regarding the cost and character of the instruction provided through the CSP.

Included as part of the right to expend money, local school boards are specifically authorized by law to engage in public-private partnerships, "Any school district has the power to contract with …any natural person, body corporate or association for the performance of any service including educational services...which any school may be authorized by law to perform or undertake." C.R.S. § 22-32-122(1). Within this authority, local boards routinely hire contractors for transportation, janitorial services, and contract with charter schools for educational services. The local board of education's determination of the expenditures and terms of those contracts brings that action under the scope of the Local Control Clause, irrespective of the public/private identity of the contractor. *Booth*, 984 P.2d at 654 (state board directing approval of a charter did not offend local control since the local board still had the opportunity to negotiate the terms of

[5] www.dcsdk12.org/sites/default/files/BusinessServices/Budget_Books/FY%202011-12%20Budget%20Book.pdf at p. 13.

the contract); *Ridgeview Classical Schools v. Poudre School District R-1,* 214 P.3d 476 (Colo. Ct App. 2008)(local board exerted local control through negotiating charter contract); *see also* IDEA, 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.104; C.R.S. § 22-20-103(18)(specifically requiring local school districts to contract with private facilities if the school district's team agrees the instruction is necessary and appropriate for the student).

If, as this Court has found, the framers intended the Local Control Clause to create "local school boards which would represent the will of their electorate", then local control must mean more than the ability of local boards to move some small pieces around. *Owens,* 92 P.3d at 944. Life is very different across Colorado between communities with local school boards serving twelve students in Agate, 114 students in both Kit Carson and Arickaree[6], to approximately 58,000 in Douglas County when this case began. Big systems with multiple layers of administration do not exist in towns without stoplights or communities averaging 26 acres per student. Local control protects the rights of each of Colorado's 178 locally elected boards of education to devise their own community-specific priorities and solutions. And the Douglas County Board of Education faces its own unique challenges. If a local board of education can meet the requirements of

[6] http://www.cde.state.co.us/cdereval/pupilcurrentdistrict

federal and state law and find a way to create a voucher program that permits some of its students to participate in instruction that the local board oversees and believes meets those students' needs, then the local board must be able to craft those programs.

Here, the voters of Douglas County reelected the architects of the CSP to the Board of Education.[7] This is what local decision making through the will of the voters looks like "*free from state intrusion*." *Owens*, 92 P.3d at 935 (emphasis added). A minority of voters should not be able to accomplish through the courts what they could not do in a fair local election. Otherwise, the design of each community's local education programs will be in the hands of many, *except* for the representative elected body charged by the constitution with the control of instruction. With ever shrinking resources, local school boards now more than ever need the opportunity for innovation protected by the constitutional right of local control.

b) State land trust funds do not constrain the local control authority of local boards of education.

Colorado Constitution, article IX, section 3 creates a state land trust as follows, in relevant part:

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[7] *Douglas County School Board Elections Reaffirm Pro-Voucher Stance,* November 5, 2011, http://www.huffingtonpost.com/2011/11/05/douglas-county-school-boa_n_1077532.html.

> The public school fund of the state shall forever remain inviolate and intact; the interest 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 or interest, shall ever be transferred to any other fund, or used or appropriated, except as herein provided…

Per the plain language of the constitutional provision, any monies generated by the land trust are added to the money sent by the state to local school districts. *See also Branson School District RE-82*, 958 F.Supp. at 691-92. In recent years, the school land trust fund income has been less than 2% of school district overall budgets. The language of article IX, section 3 prevents the state education fund from being raided by the legislature or other state agencies for other purposes by specifically requiring the distribution of funds to school districts. But, the Local Control Clause holds equal constitutional weight. Fundamental tenets of constitutional interpretation dictate that two provisions must be read in concert giving meaning to both, so 2% of the overall budget cannot constrain 100% of a local board's right of local control.

Moreover, no precedent holds local control of instruction cannot implicate state funds. In fact, this Court has declined to make legal decisions requiring and based on clean demarcations between the sources of school funding. As this Court held in *Owens*, "…the amount of funding derived from local tax revenues as

compared to state contributions is immaterial to our analysis of the level of discretion the Colorado Constitution confers on local school boards today." 92 P.3d at 943. In *Lobato*, the Court found no material purpose in measuring the costs of education initiatives or tracking expenditures from the source and to the penny in order to determine the balance of control based on the various types of funds expended. 304 P.3d at 1143-44.

Instead, the constitutional framework allows local boards of education the discretion to determine exactly how to spend school district funds to implement the local boards' educational policies. *Id.*[8] The Board of Education's Answer Brief identifies multiple examples of public-private programs accomplished through local boards' fiscal authority. Here, the Board of Education also decidedly retained control over the character of instruction requiring private partners to meet the Board of Education's established standards and assessments. Any reforms to that budget or educational programming should not be accomplished by the state stepping in to determine the appropriateness of the expenditure or program.

[8] Though this Court has permitted under the Local Control Clause state policy initiatives that specifically encumber only state funds, no case law or statute has required such isolation for constitutional purposes. *Compare Craig v. People ex Rel Hazard,* 299 P. 1064, 1067 (1931) (approving statute withholding from the student's district of residence an amount of state funds sufficient to pay the student's tuition and transfer to the district of attendance) *with Lobato*, 304 P.3d at 1143-44.

Whether or not the CSP will actually succeed in achieving the aims of the program is not to be determined by the courts, but is left by the constitution to the Board of Education and its electorate.

3. Local control reinforces the legislative decision-making authority of local boards of education and the entitlement to a presumption of constitutionality that can only be rebutted by proof beyond a reasonable doubt.

Essential to the disposition of this case and to future challenges of locally elected school boards' decisions is this Court's pronouncement of how the presumption of constitutionality applies to school boards' legislative action. The principal question at hand is whether local school boards' legislative action merits the same measure of protection granted other governing bodies' legislative acts. The answer to that question is yes.

a) School boards routinely exercise legislative power.

Legislative action "is prospective in nature, of general application, and requires the balancing of questions of judgment and discretion." *Landmark Land Co. v. City and County of Denver*, 728 P.2d 1281, 1284 (Colo. 1986). Elected officials strike this balance by weighing "broad, competing policy considerations," *Vagneur v. City of Aspen*, 295 P.3d 493, 507 (Colo. 2013) (internal cite omitted), enabling the "people of the community," to "govern its growth and its life," *Baum v. City and County of Denver*, 363 P.2d 688, 697 (Colo. 1961).

Courts have repeatedly and unhesitatingly presumed and affirmed the legislative powers held by locally-elected school boards. *Adams County Sch. Dist. No. 50 v. Heimer*, 919 P.2d 786, 790 n.3 (Colo. 1996) (questioning whether usurping the local school board's role to retain or dismiss teachers would "vest legislative authority in the court of appeals violative of separation of powers principles"); *Fremont Re-1 Sch. Dist. v. Jacobs,* 737 P.2d 816, 819-20 (Colo. 1987) (determining whether a school board improperly delegated its legislative power to school administrators); *Littleton Educ. Ass'n v. Arapahoe County Sch. Dist.,* 553 P.2d 793, 796 (Colo. 1976) (ultimate decisions regarding employment terms and conditions are legislative); *Big Sandy Sch. Dist. v. Carroll*, 433 P.2d 325, 328 (Colo. 1967) (the power to employ teachers and fix their wages is legislative); *Bruce v. Sch. Dist.*, 687 P.2d 509, 510-511 (Colo. Ct. App. 1984)(closing a school is a quasi-legislative action); *Ball v. Weld County Sch. Dist.*, 545 P.2d 1370, 1373 (Colo. Ct. App. 1975) (setting a salary schedule is a legislative action).

Reading legislative power out of these cases to cure this single policy dispute would amputate the legitimate educational policymaking arm of all locally elected school boards' governing authority. If not exercises in legislative power, what are boards' budgets, unified improvement plans, resolutions to seek additional local revenues, and policies instituting programs and defining processes

binding on the operation and administration of the district? If not quintessentially legislative techniques, what are the familiar board undertakings of gathering input and information through community engagement, legal research, logistical investigation and planning, and open public meetings? When boards debate the desirability, design and viability of a proposed educational program to determine the best way to proceed, are they acting as judges? As administrators or employees? Certainly not. They are acting as representative bodies exercising legislative power.

b) The presumption of constitutionality is essential to the entire purpose of the republican form of government and should be applied to the legislative action of local school boards.

The "entire purpose" of the republican form of government is "for a legislature to evaluate competing interests and determine . . . the best course of action," *Landmark Land Co.,* 728 P.2d *at* 1285, so it is imperative that the decisions made by any governing body in its legislative capacity not be subject to judicial override by constituents who believe their ideas should have won the day. Mindful of this danger, in each instance when Colorado courts have found a governing body's act to be legislative, from abortion regulations[9] to zoning

[9] *Urbish v. Lamm,* 761 P.2d 756, 761 & 763 (Colo. 1988) (*citing Pigg v. State Dept. of Highways*, 746 P.2d 961, 967 (Colo. 1987)).

ordinances[10] and to a wide variety of the General Assembly's education policymaking efforts,[11] the will of the people expressed in legislation receives the same presumption: courts presume legislative acts constitutional and will uphold them unless challengers prove the acts are unconstitutional beyond a reasonable doubt. *Lobato*, 304 P.3d at 1142; *Owens*, 92 P.3d at 942. Where, as here, competing interpretations are in play, "If a statute is capable of both constitutional and unconstitutional interpretations, then the constitutional interpretation must be adopted." *Parrish v. Lamm*, 758 P.2d 1356, 1364 (Colo. 1988). So, the presumption does not preclude courts from ultimately declaring a legislative act unconstitutional; it merely prevents such a declaration when the people's will can be executed constitutionally.

This presumption ensures separation of powers, requiring the judiciary to respect the role of legislative authority in the enactment of laws and public policy. *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). "A reviewing court must assume that the 'legislative body intends the statutes it adopts to be compatible with constitutional standards.'" *Mesa County Bd. of County Comm'rs*, 203 P.3d at 527 (quoting *Meyer v. Lamm*, 846

[10] *Holcomb v. City & County of Denver*, 606 P. 2d 858, 861 (Colo. 1980); *Baum v. City and County of Denver*, 363 P.2d 688 (Colo. 1961).
[11] *Lobato*, 304 P.3d at 1141-42; *Mesa County Bd. of County Comm'rs*, 203 P.3d at 527; *Owens*, 92 P.3d at 942; *Booth*, 984 P.2d at 650.

P.2d 862, 876 (Colo. 1993)); *In re Senate Resolution No. 2*, 31 P.2d 325, 330 (Colo. 1933). Like the general assembly, local board of education directors are also elected and take an oath to support the state Constitution and so it follows that they also receive the presumption that they have not passed an unlawful act.

The presumption is a heavy burden that is not easily overcome. *Barber v. Ritter,* 196 P.3d 238, 247 (Colo. 2008); *Holcomb v. City & County of Denver*, 606 P.2d 858, 861 (Colo. 1980). "Speculation that state officials may at some future time act in an unconstitutional manner under color of [the challenged legislative act]" does not suffice. *In re Interrogatory Propounded by Romer on House Bill No. 91S-1005*, 814 P.2d 875, 883 (Colo. 1991). And among all the bases for challenging legislative acts' constitutionality, facial challenges are particularly disfavored. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (U.S. 2008).

Without this robust presumption of constitutionality for legislative action, the incentive to work fervently in the public square to build responsive public policy vanishes, and our courthouses begin sprouting golden domes. This is no less true for school boards' legislative actions. A robust presumption of constitutionality applied in courts of law keeps policy debates in the legislative

arena, freeing courts to focus their expertise on constitutionally infirm government acts.

c) To rebut the presumption of constitutionality, challengers must prove no conceivable set of circumstances may exist that would render a school board's legislative act constitutionally viable.

The courts have employed many formulations of what it means to prove legislative acts unconstitutional "beyond a reasonable doubt." None contradict, but by far the most instructive standard is this: "A statute is facially unconstitutional *only if no conceivable set of circumstances exists* under which it may be applied in a permissible manner." *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo. 2006) (emphasis added); *People v. Montour*, 157 P.3d 489, 499 (Colo. 2007); *Cacioppo v. Eagle County Sch. Dist. Re-50J*, 92 P.3d 453, 463 (Colo. 2004). This standard prompts the parties to provide relevant facts and arguments to the Court by forcing them to engage arguments outside their singular approach to the policy question.[12] No doubt for any public policy decision there will exist some facts and arguments

[12] In contrast, a bare "clear and unmistakable conflict" standard naturally invites plaintiffs to cling to the clear and unmistakable conflict that surely exists when the problem is seen only from their point of view. In application, this lower standard does not assist the courts in sorting the meritorious constitutional claims from the last-ditch efforts of weary political advocates. For example, in Plaintiffs' Opening Brief, pp. 40 and 42, rather than arguing an errant legal analysis, Plaintiffs accuse the Court of Appeals of using the presumption of constitutionality to ignore supported factual findings in order to create a fiction that no conflict exists.

supporting its wisdom and others contradicting it. Balancing competing facts and perspectives in light of the broad swath of societal interests at stake is part and parcel of legislative decision-making; it cannot be successfully replicated in a lawsuit brought by one side of a multifaceted community.

Once the dust settles on a legislative public policy debate, convincing a court to invalidate the resulting legislation on constitutional grounds requires more than the existence of some facts tending to support a challenger's claims, interests, and constitutional interpretations. Rather, to overcome the presumption of constitutionality, challengers must prove *no conceivable set of circumstances may exist* that would render a school board's legislative act constitutionally viable. Colorado's honorable courts have dedicated considerable effort to carefully articulating and prudently preserving that power which most effectively incarnates the will of the people. Out of respect for those efforts as well as the meaningful ongoing legislative work of locally elected school boards across Colorado, the presumption of constitutionality must apply to the legislative acts of school boards. CASB defers to Respondents' Answer Brief for application of the presumption to the CSP.

VI. Conclusion

WHEREFORE, for these and all the foregoing reasons, CASB submits the Authority conveyed to local boards of education by Colorado's Local Control Clause forecloses Plaintiffs' attempt bring claims under the PSFA, endorses a local board of education's expenditure of funds on innovative educational programming, and reinforces local boards' legislative decision-making authority and entitlement to a presumption of confidentiality. On all other matters at issue, CASB defers to the Board of Education's Answer Brief.

Respectfully submitted this 4th day of August, 2014.

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CERTIFICATE OF SERVICE

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