WORD CERTIFICATION: 9,491

COLORADO COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203 DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Honorable Catherine A. Lemon Case No. 07 CV 3538	2008 SEP -8 P 1:25
Appellants: DOLORES HUERTA PREPARATORY HIGH, LAURA MAESTES, DENISE GALLEGOS, and MARITZA MARTINEZ v. Appellees: STATE BOARD OF EDUCATION, and PUEBLO SCHOOL DISTRICT NO. 60, a Colorado municipal corporation,	▲ COURT USE ONLY ▲
William P. Bethke KUTZ & BETHKE LLC 363 S. Harlan, Ste. 104 Lakewood, CO 80226 Phone No.: 303 922-2003 E-mail: wpbethke@lawkb.com FAX No.: 303 922-2878 Atty. Reg. #: 11802 Dolores S. Atencio Dolores Huerta Preparatory High General Counsel 633 17th St. Ste. 1700 Denver, Colorado 80202 Phone: 303 292-6545 Email: DoloresAtencio@msn.com FAX No: 303 292-6546 Atty. Reg. #: 11273	Case Number: 08CA664

OPENING BRIEF

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STATEMENT OF THE ISSUES

A. Whether the intentional refusal to provide any local facility funding to a district charter school, so that school first lacks the most basic facilities and then encumbers more than 20% of state equalized operating funding for facilities, when every other district school received substantial funding, involves a:

- Failure of a charter contract to state the manner in which a district *will* support a school's long-term facility needs, under C.R.S. § 22-30.5-105(2)(c)(II) ("Section 105"), or
- Failure to provide thorough-and-*uniform* schools under Article IX, § 2, of the Colorado Constitution, or
- Impairment of parental public school choice under *People ex rel Vollmar v. Stanley*?[1]

B. Whether the State Board of Education ("State Board") erred in finding no violation of Section 105, and that it lacked the power to find a violation, under *Board of Education v. Booth*?[2]

C. Whether the trial court erred in finding statutory and constitutional

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[1] 81 Colo. 276, 255 P. 610 (1927)("*Vollmar*"), *overruled on other issues, Conrad v. Denver*, 656 P.2d 662, 670 (Colo. 1982).

[2] 984 P.2d 639 (Colo. 1999)("*Booth*").

claims "nonjusticiable," and whether —

- *Adams County School District v. Academy of Charter Schools*[3] permits correction of State Board errors construing statutes, precedents, or its own power?
- *Lujan v. Colorado State Board of Education*[4] permits finding a violation of Article IX, § 2?
- *Lobato v. State Board of Education*,[5] and the trial court erred in finding thorough-and-uniform issues not "justiciable" and that Plaintiffs lacked standing?

D. Whether the decisions in *Vollmar, Lujan, Booth, Academy*, and *Lobato* should be explained or harmonized or, with *Lobato*, disapproved?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an action seeking long-term facilities support, under relevant statutes and the Colorado Constitution, for a public charter school.

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[3] 32 P.3d 456 (Colo. 2001)("*Academy*").

[4] 649 P.2d 1005 (Colo. 1982)("*Lujan*").

[5] 2008 Colo. App. LEXIS 69 ("*Lobato*").

II. STATEMENT OF FACTS

A. Exercise of Parental Authority

Laura Maestas, Denise Gallegos and Maritza Martinez enrolled their children in Dolores Huerta Preparatory High ("DHPH"),[6] a nonprofit corporation and public charter high school of Pueblo School District No. 60 ("the District").[7]

B. Charter Contract Negotiation

On March 14, 2004, the District CFO recommended the District Board of Education ("Board") provide $2,000,000 to DHPH to satisfy Section 105.[8] Four days later, the Board approved $900,000 for DHPH facilities.[9] The proposed charter contract provided:

- permission for DHPH to temporarily use, at its cost, surplus modulars "until a new facility is constructed";[10]

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[6] Record, 07CV3538 ("Rec."), Volume Two ("II") 284 & 287, ¶¶ 3-5.

[7] *See, e.g.,* Rec. II, 289; Administrative Record 08CA664 ("A.Rec."), Folder titled "Exhibits Tendered by JAG," ("I"), Exhibit 25 ("Charter Contract"), 1 & ¶ 13.0 (acknowledging DHPH nonprofit status).

[8] A. Rec. II, Exhibit No. 59.

[9] *See, e.g.,* A. Rec., Folder titled "*Record on Appeal*" ("I"), Notice of Appeal, Exhibit B ("Award") 4, *or* Rec. I, 15.

[10] Charter Contract, ¶ 12.2.

- $900,000 in District funds toward a permanent facility;[11]
- DHPH could seek other benefits of state or federal law;[12] and
- DHPH could "apply to District bond programs … [for] funds."[13]

Then, at the meeting to adopt this contract, the Board struck all facility funding.[14] District counsel explained: "There would not be any capital contribution.... Everything would be intact except for *any single dime* of contribution."[15] Given no choice, DHPH accepted this last-minute decision.

Before the vote was announced, DHPH informed the Board that removing funding was illegal and DHPH would request funds through a Bond Management Team ("BMT") overseeing distribution of a large District bond issue. District counsel and Board members acknowledged the BMT process was open.[16] In August, 2004, the Board again voted to provide $900,000, subject to legal review.

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[11] *Id*, ¶ 12.3 (original text struck).

[12] *Id,* ¶¶ 12.5 & 12.6.

[13] *Id*, ¶ 12.6.

[14] n. 11 & Rec. I, 10.

[15] Rec. II, 295.

[16] Rec. II, 298.

District counsel opined this vote was improper — reasoning rejected in arbitration. But after DHPH proceeded to arbitration, the Board formally rescinded the August resolution.[17]

C. Facility Funding for Other Schools

The District provided other high schools four-to-ten times the space per student as DHPH, and (on average) $3,300,000 from its $98,000,000 bond.[18] The District used that bond for many projects neither in existence nor proposed when the bond passed.[19] The District expended $0 on DHPH facilities. With no local support, DHPH applied for a State grant for water and sewer service, which was denied.[20]

D. Impact on DHPH and Its Students

DHPH initially operated a public school out of trailers without restrooms or running water — staff, students and visitors used the elementary school next-door. For three years DHPH lacked adequate space for safe science and computer labs, a

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[17] *See* Award, 3-5.

[18] *Id*, 8.

[19] *Id*, 6.

[20] Rec. II, 277, ¶ 8.

school library, and teacher meetings and preparation — and lacked proper PE or athletic opportunities. Due to its facility, DHPH lost classroom time, had high noise levels and poor air quality.[21]

Given no other means, DHPH financed a building over 30 years, reducing available operating funds to less than 78% of School Finance Act[22] defined-levels for equitable operating costs of public schools in the District.[23]

III. COURSE OF THE PROCEEDINGS

DHPH first pursued dispute resolution under C.R.S. § 22-30.5-107.5 ("Section 107.5"). The charter contract provisions for nonbinding mediation/ arbitration reach any "dispute [that] should arise in connection with this Agreement."[24] If this is unsuccessful, recourse is to the State Board.

Upon full evidentiary hearing, Judge Coughlin awarded DHPH $900,000 and found "[t]he evidence …clearly established that the students at DHPH have in fact been severely shortchanged." He disapproved the Board —

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[21] *Id*, 276-77, ¶¶ 7-12; 284, ¶¶ 7-10; & 287 ¶¶ 7-10.

[22] C.R.S. §§ 22-54-101–134.

[23] Rec. II, 271-72, ¶¶ 9-15.

[24] Charter Contract 23, ¶ 19.2 .

> acting as if this is a school in … El Paso County. It is not. DHPH is a school in Pueblo School District No. 60 and it is imperative that the School Board … provide for the … facilities [for] DHPH the same as they provide for all the other schools in the district. [25]

The District appealed to the State Board — in the first case heard under Section 107.5 following a full evidentiary hearing. The State Board ruled against DHPH. Plaintiffs timely filed this action. The trial court dismissed the case. Plaintiffs timely appealed.

SUMMARY OF ARGUMENT

The District violated Section 105, when it struck from the charter contract the only section providing long-term facility support. Remaining sections do not pledge the *District* to *any* support, but merely repeat statutes.

No "local control" issue is present, because no instructional issue is implicated in this financial dispute. And local control of instruction has been exercised through a charter contract prescribing instruction at DHPH in detail.

The charter contract and *Academy* do not bar this statutory dispute. The District was put on notice of this dispute and signed the contract knowing DHPH was pursuing this issue. *Academy* concerned standing to pursue certain

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[25] Award, 7-8 & 3.

contract claims. The claim here is *statutory*. The school in *Academy* was not organized as a nonprofit corporation; DHPH is. As such, DHPH has express power to sue. Though Section 107.5 states that State Board charter-contract-dispute-resolution decisions are "not subject to appeal," this establishes a *prerequisite* to certiorari, not a bar. Mandamus properly corrects the State Board's misapprehension of its powers under Section 107.5.

If Section 105 is unenforceable, the Thorough-and-Uniform Clause has been violated. The original intent and plain meaning of that clause establishes an enforceable right. Colorado case law, beginning with *Vollmar* and extending through and after *Lujan*, as well as persuasive authority, supports finding a violation. Further, this case — especially the liberty interests of the parents and the targeting of a politically vulnerable charter school — calls for greater judicial skepticism than the "rational relation" review practiced in *Lujan*.

This case is "justiciable." *Lobato* and trial court misconstrue *Lujan,* and *Lobato* is distinguishable.

The District has unlawfully burdened the parents' exercise of their constitutional right of school choice, as recognized in *Vollmar*.

ARGUMENT

This case was dismissed on the pleadings. A motion that tests the pleadings is only to be granted if the Court is certain the claim in question is without merit, taking all well-pled allegations as true.[26]

I. THE DISTRICT PROVIDED NO SUPPORT FOR THE LONG-TERM FACILITY NEEDS OF DHPH, VIOLATING SECTION 105

A. Statutory Scheme

Following *Lujan*,[27] the Legislature equalized the *operational* funding of Colorado schools.[28] A term used for this equalized "financial base of public education support" is "*per* pupil revenue" ("PPR").[29] Each district is allocated PPR from state and local taxes based on a "count" of students and a mathematical formula. No district is permitted — even with approval of local voters — to raise

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[26] Dismissal tests the "formal sufficiency" of pleadings. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). Allegations are viewed "in the light most favorable to the plaintiff," and the motion "viewed with disfavor." *Id.* "Unless it appears beyond doubt," such motions must be denied. *Id.* (citations omitted throughout).

[27] 649 P.2d 1005 (Colo. 1982).

[28] *Board of County Comm'rs v. Bainbridge*, 929 P.2d 691, 709 (Colo. 1996) ("*Bainbridge*").

[29] C.R.S. § 22-54-103(9.3) & 22-54-104(1)(a) (defining "total program").

more than 120% in PPR.[30] The Legislature has *not* equalized funding for facilities. In response to litigation it created a fund to address severe inequities, principally with district facilities.[31]

A major purpose of school districts is assuring "equalization of the benefits of education."[32] And "fostering equity" in school finance is a goal "of statewide importance."[33] In the Charter Schools Act[34] ("the Act"), the Legislature has assured equitable allocation of PPR between a charter school and district, in detail,[35]and provided limited assistance for charter school facilities.[36] But the Legislature itself has declared these amounts inadequate.[37] Trying to avoid this

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[30] C.R.S. § 22-54-108(3)(b)(I).

[31] *Giardino v. Colorado State Bd. Of Educ.*, Civ. Action No. 98CV0246 (Denver District Court) ("*Giardino*"); Rec. II, 323-329; C.R.S. § 22-54-117(1.5) & (4)(2007) and C.R.S. §§ 22-43.7-101–116 .

[32] C.R.S. § 22-30-102(1).

[33] *Bainbridge*, 929 P.2d at 711.

[34] C.R.S. §§ 22-30.5-101 –517.

[35] *See, e.g.,* C.R.S. § 22-30.5-112.

[36] C.R.S. § 22-54-124.

[37] C.R.S. § 22-30.5-402(1)(b) (Section 22-54-124 funds "not sufficient" to meet charter school facility needs).

type of litigation, the Legislature encourages districts to include charter school facilities in local bond issues and allows charter schools, under circumstances not present here, to appeal to local electors.[38] And districts placing charter schools in district-owned facilities may only charge costs, not rent.[39]

This patchwork has holes. A bond issue may not be attempted for years; may not pass; and may not include charter buildings. And a district may not "deem" surplus space "available" for charter schools.

The final back-stop for assuring equity is Section 105. Each charter contract must include a description of the manner in which a district "will" support a school's long-term facility needs.

Finally, the Legislature has forbidden districts to use contract negotiation (including 11th hour demands) to depart from the statutory scheme for charter school funding. Such efforts are "null and void."[40]

B. The District Violated Section 105

While discussing forms of action, constitutional theory, and "justiciability,"

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[38] C.R.S. §§ 22-30.5-404 & 405.

[39] C.R.S. § 22-30.5-104(7)(c).

[40] C.R.S. § 22-30.5-105(5).

it is easy to lose track of this core issue: did the District violate Section 105's command that the contract with DHPH "specify … [t]he manner in which the school district … *will* support any long-term facility needs of the charter school"? There is no dispute that the sections of the contract struck at the last minute would have satisfied Section 105. The position of DHPH — taken before and as the contract was signed — is that striking this section violated the statute.

The State Board and District attempt to muddy transparent facts by relying upon contract provisions mentioning Qualified Zone Academy Bonds ("QZAB"), E-rate, and school requests to participate in future bond issues. But none of these describes a manner in which the *District will* support facility needs.

First, QZAB and E-rate are creatures of federal law. With QZAB, the IRC grants a tax credit to investors, reducing the cost of school borrowing.[41] Similarly, the Telecommunications Act established subsidized telecommunications for qualified schools and libraries through E-rate.[42] Neither QZAB nor E-Rate is assistance from the District. The IRS provides QZAB. The FCC created E-Rate.

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[41] 26 U.S.C. § 1397E.

[42] 47 U.S.C. § 254(h)(1)(B). *See also, United States v. American Library Ass'n*, 539 U.S. 194, 199 (2003).

And E-rate supports telecommunications, not buildings. Last, the contract states: "DHPH may apply for Qualified Zone Academy Bonds and E-Rate ...."[43] This pledges the District to nothing.

The contract also gives no assurance the District will provide money from future bond issues. It reads:

> The District will notify DHPH of its intent to request a ...bond issue .... Such requests shall be done in accordance with Colorado law .... [T]he parties will follow Colorado law in ... handling such requests from DHPH. DHPH may apply to District 60 bond programs ... to meet future facility needs.[44]

As discussed above, "Colorado law"[45] assures a school of no part of a future district bond issue. And *if* the District proposes a bond issue and denies a DHPH request, the School is left — at its own expense, *if* it can secure agreement from other schools — with submitting a separate question to the electorate. To date, no charter school question has passed and that process is generally viewed as futile.[46] In short, the contract restates requirements of law allowing DHPH to *ask* for future

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[43] Charter Contract, ¶ 12.5.

[44] Charter Contract, ¶ 12.6.

[45] *See* C.R.S. §§ 22-30.5–404 & 405; Argument, I(A).

[46] Rec. II, 280-82.

bond proceeds, but there is no pledge the *answer* will entail *any* assistance. An inchoate possibility that the opportunity just refused may not be refused on some indefinite future date does not describe a manner in which the District "will support" DHPH's facility.

Section 105 is a *separate* command from the instruction that schools may ask for bond funds. When the district provides no bond monies — as happened here — Section 105 still *requires* the contract to state the manner in which the District *will* support the school's facility.

In sum, the District plainly refused to describe the manner of support the statute commands; and the State Board refused to enforce the statute. This straightforward understanding was met below with a blizzard of claims that the statute does not mean what is says, cannot mean this, or is ineffectual. We turn to these next.

II. *BOOTH* AND "LOCAL CONTROL" DO NOT BAR THIS CASE

A. Local Control of "Instruction" Is Not At Issue

Article IX, § 15, of the Colorado Constitution assures "local control" of "*instruction*." *Booth*, invoking Section 15 construed the Act to make charter *contracts* subject to "local control." Thus, the State Board cited *Booth* as the

reason it could not enforce Section 105 — the required term was not "bargained for and agreed to by the parties."[47]

Booth concerned the charter approval and contract negotiation. An approved charter application is the *basis* for a contract.[48] *Booth* found the State Board could issue a binding order to approve an application. The State Board believes this is only permitted because "local control" governs *all* contract provisions. This exaggerates *Booth*. First, *Booth* avoided a constitutional issue by focusing on charter approval. Second, not all contract issues raise the same constitutional concern.

And *Booth* is not the last word. In the school-voucher case,[49] the Court struck down a statute crossing the "local control" line. That law —

> .... stripp[ed] local districts of any discretion over the character of instruction participating students will receive at district expense.[50]

The conjunction of local funding and loss of control over "the character of

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[47] Rec. I, 25, ¶ 13.

[48] C.R.S. § 22-30.5-105(1).

[49] *Owens v. Colorado Congress of Parents,* 92 P.3d 933 (Colo. 2004) ("*Owens*").

[50] 92 P.3d at 943.

instruction" is the line of constitutional demarcation — and is not at issue here. Section 105 — passed well after *Booth* — does not address "instruction." Assuring a modicum of intra-district facility equity through a statute not touching "instruction" does not infringe on *constitutional* local control.

B. Local Control Has Been Exercised

Through the DHPH contract, the District "controls instruction" in detail. Curriculum and methodology; student admissions and discipline; even teacher employment are addressed. And the contract states:

> The mission statement ... of the [DHPH] Charter Application is hereby accepted by the Board ....
>
> The Board agrees to waive the requirement of Board Policy regarding curriculum and Instructional Materials.... DHPH agrees that it will consult with the District prior to making any major changes in its curriculum....
>
> ...[T]he educational programs conducted by DHPH are considered to be operated ... as a part of the District...[51]

In addition, the contract contains an elaborate description — in at least 33 separate subsections — of DHPH's District-approved educational design and objectives.[52] To suggest the District has done anything other than fully exercise

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[51] Charter Contract, art. I, ¶ 4.0(e) & ¶ 17.0.

[52] *Id*, ¶¶ 2(a)–(aa), 4(a)–(f) & 5(c).

constitutional control of instruction at DHPH is groundless. The District has *employed* local control through contract provisions concerning instruction.

In *Littleton Education Association v. Arapahoe County School District,*[53] the Court found that board approval of a collective bargaining agreement did not violate local control, but employed it. As in *Littleton*, the Board here *used* its local control. What remains is a non-instructional dispute. The State Board should not have feared a constitutional limit addressed to instruction when asked to rule on facility inequity.

Booth, properly understood, is not a bar here.

III. THE CHARTER CONTRACT AND *ACADEMY* DO NOT BAR THIS CASE

A. The Charter Contract Does Not Bar This Case

The Defendants argue as if the charter contract were a private commercial contract governed by 19th Century notions that no bargain could be too harsh.[54] But in marked contrast to the private ordering of discrete transactions, this pact

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[53] 191 Colo. 411, 553 P.2d 793 (1976).

[54] *See, e.g.,* Grant Gilmore, THE DEATH OF CONTRACT 44 (1974) ("No legal system has ever carried into practice a theory of absolute contractual liability. Our own system, during the nineteenth century, may be the only one which has ever proclaimed such a theory.")

defines a long-term relationship between public entities, subject to legislative direction — *especially* in finance — and charged with the education of *District* students.

The legislature has defined the priority between finance statutes and charter contracts:

> Any term included in a charter contract that would require a charter school to waive or otherwise forego receipt of any amount of operational *or capital construction funds* provided to the charter school pursuant to … any … provision of law is hereby declared null and void as against public policy and is unenforceable.[55]

It is a small — indeed, inevitable — step from recognizing the supremacy of school finance legislation, to reforming charter contracts to comply with that superior authority. Such reformation was a common activity for 20th Century courts with ordinary contracts.[56] It is by no means out-of-bounds to bring a "contract" between public entities charged with a public purpose into compliance

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[55] C.R.S. § 22-30.5-105(5) (emphasis added). "Capital construction" funds are those for "construction, demolition, remodeling, financing, purchasing or leasing of land, building or facilities used to educate pupils." C.R.S. § 22-54-124(1)(a).

[56] See, e.g., Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law,* 33 NEW ENG.L. REV. 265 (1999).

with law. Here the District improperly forced the School to forego a statutory benefit. The law should be enforced.

Further, the issue here is not a contract contradicting legislation. Rather, the problem is contract omission — striking the section critical to compliance. That problem is less demanding than reformation. A pedestrian principle of contract law states: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."[57] Similarly, a public tribunal may fill gaps while interpreting *and* applying a complex public bargain.[58]

Such "interpretation" is easier here for two reasons. First, all the terms necessary to the District's exercise of "local control" are agreed. Thus, this is a "bargain sufficiently defined to be a [charter] contract." Second — critically —

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[57] Restatement of the Law (2nd) Contracts § 204.

[58] *See, City & County of Denver v. Denver Firefighters*, 663 P.2d 1032 (Colo. 1983); Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 35 (1958) ("finding where the boundaries would have been drawn if the parties ... had drawn them explicitly is" a proper issue for "interpretation and application"). *Compare*, *FOP v. City of Commerce City*, 996 P.2d 133 (Colo. 2000); *Regional Transp. Dist. v. Colorado Dep't of Labor & Employment, Div. of Labor*, 830 P.2d 942 (Colo. 1992).

the missing term is the subject of clear direction. By *law,* the parties, the arbiter, and the State Board know a "term … reasonable in the circumstances" is one describing how the District "will" assist with DHPH's facility. This is not an instructional issue of the *Booth/Owens* ilk. And, the issue is statutory; within legislative competence — not, finally, contractual at all.

There is a further dimension to the District's argument. It portrays this case as if DHPH readily accepted a contract containing no building funding, hid behind a rock for two years, and filed suit. Again: the parties negotiated a contract *including* $900,000. The District removed every "dime"; gave it back; and removed it again. The District invited a post-contract application by DHPH to the BMT, then denied that request. To be sure, DHPH signed the contract — and so did the District, knowing this *statutory* dispute was ongoing.

The contract does not bar this action.

B. The *Academy* Decision Does Not Bar This Case

Academy does not wall off the Act from ordinary judicial enforcement. Rather, *Academy* concerns enforcement of charter school *contracts*. The claims filed there were for breach of contract. And the Court's statement of its holding zeros in on *contract* issues.

> The legislature has made it clear that charter schools do not have standing to sue their superior school districts for disputes arising from implementation of the governing policy provisions *in their charter contracts* ....[59]

DHPH seeks enforcement of a *statute* — Section 105 — and clarification of statutory power under Section107.5. Both issues are statutory; not, finally, contractual.

Further, *Academy* requires a charter contract to be enforceable by *someone* — lest it not be a "contract." The essential message of *Academy* is that power of contract enforcement lies *somewhere*. The position of the State Board, District and trial court is that the State Board and the courts cannot enforce a statute — that this power of enforcement lies *nowhere*. Using *Academy* to betray the reasoning of *Academy* should not stand.

1. DHPH Has the Power to Sue

Both *Academy* and the State Board relate this issue to so-called political-subdivision-standing doctrine. As a matter of *federal* law, the general rule is political subdivisions may not pursue *federal* claims in *federal* court against the state itself.[60] But a state may give subordinate entities "all the powers such a being

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[59] *Academy*, 32 P.3d at 468-69 (emphasis added).

[60] *Williams v. Mayor & City Council,* 289 U.S. 36, 40 (1933).

is capable of receiving," including power to sue.[61] Simply, under federal law powers conferred on subordinate bodies "rest in the absolute discretion of the State."[62] Of course, federalism cases do not apply wholesale to state court adjudication among state entities.

In analyzing the powers the State has given charter schools, there is an critical distinction from *Academy*. There, the school was not a nonprofit corporation. Thus, the Court reasoned from the law of contracts: for a contract to be meaningful, it must be enforceable — either courts or an administrative tribunal must be open to "contract" claims.

Here, DHPH *is* a nonprofit corporation with *express* power to sue. The Act permits charter schools to be nonprofit corporations.[63] The Nonprofit Act gives "every" nonprofit corporation power to "sue and be sued."[64] Thus, when the Legislature allowed charter schools to *be* nonprofit corporations, it gave *those*

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[61] *District of Columbia v. Thompson*, 346 U.S. 100, 108 (1953) (internal quotations and citations omitted).

[62] *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).

[63] C.R.S. § 22-30.5-104(4).

[64] C.R.S. § 7-123-102(1)(a) ("every nonprofit corporation has … the power … [t]o sue and be sued, complain, and defend in its name").

schools express power to sue.

The Legislature *might* have taken with one hand what it gave with the other. But the burden is on the Defendants to show withdrawal of the power to sue to enforce *statutes*. That burden has not been met.

2. DHPH Has Standing to Seek a Declaratory Judgment

In addition, Colorado's Declaratory Judgment Act gives every "person" the power to obtain a declaration of "rights, status or other legal relations."[65] "Persons" are defined to include: "any … corporation *of any character whatsoever.*"[66] *Academy* does not withdraw this power to seek declaratory judgment regarding *statutes*. Neither a nonprofit corporation nor such a claim was decided in *Academy*.

Academy bars a Court from *de novo* contract claims whose merits are for the State Board. It says nothing about statutory (or constitutional) issues.

3. DHPH Has Standing to Seek Certiorari

The State Board treated Section 105 as ineffective and Section 107.5 as conferring no powers. The State Board is not entitled to ignore or "interpret" a

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[65] C.R.S. § 13-51-106.

[66] C.R.S. § 13-51-103(1) (emphasis added).

statute into nothingness. This is an abuse of discretion correctable through "certiorari."[67]

Critically, the statute *Academy* read to bar certain contract claims states: "Any decision of the state board ... shall be final and not subject to *appeal*."[68] But a bar on "appeals" *justifies* certiorari.

Disallowing any "appeal" establishes a *prerequisite* to certiorari: "C.R.C.P. 106(a)(4) ... may not be employed as a substitute for prescribed appellate procedures."[69]

> Courts and other legal authorities have always recognized a distinction between review by common law certiorari and review by appeal ....
>
> ... [P]erhaps most significantly, common law certiorari is generally available only "where no direct appellate proceedings are provided by law."... Thus, review by common law certiorari and that by appeal are ordinarily mutually exclusive....[70]

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[67] *See, Cooter & Gell v. Hartmarx*, 496 U.S. 384, 405 (1990) (tribunal "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law"); *EPRI v. Denver*, 737 P.2d 822, 826 (Colo. 1987) (same).

[68] C.R.S. § 22-30.5-107.5(6).

[69] *Kirbens v. Martinez*, 742 P.2d 330, 333 (Colo. 1987) (citations omitted).

[70] *G-W Development v. Village of North Palm Beach*, 317 So. 2d 828, 830 (Fla. App. 1975) (citations omitted). *See also, Fay v. Noia*, 372 U.S. 391, 436 (1963), *overruled on other grounds Coleman v. Thompson*, 501 U.S. 722 (1991)

If *Academy* reached certiorari, it would be unavailable *both* when appeal was permitted *and* when appeal was *not* permitted. Surely, that proves too much.

The "no appeal" statute has an effect. It bars contract claims and, for example, Administrative Procedure Act ("APA") "appeals"[71] — but not Rule 106(a)(4) certiorari. The absence of "appeal" makes certiorari proper.

4. DHPH Has Standing to Seek Mandamus

Our Rule 106(a)(2) claim is restricted to the State Board misunderstanding of its own power — the false belief that it had no discretion to exercise. Part of the traditional office of mandamus is to clarify power; and, if discretion is misunderstood, return matters to an agency for informed use of well-defined power.[72] For if an agency erroneously believes it lacks power and courts refuse

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("[r]eview on certiorari ...does not provide a normal appellate channel in any sense"); *Allison v. Industrial Claims Appeals Office*, 884 P.2d 1113, 1118 (Colo. 1994) ("[c]ertiorari does not constitute judicial review on the merits").

[71] C.A.R. Rule 3(b)(APA proceeding "[a]n *appeal* permitted by statute from a state agency). *See also*, C.R.S. § 13-4-102(2)(a)-(jj) (listing administrative decisions subject to "appeal" to this Court).

[72] *See, e.g., United States ex rel Chicago Great Western RR Co. v. I.C.C.*, 294 U.S. 50, 61 (1935) ("If ... power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and to hear the case upon the merits.") *I.C.C. v. United States ex rel Humbolt Steamship*, 224

review —

- those subject to the agency's self-imposed impotence are trapped in an incorrect view of the law; and
- the parties *and* the agency are deprived of true agency discretion.

Of course, mandamus will not instruct the State Board to rule in favor of DHPH or award a particular remedy. Rather, under mandamus the Court should order the State Board to reconsider this matter knowing it may decide the merits.

Both certiorari and mandamus flow from the constitutional jurisdiction of District Courts.[73] Legislative attempts to withdraw these writs are disfavored and must be made through a clear and unmistakable enactment.[74] There is no such clear statement here.

IV. THE DISTRICT AND STATE BOARD VIOLATED ARTICLE IX, SECTION 2

The disparities in facilities (and funding for facilities) here, if not

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U.S. 474, 484 (1912) ("if it … deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion").

[73] Colo. Const. art. VI, § 9(1).

[74] *See, e.g., In the Matter of A.W.*, 637 P.2d 366, 374 (Colo. 1981) ("While jurisdiction may be limited by the legislature, no statute will be held to so limit court power unless the limitation is explicit").

remediable under the statute, violate the Thorough-and-Uniform Clause of Article IX, Section 2.

A. The Original Intent and Plain Meaning of the Thorough-and-Uniform Clause Established Enforceable Rights

1. Original Intent

The word "uniform" appears three times in the Constitution of the United States; four in the original Colorado constitution.[75] Both the United States and Colorado Supreme Courts have struck down "non-uniform" statutes — from early days to the present.[76] A nearby 1872 decision struck down a state *education*

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[75] U.S. Const., art. 1, § 8, cl. 1 (taxation) & 4 (naturalization and bankruptcy); Colo. Const., art. VI, § 19 (courts); art. IX, § 2 (public education); art. X, § 3 (taxation); art. XV, § 13 (telegraph regulation).

[76] *See, e.g., Railway Labor Executives v. Gibbons,* 455 U.S. 457 (1982) (bankruptcy law non-uniform); *Washington County Board v. Petron*, 109 P.3d 146 (2005) (county's application of tax non-uniform); *Ochs v. Hot Sulphur Springs*, 158 Colo. 456, 407 P.2d 677 (1965) (tax non-uniform); *Pueblo Junior College Dist. v. Donner*, 154 Colo. 26, 387 P.2d 727 (1963) (same); *Board of Comm'rs v. Dunn*, 21 Colo. 185, 40 P. 357 (1895) (same); *Ex Parte Stout*, 5 Colo. 509 (1881) (act organizing courts non-uniform). *See also, United States v. Ptasynski*, 462 U.S. 74 (1983) (federal tax upheld, on the merits, as uniform); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (state law pre-empted to preserve uniform naturalization law); *In re Senate Bill 9*, 26 Colo. 136, 56 P. 173 (1899) (school district consolidation bill improper special legislation).

statute due to nonuniformity.[77] And Justice Story — and *The Federalist* — saw "uniformity" as a limit on legislation; an enforceable *constitutional* law.[78]

"Uniform" is no less subject to judicial application — nor more to legislative monopoly — with education than with taxes, telegraphs, or bankrupts. Clearly, the Framers thought so. They:

- Considered free public schools an essential part of republican government;[79]

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[77] *State ex rel Stoutmeyer v. Duffy*, 7 Nev. 342 (1872) (exclusion of African-Americans from school not "uniform"). *See also*, *Clark v. Board of Directors*, 24 Iowa 266, 277(1868) (school segregation not "uniform [and] equally operative upon all").

[78] 1 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 957 (1873) ("*Story's Commentaries*") ("Unless ... excises were uniform, the grossest and most oppressive inequalities ... might exist...."); *The Federalist,* No. 36 (Hamilton) 220 (1961) (tax clauses "shut[] the door to partiality or oppression").

[79] *See, e.g.*, *Denver Daily Tribune*, February 14, 1876, 4 ("[T]he most powerful stay of our free government is the spread of intelligence. Free speech, free press, free education are the names of those means by which it is best effected; and perhaps the most important of all of them is the proper education of our youth.... [W]e must make well informed, moral and self-thinking beings of [our children] who ... will be able to appreciate their inherited free institutions, and feel themselves impelled to maintain and preserve them....") (remarks of F.J. Ebert); and Rec. II, 354-60.

- Believed, and told the People, they were creating educational rights;[80] and
- Disapproved unfettered legislative discretion, intending the Constitution — on education — to impose real limits.[81]

Review of the constitutional debates leaves no doubt our Constitution created an enforceable right to thorough-and-uniform public education. To paraphrase Justice Brandeis,

> Those who … [framed our Constitution] believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They

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[80] *See, e.g.*, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION, 727 (1907) ("PROCEEDINGS")("The maintenance of free public schools … is *forever guaranteed*") (*Address to the People*) (emphasis added); Rec. II, 362.

[81] G. Alan Tarr, *series ed.*, REFERENCE GUIDES TO THE STATES CONSTITUTIONS OF THE UNITED STATES, Number 35, Dale Oesterle & Richard Collins, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE 2 (2002) (when the Framers "empower[ed] the legislature with discretionary authority," they limited "how it should exercise its authority, particularly in matters related to education, mining and irrigation"); *Denver Daily Tribune*, March 6, 1876 p. 4. (In a debate on legislative powers in education: "Mr. Bromwell said the argument of the last gentleman amounted to an assertion that the convention … should leave everything to the Legislature. There was no danger that they would be honeyfuggled or whiskyfuggled.... The members of the convention might … as well go home to their constituents, and say that they had finally concluded not to … protect any of their rights....").; Rec. II, 360-61.

valued… [free public education] both as an end and as a means.[82]

2. Plain Meaning

The original proposal brought to the convention called for "thorough and *efficient*" public education operating "irrespective of color, birthplace or religion."[83] The replacement of both "efficient" and a non-discrimination clause with "uniform" was one of the few amendments to the original text.

Uniform connotes not just nondiscrimination, but similarity in the opportunity provided to students. A system of education is *uniform* when it has the "same character, course, plan, laws, etc.; sameness; consistency;"[84] does not "vary …in degree or rate"; and is "applicable to all places, or to all divisions."[85] Plainly, "uniform" schools called into being by the Constitution of 1876 must be

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[82] *Whitney v. California,* 274 U.S. 357, 375 (1927) (concurring opinion), *overrruled, Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[83] PROCEEDINGS, 43.

[84] William Dwight Whitney, series ed., THE CENTURY DICTIONARY OF THE ENGLISH LANGUAGE: AN ENCYCLOPEDIC LEXICON (1889-91) ("CENTURY DICTIONARY"), Part XXIII, 6616 ("uniformity"). *Accord*: Chauncey Goodrich and Noah Porter, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE BY NOAH WEBSTER (1865) 1444 ("[o]f the same form with others; agreeing with each other; conforming to one rule or mode. Consonant.").

[85] CENTURY DICTIONARY, Part XXIII, 6616.

open to all and provide educational opportunities with consistency.

In short, the plain meaning of the Thorough-and-Uniform Clause confirms the Framer's original intent: a strong, enforceable commitment to the right of each young Coloradan to publicly-provided, equitable preparation for life.

The plain meaning of "uniform" cannot be squared with discarding constitutional text. The Thorough-and-Uniform Clause did not create unfettered discretion, it created guarantees the Framers considered basic to republican existence. A constitution is more than what its framers apprehend at the moment of its conception. But "if we would supplant the opinions and policy of our fathers ... we should do so upon evidence so conclusive, and argument so clear, that even their great authority, fairly considered and weighed, cannot stand."[86]

B. Colorado Case Law Supports Finding the Thorough-and-Uniform Clause Violated Here

1. *Vollmar*

In 1927, a group of parents litigated their right to exempt their children from reading of the King James Bible in the local public schools. In the course of

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[86] Abraham Lincoln, *Cooper Union Address* (February 27, 1860), http://showcase.netins.net/web/creative/lincoln/speeches/cooper.htm (accessed 4/15/2008).

upholding the parents' claims, the Supreme Court held: "The parent has a constitutional right to have his children educated in the public schools of the state. *Colo. Const. art. IX, sec. 2.*"[87] This statement of the enforceability of Article IX, Section 2 has never been disapproved. Indeed, *Lujan* cited *Vollmar* with approval for the "inherent civil right" it recognized.[88]

2. *Lujan*

In *Lujan* the Court ruled that the right to education was not violated by failure of the then-current system of school finance to attach a precisely equal amount of money to each student in the State. Despite *Lujan*'s easily-described result, the justices were badly split: 3-1-2-1. Justice Quinn had ruled against the state in *Lujan* as a trial judge, and recused himself. Justices Dubovsky and Lohr dissented. Chief Justice Hodges wrote an opinion finding the state system constitutional. This plurality opinion was joined by two other justices. Thus, the balance, in *Lujan*, lay with Justice Erickson. Justice Erickson's "specially concurring" opinion stated:

The findings and conclusion of the trial judge ... arguably support his

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[87] 81 Colo. at 282, 255 P. 614.

[88] 649 P.2d at 1023.

> conclusion that Colorado's present school financing system does not pass constitutional muster.... *In concurring ... I do no more than to express my opinion that the statutes in issue*, when granted a presumption of constitutionality, *barely meet constitutional standards*.[89]

Since Justice Erickson's vote was essential to a majority, the *Lujan* precedent is limited by his qualifier: *Lujan* does "no more" than hold that Colorado school finance, as challenged there, "barely [met] constitutional standards."[90] For absent Justice Erickson's specially concurring opinion, there was no majority. How this translates into the markedly different circumstances and claims here is debatable; but by no stretch of *legal* imagination is *Lujan* other than a holding that thorough-and-uniform issues call for judicial review on their merits. *Lujan* upheld the school finance system on its merits — "barely."

The legislature understood *Lujan* as a shot across the bow — and promptly reformed school finance. To claim a quarter-century later that a completely different school finance issue can be easily resolved through reliance on scattered

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[89] 649 P.2d at 1026 (emphasis added).

[90] *Compare, Alexander v. Choate*, 469 U.S. 287, 293 and nn. 8 & 9 (1985) (describing the precedential effect of multiple opinions concurring in the judgment and dissenting in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983)); *Petre v. Cardiovascular Consultants*, 871 N.E.2d 780, 792 (Ill. App), *appeal denied*, 879 N.E.2d 938 (Ill. 2007)*27 (applicable precedent drawn from "specially concurring and dissenting opinions").

quotes from Chief Justice Hodges' plurality opinion — and these mutated into jurisdictional bar — is utterly misguided. Even the *Lujan* plurality repeatedly states that the Thorough-and-Uniform Clause creates a legal "mandate.[91] "Mandate" is not the language of non-justiciability — it describes enforceable rights[92] — and expresses how Justice Erickson joined this opinion.

3. Post-*Lujan* Cases

Most cases since *Lujan* recognize that it made a limited, closely divided decision — on the merits. For example, dismissal was refused in two school finance actions brought after *Lujan* — and those cases proceeded to the merits (and were settled).[93] Most important, the Supreme Court has expressly found *Lujan* recognized a constitutional right,[94] and twice found *Lujan* applied "rational

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[91] 649 P.2d at 1017, 1018-19 & 1024-25.

[92] *The Colorado Supreme Court & School Finance: What Guidance Has the Court Provided?*, Presentation to Joint Meeting of the Interim Committee on School Finance & Task Force 3 (Legis. Legal Srv. July 21, 2005)(per *Lujan* the thorough-and-uniform "mandate" imposes enforceable duties), Rec. II, 299-312.

[93] *Hafer v. Colorado State Bd. Of Educ.*, 87CV02216 (Denver Dist. Court) & *Giardino*, 98CV0246 (Denver Dist. Court); Rec. II, 313-322 & 323-29.

[94] *In the Matter of the Title,* 44 P.3d 213, 217 (Colo. 2002) ("*Lujan* did not hold that Colo. Const. art. IX, § 2 created no constitutional right …; in fact, the case stated that article IX, § 2 'mandates the General Assembly to …to establish

relation" review.[95] Putting to one side the grounds for greater judicial skepticism here — discussed below — there are many cases in which rational relation review results in a decision that a statute or practice is irrational.[96] At a minimum, it was improper to dismiss constitutional claims as not "justiciable" when the pleadings made out a stark, unjustified discrepancy in school facilities and finance.

In short, case law since *Lujan* — most notably *Owens* — supports the same conclusion as plain meaning and constitutional history, namely: a greater degree of equity than has been honored here is required in supporting facilities for public schools.

... a thorough and uniform system of public schools'").

[95] *Owens v. Colorado Congress of Parents,* 92 P.3d 933, 941 (Colo. 2004) (In *Lujan* "[*a*]*pplying rational basis review*, we held ....") (emphasis added); *Colorado Dept. of Soc. Srv. v. Bd. of County Comm'rs*, 697 P.2d 1, 38 (Colo. 1985).

[96] United States Supreme Court decisions finding enactments irrational include: *Romer v. Evans*, 517 U.S. 620 (1996); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams,* 457 U.S. 55 (1982); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *James v. Strange*, 407 U.S. 128 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Wheeling Steel v. Glander*, 337 U.S. 562 (1949); *Hartford Steam Boiler Inspection & Ins. v. Harrison*, 301 U.S. 459 (1937); *Louisville Gas & Elec. v. Coleman*, 277 U.S. 32 (1928); *F. S. Royster Guano v. Commonwealth*, 253 U.S. 412 (1920); *Southern Ry. v. Greene*, 216 U.S. 400 (1910); *Gulf, Colorado & Sante Fe Ry. v. Ellis*, 165 U.S. 150 (1897).

C. This Case is Distinguishable from *Lujan*

This case is not *Lujan II* — and, as discussed below, not akin to *Lobato*. Significant distinctions suggest that *Lujan*'s "rational relation" review is not the correct lens for this case — greater skepticism is warranted.

1. Impairment of School Choice

First, as in *Giardino*, a separate constitutionally-guaranteed interest is at stake. There, the plaintiffs relied upon a constitutionally-guaranteed liberty interest in the health and safety of students put in school custody. The trial court accepted this distinction and found a claim for relief stated.[97] Here, the parent-plaintiffs and DHPH plead their mutual interest in school choice, another constitutional liberty interest.

2. "As Applied" Inconsistency with the Legislative Scheme

In contrast to *Lujan* (and most school finance cases) the claim here is aimed at keeping faith with the design created by the Legislature. These claims complement the School Finance Act; they do not seek to overthrow it. First, if

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[97] Rec. II, 328-29. *See also Kinsey v. Preeson*, 746 P.2d 542, 547 (Colo. 1987) (constitutional liberty interest distinguishes *Lujan*; "The presumption of validity of a statute would disappear if the statute impacted on a fundamental right....").

raising more than 120% of PPR is a forbidden inequity, being constrained to less than 80% must be. And where the legislature has tried, in multiple provisions, to enable decent school facilities for charter schools without draining the general fund, a district's calculated effort to undermine legislation deserves a closer look.

Similarly, the Idaho Supreme Court found it could resolve a school finance/facility claim by acting in concert with standards of the State Board of Education:

> We believe that our acknowledgment of these standards appropriately involves the other branches of state government while allowing the judiciary to hold fast to its independent duty of interpreting the constitution when and as required.[98]

Similarly, this case reveals deviation from statutory equalization *and* charter-facilities support to a degree difficult to square with the School Finance and Charter Schools Acts. These "as-applied" rather than "facial" questions concern District, rather than legislative, failings. Thus, separation-of-powers concerns that justify deferential review do not carry the same weight here.

3. Marked Discrepancies in Provisions for School Buildings

Challenges to inequities in school *facilities* have been markedly more

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[98] *Idaho Schools for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 583-84, 850 P.2d 724 (1993).

successful than general challenges to school finance systems. More than one court has rejected an omnibus school finance claim, only to later find facility disparities to be intolerable:

> The quality of ... school facilities ... varies enormously .... There are disparities in the number of schools, their condition, their age, and the quality of classrooms and equipment.... There are schools without libraries, science laboratories, computer rooms, art programs, gymnasiums and auditoriums. But in other districts, there are schools with indoor swimming pools, a domed stadium, science laboratories, television studios, well stocked libraries, satellite dishes, and extensive computers systems.[99]

And here? Students at other Pueblo high schools enjoyed *four-to-ten* times the space as at DHPH until DHPH turned to self-help — mortgaging thirty years of PPR. It does not take educational expertise to understand such discrepancies, nor talents beyond judicial capacity to perceive *non*-uniformity. When discrepancies are patent and directly relate to student opportunities, greater skepticism is warranted.

And even if DHPH performs well (a *complaint* of the District, below) for how many decades can any school resist the gravitational pull of grossly inferior resources?

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[99] *Roosevelt Elementary Sch. Dist. v. Bishop*, 179 Ariz. 233, 877 P.2d 806, 808 (1994), *distinguishing, Shoftstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973).

4. Targeting a Charter School

Last, this case touches a most traditional function of the judiciary — assuring that the vulnerable are not steam-rolled by ill-considered majorities. Charter schools have spawned a broad range of legitimate debate. But the heat in these debates often far exceeds the light — especially locally. Charter schools "created obvious areas of conflict with … school boards, administrators, teacher unions, and local fiscal authorities — *which mostly and often vehemently opposed the effort.*"[100] Simply, creating schools that compete with a system they depend on creates opportunities for invidious local action.[101] Making "uniformity" out of judicial bounds with schools vulnerable to "the grossest and most oppressive

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[100] *Baltimore City Board v. City Neighbors Charter School*, 929 A.2d 113, 115 (2007) (emphasis added). Notably, *City Neighbors* — the only reported charter-school equalization case — found charters vulnerable to local abuses, but charged the state board with policymaking. That court *neither* neglected its duty to enforce the law, *nor* became entangled in policy. Similarly, the Court here can — especially through the Section 105 claim — charge the State Board with determining whether Judge Coughlin's remedy, a more exacting level of "equality," or some other remedy altogether is in order.

[101] *The Federalist*, No. 10, 83 (Madison) ("the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression").

inequalities"[102] disdains not an issue peripheral to the judicial function, but one at its core.

D. Persuasive Authority Supports Real, Though Deferential, Review of School Finance Equity Issues

Colorado law is sufficient to decide this case, but a comment on other jurisdictions is in order. The Defendants (and the *Lobato* panel) divide the case law in stark terms — wise courts refuse to consider school finance issues; foolish courts find themselves hopelessly enmeshed in the business of a super-legislature.

This view substitutes caricature for analysis. To be sure, some courts have found such issues non-justiciable. And a few courts have jumped into ongoing supervision of school finance with both feet. But there is a middle ground. Many courts have ruled for or against school finance plaintiffs on the merits (or *both* for *and* against) *and* exercised authentic, albeit not mechanical, deference. These courts often issue one school finance decision per decade — or less — hardly the "quagmire" imagined by those who disdain constitutional enforcement.[103]

We urge fidelity to Colorado law. And we submit such fidelity will result in

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[102] *Story's Commentaries*, § 957.

[103] *See* Rec I, 176-84 & II, 366-70 (analyzing cases).

precisely the middle course suggested by most cases from other jurisdictions.

V. THE ARTICLE IX, SECTION 2 CLAIM IS "JUSTICIABLE"

Many of the reasons for going beyond "rational relation" scrutiny are also reasons for resisting *Lobato's* — and the trial court's — effort to hammer *Lujan* into a "justiciability" mold. And the Colorado Supreme Court precedents inconsistent with a "justiciability" holding — from *Vollmar* in 1927 to *Owens* in 2004 — are *binding* reasons for not following *Lobato.*

Let us be clear: we take no position on *Lobato's* merits and understand judicial discomfort with that complaint. The *Lobato* plaintiffs allege K-12 funding is inadequate across the board, has not kept pace with intrusive "school reform," and (attacking a Pandora's-box of statutes) violates the Constitution. At points, the *Lobato* plaintiffs seem to question parts of the Constitution itself.

Rather than slog through that complaint on its merits — perhaps using rational-relation deference — the *Lobato* panel held that judges have *no* role under the Thorough-and-Uniform Clause. The vices of this approach include: negating constitutional text; reversing the intent of the Framers; and distorting precedent. It also misapplies federal law and disrespects American traditions of judicial review.

Lobato relies on recent federal "justiciability" holdings. But these doctrines

should not be imported wholesale into state law:

> ... [R]igid tests of "justiciability" breed evasions and legal fictions.... It is not prudent to link a decision declining adjudication to non-textual, self-created constitutional barriers, ... [I]nterpretations are elevated into supposedly essential doctrines of "justiciability." The word itself is superfluous, and the doctrines are unnecessary. Nothing ... calls for reading the formulas used by the United States Supreme Court into a state's constitution.[104]

"Justiciability" is a poor ground for ignoring State constitutional text and history — and precedent.

Further, the Framers knew *Marbury v. Madison*.[105] Then as now, in Colorado as in America, judicial review was an essential check on abuse of political power.[106] And our Constitution was ratified by the People, acting upon the Framers' text and commentary, making the flaw of "justiciability" patent: "To bind the ratifiers to esoteric deductions made long after the fact would make the Constitution an exercise in bait-and-switch, not in the consent of the governed."[107]

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[104] Hans Linde, *Dual Enforcement of Constitutional Norms: the State and the Federal Courts in Governance: Vive La Difference!* 46 Wm and Mary L. Rev. 1273, 1287-88 (2005).

[105] 5 U.S. 137, 1 Cranch. 137, 176-77 (1803).

[106] *Colorado General Assembly v. Lamm*, 704 P.2d 1371 (Colo. 1985).

[107] Daniel Farber, LINCOLN'S CONSTITUTION, 125 (2003).

Sound reasons for disposing of the tradition of judicial review are not present here. The bar for a violation of the Thorough-and-Uniform Clause may be high; it is not beyond all reach. And "uniformity" cannot be squared with the "inexorable zero"[108] of facilities support provided DHPH.

Lobato and the trial court were wrong *and Lobato* is distinguishable. The same grounds that separately distinguish rational-relation scrutiny *and* cases that construe *Lujan* support justiciability.[109] Further, the narrow and discrete claim here is a near-polar opposite of the *Lobato* plea to throw public education into judicial receivership. In the language of "justiciability," this case is "discrete and manageable" (where *Lobato* is sprawling and entangled). Treating claims that are manifestly different as if they were identical is one more vice of "justiciability."

The holding in *Lobato* does not keep faith with Colorado precedents. But it is an understandable response to an overly-ambitious, omnibus complaint, entirely distinguishable from this case.

VI. THE "SCHOOL CHOICE" CLAIM IS SOUND

Charter schools are public schools of choice. They do not normally use a

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[108] *Teamsters v. United States*, 431 U.S. 324, 342 n. 23 (1977).

[109] Argument, IV(B)(3) & (C)(1)-(4).

geographic catchment area, relying on parents who select the school due to unique curriculum or other distinctive features.

The Supreme Court has repeatedly found, in cases over eight decades, that a parent's right to direct the education of their child is "fundamental."[110] This may be the oldest fundamental civil right in our case law. Our Supreme Court, in *Vollmar*, recognized this as a right exercised *within* public education.[111] Thus, the District's adverse action burdened parents and students who are exercising a right to enter this public school of choice.[112] When individuals who are exercising such

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[110] *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest ...of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court.") (plurality opinion), 530 U.S. 77 (Souter, J., concurring) & 530 U.S. 95 (Kennedy, J., dissenting); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("*Pierce*"). ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.") *Meyer v. Nebraska,* 262 U.S. 390 (1923) ("*Meyer*") (prosecution of private school teacher for teaching German found unconstitutional); and cases cited at Rec. I, 185.

[111] *See, Vollmar*, 81 Colo. at 282, 255 P. at 614 ("The parent has a constitutional right to have his children educated in the public schools of the state.... He also has a constitutional right ...to direct, within limits, his children's studies. The [State] ... cannot make the surrender of the second a condition of the enjoyment of the first.").

[112] *See* n. 21.

a right — a right resented by many in conventional public education — are singled out for significant unfavorable treatment (that is, poor facilities or an education funded at more than 20% below an "equalized" level) judicial intervention is warranted.

As to standing: the right of teachers or a school to offer certain instruction and of parents to have their children enjoy that instruction are conjoined and traditionally enforced by schools, teachers *or* parents. In the seminal cases such rights were enforced by a teacher (*Meyer*) a school (*Pierce*) and, in Colorado, parents (*Vollmar*). *Meyer* makes the essential point, upholding: "[Meyer's] right thus to teach and the right of parents to engage him so to instruct their children...."[113] Without each party being able to protect the rights in question, those of the other may be sacrificed.

Given unmistakable legal interests in school choice, this case asks whether it is acceptable to create a public school choice, then discriminate in funding to render that choice "second class." This impairment is distinguishable from *Vollmar* — less direct, more insidious — but impairment nonetheless.

The Court should follow *Vollmar*. Plaintiffs have stated a kindred claim.

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[113] 262 U.S. at 400.

CONCLUSION

The State Board and District argued, and the trial court held, that dismissal preserved separation of powers. But *separation* of powers is ironic here. Defendants' plea and the trial courts ruling accomplish a *concentration* of power in the local school board, to the exclusion of: (1) Section 105's command that a district provide support for charter school buildings — a standard passed pursuant to (2) the Thorough-and-Uniform Clause; (3) the constitutional power of the Court to issue Rule 106 writs,[114] as well as (4) the duty of the Court to find and apply the law;[115] (5) the executive power of the State Board to "general supervision" of public education[116] and, pursuant to that (6) the power, under Section 107.5, of the State Board to resolve disputes between charter schools and districts. As defendants and the trial court have it, there is no power distributed among the branches of state government, because the state is impotent — the school district is all. This extreme concatenation flows from the deceptively modest power to

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[114] Colo. Const. art. VI § 9(1).

[115] *Marbury v. Madison*, 5 U.S. 137.

[116] Colo. Const. art. IX, § 1.

"control instruction."[117] And so the mantra that we must not have inconvenient lawsuits interfere with the Legislature becomes code for stripping the Legislature of authority and negating a statute already passed.

As importantly, charter schools exist in part for the very purpose of discomfiting the traditional public school system. This effort to create genuine options in public education will be sadly diminished if systematic financial discrimination is allowed to put charter schools at permanent financial disadvantage. There is no reason to believe Sections 105 or 107.5 were passed to create such second-class public schools. And if the Court finds that there is no remediable statutory violation, this is in turn a marked and dangerous departure from any constitutionally-acceptable concept of thorough-and-uniform schooling.

The judgment below should be reversed and this matter remanded for proceedings on the merits consistent with this Court's opinion and mandate.

CERTIFICATE OF WORD COUNT

By my signature below, I certify that the number of words in the body of the final form of this petition (excluding caption, signature block and certifications), as counted by WordPerfect 12, is correctly stated in the caption.

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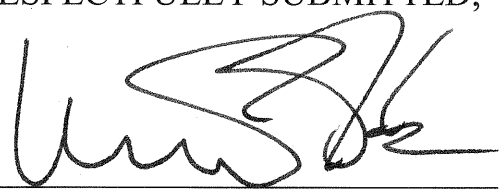
[117] Colo. Const. art. IX, § 15.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

This is to certify that the foregoing OPENING BRIEF was served by being emailed and placed in United States Mail, First Class, postage pre-paid this 8th day of September, 2008, addressed as follows:

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