WORD CERTIFICATION: 5,264

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	FILED IN THE COURT OF APPEALS STATE OF COLORADO 2008 DEC 17 P 1:15 CHRISTOPHER T RYAN CLERK COURT OF APPEALS
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

REPLY BRIEF

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SUMMARY OF ARGUMENT

There is no "local control" issue in this case, because constitutional local control was fully exercised through approval of the instructional elements of the charter contract — as this Court recently recognized in *Ridgeview Classical Schools v. Poudre School District R-1* ("*Ridgeview*").[1]

There is no "adequacy" issue. If an adequacy/equity dichotomy is applicable to school finances claims, this case lies on the "equity" side of the line. Thus, given the terms of the Supreme Court's grant of certiorari in *Lobato*,[2] this case is justiciable.

The statute was violated. The District provided, as admitted by its attorney, "no single dime" of long-term facility support. It thus violated a statute that requires the charter contract to state how a district "will" provide such support.

The statute is enforceable. The *Academy*[3] ruling is limited, by its terms, to issues of contract "implementation." Here the issue is violation of a statute. Thus,

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[1] 2008 WL 5006526 (Colo. App.)(November 26, 2008)

[2] *Lobato v. State Board of Education*, 2008 Colo. App. LEXIS 69, *certiorari granted.*

[3] *Adams County School District v. Academy of Charter Schools*, 32 P.3d 456 (Colo. 2001)

if the State Board has jurisdiction over statutory issues, the writs of certiorari or mandamus sought here lie outside the *Academy* holding that no "appeal" is permitted. Certiorari and mandamus are not "appeal." If, on the other hand, statutory issues are outside State Board jurisdiction, then *Academy* does not apply at all. In addition, whether one reasons from the express authority charter schools are given to sue and be sued *or* from the necessary implications of the statutory "nature" of charter schools, it is clear that the enforcement of the statute is authorized. The only alternative is to judicially repeal the statute and license abuses of the "vastly superior bargaining position" that, *per Ridgeview*, is held by school districts.

The issue of "uniformity" is justiciable. *Lujan*[4] applied rational relation review, as the Supreme Court has repeatedly stated. Rational relation review means a case is justiciable. Again, if *Lobato* raises "adequacy" issues that may not be justiciable, while *Lujan* raises "equity" issues that are, this case lies on the *Lujan* side of that distinction. If anything, the unique facts of this case — including the "vastly superior bargaining power" of school districts, and the tendency of districts to exhibit unjustified hostility to charter schools and school

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[4] *Lujan v. Colorado State Board of Education,* 649 P.2d 1005 (Colo. 1982).

choice[5] — calls for greater judicial care in reviewing "uniformity" issues applied to charter schools.

ARGUMENT

I. THERE IS NO LOCAL CONTROL ISSUE IN THIS CASE

At the very core of the defense arguments in this case lies a notion of "local control." Yet "local control" in a *legal* or *constitutional* sense has no bearing on the proper outcome of this matter.

The defense argues that the General Assembly had no authority to prescribe the terms of facility finance for local charter schools because "local" money is at issue. It argues that *Board of Education v. Booth* ("*Booth*")[6] bars the State Board from any effective power here — on the principle of "local control." Its "political question" and "political subdivision" and "justiciability" arguments — though ironically phrased at times in terms of respect for the General Assembly or State Board — boil down to the proposition that whatever log-rolling or horse-trading takes place at the local level, there is no possibility of any statutory or

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[5] *Baltimore City Board v. City Neighbors Charter School*, 929 A.2d 113 (Md. 2007).

[6] 984 P.2d 639 (Colo. 1999).

constitutional violation. If there were, "local control" would be forfeit and untold horrors would unfold.

Yet neither defendant deigns to join the core "local control" argument — that local control was fully exercised when the local school board approved a charter contract that (whatever its other flaws) articulated in explicit and undisputed detail the instructional characteristics of Dolores Huerta Preparatory High (DHPH). Indeed, the Colorado Supreme Court in a closely analogous case rejected a local control argument precisely because local approval of a contract constituted the *exercise* of local control, not its loss. Neither defendant bothers to cite or discuss *Littleton Education Association v. Arapahoe County S2chool District,*[7] though that case is unquestionably good law and clearly holds that no legitimate issue of "local control" is present in such circumstances. Through their silence, defendants implicitly concede that they have no answer to *Littleton Education Association* and that local control is not in legitimate dispute or jeopardy here.

Further, our Constitution does not announce "local control" as a free-floating notion bereft of any boundaries. What the constitutional text grants is

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[7] 191 Colo. 411, 553 P.2d 793 (1976).

local control "of instruction."[8] This limiting phrase is the key that unlocks the *Booth* decision, as explained in *Owens v. Colorado Congress of Parents.*[9] In *Booth*, the Court made it clear that approving a charter application upon order from the State Board would not violate the Constitution *because* the parties still needed to negotiate a charter contract. Any residual instructional concerns of the local board could still be addressed in that contract negotiating process, leaving a sphere for local control (of instruction). In *Owens* this point was sharpened. There, the legislature had required that local funds be sent to private schools and left no role for the local board in approving or disapproving of the curriculum of pedagogy of such schools — the local school board, under that statute, lost control over "instruction" — instruction funded with local dollars.

Here, of course, the facts present a refinement present in neither *Booth* nor *Owens*. The local board approved a charter contract that fully describes "instruction," but in the approval process left a finance and facility question hanging between the parties. Thus, local control *of instruction* has been exercised. It follows, under *Owens*, that there is no *constitutional* question of local control

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[8] Colo. Const., art. IX, § 15.

[9] 92 P.3d 933 (Colo. 2004).

implicated to any degree in the issue of whether the Pueblo School District No. 60 (the District) has or has not provided appropriate support for a permanent DHPH facility. To be sure, local money *may* be implicated. But *Owens* renders that irrelevant when the money is not connected to an *instructional* question.

There is a further variation on this theme. Defendants point out, accurately, that the "contract" in this case contained *both* the District's approval of all aspects of instruction at DHPH *and* the District's refusal to provide any support whatsoever for DHPH's long-term facility needs. The power to deny the application (or refuse a contract), the Defendants say, contains within it the power to defy the General Assembly's efforts to assure funding or facility equity for charter schools. DHPH, they suggest, must take the bitter with the sweet — the District's statutory noncompliance together with its instructional approval. This court has recently disposed of precisely this sort of argument in *Ridgeview* . There, the district also rewrote an apparently finished charter contract at the eleventh hour. There, the district also approved the school's instruction in elaborate detail, but insisted on financial concessions the school viewed as contrary to statute. There, the school also signed the contract, with a clear protest that the statute was being violated. This court found:

> Reading the Charter School Act as a whole, we conclude that the General Assembly has recognized that there is a natural tension between the charter school and the school district. It has further recognized that the school district is the conduit through which all of the public funding for the charter school — local, state, and federal — must pass, resulting in the school district having a vastly superior bargaining position....
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> ...
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> ... The circumstances of this case are distinguishable from those in *Owens*. Here, ... the district retains significant control over the educational program of the school. The charter contract is required by statute to include detailed descriptions of the school's goals, objectives, performance standards, education program, economics, governance and operation, and employment policies.... The contract itself addresses these areas and more.... Thus, the district exerts extensive local control over the school's educational program through the contract itself.
>
> The funding statute provisions discussed herein, and our disposition of this case, require only that the district fund a charter school ... [comparably to] the other schools in the district. In our view, the funding requirements effectuate the balance between the state's constitutional authority to set educational policy and a school board's constitutional authority to control education at the local level as envisioned by our state constitution....[10]

There is no "local control" issue. And once the smoke and mirrors of "local control" are penetrated, there is no defense for the District's abusive conduct.

II. THERE IS NO "ADEQUACY" ISSUE IN THIS CASE

The defense labors to cast this case as one concerning the quality or

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[10] 2008 WL 5006526 (Colo. App.) (November 26, 2008) at 5 & 8-9.

character of instruction at DHPH — an issue of educational "adequacy." This is not only a straw man, it is a pure invention of the defendants. DHPH's argument, from the beginning, has been that the District failed to provide appropriate long-term facility support for this high school, under the law, particularly when compared to the support it was providing other high schools. This has been, from the beginning, an issue of statutory compliance and fairness *vis a vis* other schools, not a quasi-educational-malpractice claim. There is both a statutory and constitutional element to the claim, but both focus on fairness in funding and support for school facilities, not quality of instruction.

It may be appropriate to remark, here, that the often touted distinction between "equity" claims and "adequacy" claims seems to us questionable. First, it is difficult to disentangle these two strands of school finance. The State argues that finance and quality of education have nothing to do with each other. Really? Does the State actually propose that a public school system could run on $0? Once we get past the overheated rhetoric, the State's real point is that exactly how finance translates into quality public education is a much-debated topic. This is correct, and what mathematical factors should be used for, say, local cost-of-living, or district size, or at-risk populations, are clearly for the legislature.

But for the defense to rely on that debate here is a little like a criminal defendant charged with first degree murder claiming that he not be prosecuted because there are legitimate debates about the boundaries of the criminal law — with regard to, say, gambling or regulation of alcohol. There are certainly legitimate debates on educational finance and equity, but *no one* the defense has or can cite argues in a favor of allocating $0 to school buildings or conducting an entire school in trailers with no bathrooms. At some point, quantity *becomes* quality. Where that point lies is debatable. And zero lies well beyond that point.

But put aside the "policy" debate — it is not, after all, the source of any *legal* claim these plaintiffs make. *Legally*: The statute requires that districts provide "support" for charter school facilities. So perhaps we should call this a "support" claim. The constitution requires a "thorough and uniform" system of public education. So perhaps we should call this a thorough-and-uniform claim. The extra-constitutional, extra-statutory classification of claims as concerning "equity" versus "adequacy" does not seem to us significant when measured against the actual words used in our statutes and constitutions. That is, the terms used by academics in the effort to discuss dozens of different States and the different laws and constitutional provisions in those States may have *academic* value. But it is

doubtful such terms should guide this Court's analysis. Colorado's Framers, after all, and the Colorado General Assembly gave us other specific words and phrases that we, as lawyers and judges, should work with in a *Colorado* case.

That said, *if* one still wishes to make an adequacy/equity distinction, this is an *equity* case. And that, alone, distinguishes the *Lobato* decision.[11] We discussed *Lobato* at some length in the Opening Brief and will not repeat that discussion here. But since that Brief, the Supreme Court has granted certiorari in *Lobato* and framed the issue it perceived as follows:

> Whether the court of appeals erred in holding that claims regarding educational quality and adequacy of school funding brought pursuant to article IX, section 2 of the Colorado Constitution (the Education Clause) present nonjusticiable political questions.

If this is the issue presented by *Lobato*, then *Lobato* — without regard to its fate in the Supreme Court — has no bearing here.

III. THE STATUTE WAS VIOLATED

The defense again recites a series of irrelevancies as forms of long-term facility support. Provisions of the federal tax code are, again, not support provided by a Colorado school district. It is true that the District permitted DHPH

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[11] *Lobato v. State Board of Education*, 2008 Colo. App. LEXIS 69, *certiorari granted.*

to move (at DHPH expense) two very-used District modulars for DHPH use. But this was explicitly classified as for *temporary* use. The statute requires *separately* that Districts provide for the "start-up"[12] and "long-term"[13] facility needs of an approved charter school. The trailers were for start-up,[14] not permanent use. It is also true that the DHPH may plead for support from any future bond issue, should one pass — and the local board may decline.[15] The defense even turns to hypothetical forms of support it could have provided (but didn't). What significance musing about support *not* provided is supposed to have is not clear. The truth is as clear as the scratched out portions of the contract — *no* long term facility support in any form was provided. In the candid words of the District's

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[12] C.R.S. § 22-30.5-105(2)(c)(I).

[13] C.R.S. § 22-30.5-105(2)(c)(II).

[14] Administrative Record 08CA664, Folder titled "Exhibits Tendered by JAG," Exhibit 25 ("Charter Contract") ¶ 12.2 (trailers for use "until a new facility is constructed").

[15] Indeed, the District approved a bond/mill levy for the November 4, 2008, election that did *not* include DHPH — precisely because it now had a building. That building, of course, comes at a cost approaching 30% of DHPH's operating funds or "PPR," a point discussed at greater length in the Opening Brief. Thus, absent a remedy here most students at DHPH will be deprived of the benefit of the state-defined level of "equalized" operating funds for their entire school career.

counsel: "There would not be any capital contribution.... Everything would be intact except for *any single dime* of contribution."[16] Zero equals zero.

Last, again, the defense insists on butchering the plain language used in the statute. The statute requires —

> A contract between a charter school and the chartering local board of education ... shall specify ... (II) The manner in which the school district ... will support any long-term facility needs of the charter school.[17]

The defense wants to read "the manner in which the school district *will* support" as if the word "manner" excuses turning "will" into "will not." The same level of integrity would allow one to turn "black" into "white." "Support" is not "no support"; "will" is not "will not."

When the District elected to provide DHPH with $0 in long-term facility support, the statute commanding the District to state in the contract how it "will" provide long-term facility support was violated.

IV. THE STATUTE IS ENFORCEABLE

The defense argues at some length that *Academy*[18] is indistinguishable and

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[16] Record, 07CV3538, Volume Two 295 (emphasis added).

[17] C.R.S. § 22-30.5-105(2)(c)(II).

[18] 32 P.3d 456 (Colo. 2001).

makes this matter not justiciable. First, *Academy* repeatedly describes its holding as focused on suits over "implementation of the governing policy portions of the charter contract" — this precise phrase is repeated no less than four times in the key portion of the decision.[19] This case is not about "implementation" of *any* portion of a charter contract — the problem is what is *missing* from that contract, though *required* by statute. Something is going on here that was not before the *Academy* Court.

A clue lies in the more interesting issue of whether this matter ever belonged in front of the State Board under Section 107.5.[20] It may or may not be that the scope of Section 107.5 is precisely co-terminus with the holding in *Academy* — the language of the statute and that of the holding are somewhat different.[21] Let us assume, first, that the matter was properly before the State

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[19] 32 P.3d at 468-69.

[20] C.R.S. § 22-30.5-107.5.

[21] The dispute resolution statute reaches "*any* disputes that may raise between a charter school and its chartering school district *concerning* governing policy provisions of the school's charter contract ...." C.R.S. § 22-30.5-107.5(1) (emphasis added). The scope of this section seems, in fairness, ambiguous — that is, it *could* reach statutory disputes "concerning" charter contracts and to that degree go beyond *Academy's* holding on disputes over "implementation" of charter contracts.

Board, and then turn to the possibility that the State Board proceeding was superfluous.

Assuming this statutory violation was properly before the State Board, both the statute and *Academy* clearly state that State Board decisions are not "subject to appeal."[22] The *holding* of *Academy* clearly applies to a breach of contract claim (the actual issue before the *Academy* Court) and would arguably apply to any claim that would turn contract issues brought to the State Board into a *de novo* claim in court. And at times, the *Academy* court uses "judicial review" as a synonym for the forbidden "appeal."

But as to the highly limited actions plead under Rule 106, *Academy's* statements on the limits of the judicial role are pure dicta — and, indeed, such writs are *neither* an appeal *nor* judicial review on the merits.[23] The *Academy* court did not have before it, and did not rule upon, a Rule 106(a)(4) certiorari action or a Rule 106(a)(2) mandamus action — and certainly did not do so on a statutory, rather than contractual, issue.

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[22] C.R.S. § 22-30.5-107.5(6).

[23] *Allison v. Industrial Appeals Claims Office*, 884 P.2d 1113, 1118 (Colo. 1994)("Certiorari does not constitute judicial review on the merits"); *Bovard v. People*, 99 P.3d 585, 593 (Colo. 2004) (same).

As to certiorari, we will simply repeat that the ordinary rule is that the absence of appeal *justifies* certiorari. To turn Section 107.5 into what Defendants wish would require that the statutory statement "not subject to appeal" be changed to "not subject to appeal *nor Rule 106(a)(4) certiorari.*" We respectfully suggest that this over-reads the statute and creates a contradiction — a statute that would ordinary support certiorari is transformed into its opposite without any support for that conclusion in the statutory text. Indeed, to negate *constitutional* writs, the statute should be unmistakably clear — which it is not.[24]

As to mandamus, the question is a simple one: Did the State Board misunderstand its power? Plainly, the State Board believed its power to address the statutory issue was constrained by concepts of "local control." For all the reasons discussed above, that was an egregious error. If we are correct that "local control" is not in jeopardy here, then mandamus lies *not* to instruct the State Board how to rule, but to inform it that it could, contrary to its belief, exercise discretion.[25] Reading *Academy* as if it anticipated and predetermined this refined

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[24] *In the Matter of A.W.*, 637 P.2d 366 (Colo. 1981).

[25] *Compare, Moore v. United States*, 555 U.S. ___ (2008) (*per curium*) (District court's belief that it lacked discretion under sentencing guidelines was erroneous and could not be re-characterized as an exercise of discretion).

application of mandamus jurisdiction is, with respect, utterly implausible.

Now, let us take the opposite assumption. If the State Board's jurisdiction is limited to "implementation of the governing policy portions of the charter contract," then this case falls outside that jurisdiction entirely,[26] and *Academy* is not a barrier. The statute *Academy* interpreted, Section 107.5, does not even apply. Thus, the issue becomes whether DHPH has the ability to file declaratory judgment to enforce Section 105.[27]

First, the defense insists there must be explicit statutory authority to sue, not just a statutory implication. This is wrong in every possible way. First, there *is* explicit authority to sue. Charter schools are authorized to become nonprofit corporations, which have always had express authority to sue.[28]

Since charter schools that elect to organize as nonprofit corporations have *express* authority to "sue and be sued," the State then says such express authority (even outside *Academy*'s concern for State Board finality) is not enough. The

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[26] This, of course, is the *Academy* language, and *not* the statutory description of the State Board's jurisdiction. *See n.* 20, *supra.*

[27] C.R.S. § 22-30.5-105(2)(c)(II).

[28] C.R.S. §§ 22-30.5-104(4) & 7-123-102(1)(a).

legislature can't just say it grants a power to sue; it has to say it really, really grants the power to sue.

Putting that to one side, the State cites (among others) *Romer v. Fountain Sanitation District*[29] for the proposition that instead of explicit authority to sue one should attend "not [to] ... the claim asserted, but ... the nature of the political subdivision."[30] Before turning to the nature of charter schools, it may be well to quote the *Fountain* decision:

> [A] political subdivision of the state necessarily possesses implied authority to carry out powers expressly conferred upon it by the Colorado Constitution or by statute.... Thus an exception to the general [nonjusticiability] rule is recognized when subordinate political subdivisions are constitutionally or by statute granted express *or implied* authority to file a civil action ....[31]

Note that the *Fountain* decision does *not* require express 'right-to-sue" language — a clear implication from the nature of the entity will do. So, are charter schools *expressly* or *impliedly* granted authority to enforce limitations on school districts imposed by *statute*? To answer this question, the State says we

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[29] 898 P.2d 37 (Colo. 1995).

[30] Answer Brief, p. 24.

[31] 898 P.2d at 40 (citations omitted, emphasis supplied).

should look through the lens of the "nature" of charter schools. In other words, what matters is the pragmatic question of whether suing over particular issues is congruent with the statutory purposes of the public entity. On that point, the Charter Schools Act says:

> It is the obligation of all Coloradans to provide all children with schools that reflect high expectations and create conditions in all schools where these expectations can be met....
>
> ...[T]he best education decisions are made by those who know the students best ... and, therefore, ... educators and parents have a right and a responsibility to participate in the education institutions that serve them....
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> In authorizing charter schools, it is the intent of the general assembly to create a legitimate avenue for parents, teachers, and community members to implement new and innovative methods of educating children that are proven to be effective and to take responsible risks and create new and innovative, research-based ways of educating all children within the public education system. The general assembly seeks to create an atmosphere in Colorado's public education system where research and development in developing different learning opportunities is actively pursued.[32]

According to the State, then, we should ask whether it is consistent with this legislatively-defined "nature" of charter schools to allow a district to evade statutes requiring certain "support" for an approved school? Is Section 105 a dead

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[32] C.R.S. § 22-30.5-102(1)(a), (c) & (3). And if the purposes of the "sued" entities are relevant, the State is charged with providing "uniform" public schools, Colo. Const., art IX, § 2, and school districts are created "for the equalization of the benefits of education throughout the state." C.R.S. § 22-30-102(1).

letter, outside State Board jurisdiction *and* unenforceable? Is no support at all acceptable? Is it truly appropriate for a court to announce the repeal of Section 105(2)(c)(II) and call it "nonjusticiability"? The last question is, of course, rhetorical. But in truth, the Defendants here ask the Court for nothing less.

In short, if the question is not a matter of reading and applying statutes, but of issuing a pragmatic judgment on whether a certain kind of lawsuit fits with the "nature" of a certain kind of public entity, then the correct answer is as clear as one could ask for: DHPH *must* have standing to enforce Section 105.

Thus far, we have divided this question into two parts. One: if the State Board had jurisdiction, does *Academy's* reading of the finality clause in Section 107.5 preclude even certiorari and mandamus — actions that were not before the *Academy* court? Two: if the State Board lacked jurisdiction (because the issue is statutory and not contractual), do general notions of standing of public entities negate any ability of a charter school to enforce legislation assuring fair and decent treatment of charter schools?

But it is worth remembering that the Defendants don't just want particular answers to two questions. They literally want it both ways. They want not just for there to be no *judicial* relief, but also no possibility of *administrative* relief. This

flatly contradicts *Academy* — which insisted that a charter school had to have a remedy *somewhere*. And it is worth re-stating what this Court recently observed:

> Reading the Charter School Act as a whole, we conclude that the General Assembly has recognized that there is a natural tension between the charter school and the school district. It has further recognized that the school district is the conduit through which all of the public funding for the charter school — local, state, and federal — must pass, resulting in the school district having a vastly superior bargaining position....[33]

Absent some remedy, no provision of the Charter Schools Act that attempts to correct for this "vastly superior bargaining position" is safe from local shenanigans.

Either by instructing the State Board that it sold its own power short, *or* as an initial judicial matter the statute *must* be enforceable.

V. THE ISSUE OF "UNIFORMITY"IS JUSTICIABLE

As we have already indicated, on a continuum from "adequacy" claims to "equity" claims, this is unmistakably an "equity" case. As a preliminary matter, we should state that we have made no claim of any description under federal law. We *have* made reference to the "rational relation" test commonly used under the federal Equal Protection Clause for the simple reason that this is the test applied

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[33] *Ridgeview*, 2008 WL 5006526 at 5.

by the *Lujan*[34] court to the "equity" or "uniformity" claim that was before it. In addition, the Colorado Supreme Court has at least twice held that *Lujan* was an exercise in "rational relation" scrutiny[35] *and* explicitly held that *Lujan* recognized an enforceable constitutional right.[36] And, of course, in other contexts the Colorado Supreme Court has repeatedly recognized that a constitutional requirement of "uniformity" is enforceable.[37]

The point is elementary. If the rational relation test (or something like it) applies, *then the claim is justiciable.* Rational relation scrutiny is incompatible with "nonjusticiability."

Again, that the Supreme Court's grant of certioari in *Lobato* is expressly

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[34] *Lujan v. Colorado State Board of Education,* 649 P.2d 1005 (Colo. 1982).

[35] *Owens,* 92 P.3d at 941 (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) (same).

[36] *In the Matter of the Title,* 44 P.3d 213, 217 (Colo. 2002).

[37] *See, e.g., 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).

limited to issues of "adequacy and quality" strongly suggests that it views such claims as potentially distinguishable from the fully justiciable "equity" claims heard in *Lujan*. Since this case concerns "uniformity" far more than "thoroughness" (assuming one can parse a single constitutional clause that finely) — it lies on the *Lujan*, not *Lobato*, side of the spectrum. It is thus justiciable.

That said, we have also set out at some length reasons for going beyond a rational-relation-like test in this case. Without unduly repeating these points, we would note that this court's recent *Ridgeview* case seems on point with the Maryland Supreme Court decision in *Baltimore City Board v. City Neighbors Charter School.*[38] Both decisions recognize the inequity in bargaining and tendency to conflict in the school-district-charter-school relationship. 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.*"[39] This dynamic is a clear reason for enhanced judicial skepticism.

At the same time, *City Neighbors* suggests a remedy that avoids either the

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[38] 929 A.2d 113 (Md. 2007).

[39] *Id* at 115 (2007) (emphasis added).

State Board or the courts becoming enmeshed in financial detail. There, the Maryland State Board of Education was faced with multiple declaratory petitions presenting a host of financial issues. Rather than render itself incompetent, that Board articulated guidance for charter schools and local boards on comparable funding, and then remanded the matter to the locals to apply that guidance in better defining their financial relationships. This matter — involving a far more discrete dispute over one aspect of funding — should simply be remanded to the District itself (by either the State Board or the trial court — and on either the statutory or constitutional claim) with an instruction to either restore the funds struck from the contract *or* otherwise *mutually* determine what would constitute financial support for the now-standing DHPH long-term facility reasonably comparable to that provided other district schools.

Third, and last, neither Defendant cites nor distinguishes *People ex rel Vollmar v. Stanley*.[40] While the briefs sneer at the rights of parents, no serious argument is mounted that would overcome *Vollmar*. So we repeat: that charter

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[40] 81 Colo. 276, 255 P. 610 (1927), *overruled in part, Conrad v. Denver*, 656 P.2d 662, 670 (Colo. 1982)

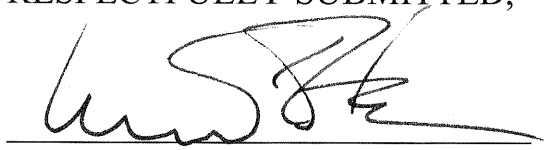
hostility to a charter school and abusive negotiation.

The decision below should be reversed.

CERTIFICATE OF WORD COUNT

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

RESPECTFULLY SUBMITTED,



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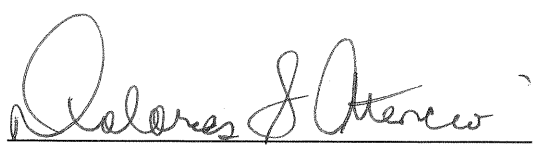

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