

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p style="text-align: center;"><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p>
<p>Plaintiffs: ANTHONY LOBATO, as an individual and as parent and natural guardian of TAYLOR LOBATO and ALEXA LOBATO; <i>et al.</i>, and</p> <p>Plaintiff-Intervenors: ARMANDINA ORTEGA, as an individual and as next friend of her minor children S. ORTEGA and B. ORTEGA, <i>et al.</i></p> <p>v.</p> <p>Defendants: THE STATE OF COLORADO; <i>et al.</i></p>	
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<p>PLAINTIFF-INTERVENORS' OPPOSITION TO DEFENDANTS' MOTION FOR DETERMINATION OF QUESTIONS OF LAW PURSUANT TO COLO. R. CIV. P. 56(H)</p>	

I. INTRODUCTION

In Defendants' Rule 56(h) motion filed on February 25, 2011, they seek thirteen questions for determinations of law. Much of Defendants' questions have already been addressed by the Supreme Court of Colorado in a prior appeal in this case, *Lobato v. State*, 218 P.3d 358 (Colo. 2009). Defendants misconstrue the law with other requests, or prematurely seek determinations that require factual findings. A few of Defendants' requests are unobjectionable to Plaintiff-Intervenors; however, Defendants often urge the Court to go beyond the bare language of these determinations, reading in additional criteria, all of which Plaintiff-Intervenors oppose. Plaintiff-Intervenors, entitled to all favorable inferences, urge the Court simply to follow the Supreme Court's instructions in *Lobato v. State*, 218 P.3d 358 (Colo. 2009), and other relevant cases. In support, Plaintiff-Intervenors state as follows:

II. BACKGROUND

Plaintiff-Intervenor parents and their minor children, who are "at risk," low-income, and English Language Learner students enrolled in lower property wealth school districts in Colorado, challenge the constitutionality of the public finance system in Colorado, seeking injunctive and declaratory relief against the current inadequate and irrational school funding scheme. *See* Plf-Intvs.' Am. Compl. in Intervention ("Complaint") at 4-5. Plaintiff-Intervenors seek relief under article 9, § 2 of the Colorado Constitution, because the State's inadequate funding bears no rational relationship to its constitutional duty to fund a "thorough and uniform" system of free public education. *Id.* at 18. While the State has continually raised standards, defined "postsecondary workforce readiness" for all Colorado public school students, and implemented accountability measures, it has failed to provide the funding that would permit low-wealth districts to meet these standards. *Id.* at 14-15. Additionally, through accountability measures, low-wealth districts that cannot bring their students to meet the rigorous State standards will see even greater strains on their resources. Plaintiff-Intervenors also seek relief under article 9, § 15 because "Defendants have stripped local communities and their taxpayers of their ability to exercise meaningful local control of their educational programs" by severely underfunding capital construction in low-wealth districts. *Id.* at 18.

III. STANDARD

Colorado Rule of Civil Procedure 56(h) allows "a party [to] move for determination of a question of law." Only "[i]f there is no genuine issue of any material fact necessary for the determination of the question of law, [may] the court . . . enter an order deciding the question." COLO. R. CIV. P. 56(h). "The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *W. Elk Ranch, LLC v. United States*, 65 P.3d 479, 480-81 (Colo. 2002) (applying summary judgment standards to a Rule 56(h) motion); *accord Henisse v. First Transit, Inc.*, 220 P.3d 980, 985 (Colo. App. 2009), *rev'd on other grounds*, 247 P.3 577, 579 (Colo. 2011) ("The nonmoving party is entitled to all favorable inferences."). As Defendants admit, Rule 56(h) applies

only to nondispositive claims. Motion, at 2 (“The purpose of Rule 56(h) is to allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment)” (citing *Matter of Bd. of County Comm’rs of County of Arapahoe*, 891 P.2d 952, 963 n.14 (internal citation and quotation marks omitted))). Thus, any questions that rely on the resolution of factual issues are inappropriate for resolution at this time.

IV. ARGUMENT

This case previously went before the Supreme Court on justiciability and constitutional interpretation questions. In *Lobato*, the Supreme Court opined on both topics and instructed this Court very specifically as to how to proceed, stating:

The plaintiffs are entitled to the opportunity to prove their allegations. To be successful, they must demonstrate that the school finance scheme is not rationally related to the constitutional mandate of a ‘thorough and uniform’ system of public education. The trial court must give significant deference to the legislature’s fiscal and policy judgments. The trial court may appropriately rely on the legislature’s own pronouncements to develop the meaning of a ‘thorough and uniform’ system of education. If the court finds that the current system of public finance is irrational, then the court must provide the legislature with an appropriate period of time to change the funding system so as to bring the system in compliance with the Colorado Constitution.

218 P.3d at 374-75.

The Supreme Court further stressed that the judiciary has “an *obligation* to evaluate the constitutionality of the state’s public school financing system.” *Id.* at 363 (emphasis added). It held that the claims in *Lobato* are justiciable and that the plaintiffs “are entitled to the opportunity to prove their allegations.” *Id.* at 374. Without limiting the claims, the Court noted that they include:

. . . substantive claims under [article 9, § 2;]

. . . the PFSA base funding amount and statutory increases are based on “historical compromise,” as opposed to a rational determination of the amount it would cost to implement the “thorough and uniform” mandate or the cost of providing an education that meets the goals mandated by education reform efforts[;]

. . . the current funding levels do not allow students the opportunity to meet the standards and objectives established in education reform legislation[;]

. . . funding for underserved student populations and capital construction is insufficient and irrationally dependent on local property taxes[; and]

. . . the state's public school financing system is unconstitutionally irrational because it prevents the district[s] from implementing the education clause mandate at a local level.

Id. There is no question that these issues are justiciable and appropriate for resolution on their facts. Any attempt to dispose of these claims here is inappropriate not only under Rule 56(h), but also under the law of the case.

The Supreme Court further resolved certain issues of constitutional construction and how to look at procedural amendments to the Colorado Constitution. In rejecting Defendants' argument that "Amendment 23, put in context, sets the constitutionally minimum level of state funding required by the education clause," the Supreme Court set an example of how to construe procedural amendments to the Colorado Constitution for this Court to follow.

The Supreme Court held that Amendment 23, a procedural provision merely

prescribes minimum increases for state funding of education. It was not intended to qualify, quantify, or modify the 'thorough and uniform' mandate expressed in the education clause Consequently, the Amendment 23 mandate relates solely to a minimum level of funding. It neither relates to nor concerns the 'thorough and uniform' mandate in the education clause

Id. at 376. That is, the Supreme Court found no direct conflict in the language of the Education Clause and Amendment 23 and therefore held that Amendment 23 was not intended to modify the Education Clause:

While the Blue Book accurately explains that Amendment 23 "sets a minimum increase in funding," nowhere does it refer to the education clause, or the words "thorough," "uniform," or "adequate." . . . Proponents did not suggest that the amendment would suffice to fund the minimum level of educational opportunities to all students as required by the education clause.

Id. at 375-76.

Defendants' requests must be viewed in light of the fact that the Supreme Court already has approved Plaintiffs' and Plaintiff-Intervenors' claims as appropriate for judicial review in this case. Further, a Rule 56(h) motion may not resolve dispositive claims.

A. The Court Need Only Follow the Supreme Court’s Specific Instructions in *Lobato v. State*.

In *Lobato*, the Colorado Supreme Court noted that the General Assembly does not have “unchecked power” in the field of education but rather is subject to the judiciary’s constitutional review. 218 P.3d at 372-73. “[T]he Colorado Constitution does not give the legislature unfettered discretion in this area[,] and . . . the court has the responsibility to review whether the actions of the legislature are consistent with its obligation to provide a thorough and uniform public school system.” *Id.* at 372.

Nevertheless, Defendants urge the Court to determine that: “1. Plaintiffs and Plaintiff-Intervenors must prove their allegations beyond a reasonable doubt; and 2. Plaintiffs and Plaintiff-Intervenors must establish [that] the General Assembly’s education funding decisions are not rationally related to the constitutional mandate of a thorough and uniform system of free public schools and protection of local control over instruction.” Plaintiff-Intervenors urge the Court to follow simply the Supreme Court’s guidance in *Lobato v. State*. Further, to the extent that Defendants attempt to import federal standards of judicial review not adopted in Colorado, Plaintiff-Intervenors urge the Court to follow the precedent set forth in *Lobato* and other binding Colorado cases.

In *Lobato*, the Supreme Court set forth the standards for review in this case:

[Plaintiffs and Plaintiff-Intervenors] must demonstrate that the school finance scheme is not rationally related to the constitutional mandate of a “thorough and uniform” system of public education. The trial court must give significant deference to the legislature’s fiscal and policy judgments. The trial court may appropriately rely on the legislature’s own pronouncements to develop the meaning of a “thorough and uniform” system of education.

218 P.3d at 374-75.

In Defendants’ briefing to the Colorado Supreme Court in the prior appeal, Defendants urged the Court to import the “beyond a reasonable doubt” standard of review. *See* Excerpts of Defs.’ Br. to Colo. Supreme Ct., Ex. 1. That standard is noticeably absent from the Court’s opinion. This falls in line with the Supreme Court’s opinion in *Board of County Comm’rs v. Vail Associates, Inc.*, where the Court noted that although it “typically accord[s] to legislative enactments a presumption of constitutionality,” “the legislature’s construction of a statutory or constitutional provision is advisory, not binding.” 19 P.3d 1263, 1273-74 (Colo. 2001) (citations omitted).

Like the *Vail* case, the General Assembly here has an affirmative mandate under the Colorado Constitution and the question is whether the school finance system satisfies the mandate. In such cases, the “beyond a reasonable doubt” standard is unnecessary.

Defendants' reliance on federal precedent to add to Plaintiff-Intervenors' persuasive burdens is unavailing. "Colorado courts have broader jurisdiction than their federal counterparts." *Lobato*, 218 P.3d at 370. The *Lobato* Court explained that the United States Constitution guarantees only negative rights, or the "areas that the government cannot infringe upon." *Id.* By contrast, the Colorado Constitution, like other state constitutions, "contain[s] the textual basis for affirmative rights, *i.e.*, *entitlements that the government must secure for its citizens.*" *Id.* at 371 (emphasis added). Section 2 of Article 9 thus affirmatively requires Colorado to provide "thorough and uniform educational opportunities" to all residents aged 6 through 21. *Id.* at 371 (*quoting Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1010 (Colo. 1982)). Section 15 requires Colorado to give "each school district . . . the control necessary to implement this mandate [of Art. 9, § 2] at the local level." *Id.* (*quoting Lujan*, 649 P.2d at 1010). Thus, while the Court's "sole function is to rule on the constitutionality of [Colorado]'s system," it is not necessarily true that Plaintiff-Intervenors "bear the burden of 'negat[ing] every conceivable basis,'" or that "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data." *Lujan*, 649 P.2d at 1025; Motion, at 4 (*quoting Heller v. Doe*, 509 U.S. 312, 320 (1993) (emphasis added)(alteration in original)); and *F.C.C. v. Beach Commun' n, Inc.*, 508 U.S. 307, 315 (1993)).

In fact, in *Lujan* the Supreme Court stated that this Court is "obligated to uphold any classification based on facts which can reasonably be conceived as supporting the action." 649 P.2d at 1022. *Lujan* did not leave room for the Court to speculate as to "any conceivable basis" that Defendants suggest; instead, the Court must rely on the facts before it. Additionally, while it is true that the Colorado courts may "question neither the merits nor the wisdom of the policy decisions," where a Constitutional violation nonetheless exists, Plaintiff-Intervenors have met their burden. *See Owens v. Colo. Congress of Parents, Teachers & Students*, 92 P.3d 933, 935 (Colo. 2004).

In sum, Plaintiff-Intervenors urge the Court to follow the Supreme Court's specific instructions in *Lobato*. That is, Plaintiff-Intervenors "must demonstrate that the school finance scheme is not rationally related to the constitutional mandate[s] of a 'thorough and uniform' system of public education [and local control over instruction]." *Lobato*, 218 P.3d at 374. Plaintiff-Intervenors further argue that importing federal standards of review is inappropriate to the extent that these standards allow the Court to speculate, rather than examine the facts in front of it.

B. The Education Clause Guarantees That the Children of Colorado Have the Opportunity to Receive a Quality Education, Not Just a Free Education.

Defendants urge the Court to determine that: "3. The Education Clause guarantees individuals aged six to twenty-one years an opportunity to receive a free public education; and 4. The Education Clause does not guarantee any qualitative educational outcome." (Motion, at 6.) Plaintiff-Intervenors agree that the "Education Clause guarantees individuals aged six to twenty-one years an opportunity to receive a free public education," but urge the Court to note that this is not the Education Clause's only substantive guarantee. Further, Defendants' fourth request is worded so broadly that

Plaintiff-Intervenors urge the Court to reject it and instead follow the Supreme Court's determinations that the Education Clause has substantive mandates. That is, Colorado's children are entitled to a "thorough and uniform" education, which includes the opportunity to accomplish Colorado's rigorous standards-based educational system.

According to the Supreme Court in *Lobato*, Plaintiff-Intervenors are entitled to present their case that the Education Clause has certain substantive guarantees. These determinations require the Court to find certain facts and are not suitable for resolution at this stage in the proceedings. That is, to the extent a "qualitative educational outcome" is a question of fact, resolution of such a question is inappropriate at this stage in the proceedings. COLO. R. CIV. P. 56(h) ("If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question."). Even if the Court is inclined to grant Defendants' third and fourth requests, Plaintiff-Intervenors respectfully request that the Court also hold that: (3) an opportunity to receive a free public education is not the Education Clause's only mandate; and (4) the definition of any particular "qualitative educational outcome" is a finding of fact to be made at trial.

1. Although the Education Clause guarantees individuals aged six to twenty-one years an opportunity to receive a free public education, this guarantee neither stands alone nor obviates the State's obligation to provide a thorough and uniform education to all children, which includes high-quality pre-K and kindergarten programs to low-income and English-Language Learning children at a younger age.

Defendants concede that "[t]he Education Clause guarantees individuals aged six to twenty-one years an opportunity to receive a free public education." Motion, at 6; Colo. Const., art. 9 § 2 ("The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously."). However, they imply that this is the State's only responsibility where Plaintiff-Intervenors contend that the Education Clause contains a number other substantive mandates. See *Lobato*, 218 P.3d at 374. For example, Plaintiff-Intervenors contend that Defendants' obligation to provide a "thorough and uniform" education to all Colorado children, does not have a lower age limit. They are entitled to make this presentation. See *Lobato*, 218 P.3d at 374 ("The plaintiffs are entitled to prove their allegations."). To prove their claim, Plaintiff-Intervenors will demonstrate that low-income and English-Language Learner ("ELL") children require high quality pre-kindergarten ("pre-K") and kindergarten programs in order to receive a thorough and uniform education, and that waiting until they turn the age of six may be too late. (Deposition of Lori G. Bowers, Feb. 15, 2011, at Ex. 2.) The Court must weigh a number of facts in determining what constitutes "thorough and uniform" for these children who are performing as disaggregated groups at the bottom of the academic rung on virtually every standardized tests required by Defendants. These facts may not be resolved here. COLO. R. CIV. P. 56(h) ("If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.").

Furthermore, Plaintiff-Intervenors vehemently disagree with Defendants' implication that Defendants meet their constitutional requirements by "warehousing" students in overcrowded and underfunded schools. Where a school does not have the funds to "educate" its pupils, as required by the Colorado Constitution, the provision of free indoor space for Colorado's children does not pass constitutional muster. COLO. CONST. art. 9, § 2 ("wherein all residents of the state . . . may be *educated* gratuitously" (emphasis added)). In their Rule 56(h) Motion, Defendants suggest a highly circumscribed reading of the clause, and one that is inconsistent not only with Colorado precedent, including *Lobato*, but also with Defendants' own statewide educational reforms and interpretations of their own constitutional duties, as well as their interpretations of the districts' constitutional duties.¹ Without so saying, Defendants imply that the *only* guarantee in the Education Clause is that individuals aged six to twenty-one years have an opportunity to attend schools, regardless of the adequacy of those schools. (E.g., Motion, at 5 ("[A]lthough the Education Clause entitles all residents aged six to twenty-one to a free education, it does not guarantee to individuals that this gratuitous education be thorough and uniform." (citation omitted)).) The Supreme Court already disagreed. E.g., *Lobato*, 218 P.3d at 374 ("We see no reason to devise a different standard of review in this case, where the plaintiffs also assert substantive claims under the same constitutional provision. . . . The plaintiffs are entitled to the opportunity to prove their allegations."). Thus, while the parties agree that the Colorado Constitution unquestionably guarantees individuals aged six to twenty-one opportunities to receive a free public education, Plaintiff-Intervenors urge the Court to hold that it also guarantees much more, or that these issues are fact-dependent and not appropriate for resolution here.

2. The Education Clause guarantees a certain level of quality in the classroom.

Defendants contend that the Education Clause does not guarantee any qualitative outcome, asserting that Plaintiff-Intervenors' allegation that "a quality education . . . enables all students to participate meaningfully in the civic, political, economic, social, and other activities of society, and to exercise the basic civil and other rights of citizens of the State of Colorado and the United States of America" seeks to declare that the law compels certain qualitative outcomes, such as Ivy League admissions or AP Physics for a single interested student. (Motion, at 5, *citing* Pltf-Inv's Amended Complaint in Intervention ("Am. Intv. Compl."), at p. 6, ¶ 21.) Defendants then urge the most circumscribed reading of the Educational Clause possible—that it guarantees *only* the opportunity to attend free public school and nothing else. Indeed, it seems that Defendants contend that as long as they successfully "warehouse" students in buildings with a teacher and a principal present, no matter how underfunded and understaffed the schools, they meet their constitutional obligations.

¹ Additionally, other states consistently interpret similar constitutional provisions to require much more than Defendants suggest. See e.g., *Neeley v. West Orange Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 764-66, 796-97 (Tex. 2005); *Claremont School District v. Governor*, 795 A.2d 744, 751-52 (N.H. 2002); *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

Plaintiff-Intervenors do not seek a reading of the Colorado Constitution so broad that it imposes outcomes guaranteed to nobody, such as “secur[ing] admittance at an Ivy League college,” as Defendants suggest. (Motion, at 5.) However, Plaintiff-Intervenors do seek enforcement of the Colorado Constitution’s guarantee of a “thorough and uniform system of free public schools . . .” COLO. CONST. art. 9, § 2. That is, a “thorough and uniform” system must meet basic minimum quality standards.² Indeed, the Supreme Court in *Lobato* tasked this Court with determining if the State’s school finance scheme is rationally related to its qualitative constitutional duties. *See* 218 P.3d at 374. It further instructed: “The trial court must give significant deference to the legislature’s fiscal and policy judgments. *The trial court must appropriately rely on the legislature’s own pronouncements to develop the meaning of a ‘thorough and uniform’ system of education.*” *Id.* at 374-75 (emphasis added).

As Plaintiff-Intervenors describe in their Amended Complaint, the General Assembly and Defendants already have defined certain minimum quality standards by devising a standards-based system of education with specific goals and a system of accountability. *See, e.g.*, Am. Compl. at 18. For example, in COLORADO REVISED STATUTES (C.R.S.) § 22-30.5-301(1), the General Assembly expressly linked its duties under the Education Clause with student performance:

The state therefore has an obligation to ensure that every student has a chance to attend a school that will provide an opportunity for a quality education. If a school is not providing a thorough and adequate education, as determined by the annual performance review conducted by the [Colorado Department of Education] . . . the state has an obligation to the students enrolled in that school to make changes to ensure that they have an opportunity to receive a quality education comparable to students in other public schools of the state.

Under Section 22-7-1002(1)(c) (Legislative Declaration for “CAP4K”) (emphasis added), the General Assembly found:

From the inception of the Nation, public education was intended both to *prepare students for the workforce* and to *prepare them to take their place in society as informed, active citizens who are ready to both participate and lead in citizenship*. . . . [T]he public education system[has an]

² *See, e.g., Lujan*, 649 P.2d at 1028 (Erickson, J., specially concurring) (“A general and uniform system, we think, is at the present time, one in which every child in the state has free access to certain minimum and reasonably standardized educational and instructional facilities and opportunities to at least the 12th grade—a system administered with that degree of uniformity which enable a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education.” (quoting *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178, 202 (Wash. 1974))).

historic mission of education for active participation in democracy.

Indeed, the General Assembly has gone so far as to specifically link the standards it legislates with the State's constitutional duties *and* with a fundamental individual right:

Every resident of the state six years of age or older but under twenty-two years of age has a fundamental right to a free public education that assures that such resident shall have the opportunity to achieve the content standards adopted pursuant to this part 4 at a performance level which is sufficient to allow such resident to become an effective citizen of Colorado and the United States, a productive member of the labor force, and a successful lifelong learner.

COLO. REV. STAT. § 22-7-403(2) (emphasis added). Given the Supreme Court's instruction to give significant deference to legislative pronouncements, the General Assembly already has determined that the Colorado Constitution requires public schools to meet certain minimum standards, and only upon meeting those standards will the schools "enable[] all students to participate meaningfully in the civic, political, economic, social, and other activities of society, and to exercise the basic civil and other rights of citizens of the State of Colorado and the United States of America." (Am. Intv. Compl. P. 6, ¶ 21.) That is, only then, do the schools "educate" the students, as required by the Constitution.

Further, Plaintiff-Intervenors urge the Court to interpret the Colorado Constitution with the plight of today's students in mind, as the courts "are not so welded unbreakably to the proposition that social change or other vicissitudes, not contemplated by the constitutional framers, are not to be considered in the current interpretation of constitutional provisions." *Marshall v. Sch. Dist. #3 Morgan County*, 553 P.2d 784, 785 (Colo. 1976). Certainly the framers, in requiring that the State and local districts "educate" Colorado's children, would not have approved of a system wherein a majority of children in certain districts or of certain backgrounds are "not proficient" despite attending school.

In sum, while Plaintiff-Intervenors agree that Defendants' third request that "the Education Clause guarantees individuals aged six to twenty-one years an opportunity to receive a free public education," is a proper statement of the law, they oppose Defendants' suggestion that this is the Education Clause's only mandate. They further oppose Defendants' constrained reading of the Education Clause and urge the Court to make the appropriate factual findings at trial.

As the General Assembly has stated repeatedly, there are minimum quality standards to be met before a school can be said to "educate" a student, and Defendants must provide for a certain quality of education for all of Colorado's students. Defendants admit this in defending the constitutionality of their sweeping school reforms, which

contain legislative pronouncements contrary to the positions Defendants now take. Now, the State needs to fund its mandates.

C. TABOR Presents No Direct Conflict with the Education Clause or the Local Control Clause, and Any Potential Indirect Conflict Necessarily Relies on Disputed Findings of Fact.

Defendants contend that TABOR and a number of other constitutional amendments place constitutional limits on what the State of Colorado may spend in fulfilling its Article 9, § 2 requirements of offering a “thorough and uniform” public education. (Motion, at 6 (“The General Assembly cannot be constitutionally required to expend revenue the Constitution does not allow it to obtain.”).) However, TABOR is a mere procedural amendment that does not “qualify, quantify, or modify the ‘thorough and uniform’ mandate expressed in the education clause.” *Lobato*, 281 P.3d at 376 (regarding Amendment 23); *see also City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1115 (Colo. 1996) (“[TABOR] creates a series of procedural requirements and nothing more; it does not create any fundamental rights.”).

Put simply, the State must provide for a “thorough and uniform” public education, and TABOR does not alter this responsibility. The Supreme Court already rejected the State’s similar argument with regard to Amendment 23, and Plaintiff-Intervenors urge the Court to reject the State’s attempt to repackage it here. None of the cases Defendants cite requires another result. Further, the question of whether the remedies Plaintiff-Intervenors seek exceed the State’s ability to raise money is inherently factual, speculative and not otherwise appropriate for resolution here. COLO. R. CIV. P. 56(h).

1. Under the Supreme Court’s reasoning in *Lobato*, TABOR does not conflict directly with the Education Clause or the Local Control Clause, and therefore the *Bickel* factors preclude the “harmonizing” that Defendants seek to impose.

Defendants contend that the Court must “harmonize” Article 9, §§ 2 and 15 with “TABOR . . . the Gallagher Amendment . . . and all other constitutional provisions.” (Motion, at 6.) This is not the case. Although Defendants cite an established rule of Constitutional interpretation, it cannot apply where there is no conflict between constitutional provisions. Additionally, other rules of construction have greater priority. As the Supreme Court set out in *Bickel v. Boulder*, 885 P.2d 215 (Colo. 1994):

First, all provisions of [TABOR] “supersede *conflicting* state constitutional, state statutory, charter, or other state or local provisions.” . . . Second, the “preferred interpretation [of TABOR] shall reasonably restrain *most* of the growth of government.” . . . Third, an unjust, absurd, or unreasonable result should be avoided when construing a constitutional provision. Finally, an interpretation which harmonizes different constitutional provisions is favored over one that would create a *conflict* between them.

Id. at 228-29 (second and third emphases added) (citations omitted). Plaintiff-Intervenors urge the Court to hold that there is no direct conflict to harmonize, and that, in any event, the test for an applied conflict will be so fact-intensive that it is not appropriate for resolution in a Rule 56(h) motion.

By its own terms, TABOR supersedes *conflicting* state constitutional and statutory provisions. COLO. CONST. art. 10, § 20. “The test for the existence of a conflict is: does one authorize what the other forbids or forbid what the other authorizes?” *In re Submission of Interrogatories on Sen. Bill 93-74*, 852 P.2d 1, 6 (Colo. 1993) (TABOR) (citing *In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 189 Colo. 1, 7 (Colo. 1975)), *accord Bolt v. Arapahoe County Sch. Dist. No. 6*, 898 P.2d 525,532-33 (Colo. 1995) (holding that TABOR and another constitutional provision were not in direct conflict). As the Colorado Supreme Court determined with regard to Amendment 23, the answer is no. Amendment 23, another procedural amendment, dealt directly and explicitly with school funding, as it “increase[d] per-pupil funding and funding for categorical programs by a minimum rate of inflation plus one percentage point until the fiscal year 2010-11, and thereafter by at least the rate of inflation.” *Lobato*, 218 P.3d at 375. As Colorado’s Supreme Court held, “nowhere does [the Blue Book] refer to the education clause, or the terms ‘thorough,’ ‘uniform,’ or ‘adequate.’” *Id.* at 375-76. “[Amendment 23] was not intended to qualify, quantify, or modify the ‘thorough and uniform’ mandate expressed in the education clause Consequently, the Amendment 23 mandate relates solely to a minimum level of funding. It neither relates to nor concerns the ‘thorough and uniform’ mandate in the education clause” *Id.* at 376.

TABOR, similarly, simply protects taxpayers from certain tax increases and neither relates to nor concerns the state’s responsibility to provide a thorough and uniform education for its students. It is quintessentially a “procedural” clause requiring taxpayer approval of certain revenue increases. *City of Wheat Ridge v. Cervený*, 913 P.2d 1110, 1115 (Colo. 1996) (“[TABOR] circumscribes the revenue, spending, and debt powers of state and local governments. It creates a series of procedural requirements and nothing more”). As is the case with Amendment 23, “nowhere does” TABOR “refer to the education clause, or the terms ‘thorough,’ ‘uniform,’ or ‘adequate.’” *Id.* at 375-76.³

³ As noted in *Mesa County*, TABOR refers to the “dual nature of public school funding,” but it only requires the School District to provide funds to schools and nothing else. 203 P.3d at 527. This provision refers only to the local district’s school funding responsibility, which is not what this Court is considering on remand. *Id.* Significantly, “[TABOR] neither changes . . . basic principles of [Colorado’s] dual funding precedent nor imposes specific election requirements to retain excess revenue under a dual funding formula.” *Id.* at 528.

For an example of an actual conflict, see *Arapahoe County Board of Equalization v. Podoll*, 935 P.2d 14, 17 n.9 (Colo. 1997) (“We note that there may be a conflict in the constitutional provisions regarding the methods used to calculate actual value. *Compare* COLO. CONST. art. X, § 3(1)(a) (actual value shall be determined solely by consideration of the cost approach and market approach to appraisal) *with* COLO. CONST. art. X, § 20(8)(c) (actual value shall be determined solely by the market approach to appraisal). We need not reconcile these potentially conflicting constitutional provisions because this case concerns whether equalization is a proper method of evaluating individual properties. Furthermore, the market approach used in the valuation of the . . . properties does not conflict with either of these

Defendants have not demonstrated a direct conflict between Article 9, §§ 2 or 15, and TABOR, the Gallagher Amendment, or any other constitutional provisions.

Bickel's second and third canons of construction counsel that "the preferred interpretation [of TABOR] shall reasonably restrain *most* of the growth of government. . . . [and that] an unjust, absurd, or unreasonable result should be avoided when construing a constitutional provision." 885 F.2d. at 228-29 (emphasis added) (internal quotation marks and citations omitted).⁴ These provisions are related. That is, TABOR was never intended to restrain the *necessary* "growth of government" caused by, for example, population increases. Indeed, it would be an "absurd result" not intended by voters to reduce, or even keep steady, school funding as the number—and needs—of the state's children increased. Indeed, as described above, the State's new and rigorous performance standards fly in the face of Defendants' interpretation here. Such an interpretation improperly would "hinder basic government functions or cripple the government's ability to provide services." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008); see also *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 557 (Colo. 1999) (noting that an overly restrictive reading of TABOR would lead to the "absurd" and government-crippling result of requiring an election more expensive than the proposed government expenditure). In *Ritter*, the Supreme Court reemphasized that it would not interpret TABOR in a way that unreasonably limited basic government services. Instead, it was "especially mindful of the cautious line [it had] to draw to reasonably interpret [TABOR] and maintain the government's ability to function efficiently." *Id.* Since TABOR may not cripple essential government functions, it cannot be read to withhold adequate funding from Colorado's schools.

Under the factors set forth in *Bickel*, the Court need not ever reach the issue of harmonizing constitutional provisions. First, Defendants have not met their burden to demonstrate that there are conflicting constitutional provisions. Second, TABOR was not intended to restrict growth of government required by, for example, population growth. Third, the Court should not interpret TABOR to cripple basic government services, such as the State's constitutional requirement to adequately fund a "thorough and uniform" education for Colorado's children. Thus, Plaintiff-Intervenors respectfully request that the Court determine that: 5. There is no need to harmonize the Education Clause with non-conflicting constitutional provisions, such as TABOR and the Gallagher Amendment

constitutional provisions." Plaintiff-Intervenors note that the existence of a relevant conflict involves examination of the facts, which is not appropriate for a Rule 56(h) motion.

⁴ "[T]he party seeking to invoke the 'preferred interpretation' has the burden of establishing that its proposed construction of Amendment 1 [TABOR] would reasonably restrain the growth of government more than any other competing interpretation." *Bickel*, 885 P.2d at 231. Defendants have not even raised this argument here, but in any event, if they had, it is a question of fact not suitable for resolution at this stage. *Id.* ("To hold otherwise would create the absurd result that any individual who disagrees with the will of the majority of the electorate could undermine the results of an election governed by Amendment 1 without presenting any evidence that his or her interpretation is actually 'preferred' by Amendment 1.").

2. Any practical restriction of TABOR on educational funding is inherently a question of fact suitable only for the remedy stage of this proceeding.

Defendants' contention that "[a]ny appropriations required by the Education Clause are constrained by TABOR's revenue restrictions" is impossible to resolve at this stage of the proceedings. TABOR is merely a procedural provision that requires the State to get voter approval for certain revenue increases. *City of Wheat Ridge v. Cervený*, 913 P.2d 1110, 1115 (Colo. 1996) ("Amendment 1 circumscribes the revenue, spending, and debt powers of state and local governments. It creates a series of procedural requirements and nothing more; it does not create any fundamental rights."). There has been no demonstration of what remedies are required of the State because this case is still in the liability phase. There has been no demonstration of needs in excess of TABOR's limits or financial threats to other essential government services at this stage.⁵ Indeed, the Court cannot fashion a remedy potentially in conflict with TABOR until giving the General Assembly an opportunity to remedy the constitutional infirmities. *Lobato*, 218 P.3d at 375. That is, any conflict between TABOR's revenue restriction and the outcome of this case would necessarily be revealed only after the Court has "provide[d] the legislature with an appropriate period of time to change the funding system so as to bring the system in compliance with the Colorado Constitution." *Id.* Only after the General Assembly has attempted to cure the constitutional infirmities inherent in the PFSA may the Court consider TABOR's revenue restrictions, if at all.

D. The Supreme Court in *Lobato* Already Instructed this Court Which Factors to Consider in Evaluating the Constitutionality of Colorado's Public School Finance.

The Supreme Court was clear in its instructions:

The plaintiffs are entitled to the opportunity to prove their allegations. *To be successful, they must demonstrate that the school finance scheme is not rationally related to the constitutional mandate of a 'thorough and uniform' system of public education.* The trial court must give significant deference to the legislature's fiscal and policy judgments. The trial court may appropriately rely on the legislature's own pronouncements to develop the meaning of a 'thorough and uniform' system of education. If the court finds that the current system of public finance is irrational,

⁵ As Plaintiffs point out, the Education Clause provides a qualitative mandate much stronger than the constitutional mandates for other government services. *See* Plaintiffs' Opposition. The Education Clause requires that the General Assembly "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." COLO. CONST. art. 9, § 2. The other "essential services" clauses are weaker in that the General Assembly must "establish and support" other services, "in such manner as may be prescribed by law." *E.g.*, COLO. CONST. art. 8, §§ 1, 5; *see also* Plaintiffs' Opposition.

then the court must provide the legislature with an appropriate period of time to change the funding system so as to bring the system in compliance with the Colorado Constitution.

Lobato, 218 P.3d at 374-75 (emphasis added.).

Notwithstanding the Supreme Court's clarity, Defendants suggest that the Court should also determine that:

7. The rational basis standard requires that significant deference be afforded to the General Assembly's fiscal and policy judgments;
8. Elementary and secondary education is not the only public service required by the Constitution;
9. It is rational for the General Assembly to control the public debt;
10. It is rational for the General Assembly to further local control over instruction; and
11. It is rational for the General Assembly to balance appropriations among public services.

(Motion, at 8.) These five requests are merely a backdoor attempt to obtain case-dispositive determinations in Defendants' favor. Defendants must wait for trial or move for summary judgment. Nonetheless, Plaintiff-Intervenors address each request in turn.

1. Plaintiff-Intervenors urge the Court to follow *Lobato* in evaluating the General Assembly's fiscal and policy judgments.

Defendants' request Number 7 tracks the Supreme Court's instruction in *Lobato* and is therefore not objectionable: "The trial court must give significant deference to the legislature's fiscal and policy judgments. The trial court may appropriately rely on the legislature's own pronouncements to develop the meaning of a 'thorough and uniform' system of education." 218 P.3d at 374-75. As noted previously, many of these legislative pronouncements expressly tie the Education Clause's requirements to students' meeting Colorado's rigorous standards.

2. The Education Clause uniquely includes qualitative standards that may not yield to budget-allocation concerns.

The standard articulated in *Lobato* focuses exclusively on the connection between public school finance and the Education and Local Control Clauses of the Colorado Constitution. See Plaintiffs' Opposition. Defendants nonetheless seek the irrelevant determination that "[e]lementary and secondary education is not the only public service

required by the Constitution.” Motion, at p. 8. The Supreme Court did not remand this case for determination of the General Assembly’s other responsibilities; instead, it instructed the Court specifically to consider whether the State’s scheme of public school finance violates the Colorado Constitution. *Lobato*, 218 P.3d at 374.

The other mandates do not contain a “thorough and uniform” clause, and they additionally contain language conferring more power on the legislature, such as “shall be established and supported by the state, *in such manner as may be prescribed by law.*” See *id.*, citing COLO. CONST. art. 8, § 1 (state institutions).

3. If *Lujan*’s conclusions regarding the public debt forced the Court to resolve this case for Defendants, the Supreme Court would have so indicated.

Defendants invoke *Lujan*’s holding that “the legislative prerogative of controlling the outer limits of any agency’s taxing authority involves a legitimate and wholly rational state purpose. The purpose of such limitations is essentially to present pledging of future public funds.” *Lujan*, 649 P.2d at 1024; Motion, at 8; see also *Lujan*, 649 P.2d at 1024 (“The restrictions and limitations found in the capital reserve fund and the bond redemption fund are rationally related to the legitimate state purpose of controlling the public debt.”). Defendants imply that they can prevail in this litigation by showing that the State’s refusal to fund schools adequately is rationally related to controlling the public debt. But if *Lujan* required disposition of this case in favor of Defendants, the Supreme Court would have made this determination in *Lobato*. Instead, the Supreme Court in *Lobato* expressly relied on *Lujan* to note that this case is justiciable and how to interpret the legislature’s actions:

Lujan thus concluded that the General Assembly’s own laws and pronouncements, as well as other courts’ interpretations of similar state education clauses, can assist the court in assessing whether the General Assembly has adequately implemented the ‘thorough and uniform’ mandate of the education clause. *In so doing, the court affirmed that the Colorado Constitution does not give the legislature unfettered discretion in this area* and that the court has the responsibility to review whether the actions of the legislature are consistent with its obligation to provide a thorough and uniform public school system.

Lobato, 218 P.3d at 372 (emphasis added). *Lujan*’s specific circumstance does not support the blanket determination that controlling the public debt always excuses the legislature from its other duties, as Defendants suggest.

Allowing Defendants to prevail simply by showing that not making an expenditure “controls the public debt” would give the General Assembly the very “unfettered discretion” that the Supreme Court disapproved of in *Lobato*. Judicial review of any

claims of lack of funding would be impossible. So, while it may be true that it is rational for the General Assembly to control the public debt, it is also irrelevant.

Determining the rationality of controlling the public debt is inappropriate in a Rule 56(h) motion. As Defendants admitted, Rule 56(h) does not permit case-dispositive resolution. Motion, at 2 (quoting *In re Bd. of County Comm'rs of County of Arapahoe*, 891 P.2d at 963 n.14). Furthermore, whether creating an underclass of undereducated Colorado schoolchildren likely to be dependent on public services throughout their lives is rationally related to controlling the public debt is a question of fact also not appropriate for resolution here. COLO. R. CIV. P. 56(h).

4. Furthering local control over instruction is both rational and constitutionally required, but the State's system of public school system is neither.

Defendants seek a determination that “further[ing] local control over instruction” is “rational for the General Assembly.” Motion, at p. 8. They are correct. However, whether the state’s public school finance system actually furthers local control over instruction is a factual issue to be resolved at trial. COLO. R. CIV. P. 56(h).

5. The rationality of the General Assembly's need to balance the State's budget does not give it *carte blanche* authority to violate its constitutional duties under the Education and Local Control clauses.

Defendants round off Requests 7-10 with a catchall request for determination that “[i]t is rational for the General Assembly to balance appropriations among public services.” Nothing in Defendant’s five “rational allocation” requests precludes the Court from determining that decisions (even political ones) regarding school finance are irrational. The notion that the General Assembly’s balancing of appropriations among public services may be “rational” is so broad that it is useless. Obviously the General Assembly must balance appropriations among public services. It is the arbitrary and capricious underfunding of Colorado’s public schools that Plaintiff-Intervenors challenge, not the mere fact that the General Assembly must allocate a pool of money.

While Defendants cite out-of-state precedent as support for their notion that the General Assembly has *carte blanche* authority to allocate its funds among government services, even in politically motivated ways, Plaintiff-Intervenors remind the Court of the Supreme Court’s admonitions in *Lobato* and *Ritter*. In *Lobato*, the Court emphasized that “the Colorado Constitution does not give the legislature unfettered discretion in [providing a thorough and uniform public education].” Allowing any “rational” act on the part of the legislature to therefore be a “rational” justification for denying Coloradans a thorough and uniform education is not constitutional under *Lobato*. *Ritter* cautions that Defendants may not allocate money so as to “hinder basic government functions or cripple the government’s ability to provide services.” *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008). Providing Colorado’s children a “thorough and uniform” public education unquestionably is one of the essential government services that the General Assembly does not have the luxury of crippling. Thus, to the extent that Defendants request that the

Court determine the obvious, that there is more than one place for it to allocate money, Plaintiff-Intervenors do not object, except on relevancy grounds. To the extent that Defendants ask the Court to look past *Ritter* and *Lobato* and allow them to cripple the statewide school system through irrational allocations, Plaintiff-Intervenors oppose this determination as inconsistent with the Colorado Constitution, as well as with the Supreme Court's explicit mandates.

E. TABOR Does Not Change Colorado's Basic Principles of Dual Funding

Citing dictum in *Mesa County Board of County Commissioners v. State*, Defendants seek the broad determination that "TABOR authorizes the General Assembly to impose unfunded educational mandates on local school districts." (Motion, at p. 9.) They overstate their case.

This determination would oversimplify and overstate the State's power, which is not "unfettered." *Lobato*, 218 P.3d at 372. Article 10, § 20(9) of the Colorado Constitution reads: "Except for public education through grade 12 or as required of a local district by federal law, a local district may reduce or end its subsidy to any program delegated to it by the general assembly for administration." Nothing in this section allows the General Assembly to require more from the school district than the school district can afford.

The State relies heavily on a sound bite from *Mesa County*, a case that affirmed the constitutionality of SB-199, which the General Assembly passed to give effect to the TABOR waivers (that is, mill levy overrides) in place in 174 of 178 state school districts. However, *Mesa County* more specifically stated: "the state can require the local government to pay *its statutorily mandated share* under a dual funding formula." *Mesa County*, 203 P.3d at 528 (emphasis added) (citing *Colo. Dep't. of Soc. Servs. v. Bd. of County Comm'rs of County of Pueblo*, 697 P.2d 1 (Colo. 1985)). There, the State and the school districts together wanted the school districts to be able to use the proceeds of their mill levy overrides without being penalized by the State Board's reduction of the State's share in response to the overrides. That is, SB-199 was a statutory fix to an irrational formula implemented by the State Board, a formula which deprived the starving districts of money they were constitutionally entitled to spend. Taxpayers challenged the bill.

In this context, the Court in *Mesa County* noted (but did not hold) that "[TABOR] expressly contemplates the state's separate constitutional obligation to provide a uniform system of free public schools throughout the state and acknowledges the state's ability to impose unfunded mandates on local districts to accomplish this goal." *Id.* The Court then held that the districts' mill levy overrides complied with TABOR's procedural requirements. *Id.* at 536. The dictum in *Mesa County* was not carefully deliberated to resolve a battle between the districts and the State but was instead the Court's notation that the State can force the districts to spend the money they raised, rather than refunding it to the taxpayers. Thus, *Mesa County* stands for the unremarkable proposition that a state may impose an unfunded mandate only where the district can afford to implement "its statutorily mandated share," and where such a mandate does not trample the district's rights under Article 9, § 15 of the Colorado Constitution. TABOR does not, as

Defendants suggest here, allow the state to impose mandates in excess of a district's ability to pay them, that is, in excess of the district's "fair share."

F. The Supreme Court in *Lobato* Already Instructed the Court with Regard to the Appropriate Procedure to Remedy a Constitutional Violation

Defendants seek the broad determination that "[t]his Court may neither coerce nor restrain the General Assembly through injunctive relief." (Motion, at 10.) This issue is moot, since the Supreme Court already instructed the Court: "If the court finds that the current system of public finance is irrational, then the court must provide the legislature with an appropriate period of time to change the funding system so as to bring the system in compliance with the Colorado Constitution." *Lobato*, 218 P.3d at 375. As Defendants acknowledge, this instruction affects none of Plaintiff-Intervenor's requests for relief. (Motion, at 9-10.) Where the General Assembly enacts an unconstitutional statute, as it has done here, "the enforcement of the unconstitutional statute . . . may be restrained or corrected." *Lewis v. Denver City Waterworks Co.*, 19 Colo. 236, 239 (1893). As Defendants admit, this is all that Plaintiff-Intervenors seek.

V. CONCLUSION

For the foregoing reasons, Plaintiff-Intervenors respectfully request that the Court simply follow *Lobato* and evaluate the constitutionality of the State's system of public school finance.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 16 day of May of 2011, sent by electronic mail, true and complete copies of **Plaintiff-Intervenors' Opposition to Defendants' Motion for Determination of Questions of Law Pursuant to CRCP 56(h)**, to:

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