

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p><b>COURT USE ONLY</b></p>
<p>PLAINTIFFS: <b>Anthony Lobato</b>, as an individual and as parent and natural guardian of <b>Taylor Lobato</b> and <b>Alexa Lobato</b>; <i>et al.</i> vs. DEFENDANTS: <b>The State of Colorado</b>; <i>et al.</i></p>	
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<p><b>PLAINTIFF-INTERVENORS' MOTION TO STRIKE DEFENDANTS' SECOND, THIRD, FOURTH AND FIFTH AFFIRMATIVE DEFENSES</b></p>	

Plaintiff-Intervenors Armandina Ortega, *et al.*, respectfully submit this Motion to Strike Defendants’ Second, Third, Fourth and Fifth Affirmative Defenses under Colorado Rule of Civil Procedure (“C.R.C.P.”) 12(f).

### **Certificate of Conference**

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Plaintiff-Intervenors conferred with counsel for Defendants, Nicholas P. Heinke, and counsel for Plaintiffs, Terry Miller, on the relief sought in this motion. Defendants’ counsel opposes the relief sought in this motion. Plaintiffs’ counsel agrees with Plaintiff-Intervenors’ motion, and does not oppose the relief sought herein.

### **Introduction**

Plaintiff-Intervenors, parents and their minor children – including English Language Learners (“ELL”) and “at-risk,” low-income students in Colorado public schools – challenge the constitutionality of the public school finance system in Colorado. *See* Plaintiff-Intervenors’ Complaint in Intervention (“Complaint”) at 4-5 (seeking declaratory and injunctive relief). Plaintiff-Intervenors joined this challenge because the public school funding scheme is not rationally related to the state constitutional mandate that the General Assembly provide a “thorough and uniform” system of public schools. *See* Colo. Const. Article IX, § 2; *see also* Complaint at 4-5.

Colorado public school students, including Plaintiff-Intervenors, face an inadequate public school finance scheme that does not keep pace with ever-increasing state mandates and academic standards. The funding scheme does not provide the necessary support to meet the state mandates and standards. *See* Complaint at 4-5. The “thorough and uniform system” sought by Plaintiff-Intervenors would include a quality education that enables all students to participate meaningfully in the civic, political, economic, and social activities of society, and to exercise

their basic civil and other rights as citizens of the State of Colorado and the United States of America. *See id.* at 7.

The Colorado public school finance system fails all students, but ELL and at-risk students are particularly harmed. *See id.* In both instances, the supplemental and categorical funds allocated to the school districts by the State to educate these students are deficient and not rationally related to providing them with a “thorough and uniform system.” *See id.* at 10. For example, public schools cannot obtain additional funds to educate adequately “at risk,” low-income students because Colorado’s school funding eligibility requirements exclude certain “at-risk,” low-income students – specifically, those on the reduced-priced lunch program. *See id.* at 11. The school finance scheme also fails to account for the actual cost of educating “at-risk” students, and forces schools to cut programs and make other drastic budget adjustments to make up for the missing funds. *See id.*

ELL students are similarly disadvantaged and harmed because Colorado’s school finance system fails to account for the actual cost of educating ELL students. The school finance scheme does not reflect the rising number of ELL students in Colorado public schools. Moreover, Colorado employs a woefully inadequate statutory programmatic approach to ELL student education. *See id.* at 12-13.

Plaintiff-Intervenors challenge the adequacy of Colorado’s school finance structure, particularly with respect to cost associated with preschool education for ELL and low-income students, and the infrastructure demands and facility problems that plague lower wealth school districts. Notably, the Colorado school finance system also prevents low wealth communities from exercising meaningful local control over their educational programs. *See Colo. Const. Article IX, § 15.* To address these serious concerns, Plaintiff-Intervenors intervened in this case.

In response, Defendants have raised various affirmative defenses to Plaintiff-Intervenors' claims but, as stated below, none are with merit.

### Argument

On March 18, 2010, this Court granted Plaintiff-Intervenors' Motion to Intervene. On May 17, 2010, Defendants filed an Answer to Complaint in Intervention ("Answer") raising a series of affirmative defenses which Plaintiff-Intervenors refute wholesale. *See Answer* at 13-14. The affirmative defenses are short and nondescript; they also employ generic, template, and boilerplate language devoid of any facts or legal argument. *Id.* (Affirmative Defense No. 1: "Plaintiff-Intervenors' Complaint in Intervention fails to state a claim upon which relief may be granted."); *see also id.* (Affirmative Defense No. 4: "Plaintiff-Intervenors' claims seek an unconstitutional remedy."); *see also id.* (Affirmative Defense No. 5: "Plaintiff-Intervenors' claims and requested relief violate the separation of powers.").

The mere recitation of an affirmative defense is insufficient to maintain it in an answer; it is Defendants' responsibility to establish and support their affirmative defenses. *See Welsh v. Smith*, 113 P.3d 1284, 1289 (Colo. App. 2005) (defendant carries the burden of establishing any affirmative defenses) (citing *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053 (Colo. 1992)). Plaintiff-Intervenors respectfully urge this Court to grant this motion because Defendants have failed to provide any factual or legal support their second, third, fourth and fifth affirmative defenses.<sup>1</sup>

#### **I. Defendants' Second and Third Affirmative Defenses Have no Merit**

Defendants bear the burden of proving their affirmative defenses, but Defendants have not met this burden for Affirmative Defenses Nos. 2 and 3. *See Welsh*, 113 P.3d at. Both affirmative defenses, discussed in-depth below, relate to Defendants' assertion that Plaintiff-

Intervenors are not composed of the requisite parties to litigate this case under C.R.C.P. 19(a). *See id.* Defendants are wrong: the current composition of Plaintiff-Intervenors in no way prevents them from maintaining this case.

In Affirmative Defenses Nos. 2 and 3, Defendants argue:

2. Plaintiff-Intervenors' Complaint in Intervention fails to join necessary and indispensable parties.

3. Plaintiff-Intervenors lack standing to the extent they assert claims on behalf of any other person or entity not named as a Plaintiff-Intervenor. Plaintiff-Intervenors lack standing to the extent that they assert claims on behalf of groups of parents or students of which they are not a part.

*Id.*

In relevant part, C.R.C.P. 19(a) states:

**(a) Persons to be Joined if Feasible.** A person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

Notably, Defendants did not identify in their affirmative defenses the persons or groups not already named as Plaintiff-Intervenors that are necessary for the litigation to proceed, or the reason why other persons or groups are indispensable. *See id.* However, in their Responses to Plaintiffs' First Set of Interrogatories, Defendants indicated that every school district and every student in Colorado, as well as the Colorado General Assembly, are necessary and indispensable

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<sup>1</sup> Plaintiff-Intervenors' submission of this motion in no way waives their right to respond to the remaining affirmative defenses raised in Defendants' Answer, or to any affirmative defenses Defendants may raise in response to Plaintiff-Intervenors' Amended Complaint, which is being filed concurrently with this motion.

parties. See Defendants' Responses to Plaintiffs' First Set of Discovery at 10-11, attached as Ex. A.<sup>2</sup> Defendants' position that Plaintiff-Intervenors must either bring this case as a class action, or represent every potentially affected party individually in order to proceed, is incorrect and unsupported by law. See Answer at 14; Ex. A at 10-11. Accordingly, Plaintiff-Intervenors urge this Court to grant this Motion to Strike because "[D]efendant's 'factual allegations, cannot support a [defense] as a matter of law.'" *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 309 (Colo. App. 2007) (quoting *BRW, Inc. v. Dufficy and Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004) (brackets in original)).

**A. No Absent Party is Necessary to be Joined in This Lawsuit.**

Defendants' affirmative defenses are unsubstantiated. See *Welsch*, 113 P.3d at 1289 (defendants bear the burden of proving their affirmative defenses). Plaintiff-Intervenors, as they are currently comprised, have standing to bring this lawsuit on behalf of themselves. No additional parties are necessary to maintain this action. See *supra* Section B In determining whether or not a party is indispensable, Colorado courts consider whether "the absent person's interest in the subject matter of the litigation [is] such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the right of such absent person?" *Civil Serv. Comm'n v. Dist. Court In & For Adams County*, 185 Colo. 179, 182-183 (Colo. 1974). Injury to the absent party is the most important factor in determining indispensability. See *Davis v. Maddox*, 169 Colo. 433, (Colo. 1969); *Prutch Bros. Television & Music Sys., Inc. v. Crow Watson No. 8*, 732 P.2d 241, 243 (Colo. App. 1986). "Mere interest in the subject matter of litigation, even if the interest is substantial, is insufficient to make a party indispensable." *Hygiene Fire Prot. Dist. v. Bd. of County Com'rs of*

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<sup>2</sup> Although Defendants' responses are to discovery propounded by Plaintiffs, the affirmative defenses proffered by Defendants in their answer to Plaintiffs' Second Amended Complaint are identical to those Defendants raise in their

*County of Boulder*, 205 P.3d 487, 489 (Colo. App. 2008) (citing *Bd. of County Comm'rs v. Roberts*, 159 P.3d 800, 807 (Colo. App. 2006)) (internal citations omitted). The courts do not require the joining of an absent party “[i]f the interests of the parties before the court may be finally adjudicated without adversely affecting the rights of an absent person.” *Id.*

In this case, Plaintiff-Intervenors represent parents and students who seek a constitutional finance system for Colorado public schools. *See* Complaint. Plaintiff-Intervenors challenge the constitutionality of Colorado’s formulaic and statutory scheme for funding public schools and programs that directly affect the quality and breadth of education that children receive. *See id.* Despite the scope of the relief sought, “[n]ot every person who has an interest in issues raised in a particular civil action must be joined as a party to that action.” *Board of County Com'rs of County of San Miguel v. Roberts*, 159 P.3d 800, 808 (Colo. App. 2006).

Defendants do not argue that the relief Plaintiff-Intervenors seek will have an adverse affect on the interests of any Colorado public school parent or student, or that the joinder of those parents and students to this lawsuit will eliminate or curtail any speculative harm. *See* Ex. A at 10-11. Defendants similarly do not offer any evidence or legal argument to support their claim that the absence of a party “prevents final resolution of the issues.” *Frazier*, 166 P.3d at 196.<sup>3</sup> Indeed, Defendants cannot substantiate this claim because a final resolution will have no such effect: even if the interests of some parents and students who are not Plaintiff-Intervenors are affected by the outcome of this case, those interests are not affected any more than those of other parents and students. *See, e.g., Margolis v. Dist. Court, In & For Arapahoe County*, 638 P.2d

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Answer to Plaintiff-Intervenors’ Complaint, and thus Plaintiff-Intervenors rely on them for purposes of this motion.

<sup>3</sup> This is especially true as it relates to the Colorado General Assembly. Not only have Defendants failed to substantiate their claim that the body is an indispensable party, it flies in the face of Colorado school finance case law where the absence of the General Assembly as parties did not prevent the courts from adjudicating the cases. *See, e.g., Lobato*, 218 P.3d at 358; *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982).

297, 301 (Colo. 1981) (noting that the resolution of a lawsuit about the legal nature of zoning and rezoning activities “in no way affects the landowners of the subject property any more than it affects other landowners of the city”). In this case, there is simply no absence of a party that would “prevent[] complete relief from being accorded among those already parties.” *Frazier*, 166 P.3d at 195 (citing C.R.C.P. 19(a)(1)).

Plaintiff-Intervenors and other unnamed parties *not* involved in the litigation stand to have their rights affected, if at all, in equal measure. This shared position eliminates the “risk of multiple inconsistent obligations,” and reinforces Plaintiff-Intervenors’ argument that there are not parties outside the litigation that *must* be included in order for the case to proceed. *See id.*; *see also Davis v. Maddox*, 169 Colo. 433 (Colo. 1969); *see also Talbott Farms, Inc. v. Bd. of County Com’rs of Garfield County*, 43 Colo. App. 131, 134 (Colo. App. 1979) (citing *San Diego Land & Town Co. v. Jasper*, 189 U.S. 439 (1903)) (individuals with no interest in the outcome of the case beyond that shared by all water users in the county were not indispensable parties). Plaintiff-Intervenors seek declaratory relief that the State’s funding scheme for educating “at-risk” and ELL students, and for capital construction of school facilities in lower wealth school districts is inadequate and in violation of the Colorado Constitution. Colo. Const. art. IX, § 2. Plaintiff-Intervenors also seek declaratory relief that due to inadequate state funding and increasing state mandates, public schools can no longer exercise meaningful local control of their educational programs in violation of the Colorado Constitution. Colo. Const. art. IX, § 15. Should Plaintiff-Intervenors prevail on their claims, such a decision will only benefit, not harm, other Colorado public school children. Therefore, the presence of all Colorado schoolchildren in this suit is unnecessary.

**B. Plaintiff-Intervenors are composed of the exact type of litigants the Colorado Supreme Court already determined has standing to bring this action.**

Defendants’ affirmative defense that Plaintiffs ‘lack standing to the extent they assert claims on behalf of any other person or entity not named as a Plaintiff-Intervenor” and “lack standing to the extent that they assert claims on behalf of groups of parents or students of which they are not a part” are without merit. Plaintiff-Intervenors represent only those parties listed in their Complaint, and do not, nor do they seek to, represent other parties not explicitly named in the pleadings. Plaintiff-Intervenors include public school students identified as “at-risk” and ELL students. Furthermore, Plaintiff-Intervenors include taxpayers in lower-wealth school districts, which are most affected by the constitutionally inadequate school finance system, particularly with respect to “at-risk” and ELL student instruction, and capital construction.

In this case, the Colorado Supreme Court has already determined that litigants such as Plaintiff-Intervenors – select parents of students in Colorado public schools – have standing to maintain this action noting that “[t]he court of appeals held *sua sponte* that the plaintiff parents possess standing, and neither the plaintiffs nor the defendants contest that holding... we have subject matter jurisdiction due to the standing of the plaintiff parents...” *Lobato v. Colorado*, 218 P.3d 358, 368 (Colo. 2009). Defendants have offered no argument or evidence as to what distinguishes Plaintiff-Intervenors from the litigants previously before the Colorado Supreme Court or why this Court should regard Plaintiff-Intervenors any differently. Thus, Plaintiff-Intervenors urge this Court to strike Defendants’ Affirmative Defenses Nos. 2 and 3.<sup>4</sup>

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<sup>4</sup> In the alternative, if this Court does determine that there are indispensable parties necessary to the litigation that are not already present, Plaintiff-Intervenors are entitled to an opportunity to amend their Complaint to add the requisite parties and respectfully ask this Court for adequate time to do so. *See Frazier*, 166 P.3d at 196; *Cold Springs Ranch, Inc. v. State Dept. of Natural Resources, Mined Land Reclamation Div.*, 765 P.2d 1035, 1037 (Colo. App. 1988) (opportunity must be afforded to an affected party to bring the indispensable party into the action).

## **II. The Colorado Supreme Court Previously Settled Affirmative Defense Numbers 4 and 5, Holding that Claims and Relief Sought Under Colo. Const. art. IX, §§ 2 and 15 are Valid, Constitutional and do not Violate the Separation of Powers.**

In Affirmative Defense Nos. 4 and 5, Defendants assert that Plaintiff-Intervenors seek an “unconstitutional remedy” and that Plaintiff-Intervenors’ “claims and relief violate the separation of powers.” Answer at 14. Defendants have not proffered any underlying facts or argument supporting either of these affirmative defenses. These affirmative defenses are, therefore, without merit. *See Welsh*, 113 P.3d at 1289; *see also* Ex. A at 11-12. Most importantly, the Colorado Supreme Court has already settled this dispute. *See Lobato*, 218 P.3d at 358.

Plaintiffs argued in their original complaint that the State school finance scheme violated their right to a “thorough and efficient” system under Article IX, section 2 of the Colorado Constitution and that the scheme stripped Plaintiffs of their right to exercise local control under Article IX, section 15 of the Colorado Constitution. *See* Complaint at 4. Defendants filed their Motion to Dismiss on August 25, 2005, arguing that this Court lacked subject matter jurisdiction and that Plaintiffs failed to state a claim upon which relief can be granted. *See generally* Motion to Dismiss. The crux of Defendants’ argument was that Plaintiffs’ claims presented non-justiciable political questions better suited for the legislative branch under the Colorado Constitution and that Amendment 23 to the Colorado Constitution established a minimum level of funding which superseded any amount required under Article IX, §2.<sup>5</sup> *See* Order dated March 2, 2006 at 1. The district court judge presiding over this case at that time agreed with Defendants and dismissed the case. *Id.* at 2-3.

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<sup>5</sup> In response to the Amendment 23 argument, the Court held that although Amendment 23 sets a minimum level of funding, it “neither relates to nor concerns the ‘thorough and uniform’ mandate in the education clause and, therefore, does not affect our holding that the plaintiffs present a justiciable claim for relief.” *Lobato*, 218 P.3d at 376.

In the subsequent appeal to the Colorado Supreme Court, the Court acknowledged the State's argument that the doctrine of the separation of powers required that the three branches of government "not interfere with or encroach on the authority or within the province of the other." *Lobato*, 218 P.3d at 372 (citation omitted). Notwithstanding, the Court stated, "[a] ruling that the plaintiffs' claims are nonjusticiable would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility to fashion and to fund a 'thorough and uniform' system of public education." *Id.* The Court also held that the Colorado Constitution required that the courts "evaluate whether the current state's public school financing system is funded and allocated in a manner rationally related to the constitutional mandate that the General Assembly provide a "thorough and uniform" public school system." *Id.* Ultimately, the Court held that "plaintiffs' constitutional challenges to Colorado's public financing scheme present appropriate claims," and that the "plaintiffs are entitled to the opportunity to prove their allegations." *Id.* at 374.

Like Plaintiffs, Plaintiff-Intervenors claim that the current school finance system is irrational and violates Colorado Constitution Article IX, § 2 by failing to provide a "thorough and efficient system." *See* Complaint at 18-19, ¶¶ 98-101. Similarly, Plaintiff-Intervenors claim that the current school finance system deprives local communities from exercising local control over their districts in violation of Colorado Constitution Article 15, § 15. *See id.* at 19, ¶¶ 102-104. Because Plaintiff-Intervenors assert essentially the same claims as Plaintiffs – whose claims have already been upheld as valid and justiciable – Plaintiff-Intervenors' claims cannot possibly violate the separation of powers doctrine.

Plaintiff-Intervenors' request for declaratory and injunctive relief also aligns well with the *Lobato* opinion. Plaintiff-Intervenors have asked this Court to declare the school funding

scheme unconstitutional consistent with their claims brought under Colorado Constitution art. IX, §§ 2 and 15, a remedy wholly within the power of this Court as recognized in the Colorado Supreme Court's opinion. *See* Complaint at 19. Plaintiff-Intervenors further request that this Court enjoin "any school finance system unless it satisfies the principles of adequacy established under Colorado law and remedies the constitutional violations." *Id.* at 20. Should Plaintiff-Intervenors prevail on their claims, Plaintiff-Intervenors recognize that the injunction will not take effect until *the State* is provided with an appropriate period of time to adopt and effectuate a constitutional school finance system. This falls directly in line with the Colorado Supreme Court's holding that, "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. Because neither Plaintiff-Intervenors' claims nor requested remedy violate the constitution or the separation of powers doctrine, Plaintiff-Intervenors respectfully urge the Court to strike Defendants' Affirmative Defense Nos. 4 and 5.

## VI. Conclusion

For the reasons foregoing reasons Defendants cannot maintain or support Affirmative Defenses Nos. 2, 3, 4 and 5, and Plaintiff-Intervenors urge this Court to strike these defenses from the Answer.

DATED: October 4, 2010

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **PLAINTIFF-INTERVENORS' MOTION TO STRIKE DEFENDANTS' SECOND, THIRD, FOURTH AND FIFTH AFFIRMATIVE DEFENSES** upon all parties herein by electronically filing through LexisNexis courtlink or by depositing copies of same in the United States mail, first-class postage prepaid, this 4<sup>th</sup> of October, 2010 addressed as follows:

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