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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202</td><td rowspan="2">□ COURT USE ONLY □</td></tr>
<tr><td>PLAINTIFFS: Anthony Lobato, et al.

and

PLAINTIFFS-INTERVENORS: Armandina Ortega, et al.

vs.

DEFENDANTS: The State of Colorado, et al.</td></tr>
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Div: 9</td></tr>
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INTRODUCTION

Education is of paramount importance to the State of Colorado. The Governor, Board of Education, and Department of Education work every day to provide all Colorado children equal access to thorough and uniform educational opportunities. Colorado is a national leader in education reform efforts and provides substantial financial support to its public school system. As the traditional base of local financial support for public schools has eroded, the State has taken on an increasingly larger share—now nearly two-thirds of the total funding for K–12 education. Indeed, the State dedicates almost half of its general fund budget to the public school system, leaving the remainder to be shared by all other state services such as higher education, health and human services, corrections, and the courts.

Unsatisfied with the State's efforts, Plaintiffs, a group of school districts and parents, filed suit alleging the General Assembly's carefully considered funding decisions were irrational. (Pls.' 2d Am. Compl. ¶¶ 3–4.) An additional group of parents subsequently joined as Plaintiff-Intervenors. According to both Plaintiffs and Plaintiff-Intervenors, the allegedly irrational funding of public schools, somehow chargeable to Defendants, precludes Colorado school children from receiving a constitutionally adequate education and infringes school districts' constitutional right to local control. (Pls.' 2d Am. Compl. ¶¶ 2–3; Pl.-Intervenors' Compl. at 4–5.) What Plaintiffs and Plaintiff-Intervenors do not acknowledge, however, is that the constitutional provision of local control over education means school districts—not just Defendants—bear significant responsibility for educating Colorado's children. They further fail to recognize the General Assembly makes its funding decisions in the midst of an ongoing national dispute over the effect of increased funding on education outcomes. And, they seek a

massive education spending increase despite the fact that Colorado's citizens have enacted strict constitutional revenue limitations. Taxpayer Bill of Rights ("TABOR"), Colo. Const. art. X, sec. 20.

Although representing just 21 of Colorado's 178 school districts and a relative handful of students from 10 additional districts, Plaintiffs and Plaintiff-Intervenors bring this case as if they represent *all* districts and students in Colorado. For example, Plaintiffs expressly request a declaration that Colorado's public school finance system "violates the rights of Plaintiffs *and the public school students and school districts of the state*." (Pls.' 2d Am. Compl., Prayer for Relief ¶ 1 (emphasis added).) Plaintiff-Intervenors similarly seek a declaration that the finance system "ha[s] stripped *local communities and their taxpayers* of their ability to exercise meaningful local control of their educational programs." (Pl.-Intervenors' Compl. ¶ 107 (emphasis added).) The sweeping scope of Plaintiffs and Plaintiff-Intervenors' allegations necessarily force Defendants to investigate, prepare, and defend a statewide case. (*See also* Pls.' 2d Am. Compl. ¶¶ 2, 4, 14,–17, 63–64, 66, 94, 102, 106, 107, 110–12, 114–15, 117, 119, 124–25, 131–32, 135, 138, 144, 146, 149, 151, 169, 176, 179–92, 195, Prayer for Relief ¶¶ 1–3, 5, attached as Defs.' App. A; Pl.-Intervenors' Compl. ¶¶ 20, 29–30, 37, 39–40, 42, 44–45, 53, 55, 58–60, 62, 67–68, 71–73, 79, 87, 89, 94–97, 99–101, 103–07, attached as Defs.' App. B.)

Moreover, while neither Plaintiffs nor Plaintiff-Intervenors have named the General Assembly as a party in this case, both request injunctive relief ordering corrective legislative action. Plaintiffs seek "interim and permanent injunctions compelling Defendants to establish, fund, and maintain a thorough and uniform system of free public schools." (Pls.' 2d Am. Compl., Prayer for Relief ¶ 5.) Plaintiff-Intervenors allege "[d]efendant State of Colorado is responsible

for enacting the laws that together form the school finance system" and ask this Court to "[e]njoin Defendants from giving force and effect to any [inadequate] school finance system," (Pl.-Intervenors' Compl. ¶¶ 14, 108.) Thus, Plaintiffs and Plaintiff-Intervenors attribute Defendants with powers they do not possess and, in effect, bring a legislative dispute to the judiciary.

In response to these largely limitless allegations and overbroad requests for relief, Defendants asserted numerous affirmative defenses. (Defs.' Answer to Pls.' 2d Am. Compl., Affirmative Defenses ¶¶ 1–6, attached as Defs.' App. C; Defs.' Answer to Pl.-Intervenors' Compl., Affirmative Defenses ¶¶ 1–5, attached as Defs.' App. D.) Plaintiffs and Plaintiff-Intervenors, in advance of any factual development, now separately move to strike the defenses asserting the absence of all necessary and indispensable parties, lack of standing, request of an unconstitutional remedy, and violation of the separation of powers. In determining whether these affirmative defenses are legally viable, this Court necessarily will set the scope and course of this case.

ARGUMENT

Plaintiffs and Plaintiff-Intervenors' motions to strike should be denied because Defendants can prove facts supporting their affirmative defenses upon any legal theory.

STANDARD OF REVIEW

"A motion to strike for failure to state a legal defense is analogous to a C.R.C.P. 12(b)(5) motion and governed by the same standards," *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 308 (Colo. App. 2007) (citing 1B Cathy S. Krendl, COLORADO METHODS OF PRACTICE § 29.6 (5th ed. 2004)). Consequently, such motions must be viewed with disfavor and should not be granted

unless it appears beyond a doubt that the proponent can prove no set of facts supporting its defense upon any legal theory. *See, e.g.*, *G & A Land, LLC v. City of Brighton*, 233 P.3d 701, 705 (Colo. App. 2010) (reciting well-established Rule 12(b)(5) standards), *accord Wagner*, 166 P.3d at 308–09.

ANALYSIS

I. Defendants' Second through Fifth Affirmative Defenses provide reasonable notice to Plaintiff-Intervenors.

Plaintiff-Intervenors generally contend Defendants' second through fifth affirmative defenses must be stricken because they were not alleged with any factual or legal support. (Pl.-Intervenors' Mot. to Strike at 4.) Because fair notice was given, this argument fails.

"A party shall state in short and plain terms his defenses to each claim asserted . . . ." C.R.C.P. 8(b). Although a defendant ultimately "carries the burden of establishing any affirmative defenses," *Welsch v. Smith*, 113 P.3d 1284, 1289 (Colo. App. 2005), "[t]he key to determining the *sufficiency of pleading* an affirmative defense is whether it gives plaintiff fair notice of the defense." *Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1023 (9th Cir. 2010) (citing cases) (emphasis added), *accord Barnes v. City of Westminster*, 723 P.2d 164, 165 (Colo. App. 1986).

Here, Defendants stated their second through fifth affirmative defenses in short and plain terms. (Defs.' App. D.) Nothing more was required. *See* C.R.C.P. 8(b)–(c). Even if the rule requires more specificity, Plaintiff-Intervenors received ample notice of the substance of Defendants' affirmative defenses. *See, e.g.*, *Simmons*, 609 F.3d at 1023. As evidenced by their motion to strike, Plaintiff-Intervenors were able to articulate arguments against Defendants' affirmative defenses. Indeed, Plaintiff-Intervenors acknowledge Defendants' responses to

Plaintiffs' discovery explained "identical" affirmative defenses. (Pl.-Intervenors' Mot. at 5–7 & n.2.) Assuming *arguendo* fair notice was not given, Defendants should be afforded leave to amend. *See* C.R.C.P. 15(a) (authorizing party to respond to amended pleading and declaring leave to amend "shall be freely given when justice so requires"); 5C Charles Alan Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE §1381 at 431 (3d ed. 2004) (citing cases).

II. Second Affirmative Defense against both Plaintiffs and Plaintiff-Intervenors: Plaintiffs and Plaintiff-Intervenors have failed to join all necessary and indispensable parties.

Plaintiffs and Plaintiff-Intervenors argue this case may proceed with the present parties because the interests of unnamed school districts and parents of students are adequately represented. (Pls.' Mot. to Strike at 6–12; Pl.-Intervenors' Mot. at 6–8.) However, a decision to increase funding in a represented school district would not necessarily yield the same effect in an unrepresented district. In addition, it is both impractical and improper to force Defendants to address statewide allegations of insufficient delivery of education in each and every school district without all districts being present in the case.

A person subject to service of process and the venue of the trial court is necessary and shall be joined, even involuntarily, as a party in an action if complete relief cannot be accorded in his absence. C.R.C.P. 19(a). Such a person is also indispensable if he cannot be made a party and justice demands the action be dismissed in his absence. C.R.C.P. 19(b).

Declaratory judgments, as sought in the present case, demand more stringent joinder. *See* Krendl, *supra*, § 35.4 at 519. "[A] court should not render a declaratory judgment unless it will fully and finally resolve the uncertainty and controversy as to *all* parties with a substantial interest in the matter that could be affected by the judgment." *Constitution Assocs. v. New*

Hampshire Ins. Co., 930 P.2d 556, 561 (Colo. 1996) (citing *People ex rel. Inter-Church Temperance Movement v. Baker*, 297 P.2d 273, 277–78 (Colo. 1956)). "Since a declaratory judgment action cannot bind non-parties, any entity or person with an *existing or potential* interest in the outcome should be named as a party in order to fully and finally resolve the controversy at issue." *Constitution Assocs.*, 930 P.2d at 562 (citing § 13-51-115, C.R.S. (2010)) (emphasis added). Thus, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." C.R.C.P. 57(j).

A. The unnamed, non-party school districts, parents, and students have unrepresented interests in the outcome of this case and feasibly can be joined.

Plaintiffs and Plaintiff-Intervenors ask this Court to declare the State's public school system is unconstitutional for *every* student in *all* 178 districts. (Defs.' Apps. A–B.) Their intent to prosecute this as a statewide case is further evidenced by their broad discovery requests, which seek information and documents about funding and other policies of all Colorado school districts. (Pls.' 1st Disc. Reqs., Definitions ¶ 3, Reqs. for Admiss. ## 2, 6–7, Non-Pattern Interrogs. ## 3, 11–18, 20, Reqs. for Produc. of Docs. # 13, attached as Defs.' App. E; Pl.-Intervenors' 1st Disc., Interrogs. ## 1–2, 5, 8–9, 11–13, 15, 19, 21–22, Req. for Produc. ## 8–9, 11–12, 18, 20–22, 27–28, Reqs. for Admiss. ## 9, 11, 14–15, 19–20, 22–23, 29–31, attached as Defs.' App. F.) Given the comprehensive breadth of Plaintiffs and Plaintiff-Intervenors' allegations, every school district and student in Colorado necessarily has a substantial interest in the outcome of this case. And, while perhaps not preferred by Plaintiffs and Plaintiff-Intervenors,

joinder is feasible. *See* C.R.C.P. 19(a); *Potts v. Gordon*, 525 P.2d 500, 503–04 (Colo. App. 1974).

Plaintiffs nevertheless contend the absent districts have no particularized interest in the outcome of this action beyond that of all individuals and entities involved with Colorado's public school system. (Pls.' Mot. at 9.) In other words, Plaintiffs argue they fully represent the unnamed districts' interests. Plaintiff-Intervenors similarly contend any absent parents and school children stand to have their rights affected, if at all, in equal measure with the named parties. (Pl.-Intervenors' Mot. at 8.) According to Plaintiff-Intervenors, judgment in their favor will only benefit other Colorado school children. (*Id.*)

This is not so. Such assertions fail to acknowledge the disparate interests implicated by this case. Plaintiffs and Plaintiff-Intervenors erroneously assume all Colorado school districts, students, and parents share their vision of the Education and Local Control Clauses. Yet, by making allegations encompassing all students in every school district, Plaintiffs and Plaintiff-Intervenors unavoidably set groups of students against one another. For example, by emphasizing systemic funding disadvantages in low property-wealth districts, Plaintiffs and Plaintiff-Intervenors imply high property-wealth districts are able to provide a better education. (Pls.' 2d Am. Compl. ¶¶ 114, 146, 191; Pl.-Intervenors' Compl. ¶¶ 29–30.) Likewise, in their Complaint, Plaintiff-Intervenors expressly target gifted and talented students for receiving more funding per-pupil than English language learners. (Pl.-Intervenors' Compl. ¶ 56.) A judicial determination that funding to the plaintiff districts or for a particular group of students like English language learners is irrational does not necessarily mean, as Plaintiffs and Plaintiff-Intervenors assume, that the State will be able to increase funding in each of the absent districts

and for all groups of students. Especially considering the reality of limited revenue, *see* TABOR, Colo. Const. art. X, sec. 20, it is at least as likely that any judgment in Plaintiff and Plaintiff-Intervenors' favor would adversely affect unrepresented students and districts' interests. *See* 7 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1604 at 60 (3d ed. 2001) ("[T]he prejudicial effect of nonjoinder referred to in Rule 19(a)(2) may be practical rather than legal in character."), *quoted in Jacobucci v. District Court*, 541 P.2d 667, 675 (Colo. 1975).

Accordingly, the unnamed school districts, parents, and students are necessary and indispensable parties to this litigation and must be joined. *See* C.R.C.P. 57(j); *see, e.g.*, *Constitution Assocs.*, 930 P.2d at 561–62; *cf. Lyon v. Amoco Prod. Co.*, 923 P.2d 350, 356–57 (Colo. App. 1996) (affirming findings that Indian tribes were necessary and indispensable parties because by complaining all of defendants' gas drilling contributed to basin-wide contamination to all lands, plaintiffs "alleged a seamless web of contamination which makes it difficult, if not impossible, to separate the wells and drilling operations outside the tribal trust land from those on tribal land"); *Mesa County Jr. Coll. Dist. v. Donner*, 371 P.2d 442, 443 (Colo. 1962) (holding junior college districts should have been allowed to intervene because "a declaration of unconstitutionality would result in the loss to them of the funds provided by the act in question"); *Baker*, 297 P.2d at 276, 279 (affirming dismissal where 1174 individual liquor license holders were not made party to suit challenging constitutionality of act authorizing licensure).

Nothing in *Harmelink v. City of Arvada*, 580 P.2d 841 (Colo. App. 1978), relied on by Plaintiffs (Pls.' Mot. at 8), dictates otherwise. There, the Court of Appeals ruled a landowner of an affected parcel, who owned it jointly with one of several named plaintiffs and later became sole owner, was not indispensable to a rezoning challenge. *Id.* at 841–42. Suggesting just one

landowner plaintiff was sufficient, the Court of Appeals creatively relied on an out-of-state case not involving joinder to reason that an individual landowner objecting to a rezoning ordinance was not required to join all other objectors because the right to bring suit was based on the individual's own injury and damage. *Id.* at 842 (quoting *Crozier v. County Comm'rs of Prince George's County*, 97 A.2d 296, 299 (Md. 1953)). The Colorado Supreme Court subsequently discredited *Harmelink*'s reasoning, emphasizing it has not yet decided "the question of whether all landowners are indispensable parties to an action challenging a rezoning determination." *Thorne v. Board of County Comm'rs of Fremont County*, 638 P.2d 69, 72 n.5 (Colo. 1981). Indeed, the Supreme Court indicated landowners might be indispensable because by affecting the land, a rezoning determination creates a direct effect upon landowners. *Id.*

Even if it were reliable authority, *Harmelink* is distinguishable. *See, e.g.*, *Clubhouse at Fairway Pines, LLC v. Fairway Pines Estates Owners Ass'n*, 214 P.3d 451, 456 (Colo. App. 2008) ("Whether a party is indispensable depends on the facts of each case."). Again, Plaintiffs and Plaintiff-Intervenors challenge the entire public school financing system as unconstitutional; they do not seek a remedial writ from an adverse rezoning ordinance. *See Snyder v. City of Lakewood*, 542 P.2d 371, 375–76 (Colo. 1975) (explaining difference between quasi-judicial rezoning decisions reviewable only under C.R.C.P. 106 and general zoning laws exercising legislative authority from which declaratory relief may be sought), *cited in Margolis v. District Court*, 638 P.2d 297, 304–05 (Colo. 1981) (declining to extend *Snyder* into referendum and initiative context). Moreover, as discussed above, the unnamed districts and individuals are not objectors with identical, non-particularized interests sufficiently represented by the named parties. *See McNichols v. City and County of Denver*, 74 P.2d 99, 102 (Colo. 1937) ("A

judgment against [the government] in a matter of *general interest* to all its citizens is binding upon the latter, though they are not parties to the suit.") (emphasis added).

Nor is Plaintiffs' reliance on *School District of City of Pontiac v. Secretary of United States Department of Education*, 584 F.3d 253 (6th Cir. 2009) (en banc), availing. (Pls.' Mot. at 10–11.) If anything, that the entire Sixth Circuit split on whether unnamed states were necessary and indispensable parties underscores the viability of Defendants' affirmative defense. *Compare id.* at 255–56, 264–68, *with id.* at 297, 300–04 (McKeague, J., concurring); *see also Connecticut v. Duncan*, 612 F.3d 107, 115 (2d Cir. 2010) ("The Sixth Circuit, considering similar claims, found them justiciable. We disagree, and are more persuaded by Judge McKeague's concurrence."). At a minimum, Defendants can prove a set of facts supporting a defense of failure to join all necessary and indispensable parties. The motions to strike, therefore, should be denied.

Even if this Court ultimately determines the unnamed districts or individual parents and students are not necessary and indispensable, Plaintiffs and Plaintiff-Intervenors should be made to reconcile their expansive allegations and discovery requests (Defs.' Apps. A–B, E–F) with their concessions in the motions to strike that they are not asserting claims on behalf of any unnamed person or entity. (Pls.' Mot. at 12–13; Pl.-Intervenors' Mot. at 9.) Otherwise, Defendants are improperly and impractically forced to defend what amounts to a statewide class action suit brought on behalf of just 21 school districts and a handful of parents and students. Plaintiffs and Plaintiff-Intervenors allege statewide harm and seek statewide relief for all students in every school district, but they avoid the burdens of proving injury to or addressing potential disparate impacts on the absent districts and their students. Plaintiffs and Plaintiff-

Intervenors unfairly force Defendants to make particularized inquiries into the local provision of K–12 education in all 178 Colorado school districts in order to defend against the largely limitless allegations in this case.

Such a fundamental disconnect between parties and claims ignores the Rules of Civil Procedure and should not be allowed. *See* Krendl, *supra*, §35.4 at 519 ("In many cases, especially those seeking declarations of rights or obligations arising under statutes, [Rule 57] requires that plaintiffs sue as a class of those affected."). If Plaintiffs and Plaintiff-Intervenors truly seek relief only on behalf of the named individuals and districts, then the far more expansive allegations in their complaints (Defs.' Apps. A–B) should be withdrawn or stricken. *See* Wright & Miller, *supra*, § 1383 at 469–71 ("[F]ederal courts have eliminated certain types of matters from the pleadings that are not germane to any issue in the action . . . includ[ing] allegations that adversely reflect on persons who are not parties . . . .") (citing cases). If, on the other hand, Plaintiffs and Plaintiff-Intervenors continue to allege injury to all Colorado school districts, parents, and students and request statewide relief, then they should seek class certification pursuant to C.R.C.P. 23. *Cf. Horne v. Flores*, 129 S.Ct. 2579, 2606 (2009) ("Nor have respondents explained how the EEOA could justify a statewide injunction when the only violation claimed or proven was limited to a single district.").

B. An injunction may not enter against the absent General Assembly.

Plaintiffs seek more than a declaratory judgment; they request an injunction compelling corrective legislative action. (Pls.' 2d Am. Compl., Prayer for Relief ¶¶ 5–6.) An injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, attorneys, and upon those persons in active concert or participation with them who receive actual notice of

the order by personal service or otherwise." C.R.C.P. 65(d); *see also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (interpreting identical federal rule). As one of the three coequal branches of government established by the Colorado Constitution, the General Assembly is neither in concert nor in participation with Defendants, who are executive branch agencies and officers. The Attorney General does not represent the General Assembly or any legislative officer or entity. § 24-31-101(1)(a), C.R.S. (2010). Thus, to even seek injunctive relief against the legislative branch, Plaintiffs must attempt to name the General Assembly as a party in this case. *See* C.R.C.P. 19(a)–(b).

Plaintiffs and Plaintiff-Intervenors contend the judiciary routinely orders appropriate relief even when the General Assembly is not named as a party. (Pls.' Mot. at 8–9; Pl.-Intervenors' Mot. at 7 n.3.) Yet, in *Mesa County Board of County Commissioners v. State*, 203 P.3d 519, 522 (Colo. 2009), and *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1010–11 (Colo. 1982), the Colorado Supreme Court addressed only declaratory—not injunctive relief. Here, the Supreme Court noted that if this Court concludes the public school system is irrationally funded, then it must "provide the legislature with an appropriate period of time to change the funding system." *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009). But, the Supreme Court did so only in the context of holding Plaintiffs' claims are justiciable, and these "incidental remarks of the court on questions not before it" hardly endorse an injunction compelling corrective legislative action. *Parker v. Plympton*, 273 P. 1030, 1034 (Colo. 1929). To the extent the Supreme Court's dicta could be read in Plaintiffs' favor, it conflicts with a long line of precedent expressly holding a mandatory injunction may not issue against the General Assembly. *E.g.*, *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 211 (Colo. 1991).

III. Third Affirmative Defense against both Plaintiffs and Plaintiff-Intervenors: The individual plaintiffs and Plaintiff-Intervenors lack standing on their own behalf as taxpayers, their children's behalf as recipients of public education, or for unnamed groups of parents, students, or districts of which they are not a part.

In their motions to strike, Plaintiffs and Plaintiff-Intervenors contend they are not seeking to assert claims on behalf of anyone other than the parties to the case. (Pls.' Mot. at 12–13; Pl.-Intervenors' Mot. at 9.) As already discussed, however, these apparent concessions squarely conflict with Plaintiffs and Plaintiff-Intervenors' broad allegations, sought relief, and discovery requests. To the extent that Plaintiffs and Plaintiff-Intervenors continue to prosecute the case on behalf of children, districts, or discrete populations that are not parties, Defendants maintain they lack standing to do so. *See, e.g.*, *Jefferson County Dept. of Soc. Servs. v. Colo. State Dept. of Insts.*, 784 P.2d 805, 808 (Colo. App. 1989) ("As a general rule, a person does not have standing to assert the constitutional rights of another person even under an assignment of that person's claim.").

To attempt to refute the remaining portion of Defendants' third affirmative defense, that Plaintiffs and Plaintiff-Intervenors themselves lack standing, Plaintiffs and Plaintiff-Intervenors rely exclusively on the law of the case doctrine. (Pls.' Mot. at 13–14; Pl.-Intervenors' Mot. at 9.) Standing, however, is jurisdictional and may be raised at any time. *E.g.*, *Kruse v. McKenna*, 178 P.3d 1198, 1199–1200 (Colo. 2008); *see also, e.g.*, *Green v. Dep't of Commerce*, 618 F.2d 836, 839 n.9 (D.C. 1980) ("[T]he doctrine of 'law of the case' does not apply to the fundamental question of subject matter jurisdiction."). In addition, neither the Court of Appeals nor the Supreme Court had any occasion to consider Plaintiff-Intervenors' standing, as they had not yet filed their complaint. Although the Court of Appeals held the individual plaintiffs had standing,

it did so on its own motion without argument from the parties. *Lobato v. State*, 216 P.3d 29, 35 (Colo. App. 2008). Even if law of the case is absolutely binding, which it is not, Defendants cannot fairly be bound to a decision on which they have yet to be heard. *See Castro v. United States*, 540 U.S. 375, 384 (2003) (emphasizing law of the case doctrine "simply 'expresses' common judicial 'practice'; it does not 'limit' the courts' power"); *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983) (explaining that binding trial courts to appellate decisions in the same case "protect[s] against the reargument of settled issues").

In addition to being procedurally proper, the standing affirmative defense is viable on its merits. This case presents nuanced and unique standing questions that deserve full briefing and consideration. For example, whether individual plaintiffs and Plaintiff-Intervenors have alleged an injury-in-fact to a legally protected interest turns on whether they or their children have a constitutional right to increased K–12 funding. *Colo. Gen. Assem. v. Lamm*, 700 P.2d 508, 516 (Colo. 1985) ("[I]f the plaintiff does allege sufficient injury, the question of whether the plaintiff is protected by law from the alleged injury must be answered."). This question of what, if any, level of funding the Constitution requires is at the heart of this case, and thus, the standing question is "inextricably tied" to the merits and should not be thrown out prematurely. *Id.* ("A decision that a plaintiff lacks standing because the claimed injury does not infringe any legally protected right of the plaintiff may be viewed as equivalent to a holding that the plaintiff has failed to state a claim upon which relief may be granted."). Moreover, by arguing absent districts and students have no unique, particularized interest in this case (Pls.' Mot. at 9; Pl.-Intervenors' Mot. at 8), Plaintiff and Plaintiff-Intervenors' reveal the generality of their alleged injuries and undercut their standing to challenge State's provision of free public education. *See, e.g.*, *Town of*

Erie v. Town of Frederick, No. 09CA1066, 2010 WL 2306702, at *3 (Colo. App. Jun. 10, 2010) (recognizing "courts do not decide abstract, generalized grievances.") (citing *City of Greenwood Village v. Pet'rs. for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000)).

Whether Plaintiffs or Plaintiff-Intervenors have standing as taxpayers is similarly complex. Both parties appear to desire higher taxes to allow greater education funding. (Pls.' 2d Am. Compl. ¶ 192 (arguing TABOR's revenue limitations should "yield" to the Education Clause); Pl.-Intervenors' Compl. ¶ 33 (arguing TABOR restricts school districts' abilities to raise revenues).) Such a result potentially imposes a new injury in the form of increased taxes on all citizens. While Colorado generally recognizes "broad taxpayer standing," *Ainscough v. Owens* 90 P.3d 851, 856 (Colo. 2004), Defendants are unaware of any other case in which plaintiffs assert standing as taxpayers to argue the government is spending too little rather than too much. *Cf. Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008) (recognizing TABOR's limitations on governmental power in taxpayer standing context). Such important, jurisdictional questions should not be stricken at this early stage of the case.

IV. Fourth Affirmative Defense against Plaintiffs: School district plaintiffs are political subdivisions of the state and lack standing to challenge the Public School Finance Act.

As Plaintiffs acknowledge, the Supreme Court did not evaluate the school district plaintiffs' standing, but rather permitted the districts to continue in the case because they asserted claims identical to the individual plaintiffs. (Pls.' Mot. at 14.) As demonstrated above, Defendants have at least a viable defense that the individual plaintiffs and Plaintiff-Intervenors lack standing. If Defendants prevail on that argument, the districts would lose their derivative standing and the unaddressed question of their separate standing would need to be resolved.

Accordingly, Defendants' affirmative defense that the school districts have no standing to sue the State should not be stricken.

V. Fourth and Fifth Affirmative Defenses against Plaintiff-Intervenors: Plaintiff-Intervenors' claims seek an unconstitutional remedy and violate the separation of powers.

Plaintiff-Intervenors move to strike Defendants' fourth and fifth affirmative defenses on the ground that the Supreme Court held the sought declaratory and injunctive relief is constitutional and respects the separation of powers. (Pl.-Intervenors' Mot. at 10–12.) This argument misunderstands the Supreme Court's holding.

As Plaintiff-Intervenors acknowledge, the only issue before the Supreme Court was whether the claims in this case were justiciable. *See Lobato*, 218 P.3d at 362. The challenged affirmative defenses go to the merits of Plaintiff-Intervenors' claims, not their justiciability. Whether the merits of the claims and requested relief are constitutional or violate the separation of powers has not yet been addressed, much less resolved.

Moreover, Defendants' affirmative defenses are grounded in a viable legal theory. The defense that Plaintiff-Intervenors seek an unconstitutional remedy is prompted by their contention that certain clauses of the Constitution conflict. Specifically, Plaintiff-Intervenors argue TABOR and the Gallagher Amendment, Colo. Const. art. X, sec. 3(1)(b), so restrict revenues to school districts that they offend both the Education Clause and the Local Control Clause. (Pl.-Intervenors' Compl. ¶ 30.) Plaintiffs more directly argue TABOR and the Gallagher Amendment must "yield" to the Education Clause. (Pls.' 2d Am. Compl. ¶ 192.)

However, it is well-established that all provisions of the Constitution must be read in harmony; one generally does not yield to another. *See, e.g.*, *Town of Frisco v. Baum,* 90 P.3d

845, 847 (Colo. 2004) ("'[I]t is essential that we take the Constitution as it is, including every part thereof relating to the subject-matter under consideration, and construe the instrument as a whole, causing it, including the amendments thereto, to harmonize, giving to every word as far as possible its appropriate meaning and effect.'"); *Colo. State Civil Serv. Employees Ass'n v. Love*, 448 P.2d 624, 630 (Colo. 1968) ("Each clause and sentence of either a constitution or statute must be presumed to have purpose and use, which neither the courts nor the legislature may ignore."). Even "[w]here an amendment to a constitution is anywise in conflict or in any manner inconsistent with a prior provision of the constitution, the amendment controls." *In re Interrogs. by Gen. Ass., H. Joint Res. No. 1008*, 467 P.2d 56, 59 (Colo. 1970) (citing cases). Thus, if Plaintiffs and Plaintiff-Intervenors' vision of the Education Clause cannot be reconciled with TABOR, it is the Education Clause that must yield.

Defendants' fifth affirmative defense that Plaintiff-Intervenors' claims and requested relief violate the separation of powers is similarly prompted by the claims asserted and relief sought. Plaintiffs seek to compel affirmative legislative action such as establishing and funding a new system of public school finance. (Pls.' 2d Am. Compl., Prayer for Relief ¶¶ 5–6.) Plaintiff-Intervenors also seek injunctive relief that, while not phrased as directly as Plaintiffs' request, appears to be similarly aimed at enjoining the legislative branch. (Pl.-Intervenors' Compl. ¶¶ 14, 108; Pl.-Intervenors' Mot. at 11.) As already mentioned, however, an injunction may not issue against the General Assembly as such would "entail[] an improper intrusion into legislative affairs . . . ." *Grossman v. Dean*, 80 P.3d 952, 961 (Colo. App. 2003) (citing *Colo. Common Cause*, 810 P.2d 201). Indeed, while the Supreme Court found Plaintiffs' claims justiciable, it cautioned that separation of powers concerns were not to be ignored in a trial on the merits. *See*

Lobato, 218 P.3d at 374–75 ("The trial court must give significant deference to the legislature's fiscal and policy judgments.").

CONCLUSION

Plaintiffs and Plaintiff-Intervenors have broadly asserted statewide claims even though the General Assembly is absent and only a small percentage of potentially affected school districts, parents, and children have been made parties to this action, improperly burdening Defendants with an impractical defense. For these and the foregoing reasons and authorities, Defendants can, at the very least, prove a set of facts upon any legal theory supporting their challenged affirmative defenses. Accordingly, Defendants respectfully request that this Court deny Plaintiffs and Plaintiff-Intervenors' motions to strike their affirmative defenses asserting a failure to join all necessary and indispensable parties, lack of standing, pursuit of an unconstitutional remedy, and violation of the separation of powers. Because it could prove helpful, Defendants do not object to Plaintiffs' request for oral argument.

DATED: November 2, 2010

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFENDANTS' RESPONSE TO PLAINTIFFS AND PLAINTIFF-INTERVENORS' MOTIONS TO STRIKE 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, at Denver, Colorado, this 2nd day of November, 2010 addressed as follows:

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