COLORADO SUPREME COURT **STATE OF COLORADO** Colorado State Judicial Building 2 E. 14th Avenue Denver, CO 80203	
Colorado Court of Appeals, Opinion by Judge J. Jones, J. Graham, concurring Court of Appeals Nos. 11CA1856 & 11CA1857, J. Bernard dissents City and County of Denver District Court Nos. 11CV4424 & 11CV4427 Honorable Michael A. Martinez	FILED IN THE SUPREME COURT MAY 15 2013 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk ▲ **COURT USE ONLY** ▲
Taxpayers for Public Education, Cindra S. Barnard; Mason S. Barnard; James Larue; Suzanne T. Larue; Interfaith Alliance of Colorado; Rabbi Joel R. Schwartzman; Reverend Malcolm Himschoot; Kevin Leung; Christian Moreau; Maritza Carrera; and Susan McMahon, Plaintiffs-Appellees, v. Douglas County School District; Douglas County Board of Education; and Colorado Department of Education, Defendants-Appellants, and Florence and Derrick Doyle, on their own behalf and as next friends of their child, Alexandra and Donovan; Diana and Mark Oakley, on their own behalf and as next friends of their child, Nathaniel; and Jeanette Strohm-Anderson and Mark Anderson, on their own behalf and as next friends of their child, Max. Intervenors-Appellants.	Case No. 2013SC233

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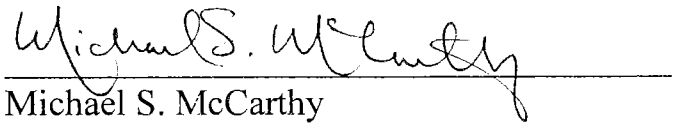
REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY THE TAXPAYER PLAINTIFFS

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

As required by C.A.R. 32(a)(3), the undersigned counsel certifies that this Reply contains 3,122 words and therefore complies with the word limit set forth in C.A.R. 53(d). Counsel relied on Microsoft Word to obtain this word count.



Michael S. McCarthy

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CONSTITUTIONAL PROVISIONS

Plaintiffs-Appellees Cindra S. Barnard, Mason S. Barnard, and Taxpayers for Public Education ("the Taxpayer Plaintiffs" or "Plaintiffs") hereby reply to the response of the Colorado State Board of Education and the Colorado Department of Education (collectively "the State") to the Taxpayer Plaintiffs' Petition for Writ of Certiorari in this case. The Taxpayer Plaintiffs also join in the LaRue Plaintiffs' reply to the response submitted by the Douglas County School District and the Intervenor Families, filed contemporaneously with this Reply.

DISCUSSION

The State's response does nothing to diminish the significance of the public school finance issues presented by the court of appeals decision and this petition for certiorari review. The State does not dispute the importance of the question whether the District's public funding of private and religious education violates the Colorado Constitution and the Public School Finance Act (the "Act"). The State does not dispute that multiple issues critical to the court of appeals decision present questions of first impression in this Court, including the court of appeals' application of the *Parfrey* standing test to injunctive claims against governmental defendants, its extension of the presumption of constitutionality to local school board decisions, and its use of a *de jure* segregation of undisputedly commingled

funds to try to evade a violation of Article IX, section 3 of the Colorado Constitution. These issues warrant the Court's review on writ of certiorari.

I. The Court of Appeals' Ruling Denying Standing to Plaintiffs Departs from This Court's Precedent.

This Court should grant certiorari to address the court of appeals' material constriction of Colorado's standing doctrine. Contrary to the State's assertion, the appeals panel did not "unanimously" deny standing to Plaintiffs under the Act. (*See* State Resp. at 5.) Although Judge Bernard's dissent specifically addressed only the merits of the constitutional issues, he did not join any portion of the majority's decision, including its narrowing of Colorado standing doctrine. (*See* Opinion at 62 (Bernard, J. "dissents from the majority's resolution of this case.").) Misapplication of this court's *Parfrey* opinion is the predicate for the court of appeals standing ruling and, as such, presents a compelling ground for certiorari review.

A. The State Board's Power to Adopt Regulations Does Not Foreclose a Private Remedy for a District's Violation of the Act.

The court of appeals held, and the State argues here, that a statute's mere grant to a state agency of the power to "make reasonable rules and regulations necessary for the administration and enforcement of this article" (Opinion at 12

(quoting C.R.S. § 22-54-120(1))) is sufficient to deprive a private plaintiff of any right to bring suit to prevent violation of the statute. (*Id.* at 13–14; State Resp. at 6–7.) But this Court has never adopted such a rule; on the contrary, the Court has held that a civil remedy is precluded only where the legislature enacts "a particular administrative remedy to redress a statutory violation." *Allstate Ins. Co. v. Parfrey*, 830 P.2d 905, 910 (Colo. 1992). The legislature provided no such "particular administrative remedy" here, and the State's response does not suggest otherwise. Despite Plaintiffs' emphasis on the *Parfrey* case in their original petition, the State's response ignores both that authority and the Colorado precedent that in fact permits private causes of action *notwithstanding* the same type of legislative grant of general agency rule-making authority present here. *See, e.g., Parfrey v. Allstate Ins. Co.*, 815 P.2d 959, 965–66 (Colo. App. 1991), *aff'd*, 830 P.2d 905 (Colo. 1992).

The State also invokes an unsubstantiated 'floodgates' argument (State Resp. at 7 (conjuring up the spectre of "constant litigation" of "individual school district spending decisions" by "any disgruntled citizen")) that seriously mischaracterizes and exaggerates what is actually at issue in this case. Plaintiffs do not dispute that the Act grants school districts broad discretion in a multitude of

day-to-day spending decisions, and Plaintiffs have never suggested that every such decision could or should be subject to litigation simply because a student or a parent disagrees with it. The circumstances here, however, do not involve an exercise of discretion or routine spending decisions. As the trial court found, the District specifically and deliberately adopted a policy that directly violates the explicit requirements of the Public School Finance Act. (Order at 56.)

The need for discretionary decision-making can never serve to insulate a direct statutory violation from judicial scrutiny. Indeed, the State's response makes only speculative allusions to "constant litigation" that would supposedly result from recognizing standing here, yet never offers a single concrete example of a "specific spending decision[]" to which a finding of standing here would—but should not—apply. (State Resp. at 7.)

B. This Court has Never Applied the *Parfrey* Standing Test to a Private Plaintiff's Statutory Claim against a *Governmental* Defendant.

The court of appeals decision substantially departed from this Court's precedent by imposing the Court's standing test for claims against *private* parties to claims against a *government* body. *See Allstate Ins. Co. v. Parfrey*, 830 P.2d 905, 911 (Colo. 1992) (establishing test for determining "whether a private tort

remedy is available against a *nongovernmental defendant* for violating a statutory duty" (emphasis added)).

The State's response does not dispute that the Court's *Parfrey* holding applies only to claims against *non*governmental defendants, and does not dispute that the court of appeals decision nevertheless applied the *Parfrey* test to a private party's claims against a *government body* for violation of a statutory duty. Remarkably, the State's response simply ignores the *Parfrey* case. The State likewise does not dispute that the public policy informing whether one private party may sue another to recover damages resulting from violation of a statute (the *Parfrey* and *Gerrity*[1] situations) are much different from those surrounding whether a private party may sue a government body for injunctive relief to halt its violation of a state statute (the situation here).

Instead, the State argues only that *other* Colorado Court of Appeals decisions (in addition to the decision here) have *also* ignored the limitation of the *Parfrey* standard and have extended the standard to claims against

[1] *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997). *Gerrity*, which itself relied on *Parfrey*, *id.* at 923, is the case the State cites in its response rather than citing *Parfrey* itself. (*See* State Resp. at 5–8.) Nothing in *Gerrity* suggests that this Court intended the *Parfrey* test to apply to a private party's standing to seek injunctive relief to compel a governmental body to obey the law.

*non*governmental defendants. (State Resp. at 8 (citing *Macurdy v. Faure*, 176 P.3d 880, 883 (Colo. App. 2007), *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203, 1208 (Colo. App. 2000), and *Olson v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002))). Even assuming *arguendo* that these cases are not distinguishable from the circumstances here,[2] the State's reliance on them actually reinforces the need for this Court to clarify the law. If the State's reading of these cases were correct, then the court of appeals' divergence from this Court's limiting language in *Parfrey* and its narrowing of Colorado standing doctrine would not be confined to the present case, but would reflect a repeated misreading of the *Parfrey* holding, necessitating this Court's review to correct the court of appeals' analytical drift.

II. The District's Use of Public Funds to Pay Private School Tuition Violates the Act.

The trial court concluded by "overwhelming evidence" that the Voucher Program "violates the Public School Finance Act funding balance and

[2] In fact, they are. *Macurdy* was an action for damages, not injunctive relief like Plaintiffs sought here. *See* 176 P.3d at 881. The *Prairie Dog* case involved the claimed violation of a criminal statute, for which the law inherently grants the State enforcement power. *See* 20 P.3d at 1208 ("the language of the statute plainly reserves its enforcement to the state"). And the *Olson* case did not cite *Gerrity* at all, but focused on issues of legal interest and actual injury. *See* 53 P.3d at 752-53.

inappropriately taps resources from other Colorado school districts." (Order at 56.) The State argues that this issue is premature because the State Board of Education had not and could not finally decide the District's eligibility for per-pupil funding of students "enrolled" in the Voucher Program at the time the injunction was entered. (State Resp. at 9–13.)

This argument is disingenuous. Under the State's own reckoning, by the time the State Board's decision would have been sufficiently "final," the facts on the ground would have precluded any effective injunctive relief. "Ripeness requires that there be an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication." *Beauprez v. Avalos,* 42 P.3d 642, 648 (Colo. 2002). A real and immediate controversy between the parties indisputably exists here. The Voucher Program is not some speculative future event that may or may not come into being depending on what the State Board of Education does. The trial court found that:

- The Colorado Department of Education repeatedly met with and advised the District on the legality of the Voucher Program and how to structure it to receive state pre-pupil funding (Order at 2, ¶ 5–6);

- Robert Hammond, the Colorado Commissioner of Education, did not intend to block the District from implementing the program (Order at 2, ¶ 6);
- The District actually began implementing the Voucher Program on March 15, 2011 (Order at 2–3, ¶ 7); and
- At the time of the injunction hearing, the District had already distributed over $200,000 in payments to participating private schools (Order at 15, ¶ 59).[3]

Given these unchallenged factual findings, it cannot reasonably be disputed that the issue of the violation of the Act is "real, immediate, and fit for adjudication." *Bd. of Directors v. Nat'l Union Fire Ins. Co.*, 105 P.3d 653, 656 (Colo. 2005).

The State also tries to avoid addressing the State Board's collusion with the District by quoting the court of appeals' comment that such an assertion is "ad hominem" and "without support in the record." (State Resp. at 12 (citing Opinion at 16).) But the trial court both found this complicity as a fact and cited specific

[3] The State's response ignores these findings and relies instead on the District Court's statement that "Robert Hammond testified 'that the state has not determined whether or not it will fund the Scholarship Program.'" (State Resp. at 10 (citing Order at 15, ¶ 60).) As the State's description acknowledges, however, the District Court merely noted that Hammond had given this testimony; it did not adopt Mr. Hammond's statements as findings.

record evidence supporting those findings. (*See* Order at 2-3, ¶¶ 6–7.) Plaintiffs' initial petition pointed the Court to this and other record evidence supporting the finding of collusion. (Taxpayers' Pet. at 4–5 & n.1.) The State's response ignores this supporting evidence.

The State also contends that the Court should not grant certiorari because the Act grants the District discretion in spending school monies, and specifically because school districts may legally contract with private parties to provide educational services. (State Resp. at 13–14 (citing Colo. Rev. Stat. §§ 22-32-122(1), 22-30.5-104(7)(b).) These statutes, however, permit a public school to contract with a private school *only* to provide services that the public school *could itself legally provide*. The statute that the State cites states:

> Any school district has the power to contract with ...any natural person, body corporate, or association for the performance of any service, including educational service, activity, or undertaking ***which any school may be authorized by law to perform or undertake***. Such contract...***shall provide that the service, including educational service, activity, or undertaking be of comparable quality and meet the same requirements and standards as would be necessary if performed by the school district.***

Colo. Rev. Stat. § 22-32-122(1) (emphasis added). This language does not authorize a school district to accomplish indirectly through contract what it cannot accomplish directly through its own employees; on the contrary, it requires any

contracting third party to meet the same requirements and standards that the public school would have had to meet. Thus, if a school district cannot legally provide religious services to students on its own—which it undisputedly cannot—it cannot contract with a private school or corporation to do so.

Finally, the State offers a speculative 'dominoes' argument, suggesting that a finding against the Voucher Program here will somehow threaten a myriad of other state educational programs involving public and private components. (State Resp. at 15–16.) None of the programs the State cites, however, is at issue in this case, and no court has ever examined either the legal terms of or the facts surrounding those programs. Moreover, as the State's own citations demonstrate, each of these other programs rests on a statute expressly authorizing the specific public-private partnership. In contrast, here, not only does the Voucher Program lack statutory authorization, it actually (in the words of the trial court) "fails to comport with the Public School Finance Act provisions which promote 'uniform' funding of education across the state." (Order at 56.) Nothing in the District Court's decision or in the arguments Plaintiffs advance pose a threat to any statutorily authorized public-private education partnership.

III. The Voucher Program is Not Entitled to a Presumption of Constitutionality.

The State does not question that all of the monies used to fund the Voucher Program are restricted for use in "public schools"—some monies by Article IX, Section 3, and the rest by the Act. The State does not dispute that the Voucher Program sends these restricted monies to private schools. But the State argues that the Voucher Program cannot be overturned because Douglas County's decision to fund "scholarships" for private school tuition is entitled to a presumption of constitutionality that cannot be rebutted, even by the trial court's clear, unrefuted factual findings that the Voucher Program sent "public school fund" monies to private schools. The Court should grant certiorari to address the court of appeals' misapplication of the presumption.

A. Colorado Law has Never Applied a Presumption of Constitutionality to a Local School Board Funding Decision.

No Colorado case has ever applied a presumption of constitutionality to a local school board decision, and the State cites no support for such an extension in its Brief. The District's Voucher Program is not a legislative enactment subject to the presumption, but merely a decision by the District to count private school students for state funding entitlement purposes. *See, e.g.*, *Landmark Land Co. Inc.*

v. City and County of Denver, 728 P.2d 1281, 1285 (Colo. 1986) (no presumption of constitutionality when municipal ordinance is not legislative).

In addition, the court of appeals' adoption of the "beyond a reasonable doubt" standard to the presumption of constitutionality in this case ignores this Court's guidance on how any such presumption can be rebutted. As the Court made clear in *Denver Publishing Co. v. City of Aurora*, 896 P.2d 306, 319 (Colo. 1995), even where such a presumption applies, the presumption can be overcome by "competent evidence" that does not need to be "substantial, but merely sufficient." And of course, a presumption of constitutionality cannot save a constitutional ruling that is flatly erroneous. *Mesa County Bd. of County Comm'rs. v. State*, 200 P.3d 519, 539 (Colo. 2009) (Eid, J., dissenting).

B. The Court of Appeals Decision Uses a Presumption of Constitutionality to Overrule Both the District Court's Factual Findings and Established Law Concerning Commingling of Funds.

Although the State contends the court of appeals did not cast aside the trial court's factual findings, that is exactly what that court did. The court of appeals ignored undisputed evidence cited by the trial court, including the testimony of Commissioner Hammond that monies from the public school fund were being used for the Voucher Program. (*See* Order at 56, 58, 63.) Despite this unrebutted

evidence, the court of appeals overturned the trial court's factual finding based on a presumption that the scheme was constitutional and on its conclusion that only a small amount of restricted money could have been diverted.[4]

Contrary to the State's argument, the court of appeals decision is not consistent with basic trust law. The State makes no effort to reconcile its argument with the case law that a commingling of funds from different sources inseparably merges them. Moreover, the hornbook law cited by the state dictates that the interest of a trust beneficiary depends on the intention of the settlor. (State Response at 20.) Here, even assuming trust law applied, the Colorado Constitution, which created the "trust," provides that the "public school fund" is to "forever remain inviolate" and that distributions of the fund "shall be in addition to and not a substitute for other moneys appropriated by the general assembly." Because all the monies used to finance the Voucher Program are restricted to use in "public schools," some by the Act and some by the Constitution, the State's argument that "non-trust income may be spent without regard to the terms of the trust" is a red herring. Here, it is undisputed that ***all*** of the monies used by the

[4] The public school fund accounts for more than $100 million in public school funding each year in Colorado. (Order at 62 (citing H.B. 10-1376 (the 2010 "Long Bill")).) The Voucher Program and similar programs that may follow therefore place at risk a substantial amount of constitutionally restricted school funding.

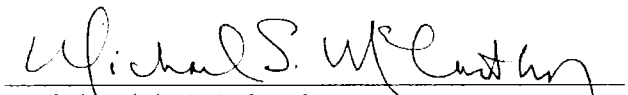
District are restricted and none can be spent on private schools. Moreover, Article IX, Section 3 makes clear that the State cannot substitute "public school fund" monies for other "public school" monies in order to spend those other "public school" monies on private schools.

The State argues that once it provides per pupil funding to the District, those monies are no longer restricted. But as discussed above, the District worked hand in hand with the State to set up the Program for the express purpose of using State provided "per pupil funding" for every child sent to private school through the Program. This case addresses whether the District can count those students as "public school students" in order to receive state per pupil funding. If the District cannot count students enrolled in the Voucher Program as public school students, no per-pupil funding will flow to the District from the State for those students, and the Program will not exist. Thus, the money at issue is not "one school district's discretionary spending," as the State contends, but rather one school district's attempt to receive more State per-pupil funding than that to which it is entitled.

CONCLUSION

Plaintiffs urge this Court to grant certiorari review to correct and clarify Colorado law on these important issues.

Respectfully submitted this 15th day of May, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2013, a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI BY THE TAXPAYER PLAINTIFFS** was served via U.S. First Class Mail, on the following:

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