COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203 ______________________________ COURT OF APPEALS, STATE OF COLORADO Judges Jones, Graham, and Bernard Appeals Court Case No. 11CA1856 and 11CA1857 Appeal from District Court, Denver County Colorado The Honorable Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427 ______________________________ **Petitioners:** JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON and **Petitioners:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child. vs. **Respondents:** DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION, and **Respondents**: COLORADO STATE BOARD OF EDUCATION; AND COLORADO DEPARTMENT OF EDUCATION, and	DATE FILED: September 15, 2014 6:25 PM FILING ID: C2644018FAB99 CASE NUMBER: 2013SC233 ^COURT USE ONLY^ Case No: 13SC233

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PETITIONERS' REPLY TO DEFENDANT-RESPONDENTS' BRIEF

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CERTIFICATE OF COMPLIANCE

I hereby certify that subject to the 8,400 word limit set in the Court's April 9, 2014 Order, this Reply Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. The Reply Brief contains 8,399 words. I acknowledge that this Reply Brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Michael S. McCarthy
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INTRODUCTION

In the Opening Brief, Plaintiffs established their standing and right to relief based upon Defendants' statutory and constitutional violations, thus justifying reinstatement of the permanent injunction imposed by the district court. With respect to the Public School Finance Act ("PSFA" or "the Act") claim, Defendants primarily respond that Plaintiffs lack standing—in other words, that the very people the Act was intended to benefit cannot sue to compel the State and the Douglas County School District ("the District") to comply with its plain terms. The defense misconstrues the statute's delegation of authority: a general directive that the Board "adopt reasonable rules and regulations" does not purport to confer absolute discretion to say what the PSFA means. Still less does it place the State's own statutory violations beyond the reach of judicial review. Indeed, none of Defendants' arguments suggests a legislative intent to cede all authority to interpret and enforce the PSFA to the State Board of Education ("State Board"). Rather, as beneficiaries *whose violated rights would otherwise lack any remedy at all*, Plaintiffs have implied standing to bring suit.

As for the PSFA violation itself—the unlawful diversion of public money to private schools—Defendants' response barely defends it. To declare the Choice Scholarship Program ("the Voucher Program" or "the Program") lawful,

Defendants rely on a solitary phrase from the PSFA: a description of state education funds as "budgeted and expended . . . in the discretion of the district." Nowhere, however, do they explain how a fictional charter school entitles the District to state funds to begin with. Defendants also call the Voucher Program unexceptional; but their claim that religious, sectarian, selective, tuition-charging, and often out-of-district private schools are just "as much part of the public education system as traditional neighborhood schools" would be news to many Coloradans. And *unlike* every other part of that system, the Voucher Program has no statutory basis whatsoever.

Defendants' response is equally unable to reconcile the undisputed spending of "Public School Fund" monies on private school tuition with Article IX, Section 3 of the Colorado Constitution. The constitutional mandate is plain: the Public School Fund cannot be used for anything but "free public schools." To defend the vouchers, Defendants rotate through a variety arguments—*e.g.,* that public school *districts* can spend funds as they see fit, that the court of appeals can presume commingled fund dollars were *not* used on private tuition, and that courts must presume the "*legislative*" decision to create the Voucher Program constitutional, never mind its funding through *non-legislative* decisions of the state board. But

these defenses are not just inadequately supported; they re-write the plain language of Article IX.

Defendants' arguments also ignore the plain language of Colorado's Religion Clauses.[1] The Clauses unambiguously prohibit diverting public funds to schools controlled by churches and religious institutions, imposing religious instruction and admissions tests in public schools, and forcing public school students to attend religious services. The Clauses contain no exception for funds that are delivered neutrally or through "private choice." And the history of the Clauses confirms that they were intended to strictly prohibit any kind of state funding of schools controlled by religious institutions. The Voucher Program does precisely what the text and intent of the Religion Clauses prohibit.

As a result, Defendants' argument rests primarily on federal case law upholding school-voucher programs. But that case law construed the federal Establishment Clause. Colorado's Religion Clauses have far more specific and detailed prohibitions, which this Court has already held must be interpreted independently of the federal Constitution. Moreover, the Court can and must give full effect to the language and intent of these provisions.

[1] This brief responds to Defendants' principal arguments concerning the Religion Clauses. Plaintiffs respond to Intervenors' principal arguments in a separate brief. Each brief incorporates the other.

This case, in sum, presents a stark choice between what Colorado's Constitution and the PSFA say, and what one school district and the State Board of Education collaborated to do. Plaintiffs respectfully seek reversal of the court of appeals' decision and reinstatement of the district court's permanent injunction.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE DISTRICT'S VIOLATION OF THE ACT.

Plaintiffs have standing to assert their statutory claims under the Act.[2] Standing requires that a plaintiff assert an "injury in fact" to a "legally protected interest." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). Here, Plaintiffs have established both the requisite interest and injury.

Defendants' Brief never fully engages Plaintiffs' argument establishing their standing to contest the District's violation of the PSFA through the Voucher Program. Instead, Defendants take a shallow approach to standing, reciting unremarkable principles of general law and distinguishing authority on superficial bases, but never acknowledging the reasoning of those cases or applying the public

[2] Defendants concede Plaintiffs' standing to raise their constitutional arguments. Defs.' Br. 15.

policy behind them. When the applicable law is examined closely, Plaintiffs' standing is clear.

As Defendants note, and the court of appeals recognized, the issue of whether Plaintiffs have standing depends on whether the legislature intended to permit Plaintiffs to sue to compel the District to comply with the PSFA. When a statute does not expressly provide for such a private civil remedy, as here, a court must consider whether:

> (1) the plaintiff is within the class of persons intended to be benefitted by the legislative enactment;
> (2) the legislature intended to create, albeit implicitly, a private right of action; and
> (3) an implied civil remedy would be consistent with the purposes of the legislative scheme.

Allstate Ins. Co. v. Parfrey, 830 P.2d 905, 911 (Colo. 1992). The court of appeals decision did not disturb the trial court's finding that Plaintiffs are within the class of persons the legislature intended the Act to benefit, *see Taxpayers for Public Educ. v. Douglas Cnty. Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140 *5 (Colo. App. Feb. 28, 2013) (hereinafter "*Taxpayers*"), and Defendants do not challenge that finding here, Defs.' Br. 16. Only the second and third considerations are now at issue, and Defendants' response fails to rebut either of them.

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First, Defendants' argument seriously misreads this Court's decision in *Parfrey*, a case the court of appeals largely ignored. As a threshold matter, the only passages from *Parfrey* that Defendants cite come from the decision's discussion of whether the statute at issue *expressly* creates a cause of action. *See id.* 18. As Defendants admit, however, the issue here is not whether the PSFA expressly grants Plaintiffs a right to challenge violations of the statute (which it does not), but whether such a right is implicit under the statute. *Id.* 16. The passages on which Defendants rely therefore have no application to the present argument.

More critically, Defendants ignore *Parfrey*'s recognition of a private cause of action for violation of an insurance statute *notwithstanding* the legislature's grant to the Insurance Commissioner of authority to make rules for the administration and enforcement of the insurance statutes. Defendants rest their argument that the PSFA committed "exclusive" enforcement of the Act to the State Board on section 22-54-120(1)'s general grant of power to "make reasonable rules and regulations necessary for the administration and enforcement of this article," claiming that grant necessarily forecloses any possible private civil remedy, *see* Defs.' Br. 17 (citing C.R.S. § 22-54-120(1)). The court of appeals adopted this argument, *Taxpayers* at *5.

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But *Parfrey* contradicts this conclusion. The insurance statutes at issue in *Parfrey* grant power to the Insurance Commissioner to "establish … such reasonable rules as are necessary to enable the commissioner to carry out the commissioner's duties under the law," C.R.S. § 10-1-109(1), and the Commissioner has adopted an extensive remedial system pursuant to this authority. *See, e.g.,* 3 Colo. Code Regs. § 702-1 *et seq*. Indeed, Colorado's insurance regulations are far more extensive, detailed, and exacting than those Defendants cite governing administration of the PSFA. *See* Defs.' Br. 17. Yet despite this statutory grant of authority and the extensive regulations adopted under it, the *Parfrey* court found that the statute nevertheless granted the plaintiff an implied cause of action to sue based on violation of the statute. *Parfrey*, 830 P.2d at 911; *see also Colo. Ins. Guar. Ass'n v. Menor*, 166 P.3d 205, 210-11 (Colo. App. 2007) (same).

Likewise here, the PSFA's general grant of rule-making authority does not preclude an implied private cause of action to compel compliance with the Act, particularly given the statute's vague and general grant of authority to the State Board. The passage on which the court of appeals relied, the PSFA's grant of authority to adopt "reasonable rules and regulations," Colo. Rev. Stat. § 22-54-120(1), by no stretch means "expressly addresses" the violations the trial court

found here, and Defendants cite no authority to suggest otherwise. *Cf. Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203, 1208 (Colo. App. 2000) (no private cause of action where statute expressly reserves enforcement to state); *Axtell v. Park Sch. Dist. R-3*, 962 P.2d 319, 320-21 (Colo. App. 1998). Here, as in *Parfrey*, the existence of a parent's or taxpayer's right to enforce the mandates of the PSFA is entirely consistent with the legislature's intention.

Defendants summarily dismiss the distinction between the equitable relief granted here and the claims for damages asserted in cases like *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997),[3] reciting unremarkable passages about what "ordinarily" occurs in assessing legislative intent. Defs.' Br. 18, 19. But both the court of appeals and Defendants fail to acknowledge the crucial difference between plaintiffs who claim that a statute gives them a right to monetary damages from a private party or a government body and the situation here, where Plaintiffs seek injunctive relief to compel a government body to obey state law. The question of whether the legislature "intended" an implicit private remedy necessarily depends in part on the nature of the remedy. The legislature is

[3] Like *Gerrity*, several other cases on which the court of appeals relied involved private parties' damage claims for statutory violations. *See Bd. of Cnty. Comm'rs v. Moreland*, 764 P.2d 812, 817-21 (Colo. 1988); *Silverstein v. Sisters of Charity*, 559 P.2d 716, 718 (Colo. App. 1976).

logically more likely to intend to permit a private party to bring suit to enjoin a school district's statutory violations than it would be to expose the public coffers to damages claims. Here, if a private injunctive remedy is not implied, the PSFA would lack any mechanism to prevent a school district from diverting millions of dollars of public money to non-public schools, with at least the tacit approval of the Colorado Department of Education.[4]

Defendants' Brief also disregards *Parfrey*'s rejection of the precise argument that Defendants urge and the court of appeals adopted here:

> Allstate argues that the legislative silence in [the act] on the matter of civil liability manifests a legislative intent to relegate the exclusive responsibility for redressing breaches of an insurer's statutory duty to the administrative process. We are unpersuaded by Allstate's argument.

830 P.2d at 910.[5] Finally, Defendants ignore this Court's decision in *Bd. of Cnty. Comm'rs v. Bainbridge, Inc.*, 929 P.2d 691, 708-13 (Colo. 1996), in which the

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[4] Although Defendants dispute the level of the Department's complicity, Defs.' Br. 19-20, that argument goes to the merits, and does not undercut Plaintiffs' standing to seek relief.

[5] Defendants' reliance on *Capital Securities of America, Inc. v. Griffin*, 278 P.3d 342 (Colo. 2012), is likewise mistaken. *See* Defs.' Br. 18. In *Griffin* (which did not involve any question of standing), the plaintiff sought disgorgement for the violation of a statute that expressly provided remedies to those injured by such violations. *Id*. at 343. The court concluded that in light of those remedies, permitting an additional remedy for disgorgement "would impermissibly alter the extensive and detailed remedial scheme adopted by the legislature." *Id*. at 343, 347. Here, the court of appeals decision denies Plaintiffs *any* remedy for the

Court addressed private claims that the PSFA preempted a county's actions concerning school finance.[6]

As detailed in Plaintiffs' Opening Brief, Pl. Br. 23-25, the right of students and parents to enjoin Defendants from violating the PSFA's requirements is not only implicit in the Act, it is critical to the Act's goals. Plaintiffs' rights under the PSFA to receive the benefit of an equitably funded, quality, and public education—rights Defendants do not dispute and the court of appeals did not mention—would be frustrated if Plaintiffs were without a civil remedy to enforce those rights. *Parfrey*, 830 P.2d at 911.

Defendants' only response to this point, and the only "public policy" it urges against standing, is a conventional floodgates argument, claiming that recognition of Plaintiffs' standing would fill the courts with litigation by "disgruntled parents" disputing mundane scholastic expenditures. Defs.' Br. 20-21.[7] But this is sheer

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District's violation of the PSFA. Defendants do not suggest how permitting Plaintiffs' standing here would "impermissibly alter" the legislature's scheme; they merely make the assertion.

[6] The court of appeals' statement that *Bainbridge* addressed only constitutional violations, *Taxpayers* at *6, is mistaken. The Bainbridge plaintiffs raised, and this Court addressed, a claim of preemption under the PSFA. *See Bainbridge*, 929 P.2d at 696 n.6, 708-13.

[7] The Colorado Association of School Boards' (CASB) amicus brief also tries to argue that permitting standing to enforce the PSFA would infringe on school

speculation; Defendants fail to suggest how any parent could tenably claim that a district's selection of one textbook over another (to use one of Defendants' examples) could possibly violate the PSFA. Moreover, this Court recognized decades ago that taxpayers have standing to litigate whether a government body's expenditure of funds fell within its authority under a statute, or even a city charter. *Dodge v. Dep't of Soc. Serv.*, 600 P.2d 70, 72 (Colo. 1979); *Johnson-Olmsted Realty Co. v. City & Cty. of Denver*, 1 P.2d 928, 930 (Colo. 1931). Yet the floodgates remain dry.

Defendants also argue against Plaintiffs' standing on the basis that "[t]here is no … distinction" between private schools and public education, Defs.' Br. 21, tellingly revealing the fundamental legal flaw underlying the District's Voucher Program. Plaintiffs do not dispute that private institutions can provide aspects of public education, and Plaintiffs agree that many public-private partnerships exist that share that responsibility. The problem here, however, is that the Voucher

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districts' authority under the Local Control Clause, Colo. Const. art. IX, sec. 15. *See* CASB Br. 5-14. This argument faces two insurmountable hurdles. First, the Local Control Clause was not raised by any party below as to the issue of standing, and neither the trial nor appellate court addressed it. An *amicus curiae* may not raise new issues on appeal. *Farmers' Union Ditch Co. v. Rio Grande Canal Co.,* 86 P. 1042, 1045 (Colo. 1906). Second, the CASB cannot and does not claim that the Local Control Clause permits them to violate statutes enacted by the legislature pursuant to its own constitutionally delegated authority, which is all that is at issue here.

Program and its fictitious "charter school" do not provide the public education that the PSFA requires. *See* Section II below. That is, of course, the central dispute in this action concerning the PSFA; but that argument goes to the merits, not to the issue of standing.

Defendants also argue that Plaintiffs lack standing because they have not demonstrated injury-in-fact. Defs.' Br. 21-22. (The court of appeals decision expressly declined to address the issue of injury-in-fact. *See Taxpayers* at *4, 11 n.6.) Defendants base their argument on their own view of what is good for the Plaintiffs, assuming that the only material concern is how much money the District itself receives. *But see Dodge*, 600 P.2d at 71 ("injury in fact may be found in the absence of direct economic injury") (citing *United States v. SCRAP*, 412 U.S. 669 (1973)). Relying on its own trial witnesses and citing no factual findings by the trial court, Defendants allege that Plaintiffs cannot have suffered any injury because, if all goes according to the District's plan, Douglas County will actually receive *more* money from the state than it would have if the District had complied with the PSFA. The argument is meritless; it is the equivalent of a pipeline owner arguing that its facilities have caused no injury to a wilderness area because the owner believes the pipeline to be more aesthetically pleasing than the natural environment.

Finally, Defendants try to distinguish *Dodge*, which held that taxpayers have standing if they suffered an injury-in-fact "to a legally protected interest encompassed by statutory or constitutional provisions which allegedly have been violated." 600 P.2d at 72. Defendants claim that in *Dodge* "there was no statute at issue," because the plaintiffs argued that the State was acting ultra vires, without statutory authority. Defs.' Br. 22. But Defendants never explain *why* that distinction makes a difference on the issue of standing, and cite no law supporting such a distinction. After all, the question of whether a government body acts *without* statutory authority or *beyond* statutory authority is essentially one of semantics, and Defendants suggest no substantial difference that would have any effect on the result here. Ultimately, Defendants offer no rationale suggesting why the plaintiffs in *Dodge* should have had standing and Plaintiffs here should not.

This Court should reverse the decision of the court of appeals, reinstate the trial court's finding of standing, and reach the merits of the District's violation of the PSFA.

II. THE DISTRICT'S USE OF PUBLIC FUNDS TO PAY PRIVATE SCHOOL TUITION VIOLATES THE ACT.

As the trial court correctly found, the Voucher Program violates the PSFA by using public money to pay tuition for 500 students enrolled in sectarian and other private schools. As discussed in Plaintiffs' Opening Brief, the PSFA makes

each district's share of state educational funds proportional to pupil enrollment in two kinds of *public* schools: those operated by the district and "qualified charter schools."[8] Yet here, the District would divert millions of dollars of public education funds to fund the enrollment of 500 students in a "Choice Scholarship School" ("the Charter School") that is neither. Existing only on paper, the Charter School is not a public school operated by the District. And though labeled a "charter school," the Charter School fails even to approximate a "qualified charter school" *as defined by the PSFA*. Instead, it is labeled a "charter school" precisely to disguise private school pupils as public school students for purposes of state funding. The "School's" private, sectarian, religious, and often out-of-district educational services fail virtually every definitional requirement of a qualifying charter school: they are not public, they are not nonsectarian, and they are not nonreligious. C.R.S. § 22-54-124(b), *citing* C.R.S. § 22-30.5-104; *see also* C.R.S. § 22-54-124(c).[9] They meet only the requirement of being outside the home.

[8] Under Section 22-54-124 of the PSFA, the term "[c]harter school means a district charter school as described in section 22-30.5-104" of the Charter School Act or an "institute charter school" that contracts directly with the state charter school institute under C.R.S. § 22-30.5-502. Section 22-30.5-104 provides that a "charter school shall be a public, nonsectarian, nonreligious, non-home-based school which operates within a public school district."

[9] Rather than address this argument, Defendants misread it, suggesting that Plaintiffs are asserting for the first time a violation of the Charter Schools Act.

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To try to validate this diversion of public money to private schools, Defendants point to a single phrase in the PSFA: its description of state education funds as "budgeted and expended … in the discretion of the district." C.R.S. § 22-54-104(1)(a). But the District has no statutory claim on these state education funds to begin with; the mere transfer of these public funds based on private school enrollment violates the PSFA. Record 2536 (Order 56) (finding "overwhelming evidence" the Voucher Program violated uniform funding provisions of PSFA). Nor could the District lawfully subsidize *private* schools with money made available for the express purpose of "fund[ing] the costs of providing *public* education." C.R.S. § 22-54-104(1)(a) (emphasis added). Perhaps realizing as much, Defendants purport to find additional discretion over how to spend state funds in the state constitution, citing this Court's decision in *Lobato v. Colorado*, 304 P.3d 1132 (Colo. 2013). Yet in *Lobato*, as elsewhere, this Court distinguished control over local versus state money. A "dual-funded public school financing

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Defs.' Br. 23. What Plaintiffs assert, however, is a violation of the PSFA, which makes a district's share of educational funds proportional to enrollment in "charter schools" as described in C.R.S. § 22-30.5-104. Far from being waived, this is precisely the argument that Plaintiffs made to the trial court. Record 400-401 (Taxpayers' Mot. for Prelim. Injunc. 5-6); *id.* 1739 (Taxpayers' Reply in Support of Mot. for Prelim. Injunc. 13).

system is constitutional," it explained, "so long as it allows the local districts to retain control over how they spend *locally-generated* tax revenue." *Lobato*, 304 P.3d at 1143 (emphasis added). Here, the funds at issue are undeniably *state* funds, not locally generated revenue.

Defendants also try to reconcile the Voucher Program with the PSFA by pointing to another statute altogether: a contracting statute that authorizes districts to "contract with private corporations to provide a complete package of educational services." Defs.' Br. 27, *citing* C.R.S. § 22-30.5-104(4)(b). Such contracted-for services, however, must "meet the same requirements and standards that would apply if performed by the school district" itself. C.R.S. § 22-32-122. Yet no one, not even Defendants, contends that the District could lawfully provide the out-of-district, religious, sectarian, tuition-based, and selectively-offered services received by Charter School students here.

Defendants' remaining arguments cannot evade this limitation. Listing requirements that the Charter School meets—however many—does nothing to excuse the requirements it *fails*. Defs.' Br. 27, n.9. Likewise, the authorization of *other* programs by *other* statutory provisions provides no authority for the Voucher Program under the PSFA—and conversely, recognizing that the Voucher Program

lacks statutory authority cannot "overturn" programs that have it.[10] *Cf. id.* at 11; *see also* Record 2456 (Order 67) (finding the other statutory programs "factually and legally dissimilar" to the Voucher Program). And the regulations Defendants cite could not and do not purport to contravene unambiguous limits written into the statute itself.[11] Moreover, all of these arguments overlook the Colorado statute that *already* allows private management of public schools: the Charter Schools Act. Defendants ask this Court to read a modest grant of contracting authority as a license to discard the express requirements of this comprehensive regulation of independent public schools.[12]

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[10] The PSFA lists specific statutory programs that increase a district's pupil enrollment. For example, unlike Charter School students, students determined to have a disability under Section 22-20-108 or in programs under the "Exceptional Children's Educational Act" are included in "District pupil enrollment" under the express terms of the statute. *See, e.g.*, C.R.S. § 22-54-103, (III.5) & (V)(e).

[11] For example, the rule classifying pupils as "enrolled" if they attend schools in a district that buys "comparable instructional services" does not reach students who attend out-of-district schools, receive subsidized (not purchased) services, or whose religious or sectarian instruction is categorically not comparable to what public schools provide. 1 Colo. Code Regs. § 301-39, Rule 2254-R-5.02.

[12] For example, if the law permitted districts to contract with private schools directly as Defendants propose, districts could avoid requirements that charter schools operated by private managers retain independent boards, C.R.S. § 22-30.5-104-7(b), or even that charter schools be nonsectarian and abide by federal laws prohibiting discrimination. C.R.S. § 22-30.5-104-(2)-(3).

For the remainder of its response, Defendants focus not on what the PSFA says, but why its plain terms should be disregarded. For example, Defendants adopt the court of appeals argument that the District could claim state funds for Charter School students "because the record evidence indicates that [they] would *otherwise* be enrolled in District public schools." Defs.' Br. 25. Having conceded, in other words, that Charter School students are *not* enrolled in District public schools—the express basis for state funding—Defendants defend funding based on a "hypothetical" enrollment that the PSFA says nothing about. But such a conclusion would re-draft the statute: the PSFA *as written* nowhere suggests that state funds should be apportioned based on where district students attended school the *previous* year. Defendants cite no factual support for their argument, and logic suggests otherwise. A need-blind voucher program in one of the wealthiest school districts in the country will almost certainly subsidize students who would attend private schools *regardless* of whether they receive state funding.

Defendants also dismiss the plain meaning of the statute as irrelevant, arguing that Plaintiffs' arguments infringe on the "discretion" of the executive branch. *Id.* 24-25. But Plaintiffs do not challenge an exercise of discretion; Plaintiffs challenge the diversion of public funds to private schools in violation of the unambiguous terms of the PSFA—a matter of no discretion at all. *See Mile*

High Cab, Inc. v. Colorado Pub. Util. Comm'n, 302 P.3d 241, 245 (Colo. 2013) ("[C]ourts are not bound by agency interpretations misconstruing or misapplying the law…."). Unlike the examples this Court addressed in *Wimberly,* the plain meaning of a statute is not a "field[] of policy preserved to…the realm of administrative discretion lodged in the executive branch." 570 P.2d at 539.

Finally, Defendants dismiss plain meaning questions as "premature" because "the Board has not decided whether to fund the Scholarship Program." Defs.' Br. 24. This claim overlooks that the program has already been funded: the trial court found that the District has received and spent more than $200,000 on private school tuition (Record 2484, 2487 (Order 4,6), a finding not challenged on appeal. So violations of the PSFA have already occurred. *See, e.g.,* Defs.' Br. 24 (conceding the PSFA "obligates the [State] Board to 'avoid overpayments of state moneys'"). In contrast, delaying relief would ensure additional violations. If not for the injunction of the trial court, up to $3 million in public education funding would have been diverted to private school education—and away from investments in District public schools[13]—before the Board even considered "clawing back" state money. Record 2484, 2486, 2495-96 (Order 4, 6, 15-16). And to what end?

[13] In contrast to the state, District taxpayers who must supply "clawed back" funds have no assurance of being made whole themselves—by either voucher recipients or participating private schools.

Defendants nowhere explain why the law requires Plaintiffs to "wait and see" if the same Board that collaborated with the District to *create* the Voucher Program will, "after careful deliberation," declare it a violation of state law. *Compare* Defs.' Br. 24-25, *with Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002) (ripeness requires an injury to be "sufficiently immediate and real in order to warrant adjudication").

In sum, Defendants identify no legal basis consistent with the PSFA for diverting state education funds to private school tuition. The private, religious, selective, and tuition-charging schools that contract with the District are *not*—notwithstanding the District's naked assurances—"as much part of the public education system as traditional neighborhood schools." Defs.' Br. 28. In many cases, they are not even part of the District itself.

III. THE VOUCHER PROGRAM VIOLATES ARTICLE IX, SECTION 3 BY USING THE PUBLIC SCHOOL FUND FOR PRIVATE SCHOOL TUITION.

As the trial court correctly found, the Voucher Program violates Article IX, Section 3 by funneling monies from the Public School Fund to pay tuition at private schools.[14] Plaintiffs' Opening Brief summarized the evidence that supported the trial court's factual finding—including a judicial admission by the

[14] The court of appeals affirmed that the Voucher Program schools were in fact "private schools." *Taxpayers* at *10, *citing Davis v. Grover*, 480 N.W.2d 460, 473-74 (Wis. 1992).

Defendants—that monies from the Public School Fund were being used for the Voucher Program. Record 2540-43 (Order 60-63). Defendants do not challenge that factual finding, but instead suggest that the District has authority to spend Public School Fund monies on any kind of education, public or private.[15] But the Colorado Constitution and State Enabling Act clearly restrict the State and the District from using the aptly named Public School Fund for anything other than the benefit of "free public schools." Colo. Const. Art. IX, §§ 2, 3. Defendants' attempt to gloss over that constitutional language by arguing that the fund can be used for any form of "education," regardless of whether the benefitted students are enrolled in public or private schools, effectively excises the words "free public schools" from the Constitution and subverts Article IX, Section 3's stated purpose of providing funding for "free public schools." As the Constitution sets forth in Article IX, Section 2, if a school district does not have any free public schools, it is not entitled to receive *any* share of the Public School Fund, even if it has students

[15] Defendants incorrectly assert that the Plaintiffs seek a declaration that the Voucher Program is facially unconstitutional and that therefore the standard of review for facial challenges applies to this case. In fact, Plaintiffs' challenge to the Voucher Program was "as applied," because Plaintiffs sued to enjoin further implementation of the Voucher Program. As of the injunction hearing, 23 schools had partnered with the District, 271 voucher students had been admitted to a participating private school, and $200,000 had been paid to private schools. Record 2484, 2487 (Order 4, 6-7).

attending private schools. Thus, logically, the monies from the Public School Fund may be used only for a District's "free public schools."

Defendants argue that school districts—and not public school students—are the beneficiaries of the Public School Fund.[16] According to Defendants, once the District receives funds from the Public School Fund, it "has the legal authority and discretion to spend them to educate students," even if those students are enrolled in private schools. But Defendants and the court of appeals ignored that Plaintiffs sued the State Department of Education to prevent it from distributing per-pupil funding to the District based on students whom the court of appeals admits are private school students. *Taxpayers* at *10. The court of appeals' reliance on *Craig v. People in Interest of Hazzard*, 299 P. 1064, 1066 (Colo. 1931) is misplaced—*Hazzard* affirmed that the state should only pay Public School Fund monies to the district where the students attend public school and not to the district where they reside. Here, even if the District were free to spend restricted Public School Fund

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[16] Defendants' reliance on *Branson School District. v. Romer*, 161 F.3d 619 (10th Cir. 1998) is misplaced. *Branson* addressed whether a Colorado school district had standing to bring claims against the State to challenge an amendment to the Colorado Constitution that altered the language of Article IX. *Id.* at 629. The court did not address whether school districts had discretion to spend Public School Fund monies on private schools, and in fact made it clear that the Colorado Enabling Act created the Public School Fund for the support of "common schools" or the "free public schools" referenced in the Constitution. *Id.*

monies as it sees fit (which it is not), the Colorado Constitution simply does not permit the State to distribute those Public School Fund monies to the District based on students enrolled in private schools.

The court of appeals reasoned, and Defendants argued, that because only a "tiny fraction" of overall public school funding comes from the Public School Fund, the court of appeals should presume that the District would not use the restricted money for private school tuition. Defendants' characterization of the amount of money at issue is, at best, misleading. Uncontroverted trial testimony established that the State distributed $101 million from the Public School Fund to local school districts in fiscal year 2011-12. Tr. Vol. II, 472:21-25; 473:1-2; 473:13-17. Under any measure, this is a constitutionally material amount.

Defendants' attempt to use private trust law to artificially segregate (1) money that is constitutionally restricted to "free public schools" under Article IX, Section 3 from (2) other state monies that are earmarked to public schools by the PSFA has no legal precedent. Defendants cite no authority for applying private trust law to the restrictions contained in Article IX, Section 3, nor have Plaintiffs located any. Defendants offer no logical reason or legal support for their argument that they can use Public School Fund money for a private school-voucher program

simply because that money is commingled with monies earmarked by the legislature (instead of the Constitution) for public schools.

The court of appeals' reasoning that the Voucher Program is entitled to a presumption of constitutionality misses the mark. Neither the court of appeals nor Defendants cite any authority applying that presumption to an internal agency decision like the State's decision to provide state per-pupil funding to the District for students enrolled in private schools. Defendants' focus on the District's decision to create the Voucher Program is obfuscation. The District does not get to decide whether it may count private school students as public school students for purposes of state funding—that decision is for the State Department of Education. It was the State's decision to provide State per-pupil funding (including monies from the Public School Fund) for those students enrolled in private schools. That decision violated Article IX, Section 3, yet it was never subject to any legislative process—only non-public conversations with the District itself. Though Defendants object to that characterization as an "ad hominem" attack, the evidence is uncontroverted that the State's decision to allow constitutionally-restricted money to flow to the District was the result of closed door meetings between the District and the State. Pls.' Exs. 69, 76, 90; Record 2482 (Order 2-3); Tr. Vol. I,

156:19-25, 157:1-5. Such an internal decision is not entitled to any presumption of constitutionality.

Defendants' final argument—that the trial court's ruling would prevent school districts from buying goods or services in the private sector—is meritless. The Public School Fund must be used solely for the support of the state's free public schools. As long as a district's expenditure is for the purpose of supporting those "free public schools," a district is allowed to purchase private goods in the marketplace. Here, the District is not doing that. The Voucher Program is not buying supplies from a private vendor for the support of free public schools; it is funding private, tuition-based schools—precisely what Article IX, Section 3 forbids.

IV. DEFENDANTS IGNORE THE PLAIN LANGUAGE OF ARTICLE IX, SECTION 7.

Defendants never address the actual language of Article IX, Section 7 (*see* Defs.' Br. 42-48), and for good reason. The language of Section 7 unequivocally bars the Voucher Program: It prohibits school districts from "ever" paying "any public fund[s] or moneys whatever" to "help support or sustain any school … controlled by any church or sectarian denomination whatsoever …." Art. IX, § 7. The undisputed facts found by the trial court below confirm that the Program would do just that. Record 2483, 2489-90 (Order 3, 9-10). Because there is no

way around this language, Defendants simply pretend that it says and means something different.

"When interpreting the constitution, [the courts] must determine the intent of those who adopted it." *People v. Johnson*, 77 P.3d 845, 847 (Colo. App. 2003). "That intent is first determined by looking at the language of the provision itself, giving words and phrases their commonly understood meaning." *Id.* When the language is plain and the meaning clear, the Court must enforce the provision "as written." *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005). Here, the records of Colorado's Constitutional Convention (not secondary sources, as Defendants claim) confirm that the Framers intended to prevent any use of public funding to support religious schools. *See* Pl. Br. 48-50 and Pls.' Reply to Intervenors at 3-8.

Nevertheless, Defendants argue that they can evade the plain text and intent of Section 7 through the artifice of sending checks to religious schools that are made out to the parents but which the parents must restrictively endorse to the schools. Defs.' Br. 45. Characterizing these checks as "indirect aid," Defendants claim that because Section 7—unlike some other state no-aid clauses—does not actually use the word "indirect," the funding scheme is permissible. But there is more than one way to express an intent to strictly prohibit any form of tax support for religious education. The framers of Section 7 did so by barring "ever" paying

"any public fund[s] or moneys whatever" to "help support or sustain any" religious school "whatsoever." Nothing in Section 7 allows public funds to be "indirectly" sent to schools controlled by churches. And this Court has long held that what a governmental body "is prohibited from doing directly it cannot accomplish indirectly." *In re Senate Bill No. 9*, 56 P. 173, 174 (Colo. 1899).

What is more, five of the six state cases cited in Plaintiffs' Opening Brief that struck down school-voucher programs relied on constitutional clauses that do not expressly prohibit "indirect" aid to religious schools (the Florida case did). *See* Pl. Br. 47. Indeed, all five of those constitutional clauses have less—in some instances, far less—restrictive and comprehensive language than Colorado's Section 7. *See id.* Similarly, eight of the nine state cases cited in Plaintiffs' Opening Brief that struck down textbook-lending and bus-transportation programs that aided religious schools cited constitutional clauses that do not explicitly bar "indirect" aid to such schools (the Oklahoma case is the exception). *See id.* at 47–48. And two of those cases relied on no-aid clauses virtually identical to Colorado's. *See Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 954 n.4 (Cal. 1981); *Epeldi v. Engelking*, 488 P.2d 860, 862 (Idaho 1971).[17]

[17] The three state cases cited by Defendants upholding school-voucher programs (*see* Defs.' Br. 45) all concern provisions with different and less restrictive no-aid language than Colorado's.

V. *ZELMAN* DOES NOT DETERMINE THE OUTCOME OF THIS CASE.

Defendants' primary argument is that this Court should simply treat Colorado's Religion Clauses as if they mean the same thing as the federal Establishment Clause and follow the U.S. Supreme Court's allowance of a school-voucher program in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *See* Defs.' Br. 36-39. Colorado's constitutional clauses have more specific and detailed language than the federal Establishment Clause, however. *Zelman* construed only the latter.[18]

This Court does not blindly follow federal constitutional law, but instead construes state constitutional provisions in light of their own language and history. *See, e.g.*, *Rodriguez*, 112 P.3d at 696; *People v. Quimby*, 381 P.2d 275, 276–79 (Colo. 1963). Thus, in *Americans United for Separation of Church & State Fund v. State*, 648 P.2d 1072, 1078, 1081 (Colo. 1982), this Court held that federal Establishment Clause analysis is "not necessarily determinative of state

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[18] *Zelman* was also fundamentally different in at least three respects: it prohibited incentivizing participants to select religious schools over secular ones, voucher recipients were not public-school students, and participating schools were prohibited from discriminating based on religion in admissions or employment. *See* 536 U.S. at 645, 653-54, 661, 712-13.

constitutional claims," and noted that Colorado's Religion Clauses are "considerably more specific than the Establishment Clause of the First Amendment." The Court then went on to engage in a detailed analysis—separate from its federal Establishment Clause analysis—of the plaintiffs' claims under Article IX, Section 7 and Article II, Section 4 of the Colorado Constitution, independently scrutinizing those clauses' specific text, historical intent, and case law. *Id.* at 1081-85. *See also Zavilla v. Masse*, 147 P.2d 823, 825-28 (Colo. 1944) (striking down mandatory recitation of Pledge of Allegiance in public schools based on detailed independent analysis of Colorado Constitution's clauses concerning religion and public education).

For the contrary proposition, Defendants cite cases that hewed closely to federal Establishment Clause law in interpreting the No-Preference Clause of Article II, Section 4. *See* Defs.' Br. 37-38. Unlike the constitutional clauses at issue in this case, however, the No-Preference Clause contains language similar to the rules of law set forth in existing federal Establishment Clause case law. *Compare* Art. II, Sec. 4 ("Nor shall any preference be given by law to any religious denomination or mode of worship.") *with Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Moreover, even the

No-Preference Clause cases acknowledge that the text and purpose of the clauses must be considered separately, and some governmental actions may violate the No-Preference Clause even if they do not violate the federal Establishment Clause. *See Conrad v. City of Denver ("Conrad II")*, 724 P.2d 1309, 1316 (Colo. 1986); *Conrad v. City of Denver ("Conrad I")*, 656 P.2d 662, 667, 671-72 n.9 (Colo. 1982); *Young Life v. Div. of Emp't & Training*, 650 P.2d 515, 526 (Colo. 1982).

Furthermore, since *Zelman*, at least two states have struck down school-voucher programs under state constitutional provisions that, like Colorado's, contain more specific prohibitions than the federal Establishment Clause. *See Cain v. Horne*, 202 P.3d 1178, 1183-85 (Ariz. 2009); *Bush v. Holmes*, 886 So.2d 340, 352-53 (Fla. District Ct. App. 2004), *aff'd on other grounds*, 919 So.2d 392 (Fla. 2006). Defendants' argument that the Court should follow federal jurisprudence instead of the text and intent of Colorado's Religion Clauses would render those clauses meaningless.

VI. *AMERICANS UNITED* DOES NOT SUPPORT DEFENDANTS' ARGUMENTS.

Defendants' argument (Defs.' Br. 39-40, 43) that the Voucher Program is authorized by *Americans United*, 648 P.2d 1072, misconstrues the case. Defendants contend that *Americans United* upheld the higher-education scholarship program at issue there because the program was neutral with respect to

religion and students chose where to use the scholarships.

But that was only one of the factors this Court relied on. As explained in Plaintiffs' Opening Brief (at 59-61), the Court emphasized several other factors that are *not* satisfied here:

• The higher-education program in *Americans United* had various safeguards designed to prevent the scholarships from being used at institutions actually controlled by churches or religious denominations, or from actually supporting religious instruction. 648 P.2d at 1082-84. For example, students had to use the scholarships at post-secondary institutions that answered to "an essentially independent governing board." *Id.* at 1084. No such safeguards exist here: Although Defendants contend that the Voucher Program provides for some review of participating schools' records (Defs.' Br. 43), nothing in such review prevents use of public funds to support religious instruction (*see* Record 2484, 2492-93 (Order 4, 12-13)).[19]

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[19] Defendants further err by contending that *Americans United* allowed scholarship funding to go to Regis College. *See* Defs.' Br. 37. In fact, *Americans United* reversed a summary-judgment ruling that allowed such funding, and remanded for determination of whether Regis' governing Board was controlled by a particular religion. 648 P.2d at 1088. That aspect of *Americans United* further supports Plaintiffs' point that, under the case, neutrality and choice are *not* sufficient to render funding of religious education constitutional.

• The scholarships in *Americans United* were limited to colleges and universities, which further reduced the likelihood that the scholarships would fund religious instruction. 648 P.2d at 1084. The vouchers here are used at elementary and secondary schools where religious instruction is undisputedly integrated into the curriculum.

• The scholarships in *Americans United* could be used at both public and private institutions, dispelling any suggestion that the higher-education program was intended to principally benefit religious schools. *Id.* at 1082, 1084. Here, the vouchers can only be used at private schools, would have been used almost exclusively at religious schools, and high school students (other than special needs students) wanting to participate in the program had no choice but to attend a religious school.

• Institutions taking part in *Americans United*'s higher-education program were barred from imposing mandatory religious instruction on students, requiring students to attend religious services, or discriminating based on admission in religion. 648 P.2d at 1075. The opposite is true here. Record 2490-93 (Order 10-13).[20]

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[20] For the reasons set forth in Plaintiffs' Reply to the Intervenors' Brief at 23-27, there is no merit to Defendants' argument that this Court would somehow violate

These key distinctions support a finding that the Voucher Program violates the Constitution's Religion Clauses.

VII. ARTICLE IX, SECTION 8 APPLIES TO AND PROHIBITS THE VOUCHER PROGRAM.

A. The Program Violates the Religious Instruction Ban.

Defendants do not dispute that the third prohibition in Article IX, Section 8—"No sectarian tenets or doctrines shall ever be taught in the public school" ("the Religious Instruction Ban")—applies to elementary and secondary schools. Defendants argue the Voucher Program complies with this prohibition because participation in the Program and enrollment in participating religious schools is voluntary. Defs.' Br. 53-54. The Religious Instruction Ban, however, prohibits any religious instruction from ever being taught in the public schools. It makes no exception for students who voluntarily enroll in a public-school program that offers religious education.

Further, the record makes clear that the Voucher Program considers participating students to be public-school students who are receiving their "public" education at the participating private schools. The Voucher Program Private School Participation Agreement provides, "The Private School understands that

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the U.S. Constitution by distinguishing *Americans United* on the grounds Plaintiffs have propounded.

Choice Scholarship Students are public school students." Pls.' Ex. 19 at 4, § F. And the contractual agreement that parents must sign when they enroll students in the public Charter School that oversees the Program states, "the education Programs conducted by the [Charter] School are considered to be operated by the School as part of the District." Record 835. Of course, all the educational programs "conducted" by the Charter School are provided by the participating private schools. Record 2485-86, 2495 (Order 5, 15).

Thus, under the Voucher Program, religious instruction is offered to (and in many cases, required of) public-school students as part of their public education. This violates not only the plain text of the Religious Instruction Ban, but also its intent. An address to the people of Colorado after the end of the Colorado Constitutional Convention, prepared by the Convention chair and nine other delegates, summarized the Religious Instruction Ban as follows: "[N]o religious or sectarian dogmas shall ever be taught in any of the schools under the patronage of the State." *Proceedings of the Colorado Constitutional Convention* 727 (1907). Receipt of tax-funded vouchers clearly places the participating private schools "under the patronage of the State."

Holding that the Program violates the Religious Instruction Ban would not cast doubt on the constitutionality of release-time programs or the use of school

property by religious groups. *Cf.* Defs.' Br. at 52–53. Federal Establishment Clause law requires that release-time programs (where students are released from public schools during the school day to receive private religious education) take place off school grounds to be constitutional. *See Zorach v. Clauson*, 343 U.S. 306, 308–09 (1952); *People ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 205, 212 (1948). And when private religious groups merely use school facilities available to all community groups after school hours pursuant to a neutral access policy (*see, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)), they are not presenting public-school instruction or teaching.

B. The Program Violates the Religious Discrimination and Coercion Bans.

Defendants argue that the first two clauses of Article IX, Section 8—the Religious Discrimination and Religious Coercion Bans—are inapplicable. These clauses apply to "public educational institutions of the state"; Defendants claim that K-12 schools are not such institutions. Defs.' Br. 48-49. This contention is wholly without merit.

Black's Law Dictionary (9th ed. 2009) defines "educational institution" as "[a] school, seminary, college, university, or other educational facility." The case Defendants rely on for their argument, *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927), was overruled on other grounds by *Conrad I*, 656 P.2d at

670 n.6, and is inconsistent with later decisions. *Wilmore v. Annear*, 65 P.2d 1433, 1434–37 (Colo. 1937), for example, concluded that public schools are "of the state," and *Industrial Commission v. Board of County Commissioners*, 690 P.2d 839, 842 (Colo. 1984), confirmed that "educational institutions" includes public schools. Further, the Colorado Constitutional Convention chair's post-convention address summarized the Religious Discrimination Ban as meaning "that no religious test shall ever be required as a condition for admission into any of the *public schools*, either as a pupil or teacher." *Proceedings of the Colorado Constitutional Convention* 727 (emphasis added). Finally, the last clause of Section 8—"nor shall any pupil be assigned or transported to any *public educational institution* for the purpose of achieving racial balance" (emphasis added)—was added in 1974 to prohibit school bussing and obviously applies to public schools. *See Keyes v. Congress of Hispanic Educators*, 902 F. Supp. 1274, 1285 (D. Colo. 1995), *appeal dismissed by Keyes v. Sch. Dist. No. 1*, 119 F.3d 1437 (10th Cir. 1995).

As to the substance of the Religious Discrimination Ban, Defendants argue that admission to a participating private school is not a prerequisite to admission to the Voucher Program's public Charter School. Defs.' Br. at 50-51. But this contention is contrary to the trial court's factual findings (Record 2484 (Order 5))

and the record (*see* Pls.' Ex. 5 at 8, §L). In any event, it is beyond dispute that unless students are accepted into one of the private schools, they will not be able to use a voucher or get an education under the Program. Since the private schools are selective, and many of the private schools use religious admission tests, a student's overall chances of being able to enroll in the Charter School are influenced by religious criteria. Thus, in clear contravention of the Religious Discrimination Ban, religious qualifications affect admission into a public school.

Defendants argue that the Religious Coercion Ban is not violated because enrollment in the Program or religious schools is voluntary. Defs.' Br. 52-54. This argument fails for the same reasons as their related argument concerning the Religious Instruction Ban. *See supra* at 33-35.

VIII. DEFENDANTS' ARGUMENTS CONCERNING ARTICLE II, SECTION 4 HAVE SIMILAR DEFECTS.

Defendants' arguments concerning Plaintiffs' claims under Article II, Section 4, are based on the same grounds as its arguments concerning Article IX, and should be rejected for the same reasons.

CONCLUSION

The Voucher Program violates the plain text and purpose of the Colorado Constitution and the Public School Finance Act. Plaintiffs respectfully request that

this Court reverse the court of appeals and remand with instructions to reinstate the district court's order permanently enjoining the Voucher Program.

Respectfully submitted this 15th day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2014, a true and correct copy of the foregoing **PETITIONERS' REPLY TO DEFENDANT-RESPONDENTS' BRIEF** was filed via ICCES, and electronically served on the following:

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