SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80203	
Appeal from the District Court City and County of Denver Hon. Joseph E. Meyer III, Case No. 03 CV 3734	
BILL OWENS, in his official capacity as Governor of Colorado; and the STATE OF COLORADO, Defendants-Appellants, and KIMBLE BREAZELL *et al*., Intervenor/Defendants-Appellants, v. COLORADO CONGRESS OF PARENTS, TEACHERS AND STUDENTS; THE INTERFAITH ALLIANCE OF COLORADO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; COLORADO STATE CONFERENCE OF BRANCHES OF THE NAACP; DEBORAH A. BRENNAN and ALAN J. DeLOLLIS, on behalf of themselves and their minor child Cameron Brennan; CAROLYN BARTELS and HOWARD BARTELS, on behalf of themselves and their minor child Hannah Bartels; SENATOR PATRICIA HILL PASCOE; SENATOR DOROTHY S. WHAM; RABBI JOEL R. SCHWARTZMAN; REVEREND DR. CYNTHIA CEARLEY; FRANCISCO CORTEZ; BEVERLY J. AUSFAHL; THERESA SOLIS; DANIELLE L. WAAGMEESTER and WILLIAM J. WAAGMEESTER, on behalf of themselves and their minor children Rachel Waagmeester, Madison Waagmeester, and Dane Waagmeester; JANET TANNER, on behalf of herself and her minor child Benjamin Tanner; and PAMELA WEBER, on behalf of herself and her minor child Kenneth Weber, Plaintiffs-Appellees.	▲ COURT USE ONLY ▲ Case No.: 03 SA 364

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STATEMENT OF THE ISSUES

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2. Whether the Colorado Opportunity Contract Pilot Program is special legislation prohibited by Article V, § 25 of the Colorado Constitution because it imposes on a permanently closed class of school districts special obligations not required by general law.

STATEMENT OF THE CASE

A. Proceedings Below

This is a constitutional challenge to the Colorado Opportunity Contract Pilot Program ("Voucher Program"), §§ 22-56-101 to 22-56-110, C.R.S., which directs certain Colorado school districts to pay for some of their students to attend private schools at taxpayer expense.

Plaintiffs are the Colorado PTA and several other organizations concerned with public education, as well as a number of individual taxpayers, many of whom pay taxes to or are the parents of children enrolled in the school districts affected by the Voucher Program. Plaintiffs brought this lawsuit in Denver District Court on May 20, 2003, alleging that the Voucher Program violated multiple provisions of the Colorado Constitution dealing with education, religious liberty, and the powers of the legislative branch of government. While some of plaintiffs' causes of action were predicated on the fact that most of private schools to which public funds would flow under the Voucher Program are pervasively sectarian institutions, other claims – including notably the two that are at issue in this appeal – were independent of the religious composition of the participating private schools.

Because their claims that the Voucher Program was in violation of Article V, § 25 (special legislation) and Article IX, § 15 (local control of education) were capable of resolution from the face of the statute, without any factual development, plaintiffs moved for judgment on the pleadings with respect to these two claims. Defendants and intervenors filed cross-motions for summary judgment on the same two claims.[1]

Following briefing and argument, the district court, Hon. Joseph E. Meyer III, entered judgment in favor of plaintiffs on December 3, 2003. While rejecting plaintiffs' contention that the Voucher Program was special legislation prohibited by Article V, § 25, Judge Meyer agreed that the Voucher Program violated Article IX, § 15 because it required school districts to fund instruction over which they had no control. The court therefore held the Program unconstitutional and enjoined its further implementation or enforcement. Order on Cross-Motions for Summary Judgment ("Order"), R. 1105.[2]

B. Statement of Facts

Enacted on April 16, 2003, the statute creating the Voucher Program directs eleven Colorado school districts to enter into "opportunity contracts" with parents of students in Grades K-12 who meet certain income and other criteria, pursuant to which the school districts are to

[1] While these motions were pending, the parties stipulated to, and the court approved, an accelerated schedule for discovery and briefing of the remaining issues raised by plaintiffs' complaint. Pursuant to this schedule the parties on November 10, 2003 filed cross-motions for summary judgment on plaintiffs' claims that the Voucher Program violated various provisions of the Colorado Constitution that prohibit public funding of religion – Article II, § 4, Article IX, § 7, and Article V, § 34. Further briefing of these summary judgment motions was rendered moot by the court's entry of judgment on plaintiffs' claim under Article IX, § 15.

[2] By order of January 6, 2004, the district court summarily denied defendants' motions for a stay of the injunction pending appeal.

pay for those children to receive their instruction in private schools, rather than in the public schools operated by the school districts.

The class of school districts required to participate in the Voucher Program is defined in § 22-56-103(10)(a)(I), C.R.S., to include any district "which, for the 2001-02 school year, had at least eight schools that received an academic performance rating of 'low' or 'unsatisfactory' pursuant to section 22-7-604(5), and which school district continues to operate said schools in the 2003-04 school year."[3] Beginning with the 2004-05 school year, these school districts must pay for a certain percentage of their students to receive their education at participating private schools – a percentage that rises gradually from 1% in 2004-05 to 6% for the 2007-08 and subsequent school years. § 22-56-104(5)(a), C.R.S. These payments are to be in an amount that is the lesser of (a) the private school's "actual educational cost per pupil," or (b) a percentage of the school district's per pupil operating revenues that varies according to the student's grade level – 85% for students in Grades 9-12, 75% for Grades 1-8, and 37.5% for Kindergarten. § 22-56-108(2), C.R.S.

School districts are to make these payments in four installments throughout the school year, § 22-56-108(3), C.R.S., by checks made payable to the parents of participating students and sent "to the participating nonpublic school in which the parent's child is enrolled." § 22-56-

[3] The parties are in agreement that this definition encompasses the following eleven school districts: Adams County School District No. 14, Aurora School District No. 28J, Colorado Springs School District No. 11, Denver County School District No. 1, Greeley School District No. 6, Harrison School District No. 2, Jefferson County School District No. R-1, Northglenn-Thornton School District No. 12, Pueblo School District No. 60, St. Vrain Valley School District No. RE-1J, and Westminster School District No. 50. *See* State Br. at 5 n.6. No other districts are required to participate in the Voucher Program, although others may voluntarily choose to do so. § 22-56-104(1)(b), C.R.S.

108(4)(a), C.R.S. The statute mandates that "the parent shall restrictively endorse the check for the sole use of the participating nonpublic school." *Id.*

Subject to the enrollment cap, the Voucher Program is open to the school districts' students who are from low-income families and who (a) for Grades 4-12, performed at a proficiency level of "unsatisfactory" in at least one academic area on a statewide assessment or college entrance exam, or (b) for Grades K-3, lack "overall learning readiness" based on certain risk factors, reside in the attendance area of a school rated "low" or "unsatisfactory," or (for Grades 1-3) performed below grade level on reading assessments. § 22-56-104(2), C.R.S. Under these standards, the academic performance rating of the public school a student would attend will, in most cases, have no bearing on whether the student qualifies for a voucher.

Any private school that meets certain standards set forth in § 22-56-106(1) & (2), C.R.S., has a right, enforceable through an appeal to the State Board of Education, to participate in the Voucher Program. School districts have no discretion to deny the application of any private school that demonstrates compliance with these standards. § 22-56-106(3)(b), C.R.S. Neither the Voucher Program nor any other provision of state law affords the school districts any control over the instruction provided to Voucher Program students by participating private schools.

SUMMARY OF ARGUMENT

1. This Court's cases, from *Belier v. Wilson* in 1915 to *Board of Education v. Booth* in 1999, consistently hold that, under Article IX, § 15 of the Colorado Constitution, the General Assembly may not require school districts to fund instruction over which the district's elected school board has no control. But that is what the General Assembly has done in enacting the Voucher Program. Section 15 limits the General Assembly's plenary authority under Article IX,

§ 2, requiring that, at a minimum, local school districts retain "substantial discretion" with regard to the instruction students receive at the district's expense. Section 15 is, under this Court's precedents, fully applicable when such district-funded instruction is provided in private schools. And, notwithstanding intervening changes in the State's system of school finance, the constitutional principle of local control of instruction through school directors democratically elected by their local communities retains its full vitality to this day.

2. The Voucher Program is special legislation in violation of Article V, § 25, because it singles out and imposes the obligation of participation on a class of school districts that is defined by reference to conditions that existed on a date in the past and thus is permanently closed to other districts that may subsequently come to be similarly situated. Such closed classes are a form of identification, not legitimate classification, and are therefore illusory. There is no logical or legal basis for defendants' contention that any class of more than one member is *per se* constitutional, and courts have not hesitated to strike down as illusory closed classes as large as the one at issue here.

ARGUMENT

The district court's judgment striking down the Voucher Program as contrary to the Colorado Constitution should be affirmed on either of two grounds. First, the court correctly held that the Voucher Program violates Article IX, § 15 by requiring school districts to pay for instruction over which the district's school directors have no control. While the judgment can be affirmed on this ground alone, this Court can also affirm on the alternative ground – also fully briefed, argued, and decided below – that the statute creating the Voucher Program impermissibly singles out and places a special burden on a closed class of school districts,

contrary to Article V, § 25.[4] We address in turn these two grounds for affirmance.[5]

I. THE VOUCHER PROGRAM UNCONSTITUTIONALLY REQUIRES SCHOOL DISTRICTS TO PAY FOR INSTRUCTION OVER WHICH THEIR SCHOOL BOARDS HAVE NO CONTROL

Drawing on a century of precedent, this Court held just five years ago in *Board of Education v. Booth*, 984 P.2d 639 (Colo. 1999), that Article IX, § 15 of the Colorado Constitution requires that locally elected school boards must have "substantial discretion regarding the character of instruction that students will receive at the [school] district's expense." *Id.* at 648. The Voucher Program, as the district court correctly held, fails that test, for it requires

[4] Contrary to the intervenors' apparent assumption, Interv. Br. at 7, no cross-appeal is necessary to ask this Court to affirm the district court's judgment that the Voucher Program is unconstitutional on this alternative ground. An "appellee may, without filing a cross-appeal, defend the judgment of the lower court on any ground supported by the record, even if the arguments involve an attack on the reasoning of the lower court, so long as that party's rights would not be increased under the judgment." *Ehrle v. Department of Admin.*, 844 P.2d 1267, 1271 (Colo. App. 1992); *see also Blocker Exploration Co. v. Frontier Exploration, Inc.*, 740 P.2d 983, 989 (Colo. 1987) (same); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 167 n.15 (5th Cir. 1978) (cross-appeal not necessary "in order to urge alternative theories in support of the district court's judgment that [a statute] is unconstitutional"), *aff'd*, 445 U.S. 308 (1980).

[5] It should go without saying that whether private-school vouchers are good public policy is a question for the political branches of government, not the courts. We do not, however, wish to leave unrebutted the impression defendants and intervenors attempt to create that vouchers have been shown to be a successful means of addressing the educational needs of poor and minority children. To the contrary, the studies defendants cite, State Br. at 12-13; Interv. Br. at 6-7, are the work of committed voucher advocates, and their conclusions are in fact highly controversial – "in large part," as one scholar has put it, "because the Peterson group's statistical analysis seems always tilted to favor a positive result for vouchers." Martin Carnoy, *School Vouchers: Examining the Evidence* 2 (2001). More dispassionate researchers have found little, if any, evidence that voucher programs improve either the academic achievement of participating students or the performance of public schools. *See, e.g., id.* at 5-30; Michael Winerip, *What Some Much-Noted Data Really Showed About Vouchers*, N.Y. Times (May 3, 2003); Economic Policy Institute, *A Conversation on School Vouchers* (June 12, 2003), *available at* http://www.epinet.org/webfeatures/viewpoints/vouchers_transcript_20030612.pdf; Alex Molnar, *Smaller Classes Not Vouchers Increase Student Achievement* (Keystone Research Center 1998), *available at* http://www.keystoneresearch.org/pdf/smClasssizes.pdf.

local school districts to pay for some of their children to receive instruction over which the district's school board has no control whatever.

A. As this Court explained in *Booth*, "[t]he framers' inclusion of article IX, section 15 makes Colorado one of only six states with an express constitutional provision for local governance" of education. 984 P.2d at 646. Article IX, § 15 assigned to local school boards "control of instruction in the public schools of their respective districts," and as a result "[t]he historical development of public education in Colorado has been centered on the philosophy of local control." *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1021 (Colo. 1982).

The 1876 Constitutional Convention's decision to place control of instruction in the hands of local school boards – even while vesting other education-related authority in the General Assembly and the State Board of Education – was a repudiation of attempts to lodge authority over instruction at the state rather than the local level. The Convention specifically rejected an initial draft prepared by its Education Committee that would have given the State Board responsibility for "supervision of instruction"; it amended the draft by limiting the State Board's role to the "general supervision of the public schools," while adding a new provision, now Article IX, § 15, that placed the constitutional authority for "control of instruction" in the hands of the elected school boards of the respective local districts. *See Proceedings of the Constitutional Convention* 185-87, 316-18, 353-63 (1907).[6]

[6] The Convention also reinforced the Constitution's placement of control over instruction in local rather than state hands by adding language, ultimately codified in Article IX, § 16, that specifically denied to both the General Assembly and the State Board of Education the authority to prescribe textbooks. *See Proceedings of the Constitutional Convention* 353, 359-60.

Consistent with this constitutional delegation of authority, this Court has repeatedly held that Article IX, § 15 prohibits the General Assembly from requiring that a school district's funds be used to provide instruction over which the district's school board has no control.

In 1915, the Court held unconstitutional a statute that authorized counties to tax residents of one school district for the support of a high school in a neighboring district. While attendance at the high school was open to students from the plaintiff's school district, the constitutional flaw was the lack of any voice for that district's voters in selecting those who managed and controlled the high school in the adjoining district. "This," the Court held, "violates, both in letter and in spirit, article IX, section 15, of our state constitution." *Belier v. Wilson*, 59 Colo. 96, 98, 147 P. 355, 356 (1915).

That same year the Court also struck down a statute that required school districts without their own high schools to pay tuition for residents to attend high school in another district:

> [T]he general assembly, by the attempted legislation, seeks to divest the directors of districts, wherein there is no high school, of control of instruction therein . . . and invest such control in the pupils residing therein or in the board of directors of an adjoining district. The legislature, in providing for the education of the pupils of a given district in the schools of another district, and imposing the cost thereof upon the former, clearly interfered with the control of instruction in such district. No discretion is left in the board of directors of the district wherein there is no high school as to the character of high school instruction the pupils thereof shall receive at the cost of the district.

School Dist. No. 16 v. Union High School No. 1, 60 Colo. 292, 293, 152 P. 1149, 1149 (1915). The Court found the case analogous to *Belier*: "In either case, the money raised in one district by taxation of the property therein, is, without the consent of the board of directors thereof, expended for instruction in another district over which the board of directors of the former district have no control." *Id.* at 294, 152 P. at 1149.

To the same effect is *Hotchkiss v. Montrose County High School District*, 85 Colo. 67, 273 P. 652 (1928), in which this Court invalidated a statute that "purport[ed] to give the right and privilege to a pupil, who resides in a high school district of one county, of attending as a pupil in a high school district of another county, and to compel the district of her residence to pay the tuition fee required by the district of her attendance . . . ." *Id.* at 69, 273 P. at 653.

The Court subsequently described the constitutional issue in the latter two cases as follows: "[T]he effect of the statutes held unconstitutional was *to permit the pupil at his option, rather than the district board, to determine and control the public school instruction that he should receive as a resident of such district*. This, of course, deprived the board of a constitutional power expressly granted to it." *Wilmore v. Annear*, 100 Colo. 106, 113-14, 65 P.2d 1433, 1436 (1937) (emphasis added).

The principle for which these cases stand – that Article IX, § 15 does not permit the State to require a school district to fund instruction over which the district's school directors have no control – retains its full vitality to this day. This Court has relied on this line of cases at least twice in recent years in emphasizing the central role of local school boards in Colorado's constitutional scheme of control over publicly funded instruction. In *Lujan*, the Court upheld the State's reliance on local property taxes in public school finance, citing both *School District No. 16* and *Belier* for the proposition that "[t]axation of local property has not only been the primary means of funding local education, but also of insuring that the local citizenry direct the business of providing public school education in their school district." 649 P.2d at 1021-22.

Most recently, in *Booth*, the Court relied on *School District No. 16*, *Hotchkiss*, and *Belier* in addressing a challenge under Article IX, § 15 to an appeal provision of the Charter Schools

Act, § 22-30.5-108, C.R.S. The Court reaffirmed the teaching of those cases "that the General Assembly cannot require money raised in one district to be expended for instruction in another district without the first district's consent," because to do so would take from the district's school board its constitutionally mandated "'discretion . . . as to the character of . . . instruction the pupils thereof shall receive at the cost of the district.'" 984 P.2d at 648 (quoting *School Dist. No. 16*, 60 Colo. at 294, 152 P. at 1149).

The issue in *Booth* was whether a local school board's constitutional authority under Article IX, § 15 was infringed by the "second appeal" provision of the Charter Schools Act, which allowed the State Board of Education to direct the local board to approve, over its objection, a charter school application. The Court was able to answer that question in the negative only because it found that, under the Charter Schools Act, an approved charter did not constitute a contract specifying the terms under which the charter school could operate, 984 P.2d at 653-54; rather, the approval of an application was merely an interim step toward a contract, and the local board could "still expect resolution of its initial grounds for denial in a satisfactory final agreement with the charter school applicants." *Id.* at 654.

A contrary interpretation of the statute – requiring a local board to fund a charter school on terms that the local board had rejected – would, the Court made clear, have raised serious problems under Article IX, § 15:

> If an approved charter application became the terms of a contract, then a State Board order to approve an application, substituting its judgment for that of the local board, would authorize a proposed charter school to operate under the terms of an application that the local board had rejected. This result . . . might easily have the effect of usurping the local board's decision-making authority or its ability to implement the educational programs for which it is ultimately responsible. Such an effect would raise serious constitutional infirmities.

984 P.2d at 653.

B. The Voucher Program is constitutionally infirm under Article IX, § 15 for precisely the reasons set forth in the cases just reviewed. The central teaching of these cases is that local school boards – democratically elected by the school district's voters – are constitutionally entitled to retain "substantial discretion," *Booth*, 984 P.2d at 648, over instructional programs the school district is required to fund, and that the General Assembly may not give either individual parents or other school entities control over any portion of the school district's funds, to finance instruction over which the school board has no control.

Under the Voucher Program, local school districts are required to pay for certain of the children, for whose education the school district is responsible, to receive their instruction in private schools rather than through the public schools operated by the school district. Far from retaining "substantial discretion" over that instruction, the school board has no control whatever over the content of the instruction, or even over which private schools will give that instruction. Nothing in either the Voucher Program itself or elsewhere in state law affords the school boards of these districts any discretion, any control, or any influence with respect to the instruction voucher students are to "receive at the district's expense." *Booth*, 984 P.2d at 648.[7]

[7] The defendants may well be correct that "the participating school districts are integrally involved in administering the program." Interv. Br. at 21. But, as the district court observed, "[h]aving administrative and record-keeping responsibilities does not equate to 'substantial discretion'" over instruction. Order at 13, R. 1117. What the statute assigns to the school districts are the purely ministerial tasks of determining – subject to review by the State Board of Education – whether private school applicants have demonstrated compliance with the participation criteria established by the General Assembly, *see* § 22-56-106(3)(b), C.R.S., and applying the statutorily mandated eligibility criteria and selection priorities to student applicants, *see* § 22-56-104, C.R.S. Neither task affords the school districts any discretion over the instruction participating children will receive.

The Voucher Program, in short, takes from school boards and the local citizens that elect them the constitutional right to control the content of the instruction provided with the school district's funds.

C. In their defense of the Voucher Program, the State and the Intervenors offer the same three lines of argument that were considered and rejected by the court below. *See* Order at 13-14, R. 1117-18. They contend that (1) establishing the Voucher Program was within the General Assembly's plenary authority over education under Article IX, § 2; (2) Article IX, § 15 has no application to the Voucher Program because participating students "leave the school district"; and (3) the caselaw interpreting Article IX, § 15 should be disregarded because of the major role the State now plays in school financing. We address each of these arguments in turn.

1. Section 2 Plenary Authority. Defendants' initial line of argument, based on the broad authority over education conferred on the General Assembly by Article IX, § 2 of the Colorado Constitution, can be disposed of readily. Defendants observe that Section 2 "is a positive grant of authority to the legislature to educate Colorado's children," and they assert that this provision "does not limit the legislature's authority to enact educational programs to those required to establish and maintain a public school system." State Br. at 8.

Even assuming for purposes of argument the accuracy of this premise, it does not address the issue before the Court.[8] The short and sufficient answer to defendants' contention is that the General Assembly's plenary power – whether derived from Article IX, § 2 or from Article V –

[8] Defendants' argument regarding the plenary nature of the General Assembly's power under Article IX, § 2 is, if anything, responsive to the claims under Article IX, §§ 2-3, that were advanced in Counts 7-8 of plaintiffs' complaint. As defendants correctly note, State Br. at 2, plaintiffs abandoned these claims in the district court.

finds its limit where another express provision of the Constitution constrains that power. As the district court explained:

> Under the Colorado Constitution, the legislature's powers are not limited except where limits are explicitly stated. *Lujan*, 649 P.2d at 1017. *One such limit is explicitly stated in section 15 of article IX*.

Order at 10, R. 1114 (emphasis added). Whatever authority the General Assembly has by virtue of Article IX, § 2 obviously cannot extend so far as to negate the control of instruction specifically delegated to the local boards of education by Article IX, § 15.

The constitutionally appropriate balance between the General Assembly's powers under Section 2 (and Article V) and school boards' authority under Section 15 was struck in *Booth*.[9] The delegation of "control of instruction" to local school boards does not mean "that the General Assembly's constitutional responsibility for public education can be carried out only to the extent that its regulations have no discernible effect on local resources." 984 P.2d at 645. Nor, obviously, does it require that school boards exercise total control over instruction. *See id.* at 649. What it does require is that locally elected school boards retain "*substantial discretion* regarding the character of instruction that students will receive at the district's expense." *Id.* at 648 (emphasis added). Under the Voucher Program, school boards have *no* discretion and *no* control over the character of instruction students receive at the district's expense.[10]

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[9] Intervenors attempt to draw conclusions about "[t]he respective roles of the state and the local districts" from *Florman v. School Dist. No. 11*, 6 Colo. App. 319, 40 P. 469 (1895), *see* Interv. Br. at 17, but the question in that case was whether a school district was the "owner" of school property so that a mechanic's lien could be enforced against the property. The case says nothing about the roles of the State and school districts in the control of instruction.

[10] The State points to the Exceptional Children's Educational Act, §§ 22-20-101 *et seq.*, C.R.S., as a program under which school districts can be required to pay for instruction in private schools over which they have no control. State Br. at 27. But any such private-school placement

The State seems to suggest that, in carrying out its duty under Article IX, § 2 to provide a publicly funded education for the State's children, the General Assembly may, if it so chooses, simply go outside "the school district delivery model," State Br. at 9, and thus avoid the constraints of Article IX, § 15. Whether that assertion is correct can be left for another day, however, for that is not what the General Assembly has done here. To the contrary. The Voucher Program in no way relieves school districts of their obligation to provide a publicly funded education for children residing in the district; it simply requires them to provide that education, for some of these children, in a different manner than they would otherwise – *i.e.*, by paying for these children to receive their instruction in private schools. This is instruction over which the district's school directors have no control, and the question presented is whether requiring school districts to pay for such instruction is consistent with the limitation placed by Article IX, § 15 on the General Assembly's plenary power over education. As the district court correctly held, it is not.

2. Applicability of Section 15. A second theme of defendants' briefs is that Article IX, § 15 simply has no application to the Voucher Program because "the Opportunity Program does not involve instruction that takes place within the school district." State Br. at 17. Because "students participating in the Program leave the school district," *id.* at 7, "the education of [these]

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is pursuant to a detailed Individualized Educational Program ("IEP") established by the school district and modified only with its agreement, *see* 1 CCR 301-8, 2220-R-4.02, 5.04(3), and the school district is to ensure that the child's education at the private facility is consistent with the IEP. 1 CCR 301-8, 2220-R-5.04(3)(e). In such placements, therefore, the school district does not lack "substantial discretion regarding the character of instruction that students will receive at the district's expense." *Booth*, 984 P.2d at 648.

student[s] is not a 'program for which the district is responsible.'" *Id.* at 18 (quoting *Booth*, 984 P.2d at 649).

The short answer is, of course, that the same was true under the statutes at issue in *Belier*, *School Dist. No. 16*, and *Hotchkiss*, and that in those cases this Court found the statutes to be in violation of Section 15 *precisely because* they required the school district to pay for instruction that did not take place within the district and over which the district had no control. As the Court put it recently in *Booth*, in those cases "the legislature's action 'clearly interfered' with the district's control of instruction because 'no discretion [was] left in the board of directors of the district . . . as to the character of . . . instruction the pupils thereof shall receive at the cost of the district.'" 984 P.2d at 648 (quoting *School Dist. No. 16*, 60 Colo. at 294, 152 P. at 1149).

There was good reason for that holding. Children participating in the Voucher Program – like those who attended school in neighboring districts under the statutes at issue in the *Belier* line of cases – are not students who have declined the school district's offer of a free public education and elected instead to attend private school at their own expense. These are, rather, students who continue to look to the school district of their residence for the publicly funded education to which they are constitutionally entitled. These students continue to count in the school district's membership, § 22-56-107(3), C.R.S., and the school district is still required to provide for their education. These are, in short, "students for whom the district remains responsible." State Br. at 18.

The State observes that "[w]hen the student leaves the district and enrolls in the nonpublic school, the school district's obligations are limited to terms and procedures of payment to the parents and administration of the statewide assessments . . . ." *Id.* That, of

course, is precisely the problem: the school district *does* have responsibility for the education of Voucher Program students, but its responsibility under the statute is to pay for instruction over which the district's democratically elected school directors have no control. As this Court made clear in *Belier* and its progeny, such an arrangement is incompatible with the principle of local control of instruction embodied in Article IX, § 15.

Nor, as the district court correctly observed, Order at 14, R. 1118, is it determinative that the constitutional language speaks of control of instruction in the "public" schools. It is, of course, "'a constitution we are expounding,'" as to which "'[n]arrow and technical reasoning is misplaced.'" *In re Y.D.M.*, 197 Colo. 403, 407, 593 P.2d 1356, 1359 (1979) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819); *City & County of Denver v. Mountain States Tel. & Tel. Co.*, 67 Colo. 225, 228, 184 P. 604, 606 (1919)). Rather, the Court "must consider 'the object to be accomplished and the mischief to be avoided' by the provision at issue." *Id.* (quoting *Institute for Educ. of Mute & Blind v. Henderson*, 18 Colo. 98, 104, 31 P. 714, 717 (1892)). It simply makes no sense of the constitutional mandate to say that a school district cannot be required to pay for instruction of its children in a neighboring district, over which the school directors of the former district have no control, but that the General Assembly can require the district to pay for some portion of its residents to receive their instruction at district expense in private schools, over which the school board's control is equally nonexistent. That a school board is directed to abdicate its control of instruction in favor of private schools rather than the public schools of a neighboring district makes the constitutional violation no less flagrant.[11]

[11] Although the district court quite appropriately did not rest its decision on this technical ground, it noted – citing a statutory definition of "public school," § 22-1-101, C.R.S. – that the schools students attend under the Voucher Program may well be considered "public schools"

3. Changes in School Financing. Finally, defendants suggest that "school finance policies and school choice practices have evolved so significantly that the *Belier* cases should not be applied to limit the General Assembly's constitutional authority to determine educational policy." State Br. at 20. The suggestion that this Court's precedents construing a mandate of the Constitution – relied upon and reaffirmed less than five years ago in *Booth* – should be cast aside as "no longer applicable," *id.* at 24, because of intervening changes in the State's school finance system is not only astonishing in itself, but has no merit for at least three separate reasons.

The first was identified by the district court: while no one questions that locally raised funds now constitute only a portion of most school districts' expenditures, "there is no doubt that revenues generated by local taxes will fund vouchers to a substantial degree." Order at 12, R. 1116. Even defendants estimate that the locally raised portion of school district revenues constitutes nearly 40 percent of the total. *Id.* It is thus clear beyond peradventure that through the Voucher Program the General Assembly is directing school districts to spend locally raised funds for instruction over which they have no control.

That, however, is not the only reason why the *Belier* line of precedent remains fully applicable, notwithstanding the increased role of the State in school finance. While Article IX, § 15 does not limit the ability of the General Assembly to dispose of state-generated funds as it sees fit, *Craig v. People ex rel. Hazzard*, 89 Colo. 139, 299 P. 1064 (1931), once the State has

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because of the public funds they receive. Order at 14 n.6, R. 1118. (The State's response that the support these schools receive under the Voucher Program comes from parents, not from the school districts, State Br. at 19, is simply a semantic argument. The substance of the transaction is that the school districts, by statute, send tuition checks directly to the participating schools, and the parents are required to endorse those checks to those schools, to the exclusion of any other use. § 22-56-108(4)(a), C.R.S. This is clearly public funding in any sense of the words.)

distributed such funds to school districts "title thereto vests in the distributees." *Id.* at 145, 299 P. at 1066.[12] At that point, these become the school districts' funds, for the expenditure of which they are responsible. The mere fact that some school district revenues originate with the State – whether as public school fund income or general fund appropriations – does not allow the State to require school districts to spend those funds, once title thereto is vested in the school district, in a manner that disregards the school districts' constitutional authority over instruction under Article IX, § 15.

Finally, and most fundamentally, there is nothing in Article IX, § 15 to suggest that the constitutional delegation to local school boards of control over instruction depends on the sources of school district revenues. Placing control over the instruction provided with the school district's funds – wherever those funds come from – in the hands of school directors "elected by the qualified electors of the district," Art. IX, § 15, promotes not only the value of accountability to taxpayers but also the value of local control of education through school directors democratically elected by their neighbors. The latter value, at least, is wholly independent of the source of the school district's funding, and it fully supports the delegation to local school boards

[12] In *Craig*, this Court upheld a statute that allowed students to attend school in another district and adjusted the State's payments apportioning the income of the public school fund so as to compensate the host district for its tuition cost at the expense of the district of residence. *See* 89 Colo. at 142-43, 299 P. at 1065-66. While the practical result may have been much the same for the school districts as under the statutory schemes struck down in *School Dist. No. 16* and *Hotchkiss*, the Court relied on the difference in form, holding that the income from the public school fund was the property of the State, that the Constitution did not limit the manner in which the General Assembly could apportion that income among counties and school districts, and that unlike the statute struck down in *Hotchkiss*, "no attempt is made to compel the district of the pupil's residence to pay the cost of public instruction furnished by another district." *Id.* at 147, 299 P. at 1067. Significantly, it is the method upheld in *Craig* that is used to fund cross-district enrollment under the Public Schools of Choice Program, §§ 22-36-101 *et seq.*, C.R.S., to which the State adverts at page 27 of its brief. *See* 1 CCR 301-39, 2254-R-5.01.

made by the Constitutional Convention – regardless of the portions of the school district's funds that come from local and state sources.

The framers' choice to enshrine in the Constitution the principle of local control of instruction was, as we noted above, a conscious and deliberate one. *See supra* p. 7. Far from reflecting "brittle words" that have "los[t] life and relevance," State Br. at 28 (quoting *Y.D.M.*, 197 Colo. at 407, 593 P.2d at 1359), the value of local decisionmaking with respect to instruction is no less important in the era of substantial state funding of education than it was in an earlier time. The Court should therefore decline defendants' invitation to disregard its precedents as "inapplicable to modern school finance jurisprudence." *Id.*

II. THE VOUCHER PROGRAM IMPERMISSIBLY IMPOSES SPECIAL OBLIGATIONS, NOT PROVIDED FOR BY GENERAL LAW, ON A CLOSED CLASS OF SCHOOL DISTRICTS

The Voucher Program is also unconstitutional because it singles out 11 of Colorado's 178 school districts and imposes on them a burden not applicable to other school districts under general law. While the General Assembly is free to accord differential treatment to genuine classes of school districts or other entities, it may not – as it has done here – impose special rules on a hand-picked group that does not constitute a genuine class of all similarly situated districts.

Article V, § 25 of the Colorado Constitution provides that "[t]he general assembly shall not pass local or special laws" with regard to certain enumerated subjects – including, *inter alia*, the subject of "providing for the management of common schools." That means, as this Court has explained, that "the legislature cannot single out a district or districts, organized under the general law, and pass an act for the management of the schools in such territory different from

that provided for their control in other districts, also existing under the general school law of the state." *In re Senate Bill No. 9*, 26 Colo. 136, 137, 56 P. 173, 174 (1899).

Article V, § 25 requires a two-pronged analysis, under which the Court must "determine whether a classification: (1) is genuine rather than illusory, and (2) is reasonably related to a legitimate governmental purpose." *City of Greenwood Village v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 441 (Colo. 2000). The Voucher Program does not pass the first prong of this test: the class of school districts required to participate in the Voucher Program is illusory, because that class is defined so as to exclude districts that in the future come to be similarly situated to the current class members.[13]

A. The striking feature of the classification established by the Voucher Program is that it determines which school districts are required to participate by reference to conditions that existed at a time in the past – whether the school district had eight or more schools rated low or unsatisfactory *for the 2001-02 school year*. This is what renders the group of school districts to which the mandatory-participation provision applies a closed – and therefore illusory – class.

It is black-letter law that "[a] statute is unconstitutional special legislation if . . . it creates a permanently closed class." 2 Norman J. Singer, *Sutherland Statutory Construction* § 40:1, at 212 (6th ed. 2001). That is because, as this Court has explained, a law must be "general and

[13] Plaintiffs argued below that the Voucher Program failed the second prong of the special legislation test as well, in that the statutory criterion for membership in the mandatory-participation class – based on the absolute number of eight or more schools rated low or unsatisfactory in 2001-02 – was irrationally over- and under-inclusive, excluding smaller school districts in which most or even all of the schools were rated "low" or "unsatisfactory," while including indisputably high-performing large school districts such as Jefferson County. On this appeal, we do not challenge the district court's holding that the eight-school criterion was within the "range of reason" of permissible legislative discretion. Order at 9, R. 1113.

uniform in its operation upon all in like situation." *American Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 370 (Colo. 1994). Throughout its history, this Court has made clear that a classification's capacity for prospective application to entities that subsequently come to be similarly situated is the *sine qua non* of a classification that is general and uniform in its operation. The Court has thus upheld legislative classifications against challenges as special legislation if, but only if, the classification is capable of encompassing other entities that may subsequently come to share the characteristic defining the class.

For example, in *Darrow v. People*, 8 Colo. 417, 8 P. 661 (1885), this Court rejected a challenge to a statute that established a superior court for cities beyond a certain population threshold, even though it then applied to only one city. While emphasizing that special legislation could not be made acceptable merely if "disguised by the use of general language," *id.* at 418, 8 P. at 662, the Court reasoned as follows:

> Denver, it is true, is the only city to which the act at present applies. *But the legislature clearly intended to provide for places that may hereafter acquire the population mentioned.* The law is general, and is unlimited as to time in its operation. There is nothing unreasonable in the supposition that other towns and cities within the state will eventually contain 25,000 inhabitants. *Whenever this size is attained by such municipal corporations, the act becomes applicable thereto.*

Id. at 418-19, 8 P. at 662 (emphasis added).

By contrast, in *In re Senate Bill No. 95*, 146 Colo. 233, 361 P.2d 350 (1961), the Court held unconstitutional legislation intended to permit Denver to annex the Town of Glendale. As in *Darrow*, the classification – although drafted in general terms – applied only to a single town, but that was not its flaw. Unlike the *Darrow* statute, the Glendale bill was drafted in a way that ensured that it *could never* apply to any town other than Glendale, even one that in the future

came to be similarly situated to Glendale in relevant respects. That is why this Court held it invalid: "The bill cannot operate prospectively because it is impossible that before July 1, 1962, [when the statute automatically expired] any circumstance can occur to allow another town to be surrounded for five years by a special charter town or city." *Id.* at 239, 361 P.2d at 354.[14]

Although the mechanism by which the Voucher Program ensures that its mandatory-participation provisions will apply only to the eleven targeted districts is different from that used in the Glendale bill, the constitutional flaw is precisely the same: the statute creates a closed, and therefore illusory, class because it excludes entities that in the future come to be similarly situated to those that populate the class at the time of the legislation's enactment. That is what makes this special, not general, legislation.

By far the most common type of closed class is one that – like the Voucher Program – is defined on the basis of conditions existing at a time in the past. Such laws are invariably struck down as special legislation. For example, the Nebraska Supreme Court – interpreting a Nebraska constitutional provision that served as the model for Colorado's Article V, § 25[15] – has

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[14] *See also Greenwood Village*, 3 P.3d at 442 (upholding act targeted to one city because it "is generic in its application, *is applicable to other foreseeable situations*, does not deal with a class of one, and thus passes constitutional muster under Article V, section 25") (emphasis added); *In re Interrogatory on House Bill 91S-1005*, 814 P.2d 875, 887 (Colo. 1991) (upholding bill intended to apply to one corporation because "we cannot say, as we did in *In re Senate Bill No. 95*, that no entity other than United Airlines will ever meet the statutory criteria set forth in H.B. 1005"); *American Water Dev.*, 874 P.2d at 371 (upholding statutory classification of certain stream systems on basis of legislation's "indefinite period of application" and possibility of application to other stream systems in future).

[15] *See* Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century* 114 (1957) (unpublished Ph.D. dissertation, University of Colorado). Nebraska's Article III, § 18 differs only in minor respects, not relevant here, from Colorado's Article V, § 25.

repeatedly invalidated statutes that confer special privileges or impose special burdens on a class defined by reference to conditions existing on a date in the past. *See City of Scottsbluff v. Tiemann*, 175 N.W.2d 74, 79 (Neb. 1970) (citing cases). The statute in question in *Scottsbluff* required the creation of a municipal court in cities with certain population characteristics "according to the 1960 federal census." The court struck down the statute because "it creates a permanently closed class," *id.* at 78-79, explaining:

> The law is unmistakably clear that a statute classifying cities for legislative purposes in such a way that no other city may ever be added to the class violates the constitutional provision forbidding special laws . . . .

Id. at 79.

Similarly, the Arizona Supreme Court has explained – in invalidating a closed class of 12 municipalities – that "[a] classification limited to a population as of a particular census or date is a typical form of defective closed class; such an act is a form of identification, not classification, because it is impossible for entities to enter or exit the class with changes in population." *Republic Investment Fund I v. Town of Surprise*, 800 P.2d 1251, 1259 (Ariz. 1990). A valid classification "must be prospective and permit the future entrance into the class when its qualification standards have been met," 2 *Sutherland Statutory Construction* § 40:6, at 248, and the courts routinely strike down as "special legislation" statutory enactments that create closed classes based on conditions existing as of a date in the past. *See also, e.g., Thomas v. Foust*, 435 S.W.2d 793, 795–96 (Ark. 1969) (act that classified school districts according to conditions existing on a date in the past was nonprospective and therefore "inappropriate and arbitrary . . . special or local legislation"); *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 920–21 (Mo. 1993) (holding that "[t]he determination whether a statute is a special law rests on whether

it is 'open-ended'" and invalidating classification based on a past census); *Garcia v. Siffrin Residential Ass'n*, 407 N.E.2d 1369, 1379 (Ohio 1980) (striking down statute that created two classes of municipalities based on municipal legislation in effect as of a past date).

As in the cited cases, the Voucher Program – by basing membership in the mandatory-participation class on school districts' academic performance ratings for the 2001-02 school year – "limits the application of the law to present condition and leaves no room or opportunity for an increase in the numbers of the class by future growth or development . . . ." *Scottsbluff*, 175 N.W.2d at 79. The General Assembly has imposed participation in the Voucher Program on eleven specific school districts – and no others – just as surely as if their names had been enumerated in the statute.

B. Defendants argued below principally that the evil against which Article V, § 25 was directed was the creation of a "class of one," and that even a closed class was constitutionally unobjectionable as long as it contained two or more members.[16] The district court properly rejected that contention. Order at 7-8, R. 1111-12. As the court noted, this Court

[16] Defendants relied on language in *House Bill 91S-1005*, in which the Court – citing *Darrow* and *Senate Bill No. 95* – observed that "the class cannot be limited to one." 814 P.2d at 885. Both *Darrow* and *Senate Bill No. 95* involved classes of one entity, yet the former was upheld while the latter was struck down. As the holdings of these cases make clear, it is not the number of members in a class that is critical, but whether or not the class is restricted to entities that share the statutory criteria at the time of the law's enactment. As this Court has emphasized, "the number of class members known to be affected by the statutory criteria at the time of enactment is not determinative in deciding whether the legislation amounts to unconstitutional special legislation." *American Water Dev.*, 874 P.2d at 370-71. Nothing in either *Darrow* or *Senate Bill No. 95* suggests that a closed class of two or more members is permissible, and the "class of one" language used to describe those cases in *House Bill 91S-1005* is thus best understood to have been stating the holdings of those cases in terms of their specific facts.

has invalidated special legislation applicable to a class of more than one member. *See In Re Senate Bill No. 9*, 26 Colo. at 140, 56 P. at 175 (class of four school districts).[17]

The courts of other states have done so as well. In particular, the Arizona Supreme Court has specifically addressed the "class of one" argument, in a decision striking down legislation applicable to a closed class of 12 municipalities:

> [Petitioner] argues that the elasticity requirement[[18]] only applies when a classification involves no more than one entity . . . . It argues that our earlier cases addressing elasticity involved situations where the classification encompassed only one city. We decline to adopt so narrow an interpretation. As we noted above, a law may be general and apply to only one entity, *if* that entity is the only member of a class, and a law may be special even if it applies to more than one entity when it applies to less than the entire class.

Republic Investment, 800 P. 2d at 1258 n.4. *See also Scottsbluff*, 175 N.W.2d at 79-80 (striking down closed class of two cities); *Garcia*, 407 N.E.2d at 1378-79 (invalidating statute that classified all Ohio municipalities into two closed classes); *State ex rel. Conkling v. Kelso*, 139 N.W. 226 (Neb. 1912) (rejecting statute dividing all Nebraska counties into two closed classes).

It is, in point of fact, impossible to discern any reason why placing a special burden or benefit on two, three, or eleven specific entities is any less offensive to the constitutional ban on special legislation than is a law that targets only one. In either event, the question is whether the

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[17] The district court also observed that this Court's reasoning in other cases was inconsistent with a rule that a class of more than one was *per se* constitutional. Thus, the class in *American Water Development*, 874 P.2d at 370, was upheld "not because it had two members, but because it was subject to being expanded in the future." Order at 8, R. 1112. This Court did not end its analysis – as it would have under defendants' theory that any legislative class of more than one is *ipso facto* permissible – upon determining that the challenged class consisted of more than one member. *See* 874 P.2d at 370-71.

[18] The Arizona courts use the term "elasticity" to describe the requirement that a class must encompass those entities that in the future come to be similarly situated. *See Republic Investment*, 800 P.2d at 1258.

law is "general and uniform in its operation *upon all in like situation*." *American Water Dev.*, 874 P.2d at 370 (emphasis added). A class that is limited to entities that shared a certain characteristic *on some date in the past* – and thus that will not expand to encompass entities that come to share that characteristic in the future – does not operate uniformly upon all in like situation and thus is no more a genuine class than is one that identifies its members by name.

C. The district court nonetheless upheld the Voucher Program against plaintiffs' contention that the mandatory-participation class was illusory, citing three grounds for its decision. First, the court explained that, "[a]lthough some language in the cases lends support to plaintiffs' theory that a class is impermissible, no matter how large, if it is closed to future similarly situated members, I cannot predict with certainty that the Supreme Court would strike a class this large solely because it is closed." Order at 8, R. 1112. This Court, of course, is not dependent on predictions. Although it is correct that a case involving a closed class of as many as eleven entities has not previously come before this Court, there is no basis in logic or law for treating a closed class of eleven differently from a closed class of some smaller number. *See Republic Investment*, 800 P.2d at 1258-59 (striking down closed class of 12 municipalities).[19]

Second, the observation that the Voucher Program permits voluntary participation by other school districts, while true, is irrelevant. What plaintiffs challenge is the imposition on

[19] None of the district court's other observations in this connection supports its position. Whether the class is a real or an illusory class, Order at 8, R. 1112, is precisely what is at issue; if the class is closed it is, for the reasons set forth above, illusory. That "the criteria by which those districts are defined are rationally related to the purpose of the voucher program," *id.*, goes to the second prong of the special legislation inquiry, and is not relevant to whether the class is closed and therefore illusory. Finally, none of the cases the court cites for the proposition that this Court has sometimes "gone to seemingly great lengths to avoid invalidating laws as special legislation," *id.*, is in any way contrary to the arguments advanced here.

eleven school districts – and no others – of the *obligation* to participate in the Voucher Program. The flaw in the Voucher Program is that it treats these eleven specially designated school districts differently than all others. *Cf. Scottsbluff*, 175 N.W.2d at 82 (statute *requiring* two cities to establish municipal court not saved by fact that other cities *permitted* to do so).[20]

Finally, the speculation that the General Assembly might in the future choose to expand the mandatory-participation class – even assuming such an inference could legitimately be drawn from the statute's mere use of the term "pilot program" in its title, § 22-56-101, C.R.S. – cannot save the Voucher Program if it constitutes special legislation. The "relevant inquiry" is indeed "whether the pilot program constitutes special legislation," Order at 8, R. 1112, and if it does – as we have shown to be the case in our discussion above – Article V, § 25 "does not have a 'pilot program exception.'" *Harrisburg School Dist. v. Zogby*, 828 A.2d 1079, 1090 n.16 (Pa. 2003). Article V, § 25 flatly forbids special legislation with respect to certain enumerated subjects including "the management of common schools," and that blanket limitation on the General Assembly's power cannot be nullified by the contention that the General Assembly thought it advisable to start by imposing the Voucher Program only on selected school districts.

CONCLUSION

For the reasons set forth above, the judgment of the district court declaring the Voucher Program unconstitutional and enjoining its implementation and enforcement should be affirmed.

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[20] The district court's attempted analogy to the *House Bill 91S-1005* and *Greenwood Village* cases is misplaced. There, the issue was whether any entity other than United Airlines or the City of Centennial could possibly become a member of the class in question; here, the possibility that other school districts could choose to participate in the Voucher Program does not mean it is possible for any other school district to become a member of that class upon which the requirement of participation is imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer Brief of Appellees was served by first-class mail, postage prepaid, this 5th day of April, 2004, on counsel for appellants and *amicus curiae* as follows:

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