

<p>DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p>DATE FILED: May 4, 2023 10:05 AM FILING ID: 39F8C8E5B954B CASE NUMBER: 2023CV31265</p>
<p>THE DENVER POST, STATES NEWSROOM DBA COLORADO NEWSLINE, NEXTAR MEDIA GROUP, KUSA 9NEWS TEGNA, THE DENVER GAZETTE AND COLORADO POLITICS, & CHALKBEAT COLORADO, Plaintiffs,</p> <p>and</p> <p>MOVIMIENTO PODER, a nonprofit corporation, Plaintiff-Intervenor,</p> <p>v.</p> <p>STACY WHEELER, in her official capacity as records custodian, for Denver Public Schools, Defendant.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Plaintiff: Eric Maxfield, #29485 Eric Maxfield Law LLC 3223 Arapahoe Avenue, Suite 300 Boulder, Colorado 80303 303-502-7849 Eric@ericmaxfieldlaw.com</p> <p>Katherine Dunn, Esq. <i>pro hac vice</i> application filed concurrently Advancement Project 1220 L. St. NW Suite 850 Washington, DC 20005 202-728-9557 kdunn@advancementproject.org</p>	<p>Case No: 23CV31265</p> <p>Division</p>

APPLICATION TO INTERVENE

Applicant Movimiento Poder (“MP”) respectfully submits this Application to Intervene as a Plaintiff against Defendant Stacy Wheeler, in her official capacity as records custodian for Denver Public School District (“DPS”). Plaintiff-Intervenor seeks to intervene in the above-captioned matter as a matter of right under C.R.C.P. 24(a)(2), or alternatively permissively, under C.R.C.P. 24(b)(2).

[Certification of conferral: Counsel for Applicant conferred with Plaintiffs and Defendant. Plaintiffs do not object to intervention, and Defendant objects.]

Standard of Review

C.R.C.P. 24(a) provides for intervention as of right. Under C.R.C.P. 24(a): "Upon timely application, anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *See* C.R.C.P. 24(a)(2).

Hence, to intervene as a matter of right, an applicant must show that: (A) the applicant claims an interest in the subject matter of the litigation; (B) the disposition of the case may impede or impair the applicant's ability to protect that interest; and (C) the interest is not adequately represented by existing parties. C.R.C.P. 24(a)(2); *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

The legal concept of intervention is based upon the right of a litigant to protect itself from the consequences of an action in which the litigant has an interest, or by the result of which it may be bound. *See Mauro v. State Farm Mut. Auto. Inc. Co.*, 410 P.3d 495, 498 (Colo. App. 2013). The Rule governing intervention should be liberally construed, "to allow, when possible and compatible with efficient and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level." *See Feigin*, 19 P.3d at 26.

Courts have the discretion to permit intervention as an alternative to intervention as a matter of right. Rule 24(b) of the Colorado Rules of Civil Procedure provides in relevant part: "Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common." In exercising its discretion to permit a party to intervene, courts must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties. *Moreland v. Alpert*, 124 P.3d 896, 904 (Colo. App. 2005) (citing *CF & I Steel, L.P. v. Air Pollution Control Div.*, 77 P.3d 933, 939 (Colo. App. 2003)). An applicant with a vital interest in the result of the suit should be granted permission to intervene as a matter of course. *Roosevelt v. Beau Monde Co.*, 384 P.2d 96, 101 (Colo. 1963).

Argument

I. The Court should grant the Applicant Intervention as a Matter of Right.

A. Intervenor Movimiento Poder has an interest in the subject matter of the litigation.

1. MP's interest is in the policy decision of the Board at its March 23, 2023 special meeting, and in the recording of the executive session, which it requested on April 6, 2023.

a. MP has a demonstrated and abiding interest in the policy at issue in the Board’s March 23, 2023 special meeting.

Movimiento Poder is a Denver, Colorado-based grassroots organization, led by working-class Latine immigrants, youth, women, and families, that works to ensure that all students, regardless of race, income, or immigration status, have safe, healthy, and equitable learning environments. Movimiento Poder (MP) uses community organizing, leadership development, and civic engagement to accomplish its mission.

For three decades, MP – formerly known as Padres y Jóvenes Unidos – has worked to eliminate barriers to this vision and ensure that every child has access to a safe, nurturing environment where they can thrive. MP began organizing in Southwest Denver in 1993 because students and families did not have access to quality education. Since that time, MP has worked to make significant improvements for young people in Denver Public Schools. They worked to achieve implementation of restorative justice practices in the district in 2005, a new student discipline code in 2008, and the first Memorandum of Understanding with the Denver Police Department in 2012.

In 2020, during the racial uprisings following the murder of George Floyd, MP worked to achieve a resolution passed by the Denver Public Schools Board of Education (“the Police Free Schools resolution”) committed to removing police from schools. The data and lived experiences of young people, including MP members, show why this resolution was necessary, as Black, Latine, and other students of color were disproportionately arrested by police in schools, and an overwhelming majority of students surveyed reported they would prefer money spent on policing to be reinvested to increase access to supports like mental health resources.

Denver Public School Board Resolution, June 11, 2020:

[https://go.boarddocs.com/co/dpsk12/Board.nsf/files/BQGUND783ACE/\\$file/Board%20Resolution%20re%20SROs_6.11.2020.pdf](https://go.boarddocs.com/co/dpsk12/Board.nsf/files/BQGUND783ACE/$file/Board%20Resolution%20re%20SROs_6.11.2020.pdf); *Local and National Support Grows in Advance of Denver*

Public Schools Vote to End Contract with Denver Police Department, June 11, 2020:

<https://advancementproject.org/news/local-and-national-support-grows-in-advance-of-denver-public-schools-vote-to-end-contract-with-denver-police-department/>.

In 2021, the Board unanimously approved Executive Limitation Policy 10.10 (EL 10.10) which states, “[t]he Superintendent will not staff schools with school resource officers or the consistent presence of security armed with guns or any other law enforcement personnel.”

Throughout the implementation of the Police Free Schools resolution and EL 10.10, Movimiento Poder has worked to ensure the process for defining school safety is community-driven and that it does not continue to criminalize and harm students of color.

On March 23, 2023, the DPS Board met in executive session for over four-and-a-half hours. They entered this executive session by unanimous vote on a motion to 1) discuss matters required to be kept confidential under federal or state law or rules or regulations, 2) discuss specialized details of security arrangements or investigations, and 3) discuss individual students. When the Board exited the executive session, Board President Xóchitl Gaytán read into the record a Memorandum detailing the Board’s decision to “hereby suspend board policy EL-10.10 and its Proclamation Regarding Gun Violence Prevention, through June 30, 2023,” and directed Superintendent Dr. Alex Marrero to “develop a systemic Long-term Safety Operational Plan in consideration of EL-11 and in accordance with Safety Ends Policy 4.” The Memorandum further directed Dr. Marrero to work with the mayor to fund “as many as two” armed police officers at all high schools in the District for the remainder of the year.

After reading the Memorandum to the public, the Board called for a motion to approve item 3.01, which was then moved and seconded by Board members Auon’tai Anderson and

Carrie Olson, respectively. There was no public discussion of any kind prior to the Board's unanimous vote to approve the Memorandum – suddenly reversing its policy preventing school police, or School Resource Officers, in the District that has been in place since 2020. The Board then adjourned.

b. MP requested the executive session recording that is sought by Plaintiffs in this case.

Movimiento Poder made the following records request to Defendant on April 6, 2023:

I request a copy of the following government record:

Recording of the March 23, 2023 Board of Education Special Meeting and Executive Session.

On April 6, 2023, Defendant responded to Movimiento Poder's request for the recording of the March 23, 2023 executive session:

The district is responding to your 4/6/2023 records request concerning a recording of the Executive Session during 03/23/2023 School Board meeting. Denver Public Schools is in possession of records responsive to your request that are not subject to disclosure pursuant to the Colorado Open Meetings Act, CRS 24-6-402(2)(d.5)(I)(D), or the Colorado Open Records Act, 24-72-204(1)(a).

The reference to § 24-72-204(1)(a) in Defendant's response is a reference to CORA stating that the records are closed to inspection because "[s]uch inspection would be contrary to any state statute." The response does not identify the statute that is at issue requiring closure. Consistent with the requirements of § 24-72-204(5.5), C.R.S., MP can show grounds sufficient to support a reasonable belief that the state public body or local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402 (3) or (4) or that the state public body or local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in

the executive session in contravention of section 24-6-402 (3)(a) or (4). Consequently, it is MP's position that the executive session recording should be opened to inspection.

It cannot be reasonably disputed that, due to MP's long standing policy interest and advocacy on the topic at hand in the March 23, 2023 Board meeting, along with its request for the recording from the executive session based on grounds that support a reasonable belief in misuse of the executive session, MP has an interest in the subject matter of the litigation.

B. The disposition of the case may impede or impair Movimiento Poder's ability to protect that interest.

The Plaintiffs in the case are all members of the press. Consistent with the role of the press, they seek to open the recording of the executive session to public inspection so that they may inform the public about events that are public business. *See, e.g.,* Colorado Newsline, *Why We're Suing Denver Public Schools*, <https://coloradonewsline.com/2023/05/02/why-were-suing-denver-public-schools/>. MP is likewise interested in open government. However, its interests are focused here on the policy issue at the March 23, 2023 Board meeting. MP's abiding interests are described above, and while the press might resolve the matter in its own narrower interest of opening the record, MP has a broader interest, including seeking findings and Orders by the Court, specifically:

1. That the Court enter an Order that Defendant violated the COML by failing to discuss public business in the public portion of the meeting, failing to take a vote on public business in the public portion of the meeting that is not a rubber stamp of a straw poll in executive session, failing to properly notice the meeting's open session or executive session by full agenda or adequate motion, and failing to describe the subject matter in as much detail as possible without compromising the purpose for which an executive session was called, in violation of §§ 24-6-402(2)(b), 24-6-402(2)(c)(I), § 24-6-402(2)(d.5)(II)(A),(C); § 24-6-402(4), and § 24-72-204(5.5), C.R.S.;

2. That the Court enter an Order directing Defendant to release to Plaintiff-Intervenor the recording from its executive session held on March 23, 2023;
3. That if the Court does not Order the executive session recording open to inspection, to enter an Order directing Defendant to provide to the Court, for in camera review, the recording so that the Court may determine if the executive session was properly noticed, moved, and if a discussion and vote occurred in executive session that is required to occur in public session;
4. That the Court enter a declaratory judgment finding that the requested records are public records subject to disclosure and not exempt under CORA, and that they are subject to public access pursuant to Movimiento Poder's valid request under CORA;
5. That the Court enter an Order invalidating the decision to approve item 3.01 at the March 23, 2023 meeting adopting the Memorandum to deploy police to all District high schools.

MP's interests and remedies sought in the litigation far exceed the scope of the Plaintiff's requested opening of the executive session to inspection. It is also relevant that the Plaintiffs here rely in their second claim for relief on:

Plaintiffs are informed and believe, based on the March 23 Memorandum, news reporting, and the March 29 Memorandum that DPS unlawfully adopted a position or resolution during the March 23 executive session, namely, to draft and approve the policy position set forth in the March 23 Memorandum.

MP, while likewise relying on this basis, will argue and prove that the proximity in time between the over four-hour executive session, the lack of agenda notice, lack of adequate executive session specificity, and the reversal of a critical policy without any debate or discussion demonstrate grounds on their own for opening the executive session recording, or alternatively for an *in camera* review.

Therefore, a disposition here on the Plaintiff's case may, through the resulting *res judicata* on a narrow issue regarding release of the executive session recording, bind MP in a manner that impedes or impairs its ability to seek the findings, declaratory judgment and

invalidation that it applies to seek here. Moreover, because the Rule governing intervention should be liberally construed, "to allow, when possible and compatible with efficient and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level," MP's claims should be heard together in the interests of efficient and fair resolution of the conflict between the parties. See *Feigin*, 19 P.3d at 26.

C. The interest of the Applicant is not adequately represented by existing parties.

MP's interests in the litigation, where it *is* congruent with the Plaintiffs' pending claims, is not adequately represented because, as explained more fully above in sections I(A) and (B), MP has as part of its mission "to ensure that all students, regardless of race, income, or immigration status, have safe, healthy, and equitable learning environments." MP seeks to protect its accomplishments, consistent with this mission, including the Board's 2021 unanimously approved Executive Limitation Policy 10.10 (EL 10.10) which states, "[t]he Superintendent will not staff schools with school resource officers or the consistent presence of security armed with guns or any other law enforcement personnel." This signature achievement in the interests of students was overturned behind closed doors and without MP being able to observe or attempt to impact the formulation of new policy.

The goals of MP's litigation here include improving the notice on agendas, improving motions to enter executive sessions, correcting misuse of executive sessions, and making sure that policy debates are held in broad daylight, not closed meetings. The press Plaintiffs are here seeking to secure only a portion of MP's goals, the opening of the executive session recording.

II. In the alternative, the Court should grant Applicant Permissive Intervention.

A. The application is timely.

The lawsuit was filed only five days ago, and no activity has yet occurred in the case.

B. Movimiento Poder's claim and the main action have a question of law or fact in common.

MP's claim and the Plaintiffs' claims cover some, but not all, identical ground. MP and the Plaintiffs each seek to secure opening of the executive session recordings. This falls under the same Open Records and Open Meetings laws, including § 24-72-204(5.5), and § 24-6-402(2)(d.5)(I)(C), C.R.S. The facts at issue involving the agenda, motion to enter executive session, activity in the executive session, and immediate reversal of a policy are in common between Plaintiffs' and Applicant's case.

C. The intervention will not unduly delay or prejudice the adjudication of the original parties.

The case was filed recently, the Defendant has not yet filed a pleading, and no delay or prejudice will accrue to the original parties.

Under C.R.C.P. 24(b) related to permissive intervention, an applicant with a vital interest in the result of the suit should be granted permission to intervene as a matter of course.

Roosevelt, 384 P.2d at 101. Here, MP easily meets the criteria for permissive intervention.

Conclusion

MP meets the standard for intervention of right and permissive intervention under C.R.C.P. 24(a) and (b), and the court should grant the Application and accept the filing of the Complaint.

Respectfully submitted this 4th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPLICATION TO INTERVENE was served on May 4, 2023, through the Colorado Court electronic filing system to:

Rachael Johnson, Esq.
Reporters' Committee for Freedom of the Press

Steven D. Zansberg, Esq.
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