

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

District Court of the City and County of Denver
Honorable Hebert L. Stern, III
Case No. 2014CV32543

Petitioners:

Lindi Dwyer and Paul Dwyer, as individuals and parents of Jayda Dwyer, Joslyn Dwyer, Janesha Dwyer, and Jentri Dwyer; Terri Siewiyumtewa, as an individual and as parent and natural guardian of Shane Siewiyumtewa and Kristen Johnson; Tracey Weeks and Monty Weeks, as individuals and as parents of Jared Weeks and Jordyn Weeks; Terri Piland and Jeffrey Piland, as individuals and as parents of Joseph Piland and George Piland; Colorado Rural Schools Caucus a/k/a Rural Alliance; East Central Board of Cooperative Educational Services; Colorado PTA; Boulder Valley School District; Colorado Springs School District No. 11; Mancos School District; Holyoke School District; and Plateau Valley School District 50

v.

Respondents:

The State of Colorado; Robert Hammond, in his official capacity as Commissioner of Education of the State of Colorado; and John Hickenlooper, in his official capacity as Governor of the State of Colorado.

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Case No. 2015SA22

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**BRIEF OF *AMICI CURIAE* GREAT EDUCATION COLORADO, EDUCATION
FOUNDATION OF EAGLE COUNTY, GRASSROOTS ST. VRAIN, AND COLORADO
LATINO FORUM'S DENVER METRO CHAPTER IN SUPPORT OF PLAINTIFFS**

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that: The Brief complies with C.A.R. 28(g) as it contains 6,092 words.

The Brief complies with C.A.R. 28(k).

I acknowledge that my 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/ David W. Stark

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Latino Forum's Denver Metro Chapter

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Great Education Colorado, Education Foundation of Eagle County, Grassroots St. Vrain, and the Colorado Latino Forum’s Denver Metro Chapter (“Amici”) submit this brief as amici curiae in support of the position of Plaintiffs-Respondents Lindi Dwyer, et al. (“Plaintiffs”). If this Court reaches the question¹ presented by Defendant-Petitioner State of Colorado, et al. (the “State”), this Court should reject the State’s proposed rule. The voters adopted Amendment 23 to increase per pupil funding in Colorado schools. The General Assembly effectively nullified that vote when it modified the school funding formula to eliminate the required increases. This Court must reject the State’s interpretation of Amendment 23 because it contravenes the voters’ intent.

ISSUE STATEMENT

Amendment 23 must be construed to effectuate the intent of the Colorado voters who adopted it. The amendment’s text, and the meaning universally ascribed to it in materials available to voters at the time of its adoption, show that

¹ Amici agree with Plaintiffs that this Court need not reach the question whether Amendment 23’s mandated increases are limited to the “base per pupil funding” portion of the current school financing formula and may be undone by other changes to the formula, because the General Assembly has violated the amendment by reducing “base per pupil funding” even as the State narrowly construes that term. This Brief, however, addresses the point that the amendment requires per pupil funding increases and does not permit the State to simultaneously increase “base per pupil funding” and nullify or substantially reduce that increase by altering other aspects of the school finance formula.

the voters intended to require annual increases in per pupil funding for state education, in both good and bad economic times. Can the legislature now alter the school-finance formula to nullify the per pupil funding increases the voters mandated?

INTEREST OF AMICI

Great Education Colorado (“GEC”) is a statewide, nonpartisan, grassroots organization created in 2005 to focus on improving funding for education in Colorado. GEC informs citizens on issues related to school funding and promotes legislation to adequately fund Colorado’s schools. Its roots are intertwined with Amendment 23. The organization includes or works with many of the people involved with the passage of Amendment 23 and has consistently worked to further the objectives the amendment sought to achieve. GEC communicates with over 28,000 people in over 200 communities throughout the state. More than 3,500 people have taken action to support education through GEC, either online or in person, in the past year. Because funding public education is the primary issue GEC was formed to address, the organization has a particular interest in cases that concern Amendment 23 or other issues related to school funding.

The **Education Foundation of Eagle County** (“EFEC”) is a nonpartisan, grassroots organization whose top priority is to maintain an excellent learning

experience for K-12 students in Eagle County, Colorado. EFEC informs Eagle County citizens on issues related to school funding and promotes legislation to adequately fund Colorado's schools. EFEC was created in 2001 to attract private resources and organize community and school district initiatives to support Eagle County schools, teachers, and students. In November 2011, after the failure of a mill levy tax proposed to fund the deficit after state budget cuts to K-12 education in Eagle County, numerous concerned community members joined EFEC, revitalizing its purpose to retain Eagle County Schools' most qualified teachers, preserve staffing levels, maintain smaller class sizes, conserve and improve on one on one teacher-student ratios, and to protect vital programs and curricula that had been or were in danger of being reduced or eliminated. From 2009 through the end of the 2014-2015 school year, Eagle County has experienced a cumulative reduction of approximately \$35,440,361 caused by the negative factor.

Grassroots St. Vrain is an independent, non-profit organization made up of parent volunteers committed to informing and activating citizens on education-related issues impacting St. Vrain Valley Schools and public education in general. Grassroots St. Vrain was instrumental in supporting the passage of the district's first-ever mill levy override in 2008 and again in 2012. At the state level, the organization provides opportunities for members to contact and meet with

elected officials to advocate for improved education funding, including reversal of the negative factor, which has removed over \$21 million from the St. Vrain Valley School District budget in just the current 2014-15 school year alone.

Colorado Latino Forum is a non-profit, statewide advocacy organization founded in 2009 to increase Latino participation and awareness in the electoral process, mobilize the Latino community on important issues, and ensure that elected officials are responsive to the needs of the Latino community in Colorado. The **Denver Metro Chapter** is the organization's largest chapter, and actively promotes the Forum's values concerning quality education by convening Latino stakeholders including students, families, educators, and community leaders in policy discussion and advocacy activities. The Denver Metro Chapter of the Colorado Latino Forum supports Plaintiffs in this case to protect and promote funding Colorado's schools at the primary and secondary levels as a critical investment in the development of future leaders and the long-term economic prosperity of the community.

SUMMARY OF ARGUMENT

In 2000, Colorado voters passed Amendment 23 to increase “per pupil funding for public schools...by at least the rate of inflation plus one percentage point for the next ten years and by at least the rate of inflation thereafter.” (Exh. 1,

Legislative Council of the Colorado General Assembly, “An Analysis of the Statewide 2000 Ballot Proposals,” Research Publication No. 475-0 (“2000 Blue Book”) (excerpts), first line of description of proposed Amendment 23.) The amendment implemented that increase by raising the “statewide base per pupil” funding as “defined in” the Public School Finance Act effective in 2000, which “base” was then augmented by district-specific factors to account for variations in student and district needs, yielding an overall increase in per pupil funding statewide. Colo. Const. art. IX, § 17(1); Exh. 2, C.R.S. § 22-54-103, -104 (2000).

The PSFA does not define the term “base per pupil funding.” Given the way that term was used in the PSFA in 2000, however, an increase in “base per pupil funding” in the context of the amendment necessarily *means* an increase in per pupil funding overall. The voters’ intent to increase per pupil funding is evident not only in the text of Amendment 23, but also in the materials available to voters when they approved the amendment. Proponents and opponents disagreed strenuously on the merits of Amendment 23 precisely *because* they agreed as to what the Amendment would mean: required annual increases in per pupil funding for K-12 education, regardless of economic conditions.

But the General Assembly now refuses to implement those required per pupil funding increases. Instead, the legislature has undertaken a mathematical

sleight of hand: it purports to add dollars to the “base per pupil funding” part of the finance equation but then takes those dollars back out of school budgets by introducing a “negative factor” that was not a part of the school finance formula nor contemplated by voters at the time Amendment 23 was adopted. The voters did not and could not have intended the legislature to with one hand give the increased funding to schools and with the other hand take that funding away. The rule the State asks this Court to adopt is a license to nullify the will of the voters and short-change Colorado’s kids; this Court should decline to issue the rule.

ARGUMENT

I. The electorate’s intent in adopting Amendment 23 controls the outcome of this case.

This “court’s duty in interpreting” Amendment 23 “is to give effect to the electorate’s intent in enacting the amendment.” *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004). In so doing, the Court “must give words their ordinary and popular meaning in order to ascertain what the voters believed the constitutional amendment to mean when they adopted it.” *Id.* But “[c]ourts should not engage in a narrow or technical construction of the initiated amendment if doing so would contravene the intent of the electorate.” *Id.* (citing *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996)).

When “the intent of the voters cannot be discerned from the language, ‘courts should construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment.’” *Davidson*, 83 P.3d at 654 (quoting *Zaner*, 917 P.2d at 283). In such cases, this Court may determine the voters’ intent by “considering other relevant materials such as the ballot title and submission clause and the biennial ‘Bluebook’....” *Id.* (quoting *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999)). As with all constitutional provisions, Amendment 23 should be construed to avoid “an unjust, absurd or unreasonable result.” *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994).

Colorado’s General Assembly must not enact a law that is “expressly or inferentially prohibited by the constitution of the state....” *People v. Y.D.M.*, 593 P.2d 1356, 1359 (Colo. 1979). The General Assembly can only “supplement the provisions” of the Constitution, and “no legislation contrary to the express or implicit requirements” of the Constitution “can survive a constitutional challenge.” *Colorado Ass’n of Public Employees v. Lamm*, 677 P.2d 1350, 1353 (Colo. 1984). To save its “negative factor” legislation, the State urges this Court to adopt a narrow and technical interpretation of Amendment 23 by relying in isolation on

one term—“base per pupil funding.” That interpretation, however, cannot be squared with the amendment or Colorado voters’ intent in enacting it.

II. The voters’ intent reflected in the plain meaning of the amendment requires annual per pupil increases in funding.

A. The plain meaning of the amendment requires annual increases in per pupil funding.

The State relies heavily on the amendment’s use of the term “statewide base per pupil funding” to support its assertion that so long as the State increases the dollar amount included in the school funding formula as “base per pupil funding” it can make any other change to the school funding formula—even if that change results in a decrease rather than an increase in per pupil school funding—and remain in compliance with Amendment 23’s directives. (*See, e.g.*, Pet. for Rule to Show Cause 12.)

The amendment, however, does not use the term “statewide base per pupil funding” in a vacuum. The Court “must be careful not to determine intent by considering language in isolation when other relevant provisions cast doubt upon that interpretation.” *Zaner*, 917 P.3d at 284. The Court’s interpretation should not “contravene the text and context” of the provision it is construing. *See Springer v. City and Cnty. of Denver*, 13 P.3d 794, 800 (Colo. 2000).

Amendment 23 requires annual increases in “statewide base per pupil funding, as defined by the Public School Finance Act of 1994, article 54 of title 22, Colorado Revised Statutes on the effective date of this section.” Colo. Const. art. IX, § 17(1). While the Public School Finance Act does not define “statewide base per pupil funding,” the school funding formula in the statute in 2000 uses that term as the lone variable in the school funding formula that is a fixed dollar amount. Exh. 2, C.R.S. § 22-54-103, -104(3) (2000). The remaining variables are factors – multiples to be applied to the fixed per pupil funding amount to account for economic, demographic, and geographic variables beyond the control of each district. *Id.* Under the version of the formula in effect when the voters enacted Amendment 23, an increase in the “base per pupil funding” necessarily caused an increase in the overall per pupil funding. The voters understood the amendment to mean that per pupil funding would increase as a result of their enactment.

The State asserts that “[h]ad the People intended that either the finance formula’s per pupil yield or overall state spending on public education increase with inflation, they could have said so.” (Pet. for Rule to Show Cause 12.) But neither of the State’s proposed alternatives is workable.

An increase in “overall state spending on public education” would have broken the important tie between school funding and the number of pupils enrolled

in Colorado's schools. It makes sense that when there are more students, more school funding is needed, and if the student population plummeted then the *total* amount of school funding would and should decrease even as per pupil funding rises with inflation. The amendment as adopted appropriately retains the relationship between number of pupils and funding levels.

A constitutionally prescribed increase in what the State calls the “finance formula’s per pupil yield” would have been impossible to draft. (*Id.*) As the State acknowledges, a district’s per pupil funding includes amounts factored into the equation to account for variations among districts that vary year to year based on demographics that change year to year and district to district, such as the percentage of the district’s student population that are “at risk” pupils. (*Id.* at 8.) *See also* C.R.S. § 22-54-104(4) (describing how a factor is applied to account for at-risk students). A constitutional amendment cannot mandate increases in the “yield” of an equation that by definition is calculated from district-specific demographic factors that will vary year to year, because a constitutional amendment applies statewide and does not change year to year. (That is the beauty of a constitutional amendment.)

Instead, by mandating increases in the “base per pupil funding” as that term was understood against the backdrop of the 2000 PSFA, the amendment

necessarily increases the per pupil funding—ensuring that it keeps pace, at a minimum, with inflation—without affecting the legislature’s ability to adjust for equitable factors that vary by year and district.

The Court’s purpose in interpreting the words of the amendment is to “ascertain what the voters believed the amendment to mean.” *Davidson*, 83 P.3d at 654. Considered not in isolation but along with the 2000 PSFA—which is referenced in the amendment and informed voters’ understanding of the proposed amendment’s effect—what the amendment meant to voters *was* a required annual increase in per pupil funding of education in Colorado.

B. The State’s interpretation cannot be squared with the plain text of the amendment.

Despite the amendment’s plain meaning, the General Assembly has not met its obligation to increase per pupil funding to keep pace with inflation.² To make an action so contrary to Amendment 23 even facially plausible, the General Assembly had to change the equation at the root of the amendment.

² The State admits the \$1 billion shortfall and does not (and cannot) suggest that there has been a commensurate decline in Colorado’s student population. (*See* Pet. for Rule to Show Cause 13 (“If the negative factor is unconstitutional, the General Assembly must find nearly \$1 billion in new revenue....”).) *See also* Colorado School Finance Project website, <http://cosfp.org/BudgetCuts.html> (collecting data from Colo. Dep’t of Educ. and Colorado Legislative Council to quantify the impact of negative factor).

Perhaps recognizing that simply passing a bill to subtract back out the amount of the voter-mandated increase might draw the ire of the majority of Coloradans who voted to require the increase, the General Assembly attempted a slightly more sophisticated—though no less suspect—workaround. It adopted a “negative factor”: a new element introduced into the equation to back out of the formula whatever amount the legislature deemed necessary to balance the budget. As explained in Plaintiffs’ brief, the actual implementation of the so-called negative factor threw out the window the entire statutory funding equation, and in particular the “statewide base per pupil funding” and replaced it with a simple (and unconstitutional) funding cap.

To voters, because the increases were mandatory and tied to inflation, Amendment 23 meant that the amount of school funding would be tied to the real-world needs of Colorado’s students rather than the political decisions of legislators: funding would be tied to the number of students and required, at a minimum, to keep pace with inflation. The “negative factor” reinstates the system that the

Amendment 23 voters rejected³: allowing the legislature to decide what amount they are willing to spend on education and then calculating district funding amounts based on the legislature's pre-determined total spending amount without reference to the schools' and students' actual needs. *See* C.R.S. § 22-54-104(5)(g)(I) (legislature determines funding amount “based on budget projections” independent of inflation and enrollment); § 22-54-104(g)(II)(A) (the negative factor is not applied to the base per pupil funding but instead is to be applied to the “district’s total program funding”). The so-called “negative factor” constitutes a

³ A 2003 Mind of Colorado Survey of Public Opinion report confirms that Coloradans meant what they said when they adopted Amendment 23. The report finds:

The Voters are unwilling to modify the spending mandate in Amendment 23 to give greater flexibility to the Legislature in times of recession. Respondents were told: “Amendment 23 requires annual increases in funding for K-12 education. When revenues drop due to recession, this requirement forces large cuts to other parts of the state’s budget.” They were then asked: “Should Amendment 23 be modified to give the legislature flexibility in times of recession to cut K-12 education along with other programs, or would you prefer to keep Amendment 23 as it is?” Seven in ten Coloradans (69%) would not modify Amendment 23’s spending provisions while 27% would prefer the proposed modification.”

(Exh. 3, Inst. for Public Policy, Univ. of Colo. at Denver, Graduate School for Public Policy, “Ninth Annual Mind of Colorado Survey of Public Opinion (June 2003) (excerpts), also available at <http://www2.cde.state.co.us/artemis/ucdserials/ucd62410internet/ucd624102003internet.pdf>, at p. 12.

wholesale nullification of the system the voters mandated by adopting Amendment 23.

Even if the “negative factor” had been implemented as an actual factor (which would have required complicated district by district reductions), it still would amount to a way to take away with the left hand what one has given with the right. *See City of Boulder v. Payne*, 426 P.2d 194, 197 (Colo. 1967) (adopting a rule “with the conviction that the legislature could not have intended to give substantive benefits on the one hand and then, on the other, take them away”). It is no more permissible than if the General Assembly had passed a bill to straightforwardly subtract back out of the equation the amount the voters required it to put in. No matter how simple or fancy the math, the result is illogical and unconstitutional. *See Bickel*, 885 P.2d at 229 (construction of constitutional provision must avoid “an unjust, absurd or unreasonable result”). Had the voters intended that the General Assembly could simply alter the remaining aspects of the formula to subtract back out the mandated increase, there would have been no reason to enact the amendment. The General Assembly cannot be permitted to *negate* the express will of the people.

III. The materials surrounding the enactment of Amendment 23 confirm the amendment’s purpose: mandatory annual increases in per pupil funding.

A. Evidence of voter intent beyond the text of the amendment should be considered to resolve any ambiguity.

Even if there were ambiguity caused either by the lack of definition of the term “statewide base per pupil funding” in the amendment and in the definitions section of the PSFA, or by the interaction between the amendment and the current version of PSFA, the Court should “construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment.” *Davidson*, 83 P.3d at 655 (citing *Zaner*, 917 P.2d at 283). In such circumstances, the Court can and should consider other evidence of voter intent. *See id.* (quoting *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2 549, 554 (Colo. 1999) (consider “other relevant materials such as the ballot title and submission clause and the biennial ‘Bluebook’”)); *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009) (“*Lobato I*”) (quoting *Bedford .v Sinclair*, 147 P.2d 486, 489 (Colo. 1944)) (same, and “[e]vidence of the ‘contemporary interpretation of those actively promoting the amendment’ may also be given weight”). Examination of the materials surrounding the amendment’s enactment further supports the conclusion that the voters intended the amendment to require annual per pupil increases in funding.

B. The Blue Book establishes that the purpose of the amendment was to increase “per pupil funding for public schools.”

The first statement in the 2000 Blue Book’s analysis of Amendment 23 is: “The proposed amendment to the Colorado Constitution: **increases per pupil funding for public schools** and total state funding for special purpose education programs by at least the rate of inflation plus one percentage point for the next ten years and by at least the rate of inflation thereafter.” (Exh. 1, 2000 Blue Book at 9 (emphasis added).) In the “Background” section, the Blue Book reiterates that “[u]nder this proposal, the state constitution sets a minimum increase in funding.” (*Id.*)

Then, in a section headed “School finance act,” the Blue Book explains how that goal is implemented by increasing the “base” per pupil funding as that term is used in the PSFA. It describes how “[u]nder the school finance act, every school district starts with the same per pupil funding amount called the ‘base,’” which “is then adjusted in each school district for special district characteristics such as the number of students and the local community’s cost of living.” (*Id.* at 10.) The Blue Book then explains that “[t]his proposal requires a minimum increase in the base equal to the rate of inflation plus one percentage point for the next ten years, and inflation thereafter.” (*Id.*) It concludes that paragraph by noting that: “Under the proposal, if inflation is 3.7 percent in each of the next ten years, the base will

increase by at least 58 percent to \$6,335, for an average **per pupil funding level** of \$8,192.” (*Id.* (emphasis added).) The increase in the “base” is thus explicitly tied to a resulting increase in “average per pupil funding.”

The Ballot Title similarly explains that the amendment “concern[s] **increased funding** for preschool through twelfth-grade public education, and **in connection therewith, requires the statewide base per pupil funding for public education...to grow** annually...” (*Id.* at 46 (emphasis added).) The Blue Book and Ballot Title explain precisely what the amendment and its reference to the PSFA entail: the intent to increase “per pupil” funding and how that goal is accomplished by increasing the “base” under the PSFA.

Moreover, both the “Arguments For” and the “Arguments Against” sections assume correctly that the “proposal increases funding to public schools.” (*Id.* at 11.) The “Arguments Against” section focuses on the state keeping tax money that could otherwise be refunded and asserts that “**increased education funding** will not guarantee increased student achievement.” (*Id.* at 12 (emphasis added).)

The feature of the amendment that the State decries now—the legislature’s inability to move money away from education in difficult economic times—was understood before the amendment was passed and described to voters in the Blue

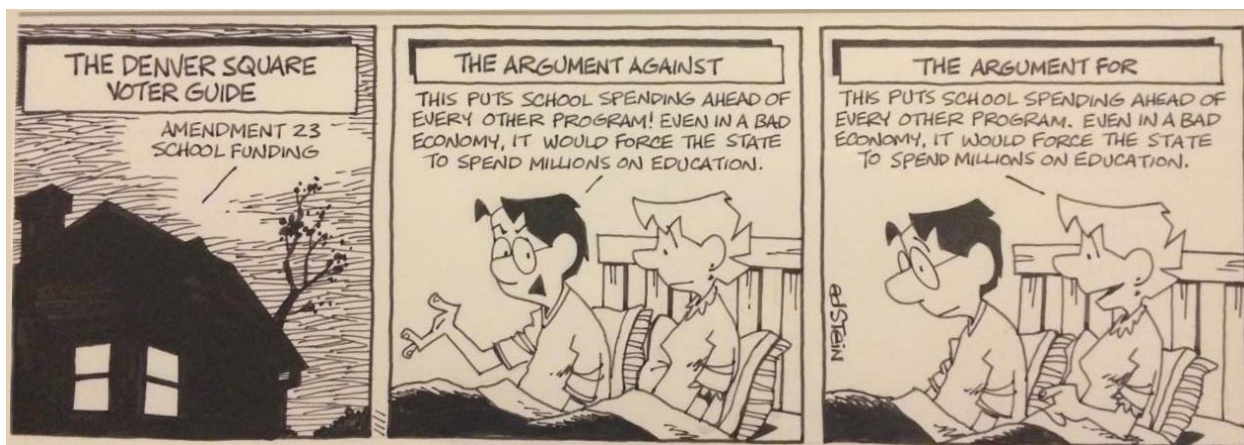
Book.⁴ It explained to voters that “[a]llocating money through the constitution reduces the state legislature’s flexibility to respond to changing state needs because the constitution can only be modified by voter approval.” (*Id.* at 13.) The voters nonetheless enacted the amendment because they intended to “increas[e] per pupil funding for public schools.” (*Id.* at 9.)

C. Proponents and opponents in the press leading up to the election universally agreed that the amendment meant mandatory increases in per pupil funding for education.

As indicated by the “Arguments For” and “Arguments Against” in the Blue Book, the opponents and proponents of the amendment were united in their understanding that it would mandate annual increases in per pupil funding for education. The cartoon below appeared in the Denver Rocky Mountain News on

⁴ The mandatory increases in funding and the potential impact on other programs were discussed during the process leading up to Amendment 23’s appearance on the ballot. The Office of State Planning and Budgeting (“OSPB”) issued an April 28, 2000 letter to the Colorado Secretary of State opining that Amendment 23 had a “state fiscal impact” because “the measure prescribes the minimum annual increases in total program, per pupil funding, and categorical programs in the Public School Finance Act.” (Exh. 4, April 28, 2000 letter from Nancy McCallin, Director of the OSPB, to Donetta Davidson, the Secretary of State at p. 1.) The OSPB explained that “while the intent of the measure is to increase funding for preschool through 12th grade education, under certain conditions the measure would also affect funding increases for other General Funded programs.” *Id.* That is because “during an economic slowdown, state revenues may not increase, yet the measure would provide for increases in public school education funding” and “[i]n this case, funding for other state programs would need to be reduced.” (*Id.*)

Wednesday, November 1, 2000, just days before the November 7, 2000 election at which the initiative was passed:



(Exh. 5, Ed Stein, “*The Denver Square Voter Guide*” cartoon, Denver Rocky Mountain News, Nov. 1, 2000.)

The opponents’ strenuous objections were premised on their understanding that the increased per pupil funding was mandatory. An editorial in the Denver Rocky Mountain News opposing the amendment, for example, objected on grounds that “[t]he education budget will march magnificently ever upward, oblivious to events in the real world.” (Exh. 6, Editorial, “*No. 23: a stealth amendment*,” Denver Rocky Mountain News, Nov. 5, 2000 at 2B.) The opponents asserted that the amendment “will put funding for public schools on automatic pilot indefinitely, guaranteeing that education enjoys a steady diet of more through both good times and bad.” (*Id.*) The Boulder Daily Camera explained that opponent John Caldera “is campaigning against a constitutional amendment that

would increase per pupil funding for public schools by at least the rate of inflation plus 1 percent, with increases at least equal to the rate of inflation thereafter.” (Exh. 7, Kate Larsen, “*Education amendment disagreeable to some,*” Boulder Daily Camera, Oct. 8, 2000 at 1A.)

The Longmont Daily Times-Call reported that Governor Owens opposed the amendment because the “mandated inflation plus 1 percentage point increases in school finance spending for the next 10 years – and increases matching the inflation rate each year after that...‘will eat into our ability’ to also pay for any increases needed by’ other programs.” (Exh. 8, John Fryar, “*Owens now opponent of Amend. 23,*” Longmont Daily Times-Call, Oct. 19, 2000 at B1; *see also* Exh. 9, Eric Hubler, “*Owens comes out against education tax amendment,*” Denver Post, Oct. 20, 2000 (“Noting that Amendment 23 requires education to be funded at the rate of inflation plus 1 percent for 10 years whether or not there’s a budget surplus, Owens painted some grisly scenarios.”)) And a Denver Rocky Mountain News editorial asserted that the governor should oppose the amendment more forcefully on grounds that “[u]nder Amendment 23, even in bad times education funding will never share the general pain.” (Exh. 10, Editorial, “*A wishy-washy governor,*” Denver Rocky Mountain News, Oct. 20, 2000.)

Proponents lauded the proposed amendment in the press for the same reason: mandatory increased per pupil funding of education. An editorial supporting the amendment in the Loveland Reporter Herald urged that “voters have an opportunity to permanently reverse a trend that has impaired the state’s ability to deliver the caliber of education our students deserve and our economy demands,” and explained that “Amendment 23 will change the state constitution to increase funding for public schools by at least the rate of inflation plus 1 percent for the next 10 years, and by at least the rate of inflation each year after that.” (Exh. 11, Editorial, “*Amendment 23 makes education a top priority,*” Loveland Reporter Herald, Oct. 13, 2000.)

Explanatory articles also described how the proposed amendment “would increase funding for each pupil by at least 1 percent more than inflation each year for the next decade,” and would thereafter require “annual school funding increases...to keep pace with or exceed inflation.” (Exh. 12, Holly Kurtz, “*Amendment would increase school funding,*” Denver Rocky Mountain News, June 22, 2000 at 5A.) The same article reports that a research poll conducted “for the Denver Rocky Mountain News and Channel 4 News asked 517 voters if they would be willing to ‘require the state to meet the cost of inflation for schools plus provide an additional 1 percent increase in funding per year for the next 10 years’”

and found that a “resounding 71 percent said ‘yes.’” (*Id.* at 27A.) Similarly, an article from the Broomfield Enterprise explains that the “ballot proposal mandates an ‘inflation plus 1 percent increase’ in public education for the next 10 years, with increases at least equal to the rate of inflation thereafter,” and reported that “[o]pponents claim the initiative could lead to cuts in other state programs.” (Exh. 13, Kate Larsen, “*Initiative to create State Education Fund,*” Broomfield Enterprise, June 28, 2000 at A8.)

The information available to voters in the months leading up to the vote on Amendment 23, whether pro, con, or neutral, reflected a universal understanding that the amendment mandates increased per pupil funding. The voters did not intend a different result.

IV. After its enactment, Amendment 23 has been interpreted by the State, the drafters of later Blue Books, and this Court to require per pupil increases in funding.

A. The 2008 and 2013 Blue Books each describe Amendment 23 as requiring funding increases to keep pace with inflation.

In 2008, a ballot measure ultimately rejected by the voters proposed to amend the Constitution to “eliminate the required inflationary increase for P-12 education spending.” (Exh. 14, Legislative Council of the Colo. General Assembly, *2008 State Ballot Information Booklet*, Research Publication No. 576-1 (“2008 Blue Book”) (excerpts).) Consistent with the 2000 Blue Book’s

explanation of Amendment 23, the 2008 Blue Book explained the effect of the 2008 proposal on Amendment 23 as follows: “*What are the required increases for education spending and how are they changed?*” Another constitutional provision known as Amendment 23 requires the state to increase the amount of money it spends on P-12 education. Spending per student must increase by at least inflation each year after 2011. Amendment 59 eliminates this requirement.” (*Id.* at 29 (emphasis in original).) The voters rejected Amendment 59 and Amendment 23’s increased funding requirements remained in effect.

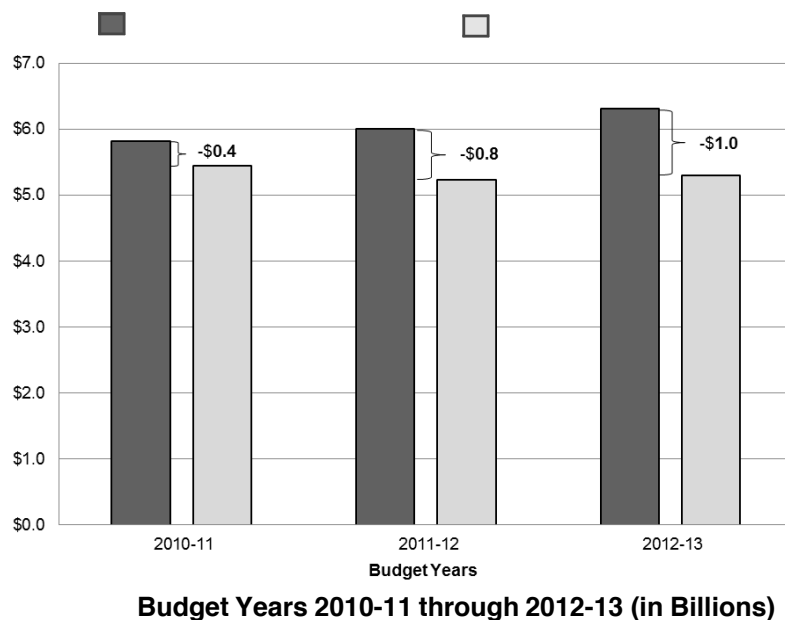
Similarly, the 2013 Blue Book described a ballot initiative to change school funding that would have eliminated Amendment 23’s mandatory increases in funding. The 2013 Blue Book then explained both Amendment 23’s requirements and how the state had failed to meet them in recent years. First the 2013 Blue Book explained that the “[f]ormula funding for each school district begins with the same amount of funding per student, known as base per pupil funding,” which “is then adjusted upward for each school district, depending on particular district characteristics, to determine a final per pupil funding amount.” (Exh. 15, Legislative Council of the General Assembly, *2013 State Ballot Information Booklet*, Research Publication No. 626-1 (“2013 Blue Book”) (excerpts) at p. 2.) The 2013 Blue Book explained Amendment 23’s constitutional requirement “that

the base funding amount increase every year by at least inflation.” (*Id.*) It then went on to explain that the state has not met the amount required by the formula with Amendment 23’s constitutionally required increases:

The recent recession reduced the amount of state and local tax revenue available for P-12 public education funding. In each of the past three budget years, the decline in state revenue caused the legislature to reduce the amount of state money going to school districts below what would have been required by the funding formula.

(*Id.*) The 2013 Blue Book provided an illustration of the shortfall: “Figure 1 compares formula funding before this legislative change with actual funding for each of the last three budget years. For example, in budget year 2012-13, actual funding was \$1.0 billion below what the funding formula would have required.”

(*Id.* at p. 2.)



(*Id.* at p. 3 (Fig. 1. Formula Funding Compared to Actual Funding).) The proposed amendment was rejected and Amendment 23’s constitutionally required increases remain in effect.

B. In the *Lobato* litigation, the State, four former governors of Colorado who submitted an amici brief, and this Court all interpreted Amendment 23 to require increases in per pupil funding.

In recent school-funding litigation, the State and four former governors of Colorado took the position that Amendment 23 requires increases in per pupil funding. The State’s position in the *Lobato* litigation, as well as this Court’s interpretation of Amendment 23 in that case, further reinforce the conclusion that Amendment 23 mandates increases in per pupil funding of education.

In the *Lobato* case challenging the constitutionality of the state’s education funding, the State—taking a position directly contrary to its position in this litigation, asserted that “Amendment 23 has done what Plaintiffs now ask this court to do: set the minimum level of state funding for public education.” (Exh. 16, Appellees State of Colorado, et al. Answer Brief to Colorado Court of Appeals in *Lobato, et al. v. State of Colorado*, 06 CA 733, dated March 13, 2007, 2007 (also available at http://www.coloradoattorneygeneral.gov/departments/state_services/education/lobato) (excerpts) at p. 9.) The State then explained that, in its view, “Amendment 23 does so by requiring increases in per pupil funding for public

schools and special purpose education programs of at least the rate of inflation plus one percentage point through fiscal year 2011, and by at least the rate of inflation thereafter.” (*Id.*) As recently as 2007,⁵ then, the State understood the amendment to “require[e] increases in per pupil funding.”

Similarly, when the *Lobato* case reached this Court the second time, in 2012, former Governors Ritter, Owens, Romer, and Lamm filed an amici brief asserting that “[w]hile TABOR and the Gallagher Amendment combine to limit funding, Amendment 23 simultaneously requires the State to increase per pupil K-12 education funding each year relative to inflation.” (Exh. 18, Brief of *Amici Curiae*, Former Colorado Governors Ritter, Owens, Romer, and Lamm in Support of Defendant-Appellants, submitted to this Court in *Lobato*, No. 2012SA25, on July 18, 2012 (excerpts) at p. 8.)

⁵ Rather than a shift in the State’s understanding of the meaning of Amendment 23, the “negative factor” may instead represent a decision on the part of legislators that violating Amendment 23’s constitutional requirements was a path of less resistance than either making cuts in other programs or seeking to raise taxes. In an August 30, 2009 *Denver Post* article, Representative Jack Pommer, the then-incoming chairman of the legislature’s Joint Budget Committee is quoted as saying: “I don’t know how we can get through this year or really next year without violating some law or our constitution...It comes down to what we think we can violate.” (Exh.17, Tim Hoover, “*School funds may not be spared from cuts*,” *Denver Post*, Aug. 30, 2009, also available at http://www.denverpost.com/politics/ci_13231782.)

This Court, in its 2009 opinion in *Lobato*, addressed the State’s argument that Amendment 23 should be understood to set “the constitutionally minimum level of state funding required by the education clause.” *Lobato v. State of Colorado*, 218 P.3d 358, 375 (Colo. 2009). This Court held that Amendment 23 did not concern the education clause’s “thorough and uniform” requirement, but the amendment did “prescribe[] minimum increases for state funding of education” through a “mandate” that “relates solely to a minimum level of funding.” *Id.* at 376. In reaching that holding, this Court found that “[b]y its plain terms and as described in the Blue Book, Amendment 23 increases per pupil funding and funding for categorical programs by a minimum rate of inflation plus one percentage point until the fiscal year 2010-11, and thereafter by at least the rate of inflation.” *Id.* at 375.

CONCLUSION

The State’s end-run around the voters’ mandate to increase per pupil funding finds no support in the plain text of the amendment, the history showing the voters’ intent in enacting the amendment, or logic. This Court should effectuate the voters’ intent to increase per pupil funding of education at least to account for inflation. Accordingly, if this Court reaches the Rule requested by the State, the proposed Rule must be rejected.

Respectfully submitted this 23rd day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2015, a true and correct copy of the foregoing BRIEF OF *AMICI CURIAE* GREAT EDUCATION COLORADO, EDUCATION FOUNDATION OF EAGLE COUNTY, GRASSROOTS ST. VRAIN, AND COLORADO LATINO FORUM'S DENVER METRO CHAPTER IN SUPPORT OF PLAINTIFFS was e-filed with the Court and e-served upon the following through ICCES:

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