SUPREME COURT, STATE OF COLORADO **2 East 14th Avenue** **Denver, Colorado 80203**	
Original Proceeding **District Court, City and County of Denver** **Case No. 2014CV32543**	
In Re **Plaintiffs:** Lindi Dwyer and Paul Dwyer, as individuals and parents of Jayda Dwyer, Joslyn Dwyer, Janesha Dwyer, and Jentri Dwyer; Terri Siewiyumptewa, as an individual and as parent and natural guardian of Shane Siewiyumptewa 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. **Defendants:** 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.	▲COURT USE ONLY▲
Attorneys for *Amicus Curiae* Colorado Fiscal Institute: Edward T. Ramey, No. 6748 Heizer Paul LLP 2401 15th Street, Suite 300 Denver, CO 80202 Phone: (303) 595-4747 Fax: (303) 595-4750 E-mail: eramey@hpfirm.com	Case No.: 2015SA22
BRIEF OF *AMICUS CURIAE* COLORADO FISCAL INSTITUTE IN SUPPORT OF PLAINTIFFS-RESPONDENTS' POSITION	

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). It contains 2,328 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

☐ It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☐ It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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.AR. 32.

By: s/Edward T. Ramey

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

I. INTEREST OF *AMICUS CURIAE* 1

II. STATEMENT OF ISSUE ADDRESSED BY *AMICUS CURIAE* 1

III. SUMMARY OF ARGUMENT 2

IV. ARGUMENT 2

A. The Constitutional and Statutory Framework 3

B. The Decisions That Have Brought Us Here 7

V. CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Bickel v. City of Boulder,
885 P.2d 215 (Colo. 1994).....7

Gannon v. State of Kansas,
319 P.3d 1196 (Kan. 2014).....7

Lujan v. Colorado State Board of Education,
649 P.2d 1005 (Colo. 1982).....3

Mesa County Bd. of County Commr's v. State of Colorado,
203 P.3d 519 (Colo. 2009)..... 5, 7, 8, 9

Zaner v. City of Brighton,
917 P.2d 280 (Colo. 1996).....7

Statutes

§22-54-101, *et seq*., C.R.S. (2014) 3

§22-54-104(1)(a), C.R.S. (2014).....4

§22-54-104(2), C.R.S. (2014).....4

§22-54-104(3), C.R.S. (2014).....4

§22-54-104(3.5), C.R.S. (2014).....4

§22-54-104(5)(g)(I), C.R.S. (2014) 11

§22-54-106(1)(a), C.R.S. (2014).....4

§22-54-106(1)(b)(I), C.R.S. (2014) 4

§22-54-106(2)(a).....7

§22-54-106(2)(a)(III), C.R.S. (2014).....8, 9

§22-54-106(2)(a)(V), C.R.S. (2014) 9

§22-54-106(2), C.R.S. (2014) 4

§22-54-106(4), C.R.S. (2014) 4

Other Authorities

Colo. Dept. of Local Affairs, Div. of Property Taxation, Report to State Bd. of Equalization and General Assembly on Estimated Residential Assessment Rate for 2015-2016 (Jan. 15, 2015) 10

HB-04-1397 8

HCR10-1002 10

SB07-199 9

Constitutional Provisions

Colo. Const. art. IX, § 2 3

Colo. Const. art. IX, §17 ..... passim

Colo. Const. art. X, § 3(b) 5, 9

Colo. Const. art. X, §20 ..... 5, 6, 7, 9

Colo. Const. art. X, §20(1) 7

Colo. Const. art. X, §20(3) 10

Colo. Const. art. X, §20(4) 10

Colo. Const. art. X, §20(7)(b) 5

Colo. Const. art. X, §20(7)(c) 5, 7, 8, 9

Colo. Const. art. X, §20(7)(d) 5, 7

Colorado Fiscal Institute respectfully submits the following Brief *Amicus Curiae* in support of the Plaintiffs and in opposition to the relief requested by the Defendants in their Petition under C.A.R. 21:

I. INTEREST OF *AMICUS CURIAE*

Colorado Fiscal Institute ("CFI") is a Colorado nonprofit corporation organized and operated exclusively for public, charitable, and educational purposes as described in Section 501(c)(3) of the Internal Revenue Code. Formerly a project of the Colorado Center on Law and Policy, CFI's primary mission is to conduct and disseminate research and analyses designed to increase the understanding of the impact of fiscal, tax, and budgetary decisions on the vitality of the economy, communities, and individuals in Colorado. An important and frequent focus of CFI's research and analyses is the impact of such decisions on the funding and health of Colorado's K-12 public education system.

II. STATEMENT OF ISSUE ADDRESSED BY *AMICUS CURIAE*

Would further proceedings in the district court materially assist in the resolution of the issues presented in this case?

III. SUMMARY OF ARGUMENT

Defendants' petition under C.A.R. 21seeks the extraordinary remedy of an immediate and peremptory disposition of this case in their favor with absolutely no development of a factual record. From the perspective of this *amicus*, consideration of the historical decisions and policy considerations that have brought us to this point, are essential to a fair and reasoned resolution of this case.

IV. ARGUMENT

Not having succeeded in convincing the district court to dismiss this case under C.R.C.P. 12(b)(1) and (5), the Defendants now seek the extraordinary and immediate intervention of this Court under C.A.R. 21 to the same end. Defendants submit that the legal issues posed, albeit laden with legislative history and fiscal and operational implications, may easily be resolved in their favor here without recourse to any factual record or developed argument. They further submit, or at least imply, that the district and appellate courts would be wholly unable to fashion a workable and non-catastrophic remedy for the claims the Plaintiffs present. CFI respectfully disagrees with both of these propositions.

As discussed below, the conundrum in which the defendants now find themselves is to a significant degree the product of their own policy choices, complicating and exacerbating the effects of economic cycles and constitutional

constraints. And the situation created by these choices can and should be addressed in a manner consistent with the constitutionally expressed direction and will of the people of this state.

A. The Constitutional and Statutory Framework:

As pertinent to this case, the people of Colorado have adopted two principal constitutional directives specifically addressing funding for public education. First, Colo. Const. art. IX, §2, adopted at statehood, mandates that the "general assembly shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state." Second, Colo. Const. art. IX, §17 ("Amendment 23"), adopted in 2000, mandates an incremental maintenance level for base per pupil funding for students attending public schools throughout the state.

Since 1935, Colorado's public school system has been funded by a combination of locally-generated revenues and direct state support, with the latter since 1952 incorporating adjustments to the level of state support provided to each local school district to address spending disparities among the districts. *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1011 (Colo. 1982).

The current statutory framework – embodied in the Public School Finance Act of 1994, §22-54-101, *et seq*., C.R.S. (2014) – creates a formula that begins

with the determination of each individual school district's "total program" funding – "the financial base of support for public education in that district." §22-54-104(1)(a), C.R.S. (2014). A district's "total program" consists (subject to specified adjustments for at-risk and on-line funding) of an annual "funded pupil count" for that district multiplied by a "per pupil funding" amount calculated for the district. §22-54-104(2), C.R.S. (2014). Each district's "per pupil funding amount" is determined by adjusting a "statewide base" amount by various specified "factors" to reflect variances among districts due to size, cost of living, and personnel and nonpersonnel costs." §22-54-104(3), (3.5), C.R.S. (2014).

Each district's "total program" is then funded by a combination of state and local tax revenues. The local share of the funding is derived from the proceeds of a mill levy upon the assessed valuation of taxable property within the district's boundaries, subject to specified limitations. §22-54-106(1)(a), (2), C.R.S. (2014). The state's share is calculated generally as "the difference between the district's total program and the district's share of its total program" – §22-54-106(1)(b)(I), C.R.S. (2014) – and the general assembly is required to make annual appropriations and supplemental appropriations to fund the state's share – §22-54-106(4), C.R.S. (2014). The state is also the primary source of direct funding for a variety of specific "categorical" programs, to include such things as English

language proficiency education, gifted and talented education, small attendance centers, special education, vocational education, and transportation.

In the wake of the adoption of Colo. Const. art. X, §3(b) ("Gallagher Amendment") in 1982, reductions in residential assessment rates (the percentage of the property value that is subject to taxation) – to maintain a mandated approximate 45%/55% ratio between total property tax revenue from residential and nonresidential properties – required local districts to increase their property tax mill levies, and the state to increase its state share, to maintain existing levels of "total program" funding. This was complicated by the adoption of Colo. Const. art. X, §20 ("TABOR") in 1992, placing additional limitations and voter approval requirements on the ability to increase taxes and retain revenues at both the state and local levels.

At the local level, between 1995 and 2006, 175 of Colorado's 178 school districts successfully conducted "de-Brucing" elections under Colo. Const. art. X, §20(7)(d), to address particularly the spending and revenue limits otherwise imposed by §20(7)(b) and (c). These voter approved "revenue change[s] as an offset" to TABOR's limits constitutionally permitted the districts to retain and spend all revenue from any source. *Mesa County Bd. of County Commr's v. State of Colorado*, 203 P.3d 519, 524-25 (Colo. 2009). Nevertheless, as discussed below,

the State effectively (and unnecessarily) blocked the effectiveness of these local waivers of the TABOR limits for 15 years, thereby shifting the bulk of the burden for "total program" funding from the districts to the state. Overall, the effect by the year 2000 was that statewide per pupil funding had dropped significantly in real terms, and from well above to below the national average, despite a growing economy.

This state of affairs led to the adoption in 2000 of Colo. Const. art. IX, §17 ("Amendment 23"). By this constitutional amendment, the people of Colorado directed their representatives specifically to grow the "statewide base" per pupil funding amount, together with total state funding for all "categorical" programs, annually by at least the rate of inflation plus 1% from the 2001-02 fiscal year through the 2010-11 fiscal year, and at least at the rate of inflation thereafter. Uniformly applicable to all districts, the "statewide base" (as noted above) is the beginning point – prior to consideration of the "factor" variances among the districts – in the calculation of each district's specific "per pupil funding" amount and, ultimately, its "total program" funding.

Of particular note, Amendment 23 is the most recent, and the most specific, constitutional directive from the people of this state to their representatives on the topic of funding for public education. It should be presumed to have been adopted

"in the light and understanding" of existing constitutional provisions, subject to construction in harmony with them, and capable of application in such manner as to avoid an absurd or unreasonable result. *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994). Most important, we should "ascertain and give effect to the intent of the electorate" and avoid "narrow or technical" readings that would "defeat the intent of the people." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996); *cf., Gannon v. State of Kansas*, 319 P.3d 1196, 1237-38 (Kan. 2014). The expressed intent of the people, incorporated in their constitutional directive to their representatives, is to accord a defined level of priority to funding for public schools.

B. The Decisions That Have Brought Us Here:

Upon the adoption of TABOR in 1992, the General Assembly promptly amended §22-54-106(2)(a) of the Public School Finance Act to limit local district mill levies to be consistent with the property tax revenue limitations of Colo. Const. art. X, §20(7)(c). *Mesa County*, 203 P.3d at 524. No such limits were imposed by the General Assembly upon any other form of TABOR "district." Though the vast majority of the local districts proceeded to exempt themselves from these revenue limitations through waiver elections under TABOR §20(7)(d) – and though TABOR §20(1) explicitly permitted districts to adopt other "reasonable

method[s]" (*e.g.*, temporary mill levy reductions) to fulfill their refund obligations – the Colorado Department of Education restricted both of these options. The Department continued to instruct the local districts to calculate their mill levies in accordance with the growth-plus-inflation revenue limit of §20(7)(c) – failing which they would risk reductions in the state share of their "total program" funding. *Mesa County*, 203 P.3d at 525. The great majority of local districts were, therefore, compelled to reduce their mill levies in the face of increasing property tax revenues in order to maintain their maximum funding from the state. *Mesa County*, 203 P.3d at 525.

As a result, district mill levies dropped from an average of 38 mills in fiscal year 1993-94 to 21 mills in fiscal year 2006-07. *Id*. Concurrently, between 1994 and 2007, the state's share of "total program" funding grew from 53% to 64%. *Id*. Per a CFI calculation, if school district levies were still at 38 mills today, local school districts would generate an additional $1.5 billion annually, enough to completely eliminate the "negative factor" at issue in this case and fully fund the voter-mandated increases in Amendment 23.

In 2004, the General Assembly rejected an amendment to a school finance bill (HB-04-1397) that would have stricken the mill levy limitations in §22-54-106(2)(a)(III), C.R.S. (2014). The effect was to leave those statutory limits in place

for every school district, even for the majority of local districts that had exempted themselves from the constitutional revenue limits they were designed to enforce.

Finally, in 2007, the General Assembly amended §22-54-106(2)(a)(III) specifically to exempt local districts who obtain voter waiver of the constitutional §20(7)(c) TABOR revenue limits from the separate statutory limitation on their mill levies. In that legislation (SB07-199), however, the General Assembly, rather than allowing the local mill levies to recover to the de-Bruced levels, froze the 2007 levies in place for most districts and imposed a new statewide mill levy cap of 27 mills. §22-54-106(2)(a)(V), C.R.S. (2014). In sustaining the constitutionality of SB07-199 under TABOR in *Mesa County*, *supra*, this Court noted that the de-Brucing elections had already effectively freed the local districts from the TABOR revenue limits. There was, therefore, no constitutional imperative for the General Assembly to have included the mill levy freeze and 27 mill cap in the legislation.

As discussed above, the other component of the local districts' share of their "total program" funding is the assessment rate for the taxable property within their districts. Residential assessment rates are adopted by the state to maintain the mandated Gallagher ratio, yet in seven of the last sixteen years would have increased under that ratio but for the TABOR requirement of voter approval. On none of these occasions did the General Assembly refer a measure to the voters

under Colo. Const. art. X, §20(3), (4) to seek such voter approval. As a result, the lower prior year's assessment rate has been re-enacted into law on each occasion. Even at current mill levies, this has resulted in the loss of potential property tax revenue available to fund the local districts' share of their "total program" amounting to more than $42 million in 2015 alone. *Colo. Dept. of Local Affairs, Div. of Property Taxation, Report to State Bd. of Equalization and General Assembly on Estimated Residential Assessment Rate for 2015-2016* (Jan. 15, 2015). Again, the result is a shift in burden for "total program" funding to the state share.

Similarly, presented in 2010 with a proposed Concurrent Resolution (HCR10-1002) to refer to the voters a proposed amendment to Colo. Const. art. IX to exempt from TABOR's §(4)(a) voter approval requirements legislation that would increase state revenues to prevent further funding reductions to Colorado's public schools, the General Assembly failed to garner sufficient votes for the referral. This was potential revenue that would have gone directly to fund Amendment 23's constitutional mandates.

Each year, the General Assembly is confronted with numerous budgetary choices, including the ability to limit or eliminate tax credits, limit deductions, and decouple from specific federal tax deductions that may have limited support in the state. Each of these options would increase revenues available for the state to meet

all of its budgetary needs, including its share of the "total program" funding for public education that it has managed to shift to itself over the years. Rather than make those choices, it has repeatedly made choices that effectively constrain its ability to meet both its overall budget obligations and the constitutional obligations assigned to it by the people of this state through their adoption of Amendment 23.

Instead, the State has resorted to the measure before this Court – enacting a new "negative factor" that uniformly reduces each district's "total program" funding, not to reflect variances among the districts as the "factors" were intended to do, but to reduce the total amount of the cumulative "state shares" of "total program" funding and to accomplish overall "stabilization of the state budget." §22-54-104(5)(g)(I), C.R.S. (2014). Nothing could be more contrary to the clear intent and direction of the people as expressed in Amendment 23.

V. CONCLUSION

CFI respectfully opposes the relief requested by the Defendants in their C.A.R. 21 petition, and supports the position of the Plaintiffs in this action.

Respectfully submitted this 23rd day of March, 2015.

HEIZER PAUL LLP

By: s/Edward T. Ramey
Edward T. Ramey, No. 6748
2401 15th Street, Suite 300
Denver, Colorado 80202
Phone Number: (303) 595-4747
FAX Number: (303) 595-4750
E-mail: eramey@hpfirm.com

Attorneys for *Amicus Curiae* Colorado Fiscal Institute

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2015 a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO FISCAL INSTITUTE IN SUPPORT OF PLAINTIFFS-RESPONDENTS' POSITION** was filed via the Integrated Colorado Courts E-Filing System and served upon all counsel of record via the Integrated Colorado Courts E-Filing System.

s/Amy Knight

In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.