SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 _____ District Court of the City and County of Denver Honorable Hebert L. Stern, III Case No. 2014CV32543 _____ In Re: 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. 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▲ _____ Case No. 2015SA22

Attorneys for Defendants: CYNTHIA H. COFFMAN, Attorney General FREDERICK R. YARGER, Solicitor General MICHELLE MERZ-HUTCHINSON, First Assistant Attorney General, Reg. No. 33306* ANTONY B. DYL, Senior Assistant Attorney General and Assistant Solicitor General, Reg. No. 15968* JONATHAN P. FERO, Senior Assistant Attorney General and Assistant Solicitor General, Reg. No. 35754* WILLIAM V. ALLEN, Senior Assistant Attorney General, Reg. No. 26386* DAVIN DAHL, Assistant Attorney General, Reg. No. 40439* KATHRYN STARNELLA, Assistant Attorney General, Reg. No. 43619* Ralph L. Carr Colorado Judicial Center Colorado Department of Law State Services Section, Education Unit 1300 Broadway, 6th Floor Denver, CO 80203 (720) 508-6000 Michelle.Merz-Hutchinson@state.co.us Tony.Dyl@state.co.us Jon.Fero@state.co.us Will.Allen@state.co.us Davin.Dahl@state.co.us Kathryn.Starnella@state.co.us *Counsel of Record	
REPLY TO PLAINTIFFS' RESPONSE TO ORDER AND RULE TO SHOW CAUSE	

INTRODUCTION

Amendment 23's language is specific, plain, and unambiguous. It requires only that "the statewide base per pupil funding" for public education increase to keep pace with inflation. Since Amendment 23 took effect in 2000, the General Assembly has complied.

Respondents urge this Court to discard the plain language of Amendment 23, claiming that supporters of the Amendment intended to prevent the legislature from ever reducing total formula funding for public schools. But nothing in the text of Amendment 23 constitutionalizes the entire finance formula or otherwise prevents the legislature from adjusting the funding provided to school districts above and beyond the base. Petitioners therefore ask that the rule to show cause be made absolute.

SUMMARY OF THE ARGUMENT

Respondents contend that **total** school funding has decreased, and so the base level of financial support for public education must have done the same. However, this contention fails to acknowledge that the statewide base per pupil funding has in fact increased with the rate of inflation every year that the negative factor has been applied. These

increases are statutorily codified and beyond dispute. Moreover, in no year has the negative factor canceled out the district-specific funding provided on top of the statewide base per pupil funding amount. Public schools across the State have continued to receive increases in base per pupil funds along with additional district-specific funding.

What Respondents really argue is that the spirit of Amendment 23 requires total formula funding for education to grow, even though its plain text—the text the People voted on—specifically singles out the per pupil base funding amount for inflationary increases. As demonstrated below, Amendment 23's language is plain and may not be made ambiguous with irrelevant, extraneous evidence that is not reflected in the Amendment itself.

ARGUMENT

I. Amendment 23 Plainly Requires that the Base, and Not the Total Per Pupil Funding, Increase.

Amendment 23 mandates increases to "the statewide base per pupil funding, as defined by the Public School Finance Act of 1994." COLO. CONST. Art. IX, sec. 17(1). This means the Amendment's requisite inflationary increases are applied to the state's **base** level of financial support for school districts—not the total amount allocated to each

district. The Act specifies a mathematical formula, in which one portion—the uniform "statewide base per pupil funding"—is multiplied by a number of variable factors to arrive at a unique "district per pupil funding" amount for each of Colorado's 178 school districts. § 22-54-104(3), C.R.S. (2014). This district per pupil funding amount is then multiplied by a district's pupil count to yield a "district total program," *id.*, -104(1)–(2), which is funded by a combination of state and local revenue, *see generally* 22-54-106, C.R.S. (2014).

Accordingly, there is nothing unclear about the word "base," which in a mathematical context is "a number that is multiplied by a rate or of which a percentage or fraction is calculated." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 101 (11th ed. 2004). "In interpreting a constitutional amendment, which has been adopted by popular vote, the court must presume that the words were used in their ordinary meaning and that the people intended what they have said." *Colo. State Civil Serv. Empl. Ass'n v. Love*, 448 P.2d 624, 628 (Colo. 1968). By definition, a "base" amount is never a "total" amount. *Cf.* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1320 (defining "total" as *inter alia*, "comprising or constituting a whole").

Had the People intended to require annual inflationary increases to the total amount districts receive, they would have used the word "total" rather than the word "base." There can be no doubt the People appreciated this common-sense distinction, as "total" is used elsewhere in Amendment 23. *E.g.*, COLO. CONST. Art. IX, sec. 17(1) (mandating increases for "**total** state funding for all categorical programs" (emphasis added)). It is well established that "[e]ach clause and sentence of either a constitution or statute must be presumed to have purpose and use, which neither the courts nor the legislature may ignore." *Colo. State Civil Serv. Employees*, 448 P.2d at 630; *see also Zaner v. City of Brighton*, 917 P.2d 280, 284 (Colo. 1996) ("[C]ourts must be careful not to determine intent by considering language in isolation when other relevant provisions cast doubt upon that interpretation.").

In addition to the State's share of their calculated total program funding, districts receive state monies for categorical programs calculated outside of the Act's finance formula. *See generally, e.g.*, § 22-20-114, C.R.S. (2014) (special education); § 22-20-205, C.R.S. (2014) (gifted education); § 22-24-104, C.R.S. (2014) (English language development). In the very same sentence that requires increases to the

"statewide base per pupil funding," Amendment 23 requires increases in "**total** state funding for all categorical programs." COLO. CONST. Art. IX, sec. 17(1) (emphasis added). And in a separate provision, Amendment 23 temporarily required a "maintenance of effort": from 2001–02 to 2010–11, the General Assembly was required to "annually increase the general fund appropriation for **total program** under the [ ]Act." COLO. CONST. Art. IX, sec. 17(5) (emphasis added). Thus, when the People intended to require an increase to a particular portion of the finance formula—particularly its total yield—they knew how to say so and said so with precision.

II. Statewide Base Per Pupil Funding Is, as Amendment 23 Recognizes, Defined by the Public School Finance Act.

The People did not rely solely on the difference between the words "base" and "total" to express their intent. Amendment 23 expressly states that the "statewide base per pupil funding" is "**as defined by** the Public School Finance Act of 1994." COLO. CONST. Art. IX, sec. 17(1) (emphasis added). Such a term of art must be afforded its intended technical meaning—especially when the constitutional text explicitly acknowledges that it is in fact a term of art. *Cf. Bruce v. City of Colo. Springs*, 129 P.3d

988, 993–94 (Colo. 2006) (giving effect to definitions in TABOR and declining to extend technical meanings to other, undefined terms).

And despite Respondents and amici's contrary assertions, there can be no serious dispute about that technical meaning. As just discussed, "statewide base per pupil funding" is the starting value in the finance formula that is the hallmark of the Act. § 22-51-104(3). Subsections 22-54-104(5)(a)(I)–(VII), C.R.S. (2000), of the Act set forth exact dollar amounts of the statewide base per pupil funding for every fiscal year preceding Amendment 23's adoption. When the Amendment took effect on December 28, 2000, the statewide base per pupil funding was "$3,878 supplemented by $123.70 to account for inflation." *Id.*, -104(5)(a)(VII).

It does not matter that the statewide base per pupil funding amounts are listed in their own subsection rather than with the definitions set forth at the beginning of the Act. This makes sense considering that unlike the other terms listed in the Act's list of definitions, § 22-54-103, C.R.S. (2000), statewide base per pupil funding is an annually changing number that is the same for all school districts. And with an expressly stated numerical value, the meaning of statewide base per pupil funding in the Act could not be any plainer or more

precise. The essential quality of the base—indeed, its only quality—was $4,001.70 when Amendment 23 took effect. § 22-54-104(5)(a)(VII). Because the words "statewide base per pupil funding" "embody a definite meaning which involves no absurdity or contradiction between" them, "there is no room for construction," and the Amendment must be applied as written. *Colo. State Civil Serv. Employees*, 448 P.2d at 627.

III. The Blue Book Confirms the Plain Meaning of Amendment 23.

Even if the language of the Amendment were not plain, and resort to extrinsic aids were appropriate as Respondents and their amici contend, the Blue Book confirms it is the statewide base per pupil funding—and not total per pupil funding—that must increase. *E.g.*, *In re Title*, 898 P.2d 1076, 1079 n.5 (Colo. 1995) ("[W]e have found the Legislative Council's publication to be a helpful source equivalent to the legislative history of a proposed amendment."). After explaining that "every school district starts with the same per pupil funding amount called the 'base,'" which "is then adjusted in each school district," the nonpartisan summary of Amendment 23 informed voters that it would "require[ ] a minimum increase in the **base** equal to the rate of inflation plus one percentage point for the next ten years, and inflation

thereafter." Leg. Council of the Colo. Gen. Ass., *An Analysis of the 2000 Statewide Ballot Proposals*, Pub. No. 475-0, at 10 (Ex. A to Pls.' Resp.) (emphasis added); *see also id.* at 46 (printing ballot title, which informed voters that Amendment 23 "requir[ed] the **statewide base per pupil funding** . . . to grow annually") (emphasis added).[1]

To the extent any proponents or opponents purported to interpret Amendment 23 differently, their views have no bearing on the question of constitutional interpretation before this Court. The intent of proponents or drafters "not expressed in the language of the amendment, is not relevant" and "will not govern the court's construction." *Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004) (citing *In re Interrogs. Relating to the Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 540 (Colo. 1996)); *cf. Mesa County Bd. of County Comm'rs v. State*, 203 P.3d 519, 533 (Colo. 2009) (noting statements of "individuals who participated in the drafting of the ballot questions at issue or were otherwise interested in the election" was "irrelevant"); *see also Title v. Swingle*, 877 P.2d 321, 327 (Colo. 1994) (explaining proponents may speak freely before title board

[1] Respondents ignore this clear and unambiguous language and instead selectively quote the shorthand "increases per pupil funding" phrase from the bullet-point summary printed above Legislative Council's detailed analysis.

without concern that their comments will be treated as legislative history).

To impeach Amendment 23's plain language Respondents cite various contemporaneous opinions about Amendment 23 that were reported in the media before the People voted on it. Respondents attempt to justify their reliance on those materials with this Court's statement in *Lobato v. People* that "[e]vidence of the 'contemporary interpretation of those actively promoting the amendment' may also be given weight." 218 P.3d 358, 375 (Colo. 2009) (quoting *Bedford v. Sinclair*, 147 P.2d 486, 489 (1944)). In context, this referenced nothing more than the Blue Book, which was as far as this Court looked to understand voter intent. *Id.* (explaining the relevance of the Blue Book). A broader reading would be dictum and cannot be squared with *Davidson*, *Mesa County*, and *Title*. In addition, the older decision that *Lobato I* cited as support for its statement did nothing more than recognize that the appellants had never expressed their proposed interpretation of a particular amendment despite multiple opportunities in previous litigation. *Bedford*, 147 P.2d at 488–89 (describing "various court proceedings in relation to the amendment and its workings," during which appellants' interpretation of

the amendment "was not suggested in any quarter").

Thus, understood properly, *Lobato I* and *Bedford* are unremarkable: they are among the many examples of this Court pointing to legislative history (or, in this context, the Blue Book) for the limited purpose of supporting its determination that statutory or constitutional language is plain and unambiguous. *E.g.*, *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 594 (Colo. 2005) ("[A]lthough the statutory language is clear, we note that SB 216's legislative history comports with our plain language analysis."). In the days before the Blue Book, the type of information relevant to this inquiry may have been slightly broader. *Bedford*, 147 P.2d at 488–89. But Respondents present no authority supporting their far more novel use of statements of opinion reported not in official documents, but in private newspapers and other media.

News stories, however, are not written with the same purpose as the analysis contained in the Blue Book. Private media lacks the trustworthiness and objectivity of the legislative council, whose "interpretation, while not binding, provides important insight into the electorate's understanding of the amendment when it was passed."

Davidson, 83 P.3d at 657 (quoting *Carrara Place, Ltd. v. Arapahoe County Bd. of Equalization*, 761 P.2d 197, 203 (Colo. 1988)). When interviewed by the media, proponents of a measure with significant budgetary consequences like Amendment 23 may be tempted to minimize the financial impact, while opponents—assuming they are fully informed of the nuances of the measure's precise language—may have the motivation to exaggerate. Even if these biases could be overcome, entertaining the views of a selected number of those in favor of or against a ballot initiative is simply unworkable. Out of 1,674,562 votes cast, what is a reliably representative sample size?[2]

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[2] Although Amendment 23 is unambiguous and resort to constructive aids beyond the Blue Book is inappropriate, given that Respondents have presented a mass of irrelevant contemporaneous statements, it is only fair that this Court know how a key proponent interpreted Amendment 23 before its passage. "The difference between statewide base per pupil funding and district total program funding was discussed during a review and comment hearing on one of the proposed versions of Amendment 23, and the proponents of the measure acknowledged that their intent was to require statewide *base per pupil funding, and not total program funding*, to increase by inflation plus one percent." Office of Legislative Legal Services, MEMORANDUM TO REP. KEITH KING, p. 9 n.22 (January 22, 2003) (emphasis added), *available at* http://www.colorado.gov/cs/Satellite?c=Document_C&childpagename=CGA-LegislativeCouncil%2FDocument_C%2FCLCAddLink&cid=1251624756181&pagename=CLCWrapper. "In fact, the proponents specifically stated that since the rest of the factors affecting total program funding are 'very fluid,' their intent was to ensure that the statewide base per pupil funding increases by the rate of inflation plus one percentage point." *Id.* "Moreover, when it was pointed out to the proponents that even if the base increases by inflation plus 1%, a district's total program funding may not increase by that same amount because

IV. Construing Amendment 23 to Require Annual Inflationary Increases to the Total Would, Contrary to its Language, Erase Legislative Discretion Over Public School Funding.

It is no coincidence that the narrowest reading of Amendment 23 is also its plain reading. Expanding the mandate beyond the base would constitutionalize the entire finance formula and leave the General Assembly with no meaningful discretion over its funding for public education.

Subject to the Governor's veto, the legislature's power over "the objects and level of support to which the public revenues may be put" is absolute. *Colo. Gen. Ass. v. Lamm*, 700 P.2d 508, 519–20 (Colo. 1985) (citing cases). "Since the plenary power of the legislature is the general rule, a limitation of that power is an exception that must be clearly apparent." *Colo. Ass'n. of Pub. Employees*, 677 P.2d at 1355 (citing *People v. Y.D.M.*, 593 P.2d 1356 (Colo. 1979)); *see also People ex rel. Tate v. Prevost*, 134 P. 129, 139 (Colo. 1913) ("[I]n construing a constitutional amendment it must be presumed that the people did not intend to make any change in the existing instrument beyond what is expressly

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the district may lose a portion of its pupils or be negatively impacted by another factor in the formula, proponent Cary Kennedy's response was, 'Okay, good. I think that is . . . that is our intent.'" *Id.* at 9–10 n.22.

declared.").

Amendment 23 clearly limits legislative discretion over education funding by requiring that the state's base level of support increase annually with at least the rate of inflation. By its express terms, however, it goes no further, leaving the General Assembly discretion over the remainder of the public school finance formula, including the factors and the funding attributable to them.

In 2010, the General Assembly exercised this discretion and determined that "stabilization of the state budget require[d] a reduction in the amount of the annual appropriation to fund the state's share of the total program funding for all districts." § 22-54-104(5)(g)(I). As a statute duly enacted by the People's elected representatives, the negative factor is presumed constitutional until shown otherwise beyond a reasonable doubt. *E.g.*, *Mesa County*, 203 P.3d at 527; *see also Johnson v. McDonald*, 49 P.2d 1017, 1022 (Colo. 1935) ("We peruse the expressions of their will in the statute; then examine the constitution and ascertain if this instrument says, 'Thou shalt not,' and if we find no inhibition, then the statute is the law, simply because it is the will of the people and not because it is wise or unwise."). Furthermore, this Court has repeatedly

disfavored constitutional constructions "that would hinder basic government functions or cripple the government's ability to provide services." *Barber v. Ritter*, 196 P.3d 238, 248 (Colo. 2008) (citing cases). Respondents have failed to overcome these presumptions, and any ambiguity in Amendment 23 must be resolved in favor of the negative factor.

V. Statewide Base Per Pupil Funding Has Increased.

It is beyond dispute that as a matter of law, statewide base per pupil funding has increased from $4,001.70 in 2000 to $6,121 in the current fiscal year. *Compare* § 22-54-104(5)(a)(VII), C.R.S. (2000), *with* § 22-54-104(5)(a)(XXI). Although the negative factor has decreased the amount of money the State appropriates to fund the **factors** in the finance formula, this reduction has never constituted 100 percent or more of those factors—that is, the negative factor has never canceled out the factor funding entirely and encroached on the base per pupil amount. Only if the negative factor went this far, could it be said to have reduced the mandated funding for the base.

For example, Respondents highlight that Colorado Springs School District 11's total program per pupil funding decreased from $7,091.48 in

2009–10, the last fiscal year before the negative factor, to $6,343 in 2011–12. Yet, in that later year, the total per pupil funding amount still exceeded the statewide base per pupil funding amount of $5,634.77. § 22-54-104(5)(a)(XVIII). Thus, although the negative factor meant Colorado Springs School District 11's factors were not fully funded in 2011–12, it still received district-specific factor funds of just over $708 per pupil **above** the base funding amount.[3] Colo. Dep't of Educ., "Fiscal Year 2011–12 District Funding Calculation Worksheet," lines 115, 289, *available at* http://www.cde.state.co.us/cdefinance/SchoolFinanceFundingFY2010-11. Correcting Respondents' analogy of a child's allowance to accurately portray the public school finance formula, if the base allowance is $6, a negative factor would not reduce that base; it would reduce the total received after application of additional factors (such as a 25 percent increase for a spring cleaning week). But the child would still be entitled to receive at least $6.

From this exercise, it is clear that the base has not been removed

[3] This is true for all of the districts cited by Respondents and their amici for each of the five years the negative factor has been applied. As demonstrated by the funding worksheets publically accessible on the Colorado Department of Education website, the negative factor has never reduced all of the formula's factor funding for any school district.

from the finance formula, and the formula itself still functions. Like every school district, Colorado Springs District 11's total per pupil funding is comprised of funds attributable to the statewide base per pupil funding and monies attributable to the factors. § 22-54-104(3). While the base is the same for all districts, each receives a different amount of additional funds provided by the factors.

Respondents emphasize that the multiplier values of the factors themselves do not change, purportedly as evidence that the funding reduced by the negative factor must be deemed to have come from the base. As already discussed, however, it is the constitutionality of the negative factor that must be presumed. Nor is there need to rely on presumption alone. The General Assembly made its intent plain by calling its reductions the "negative **factor**." § 22-54-104(5)(g)(I). Even if that were not clear enough, the reductions deemed necessary by the legislature must have been taken from the factor funding because they could not come from anywhere else; Amendment 23 protects the base. The addition of what Respondents call a savings clause merely confirms the legislature's intent not to reduce the statewide base per pupil funding for any district. § 22-54-104(5)(g)(III). That the General Assembly

ultimately chose to apply the negative factor uniformly amongst districts—as opposed to some factors-specific pro rata basis—has no bearing on the narrow question of law before this Court. The only way the negative factor would be unconstitutional is if it displaced all of the funding for the factors and then eroded the statewide base per pupil funding. That is not alleged in the underlying proceeding, and it has never happened.[4]

CONCLUSION

The express will of the People was to require inflationary increases to the statewide base per pupil funding in the General Assembly's finance formula—not the total program per pupil funding. If as Respondents argue the unstated intent of Amendment 23 is to fix the entire public school finance formula and mandate increases to the total yield, then its text would not be limited to base funding. Petitioners simply ask this Court to give effect to the plain language of Amendment

[4] This Court should decline to address Respondents' suggestion that allowing the negative factor to stand somehow undercuts the affirmance of the public school finance system in *Lobato v. State*, 304 P.3d 1132, 1140 (Colo. 2013). This is a new claim against a different constitutional provision never alleged in the underlying proceeding. Moreover, as just demonstrated, because the negative factor has never amounted to 100 percent of the funding attributable to the factors, the formula itself continues to function in furtherance of a state and local dual-funded finance system that accounts for the uniqueness of each of Colorado's 178 school districts.

23, which does not preclude the negative factor, and make its rule to show cause absolute.

Dated this 22nd day of April, 2015.

CYNTHIA H. COFFMAN
Attorney General
FREDERICK R. YARGER
Solicitor General

/s/ Jonathan P. Fero

MICHELLE MERZ-HUTCHINSON*
First Assistant Attorney General
ANTONY B. DYL*
Senior Assistant Attorney General and
Assistant Solicitor General
JONATHAN P. FERO*
Senior Assistant Attorney General and
Assistant Solicitor General
WILLIAM V. ALLEN*
Senior Assistant Attorney General
DAVIN DAHL*
Assistant Attorney General
KATHRYN STARNELLA*
Assistant Attorney General

Attorneys for 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

*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2015, the foregoing **REPLY TO PLAINTIFFS' RESPONSE TO ORDER AND RULE TO SHOW CAUSE** was filed and served via ICCES as follows:

Timothy R. Macdonald, Esq.
Nathaniel J. Hake, Esq.
Arnold & Porter LLP
370 Seventeenth St., Suite 4400
Denver, CO 80202
Timothy.Macdonald@aporter.com
Nathaniel.Hake@aporter.com
telephone: (303) 863-1000
fax: (303) 832-0428
Counsel for Respondents

Sean Connelly, Esq.
Reilly Pozner LLP
1900 Sixteenth St., Suite 1700
Denver, CO 80202
sconnelly@rplaw.com
telephone: (303) 893-6100
fax: (303) 893-6110
Counsel for Respondents

Kathleen J. Gebhardt, Esq.
Kathleen J. Gebhardt LLC
1900 Stony Hill Rd.
Boulder, CO 80305
kjgebhardt@att.net
telephone: (303) 499-8859
fax: n/a
Counsel for Respondents

Zhonette M. Brown, Esq.
Bryan Cave LLP
1700 Lincoln St., Suite 4100
Denver, CO 80203
Zhonette.brown@bryancave4.com
telephone: (303) 867-7000
fax: (303) 866-0200
Counsel for Respondents

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

/s/Doreen Ramos