

<p>SUPREME COURT, STATE OF COLORADO Two East 14th Street Denver, CO 80203</p>	
<p>Original Proceeding: District Court, City and County of Denver Honorable Herbert L. Stern, III Case No. 2014CV32543</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Plaintiffs-Respondents: Lindi Dwyer and Paul Dwyer, as individuals and parents of Jayda Dwyer, Joslyn Dwyer, Janesha Dwyer, and Jentri Dwyer; Terry 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</p> <p>v.</p> <p>Defendants-Petitioners: 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.</p> <p><i>Attorney for Amicus Curiae the Colorado Hispanic Bar Association</i> Daniel Spivey, #41504 PO Box 8895 Denver, CO 80201 719-213-8728 dspivey@gmail.com</p>	<p>Case No. 2015SA22</p>
<p>AMICUS CURIAE BRIEF OF THE COLORADO HISPANIC BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS-RESPONDENTS</p>	

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with C.A.R. 28 and 32, including all formatting requirements set forth in these rules. The brief complies with C.A.R. 28(g) because it does not exceed 30 pages. The brief complies with C.A.R. 28(k). The *amicus curiae* party filing this brief is neither raising an issue on appeal nor responding to an issue within the meaning of 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/ Daniel Spivey

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Pursuant to C.A.R. 29 and the Court's February 6, 2015 Order and Rule to Show Cause, the Colorado Hispanic Bar Association ("CHBA") through undersigned counsel, file this *amicus curiae* brief in support of Plaintiffs-Respondents ("Plaintiffs"), and state as follows:

INTEREST OF *AMICUS CURIAE* CHBA

The CHBA is a strong and vibrant specialty bar association. The CHBA was incorporated in 1977 and its founders "envisioned the organization as the legal advisor to the Hispanic community." CHBA Mission & History, found at: www.chba.net/About-Us/Mission-and-History.aspx. The CHBA is proud of its mission of "serv[ing] Colorado and promot[ing] justice by advancing Hispanic interests and issues in the legal profession and seeking equal protection for the Hispanic community before the law." CHBA Bylaws at Art. I § 2 (2012), found at: www.chba.net/About-Us/Bylaws.aspx.

Supporting the Plaintiffs in this case is squarely aligned with the mission and goals of the CHBA. Hispanic youths comprise a large percentage of Colorado's public school student population. In 2011, 264,000 students enrolled in Colorado K-12 public schools were Hispanic, accounting for 30% of the total K-12 Colorado public school population. *See* Pew Research Ctr., Demographic Profile of Hispanics in Colo., 2011, found at: www.pewhispanic.org/states/state/co/. Further,

Colorado's Hispanic youths are more likely to be low income compared to the overall Colorado population. In 2012, there was a 24.8% poverty rate among Colorado's Hispanic community, compared to the overall poverty rate of 13.7% in Colorado. *See Colo. Fiscal Inst., Disparities in Poverty and Income by Race* (Sept. 19, 2013). Further, 126,750 English language learners were served in Colorado's public schools in 2013-14. *See Colo. Sch. Fin. Project, Students Learning English in Colo.* (Winter 2014).

Public education is critical in helping all of Colorado's Hispanic youth, particularly those who are low income or English language learners, become educated citizens of Colorado who are productive and can compete in a global environment. As the demographic data above shows, Colorado's Hispanic community stands much to gain or lose from the outcome of this case. A public education system that is funded pursuant to the Colorado constitution and as intended by Colorado voters when they passed Amendment 23 benefits Colorado's Hispanic community and the entire State of Colorado.

As an organization composed primarily of Hispanic attorneys practicing in Colorado, the CHBA has chosen to file this *amicus curiae* brief to fulfill its mission as legal advisor to the Colorado Hispanic community and to seek equal protection for the Hispanic community before the law. It is the position of the

CHBA that the State’s arguments concerning the application of the Negative Factor to the public school finance formula are without merit under the applicable law. Further, on a broader level, the CHBA is concerned by the conduct of the Colorado legislature in disregarding the State constitution by creating an end run around Amendment 23 through application of the Negative Factor.

ISSUE PRESENTED FOR REVIEW

1. Does application of subsection (g) of the Public School Finance Act violate Amendment 23 to the Colorado constitution?

PRELIMINARY STATEMENT

Plaintiffs are individuals (parents and their schoolchildren) in school districts located throughout Colorado, as well as individual school districts, and school organizations. Plaintiffs filed suit against the State of Colorado, Robert Hammond as Commissioner of Education of Colorado, and John Hickenlooper as Governor of Colorado (collectively, the “State”). Plaintiffs seek a declaration that the legislature’s application of subsection (g) of the Public School Finance Act (“PSFA”) – the “Negative Factor” – to the public school finance formula violates Amendment 23 to the Colorado constitution. Plaintiffs also seek to enjoin the legislature from applying the Negative Factor. The State appeals the ruling below that Amendment 23 prescribes minimum increases in state funding of education

and that sufficient facts have been alleged to survive a motion to dismiss. The State requests that the Court intervene now and issue a rule providing that the Negative Factor does not violate Amendment 23.

Amendment 23 was passed by Colorado voters in 2000 to require minimum annual increases in per pupil funding for public school students in preschool through twelfth grade. Amendment 23 was passed to ensure that public education funding would increase by a minimum amount every year despite pressures from other areas of Colorado's budget. From FY 2001-02 to FY 2009-10, the legislature followed Amendment 23's mandate requiring minimum increases in public education funding. However, beginning in FY 2010-11, the legislature began adding a Negative Factor to the public school finance formula resulting in cuts to per pupil funding in violation of Amendment 23. The State argues that implementation of the Negative Factor does not violate Amendment 23 because while it results in a total reduction in education funding below the percentage growth prescribed by Amendment 23, it does not reduce "statewide base per pupil funding" as that factor is used in the public school finance formula. However, the State's argument is based on an accounting maneuver that violates the language of Amendment 23 and is fundamentally inconsistent with voter intent when passing Amendment 23.

The CHBA respectfully requests that the Court deny the State's request for a rule that the application of the Negative Factor does not violate Amendment 23.

ARGUMENT

I. The Negative Factor Reduces Base Per-Pupil Funding In Violation of the Express Language of Amendment 23.

In 2000, Colorado voters adopted Amendment 23. Amendment 23 requires minimum increases in “statewide base per pupil funding” and states in relevant part:

In state fiscal year 2001-2002 through state fiscal year 2010-2011, the 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, for public education from preschool through the twelfth grade and total state funding for all categorical programs shall grow annually at least by the rate of inflation plus an additional one percentage point. In state fiscal year 2011-2012, and each fiscal year thereafter, the statewide base per pupil funding for public education from preschool through the twelfth grade and total state funding for all categorical programs shall grow annually at a rate set by the general assembly that is at least equal to the rate of inflation.

Colo. Const. art. IX § 17. While “statewide base per pupil funding” was not defined in the PSFA as it existed on Amendment 23’s effective date (R. 64 n.1)¹, it was one of the factors used to determine a school district’s total funding. (*Id.* 35

¹ The record consists of a single 119-page PDF file submitted to the Court by the State when it filed its Petition for Rule to Show Cause which contains the State’s petition and the relevant pleadings and filings from the district court. Citations to the record in this brief are to the page number in the single PDF file and labeled as “R. [page number]”.

¶ 30.) At its most basic level, at the time Amendment 23 was passed, total state funding for a school district was determined by taking the value assigned to “statewide base per pupil funding” and then multiplying that by the “district’s weighted enrollment.” (*Id.* 33 ¶ 20.) As explained by Plaintiffs, the “purpose of ‘weighted enrollment,’ which can increase but never decrease the counted number of actual enrolled students, is to distribute education funding more equitably based on factors such as the district’s size, cost of living and number of ‘at-risk’ students.” (*Id.*) Further, Amendment 23 required an increase in “statewide base per pupil funding” because the base “was the only way to require annual education funding increases while retaining equity among differently-situated districts, as a legislature cannot limit the number of statewide pupils that will change the total weighted enrollment over time.” (*Id.* 35 ¶ 31.) Thus, an increase in the value of the statewide base per pupil funding factor would necessarily result in an increase in total per pupil funding for education. (*Id.*)

As explained in detail in Plaintiffs’ response to the State’s motion to dismiss (*Id.* 67-72) and the *amicus curiae* brief of the Department of Business Officials of the Colorado Association of School Executives (“DBO’s Brief”), the Negative Factor is an accounting maneuver that renders “statewide base per pupil funding”

meaningless under the public school finance formula.² While the CHBA defers to the expertise of the DBO as to the reasons that the Negative Factor reduces base per pupil funding, the CHBA would like to make one observation. In its Petition, the State essentially admits to the meaninglessness of the statewide base per pupil funding factor, asserting that in “2010, the General Assembly determined 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. ... To accomplish the reduction, the General Assembly added a negative factor to the school finance formula to ensure the total program funding for all districts *did not exceed a sum certain to be determined annually.*” (R. 12) (citation and quotation marks omitted) (emphasis added).

Prior to the enactment and application of the Negative Factor, the public school finance formula was a formula that included base per pupil funding as an input factor along with other inputs, and the formula resulted in an amount of total funding every year that was not predetermined. Between FY 2001-02 and FY 2009-10, the legislature increased the input factor of base per pupil funding at the mandated rate under Amendment 23, and the result was an annually increasing

² The CHBA defers to the expertise of the DBO and the analysis contained in the DBO’s Brief as to why the Negative Factor reduces statewide base per pupil funding and adopts the DBO’s analysis and conclusions herein.

total amount of per pupil funding. Now, after the legislature added the Negative Factor, a “sum certain is determined annually” and the inputs to the public school finance formula must be manipulated to result in that sum certain, and that manipulation comes in the form of the Negative Factor. Even though the State argues that the value of the input factor of base per pupil funding is technically increased at the rate of inflation every year, as noted in Plaintiffs’ response to the State’s motion to dismiss (R. 67 – 72) and the DBO’s Brief, such increase is necessarily meaningless because of the application of the Negative Factor.

The legislature’s use of the Negative Factor is an obvious end run around Amendment 23 that adversely impacts Colorado’s Hispanic community and such a tactic used in violation of the Colorado constitution is concerning to the CHBA. The Court should deny the State’s request for a rule that Amendment 23 allows the use of the Negative Factor in the public school finance formula. *See People v. Y. D. M.* (State Report Title: *People in Interest of Y.D.M.*), 593 P.2d 1356, 1359 (Colo. 1979) (the legislature “may enact any law not expressly or inferentially prohibited by the constitution of the state”).

II. While the Negative Factor Violates the Express Language of Amendment 23, at a Minimum, the State’s Argument Relies on Ambiguity in Amendment 23 Requiring Analysis into Voter Intent.

The central issue in this case is whether the application of the Negative Factor violates Amendment 23’s mandate that “statewide base per pupil funding” increase at a minimum rate every year. If the Negative Factor reduces “statewide base per pupil funding” than it violates Amendment 23. Thus, what constitutes “statewide base per pupil funding” is the critical inquiry.

While it is the position of the CHBA that the Negative Factor violates the express language of Amendment 23 and thus, no ambiguity exists in Amendment 23, at a minimum, if the State’s theory is plausible, then there is an ambiguity in Amendment 23. The State’s theory relies on an ambiguity because the term “statewide base per pupil funding” (1) was not defined in Amendment 23 and the PSFA at the time Amendment 23 was passed (R. 72), and (2) is susceptible to more than one interpretation. *See Bruce v. City of Colo. Springs*, 129 P.3d 988, 993 (Colo. 2006) (court analyzed ambiguity when there was a lack of definitions for key terms in the constitutional amendment); *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004) (“Language in an amendment is ambiguous if it is reasonably susceptible to more than one interpretation.”) (citation and quotation marks omitted). The State interprets “statewide base per pupil funding” to mean one

factor in the public school finance formula that is independent of the formula itself and is unaffected by the Negative Factor, even though the Negative Factor has a direct impact on the value of statewide base per pupil funding. The Plaintiffs interpret “statewide base per pupil funding” differently, as a number that must be considered within the formula of which it is a factor and whose value is fundamentally changed by application of the Negative Factor.

Because the State’s theory relies on an ambiguity in Amendment 23, voter intent should be considered to determine whether the Negative Factor violates Amendment 23. *See Davidson*, 83 P.3d 654-55 (“If 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.”) (citation and quotation marks omitted); *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996) (“When construing a constitutional amendment courts must ascertain and give effect to the intent of the electorate adopting the amendment.”). “Courts may determine [voter intent] by considering ... relevant materials such as the ballot title ... and the biennial Bluebook, which is the analysis of ballot proposals prepared by the legislature.” *Davidson*, 83 P.3d at 655 (citation and quotation marks omitted); *see also Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962, 965 (Colo. App. 2006) (same). As explained in detail in the

Plaintiffs' response to the State's motion to dismiss, this evidence supports the Plaintiffs' position. (R. 73-75.)

The Ballot Title for Amendment 23 makes clear that it was intended to increase total per pupil funding for education. (*Id.* 73.) The Ballot Title stated:

An amendment to the Colorado Constitution *concerning increased funding for preschool through twelfth-grade public education*, and, in connection therewith, requiring the statewide base per pupil funding for public education and funding for specifically defined categorical programs to grow annually by at least the rate of inflation plus one percentage point for fiscal years 2001-02 through 2010-11 and annually by at least the rate of inflation for fiscal years thereafter....

(*Id.* 73) (emphasis added). The language of the Ballot Title shows that the intent of Amendment 23's required increases in "statewide base per pupil funding" was to increase total per pupil funding for education. *See also Bruce*, 129 P.3d at 995 ("We also consider how the typical voter would interpret [the disputed term] because our concern here is how the form of the election notice affects a voter's understanding of a proposed measure."). If there is any doubt that the intent of increasing "statewide base per pupil funding" was to increase total per pupil funding, the Blue Book and the legislature's own declarations provide the answer.

The Blue Book stated that "[t]he proposal increases funding to public schools, which has been eroding since the late 1980s. ... This erosion has had a negative effect on per pupil funding, teacher salaries, and class sizes." (*Id.* 73-74.)

Further, the Blue Book included as an argument in support of Amendment 23 that “[t]he best way to infuse the school system with the necessary level of funding is for voters to approve this proposal, which earmarks a portion of state revenue for public education without increasing tax rates ... an increased investment in education is necessary for Colorado students to be competitive in a global environment.” (*Id.* at 74.) Importantly, the Blue Book also contained arguments against Amendment 23, further establishing voter intent. The Blue Book included as an argument against Amendment 23 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.*)

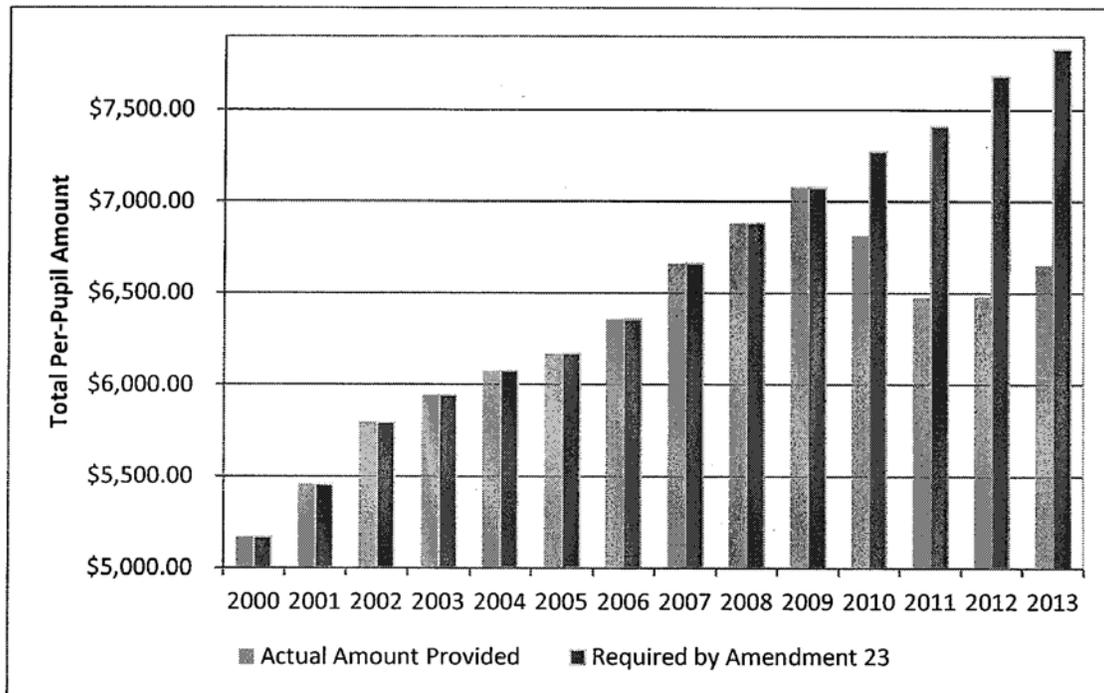
Even the legislature agreed in its declaration regarding Amendment 23 that the intent was to increase total per pupil funding statewide. The legislature declared that Amendment 23 “requires the general assembly to increase funding for preschool through twelfth grade public education and for categorical programs.” C.R.S. § 22-55-101(1)(a). Further, “[b]ecause the amount of funding provided for the prior state fiscal year plays a significant role in the calculation of the minimum amount of the increase in state appropriations for education required for each state fiscal year by [Amendment 23], the amount of money that the state will be required to spend for education funding for each state fiscal year will

increase dramatically over time due to a compounding effect.” C.R.S. § 22-55-101(3)(a). Finally, that “[s]ince [Amendment 23] does not create any new tax, increase the rate of any existing tax, or otherwise increase the amount of revenues that will be collected by the state, some of the increases in state education funding that [Amendment 23] requires will affect the amount of money available to fund other state programs and services.” C.R.S. § 22-55-101(3)(b).

There is no doubt that this evidence shows the intent of Amendment 23 was to increase total per pupil funding annually by at least the rate of inflation and to protect education funding from pressures from other areas of Colorado’s budget. *See also Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009) (“By 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. ... The Blue Book summarize[s] ... arguments in favor of Amendment 23 [including] as seeking to reverse the decline of funding for education, which began after the adoption of constitutional limitations on state revenue and spending.”).

The State’s position is at odds with voter intent. As illustrated in a graph included in Plaintiffs’ response to the State’s motion to dismiss, the result of the

application of the Negative Factor to total per pupil funding has been devastating relative to what the total amount would have been had the legislature honored Amendment 23:



(R. 66.) To further illustrate the effect of the Negative Factor, in FY 2013-14, had the legislature honored Amendment 23, total funding for public education would have been \$6.514 billion. (*Id.* 36 ¶ 36.) Instead, the “sum certain” determined by the legislature was \$5.505 billion. (*Id.*) To back into this \$5.505 billion, the Negative Factor was used. (*Id.* at ¶ 37.) Such a result cannot be what the voters intended when they passed Amendment 23 to ensure education funding was a protected expenditure that would grow annually by at least the rate of inflation.

See Bickel v. City of Boulder, 885 P.2d 215, 229 (Colo. 1994) (“an unjust, absurd or unreasonable result should be avoided when construing a constitutional provision”). Further, this shortfall in education funding – roughly \$1 billion in FY 2013-14 alone – has a direct negative impact on Colorado’s Hispanic community and Hispanic youth in Colorado’s public schools.

At a minimum, the State’s argument relies on an ambiguity in Amendment 23 as to the meaning of “statewide base per pupil funding.” As a result, voter intent should be considered in the Court’s interpretation of that term. The State’s argument defies logic because the State would argue that voters intended that the legislature could technically increase the numerical value of the input factor of base per pupil funding in the public school finance formula but actually provide less education funding than before the adoption of Amendment 23.

CONCLUSION

The CHBA is composed primarily of attorneys representing the interests of Colorado’s Hispanic legal community as well as Colorado’s Hispanic community at large. Hispanics in Colorado are disproportionately affected by a public education system that is funded at an amount less than required by the Colorado constitution. The CHBA’s position is that the State’s arguments regarding the

Negative Factor are wrong in light of the express language of Amendment 23 and voter intent.

Finally, the courts are the only arena for relief to ensure public education funding is increased at the minimum rate set by the Colorado constitution. The voters already acted by passing Amendment 23, expecting that their action would result in education funding that was protected from budgetary pressures and that would increase by a minimum amount every year. The voters cannot rely on its elected legislators because the legislature, by using the Negative Factor, has shown a willingness to disregard the constitution. The courts are the only place left to grant relief to ensure that the requirements of Amendment 23 are carried out. The Court should deny the State's request for a rule.

Dated: March 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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