

COLORADO SUPREME COURT

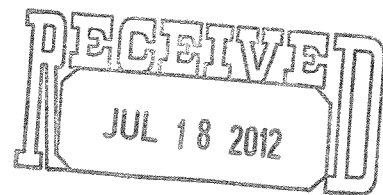
101 W. Colfax Avenue, Suite 800
Denver, Colorado 80202

Appeal from District Court, Denver County
Hon. Sheila A. Rappaport, Judge Presiding
Case No. 2005CV4794

Plaintiffs-Appellees: Anthony Lobato, as an individual and as parent and natural guardian of Taylor Lobato and Alexa Lobato; Denise Lobato, as an individual and as parent and natural guardian of Taylor Lobato and Alexa Lobato; Miguel Cendejas and Yuri Cendejas, individually and as parents and natural guardians of Natalia Cendejas and Salma Cendejas; Pantaleón Villagomez and Maria Villagomez, as individuals and as parents and natural guardians of Chris Villagomez, Monique Villagomez and Angel Villagomez; Linda Warsh, as an individual and as parent and natural guardian of Adam Warsh, Karen Warsh and Ashley Warsh; Herbert Conboy and Victoria Conboy, as individuals and as parents and natural guardians of Tabitha Conboy, Timothy Conboy and Keila Barish; Terry Hart, as an individual and as parent and natural guardian of Katherine Hart; Larry Howe-Kerr and Anne Kathleen Howe-Kerr, as individuals and as parents and natural guardians of Lauren Howe-Kerr and Luke Howe-Kerr; Jennifer Pate, as an individual and as parent and natural guardian of Ethan Pate, Evelyn Pate and Adeline Pate; Robert L. Podio and Blanche J. Podio, as individuals and as parents and natural guardians of Robert T. Podio and Samantha Podio; Tim Hunt and Sabrina Hunt, as individuals and as parents and natural guardians of Darean Hunt and Jeffrey Hunt; Doug Vondy, as an individual

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Case No. 2012SA25



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and as parent and natural guardian of **Hannah Vondy**; **Denise Vondy**, as an individual and as parent and natural guardian of **Hannah Vondy** and **Kyle Leaf**; **Brad Weisensee** and **Traci Weisensee**, as individuals and as parents and natural guardians of **Joseph Weisensee**, **Anna Weisensee**, **Amy Weisensee** and **Elijah Weisensee**; **Stephen Topping**, as an individual and as parent and natural guardian of **Michael Topping**; **Debbie Gould**, as an individual and as parent and natural guardian of **Hannah Gould**, **Ben Gould** and **Daniel Gould**; **Lillian Leroux Snr.**, as an individual and natural guardian of **Lillian Leroux III**, **Ashley Leroux**, **Alixandra Leroux** and **Amber Leroux**; **Theresa Wrangham**, as an individual and natural guardian of **Rachel Wrangham**; **Lisa Calderon**, as an individual and natural guardian of **Savannah Smith**; **Jessica Spangler**, as an individual and natural guardian of **Rider Donovan Spangler**; **Jefferson County School District No. R-1**; **Colorado Springs School District No. 11**, in the County of El Paso; **Bethune School District No. R-5**; **Alamosa School District, No. RE-11J**; **Centennial School District No. R-1**; **Center Consolidated School District No. 26JT**, of the Counties of Saguache and Rio Grande and Alamosa; **Creede Consolidated School District No. 1** in the County of Mineral and State of Colorado; **Del Norte Consolidated School District No. C-7**; **Moffat, School District No. 2**, in the County of Saguache and State of Colorado; **Monte Vista School District No. C-8**; **Mountain Valley School District No. RE 1**; **North Conejos School District No. RE1J**; **Sanford, School District No. 6**, in the County of Conejos and State of Colorado; **Sangre de Cristo School District, No. RE-22J**; **Sargent School District No. RE-33J**;

Sierra Grande School District No. R-30; South Conejos School District No. RE10; Aurora, Joint School District No. 28 of the Counties of Adams and Arapahoe; Moffat County School District Re: No. 1; Montezuma-Cortez School District No. RE-1; and Pueblo, School District No. 60 in the County of Pueblo and State of Colorado;

and

Plaintiffs-Intervenors-Appellees:

Armandina Ortega, individually and as next friend for her minor children **S. Ortega** and **B. Ortega**; **Gabriel Guzman**, individually and as next friend for his minor children **G. Guzman**, **Al. Guzman** and **Ar. Guzman**; **Robert Pizano**, individually and as next friend for his minor children **Ar. Pizano** and **An. Pizano**; **Maria Pina**, individually and as next friend for her minor children **Ma. Pina** and **Mo. Pina**; **Martha Lopez**, individually and as next friend for her minor children **S. Lopez** and **L. Lopez**; **M. Payan**, individually and as next friend for her minor children **C. Payan**, **I. Payan**, **G. Payan** and **K. Payan**; **Celia Leyva**, individually and as next friend for her minor children **Je. Leyva** and **Ja. Leyva**; and **Abigail Diaz**, individually and as next friend for her minor children **K. Saavedra** and **A. Saavedra**;

v.

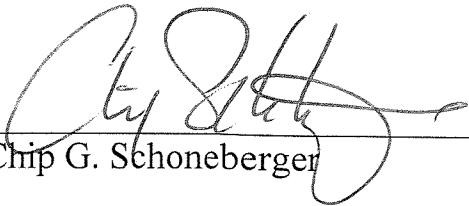
Defendants-Appellants: The State of Colorado; Colorado Board of Education; Robert K. Hammond, in his official capacity as Commissioner of Education of the State of Colorado; and John Hickenlooper, in his official capacity as Governor of the State of Colorado

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<p>BRIEF OF <i>AMICI CURIAE</i>, FORMER COLORADO GOVERNORS BILL RITTER, BILL OWENS, AND RICHARD LAMM IN SUPPORT OF DEFENDANTS-APPELLANTS</p>

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all relevant requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules, and contains 2,046 words as calculated by the word processing system used to create it.



Chip G. Schoneberger

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Amici are former Colorado governors whose terms of office collectively span the majority of the previous four decades: Bill Ritter (2007-2011); Bill Owens (1999-2007); and Richard Lamm (1975-1987). During that time the Executive and Legislative Branches achieved major advancements toward improving the quality of Colorado's public schools by enacting into law a significant body of public education legislation.¹ This case presents an issue of particular concern to the Amici as former Colorado chief executives elected by the people to make public policy determinations on their behalf and charged with upholding the Colorado Constitution and the laws of the State of Colorado.

The Amici submit this brief to provide the Court with their viewpoint and understanding of the Executive Branch's constitutional and statutory responsibilities regarding K-12 public education funding – including guiding,

¹ Included among these are: (1) English Language Proficiency Act (C.R.S. § 22-24-101 *et seq.* (1981)); (2) Colorado School Finance Act of 1988 (C.R.S. § 22-53-101 *et seq.* (1988)); (3) Colorado Standards-Based Education Reform (C.R.S. § 22-2-106 *et seq.* (1993)); (4) Charter Schools Act (C.R.S. § 22-30.5-101 *et seq.* (1993)); (5) Public School Finance Act of 1994 (C.R.S. § 22-54-101 *et seq.* (1994)); (6) Colorado Basic Literacy Act (C.R.S. § 22-7-501 *et seq.* (1996)); (7) Educational Accreditation Act (C.R.S. § 22-11-101 *et seq.* (1998)); (8) School Accountability Report (S.B. 00-186 (2000)); (9) Preschool to Postsecondary Education Alignment Act (C.R.S. § 22-7-1001 *et seq.* (2008)).

administering, and approving the General Assembly's appropriations, and the difficult policy and fiscal challenges Colorado faces, which ultimately render these issues inherently political in nature and thus ill-suited for resolution through the courts.

ARGUMENT

I. Introduction

The Amici support reversing the district court's ruling that Colorado's public school finance system is unconstitutional. Specifically, in light of the district court's over-reaching ruling below, the Amici urge this Court to reconsider its decision in *Lobato v. State of Colorado*, 218 P.3d 358 (Colo. 2009) (*Lobato I*) and hold that plaintiffs' claims present non-justiciable political questions. As discussed below, two issues in this case directly impact the Executive Branch's responsibilities and obligations in this area.

A key factor in this Court's *Lobato I* decision was its concern that declaring the adequacy of public education funding a non-justiciable political question "would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility to fashion and to fund a 'thorough and uniform' system of public education." *Id.* at 372. This concern overlooks the Executive Branch's own constitutional and statutory

directives, which provide substantial “checks and balances” against the General Assembly’s powers regarding education funding.

Second, the Colorado Constitution itself is replete with mandates directing the Legislative and Executive Branches to authorize numerous essential state services while restricting the funds available for appropriation to support them. Balancing these competing interests requires making difficult choices that are inherently political in nature. The people of Colorado, through their votes, place the responsibility for making these determinations in the hands of their elected officials. The Amici believe judicial intervention in this realm impedes the executive policy-making process and makes it difficult for a governor to govern effectively.

II. The Executive Branch’s own constitutional and statutory directives provide sufficient “checks and balances” against the General Assembly’s appropriations powers

The political question doctrine reflects a staunch commitment to the constitutional separation of powers. Colo. Const. art. III; *Baker v. Carr*, 369 U.S. 186, 211 (1962) (“the political question doctrine is a function of the separation of powers”). But the same separation of powers underlying the political question doctrine also protects against its abuse. *Baker*, 369 U.S. at 211. As the majority in *Lobato I* recognized, the coordinate government

branches are designed to “act *as checks and balances against one another*[.]” 218 P.3d at 372 (emphasis in original).

Indeed, the Colorado Constitution vests supreme executive power in the Governor and charges that office with faithfully executing the laws of this State, including the Education Clause. Colo. Const. art. IV, § 2; art. IX § 2. Notwithstanding its plenary appropriations power, the General Assembly cannot exercise its power absent the Governor’s guidance, oversight, and ultimate approval.

The Governor serves a critical role in education funding by providing the General Assembly with the research and information necessary to intelligently exercise its appropriations power. *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 520 (Colo. 1985); *Dodge v. Dep’t of Social Serv. of State of Colo.*, 657 P.2d 969, 976 (Colo. App. 1982). Before the General Assembly makes any appropriations decisions, the Governor, by statutory mandate, must first evaluate the plans, policies, and programs of all departments of state government. C.R.S. § 24-37-301. The Governor prioritizes the fiscal needs of those programs and formulates them into the executive budget – a financial plan encompassing all sources of revenue and expenditures presented to the legislature’s Joint Budget Committee for

consideration. *Id.* The Office of State Planning and Budgeting (“OSPB,” also housed in the Executive Branch) assists with this prioritizing by conducting hearings on the budget requests of all state agencies and developing recommendations for the Governor in his formulation of budget proposals. C.R.S. §§ 24-37-102 and 302.

Once the General Assembly finalizes its appropriations after analyzing the executive budget and information provided to it through the OSPB, the Governor has veto power over those appropriations and may disapprove any item of appropriation. Colo. Const. art. IV, § 12. *See also In re Inter. of Gov. Re Certain Bills of Fifty-First Gen. Assembly*, 195 Colo. 198, 578 P.2d 200 (1978). The Governor has ultimate authority whether to approve and sign the General Appropriations Bill (or “long bill”) into law and thereafter to administer the General Assembly’s appropriations. Colo. Const. art IV, § 11; C.R.S. § 24-37-301. The General Assembly cannot “interfere with the executive’s power to administer appropriated funds.” *Anderson v. Lamm*, 195 Colo. 437, 442, 579 P.2d 620, 623–24 (1978). And the Governor also may convene the General Assembly on extraordinary occasions to address fiscal crises. Colo. Const. art. IV, § 9.

In short, budget formulation and appropriations for public education develop from a collaborative and complementary political process between the two governmental branches constitutionally charged with that task.

Holding the plaintiffs' claims non-justiciable thus would not give the General Assembly unchecked power in the area of school funding. *Lobato*, 218 P.3d at 372. The Executive Branch's dual responsibilities to uphold the Education Clause and related statutes while also guiding and ultimately approving the General Assembly's appropriation of funds provides sufficient checks and balances against the General Assembly's appropriations powers. Colo. Const. Art. IV §§ 2, 11, 12; C.R.S. § 24-37-301.

III. Judicial intrusion in public education funding obstructs executive policy-making responsibilities and obligations to other state programs

Balancing the competing fiscal interests of all state programs is inherently political in nature. It is axiomatic that proposed budget expenditures cannot exceed estimated moneys available. C.R.S. § 24-37-301. The Governor's role in guiding budget formulation and appropriations within those monetary limits requires making certain policy judgments about the respective governmental programs. *Lamm*, 700 P.2d at 532 (Quinn, J., dissenting). Each dollar allocated to one government program equates to one

less dollar available for other programs, meaning every funding decision necessarily reflects a prioritizing of those respective programs.

Existing constitutional and statutory spending restrictions already make these policy decisions extremely difficult. For example, the Taxpayer Bill of Rights (“TABOR”) restrains the State’s ability to raise and spend money by imposing limits on the appropriations and taxing powers of state and local governments. Colo. Const. art X, § 20(1); *Bickel v. City of Boulder*, 885 P.2d 215, 225 (Colo. 1994). Under TABOR, the State government must obtain voter approval for any new tax or debt increase above that for the prior year. *HCA-Healthone, LLC v. City of Lone Tree*, 197 P.3d 236, 241-42 (Colo. App. 2008) (quoting Colo. Const. art. X, § 20(4)(a)). Therefore, TABOR limits annual state revenues available to fund state programs and services.

At the same time, the Gallagher Amendment (Colo. Const. art. X, § 3) strictly regulates the property taxes that traditionally provide a major source of local funding for K-12 education. Gallagher ties property tax revenue to a fixed ratio of commercial and residential property despite fluctuations in the actual ratio. *Id.* at § 3(1)(b). As Colorado’s population grew and residential property values outpaced that of commercial property in the three decades

since its 1982 enactment, the Gallagher Amendment has restricted overall property tax revenue available to fund public schools.

And while TABOR and the Gallagher Amendment combine to limit available funding, Amendment 23 simultaneously requires the State to increase per-pupil K-12 education funding each year relative to inflation. Colo. Const. art. IX, § 17(1). Consequently, meeting Amendment 23's funding mandate requires the State to use the general appropriations fund (C.R.S. § 24-75-201) to "backfill" revenue shortages created by TABOR and Gallagher. *Mesa County Bd. of County Com'rs v. State*, 203 P.3d 519, 524 (Colo. 2009). These three constitutional mandates (TABOR, Amendment 23, Gallagher) greatly reduce the General Assembly's and the Governor's ability to effectively set and alter budget priorities.

The foregoing fiscal and constitutional constraints illustrate the non-justiciability of plaintiffs' claims. As it stands, nearly half of the general fund already goes to fund K-12 public education. Evidence presented at trial shows the total general fund appropriations for FY 2010-11 were \$6.9 billion. (Def's Ex. 30136 at AGLEG004552). Of that amount, \$3.17 billion went to fund K-12 education as required by Amendment 23, or 46% of the total general fund appropriations intended to maintain all state programs. (Def's

Ex. 30136 at AGLEG004562). Shifting more of the general fund to education necessarily means diverting it from other programs such as Medicaid and its spending and maintenance requirements. But defunding the State's financial obligations to Medicaid could result in Colorado losing the significant federal funding that accompanies it. *See, e.g.*, 42 C.F.R. § 431 *et seq.* Unlike the judiciary, the executive and legislative branches are best equipped to deal with these tough fiscal decisions by virtue of the investigative and advisory tools available to them through the political process.

In *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1018 (Colo. 1982), the Colorado Supreme Court cautioned against “judicial intrusion” into the type of policy judgments necessarily raised by adequacy of school funding issues. The *Lobato I* majority recognized *Lujan's* warning and endeavored to minimize judicial intrusion in this area by limiting justiciability to a rational relationship analysis. *Lobato*, 218 P.3d at 373-74 (citing *Lujan*). However, after remand and trial, the district court below ruled a rational relationship requires the State to actually “*fund* a finance system that provides the necessary resources” to meet the criteria reflected in the standards-based K-12 education reform statutes. (ID 41327325, Ct's Findings of Fact and Conclusions of Law at 174) (emphasis added).

The Amici believe this type of judicial intrusion into the budgeting and appropriation of state funds wholly usurps the executive's and the legislature's constitutional duties and renders it impossible for them to govern effectively. "[T]he judiciary cannot exercise executive or legislative power." *Mac Manus v. Love*, 179 Colo. 218, 221, 499 P.2d 609, 610 (1972). Yet judicial oversight of budgeting and funding state services distills to the judiciary doing legislative and executive work. The judiciary would be substituting its own policy judgments for that of the two political branches constitutionally charged with making those decisions and elected by the people to represent their interests in doing so. This essentially collapses the separate governmental branches into the judiciary and eliminates the flexibility required to make policy choices necessary to formulate a balanced state budget while also meeting the needs of all state programs competing for the same limited funds.

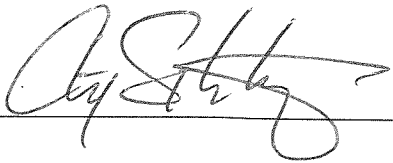
If permitted to stand, the district court's decision also would open the door to judicial intervention at every step in the budgeting and appropriations process. The executive budget – which evaluates and prioritizes the needs of all state programs in the first instance and guides the General Assembly's appropriations decision – would be subject to judicial scrutiny, as would the

legislative appropriations process as a whole. Such judicial intrusion in public education funding obstructs executive policy-making responsibilities and obligations to other state programs.

CONCLUSION

For the foregoing reasons and upon the authorities cited, this Court should reverse the district court's judgment in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the within **BRIEF OF AMICI CURIAE, FORMER COLORADO GOVERNORS BILL RITTER, BILL OWENS, AND RICHARD LAMM IN SUPPORT OF DEFENDANTS-APPELLANTS** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 18th day of July, 2012, addressed as follows:

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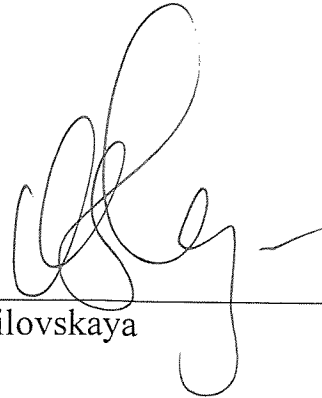
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