

<b>SUPREME COURT, STATE OF COLORADO</b> Colorado State Judicial Building 2 East 14 <sup>th</sup> Avenue, Denver, Colorado 80203	
Appeal from District Court, City and County of Denver, State of Colorado, Christina M. Habas District Court Judge, Case No. 07CV12064	
<b>APPELLANTS:</b> Colorado Dept. of Education, State of Colorado and Bill Ritter, Jr., in his official capacity as the Governor of Colorado  <b>APPELLEES:</b> Mesa County Board of County Commissioners, Main Street Café, Evan Gluckman, Donald Shonkwiler, John Bozek, Sharon Johnson, and Rick Nevin, and all similarly situated Colorado Taxpayers and Registered Voters  <b>AMICUS CURIAE:</b> Colorado Center on Law and Policy	<b>▲ COURT USE ONLY ▲</b>
<b>ATTORNEY FOR AMICUS:</b> TERRANCE R. KELLY KELLY GARNSEY HUBBELL + LASS LLC 1441 Eighteenth Street, Suite 300 Denver, Colorado 80202-1255 Phone: (303) 296-9412 E-mail: tkelly@kghllaw.com Atty. Reg. #: 4551 ATTORNEY FOR AMICUS CURIAE COLORADO CENTER ON LAW AND POLICY	Case No. 08SA216
<b>SUBSTITUTED AMICUS CURIAE BRIEF OF COLORADO CENTER ON LAW AND POLICY</b>	

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## STATEMENT OF ISSUE PRESENTED FOR REVIEW

Is Senate Bill 07-199 (“SB-199”) constitutional under Article X, Section 20 of the Colorado Constitution, known as “The Taxpayer’s Bill of Rights” (“TABOR”), and other relevant constitutional jurisprudence?

## STATEMENT OF THE CASE

### A. Nature, Course and Trial Court Disposition of Case.

This case involves the application of Colorado constitutional law to a Colorado education-finance statute. The amicus seeks to expand the interpretive method used by the trial court to include traditional factors in addition to a limited “plain meaning,” “ordinary meaning” analysis. This case comes to this court from the Denver District Court pursuant to the trial court’s declaration that the statute, SB-199, “is unconstitutional, as measured by the standards of TABOR.”

*(Findings, Conclusions, Order and Judgment [hereinafter “Findings”] at 12.)*

### B. Statement of Facts

#### **Summary of Trial Court’s *Findings of Fact, Conclusions of Law, Orders and Judgment, May 30, 2008***

The Colorado Public School Finance Act (“School Finance Act”) sets the amount of funding for each school district in the state, as well as the division of funding between local school districts and the State. The great majority of local revenues come from property tax revenues. The State’s share of revenues is derived from the general fund and from the state education fund.

This state-local sharing arrangement has changed significantly over the last twenty-five years. The total revenues increased from \$2 billion annually to \$5 billion annually, and the local share fell from 60% to 37% of the total. TABOR limited the growth of school property tax revenues, and the School Finance Act limited the ability of local school districts to manage the local property tax revenue. As a result, and because of substantial increases in the value of the State's assessed property, three phenomena arose. First, county property tax mill levies were reduced in order to avoid revenues in excess of the TABOR formula. Second, the School Finance Act denied school districts the revenues otherwise due them under TABOR. Third, the increasing percentage of increasing amounts demanded from the State under the School Finance Act was threatening to bankrupt the State Education Fund.

In response to these developments, the Colorado executive and legislative branches of government undertook two significant measures. First, the State Department of Education assisted school districts in establishing elections for the purpose of securing relief from the TABOR revenue constrictions, a process referred to as "de-Brucing." Second, in 2007, the General Assembly passed, and Governor Ritter signed, Senate Bill 07-199 ("SB-199"), which stabilized property mill levy calculations under the School Finance Act. No school district's mill levy was increased, and counties received the revenue generated by increased property

valuations, passing them through to their local school districts. As a result, approximately \$118 million dollars in Colorado school finance moneys came from county revenue sources instead of state revenue sources. (*Findings* at 8; citations omitted.)

The trial court held that this transfer of \$118 million in State public school funding from State revenues to local property tax revenues violated TABOR by “caus[ing] net tax revenue gain [to the State] as defined by TABOR .” (*Findings* at 9.) According to the trial court, its determination was supported by “the preferred interpretation of TABOR to ‘reasonably restrain most the growth of government.’” *Id.* The trial court also noted its concern, however, with the consequences of adhering to TABOR’s “preferred interpretation” methodology. *Id.* at 13.

## **ARGUMENT OF AMICUS**

### **Summary**

The development of state constitutional law in Colorado has occurred within the common-law tradition, case by case, controversy by controversy, brick by brick. Pursuant to that course, Colorado jurisprudence has developed the meaning of its State Constitution by studying its language, not only in its plain or ordinary sense, but also from the perspective of context, purpose, results and consequences, history and precedent, as well as other pertinent factors.

TABOR is a citizen-initiative constitutional amendment passed in 1992.

While anti-tax revolts go back to the earliest days of American history, the early tax rebellions were generated in opposition to oppressive English colonial policies (“no taxation without representation”), or to specific taxes that were fundamentally regressive. The late-18<sup>th</sup> century uprisings were all push-backs against specific “unfair” taxes. However, the anti-tax laws that arose in the late twentieth century were fundamentally anti-government in purpose. These laws developed in political contexts that portrayed government as the enemy of national liberty and prosperity. TABOR itself developed alongside rhetoric that spoke to the political goal of starving government, “to get it down to the size where we can drown it in the bathtub.”<sup>1</sup>

During the last two decades, the anti-government movement has gained power in several states. There has been a concentrated campaign to even oppose “taxation with representation,” seeking instead to conduct government financial matters via direct democracy, popular elections. This movement most prominently expresses itself in laws that impose rigid tax and expenditure limitations on state government, the most extreme being Colorado’s TABOR.

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<sup>1</sup> Grover Norquist, the founder of Americans for Tax Reform, famously advised that his goal was to get government “down to the size where we can drown it in the bathtub.” Robert Dreyfuss, Grover Norquist: *Field Marshal of the Bush Plan* “THE NATION,” May 14, 2001 (<http://www.thenation.com/doc/20010514/dreyfuss>. Last visited July 25, 2008.)

Today, forty-six states have some form of constitutional or statutory state limitations on local or state governments. [Table 3 at p. 544.] The most restrictive [tax and expenditure limitation] in the United States is Colorado's Taxpayer's Bill of Rights ("TABOR"), which places severe restrictions on how much state and local government spending can increase.

Steven Deller and Judith I. Stallmann, "Tax and Expenditure Limitations and Economic Growth," 90 MARQ. L. REV. 497, 497- 498 (2007) (citations omitted; underlining added).

The impact of such restrictions on state and local government taxation and spending can also undermine our representative form of government, guaranteed by the Federal Constitution, Article IV, Section 4.

The present case revolves around the application of TABOR's "anti-growth" provisions to the Colorado Public School Finance Act, as amended in 2007 by SB-199. Approximately thirty-eight published appellate cases have considered TABOR's impact on state and local revenue and spending legislation. Most of these cases have been narrowly framed. Plaintiffs, urging an interpretation of TABOR as an extreme anti-government initiative, focus on a "plain meaning", "ordinary meaning" parsing of TABOR's language. Government defendants almost always keep their analysis within those same boundaries, rely on their own parsing of TABOR's language, or in the case of ambiguous language, look at particular interpretive tools such as Colorado's Legislative Council's published analyses of the TABOR. The amicus expects that the parties will continue the same interpretive approaches in their arguments to this court.

This brief supports the arguments of the State defendants in opposition to the trial court's application of TABOR to the School Finance Act. In addition to aligning itself with the arguments of the State defendants, amicus seeks to expand upon the trial court's work of reconciling TABOR and the School Finance Act. It does so by applying time-honored constitutional interpretive factors in addition to the "plain meaning" inquiry. These additional interpretive factors include the context of the laws, their purpose, their results or consequences, their history and precedents. This brief's more extensive interpretive analysis assists the State defendants' conclusion that SB-199 is constitutionally sound, on its face and as applied.

### **I. The Trial Court's Reliance on a "Plain Meaning" Interpretive Methodology Led to the Court's Erroneous Ruling that SB-199 Violated TABOR.**

TABOR declares itself to be a "Bill of Right", an interpretation that has been rejected.<sup>2</sup> Its opening text claims to usurp the judiciary's historical role of constitutional interpreter, asserting that "Its preferred interpretation shall reasonably restrain most the growth of government." TABOR §(1). TABOR then purports to gut any and all state laws that might check its breadth, asserting that it "supersede[s] conflicting state constitutional, state statutory, charter, or other state or local provisions." *Id.*

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<sup>2</sup> This court rejected an attempt to declare TABOR a "fundamental right" subject to strict scrutiny protection. *Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo.1994).

