Case No. 12-1445

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, Colorado State
Representative, et al.

Plaintiffs-Appellees,

v.

JOHN HICKENLOOPER, Governor of
Colorado, in his official capacity,

Defendant-Appellant.

On Appeal from
The United States District Court For the District of Colorado
D.C. No. 11-cv-01350-WJM-BNB
Hon. William J. Martinez, United States District Judge

BRIEF OF *AMICUS CURIAE* THE BELL POLICY CENTER AND THE COLORADO FISCAL INSTITUTE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* Bell Policy Center and the Colorado Fiscal Institute state that they have no parent corporations and issue no stock.

Dated: April 17, 2013

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THE *AMICUS CURIAE*

The Bell Policy Center ("Bell") and the Colorado Fiscal Institute ("CFI"), two of Colorado's foremost, non-profit think tanks, focus on conducting high-quality and well-researched analysis of issues that impact Colorado.

Bell advocates for progressive public policies that ensure Colorado is a state of opportunity for all. Bell has conducted extensive research and analysis on TABOR's impact, including Bell's landmark 2003 report, *Ten Years of TABOR*. Bell also supported Referendum C as a good step toward more responsible fiscal policy.

CFI provides independent analysis of the fiscal and economic issues facing Colorado. CFI staff, recognized as experts in Colorado fiscal policy, have analyzed the effects of TABOR on Colorado's ability to finance public programs for over a decade and have been invited by countless states considering the adoption of a TABOR to address the impacts of TABOR here in Colorado.

The parties have consented to the filing of this *amicus* brief.

FED. R. APP. P. 29(C)(5) CERTIFICATION

No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparation or submission of the brief. Nor has any entity other than *Amicus* and its counsel participated in, or provided financial support for, the brief.

INTRODUCTION

In 1992, Colorado voters approved Amendment 1, commonly known as the Taxpayer's Bill of Rights or TABOR. TABOR amended Article X of Colorado's Constitution and, in doing so, dramatically hindered the ability of the General Assembly to appropriately and efficiently support state programs.

This *amicus* brief focuses on the impact of TABOR on just three of the vital services funded by the state: higher education, K-12 education, and transportation. The picture that emerges is stark. Of note:

- Colorado ranks last in the nation for state support of major public research universities per enrolled student;
- Tuition has grown an average of 10% annually for the past 8 years across Colorado's higher education institutions;
- The average Colorado K-12 teacher earns $5,200 less today (adjusted for inflation) than in 1992;
- Colorado ranks 42nd in the nation in spending per pupil;
- Colorado ranks 46th among all states in highway funding; and
- The average state spends nearly $1 billion more on highways on an annual aggregated per capita basis than Colorado.

These statistics, as troubling as they are by themselves, are merely a snapshot of a much larger picture. The state funds a variety of critical services that, like the three being discussed, play an essential role in supporting thriving individuals and communities, a vibrant economy, and Colorado's revered quality of life. TABOR has taken its toll on all of these services and forced the General Assembly to resort to convoluted fiscal gymnastics in a failing attempt to avoid TABOR's self-imposed economic crisis.

ARGUMENT

I. AN OVERVIEW OF TABOR

Before delving into a discussion of impacts, a basic understanding of TABOR is a must. This section thus describes TABOR's essential components as well as three significant legislative reactions to TABOR. This quick overview makes clear that the fundamental changes imposed by TABOR transfer the primary engine of self-government from elected representatives to the voters themselves.

A. TABOR's Three Primary Provisions

TABOR contains three primary provisions, which are applicable to all levels of government in Colorado: (1) a spending limitation; (2) a revenue limitation; and (3) a taxing limitation (and, in some cases, a complete taxing prohibition). While each provision can act separately, it is the interaction of these three provisions that restrains state and local government growth.

It is important to understand that TABOR's revenue and spending limitations apply to only certain revenue. Specifically, "TABOR revenue" includes General Funds and certain cash funds.[1] General Fund revenue sources include taxes on individual income, sales and use, corporate income, and insurance. Cash fund revenue includes gaming, regulatory agency, severance tax, and transportation-related revenue.[2]

TABOR exempts other types of revenue from its limitations. Such "TABOR-exempt revenue" includes revenue from pension funds, federal government funds, and employee pension contributions, as well as "enterprise" revenue.[3] As of 2010, 62% of state expenditures originated from TABOR-exempt revenue sources, with nearly half of that amount attributable to enterprise revenue.[4]

1. <u>TABOR Limits Spending</u>

TABOR limits the amount of revenue that government may spend to the previous year's TABOR revenue times inflation (as defined by the Denver-

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[1] Kate Watkins, Colo. Legislative Council Staff ("CLCS"), *State Spending Limitations: TABOR and Referendum C* 4 (Dec. 6, 2010), *available at* http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CGA-LegislativeCouncil%2FCLCLayout&cid=1251610083991&pagename=CLCWrapper.

[2] *See id.*

[3] *See* Colo. Const. art. X, §§ 20(2)(d), (7)(d). Enterprises, which are government-owned businesses receiving less than 10% of their funding from state and local government, are further discussed *infra* at II.A and IV.D.

[4] *See* Watkins, *supra* note 1, at Figure 2.

Boulder-Greeley Consumer Price Index ("CPI")) plus growth.[5] The definition of growth depends on the level of government at issue:[6]

Level of Government	Definition of Growth
State	% Change in State Population
Local (non-school districts)	% Change in Value of Taxable Property Due to Construction
Local (school districts)	% Change in Student Enrollment

For example, if state TABOR revenue in the previous year equaled $1 billion, CPI showed 2% inflation, and the population increased by 1%, TABOR spending for the current year would be calculated as follows:

$1 billion x (1 +.02 + .01) = $1.03 billion

TABOR then adds to this amount any previous year's revenue in excess of the TABOR limit that voters approved to retain. Thus, in the example above, if voters approved retention of $200 million of revenue collected in excess of the previous year's revenue limit, TABOR spending would be increased as follows:

$1.03 billion + $200 million = $1.23 billion

This amount is known as the TABOR limit.

[5] *See* Colo. Const. art. X, § 20(7))(a)-(c); *see also id.* § 20(1)(b), (f), (g).
[6] *See id.* § 20(7))(a)-(c).

A spending limitation, such as TABOR, which is tied to population growth and inflation, does not adequately reflect the costs of offering government services. First, the cost of core government services such as health care, education, and corrections generally grows more rapidly than the cost of consumer goods.[7] Indeed, it is questionable whether there is any rational relationship between CPI, which measures consumer goods, and the types of services government buys. Inflation, thus, does not adequately account for the annual increase of these core services. Second, certain subpopulations that consume more government resources, *e.g.*, the elderly and prison populations, historically increase faster than the general population. When these population segments grow more rapidly than the population as a whole, the cost of government necessarily grows more rapidly than the TABOR spending limit allows.[8]

2. TABOR Limits Revenue

TABOR limits the amount of revenue that the government can collect and, therefore, spend on government services. If the state collects more revenue than is permitted under the TABOR limit, such revenue must be refunded to taxpayers unless voters allow the General Assembly to retain that revenue.[9] This approval

[7] *See* David Bradley, Nicholas Johnson, & Iris Lav, *The Flawed "Population Plus Inflation" Formula: Why TABOR's Growth Formula Doesn't Work*, Center on Budget & Policy Priorities (Jan. 13, 2005).

[8] *See id.*

[9] *See* Colo. Const. art. X, § 20(7)(d).

occurs through so-called "de-Brucing" ballot measures.[10] Referendum C, discussed in section B.2 below, is an example of such a measure.

3. <u>TABOR Limits Taxation</u>

a. TABOR Requires Voter Approval for Tax Increases

TABOR requires voter approval for a wide variety of revenue increasing measures: "[a]ny new tax, tax rate increase, mill levy above that for prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district."[11]

b. TABOR Prohibits Some Taxation Options

With some taxes, voter approval is insufficient. Specifically, TABOR wholly prohibits any "new or increased transfer tax rates on real property, state real property tax, or local district income tax."[12] It also prohibits a tiered income tax.[13]

B. Legislative Responses to TABOR

Voters approved three significant measures in reaction to TABOR: the Single Subject Rule, Referendum C, and Amendment 23.[14]

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[10] "De-Brucing" refers to TABOR's author, Douglas Bruce.
[11] *Id.* § 20(4)(a).
[12] *Id.* § 20(8)(a).
[13] *See id.*
[14] Amendment 23, which impacts funding for K-12 education, is discussed *infra* III.C.

1. The Single Subject Rule

In 1994, voters passed the "Single Subject Rule," which requires that constitutional amendments contain no more than a single topic.[15] The Single Subject Rule was intended to ensure that complicated, multi-faceted amendments like TABOR cannot be placed on the ballot. Ironically, though, the new amendment has virtually ensured that TABOR, comprised of multiple subjects, cannot be repealed, or even altered in part, by a single amendment.[16]

2. Referendum C

In 2005, faced with the effects of an economic downturn that would be exacerbated as a result of TABOR's "ratchet-down effect," voters passed Referendum C.[17]

Originally, the TABOR limit was tied to the previous year's actual revenue. Thus, when state revenues decreased (as during an economic downturn), TABOR "ratcheted-down" the next year's TABOR limit.[18] When the economy rebounded and revenues increased, however, the TABOR limit did not ratchet back up. Because the TABOR limit was tied to the previous year's depressed revenue, and

[15] Colo. Const. art. V, § 1(5.5).

[16] *See*, *e.g.*, *In Re 2005-2006 #73*, 135 P.3d 736 (Colo. 2006); *In re 1997-98 #30*, 959 P.2d 822 (Colo. 1998); *In re Proposed Initiative #84*, 961 P.2d 456 (Colo. 1998); *In Re Proposed Initiative 1996-4*, 916 P.2d 528 (Colo. 1996); *In re Amend TABOR #25*, 900 P.2d 121 (Colo. 1995); *In re Amend TABOR #32*, 908 P.2d 125 (Colo. 1995).

[17] *See* Watkins, *supra* note 1, at 2; *see generally* C.R.S. § 24-77-103.6.

[18] *See* Watkins, *supra* note 1, at 3.

spending could increase at no more than inflation plus growth, the TABOR limit could not return to pre-recession levels in any reasonable timeframe. Also, any revenue collected in excess of the TABOR limit was subject to taxpayer refund.[19]

Referendum C accomplished two goals. First, it eliminated the TABOR limit for five years from FY2005-06 to FY2009-10, thus allowing the state to retain all revenue in excess of the TABOR limit.[20] This retained revenue, which equaled $3.6 billion over those five years, was earmarked to health care, education (including K-12, higher education, and capital construction), firefighter and police pension plans, and strategic transportation projects.[21] Second, it effectively eliminated the "ratchet-down" effect by tying the TABOR limit to the previous year's TABOR limit, as opposed to actual revenue.[22] Then, beginning in FY2010-11, it reset the TABOR limit to the highest annual revenue over the previous five years and then increased that limit by inflation and growth for each year. This revised cap is known as the Referendum C cap.[23]

II. TABOR'S IMPACT ON HIGHER EDUCATION

TABOR squeezes the state's ability to spend on "discretionary" programs -- programs that are neither earmarked nor mandated. Thus, funding for higher

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[19] *See id*. at 3-4.
[20] *Id*. at 2.
[21] *Id*. at 8.
[22] *See id*.
[23] *Id*. at 2-3.

education, a "discretionary" service, has dropped precipitously since TABOR's enactment. Accordingly, Colorado higher education has been forced to engage in various TABOR-sanctioned fiscal tactics to simply stay afloat. First, higher education institutions switched to enterprise status in conjunction with the passage of Senate Bill ("SB") 04-189. Second, such institutions advocated for the passage of Referendum C. These attempts to mitigate the effects of TABOR, however, have not significantly blunted its impact, with Colorado now ranking last nationally in state funding for major public research universities per enrolled student.

A. Higher Education's Accounting Fictions

Until 2005, tuition revenue from Colorado's public colleges and universities counted as TABOR revenue. Because any increase in tuition could potentially trigger TABOR refunds and force the state to cut other services to keep revenue under the TABOR limit, the state was under significant pressure to keep tuition increases to a minimum.[24] Despite this pressure to avoid tuition increases, the state continued to decrease its support for higher education.

Of note, from 1992 to 2002, higher education's share of total state appropriations dropped from 17.6% to 12.5%.[25] This drop represented the largest

[24] *See* Governor's Blue Ribbon Panel on Higher Education for the 21st Century 12, 15-17 (Jan. 10, 2003).

[25] Bell Policy Center, *Ten Years of TABOR* 22 (Feb. 2003).

decline in share of the state budget as compared to all other significant state programs, such as K-12 education, corrections, transportation, and Medicaid.[26] Stated differently, from 1995 to 2005, higher education funding per resident student dropped 31% (adjusted for inflation).[27]

Recognizing the resulting strain on higher education, the General Assembly passed SB 04-189 in 2004. SB 04-189 creates the Colorado Opportunity Fund ("COF"), a program comprised of two accounting fictions that allow higher education institutions to qualify for enterprise status and the state to avoid counting tuition as TABOR revenue: (1) student stipends and (2) fee-for-service contracts.

COF is a trust that is funded through an annual appropriation from the state's General Fund and that provides financial assistance to qualified students through stipend payments. Upon an eligible student's request, COF transfers the student's stipend directly to the institution to apply against the student's tuition.[28] Because the stipends are tied to the students, as opposed to the state, the institution does not include these stipends for purposes of calculating "grants" received from the state under TABOR.[29]

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[26] *See* Iris Lav & Erica Williams, Center on Budget & Policy Priorities, *A Formula for Decline: Lessons from Colorado for States Considering TABOR* 8 (Mar. 15, 2010).

[27] *Id.*

[28] *See* Sally Symanski, Office of the State Auditor, *Higher Education TABOR Enterprise Status* 1 (Oct. 22, 2010).

[29] *See* Colo. Const. art. X, § 20(2)(d).

SB 04-189 also directs the Department of Higher Education and higher education governing boards to enter into fee-for-service contracts for certain educational services. Such services include, for example, graduate school services and specialized education services such as medicine and forestry.[30] Like stipends, fee-for-service contracts avoid TABOR implications because they are not "grants" from the state.[31]

By creating these two accounting fictions, higher education institutions could qualify for enterprise status. An enterprise is a "government-owned business" that receives "under 10% of annual revenue in grants from all Colorado state and local governments combined."[32] As an enterprise, the institution can increase tuition with significantly less oversight from the General Assembly because tuition revenue is TABOR-exempt. In 2004 and 2005, eleven higher education institutions were approved for enterprise status.[33]

As a result of their enterprise status, higher education institutions have turned disproportionately to increased tuition revenue for funding, as state revenues were shifted to other departments. Since passage of SB 04-189, tuition

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[30] *See* Symanski, *supra* note 28, at 2.

[31] *See* Colo. Const. art. X, § 20(2)(d).

[32] *Id*. Other examples of current enterprises include the state nursing home system, Unemployment Insurance Program, and Division of Wildlife. *See* Watkins, *supra* note 1, at 5.

[33] *See* Symanski, *supra* note 28, at 1.

rates have steadily increased across Colorado's public universities and colleges — on average 10% per year:[34]

Tuition Growth (%) Across State Higher Education Institutions	
Fiscal Year	**Percentage Increase**
2005-2006	10.2
2006-2007	5.3
2007-2008	9.3
2008-2009	12
2009-2010	13.7
2010-2011	11.7
2011-2012	9.1
2012-2013	8.1

To put these statistics into real terms, average resident tuition rose from $6,175 in FY2005-06 to $9,665 in FY2011-12 in the University of Colorado ("CU") system; and, at Colorado State University, from $3,926 to $6,691.[35]

B. The Limited Impact of Referendum C

SB 04-189 was one step to mitigate TABOR's impact on higher education. Referendum C was a second effort at mitigation. It permitted the state to use certain of the revenues retained in excess of the TABOR limit from FY2005-10 for higher education.[36] In that span, Referendum C spending on higher education was

[34] Keshia Duncan, CLCS, *Higher Education Enrollment and Revenue Forecast* 1-2 (Mar. 13, 2012).

[35] *Id*. at Table 1.

[36] *See* Watkins, *supra* note 1, at 8.

significant, totaling $1.1 billion.[37] Nonetheless, as the statistics below demonstrate, neither effort avoided a crisis in higher education funding, and this crisis will only worsen if, and when, revenues reach the Referendum C cap.

C. Funding for Higher Education Continues to Decline

Despite most higher education institutions gaining enterprise status by 2006 and Referendum C's passage in 2005, higher education continues to suffer.

In 2010, Colorado ranked last nationally in state funding for major public research universities per enrolled student (dollars).[38] In 2013, Colorado ranked 49th in state support for higher education per capita and 49th in state support for higher education per $1,000 in personal income.[39] Compare these two statistics to 1992 when Colorado ranked 31st and 34th, respectively.[40] Also consider that in 2012 Colorado ranked 13th in per capita personal income.[41]

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[37] CLCS, *Report on Referendum C Revenue and Spending FY 2005-06 through FY 2009-10*, at Table 1 (Oct. 15, 2010).

[38] National Science Foundation Report, *Science and Engineering Indicators 2012 State Data Tool*, http://www.nsf.gov/statistics/seind12/c8/interactive/chart.cfm?table=29.

[39] Grapevine, *An Annual Compilation of Data on State Fiscal Support for Higher Education, Summary Tables, Fiscal Year (FY) 2012-13* at Table 5, *available at* http://grapevine.illinoisstate.edu/tables/index.htm.

[40] Grapevine, Historical Data: 1992-93, *available at* *http://grapevine.illinoisstate.edu/historical/index.htm*.

[41] *See* U.S. Bureau of Economic Analysis, Personal Income Summary, *available at* *http://www.bea.gov/iTable/drilldown.cfm?reqid=70&stepnum=40&MajorAreaKey=3&GeoStateKey=0&GeoFipsReis=XX&TableIdReal=21&LineKey=3&YearReis=2012&YearReisBegin=-1&YearReisEnd=-1&UnitOfMeasureKeyReis=Levels&RankKeyReis=1&Drill=1&nRange=5*.

Put another way, state funding for higher education has dropped 14.3% from 2008 to 2013.[42] Indeed, even after taking into account tuition increases, higher education funding (tuition plus General Fund appropriations) dropped 13% from 2005 to 2009.[43] This decline in funding has led to layoffs of faculty and staff, cuts to construction, and the loss of tenured faculty.[44]

As one CU regent recently stated, "The fact is that state funding is going away, and in order to keep the university open, that puts pressure on the tuition that students pay. . . . There needs to be a conversation on whether the state thinks higher education is a public good or a private one."[45] TABOR ensures that such a conversation, though, is not a possibility. TABOR forced the General Assembly into creating fictions that allowed higher education institutions to convert to enterprise status and to dramatically raise tuition to cover the state's declining support. The General Assembly was left impotent to correct this situation, and students were left holding the bill.

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[42] Grapevine, *supra* note 39, at Table 2.

[43] Duncan, *supra* note 34, at 9.

[44] *See* Lav & Williams, *supra* note 27, at 9; Anthony Cotton, *CU Board of Regents Approve 8.7 Percent Tuition Hike for Next Year*, Denver Post (Apr. 9, 2013), http://www.denverpost.com/breakingnews/ci_22989798/cu-board-regents-approve-8-7-percent-tuition (quoting CU President Bruce Benson as "contend[ing] the university is increasingly being hurt by other schools poaching star-quality professors away from CU").

[45] Cotton, *supra* note 44 (quoting CU President Bruce Benson as "contend[ing] the university is increasingly being hurt by other schools poaching star-quality professors away from CU").

III. TABOR'S IMPACT ON K-12 EDUCATION

Colorado's provision of public K-12 education is in a state of funding disarray as TABOR, in conjunction with the 1982 Gallagher Amendment, has squeezed local funding and forced the state to fund an ever-increasing share. Despite the passage of Amendment 23 in 2000, which was intended to alleviate some of these funding issues, funding for Colorado's educational system cannot keep pace with students' needs and TABOR has hindered the ability of the General Assembly and school boards to effectively respond to this crisis. Colorado's teachers now earn thousands less, in real terms, than they did when TABOR passed and per-pupil funding lags far behind the rest of the nation. Indeed, Colorado's own Attorney General admitted that TABOR constrains the state's ability to raise sufficient revenues to adequately fund its education system.

A. TABOR Complicates Public Funding for K-12 Education

1. <u>Colorado's K-12 Education Funding Mechanism</u>

Under the Public School Finance Act of 1994 ("PSFA"), school district funding is determined by multiplying the number of funded pupils in a district by the per-pupil funding amount for that district, producing a total funding number.[46] The per-pupil funding amount is a statewide base amount set by the General

[46] *See* CLCS, *School Finance in Colorado* 3-4 (Apr. 2012); *see generally* C.R.S. § 22-54-101 *et seq*.

Assembly that is adjusted to reflect various factors such as size of a school district and enrollment of at risk students.[47]

Each school district's total funding is paid for via a combination of state and local revenues. Local contributions derive primarily from property taxes. The state's contribution, which provides the difference between a district's local contribution and that district's total funding amount, primarily comes from the General Fund, which is subject to the TABOR limit.[48] In FY2011-12, for example, the General Fund supplied 80.1% of the state's aid package.[49]

2. <u>TABOR and Gallagher Act to Significantly Lower Local Revenues</u>

TABOR, in combination with the 1982 Gallagher Amendment, have acted to significantly lower local property tax revenues over the past two decades.

TABOR's revenue provision limits the total amount of revenue that a school district can raise via property taxes. Thus, in an area with growth in property value, the district must limit its property tax contribution to schools. Gallagher intensifies this effect by mandating that the ratio between residential and nonresidential property statewide be kept constant — residential property must

[47] *See* CLCS, *supra* note 46, at 5-11.
[48] *See id*. at 12, 15.
[49] *See id*.

account for ~45%, and non-residential property ~55%, of total revenues.[50] This means that when residential property values outpace nonresidential property values, residential assessment rates must be reduced to maintain the ratio. As a result, property tax revenues do not keep pace with growth and, in some cases, can actually decline.[51]

Prior to TABOR, local governments could increase mill levies to offset revenues lost to Gallagher.[52] TABOR, though, requires voter approval to raise mill levies.[53] Indeed, from 1982 to 2002, while property values rose by 600%, residential school property tax collection fell by 34% (in real terms).[54]

3. <u>The State Shoulders an Increasing Share of K-12 Education Funding</u>

Historically, local property taxes provided the majority of funds for K-12 education. In 1987, for example, local revenue accounted for 56.5%, and the state 43.5%, of K-12 funding.[55] Today, the situation is reversed. As of FY2011-12, the

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[50] *See* CLCS, *House Joint Resolution 03-1033 Study: TABOR, Amendment 23, the Gallagher Amendment, and Other Fiscal Issues* 68-69 (Sept. 2003).

[51] *See id.* at 72.

[52] *See id.* at 74.

[53] Hundreds of localities have voted to "de-Bruce" mill levies in order to stem further reduction of local revenue. *See* John Schroyer, TABOR Has Decimated Education, Critics Say, *Colorado Spring Gazette* (Oct. 29, 2012), http://www.gazette.com/articles/tabor-146547-education-taxpayer.html.

[54] *See* Christine Martell & Paul Teske, *Fiscal Management Implications of the TABOR Bind*, Public Administration Review 678 (July/Aug. 2007).

[55] CLCS, *supra* note 50, at 66.

local share was 36% and the state's was 64%.[56] To meet the state's burden, 44% of General Fund expenditures today flow to K-12 education — the largest category of General Fund expenditures and more than double the next largest category.[57]

The state's increased share of K-12 funding is partly attributable to Amendment 23, which voters passed in 2000 in response to TABOR. Amendment 23 requires the state to increase per-pupil funding by at least 1% above inflation for ten years, and by inflation thereafter.[58] It also diverts income tax revenues equal to ⅓ of 1% of total state taxable income to the State Education Fund and exempts this diverted tax from TABOR's revenue limit.[59] Multiple recessions, however, have limited the additional funding provided by Amendment 23.[60] Even absent the recessions, Amendment 23 simply does not provide enough revenue for Colorado to keep pace with the rest of the nation on education spending, as discussed below.

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[56] CLCS, *supra* note 46, at 12.

[57] *See* CLCS, *Colorado's State Government Revenue Structure, Spending Limits, and General Fund Expenditures* 12 (Dec. 2010).

[58] CLCS, *supra* note 50, at 93.

[59] *Id*.

[60] *Id*. at 97.

B. TABOR Caused a Dramatic Decline in K-12 Public Education

1. Teacher Salaries Have Declined

In 2012, Colorado's teachers made $6,400 per year less than the national average.[61] While most states have increased teacher salaries, the average Colorado teacher earns $5,200 less today (adjusted for inflation) than in 1992 — a 9.6% reduction.[62]

2. Per-Pupil Spending Has Declined

When TABOR passed in 1992, Colorado's per-pupil spending was close to the national average.[63] Today, Colorado spends $2,518 less per pupil than the national average, placing Colorado 42nd in the nation in spending per pupil.[64]

3. The Quality of K-12 Education Has Declined

A state trial court recently ruled that Colorado's school finance system violates the state's constitution.[65] As the court found,

> Due to lack of access to adequate financial resources, [school districts are] unable to provide the educational programs, services, instructional materials, equipment,

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[61] Colorado School Finance Project ("CSFP"), *Profile Data: 2012 Highlights*, *available at* http://www.cosfp.org/StateProfileData/2012/ProfileDataHighlights_2012.pdf.

[62] *Id*.

[63] *See* CSFP, *Chart of U.S. Census Bureau Rankings*, *available at* http://www.cosfp.org/HomeFiles/OnePagers/USCensus/US_Census_Data_CO_Per_Pupil_Spending_Revenue_2009-10.pdf.

[64] *See* CSFP, *Chart of Education Week Quality Counts 2013 Data*, *available at* http://www.cosfp.org/HomeFiles/QualityCounts/QC2013/QC2013_State_Per_Pupil_Funding_Chart_2010%20data.pdf.

[65] *See* Findings of Fact and Conclusions of Law 177, *Lobato v. Colorado*, No. 05CV4794 (Colo. Dist. Ct. Dec. 9, 2011).

> technology, and capital facilities necessary to assure all children an education that meets the mandates of the Education Clause and standards-based education.[66]

Of note, in 2013, *Education Week* gave Colorado schools a "C" for overall quality, which fell below the national average, and an "F" for spending on school finance.[67] Another study concluded that Colorado's school district operating budgets are grossly deficient by any measure, concluding that Colorado annually underfunds education by between $1.35 billion and $4.15 billion.[68]

Moreover, between 2009 and 2012, over 85% of school districts had to increase class size, combine grades, or eliminate programs.[69] These cuts have continued into the 2012-13 school year, with districts increasingly turning to furlough days, salary freezes, and teacher and staff reductions to meet budget shortfalls.[70]

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[66] *Id*. at 178.

[67] Education Week, *Colorado 2013 Report Card* (Apr. 16, 2013), *available at* http://www.edweek.org/ew/qc/2013/state_report_cards.html.

[68] Augenblick, Palaich & Assoc., *Costing Out the Resources Needed to Meet Colorado Education Standards and Requirements* (Mar. 2011), *available at* http://childrens-voices.org/wp-content/uploads/2010/11/267-1-Exhibits-to-Plaintiffs-Expert-Disclosures.pdf.

[69] *See* CSFP, *District Survey Results*, *available at* http://www.cosfp.org/HomeFiles/OnePagers/Survey_Results_3_Years_of_Budget_Cuts_to_Colorado_School_Districts.pdf.

[70] *See* CSFP, *2012-13 Trends of Budget Cuts*, *available at* http://www.cosfp.org/HomeFiles/BudgetConversations2012_13/Trends_0f_2012-13_District_Budget_Cut.pdf.

C. Funding for K-12 Education Remains Inadequate

The tragic state of Colorado's K-12 education system is intricately linked to TABOR. Indeed, Colorado's Attorney General recently acknowledged that TABOR constrains the ability of the General Assembly to fulfill the state's constitutional obligation to provide "a thorough and uniform system of free public schools."[71]

If TABOR did not exist, the General Assembly could raise and appropriate sufficient revenue to fulfill its constitutional obligation. For example, the Senate recently passed SB 13-213 to address the serious financial problems in K-12 education. That bill, however, will not be effective unless it receives voter approval of a tax increase — an increase that is far from certain to win approval, given that Colorado voters have passed only one statewide tax increase in 20 years.[72] Similarly, without TABOR, local school boards would have a greater ability to raise mill levies and alleviate the financial burden on the state. Instead, TABOR ties the hands of the General Assembly and school boards. Colorado's students have suffered as a result.

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[71] *See* Defs.' Mot. Determination of Questions of Law 6, *Lobato v. Colorado*, No. 05CV4794 (Colo. Dist. Ct. Feb. 25, 2011).

[72] *See* Todd Engdahl, *School Finance Bill Goes to House*, EdNews Colorado (Apr. 2, 2013), http://www.ednewscolorado.org/news/capitol-news/school-finance-overhaul-passes-senate; *see also* Tim Hoover, *Two Decades Later, TABOR Praised, Blamed for Limiting Government*, Denver Post (Dec. 23, 2012), http://www.denverpost.com/ci22248157/two-decades-later-tabor-praised-blamed-limiting-government.

IV. TABOR'S IMPACT ON TRANSPORTATION INFRASTRUCTURE

Under TABOR, Colorado's investment in roads, highways, and transportation infrastructure have failed to keep pace with the state's needs, creating a "quiet crisis" in transportation.[73] Indeed, the average state spends nearly $1 billion more on highways on an annual aggregated per capita basis than Colorado, leading to poor road conditions, highways riddled with congestion, and higher costs to drivers. Transportation has turned to the enterprise structure to avoid TABOR's consequences but, as with higher education, attempts to use the enterprise structure have proven problematic.

A. Colorado's Transportation Funding Mechanism

The Colorado Department of Transportation ("CDOT") is responsible for more than 88,000 miles of roads and 8,000 bridges, including 9,146 miles of highway that handle over 27.4 billion vehicle miles of travel annually.[74] Funding for CDOT is derived from a combination of state and federal sources.

The Highway Users Tax Fund ("HUTF") is primarily funded by state motor fuel taxes, as well as by motor vehicle registration fees and daily rental car surcharges.[75] Over the last 20 years, HUTF has provided approximately one-third

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[73] Colorado Transportation Finance and Implementation Panel ("CTFIP"), *A Report to Colorado* 5, 40 (Jan. 2008).

[74] CDOT, *Strategic Plan, FY 2012-2013 Budget* (2012); CDOT, *Transportation Facts 2011* 24 (2011).

[75] CDOT, *Fiscal Year 2011 Annual Report* 3 (2012).

of all transportation funding in Colorado. Today, as a result of declining federal funding, HUTF provides nearly 40%.[76]

Federal funding for Colorado transportation projects is derived from the Highway Trust Fund ("HTF"), which is primarily funded by federal motor fuel taxes.[77] Additional federal funds for transportation occasionally flow into Colorado, but currently there is no long-term authorization bill that would guarantee such funding for Colorado.[78] In 2012, federal funding was expected to provide 35% of all transportation funding in Colorado.[79]

CDOT's remaining revenues come from three other sources: (1) transfers from the state General Fund when certain conditions are satisfied;[80] (2) bridge safety surcharges;[81] and (3) miscellaneous sources, including fees for overweight / oversize permits on state highways and interest on balances in the State Highway Fund.[82]

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[76] *Id.*; *see also* CDOT, *supra* note 74, at 16.

[77] CDOT, *supra* note 75, at 3.

[78] *Id.*

[79] CDOT, *supra* note 75, at 4 .

[80] CDOT, *supra* note 75, at 3. Under S.B. 09-228 (2009), General Fund transfers are triggered by a 5% growth in annual personal income in a particular year, continuing for five years once they begin. *Id.*

[81] Colorado Senate Bill 09-108, *Funding Advancement for Surface Transportation and Economic Recovery* ("FASTER") (2009).

[82] CDOT, *supra* note 75, at 3.

B. The Quiet Crisis of Transportation Funding Under TABOR

TABOR ushered in stagnation for transportation funding in Colorado, leaving the state unable to keep pace with its rapidly growing transportation needs.

After the first decade of TABOR, Colorado roads faced serious problems. In 2005, CDOT rated 35% of roads in poor to mediocre condition.[83] Likewise, the American Society of Civil Engineers ("ASCE"), which issues an annual "report card" on state infrastructure, graded 43% roads as poor or mediocre, and found that 30% of Colorado's major urban roads were congested.[84] CDOT itself expressly found that the state's transportation system would deteriorate with then-current plans for transportation funding.[85]

In 2005, voters passed Referendum C, which resulted in increased General Funds support for transportation.[86] Between 2005-2010, Referendum C spending on transportation totaled $45 million.[87] This modicum of relief, however, was far from enough to remedy the state's transportation woes. In 2010, ASCE gave Colorado roads a grade of D.[88] ASCE further found that 70% of Colorado's roads

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[83] CDOT, *Fact Book 2006* 24 (2006).

[84] ASCE, *Colorado Infrastructure Report Card 2005*, https://apps.asce.org/reportcard/2005/page.cfm?id=45.

[85] CDOT, *Moving Colorado, Vision for the Future: 2030 Statewide Transportation Plan* 4 (Feb. 2005).

[86] *See generally* Watkins, *supra* note 1, at 8.

[87] CLCS, Report on Referendum C Revenue and Spending, *supra* note 37, at 2.

[88] ASCE, *Colorado Key Facts*, http://www.infrastructurereportcard.org/colorado/colorado-overview.

were in poor or mediocre condition.[89] Indeed, by 2009, well into the Referendum C time-out, Colorado ranked 46th among all states in highway funding, up only 2 spots, from 48th, in 2007.[90] The average state spent nearly $1 billion more on highways on an annual aggregated per capita basis than Colorado.[91]

The decline in transportation infrastructure is far more than a theoretical problem: poor road conditions and congestion have had a direct economic impact on individuals and the state economy. As CDOT warned, "A faulty system — one riddled with congestion and poor pavement conditions — only leads to higher transportation costs, which ultimately yield higher prices to consumers."[92] For example, rough pavement causes more rapid deterioration of tires and car suspensions, requiring more frequent repair or replacement.[93]

By 2005, poor road conditions cost each motorist $264 per year in extra operating and repair expenses.[94] In the Denver, Boulder, and Colorado Springs metropolitan areas, traffic congestion cost each driver more than $1,426 annually

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[89] *Id.*

[90] CFI, *Aiming for the Middle 2011: Benchmarks for Colorado's Future* 8 (Dec. 15, 2011) [hereinafter, "*Aiming for the Middle 2011*"]; CFI, *Aiming for the Middle 2009: Benchmarks for Colorado's Future* 3 (Jun. 25, 2009).

[91] *Aiming for the Middle 2011*, *supra* note 90, at Appendix 1.

[92] CDOT, *supra* note 85, at 15.

[93] CTFIP, *supra* note 73, at 26.

[94] CDOT, *supra* note 85, at 5.

in delays and expenses.[95] And, the overall cost to Colorado drivers of driving on roads in poor or mediocre condition was $955 million annually.[96] By 2008, driving on roads in need of repair cost Colorado motorists $1.034 billion annually in extra vehicle repairs and operating costs, or $287 per motorist.[97] Also, for every hour driven on Colorado highways, drivers spent 20 minutes on rough pavement; by 2016, drivers will spend 40 minutes on rough pavement.[98]

The average traffic delay in congested corridors was 17 minutes per commuter and is expected to grow to 48 minutes by 2035.[99] In Denver and Colorado Springs, traffic congestion costs drivers $1.35 billion annually in delays and wasted fuel.[100]

Thus, TABOR has not only prevented the state from maintaining road quality, but also has passed the cost of traveling those poor roads onto motorists.

C. TABOR Hinders Adequate Response to the State's Evolving Transportation Demographics

Colorado witnessed unprecedented expansion in population and road usage in the years immediately following TABOR. Yet, funding for transportation did

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95 *Id*.
96 ASCE, *supra* note 84.
97 CTFIP, *supra* note 73, at 26.
98 *Id*. at 5.
99 CDOT, *supra* note 74, at 29.
100 *Id*.

not keep pace as TABOR limited the General Assembly's ability to effectively respond to these changed circumstances.

In 1990, Colorado's population was just over 3.3 million people.[101] By 2005, the population exceeded 4.6 million, and by 2010 surpassed 5 million.[102] Concomitant with this population increase was an increase in highway usage. Between 1990 and 2009, vehicle miles on Colorado interstate highways increased by 65%, and vehicle miles on state highways increased by 55%.[103] Between 1990 and 2003, traffic through the Eisenhower/Johnson Tunnel on I-70 grew 54%.[104] And by 2008, at least 100 of Colorado's bridge's were structurally deficient.[105]

To deal with these circumstances, the state needed additional funds for transportation. In the past, the General Assembly increased the state fuel tax one cent per year on average, until it reached 22 cents per gallon on gasoline in 1992.[106] Since TABOR, the fuel tax has remained static. This lack of increase results in an effective decline in fuel tax revenue for two reasons. First, car fuel efficiency has increased.[107] Second, since 1992, it costs on average 6.4% more per year to fund

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[101] Data derived from the Colorado Department of Local Affairs population database, https://dola.colorado.gov/demog_webapps/pe_parameters.jsf.

[102] *Id*.

[103] CDOT, *supra* note 74, at 29.

[104] CDOT, *supra* note 85, at 15.

[105] CTFIP, *supra* note 73, at 1.

[106] *Id*. at 3.

[107] CDOT, *supra* note 74, at 27.

Colorado transportation projects, *i.e.* a dollar of revenue generated in 1992 was worth only 39 cents by 2006.[108] To keep up with inflation, fuel taxes needed to average a 1.5 cents increase per year over that time.[109] Yet, TABOR halted any increase.

In short, TABOR had the perverse effect of pulling funding from transportation just as Colorado roads began a period of unprecedented increase in usage.

D. TABOR Stymies Alternative Transportation Funding Mechanisms

In 2009, the Funding Enhancement for Surface Transportation and Economic Recovery Act ("FASTER") created the Colorado Bridge Enterprise ("CBE") to seek alternative mechanisms for funding transportation.[110]

CBE was tasked with a particularly urgent mission: financing and performing repair work on bridges that have been designated as structurally deficient or functionally obsolete and rated as poor by CDOT.[111] CBE receives revenue from a bridge safety fee added to the vehicle registration process and may issue bonds to accelerate the completion of work on bridges in the worst

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[108] *Id*.
[109] CTFIP, *supra* note 73, at 3.
[110] *See* CDOT, *supra* note 74, at 9.
[111] *See id*. at 10.

condition.[112] CBE yielded rapid progress toward remediation of deficient bridges: work on over 57% of the bridge population eligible for repair was completed or in construction by the end of 2012.[113] The creation of the bridge safety fee, however, has been challenged by a lawsuit alleging the fee should be classified as a tax and, thus, subject to TABOR.[114] The challenge highlights how the General Assembly's effort to achieve a "flexible" and rapid response to significant problems is stymied under the banner of TABOR.

V. TABOR CREATED AN OPAQUE GOVERNMENTAL MORASS

TABOR was intended to "reasonably restrain the growth of government."[115] What TABOR actually accomplished, however, is far different: (1) TABOR forced a fundamental change in how the General Assembly can legislate; (2) TABOR reduced the transparency of government; and (3) TABOR created less effective government -- ultimately placing Colorado in the untenable fiscal position in which it finds itself today.

A. TABOR Forced a Fundamental Change in How the General Assembly Can Legislate

TABOR ties the hands of the General Assembly. Representatives now must make decisions, not based on a substantive dialogue about various policy and

[112] *Id*.
[113] CBE, *2012 Annual Report* 10 (Jan. 14, 2013).
[114] *See id*. at 3.
[115] Colo. Const. art. X, § 1.

budgetary considerations, but based predominantly on what TABOR allows them to do. That is, under TABOR, the General Assembly must divorce its budget decisions from any serious consideration of unmet needs that might warrant additional revenue.

In higher education, this means that the General Assembly was forced to forego what once was the state policy of low tuition and generous state support. The General Assembly simply has no choice but to transfer the costs that had been previously born by the state onto the students. The irony is that to even get to this point the General Assembly had to first engage in TABOR-sanctioned fiscal gymnastics to allow higher education institutions to qualify for enterprise status.

The situation is similar in transportation, where state support for infrastructure has fallen so low that motorists are now seeing the costs in the form of increased congestion and higher vehicle maintenance. And, in order to get the most critical infrastructure work accomplished, the General Assembly had to create another enterprise — an enterprise that has been since challenged as a violation of TABOR.

And, in K-12 education, faced with looming cuts from TABOR, voters resorted to Amendment 23. But, even that measure has proven insufficient and, thus, the General Assembly is likely to return to voters this year to ask for additional funding.

B. TABOR Reduced Government Transparency

Through its complex spending and revenue provisions, TABOR created a lack of transparency in government spending and added unnecessary complexity to the state budget and elections.

Fiscal decisions can only be properly made in the context of the entire budget, as changes in one area can carry unintended consequences in completely unrelated areas. Yet, Colorado's "fiscal rules are so complex and obtuse that only a few specialists really know how the current system works and understand what would happen if even minor changes were implemented."[116]

Nonetheless, TABOR removes funding decisions from the purview of those who are best situated to understand the interrelations of budgetary decisions — legislators — and places the decisions in the hands of those least likely to be fully versed in Colorado's budget complexities -- the voters. TABOR elections thus skirt a substantive legislative dialogue, which would include public debate of fiscal issues, negotiation concerning competing interests and different values, and inherent checks and balances between the General Assembly and the Governor. Instead, crucial revenue decisions are played out on statewide ballots, in elections

[116] Martell & Teske, *supra* note 54, at 682.

that emphasize fundraising and paid advertisements and where competing regional interests make it extremely difficult to pass a tax increase.[117]

Moreover, passing statewide measures has become increasingly difficult by the sheer number of fiscal elections demanding voter attention. State and local special elections, dominated by fiscal issues, have become the norm. Voters are placed in the difficult position of trying to make informed fiscal decisions in complex and obtuse elections that divorce budgetary choices from their implications.

C. TABOR Produced a Less Effective Government

In an attempt to compensate for TABOR's most troubling consequences, Colorado has been forced to engage in a combination of fiscal gymnastics and legal fictions. The most well-known of these efforts include the creation of enterprises, de-Brucing laws throughout the state, Amendment 23, and Referendum C. Such efforts have been reactionary and insufficient to address the state's broader fiscal problems, as detailed above. Indeed, as one legislator described such efforts in the context of higher education, they are merely "band-aids on a hemorrhaging aorta," where the only true remedy is to repair the state's Constitution to remove TABOR.[118]

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[117] *See*, *e.g.*, Hoover, *supra* note 72.

[118] Second House Reading, SB 04-189, at 2:19:50 (Apr. 26, 2004).

TABOR, and the subsequent attempts to mitigate its harsh effects, result in a government "less able to respond to recessions than most other states due to its restrictive revenue and expenditure provisions."[119] This decreased governmental effectiveness is due, in large part, to TABOR's voter approval requirement for tax increases and revenue changes, as well as its limitations on where, and how much, revenue can flow to discretionary programs.

Thus, TABOR created a sea change in the way Colorado manages its budget and propelled convoluted mechanisms for circumnavigating the amendment itself. As CU President (and former TABOR supporter) Bruce Benson observed, "Tax limitations are great, but you can overlimit."[120] Indeed, Colorado has been overlimited to the breaking point.

CONCLUSION

TABOR impaired state funding for a broad range of vital services, typified by the serious funding issues of higher education, K-12 education, and transportation infrastructure, all of which have fallen behind nearly all other states' funding levels. Indeed, TABOR created a stranglehold on the state's ability to raise and appropriate funds, and it stripped the General Assembly of its obligation

[119] CFI *et al.*, *Looking Forward: Colorado's Fiscal Prospects Amid a Financial Crisis* 4 (Jul. 2009).

[120] Quoted in Hoover, *supra* note 72.

to work effectively for economic prosperity. Appellees have challenged TABOR on this very basis, and Appellants' interlocutory appeal should be denied.

Respectfully submitted this 17th day of April, 2013.

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Dated: April 17, 2013

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Dated: April 17, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2013, I electronically filed the foregoing Brief Of *Amicus Curiae* **The Bell Policy Center and the Colorado Fiscal Institute in Support of Appellees and in Support Of Affirmance** with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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