UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, Colorado State Representative, *et al.*, Plaintiffs-Respondents, v. JOHN HICKENLOOPER, Governor of Colorado, in his official capacity, Defendant-Petitioner.	Case No. 12-1445

BRIEF OF AMICI CURIAE COLORADO ASSOCIATION OF SCHOOL BOARDS AND COLORADO ASSOCIATION OF SCHOOL EXECUTIVES, SUPPORTING THE PLAINTIFFS

Appeal from the United States District Court for the District of Colorado
The Honorable William J. Martinez, U.S. District Judge
Case No. 11-cv-01350-WJM-BNB

This brief contains attachments in native PDF form.

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AUTHORITY TO FILE

This brief is authorized pursuant to F.R.A.P. 29(a) because counsel for all parties have consented to its filing.

STATEMENT CONCERNING AUTHORSHIP AND FUNDING

This brief was authored wholly by undersigned counsel for the amici curiae. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting the brief. No person—other than the amici curiae, their members, and their counsel—contributed money intended to fund preparing or submitting the brief.

AMICI AND THEIR INTEREST IN THE CASE

A. The Amici Curiae.

The Colorado Association of School Boards ("CASB") is a nonpartisan association of locally-elected school boards. Of the state's 178 school boards, all but three are members of CASB. One of CASB's missions is to lobby the Colorado General Assembly for legislation supporting resolutions approved by CASB's Delegate Assembly. Accordingly, during the annual state legislative session, a CASB employee works primarily as a lobbyist at the General Assembly. CASB's approved resolutions include support for (1) increasing school funding to pre-TABOR levels and (2) repealing or invalidating TABOR.

The Colorado Association of School Executives ("CASE") is a professional membership association focusing on, among other things, lobbying and advocacy for increased school funding. CASE's 2,300 members include Colorado school superintendents, principals, and other administrators.

The plaintiffs who are members of local school boards or the State Board of Education are referred to in this brief as the "educator plaintiffs."[1]

B. Amici's Interest in This Case

The Colorado Constitution places CASB's members—locally-elected school boards—in control of public school instruction. Colo. Const. art. IX, § 15. The members of CASE are employees of the school boards and are responsible for the day-to-day operation of the schools. Collectively, the members of CASB and CASE, under the "general supervision" of the State Board of Education, are responsible for delivering the "thorough and uniform" system of public education called for by Colorado's constitution. *Id.* §§ 1, 2.

Beginning with the passage of TABOR, however, funding of K-12 education in Colorado declined steadily and fell behind other states:

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[1] The educator plaintiffs are: Elaine Gantz Berman, Colorado State Board of Education; William K. Bregar, Pueblo District 70 Board of Education; Robin Crossan, Steamboat Springs RE-2 Board of Education; and Stephanie Garcia, Pueblo City Board of Education.

- Since the passage of TABOR, spending per pupil in Colorado fell from $42.88 per $1,000 of personal income to $35.56, a decline of 16 percent. Colorado School Finance Project, *Per Pupil Revenue and Spending and Per $1,000 Personal Income: 1991-92 through 2009-10* (2012) ("*Per Pupil Revenue and Spending*"), *available at* http://www.cosfp.org/HomeFiles/OnePagers/USCensus/US_Census_Data_CO_Per_Pupil_Spending_Revenue_2009-10.pdf.
- As a result, from 1992 to 2001, Colorado dropped from 35th to 49th in the nation in K-12 spending as a percentage of personal income. Iris J. Lav & Erica Williams, Ctr. on Budget & Policy Priorities, *A Formula for Decline: Lessons from Colorado for States Considering TABOR* 5 (2010) ("*Formula for Decline*"), *available at* http://www.cbpp.org/files/10-19-05sfp.pdf.
- Since the passage of TABOR, annual funding per pupil has fallen by more than $1,300 compared to the national average. Colorado School Finance Project, *K-12 Per-Pupil Funding: Colorado vs. National Average* (2011), *available at* http://www.cosfp.org/HomeFiles/OnePagers/K-12_Per_Pupil_Funding_Colorado_National_Average.png.

- As a result, Colorado has declined from 30th to 41st in the nation in total funding per pupil. *Per Pupil Revenue and Spending*.

While low funding levels reduce the quality of all students' education, the effect is particularly severe on low-income, minority, and special-needs students. For example, the high school graduation rate of Hispanic students in Colorado is 55 percent, far below the national average for Hispanic students. Findings of Fact & Conclusions of Law, *Lobato v. Colorado*, Denver Dist. Ct. No. 2005CV4794, at 57 ¶VIII(C)(2) (Dec. 9, 2011) ("*Lobato* Findings"; copy attached hereto as Appendix A). The Colorado graduation rate for white students, in contrast, is 80 percent. *Id*. The disparity in achievement levels between Colorado's white students and minority students—known as the "achievement gap"—is among the largest in the country. *Id*. at 56-57, ¶¶VIII(B)(2), VIII(C)(2).

Amici's members are deeply concerned about this decline in funding of and academic achievement in Colorado's public school system. Along with numerous academic and policy commentators, Amici believe that these declines have been caused mainly by TABOR. Consequently, Amici have an interest in obtaining a ruling in this case invalidating TABOR so that Amici, on behalf of the educator plaintiffs, may reclaim their right under a republican form of government to lobby the General Assembly for increased public school funding.

SUMMARY OF ARGUMENT

The Colorado Constitution mandates the creation and funding of a "thorough and uniform" system of public education, operated under the control of local boards of education and under the general supervision of the State Board of Education. The adoption of TABOR in 1992 caused a steady, sustained erosion of funding for public education. As a result, a group of plaintiffs brought an action in state court (*Lobato v. Colorado*) seeking a ruling that funding was no longer sufficient to meet the constitutional mandate. Following years of litigation and a three-week trial, the state judge issued extensive findings of fact and conclusions of law agreeing with the plaintiffs that current levels of funding are constitutionally inadequate. That ruling is now on appeal to the Colorado Supreme Court.

Regardless of the ultimate outcome of *Lobato*, there are ample grounds for believing that Colorado's K-12 public schools need increased funding. Because the state constitution specifically places state and local school boards in control of public education, those boards have a unique constitutional duty to seek greater funding if they believe that current appropriations are insufficient.

The Colorado General Assembly currently provides 63 percent of total school funding statewide and consequently is the most important body for school boards to lobby when they seek increased funding. Before TABOR, school boards could do so. The enactment of TABOR, however, made such lobbying pointless

because the General Assembly no longer had the power to raise additional revenue or to spend revenue that it collected above very tight spending caps. The only way around these limitations was approval by a statewide vote.

The guarantee of a republican form of government includes a right to a state legislature, which citizens may petition—i.e., lobby—for redress of grievances. Here, the educator plaintiffs seek to petition for increased school funding, but TABOR bars the General Assembly from redressing that grievance, absent a statewide referendum. TABOR violates the Guarantee Clause by removing essential powers from an essential institution in a republican form of government, thereby rendering the educator plaintiffs unable to exercise effectively their right to lobby.

In this action, the educator plaintiffs have Article III standing to challenge that violation because all three parts of this Court's test in *Branson School District v. Romer* are met:

- First, the educator plaintiffs have suffered a particularized and concrete injury-in-fact because, unlike other Colorado citizens, they are given constitutional control of the school system and thus have a special duty to seek funding sufficient to meet the state constitution's mandate of a thorough and uniform system of education. As shown by the ruling in *Lobato*, there is a real dispute—not a hypothetical or

conjectural one—about whether the current level of funding is sufficient to meet that mandate.

- Second, there is an irrefutable causal connection between TABOR and the educator plaintiffs' loss of their right to lobby: TABOR was the instrument that took away the General Assembly's power to grant school boards' requests for increased funding.
- Third, for the same reason, invalidation of TABOR would redress the injury by restoring to the General Assembly its power to raise revenue and appropriate it for school funding.

The injury for which the educator plaintiffs seek redress is *not* decreased school funding. Rather, it is school boards' loss of their former right and ability to lobby the Colorado General Assembly for increased funding. It does not matter whether school boards would succeed in persuading the legislature to increase funding. The injury is that under TABOR, the educator plaintiffs were deprived of their historic right—which is included within the guarantee of a republican form of government—to petition the state legislature for such an increase.

ARGUMENT

THE EDUCATOR PLAINTIFFS HAVE ARTICLE III STANDING.

As to Article III standing, the decision below and most of the parties' briefing focus on the legislator plaintiffs. This brief shows that the educator plaintiffs also have Article III standing.

A. The Educator Plaintiffs Carry a Unique Burden Under the Colorado Constitution to Deliver a Thorough and Uniform System of Public Education Under Local Control.

Colorado's Constitution commands the General Assembly to "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state." Colo. Const. art. IX, § 2. The Constitution further directs the General Assembly to "provide for organization of school districts," which shall be governed by boards of education that "shall have control of instruction in the public schools of their respective districts," under the "general supervision" of the State Board of Education. *Id.* §§ 1, 15.

If the General Assembly's funding of public education is inadequate, it becomes the responsibility of the school boards to seek increased funding. Thus, members of the state and local school boards have a duty, rooted in the state constitution, to see that funding of public education is "uniform" and sufficient to deliver a "thorough" education.

Under the Colorado constitution, no other person or entity is charged with the duty to educate the state's K-12 students. The General Assembly is commanded to "provide for" and the school boards are placed in "control" of Colorado's system of free K-12 public education. *Id.* §§ 2, 15. These constitutional provisions distinguish school boards and their members from all other citizens of Colorado with respect to the funding and delivery of public education.

Further, these constitutional provisions establish a unique relationship between school boards and the General Assembly because they share a duty to deliver a system of public education that is thorough and uniform. This duty is not assigned to any other citizens of Colorado—just the General Assembly and the school boards.

B. With the Passage of TABOR, the General Assembly Lost Its Ability to Raise Additional Revenue for Schools, and School Boards Lost Their Ability to Lobby the Legislature for Funding.

Before the adoption of TABOR, the General Assembly had established a system of funding public education based on revenue from local property taxes plus state funding. This system was contained in a series of public school finance acts and was modified from time to time. *See generally Lobato* Findings (Appendix A hereto) 30-34; *Lobato v. Colorado*, 218 P.3d 358, 364 (Colo. 2009).

Under this system of school finance, if school boards believed that school funding was insufficient, they could seek increases (1) in the state's portion of the funding formula by lobbying the General Assembly and (2) in the local portion by increasing the mill levy district by district or by lobbying the General Assembly to adopt legislation increasing mill levies statewide. The General Assembly provides 63 percent of school funding and consequently is the most important body to lobby. Univ. of Denver, *Financing Colorado's Future* 30 (2011) ("*Financing Colorado's Future*"), *available at* http://www.du.edu/economicfuture/documents/CCEF_ReportPhase1.pdf.

In lobbying the General Assembly, school board members were exercising a treasured right conferred by the Constitution: their First Amendment right "to petition the government for a redress of grievances." While the educator plaintiffs do not sue under the First Amendment, the right to petition is closely linked to the right to a republican form of government. The right to petition has two parts. First, petitioners must be free to articulate their grievances. That part is guaranteed by the First Amendment. Second, the government being petitioned must have the power to grant the "redress" that the petitioners seek. One aspect of the Guarantee Clause is to ensure that petitioners will be able to present their petitions to (i.e., lobby) a state legislature that can exercise the full range of governmental powers.

Before TABOR, members of school boards lobbied the General Assembly through two main channels of communication. First, members of individual school boards contacted the representatives and senators elected in the districts where those school boards operated. Through these one-on-one conversations, school board members acquainted their representatives with conditions in their particular school districts and their relative need for funding. Second, CASB and CASE employed lobbyists who contacted members of the General Assembly before and during the annual legislative session.

These contacts by and on behalf of the school boards were directed to state legislators because the state constitution directs the General Assembly to fund public education and because the General Assembly had the power to enact legislation levying taxes, raising revenue, and appropriating that revenue to fund public schools. While there have been disputes about how to equalize levels of funding between wealthy and poor school districts, *see Lujan v. Colo. State Bd. of Educ.,* 649 P.2d 1005 (Colo. 1982), there was no dispute that the General Assembly had the power to levy taxes and appropriate the resulting revenue to pay for school operations and capital construction.

TABOR was adopted via a statewide ballot initiative in 1992. It is beyond the scope of this brief to present either a complete description of TABOR's provisions or its effects on Colorado's state and local governments. For a fuller

description of these matters, see the amicus brief being submitted by the Bell Policy Center and the Colorado Fiscal Institute. *See also* Anna-Liisa Mullis, *Dismantling the Trojan Horse: Mesa County Board of County Commissioners v. State*, 82 U. Colo. L. Rev. 260, 266-80 (2011) ("*Trojan Horse*"); *Financing Colorado's Future* 30-39.

In its broad outlines, however, TABOR's effect on spending at the state level is clear. Without approval by a statewide vote, the General Assembly cannot adopt "any new tax, tax rate increase, mill levy above that for the prior year, … or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20(4)(a). The term "district" is defined to include the state. *Id.* § 20(2)(b). TABOR also imposes a spending limit, based on the inflation rate plus population growth rate, and requires that all revenues exceeding the limit must be returned to the citizens.[2] *Id.* § 20(7).

As a result, school boards effectively lost the ability to lobby the General Assembly to increase state funding of public schools. There simply was no point in asking for legislation that was forbidden by TABOR. While the General Assembly theoretically could transfer money to school funding by cutting

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[2] This aspect of TABOR has forced the state to return large amounts of revenue to the taxpayers, including $941 million in 2000 and $679 million in 1999. *Formula for Decline*, at 7. Because the increase in the spending limit does not fully take into account growth of the state's economy, TABOR has caused state spending as a percentage of gross economic product to decline steadily. *Trojan Horse*, at 272-75.

expenditures on other state operations (like roads, courts, environmental protection, prisons, and Medicaid), TABOR's downward pressure on state spending was so intense that no excess funds were available. *See generally Trojan Horse*, 82 U. Colo. L. Rev. at 272-80. Thus, school boards and their members could no longer lobby the General Assembly effectively for increased school funding.

The state does not dispute that TABOR is preventing it from increasing funding for K-12 public schools. In 2005 a group of plaintiffs sued the State of Colorado, claiming that current funding is insufficient to meet the requirement in the state constitution's "Education Clause" (art. IX, § 2) to provide a "thorough and uniform" system of public education. *See Lobato* Findings at 1. In a motion for determination of questions of law, the state argued that "[a]ny appropriations required by the Education Clause are constrained by TABOR's revenue restrictions" and that in any conflict between the Education Clause's mandate to provide a thorough and uniform system of education and TABOR's taxing and spending limitations, "TABOR prevails." *Lobato v. Colorado*, Denver Dist. Ct. No. 2005CV4794, doc. no. 216 (Feb. 25, 2011), at 6-7 (copy attached as Appendix B). In short, the state argues that the General Assembly is prevented by TABOR from raising additional revenue and appropriating it for school funding.

C. The Loss of the Ability to Lobby the General Assembly for Funding Constitutes an Injury Sufficient to Confer Article III Standing.

The educator plaintiffs' loss of their right to lobby a state legislature empowered to raise revenue and appropriate funds without a statewide referendum constitutes an injury-in-fact that meets all requirements for Article III standing.

1. A republican form of government includes a legislature empowered to adopt legislation without a vote of the people.

School boards' loss of their former ability to lobby the state legislature for school funding is exactly the type of injury that the Guarantee Clause is supposed to prevent. As the Federalist Papers make clear, a republican form of government means one in which the citizens do not govern directly, Athenian-style, but instead elect representatives who meet, debate, and adopt legislation.

According to Madison, the distinction between a republican government and a democracy "is, that in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents." James Madison, *Federalist Paper No. 14*, 1787 WL 342 (Nov. 30, 1787). In another paper, Madison referred to a "republican" government and explained that he was distinguishing "between a democracy and a republic," with "the delegation of the government, in the latter, to a small number of citizens elected by the rest." James Madison, *Federalist Paper No. 10*, 1787 WL 338

(Nov. 23, 1787). In other words, a "republican" government means government through elected representatives.

The existence and powers of a body of elected representatives was not a matter of mere administrative convenience. Alexander Hamilton explained that legislatures were intended to serve as an essential check on what he viewed as easily-aroused passions of the voters. Legislatures provided an opportunity for "cool and sedate reflection" and gave elected representatives an opportunity to save the people from "their own mistakes":

> When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.

Alexander Hamilton, *Federalist Paper No. 71*, 1788 WL 485 (Mar. 18, 1788).

While some would view this attitude as outdated, the fact remains that the drafters of the Constitution viewed the independent powers of legislatures as an essential feature of the proposed new American government. And, Hamilton's point may have more continuing validity than first appears. With a complex and lengthy proposed amendment like TABOR, few voters take the time to read and

understand its provisions. The election campaign is waged largely through warring television advertisements expressing their points in sound bites. Even the title of the initiative as printed on the ballot may give little clue of the initiative's true effect.[3] When particular decisions on complex issues of state governance are shifted from the legislature to the voters, the only certainty is that the decisionmakers will be poorly informed.

Consistent with the Federalist Papers, the Supreme Court has emphasized the central role in our nation's history of state legislatures and the representative form of government. "State legislatures," the Court wrote in a state redistricting case, "are, historically, the fountainhead of representative government in this country." *Reynolds v. Sims*, 377 U.S. 533, 564 (1964). Representative government, in turn, "is in essence self-government through the medium of elected representatives of the people." *Id*. at 565. Citizens interact with the government by communication with their elected representatives. "So significant is the preservation of this legislator-citizen relationship that six amendments to the

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[3] The 61-word ballot question for TABOR, for example, gave scant preview of the momentous changes it would bring about. It asked the voters: "Shall there be an amendment to the Colorado Constitution to require voter approval for certain state and local government tax revenue increases and debt; to restrict property, income, and other taxes; to limit the rate of increase in state and local government spending; to allow additional initiative and referendum elections; and to provide for the mailing of information to registered voters?" *Trojan Horse*, at 266 n.42.

federal Constitution protect and enhance it." *Gordon v. Griffith*, 88 F. Supp. 2d 38, 44 (E.D.N.Y. 2000) (Weinstein, J., discussing the Guarantee Clause).

It follows from the foregoing that a republican form of government means one with a legislature having plenary powers. Among those powers is the power to impose taxes and raise revenue, which Hamilton described as "the essential engine by which the means of answering the national exigencies must be procured." Alexander Hamilton, *Federalist Paper No. 31*, 1788 WL 445 (Jan. 1, 1788). If the legislature needs an approving vote of the entire people to exercise such a central governmental power, then the form of government is no longer republican. Power has been stripped from the representatives and handed back to the people, in a version of direct democracy. If Colorado's General Assembly could not adopt *any* legislation unless first submitted to and approved by statewide vote, surely all would agree that the government was no longer republican.

2. The *Branson* test for Article III standing.

The test for determining whether a plaintiff has standing to bring suit is articulated in *Branson School District RE-82 v. Romer*, 161 F.3d 619, 630 (10th Cir. 1998). "It is well-settled today that the core requirements for showing a case or controversy under Article III are three-fold: A plaintiff must allege (1) an injury-in-fact, (2) a causal connection between the injury and defendant's actions, and (3) redressability of the injury." *Id.* (internal quotation marks omitted). To

meet the injury-in-fact requirement, the plaintiff must show "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.*

An injury-in-fact is sufficiently concrete and particularized if the challenged law is invalid, and the plaintiff has sustained some direct injury as the result of its enforcement. *See Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). Although generalized grievances are not judicially cognizable, *see*, *e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989), the mere fact that an injury is widely shared does not preclude it from being concrete as long as the plaintiff suffered his injury in a personal and individual way. *See United States v. SCRAP*, 412 U.S. 669, 688 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion."); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 34 (1998) ("Where a harm is concrete, though widely shared, the Court has found 'injury in fact.'").

To show causation and redressability, a plaintiff must allege a "personal injury that is fairly traceable to the challenged conduct and likely to be redressed by the requested relief." *ASARCO*, 490 U.S. at 615-16. While the traceability of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation, Article III does require proof of a substantial likelihood that the

defendant's conduct caused plaintiff's injury-in-fact. *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1225 (10th Cir. 2008). The redressability prong requires a plaintiff to demonstrate that it is likely, not merely speculative, that the injury will be redressed by a favorable decision. *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1318 (10th Cir. 2008).

3. The educator plaintiffs meet all parts of the *Branson* test for Article III standing.

The educator plaintiffs do not complain of some abstract or generalized harm, shared equally by all citizens of Colorado. Rather, the school boards and their members are a small and unique subset of the population, on whom the state constitution confers "control" and "general supervision" of public instruction. Colo. Const. art. IX, §§ 1, 15. The constitution further mandates that the system of public education shall be "thorough and uniform." *Id.* § 2.

Together, these two sections place on the educator plaintiffs a duty to provide a public education that meets a certain standard of quality. This duty, in turn, necessarily includes the duty to seek the funding to provide such an education if the General Assembly has not provided sufficient funding. The educator plaintiffs thus have a need to perform certain specific and concrete actions: approaching state legislators to lobby for increased school funding. TABOR makes such lobbying futile, however, because it strips the General Assembly of its

power to grant the educator plaintiffs' request. This injury meets all parts of the *Branson* test.

a. The educator plaintiffs' loss of their ability to lobby the General Assembly for increased funding constitutes an injury-in-fact that is concrete and particularized.

Vague and generalized assertions of harm, especially those that could be asserted by any citizen, do not give rise to standing to sue. Thus, for example, plaintiffs who professed a nonspecific desire to view threatened species abroad sometime in the future were held to lack standing to challenge a rule by the Secretary of the Interior limiting the Endangered Species Act to the United States and the high seas. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563-65 (1992).

In contrast, plaintiffs had standing to challenge a citizen-initiated state constitutional amendment requiring a two-thirds supermajority for future citizen initiatives on the subject of wildlife management, where plaintiffs had actually supported past initiatives on that subject and wished to do so again in the future. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006). Similarly, residents who lived downstream of a ski area and who used the river for fishing and irrigation had standing to challenge a Forest Service ruling approving the ski area's request to operate in the summertime, where the plaintiffs alleged that the ski area's operations would consume water and degrade its quality. *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 450-51 (10th Cir. 1996). *See also*

Akins, 524 U.S. at 21-26 (voters' lack of information caused by FEC's ruling that organization did not have to disclose members and donors was sufficiently concrete to confer standing, even though denial of this information was widely shared).

Here, the educator plaintiffs constitute a small, clearly-defined group, as in *Committee to Save the Rio Hondo*. Their injury is as concrete as the downstream residents in that case, and it is far more particularized than voters' general desire for more information, as in *Akins*, or activists' general desire to pursue future citizen initiatives relating to wildlife, as in *Walker*. Moreover, the educator plaintiffs have something that none of the plaintiffs in any of these cases had: specific designation in the state constitution to carry out a duty, the accomplishment of which is impaired by TABOR.

In short, the educator plaintiffs have suffered an injury-in-fact, which is sufficiently concrete and particularized to meet the *Branson* test.

b. As shown by the Lobato Findings, the educator plaintiffs' injury arises from a dispute that is actual, not conjectural or hypothetical.

Part of the test for Article III standing is whether the case arises from an actual or imminent dispute between the parties, and is not a hypothetical argument conjured up solely for the purpose of challenging constitutionality. If it were undisputed that current levels of school funding in Colorado were entirely

adequate, then the Governor might object that the educator plaintiffs have no actual or imminent need to lobby the General Assembly to increase funding.

As it happens, however, there is a real and current dispute about the adequacy of school funding. In *Lobato*, the Colorado trial judge entered extensive findings and conclusions. (*See* Appendix A.) The court's ultimate conclusion was that "[t]here is not one school district that is sufficiently funded," and that "Colorado's history of irrational and inadequate school funding goes back for over two decades." *Lobato* Findings at 181-82.

The state appealed this ruling to the Colorado Supreme Court (no. 12SA25), and the case was argued on March 7, 2013. For purposes of standing here, it does not matter how the Colorado Supreme Court rules. The mere existence of the case and the trial court's ruling shows that there is a current, actual dispute about the adequacy of school funding. Even if the Colorado Supreme Court were to rule that there is no violation of the state constitution, the existence of this dispute shows that the educator plaintiffs have a reasonable, evidence-based ground for dissatisfaction with current funding and for a desire to lobby the General Assembly for increased funding.

c. The educator plaintiffs' injury was caused by TABOR and will be redressed by invalidating it.

The second and third parts of the *Branson* test for standing require showing that there is a causal connection between the challenged law and the plaintiffs'

injury, and that it is likely that invalidation of the law will redress the injury. The educator plaintiffs' injury meets both parts of the test.

As to causation, the injury is inherent in TABOR. That is, TABOR takes away from the General Assembly the power to increase taxes and spending, and it is that loss of power that violates the educator plaintiffs' right to lobby a legislature empowered to grant their petition for increased funding. Thus, TABOR causes the injury.

The educator plaintiffs do not run afoul of *ASARCO*, where taxpayers and teachers challenged an Arizona statute governing mineral leases on state lands and alleged that invalidating the statute would increase revenue to school trust funds. The Supreme Court pointed out that even if increased revenues were available, the state might simply reduce taxes or reduce school funding from other sources, "so that the money available for schools would be unchanged." *ASARCO*, 490 U.S. at 614. Here, in contrast, the educator plaintiffs do not assert that invalidation of TABOR necessarily would lead to increased school funding. Rather, the injury is loss of their right under a republican form of government to lobby a state legislature empowered to raise revenue and increase funding.

For the same reason that TABOR causes the injury, invalidation of TABOR would redress it—by restoring the General Assembly's revenue powers and re-enabling the educator plaintiffs to lobby meaningfully for increased school

funding. There can be no dispute that parts two and three of the *Branson* test for Article III standing are met here.

4. The ability to initiate a statewide ballot question is not a substitute for the lost ability to lobby the General Assembly and does not vitiate the educator plaintiffs' injury.

Under TABOR, the only way the Colorado state government can raise more revenue or appropriate revenue that exceeds TABOR's spending limit is by a majority vote in a statewide election. Colo. Const. art. X, § 20(3), (4). An issue-by-issue statewide vote, however, is direct democracy. It is the antithesis of a republican form of government and is no answer to a challenge to TABOR under the Guarantee Clause.

In any event, it is far too expensive for any of the educator plaintiffs or the Amici to mount and finance a statewide election campaign. The only method of communication presenting a reasonable opportunity to win such a statewide election is through advertising on television, which is extremely expensive. For example, in a 2005 article, the Denver Post reported that "[l]ast fall, supporters and opponents spent $11.5 million on four citizen-sponsored initiatives on the Colorado ballot." Mark P. Couch, *Ballot Measures Tilt Legislative Landscape*, The Denver Post, Jan. 9, 2005, 2005 WLNR 395735. Neither the educator plaintiffs individually nor the Amici on their behalf have anything close to the resources to mount such expensive campaigns.

CONCLUSION

The Court should hold that the educator plaintiffs have Article III standing and should affirm the district court's denial of the Governor's motion to dismiss.

Dated: April 17, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B)(i) and 29(d) because, according to the word count feature of Microsoft Word 2007, the brief contains a total of 5,400 words, excluding the sections listed in Rule 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point, Times New Roman type style.

s/ *Andrew M. Low*

CERTIFICATE OF SERVICE

The undersigned certifies that on April 17, 2013, the foregoing brief was served via this Court's ECF system on the following:

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s/ Judy Terranova